

PRESIDENTIAL ELECTION REFORM:  
A CURRENT NATIONAL IMPERATIVE

by

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*This Article suggests several important practical reforms in how we choose our President and Vice President. It first identifies problems with the Electoral College system, and proposes solutions that would not require a constitutional amendment. The Article also discusses how the long-forgotten provisions of Section 2 of the Fourteenth Amendment authorize reduction in the electoral votes from states whose legislatures deprive or abridge the right of the people to vote for their presidential electors. By exploring the history and language of Section 2, this Article demonstrates that it was ratified with the specific purpose of preventing state legislatures from usurping the popular vote in their states for the Electoral College. The Article maintains that Congress has the authority to enact several important presidential election reforms, and that it is our duty to ensure that the people's voice is not taken away in the presidential election process.*

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## INTRODUCTION

Since November 2020, Donald J. Trump and his allies enthusiastically exploited two major, serious flaws in our method of choosing the President. Fortunately, as our country struggled with the re-integration of the defeated South in the decades after the Civil War, constitutional amendments and federal statutes established both the authority and the precedents for Congress to enact statutes to address these risks. Currently, it appears that Congress will not act to address access to the ballot on a bipartisan basis. Yet both major parties, if they wish to operate within the boundaries of our Constitution, have an ongoing interest in assuring a peaceful transfer of power after election day. The purpose of this Article is to show how, without amending the Constitution, Congress can assure this crucially important result no matter who wins the election.

Our first major problem is that we now have an unnecessarily large number of procedural steps between voting and inauguration. This can and did provide the loser and his supporters multiple, disruptive opportunities to try to change the outcome. They came frighteningly close to eviscerating the presidential election result. Had it not been for public officials and judges honorably doing their jobs, Trump might well have succeeded. Our current ponderous and complicated election processes greatly assisted the losing candidate and his allies to convince large segments of the citizenry that Donald Trump actually won.

The second serious problem, the increasing irrelevance of the national popular vote, meant that we only narrowly avoided yet another clash between the outcome of the national popular vote and the outcome within the Electoral College. Once again, our nation's demographic shift toward heavy concentrations of voters in a decreasing number of states continues to make the irrelevance of the national popular vote a grievous threat to the unification of the entire country in support of a President and Vice President elected by "We, the People."

In this Article, we discuss four principal dangers within the present system. First is the inherently dysfunctional nature of a winner-take-all approach, which confounds the central virtue of our democratic system by severing the relationship between the voters and the President, thereby rendering the votes of up to 80% of the electorate, in effect, meaningless. Second is the stark reality that the current presidential election system can—and in 2020, almost did—install as President a candidate rejected by a clear majority of the people. In the last election, the popular vote margin was a net seven million voters. Third is the danger that voters would be excluded altogether if state legislatures assume the power to appoint electors on their own, as is now being widely proposed. Fourth is the numerous opportunities for mischief created by the cumbersome and ambiguous terms of the Electoral Count Act of 1887 that are now being exploited.

We then propose and briefly discuss three measures to substantially improve the current system. First is the new Voter Choice Ballot system: It can be implemented on a state-by-state basis, and it empowers individual voters to express their commitment to electing the presidential candidate who secures the support of the greatest number of fellow citizens. Second are measures to clarify and streamline the counting and certification of votes after election day, including a provision to create an official count of the national popular vote. Third are measures to honor and implement the constitutional guarantee that presidential elections are decided by the votes of the people, and not by state legislatures. That guarantee is anchored in existing provisions of state and federal constitutions and federal legislation based on Congress's enforcement powers under Sections 2 and 5 of the Fourteenth Amendment. Congress may also have untapped power to implement the constitutional guarantee of a republican form of government for each state under Article 4, Section 4 of the Constitution.

## I. DANGERS OF THE PRESENT SYSTEM

The core virtue of the democratic method of choosing a President is the connection of the chief executive to the people: The President gains legitimacy to govern with the consent of the governed.<sup>1</sup> This connection echoes Chief Justice John

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<sup>1</sup> Through the mechanisms of the Electoral College and the contingent election in the House of Representatives, the original Electoral College intentionally distanced the process of selecting

Marshall's vital claim that the federal Constitution was adopted by the people rather than by the states.<sup>2</sup> As such, Americans are generally inclined to accept executive decisions, without the need for the kind of police or military enforcement that is common in some other countries. Our acceptance is tempered, of course, by a robust tradition of dissent, as well as by our Constitution, by the law on the books, and by the law in action. We enjoy and frequently invoke rights to complain against, assemble in protest of, publish views contrary to, and even pray for the replacement of the duly elected executive. This is fundamental in a successfully functioning democratic state: People who are divided politically nonetheless accept the decisions of others who have been lawfully chosen to make those decisions.

At least in theory, the President is motivated to govern on behalf of all the people, rather than a faction, and is rewarded in the court of public opinion. Such positive feedback—now often expressed through approval ratings, but more profoundly reflecting an exchange of trust—should motivate the President to make sure that laws are faithfully followed, including laws enacted primarily by members of an opposing party. It should also enable the President to lead the whole nation through crises, which tragically may include pandemics as well as numerous other threats.

The method through which we now choose the President and transfer power peacefully threatens to gut this vital connection between the people and the executive. Under our current approach, eight out of ten voters are taken for granted and can be almost entirely ignored in the general election. All but two states now award all electors to the candidate who wins a plurality of votes in those states;<sup>3</sup> further, in all but a handful of states, that plurality winner is basically foreordained. Thus, 80% of all Americans who vote may justifiably believe that they have no meaningful participation in the choice of the President. They voted, and in the down-ballot races, each vote might have been critical. Yet, in at least 40 states, voters choosing between the presidential and vice-presidential tickets of each major political party know that their votes have no significant meaning for the final outcome.

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the President from the people to some degree. The Twelfth Amendment, however, by requiring designation of presidential slates, and by doing so in the context of the emergence of strong partisanship, rendered the original system obsolete. It transformed presidential elections into plebiscites on presidential candidates and their policies, thus fundamentally recasting the presidency into a truly political office and furthering the world view that legitimate governmental authority rests on the consent of the governed. JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT* 91–92 (2020); Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501 (2014).

<sup>2</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402–05 (1819).

<sup>3</sup> Grant Schulte, *Nebraska, Maine Could Play Pivotal Role in Presidential Race*, AP NEWS (Oct. 23, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-omaha-nebraska-52a600f3491ed479da827e466bd914c2>.

In only a handful of states is the Democratic–Republican split so close that every vote for President truly matters to the outcome.<sup>4</sup> In 2020, there were only five states in which the margin between Joe Biden and Donald Trump was 2% or less: Arizona, Georgia, North Carolina, Pennsylvania, and Wisconsin.<sup>5</sup> If combined, the votes in these states totaled 15% of the 158 million votes cast nationally.<sup>6</sup> Even when one includes a vote margin of 3%, this adds only Michigan and Nevada to the swing state category, bringing the percentage of voters in the decisive battlegrounds to 20% of all the votes cast for President.<sup>7</sup>

In other words, 80% of all voters who lived in states in which the two national parties did not closely compete may well believe that they did not meaningfully participate in consenting to be governed by the candidate who won in the Electoral College—or at least that their participation was marginal and largely symbolic. This, in turn, may render their willingness to be loyal to the chosen President similarly marginal.

The skimpy connection between the vast majority of voters and the actual presidential outcome is compounded by the “otherness” of the result. For the voters in 43 states in 2020, the winner was chosen by 7 other states, totaling only 14% of all the states. In addition, vote-counting processes in these seven states were opaque, and the losing party did its best to describe these processes as untrustworthy.<sup>8</sup> The governed cannot be expected to have full faith in their own act of consenting when neither they nor their elected officials play a meaningful role in what has become the single most important act in American democracy: the people’s choice of the Chief Executive. This problem is exacerbated when it is suggested repeatedly that results in the states that ultimately did have a meaningful role cannot be trusted. In

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<sup>4</sup> Indeed, in the three closest states—Georgia, Arizona, and Wisconsin—the combined margin was fewer than 45,000 votes in 2020. *Presidential Election Results: Biden Wins*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html> (last visited June 14, 2022) (showing that Georgia had a margin of 11,779 votes; Arizona a margin of 10,457; Wisconsin a margin of 20,682). Had Trump prevailed in these states, the Electoral College vote would have been tied, and Trump clearly would have been elected President in the House of Representatives, given the complicated process to resolve such a quandary established by the Twelfth Amendment and the Electoral Count Act of 1887. In hindsight, this is to say that some 45,000 voters in three states decided the 2020 election.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Dave Boucher, Kevin McCoy & Kevin Johnson, *Trump Sues to Stop Vote-Counting in Michigan, Pennsylvania; Claims Late Ballots Mixed with Others in Georgia*, USA TODAY, <https://www.usatoday.com/story/news/politics/elections/2020/11/04/trump-files-lawsuit-stop-michigan-vote-count-temporarily/6164647002/> (Nov. 5, 2020, 9:08 AM); Laura Corley, *Counting Votes: Who’s Watching the Watchers in Georgia Elections?*, GPB (Dec. 10, 2020, 10:46 AM), <https://www.gpb.org/news/2020/12/10/counting-votes-whos-watching-the-watchers-in-georgia-elections>.

contrast, Joe Biden won by a 4.4% margin nationally in the popular vote.<sup>9</sup> This was not a landslide, but it meant that his national vote victory was clear within a few hours after the polls closed across the nation.

