Voter Suppression

Voter suppression, or strategies used to discourage or prevent individuals from voting, is experiencing a resurgence in recent years. Various methods of voter suppression have been used to keep minorities from voting since the Fifteenth Amendment extended the franchise to black American men. Jim Crow laws across the South imposed stringent limitations on voter eligibility such as “grandfather clauses” that prohibited a citizen from voting unless his grandfather was eligible to vote, effectively foreclosing newly-freed black Americans from casting their ballots.

The Voting Rights Act of 1965 marked a major shift in voter enfranchisement by prohibiting racial discrimination in voting. Importantly, the VRA contains a provision that any states that had a history of racially discriminatory laws would have to obtain federal approval to enact new laws that would restrict voting access. However, in the 2013 case *Shelby County v. Holder*, the Supreme Court struck down that section of the VRA as unconstitutional, ruling that it was no longer responsive to current conditions. As a result, the enforcement provisions of the VRA lost their teeth. After the *Shelby County* ruling, states began enacting a bevy of laws that restrict voting access in various ways.

Voter suppression methods such as voter ID laws disproportionately target minority communities, effectively disenfranchising those who are already underrepresented in politics. “One person, one vote” is a fundamental tenet of democracy, yet many eligible voters are precluded from exercising this right by restrictive laws passed under the pretext of preventing voter fraud.

The impact of voter suppression can be determinative in a closely-contested race. During the 2018 midterm election, the Georgia gubernatorial election came under fire because of allegations of voter suppression tactics imposed by Republican candidate and then-Secretary of State Brian Kemp, who ultimately defeated Democrat Stacey Abrams to win the election. Given the Supreme Court’s tacit blessing for states to enact stringent voter requirements, Americans can only expect to see more voter suppression methods employed by state legislatures looking to gain a partisan advantage. With the 2020 presidential election fast approaching, Americans must do what we can to stand up for voting rights for everyone, lest the United States become a true democracy in name only.

Electoral College

The Electoral College is a constitutional mechanism through which the President of the United States is elected. This process was established by the Framers as a compromise between factions who wanted the president elected through a national popular vote and those who supported choosing the president through a Congressional vote. The Electoral College grants each state (and the District of Columbia) a number of electors equal to the number of U.S. senators and representatives of that state.

Typically, the winner of the Electoral College also wins the national popular vote. However, five times in American history, and twice in the last twenty years, the winner of the popular vote lost in the Electoral College. That a candidate could win more votes nationwide, yet still lose the election, has created no small amount of dissatisfaction with the Electoral College process. However, abolishing the Electoral College would require a constitutional amendment. In lieu of amending the Constitution, some states are trying to work around the Electoral College system by entering into an agreement known as the National Popular Vote Interstate Compact (NPVIC). States that enact the NPVIC agree to pledge their electors to the winner of the national popular vote, regardless of which candidate wins the majority of the state itself. At present, fourteen states and the District of Columbia have adopted the NPVIC for a total of 189 Electoral College votes, 70% of the 270 votes needed to give the Compact legal force.

Gerrymandering

Gerrymandering occurs when a legislature manipulates voting district boundaries in order to favor one party or class of citizens. Two principal tactics are used in gerrymandering: "packing," in which legislatures concentrate a party's or group's voting power into a small number of districts, and "cracking," where the legislature dilutes the effect of a voting block by splitting it into multiple districts to reduce voters' electoral power. In the 1960 case *Gomillion v. Lightfoot*, the Supreme Court found that districts gerrymandered to disenfranchise black voters violated the Fifteenth Amendment. While racial gerrymandering is specifically prohibited, the Supreme Court has not yet definitively ruled on the issue of partisan gerrymandering. In 2004, a plurality of the Supreme Court held in *Vieth v. Jubelirer* that partisan gerrymandering is nonjusticiable, but Justice Kennedy's concurrence indicated that there exists a level of partisan redistricting that would not be constitutional. In his concurring opinion, Justice Kennedy suggests that "invidious" partisan gerrymandering would violate individual representational rights.

Before the Court are two cases challenging the constitutionality of partisan redistricting: *Benisek v. Lamone* out of Maryland and *Rucho v. Common Cause* out of North Carolina. Although Justice Kennedy's concurrence could provide some insight into how the court might analyze these cases, Kennedy is no longer on the Court, and the staunchly-conservative majority might be disinclined to weigh in on state districting procedures. It remains to be seen how the Supreme Court will address partisan gerrymandering tactics.

Census

Article I, Section 2 of the Constitution dictates that the federal government must conduct a decennial census that provides an "actual enumeration" of the number of people living in the United States. Since 1790, the U.S. has conducted a census every ten years. Although the

Constitution requires only a population count, the federal government began using the census to acquire additional information about the U.S. population and economy.

In March 2019, Commerce Secretary Wilbur Ross announced that the 2020 census would include a question about the citizenship status of respondents for the first time since 1950. This announcement triggered an avalanche of legislation by states asserting that the question would depress responses from immigrant communities and result in an inaccurate population count. In response, the Census Bureau has argued that a citizenship question is necessary to enforce the Voting Rights Act. In the case *Department of Commerce v. New York* the district court ruled in favor of the law's challengers and issued a stay preventing the Department of Commerce from including the citizenship question on the census. The case is now pending before the Supreme Court.

Echoes of Slavery II: How Slavery's Legacy Distorts Democracy

Juan F. Perea[*]

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> "We are never as steeped in history as when we pretend not to be, but if we stop pretending we may gain in understanding what we lose in false innocence."
>
> Michel-Rolph Trouillot[1]

INTRODUCTION

We continue to pay a heavy price for our history in slavery.[2] It is no exaggeration to say that the legacies of slavery determined the

 Professor of Law, Loyola University Chicago School of Law. Many thanks to Dean Jennifer Rosato Perea, and to Gregory Mark, Daniel Morales, Allison Tirres, Judge Warren Wolfson, and Maggie Livingston and the DePaul University School of Law Faculty Workshop for helpful comments and critique. And thanks to the editors and staff of the UC Davis Law Review, in particular Ms. Andreanne Breton, for their very thoughtful and careful editing of this article.

This is the second in a series of articles exploring the current effects of slavery on our law. The first in the series is *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L. J. 95 (2010).

[1] MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY xix (2015).

outcome of the most recent presidential election. Donald Trump lost the popular vote by 2.8 million votes.[3] As a matter of democracy, and according to the will of the voters, he lost the election. Yet as a matter of constitutional law and state electoral-vote allocations, Trump received a substantial majority of the votes in the electoral college and won the presidency. In addition, millions of otherwise eligible voters were denied the right to vote through calculated voter suppression efforts and felon disenfranchisement.[4] For a few days after the election, there was a brief flicker of interest in the electoral college and its origins in slavery. Now, several months since the election, this interest has waned and there is little reckoning with the reason why we have such undemocratic elections.

Donald Trump won the presidency because of two artifacts of slavery: the electoral college and our post-Reconstruction legacy of state voter suppression and disenfranchisement efforts. The electoral college was created in the Constitution to protect the interests of slave owners.[5] And current voter suppression efforts are a direct legacy of white efforts to prevent blacks from voting after the Fifteenth Amendment prohibited race discrimination in voting.[6]

Our failure to know and appreciate the depth of the legacies of slavery leaves us entirely unprepared to understand why presidential elections come out the way they do. In addition, the lack of historical perspective leads us to accept that certain aspects of elections, like state control over voting qualifications and felon disenfranchisement, are somehow neutral and benign doctrines. State voter-suppression efforts enjoy a surface plausibility they do not deserve.

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[2] These political costs of slavery protection, though substantial, come nowhere near to reflecting the continuing emotional and economic costs to African Americans of slavery and continuing white resistance to acknowledging the effects of slavery and racism.

[3] Judd Legum, *Donald Trump Lost the Popular Vote by 2.8 Million. Most Republicans Are Convinced He Won*, THINKPROGRESS (Dec. 18, 2016, 1:47 PM), https://thinkprogress.org/donald-trump-lost-the-popular-vote-by-2-8-million-most-republicans-are-convinced-he-won-b0d8d3c0a0b0.

[4] *See infra* Section II.B.

[5] *See* Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1155 (2002); Akhil Amar, *The Troubling Reason the* Electoral College *Exists*, TIME (Nov. 10, 2016, 2:19 PM), http://time.com/4558510/electoral-college-history-slavery.

[6] *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE UNCONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 111-12 (2000); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 1-6 (1974).

This Essay describes some of the principal legacies of slavery in our electoral law and their major effects on the most recent presidential election. First, I discuss why the Constitution itself is properly considered a proslavery document. One of the proslavery features of the Constitution is the electoral college, enacted as a way to protect the interests of slave owners. Next, I discuss two aspects of state control over voter qualifications that had a major restrictive impact on the electorate: ostensibly neutral efforts like voter ID laws and felon disenfranchisement laws.

I. THE PROSLAVERY CONSTITUTION AND ELECTORAL POLITICS

The United States Constitution was a proslavery document. When I write proslavery, I mean that the Constitution both protected slavery and provided incentives to increase slavery. The proof of its proslavery essence is straightforward. The apportionment clause provides that each state shall have representatives in the House according to the number of free persons and "three fifths of all other persons" that inhabit the state.[7] "Three fifths of all other persons" is a euphemism for slaves. Under this provision, the number of congressional representatives from slave states was increased by the number of persons enslaved. This constitutional arrangement provided extra political representation to protect slavery in the slave states. In addition, the slave import limitation of Article I, Section 9, prohibited Congress from regulating the slave trade until 1808, a twenty-one-year window for additional slave importation.[8] Under these two provisions, slave owners and their elected representatives had a political incentive to increase their number of slaves: more representation in Congress corresponding to more slaves. And the slave import limitation guaranteed their ability to import more slaves for twenty-one years. Therefore, the original, proslavery Constitution provided incentives to own more slaves and protection for the ability to import more slaves.

The Constitution provided additional protections for slave owners. The Fugitive Slave Clause guaranteed the right of slave owners to

[7] U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

[8] *Id.* art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . .").

recapture their escaped slaves anywhere in the United States.[9] Article V of the Constitution forbade amending the Constitution to allow Congress to inhibit the slave trade before 1808,[10] one of only three subjects protected from the amendment process in the whole document.[11] Article IV also guarantees federal protection for states against "domestic violence," a phrase understood at the time to mean slave rebellions.[12]

In addition to the Constitution's text, we have the words of the Framers themselves. During the constitutional convention, Madison recognized that slavery was the major political fault line between the states:

> But [Madison] contended that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from (the effects of) their having or not having slaves. These two causes concurred in forming the great division of interests in the U. States. It did not lie between the large & small States: it lay between the Northern & Southern, and if any defensive power were necessary, it ought to be mutually given to these two interests. He was so strongly impressed with this important truth that he had been casting about in his mind for some expedient that would answer the purpose.[13]

Madison also defended the proslavery provisions of the Constitution in the Federalist Papers. In Federalist No. 54, regarding the apportionment clause, Madison wrote:

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[9] *Id.* art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

[10] *See id.* art. V.

[11] *See id.* art. V.

[12] *Id.* art. IV, § 4; *see* ROBERT G. PARKINSON, THE COMMON CAUSE: CREATING RACE AND NATION IN THE AMERICAN REVOLUTION 253, 527 (2016); THE FEDERALIST NO. 43 (James Madison) ("I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.").

[13] James Madison, *Proceedings of Convention, June 19–July 13*, *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 322, 486 (Max Farrand ed., 1911); *see also* THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES 194-95 (Gaillard Hunt & James Brown Scott eds., 1920).

> The Federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property . . . . Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the *slave* as divested of two fifth of the *man*.[14]

Madison later defended these slavery protections during the Virginia state ratification convention. On June 17, 1788, responding to George Mason's critique of the Constitution, Madison discusses the slave import limitation and the Fugitive Slave Clause:

> I should conceive . . . [the slave import limitation] to be impolitic, if it were one of those things which could be excluded without encountering greater evils. The Southern States would not have entered into the Union of America without the temporary permission of . . . [the slave] trade; and if they were excluded from the Union, the consequences might be dreadful to them and to us . . . . Another clause secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the states are uncharitable to one another in this respect. But in this Constitution, "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor shall be due." This clause was expressly inserted, to enable owners of slaves to reclaim them. This is a better security than any that now exists. No power is given to the general government to interpose with respect to the property in slaves now held by the states . . . . Great as the evil is, a dismemberment of the Union would be worse. If those states should disunite from the other states for not indulging them in the temporary continuance of this traffic, they might solicit and obtain aid from foreign powers.[15]

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[14] THE FEDERALIST NO. 54 (James Madison), *reprinted in* THE AMERICAN CONSTITUTION FOR AND AGAINST: THE FEDERALIST AND ANTI-FEDERALIST PAPERS 240-41 (J.R. Pole ed., 1987).

[15] James Madison, Speech at the Virginia Ratifying Convention (June 17, 1788),

During ratification debates in South Carolina on January 17, 1788, General Charles Cotesworth Pinckney, also a participant in the drafting of the Constitution, expressed his satisfaction with the Constitution's protections for slaveholders:

> By this settlement we have secured an unlimited importation of negroes for twenty years. Nor is it declared that the importation shall be then stopped; it may be continued. We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states. We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before. In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but, on the whole, I do not think them bad.[16]

Pinckney's comments are important because he was one of the most ardent defenders of slavery at the convention. Had the Constitution not protected slavery, the greatest form of wealth in the south, he would never have defended its propriety for South Carolina and other slave states.

While this exposition is necessarily brief, the evidence demonstrates that the Constitution was a proslavery document. In addition, the majority position among modern historians is that the Constitution was proslavery.[17] As written by historian George Van Cleve, the

reprinted in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 453-54 (Jonathan Elliot ed., 2d ed. 1836).

[16] Charles Cotesworth Pinckney, Speech at the South Carolina Ratifying Convention (Jan. 17, 1788), *as reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 286 (Jonathan Elliot ed., 2d ed. 1836).

[17] For contemporary scholarship interpreting the Constitution as proslavery, see RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 333-36 (2009); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON ix (2d ed. 2001); GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 270 (2010); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 161-68 (2009); James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2023-27 (1996); *cf.* DON E.

Constitution "was pro-slavery in its politics, its economics, and its law."[18] Unfortunately, and notwithstanding the clear evidence and the consensus among historians, the nature and consequences of the proslavery Constitution remain relatively unknown and understudied.[19]

II. LEGACIES OF SLAVERY AND THE PRESIDENTIAL ELECTION

A. Slavery Protection and the Electoral College

By now everyone knows the paradoxical, undemocratic result of the 2016 election for president. Despite winning the popular vote by 2.8 million votes, Hillary Clinton lost the election to Donald Trump. Trump won a substantial victory in the electoral college, which was dispositive.[20] In the wake of Clinton's electoral college defeat, many wondered why we have an electoral college at all. Why does the world's leading democracy rely on an electoral institution that overrides the results of democracy?

The answer to this question can be found in the proslavery provisions of the Constitution. As described earlier, the "three-fifths of all other persons" phrase in the apportionment clause was intended to give additional representation in Congress to the slave states. The electoral college also was created to protect the political interests of slave owners in presidential elections.

FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 39 (Ward M. McAfee ed., 2001) [hereinafter FEHRENBACHER, THE SLAVEHOLDING REPUBLIC] ("[The] view of the Constitution as culpably proslavery . . . has gained wide acceptance in modern historical scholarship."); Matthew Mason, Book Note, 42 J. INTERDISC. HIST. 309, 309 (2011) (reviewing VAN CLEVE, *supra*) ("Van Cleve, along with the majority of current scholars, thus places slavery at the heart of the Founding of the United States, in no instance more so than the Constitution . . . ."). Some historians continue to argue that the Constitution was essentially neutral on slavery. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE 26-27 (1978) (arguing that slavery was peripheral to the Constitution); FEHRENBACHER, THE SLAVEHOLDING REPUBLIC, *supra*, at 47 ("[T]he Constitution as it came from the hands of the framers dealt only minimally and peripherally with slavery and was essentially open-ended on the subject.").

[18] VAN CLEVE, *supra* note 17, at 270.

[19] The question of why only a few of my readers know that the Constitution was proslavery, raises interesting questions of epistemology and the ideology of Constitutional Law casebooks. *See* Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1125 (2012).

[20] While many Clinton supporters hoped for "rogue electors" who would reject their assigned votes for Trump, this very slim possibility never materialized.

The problem the Framers tried to solve with the electoral college was this: the Northern states had many more qualified, free white male voters than the slave South, since slaves could not vote.[21] This meant that the antislavery North would outvote the South consistently in elections for Congress and the President. The North's greater political power under representative democracy posed an unacceptable threat to slavery. In order to solve this problem, the Framers adopted the "three-fifths" compromise, which increased the number of representatives from the slave states by a number corresponding to three-fifths the number of slaves held. This compromise equalized roughly, at the time of the convention, the political power of the North and South.

In order to solve this problem in presidential elections, the delegates to the constitutional convention created the electoral college. The need to protect the interests of slave owners was a primary objection to having presidential elections directly by the people. On July 19, 1787, James Madison described both the intuitive appeal of direct democracy and the superseding need for slavery protection through an electoral college:

> The people at large was in his opinion the fittest in itself. It would be as likely as any that could be devised to produce an Executive Magistrate of distinguished Character . . . . There was one difficulty however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern states; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole liable to the fewest objections.[22]

As Madison describes, the problem with direct democracy was that the free voting population in the North was much larger than that of the South, since slaves could not vote. The southern slave states would never agree to a system in which they could be consistently outvoted by northerners, many of whom opposed slavery. The solution was to bolster southern representation in the electoral college as in legislative apportionment.

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[21] *See* Finkelman, *supra* note 5, at 1155.

[22] James Madison, *Session of Thursday, July 19, 1787*, *in* THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES, *supra* note 13, at 282, 285-86.

Votes in the electoral college were allocated to states using the same formula as legislative apportionment.[23] Each state's electoral votes incorporated representation based on three-fifths of the number of slaves, therefore boosting the electoral representation of slave states.[24] The only reason we have an electoral college rather than a more direct popular election was the need of slave owners to have additional representation based on their slave ownership. Without this "slave bonus," Southern slave states, with fewer free white voters, would have been outvoted every time, as Madison recognized.[25]

Unlike any other democracy in the world, the United States has presidential elections distorted in the bizarre manner of the electoral college.[26] The magnitude of the distortion of democracy becomes apparent when we consider the consequences of the electoral college. In two out of the last five elections, in 2000 and 2016, the winner of the popular vote lost the election in the electoral college.[27] The electoral college thus repudiated the results of democracy fully forty percent of the time over the last five elections. Other than a military coup, there is no greater distortion possible than reliance on a system that repudiates the results of democracy.

The electoral college system only makes sense when one considers its original purpose in protecting the interests of slave owners. If the electoral college had any rationality beyond the protection of slave owners' property interests, then it would have been reproduced as a reasonable manner of election somewhere. This is particularly true since the United States has long been considered a leading democracy in the world, modelling democracy for other countries.

Yet there is not a single instance of any other democratic government choosing to reproduce the electoral college. Every other form of election in this democracy, for governors, congressmen,

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[23] U.S. CONST. art. I, § 2; *id.* art. II, § 1, cl. 2.

[24] *See id.* (stating that the number of electors is "equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress" thereby incorporating by reference the "three-fifths" clause, used to calculate the number of representatives of a state in Congress).

[25] *Cf.* GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 75-76 (2005) (discussing how the "slave bonus" helped Thomas Jefferson become president in 1800).

[26] Finkelman, *supra* note 5, at 1146 ("The system seems to be unique in the United States — applying only to the presidential election — and unique to the United States. I know of no western or industrialized democracy that uses such a system.").

[27] Bill Chappell, *Shades of 2000? Clinton Surpasses Trump in Popular Vote Tally*, NPR (Nov. 9, 2016, 7:22 AM), http://www.npr.org/sections/thetwo-way/2016/11/09/501393501/shades-of-2000-clinton-surpasses-trump-in-popular-vote-tally.

senators, state representatives, mayors, and other local elections, relies on a democratic process, not the electoral college.[28] If the electoral college was a reasonable manner of election, or even a rational manner of election, then it would be imitated somewhere. The fact that the electoral college does not exist or function anywhere besides presidential elections in the United States is powerful evidence of just how bizarre it is in a nation now free of slavery.

The electoral college results in myriad other distortions of democracy. Because every state is guaranteed at least three electoral votes regardless of size, small states have disproportionally more representation, and therefore more electoral power, then the larger states.[29] For example, sparsely populated Wyoming has the minimum of three electoral votes, each electoral vote corresponding to 177,556 Wyoming citizens.[30] Densely populated California, in contrast, has fifty-five electoral votes, each corresponding to 668,303 California citizens.[31] Wyoming electoral votes have 3.18 times more than the electoral power of the national average, while California electoral votes have only eighty-five percent of the power of the national average.[32] In the last election this meant that voters in populous California had less electoral clout than voters in sparsely populated Wyoming, a nonsensical result. In addition, most states allocate their electoral votes by winner-take-all, rather than by a proportional process, making many votes appear meaningless.[33] Because of our electoral system, candidates concentrate their attention only on a few swing states and essentially ignore the rest of the country.

We live with a bizarre, undemocratic electoral system because we fail to recognize the proslavery origins of the electoral college and we have not amended the Constitution to provide a more rational alternative. Yet there is little or no chance of achieving sufficient consensus to abolish the electoral college, since the party winning the presidency always benefits from the operation of the college.

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[28] Finkelman, *supra* note 5, at 1146; *see, e.g.*, Amar, *supra* note 5 (explaining that no governorship is decided using an electoral college method).

[29] Finkelman, *supra* note 5, at 1145.

[30] *See Population vs. Electoral Votes*, FAIRVOTE (last visited Sept. 27, 2017), http://www.fairvote.org/population_vs_electoral_votes (follow "2008 Population vs. Electors, State-by-State information" hyperlink).

[31] *See id.*

[32] *Id.*

[33] Devin McCarthy, *How the Electoral College Became Winner-Take-All*, FAIRVOTE (Aug. 21, 2012), http://www.fairvote.org/how-the-electoral-college-became-winner-take-all.

Instead of struggling in vain for an amendment, the best option for reform today is the National Popular Vote Interstate Compact.[34] States who join the Compact commit to award their electoral votes to the winner of the popular vote.[35] When the total number of electoral votes committed by states joining the Compact reaches 270 or more, the winning total is awarded to the candidate who wins the popular vote.[36] The Compact guarantees that the winner of the popular vote also wins the electoral college and becomes president. To date, eleven states totaling 165 electoral votes have joined the Compact.[37]

B. State-Centered Voter Qualification Standards and Voter Suppression

One of the important aspects of federalism today is our state-centered system of voter qualifications in national elections. Prior to the adoption of the Constitution, each colony was able to set its own voter qualifications.[38] In general, suffrage was limited to property-owning white males.[39] The original Constitution was silent on the right to vote, except to specify that state legislatures would determine the "manner" of selection of electors for the presidency.[40] Accordingly, under the Constitution states retained their original colonial powers to determine the qualifications of voters. While subsequent amendments forbade state discrimination with regard to race, sex, age, and poll taxes,[41] states remained free to decide for themselves all other qualifications for voters.[42] This is why different states are able to define different periods for early voting, require different sorts of voter IDs, and use differing standards for felon disenfranchisement.[43]

Voter qualification standards, however, have been used throughout our history as a way to deny African Americans the right to vote. After

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[34] Mark Joseph Stern, *Yes, We Could Effectively Abolish the Electoral College Soon. But We Probably Won't.*, SLATE (Nov. 10, 2016, 2:14 PM), http://www.slate.com/blogs/the_slatest/2016/11/10/the_electoral_college_could_be_abolished_without_an_amendment.html.

[35] *Id.*

[36] *Id.*

[37] *Id.*; *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, http://www.nationalpopularvote.com/written-explanation (last visited Sept. 12, 2017).

[38] KEYSSAR, *supra* note 6, at 18.

[39] *Id.* at 8, 56.

[40] *Id.* at 4.

[41] *See* U.S. CONST. amend. XV, XIX, XXIV, XXVI.

[42] KEYSSAR, *supra* note 6, at 4.

[43] *See id.*

the Fifteenth Amendment prohibited overt race discrimination in voting, southern slave owners and their supporters engaged in a prolonged, violent campaign to suppress voting by the newly freed slaves.[44] Violent suppression of the vote was supplemented by laws designed and enforced to eliminate black voting.[45] White-controlled state legislatures enacted ostensibly race-neutral, yet racially targeted voting qualifications and rules to disqualify African Americans, and, in the Southwest, Mexican Americans. These racially suppressive laws included grandfather clauses, poll taxes, felon disenfranchisement, secret ballots, literacy tests and white primaries.[46] Responding to the continuing intimidation and suppression of African American voters, Congress passed the Voting Rights Act of 1965.[47] Considering the long history of voter suppression laws targeted at people of color, it is remarkable that laws restricting voting continue to have any plausibility.

Our history warrants suspicion and careful scrutiny of such laws. Instead, the Supreme Court has legitimized and encouraged voter suppression in its recent voting rights decisions. In *Crawford v. Marion County Election Board*,[48] the Court decided that Indiana's voter identification law was constitutional, notwithstanding its potential effect in suppressing voters.[49] Only Justice Souter, dissenting, recognized that the law was pretextual and intended to benefit

[44] *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 253-55 (7th ed. 1994); NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE COLD WAR XI (2007) (describing vigilantism in the South to suppress African American rights); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 44-45 (2006).

[45] MANZA & UGGEN, *supra* note 44, at 44-45.

[46] *Id.* Though initially upheld, the Supreme Court eventually struck down such voting restrictions, mostly during the second half of the twentieth century. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (stating Congress has power to regulate and invalidate certain literacy requirements); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (declaring poll taxes unconstitutional); Terry v. Adams, 345 U.S. 461, 470 (1953) (striking down white primaries); Guinn v. United States, 238 U.S. 347, 367-68 (1915) (striking down grandfather clauses).

[47] 52 U.S.C. § 10301 (2018).

[48] 553 U.S. 181 (2008).

[49] Indiana's law required all voters casting a ballot in person to present valid, government-issued photo identification. The state justified the measure as a way to prevent voter fraud. The Court found insufficient evidence of the exact number of voters potentially disenfranchised by the photo ID requirement. According to the lead opinion, on the basis of the record that had been made in this litigation, the Court could not "conclude that the statute imposes excessively burdensome requirements on any class of voters." *Id.* at 202.

Republicans.[50] Ironically, Judge Richard Posner, who authored the appeals court decision upheld in *Crawford*, later admitted that he had made a mistake and acknowledged that voter ID laws are "a type of law now widely regarded as a means of voter suppression rather than of fraud prevention."[51]

In *Shelby County v. Holder*, the Court invalidated the preclearance provisions of the Voting Rights Act ("VRA") because, according to the Court, the VRA violated the equal dignity of states.[52] Under the VRA prior to *Shelby*, covered jurisdictions, mostly in the Deep South, had to seek preclearance from the Justice Department before executing laws that adversely affected voter participation.[53]

Newly freed from the preclearance requirement, several states promptly enacted new, restrictive voting requirements.[54] The same day as the Court's ruling, Texas officials vowed to enforce a strict photo ID requirement.[55] Alabama and Mississippi followed suit.[56] North Carolina enacted one of the nation's most restrictive laws, reducing the availability of voter registration and early voting.[57]

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[50] *See id.* at 224-25 (Souter, J., dissenting).

[51] RICHARD A. POSNER, REFLECTIONS ON JUDGING 85 (2013); John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), http://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html?mcubz=1. In a subsequent dissent, Posner wrote, "There is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens." Frank v. Walker, 773 F.3d 783, 796 (7th Cir. 2014) (Posner, J., dissenting).

[52] *See* Shelby County v. Holder, 133 S. Ct. 2612, 2623-24 (2013). According to a recent report, the decision in Shelby County has had three major effects: Section 5 no longer blocks or deters discriminatory voting changes, as it did for decades and right up until the Court's decision; challenging discriminatory laws and practices is now more difficult, expensive, and time-consuming; and the public now lacks critical information about new voting laws that Section 5 once mandated be disclosed prior to implementation. TOMAS LOPEZ, BRENNAN CTR. FOR JUSTICE, *SHELBY COUNTY*: ONE YEAR LATER 1 (2014), http://www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf.

[53] *See Shelby County*, 133 S. Ct. at 2619-20.

[54] *See* Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html?mcubz=1 (discussing moves made by state officials of former VRA-affected states to pass new voter ID laws).

[55] *Id.*

[56] *Id.*

[57] Ari Berman, *North Carolina Passes the Country's Worst Voter Suppression Law*, NATION (July 26, 2013), https://www.thenation.com/article/north-carolina-passes-countrys-worst-voter-suppression-law.

1. Ostensibly Neutral Voter Suppression

These voter suppression laws are another legacy of slavery that affected the 2016 election. Republican-controlled legislatures in many states enacted laws that made voting more difficult for persons of color and other presumptively Democratic voters. Since 2010, twenty states enacted restrictive new laws.[58] In fourteen states, more restrictive laws became newly effective during the 2016 election.[59] Wisconsin's voter ID law, for example, suppressed 200,000 votes.[60] The suppression targeted African-American and likely Democratic voters, whose voter turnout was disproportionately reduced.[61] Since Donald Trump won Wisconsin by a bare 22,748 votes, one-tenth of the number of suppressed votes, voter suppression probably determined the outcome in that swing state.[62]

Republicans have attempted to justify these laws by claiming that they are intended to reduce voter fraud and to boost voter confidence in elections.[63] This explanation is pretextual, since there is virtually no in-person voter fraud in United States elections.[64] Evidence demonstrates that the actual intent of these laws was exactly what they accomplished: the suppression of African-American and other likely Democratic voters. As one writer noted, "[t]he passage of voter ID laws is 'highly partisan, strategic, and racialized.'"[65] And as noted by the federal judge who initially overturned Wisconsin's voter restrictions, "The evidence . . . casts doubt on the notion that voter ID laws foster integrity and confidence. The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine

[58] Vanessa Williamson, *Voter Suppression, Not Fraud, Looms Large in U.S. Elections*, BROOKINGS INST. (Nov. 8, 2016), https://www.brookings.edu/blog/fixgov/2016/11/08/voter-suppression-in-u-s-elections.

[59] *Id.*

[60] Ari Berman, *Wisconsin's Voter-ID Law Suppressed 200,000 Votes in 2016 (Trump Won by 22,748)*, NATION (May 9, 2017), https://www.thenation.com/article/wisconsins-voter-id-law-suppressed-200000-votes-trump-won-by-23000. It is important to note that the statistics cited in this source were collected by an agency with ties to the Democratic Party and have not been peer-reviewed, but they are corroborated by data collected by the Government Accountability Office. *Id.*

[61] *Id.*

[62] *See id.*

[63] *See, e.g.*, N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 235 (4th Cir. 2016).

[64] Frank v. Walker, 773 F.3d 783, 791 (7th Cir. 2014) (Posner, J., dissenting).

[65] Williamson, *supra* note 58.

rather than enhance confidence in elections, particularly in minority communities."[66]

According to one writer, North Carolina was "the epicenter of voter suppression efforts during the 2016 campaign."[67] Prior to the *Shelby County* decision, North Carolina was a covered jurisdiction under the VRA, required to submit legislation affecting voting rights to the Justice Department for preclearance.[68] Days after *Shelby County* eliminated the preclearance requirement, the Republican-controlled legislature considered new, extensive voting restrictions.[69] The legislators requested information on voter behavior by race, and decided to restrict practices that were used most frequently by black voters.[70] Hoping to reduce black voter participation, which had reached historic highs, the legislature voted to require specific voter IDs known to be less available to African Americans, and to reduce early voting, same-day registration, out-of-precinct voting, and preregistration.[71] In July 2016, these extensive voting restrictions were declared unconstitutional because they targeted black voters.[72] Because black voters were targeted "with almost surgical precision,"[73] the court concluded that "because of race, the legislature enacted one of the largest restrictions of the franchise in modern North Carolina history."[74]

Contrary to the appellate court's negative appraisal, North Carolina Republicans boasted about the effectiveness of their voter restrictions in suppressing the black vote. According to a Republican press release, "fewer black voters cast early ballots this year than they did in 2012. 'African American Early Voting is down 8.5 percent from this time in 2012.'"[75] This decline in black voting was the cumulative result of Republican voter suppression efforts.[76]

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[66] One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 903 (W.D. Wis. 2016).

[67] Max J. Rosenthal, *North Carolina GOP Brags About How Few Black People Were Able to Vote Early*, MOTHER JONES (Nov. 7, 2016, 7:17 PM), http://www.motherjones.com/politics/2016/11/north-carolina-gop-brags-about-how-few-black-people-were-able-vote-early.

[68] *McCrory*, 831 F.3d at 215.

[69] *See id.* at 216.

[70] *See id.* at 216-18.

[71] *Id.*

[72] *See id.* at 214-15.

[73] *Id.* at 214.

[74] *Id.* at 242.

[75] Rosenthal, *supra* note 67.

[76] *Id.* ("The decline in early voting among black voters is likely a result of yearslong efforts by North Carolina's Republican officials and political operatives to

Wisconsin and North Carolina are just two of the states that sought to curb voting by African Americans and other likely Democratic voters. Taking the history of attempts to eliminate black voting into account, we can understand that even ostensibly neutral laws like voter ID requirements are merely present-day attempts to suppress black voters and democrats. The Supreme Court's decisions finding such requirements constitutional deny history and condone these attempts to curb black voting. If the Court took the history of racially discriminatory voter suppression seriously, it would be impossible to condone these restrictions by accepting pretextual state interests in eliminating non-existent fraud or bolstering the credibility of elections.

2. Felon Disenfranchisement

Alone among major world democracies, the United States allows millions of criminal convicts to be barred from voting.[77] Felon disenfranchisement played a large role in the 2016 presidential election. Over *six million* otherwise eligible voters were unable to vote because of felony convictions.[78] In Florida, for example, fully twenty-one percent of the African American voting population was disenfranchised because of a felony conviction.[79] There is little doubt that Hillary Clinton would have won Florida outright if felons had not been disenfranchised.[80] The very close outcomes in important swing states also might have been different but for felon disenfranchisement: in Michigan, the number of disenfranchised felons, 44,221, far exceeded Trump's margin of victory, 10,704; in Wisconsin, the number of felons disenfranchised, 65,606, was much larger than Trump's margin of victory, 22,748; and in Pennsylvania, the number of disenfranchised felons, 52,974, was larger than Trump's margin of

impose voting restrictions in the state. Emails obtained last week by Reuters showed that Republican officials pushed successfully to restrict early voting sites and cut down on early voting on Sundays, when many black churches hold 'Souls to the Polls' mass voting drives.").

77 ERIN KELLEY, BRENNAN CTR. FOR JUSTICE, RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY 1 & 4 n.1 (2017), https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf; MANZA & UGGEN, *supra* note 44, at 41.

78 CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 3 (2016), http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf.

79 *Id.*

80 This assumes that felons would have voted in roughly the same proportions as their voting-eligible counterparts.

victory, 44,292.[81] According to one estimate, 68.9% of disenfranchised felons would have a preference for democrats.[82] Depending on turnout, felon disenfranchisement probably made a significant difference in the 2016 election.

As with other restrictions on voting, felon disenfranchisement came into wide use to suppress the votes of newly enfranchised African American voters after Reconstruction.[83] Even though the Thirteenth Amendment formally abolished slavery, the Amendment contains an exception allowing involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted."[84] Recalcitrant Southern former slave owners were determined to re-establish white rule and to deny their recent ex-slaves the right to vote by all means necessary, including violence.[85]

Since the Fifteenth Amendment prohibited direct race discrimination in voting, southern whites acted by proxy, shaping criminal law in such a way that disenfranchised newly freed blacks.[86] First, "black codes" were enacted that "criminalize[ed] black life."[87] This included criminalizing activities that whites thought blacks were more apt to engage in.[88] Thus, southern states disenfranchised any person found to be "a landless laborer, a vagrant, or a farmer who

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[81] UGGEN ET AL., *supra* note 78, at 15 (depicting the data for felon disenfranchisement); *Presidential Election Results 2016*, CNN, http://edition.cnn.com/election/results/president (last visited Sept. 27, 2017) (depicting data of Trump's margin of victory over Clinton).

[82] *See* MANZA & UGGEN, *supra* note 44, at 190-92.

[83] *See id.* at 43.

[84] U.S. CONST. amend. XIII, § 1.

[85] *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II, at 53 (2008) ("The attitudes among southern whites that a resubjugation of African Americans was an acceptable — even essential — element of solving the 'Negro question' couldn't have been more explicit."); *see* MANZA & UGGEN, *supra* note 44, at 56-57.

[86] *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 299 (1985) ("[T]he Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.").

[87] BLACKMON, *supra* note 85, at 53 ("[E]very southern state enacted an array of interlocking laws essentially intended to criminalize black life . . . . Few laws specifically enunciated their applicability only to blacks, but it was widely understood that these provisions would rarely if ever be enforced on whites."); *see* PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISENFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 52 (2014) ("In this critical period when black southerners gained U.S. citizenship and secured their voting rights, white southern political leaders pushed back, hoping to deny this population both citizenship and political power . . . .").

