

Foreword

*Lawrence Lessig**

The papers collected in this volume were first presented at a conference at Harvard Law School in Fall 2019. Much has happened since that conference, yet the analysis offered here remains important.

The puzzle of the Electoral College has been the focus of scholars and activists for generations. Its essence is captured best in a question that is the title to an extraordinary book previewed at the conference by Alex Keyssar, *Why Do We Still Have the Electoral College?*¹ In the interplay of these six essays, we can glimpse the beginning of an answer to that question. But to put that answer in context, I want to begin by identifying three distinct issues—or, depending upon your perspective, problems—that have been the focus of skeptics and reformers since the beginning of the Republic.

1. *The “one person, one vote problem”*: Because each state is allocated presidential electors based upon their representation in Congress, some states have more electoral votes per voter than others. In 2020, for example, there were about 275,000 votes cast for President in Wyoming. Those voters got represented by 3 votes in the Electoral College—one electoral vote per about 92,000 votes cast. In the same election, there were about 17,500,000 votes cast for President in California. Those voters got represented by 55 votes in the Electoral College—one electoral vote per about 318,000 votes cast. That means that one vote from Wyoming earns about 3.5 times as much weight in the College as one vote from California. That difference is the “one person, one vote problem.”

2. *The “swing state problem”*: All but two states (Maine and Nebraska) allocate all of their electoral votes to the plurality winner of the popular vote in that state. That fact has an important strategic political consequence: campaigns focus almost exclusively on the so-called “swing states,” states that could go one way or another, because the electoral vote in the other states will not change. For example, in 2016, 99% of general campaign spending occurred in just 14 states. Those states thus effectively selected our President. But those states are not representative of America generally. That unrepresentativeness is the “swing state problem.”

3. *The “inverted election problem”*: Because the Constitution requires the President be selected by a majority of electoral votes, and because electoral votes are not perfectly proportional to the popular vote, there is always a chance that the winner of the popular vote will not be the winner in the Electoral College. That inversion has happened in five elections, two in the last 20 years—2016 and 2000. This is the “inverted election problem.”

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¹ ALEXANDER KEYSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* (2020)

Reformers have tried to address each of these three problems. As we'll see, the most ambitious reforms address all three together. In the end, I will ask whether solving all three is actually essential to meaningful reform. But put that question to the side for the moment so we might see how these essays relate to these three problems.

Samuel S.-H. Wang and Jacob S. Canter's essay motivates the practical political need for reform. Though most who criticize the College focus upon the episodic (though as they argue, increasingly frequent) "inverted election problem," Wang and Canter help us focus on the persistent problems of the College, problems that happen in every election. And between the "one person, one vote problem," and the "swing state problem," they argue quite convincingly that the latter is far more significant than the former. (They refer to swing states as "battleground" states; for consistency, I'll stick with my moniker.)

I have already hinted at the reasons: Because of winner-take-all, the rational focus of both major campaigns is upon a small and unrepresentative fraction of the United States. These are the "swing states," which though not representative of America as a whole, receive practically all of any serious campaign's attention. Paralleling the work of Andrew Reeves and Douglas L. Kriner,² Wang and Canter argue that this fact has the predictable consequence of bending policy to an unrepresentative few. Those few are not small states. They are instead the demographics represented best in the swing states. But no framer chose the system for selecting the President with this effect in view. And no one today has identified any plausible moral or political reason to elevate the significance of swing state voters over Americans generally.

These problems press the need for reform. Wang and Canter urge that we focus on plausible reform. They discount the possibility of constitutional amendment (I'll return to that below) and press instead the National Popular Vote Compact ("NPVC").

The NPVC is an agreement among states to allocate their electoral votes to the national winner of the popular vote. Under the terms of that agreement, the obligation commences when states representing 270 electoral votes have joined the compact. As of this writing, states representing 196 electoral votes have already joined.