At least as disturbing as the weak connection between the preference of the majority of voters and the actual presidential outcome is that the Electoral College system can be abused in a way that entirely severs the relationship between the people and the President. This may come about if state legislatures assert their power to appoint presidential electors themselves, dispensing with popular election results. Under this scenario, legislators—elected one to four years prior to the presidential election—would nonetheless be the ones to appoint presidential electors, doing away with the people’s choice. The wishes of the legislators would thereby supersede the more current judgments of the voters about the actual candidates and the pressing national policy issues that surfaced during the presidential campaign.<sup>10</sup>

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<sup>9</sup> *Presidential Election Results: Biden Wins*, *supra* note 4.

<sup>10</sup> The threat posed by state legislative appointment of electors was identified during the congressional debate in January–February 1869, concerning the Fifteenth Amendment and a proposed companion “Sixteenth Amendment,” which explicitly required popular election of electors and empowered Congress to prescribe a uniform rule. CONG. GLOBE, 40th Cong., 3d Sess. 711 (1869). With others, Indiana Senator Oliver P. Morton made the case. Morton had been a loyal supporter of President Lincoln as a “War Governor” during the Civil War and had extensive personal experience with close elections, partisan legislatures, and constitutional issues. He became a Radical Republican leader in the Senate, and as chairman of the Committee on Representative Reform, he emphatically warned against the possibility of legislative appointment of electors:

[This process] may under certain circumstances be a most dangerous power . . . which might bring on civil war and revolution where a Legislature, finding itself in a minority, and unwilling that the people of the State shall vote directly for President and Vice President, may, as it has the power now, repeal the law by which the people can vote at all for these officers and select electors who shall cast the vote of that State. In the desperation of party and in the contingencies of politics such a great power as this should not be left to the Legislature of any State. . . . That is a very dangerous power, placing it in the power of one State, in a close presidential election, where the election might turn upon the vote of that State, with a Legislature elected perhaps a year before, to meet and repeal the law permitting the election of electors to the people and appoint them by a direct vote of the Legislature, as in the case of South Carolina.

CONG. GLOBE, 40th Cong., 3d Sess., at 711, 1042. The same argument had been made in 1826—when resolutions for constitutional amendments were debated in the House for one and a half months. 2 REG. DEB. 1373–74 (1826) (McDuffie); *see also* S. REP. NO. 19-22, at 6–7, 16 (1826) (legislatures that assume the power to appoint electors without clear authority—that is, without express delegation from the people who are the true sovereigns—become “mere usurpers”); 2 REG. DEB. Appendix 122, 126 (1826). The question of legislative usurpation was not put to a vote in 1826. In 1869, however, the bipartisan Sixteenth Amendment was approved unanimously in committee, and combined with the Fifteenth Amendment, passed with more than a two-thirds majority in the Senate. CONG. GLOBE, 40th Cong., 3d Sess. 704, 1042, 1044 (1869).

In decades past, this might have been dismissed as the fear of a fevered imagination, but it is now an unambiguously real threat. The assertion that state legislatures have this power, and the hope that they might actually exercise it, became the foundation stones for the litigation explosion that followed the 2020 election, as well as for the January 6, 2021 assault on the Capitol.<sup>11</sup>

The fever has not broken. A bill introduced in Arizona in 2021 would explicitly authorize the Arizona Legislature to appoint electors by joint resolution at any time.<sup>12</sup> Other measures, such as Georgia's new law,<sup>13</sup> might—in the name of assuring “voter integrity”—create a system of challenges and state court decisions that could not reasonably be resolved prior to the time for appointing electors, thus putting the Georgia Legislature in a position where it is “forced” to appoint electors at the last minute, just as the Florida Legislature threatened to do in December 2000.<sup>14</sup>

Finally, the plodding pace of taking more than nine weeks between the election and the inauguration to confirm the outcome of the presidential vote creates many opportunities—not even limited to those used by the incumbent in 2020—for defeated presidential candidates to persuade their supporters that the method of selecting the President was unfair. We just witnessed a remarkable plan for tossing major monkey wrenches, facilitated by the remarkably slow-moving gears of the system established by the Electoral Count Act of 1887.<sup>15</sup> Instead of simply hoping that no one will emulate former President Trump's tactics, the process for electing our President cries out for reform.

We should strive to make every vote truly count. To choose our President by a single national vote would make every vote equal. If every vote mattered, every vote would be sought. The national political parties would need to pay much more attention to every voter everywhere. To be sure, as in virtually every election for any

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<sup>11</sup> See generally *Current Litigation*, ABA (Apr. 30, 2021), [https://www.americanbar.org/groups/public\\_interest/election\\_law/litigation/](https://www.americanbar.org/groups/public_interest/election_law/litigation/) (providing a list of “pending and recent cases litigating election procedures for the 2020 election”); Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-Out*, BROOKINGS INST. (Nov. 30, 2021), <https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/> (noting that “Republican state legislatures are pointing to the Constitution's . . . provisions that authorize state legislatures to prescribe methods for selecting presidential electors”).

<sup>12</sup> H.B. 2720, 55th Leg., Reg. Sess. § 3(B) (Ariz. 2021).

<sup>13</sup> S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

<sup>14</sup> Brief of the Florida House of Representatives and Florida Senate as Amici Curiae at 4–9, *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836). The danger of politicization and dark money manipulation of election administration recently has received considerable attention. See, e.g., *The Real Risk to America's Democracy*, ECONOMIST (July 3, 2021), <https://www.economist.com/leaders/2021/07/03/the-real-risk-to-americas-democracy>; Jane Mayer, *The Big Money Behind the Big Lie*, NEW YORKER (Aug. 2, 2021), <https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie>.

<sup>15</sup> See *infra* Section II.B.

position, in the final days before the vote, candidates would focus on undecided voters, including those who remain undecided about whether even to vote. But these would be swing voters, not swing states. The November election itself would be a national event, in which every voter and, indeed, nearly every person could play a meaningful role—trying to persuade friends and family members to vote; driving neighbors to the polls; and engaging directly within their local communities. All those who vote would do so with the knowledge that millions of Americans were doing the same thing across the entire country. This nationally shared event would give more meaning to the act of the people’s consent regarding the winner of the election, no matter how close the national vote margin.

Even without any major reform, the national popular vote need not itself be made determinative of the outcome for our current system to be improved significantly. To help us to emerge from our current electoral mess, it would be a substantial improvement if the national vote were at least to become relevant—to become a factor in the outcome—especially in a swing state. The people could then be assured that presidential elections will actually be decided by the people.

## II. POSSIBLE REMEDIES

An ideal remedy would be a constitutional amendment to replace the current system with a national popular vote system. A constitutional amendment would require ratification by three-fourths of the states, or an unprecedented Constitutional Convention initiated by two-thirds of the states.<sup>16</sup> Neither path to ratification is realistic now. Nonetheless, there are several attainable remedies constitutionally and politically possible today. States can enact reform at the level of the individual ballot, Congress can reform the process of counting the votes, and both states and Congress can require that electors for President be appointed solely based on the outcome of the popular vote in each state. Separately or together, these reforms provide realistic and practical options to safeguard the will of the people in presidential elections.

### A. *Reform at the Level of Individual Ballots*

Over nearly two years, the non-profit and non-partisan organization, Making Every Vote Count (MEVC), has developed a state-by-state voter choice reform proposal (called the Voter Choice Ballot (VCB)), through which any state can adopt a system to give its voters the *option* to cast their votes in the state’s presidential election for whichever candidate wins the national popular vote.<sup>17</sup> Even if the voter’s preferred candidate did not win the national popular vote, at the voter’s sole option,

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<sup>16</sup> U.S. CONST. art. V.

<sup>17</sup> MAKING EVERY VOTE COUNT, <https://www.makingeveryvotecount.com/> (last visited June 14, 2022).

that person's vote in the state election would count towards the winner of the national popular vote for purposes of assigning Electoral College votes.<sup>18</sup>

This reform would not change the Electoral College system. Each voter would still get only one vote, but that vote would be counted differently. It would be included in tallying the national popular vote winner and, if the voter wished, it would also be used in tallying each state's Electoral College slate. If the voter did not wish to vote for the winner of the national popular vote in the state's election, that voter's personal preference then would be counted, as it currently is counted, in tallying the winner of each state's Electoral College slate. In other words, the proposal would expand the individual voter's expression of her or his voting preferences—allowing voters to include in their vote “a choice for democracy”—without disturbing the existing federal Electoral College system.<sup>19</sup> As has been the case in almost all other election reforms in the United States (for example, women's suffrage, lowered age limit for voting, and election of U.S. senators), a national reform can be started by a single state.

This reform would come into effect immediately in any state that adopts it. Even at this early stage, we would have the first national popular vote with practical importance in our history—a landmark that would send healthy shock waves throughout the country. It would change the focus of presidential campaigning from at most ten swing states containing 20% of the country's population to voters nationwide, and it would motivate national parties to nominate candidates who appeal to most of the national electorate.