[88] MANZA & UGGEN, *supra* note 44, at 43.

allowed his animals to graze on common lands."[89] States also disenfranchised blacks who were jobless, who used "insulting gestures or language," or who "preach[ed] the Gospel without a license."[90]

Second, white legislators reclassified former misdemeanors, such as petty theft and other minor offenses, as felonies, keeping former slaves imprisoned longer and simultaneously disenfranchising them.[91] One historian commented on the "region-wide pattern of expanded punishment for petty theft that was identified at the time as intended to disfranchise African Americans."[92]

These techniques yielded double benefits to former slave owners, as they perceived it. First, their imprisoned former slaves could be leased out profitably to plantation owners, thus guaranteeing a captive work force to labor in the fields and toil in the mines.[93] Second, their former slaves would be disenfranchised as felons, practically guaranteeing that they could never have voting power again.[94]

The evidence shows that the intention of these disenfranchisement laws was to eliminate black voting and bolster white supremacy. In 1896, the Mississippi Supreme Court approved of the state's felon disenfranchisement scheme, which punished nonviolent offenses committed by blacks, but preserved the voting rights of whites convicted of violent crimes like rape and murder:

> The convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites — a patient docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its

[89] ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 20 (2006).

[90] *Id.*; *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 253-61, 323-24 (1988).

[91] HOLLOWAY, *supra* note 87, at 56.

[92] HOLLOWAY, *supra* note 87, at 57.

[93] *See, e.g.*, BLACKMON, *supra* note 85, at 54-57.

[94] *See id.*

> characteristics and the offenses to which its weaker members were prone.[95]

During its constitutional convention in 1901, Alabama added to the offenses yielding disenfranchisement. The convention began disenfranchising felons for "crimes of moral turpitude," including vagrancy and living in adultery, crimes assumed to be more commonly committed by blacks.[96]

In *Hunter v. Underwood*, the Supreme Court struck down Alabama's felony disenfranchisement provision because it was intended to be racially discriminatory:

> The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[97]

Although the Court responded appropriately to the evidence of outright racial discrimination in *Hunter v. Underwood*, as a general proposition the Court has approved of a wide array of ostensibly neutral reasons that states may use as reasons for disenfranchisement.[98] This means that where there is little or no direct evidence of racial discrimination, it will likely be difficult to challenge felon disenfranchisement laws. Indeed, Alabama recently re-enacted disenfranchisement for felonies involving "moral turpitude," this time

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[95] Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896); MANZA & UGGEN, *supra* note 44, at 42.

[96] MANZA & UGGEN, *supra* note 44, at 58; *see* Hunter v. Underwood, 471 U.S. 222, 226 (1985).

[97] *Hunter*, 471 U.S. at 229 (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901 TO SEPTEMBER 3RD, 1901, at 8 (1940)).

[98] *See* Richardson v. Ramirez, 418 U.S. 24, 53 (1974) ("Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of the last century, the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho. Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision. In *Lassiter v. Northampton County Board of Elections* . . . the Court said, 'Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.'" (citations omitted)).

avoiding overt discussions of race while accomplishing exactly the same discriminatory result.[99]

While felon disenfranchisement may seem intuitively reasonable, it becomes much less so when one examines some of the actual felonies that result in disenfranchisement. Felonies include the serious crimes that immediately come to mind, like violent crimes. Violent crimes, however, constituted only nineteen percent of felony convictions in state courts in 2002.[100] Drug trafficking and drug possession together constituted thirty-one percent of felony convictions.[101] In certain states, some remarkably minor crimes are classified as felonies, rather than misdemeanors, also leading to disenfranchisement. In Maryland, for example, "relatively innocuous [offenses] such as passing bad checks, using fake IDs, and possessing fireworks without a license" can result in disenfranchisement.[102] In Alabama, a conviction for vagrancy will result in the loss of voting rights.[103]

Felon disenfranchisement, which expanded after Reconstruction to eliminate black voting, today operates in much the same way. Six million otherwise eligible voters were denied the vote in the 2016 presidential election because they were deemed felons.[104] Given the disparate enforcement of criminal law against communities of color and the expansion of crimes deemed felonies, it is no surprise that felon disenfranchisement has a disproportionate disqualifying effect on communities of color. The racially discriminatory character of felon disenfranchisement laws is also made evident by the examples of Vermont and Maine. Neither of these states disenfranchises felons.[105] Indeed, felons in these states can even vote from their prison cells.[106] The population of both states is overwhelmingly white, over ninety

[99] *See* Kira Lerner, *Alabama Governor Signs Law Giving Thousands of Felons Their Right to Vote Back*, THINKPROGRESS (May 24, 2017, 5:29 PM), https://thinkprogress.org/alabama-voting-restoration-86d82cc1c2d0. More recently, the governor signed legislation clarifying the definition of "moral turpitude" which restored voting rights to some felons. *"Definition of Moral Turpitude Act" (HB 282)*, ACLU ALABAMA, https://www.aclualabama.org/en/legislation/definition-moral-turpitude-act-hb-282 (last visited Jan. 26, 2018).

[100] MANZA & UGGEN, *supra* note 44, at 70.

[101] *Id.*

[102] HULL, *supra* note 89, at 5.

[103] *Id.*

[104] UGGEN ET AL., *supra* note 78; Annie Gurvis, *Six Million Americans Are Not Allowed to Vote*, URB. INST. (Oct. 3. 2016), http://www.urban.org/2016-analysis/six-million-americans-are-not-allowed-vote.

[105] Vann R. Newkirk II, *Polls for Prisons*, ATLANTIC (Mar. 9, 2016), https://www.theatlantic.com/politics/archive/2016/03/inmates-voting-primary/473016.

[106] HULL, *supra* note 89, at 6.

percent white.[107] Felon disenfranchisement in those states would disqualify white people, which may explain why they eschew disenfranchisement altogether. In a democracy we should be highly suspicious of laws whose current functioning excludes people of color nearly as effectively as their more overtly racist forebears intended.

CONCLUSION: WHY THIS HISTORY MATTERS NOW

Protections for slavery and for white supremacy determined the outcome of the most recent election. Hillary Clinton lost the election only because we cling to the bizarre electoral college, created simply to bolster the political power of slave owners. And the continued acceptance of state voter suppression laws, including felon disenfranchisement, artificially disqualified millions of otherwise eligible voters, and discouraged many thousands of others from any participation.

So why does it make a difference to know the proslavery and white supremacist origins of the electoral college and voter suppression efforts? First, we can understand that we have a bizarre electoral process because of the Framers' desire to protect slave owners in their slave ownership. These are the real, evidence-based origins of the electoral college. If the reason for the college was unclear before, now it makes sense. We can understand that the world we inhabit continues to be shaped in important ways by slavery and its aftermath. The continuing legacies of slavery need to be explored further to improve our understanding of our society. This clarity of understanding is important for its own sake.

But this is not just an idle venture into history — this history is dismayingly relevant, since the legacies of slavery continue to have grave consequences for our society. Few things are more important in a democracy than the election of a President and the consequences of that election, such as the appointments of Supreme Court justices and decisions to make or avoid war. We must recognize the proslavery origins of our electoral politics to understand why change is necessary. Once we understand this, then we can begin imagining different ways of doing things that get us beyond the legacies of slavery. Clarity of understanding leads to clarity of diagnosis. Clarity of diagnosis enables meaningful strategies for change.

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[107] Newkirk, *supra* note 105; *Population Distribution by Race/Ethnicity*, KAISER FAM. FOUND. (2016), https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

So what can be done once we have understanding? The problem posed is an interesting one. To what extent should rules adopted to protect slavery and slave owners, and later to prevent newly freed slaves from political participation, continue to affect our national elections? Many of us would answer "not at all." Yet when we consider possible responses to this history, there are interesting political dynamics that come into play that make change difficult.

First, consider the electoral college. We should amend the Constitution to eliminate the electoral college. Interestingly, though, there appears to be little sustained interest in that possibility.[108] Even if interest were sustained, it is hard to imagine reaching sufficient national consensus to achieve an amendment. Whichever party wins the election will have benefitted from the college and will therefore be loath to change it. This happened in the most recent election, with Republicans singing retroactively the praises of the electoral college. The most plausible alternative today is the National Popular Vote Interstate Compact, which, if adopted by enough states, would award the winning margin of 270 electoral votes to the winner of the popular vote.[109] Alternatively, more states could choose to award their electoral votes proportionately, rather than winner-take-all. To date, only two states, Nebraska and Maine, have chosen to award their electoral votes proportionately.[110]

Another avenue for reform is to reduce state discretion in defining voter qualifications. At present, states can define their own voter qualifications as long as they comply with constitutional amendments abolishing race, sex, and age discrimination. Notwithstanding the *Shelby County* decision, much of the Voting Rights Act remains constitutional as an enforcement of the Fifteenth Amendment, which

[108] Attention to the college disappeared quickly, just as it did when Al Gore won the popular vote but lost the election in the electoral college. *See* Mario Trujillo, *After* Bush v. Gore*, Obama, Clinton Wanted Electoral College Scrapped*, HILL (Oct. 27, 2012, 10:00 AM), http://thehill.com/homenews/campaign/264347-obama-clinton-backed-reforms-to-electoral-college-after-bush-v-gore ("The outcome triggered an intense — if shortlived — debate over reforming the Electoral College.").

[109] Stern, *supra* note 34 ("The NPVIC is a proposed agreement among the states and the District of Columbia to render the Electoral College obsolete by ensuring that the winner of the popular vote also wins a majority of electoral votes . . . . If a state passes the NPVIC, it vows to assign its electors to whichever candidate wins the national popular vote — but only once enough states have joined the NPVIC to guarantee that candidate 270 electoral votes.").

[110] *See Maine & Nebraska*, FAIRVOTE, http://www.fairvote.org/maine_nebraska (last visited Sept. 24, 2017).

prohibits race discrimination in voting.[111] Recognizing the proslavery and racist origins of much state law defining voter qualifications, there is a strong basis for further regulation under the Fifteenth Amendment.

Lastly, there could be an important role for judicial review in dealing with these vestiges of slavery. Given the demonstrable history of racism with regard to state voter-qualifications law, the courts should be extremely skeptical of any voter qualifications that reduce access to voting. A democracy should protect, encourage, and facilitate voting, rather than facilitate the denial of access to voting. Unfortunately, recent Supreme Court decisions like *Crawford* and *Shelby County* offer little hope that the current Court has any interest in protecting minority voting rights.

So we come full circle. I began with the proposition that "we are never as steeped in history as when we pretend not to be."[112] We pretend that our Constitution is sound, and that the electoral college and mostly unregulated, state-created voter qualifications are natural features of our legal environment. But now we can know this is false: large electoral consequences result from our history of slavery. These vestiges of slavery cost us — black, white, Latino, other people of color, and people of good will — dearly.

[111] *See* Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula.").

[112] TROUILLOT, *supra* note 1, at xxiii.

Did Voter Suppression Win President Trump the Election?: The Decimation of the Voting Rights Act and the Importance of Section 5

By MATTHEW MURILLO*

DONALD TRUMP'S RECENT PRESIDENTIAL VICTORY in the United States has created a media firestorm centered largely around President Trump's explosive tweeting, anti-Trump protests, and an eerie uncertainty over his roadmap of policy creation. However, civil rights leaders are contending that there is a much larger issue at hand—whether Trump used calculated voter suppression to tip the scales in his favor. While voter suppression is an issue that many believe has been eradicated, civil rights leaders contend that "a tangle of Republican-backed 'voter suppression' laws enacted since 2010 probably helped tip the scale for Republican nominee Donald Trump in some closely contested states on election night."[1] While many questions remain, there is one question that stands out—did the suppression of minority votes win Trump the election?

Voter suppression has been an issue in America since our nation's birth. Section 5 of the landmark 1965 Voting Rights Act ("VRA") has stood as hallmark legislation to combat voter discrimination through requiring areas with a history of racial discrimination to receive a voting plan "preclearance" prior to enacting any new voting laws.[2] Since 1965, the Supreme Court has repeatedly affirmed Section

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1. Tony Pugh, *Voter Suppression likely tipped the scales for Trump, civil rights groups say,* MCCLATCHY D.C. (Nov. 10, 2016), http://www.mcclatchydc.com/news/politics-government/election/article113977353.html [https://perma.cc/QP89-54S8].

2. Arusha Gordan & Ezra D. Rosenberg, *Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century*, 21 MICH. J. RACE & L. 23, 37–39 (2015).

5's broad power.[3] However, in 2013's *Shelby County v. Holder,* the Supreme Court radically departed from its previous holdings by essentially invalidating Section 5 of the VRA.[4] The Supreme Court left disenfranchised voters with a harder path to recovery, stripping voters of the protection Section 5 gave for over four decades.

This Comment focuses on the evolution of Section 5 of the Voting Rights Act and the legal effect it has had and will have on the American electoral process. Part I focuses on the history of voting rights. Part II analyzes the legal effect the Supreme Court case *Shelby County* has had on Section 5, as well as the possible future effects the case could have. Part III advocates for the overturn of *Shelby County.* Part IV illustrates the blatant racial voter suppression post-*Shelby County.* Finally, Part V analyzes the effect voter suppression had on the 2016 Presidential Election, emphasizing how voter suppression may have made the difference in the close battle between Hillary Clinton and Donald Trump.

I. History of Voting Rights

Prior to the Civil War, women and racial minorities were not allowed to vote.[5] A bevy of amendments in the mid-1800's gave black men the right to vote, and a period of "unprecedented electoral success for African Americans" began.[6] While constitutional amendments transformed the political landscape in voting, African-American voters were often threatened and physically beaten in their attempt to vote.[7] To illustrate this, Ben Cady and Tom Glazer described the experience of a black man who was confronted and violently threatened by two white men when he attempted to register to vote in *Paynes v. Lee.*[8]

While voter intimidation was extreme in the early 1960s, the enforcement of several civil rights laws massively strengthened African-

3. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966); *see also* Shelby Cty., Alabama v. Holder, 133 S.Ct. 2612, 2619 (2013).

4. *Shelby Cty.*, 133 S.Ct. at 2619.

5. Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Proactive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 62 (2008).

6. Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 185 (2015).

7. John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 122 (1972).

8. Cady & Glazer, *supra* note 6, at 216 (showcasing the extremity of voter intimidation in the early 1960s, including threats of assault, battery, and even death in Paynes v. Lee, 377 F.2d 61 (5th Cir. 1967)).

American voter participation.[9] When African-American men showed up at the polls, southern states began to enact a number of ways to prevent black men from voting, "includ[ing]: district gerrymandering, purposeful closing of black polling places, poll taxes, literacy tests, grandfather clauses, and above all else, waves of Ku Klux Klan terrorism in the form of lynching and vigilante violence against blacks and white civil rights activists in the South."[10]

a. The Voting Rights Act of 1965

After years of voter complications due largely to minority voter suppression, Congress passed the Voting Rights Act in 1965.[11] The VRA was signed into law by President Johnson, who called the legislation "one of the most monumental laws in the entire history of American freedom."[12] Established to challenge discriminatory voting practices, it has been heralded as "the most successful civil rights law of the 20th century," that "sparked a revolution in ballot access."[13] The Act installed a nationwide ban on any denial of the right to vote based on race or color.[14] Further, the Act made many changes, including banning long-standing laws which required literacy tests.[15] Most legal scholars believe that Section 5 of the Act was the most influential because it established powerful remedial actions by creating a system of examination in jurisdictions falling under the VRA's coverage.[16]

Section 5 mandated that jurisdictions with a specific history of discrimination would be required to allow federal oversight regarding preclearance of a state's particular voting plan.[17] Specifically, Section 5 required certain jurisdictions to obtain "preclearance" for the imple-

9. *Id.*

10. Daniel Sullivan, *Viewing Tennessee's New Photo Identification Requirements for Voters Through Historical and National Lens*, 9 TENN. J.L. & POL'Y 135, 143 (2013) (using examples such as a poll tax to show how black males were suppressed from voting because they could not afford a heavy tax required to vote) (quoting Bass, *infra* note 23, at 116–17).

11. Gordan & Rosenberg, *supra* note 2, at 24 (analyzing how the VRA changed the electoral landscape of America); *see also* Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 375 (2014).

12. President Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 1965 Pub. Papers 840, 841 (Aug. 6, 1965).

13. Gordan & Rosenberg, *supra* note 2, at 24 ("The Voting Rights Act immediately changed the electoral landscape of the country.").

14. *Id.*

15. *Id.*

16. Daniels, *supra* note 5, at 69 ("The importance of Section 5 is difficult to overstate.").

17. *Id.* at 69–70.

mentation of any new voting procedures.[18] This preclearance requirement placed the burden on the specific state to prove the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color."[19] Jurisdictions that were designated "preclearance" under Section 4 were called "covered" jurisdictions, determined by a formula.[20] A "covered" jurisdiction was a state or area that (1) maintained a test as a prerequisite to vote as of November 1, 1964 and (2) had less than fifty percent voter registration or turnout in the 1964 Presidential election.[21]

Historically, jurisdictions implemented tests which indirectly discriminated against African-American voters, including literacy and knowledge tests, good moral character requirements, and the need for vouchers from already registered voters.[22] In an effort to remedy discrimination, areas falling under these requirements also required the United States Attorney General to approve any new proposed voting practices.[23] Once a "covered" jurisdiction proposed a voting plan, the Department of Justice could either block a proposed change or request more information.[24] At that point, the jurisdiction could modify or completely withdraw the proposed change, giving them broad power to deny the jurisdiction's plan.[25]

By imposing a preclearance requirement, the VRA aimed to prevent the enactment of discriminatory laws, in part, to preventively solve voter disenfranchisement instead of after-the-fact with costly litigation.[26] Before the VRA, an "illegal scheme might be in place for several election cycles before a . . . plaintiff can gather sufficient evidence to challenge it," forcing a plaintiff to often wait years for an appropriate remedy.[27] For over forty years, Section 5 stood as a requirement for states to elicit federal pre-approval before being al-

18. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (2000) (current version at 52 U.S.C. 10304 (2006)).

19. *Shelby Cty*, 133 S.Ct. at 2620.

20. *Id.*

21. *Id.*

22. *Id.* at 2619.

23. Karyn L. Bass, *Are We Really over the Hill Yet? The Voting Rights Act at Forty Years: Actual and Constructive Disenfranchisement in the Wake of Election 2000 and Bush v. Gore*, 54 DEPAUL L. REV. 111, 121 (2004).

24. *Shelby Cty.*,133 S.Ct. at 2620.

25. *Id.* at 2621.

26. *Id.* at 2640 ("Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency.").

27. *Id.*

lowed to implement any voting changes in their state.[28] Since 1965, the Supreme Court has further defined the broad scope of Section 5.[29]

b. Supreme Court's Early Reaffirmation of the VRA

The Supreme Court has continuously reaffirmed the constitutionality of the VRA.[30] In 1966, only one year after the VRA was enacted, the Supreme Court decided *South Carolina v. Katzenbach*.[31] The Supreme Court rejected South Carolina's argument that certain provisions of the VRA violated the Constitution, holding that it was a valid exercise of Congress' power under the enforcement clause of the Fifteenth Amendment.[32] Justice Warren, writing for the majority, stated that while Congress' method "may have been an uncommon exercise of congressional power," the VRA was enacted under "exceptional conditions."[33] By promptly affirming the VRA in *Katzenbach*, the Court demonstrated its steadfast support for the legislation.[34]

Additionally, in *Georgia v. United States,* the Court reaffirmed Section 5's powerful breadth by holding that preclearance must be broadly construed and that all covered jurisdictions must get new voting plans cleared by the Attorney General.[35] Georgia submitted a voting plan, pursuant to Section 5 of the VRA, to the Attorney General who then requested further information "to assess the racial impact of the tendered plan."[36] The Attorney General ultimately rejected the plan, explaining that the state's extensive departures from the usual county lines suggested the possibility of racial discrimination.[37] Upon review, Justice Black's dissent in *Katzenbach* cited the broad scope of Section 5:

28. Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 231 (2003) ("The drastic nature of the Section 5 remedy comes from its abrogation of the autonomy of some state and local governments in all matters related to voting.").

29. *See generally* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 330–34 (holding that Section 5's preclearance formula was "rational both in practice and in theory").

34. Pitts, *supra* note 28, at 238 ("[T]he Court upheld Section 5 [in *Katzenbach*], employing a highly deferential standard that gave Congress 'full remedial powers' to use 'all means which are appropriate' to eliminate unconstitutional voting discrimination.").

35. *See generally* Georgia v. United States, 411 U.S. 526 (1973).

36. *Id.* at 529.

37. *Id.* at 529–30.

> Section 5 goes on to provide that a State . . . can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General . . . that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color.[38]

The Court used Justice Black's dissent to emphasize that all preclearance plans in covered jurisdictions would need continuous preclearance by the Attorney General.[39]

c. Section 5 Violation Test

In *Beer v. United States,* the Supreme Court created a two-part test to determine whether Section 5 has been violated: (1) determine whether the change would be a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"; and (2) assuming there is no retrogression, determine whether the plan is constitutionally discriminatory based on race under the Fourteenth Amendment.[40] In *Beer,* the Supreme Court validated a voting reapportionment plan in New Orleans that effectually enhanced the position of racial minorities, explicitly stating that reapportionment helps minority voters who cannot abridge the right to vote because of race.[41]

While the Court established a clear analysis for Section 5 claims, some commentators contend that it failed to consider who has the burden of proof on a Section 5 violation.[42] Nevertheless, *Beer*'s effect encouraged a "retrogression" test to determine if Section 5 had been violated.[43]

d. The Supreme Court Continously Reaffirms the VRA

The Supreme Court had continued to reaffirm its approval of the VRA, specifically noting in *City of Rome v. United States* the "modest and spotty" progress that minorities had struggled to attain in recent

38. *Id.* (quoting *Katzenbach*, 383 U.S. at 356).

39. *Id.*

40. Beer v. United States, 425 U.S. 130, 141 (1976).

41. *Id.* ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5.").

42. Pitts, *supra* note 28, at 234 (arguing that the Voting Rights Act of 2013 clearly places the burden on the jurisdiction to prove their plan does not have a discriminatory purpose or effect).

43. *Beer*, 425 U.S. at 146 (1976).

years.[44] In *Rome*, the Attorney General refused to preclear a voting plan requested by the city of Rome, Georgia, because "[the Attorney General] conclud[ed] that in a city such as Rome, in which the population is predominately white and racial bloc voting has been common, such electoral changes would deprive [African-American] voters of the opportunity to elect a candidate of their choice."[45] Justice Marshall, writing for the majority, affirmed Congress' intent for states to request Section 5 preclearance when evidence of a discriminatory purpose and effect were absent.[46] Finally, the Court explained that despite some delays from the Attorney General, the government was well within its right to deny the voting plan.[47]

The Supreme Court bolstered the protection of Section 5 once more in *Lopez v. Monterey County*, holding that a judicial election system in California was not legally valid without preclearance.[48] The Court remained consistent, standing firm in its opinion that "covered" state governments must obtain preclearance from the federal government for voting plans.[49] The Court in *Morse v. Republican Party of Virginia* invalidated an argument that would have created a Section 5 loophole by allowing political parties to establish voting plans without preclearance in "covered" jurisdictions, showing that the Court would continue to take any attempts to seriously bypass Section 5.[50]

e. The Supreme Court's Shift to Reduce Federal Power Regarding Section 5

In 1997, the Supreme Court's opinion of Section 5 seemed to have shifted when it reduced federal power over state governments in a multitude of cases.[51] This shift is evidenced in *City of Boerne v. Flores,* which "redefin[ed] Congress's ability to pass legislation under its enforcement power, applying much stricter limits to congressional authority than were extant when Section 5 was previously upheld."[52] Specifically, the Court focused on the enforcement clause—the clause

44. City of Rome v. United States, 446 U.S. 156, 181 (1980).
45. *Id.* at 156.
46. *Id.* at 170.
47. *Id.*
48. Lopez v. Monterey County, Cal., 519 U.S. 9 (1996).
49. *Id.* at 19.
50. Morse v. Republican Party of Virginia, 517 U.S. 186, 188–89 (1996); *see also* Michael J. Pitts, *What Will the Life of Riley v. Kennedy Mean for Section 5 of the Voting Rights Act?*, 68 MD. L. REV. 481, 515 (2009).
51. Pitts, *Life of Riley*, *supra* note 50, at 512.
52. Pitts, *Section 5*, *supra* note 28, at 241.

that previously gave Section 5 its wide scope—to conclude that Congress must pass a "proportionality" test in order to prove that its legislation is constitutionally sound under the enforcement clause.[53] While Section 5 remained constitutionally valid, some thought it would not survive the new Supreme Court test laid out in *Boerne*.[54] After *Boerne*, some legal scholars sensed the shift in the Supreme Court as Congress moved its focus to second-generation issues facing disenfranchised voters.[55] Author Sudeep Paul emphasized a shift in Congress' focus to modern voters experiencing racially polarized voting and vote dilution, bringing with it a battle between Congress and the Supreme Court regarding what to do with the VRA.[56] With its decision in *Boerne*, the Supreme Court looked as though it would continue to protect states' power to constrain the long-standing power of the VRA by showing that Congress' authority would be pulled back if Congress attempted to prohibit states too much.

f. Congress' Reauthorization of the VRA

In 2006, perhaps in response to the Supreme Court's new willingness to restrict Section 5 for second-generation voters, Congress extended the VRA for twenty-five years by declaring that Section 5 prohibits a "discriminatory purpose" regardless of its retrogressive effect.[57] This legislation effectively mandated that Section 5 would remain "a necessary tool in the statutory arsenal used to combat voting-related discrimination."[58] To bolster its position, Congress provided more than 15,000 pages of records which demonstrated that the covered jurisdictions that had engaged in the worst voting discrimination also had a recent record of racial discrimination in voting, noting that "without the construction of the VRA protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[59]

53. *Id.* at 243.

54. *Id.* at 248–49.

55. Sudeep Paul, *The Voting Rights Act's Fight to Stay Rational:* Shelby County v. Holder, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 271, 280 (2013).

56. *Id.* at 279 (explaining that racially polarized voting "refers to a pattern of voting where voters of one race support the same candidate while voters of another race all support a different candidate").

57. *Id.* at 280.

58. Pitts, *Life of Riley*, *supra* note 50, at 524.

59. Marcus Hauer, Shelby County v. Holder*: Why Section 5 of the Voting Rights Act is Constitutional and Remains Necessary to Protect Minority Voting Rights Under the Fifteenth Amendment*, 38 VT. L. REV. 1027 (2014).

Specifically, Congress mandated that Section 5 forbid "voting changes with 'any discriminatory purpose' as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, 'to elect their preferred candidates of choice.'"[60] Legal scholar Michael J. Pitts pointedly described the VRA extension in 2000 as "a congressional smack-down of the Court's interpretations of the substantive reach of Section 5" which stood as "Congress' humbling of the Court's ill-fated attempts at interpreting a seminal civil rights statute."[61]

g. The Supreme Court Clashes with Congress' 2006 Reauthorization of the VRA

After Congress' reauthorization of the VRA in 2006, the Supreme Court reversed a Texas District Court opinion which protected Section 5 in *Northwest Austin Municipal Utility District Number One v. Holder* ("*NAMUDNO*").[62] A Texas utility district challenged the constitutionality of the VRA and sought a "bail out" from the VRA's coverage.[63] The District Court upheld the VRA, explaining that because the Texas utility district was not a political subdivision it was not eligible for a bail out.[64] The Supreme Court reversed, expressly stating that it had "constitutional concerns" regarding the VRA.[65] The Court noted that "the [VRA] imposes current burdens and must be justified by current needs," and that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[66] Most importantly, the Court indicated its doubts that the VRA would remain constitutionally valid.[67]

II. *Shelby County's* Effect on Section 5

In 2013, the Supreme Court issued an opinion that many called a "game-changer."[68] By granting certiorari in *Shelby County v. Holder,* the

60. *Id.*
61. Pitts, *Life of Riley, supra* note 50, at 525.
62. Nw. Austin Mun. Util. Dist. No. One v. Holder (hereinafter *NAMUDNO*), 557 U.S. 193 (2009).
63. *Id.*
64. *Shelby Cty.*, 133 S.Ct. at 2621.
65. *Id.*
66. *Id.* at 2619.
67. *NAMUDNO*, 557 U.S. at 206.
68. Jon Greenbaum, Alan Martinson & Sonia Gill, Shelby Country v. Holder*: When the Rational becomes Irrational*, 57 HOWARD L. J. 811, 825 (2014).

Court effectively signaled that it was ready to decide whether Section 5's preclearance requirement was still constitutionally viable.[69] In a landmark opinion, the Supreme Court "immobilized" Section 5 in *Shelby County* by calling the historically dated formula "irrational."[70] Petitioner Shelby County, located in a "covered" jurisdiction in Alabama, sued the Attorney General in federal district court, seeking a judgment declaring Section 5 of the VRA unconstitutional.[71] The District Court upheld the VRA, and the Court of Appeals for the D.C. Circuit affirmed the judgment, concluding that Section 5 was still necessary and continued to pass constitutional muster.[72] The District Court also leaned heavily on evidence from Congress' reauthorization of the VRA 2006, concluding that Congress was correct in its decision to continue the coverage and preclearance formula mandated by Section 5.[73]

a. The Supreme Court Majority Rules on Shelby County

The Supreme Court emphasized the intended relationship between the federal government and state government, explaining that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."[74] Importantly, the Court reiterated its opinion from four years earlier, stating "as we made clear in [*NAMUDNO*], the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States."[75] In the very next sentence, the Court announced, "[t]he Voting Rights Act *sharply* departs from these basic principles."[76] The Court also revealed its distaste for the requirement that states get permission to enact laws from the federal government—a power that the states already have.[77] The Court in Shelby County expressly restated its opinion in *Lopez* that the VRA "authorizes federal intrusion into sensitive areas of state and local policymaking" and represents an "extraordinary departure from the traditional

69. Paul M. Wiley, *Shelby and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights After* Shelby County v. Holder, 71 WASH. & LEE L. REV. 2115, 2127 (2014).

70. *Shelby Cty.*, 133 S.Ct. at 2651 (2013).

71. *Id.* at 2615.

72. *Id.*

73. *Id.*

74. *Id.* at 2623 (quoting Coyle v. Smith, 221 U.S. 559, 580 (1911)).

75. *Id.* at 2624.

76. *Id.* (emphasis added).

77. *Id.*

course of relations between the States and the Federal Government."[78]

In addition to its conclusion regarding federal government's encroachment on the states, the Supreme Court suggested that Section 5 was outdated and irrelevant, noting that the purpose of the VRA in 1965 was to stop intentional, malicious legislation that certain states had enacted to directly stop African-Americans from voting.[79] While the Court agreed that, at the time, the VRA made sense, currently, America hardly faces the same problem because most citizens are free to vote and there is no state legislation that maliciously attempts to deny African-Americans the basic right to vote.[80] As the Court then pointed out, "[n]early 50 years later, things have changed dramatically."[81] The Court then relied on Congress' own reauthorization evidence from 2006, citing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices."[82] To bolster its position, the Court included a Census Bureau chart that compared voter registration numbers from 1965 and 2004, showing a huge improvement in voter registration since 1965.[83] The Court also leaned on voter statistics to suggest that Section 5 was outdated, citing that "African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by [Section] 5, with a gap in the sixth State of less than one half of one percent."[84]

While the Court conceded that much of the success seen in voter registration improvement was in large part *because* of the VRA, it criticized the lack of modification or changes to the original legislation.[85] Specifically, the Court seemingly expressed its surprise that these "extraordinary and unprecedented features were reauthorized as if nothing had changed."[86] Finally, the Court held that current legislation needs to meet "current burdens," justified by "current needs,"[87] con-

78. *Shelby Cty.*, 133 S.Ct. at 2612; *see also* Lopez v. Monterey Cty., 525 U.S. 266, 282 (1999).
79. *Id.* at 2625.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 2619.
85. *Id.*
86. *Id.*
87. *Id.*

demning the VRA as a piece of legislation that effectively punishes "covered" jurisdictions for their past sins and not their current needs.[88]

In addition to characterizing Section 5 as antiquated, the Court directly criticized Congress' evidence for its 2006 reauthorization plan, noting that Congress used obsolete data with 40-year-old facts that bore no relationship to the present day.[89] The majority expressed disdain towards the dissent, claiming the dissent treated the VRA as if it were "just like any other piece of legislation, but this Court has made it clear from the beginning that the Voting Rights Act is far from ordinary."[90] Finally, the Court implied that Congress was out of line for distinguishing states in "such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story."[91]

While the Court wrote a scathing opinion on Section 5, it only ruled on the constitutionality of Section 4, holding that the formula to determine which areas should be considered "covered jurisdictions" was antiquated.[92] By ruling that "covered jurisdictions" no longer existed, the Court effectively castrated Section 5, because without jurisdictions being labeled "covered," there is no preclearance requirement.[93] Moreover, its scathing opinion of the VRA left little doubt of the "compelling [demonstration] that Congress has failed to justify 'current burdens' with a record demonstrating 'current needs.'"[94]

In his concurring opinion, Justice Thomas agreed with the Court's opinion but explained that he would also find Section 5 unconstitutional.[95] Justice Thomas criticized Congress for its increasing restrictions on states regarding Section 5 preclearance in 2006, suggesting that Congress miscalculated by heightening the standards of already outdated legislation.[96] Finally, Justice Thomas criticized the majority for delaying what he believes to be the inevitable—declaring Section 5 of the VRA unconstitutional: "[b]y leaving the inevitable

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 2631–32.
92. *Id.* at 2631.
93. *Id.* at 2628.
94. *Id.* at 2632.
95. *Id.* at 2631–32.
96. *Id.* at 2632–33.

conclusion unstated, the Court needlessly prolongs the demise of [Section 5]."[97]

b. Justice Ginsburg's Dissenting Opinion on Shelby County

In her dissent, Justice Ginsburg stated that "[t]he question this case presents is who decides whether, as currently operative, [Section] 5 remains justifiable, this Court, or a Congress charged with the obligation to enforce post-Civil-War Amendments by 'appropriate legislation.'"[98]

Then, Justice Ginsburg stated that Congress was well within its power to make the assessment that Section 5 remains valid and relevant.[99] Additionally, Justice Ginsburg criticized the majority for what she believes will effectively destroy the remedy "that proved to be best suited to block that discrimination."[100]

In addition to stating that Congress was well within its legislative power to reauthorize the VRA, Justice Ginsburg also criticized the majority for claiming that legislation was outdated.[101] To bolster her opinion, the dissent relied on a multitude of evidence that showcased current problems in voter disenfranchisement, such as "second generation barriers constructed to prevent minority voters from fully participating in the electoral process."[102] Ginsburg also noted racially polarized voting in "covered" jurisdictions, which increases the political vulnerability of minorities in those areas.[103]

Regarding Section 5 preclearance, Ginsburg's dissent then listed eight examples involving states attempting to enact legislation that were ultimately thwarted by Section 5, including a 2003 example of a South Carolina school board that had attempted a re-vote of a school board seat after African-Americans had won a majority of the seats.[104] During its conversation about a possible re-vote, the school board excluded all African-American members. The proposal was found to be an "exact replica" of an earlier voting scheme rejected by the VRA.[105] In another example, the dissent showcased a 2004 case in which a Texas city threatened to prosecute two black students after they an-

97. *Id.* at 2632.
98. *Id.* at 2632.
99. *Id.* at 2632–33.
100. *Id.* at 2633.
101. *Id.*
102. *Id.* at 2636.
103. *Id.*
104. *Id.* at 2640–41.
105. *Id.* at 2641.

nounced their intentions to run for office.[106] In response, the county reduced the availability of early voting at polling places close to a historically black university.[107] The dissent highlighted a case from 2006 where a Texas county attempted to thwart Latino voters by stopping early voting, an action that was ultimately blocked by a Section 5 preclearance requirement.[108] In another example, the dissent noted a 2001 case in which an all-white mayor and county board canceled their town's election after "'an unprecedented number' of African-American candidates announced they were running for office."[109]

After citing eight cases of current racially based voter discrimination, Justice Ginsburg reinforced her position by explaining that "these examples, and scores more like them, fill the pages of the legislative record." She then concluded that this extensive data was more than sufficient for Congress to conclude that "racial discrimination in voting in covered jurisdictions [remains] serious and pervasive."[110] Importantly, Justice Ginsburg pointed out that while conditions have massively improved in the South since 1965, Congress accurately assessed that voting discrimination had often evolved into "subtler second generation" barriers.