Without doubt, the NPVC is an elegant innovation that would reform fundamentally the nature of the presidential election. If it succeeds, it would solve both the "swing state problem" and (subject to an important qualification discussed below) the "one person, one vote problem." And if it succeeds as amended in the manner described in the essay by Rob Richie and his colleagues, it would also solve the "inverted election problem." If elections turned on the national vote, then no state would have any special advantage because of its swing state status. And no citizen would have any special ad-

² DOUGLAS L. KRINER, *THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY* (2015).

vantage, because a vote from one would be worth as much as a vote from any.

But the problem with the NPVC is the idea of a “national popular vote” itself. Derek Muller rightly observes that there is no actual national popular vote in America. There is instead an aggregation of the votes in fifty-one separate jurisdictions (the fifty states plus the District of Columbia). Right now, the rules for implementing the vote in those fifty-one separate jurisdictions differ in important ways. Voter eligibility (including whether felons may vote) differs among these jurisdictions. Residency rules differ. Voting procedures differ. Ballot access rules differ. Recount rules differ. And while Muller rightly notes that some of these differences also exist intrastate for state-wide offices, he is certainly correct that no state evinces the level of difference intrastate that exists interstate at the national level. Or put differently, if any state crafted its popular vote system with a non-uniformity intrastate as great as the NPVC would create interstate, that state-based system would raise serious constitutional questions (and indeed, as Michael Morley argues, that system would be unconstitutional).

The problem is not just static. As Muller rightly notes, if the nation adopted the NPVC, there would be an ongoing incentive to “gamesmanship.”³ As he writes, “[w]e would expect states to start behaving differently if their election laws no longer had only intrastate influence but interstate influence”⁴ This raises questions about the stability of the compact across elections. If states started behaving strategically, enhancing or curtailing the ability of their residents to vote for partisan reasons, it is not difficult to imagine the compact unraveling—and precisely because of a version of the “one person, one vote problem.” Even though that problem is radically more significant today, it may well be more politically salient under the NPVC, even though the differences then would be relatively smaller. And while one might consider addressing these problems through federal legislation, Muller is convincing in his claim that the plausibility and federal authority for such a resolution is questionable. Barring an amendment, the NPVC is, in Muller’s eyes, unstable at best.

Michael Morley doubles down on these doubts. His essay is a full-throated rejection of the NPVC on constitutional grounds. And while it is not my role here to respond fully to the arguments he’s made, it is important for supporters of the compact to recognize that his arguments offer a map by which a court could well agree that the NPVC is beyond the power of the states.

The power of Morley’s critique, however, hangs upon an assumption that is no longer clear. That assumption is that the Supreme Court is going to identify an implicit and original expectation about how the President is to be selected, and then enforce that expectation against the modern choices of

³ Derek T. Muller, *The Electoral College and the Federal Popular Vote*, 15 HARV. L. & POL’Y REV. 129, 147 (2020).

⁴ *Id.* at 137.

state legislatures. The relevant implicit expectation is that it must be the votes of a people within a state that determine how a state allocates its electors—at least if voting is used at all. The NPVC violates that expectation by determining a state's electoral votes based in part at least upon the votes of people from without a state. For example, California, a member of the compact, has committed to allocating its electoral votes based on the national vote. Its contribution to that national vote is less than 12%. Thus, its determination of how its electors will be allocated turns mainly on the votes of people from without California.

Yet the constitutional status of such an expectation is strange. Morley doesn't argue (because of course, he couldn't) that this expectation was set at the founding. There was then no single method by which states selected their presidential electors. Legislatures were free to select electors themselves; they could—and certainly did—choose their electors or the method by which their electors would be selected based on the expected political map of the nation as a whole. Indeed, it is clear that the repeated shifts in the early history of America in the “manner” for selecting electors—between at-large elections, district elections, and choice by the legislature—were driven by a perception of the political landscape nationally.⁵ If the original legislatures were free to make that adjustment directly, it's not clear why they couldn't effect the same adjustment, through a national popular vote, indirectly. Put differently, if state-based strategic behavior to support a national party was common soon after the founding; nothing since has expressly rejected that state power.