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<sup>18</sup> See Appendix A for a sample ballot and more specifics about how the Voter Choice Ballot (VCB) would work.

<sup>19</sup> The VCB system aligns with the values of all three versions of the Electoral College. The original Electoral College was based on the hope that the President would be a consensus figure, such as George Washington, somewhat above the partisan fray. Hawley, *supra* note 1, at 1521–22. The original voting structure—two votes of equal value, for individuals from different states—was intended to direct the electors' attention to figures of national stature and, it was hoped, to assure a consensus or majority outcome that would avoid a contingent election in the House of Representatives. The “yes” choice under VCB empowers individual voters to throw their weight behind a national consensus choice, while also expressing a preference for a “favorite son” or third-party ticket.

The Twelfth Amendment transformed the idea of the presidency from a consensus figurehead to a truly political leader, whose person and policies would face a national plebiscite every four years. Hawley, *supra* note 1, at 1561. Again, a “yes” choice under VCB empowers a voter to throw her weight behind the national choice. Section 2 of the Fourteenth Amendment requires elections; the VCB—combined with measures to assure elections—again is aligned with the Fourteenth Amendment.

B. *Reform the Process of Counting Votes*

Considering how we now count votes, reform of the Electoral Count Act of 1887 is badly needed. That Act was intended to prevent a repeat of the calamitous 1876 election scenario. It also tried to address the broader problem of the lack of any mechanism within the states or in Congress to resolve controversies about presidential election results. In 1876, several states submitted alternative slates of electors, leaving it to Congress to decide which of the slates to count for those states. The choice of the President became an extremely messy, prolonged negotiation between the Republicans and Democrats in Congress.<sup>20</sup> Attention was not paid to the actual votes of actual voters. A tragic bargain followed when the Republicans agreed to abandon Reconstruction in the South entirely in exchange for their candidate, Rutherford B. Hayes, being named the President to succeed Ulysses S. Grant. This happened even though the Democratic candidate, Samuel Tilden, had clearly won the national vote.<sup>21</sup> Tilden also might well have won the never-quite-decided counts in those states that had submitted multiple slates.

Earlier, in July 1868 and February 1869, Congress had addressed the immediate problem of how to count electoral votes<sup>22</sup> in the context of actual and threatened political violence and brazen, official racial discrimination, as well as suggestions that multiple slates of electors might be submitted and that the established processes were invalid.<sup>23</sup> In July 1868, Congress had decided that it possessed adequate authority to ascertain which votes were cast in conformity with the Constitution and applicable laws, and to count those votes, and only those votes. In February 1869, Congress passed a joint resolution requiring special treatment of the votes from Georgia, whose legislature had expelled all its African American members. Congress rejected Georgia's theory that the state's reconstructed constitution, which Congress had approved, granted the right to vote, but did not grant the right to hold office. Congress reported the totals with and without Georgia's vote and declared President

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<sup>20</sup> Sheila Blackforth, *Disputed Election of 1876*, UNIV. OF VA. MILLER CTR., <https://millercenter.org/the-presidency/educational-resources/disputed-election-1876> (last visited June 14, 2022).

<sup>21</sup> *Id.*

<sup>22</sup> Act of July 20, 1868, ch. 58, 15 Stat. 257 (overriding President Johnson's veto of that same date; entitled "A Resolution excluding from the electoral College Votes of States lately in Rebellion, which shall not have been reorganized.").

<sup>23</sup> CONG. GLOBE, 40th Cong., 2d Sess. 3870–72, 3874–81, 3904–26, 3974–81 (1868); *id.* at 4235–36, 4258–59 (discussing overriding President Johnson's veto). Michigan Senator Jacob M. Howard declared that President Johnson's veto message was "one of the most incendiary documents that have ever emanated from the source from whence it came" in that it was "a direct and open declaration that the governments which have been established in the insurrectionary States under the reconstruction acts are utterly illegal and void, and that no votes given for President and Vice President in those States under those governments ought to be counted as legally given for those offices." *Id.* at 4236.

Grant had been elected, without specifying whether Georgia's vote had actually been counted. The House unsuccessfully sought to withdraw from the joint resolution, demanding that Georgia's vote be rejected outright.<sup>24</sup>

The broader problem of counting Electoral College votes was investigated and discussed by a Senate committee in 1873–74.<sup>25</sup> Thereafter, Congress held hearings in every Congress from 1877 to 1885 without resolution. Finally, in 1886–87, the political alignment in Congress had changed sufficiently for Congress to adopt a compromise measure.<sup>26</sup> The Electoral Count Act is notoriously opaque, and some key issues were not clearly resolved. Overall, the Act created incentives for states to establish dispute resolution mechanisms—and their results would receive “safe harbor” treatment if they were finalized at least six days prior to the date set for the presidential electors to vote. The Act also established rules for how Congress would count votes, particularly if a state submitted more than one slate of purported electors and the House and Senate did not concur as to which slate to count.<sup>27</sup>

This 1887 statutory reform occurred long before our current information age. Today, the national results of American presidential elections can be speedily and definitively decided—and the winner declared with what one hopes is incontestable certainty. Even in a close election, this can happen as soon as the states with the closest pluralities have conducted recounts. This can and should be finished no later than four weeks after Election Day. Moreover, there should be no need for the federal judiciary to be pulled regularly into determinations of the vote count.

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<sup>24</sup> CONG. GLOBE, 40th Cong., 3d Sess. 978, 1053–55, 1059, 1062–63 (1869); H.R. MISC. DOC. NO. 44-13, at 235, 256–57, 259–61, 263–65 (1877). The joint resolution was patterned on the 1821 joint resolution regarding Missouri's electoral votes. Missouri was admitted to the Union as a slave state, but Missouri's constitutional convention instructed its legislature to pass a law to deprive free African Americans of the right to “settle” in the state. The underlying theory was that the right to travel might be a “privilege and immunity” of citizenship recognized in the Articles of Confederation, but that this right did not include the right to “settle.” 37 ANNALS OF CONG. 341–43, 345–46, 1125, 1147–66 (1821); H.R. MISC. DOC. NO. 44-13, at 48–56; KEN S. MUELLER, *SENATOR BENTON AND THE PEOPLE: MASTER RACE DEMOCRACY ON THE EARLY AMERICAN FRONTIER* 84–86, 92–94 (2014). In both 1821 and 1869, Congress exercised its power over electoral vote counting to vindicate rights not “enumerated” in the Constitution.

<sup>25</sup> Oliver P. Morton, *The American Constitution, Part II*, 125 N. AM. REV. 68 (1877). See generally ALEXANDER KEYSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 120–31 (2020).

<sup>26</sup> See Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004); see also Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lessons from the Hayes-Tilden Dispute*, 79 FORDHAM L. REV. 1043 (2010); Eric Schickler, Terri Bimes & Robert W. Mickey, *Safe at any Speed: Legislative Intent, The Electoral College Count Act of 1887, and Bush v. Gore*, 16 J.L. & POL. 717 (2000).

<sup>27</sup> Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (codified as amended in scattered sections of 3 U.S.C.).

Congress can and should pass a law accelerating the determination of the outcome of the election in every state within a time span much shorter than that provided in the 1887 statute; even then, this process would still take much longer than in any other major democracy.<sup>28</sup> Such a reform law should include a process for counting the national tally. Absent direct Electoral College reform, this would provide a mechanism for combining each state's vote count (and that of the District of Columbia).<sup>29</sup> Until now, however, no official national count has ever been declared. To depend on the media to do this job, as we now do, is to lean on weak reeds, especially now that we know there are major political leaders and their supporters who have no compunction about declaring news that they do not like to be "fake news."

There are two main benefits to determining a national count as quickly as possible. First, if the national vote were relevant in a state or in many states, as would be the case either with the Voter Choice Ballot or through a constitutional amendment, a system to count the national vote already would be in place. Second, an official, indisputable national count might dispel some of the fantastical thinking that causes many people to believe the counterfactual claim that their losing candidate won the election.

### *C. Reform that, Directly or Indirectly, Bars State Legislatures from Appointing Electors*

#### *1. Direct Reform—Constitutional Amendments*

The most direct way to assure that state legislatures do not seize authority to appoint presidential electors themselves is through state constitutional amendments that require appointment of electors by popular election. The main objection to this reform is the so-called Independent State Legislature Doctrine, which posits that state legislatures are not bound by their own state constitutions regarding the appointment of electors.<sup>30</sup> A long line of U.S. Supreme Court decisions has consistently rejected the closely analogous argument about Article I, Section 4.<sup>31</sup> The Colorado Constitution already contains a preemptive provision to protect the popular

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<sup>28</sup> See Christopher Ingraham, *Mob Violence at the Capitol Underscores Risks of Lengthy Presidential Transitions*, WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/business/2021/01/07/long-presidential-transitions> (comparing OECD country timelines between election and taking office).

<sup>29</sup> In 1963, the Twenty-Third Amendment granted U.S. citizens who reside in the District of Columbia the right to vote in presidential elections, albeit with no vote for their regular congressional representatives. U.S. citizens residing in Puerto Rico and other U.S. Territories still lack either vote.

<sup>30</sup> Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 734 (2001).