Finally, Justice Ginsburg relied on the serious and massive effort of Congress' reauthorization plan in 2006, citing Congress' extensive and conscientious hearings that lasted over a year.[111] Justice Ginsburg concluded by citing the Chairman of the House Judiciary Committee, who stated that Congress' reauthorization plan was "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 [and a half] years" he had served in the House.[112]

c. Reactions to *Shelby*

Some legal scholars believe that the decision in *Shelby County* "completely undermines" the original purpose of "prioritiz[ing] federal enforcement to eliminate racial discrimination in voting over state sovereignty issues."[113] *Shelby County* has also gotten the attention

106. *Id.*
107. *Id.*
108. *Id.* at 2640–41.
109. *Id.* at 2640.
110. *Id.* at 2641.
111. *Id.* at 2644 ("Congress did not take this lightly. Quite the opposite.").
112. *Id.* at 2651.
113. Greenbaum, *supra* note 68, at 866–67 ("When President Reagan signed the 1982 reauthorization of [the Voting Rights] Act, he stated that 'the right to vote is the crown

of high-ranking officials in Washington: President Obama criticized the opinion as a disappointment, stating that the ruling "upset decades of well-established practices that help make sure voting is fair, especially in places where voting discrimination has been historically prevalent."[114] Attorney General Eric Holder noted *Shelby County*'s "serious setback for voting rights."[115]

Paul M. Wiley explains that the new question emerging from *Shelby County* will concern tailoring a new Section 5 preclearance system that is resilient enough to realistically prevent voter discrimination and disenfranchisement but remain narrow enough to "survive strict scrutiny from a skeptical Supreme Court."[116] To combat this emerging issue, Wiley suggests the possibility of enacting new legislation to give the federal government more ammunition to combat voter disenfranchisement.[117]

III. Reasons to Overturn *Shelby County*

There is no dispute Section 5 gave disenfranchised voters a powerful tool to combat voter discrimination for over four decades.[118] Since 1965, millions of minority voters have cast their votes. By 2011, African American elected officials rose to 10,500.[119] The number of language-minority voters, specifically Hispanic voters, doubled between 1973 and 2006, due largely to Congress' amendments requiring bilingual election requirements.[120]

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jewel of American liberties, and we will not see its luster diminish.' With the [*Shelby County*] decision, the Roberts Court has significantly diminished the luster of America's crown jewel.").

114. Wiley, *supra* note 69, at 71 (quoting David Jackson, *Obama "Disappointed" in Court's Voting Rights Decision*, USATODAY, (June 25, 2013), http://www.usatoday.com/story/theoval/2013/06/25/obama-supreme-court-voting-rights-act/2455939/ [https://perma.cc/VM76-UHVJ].

115. David Jackson, *Obama "Disappointed" in Court's Voting Rights Decision,* USATODAY (June 25, 2013), http:// www.usatoday.com/story/theoval/2013/06/25/obama-supreme-court-voting-rights-act/2455939/ (quoting Attorney General Holder) [https://perma.cc/VM76-UHVJ].

116. Wiley, *supra* note 69, at 2121.

117. *Id.* at 2152–53.

118. Juliet Eilperin, *What's changed for African Americans since 1963, by the numbers*, WASH. POST (Aug. 22, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/08/22/whats-changed-for-african-americans-since-1963-by-the-numbers/?utm_term=.433634310430 [https://perma.cc/L2LH-MTZP].

119. *Id.*

120. James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS & PUB. POL'Y 195, 233–34 (2006).

While voter discrimination has largely improved since the civil rights era, Justice Ginsburg's dissent in *Shelby County* remains overwhelmingly persuasive. *Shelby County* failed to account for the multitude of voting plans that have been denied preclearance due to discrimination. During oral arguments in *Shelby County,* Justice Sotomayor stated that "if some portions of the South have changed, [Shelby] [C]ounty clearly hasn't."[121] One can also analyze Congress' conclusion regarding current voter discrimination: "[the] vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process."[122] Additionally, the Supreme Court has held through various cases brought through the VRA that, "polarization renders minority voters uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them."[123]

By safeguarding Section 5's preclearance, jurisdictions that continue to racially and illegally discriminate against voters should be forced to submit voting plans for approval. Thousands of examples of hatred, racism, and voter suppression in recent years prove that Section 5 should remain constitutionally valid. However, the questions remain: Exactly how much has the South changed? And exactly how great is the risk that voting equality may be lost without Section 5?[124]

IV. Voter Suppression Post-*Shelby County*

If it was not for three important rulings by three federal appellate courts, including *North Carolina State Conference of the NAACP v. McCrory,* the number of states with discriminatory voting suppression post-*Shelby County* could be much higher.[125] Just a month after *Shelby County* freed states from the requirement to approve voting plans despite their long history of racially discriminatory voting practices, the North Carolina State Legislature passed a "'monster' voter-suppression law that required strict photo ID, cut early voting, and eliminated

121. Hauer, *supra* note 59.

122. *Id.*

123. North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).

124. Hauer, *supra* note 59.

125. Roger Parloff, A Guide to Voter Suppression, Intimidation Lawsuits, FORTUNE (Nov. 7, 2016), http://fortune.com/2016/11/07/voter-suppression-intimidation-lawsuits-minorities/ [https://perma.cc/QE25-RJDD].

same-day registration and pre-registration for 16 and 17-year-olds."[126] Prior to *Shelby County*, North Carolina had introduced a bill which allowed all government-issued IDs, including expired IDs, to satisfy the requirement as an alternative to DMV-issued photo IDs.[127] After *Shelby County,* "the legislature requested and received racial data [for] . . . the practices changed by the proposed law."[128] Once the data had been received, the legislature used the race data it had received to "amend the bill to exclude many of the alternative photo IDs used by African-Americans."[129] "As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess."[130] The bill also eliminated the first seven days of early voting, eliminated one of the two "souls-to-the-polls" Sundays in which African American churches provided transportation to voters, eliminated out-of-precinct voting, and eliminated same-day registration.[131] The United States Court of Appeals found that the law targeted African-Americans "with almost surgical precision."[132]

North Carolina's legislative actions denotes a clear racial bias. The legislature specifically requested racial data and then used that data to amend the law, which then had the discriminatory effect of thwarting many African-American voters at the polls. These acts from states like North Carolina prove that VRA protection is necessary and remains current. More importantly, North Carolina's racially motivated legislation exemplifies a type of blatant racial discrimination. This continued attempt to suppress minority voters is not the subtle and indirect type of disenfranchisement that Justice Ginsburg worried about in her dissent in *Shelby County*, but rather an eerily similar scene analogous to the discrimination minorities faced when the VRA was originally enacted. Unfortunately, this legislation would most likely have been rejected under Section 5 of the VRA due to its discriminatory purpose and effect on minority voting. Since *Shelby County*, fourteen states have enacted some form of voting restrictions, many of

126. Ari Berman, Donald Trump Is the Greatest Threat to American Democracy in Our Lifetime, THE NATION (Nov. 28, 2016), https://www.thenation.com/article/donald-trump-is-the-greatest-threat-to-american-democracy-in-our-lifetime/ [https://perma.cc/277H-7PUZ].

127. *McCrory*, 831 F.3d at 216.

128. *Id.*

129. *Id.*

130. *Id.* at 216–17.

131. *Id.* at 214–15.

132. *Id.*

which may not have been given preclearance by the Department of Justice if the Supreme Court had ruled differently in *Shelby County*.[133]

V. How Voter Suppression Tipped the Scales in Favor of Donald Trump

While the use of voter suppression tactics exploded post-*Shelby County*, the biggest example of voter suppression may lie at the highest point of our electoral system—the 2016 Presidential Election. Some civil rights leaders contend that voter suppression tipped the scales in favor of a Donald Trump victory because it was the first presidential election without the protections of Section 5 of the VRA.[134] Wade Henderson, the president of the Leadership Conference on Civil and Human Rights, stated that the 2016 presidential election "in all likelihood, influenced the outcome of this election" because of "voter suppression and a conscious effort to shave off 1 or 2 percent of the vote in key states."[135]

Enacting voter ID laws was not the only method used to disenfranchise voters in the recent presidential election.[136] The closing of polling places led to longer lines, and fewer opportunities to vote for those who lack transportation or the ability to take time away from work to stand in long lines.[137] Over eight-hundred polling places were closed this election in states such as Arizona, Texas, and North Carolina, jurisdictions with a long history of voter discrimination.[138] In North Carolina, black voter turnout decreased by 16% during the first week of voting in forty heavily black counties due to there being 158 fewer early polling places.[139] Of the 381 counties that previously required preclearance by Section 5, 43% reduced voting locations post-*Shelby*.[140] These tactics not only unfairly influenced the results of the election, they also disproportionately disenfranchised African-American voters.

133. Pugh, *supra* note 1.
134. *See* Parloff, *supra* note 125; *see also* Pugh, *supra* note 1.
135. Pugh, *supra* note 1.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

In Wisconsin, a tightly contested swing state, the margin of victory for Donald Trump was 27,000.[141] The margin of victory is striking when 300,000 registered voters in Wisconsin were unable to vote due to a lack of the strict form of voter ID required by Wisconsin law.[142] This led to the lowest voter turnout numbers in two decades, and decreased voter turnout in Milwaukee by 13%.[143] The decrease in voter turnout in Milwaukee is important to note since over 70% of Wisconsin's African-American population resides in Milwaukee.[144] Voter ID laws also have a deterrent effect on eligible voters. Confusion over what types of IDs are acceptable led some voters to erroneously believe they lacked the required ID, when in fact, their ID was acceptable.[145] While there is a valid counterargument that closed polling places and ID restrictions are for reasons besides racial discrimination, the lack of transparency often means that citizens are left in the dark when their polling places are closed.

Wisconsin and North Carolina were just two of the many states that faced voter discrimination issues in the 2016 presidential election. Key swing states like Ohio, Michigan, Virginia, and Iowa were among those that faced voter suppression problems.[146] In Virginia, a federal court held that certain legislators "racially gerrymandered" Virginia Congressman Robert Scott's district in order to "pack far more blacks into it than necessary."[147] The Court ordered Virginia to redraw its congressional map recognizing that "individuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm."[148] The invalidated congressional map included a district with a

141. Ari Berman, *The GOP's Attack on Voting Rights Was the Most Under-Covered Story of 2016*, THE NATION (Nov. 9, 2016), https://www.thenation.com/article/the-gops-attack-on-voting-rights-was-the-most-under-covered-story- [https://perma.cc/26CJ-S2GN].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Michael D. Regan, *What does voter turnout tell us about the 2016 election?*, PBS NEWSHOUR (Nov. 20, 2016), http://www.pbs.org/newshour/updates/voter-turnout-2016-elections/ [https://perma.cc/C2SQ-JFF4].

147. J. Gerald Hebert & Danielle Lang, *Courts are finally pointing out the racism behind voter ID laws*, WASH. POST (Aug. 3, 2016) https://www.washingtonpost.com/posteverything/wp/2016/08/03/courts-are-finally-pointing-out-the-racism-behind-voter-id-laws/?utm_term=.7add44610a8f [https://perma.cc/PP7B-KSG5].

148. Ben Kamisar, *Federal court strikes down Virginia's congressional map*, THE HILL (June 5, 2015) available at http://thehill.com/blogs/ballot-box/redistricting/244187-federal-court-strikes-down-virginias-congressional-map [https://perma.cc/EL4L-J9GE].

black population of 57%, a stark difference to similar districts in the area.[149]

In late December, an appeals court upheld a Virginia voting restriction that requires residents to present photo identification to cast ballots.[150] The panel ruled that the voting rule put no undue hardship on minorities, however, attorneys for the Democratic Party maintained that the law disparately impacted minorities who are less likely to have photo ID than white voters.[151] In 2012, the Virginia legislature passed an election law requiring photo ID, however, ten months later, the Republican-controlled legislature tightened the law, barring those without photo ID from voting.[152] Both bills were passed, and a federal judge upheld the laws in May 2016, finding that the state had provided all citizens with an equal opportunity to vote.[153] The three appeals judges who upheld Virginia's law in late December were all nominated by Republican presidents.[154] The head of the Virginia ACLU criticized the decision, stating that it "discounts the reality of the hardships that voters with disabilities encounter, and ignores that many other vulnerable groups lack ID or the means to obtain one."[155]

Ironically, President Trump—through his Twitter account—called for an investigation into voter fraud in January 2017, stating that he lost the popular vote to Hillary Clinton due to voter fraud.[156] However, independent fact-checkers were quick to debunk the accusation, citing House Speaker Paul Ryan's agreement that there was no evidence to support Trump's claim.[157] Others worry about the implications Trump's accusation could have on an already-shaky voter suppression issue: "[This] voter fraud [accusation] gives the Republicans

149. *Id.*

150. Ann E. Marimow & Rachel Weiner, *Appeals court upholds Virginia's voter-ID law*, WASH. POST (Dec. 31, 2016) https://www.washingtonpost.com/local/public-safety/appeals-court-upholds-virginias-voter-id-law/2016/12/13/3888f46e-c150-11e6-9a51-cd56ea1c2bb7_story.html?utm_term=.ee295b589ff8 [https://perma.cc/6HYP-8GXG].

151. *Id.*

152. *Id.*

153. *Id.* ("Virginia allows everyone to vote and provides free photo IDs to persons without them".).

154. *Id.*

155. Al Sharpton, *Voter suppression contributed to Trump win*, MSNBC (Dec. 18, 2016), http://www.msnbc.com/politicsnation/watch/voter-suppression-contributed-to-trump-win-836030531794 [https://perma.cc/4H4V-HZDK].

156. Madeline Conway & Heather Caygle, *Democrats warn Trump's voter fraud investigation will increase voter suppression*, POLITICO (Jan. 25, 2017), http://www.politico.com/story/2017/01/trump-voter-fraud-investigation-democrats-react-234161 [https://perma.cc/7F6A-FW7F].

157. *Id.*

and others another tool and another reason to justify to the public of denying people the right to vote."[158] However, Trump's allegation could give Republican-led state legislatures a platform to make a case to enact new voter regulations.[159] In response, civil rights leaders maintain that voter restrictions are discriminatory because they significantly hurt minorities and others who lack the resources to combat voter discrimination—and who also tend to vote for Democrats.[160] Bernie Sanders, the independent who lost to Hillary Clinton in the Democratic presidential primary last year, responded to Trump's tweet, claiming that President Trump "is telling Republicans to accelerate voter suppression, to make it harder for the poor, young, elderly and people of color to vote."[161] Additionally, Sanders criticized Trump, stating that "[t]he great political crisis we face is not voter fraud, which barely exists. It's voter suppression and the denial of voting rights. Our job is to fight back and do everything we can to protect American democracy from cowardly Republican governors and legislators."[162]

In addition to President Trump setting the stage for the future implementation of voter suppression laws, many claim that voter suppression in the 2016 election helped swing the win in favor of Trump.[163] In a MSNBC interview with Al Sharpton in December 2016, Kristen Clarke, the president of the Lawyers' Committee for Civil Rights explained how voter suppression during the 2016 presidential election barred Black and Hispanic voters from the polls: "There were some patterns that emerged. Voter suppression was most certainly a culprit in the 2016 election cycle."[164] In addition, Clarke claims that the civil rights group heard from a countless number of voters who encountered barriers to vote.[165]

In addition to some civil rights leaders claiming voter discrimination, Al Sharpton released a poll on MSNBC regarding voter suppression just after the presidential election that showed that 41% of Black and 34% of Hispanic voters could not get time off of work to vote on election day.[166] On average, Hispanic voters had to wait twice as long

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. Sharpton, *supra* note 155.
164. *Id.*
165. *Id.*
166. *Id.*

in line than white voters, and were twice as likely to have their voting eligibility questioned once at the polls.[167] In addition to resistance at the polls, Hispanic and Black voters claim in a Craig Newmark Foundation post-election poll that 47% and 42%, respectively, were unable to cast their votes on election day.[168] Sharpton claims that this is a direct result of new voter ID laws and what the "gutting of the Voting Rights Act has done on the 2016 election."[169]

Conclusion

By essentially revoking Section 5 of the VRA, the Supreme Court left Donald Trump a wide opening to use voter suppression to thwart minority voters that could have turned the election in favor of Hillary Clinton. As civil rights activist Kristen Clarke stated, "When we look back, we will find that voter suppression figured prominently in the story surrounding the 2016 presidential election."[170] Many others continue to speak out about voter suppression.[171] David Axelrod, Barack Obama's former chief strategist, maintains that "[i]f you want to investigate voting in this country, the most productive thing you can do is . . . try to ascertain whether these stringent new requirements in some states, or more stringent new requirements, have kept some people from voting."[172]

Conservative courts continue to uphold voting restrictions that have a disparate impact on minority and vulnerable citizens.[173] Following the election, states like Arkansas and Michigan have proposed stricter voting ID laws.[174] In Texas, the attorney general asked the Supreme Court to reinstate a voter ID law that was ruled unconstitutional in federal court; in Michigan, a new strict voter ID law was approved by the Michigan House.[175] With President Trump in the White House, the Voting Rights Act demolished, and stronger voter restriction laws being passed, the future of equal opportunity voting for every eligible citizen is in great danger.

While many states passed voter laws, it is Wisconsin and North Carolina that demand closer inspection. Trump seized the White

167. *Id.*
168. *Id.*
169. *Id.*
170. Pugh, *supra* note 1.
171. *See* Conway, *supra* note 156.
172. *Id.*
173. Sharpton, *supra* note 155.
174. *Id.*
175. *Id.*

House by securing victories in the two states—in Wisconsin, Trump won by three percentage points; in North Carolina, he won by four. Wisconsin and North Carolina have both historically executed voter suppression towards minorities and college students.[176] As a result of the voter suppression problems in both states, minority and other vulnerable voters were "forced to wait in longer lines at less convenient locations" and "had less time to cast ballots."[177] As the *Nation's* voting rights expert Ari Berman wrote on [election night], thousands of voters had to "'jump through hoops' just to vote this year."[178] While the future of voter suppression is unclear, the present facts remain: President Trump is in the White House, and he won two historically voter-suppressed swing states by three percent.

176. Mark Joseph Stern, *Did the Republican War on Voting Rights Help Trump Win?*, SLATE (Nov. 9, 2016), http://www.slate.com/blogs/the_slatest/2016/11/09/republican_war_on_voting_rights_may_have_helped_trump_win.html ("[I]t is certainly worth noting that [both Wisconsin and North Carolina] engaged in extensive and carefully coordinated voter suppression in the years preceding the election.") [https://perma.cc/87NW-36U5].

177. *Id.*

178. *Id.*

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14502-GG

GEORGIA MUSLIM VOTER PROJECT,
ASIAN-AMERICANS ADVANCING JUSTICE-ATLANTA,

Plaintiffs - Appellees,

versus

BRIAN KEMP,
in his official capacity as the Secretary of State of Georgia,

Defendant - Appellant,

GWINNETT COUNTY BOARD OF VOTER REGISTRATION AND ELECTIONS,
on behalf of itself and all others similarly situated,

Defendant.

No. 18-14503-GG

RHONDA J. MARTIN,
DANA BOWERS,
JASMINE CLARK,
SMYTHE DUVAL,
JEANNE DUFORT,
THE GEORGIA COALITION FOR THE PEOPLE'S AGENDA, INC.,

Plaintiffs - Appellees,

versus

BRIAN KEMP,
Secretary of State of Georgia,

Defendant - Appellant,

REBECCA N. SULLIVAN, et al.,

Defendants.

On Appeal from the United States
District Court for the Northern District of Georgia

BEFORE: TJOFLAT, JILL PRYOR, and NEWSOM, Circuit Judges.

BY THE COURT:

On November 2, 2018, we denied the Emergency Motion for Stay of Injunction Pending Appeal filed by Appellant Brian Kemp and advised at that time that one judge dissented and separate opinions would follow. Today, we issue those opinions.

JILL PRYOR, Circuit Judge, concurring in the denial of the motion for a stay.

On the eve of the 2018 general election, and in the wake of a surge in interest in voting by mail in Georgia, the Georgia Muslim Voter's Project and Asian-Americans Advancing Justice-Atlanta filed suit challenging the State's lack of prerejection procedures for redress when an elector's signature on an absentee ballot application or absentee ballot appears not to match the signature on her voter registration card. For such a perceived mismatch, the State offered only notice of rejection and an opportunity to try again, whether by mail or by voting in person. But for other absentee ballot deficiencies, the State offered a more robust system of prerejection notice and an opportunity to be heard. Finding a likely violation of procedural due process, the district court entered an injunction in which it ordered the Secretary of State of Georgia to instruct county elections officials to provide prerejection notice and an opportunity to be heard in the event of a perceived signature mismatch. In so doing, the district court borrowed heavily from existing voting procedures pertaining to other ballot deficiencies, which had been passed by Georgia's legislature and long followed by state and local officials, to craft a narrow remedy for a narrow class of ballot applications and ballots.

When the Secretary moved in this Court for a stay pending appeal from the injunction, we denied the stay, concluding that the district court had not abused its discretion in crafting the relief it ordered. *See Cumulus Media, Inc. v. Clear*

Channel Commc'ns, Inc., 304 F.3d 1167, 1171 (11th Cir. 2002) ("[The district court's] judgments, about the viability of a plaintiff's claims and the balancing of equities and the public interest, are the district court's to make and we will not set them aside unless the district court has abused its discretion in making them."). Our order denying the Secretary's motion issued days before the November 2018 election, and in it we noted that opinions would follow. This is my opinion, written as if it had been issued contemporaneously with that order.[1]

I. BACKGROUND

A. Georgia's Statutory Absentee Voting Scheme

Like many states, Georgia permits electors to vote by mail, for any reason, through a process it calls absentee voting. *See* O.C.G.A. § 21-2-380(a), (b). Absentee electors must follow a two-step process, first applying for and second voting via an absentee ballot. *Id.* §§ 21-2-381, -383, -384. At both steps, an absentee elector must sign the application or ballot, and at both steps that signature is compared by elections officials to the elector's voter registration card signature. *Id.* § 21-2-381(b)(1) (absentee ballot applications); *id.* §§ 21-2-384(b), (c), - 386(a)(1)(B), (C) (absentee ballots). If the county elections official

[1] I agree with Judge Newsom's concurring opinion that this case is now moot, since the election has passed. But one member of the panel dissented from our order denying the motion for a stay pending appeal, and he has since written a dissenting opinion explaining his reasons for declining to join the majority. I explain here why I believe the motion properly was denied.

reviewing submissions concludes that the signatures match at the application stage, an absentee ballot issues; if the signatures match at the absentee ballot stage, and there are no other deficiencies, the absentee elector's vote is counted. *Id.* § 21-2-381(b)(2)(A) (absentee ballot applications); *id.* § 21-2-386(a)(1)(B) (absentee ballots). If the official concludes that the signature on the absentee ballot application or absentee ballot does not match that of the elector's voter registration card, then the application or ballot is rejected. *Id.* § 21-2-381(b)(3) (absentee ballot applications); *id.* § 21-2-386(a)(1)(C) (absentee ballots). At issue in this case is the process offered to absentee electors whose signatures on absentee ballot applications and absentee ballots are deemed a mismatch.

Georgia law has no provision by which an absentee elector notified of a perceived mismatch may contest the decision, cure the mismatch, or prove her identity before the absentee application or absentee ballot is rejected for a signature mismatch. Instead, the law provides that after the application or ballot is rejected, the county board of registrars[2] or absentee ballot clerk is required to "promptly notify" the elector of the rejection. *Id.* § 21-2-381(b)(3) (absentee ballot applications); *id.* § 21-2-386(a)(1)(C) (absentee ballots).[3] The law does not

[2] County boards of registrars are empowered by state law to conduct primaries and elections and to oversee the registration of electors and absentee balloting procedures. *See generally* O.C.G.A. § 21-2-40.

[3] For example, within three days of rejection of an absentee ballot, Gwinnett County

prevent the absentee elector from trying again, either by filling out a new application or by completing a new ballot. Nor does the law prevent an able absentee elector from voting in person, either during early voting hours or on Election Day. Ga. Comp. R. & Regs. 183-1-14-.09.

Still, perceived signature mismatches are a bit of an outlier: Georgia law provides *pre*rejection procedures for other flaws in absentee ballot applications and absentee ballots, just not for a signature mismatch. If the registrar or absentee ballot clerk determines that an absentee ballot application lacks information such that the official cannot determine the absentee elector's identity, Georgia law provides that the official must "write to request additional information" from the elector instead of rejecting the application outright. O.C.G.A. § 21-2-381(b)(4). If the board of registrars has probable cause to believe based on an absentee ballot that the "elector is not qualified to remain on the list of electors," the board must, "if practical, notify the challenged elector and afford such elector an opportunity to answer," and then "shall proceed to conduct a hearing on the challenge on an expedited basis prior to the certification of the consolidated returns of the election superintendent." *Id.* § 21-2-230(b), (g). If the absentee elector fails to prove her eligibility at this stage, she may appeal to the superior court within 10 days of the

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provides the absentee elector with a letter stating the reasons for the rejection, a new application for an absentee ballot, and information about how to vote by other means.

board of registrars' decision. *Id.* § 21-2-230(g) (cross-referencing O.C.G.A. § 21-2-229(e)). If the board of registrars believes that an absentee ballot has some other deficiency that does not affect the elector's qualifications to remain on the list of electors—for example, if the absentee elector failed to provide the required identification—*and* "it is not practical to conduct a hearing prior to the close of the polls," then elections officials must treat the ballot as a "challenged" ballot—that is, a provisional ballot. *Id.* §§ 21-2-230(e), (i), -386(e), -419. If the absentee elector provides the board of registrars with the required identification no more than three days after the election, then her vote is counted. *Id.* § 21-2-419(c)(1); Ga. Comp. R. & Regs. 183-1-14-.03(2), (3), (5). If the absentee elector fails to do so, then the ballot is not counted and the absentee elector is so notified. Ga. Comp. R. & Regs. 183-1-14-.03(5); O.C.G.A. § 21-2-419(d)(1). If necessary based on these procedures, the election returns are adjusted and a corrected return is certified. O.C.G.A. § 21-2-230(g), -493(l). Again, under Georgia law these prerejection procedures are inapplicable to absentee ballot applications and ballots with perceived signature mismatches.

B. The Proceedings Below

The Georgia Muslim Voter Project and Asian-Americans Advancing Justice-Atlanta (collectively, "GMVP") caught wind of an October 12, 2018 news article reporting increased rates of rejection of absentee ballot applications and

absentee ballots in Gwinnett County due to perceived signature mismatches. Four days later, the organizations filed suit in the Northern District of Georgia against Brian Kemp, in his official capacity as Secretary of State of Georgia,[4] and the Gwinnett County Board of Registrars and Elections, on behalf of itself and similarly situated boards of registrars in all 159 Georgia counties. As relevant to this appeal, GMVP alleged that Georgia's absentee voting scheme violated procedural due process insofar as the State failed to provide prerejection notice, an opportunity to be heard, and a chance to appeal for absentee electors whose absentee ballot applications or absentee ballots contained a perceived mismatched signature.

GMVP moved for an injunction to prevent elections officials from rejecting absentee ballot applications and absentee ballots due to perceived signature mismatches without these prerejection procedures. After holding a hearing, the district court determined that it was substantially likely that the Georgia's statutory procedures for rejecting absentee ballot applications and absentee ballots facially violated the Fourteenth Amendment's guarantee of procedural due process. The district court found that the other factors courts consider in deciding whether to

[4] Secretary Kemp also was a candidate for governor of Georgia in the November 2018 election. He won that election, and a new Secretary of State has assumed his prior position. For ease of reference, I use the term "the Secretary" throughout.

grant injunctions—irreparable injury, harm to the opposing party, and the public interest—also weighed in favor of granting injunctive relief.

The district court thereafter entered an injunction[5] in which it ordered the Secretary of State's Office to issue the following instructions, reproduced in full here, to all county boards of registrars, boards of elections, election superintendents, and absentee ballot clerks:

> *1)* All county officials responsible for processing absentee ballots shall not reject any absentee ballots due to an alleged signature mismatch. Instead, for all ballots where a signature mismatch is perceived, the county elections official shall treat this absentee ballot as a provisional ballot, which shall be held separate and apart from the other absentee ballots. *See* O.C.G.A. § 21-2-419; Ga. Comp. R. & Regs. 183-1-14-.03(2). The county elections official shall then provide pre-rejection notice and an opportunity to resolve the alleged signature discrepancy to the absentee voter. This process shall be done in good faith and is limited to confirming the identity of the absentee voter consistent with existing voter identification laws. *See* O.C.G.A. §§ 21-2-417, -417.1. The elections official is required to send rejection notice via first-class mail and also electronic means, as available or otherwise required by law. *See* O.C.G.A. § 21-2-384(a)(2). This process shall include allowing the absentee voter to send or rely upon a duly authorized attorney or attorney in fact to present proper identification. This process shall be done prior to the certification of the consolidated returns of the election by the election superintendent. *See* O.C.G.A. § 21-2-230(g). The absentee voter shall have the right to appeal any absentee ballot rejection following the outcome of the

[5] Although the district court labeled its order a "Temporary Restraining Order," GMVP Doc. 32 at 2, it actually was an immediately appealable preliminary injunction. *See* 28 U.S.C. § 1292(a)(1); *Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982) (explaining that the functional effect of an order controls and that an order is an injunction if, rather than "merely preserving the status quo," it "grant[s] most or all of the substantive relief requested").

aforementioned process, as designated in O.C.G.A. § 21-2-229(e). Any aforementioned appeals that are not resolved as of 5 p.m. on the day of the certification deadline shall not delay certification and shall not require recertification of the election results unless those votes would change the outcome of the election. *See* O.C.G.A. § 21-2-493(l).

2) All county elections officials responsible for processing absentee ballot applications shall not reject any absentee ballot application due to an alleged signature mismatch. Instead, for all ballot applications where a signature mismatch is perceived, the county elections official shall, in addition to the procedure specified in O.C.G.A. § 21-2-381(b), provide a provisional absentee ballot to the absentee voter along with information as to the process that will be followed in reviewing the provisional ballot. The outer envelope of the absentee ballot provided shall be marked provisional. Once any provisional ballot is received, the procedure outlined in section 1 above is to be followed.

3) This injunction applies to all absentee ballot applications and absentee ballots rejected solely on the basis of signature mismatches submitted in this current election. This injunction does not apply to voters who have already cast an in-person vote.

GMVP Doc. 32 at 2-3.[6]

The Secretary filed an emergency motion to stay the injunction pending appeal, arguing that laches barred GMVP's claims and that GMVP was unlikely to prevail on the merits of the facial due process challenge.[7] Only the Secretary

[6] "Doc. #" refers to the numbered entry on the district court's docket. Unless otherwise noted, citations are to the *GMVP v. Secretary* case in the district court.

[7] Several electors and the Georgia Coalition for the People's Agenda, Inc. (collectively, the "Electors") separately filed suit against the Secretary, members of the Gwinnett County Board of Voter Registration and Elections, and members of the State Election Board. The State Election Board is tasked with promulgating rules and regulations that will "obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and

moved for a stay; the Gwinnett County Board of Voter Registration and Elections did not. The district court denied the Secretary's motion. The Secretary then filed in this Court an Emergency Motion for Stay of Injunction Pending Appeal. We summarily denied the motion for a stay. Judge Tjoflat dissented from our summary order denying a stay and now has provided his reasons for doing so. This is my response.

II. LEGAL STANDARDS

"A stay of a preliminary injunction requires the exercise of our judicial discretion, and the party requesting the stay must demonstrate that the circumstances justify the exercise of that discretion." *Democratic Exec. Comm. of*

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other officials" and facilitate the "fair, legal, and orderly conduct of primaries and elections." State Election Board Duties, http://sos.ga.gov/index.php/elections/state_election_board (last accessed March 18, 2019).

The Electors brought substantive due process and equal protection claims arising from the rejection of absentee ballot applications and absentee ballots with perceived signature mismatches. The Electors sought an injunction on these grounds, rather than on the basis of procedural due process. Without consolidating the cases, the district court held a joint hearing at which it entertained both motions for injunctive relief. There, the court expressed its inclination to grant relief only on GMVP's procedural due process claim and heard argument primarily on GMVP's request for an injunction on that claim. When the district court granted the injunction, it entered the injunction onto the dockets in both cases. The district court denied the Electors' motion for an injunction but noted in its order that the Secretary remained enjoined as set forth in the GMVP case.

We consolidated both cases on appeal. The Secretary argues here that he "is especially likely to succeed on the merits of his appeal" of the injunction entered onto the docket in the Electors' case because the Electors did not raise a procedural due process claim. Mot. for Stay at 13 n.3. But based on the context in which the injunction was entered on the docket in the Electors' case, I do not read the injunction as granting the Electors any relief separate and apart from the relief granted to GMVP. I therefore reject the Secretary's argument.

Fla. v. Lee, 915 F.3d 1312, 1317 (11th Cir. 2019). In deciding whether to grant a stay of an injunction pending appeal, the Court considers the following factors, which mirror the factors the district court considered in entering the injunction:

> (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies.

Id. (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The first two factors are the "most critical." *Nken*, 556 U.S. at 434. As to the first factor, "[i]t is not enough that the chance of success on the merits be better than negligible." *Id.* (internal quotation marks omitted).

As to the second factor, irreparable injury, "even if [a party] establish[es] a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make [a stay] improper." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).[8] That is because "[a] showing of irreparable injury is the sine qua non of injunctive relief." *Id.* (internal quotation marks omitted). "[T]he asserted irreparable injury must be neither

[8] *Siegel* arose in the context of an appeal from the denial of a preliminary injunction, not from a motion to stay a preliminary injunction. 234 F.3d at 1168. Because we use the *Nken* factors for both inquiries, however, *Siegel* is directly applicable to this case.

remote nor speculative, but actual and imminent." *Id.* (internal quotation marks omitted).

On appeal we do all of this legal legwork through the lens of an abuse of discretion standard of review. *Lee*, 915 F.3d at 1317. In so doing, we review *de novo* any legal conclusions and for clear error any factual conclusions underlying the district court's exercise of its discretion. *Id.* But the weight to be afforded any given factor and the ultimate weighing of the factors together are quintessential exercises of discretion that we reverse only if that discretion is abused. *See Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1320-21 (11th Cir. 2010); *BellSouth Telecommc'ns, Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 968-70 (11th Cir. 2005).

In determining whether the plaintiffs showed a substantial likelihood of success on the merits of the procedural due process claim, the district court was obliged to apply the framework from *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under *Mathews*, a court determining what process is due in connection with a potential deprivation of a liberty or property interest must balance three considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and

> administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. We must apply this test "to the generality of cases, not the rare exceptions." *Id.* at 344.

III. DISCUSSION

In this section, I first explain why the Secretary's failure to show that he is likely to suffer irreparable harm requires that his motion for a stay be denied without regard to any of the other *Nken* factors. Second, I respond to the Secretary's argument as to the other *Nken* factors and explain why they also do not weigh in favor of a stay pending appeal. Third, I address my dissenting colleague's remaining concerns about the denial of the stay pending appeal.

A. The Secretary Has Made No Strong Showing that the Injunction Would Cause Him Irreparable Injury.

Starting with irreparable injury, the Secretary argues that the district court's injunction would cause irreparable harm because the injunction prevents it "'from effectuating statutes enacted by representatives of its people,'" upsets the election process, and "risks introducing confusion, uncertainty, and inaccuracy during a general election" such that this *Nken* factor "strongly favors granting a stay." Mot. for Stay at 22-23 (quoting *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018)). I disagree. First, the injunction does not prevent the Secretary from effectuating any statutes because it does not negate the effects of any statutes.

Instead, it adds procedural protections. Second, the Secretary has failed to substantiate any "injury following from the simple preparation on paper of a plan to carry out the [district] court's directives"—the only thing the injunction required the Secretary to do. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1455 (11th Cir. 1986).

I might view the risk of irreparable harm differently had any other defendant moved for a stay or signaled that the injunction had in fact led to confusion, uncertainty, or inaccuracy. But no other defendant so moved, and in fact the evidence in this case belies the Secretary's conclusory assertion that the injunction will irreparably harm the State's voting procedures. On the same day the injunction was entered, the Secretary sent a four-page bulletin to county elections officials statewide instructing them to comply with the injunction and explaining in some detail how to do so. The Secretary has submitted no evidence or even argument that any county has reported difficulty complying with the guidance; indeed, the Chair of the Board of Registrars of one of Georgia's most populous counties testified that compliance with the injunction as instructed by the Secretary was "pretty straightforward" and "easily doable" and would "not really add any burdens to what we are already doing." GMVP Doc. 37-1 at 2-3. The Chair stated he did "not believe that it will be difficult to implement the guidance . . . even with a week left until Election Day." *Id*. at 2.

Our precedent makes clear that the Secretary's failure to show that the injunction would cause irreparable injury is an adequate and independent basis for denying the motion to stay pending appeal. *See Siegel*, 234 F.3d at 1176. In any event, because the Secretary argues that he can satisfy all of the *Nken* factors—and my dissenting colleague agrees—I discuss the remaining factors in the sections that follow.