No doubt, soon into the history of the Republic, a clear pattern for allocating electors evolved. That pattern sets modern expectations, fundamentally. But even here, the Court has been clear that such patterns can be broken. *McPherson v. Blacker*⁶, which has proven to be the most important presidential electors case in our history, expressly permits states to change evolved patterns for selecting the President. Petitioners in that case had challenged Michigan's decision to allocate electors at a district level rather than using the then-common “unit method,” or what I refer to in this essay as “winner take all.” The Supreme Court rejected this effort to enforce the then-present expectations against an expressly granted constitutional discretion. The framers had granted legislatures “plenary authority” to select the “manner” by which electors were selected. That plenary authority was not limited by any evolved practice of Michigan or of any other state.

That reasoning, if applied consistently, should free state legislatures to adopt new ways of determining how they will select the slate of electors from their states—including the NPVC. No doubt, there may be limits to that power. Could a state legislature say that the views of the British monarch shall determine which slate of electors shall represent a state? Could it decide to allocate its electors according to the vote of the UN? Or could it decide to

⁵ This story is told in KEYSSAR, *supra* note 1, part II.

⁶ 146 U.S. 1 (1892).

allocate its electors to the loser of the popular vote in a state—an idea pursued by some legislators in the 2020 election?

Strictly speaking, we have no authority from the Supreme Court restricting the scope of a state legislature’s power under the Manner Clause of Article II⁷ in any context. Yet the Court’s most recent authority might well suggest some limits. These limits, however, would not help Morley’s argument.

In *Chiafalo v. Washington*,⁸ the Supreme Court upheld state rules restricting the scope of electors’ discretion.⁹ That limitation was justified, the Court held, by an evolved democratic norm that the Court expressly recognized: As Justice Elena Kagan articulated it at the end of her opinion—“here, We the people rule.”¹⁰ That norm may well forbid a legislature from selecting the loser of a popular vote simply because s/he was the loser. It may well forbid a legislature from allocating electors according to the vote of the UN. But if state legislatures at the framing were free to survey the national political situation in deciding the “manner” by which their electors were to be selected, it’s not clear why Kagan’s norm must force states today to act obliviously to the democratic choices of other states. Kagan’s norm was not present at the founding. There’s nothing in the nature of that norm to demand that a state ignore the national political context.

One contrast makes the point more clearly. Imagine that prior to the Seventeenth Amendment (which changed the method by which senators were selected), state legislatures had entered into a compact similar to the NPVC. Under that agreement, states would conduct popular elections for senators. But the ultimate choice of a senator by a state was to be determined under the compact by the aggregate vote of members in that compact. If a majority of those states voted Democratic, then the legislature would select the Democratic candidate for Senate. If it voted Republican, then the legislature would vote Republican. Defenders of this senatorial compact might insist that the plan maximized the power of the state, by assuring that its Senators were part of the Senate majority, and that states were free to determine their Senators however they wished—an argument that parallels the arguments in favor of the NPVC today. But in this case, the opponents of the senatorial compact would have a strong argument that the Senator from a state was meant to represent that state. That argument, however, would not apply to the NPVC, since a President is elected to represent the nation as a whole, not any particular state. With the NPVC, “We the people” refers to the people of the nation. Nothing in Kagan’s evolved democratic norm should forbid a state from choosing to empower that different, more national, “people.”

⁷ U.S. CONST. art. II, § 1, cl. 2.

⁸ 140 S. Ct. 2316 (2020).

⁹ As I describe more fully below, I was lead counsel for the petitioners in *Chiafalo v. Washington*, and argued the case before the Supreme Court.

¹⁰ *Chiafalo*, 140 S. Ct. at 2328.

Chiafalo thus strengthens the constitutional argument in favor of the NPVC. But as two of the essays in this volume suggest, the case has other lessons to teach as well.