<sup>31</sup> See, e.g., *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015); *Smiley v. Holm*, 285 U.S. 355 (1932); *Hawke v. Smith*, 253 U.S. 221 (1920); *Ohio ex rel. Davis*

vote, and other states may wish to follow suit. A draft amendment is available in Appendix B.<sup>32</sup>

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v. Hildebrant, 241 U.S. 565 (1916). *See generally* MARK BOHNHORST, THE CONSTITUTIONALITY OF CITIZEN INITIATIVE FOR REFORMING THE PRESIDENTIAL ELECTION SYSTEM 36–41 (2020), <https://static1.squarespace.com/static/5a7b7d95b7411c2b69bd666f/t/5fcc232874a40730fb894414/1607213876032/Constitutionality+of+an+Initiative.pdf>.

In *McPherson v. Blacker*, the leading case construing Article II, Section 1, Chief Justice Fuller’s unanimous opinion stressed that state legislatures are bound by their state constitutions. 146 U.S. 1, 25 (1892). The claim that state legislatures have discretion to disregard their own state constitutions is traceable to an 1874 U.S. Senate Report, which Chief Justice Fuller cited in his review of the historical record, but did not mention within the Court’s analysis. *McPherson*, 146 U.S. at 34–35; BOHNHORST, *supra* note 31, at 34–35.

Nonetheless, that 1874 Senate Report was mischaracterized in the litigation that led to *Bush v. Gore*, and in dictum within the Court’s per curiam opinion. 531 U.S. 98, 104 (2000); *see also* Chief Justice Roberts’s dissent in *Ariz. State Legis.*, 576 U.S. at 839–40; BOHNHORST, *supra* note 31, at 42–45, 50–51, 59–64. The 1874 Senate Report and the *McPherson* decision were similarly mischaracterized in Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 15, 70–71 (2020).

Not only has no state legislature ever purported to have the authority to disregard that state’s constitution in appointing electors, but early historical examples undermine such a claim. For example, in 1800, Alexander Hamilton proposed that New York Governor John Jay call the pro-Federalist lame duck state legislature into special session to adopt a district plan for the appointment of electors so that the newly-elected pro-Jeffersonian legislature could not cast all New York’s votes for Jefferson, as it did pursuant to New York law. If Hamilton or Jay thought that the incoming legislature could simply ignore such a new district plan, this proposed strategy would have made no sense. BOHNHORST, *supra* note 31, at 33.

In addition, a study of the first presidential election in 1788 found that, in every instance, state legislatures complied fully with each state’s constitutional requirements regarding electors. Even in states that did not yet have written constitutions, state legislatures complied with analogous provisions in their colonial charters. *See* Grace Brososky, Michael C. Dorf & Laurence H. Tribe, *State Legislatures Cannot Act Alone in Assigning Electors*, DORF ON LAW (Sept. 25, 2020), <http://www.dorfonlaw.org/2020/09/state-legislatures-cannot-act-alone-in.html>; Memorandum from Grace Brososky, Michael C. Dorf & Laurence H. Tribe, *State Legis. Cannot Act Alone in Assigning Electors* 7–8 (Sept. 25, 2020), <https://drive.google.com/file/d/109FpcfXzXwcpJL43pgaTBmh-PD9pgDLx/view>.

<sup>32</sup> An amendment to the U.S. Constitution that requires the direct election of electors, based on the popular vote, would offer a complete solution. A draft amendment is set out in Appendix B. Alternatively, the draft state constitutional amendment provided in Appendix B could be submitted to voters by a state legislature or through a popular initiative. An initiative passed by a state’s voters also could prevent legislators from giving themselves the authority to appoint electors regardless of the state’s election outcome. Such an initiative would thus provide a safeguard in states such as Arizona, where a bill was introduced in 2021 to authorize the Legislature to appoint electors at any time. H.B. 2720, 55th Leg., Reg. Sess. § 3(B) (Ariz. 2021).

## 2. *Indirect Reform—Congress’s Power Under Section 2 of the Fourteenth Amendment*

While state constitutional amendments would furnish a patchwork of remedies, federal legislation could and should resolve the issue nationwide. The long-overlooked provisions of Section 2 of the Fourteenth Amendment<sup>33</sup>—combined with Congress’s enforcement powers under Section 5 of the Fourteenth Amendment—provide textual authorization for such legislation. The plain language of Section 2 states that, if the right to vote with respect to presidential elections is “denied” or “in any way abridged” by a state, that state’s representation in the House (and, as a consequence, in the Electoral College) “shall be reduced” proportionally.<sup>34</sup> In the case of state legislative overreach through an effort by the legislature to appoint a state’s presidential electors, the people in that state could lose most of their influence in the vote for President and Vice President. Article I provides in Sections 2 and 3 that each state shall have at least one Representative and two Senators; thus, a state almost certainly retains at least three Electoral College votes. Because the only office for which the right to vote would be abridged through currently proposed legislation would be for electors for President and Vice President, the penalty would likely be limited to reducing the state’s representation in the Electoral College, but not in the House.<sup>35</sup> The nexus between the people of the United States and the federal government is at the very core of Chief Justice John Marshall’s classic explanation for

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<sup>33</sup> Section 2 of the Fourteenth Amendment reads in full: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”

<sup>34</sup> U.S. CONST. amend. XIV, § 2 (amended 1971); *id.* amend. XIV, § 5.

<sup>35</sup> This issue has never been litigated. Some elements of Section 2 were superseded by the Nineteenth and Twenty-fourth Amendments, but the potential penalty remains. Professor Franita Tolson has examined the history of Section 2 in some depth and believes that the “congruent-and-proportional” standard might apply to Section 2 in voting rights cases. Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 385–425 (2014) (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). There are many reasons to doubt this element of the Court’s recent interpretations of the Enforcement Clauses, however.

One historical example shows that the 39th Congress—the same men who promulgated the Thirteenth and Fourteenth Amendments—believed that Congress’s power extended beyond the rights explicitly stated in the constitutional texts. The 39th Congress adopted the Peonage Abolition Act of 1867, ch. 187, 14 Stat. 546 (current version at 42 U.S.C. § 1994), based on the recently ratified Thirteenth Amendment. The Thirteenth Amendment proclaimed that “[n]either slavery nor involuntary servitude” was to exist in the United States or its jurisdiction, except for

how and why the Constitution had been ratified as it was; by enforcing Section 2, Congress preserves that nexus.<sup>36</sup>

The language of Section 2 seems quite clear, and the history of its drafting and ratification underscore the Section's commitment to national protection for the right of citizens—at the time, the right of only male citizens—to vote for the electors of the President and Vice President. The key phrase—"the right to vote at any election for the choice of electors for President and Vice-President"—was proposed late in the drafting of the Fourteenth Amendment on June 8, 1866. It had been stated on June 7 that, unless the right to vote for President was specified in the Constitution, Section 2 would not apply if a state legislature elected and appointed the state's electors.<sup>37</sup> The June 8 change to Section 2 solved that problem.

Congress had serious concerns about state legislatures electing federal officials and good reason to constrain that power through Section 2. One month after drafting Section 2 of the Fourteenth Amendment, for example, the Senate severely criticized the manner in which state legislatures had conducted elections of U.S. Senators.<sup>38</sup> A July 1866 Senate hearing on a bill that imposed a uniform state legislative

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those duly convicted of crimes. U.S. CONST. amend. XIII, § 1. Yet the Peonage Abolition Act went substantially further when it also prohibited "voluntary peonage." *See generally* Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1615–19 (2012).

<sup>36</sup> *See supra* notes 1–2 and accompanying text. The Congressional Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, explained Section 2 as follows: "Such a provision would be in its nature gentle and persuasive, and would lead, it was hoped, at no distant day, to an equal participation of all, without distinction, in all the rights and privileges of citizenship, thus affording a full and adequate protection to all classes of citizens, since all would have, through the ballot-box, the power of self-protection." H.R. REP. NO. 39-30, at XIII (1866).

<sup>37</sup> On June 6, Oregon Senator George H. Williams proposed replacing the phrase "elective franchise" with the phrase "right to vote at any election held under the Constitution and laws of the United States, or of any State." CONG. GLOBE, 39th Cong., 1st Sess. 2991 (1866). At the end of debate on June 7, however, Missouri Senator John B. Henderson noted the "mistaken" apprehension that Williams's language might apply to all elections for President and Vice President. Under the original constitution, a state could choose not to have an election by the people for President, as South Carolina had done when the state legislature elected the Electors. *Id.* at 3011. The following day, after consulting with the Joint Committee on Reconstruction (of which Williams was a member) and other allies, Senator Williams proposed the key change in the language of Section 2, "[s]pecifying particularly the officers for which these people must be allowed to vote in order to be counted." *Id.* at 3029.

Later that day, Michigan Senator Jacob M. Howard proposed eliminating Section 2's reference to presidential electors (and other listed offices). He noted that the states previously had different requirements for voting for President. His proposal was defeated on a voice vote. *Id.* at 3039–40.