B. The Secretary Has Made No Strong Showing that He Is Likely to Succeed on Appeal.

The Secretary advances three arguments for why the district court abused its discretion in entering the injunction requiring state officials to provide prerejection processes to absentee ballot applicants and electors whose ballot applications and ballots suffer from perceived signature mismatches. First, he argues that the plaintiffs' challenge does not satisfy the requirements of a facial challenge and therefore fails as a matter of law, merits aside. Second, and relatedly, he argues that the district court erred in weighing the *Mathews* factors such that the facial challenge fails on the merits. Third, he contends that the plaintiffs' challenge likely is barred by the doctrine of laches. For the reasons that follow, I disagree on all three fronts. Where the dissent's arguments are different from the Secretary's, I address those points as well.[9]

[9] I focus my discussion primarily on the injunction as it relates to absentee ballots, as

1. *The Secretary has made no strong showing that the district court likely erred in concluding that the plaintiffs could advance a facial challenge.*

The Secretary argued in the district court that GMVP's procedural due process challenge could only be construed as a facial challenge because GMVP failed to identify any absentee elector to whom the signature mismatch procedure had been unconstitutionally applied. And, the Secretary argued, GMVP could not advance a facial challenge because it could not under any circumstances prove that Georgia's absentee election law would be "'unconstitutional in all of its applications.'" GMVP Doc. 24 at 19 (quoting *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449 (2008)). The Secretary explained that this is because an elector who applies for an absentee ballot "weeks before the election and is immediately notified of the rejection," action "permitted if not contemplated" by the absentee ballot application statute, has not been deprived of a right without due process. *Id.* at 19-20. Nor, for that matter, the Secretary argued, would an elector whose absentee ballot is rejected "and who is immediately notified and provided an opportunity to cast another absentee ballot,

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opposed to absentee ballot applications, because neither the Secretary nor the dissent makes any argument specifically about the latter.

which is not subsequently rejected," suffer from deprivation of a right without due process. *Id.* at 20. The district court agreed with the Secretary that GMVP could not advance an as-applied challenge but disagreed that GMVP could not advance a facial challenge.

On appeal, the Secretary again argues that GMVP cannot advance a valid facial challenge. He reiterates the argument he made in the district court—that GMVP cannot show that Georgia's statutory procedures are constitutionally deficient "for *all* voters in *all* circumstances under which signatures are rejected." Mot. for Stay at 14.

The dissenting opinion also asserts that GMVP cannot advance a facial challenge, but for a reason further afield than the Secretary's. The dissent says that GMVP's challenge to Georgia's absentee ballot signature mismatch procedure fails as a matter of law because "countless mail-in voters' signatures are determined by election officials to match," and their votes are counted. Dissenting Op. at 50. In other words, plenty of absentee electors never suffer from a perceived signature mismatch on their absentee ballot applications or absentee ballots, so GMVP cannot show that Georgia's absentee ballot procedures are unconstitutional in all of their applications.

I take on the dissent's argument first, followed by the Secretary's. The dissent's focus on absentee electors who are unaffected by Georgia's signature

mismatch provisions overlooks the Supreme Court's instruction that when reviewing a facial challenge we do not consider instances in which a statute "do[es] no work." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451 (2015). "Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992). "The proper focus of the constitutional inquiry is the group for whom the law is a *restriction*, not the group for whom the law is *irrelevant*." *Id.* (emphasis added). Georgia's signature mismatch procedures are irrelevant for those absentee electors who have no signature mismatch. Thus, I respectfully reject the dissent's argument.

The Secretary's narrower argument also fails to persuade me. The Secretary points out that an absentee elector whose ballot application or ballot is rejected for a perceived signature mismatch but who receives a rejection notice in time to try again (although there is no guarantee that he will) can either attempt to submit another absentee ballot application and/or absentee ballot (although there is no guarantee that second ballot will not be deemed another signature mismatch) or can vote in person (provided he is physically able to do so). True, but immaterial for purposes of determining whether GMVP is entitled to advance a facial challenge. That is because if Georgia's signature mismatch procedure violates the dictates of procedural due process by failing to provide adequate *pre*deprivation

notice and opportunity to be heard, then any *post*deprivation opportunity to take advantage of entirely different procedures does not cure the due process violation. That brings me to the merits of the procedural due process challenge, which I address in the section that follows.

2. *The Secretary has made no strong showing that the district court likely erred in weighing the* Mathews *factors.*

The Secretary challenges the weight the district court assigned each of the *Mathews* factors. For the reasons that follow, I find no error.

a. The Private Interest at Stake

As to the first of the *Mathews* factors, the private interest at stake, the Secretary faults the district court for defining the interest at stake—too broadly—as the fundamental right to vote. Instead, the Secretary argues, the private interest at stake "is only the narrow interest in voting by mail," which is "modest" for most electors who could instead simply vote in person. Mot. for Stay at 15.

As an initial matter, I disagree that the district court so broadly defined the private interest at stake. The district court determined that the private interest at stake here "*implicates* the individual's fundamental right to vote" and therefore is "substantial." GMVP Doc. 28 at 23 (emphasis added). It is undeniably true that the interest in voting absentee implicates the right to vote. Indeed, the parties

appear to agree that the private interest at stake is the interest in voting by mail—that is, by absentee ballot.

The Secretary's real disagreement is with the district court's determination that the interest in voting absentee is substantial. But the Secretary has failed to meet his burden of showing that the district court likely erred. As the district court explained, that the interest in voting by absentee ballot implicates the fundamental right to vote lends it more than modest weight. And even though the Secretary posits that an absentee elector rejected for a perceived signature mismatch may still have ample time to vote in person, he has not shown that this elector represents the "generality of cases." *Mathews*, 424 U.S. at 344.

To the contrary, given the statutory and regulatory scheme Georgia has constructed for absentee voting, the Secretary's hypothetical likely does not cover the generality of cases. Although any elector in Georgia may vote by absentee ballot, Georgia's Administrative Code suggests that electors applying for absentee ballots often do so because they are elderly, physically disabled, or residing temporarily or permanently outside the voting precinct on Election Day, either because of military obligations or because they have taken up residence overseas. *See* Ga. Comp. R. & Regs. 183-1-14-.01(3) (listing these categories of absentee electors along with a category for "[n]o reason is provided"). Individuals falling into these categories are likely to have difficulty appearing in person to vote.

Moreover, the ability to appear in person depends on receiving rejection notice in time to do so. Although Georgia's code requires that rejection notices "promptly" issue, O.C.G.A. §§ 21-2-381(b)(3), -386(a)(1)(C), there is no time frame specified. The Secretary points to nothing in the record to suggest that in the generality of cases absentee electors apply for and cast ballots early enough within the voting period such that they would benefit from a "prompt" notice, whatever that means.

In sum, the Secretary has failed to show that the district court likely erred in giving this first *Mathews* factor substantial weight.

b. The Risk of an Erroneous Deprivation

As to the second *Mathews* factor, the Secretary argues that the risk of an erroneous deprivation is small considering the relatively low percentages of absentee ballot applications and absentee ballots that were rejected for perceived signature mismatches in previous elections. And, the Secretary again stresses, rejections must be accompanied by notice, and this notice provides electors with ample time to either mail in another absentee ballot application or absentee ballot or vote in person. The Secretary's arguments, however, do nothing to refute the district court's determination that although "the risk of an erroneous deprivation is by no means enormous, permitting an absentee elector to resolve an alleged signature discrepancy nevertheless has the very tangible benefit of avoiding disenfranchisement" for that elector. GMVP Doc. 28 at 24. Because the

Secretary has not even argued that this determination was in error, he cannot show that the district court likely erred in finding that this second *Mathews* factor weighs in favor of GMVP.[10]

c. The Government's Interest and Burden

As to the final *Mathews* factor, the district court found "that additional procedures would involve minimal administrative burdens while still furthering the State's" interest. *Id.* at 26. The Secretary disagrees, arguing that the injunction's procedures for absentee ballot applications or absentee ballots with a perceived signature mismatch impose substantial burdens on the State. As I explain below, the Secretary's arguments do not convince me that the district court erroneously weighed this factor.

First, the Secretary takes issue with the injunction's requirement that the elector may send an attorney or attorney in fact to confirm the elector's identity. The Secretary argues that this predeprivation procedure burdens the State's undisputed substantial interest in preventing voter fraud by permitting individuals

[10] Further in analyzing the second *Mathews* factor, the district court explained that the "probative value of additional procedures is high" given the risk of disenfranchisement. GMVP Doc. 28 at 25. The Secretary objects that the injunction's requirements "are unlikely to add significant value to the prompt notice and generous opportunities for cure the statute already provides." Mot. for Stay at 17. For the reasons I have explained, however, for many absentee electors the cure of showing up to vote simply will not be possible or practicable.

other than the elector to confirm the elector's identity, "without any kind of oath or affidavit, merely by possessing the [elector's] identification." Mot. for Stay at 18. This is inaccurate: the injunction allows only "a *duly authorized* attorney or attorney in fact to present proper identification" on behalf of the elector; implicit is a requirement that the attorney or attorney in fact demonstrate that she is duly authorized. GMVP Doc. 32 at 2 (emphasis added). Moreover, the injunction is not a leap into wholly unfamiliar territory: Georgia law already contemplates that someone other than the absentee elector may appear to prove the elector's identity. *See* O.C.G.A. § 21-2-381(a)(1)(B) (permitting a physically disabled elector to present absentee ballot applications via her "mother, father, grandparent, aunt, uncle, sister, brother, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, or sister-in-law of the age of 18 or over"). Thus, this aspect of the injunction's prerejection procedure does not substantially burden the State's interest in preventing voter fraud.

Second, the Secretary argues that the injunction's prerejection procedures cause administrative burdens because they "necessitate significant changes to how at least some counties track absentee ballot rejections[,] changes to the systems for tracking absentee ballot voters[,] and more." Mot. for Stay at 18-19. Even assuming these changes would be required, the record does not support the

Secretary's assertion that they would create a substantial burden. In fact, as I explained above in Part III.A., the evidence is to the contrary: by election officials' own reports, the injunction has caused little disruption. The Secretary therefore has failed to persuade me as to administrative burdens.

Third, the Secretary argues that the injunction's prerejection right of appeal imposes other burdens, specifically, on county elections officials "who will have to appear and defend their rejection decisions, including on an expedited basis prior to certification of the election" and on state courts who now must hear "this new class of appeals on an expedited basis." Mot. for Stay at 19. In addition, the Secretary says, the injunction's prerejection procedures inject the new burden of requiring a system for recertification of election results if absentee ballots tied up in any unresolved appeals would change the outcome of the election—a system the Secretary says does not currently exist. Again, the Secretary has failed to meet his burden. As explained in Part I.A., these procedures are already statutorily in place for absentee ballot application and absentee ballot defects other than signature mismatches. Contrary to the Secretary's suggestion, the injunction does not require the creation of a new system, nor does it newly obligate county elections officials or state courts to adjudicate disputes relating to the rejection of absentee ballots.

The burden on these entities may increase to some limited extent because of this new class of ballot applications and ballots to which prerejection procedures apply, but by the Secretary's own calculation the number of perceived signature mismatches is quite low. And by the Secretary's own admission, some of the prerejection procedures are unlikely to be used frequently. *See* Mot. for Stay at 18 ("[I]t is hard to see what additional work the . . . right of appeal could do in any given case; either the voter will provide identification in the pre-rejection opportunity to resolve the alleged signature deficiency, or the voter will not . . . ." (internal quotation marks omitted)). For these reasons, I reject the Secretary's argument that the third *Mathews* factor should weigh in his favor and that the district court likely erred in concluding otherwise.[11]

[11] Also for these reasons, I disagree with the dissent that the injunction violates principles of federalism by requiring counties in Georgia to "to craft ad hoc administrative tribunals" and by requiring state courts to hear appeals from these tribunals. Dissenting Op. at 55. The hearings the district court's injunction contemplates already take place in Georgia, and the state superior courts already hear appeals from the results of these hearings, where they are necessary.

The dissent opines that the injunction provides a poor remedy for absentee electors with perceived signature mismatches and that a state-law procedural due process claim in superior court would be just that—superior—but the dissent's characterization of the process the injunction contemplates is inaccurate. The dissent argues that first the "voter must wait to see whether he or she receives rejection notice." *Id.* True, but given the injunction's requirement that the notice be sent by first-class mail and electronic means, this wait should not be onerous. And in any event, an elector also would have to await a rejection notice before going straight to the superior court to file a lawsuit. Second, the dissent says, the "voter must then respond to the notice," and "the [injunction] does not tell us the means of responding or the timeframe for doing so." *Id.* This is simply not true. As to the means of responding, the injunction provides that the elector must respond by providing identification in accordance with O.C.G.A. §§ 21-2-417 and -417.7 and that the elector may "send or rely upon a duly authorized attorney or attorney in fact to present proper identification," GMVP Doc. 32 at 2. As

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In conclusion, the Secretary has failed to show that the district court likely erred in determining the weight of any single *Mathews* factor. And when I examine all of the factors together, I cannot say that the district court likely erred in weighing them. Thus, the Secretary has failed to make a strong showing that he is likely to succeed on the merits of his appeal.

3. *The Secretary has made no strong showing that he is likely to succeed on the merits of his laches argument.*

In the alternative to his main merits argument, the Secretary argues that we should stay the district court's injunction because the equitable doctrine of laches likely bars the plaintiffs' procedural due process challenge. To succeed on a

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to the timeframe for responding, the injunction expressly requires that the elector's response "shall be done prior to the certification" of the election returns. *Id.* at 2-3 (citing O.C.G.A. § 21-2-230(g)). Third, the dissent asserts, "[i]f the voter challenges the election official's signature determination, he or she attends a hearing held by an unknown adjudicator." Dissenting Op. at 55. Again, this is inaccurate. The injunction expressly cites to O.C.G.A. § 21-2-230(g), which provides that the adjudicator in such a dispute is "the [county] board of registrars." Fourth, the dissent says that if the adjudicator upholds the signature mismatch determination, then the elector can appeal the decision to the superior court. Yes, according to procedures already delineated in O.C.G.A. § 21-2-229(e). And although the dissent suggests that all of these steps are inevitable, I disagree. In all likelihood, most electors will never file a lawsuit in the superior court, or even seek a hearing before the board of registrars, because earlier steps in the predeprivation process will vindicate their rights. *See* Mot. for Stay at 18 (the Secretary arguing that "it is hard to see what additional work" the right to appeal will do in light of the injunction's other prerejection procedures). For this reason, I am unconvinced that an elector's filing a procedural due process claim directly in the superior court is a superior process to the one the district court ordered. And, of course, where state law is found to violate the federal Constitution, the district court is empowered to remedy that violation without regard to whether a different—even superior—remedy exists under the State's constitution.

laches claim, the Secretary must show that the plaintiffs inexcusably delayed bringing their procedural due process claim and that the delay caused undue prejudice. *Lee*, 915 F.3d at 1326; *see United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005).[12] He cannot at this stage do so. As the district court explained, it is undisputed that events of the 2018 election cycle sparked their action: for GMVP specifically, it was an October news report on increased rates of rejection of absentee ballot applications and absentee ballots in Gwinnett County due to perceived signature mismatches.[13] Moreover, the Secretary does not contest that laches is generally a factual question that requires factual development—something that is lacking at the early stage of this case. In light of the plaintiffs' allegations and the early stage of this litigation, I cannot say it is likely that the Secretary will be able to prove inexcusable delay merely because Georgia's absentee voting statutes have been on the books for several years.

Nor is the Secretary likely to establish undue prejudice. As explained in detail above, the record in this case shows that the injunction caused and was

[12] "When the district court has weighed the proper factors in determining whether a defendant has proven the elements of laches, we review the district court's decision for abuse of discretion." *Angel Flight of Ga., Inc. v. Angel Flight Am. Inc.*, 522 F.3d 1200, 1207 (11th Cir. 2008). I apply this standard of review here because the Secretary does not argue that the district court weighed improper factors.

[13] As for the Electors, they say it was the surge in litigation over the reliability of Georgia's in-person voting system and corresponding increase in absentee voting, which was seen as more dependable.

expected to cause little if any disruption to those tasked with administering the 2018 election.

Thus, on this record, the Secretary cannot make a strong showing that he is likely to succeed on the merits of his laches argument.

C. The Remaining *Nken* Factors Counsel Against a Stay of the District Court's Preliminary Injunction.

As with the first and second factors, the remaining *Nken* factors— whether the stay will substantially injure other interested parties and the public interest—do not militate in favor of granting a stay of the injunction. "A stay would disenfranchise many eligible electors whose ballots were rejected" for a perceived signature mismatch even when they were eligible to vote. *Lee*, 915 F.3d at 1327. "And public knowledge that legitimate votes were not counted due to no fault of the voters"—and with no prerejection notice to the voters that their votes would not be counted and no opportunity to rectify that situation—"would be harmful to the public's perception of the election's legitimacy." *Id.* It is beyond dispute that "protecting public confidence in elections is deeply important—indeed, critical—to democracy." *Id.* (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (plurality opinion)). Thus, the remaining *Nken* factors do not favor granting a stay.

In sum, the Secretary has failed to make the requisite showing to justify a stay of the district court's injunction. Before I conclude, I address some of the points in my colleague's dissent.

D. Neither the *Parratt* Doctrine, nor Principles of Federalism and Separation of Powers, nor the Equal Protection Clause Justifies a Stay of the Injunction.

Aside from those points I have already addressed, the dissent makes at least three additional arguments for why we should stay the district court's injunction pending appeal. None of these arguments, taken individually or collectively, convinces me.

*1. The "*Parratt *Doctrine" does not doom GMVP's due process claim.*

In addition to challenging the district court's conclusion that GMVP was entitled to advance a facial due process challenge, the dissent argues that GMVP's claim fails under the so-called "*Parratt* doctrine." Dissenting Op. at 49, 51-54. In *Parratt v. Taylor*, 451 U.S. 527 (1981), as in a related case, *Hudson v. Palmer*, 468 U.S. 517 (1984), the Supreme Court held that when a state official was "not acting pursuant to any established state procedure," but rather was engaging in a "random, unauthorized" act, the State is in no position to provide predeprivation process, and postdeprivation process is all that is due. *Zinermon v. Burch*, 494

U.S. 113, 130 (1990). *Parratt* does not bar GMVP's claim for predeprivation process in this case for two related reasons.[14]

First, to my knowledge we have never applied *Parratt* to a facial procedural due process challenge to an existing statutory or administrative scheme, and there is good reason not to, at least in this context. Indeed, my dissenting colleague appears not to disagree: he invokes *Parratt* only after opining (incorrectly, I think) that GMVP's claim can only be construed as an as-applied claim. In *Parratt*, *Hudson*, and their progeny, *see, e.g.*, *McKinney v. Pate*, 20 F.3d 1550, 1562-63 (11th Cir. 1994) (en banc), the state actor whose actions were challenged was acting contrary to established state customs or policies. In *Parratt*, a prison employee allegedly negligently mishandled an inmate's property. *Parratt*, 451 U.S. at 530.[15] In *Hudson*, a prison employee allegedly maliciously destroyed inmate property because of a "personal vendetta." *Zinermon*, 494 U.S. at 129-30 (citing *Hudson*, 548 U.S. at 521). In *McKinney*, members of a county Board of Commissioners allegedly were biased against the plaintiff. *McKinney*, 20 F.3d at 1554; *see id.* at 1563 ("As any bias on the part of the Board was not sanctioned by

[14] There is a third potential reason: the Secretary has not argued in his motion for a stay pending appeal that *Parratt* applies. *See Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 680 (11th Cir. 2014) (explaining that arguments not advanced by an appellant are deemed abandoned).

[15] The Supreme Court subsequently held that a state actor is not liable under § 1983 for negligent conduct. *See Daniels v. Williams*, 474 U.S. 327, 336 (1986).

the state and was the product of the intentional acts of the commissioners, under *Parratt,* only the state's refusal to provide a means to correct any error resulting from the bias would engender a procedural due process violation."). Here, the state actor whose actions are challenged—the Secretary—is not alleged to have acted contrary to Georgia's customs or policies. Rather, he is alleged to have followed them. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982) (explaining that *Parratt* is inapplicable when "it is the state system itself that destroys a complainant's property interest, by operation of law").

Second, and relatedly, I disagree with the dissent's characterization of signature mismatch determinations as "'random and unauthorized act[s] by a state employee.'" Dissenting Op. at 51 (quoting *Parratt*, 451 U.S. at 539). The Supreme Court expressly has stated that *Parratt* does not apply where the state actor—here, the Secretary—"delegated to [its employees] the power and authority to effect the" alleged deprivation and the "concomitant duty to initiate the [state-law] procedural safeguards." *Zinermon*, 494 U.S. at 138. These are precisely the circumstances here. The Secretary has delegated to the county elections officials reviewing absentee ballot application and absentee ballot signatures the power and authority to reject, without predeprivation procedures, perceived signature mismatches. In so doing, the elections officials, rather than engaging in random and unauthorized acts, are following procedures established and authorized by

Georgia law—that is, comparing signatures on absentee ballot applications and absentee ballots to the signatures on electors' voter registration cards. O.C.G.A. § 21-2-381(b)(1) (absentee ballot applications), *id.* §§ 21-2-384(b), (c), - 386(a)(1)(B), (C) (absentee ballots). Those same elections officials initiate the postdeprivation processes in place for rejecting absentee ballot applications and absentee ballots and providing instructions on how to vote despite the rejection. Thus, "[u]nlike in *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged." *Zinermon*, 494 U.S. at 139.

For these reasons, I cannot agree that *Parratt* applies to this case or in any way bars GMVP from obtaining relief.

2. *The injunction does not violate principles of federalism or separation of powers.*

The dissent argues that the district court violated the Constitution's core principle of federalism by ordering an injunction that "inserted a new provision into the [Georgia] Code." Dissenting Op. at 57. The dissent describes this "new statutory provision"—the contents of the injunction—as an "egregious[ ] . . . overreach." *Id.* at 15-16. Comparing the lack of statutory prerejection procedures for perceived signature mismatches against statutory procedures for

challenges to electors' eligibility to remain on a county's list of electors, the dissent makes two points: the district court contravened the will of the Georgia legislature by adding a procedural requirement and "the legislature deliberately omitted the [district court's procedural requirement] because it would be impossible to implement." *Id.* at 17.

As to the dissent's first argument, "while federalism certainly respects states' rights, it also demands the supremacy of federal law when state law officials offend federally protected rights." *Lee*, 915 F.3d at 1331. If the district court finds that the State likely has failed to protect the federal right to due process, then it is the district court's prerogative to grant relief even if the Georgia legislature did not contemplate the remedy. And, as I have explained, rather than cutting an entirely new scheme from whole cloth, the district court's injunction borrowed heavily from the processes already in place for other absentee ballot application and absentee ballot defects. *See* GMVP Doc. 32 at 2-3 (incorporating procedural protections set forth in O.C.G.A. §§ 21-2-230, -384, -417, -419).[16] Although the

[16] The dissent cites two additional statutes—O.C.G.A. § 21-2-228 and O.C.G.A. § 21-2-229—to illustrate how Georgia can legislate intricate procedures for administrative adjudication and judicial review of voting processes when it wants to and that the legislature simply had no will to do so here. Aside from the fact that the legislature's will must bend to the dictates of due process, these two statutes are poor comparators for the procedures sought and ordered here. Challenges to elector eligibility under these two statutes can be made at any time because they concern the right of an elector to remain on the county's list of eligible electors. For that reason, the processes set forth in those statutes are more intricate and contemplate more thorough, time-consuming review. The district court's injunction incorporated nothing of O.C.G.A. § 21-2-

federalism and separation-of-powers implications of any federal court's injunction against state procedures is significant, narrow relief like that granted here does not so offend these principles as to violate the Constitution. *See generally Goldberg v. Kelly*, 397 U.S. 254 (1970) (mandating narrow reforms to a state agency's procedure that lacked adequate procedural due process protections). Indeed, "rather than undermining [Georgia's] sovereignty, the preliminary injunction's solution actually respected it" by borrowing from existing statutory procedures relating to absentee ballot applications and absentee ballots. *Lee*, 915 F.3d at 1331.

As to the dissent's second argument, the record in this case suggests that the procedural protections the district court ordered not only are possible to implement, but in fact are rather simple to do. *See* GMVP Doc. 37-1 (Chair of the Chatham County Board of Registrars' testimony that compliance with the injunction was "pretty straightforward" and "easily doable" and that he did "not

228. And it incorporated O.C.G.A. § 21-2-229 only insofar as one subsection of that statute—subsection (e) permitting judicial review of the administrative decision—is expressly incorporated into O.C.G.A. § 21-2-230. Section 230, from which the injunction rather heavily borrowed, *see supra* at 9-10, 26-27 n.11, covers challenges to elector eligibility advanced much closer to the date of an election. *See* O.C.G.A. § 21-2-230(a) ("Such challenge may be made at any time prior to the elector whose right to vote is being challenged voting at the elector's polling place or, if such elector cast an absentee ballot, prior to 5:00 P.M. on the day before the election"). This statutory scheme shows that the legislature also contemplated a more hurried predeprivation review process for challenges occurring closer in time to an election (as would be the case for perceived signature mismatches).

believe that it will be difficult to implement the guidance . . . even with a week left until Election Day"). Further, the existence of O.C.G.A. § 21-2-230, which governs challenges that occur once voting has begun and from which the injunction here borrowed several procedures, demonstrates that the procedural protections the district court ordered *are* possible to implement. The dissent downplays the relevance of § 230 by saying that "the volume of challenges under that section pales in comparison to the volume of signature reviews at issue here." Dissenting Op. at 60 n.32. This statement is unsubstantiated by any data, though, and the data we do have in the record does not indicate that the individual county registrars' offices would be burdened with herculean tasks. For example, of the 524 absentee ballots Gwinnett County had rejected as of October 18, 2018, only 9 were due to perceived signature mismatches.

I therefore disagree with the dissent that the injunction offends principles of federalism and separation of powers.[17]

3. The injunction does not violate the Equal Protection Clause.

[17] The dissent makes a third argument for why the district court's injunction violates these principles, saying the injunction is a re-writing of Georgia's code and that the district court had no authority to do. My colleague made a nearly identical argument in a recent case, *see Lee*, 915 F.3d at 1347-48 (Tjoflat, J., dissenting). I disagree with his reasoning here for the same reasons the majority in *Lee* rejected his argument there. *See id.* at 1331 (majority opinion).

Finally, the dissent argues that the injunction violates the Equal Protection Clause. The dissent complains that the injunction left unfilled a number of details, including whether the board of registrars at the administrative hearing owes any deference to the clerk who perceived the signature mismatch and, if so, under what standard that decision is reviewed; whether and what evidence is admissible; whether and how discovery may proceed; and who bears the burden of proof and what is that burden. And, the dissent says, the injunction violates equal protection because it "leaves election officials to fill in the details" of the prerejection notice and opportunity to be heard with a requirement "only that they do so 'in good faith.'" Dissenting Op. at 65 (quoting GMVP Doc. 32 at 2). Specifically, the dissent says that the injunction runs afoul of the principle that "'[w]hen a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.'" *Id.* (quoting *Bush v. Gore*, 531 U.S. 98, 109 (2000)).

As an initial matter, I disagree that the injunction leaves unanswered each of the questions the dissent poses. The injunction answers the questions of what evidence is admissible and who bears the burden of proof by its explicit reference to O.C.G.A. § 21-2-417. That statute provides that "each elector shall present proper identification to a poll worker"—placing the burden of proof on the elector—by presenting any of a list of identifying documents—the type of

evidence that would be admissible. By its reference to O.C.G.A. § 21-2-230, the injunction suggests that the board of registrars would owe no more deference to the official who identified a possible signature mismatch than the board would owe if it had probable cause to believe an elector was not eligible to remain on a voting list. *See* O.C.G.A. § 21-2-230(b), (e). The injunction thus is not so standardless as to offend the Constitution.

Moreover, I disagree that ordering county officials to act in "good faith" leaves us without any assurance that equal protection will be provided. Given that the injunction provides cogent standards for prerejection process, requiring county officials to act in "good faith" does not make it likely that counties will engage in such vastly different practices that those practices will run afoul of equal protection principles. Indeed, county officials already are tasked with acting in good faith to determine the eligibility of an elector who submits a provisional ballot. *See* O.C.G.A. § 21-2-419(b) ("The board of registrars shall immediately examine the information contained on [the elector's provisional ballot] and make a *good faith* effort to determine whether the person casting the provisional ballot was entitled to vote in the primary or election." (emphasis added)). As with that process, given

the procedural parameters for making such a determination, I do not view the requirement here that officials act in "good faith" as constitutionally infirm.[18]

Finally, I note that the Secretary has not argued that the injunction violates the Equal Protection Clause. He cannot satisfy his burden to show that he is entitled to a stay pending appeal if he does not make an argument, even a meritorious one. I therefore respectfully disagree with the dissent that we should grant a stay on equal protection grounds.

IV. CONCLUSION

The task of a federal Court of Appeals in reviewing a district court's preliminary injunction is a narrow one: it must decide only whether the district court abused its discretion. In this case, the district court exercised its discretion narrowly, hewing largely to preexisting state law and procedures in analogous contexts to afford affected absentee electors a narrow form of relief. The Secretary's arguments on appeal have failed to convince me that the district court's careful exercise of its discretion to provide this limited form of relief is so

[18] The dissent also says that in contrast to the injunction, O.C.G.A. §§ 21-2-228, 229, and 230 "each . . . answers the questions" the dissent poses, Dissenting Op. at 66, but that is untrue for the closest analogue to the signature mismatches at issue, § 230. Section 230 no more answers these questions than does the district court's injunction. But, for the same reasons the prerejection procedures in the district court's injunction pass muster, § 230's procedures comply with the dictates of equal protection.

egregious that this Court must overturn it. It is for these reasons that I voted to deny the Secretary's motion for a stay.

NEWSOM, J., CIRCUIT JUDGE, concurring in the judgment:

On November 2, 2018, I voted to deny then-Secretary Kemp's motion to stay the district court's injunction on the ground that he had not made the requisite showing under *Nken v. Holder*, 556 U.S. 418 (2009). I write separately today only to emphasize my belief that our November 2 order refusing the stay says all that needs to be said.

On November 2, we had before us a live "case or controversy," to be sure. The November 2018 election was fast approaching, the district court had entered an injunction to which Kemp objected, and Kemp had filed an appeal and, with it, a motion to stay. We denied the stay, the election went forward, Kemp was elected Governor, and the Office of the Secretary of State has since voluntarily dismissed its appeal of the district court's injunction. So while our November 2 decision was not the least bit "advisory," it seems to me that everything we say today—more than four months after the fact and with so much water under the bridge—is. In my judgment, we should not now opine on issues in a case that, though once live, is now doubly (if not triply) moot—particularly given that nothing we can say at this point could even theoretically provide Kemp the relief he once sought. *Cf. Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015) ("We cannot turn back the clock and create a world in which the County does not have to administer the 2014 election under the strictures of the injunction."); *Stone*

v. Bd. of Election Comm'rs for City of Chicago, 643 F.3d 543, 544–45 (7th Cir. 2011) (holding that an appeal of the decision to deny a preliminary injunction was moot "[b]ecause the election has taken place").

TJOFLAT, Circuit Judge, dissenting:

This conflict centers on absentee voting under Georgia law. On October 25, 2018, the United States District Court for the Northern District of Georgia—in an effort to ensure that all absentee ballots for the general election would be counted—entered a preliminary injunction that effectively rewrote Georgia's election code. Georgia's Secretary of State ("the Secretary") moved in this Court for a stay of the injunction pending appeal. We denied the Motion; I dissented, noting that an opinion would follow. I now explain my reasons for dissenting.

I.

A.

Georgia permits registered voters to vote in person on Election Day, in person early, or by mail. Ga. Code Ann. §§ 21-2-380 to -381.[19] This case concerns the last method—voting by mail—the details of which are set out in Sections 21-2-381 and -386 of Georgia's election code ("the Statutes").

To receive a mail-in ballot, a voter must first submit an application for a mail-in ballot. *Id.* § 21-2-381. When an application is received, the registrar or absentee ballot clerk shall "compare the signature or mark of the elector on the application with the signature or mark of the elector on the elector's voter

[19] Georgia's election code collectively refers to all voting that occurs before Election Day, whether in person or by mail, as "absentee voting."

registration card." *Id.* § 21-2-381(b)(1). If the voter is found to be eligible, a ballot is mailed out within three business days. *Id.* § 21-2-381(b)(2)(A); Ga. Comp. R. & Regs. 183-1-14-.11. But if the voter is found to be ineligible, the registrar or clerk shall "deny the application by writing the reason for rejection in the proper space on the application and shall promptly notify the applicant in writing of the ground of ineligibility." *Id.* § 21-2-381(b)(3).

The registrar or absentee ballot clerk follows a similar process for mail-in ballots themselves. When a mail-in ballot is received, the registrar or clerk shall

> compare the signature or mark on the oath with the signature or mark on the absentee elector's voter registration card or the most recent update to such absentee elector's voter registration card and application for absentee ballot or a facsimile of said signature or mark taken from said card or application.

Id. § 21-2-386(a)(1)(B). If the signature appears to be valid, and other information appears to be correct, the ballot is certified. *Id.* If the signature appears to be invalid, however, the registrar or clerk "shall promptly notify the elector of such rejection." *Id.* § 21-2-386(a)(1)(C).

A voter whose signature is determined to be invalid receives process in the form of notice, *id.* §§ 21-2-381(b)(3), -386(a)(1)(C), as well as the "opportunity to vote in the primary, election, or runoff either by applying for a second absentee ballot prior to the day before such primary, election, or runoff or by voting in person at the elector's polling place on the day of the primary, election, or runoff,"

Ga. Comp. R. & Regs. 183-1-14-.09(2).[20]

Plaintiffs to this suit, Betty J. Jones, a registered voter in Georgia, and various advocacy groups, allege that the process set out in the Statutes is constitutionally defective.[21] The mail-in voting scheme is a facial violation of procedural due process, they argue, because the Statutes do not set out any manner and method for appealing a determination that the signature on a mailed-in application or ballot is invalid—that is, that it fails to match the signature on record.

The District Court agreed and held that Plaintiffs were substantially likely to succeed on the merits of their procedural due process claim. The Court reasoned that Plaintiffs have a liberty interest in voting by mail-in ballot and that the balance of interests under *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976), the test to determine what process is due in any situation, required Defendants to provide notice and an opportunity to be heard before voters are first denied the

[20] A voter who votes in person, whether on Election Day or before Election Day, is verified by identification, not by signature. Ga. Code. Ann. § 21-2-417.

[21] A bit more about Plaintiffs:

Ms. Jones suffers from "circulation problems that make it very difficult for her to stand in long lines or walk and to vote in-person." She submitted a mail-in ballot application in September 2018 that was rejected due to a signature mismatch. She then submitted additional forms, but as of one week before Election Day, she had yet to receive an absentee ballot.

The advocacy groups are the Georgia Muslim Voter Project and Asian-Americans Advancing Justice-Atlanta.

opportunity to vote by mail-in ballot.

The District Court enjoined the Secretary to order election officials in Georgia's 159 counties to provide pre-rejection notice, to set up ad hoc administrative tribunals to adjudicate signature disputes, and to allow an attorney to stand in for voters at those proceedings. The Court also vested Georgia's superior courts, the state's trial courts of general jurisdiction, Ga. Const. art. VI, § 4, para. 1, with appellate jurisdiction over the tribunals:

> The county elections official shall . . . provide pre-rejection notice and an opportunity to resolve the alleged signature discrepancy to the absentee voter. This process shall be done in good faith and is limited to confirming the identity of the absentee voter consistent with existing voter identification laws. The elections official is required to send rejection notice via first-class mail and also electronic means, as available or as otherwise required by law. This process shall include allowing the absentee voter to send or rely upon a duly authorized attorney or attorney in fact to present proper identification. . . . The absentee voter shall have the right to appeal any absentee ballot rejection following the outcome of the aforementioned process, as designated in [Ga. Code Ann.] § 21-2-229(e).

Ga. Muslim Voter Project v. Kemp, No. 1:18-cv-04776-LMM, slip op. at 2 (N.D. Ga. Oct. 25, 2018) (temporary restraining order) (citations omitted).

The Court also required, for mail-in ballot applications, that election officials provide voters with provisional ballots:

> [F]or all ballot applications where a signature mismatch is perceived, the county elections official shall . . . provide a provisional absentee ballot to the absentee voter along with information as to the process that will be followed in reviewing the provisional ballot. . . . Once

> any provisional ballot is received, the procedure outlined in section 1 above is to be followed.

Id. at 3. A provisional ballot is a ballot issued to a voter who is unable to produce a type of statutorily enumerated identification at the polling place but who nonetheless "swear[s] or affirm[s] that the elector is the person identified in the elector's voter certificate." *See* Ga. Code Ann. § 21-2-417(b). The ballot is counted only if officials verify the voter's identification within the statutory timeframe. *Id.*

The Secretary moved in this Court under Federal Rule of Appellate Procedure 8 for a stay of the injunction pending appeal and in the alternative, for expedited appeal, both of which the majority denied.[22] *Ga. Muslim Voter Project v. Kemp*, No. 18-14502-GG, slip op. at 2 (11th Cir. Nov. 2, 2018). The majority believed that the Secretary had not made the requisite showing under *Nken v.*

[22] This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to hear the motions. Under an exception to the final-judgment rule, we have authority to review a district court's grant of injunctions. 28 U.S.C. § 1291(a)(1). Though the District Court entered a temporary restraining order ("TRO") under Federal Rule of Civil Procedure 65(b), not a preliminary injunction under Rule 65(a), the "label placed upon the order is not necessarily dispositive of its appealability." *AT&T Broadband v. Tech Commc'ns, Inc.*, 381 F.3d 1309, 1314 (11th Cir. 2004) (citation omitted). We treat a TRO as an injunction when "(1) the duration of the relief sought or granted exceeds that allowed by a TRO (ten days), (2) the notice and hearing sought or afforded suggest that the relief sought was a preliminary injunction, and (3) the requested relief seeks to change the status quo." *Id.* (citations omitted).

The TRO here is properly classified as a preliminary injunction because the TRO has no expiration, because the parties filed motions and the District Court held an evidentiary hearing, and because the relief requires the Secretary to take new action.