No case prior to *Chiafalo* had addressed whether the state had the power to control how electors may vote. In *Ray v. Blair*¹¹, the Court had upheld the right of the state to discriminate in appointment against electors who had refused to pledge to support a candidate. Yet the power to discriminate in the appointment of an elector is fundamentally different from the power to control how an elector might vote. No one doubts the right of the President to discriminate among the potential judges that he or she might nominate; no one doubts that he or she has no power to control how a judge votes.

That electors would have a constitutional discretion had been a fairly uncontroversial view among scholars and historians. In *Ray*, Justice Jackson wrote in dissent:

no one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices.¹²

The only fair question was whether that presumption had somehow been changed. That presumption produced enormous anxiety among some across our history. Jefferson had supported an amendment to eliminate the office of elector, precisely because of this danger.¹³ Thomas Hart Benton introduced an amendment every year for twenty years that would have done the same thing.¹⁴

These facts led Rebecca Green to conclude in her essay for this volume—written before the Supreme Court's decision—that if history had liquidated anything, it had liquidated the fact that electors were indeed free. Applying the framework outlined by the Supreme Court in *National Labor Relations Board v. Noel Canning*,¹⁵ Green surveyed this history of constant contestation about elector discretion and concluded the “evidence suggests that Electoral College norms and practice routinely anticipate elector discretion and that institutional and popular acceptance of elector discretion is widespread.”¹⁶

Yet the Supreme Court in *Chiafalo* concluded to the contrary—certainly the clearest contradiction of an argument made by Will Baude that “in case after case, where the court looks at . . . a conflict between the original

¹¹ 343 U. S. 214 (1952).

¹² *Id.* at 232 (Jackson, J., dissenting).

¹³ Letter from Thomas Jefferson to Albert Gallatin (Sept. 18, 1801), <https://founders.archives.gov/documents/Jefferson/01-35-02-0245> [<https://perma.cc/PTE2-YZL6>].

¹⁴ See KEYSSAR, *supra* note 1, at 87.

¹⁵ 573 U.S. 513 (2014).

¹⁶ Rebecca Green, *Liquidating Elector Discretion*, 15 HARV. L. & POL'Y REV. 53, 77 (2020) (emphasis removed).

meaning and something else, it's the original meaning that wins."¹⁷ *Chiafalo* flatly rejects an original meaning (and textualist) interpretation of the electors' power. As one of the most prominent originalist scholars wrote of the decision, "[i]t is difficult to overstate how much of a catastrophe the 'faithless electors' *Chiafalo* case is for originalism."¹⁸

Justice Thomas's concurrence doesn't do much better. Thomas rejected the idea that Article II authorized the states to discipline electors. Article II, as he argued, gives states the power to choose the "Manner" by which electors are appointed. Article I gave states the power to determine the "Time, Place and Manner" by which representatives would be chosen. "Manner," Thomas argued, must be read in the same way in both clauses. As he wrote, "Nothing in the Constitution's text or history indicates that the Court should take the strongly disfavored step of concluding that the term 'Manner' has two different meanings in these closely aligned provisions."¹⁹ And yet the Court had concluded that "Manner" in Article I gave the states no power over the qualifications of candidates for Congress; the same must be true, he argued, about "Manner" in Article II.

Even if the states have no power to control electors under Article II, they do, Thomas concluded, retain that power under the Tenth Amendment. But this conclusion raises an obvious question: What power did any state ever have to control how "electors" vote? If states have the power to control how presidential electors may vote, do states have the power to control how congressional electors—i.e., "voters"—may vote? Thomas had insisted that words must be read in the same way. So is the state's power over "electors" in Article I the same as its power over "electors" in Article II? If the Tenth Amendment reserved the former power to the states, did it reserve the latter? Can Massachusetts, under the Tenth Amendment, pass a law fining voters if they vote for a Republican?