<sup>38</sup> A few months earlier, in the contested election case of John Stockton, the Senate had confronted a decision by the legislature of New Jersey that violated all prior law—state constitutional law, statutory law, common law, and universal practice. The debate, in February

procedure reads like a summary of Congress's 1824 and 1826 denial that legislatures could usurp the right of the people to vote for electors.<sup>39</sup> Choosing U.S. Senators had led to legislative impasses. After all, state legislatures could be controlled by "ambitious or corrupt minorities, factions, [that] may defeat an election, may prevent any business being done." This happened frequently; it was "a mischief, an admitted evil."<sup>40</sup> Ohio Senator John Sherman recalled that it "often occurred" that state legislative elections of senators had become "the business of corrupt propositions, until the election of Senator in the old-fashioned way became—I can scarcely use any word strong enough—it became the mere plunder of political contention and barter."<sup>41</sup>

This was the rare issue on which President Andrew Johnson agreed with Congress. In proposing a constitutional amendment for popular election of Senators, President Johnson did not bother to explain why the amendment was needed: "The objections to the election of Senators by the legislatures are so palpable that I deem it unnecessary to do more than submit the proposition for such an amendment. . . ."<sup>42</sup>

Section 2 sought to establish the right of U.S. citizens to vote for the president and vice president by assuring that all adult male citizens would directly elect the members of the Electoral College from their states. Section 2 became central to the Fourteenth Amendment ratification debate, particularly in the South. Unsurprisingly, there was intense opposition to Section 2's requirement that all adult Black

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1866, extended over four days and yielded two conflicting votes. Ultimately, the Senate rejected application of what currently is called the Independent State Legislature Doctrine. CONG. GLOBE, 39th Cong., 1st Sess. at 1564–73, 1589–1602, 1635–48, 1666–77 (state legislature, meeting in joint session, must comply with pre-existing law and cannot elect by a plurality). The difficulties encountered in the Stockton case led the Senate to investigate—at the same time that it was debating the Fourteenth Amendment—and to propose a uniform rule imposed on state legislatures in July 1866. *Id.* at 3732. In the absence of the constraints contained in Section 2 of the Fourteenth Amendment, election of presidential electors could be subjected to the evils the Senate identified in July 1866.

<sup>39</sup> See *supra* note 10; *infra* note 71. The Senate's harsh judgment of state legislatures also mirrors language from the Constitutional Convention and *The Federalist*—for example: Madison, "pernicious"; Randolph, influence by "demagogues"; Spaight, "tyrannical and unjust"; Hamilton, "evil" and "hazardous." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 110 (Max Farrand ed., 1911) (Madison); *id.* at 103–04 (Randolph); Letter from Richard Spaight to James Iredell (Aug. 12, 1787), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 168 (Griffith McRae ed., 1858); THE FEDERALIST NO. 59 (Alexander Hamilton); THE FEDERALIST NO. 60 (Alexander Hamilton).

<sup>40</sup> Act of July 25, 1866, ch. 245, 14 Stat. 243, 243–44; CONG. GLOBE, 39th Cong., 1st Sess. at 3727–34.

<sup>41</sup> 17 CONG. REC. 818 (1886).

<sup>42</sup> Andrew Johnson, President, Special Message to the Senate and House of Representatives (July 18, 1868), <https://www.presidency.ucsb.edu/documents/special-message-2348>.

male citizens had a right to vote (enforced by a penalty). Nonetheless, apparently there was no objection to its requirement that the President and Vice President be elected by the people through their chosen electors, rather than by state legislatures—despite the possible draconian remedy if the right of the people to vote for electors was denied or abridged.<sup>43</sup>

Contemporaneous understandings further underscore the point that Section 2 is meant to protect the popular right to vote for President through each state's electors. This was most salient in South Carolina, the only state in which the people had never had the right to vote for presidential electors.<sup>44</sup> In 1868, a South Carolina constitutional convention created a special committee to investigate what effect Section 2 would have on South Carolina's representation in the House of Representatives (and in the Electoral College) when South Carolina adopted the standard of universal suffrage. The new state constitution was ratified by the people of South Carolina in April 1868. It provided that "Presidential Electors shall be elected by the people."<sup>45</sup> In June 1868, Congress approved South Carolina's readmission to the Union with the special condition that the rights to vote set forth in the constitution would never be withdrawn.<sup>46</sup> The South Carolina legislature—elected under

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<sup>43</sup> Leading texts about the Fourteenth Amendment's ratification process and the source material they include do not contain evidence of opposition to the role of the people rather than the state legislatures in Section 2. *See, e.g.*, JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1984); JAMES E. BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1997); 2 *THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 227–434* (Kurt T. Lash ed., 2020).

<sup>44</sup> In fact, in 1865, well before the Fourteenth Amendment was drafted, South Carolina had moved decisively against election of presidential electors by the legislature. On September 20, 1865, a constitutional convention organized under presidential reconstruction orders passed a resolution stating that electors should be chosen by the people. In September, Provisional Governor B.F. Perry told the convention that the legislative election of electors had been a "usurpation" of the rights of the people and a "gross error." *PEOPLE OF S.C., JOURNAL OF CONVENTION* 15, 68 (1865). Correcting this error was part of a package of democracy reforms that had been urged by the people of South Carolina for decades; President Andrew Johnson supported Perry's advocacy of the reform package. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 194–95 (updated ed. 2014); 8 *THE PAPERS OF ANDREW JOHNSON* 275, 280–85 (Paul H. Bergeron ed., 1989); 9 *THE PAPERS OF ANDREW JOHNSON* 9, 76, 94–95, 124–25 (Paul H. Bergeron ed., 1991). A few years later, in his July 18, 1868 special message to Congress, President Johnson called for a constitutional amendment to require direct election of presidential electors along the lines Andrew Jackson had advocated. Johnson, *supra* note 42. Such opposition to state legislatures electing presidential electors was a tenet of Jacksonian Democracy traceable to a January 30–February 3, 1824 speech by Missouri Senator Thomas H. Benton in support of a constitutional amendment requiring direct election. 41 *ANNALS OF CONG.* 177 (1824) (election by legislatures condemned as a "usurpation").

<sup>45</sup> S.C. CONST. of 1868, art. VIII, § 9.

<sup>46</sup> An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia,

the new constitution—then ratified the Fourteenth Amendment the following month.

Immediately after the ratification of the Fourteenth Amendment and in the face of a rising tide of white supremacist vigilante violence, the Florida and Alabama legislatures passed bills in August 1868 under which the legislatures, not the people, would choose presidential electors. Some Republican state legislators quickly voiced opposition—in Florida, where the bills passed each house in a single day, by seeking to delay action through dilatory motions; in Alabama, by entering formal protests. These objections—along with Alabama Republican Governor Smith’s subsequent veto message—denounced the bills as a partisan, unprincipled, and dangerous usurpation that deprived the people of their sacred right to vote for the most important office in the nation.<sup>47</sup> The Democratic press vehemently attacked the bills, which also were assailed by leading Republican newspapers.<sup>48</sup> Many critics declared that the bills were unconstitutional, in general,<sup>49</sup> and, specifically, because they violated Section 2 of the Fourteenth Amendment.<sup>50</sup>

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Alabama, and Florida, to Representation in Congress, ch. 70, § 1, 15 Stat. 73, 73–74 (1868).

<sup>47</sup> S. JOURNAL, Jul, Sept. & Nov. Sess. 104, 110–11, 124–27 (Ala. 1868); H.R. JOURNAL, July, Sept. & Nov. Sess. 126–28 (Ala. 1868); S. JOURNAL 199–200, 205 (Fla., 1868); ASSEMB. JOURNAL 190 (Fla. 1868). The Florida bill was signed into law. Florida had only the minimum of three electoral votes that year; so, technically, Section 2 did not apply.

<sup>48</sup> See, e.g., *Florida Legislature Last Selected Electors in 1868*, ITEM, Dec. 3, 2000, at 6A (quoting FLORIDIAN, Aug. 4, 1868 (“unconstitutional,” “a farce”)); MONTGOMERY WKLY. ADVERTISER, Aug. 18, 1868 (“monstrous outrage,” “bogus election”).

On August 8, the New York Times editorialized against the Florida bill, and on August 17, the New York Herald explained that pressure from leading Republicans throughout the North had contributed to Governor Smith’s veto. Editorial, *Choice of Presidential Electors*, N.Y. TIMES, Aug. 8, 1868; *Political Intelligence*, N.Y. HERALD, Aug. 17, 1868.

The August 25 edition of the Weekly Advertiser printed excerpts from several leading Republican papers that opposed the bills, including the Chicago Tribune and the Cleveland Herald. MONTGOMERY WKLY. ADVERTISER, Aug. 25, 1868.

<sup>49</sup> See, e.g., *Florida Legislature Last Selected Electors in 1868*, *supra* note 48 (“unconstitutional”); H.R. JOURNAL, July, Sept. & Nov. Sess. 128 (Ala. 1868) (a power “never intended to be granted by the organic law of the land”); *The Electoral College—Prospect of Difficulty Ahead*, N.Y. HERALD, Aug. 10, 1868 (“questionable” whether state legislatures legally possess such power).