Holder, 556 U.S. 418, 129 S. Ct. 1749 (2009), which outlines the factors for determining whether a stay pending appeal is warranted.[23] *Id.* The panel also invoked its authority under Federal Rule of Appellate Procedure 3(b)(2) to consolidate this case and a related case, *Martin v. Kemp*. *Ga. Muslim Voter Project*, slip op. at 2 (11th Cir. Nov. 2, 2018).

B.

The District Court committed three errors, each of which reveals that the Secretary makes a "strong showing that he is likely to succeed on the merits" and that the "public interest lies" with granting the stay. *See Nken*, 556 U.S. at 434, 129 S. Ct. at 1761.

In Part II, I explain that Plaintiffs' claim must rise or fall as a facial challenge because, as the District Court observed, "Plaintiffs have not identified a voter to whom [the Statutes] have been unconstitutionally applied." *Ga. Muslim Voter Project*, slip op. at 19 (N.D. Ga. Oct. 24, 2018) (order granting temporary restraining order). But Plaintiffs have not met their burden—under precedent of

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[23] In deciding whether the Court should grant a stay pending appeal, the factors are

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 434, 129 S. Ct. at 1761 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119 (1987)).

both this Court and the Supreme Court—of showing that the Statutes are unconstitutional in all of their applications.

In Part III, I explain that even if I were to construe Plaintiffs' claim as an as-applied procedural due process challenge, their claim would still fail because—under the *Parratt* doctrine, as expounded by this Court in *McKinney*—the deprivations are random and unauthorized acts.[24] Because Georgia provides a constitutionally adequate remedy, the law requires Plaintiffs to seek relief in Georgia superior court, not here.

And in Part IV, I explain that even if I could conceive of a situation in which Georgia afforded Plaintiffs no remedy, the District Court's remedy—which takes a hacksaw to Georgia's election code—is unconstitutional because it violates the doctrine of federalism and the Equal Protection Clause. A federal court faced with a facially unconstitutional state statute has but one remedy: strike down the statute *in toto*. Applied here, that remedy would be to enjoin enforcement of Georgia's entire mail-in voting scheme. The Court's remedy here is particularly abusive not only because it modifies the scheme, thus allowing it to stand, but because it allows the scheme to vary from county to county.

[24] The cases are *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986), and *McKinney v. Pate*, 20 F.3d 1550 (1994) (en banc).

II.

As an initial matter, Plaintiffs have no viable facial challenge to the Statutes. In Plaintiffs' view, the "opportunity to be heard is—or is not—provided by the statute on its face." *Ga. Muslim Voter Project*, slip op. at 21 (N.D. Ga. Oct. 24, 2018) (order granting temporary restraining order). As such, they must show that "no set of circumstances exists under which the law would be valid." *J.R. v. Hansen*, 803 F.3d 1315, 1320 (11th Cir. 2015) (alteration omitted) (quoting *Horton v. City of St. Augustine*, 272 F.3d 1318, 1329 (11th Cir. 2001)); *see also GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 (11th Cir. 2012) (requiring that, as to a facial challenge, a statute be "unconstitutional in all applications" (citing *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095 (1987))). To succeed on their procedural due process challenge, Plaintiffs must identify a liberty interest that is burdened. Putting these two concepts together, then, Plaintiffs must show that the identifiable liberty interest is burdened in all of the law's applications.

For scores of Georgia's mail-in voters, however, the Statutes *are* valid. The District Court determined that Plaintiffs have a "right to apply for and vote via absentee ballot." *Ga. Muslim Voter Project*, slip op. at 22 (N.D. Ga. Oct. 24, 2018) (order granting temporary restraining order). But countless mail-in voters' signatures are determined by election officials to match. These voters

successfully apply for mail-in ballots and, when they return those ballots, successfully have their votes counted. For these voters, then, the right to apply for and vote via mail-in ballot is not burdened at all. For this reason alone, Plaintiffs' facial challenge to the Statutes fails as a matter of law.

III.

Even construed as an as-applied challenge, Plaintiffs' procedural due process claim still fails.

The state may not "deprive any person of life, liberty, or property[] without due process of law." U.S. Const. amend. XIV, § 1. A violation of procedural due process requires "(1) a deprivation of a constitutionally[] protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process." *Hansen*, 803 F.3d at 1320 (alteration omitted) (quoting *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)). My focus is on the third element alone—the process due.

The Supreme Court in *Parratt v. Taylor* told us what process is due in cases when, as here, we face the "impracticality of providing any meaningful predeprivation process," given a "random and unauthorized act by a state employee." *Parratt*, 451 U.S. at 539, 541, 101 S. Ct. at 1915, 1916. In such situations, "postdeprivation tort remedies are all the process that is due, simply

because they are the only remedies the State could be expected to provide."[25] *Zinermon*, 494 U.S. at 128, 110 S. Ct. at 985. The only relevant question once we determine that *Parratt* applies is whether the state's post-deprivation remedies are constitutionally adequate. *Cf. McKinney*, 20 F.3d at 1562 (observing that "procedural due process violations do not become complete 'unless and until the state refuses to provide due process'" (quoting *Zinermon*, 494 U.S. at 123, 110 S. Ct. at 983)).

I explain below that this case is a textbook application of *Parratt* and that Georgia provides a constitutionally adequate remedy. I also explain that the remedy in state court more effectively and efficiently resolves Plaintiffs' grievance than does the District Court's solution.

A.

This case falls squarely within *Parratt* because it would be impracticable for Georgia to provide additional pre-deprivation procedures. *Cf. Fetner v. City of Roanoke*, 813 F.2d 1183, 1185–86 (11th Cir. 1987) ("The touchstone in *Parratt* was the impracticability of holding a hearing prior to the claimed deprivation."

[25] The Court explained that "*Parratt* is not an exception to the *Mathews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue." *Zinermon v. Burch*, 494 U.S. 113, 129, 110 S. Ct. 975, 985 (1990).

(citing *Parratt*, 451 U.S. at 539–41, 101 S. Ct. at 1914–16)).

To state the obvious, the Statutes do not authorize election officials to deprive eligible voters of the right to apply for and to vote by mail-in ballot. Indeed, the very fact that the Secretary would remove election officials shown to perform erroneous signature reviews reveals that election officials "lack[] the state-clothed authority to deprive persons of constitutionally protected interests." *See Burch v. Apalachee Cmty. Mental Health Servs., Inc.*, 840 F.2d 797, 801 n.9 (11th Cir. 1988) (en banc) (emphasis omitted), *aff'd sub nom. Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990); *see also Dykes v. Hosemann*, 776 F.2d 942, 952 (11th Cir. 1985) (Tjoflat, J., concurring in part and dissenting in part) (reasoning that state officials lack such authority when the state subjects them to consequences for wrongdoing).

I have no doubt, of course, that election officials make erroneous determinations. But the relevant question under *Parratt* is whether it is *practicable* for the state to do more. The volume of signatures at issue in this case provides a ready answer to that question. As of November 2, 2018, 184,925 mail-in ballots had been returned statewide.[26] And another 85,398 were still

[26] Ga. Sec'y of State, *Election Update* 1 (Nov. 2, 2018), http://sos.ga.gov/admin/uploads/ABSENTEE_TURNOUT_REPORT_11-2-181.pdf.

outstanding.[27] That's 270,323 ballots. Recall, too, that a mail-in ballot does not issue before an application, which also requires a signature review. Ga. Code Ann. § 21-2-381. In short, Georgia's election officials were in for 540,646 signature reviews this past election cycle. It is simply not practicable to provide pre-deprivation notice and an opportunity to be heard when so many signature reviews are at issue.

B.

Plaintiffs have a remedy; it just isn't a federal one.

Georgia superior courts, the state's courts of general jurisdiction, provide Plaintiffs a forum in which to sue the election officials. *See* Ga. Const. art. VI, § 4, ¶ 1 ("The superior courts shall have jurisdiction in all cases, except as otherwise provided in this Constitution."). Plaintiffs, moreover, have a procedural due process claim under the state constitution, which prohibits the deprivation of "life, liberty, or property except by due process of law," *id.* art. I, § 1, para. 1, and which confers a private right of action, *see, e.g.*, *Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*, 638 S.E.2d 307, 314 (Ga. 2006). In short, I have no doubt that a suit in state court would make Plaintiffs whole—in other words, that they would be able to vote by mail-in ballot.[28]

[27] Ga. Sec'y of State, *supra* note 26, at 1.

[28] To entertain Plaintiffs' procedural due process claim, the District Court must have

When, as here, it is impracticable for a state like Georgia to provide pre-deprivation process for erroneous signature reviews because the state must conduct over half a million reviews in short order, a post-deprivation suit against election officials in state court is a constitutionally sufficient remedy.

C.

What the majority fails to realize is not just that a remedy in Georgia superior court is sufficient but that it is also superior.

The District Court orders election officials to craft ad hoc administrative tribunals and vests Georgia's superior courts with jurisdiction to review the tribunals' decisions. The Court's remedy requires Plaintiffs to leap through four hoops.

- A voter must wait to see whether he or she receives rejection notice.
- The voter must then respond to the notice. (The TRO does not tell us the means of responding or the timeframe for doing so.)
- If the voter challenges the election official's signature determination, he or she attends a hearing held by an unknown adjudicator. (The TRO does not tell us who.)

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believed that a Georgia court, hearing Plaintiffs' claim that they were unlawfully denied the right to vote, would do *nothing* to redress Plaintiffs' harm. *Cf. McKinney*, 20 F.3d at 1563 ("[U]nder *Parratt*, only the state's refusal to provide a means to correct any error . . . would engender a procedural due process violation."). I find that belief to be utterly implausible.

- If the adjudicator upholds the official's signature determination, the voter can appeal the decision to the superior court.

That's a fatiguing process, which is made all the more frustrating by the fact that Plaintiffs might still end up in superior court. I would send Plaintiffs directly to superior court—the neutral decisionmaker that wields the constitutional power to remedy their deprivations in the first instance.

IV.

Set all of this aside, now, and assume that Georgia's mail-in voting scheme does violate procedural due process and thus that the District Court was right to award some remedy. The Court still violated two bedrock constitutional principles when it crafted its injunction. First, in re-writing Georgia's election code, the Court violated the doctrine of federalism, which prevents federal courts from taking action that, if done by a state's own courts, would breach separation of powers. And second, it violated equal protection because in re-writing Georgia's election code, it created a system whereby the same mail-in application or ballot might be counted in one Georgia county but not in another. The Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000) (per curiam), forecloses any remedy that, like the District Court's sweeping injunction, lacks "specific standards to ensure its equal application." *Id.* at 106, 121 S. Ct. at 530. I explain each of the District Court's errors in turn.

A.

The District Court wrongfully took its finding of a procedural due process violation as an invitation to rewrite Georgia's election code out of whole cloth. I illustrate how the Court inserted a new provision into the Code and then detail why, under the doctrine of federalism, that insertion amounts to a constitutional violation.

1.

The District Court's injunction creates a new statutory provision in Georgia's election code. In relevant part, it requires county officials to provide pre-rejection notice, to set up ad hoc administrative tribunals to adjudicate signature disputes, and to allow an attorney to stand in for voters at those proceedings. It also vests Georgia's superior courts with appellate jurisdiction over the tribunals:

> The county elections official shall . . . provide pre-rejection notice and an opportunity to resolve the alleged signature discrepancy to the absentee voter. This process shall be done in good faith and is limited to confirming the identity of the absentee voter consistent with existing voter identification laws. The elections official is required to send rejection notice via first-class mail and also electronic means, as available or as otherwise required by law. This process shall include allowing the absentee voter to send or rely upon a duly authorized attorney or attorney in fact to present proper identification. . . . The absentee voter shall have the right to appeal any absentee ballot rejection following the outcome of the aforementioned process, as

> designated in [Ga. Code Ann.] § 21-2-229(e).[29]

Ga. Muslim Voter Project, slip op. at 2 (N.D. Ga. Oct. 25, 2018) (temporary restraining order) (citations omitted). For mail-in ballot applications with signatures that are determined not to match, the injunction requires election officials to provide voters with provisional ballots:

> [F]or all ballot applications where a signature mismatch is perceived, the county elections official shall . . . provide a provisional absentee ballot to the absentee voter along with information as to the process that will be followed in reviewing the provisional ballot. . . . Once any provisional ballot is received, the procedure outlined in section 1 above is to be followed.

Id. at 3.

The egregiousness of the District Court's overreaching is apparent once the injunction is examined alongside Georgia's election code. The code prescribes three ways in which a voter's qualifications or right to vote can be challenged. *See* Ga. Code Ann. §§ 21-2-228 (challenges to voter qualifications by boards of registrars), -229 (challenges to voter qualifications by other voters), -230 (challenges to the right to vote by other voters).[30] For those mechanisms,

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[29] The injunction presupposes a system of administrative tribunals because without an administrative hearing and a record thereof, the superior courts would be reviewing an administrative decision without any record before it.

[30] The difference between § 21-2-229 and § 21-2-230 seems to be that a voter can be validly registered to vote yet not have the right to vote. For example, a person that meets all qualifications but for age may register to vote if that person would reach the legal age within six months of registration. Ga. Code Ann. § 21-2-216(c). That said, the person cannot actually

Georgia's legislature outlined intricate procedures for administrative adjudication followed by judicial review in the superior courts. These procedures, each of which I set out fully in an appendix, *see* Appendix B, outline every possible detail of the adjudicatory process, including filing of a complaint, service of process, standards for allowing a complaint to go forward, burdens of proof, allowances for discovery (including subpoenas), allocations of costs, and timeframes and procedures for appeal.

Sections 21-2-228, -229, and -230 collectively reveal two important facts: first, the District Court contravened Georgia's legislature's will when it wrote into the election code its own provision and relatedly, the legislature deliberately omitted the Court's provision because it would be impossible to implement.

First, the level of detail that §§ 21-2-228, -229, and -230 provide prevent the District Court from hiding behind any assertion that it was merely effectuating the legislature's intent; the legislature knew how to write the Court's remedial scheme for itself had it wanted to. *Cf. Expressio Unius Est Exclusio Alterius*, Black's Law Dictionary (10th ed. 2014) ("[T]o express or include one thing implies the exclusion of the other . . . ."). Said differently, the purposeful inclusion of the procedures in §§ 21-2-228, -229, and -230 evidences the legislature's purposeful

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vote until he or she reaches the legal age. *Id.*

exclusion of them from the Statutes—sections within the *same code title*.[31]

Second, the District Court's remedy is unachievable, something that Georgia's legislature was well aware of when it declined to write the Court's remedial scheme into the Statutes. The challenges created by §§ 21-2-228 and -229 can be conducted at any time because they concern counties' and municipalities' lists of voters, lists that are perpetually in existence. Indeed, § 21-2-228 charges counties and municipalities with examining voters' qualifications "from time to time." Ga. Code Ann. § 21-2-228(a). When examinations can occur throughout the year, administrative adjudications and judicial review are feasible.[32] Here, by contrast, all signature examinations would be forced to occur in a span of less than two months.[33]

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[31] In evaluating the legislature's intent, we look to the election code as a whole. *See Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 734 F.3d 1297, 1302 (11th Cir. 2013) ("[T]he 'fundamental canon of statutory construction is that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme' and that a court should 'fit, if possible, all parts into a harmonious whole.'" (alterations omitted) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33, 120 S. Ct. 1291, 1301 (2000))).

[32] Examinations under § 21-2-229, which authorizes one elector to challenge another elector's qualifications, can also occur throughout the year. Though examinations under § 21-2-230, which authorizes one elector to challenger another elector's right to vote, occur once voting has begun, the volume of challenges under that section pales in comparison to the volume of signature reviews at issue here.

[33] The boards of registrars cannot issue mail-in ballots more than 49 days before a general election, Ga. Code Ann. § 21-2-384(a)(2), and the superintendents of elections must transmit consolidated returns to the secretary of state no later than 5:00 P.M. on the Monday following the election, *id.* § 21-2-493(k).

2.

The Georgia Supreme Court—or for that matter, any Georgia court—could not rewrite the Statutes as the District Court has done here. The Georgia Constitution requires strict separation of powers. *See* Ga. Const. art. I, § 2, para. 3 ("The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided."). That paragraph, at bare minimum, precludes judicial rewriting of statutes. *See Robinson v. Boyd*, 701 S.E.2d 165, 168 (Ga. 2010) ("Under our system of separation of powers this Court does not have the authority to rewrite statutes." (alteration omitted) (quoting *State v. Fielden*, 629 S.E.2d 252 (Ga. 2006))); *see also Lumpkin Cty. v. Ga. Insurers Insolvency Pool*, 734 S.E.2d 880, 882 (Ga. 2012) ("[A] court of law is not authorized to rewrite the statute by inserting additional language" (quoting *Abdulkadir v. State*, 610 S.E.2d 50, 53 (Ga. 2005))).

Our Constitution, which enshrines federalism, requires us, as a federal court, to respect Georgia's choice on its own governmental structure.[34] As a sister

[34] The reason is simple: separation of powers within a state implements federalism's purpose in our constitutional structure. Whereas federal separation of powers secures liberty by diffusing power among coequal branches of the same sovereign, federalism further secures liberty by diffusing power among different sovereigns. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 222, 131 S. Ct. 2355, 2364 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."); *see also Metro. Wash. Airports Auth. v. Citizens for Abatement of*

circuit has said, "Even the narrowest notion of federalism requires us to recognize a state's interest in preserving the separation of powers within its own government as a compelling interest." *White*, 416 F.3d at 773. The court explained that a "state's choice of how to organize its government is 'a decision of the most fundamental sort for a sovereign entity.'" *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 2400 (1991)).

So what was the District Court to do if it found, contrary to my conclusion, that Georgia's mail-in voting scheme violated procedural due process?

The power that the Supremacy Clause, *see* U.S. Const. art. VI, para. 2, grants federal courts that undertake judicial review of state statutes is limited to refusing to apply state rules of decision that they believe are unconstitutional. *See United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir. 2000) ("The remedy if the facial challenge is successful is the striking down of the regulation . . . ." (citing *Stromberg v. California*, 283 U.S. 359, 369–70, 51 S. Ct. 532, 536 (1931))); *see also* Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 154 (1994) ("American courts have no general power of control over legislatures. Their

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Aircraft Noise, Inc., 501 U.S. 252, 285, 111 S. Ct. 2298, 2316 (1991) (noting that federalism "protects the rights of the people no less than separation-of-powers principles" (citing The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961))). If states in turn choose to embrace separation of powers, liberty is only further protected. *Cf. Republican Party of Minn. v. White*, 416 F.3d 738, 773 (8th Cir. 2005) ("Separation of powers is a concept basic to the states' constitutions as well as the federal Constitution.").

power, *tout simple*, is to treat as null an otherwise relevant statute which they believe to be beyond the powers of the legislature . . . ."). That power does not extend—as the District Court clearly believed—to prescribing *new* rules of decision on the state's behalf. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397, 108 S. Ct. 636, 645 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements.").[35]

The District Court could impose no remedy other than full-on injunction of Georgia's mail-in voting scheme in all of its applications. The Court, in other words, can offer Georgia a choice: forego mail-in voting altogether—a privilege that the Constitution does not require states to confer—or rework the mail-in voting scheme so that it accords with procedural due process. As a separate sovereign, Georgia is entitled to make that choice without the District Court's interference. *Cf. Stanton v. Stanton*, 421 U.S. 7, 18, 95 S. Ct. 1373, 1379 (1975) (holding that the means of remedying a constitutionally defective statute "plainly is an issue of state law to be resolved by the [state] courts on remand"); *see also* Eric

[35] Remarkably, courts cannot rewrite statutes even by *striking down* language, rather than by adding it. Take severability clauses—which this statute noticeably lacks. In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *as revised* (June 27, 2016), for example, the state defendant argued for a "narrowly tailored judicial remedy," not facial invalidation, by pointing to a severability clause in Texas' abortion statute. *Id.* at 2318−19. But the Supreme Court responded that a "severability clause is not grounds for a court to 'devise a judicial remedy that entails quintessentially legislative work.'" *Id.* at 2319 (alterations omitted) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329, 126 S. Ct. 961, 968 (2006)).

S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. Rev. 322, 350 (2016) ("In most cases, courts do not permit themselves to add language. They cannot, for instance, add new procedures to a statute to satisfy due process requirements . . . .").

Here's the long and short of it: the District Court violated the Constitution's command to respect Georgia's decision to separate its governmental functions. Because Georgia has precluded its state's courts from rewriting its legislative enactments, our Constitution prevents the District Court from doing the same.[36]

B.

The District Court not only rewrote Georgia's election code, but it did so in

[36] Ironically, the District Court could not do to a statute passed by *Congress* what it today does to one passed by Georgia's legislature. *See Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) ("[T]he role of the judicial branch is to apply statutory language, not to rewrite it." (citing *Badaracco v. Comm'r*, 464 U.S. 386, 398, 104 S. Ct. 756, 764 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); then citing *Blount v. Rizzi*, 400 U.S. 410, 419, 91 S. Ct. 423, 429 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute."); then citing *Korman v. HBC Florida, Inc.*, 182 F.3d 1291, 1296 (11th Cir. 1999) ("It is not the business of courts to rewrite statutes."))); *Califano v. Westcott*, 443 U.S. 76, 95, 99 S. Ct. 2655, 2666 (1979) (Powell, J., concurring in part and dissenting in part) (reasoning that when a statute is held unconstitutional, "it is the duty and function of the Legislative Branch to review its [statute] in light of [the court's] decision and make such changes therein as it deems appropriate"); *see also* Fish, *supra*, at 339 ("[I]f judges could add language to statutes in ordinary cases, then the judiciary would effectively become a second legislature.").

The District Court's behavior here is in fact worse. Whereas rewriting congressional statutes implicates only the separation of powers between Congress and the Judiciary—two coequal branches within the same sovereign—rewriting state statutes intrudes on the authority of a distinct sovereign. *See Welsh v. United States*, 398 U.S. 333, 367 n.15, 90 S. Ct. 1792, 1811 n.15 (1970) (Harlan, J., concurring in the result) (noting the "limited discretion [the] Court enjoys to extend a policy for the State even as a constitutional remedy" (citations omitted)).

a completely standardless manner—in plain violation of what the Equal Protection Clause requires.

The District Court requires election officials to "provide pre-rejection notice and an opportunity to resolve the alleged signature discrepancy to the absentee voter." *Ga. Muslim Voter Project*, slip op. at 2 (N.D. Ga. Oct. 25, 2018) (temporary restraining order). It then leaves election officials to fill in the details of that process, requiring only that they do so "in good faith." *Id.* Though "good faith" may be sufficient for an agreement between two friends, it is constitutionally defective guidance to protect the fundamental right to vote.

As the Supreme Court explained in *Bush v. Gore*, "When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." 531 U.S. at 109, 121 S. Ct. at 532. There, various of Florida's 67 counties employed a system whereby voters selected a candidate by punching through the ballot, thus creating a hole next to the candidate's name. *Id.* at 105, 121 S. Ct. at 530. But many voters failed to fully punch the ballot, so the ballots contained partial perforations or, in some cases, only indentations. *Id.* The Florida Supreme Court ordered each of Florida's counties to divine the "intent of the voter." *Id.* The Court explained that the Florida Supreme Court's command was "unobjectionable as an abstract proposition and a starting principle." *Id.* at 106, 121 S. Ct. at 530.

The problem, however, "inhere[d] in the absence of specific standards to ensure its equal application." *Id.* The Court discussed, for example, how the voter's intent varies based on whether, for a ballot to be legally counted, a chad must be completely punched, whether it must only be dimpled, or whether it must only be punched enough so that "any light could be seen." *Id.* at 106−07, 121 S. Ct. at 531.

The District Court's injunction is similarly standardless because it leaves numerous questions unanswered:

- Does the administrative tribunal owe any deference to the election official's decision? If so, under what standard is the decision reviewed?
- Is evidence admissible? If so, what evidence?
- How is that evidence obtained, i.e., what discovery is available?
- Who bears the burden of proof? What burden does that party face?

Because each county can answer these questions differently, Equal Protection rears its head. The irony, of course, is that Georgia's legislature avoided these *Bush v. Gore* problems when it crafted §§ 21-2-228, -229, and -230, each of which answers the questions that the Court here left for "good faith" implementation.

In short, the District Court could not, in crafting a remedy, create a system of uttlerly standardless review. When the processes for determining whether two signatures match vary from county to county, the court has provided inadequate

protection for the fundamental right to vote.

* * *

For these reasons, I respectfully dissent.

Appendix A: District Court's Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RHONDA J. MARTIN, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
BRIAN KEMP, *et al.*,	:	CIVIL ACTION NO.
	:	1:18-CV-4776-LMM
	:	
Defendants.	:	

GEORGIA MUSLIM VOTER PROJECT, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
BRIAN KEMP, *et al.*,	:	CIVIL ACTION NO.
	:	1:18-CV-4789-LMM
	:	
Defendants.	:	
	:	
	:	
	:	

TEMPORARY RESTRAINING ORDER

Based upon the Court's prior findings, see Martin Dkt. No. [23]; GMVP Dkt. No. [28], the Secretary of State's Office shall issue the following instructions to all county boards of registrars, boards of elections, election superintendents, and absentee clerks:

1) All county elections officials responsible for processing absentee ballots shall not reject any absentee ballots due to an alleged signature mismatch. Instead, for all ballots where a signature mismatch is perceived, the county elections official shall treat this absentee ballot as a provisional ballot, which shall be held separate and apart from the other absentee ballots. See O.C.G.A. § 21-2-419; Ga. Comp. R. & Regs. 183-1-14-.03(2). The county elections official shall then provide pre-rejection notice and an opportunity to resolve the alleged signature discrepancy to the absentee voter. This process shall be done in good faith and is limited to confirming the identity of the absentee voter consistent with existing voter identification laws. See O.C.G.A. §§ 21-2-417, -417.1. The elections official is required to send rejection notice via first-class mail and also electronic means, as available or as otherwise required by law. See O.C.G.A. § 21-2-384(a)(2). This process shall include allowing the absentee voter to send or rely upon a duly authorized attorney or attorney in fact to present proper identification. This process shall be done prior to the certification of the consolidated returns of the election by the election superintendent. See

O.C.G.A. § 21-2-230(g). The absentee voter shall have the right to appeal any absentee ballot rejection following the outcome of the aforementioned process, as designated in O.C.G.A. § 21-2-229(e). Any aforementioned appeals that are not resolved as of 5 p.m. on the day of the certification deadline shall not delay certification and shall not require recertification of the election results unless those votes would change the outcome of the election. See O.C.G.A. § 21-2-493(l).

2) All county elections officials responsible for processing absentee ballot applications shall not reject any absentee ballot application due to an alleged signature mismatch. Instead, for all ballot applications where a signature mismatch is perceived, the county elections official shall, in addition to the procedure specified in O.C.G.A. § 21-2-381(b), provide a provisional absentee ballot to the absentee voter along with information as to the process that will be followed in reviewing the provisional ballot. The outer envelope of the absentee ballot provided shall be marked provisional. Once any provisional ballot is received, the procedure outlined in section 1 above is to be followed.

3) This injunction applies to all absentee ballot applications and absentee ballots rejected solely on the basis of signature mismatches submitted in this current election. This injunction does not apply to voters who have already cast an in-person vote.

IT IS SO ORDERED this 25th day of October, 2018.

_____

Leigh Martin May
United States District Judge

Appendix B: Compiled Sections of Georgia's Election Code

Section 21-2-228

Section 21-2-228 requires the state's counties and municipalities to periodically examine their electors' qualifications. The board of registrars, upon questioning the right of any existing elector to remain on the list of electors, "shall give such person at least three days' written notice of the date, time, and place of a hearing." *Id.* § 21-2-228(d). The board must send notice by first-class mail or by personal service by various law-enforcement officers. *Id.* If a majority of the registrars determines that the elector lacks the necessary qualifications, the elector is removed from the list of electors and must be sent notice in the same manner described above. *Id.* §§ 21-2-228(e), -228(b). An aggrieved elector "shall have a right of appeal." *Id.* § 21-2-228(f). The elector exercises that right by "filing a petition with the clerk of the superior court within ten days after the date of the decision of the registrars." *Id.* The board must receive a copy of the petition. *Id.* The board's decision "shall stand" unless it is reversed by the court. *Id.*

The board has broad investigatory powers. It may "require the production of books, papers, and other material" and "subpoena witnesses," whom it may swear. *Id.* § 21-2-228(b). All with at least three days' notice. *Id.* As to the witnesses, all summonses, notices, and subpoenas issued by the board are required to be served by designated law-enforcement officers, who receive specified

compensation for these services. *Id.* §21-2-228(c). The witnesses themselves "shall be allowed and paid the same mileage and fee as allowed and paid witnesses in civil actions in the superior court." *Id.* The failure of a subpoenaed witness to attend or testify "shall be reported immediately by the registrars to the appropriate superior court." *Id.* The court "shall order such witness to attend and testify," and the witness, upon refusal, "shall be dealt with as for contempt." *Id.*

Section 21-2-229

Section 21-2-229 allows one elector to challenge the qualifications of a person "applying to register to vote" or "whose name appears on the list of electors," so long as the person is in the same county or municipality. *Id.* § 21-2-229(a). The challenge "shall be in writing and shall specify distinctly the grounds." *Id.* Upon receiving a challenge, the board of registrars "shall set a hearing," notice of the date, time, and place of which "shall be served" upon the challenger and the challenged party. *Id.* § 21-2-229(b). The challenged party "shall receive at least three days' notice" in the manner provided for by § 21-2-228. *Id.* At the hearing, the burden of proof "shall be on the elector making the challenge." *Id.* § 21-2-229(c). After reaching a decision, the registrars "shall notify the parties of their decision." *Id.* § 21-2-229(d). If the challenge is successful, the "application for registration shall be rejected or the person's name removed from the list of electors." *Id.* The aggrieved elector "shall be notified"

in the manner provided for by § 21-2-228. *Id.* Both the challenger and the challenged elector "shall have a right of appeal," and the notice requirements for and consequences of appeal match those provided for by § 21-2-228. *Id.* § 21-2-229(e).

Here too, the code confers broad discovery powers. Upon petition by the challenger or the challenged elector, the board "shall have the authority to issue subpoenas for the attendance of witnesses and the production of books, papers, and other material."*Id.* § 21-2-229(c). The requesting party "shall be responsible to serve such subpoenas and, if necessary, to enforce the subpoenas by application to the superior court." *Id.* As is the case under § 21-2-228, the witnesses are compensated. *Id.*

Section 21-2-230

Section 21-2-230 allows one elector to challenge the right of any elector to vote, again so long as the person is in the same county or municipality. *Id.* § 21-2-230(a). The challenge "shall be in writing and specify distinctly the grounds." *Id.* If the challenge is made to a mail-in absentee ballot, it must be lodged before 5:00 p.m. on the day before the election; if it is made to an in-person absentee ballot, or if it is made to any other method of voting, it must be made before the vote is cast. *Id.*

The board "shall immediately consider such challenge and determine

whether probable cause exists." *Id.* § 21-2-230(b). If the board finds probable cause, it "shall notify the poll officers" of the challenged elector's precinct or absentee ballot precinct and "if practical, notify the challenged elector and afford such elector an opportunity to answer." *Id.*

What happens thereafter depends on whether the challenged elector casts a ballot and on the grounds for the challenge.

- If the challenged elector seeks to cast a vote at the polls, and if it is practical to conduct a hearing before the close of polls, the board "shall conduct such hearing and determine the merits of the challenge." *Id.* § 21-2-230(h). If the board sustains the challenge, the elector "shall not be permitted to vote," and if the grounds for the challenge are ineligibility to remain on the list of electors, the elector's name "shall be removed from the list." *Id.* If the board denies the challenge, the elector "shall be permitted to vote." *Id.* Even if the polls have closed, the elector may still vote so long as he or she "proceeds to vote immediately after the decision of the registrars." *Id.*
- If the challenged elector seeks to cast a vote at the polls, but if it is impracticable to conduct a hearing before the close of polls or if the board at any time determines that it could not render a decision within a "reasonable time," the elector "shall be permitted to vote by casting a

challenged ballot on the same type of ballot that is used . . . for provisional ballots." *Id.* § 21-2-230(i). Here too, the elector may still vote even if the polls have closed, so long as he or she "proceeds to vote immediately after such determination of the registrars." *Id.* If the challenge is based on the eligibility of the elector to remain on the list of electors, the board "shall proceed to finish the hearing prior to the certification of the consolidated returns of the election by the election superintendent." *Id.* If the challenge is based on other grounds, the board does not need to take further action. *Id.* Both the challenger and the challenged elector may appeal the board's decision in the same manner as is set out in § 21-2-229(e). *Id.*

- If the challenged elector casts an absentee ballot, and if the challenge concerns the elector's eligibility to remain on the list of electors, the board "shall proceed to conduct a hearing on the challenge on an expedited basis prior to the certification of the consolidated returns of the election." *Id.* § 21-2-230(g). The election superintendent "shall not certify such consolidated returns until such hearing is complete and the registrars have rendered their decision on the challenge." *Id.* If the board sustains the challenge, the challenged elector "shall be removed from the list of electors," and the ballot "shall be rejected and not

counted." *Id.* Both the challenger and the challenged elector may appeal the board's decision in the same manner as is set out in § 21-2-229(e). *Id.*

- If the challenged elector casts an absentee ballot, but if it is impracticable to hold a hearing prior the close of polls, and if the challenge is not based on the elector's qualifications to remain on the list of electors, the ballot "shall be treated as a challenged ballot" as provided for by § 21-2-386(e). *Id.* § 21-2-230(e).
- If the challenged elector does not vote, absentee or otherwise, and if the challenge is based on the elector's qualifications to remain on the list of electors, the board "shall proceed to hear the challenge" pursuant to the procedures of § 21-2-229. *Id.* § 21-2-230(f).
- If the challenged elector does not vote, absentee or otherwise, and if the challenge is not based on the elector's qualifications to remain on the list of electors, the board does not need to take further action. *Id.* § 21-2-230(d).

CARDOZO LAW REVIEW
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CHANGING THE SYSTEM WITHOUT CHANGING THE SYSTEM: HOW THE NATIONAL POPULAR VOTE INTERSTATE COMPACT WOULD LEAVE NON-COMPACTING STATES WITHOUT A LEG TO STAND ON

Jillian Robbins[†]

"[Y]ou win some, you lose some. And then there's that little-known third category."[1]

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† Articles Editor, *Cardozo Law Review* Vol. 38. J.D. Candidate, Benjamin N. Cardozo School of Law, 2017; B.A., University of Michigan, 2014. I would like to thank Professor Kate Shaw for her guidance and expertise in helping me write this Note. I also would like to thank all of my friends and family for their constant support during the entire Note-writing process.

1 Al Gore, Former Vice President, Address at the Democratic National Convention (July 26, 2004) (referring to when he won the national popular vote but lost the presidency in the infamous 2000 presidential election).

INTRODUCTION

It is our duty and our privilege as American citizens to cast our vote for the next president of the United States.[2] But voters who live in populous but solid blue and red states feel as if their votes do not count; voters who live in less populated swing states get all of the attention from presidential candidates.[3] Every four years, with every presidential election, we are familiarized with this system the Founding Fathers put in place in 1787: the Electoral College.[4] A presidential candidate has won the national popular vote but not the Electoral College five times before.[5] It is one of the most criticized provisions of the Constitution, yet, even though there have been many challenges to it, there has been

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2 *See* U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI.

3 *See infra* Section I.B.

4 *See generally* William C. Kimberling, *The Electoral College*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, http://uselectionatlas.org/INFORMATION/INFORMATION/electcollege_history.php (last visited Sept. 8, 2015).

5 Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 218 (2012); *see* D'Angelo Gore, *Presidents Winning Without Popular Vote*, FACTCHECK.ORG, http://www.factcheck.org/2008/03/presidents-winning-without-popular-vote (last updated Dec. 23, 2016); *infra* Section I.A.

no success in abolishing it.[6] The last time Congress came close to abolishing the Electoral College was in the late 1960s, following the 1968 Presidential Election between Richard Nixon and Hubert Humphrey.[7] But what if there was a way to change the system, without exactly changing the system?

The most recent attempt to change the Electoral College system is through the National Popular Vote Interstate Compact (NPVIC).[8] Eleven jurisdictions[9] have passed the NPVIC, and as a result, have agreed to appoint their electors to the presidential candidate that wins the national popular vote.[10] Proponents of the NPVIC believe the states are exercising their constitutional rights under the Electoral College provision,[11] but opponents of the NPVIC claim that it is unconstitutional under the Compact Clause, since there is no congressional approval.[12]

This Note will discuss the constitutional and legal implications of the NPVIC, and will explore the strengths and weaknesses of the arguments both for and against its implementation. It will argue that the NPVIC is constitutional, despite many opponents' views that it is not, because it does not encroach on federal supremacy or threaten the political relevance or rights of non-compacting states.[13] This Note

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6 Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011).

7 Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 217 (2004).

8 *See generally* NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com (last visited Sept. 7, 2015).

9 The eleven jurisdictions that have passed the NPVIC are: California, District of Columbia, Hawaii, Illinois, Massachusetts, Maryland, New Jersey, New York, Rhode Island, Vermont, and Washington. *Status of National Popular Vote Bill in Each State*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/state-status (last visited Apr. 5, 2017). Together, these states have 165 electoral votes—61% of the 270 electoral votes needed to win the presidency, and the 270 votes needed to enact the NPVIC. *See id*.