As I sat down to present my argument in the case—the case was argued during the pandemic, and therefore, remotely—I looked across my desk to a book I had published the year before, *Fidelity and Constraint*.²⁰ That book is an extended account of the interaction between the meaning of the constitution, properly determined, and the constraints on the Court's ability to articulate that meaning. While preparing to offer the Supreme Court an originalist argument for elector discretion "on a silver platter,"²¹ as Michael Rappaport described it, seeing my book triggered a premonition: I was about to be swallowed by my own theory. Yes, originally Article II "electors" had

¹⁷ See William Baude, *Is Originalism Our Law?* at 11:05, YOUTUBE (Mar. 16, 2015), https://www.youtube.com/watch?v=rez2zEjO98w&feature=emb_logo&ab_channel=UniversityofChicagoLawSchool [<https://perma.cc/55BA-VL5L>].

¹⁸ Michael Rappaport, *The Originalist Disaster in Chiafalo*, LAW AND LIBERTY (August 7, 2020), <https://lawliberty.org/the-originalist-disaster-in-chiafalo/> [<https://perma.cc/T2S4-NS2F>].

¹⁹ *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring).

²⁰ LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* (2019).

²¹ Michael Rappaport, *supra* note 18.

the discretion we now presume Article I “electors” to have. But a cross-partisan norm now constrained that discretion. Because “here, We the People rule.” *Chiafalo* is not an example of fidelity. *Chiafalo* is an example of judicial constraint—a constraint, in my view, that too few in constitutional theory try to reckon.

Chiafalo’s democratic principle — “here, We the people rule” — should have an effect even beyond electors. In the brief moment in 2020 when supporters of President Trump suggested that state legislatures act on a power that *Bush v. Gore* had suggested they have, to recall the vesting of the appointment of electors in the people “at any time,”²² the principle of *Chiafalo* showed just why that argument could not fly.²³ If *electors* have no power to ignore the will of the people, once expressed, then certainly *state legislatures* have no such power. At least the framers had intended some discretion in electors. We know quite clearly that they also intended that no existing authority—whether Congress, the state legislatures or the governors—was to have the power to select the President. If “here, We the people” rule over the presumptively entitled electors, then a fortiori, “We the people” rule over the presumptively disentitled state legislatures.

Guy Charles and Luis E. Fuentes-Rohwer offer a complicating view of this interpretive constraint. Their essay is a completely compelling account of why *Chiafalo* is supported neither by the text of the Constitution nor by its original public meaning. They therefore engage the question that I had hoped the Supreme Court would have engaged openly and honestly—what accounts for the change in the Constitution’s meaning, if not an amendment? Charles and Fuentes-Rohwer explain the Court’s evolved jurisprudence of historical “gloss.” That account is grounded in “normative justifications” for the result, rather than “categorical definitions.”²⁴

I agree with Charles and Fuentes-Rohwer’s rejection of an account tied to “categorical definitions.” The Court has no list of categories against which it checks Supreme Court opinions. But I don’t accept that the right way to understand the pressure that pushes the Court away from text and original meaning is to talk about “normative justifications.” The constraint is less fancy than that, and if *Chiafalo* has convinced me of anything, it has convinced me of the increased importance of understanding the nature of the constraints on Supreme Court interpretations. The Court could not hold as text and original meaning would require because it had become taken-for-granted that electors are potted plants. This was not a partisan view; but it was a common view that the Court saw no reason to disturb. This is true not because America has a sophisticated gloss on history, or because America has a committed and informed normative view. This is true because in the mid-

²² 531 U.S. 98, 104 (2000).

²³ See Lawrence Lessig & Jason Harrow, *State Legislatures Can’t Ignore the Popular Vote in Appointing Electors*, LAWFARE BLOG, <https://www.lawfareblog.com/state-legislatures-cant-ignore-popular-vote-appointing-electors> [<https://perma.cc/ZB5Y-S76W>].