<sup>50</sup> “A careful reading of the second section of the fourteenth amendment of the Constitution shows that the people must vote for Presidential electors, or lose their representation in Congress.” *Affairs in Washington*, DAILY PHOENIX, Aug. 9, 1868, at 3; see also *Northern News*, CHARLESTON MERCURY, Aug. 10, 1868, at 1; *Northern News*, CHARLESTON MERCURY, Aug. 11, 1868, reprinting *The Electoral Vote Swindle*, from N.Y. WORLD, Aug. 8, 1868; *A Radical Juggle Foiled*, NASHVILLE UNION & DISPATCH, Aug. 11, 1868, at 2; *The Proposition to Have No Election in November*, NASHVILLE UNION & DISPATCH, Aug. 13, 1868, at 2; *Alabama*, ATHENS POST, Aug. 14, 1868, at 2.

These bills seemed destined to become a significant issue in the 1868 election when Horatio Seymour, in his formal statement accepting the Democratic Party nomination for President, denounced the plan that gave rise to the bills as “bold steps” urged by the “radicals” in Congress to “destroy the rights of suffrage.”<sup>51</sup> The next day, there were reports that the plan and the emerging bills were “causing no little alarm in the official circles in Washington,” where there was “indignation” that the idea was even entertained.<sup>52</sup> After Governor Smith vetoed the Alabama bill, a report from Washington observed that it was “very evident” that “the idea of allowing the Legislatures of the States to elect Presidential electors has been abandoned.”<sup>53</sup>

Over a hundred years later, the Florida Legislature in December 2000 again threatened to choose the state’s presidential electors. Professor Peter Shane, participating in a colloquium about the 2000 Bush–Gore election, detailed the history of the June 6–8, 1866 changes in Section 2 and concluded that, at a minimum, Congress established a citizen’s right to vote for the President and Vice President by electing a state’s Electoral College delegation.<sup>54</sup> Shane argued convincingly that this right to vote, anchored in Section 2, is sufficient to empower a court to enjoin legislative usurpation of the right to vote for President, even without additional Congressional action.<sup>55</sup>

In the same *Bush v. Gore* symposium in which Professor Shane’s article appeared, Professor Pamela S. Karlan disagreed.<sup>56</sup> She noted that Section 2 also covers elections for judicial officers, but that many states do not elect their judges. Karlan

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<sup>51</sup> *Political Intelligence: The Presidency*, N.Y. HERALD, Aug. 6, 1868, at 6.

<sup>52</sup> *Washington News and Gossip*, CHARLESTON MERCURY, reprinted from N.Y. HERALD, Aug. 5, 1868.

<sup>53</sup> *Washington News and Gossip*, ANDERSON INTELLIGENCER, Aug. 12, 1868, at 2 (citing a correspondent from the Baltimore Gazette).

<sup>54</sup> Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 539–50 (2001). Apparently, Shane was the first scholar to consider specifically the potential impact of Section 2 on the question of whether state legislatures, rather than the people, may constitutionally elect presidential and vice-presidential electors.

<sup>55</sup> *Id.* at 549–50. Years earlier, Professor William Van Alstyne argued that Section 2 establishes both a right to vote and a particular remedy for violations of that right, and noted that this view does not foreclose the modern understanding that Section 1 of the Fourteenth Amendment similarly protects the fundamental right of the people to elect their leaders. William W. Van Alstyne, *The Fourteenth Amendment, the ‘Right’ to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 40, 50–52 & n.61, 81–85.

Van Alstyne wrote that the “right to vote” in Section 2 applied to “all six specified groups of offices and . . . complete disqualification from voting for any one of the six would constitute an ‘abridgement’ of the right to vote for them all, for representational reduction purposes.” *Id.* at 84–85.

<sup>56</sup> Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in Bush v. Gore*, 29 FLA. ST. U. L. REV. 587, 589–93 (2001).

argued that it would be an anomaly to say that Section 2 imposes a penalty if a state does not hold an election for President and Vice President but that it does not impose a penalty if a state does not elect judges. Yet the history of the drafting of Section 2 seems to refute Karlan's argument.<sup>57</sup> Karlan also expressed hope that Section 2 might not actually matter because state legislatures would be highly unlikely to deny their citizens the right to vote for President and Vice President. Her faith now seems overly optimistic.

At first glance, the Supreme Court's decision in *McPherson v. Blacker*<sup>58</sup> might challenge our view, shared with Professor Shane, that Section 2 of the Fourteenth Amendment does create an indirect right to vote for President and Vice President. *McPherson* does no such thing, however. The *McPherson* appellants relied on two constitutional claims. First, they claimed that the language of Article II, Section 1 ("State shall appoint . . .") requires that a state act as a unitary whole, and not by districts.<sup>59</sup> Relying on the historical record that preceded ratification of the Fourteenth Amendment, the *McPherson* Court made clear that Article II does not require a state to appoint as a unitary whole.<sup>60</sup>

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<sup>57</sup> Compare *id.* at 589–90, with *supra* notes 36–37, 43. Senator Henderson's main point on June 7, 1866, was that the June 6 proposal was too broad because it would include many local offices, but he agreed with the principle of the June 6 proposal. CONG. GLOBE, 39th Cong., 1st Sess. 3011 (1866). That proposal covered only state offices for which elections were required by the state's constitution and laws.

<sup>58</sup> 146 U.S. 1, 38–39 (1892).

<sup>59</sup> *Id.* at 24.

<sup>60</sup> *McPherson*, 146 U.S. at 27. The Court acknowledged that its historical narrative was incomplete. It contained significant gaps and overlooked harsh criticism of state legislatures extending from 1787 to 1826. Missing was criticism expressed by delegates to the Constitutional Convention and in *The Federalist*. See *supra* note 39. The narrative's history of proposals for constitutional amendments jumped from December 1823 to 1835, leaving out Senator Thomas Hart Benton's major address from 1824, the extensive debates in the House in 1826, and Senate Report 22 from 1826. See *supra* notes 10, 44; *infra* note 71.

The Court also incorrectly stated that in the 1800 election no question had been raised about the mode of electing the President. In fact, the constitutionality of legislative choice was a major issue in that year. KEYSSAR, *supra* note 25, at 35–36; TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804, at 73 (1994). In 1800, actions of state legislatures that denied or threatened to deny the people the right to vote in presidential elections dominated state elections in New York, Pennsylvania, and Maryland. EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN 87–111 (2007) (New York); *id.* at 206–09 (Pennsylvania); *id.* at 202–04 (Maryland). The Court also did not mention numerous resolutions, laws, constitutional provisions and official governmental acts that did not concede "plenary power" to state legislatures—for example, the South Carolina Constitutional Convention Resolution of 1865 and that state's 1868 Constitution and the Act of Congress re-admitting South Carolina to the Union, as well as the August 1868 Alabama veto of a bill seeking legislative election. See *supra* notes 43–46 and accompanying text.

Second, the appellants claimed that the language of Section 2 (“the right to vote at any election for the choice of electors for President and Vice President”) was intended to incorporate a specific type of election practiced in all states at the time of ratification of the Fourteenth Amendment.<sup>61</sup> Each state cast its electoral votes as a unit. This claim essentially was that Section 2 amended Article II by removing all discretion regarding the manner of conducting elections for presidential electors. But this interpretation was never mentioned as Section 2 was drafted and ratified. Indeed, one of the Fourteenth Amendment’s most ardent supporters, Indiana Senator Oliver P. Morton, did later champion such a district system in 1874.<sup>62</sup> The *McPherson* Court concluded that such a claim was “untenable.”<sup>63</sup>

*McPherson*’s discussion of Section 2 was limited to a single paragraph. The unanimous Court did not address the question of whether or how Section 2 applies in the case of legislative usurpation of the right to vote for presidential electors.<sup>64</sup> That issue was not presented on the facts, and the parties barely mentioned such a scenario in their arguments concerning Section 2.<sup>65</sup>

Today, Section 2 should continue to be interpreted in light of its text and its clear purpose: It sought to establish fundamental equality of political power among voters throughout the nation.<sup>66</sup> On June 8, 1866, the text of Section 2 was changed to directly address a point missing in prior drafts; this specific addition underscored the assertion that elections for President and Vice President, and for the House of Representatives, were to be covered by Section 2. It was integral to achieving a fundamental equality. Those who drafted and ratified Section 2 fully understood that its language would advance their goal of universal suffrage for all those qualified to vote for core federal offices. It clearly sought to include male individuals at least 21

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<sup>61</sup> *Id.* at 37–39 (quoting U.S. CONST. amend. XIV, § 2 (amended 1971)).

<sup>62</sup> *See* Morton, *supra* note 25.

<sup>63</sup> *McPherson*, 146 U.S. at 40.

<sup>64</sup> Professor Morley stated that *McPherson v. Blacker* “held” that Section 2 does not “require” states to hold elections for presidential electors. Michael T. Morley, *Remedial Equilibrium and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 334 (2015) (citing *McPherson*, 146 U.S. at 39). *McPherson* did not so hold, and the Court merely observed that Section 2 created a penalty, and not a “requirement.” 146 U.S. at 38–39.

<sup>65</sup> Neither the relevant history of the drafting of Section 2, nor the ratification and contemporaneous post-ratification history from South Carolina, Alabama, and Florida, were briefed. The long-standing tenets of Jacksonian Democracy, *see supra* note 44; *infra* note 70, also were not briefed, despite the fact that the principal proponents of the idea—Senator Benton and President Jackson—“were particular favorites of late nineteenth-century reformers.” KEYSSAR, *supra* note 25, at 116–17.