10 *See Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/written-explanation (last visited Apr. 5, 2017).

11 "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." U.S. CONST. art II, § 1, cl. 2.

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

13 There are many political implications of the NPVIC, but this Note will not address those. Additionally, this Note will not argue that the Electoral College is unconstitutional under the Equal Protection Clause, as this principle was shot down by the Supreme Court in the wake of various actions following the infamous 2000 presidential election. The Court has stated that the "one person, one vote" doctrine is embodied in the Equal Protection Clause. *See* Rice v. Cayetano, 528 U.S. 495 (2000); Gray v. Sanders, 372 U.S. 368 (1963). However, the Eastern District of New York declined to extend this ruling to the Electoral College when a New Yorker claimed his vote was diluted because of the Electoral College system. *See* New v. Ashcroft, 293 F.Supp.2d 256 (E.D.N.Y. 2003). The Court explained that "'[n]either the Constitution nor the 'one person, one vote' doctrine vests a right in the citizens of this country to vote for Presidential

proposes that if a lawsuit between the states resulted from the enactment of the NPVIC, even if the merits of the claim are constitutional, the United States Supreme Court should dismiss these cases because the states bringing the suit would not have standing.[14] Finally, this Note concludes that since congressional approval is not required, and if a non-compacting state were to bring suit once the NPVIC goes into effect it would not have Article III or prudential standing, there is virtually nothing stopping the NPVIC's enactment in a state.

Part I describes the history of the Electoral College, how it came to be, and its implications since its enactment—including the times when it has worked, the times when it has not, and the differences between the state of the nation then and today.[15] It then argues that the Electoral College is a system no longer suitable for our government today, which is why the NPVIC is created by a more undivided and cooperative set of states than the states that created the Electoral College. It then describes the specific mechanisms of the NPVIC.[16]

Part II explains the constitutional debate that the NPVIC faces—that it may be consistent with Article II, Section 1 (the Electoral College), but may be unconstitutional under Article 1, Section 10 (the Compact Clause).[17] It then concludes that the NPVIC is constitutional under the Compact Clause and consistent with the Electoral College, since Article II, Section 1 gives state legislatures plenary power to appoint their electors in any manner they see fit, and that it does not require congressional consent under Article 1, Section 10.[18] Part II further analyzes why the NPVIC is constitutional—mainly because it does not encroach on federal supremacy, nor does it threaten the political power and rights of non-compacting sister states.[19] Part II will also respond to arguments that the NPVIC is unconstitutional under the Compact Clause and it will debunk common myths about the NPVIC.[20]

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electors . . . or empowers the courts to overrule constitutionally mandated procedure in the event that the vote of the electors is contrary to the popular vote.'" *Id*. at 259 (citing Trinsey v. United States, No. CIV.A. 00-5700, 2000 WL 1871697, at *2 (E.D. Pa. Dec. 21, 2000)).

14 Courts in the United States are not permitted to issue advisory opinions, meaning there must be a dispute at issue, with specific parties related to that dispute in front of the court. *See infra* notes 220–21 and accompanying text. "The judicial Power shall extend to all Cases . . . [and] Controversies . . . ." U.S. CONST. art. III, § 2, cl. 1. There are two types of standing the plaintiff must have in order to proceed in a case against the defendant: Article III standing and prudential standing. *See infra* notes 216, 220. This Note explores both kinds of standing and concludes that the non-compacting sister state would have neither form of standing, and thus the case would be dismissed.

15 *See infra* Part I.

16 *See infra* Part I.

17 *See infra* Part II.

18 *See infra* Sections II.A and II.B.

19 *See infra* Section II.C.

20 *See infra* Section II.C.

Part III proposes that if enough states were to pass the NPVIC[21] and a non-compacting sister state and/or its citizens tried to bring suit in federal court, they would not have standing to do so because they would be asserting generalized grievances as opposed to a specific, direct, injury.[22] It will explain how courts would address the issues, how they would analyze and decide the various standing issues, and what the outcome would be based on a hypothetical case.[23]

Ultimately, this Note argues that the National Popular Vote Interstate Compact is constitutional due to the reasons stated above.[24] It will show that the NPVIC does not violate the Compact Clause (thus it does not need congressional consent), it is consistent with Article II Section 1 of the Constitution, and a non-compacting sister state would not have standing to bring suit to challenge it.[25] Thus, if enough states pass the NPVIC to bring it into effect, there would be virtually nothing stopping its enactment.[26]

I. A FRAGMENTED, NEW NATION CREATED THE ELECTORAL COLLEGE: HOW THE SYSTEM IS NOT SUITABLE TODAY

When the Constitutional Convention (Convention) met in 1787, the Founding Fathers had a peculiar situation to grapple with: how to elect a president of a newly formed, democratic, but not yet unified nation. The state of the nation those hundreds of years ago was, as one can imagine, vastly different than the nation we know today. The nation, then fresh out of the Revolutionary War, only had thirteen states—both large and small—that were not unified by any common ground[27], and that were apprehensive about the concept of a federal government.[28] Additionally, there were four million people spread out with barely any form of communication or transportation, and thus had no concrete way to keep

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21 This is a scenario that is not unrealistic, since the number of states that have passed the NPVIC have 61% of the total 270 electoral votes needed to elect the president, and the number of electoral votes needed to enact the NPVIC. *See generally* NATIONAL POPULAR VOTE, *supra* note 8. Additionally, while not expressly the National Popular Vote Interstate Compact, national popular vote legislation has been introduced in forty-seven states, which shows that states are seriously considering the idea that the Electoral College should be replaced with the national popular vote. *See generally id*.; Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218 (2008).

22 *See infra* Part III.

23 *See infra* Part III.

24 *See infra* Conclusion.

25 *See infra* Conclusion.

26 *See infra* Conclusion.

27 *See infra* notes 35–37 and accompanying text.

28 *See* Kimberling, *supra* note 4.

them connected.[29] The Constitutional Convention had several options in deciding how to elect the next president;[30] however, in the end, the Framers selected the Electoral College. During this time, political parties did not nearly have the influence that they have today,[31] and there was no way for the Framers to predict just how influential political parties would become, and the effect they would have on the Electoral College.[32]

Much of the debate surrounding the method of electing the president during this time was between larger free states and smaller slave states: the former wanted a national popular vote, but the latter were concerned that their political voice would not be heard and they would run the risk of having to give up their slaves.[33] Thus, the Convention's goal was to appease southerners with slaveholding interests.[34] The South during this time wanted a guarantee that they would still dominate the nation and could continue to possess slaves; with a national popular vote, this would not be the case.[35]

Another reason the Convention rejected the idea of a national popular vote was because there would be little to no way for citizens to gain information about all the candidates and make an educated

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[29] *Id*.

[30] The Constitutional Convention considered having Congress elect the president. However, it was rejected for many reasons, mainly because it would disturb the balance of power between the branches, would lead to too many "hard feelings" on Congress, and could potentially cause corruption. *Id*. Additionally, the Convention considered having state legislatures elect the president, but this was also rejected because a president would be too "beholden" to state legislatures. *Id*.; *see* Matthew J. Festa, Note, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND L. REV. 2099 (2001). Electoral College did not result from an overall vision for the nation by the Framers; it was a product of strenuous debate. *Id*.

[31] *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313–15 (2006).

> The Framers had not anticipated the nature of the democratic competition that would emerge in government and in the electorate. . . . Justice Jackson astutely recognized that the separation of powers no longer works as originally envisioned because interbranch dynamics have changed with the rise of political parties, which . . . ha[s] diminished the incentives of Congress to monitor and check the President. . . . [T]he degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by [a] political party.

Id.

[32] Herbst, *supra* note 5, at 221.

[33] Roberta A. Yard, Comment, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure "One Person, One Vote"*, 42 SANTA CLARA L. REV. 185, 187 (2001).

[34] Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 202 (1994).

[35] *Id*. With the enactment of the 13th Amendment, to think that our current system of electing the President of our country was a result of appeasing slaveholder interests is something that is unimaginable, and something that demonstrates just how outdated the system is.

decision. Thus, they would be inclined to vote for the candidate from their own state, since that was all they knew, or they would be forced to make a completely uninformed decision.[36] James Madison himself said that the people would never be informed enough to be able to choose the executive properly.[37] All of this evidence shows that the Electoral College was implemented in a fragmented nation during a tumultuous time, with little to no communication between voters—all factors that are not applicable today.[38]

All of these issues bear the question: how did the original Electoral College turn into the winner-take-all system we see today? The rising prominence of political parties in the 19th century pushed the states to adopt the winner-take-all system; the last time a majority of states used the district-plan[39] instead of the winner-take-all plan was in 1800.[40] The rise of political parties meant that the Democrats and Republicans were feeling the pressure, both locally and nationally, to ensure that their party was in control—the winner-take-all system was the way to achieve this goal.[41]

Because the Electoral College's foundations are extremely outdated and inapplicable to how society looks today, the United States needs a new system.[42] The next section of this Note will further this analysis by exploring the instances in which the Electoral College has

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[36] Connecticut delegate Roger Sherman said at the time that the "sense of the nation would be better expressed by the legislature, than by the people at large." Ky Fullerton, Comment, *Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College to Go?*, 80 OR. L. REV. 717, 719 (2001); *see also* Herbst, *supra* note 5, at 221.

[37] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 306 (1966).

[38] As of 2013, a reported 116,291,000 households have Internet access. Thom File & Camille Ryan, *Computer and Internet Use in the United States: 2013*, UNITED STATES CENSUS BUREAU (2014), https://www.census.gov/history/pdf/acs-internet2013.pdf. A reported 69% of Americans get their news from their laptop or computer. *How Americans Get Their News*, AM. PRESS INST., (2014), http://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news. This shows how Americans are more connected than ever before and they are capable of receiving news instantly at any time of day.

[39] The district-plan allocated a certain amount of electoral votes to each district within a state, rather than to each state. This made states more fragmented and thus the allocation of electoral votes more fragmented as well. Norman R. Williams, *Why the National Popular Vote Compact is Unconstitutional*, 2012 BYU L. REV. 1523 (2012), Section III.C.

[40] *Id*.

[41] *Id*. The first president of the United States, George Washington, pleaded against political parties in general; fearing the effects they would have on the country. He stated in his farewell address:

> However [political parties] may now and then answer popular ends, they are likely . . . to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.

George Washington, Former President, Farewell Address (Sept. 17, 1796).

[42] *See supra* Part I.

failed us.

A. *The Electoral College Has Failed Us: Historical Considerations*

A presidential candidate has won the national popular vote but not the Electoral College, thus losing the presidency, five times in our nation's history: 1824, 1876, 1888, 2000, and 2016.[43]

In 1824, the Electoral College was deadlocked in the presidential election between Andrew Jackson and John Quincy Adams, so the House of Representatives acted as the tiebreaker vote to determine who the next president would be.[44] Ultimately, Adams prevailed in this election, but only after allegations of corruption that Adams created a secret deal with the House of Representatives in order to secure the presidency, and only after Jackson won 38,000 more votes in the national popular vote.

In 1876, the Democratic candidate, Samuel J. Tilden, won the national popular vote by 200,000 votes, but was one electoral vote short of winning the presidency—Republican candidate Rutherford B. Hayes ended up winning that election.[45] Hayes' supporters devised a plan to secure all the disputed electoral votes, which included promising a federal subsidy for the Texas and Pacific Railway Company to a Southern Congressman; in exchange, the Congressman abstained from the Democratic filibuster against the decision of the Electoral Commission, resulting in Hayes' victory.[46]

In 1888, no fraud was involved, but the Democratic candidate and then-president Grover Cleveland won the national popular vote by about 100,000 votes to Republican counterpart Benjamin Harrison, but Cleveland lost in the Electoral College.[47] Cleveland carried many small

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[43] Herbst, *supra* note 5, at 229. Although only five times may not seem like many, there have been a total of fifty-eight presidential elections—so the Electoral College has failed us five out of fifty-eight times, or about 8%. *See id.*; *see also* Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 721 (2007). At the time of this writing in the Fall of 2015, the 2000 election was the last time a presidential candidate won the Electoral College but not the national popular vote. Since then, the 2016 election can be added to this list. Hillary Clinton beat Donald Trump by almost 2.9 million votes in the national popular vote, but Trump beat Clinton by seventy-four electoral votes. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count.

[44] *See* Christopher Anglim, *A Selective, Annotated Bibliography on the Electoral College: Its Creation, History, and Prospects for Reform*, 85 L. LIBR. J. 297, 307 (1993); Fullerton, *supra* note 36, at 728.

[45] Anglim, *supra* note 44, at 309.

[46] *Id*.

[47] Brandon H. Robb, Comment, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President by National Popular Vote*, 54 LOY. L. REV. 419, 442 (2008).

and mid-sized states by wide margins, but Harrison carried most of the large states by small margins, meaning that even though Harrison did not win the large states by much, he received all of the electoral votes because of the winner-take-all system, which is still in place today.[48]

Over a century later, the Electoral College failed us again, in the infamous 2000 election between George W. Bush and Al Gore[49]—the election that sparked the current movement to reform the presidential election process.[50] After a long back and forth series of both candidates winning different major states, and with no clear winner of the election in sight, it seemed as though one state's electoral votes would determine the outcome of the election: Florida.[51] In the end, Bush won the election by receiving 271 electoral votes—one more than needed—but Gore won the national popular vote: he had 50,999,897 votes whereas Bush had 50,456,002 votes—over 500,000 fewer.[52] As a consequence of this election, Gore filed a complaint, which made its way all the way to the Supreme Court.[53]

While the period between the second and third times the Electoral College failed us was over 100 years, the span between the third and fourth times was only sixteen years. In the 2016 election, perhaps the most controversial of them all, Republican candidate Donald Trump surpassed Democratic candidate Hillary Clinton by seventy-four Electoral College votes, whereas Clinton surpassed Donald Trump by 2.9 million votes in the national popular vote.[54]

B. *Common Criticisms of the Electoral College*

One criticism of the Electoral College is that it causes candidates to ignore the larger states with the largest populations in favor of less populous, but more "battleground," states.[55] For example, New York, California, and Texas are relatively solid Democratic, Democratic, and Republican states, respectively, and they also have three of the largest

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48 *Id*. at 442–43.

49 *See 2000 Official Presidential General Election Results*, FED. ELECTION COMM'N, http://www.fec.gov/pubrec/2000presgeresults.htm (last updated Dec. 2001).

50 *See* Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2526 (2001).

51 Fullerton, *supra* note 36, at 729–30.

52 *See* FED. ELECTION COMM'N, *supra* note 49.

53 Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam). While this case does not have much to do with the Electoral College itself, it is an important piece of the story. The Supreme Court reversed the Florida Supreme Court's decision that Gore satisfied his burden of proof with respect to the County's failure to tabulate the 9,000 ballots that the machine did not detect a vote. *Id*. at 102.

54 *See* Krieg, *supra* note 43.

55 *See infra* note 57 and accompanying text.

populations in the entire nation.[56] However, in the 2012 presidential election, from June 2012 to Election Day, presidential candidates Barack Obama and Mitt Romney made only a combined total of thirty-six visits to California, thirty-four visits to New York, and fourteen visits to Texas, whereas they made a combined seventy-six visits to Ohio, a state with a population of only 11,550,839 in 2012—more than 26 million fewer people than California.[57] Additionally, vice presidential candidates Joe Biden and Paul Ryan made only a combined total of three visits to California, five visits to New York, and four visits to Texas, whereas they made a combined forty-eight visits to Ohio. This is a staggering difference.[58]

Another criticism of the Electoral College is that it discourages voter turnout.[59] For example, in 2012, voter turnout was 11% higher in battleground states than in the rest of the country.[60] In that election, voter turnout was 71.1% in Colorado—a battleground state—but only 59.4% in the rest of the nation.[61] The percentage of voters who participated in the 2004 election, as compared to the 2000 election, was almost 5% higher, but this increase is only due to the battleground states.[62] This shows that many people who do not live in large swing states—the majority of Americans[63]—feel as though their votes do not

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56 *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016*, U.S. CENSUS BUREAU (2016), https://www.census.gov/data/tables/2016/demo/popest/state-total.html (click first Excel table). As of 2012, New York had an estimated population of 19,602,769 California had an estimated population of 38,011,074 and Texas had an estimated population of 26,071,655.

57 *Id*.; *Presidential Campaign Stops: Who's Going Where*, WASH. POST (Sept. 10, 2012), http://www.washingtonpost.com/wp-srv/special/politics/2012-presidential-campaign-visits (explaining that the presidential candidates made a combined thirty-five visits to Iowa and forty-seven visits to Virginia, but only fourteen visits to Texas). These statistics show that the Electoral College discourages candidates from visiting the states with the largest populations, but rather focuses the candidates on visiting "swing" states, even though they have significantly lower populations. As of September 2016, half of the 105 presidential campaign visits have only been in five states—Pennsylvania, Ohio, Florida, North Carolina, and Virginia. *Two-thirds of Presidential Campaign Is in Just 6 States*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/campaign-events-2016 (last visited Apr. 17, 2017). Since July 2016, thirty-one states have been ignored by the candidates. *Id*.

58 *Presidential Campaign Stops: Who's Going Where*, *supra* note 57.

59 JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 37–38 (4th ed. 2013). Additionally, after the infamous 2000 presidential election, the subsequent 2004 and 2008 presidential elections saw higher voter turnouts. *Voter Turnout in Presidential Elections: 1828–2012*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/data/turnout.php (last visited Apr. 17, 2017).

60 KOZA, *supra* note 59, at 37.

61 *Id*.

62 Pietro S. Nivola, *Thinking About Political Polarization*, BROOKINGS INST. (Jan. 1, 2005), http://www.brookings.edu/research/papers/2005/01/01politics-nivola (explaining that since the Electoral College has narrowed elections—like the 2000 presidential election—down to the final votes in one battleground state, voters elsewhere feel as if their votes do not matter).

63 There were only nine swing states in the 2012 election: Colorado, Florida, Iowa, Nevada,

count, since their state will almost definitely go a certain way.[64]

Yet another criticism is that the Electoral College system is unnecessarily complex. Instead of a direct national popular vote—where every vote is counted as one and added up—there are many complexities in the Electoral College.[65] Votes must be counted in every state, electoral votes need to be delegated, and the president has to be chosen through those electoral votes.[66] It is a far more complex system of voting than necessary for a democratic nation; a national popular vote would increase efficiency and would be much simpler.[67]

Another major problem with the Electoral College is the winner-take-all system it implements.[68] With this system, each state gives its entire slate of electoral votes to the winner of its statewide popular vote.[69] Disadvantages of this system include ignoring minority candidates, and creating the battleground states which garner so much of the presidential candidates' attention, leaving non-battleground states without any presidential candidate influence.[70] For example, if a candidate only has one more vote than another, they will win the entire slate of electoral votes, even though they only won by one vote.[71]

C. *Other Electoral College Reform Ideas That Fell Short*

Many of these common criticisms have led some (congressional representatives and others, alike) to propose various reforms to the system.[72] However, these proposals to reform the Electoral College involve completely changing the system and even the Constitution.

New Hampshire, North Carolina, Ohio, Virginia, and Wisconsin. Chris Cillizza, *The 9 Swing States of 2012*, WASH. POST (Apr. 16, 2012), https://www.washingtonpost.com/blogs/the-fix/post/the-9-swing-states-of-2012/2012/04/16/gIQABuXaLT_blog.html. As of September 2016, there are only eleven swing states in the 2016 election, the same swing states as 2012 plus Michigan and Pennsylvania. *The Battleground States Project*, POLITICO, http://www.politico.com/2016-election/swing-states (last visited Apr. 17, 2017).

64 Stanley Chang, Recent Development, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 218 (2007).

65 GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2d ed. 2011).

66 Elizabeth D. Lauzon, *Challenges to Presidential Electoral College and Electors*, 20 A.L.R. FED. 2d 183, Part I § 2 (2007).

67 *Id*.

68 This winner-take-all system has been in effect since 1836. Herbst, *supra* note 5, at 230. Forty-eight states currently use the winner-take-all system—the exceptions being Maine and Nebraska, which allocate their electoral votes by district. *Id*.

69 *Id*.

70 *Id*.

71 Lauzon, *supra* note 66.

72 *See infra* note 83 and accompanying text.

Thus, there is no feasible way these plans could go into effect.[73]

After the infamous 2000 election,[74] Senator Dick Durbin and Representative Ray LaHood advocated for a direct national popular vote plan, mainly proposing that a candidate must receive at least 40% of the whole number of votes in order to win the general election.[75] If neither candidate gets at least 40%, the candidates participate in a run-off election.[76] While there are many benefits to this system,[77] it would completely destroy the Electoral College in its entirety, which would require Congress to come to a decision to make a constitutional amendment—an unlikely scenario.[78]

Another commonly known proposal to reform the Electoral College is the district-plan.[79] This would involve giving electoral votes to each congressional district, rather than to states as a whole (much like the system Maine and Nebraska still use today)[80] and having the winner of each district get those electoral votes.[81] However, the main problem with this plan is that it does not necessarily guarantee the winner of the national popular vote the presidency—we could still run into the same problems that we have with the Electoral College. It is still the same winner-take-all system that the Electoral College implements except instead of a state winner-take-all, it is a district winner-take-all. This may break up the current Electoral College system into smaller pieces, but the same problems remain.[82]

D. *The NPVIC: An Overview*

There were many attempts to abolish the Electoral College in the

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73 *See* Fullerton, *supra* note 36, at Part V.

74 *See supra* Section I.A.

75 S.J. Res. 56, 106th Cong. (2000); H.R.J. Res. 23, 106th Cong. (1999).

76 S.J. Res. 56, 106th Cong. (2000); H.R.J. Res. 23, 106th Cong. (1999).

77 Fullerton, *supra* note 36. For example, there would be no dispute as to which candidate wins the election—the candidate who wins the national popular vote wins.

78 The process to amend the Constitution is outlined in Article V: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid . . . when ratified by the Legislatures of three fourths of the several States . . . ." U.S. CONST. art. V. Since the Constitution was enacted in the 18th century, there have been over 10,000 proposed amendments in Congress; only thirty-three survived two-thirds of both houses, and twenty-seven have been ratified. Darren R. Latham, *The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. U. L. REV. 145, 165 (2005). These numbers show how difficult it is for the Constitution to be amended.

79 Fullerton, *supra* note 36, at 733; Herbst, *supra* note 5, at 238.

80 ME. REV. STAT. ANN. tit. 21-A, § 805(2) (West 2008); NEB. REV. STAT. ANN. § 32-714 (West 2009).

81 Fullerton, *supra* note 36, at 733.

82 *Id*. at 734.

past through congressional action[83] and some recent proposals,[84] but in 2006, John Koza co-authored a book proposing the National Popular Vote Interstate Compact.[85] He explains that his motivation was the lack of democratic elements in the current system of electing the president.[86] One year later, NPVIC legislation began to emerge in forty-two states.[87] Maryland became the first state to enact the legislation when Governor Martin O'Malley signed it into law on April 10, 2007.[88] In 2008, New Jersey, Illinois, and Hawaii followed suit and enacted the legislation.[89] One year later in 2009, Washington State enacted the legislation.[90] In 2010, Massachusetts and District of Columbia enacted the legislation.[91] Vermont and California followed suit in 2011,[92] Rhode Island in 2013,[93]

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[83] Most notably, in the 1968 election between Richard Nixon and Hubert Humphrey, Nixon took a very small plurality of the national popular vote (43.3% to 42.7%), but won by a landslide in the Electoral College (301 to 191). Boudreaux, *supra* note 7, at 217. This election caused Senator Birch Bayh to propose a constitutional amendment to abolish the Electoral College in favor of a national popular vote. Symposium, *A Modern Father of our Constitution: An Interview with Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 783 (2010). Ultimately, the resolution failed due to lack of votes to end the filibuster blocking the bill. *Id*. Additionally, Supreme Court justices have voiced their opinion when it comes to abolishing the Electoral College: "To abolish [the Electoral College] and substitute direct election of the President, so that every vote wherever cast would have equal weight in calculating the result, would seem to me a gain for simplicity and integrity of our governmental processes." Ray v. Blair, 343 U.S. 214, 234 (1952) (Jackson, J., dissenting).

[84] *See supra* Section I.C.

[85] KOZA, *supra* note 59; *see e.g*., *News History*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/news-history (last visited Apr. 5, 2017) (John Koza is the "originator of the plan."). When states pass this legislation, they are pledging to allocate all of their electoral votes to the winner of the national popular vote, no matter which way the state itself may go (Democratic or Republican) during a presidential election. *Id*.

[86] Koza first explains how anyone who does not live in a swing state has an irrelevant vote under the current system, and how voters in four-fifths of the states are ignored in presidential elections. KOZA, *supra* note 59, at 255. Additionally, he explains how in four out of fifty-six presidential elections, the Electoral College elected a president that did not win the national popular vote. *Id*. at 256.

[87] *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

[88] MD. CODE ANN. ELEC. LAW § 8-5A-01 (West 2013); *see* Associated Press, *Maryland Sidesteps Electoral College*, NBC NEWS (Apr. 11, 2007, 11:17 AM), http://www.nbcnews.com/id/18053715.

[89] N.J. STAT. ANN. § 19:36-4 (West 2014); 10 ILL. COMP. STAT. ANN. 20/1-10 (West 2015); HAW. REV. STAT. ANN. § 14D-1 (West 2008).

[90] WASH. REV. CODE ANN. § 29A.56.300 (West 2014); *see also* Brad Shannon, *State Joins Electoral College Pact*, THE OLYMPIAN (Apr. 29, 2009, 12:00 AM), http://www.theolympian.com/news/local/politics-government/election/article25232041.html.

[91] H.B. 4156, 186th Gen. Court, Reg. Sess. (Mass. 2009); *see also* Steve LeBlanc, *Massachusetts Governor Signs National Popular Vote Bill*, NATIONAL POPULAR VOTE (Aug. 4, 2010), http://archive.nationalpopularvote.com/pages/articles/washingtonexaminer_20100804.php; D.C. CODE ANN. § 1-1051.01 (West 2013).

[92] VT. STAT. ANN. tit. 17, § 2752 (West 2011); CAL. ELEC. CODE ANN. § 6921 (West 2012); Hendrik Hertzberg, *Electoral College Halfway Fixed!*, THE NEW YORKER (July 23, 2013), http://www.newyorker.com/news/hendrik-hertzberg/electoral-college-halfway-fixed.

[93] 17 R.I. GEN. LAWS ANN. § 17-4.2-1 (West 2013); Hertzberg, *supra* note 92.

and finally New York on April 14, 2014.[94]

The mechanisms of the NPVIC are relatively simple. First, the compact would not become effective until it is enacted by states that, in total, have 270 electoral votes—the majority necessary for electing the president in the Electoral College.[95] The compact would not change the overall scheme of the Electoral College—each state still retains its allotted number of electoral votes based on its amount of representation in Congress.[96] The NPVIC solely proposes that the states that pass the compact give their allotted electoral votes to the winner of the National Popular Vote, rather than the winner of the popular vote in the state.[97] Koza proposes that the NPVIC would *reform* the Electoral College in a way that retains the American federalist system of state control over elections, rather than *abolish* the Electoral College.[98]

The NPVIC bill itself is short and simple, outlining the mechanisms described above as well as other provisions.[99] Article III of the bill sets out the specific mechanisms of how the compact would work during a presidential election: the chief election official of each state determines the number of votes for each presidential slate in each state and adds the votes together to create a national popular vote and determines which candidate is the winner.[100] Each member state then makes a final determination of the number of popular votes cast in its state at least six days before the day fixed by law for the meeting and voting by the presidential electors; then, it communicates an "official statement of such determination" within twenty-four hours to the chief election official of every other member state.[101] The chief election official of each compacting state treats this official statement as

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94 N.Y. ELEC. LAW § 12-402 (McKinney 2014); *see also* Hendrik Hertzberg, *National Popular Vote: New York State Climbs Aboard*, THE NEW YORKER (Apr. 16, 2014), http://www.newyorker.com/news/daily-comment/national-popular-vote-new-york-state-climbs-aboard.

95 KOZA, *supra* note 59, at 258.

96 *Id*.

97 *Id*.

98 *Id*.

99 Article I states that any state can become a member of the agreement by enacting the legislation. Article II states that "each member state shall conduct a statewide popular election for President and Vice President," which is the current system in place. KOZA, *supra* note 59, at 559–60; *The Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf (last visited Apr. 5, 2017). The majority of this Note will focus on Articles III and IV of the NPVIC. The entirety of the bill can be found at http://www.nationalpopularvote.com/pages/misc/888wordcompact.php.

100 *The Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf (last visited Apr. 5, 2017).

101 *Id*.

conclusive.[102] Once the number of popular votes is determined, each member state allocates its electoral votes to the projected winner of the national popular vote, regardless of the turnout in the state.[103] In the extremely rare event of a tie for the national popular vote winner, the allocated elector votes will go to the winner of the popular vote in that specific state rather than the winner of the national popular vote.[104]

Article IV of the bill outlines other miscellaneous provisions.[105] It reiterates that the agreement only goes into effect when the states that enacted it possess more than 270 total electoral votes.[106] It also explains that any member state can withdraw from the agreement, except a state cannot withdraw six months or less before the end of a president's term—this prevents states not being happy with how the presidential election may have turned out from being able to withdraw too close to Election Night.[107] Additionally, it explains that the chief executive of each member state shall notify the chief executive of all the other states of when the NPVIC has been enacted and has taken effect; it also articulates that the NPVIC will terminate if the Electoral College is abolished.[108] It concludes by determining that if any provision is held invalid, such invalidation will not affect the remaining provisions.[109]

The majority of this Note will focus on the constitutional implications of Article III and Article IV of the NPVIC. The next section of this Note will explore the constitutional implications of the NPVIC and how they can be resolved.

II. A CONSTITUTIONAL DEBATE—THE ELECTORAL COLLEGE VERSUS THE COMPACT CLAUSE

The National Popular Vote Interstate Compact presents a unique debate; it seems as though it is consistent with the Electoral College Clause, but could be unconstitutional under the Compact Clause. This Part will first explain why the NPVIC is consistent with the Electoral College Clause—since it allows states to exercise power they already have under Article II, Section 1.[110] It will then respond to common

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102 *Id*.; *see also* KOZA, *supra* note 59.

103 KOZA, *supra* note 59.

104 *Id*.

105 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

106 *See generally id*.

107 This is specifically designed so if a state is not satisfied with the outcome of the election—i.e., if the candidate it believed would win the national popular vote did not—they cannot back out of the compact on Election Night, or too close beforehand. *See generally id*.

108 *See generally id*.

109 *See generally id*.

110 *See infra* Section II.A.

constitutionality concerns under the Compact Clause—since under the Constitution states cannot contract together without congressional consent[111]—and explain how these common criticisms can be defeated. It will mainly respond to arguments that the entirety of the NPVIC is unconstitutional under the Compact Clause.[112]

A. *The Electoral College: Article II, Section 1*

This Note previously explores the history of the Electoral College[113], but it is worth noting that during the Constitutional Convention, states' rights advocates were worried that a national popular vote would create a more powerful, partisan federal government, while leaving little role for state governments.[114] This is interesting, in hindsight, since the Electoral College ended up having this exact effect—the effect that, originally, states were concerned would be an effect of a national popular vote.[115]

Article II, Section 1 of the Constitution states, "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[116] This inherently means that the legislature of each state can choose the manner in which to appoint their electors—it does not say specifically how the number of electors should be appointed, only that it must be equal to the number of Senators and Representatives.

In *McPherson v. Blacker*,[117] the Supreme Court declared constitutional the challenged manner of the appointment of electors in the state of Michigan: the election of an elector and an alternate elector in each district, and of an elector and alternate elector at large in each of two districts.[118] While there are differences between this method of appointing electors and those set out in the NPVIC, the Court's reasoning in this case can be applied to the NPVIC. The Court reasoned:

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111 *See infra* Section II.B.

112 Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007); *see* U.S. CONST. art. I, § 10, cl. 3.

113 *See supra* Section I.A.

114 Amanda Kelley Myers, Comment, *Importing Democracy: Can Lessons Learned from Germany, India, and Australia Help Reform the American Electoral System?*, 37 PEPP. L. REV. 1113, 1118 (2010) (quoting Martin J. Siegel, *Congressional Power Over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VT. L. REV. 373, 378 (2004)).

115 *See supra* Section I.B.

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

117 146 U.S. 1 (1892).

118 *Id*. at 6, 23–24.

> [Article II, Section 1, Clause 2] does not read that the people or the citizens shall appoint, but that "each state shall[]" . . . . Hence the insertion of [the language, "in such manner as the legislature thereof may direct"], while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself. . . . [The Constitution] recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of [appointing electors]. . . . [I]t is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.[119]

This is a broad reading of the Electoral College clause that directly applies to the NPVIC; the states possess the plenary power to appoint electors how the legislatures see fit, and the people of that state exercise their rights through their elected officials.[120] The NPVIC does not seek to abolish the Electoral College system, or even change it at all, but rather to allocate their electoral votes differently—a right they explicitly have under the Constitution.[121] Some critics of the NPVIC contend that the only reason the Court allowed Michigan to change its electoral appointment plan from winner-take-all to district-based is because states had already done so in the past, so there was little to no risk in allowing some states to do that now.[122] However, this argument presumes that it is unrealistic for the Court to adopt a principle that has never been adopted before, which is not the case.[123] The Court has shown in the past that it is not afraid to go against years of precedent in the interest of justice; it is not far-fetched to say that the Court would be comfortable making a decision about the national popular vote in lieu of the Electoral College, a far less drastic issue than the ones previously cited.[124]

Over a century later—after the infamous 2000 presidential election—the Supreme Court upheld the same principles set out in

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119 *Id*. at 25–27, 35.

120 *Id*.

121 U.S. CONST. art. II, § 1, cl. 2; Strunk v. U.S. House of Representatives, 24 F. App'x 21 (2d Cir. 2001) (explaining that when a New York voter tried to bring suit challenging the manner in which electors are selected, his case was moot because states are constitutionally empowered to determine how to select electors).

122 Williams, *supra* note 39, at 1581–82.

123 There have been many instances in American history where the Court overturned years of precedent and adopted policies that had never been seen before, and were in fact revolutionary. The Court is clearly comfortable with making these kinds of decisions. *See, e.g*., Brown v. Bd. of Educ., 347 U.S. 483 (1954); Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

124 *See supra* note 123.

McPherson,[125] showing that it did not seek to overturn over 100 years of precedent regarding the Electoral College.[126] When evaluating Florida's manner of appointing electors, Chief Justice Rehnquist said in his concurring opinion, "[W]ith respect to a Presidential election, the court must be . . . mindful of the legislature's role under Article II in choosing the manner of appointing electors . . . ."[127] This shows that it is likely that the Court will give deference to a state's method of appointing electors; thus, as long as a state is following the Electoral College system but appointing the electors in a different way, the Court will give deference to a state's plenary power.[128] The NPVIC does exactly this;[129] it retains the federalist system of the Electoral College laid out in Article II, Section 1,[130] while allowing the states to appoint their electors in a different manner.

In order for a manner of electoral appointment to be considered unconstitutional, it must *offend* the Constitution.[131] This may seem like a broad standard, but the Eastern District of Virginia, in explaining why a general ticket system of electoral appointment does not offend the Constitution in such a way that deems it unconstitutional, stated that the general ticket system "is but another form of the unit rule"—the unit rule being Article II Section 1.[132] The court explains that the unit rule is the system already in place—the Electoral College.[133] The NPVIC is another form of the unit rule as well since it does not seek to abolish the Electoral College or any other constitutional provision, but rather changes the manner in which electors are appointed, a right that the states already possess.[134]

B. *The Compact Clause: Article I, Section 10*

The Compact Clause has British roots; during the colonial era, the Crown sought to resolve disputes between different colonies from across the Atlantic Ocean.[135] Once the Revolutionary War was over,

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125 *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).
126 *See id*.
127 *Id*. at 114 (Rehnquist, C.J., concurring).
128 *Id*.
129 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.
130 U.S. CONST. art. II, § 1.
131 Williams v. Virginia State Bd. of Elections, 288 F.Supp. 622 (E.D. Va. 1968).
132 *Id*. at 626–27.
133 *Id*.
134 *See* KOZA, *supra* note 59; U.S. CONST. art. II, § 1.
135 Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925). Frankfurter and Landis explain that there were two modes of settling these kinds of disputes. *Id*. at 692.

many of these disputes were left unresolved, and the United States was under the Crown's reign, and the new United States needed to find a way to resolve these disputes on its own.[136] In the end, the Compact Clause of the Constitution was born during the Constitutional Convention.[137] The Framers created the Compact Clause so that the states could not come together to threaten the Union without congressional consent.[138] The Framers sought stronger language than that in the Articles of Confederation in order to ensure that state power would not endanger the Union.[139]

The Compact Clause in the Constitution states, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."[140] While this language may seem very restrictive, the Supreme Court has recognized that congressional consent is not feasible or necessary in every agreement between states, so it has held that congressional consent is only required when a compact encroaches on federal supremacy.[141] The Court reached this conclusion when it was resolving a border dispute between Virginia and Tennessee, and held that a border dispute between two states does not concern the federal interest.[142] Since *Virginia v. Tennessee* was decided, many courts have followed this proposition that congressional consent is not required unless the compact encroaches on federal supremacy.[143]

> If an agreement was reached, not infrequently after years of torturous discussion, the further approval of the Crown was required. If negotiations failed or in lieu of such direct settlement, the second mode of procedure . . . . was an appeal to the Crown, followed normally by a reference of the controversy to a Royal Commission . . . . [which] bore the characteristics of a litigation.