²⁴ Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Chiafalo: Constitutionalizing Historical Gloss in Law & Democratic Politics*, 15 HARV. L. & POL’Y REV. 15, 47 (2020).

dle of a pandemic, facing an extraordinarily volatile presidential election, no justice was going to add to the uncertainty of that election by suggesting the possibility that electors alone could flip the popular result. Kagan's last line would have been more accurate had it said, "here, what we all believe rules," because she knows personally that the no deep normative commitment to "democracy" constrains this Supreme Court.

If constitutional jurisprudence were a real science, it would be this sort of anomaly that we would focus upon. David Strauss is right to insist that the actual constitution is far from the text as originally understood.²⁵ We need take seriously his observation and develop a better account of what allows that gap to exist. My sense is that the answer will be closer to Searle than Dworkin.²⁶ But the most striking fact to me is just how invisible anomaly-talk is in modern American jurisprudence. Michael Klarman devoted more than 150 pages to the question of democracy in his review of the Supreme Court term — a Harvard Foreword at least twice as long as any in the Journal's history.²⁷ *Chiafalo* doesn't merit even a footnote.

The final essay by Rob Richie, Patrick Hynds, Stevie DeGross, David O'Brien, and Jeremy Seitz-Brown ("Richie et al.") offers one important modification to the NPVC to allow it to solve not only the "one person, one vote problem" and "swing state problem," but also the "inverted election problem."

To be clear analytically, there are two sources of the "inverted election problem," one of which a national popular vote eliminates automatically.

The first source, as described above, is the non-proportionality between the electoral votes in a state and the state's popular vote. The second source is the potential distortion caused by strong third-party candidates.

The first source is what Wang and Canter had modeled: even with just two candidates, an election can be inverted, because electoral votes are not perfectly proportional to the popular vote in a state.²⁸ This inversion is purely technical: The failure to select the majority candidate is not a product of a third candidate; it is simply the product of the system for aggregating preferences.

But the second source—strong third-party candidates—would be present even if there were a national popular vote.

Across our history, it is the second source that has presented itself most clearly. In 1844, for example, America was choosing between James Knox Polk, a pro-slavery warmonger, who insisted that Texas should be taken by force, and that "Manifest Destiny" entitled America to everything else west. Against him ran a soft abolitionist, Henry Clay, who like Lincoln at the

²⁵ *Id.* at 41.

²⁶ Compare JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 4–5 (1995) (describing the invisible social reality), with RONALD DWORIN, *A MATTER OF PRINCIPLE* (1985).

²⁷ See Michael J. Klarman, Foreword: The Degradation of American Democracy — and the Court, 134 *HARV. L. REV.* 1 (2020).

²⁸ Samuel S.-H. Wang & Jacob S. Canter, *The Best Laid Plans: Unintended Consequences of the American Presidential Selection System*, 15 *HARV. L. & POL'Y REV.* 209, 219 (2020).

time, believed that slavery should be isolated so that a natural death would overwhelm it. But in New York, there was a third candidate?—?a hardline abolitionist, James Birney, who insisted that slavery must end immediately. Polk beat Clay in New York by 5,106 votes, yet Birney had received 15,812 votes. Between Polk and Clay, there is no doubt who the second choice of the Birney voters would have been. Had they been counted for Clay, Clay would have become President, the Mexican War would have been averted, and maybe slavery could have been ended without the bloodiest war in American history.

That same story could be told about the election of 2000. George Bush beat Al Gore in Florida by 537 votes. Ralph Nader received 97,488 votes. Between Gore and Bush, it is contested but plausible that Gore would have been a sufficient favorite of the Nader voters.²⁹ Had they been counted for Gore, who knows whether we would have blundered into the worst foreign policy mistake in American history, Iraq, and quite likely, we would today be anticipating a twenty-year anniversary of the first major climate change legislation enacted by the United States Congress.

These inversions were caused primarily by the system of requiring a majority of electoral votes. Yet even with a national popular vote, so long as more than two candidates can run, the risk of an inverted election remains. Richie, et al. aim to minimize this risk, by adding “ranked choice voting” (“RCV”) into the national popular vote. RCV gives voters the opportunity to rank their choices. If their top-ranked choice doesn’t receive a majority, then their second-choice vote gets counted. If that choice also does not receive a majority, then their third choice gets counted—and so on.