<sup>66</sup> In the congressional debates about Section 2 of the Fourteenth Amendment, Ohio Representative Ephraim Eckley pointed out that, without Section 2, two white rebels in South Carolina would have the same political power as five white loyalists in Ohio, Pennsylvania, or New York. CONG. GLOBE, 39th Cong., 1st Sess. 2535 (1866).

years old who had recently been freed from bondage. The Fifteenth Amendment soon followed in response to overt resistance to this then-bold innovation.

### 3. *Indirect Reform—Congress’s Power to Assure States a Republican Form of Government*

A supplemental source of congressional power to reject electoral votes, if any state legislatures now usurp the right of the people to choose the electors, might be anchored in the Constitution’s Article IV, Section 2 guarantee to each state of a “republican form of government.”<sup>67</sup> Furthermore, the Fourteenth Amendment itself provided criteria to assure that any state that failed to protect the exercise of the franchise would not be readmitted to the Union.<sup>68</sup>

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<sup>67</sup> President Benjamin Harrison’s December 9, 1891 Address to Congress (Appendix C) made the point. His speech devoted ten paragraphs to electoral justice and, in particular, to the “Miner Law” that established a district system and gave rise to *McPherson*—and focused on the Fourteenth Amendment and its language concerning presidential elections. Indeed, Ohio Representative John Bingham, one of the chief architects of the Fourteenth Amendment, emphasized the connection between Section 2 and the guarantee of a republican form of government:

There is a further guarantee in the Constitution, of a republican form of government to every State, which I take to mean that the majority of the free male citizens in every State shall have the political power. I submit to my friend that this proviso is nothing but a penalty for a violation on the part of the people of any State of the political right of franchise guaranteed [sic] by the Constitution to their free male fellow-citizens of full age. . . . The further provision is that the United States shall guaranty to each State a republican form of government, which means the majority of male citizens of full age in each State shall govern, not, however, in violation of the Constitution of the United States or of the rights of the minority.

CONG. GLOBE, 39th Cong., at 431.

<sup>68</sup> In what was widely labelled as Indiana Senator Morton’s “Great Reconstruction Speech,” Morton decried the state governments that had been set up by President Johnson precisely because they had failed to fulfill the first duty of republican government: protecting people from mob violence when they exercised their rights. There had been numerous murders of loyal Americans, Black and white, but not a single case had been successfully prosecuted. Both the Fourteenth and Fifteenth Amendments, and several Reconstruction civil rights statutes, aimed at guaranteeing truly republican government, and the guarantee in Article IV, Section 2 of the Constitution was a central theme for many antislavery activists.

In the course of Ulysses S. Grant’s presidential campaign, his backers had several million copies of Morton’s January 1868 address printed and distributed. Morton delivered the address while ratification of the Fourteenth Amendment was still pending; he played a key role in the adoption of both the Fourteenth and Fifteenth Amendment. A. JAMES FULLER, OLIVER P. MORTON AND THE POLITICS OF THE CIVIL WAR AND RECONSTRUCTION 213–20, 227–33 (2017). Morton has been called the nineteenth century’s “most assiduous and convincing exponent” for presidential election reform. J. HAMPDEN DOUGHERTY, THE ELECTORAL SYSTEM OF THE UNITED STATES 348 (1906).

State legislators elected several years prior to a presidential election year<sup>69</sup> cannot be considered representative of the views of the people in a presidential election year that occurs years after than their own elections (in any reasonable sense of the term “representative”).<sup>70</sup> Such a system runs counter to our evolving commitment to the ideal of the consent of the governed. Pursuit of this ideal underlies the presidential selection process created by the Twelfth Amendment. In turn, the Fourteenth Amendment, Section 2—forged in the aftermath of the Civil War by those who believed that the Civil War had been fought to advance democratic ideals—furnishes a textual basis for requiring that the people elect the President.

### III. CONGRESS’S ENFORCEMENT POWERS

Much as Congress did in 1868, Congress again must confront threats of violence and vigilante interference with electoral processes, as well as the possibility of multiple slates of electors. There are also numerous recent bogus claims of the illegality and irregularity of professionally conducted and much-scrutinized elections. Ultimately, Congress has the power to count all electoral votes cast in legally conducted elections, to ensure that the right of the people to vote is not denied or abridged. Conversely, Congress has the authority to refuse to count votes cast in violation of the U.S. Constitution<sup>71</sup>—particularly any votes cast in situations viola-

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<sup>69</sup> In the current reality of political calendars, state senators elected in 2024, for example, could decide the 2028 presidential election. The existence of gaps as large as four years was featured in Senator Benton’s 1824 condemnation of state legislative election of presidential electors. 41 ANNALS OF CONG. 174 (1824); H.R. MISC. DOC. NO. 44-13, at 726–27 (1877). The same point was made at the Founding. In January 1789, the Federalist New York Senate—one-fourth of whose members were elected each year to four-year terms, and which refused to agree to choose electors jointly with the lower house, elected annually—was rebuked directly by one of its anti-Federalist members. He stressed that New York Senators elected four years before did not represent the current will of the people. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, at 307–08, (Gordon DenBoer, Lucy Trumbull Brown & Charles D. Hagermann eds., 1986) (February 1789 broadside reporting a speech delivered in January).

<sup>70</sup> The analogous case is the responsibility of the House of Representatives to elect the President when no candidate receives a majority of the electoral votes. Originally it was the outgoing House that would so elect the President—a fact that challenged the very survival of the nation in 1800, when the outgoing Federalist House played partisan games extensively with the election of Thomas Jefferson. This was an unanticipated artifact of the decision by the Continental Congress to commence all terms of the newly organized government on the same day. 75 CONG. REC. 1373 (1932). The power of a “repudiated House” nonetheless “to elect a President who would be in control of the country for the next four years” was “a power [that] ought not exist.” *Id.* Correcting this major problem was “another very important reason” for adopting the Twentieth Amendment in 1933, which changed the timing of the terms in office of the President, Vice President, and the Senators and Representatives, and their successors. *Id.*

<sup>71</sup> In February 1824, Missouri Senator Thomas H. Benton first suggested “hypothetically”

tive of Section 2 of the Fourteenth Amendment. Legislation assuring that all legitimate votes are counted is an appropriate means to implement the Fourteenth Amendment. It might be wise to add a definition to the current Electoral Count Act (set out in Appendix B), to provide that, beyond each state's minimum of three electoral votes, Congress will count only Electoral College votes made through the direct vote of the people.

Congress also might amend the "safe harbor" provision of the Electoral Count Act to specify that only elections conducted under standards that guarantee the integrity of the election process will enjoy such safe harbor status. Many such standards are set out in Senate Bill 2747, which is the Freedom to Vote Act (FTVA) recently introduced in the Senate.<sup>72</sup> It contains Congress's findings of its constitutional authority to enact the FTVA, which include Section 2 of the Fourteenth

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that electoral votes cast in violation of the Constitution might not be counted—specifically, votes from electors chosen by seven state legislatures that had "usurped" the right of the people to vote. Benton hoped that recognizing that Congress might possess and use this power would "bring[ ] back these States to the path of the Constitution by . . . gentle means." 41 ANNALS OF CONG. at 177–78. In 1869, during an extended House session prompted by the Senate's refusal to reject Georgia's votes outright, Ohio Representative Samuel Shellabarger asserted that actually—not merely hypothetically—Congress must have the power to reject votes from electors who had been appointed by state legislatures in violation of the law. CONG. GLOBE, 40th Cong., 3d Sess. Appendix 173 (1869).

Two years after Senator Benton's speech, the House of Representatives took up legislative usurpation in an extended debate (February 15–April 1, 1826). At the time, Senator Benton's hoped-for "gentle" transformation at the state level was already well under way. In fact, the number of states whose laws provided for legislative election of electors had dropped from seven to two; and in at least some of the states that had switched to popular election—such as Benton's own state of Missouri—the change might reasonably be considered a "practical construction" that legislative election was or might be an unconstitutional usurpation. In the House debate, few Congressmen spoke in favor of legislative authority and most who addressed the issue agreed that this legislative practice violated the intent of the Framers. 2 REG. DEB. 1369 (1826) (McDuffie: "usurpation"); *id.* at 1401–02 (Storrs: "neither warranted by any fair construction of the Constitution, nor the spirit of the system"); *id.* at 1466–67 (Saunders: citing *The Federalist* to support his point that the "People" are to elect (citing *THE FEDERALIST* NO. 68 (Alexander Hamilton))); *id.* at 1564 (Drayton: "unsanctioned by, and at variance with, the Constitution"); *id.* at 1628 (Bryan: "violated the rights of the People" (citing *THE FEDERALIST* NO. 68)); *id.* at 1634–36 (Polk: quoting Hamilton, Randolph, Madison, Monroe); *id.* at 1730 (Mitchell of Tennessee: explaining that the use of "direct" in Article II means the People, not the legislatures, are to elect; one does not "direct" oneself); *id.* at 1843 (Worthington: risk of "cabal, corruption, and intrigue"); *id.* at 1894, 1896, 1900–03 (Barbour: "singularly obnoxious" and "subverts the whole theory of the Constitution,"); *id.* at 1701 (Isaacs: legislative election has "so few friends here"); *id.* at 1877–79 (Hoffman: explaining change of law in New York, 1824–25).