Id. at 692–93.

136 *Id*. at 693.

137 *Id*. at 694.

138 Michael S. Greve, *The Heritage Guide to the Constitution*, *The Compact Clause*, THE HERITAGE FOUNDATION, http://www.heritage.org/constitution/#!/articles/1/essays/75/compact-clause (last visited Apr. 17, 2017).

139 *Id*.

140 U.S. CONST. art. I, § 10, cl. 3.

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

142 "The mere selection of parties to run and designate the boundary line between two states, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition [of the Compact Clause]." *Id*. at 520.

143 *See, e.g*., U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (In *U.S. Steel Corp*., the Court held that the Multistate Tax Compact at issue was constitutional, since not all agreements between states are subject to the Compact Clause. In coming to this determination, the Court cites Justice Fields in *Virginia v. Tennessee*: "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.") (citing Virginia v. Tennessee, 148 U.S. at 519); *see also* Star Sci. Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002) (noting that in *U.S. Steel Corp*., the Supreme Court upheld a compact resulting in reciprocal State legislation);

This Note argues that the NPVIC is constitutional under the Compact Clause because it does not encroach on said federal supremacy.

The Supreme Court in later cases followed the propositions set out in *Virginia*.[144] In *U.S. Steel Corp. v. Multistate Tax Commission*, [145] the Court expanded on the *Virginia* rule, by creating a test for compacts that are alleged violations of the Compact Clause.[146] The Court explained that the "test is whether the Compact enhances state power *quoad*[147] the National Government."[148] The Court ruled that the Multistate Tax Compact at issue was constitutional since it did not purport to authorize the member states to exercise any powers they otherwise could not have if there was no compact.[149] Additionally, the Court noted that many times in the past it had upheld a *variety* of interstate agreements that did not have congressional consent, and even those that resulted in reciprocal state legislation.[150] This logic applies to the NPVIC since it would result in reciprocal state legislation in the sense that other, originally non-compacting, states may choose to enact the NPVIC once it goes into effect.

Another factor the Court in *U.S. Steel Corp*. relies on is making sure that the compact at issue does not have an impact on "federal structure."[151] The definition of structure is, "[t]he arrangement of and relations between the parts or elements of something complex."[152] The definition of federal is, "[h]aving or relating to a system of government in which several states form a unity but remain independent in internal affairs."[153] Thus, when the two definitions are combined, it follows that federal structure inherently refers to the relations between the federal government. The NPVIC would not have an impact on federal structure since it does not purport to change the Constitution or any aspect of the federal government, nor does it seek to enhance states' power at the expense of the federal government;[154] it strictly has to do with states'

Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 176 (1985) (holding that the state bank statute at issue was constitutional, since "[t]o the extent that the state statutes might conflict in a particular situation with other federal statutes . . . they would be pre-empted by those statutes, and therefore any Compact Clause argument would be academic[]").

144 *See supra* note 143.

145 434 U.S. 452 (1978).

146 *U.S. Steel Corp*., 434 U.S. 452.

147 The definition of quoad is "with respect to" or "regarding." *Quoad*, COLLINS ENGLISH DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/quoad (last visited Apr. 17, 2017).

148 *U.S. Steel Corp*., 434 U.S. at 473.

149 *Id*.

150 *Id*. at 469–70.

151 *Id*. at 470–71.

152 *Structure*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2016).

153 *Federal*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2016).

154 *See infra* note 206.

rights.[155] The Court in multiple instances has deemed certain compacts, even those that result in reciprocal state legislation—a political effect—not to have an impact on the federal structure.[156]

C. *The NPVIC Does Not Encroach on Federal Supremacy, or on the Rights of Non-Compacting Sister States*

This section of the Note will directly respond to arguments against the NPVIC,[157] in which opponents primarily argue that the NPVIC is unconstitutional because it encroaches on federal supremacy and on the rights of non-compacting sister states.[158] This Note argues that these arguments are flawed and outdated, and that the NPVIC does not encroach on federal supremacy or on the rights of non-compacting sister states. The NPVIC does not concern federal supremacy or a federal interest because it would not change the system at all, and the NPVIC is not radical enough of a compact to overturn hundreds of years of Supreme Court precedent, since the Supreme Court has never invalidated a compact based upon the effect on non-compacting sister states.[159]

1. Federal Supremacy? No Encroachment.

In analyzing whether or not the NPVIC encroaches on federal supremacy, it is important to define what exactly federal supremacy means. This definition can be found in the Supremacy Clause of the Constitution.[160] The Supreme Court has interpreted this provision in many ways; one of the landmark cases is *M'Culloch v. Maryland*.[161] The Court held that the state of Maryland could not tax a federal bank because if it had the power to do so, it would have the power to destroy the federal institution, and that states would effectively become more powerful than the federal government.[162] This logic regarding the

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155 U.S. CONST. art. II, § 1, cl. 2.

156 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 478 (1978).

157 *See* Muller, *supra* note 112; Williams, *supra* note 39; Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 197 (2008); Tara Ross, *Legal and Logistical Ramifications of the National Popular Vote Plan*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 37 (2010).

158 *See* Muller, *supra* note 112, at 372.

159 *See infra* note 188 and accompanying text.

160 "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

161 17 U.S. 316 (1819).

162 *See id*.

Supremacy Clause does not follow to the NPVIC—the NPVIC has no threat on the federal government, and it certainly does not make the states more powerful than the federal government.[163] The federal government has no control when it comes to presidential elections.[164] Thus, if the NPVIC were to be put into effect, there would be no disturbance in the balance of power—the states are simply exercising a right they already have under the Constitution, and that has no effect on federal authority.[165] There is no relationship between the states and the federal government here as there was in *M'Culloch*, when a state directly tried to lessen the power of the national federal government.[166] Additionally, if the Constitution is the supreme law of the land,[167] then the states' plenary power under Article II is included in the Supremacy Clause.[168] The states that have enacted the NPVIC do not seek to impose anything on the federal government; rather, they seek to exercise the power they already have under the Constitution.[169]

One opponent to the NPVIC claims that all political compacts need congressional consent, and that the Court in *Virginia* laid out all possible types of non-political compacts:[170] land purchases, contracting to use a canal, draining a disease-causing swamp, and uniting to resist pestilence.[171] However, this argument fails to take into account the time period in which *Virginia* was decided. This case was decided in 1893,[172] at which point there was no way for the Court to know the effect the Electoral College would have on American government, or that states would eventually want to compact to allocate their electoral votes differently.[173] There was no way for the Court in 1893 to be able to

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163 The states would not have more power than the federal government if the NPVIC were to be enacted. It merely gives states a mechanism to enact electors in the manner they see fit, a right explicitly granted in the Constitution. U.S. CONST. art. II, § 1, cl. 2.

164 Except in the event of a tie, at which point the House of Representatives has the deciding vote. U.S. CONST. amend. XII.

165 *See supra* note 163.

166 *See M'Culloch*, 17 U.S. 316.

167 U.S. CONST. art. VI, cl. 2.

168 U.S. CONST. art. II, § 1, cl. 2.

169 *Id*.

170 "Non-political"—meaning that the compact at issue does not affect national sovereignty. Muller, *supra* note 112, at 382.

171 *Id*. at 383 (citing Virginia v. Tennessee, 148 U.S. 503, 518 (1893)).

172 *Virginia*, 148 U.S. 503.

173 1893 was over 100 years ago; needless to say the state of the country looked very different than it does today. This was right at the beginning of the Industrial Revolution. *See* EDWARD C. KIRKLAND, INDUSTRY COMES OF AGE, BUSINESS, LABOR, AND PUBLIC POLICY, 1860–1897 (1961). It was additionally during the woman's suffrage movement. *See* REBECCA J. MEAD, HOW THE VOTE WAS WON: WOMAN SUFFRAGE IN THE WESTERN UNITED STATES, 1868–1914 (2006). Because of these historical differences, hindsight is not 20/20. For the Supreme Court in 1893 to imagine what the state of the country would be like today would be comparable to the Supreme Court now trying to imagine what the state of the country will be like in the year 2130.

create an exhaustive list of all non-political compacts.[174] The NPVIC is not a political compact, despite the fact that it may seem like one on its face. A political compact is not one that has to do with politics, but rather one that affects national sovereignty.[175]

Some argue that Article II of the Constitution does not give the states the plenary power suggested to appoint their electors in the manner they see fit—rather, although they have this power, it cannot be used in ways that change the structure of the federal government.[176] There have been attempts to compare the NPVIC to the congressional term limits at issue in *U.S. Term Limits, Inc. v. Thornton*,[177] but these are of no avail. First, a congressional term limit is incomparable to the Electoral College, since they are two completely different constitutional provisions.[178] Additionally, the states' power to impose congressional limits on Congress has nothing to do with the states' power to appoint electors in a presidential election—we are dealing with two completely different branches of government.[179] Opponents have attempted to argue that analogizing these two provisions is possible because the wording of the constitutional provisions can be compared. Thus, the Framers would believe that the NPVIC would irrevocably change the face of federal government, which is not what was intended.[180] However, this argument is flawed. The Constitution is structured to guarantee a separation of powers so there is no threat of tyranny to the federal government.[181] Nothing relating to the NPVIC suggests that there is a threat of tyranny[182]—if the Framers truly intended for these two provisions to be so similarly worded that they can be compared, it seems as though that these two provisions would at least be in the same section of the Constitution—or at least, relating to the same branch of government.[183]

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174 1893 was right before the start of the Progressive Era—which lasted roughly from 1903–1917—a period of time in which the United States saw new forms of government regulation, bipartisanship, socialism, and collective action. *See* Elizabeth Sanders, Symposium, *Rediscovering the Progressive Era*, 72 OHIO ST. L.J. 1281 (2011). With a time period like the Progressive Era on the Court's heels, it's difficult to imagine that the Court could find a way to create a list of all non-political compacts.

175 Muller, *supra* note 112.

176 Williams, *supra* note 39.

177 514 U.S. 779 (1995).

178 The two provisions are not even in the same Article of the Constitution. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. art. I, § 4.

179 Article I of the Constitution deals with legislative powers, whereas Article II of the Constitution deals with executive powers. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. art. I, § 4.

180 *See* Williams, *supra* note 39; Ross, *supra* note 157.

181 *See* United States v. Nichols, 784 F.3d 666 (10th Cir. 2015).

182 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

183 This is especially true since, as analyzed above, the Electoral College was one of the most hotly debated topics during the Constitutional Convention. *See* Heather Green, Comment, *The National Popular Vote Compact: Horizontal Federalism and the Proper Role of Congress Under the Compact Clause*, 16 CHAP. L. REV. 211, 232–33 (2012); *supra* Part I.

Another argument is that even if the states do have the ability to exercise the rights laid out in Article II, the Guarantee Clause[184] would prevent the NPVIC's enactment, since the NPVIC does not guarantee a federal republic government.[185] Specifically, allowing a national popular vote without a constitutional amendment does not guarantee a republican form of government.[186] However, this is a flawed argument, because the Guarantee Clause protects a *representative democracy*, and a national popular vote election of the president is perhaps the most direct form of a representative democracy this nation has seen—each person being represented equally, more so than in the Electoral College.[187]

2. Non-Compacting Sister States' Rights? No Encroachment.

It is important to note that the Supreme Court has never invalidated a compact based on the effect on non-compacting sister states.[188] Thus, for the Court to do so, it would take an extremely invasive and radical compact for the Court to depart from hundreds of years of precedent.

Some opponents argue that the NPVIC seeks to make larger compacting states more powerful at the expense of smaller, non-compacting states.[189] They mistakenly attempt to compare a compact involving a border dispute to the NPVIC, and in the wake of *Virginia*, make a sweeping generalization that the Court "would" ultimately define a political compact as one that "aggrandiz[es] the political power of the compacting states[,]"[190] and conclude that if the Court were deciding on the NPVIC, it would deem it unconstitutional on these grounds.[191] This claim is a big jump from discussing compacts that deal with border disputes.[192] Additionally, this argument fails to take into consideration the fact that the NPVIC would not increase the political

184 U.S. CONST. art. IV, § 4.

185 *See* Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009).

186 *Id*. at 1444.

187 *See*, *e.g*., Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941 (2012).

188 *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978); Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985) (determining that while non-compacting sister state interests are an important inquiry in evaluating whether or not a compact violates the Compact Clause, it is not dispositive).

189 Muller, *supra* note 112, at 385.

190 *Id*. at 384.

191 *Id*.

192 A compact dealing with border disputes has virtually nothing to do with a compact like the NPVIC—they are from two different realms.

power of compacting states.[193] While it is true that presidential candidates may visit these states more often if the NPVIC were to go into effect, this does not mean that their political power will be "aggrandized." More presidential candidate visits do not mean that a state's political power is increased.[194] The states are not seeking to increase the number of electoral votes they allocate; in fact, these states' political influence would arguably remain the same.[195]

Another argument opponents make is that since the NPVIC goes into effect when it has the majority number of electoral votes, if it were to go into effect, it would "guarantee" the winner of the presidential election by the national popular vote—thus, non-compacting minority states could lose their appointment of electors.[196] This is simply not the case. The NPVIC does not take away the constitutional rights of other non-compacting states to appoint their electors in the manner they see fit.[197] Nor does the NPVIC guarantee the winner of the presidential election by national popular vote—there have been times in the nation's history where the president won the election by only a narrow margin of national popular vote votes.[198] Thus, this argument does not show that non-compacting sister states would become irrelevant, unless opponents want to claim that fewer presidential visits to states makes states completely irrelevant, which has no factual basis.[199] If this logic were to

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193 KOZA, *supra* note 59, at 457 (explaining that smaller states are currently disadvantaged by the winner-take-all system and if smaller states were to compact, they would arguably have more political influence than they do now).

194 *Id*.

195 *Id*. at 473–74 (explaining that the equal representation of the states in the Senate is protected by the Constitution and cannot be changed by any kind of compact, and that the NPVIC does not affect this equal representation laid out in the Constitution—the mechanism that creates the Electoral College).

196 Muller, *supra* note 112, at 391.

197 U.S. CONST. art. II, § 1, cl. 2. Other scholars have also taken this approach. In an Article that was written in 2002 (before the NPVIC was formulated), Robert Bennett saw something like the NPVIC coming, and he determined that:

> [I]t is far from clear that 'compacting' states could be seen as 'enhancing' their political power. . . . A state's influence after the suggested change . . . is highly contingent and unpredictable, providing only the most fragile basis for making any 'enhancement' judgment. . . . [A] degree of state coordination in the move to a nationwide popular vote would likely survive a Compact Clause challenge.

Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 GREEN BAG 2d 141, 145–46 (2002).

198 *See supra* Section I.A.

199 Presidential campaign visits do not equal political influence. The political influence a state has resides in the amount of electoral votes it has—for this is what ultimately decides the outcome of an election. U.S. CONST. art. II, § 1, cl. 2. Additionally, studies conducted have concluded that political campaigns generally have little influence on the outcome of the election. *See* Henry E. Brady, Richard Johnston & John Sides, *The Study of Political Campaigns*, http://home.gwu.edu/~jsides/study.pdf (last visited Nov. 20, 2015). It is generally very difficult to change a voter's mind once he has decided which candidate he is voting for, and campaigns won't

be applied to the Electoral College today, it can be said that large or battleground states take away the constitutional rights of small non-swing states, since the latter are disadvantaged by the actions of the former; if this logic were applied, there would be no solution to the problem of how to elect the president.

Justice White's dissent in *U.S. Steel Corp.*—regarding the expansion of the *Virginia* rule—says that groups of states cannot take action collectively even if they are permitted to do so individually.[200] However, proponents who use this argument fail to take into account that this is a dissenting opinion—thus, it is by no means law—and there is no other evidence to support this argument. In fact, state collective action can arguably be beneficial for both the federal government and its individuals.[201] They argue that the Compact Clause concerns the relationship of non-compacting sister states in addition to the general federal interest.[202] While the NPVIC may "concern" the relationship of non-compacting sister states, this concern alone is not sufficient to deem it an unconstitutional compact.[203] In addition, the NPVIC does not concern the federal interest—there would be absolutely no change in the federal system at all.[204]

In *U.S. Steel Corp.*, the Court held that the compact at issue (a tax compact) did not affect non-compacting sister states especially with regards to the Privileges and Immunities Clause,[205] since the pressure of the Multistate Tax Compact was not great enough to deem the rights of these states so affected.[206] In interpreting this section, scholars have noted that a secondary effect is not enough for a non-compacting sister

change that bias. *See id*. This shows that just because a presidential candidate makes a certain number of visits to certain states does not mean that particular states have greater political influence.

200 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 482 (1978) (White, J., dissenting).

201 *See* Note, *State Collective Action*, 119 HARV. L. REV. 1855 (2006). Additionally, it can maximize social welfare by creating benefits and without imposing costs on others. *See id*.

202 Muller, *supra* note 112, at 385 (citing the opinion set out in Rhode Island v. Massachusetts, which said that the Compact Clause intended to "guard against the derangement of [the states'] federal relations with the other states of the Union, and the federal government . . . ." (Rhode Island v. Massachusetts, 37 U.S. 657, 726 (1838))).

203 Since the NPVIC has not gone into effect yet, it is impossible to say what the effect on non-compacting sister states will be. *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

204 *See* KOZA, *supra* note 59; *see generally* NATIONAL POPULAR VOTE, *supra* note 8.

205 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

206 The Court stated, "Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause . . . it is not clear how [the] federal structure is implicated." U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 478 (1978); *see* Bradley T. Turflinger, Note, *Fifty Republics and the National Popular Vote: How the Guarantee Clause Should Protect States Striving for Equal Protection in Presidential Elections*, 45 VAL. U. L. REV. 793, 812–13 (2011).

state to claim that its rights have been infringed upon due to the effect of a compact.[207] In the case of the NPVIC, non-compacting states would not suffer a secondary effect because the NPVIC does not take away any of their rights or attempt to diminish them in any way.[208] Just because an effect of the NPVIC may be that smaller states get less presidential candidate attention, this is not a primary, or even a secondary, effect.

In light of the relevant case law, constitutional provisions, and scholarly commentary, it is clear that the National Popular Vote Interstate Compact passes the Compact Clause tests set out by the Court since it does not encroach on federal supremacy and it does not so gravely encroach on the rights of non-compacting sister states.[209] The NPVIC passes both the *Virginia* and the *U.S. Steel Corp*. tests,[210] and the states are not exercising any constitutional right they would not have had.[211] It does not matter if the NPVIC is in place or not; states choosing to allocate their electoral votes in a different way is a power they have under Article II Section 1.[212]

III. IN THE CASE OF CITIZENS OF A NON-COMPACTING SISTER STATE VERSUS CITIZENS OF A COMPACTING STATE: THE FORMER IS LEFT WITHOUT A LEG TO STAND ON

This Part will provide an important solution to the problem set out in the preceding sections: since the NPVIC passes all Compact Clause tests—thus, it does not need congressional consent for its enactment—and the states have plenary power under Article II to appoint their electors in the manner they see fit, one of the only ways for the NPVIC to be challenged and/or abolished is if a non-compacting sister state chose to bring suit against a compacting state in order to get rid of the law. However, this Note argues that even if the merits of the claim are constitutional, courts should dismiss these cases because the non-compacting sister state would not have standing to bring such a suit.[213] Since the NPVIC does not require congressional consent and a lawsuit of this type would not survive, there is virtually nothing stopping the

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207 Turflinger, *supra* note 206, at 833–34.

208 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

209 *See infra* Part III.

210 *See U.S. Steel Corp*., 434 U.S. 452.

211 *See generally* U.S. CONST. art. II, § 1, cl. 2.

212 *Id*.

213 Standing is required for any litigant to bring a suit—this means that a party must have injury, causation, and redressability in order for the case to be heard. *See infra* notes 215–217 and accompanying text. This Note will further analyze these doctrines and conclude that a non-compacting sister state attempting to bring suit would have no standing in such a case.

NPVICs enactment if it were to acquire the necessary 270 electoral votes needed for it to pass.[214] Because the NPVIC passes all constitutional tests, a state could not go before a court and assert that the statute is unconstitutional—it would have to attempt to assert a different argument.

In order for a plaintiff to have Article III standing, it must show three elements: injury-in-fact (a specific injury—meaning that a plaintiff cannot simply go to court wanting to change the law), causation[215] (the law that is being challenged must have caused the injury and/or the defendant must have caused the injury), and redressability (the issue must be capable of being redressed by the court).[216] One of the most frequently litigated prongs that arise in cases is the injury-in-fact prong.[217] The United States Supreme Court has stated that in order to meet the standing requirements outlined in Article III,[218] a plaintiff must prove that he has a "personal stake" in the dispute and the alleged injury is particularized to him.[219]

Prudential standing issues arise when the plaintiff may have Article III standing, but a court still should not take the case whether it is for policy reasons, or that the dispute would be more effectively resolved with another branch of government.[220] One instance of when this

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214 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

215 This Note will not evaluate the causation prong of constitutionally-required standing.

216 For example, when an issue is better suited with the legislature rather than with the court. *See* Allen v. Wright, 468 U.S. 737 (1984); Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992) (holding that although the plaintiffs had constitutionally-required standing in challenging the actions of the Endangered Species Act of 1973, they did not have prudential standing because they were asserting a "generalized grievance" since they could not prove that they were directly affected by the statute at issue).

217 *See, e.g.*, Conservation Law Found. v. EPA, 964 F.Supp.2d 175, 186, 188 (D. Mass. 2013) (holding that citizens that petitioned the Environmental Protection Agency in order to change their policies on certain climate change issues did not have constitutionally-required standing because they did not allege a specific injury in fact that directly affected them); Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 39–40 (1976) (holding that organizations that sought to promote health service access to the poor could not establish constitutionally-required standing simply by this goal alone). Courts have even determined that there are instances where State Senates do not have constitutionally-required standing. *See* Favors v. Cuomo, No. 11-cv-5632, 2013 WL 5818773 (E.D.N.Y. Oct. 29, 2013) (holding that the Senate Minority did not have a personal interest in alleging that a certain Senate plan violated the equal population requirement of the Fourteenth Amendment).

218 U.S. CONST. art. III, § 2.

219 *See* Raines v. Byrd, 521 U.S. 811, 818–19 (1997) (citing *Allen*, 468 U.S. 737); *see also* Coastal Outdoor Advert. Grp. v. Township of E. Hanover, 630 F.Supp.2d 446, 450 (D.N.J. 2009) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004)) ("In addition to the constitutionally-required standing factors, prudential factors also apply, which constitute 'judicially self-imposed limits on the exercise of federal jurisdiction.'").

220 "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–74.

happens is when the plaintiff is asserting a "generalized grievance," rather than a specific injury.[221] In the case of the NPVIC, the plaintiffs in such a case would be asserting a generalized grievance, and would simply be going to the court to complain about how the political arena has arrayed itself, rather than alleging a specific, direct injury.[222] Additionally, the citizens of a non-compacting sister state would not be able to claim that they have standing because they are taxpayers of a state, since the Court has struck down this idea.[223] The rest of this Part will focus on how a hypothetical plaintiff in the case of the NPVIC would have neither constitutionally-required nor prudential standing to succeed in a case.

A. *Article III Standing Fails*

First, a non-compacting state seeking to bring suit would not have Article III standing because it would not have an injury-in-fact. As the Court in *Raines* said, the state would not be able to allege a specific, personal injury that is directly particularized.[224] For example, a state would go before a court asserting that the NPVIC has adversely affected them because they now do not have as much political influence, presidential candidates are not visiting their state as much, etc. However, as this Note previously explored, there is nothing to support these arguments and there is no evidence to suggest that presidential candidate visits are directly correlated with political influence.[225] In addition to not having an injury-in-fact, the plaintiffs would also not satisfy the redressability requirement of constitutionally-required standing.[226] If a suit such as this were to arise, the court would determine that it could not redress the injury that the plaintiff is

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221 *Id*.; *see also Allen*, 468 U.S. 737 (explaining that parents of children in private segregated schools do not have standing because they are simply coming to the Court with a problem that the political area has arrayed itself). The Court explains that in order to solve this problem, the plaintiffs should have gone to the legislature. *Lujan*, 504 U.S. at 606. *But see* Flast v. Cohen, 392 U.S. 83 (1968) (explaining that the only exception in the generalized standing principle is when government expenditures are being challenged under the Establishment Clause of the Constitution). This is the only exception to standing that's been addressed by the Supreme Court, and the NPVIC does not fall within this exception. *Id*. at 105.

222 Since the party would not go to the Court asking for a change in the laws, that is not a specific injury; that is a proper question for the legislature, not the Court. *Allen*, 468 U.S. at 761.

223 United States v. Richardson, 418 U.S. 166 (1974) (holding that a taxpayer cannot go to the Court asking how the CIA spends tax dollars, since that is not a direct injury since all members of the public share the injury and the judiciary can't act as a "second guessing mechanism").

224 *Raines*, 521 U.S. at 829–30.

225 *See supra* note 199.

226 Additionally, the Ninth Circuit has defined redressability as requiring "an analysis of whether the court has the power to right or to prevent the claimed injury." Gonzales v. Gorsuch, 688 F.2d 1263, 1267 (9th Cir. 1982).

claiming it has, since it is not certain whether or not the court's remedy would fix the plaintiff's injury.[227]

B. *Prudential Standing Fails*

Even in the rare occurrence that a court does determine that the plaintiff has constitutionally-required standing, it would still dismiss the case on the grounds that the plaintiff does not have prudential standing, meaning that the alleged injury is a generalized grievance that is more capable of being remedied by another branch of government—here, the legislature.[228] The plaintiff would have to allege something more than the "generalized interest of all citizens in constitutional governance."[229] There could not be a more perfect generalized grievance than the fact that the citizens of the non-compacting sister state do not like the law. Hypothetically, their argument would go something along the lines of the following: "The National Popular Vote Interstate Compact adversely impacts us as citizens because if it were to go into effect we would have less political influence in presidential elections than we do today under the Electoral College." The plaintiff would effectively be alleging that they did not like the law because of the effect it has on *all citizens*, which is prohibited under traditional prudential standing principles.[230]

Thus, the entire argument of citizens attempting to oppose the National Popular Vote Interstate Compact in court would first try to rely on Article III standing. This would fail since they would not be able to allege a specific injury-in-fact that directly affects the plaintiff alone, since they would not be able to successfully argue that their political influence would be diminished if the NPVIC were to go into effect. The plaintiffs would additionally not satisfy the redressability prong of constitutionally-required standing, since the issue is not capable of being redressed by the court and would be more appropriately by the legislature.[231] Next, even if a court were to find that the plaintiff did have Article III standing, the plaintiff would not have prudential

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227 *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) (holding that the "mental displeasure" injury alleged by the plaintiff is not capable of being redressed by the Court).

228 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 761 (1984); Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1387–89 (2014).

229 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974); *see, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); United States v. Richardson, 418 U.S. 166 (1974). "[A] 'generalized grievance,' no matter how sincere, is insufficient to confer standing." Hollingsworth v. Perry, 133 S.Ct. 2652, 2662 (2013).

230 *Hollingsworth*, 133 S.Ct. at 2662.

231 *See supra* note 220.

standing since it would be asserting a generalized grievance that affects "all citizens in constitutional governance."[232] A court would have no choice but to hold that, although the generalized grievance is sincere, the alleged injuries and the generalized grievances the plaintiffs allege do not amount to satisfy any prong of standing[233]—and the case would be dismissed.

C. *What About the Candidates?*

Another standing argument briefly worth addressing is, after the NPVIC gets enacted, what if a presidential candidate wins in a state using the Electoral College, but does not win the national popular vote? That is, the flip side of what happened in the infamous 2000 presidential election. This would mean that they would effectively have to give up their electoral votes. If that candidate were to bring a suit, would that candidate have standing, and would it be a successful suit? It is likely that a candidate would have a better argument for standing than a state would, considering they effectively lost the presidency because of the NPVIC—thus, a direct injury.[234] However, it would have to depend on the results of the election: if losing those electoral votes cost the candidate the election, there is a better argument for standing.

However, even if standing could be established, there will likely be no remedies available for such a candidate, and they would likely lose the suit, just as in 2000.[235] While the Court in 2000 did not specifically address the Electoral College issue, the result was the same in that the Electoral College system remained unchanged, and Gore did not assume the presidency as a result of this case.[236]

CONCLUSION

It is no secret that the Electoral College is one of the most controversial and one of the most challenged constitutional provisions in the Constitution.[237] After the infamous 2000 election, this became even more so—people were appalled that a presidential election could turn out this way, voters felt as if their votes did not count, and people

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232 *See supra* Section III.B.
233 *See supra* Sections III.A. & B.
234 *See supra* note 217.
235 *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).
236 *See id*.
237 *See supra* Part II.

sought reform.[238] There have been many attempts to abolish the amendment[239]—all unsuccessful—and there have been many proposed solutions to the problem—all unavailing or impossible to enact.[240] The National Popular Vote Interstate Compact is leading the way—a compact that would change the system, without changing the system.[241]

The most common criticism of the NPVIC is that it is an unconstitutional compact since it does not have congressional consent.[242] However, as this Note shows, congressional consent is not needed in the case of the NPVIC because it does not encroach on federal supremacy[243] or on the rights of non-compacting sister states.[244] As it passes both the *Virginia* and *U.S. Steel Corp*. compact tests, congressional consent is not necessary.[245]

With all of this in mind, the next avenue opponents of the NPVIC could attempt to travel down is seeking a remedy from a court. However, it would quickly be determined that citizens of non-compacting sister states do not have a leg to stand on—they have neither constitutionally-required nor prudential standing to bring such a suit.[246] They would not be able to allege a specific injury in fact capable of redressability by a court (since lesser political influence should not be considered an injury), and their assertion of a generalized grievance would further reinforce the fact that the courts are not the place for these citizens to be challenging the NPVIC.[247]

Since the National Popular Vote Interstate Compact is not an unconstitutional compact because it does not require congressional consent and it does not encroach on federal supremacy or the rights of non-compacting sister states, and since citizens of non-compacting sister states would not have standing to bring suit, there is virtually nothing stopping the NPVICs enactment. This is not harmful or threatening to democracy since the NPVIC would be wholly more democratic than the Electoral College system today. Once the number of states that enact the compact electoral votes reaches 270, the National Popular Vote Interstate Compact will largely determine the outcome of the election of the president of the United States.

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238 *See supra* Section II.C.
239 *See supra* Section II.A.
240 *See supra* Section II.C.
241 *See* KOZA, *supra* note 59; *see generally* NATIONAL POPULAR VOTE, *supra* note 8.
242 *See supra* Part II.
243 *See supra* Section II.C.1.
244 *See supra* Section II.C.2.
245 *See* Virginia v. Tennessee, 148 U.S. 503 (1893); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978); *supra* Section II.C.
246 *See supra* Part III.
247 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); *supra* Section III.B.

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CHANGING THE SYSTEM WITHOUT CHANGING THE SYSTEM: HOW THE NATIONAL POPULAR VOTE INTERSTATE COMPACT WOULD LEAVE NON-COMPACTING STATES WITHOUT A LEG TO STAND ON

Jillian Robbins[†]

"[Y]ou win some, you lose some. And then there's that little-known third category."[1]

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† Articles Editor, *Cardozo Law Review* Vol. 38. J.D. Candidate, Benjamin N. Cardozo School of Law, 2017; B.A., University of Michigan, 2014. I would like to thank Professor Kate Shaw for her guidance and expertise in helping me write this Note. I also would like to thank all of my friends and family for their constant support during the entire Note-writing process.

1 Al Gore, Former Vice President, Address at the Democratic National Convention (July 26, 2004) (referring to when he won the national popular vote but lost the presidency in the infamous 2000 presidential election).

INTRODUCTION

It is our duty and our privilege as American citizens to cast our vote for the next president of the United States.[2] But voters who live in populous but solid blue and red states feel as if their votes do not count; voters who live in less populated swing states get all of the attention from presidential candidates.[3] Every four years, with every presidential election, we are familiarized with this system the Founding Fathers put in place in 1787: the Electoral College.[4] A presidential candidate has won the national popular vote but not the Electoral College five times before.[5] It is one of the most criticized provisions of the Constitution, yet, even though there have been many challenges to it, there has been

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2 *See* U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI.

3 *See infra* Section I.B.

4 *See generally* William C. Kimberling, *The Electoral College*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, http://uselectionatlas.org/INFORMATION/INFORMATION/electcollege_history.php (last visited Sept. 8, 2015).

5 Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 218 (2012); *see* D'Angelo Gore, *Presidents Winning Without Popular Vote*, FACTCHECK.ORG, http://www.factcheck.org/2008/03/presidents-winning-without-popular-vote (last updated Dec. 23, 2016); *infra* Section I.A.

no success in abolishing it.[6] The last time Congress came close to abolishing the Electoral College was in the late 1960s, following the 1968 Presidential Election between Richard Nixon and Hubert Humphrey.[7] But what if there was a way to change the system, without exactly changing the system?

The most recent attempt to change the Electoral College system is through the National Popular Vote Interstate Compact (NPVIC).[8] Eleven jurisdictions[9] have passed the NPVIC, and as a result, have agreed to appoint their electors to the presidential candidate that wins the national popular vote.[10] Proponents of the NPVIC believe the states are exercising their constitutional rights under the Electoral College provision,[11] but opponents of the NPVIC claim that it is unconstitutional under the Compact Clause, since there is no congressional approval.[12]

This Note will discuss the constitutional and legal implications of the NPVIC, and will explore the strengths and weaknesses of the arguments both for and against its implementation. It will argue that the NPVIC is constitutional, despite many opponents' views that it is not, because it does not encroach on federal supremacy or threaten the political relevance or rights of non-compacting states.[13] This Note

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6 Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011).

7 Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 217 (2004).

8 *See generally* NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com (last visited Sept. 7, 2015).

9 The eleven jurisdictions that have passed the NPVIC are: California, District of Columbia, Hawaii, Illinois, Massachusetts, Maryland, New Jersey, New York, Rhode Island, Vermont, and Washington. *Status of National Popular Vote Bill in Each State*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/state-status (last visited Apr. 5, 2017). Together, these states have 165 electoral votes—61% of the 270 electoral votes needed to win the presidency, and the 270 votes needed to enact the NPVIC. *See id*.

10 *See Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/written-explanation (last visited Apr. 5, 2017).

11 "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." U.S. CONST. art II, § 1, cl. 2.

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

13 There are many political implications of the NPVIC, but this Note will not address those. Additionally, this Note will not argue that the Electoral College is unconstitutional under the Equal Protection Clause, as this principle was shot down by the Supreme Court in the wake of various actions following the infamous 2000 presidential election. The Court has stated that the "one person, one vote" doctrine is embodied in the Equal Protection Clause. *See* Rice v. Cayetano, 528 U.S. 495 (2000); Gray v. Sanders, 372 U.S. 368 (1963). However, the Eastern District of New York declined to extend this ruling to the Electoral College when a New Yorker claimed his vote was diluted because of the Electoral College system. *See* New v. Ashcroft, 293 F.Supp.2d 256 (E.D.N.Y. 2003). The Court explained that "'[n]either the Constitution nor the 'one person, one vote' doctrine vests a right in the citizens of this country to vote for Presidential

proposes that if a lawsuit between the states resulted from the enactment of the NPVIC, even if the merits of the claim are constitutional, the United States Supreme Court should dismiss these cases because the states bringing the suit would not have standing.[14] Finally, this Note concludes that since congressional approval is not required, and if a non-compacting state were to bring suit once the NPVIC goes into effect it would not have Article III or prudential standing, there is virtually nothing stopping the NPVIC's enactment in a state.

Part I describes the history of the Electoral College, how it came to be, and its implications since its enactment—including the times when it has worked, the times when it has not, and the differences between the state of the nation then and today.[15] It then argues that the Electoral College is a system no longer suitable for our government today, which is why the NPVIC is created by a more undivided and cooperative set of states than the states that created the Electoral College. It then describes the specific mechanisms of the NPVIC.[16]

Part II explains the constitutional debate that the NPVIC faces—that it may be consistent with Article II, Section 1 (the Electoral College), but may be unconstitutional under Article 1, Section 10 (the Compact Clause).[17] It then concludes that the NPVIC is constitutional under the Compact Clause and consistent with the Electoral College, since Article II, Section 1 gives state legislatures plenary power to appoint their electors in any manner they see fit, and that it does not require congressional consent under Article 1, Section 10.[18] Part II further analyzes why the NPVIC is constitutional—mainly because it does not encroach on federal supremacy, nor does it threaten the political power and rights of non-compacting sister states.[19] Part II will also respond to arguments that the NPVIC is unconstitutional under the Compact Clause and it will debunk common myths about the NPVIC.[20]

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electors . . . or empowers the courts to overrule constitutionally mandated procedure in the event that the vote of the electors is contrary to the popular vote.'" *Id*. at 259 (citing Trinsey v. United States, No. CIV.A. 00-5700, 2000 WL 1871697, at *2 (E.D. Pa. Dec. 21, 2000)).