Even today, RCV is a critical innovation that could make the current system wildly more stable. Both Alaska and Maine have recognized this fact, and have now adopted RCV for determining how presidential electors are to be allocated in their states. If the NPVC were enacted, then RCV would protect against the potential distortion caused by a third-party candidate who attracts more votes than the difference between the top two candidates. That happened in 2000 (the difference between Gore and Bush was 543,895; Nader received 2,882,955 votes nationally), and in 1992 (the difference between Clinton and Bush was 5,805,339; Perot received 19,743,821). It could easily happen again.

RCV has been tested in many representative democracies across the world. It would complement the constitutional presumption of majoritarianism, by enabling a choice that expresses the preferences of a majority. But whether it can be integrated into the NPVC is a harder question. Richie, et al., are convinced that Congress has the power to mandate a national ballot

²⁹ Michael C. Herron and Jeffrey B. Lewis’s fascinating study the implicit political preferences of the actual ballots cast for Nader in 2000 suggests that Gore would have won a sufficient majority of Nader voters to prevail. See Michael C. Herron & Jeffrey B. Lewis, *Did Ralph Nader Spoil Al Gore’s Presidential Bid?: A Ballot-Level Study of Green and Reform Party Voters in the 2000 Presidential Election*, 2 QJ. POL. SCI. 205 (2007). James Carville, by contrast, declared Nader’s spoiling of 2000 “obvious.” See *id.*

enabling RCV with the compact. I fear that's one federal power too far, given the clear difference between the Constitution's securing of power over congressional elections to Congress without any parallel power in Congress over presidential elections. Richie, et al.'s backup solution, building a RCV system into the states adopting the compact, is certainly constitutional if the compact is constitutional. But if we had different methods for counting the popular vote across the nation, that would emphasize the challenge that both Muller and Morley have raised: How do we reckon the national popular vote? With RCV or not? Or with RCV where enabled, and not where it is not? Is there an Equal Protection problem if half of the states eliminate all but the top two candidates in reckoning the popular vote, but half of the states do not?

These are serious questions. But I remain a supporter of the NPVC. It is still the easiest solution to both the "one person, one vote problem" and the "swing state problem." And if Richie, et al.'s, amendments were possible, it would also weaken the chances of an inverted election.

But in the closing paragraphs of this foreword, I offer a sketch of an idea that both I and Kevin Johnson have advanced, based on a proposal most recently considered in Congress in the middle of the last century.³⁰

The presumption of reformers is that because partisan division is so stark, constitutional amendments are impossible. I agree that partisan division is stark. I'm not convinced that entails that constitutional amendments are impossible.

Because if, among the three problems that we've identified, the "swing state problem" were viewed as the most significant, then it seems clear that both parties in more than three-fourths of the states would actually benefit from an alternative solution to the problem of the Electoral College—one that would solve the swing state problem and the inverted election problem, even if it cannot address the "one person, one vote problem."

That alternative accepts the allocative framework of electoral votes in the Electoral College. It changes the division of votes within that framework. Under its terms, states would receive the same number of electoral votes as they receive now. But those votes would be allocated proportionally, at a fractional level, between the top two candidates within the state. States would have the power to determine how those top two candidates would be identified. Presumably, most would adopt RCV, but the solution would leave open the opportunity for states to experiment with other methods as well.

Under this system, for example, if the Democratic candidate in Montana received 41.70% of the vote (as Obama did in 2012), then s/he would receive 1.251 electoral votes. Likewise, if the Republican candidate in New

³⁰ See *Presidential Elections: The Top Two Proportional Solution*, ELECTION REFORMERS NETWORK, <https://electionreformers.org/the-proportional-allocation-solution/> [<https://perma.cc/G3QL-W9CH>]. This solution is similar to, though an improvement of, the Lodge-Gossett Amendment considered in the 1950s. See *Past Attempts at Reform*, FAIRVOTE, https://www.fairvote.org/past_attempts_at_reform [<https://perma.cc/735S-DEY6>].