<sup>72</sup> The Freedom to Vote Act includes requirements for an auditable paper record and prohibitions on partisan removal of election administrators, harassment of election workers, and interference by poll observers. Freedom to Vote Act, S. 2747, 117th Cong. §§ 3902, 3001, 3101, 3601 (2021). The bill's "Voting System Security" would require post-election audits of elections

Amendment, as well as Congress's authority to assure to the states a republican form of government.<sup>73</sup> The bill also provides that Congress formally recognize its power to require that congressional elections be administered in an impartial manner, free from political bias or abuse of state power.<sup>74</sup> Similarly, in the exercise of Congress's Fourteenth Amendment, Section 5 power to enforce Section 2 of the Fourteenth Amendment and its sole authority to count Electoral College votes, Congress has the authority to determine whether biased election administration can abridge the right to vote for President—which includes the right to have one's vote counted fairly. Congress therefore could specify that election systems that evidence bias in counting and certifying the vote do not qualify for safe harbor status (at a minimum) and that serious state barriers to a fair presidential vote may subject a state to a reduction of its electoral votes.

More narrowly, Congress might focus on penalizing efforts to manipulate the election process while an election is underway. Congress could specify, for example, that the nation-wide "election for choice of electors" shall begin no later than January 20 of the year preceding the inauguration, and that any state that changes its laws after that date has abridged the pre-existing right of all its people to vote for presidential electors, which might make that state subject to Section 2 penalties. Alternatively, Congress might limit the permissible scope of changes made after the election process has commenced within a state, either through a primary or nominating event or upon distribution of ballots in the general election.

## CONCLUSION

Making every vote count is no longer simply a progressive call for important change to a creaky, centuries-old system. It has become the only effective way to maintain our democracy, which is currently under siege. We must protect the individual voter's decision by strengthening the vote-counting process and by making the national popular vote relevant to the outcome of the election of the nation's Chief Executive. Even without a constitutional amendment, meaningful presidential election reform is feasible through both federal and state governments. The people—the ultimate sovereigns of the Republic—should choose our President. The people must be assured that they are being heard by their state governments and that their votes cannot be set aside by any state. There is no time to waste. Not only does our commitment to democracy and the rule of law require us to ensure that American presidential elections are protected by effective safeguards; it is our duty to do this now.

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for all federal offices, including elections for President and Vice President. *Id.* § 4001.

<sup>73</sup> *Id.* § 3(2), (3)(A)–(B).

<sup>74</sup> *Id.* § 3001(a)(1), (3), (9).

## APPENDIX A: VOTER CHOICE BALLOT

President of the United States	Voter Choice Voting
Vote for 1	Vote yes or no
<input type="radio"/> <b>Republican Candidate</b> Republican	The STATE will count your vote for president and vice president along with all other votes in this STATE, and add them to all votes cast in all other states and the District of Columbia in order to determine who has won the national popular vote.
<input type="radio"/> <b>Democratic Candidate</b> Democratic	<b>Do you want the candidate who receives the most votes in the nation to become the President? If you do, fill in the oval next to YES.</b>
<input type="radio"/> <b>or write-in:</b> ----- For President	<input type="radio"/> <b>Yes</b> <input type="radio"/> <b>No</b>
	The STATE will count the votes of all those who filled in the YES oval as cast for the winner of the national popular vote for the purpose of appointing electors.

Today, when you vote for a presidential ticket, you choose among the listed options (or write in a candidate) and select your preferred candidate. Under our Electoral College system, your state tallies all of the votes within your state, and whichever candidate wins the most votes in that state wins all of the electoral votes in that state. The losing candidates in that state receive zero electoral votes, even if they lose your state by only a few individual votes. The national popular vote, which reflects tallies of all of the individual votes in every state throughout the country, does not matter.

The Voter Choice Ballot, if adopted in your state, would allow you to decide how your state should count your individual vote. It would empower you (but not require you) to make the national popular vote relevant to how your state decides which candidates should win your state. In other words, through your individual vote, you would be able to ensure that your state considers the national popular vote when assigning its electoral votes.

The Ballot first asks you to select your preferred presidential ticket. That preference would be reflected in the national popular vote count of all the individual votes in every state throughout the country. In this important way, you have a say—equal to every other voter’s say in every state—in which candidates win the national popular vote.

Second, the Ballot asks whether you would like your vote to count for the winner of the national vote, whoever that may be. If you vote “yes,” then your state will

count your vote for whichever candidate won the national popular vote, whether or not that candidate was your expressed preference. If you vote “no,” then your state will count your vote for your expressed preferred ticket, even if that candidate did not win the national popular vote.

Why would you consider voting “yes,” when it might mean that your state will count your individual vote for candidates you did not specifically select in your Ballot? Most important, a “yes” vote would signal your desire to have your vote count for the winner of the national popular vote in your state’s assignment of its electoral votes. Most Americans believe that the national popular vote winner should be elected President, but under our Electoral College system, the outcome of the national popular vote is irrelevant. The Ballot lets you make it relevant.

The Ballot gives the voter a chance to say who they want and also to say they want the national popular vote winner always to be elected. The voter has two decisions to make: (a) who do you want to be President, and (b) do you want the national popular vote winner to be President even if it’s not your preferred choice.

The Ballot has an added advantage for independents or anyone who does not prefer either of the two major party nominees. That voter can register a vote nationally for a third-party candidate. That is a way to send a message to the major parties, or even to help start a new party. But by voting “yes” to the question of whether you want the national popular vote winner to be elected, you can make sure that your vote is not wasted in your state. You can make your point about a third-party candidate, and also express your preference that the national popular vote winner is elected President.

The Ballot of course does not require any voter to make the national popular vote matter. A minority of Americans like the possibility that their candidate can lose the national popular vote and still win the Electoral College. Those voters simply check “no” to the second question.

## APPENDIX B: DRAFT LEGISLATION

### *State Constitutional Amendment*

Presidential and vice-presidential Electors of the Electoral College shall be chosen by direct vote of the people of [State]; provided that, as may be prescribed by law, said Electors may be chosen in or whole or in part on the basis of the total direct vote of the people of the United States (including Washington, D.C.).

### *Federal Legislation*

3 U.S.C. § 1(a):

Definitions:

The terms “regularly given by electors whose appointment has been so certified,” “lawful electors appointed in accordance with the laws of the State,” and “lawful

votes of legally appointed electors” (Section 15) apply only to electors appointed as the result of an election by the state’s qualified voters or an election based in whole or in part on the result of the nationwide popular vote; provided, a state whose electors are appointed by the legislature shall be entitled to three (3) electoral votes, to be chosen by lot, unless the electoral votes of electors chosen by direct vote of the people are counted.

*Amendment to the U.S. Constitution*

Article II, Section 1, Clause 2 of the U.S. Constitution is hereby amended as follows:

Each State, by a vote of the people thereof qualified to vote for Representatives in Congress, shall cast a Number of whole or fractional Electoral Votes, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. Each State shall prescribe by law the manner of holding such elections; but Congress may at any time by uniform law approved by two-thirds of each chamber make or alter such regulations and may, by law approved by two-thirds of each chamber, prescribe that Electoral Votes shall be awarded to the presidential and vice-presidential candidates who receive the largest number of direct votes of the people among all of the states and the District of Columbia.

Provisions relating to the office of elector and counting the votes of electors in Article II, Section 1 and in the Twelfth Amendment are repealed.

APPENDIX C: EXCERPTS FROM PRESIDENT HARRISON’S DECEMBER 9, 1891 ANNUAL MESSAGE TO CONGRESS<sup>75</sup>

An election implies a body of electors having prescribed qualifications, each one of whom has an equal value and influence in determining the result. So when the Constitution provides that “each State shall appoint” (elect), “in such manner as the legislature thereof may direct, a number of electors,” etc., an unrestricted power was not given to the legislatures in the selection of the methods to be used. “A republican form of government” is guaranteed by the Constitution to each State, and the power given by the same instrument to the legislatures of the States to prescribe methods for the choice by the State of electors must be exercised under that limitation. The essential features of such a government are the right of the people to choose their own officers and the nearest practicable equality of value in the suffrages given in determining that choice. . . .

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<sup>75</sup> Benjamin Harrison, President, Address to Congress: Third Annual Message (Dec. 9, 1891), <https://www.presidency.ucsb.edu/documents/third-annual-message-14>.

. . . .

Respect for public officers and obedience to law will not cease to be the characteristics of our people until our elections cease to declare the will of majorities fairly ascertained without fraud, suppression, or gerrymander. If I were called upon to declare wherein our chief national danger lies, I should say without hesitation in the overthrow of majority control by the suppression or perversion of the popular suffrage. . . . If a legislature chosen in one year upon purely local questions should, pending a Presidential contest, meet, rescind the law for a choice upon a general ticket, and provide for the choice of electors by the legislature, and this trick should determine the result, it is not too much to say that the public peace might be seriously and widely endangered.