York received 35.17% of the vote (as Romney did in 2012), then s/he would receive 10.199 electoral votes. By limiting the allocation to the top two candidates within a state, the system minimizes the chance of an inverted election. It doesn't eliminate that chance—a strong third-party candidate in one state could become one of the top two. But the system would work more effectively to identify a majority candidate across the fifty-one electoral systems within the United States than the current system does.

Like the NPVC, this change would solve the “swing state problem.” It would also minimize the risk of the inverted election problem. But it would not solve the “one person, one vote problem,” since the unequal allocation of electoral votes would be unchanged. And unlike the NPVC, it would also likely require a constitutional amendment to be effected.³¹ These are all reasons to prefer the NPVC, since NPVC would get us more, sooner.

But the cost of not solving the “one person, one vote problem” might well be exaggerated. As the nation is today, there's no strong partisan advantage that would be secured through the extra weight given to small states. Among the 12 smallest Electoral College jurisdictions, 5 are solidly Blue (DC, VT, DE, RI, HI) and 5 are solidly Red (WY, AK, ND, SD, MT), and two swing (ME, NH). And to the extent the practical and constitutional concerns raised by Muller and Morley are seen as significant, they are mitigated in a system that remains federal rather than national.

I don't suggest this reform as an alternative to the NPVC. The NPVC is a critically important innovation that should happen right now. Yet at the same time that it is being considered and (hopefully) enacted, Congress should also be deliberating two distinct constitutional amendments. The first would ratify the NPVC, giving Congress the power to regulate the presidential vote as it regulates congressional elections, thereby avoiding many of the problems Morley and Muller identify. The second amendment would advance this second-best alternative of the top-two proportional allocation within each state at a fractional level.

If the NPVC proves to be stable, then there would be no practical push for either amendment. But to the extent it proves to be unstable, then these constitutional alternatives would give America two clear paths forward to pursue. Both would end the “swing state problem”—the problem that in my view is the most important problem to solve. Both could also solve the “inverted election problem,” by incorporating RCV, and providing for an alternative to the flawed contingent election system of the Twelfth Amendment.³² And while between the two, my strong preference would be for NPV, I do not believe it would not be deeply damaging if the United

³¹ In LAWRENCE LESSIG, *THEY DON'T REPRESENT US* (2020), I argue that fractional allocation could be a remedy to a finding that winner take all violates the Equal Protection Clause. See *id.* at 163–65.

³² The Twelfth Amendment requires that if the Electoral College does not identify a majority winner, then the House selects a president from the top three candidates. U.S. CONST. amend XII. But the House votes one vote per state. That rule creates an enormous one person, one vote problem.

States, a federal republic, retained its federal system for selecting the President, despite its inherent bias for small states. So long as the swing state distortion is removed, we could at least secure a fundamentally more representative president.

So “Why do we still have an Electoral College?”

The interplay of these essays suggests to me at least one clear reason: We are viewing reform as a set of alternatives, rather than complements. Reformers should not be arguing about one reform over another. We should recognize the ways in which they could complement each other.

Let us ratify the NPVC as quickly as possible. But let us also acknowledge the concerns, raised in good faith and without any necessary partisan motive, about the NPVC, and begin the more difficult project of giving America a more fundamental choice. Congress should offer the states two amendments to choose between—one enacting a national popular vote; one requiring proportional allocation of electoral votes at a fractional level among the top two candidates in a state.

Both amendments would solve the “swing state problem.” Both could minimize the chance of an inverted election. And the choice between the two would give America the chance to either confirm the value of one person, one vote, effected by the NPVC, or reaffirm the value of a federal system that could enable experimentation within a radically more representative framework. The temporary fix of the NPVC could well prove to be permanent. But the chance for a permanent fix should not stop us from effecting that fundamental reform, now.