14 Courts in the United States are not permitted to issue advisory opinions, meaning there must be a dispute at issue, with specific parties related to that dispute in front of the court. *See infra* notes 220–21 and accompanying text. "The judicial Power shall extend to all Cases . . . [and] Controversies . . . ." U.S. CONST. art. III, § 2, cl. 1. There are two types of standing the plaintiff must have in order to proceed in a case against the defendant: Article III standing and prudential standing. *See infra* notes 216, 220. This Note explores both kinds of standing and concludes that the non-compacting sister state would have neither form of standing, and thus the case would be dismissed.

15 *See infra* Part I.

16 *See infra* Part I.

17 *See infra* Part II.

18 *See infra* Sections II.A and II.B.

19 *See infra* Section II.C.

20 *See infra* Section II.C.

Part III proposes that if enough states were to pass the NPVIC[21] and a non-compacting sister state and/or its citizens tried to bring suit in federal court, they would not have standing to do so because they would be asserting generalized grievances as opposed to a specific, direct, injury.[22] It will explain how courts would address the issues, how they would analyze and decide the various standing issues, and what the outcome would be based on a hypothetical case.[23]

Ultimately, this Note argues that the National Popular Vote Interstate Compact is constitutional due to the reasons stated above.[24] It will show that the NPVIC does not violate the Compact Clause (thus it does not need congressional consent), it is consistent with Article II Section 1 of the Constitution, and a non-compacting sister state would not have standing to bring suit to challenge it.[25] Thus, if enough states pass the NPVIC to bring it into effect, there would be virtually nothing stopping its enactment.[26]

I. A FRAGMENTED, NEW NATION CREATED THE ELECTORAL COLLEGE: HOW THE SYSTEM IS NOT SUITABLE TODAY

When the Constitutional Convention (Convention) met in 1787, the Founding Fathers had a peculiar situation to grapple with: how to elect a president of a newly formed, democratic, but not yet unified nation. The state of the nation those hundreds of years ago was, as one can imagine, vastly different than the nation we know today. The nation, then fresh out of the Revolutionary War, only had thirteen states—both large and small—that were not unified by any common ground[27], and that were apprehensive about the concept of a federal government.[28] Additionally, there were four million people spread out with barely any form of communication or transportation, and thus had no concrete way to keep

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21 This is a scenario that is not unrealistic, since the number of states that have passed the NPVIC have 61% of the total 270 electoral votes needed to elect the president, and the number of electoral votes needed to enact the NPVIC. *See generally* NATIONAL POPULAR VOTE, *supra* note 8. Additionally, while not expressly the National Popular Vote Interstate Compact, national popular vote legislation has been introduced in forty-seven states, which shows that states are seriously considering the idea that the Electoral College should be replaced with the national popular vote. *See generally id*.; Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218 (2008).

22 *See infra* Part III.

23 *See infra* Part III.

24 *See infra* Conclusion.

25 *See infra* Conclusion.

26 *See infra* Conclusion.

27 *See infra* notes 35–37 and accompanying text.

28 *See* Kimberling, *supra* note 4.

them connected.[29] The Constitutional Convention had several options in deciding how to elect the next president;[30] however, in the end, the Framers selected the Electoral College. During this time, political parties did not nearly have the influence that they have today,[31] and there was no way for the Framers to predict just how influential political parties would become, and the effect they would have on the Electoral College.[32]

Much of the debate surrounding the method of electing the president during this time was between larger free states and smaller slave states: the former wanted a national popular vote, but the latter were concerned that their political voice would not be heard and they would run the risk of having to give up their slaves.[33] Thus, the Convention's goal was to appease southerners with slaveholding interests.[34] The South during this time wanted a guarantee that they would still dominate the nation and could continue to possess slaves; with a national popular vote, this would not be the case.[35]

Another reason the Convention rejected the idea of a national popular vote was because there would be little to no way for citizens to gain information about all the candidates and make an educated

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[29] *Id*.

[30] The Constitutional Convention considered having Congress elect the president. However, it was rejected for many reasons, mainly because it would disturb the balance of power between the branches, would lead to too many "hard feelings" on Congress, and could potentially cause corruption. *Id*. Additionally, the Convention considered having state legislatures elect the president, but this was also rejected because a president would be too "beholden" to state legislatures. *Id*.; *see* Matthew J. Festa, Note, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND L. REV. 2099 (2001). Electoral College did not result from an overall vision for the nation by the Framers; it was a product of strenuous debate. *Id*.

[31] *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313–15 (2006).

> The Framers had not anticipated the nature of the democratic competition that would emerge in government and in the electorate. . . . Justice Jackson astutely recognized that the separation of powers no longer works as originally envisioned because interbranch dynamics have changed with the rise of political parties, which . . . ha[s] diminished the incentives of Congress to monitor and check the President. . . . [T]he degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by [a] political party.

Id.

[32] Herbst, *supra* note 5, at 221.

[33] Roberta A. Yard, Comment, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure "One Person, One Vote"*, 42 SANTA CLARA L. REV. 185, 187 (2001).

[34] Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 202 (1994).

[35] *Id*. With the enactment of the 13th Amendment, to think that our current system of electing the President of our country was a result of appeasing slaveholder interests is something that is unimaginable, and something that demonstrates just how outdated the system is.

decision. Thus, they would be inclined to vote for the candidate from their own state, since that was all they knew, or they would be forced to make a completely uninformed decision.[36] James Madison himself said that the people would never be informed enough to be able to choose the executive properly.[37] All of this evidence shows that the Electoral College was implemented in a fragmented nation during a tumultuous time, with little to no communication between voters—all factors that are not applicable today.[38]

All of these issues bear the question: how did the original Electoral College turn into the winner-take-all system we see today? The rising prominence of political parties in the 19th century pushed the states to adopt the winner-take-all system; the last time a majority of states used the district-plan[39] instead of the winner-take-all plan was in 1800.[40] The rise of political parties meant that the Democrats and Republicans were feeling the pressure, both locally and nationally, to ensure that their party was in control—the winner-take-all system was the way to achieve this goal.[41]

Because the Electoral College's foundations are extremely outdated and inapplicable to how society looks today, the United States needs a new system.[42] The next section of this Note will further this analysis by exploring the instances in which the Electoral College has

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[36] Connecticut delegate Roger Sherman said at the time that the "sense of the nation would be better expressed by the legislature, than by the people at large." Ky Fullerton, Comment, *Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College to Go?*, 80 OR. L. REV. 717, 719 (2001); *see also* Herbst, *supra* note 5, at 221.

[37] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 306 (1966).

[38] As of 2013, a reported 116,291,000 households have Internet access. Thom File & Camille Ryan, *Computer and Internet Use in the United States: 2013*, UNITED STATES CENSUS BUREAU (2014), https://www.census.gov/history/pdf/acs-internet2013.pdf. A reported 69% of Americans get their news from their laptop or computer. *How Americans Get Their News*, AM. PRESS INST., (2014), http://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news. This shows how Americans are more connected than ever before and they are capable of receiving news instantly at any time of day.

[39] The district-plan allocated a certain amount of electoral votes to each district within a state, rather than to each state. This made states more fragmented and thus the allocation of electoral votes more fragmented as well. Norman R. Williams, *Why the National Popular Vote Compact is Unconstitutional*, 2012 BYU L. REV. 1523 (2012), Section III.C.

[40] *Id*.

[41] *Id*. The first president of the United States, George Washington, pleaded against political parties in general; fearing the effects they would have on the country. He stated in his farewell address:

> However [political parties] may now and then answer popular ends, they are likely . . . to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.

George Washington, Former President, Farewell Address (Sept. 17, 1796).

[42] *See supra* Part I.

failed us.

A. *The Electoral College Has Failed Us: Historical Considerations*

A presidential candidate has won the national popular vote but not the Electoral College, thus losing the presidency, five times in our nation's history: 1824, 1876, 1888, 2000, and 2016.[43]

In 1824, the Electoral College was deadlocked in the presidential election between Andrew Jackson and John Quincy Adams, so the House of Representatives acted as the tiebreaker vote to determine who the next president would be.[44] Ultimately, Adams prevailed in this election, but only after allegations of corruption that Adams created a secret deal with the House of Representatives in order to secure the presidency, and only after Jackson won 38,000 more votes in the national popular vote.

In 1876, the Democratic candidate, Samuel J. Tilden, won the national popular vote by 200,000 votes, but was one electoral vote short of winning the presidency—Republican candidate Rutherford B. Hayes ended up winning that election.[45] Hayes' supporters devised a plan to secure all the disputed electoral votes, which included promising a federal subsidy for the Texas and Pacific Railway Company to a Southern Congressman; in exchange, the Congressman abstained from the Democratic filibuster against the decision of the Electoral Commission, resulting in Hayes' victory.[46]

In 1888, no fraud was involved, but the Democratic candidate and then-president Grover Cleveland won the national popular vote by about 100,000 votes to Republican counterpart Benjamin Harrison, but Cleveland lost in the Electoral College.[47] Cleveland carried many small

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[43] Herbst, *supra* note 5, at 229. Although only five times may not seem like many, there have been a total of fifty-eight presidential elections—so the Electoral College has failed us five out of fifty-eight times, or about 8%. *See id.*; *see also* Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 721 (2007). At the time of this writing in the Fall of 2015, the 2000 election was the last time a presidential candidate won the Electoral College but not the national popular vote. Since then, the 2016 election can be added to this list. Hillary Clinton beat Donald Trump by almost 2.9 million votes in the national popular vote, but Trump beat Clinton by seventy-four electoral votes. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count.

[44] *See* Christopher Anglim, *A Selective, Annotated Bibliography on the Electoral College: Its Creation, History, and Prospects for Reform*, 85 L. LIBR. J. 297, 307 (1993); Fullerton, *supra* note 36, at 728.

[45] Anglim, *supra* note 44, at 309.

[46] *Id*.

[47] Brandon H. Robb, Comment, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President by National Popular Vote*, 54 LOY. L. REV. 419, 442 (2008).

and mid-sized states by wide margins, but Harrison carried most of the large states by small margins, meaning that even though Harrison did not win the large states by much, he received all of the electoral votes because of the winner-take-all system, which is still in place today.[48]

Over a century later, the Electoral College failed us again, in the infamous 2000 election between George W. Bush and Al Gore[49]—the election that sparked the current movement to reform the presidential election process.[50] After a long back and forth series of both candidates winning different major states, and with no clear winner of the election in sight, it seemed as though one state's electoral votes would determine the outcome of the election: Florida.[51] In the end, Bush won the election by receiving 271 electoral votes—one more than needed—but Gore won the national popular vote: he had 50,999,897 votes whereas Bush had 50,456,002 votes—over 500,000 fewer.[52] As a consequence of this election, Gore filed a complaint, which made its way all the way to the Supreme Court.[53]

While the period between the second and third times the Electoral College failed us was over 100 years, the span between the third and fourth times was only sixteen years. In the 2016 election, perhaps the most controversial of them all, Republican candidate Donald Trump surpassed Democratic candidate Hillary Clinton by seventy-four Electoral College votes, whereas Clinton surpassed Donald Trump by 2.9 million votes in the national popular vote.[54]

B. *Common Criticisms of the Electoral College*

One criticism of the Electoral College is that it causes candidates to ignore the larger states with the largest populations in favor of less populous, but more "battleground," states.[55] For example, New York, California, and Texas are relatively solid Democratic, Democratic, and Republican states, respectively, and they also have three of the largest

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48 *Id*. at 442–43.

49 *See 2000 Official Presidential General Election Results*, FED. ELECTION COMM'N, http://www.fec.gov/pubrec/2000presgeresults.htm (last updated Dec. 2001).

50 *See* Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2526 (2001).

51 Fullerton, *supra* note 36, at 729–30.

52 *See* FED. ELECTION COMM'N, *supra* note 49.

53 Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam). While this case does not have much to do with the Electoral College itself, it is an important piece of the story. The Supreme Court reversed the Florida Supreme Court's decision that Gore satisfied his burden of proof with respect to the County's failure to tabulate the 9,000 ballots that the machine did not detect a vote. *Id*. at 102.

54 *See* Krieg, *supra* note 43.

55 *See infra* note 57 and accompanying text.

populations in the entire nation.[56] However, in the 2012 presidential election, from June 2012 to Election Day, presidential candidates Barack Obama and Mitt Romney made only a combined total of thirty-six visits to California, thirty-four visits to New York, and fourteen visits to Texas, whereas they made a combined seventy-six visits to Ohio, a state with a population of only 11,550,839 in 2012—more than 26 million fewer people than California.[57] Additionally, vice presidential candidates Joe Biden and Paul Ryan made only a combined total of three visits to California, five visits to New York, and four visits to Texas, whereas they made a combined forty-eight visits to Ohio. This is a staggering difference.[58]

Another criticism of the Electoral College is that it discourages voter turnout.[59] For example, in 2012, voter turnout was 11% higher in battleground states than in the rest of the country.[60] In that election, voter turnout was 71.1% in Colorado—a battleground state—but only 59.4% in the rest of the nation.[61] The percentage of voters who participated in the 2004 election, as compared to the 2000 election, was almost 5% higher, but this increase is only due to the battleground states.[62] This shows that many people who do not live in large swing states—the majority of Americans[63]—feel as though their votes do not

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56 *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016*, U.S. CENSUS BUREAU (2016), https://www.census.gov/data/tables/2016/demo/popest/state-total.html (click first Excel table). As of 2012, New York had an estimated population of 19,602,769 California had an estimated population of 38,011,074 and Texas had an estimated population of 26,071,655.

57 *Id*.; *Presidential Campaign Stops: Who's Going Where*, WASH. POST (Sept. 10, 2012), http://www.washingtonpost.com/wp-srv/special/politics/2012-presidential-campaign-visits (explaining that the presidential candidates made a combined thirty-five visits to Iowa and forty-seven visits to Virginia, but only fourteen visits to Texas). These statistics show that the Electoral College discourages candidates from visiting the states with the largest populations, but rather focuses the candidates on visiting "swing" states, even though they have significantly lower populations. As of September 2016, half of the 105 presidential campaign visits have only been in five states—Pennsylvania, Ohio, Florida, North Carolina, and Virginia. *Two-thirds of Presidential Campaign Is in Just 6 States*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/campaign-events-2016 (last visited Apr. 17, 2017). Since July 2016, thirty-one states have been ignored by the candidates. *Id*.

58 *Presidential Campaign Stops: Who's Going Where*, *supra* note 57.

59 JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 37–38 (4th ed. 2013). Additionally, after the infamous 2000 presidential election, the subsequent 2004 and 2008 presidential elections saw higher voter turnouts. *Voter Turnout in Presidential Elections: 1828–2012*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/data/turnout.php (last visited Apr. 17, 2017).

60 KOZA, *supra* note 59, at 37.

61 *Id*.

62 Pietro S. Nivola, *Thinking About Political Polarization*, BROOKINGS INST. (Jan. 1, 2005), http://www.brookings.edu/research/papers/2005/01/01politics-nivola (explaining that since the Electoral College has narrowed elections—like the 2000 presidential election—down to the final votes in one battleground state, voters elsewhere feel as if their votes do not matter).

63 There were only nine swing states in the 2012 election: Colorado, Florida, Iowa, Nevada,

count, since their state will almost definitely go a certain way.[64]

Yet another criticism is that the Electoral College system is unnecessarily complex. Instead of a direct national popular vote—where every vote is counted as one and added up—there are many complexities in the Electoral College.[65] Votes must be counted in every state, electoral votes need to be delegated, and the president has to be chosen through those electoral votes.[66] It is a far more complex system of voting than necessary for a democratic nation; a national popular vote would increase efficiency and would be much simpler.[67]

Another major problem with the Electoral College is the winner-take-all system it implements.[68] With this system, each state gives its entire slate of electoral votes to the winner of its statewide popular vote.[69] Disadvantages of this system include ignoring minority candidates, and creating the battleground states which garner so much of the presidential candidates' attention, leaving non-battleground states without any presidential candidate influence.[70] For example, if a candidate only has one more vote than another, they will win the entire slate of electoral votes, even though they only won by one vote.[71]

C. *Other Electoral College Reform Ideas That Fell Short*

Many of these common criticisms have led some (congressional representatives and others, alike) to propose various reforms to the system.[72] However, these proposals to reform the Electoral College involve completely changing the system and even the Constitution.

New Hampshire, North Carolina, Ohio, Virginia, and Wisconsin. Chris Cillizza, *The 9 Swing States of 2012*, WASH. POST (Apr. 16, 2012), https://www.washingtonpost.com/blogs/the-fix/post/the-9-swing-states-of-2012/2012/04/16/gIQABuXaLT_blog.html. As of September 2016, there are only eleven swing states in the 2016 election, the same swing states as 2012 plus Michigan and Pennsylvania. *The Battleground States Project*, POLITICO, http://www.politico.com/2016-election/swing-states (last visited Apr. 17, 2017).

64 Stanley Chang, Recent Development, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 218 (2007).

65 GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2d ed. 2011).

66 Elizabeth D. Lauzon, *Challenges to Presidential Electoral College and Electors*, 20 A.L.R. FED. 2d 183, Part I § 2 (2007).

67 *Id*.

68 This winner-take-all system has been in effect since 1836. Herbst, *supra* note 5, at 230. Forty-eight states currently use the winner-take-all system—the exceptions being Maine and Nebraska, which allocate their electoral votes by district. *Id*.

69 *Id*.

70 *Id*.

71 Lauzon, *supra* note 66.

72 *See infra* note 83 and accompanying text.

Thus, there is no feasible way these plans could go into effect.[73]

After the infamous 2000 election,[74] Senator Dick Durbin and Representative Ray LaHood advocated for a direct national popular vote plan, mainly proposing that a candidate must receive at least 40% of the whole number of votes in order to win the general election.[75] If neither candidate gets at least 40%, the candidates participate in a run-off election.[76] While there are many benefits to this system,[77] it would completely destroy the Electoral College in its entirety, which would require Congress to come to a decision to make a constitutional amendment—an unlikely scenario.[78]

Another commonly known proposal to reform the Electoral College is the district-plan.[79] This would involve giving electoral votes to each congressional district, rather than to states as a whole (much like the system Maine and Nebraska still use today)[80] and having the winner of each district get those electoral votes.[81] However, the main problem with this plan is that it does not necessarily guarantee the winner of the national popular vote the presidency—we could still run into the same problems that we have with the Electoral College. It is still the same winner-take-all system that the Electoral College implements except instead of a state winner-take-all, it is a district winner-take-all. This may break up the current Electoral College system into smaller pieces, but the same problems remain.[82]

D. *The NPVIC: An Overview*

There were many attempts to abolish the Electoral College in the

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73 *See* Fullerton, *supra* note 36, at Part V.

74 *See supra* Section I.A.

75 S.J. Res. 56, 106th Cong. (2000); H.R.J. Res. 23, 106th Cong. (1999).

76 S.J. Res. 56, 106th Cong. (2000); H.R.J. Res. 23, 106th Cong. (1999).

77 Fullerton, *supra* note 36. For example, there would be no dispute as to which candidate wins the election—the candidate who wins the national popular vote wins.

78 The process to amend the Constitution is outlined in Article V: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid . . . when ratified by the Legislatures of three fourths of the several States . . . ." U.S. CONST. art. V. Since the Constitution was enacted in the 18th century, there have been over 10,000 proposed amendments in Congress; only thirty-three survived two-thirds of both houses, and twenty-seven have been ratified. Darren R. Latham, *The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. U. L. REV. 145, 165 (2005). These numbers show how difficult it is for the Constitution to be amended.

79 Fullerton, *supra* note 36, at 733; Herbst, *supra* note 5, at 238.

80 ME. REV. STAT. ANN. tit. 21-A, § 805(2) (West 2008); NEB. REV. STAT. ANN. § 32-714 (West 2009).

81 Fullerton, *supra* note 36, at 733.

82 *Id*. at 734.

past through congressional action[83] and some recent proposals,[84] but in 2006, John Koza co-authored a book proposing the National Popular Vote Interstate Compact.[85] He explains that his motivation was the lack of democratic elements in the current system of electing the president.[86] One year later, NPVIC legislation began to emerge in forty-two states.[87] Maryland became the first state to enact the legislation when Governor Martin O'Malley signed it into law on April 10, 2007.[88] In 2008, New Jersey, Illinois, and Hawaii followed suit and enacted the legislation.[89] One year later in 2009, Washington State enacted the legislation.[90] In 2010, Massachusetts and District of Columbia enacted the legislation.[91] Vermont and California followed suit in 2011,[92] Rhode Island in 2013,[93]

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[83] Most notably, in the 1968 election between Richard Nixon and Hubert Humphrey, Nixon took a very small plurality of the national popular vote (43.3% to 42.7%), but won by a landslide in the Electoral College (301 to 191). Boudreaux, *supra* note 7, at 217. This election caused Senator Birch Bayh to propose a constitutional amendment to abolish the Electoral College in favor of a national popular vote. Symposium, *A Modern Father of our Constitution: An Interview with Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 783 (2010). Ultimately, the resolution failed due to lack of votes to end the filibuster blocking the bill. *Id*. Additionally, Supreme Court justices have voiced their opinion when it comes to abolishing the Electoral College: "To abolish [the Electoral College] and substitute direct election of the President, so that every vote wherever cast would have equal weight in calculating the result, would seem to me a gain for simplicity and integrity of our governmental processes." Ray v. Blair, 343 U.S. 214, 234 (1952) (Jackson, J., dissenting).

[84] *See supra* Section I.C.

[85] KOZA, *supra* note 59; *see e.g*., *News History*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/news-history (last visited Apr. 5, 2017) (John Koza is the "originator of the plan."). When states pass this legislation, they are pledging to allocate all of their electoral votes to the winner of the national popular vote, no matter which way the state itself may go (Democratic or Republican) during a presidential election. *Id*.

[86] Koza first explains how anyone who does not live in a swing state has an irrelevant vote under the current system, and how voters in four-fifths of the states are ignored in presidential elections. KOZA, *supra* note 59, at 255. Additionally, he explains how in four out of fifty-six presidential elections, the Electoral College elected a president that did not win the national popular vote. *Id*. at 256.

[87] *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

[88] MD. CODE ANN. ELEC. LAW § 8-5A-01 (West 2013); *see* Associated Press, *Maryland Sidesteps Electoral College*, NBC NEWS (Apr. 11, 2007, 11:17 AM), http://www.nbcnews.com/id/18053715.

[89] N.J. STAT. ANN. § 19:36-4 (West 2014); 10 ILL. COMP. STAT. ANN. 20/1-10 (West 2015); HAW. REV. STAT. ANN. § 14D-1 (West 2008).

[90] WASH. REV. CODE ANN. § 29A.56.300 (West 2014); *see also* Brad Shannon, *State Joins Electoral College Pact*, THE OLYMPIAN (Apr. 29, 2009, 12:00 AM), http://www.theolympian.com/news/local/politics-government/election/article25232041.html.

[91] H.B. 4156, 186th Gen. Court, Reg. Sess. (Mass. 2009); *see also* Steve LeBlanc, *Massachusetts Governor Signs National Popular Vote Bill*, NATIONAL POPULAR VOTE (Aug. 4, 2010), http://archive.nationalpopularvote.com/pages/articles/washingtonexaminer_20100804.php; D.C. CODE ANN. § 1-1051.01 (West 2013).

[92] VT. STAT. ANN. tit. 17, § 2752 (West 2011); CAL. ELEC. CODE ANN. § 6921 (West 2012); Hendrik Hertzberg, *Electoral College Halfway Fixed!*, THE NEW YORKER (July 23, 2013), http://www.newyorker.com/news/hendrik-hertzberg/electoral-college-halfway-fixed.

[93] 17 R.I. GEN. LAWS ANN. § 17-4.2-1 (West 2013); Hertzberg, *supra* note 92.

and finally New York on April 14, 2014.[94]

The mechanisms of the NPVIC are relatively simple. First, the compact would not become effective until it is enacted by states that, in total, have 270 electoral votes—the majority necessary for electing the president in the Electoral College.[95] The compact would not change the overall scheme of the Electoral College—each state still retains its allotted number of electoral votes based on its amount of representation in Congress.[96] The NPVIC solely proposes that the states that pass the compact give their allotted electoral votes to the winner of the National Popular Vote, rather than the winner of the popular vote in the state.[97] Koza proposes that the NPVIC would *reform* the Electoral College in a way that retains the American federalist system of state control over elections, rather than *abolish* the Electoral College.[98]

The NPVIC bill itself is short and simple, outlining the mechanisms described above as well as other provisions.[99] Article III of the bill sets out the specific mechanisms of how the compact would work during a presidential election: the chief election official of each state determines the number of votes for each presidential slate in each state and adds the votes together to create a national popular vote and determines which candidate is the winner.[100] Each member state then makes a final determination of the number of popular votes cast in its state at least six days before the day fixed by law for the meeting and voting by the presidential electors; then, it communicates an "official statement of such determination" within twenty-four hours to the chief election official of every other member state.[101] The chief election official of each compacting state treats this official statement as

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94 N.Y. ELEC. LAW § 12-402 (McKinney 2014); *see also* Hendrik Hertzberg, *National Popular Vote: New York State Climbs Aboard*, THE NEW YORKER (Apr. 16, 2014), http://www.newyorker.com/news/daily-comment/national-popular-vote-new-york-state-climbs-aboard.

95 KOZA, *supra* note 59, at 258.

96 *Id*.

97 *Id*.

98 *Id*.

99 Article I states that any state can become a member of the agreement by enacting the legislation. Article II states that "each member state shall conduct a statewide popular election for President and Vice President," which is the current system in place. KOZA, *supra* note 59, at 559–60; *The Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf (last visited Apr. 5, 2017). The majority of this Note will focus on Articles III and IV of the NPVIC. The entirety of the bill can be found at http://www.nationalpopularvote.com/pages/misc/888wordcompact.php.

100 *The Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf (last visited Apr. 5, 2017).

101 *Id*.

conclusive.[102] Once the number of popular votes is determined, each member state allocates its electoral votes to the projected winner of the national popular vote, regardless of the turnout in the state.[103] In the extremely rare event of a tie for the national popular vote winner, the allocated elector votes will go to the winner of the popular vote in that specific state rather than the winner of the national popular vote.[104]

Article IV of the bill outlines other miscellaneous provisions.[105] It reiterates that the agreement only goes into effect when the states that enacted it possess more than 270 total electoral votes.[106] It also explains that any member state can withdraw from the agreement, except a state cannot withdraw six months or less before the end of a president's term—this prevents states not being happy with how the presidential election may have turned out from being able to withdraw too close to Election Night.[107] Additionally, it explains that the chief executive of each member state shall notify the chief executive of all the other states of when the NPVIC has been enacted and has taken effect; it also articulates that the NPVIC will terminate if the Electoral College is abolished.[108] It concludes by determining that if any provision is held invalid, such invalidation will not affect the remaining provisions.[109]

The majority of this Note will focus on the constitutional implications of Article III and Article IV of the NPVIC. The next section of this Note will explore the constitutional implications of the NPVIC and how they can be resolved.

II. A CONSTITUTIONAL DEBATE—THE ELECTORAL COLLEGE VERSUS THE COMPACT CLAUSE

The National Popular Vote Interstate Compact presents a unique debate; it seems as though it is consistent with the Electoral College Clause, but could be unconstitutional under the Compact Clause. This Part will first explain why the NPVIC is consistent with the Electoral College Clause—since it allows states to exercise power they already have under Article II, Section 1.[110] It will then respond to common

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102 *Id*.; *see also* KOZA, *supra* note 59.

103 KOZA, *supra* note 59.

104 *Id*.

105 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

106 *See generally id*.

107 This is specifically designed so if a state is not satisfied with the outcome of the election—i.e., if the candidate it believed would win the national popular vote did not—they cannot back out of the compact on Election Night, or too close beforehand. *See generally id*.

108 *See generally id*.

109 *See generally id*.

110 *See infra* Section II.A.

constitutionality concerns under the Compact Clause—since under the Constitution states cannot contract together without congressional consent[111]—and explain how these common criticisms can be defeated. It will mainly respond to arguments that the entirety of the NPVIC is unconstitutional under the Compact Clause.[112]

A. *The Electoral College: Article II, Section 1*

This Note previously explores the history of the Electoral College[113], but it is worth noting that during the Constitutional Convention, states' rights advocates were worried that a national popular vote would create a more powerful, partisan federal government, while leaving little role for state governments.[114] This is interesting, in hindsight, since the Electoral College ended up having this exact effect—the effect that, originally, states were concerned would be an effect of a national popular vote.[115]

Article II, Section 1 of the Constitution states, "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[116] This inherently means that the legislature of each state can choose the manner in which to appoint their electors—it does not say specifically how the number of electors should be appointed, only that it must be equal to the number of Senators and Representatives.

In *McPherson v. Blacker*,[117] the Supreme Court declared constitutional the challenged manner of the appointment of electors in the state of Michigan: the election of an elector and an alternate elector in each district, and of an elector and alternate elector at large in each of two districts.[118] While there are differences between this method of appointing electors and those set out in the NPVIC, the Court's reasoning in this case can be applied to the NPVIC. The Court reasoned:

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111 *See infra* Section II.B.

112 Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007); *see* U.S. CONST. art. I, § 10, cl. 3.

113 *See supra* Section I.A.

114 Amanda Kelley Myers, Comment, *Importing Democracy: Can Lessons Learned from Germany, India, and Australia Help Reform the American Electoral System?*, 37 PEPP. L. REV. 1113, 1118 (2010) (quoting Martin J. Siegel, *Congressional Power Over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VT. L. REV. 373, 378 (2004)).

115 *See supra* Section I.B.

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

117 146 U.S. 1 (1892).

118 *Id*. at 6, 23–24.

> [Article II, Section 1, Clause 2] does not read that the people or the citizens shall appoint, but that "each state shall[]" . . . . Hence the insertion of [the language, "in such manner as the legislature thereof may direct"], while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself. . . . [The Constitution] recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of [appointing electors]. . . . [I]t is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.[119]

This is a broad reading of the Electoral College clause that directly applies to the NPVIC; the states possess the plenary power to appoint electors how the legislatures see fit, and the people of that state exercise their rights through their elected officials.[120] The NPVIC does not seek to abolish the Electoral College system, or even change it at all, but rather to allocate their electoral votes differently—a right they explicitly have under the Constitution.[121] Some critics of the NPVIC contend that the only reason the Court allowed Michigan to change its electoral appointment plan from winner-take-all to district-based is because states had already done so in the past, so there was little to no risk in allowing some states to do that now.[122] However, this argument presumes that it is unrealistic for the Court to adopt a principle that has never been adopted before, which is not the case.[123] The Court has shown in the past that it is not afraid to go against years of precedent in the interest of justice; it is not far-fetched to say that the Court would be comfortable making a decision about the national popular vote in lieu of the Electoral College, a far less drastic issue than the ones previously cited.[124]

Over a century later—after the infamous 2000 presidential election—the Supreme Court upheld the same principles set out in

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119 *Id*. at 25–27, 35.

120 *Id*.

121 U.S. CONST. art. II, § 1, cl. 2; Strunk v. U.S. House of Representatives, 24 F. App'x 21 (2d Cir. 2001) (explaining that when a New York voter tried to bring suit challenging the manner in which electors are selected, his case was moot because states are constitutionally empowered to determine how to select electors).

122 Williams, *supra* note 39, at 1581–82.

123 There have been many instances in American history where the Court overturned years of precedent and adopted policies that had never been seen before, and were in fact revolutionary. The Court is clearly comfortable with making these kinds of decisions. *See, e.g*., Brown v. Bd. of Educ., 347 U.S. 483 (1954); Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

124 *See supra* note 123.

McPherson,[125] showing that it did not seek to overturn over 100 years of precedent regarding the Electoral College.[126] When evaluating Florida's manner of appointing electors, Chief Justice Rehnquist said in his concurring opinion, "[W]ith respect to a Presidential election, the court must be . . . mindful of the legislature's role under Article II in choosing the manner of appointing electors . . . ."[127] This shows that it is likely that the Court will give deference to a state's method of appointing electors; thus, as long as a state is following the Electoral College system but appointing the electors in a different way, the Court will give deference to a state's plenary power.[128] The NPVIC does exactly this;[129] it retains the federalist system of the Electoral College laid out in Article II, Section 1,[130] while allowing the states to appoint their electors in a different manner.

In order for a manner of electoral appointment to be considered unconstitutional, it must *offend* the Constitution.[131] This may seem like a broad standard, but the Eastern District of Virginia, in explaining why a general ticket system of electoral appointment does not offend the Constitution in such a way that deems it unconstitutional, stated that the general ticket system "is but another form of the unit rule"—the unit rule being Article II Section 1.[132] The court explains that the unit rule is the system already in place—the Electoral College.[133] The NPVIC is another form of the unit rule as well since it does not seek to abolish the Electoral College or any other constitutional provision, but rather changes the manner in which electors are appointed, a right that the states already possess.[134]

B. *The Compact Clause: Article I, Section 10*

The Compact Clause has British roots; during the colonial era, the Crown sought to resolve disputes between different colonies from across the Atlantic Ocean.[135] Once the Revolutionary War was over,

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125 *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).
126 *See id*.
127 *Id*. at 114 (Rehnquist, C.J., concurring).
128 *Id*.
129 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.
130 U.S. CONST. art. II, § 1.
131 Williams v. Virginia State Bd. of Elections, 288 F.Supp. 622 (E.D. Va. 1968).
132 *Id*. at 626–27.
133 *Id*.
134 *See* KOZA, *supra* note 59; U.S. CONST. art. II, § 1.
135 Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925). Frankfurter and Landis explain that there were two modes of settling these kinds of disputes. *Id*. at 692.

many of these disputes were left unresolved, and the United States was under the Crown's reign, and the new United States needed to find a way to resolve these disputes on its own.[136] In the end, the Compact Clause of the Constitution was born during the Constitutional Convention.[137] The Framers created the Compact Clause so that the states could not come together to threaten the Union without congressional consent.[138] The Framers sought stronger language than that in the Articles of Confederation in order to ensure that state power would not endanger the Union.[139]

The Compact Clause in the Constitution states, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."[140] While this language may seem very restrictive, the Supreme Court has recognized that congressional consent is not feasible or necessary in every agreement between states, so it has held that congressional consent is only required when a compact encroaches on federal supremacy.[141] The Court reached this conclusion when it was resolving a border dispute between Virginia and Tennessee, and held that a border dispute between two states does not concern the federal interest.[142] Since *Virginia v. Tennessee* was decided, many courts have followed this proposition that congressional consent is not required unless the compact encroaches on federal supremacy.[143]

> If an agreement was reached, not infrequently after years of torturous discussion, the further approval of the Crown was required. If negotiations failed or in lieu of such direct settlement, the second mode of procedure . . . . was an appeal to the Crown, followed normally by a reference of the controversy to a Royal Commission . . . . [which] bore the characteristics of a litigation.

Id. at 692–93.

136 *Id*. at 693.

137 *Id*. at 694.

138 Michael S. Greve, *The Heritage Guide to the Constitution*, *The Compact Clause*, THE HERITAGE FOUNDATION, http://www.heritage.org/constitution/#!/articles/1/essays/75/compact-clause (last visited Apr. 17, 2017).

139 *Id*.

140 U.S. CONST. art. I, § 10, cl. 3.

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

142 "The mere selection of parties to run and designate the boundary line between two states, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition [of the Compact Clause]." *Id*. at 520.

143 *See, e.g*., U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (In *U.S. Steel Corp*., the Court held that the Multistate Tax Compact at issue was constitutional, since not all agreements between states are subject to the Compact Clause. In coming to this determination, the Court cites Justice Fields in *Virginia v. Tennessee*: "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.") (citing Virginia v. Tennessee, 148 U.S. at 519); *see also* Star Sci. Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002) (noting that in *U.S. Steel Corp*., the Supreme Court upheld a compact resulting in reciprocal State legislation);

This Note argues that the NPVIC is constitutional under the Compact Clause because it does not encroach on said federal supremacy.

The Supreme Court in later cases followed the propositions set out in *Virginia*.[144] In *U.S. Steel Corp. v. Multistate Tax Commission*, [145] the Court expanded on the *Virginia* rule, by creating a test for compacts that are alleged violations of the Compact Clause.[146] The Court explained that the "test is whether the Compact enhances state power *quoad*[147] the National Government."[148] The Court ruled that the Multistate Tax Compact at issue was constitutional since it did not purport to authorize the member states to exercise any powers they otherwise could not have if there was no compact.[149] Additionally, the Court noted that many times in the past it had upheld a *variety* of interstate agreements that did not have congressional consent, and even those that resulted in reciprocal state legislation.[150] This logic applies to the NPVIC since it would result in reciprocal state legislation in the sense that other, originally non-compacting, states may choose to enact the NPVIC once it goes into effect.

Another factor the Court in *U.S. Steel Corp*. relies on is making sure that the compact at issue does not have an impact on "federal structure."[151] The definition of structure is, "[t]he arrangement of and relations between the parts or elements of something complex."[152] The definition of federal is, "[h]aving or relating to a system of government in which several states form a unity but remain independent in internal affairs."[153] Thus, when the two definitions are combined, it follows that federal structure inherently refers to the relations between the federal government. The NPVIC would not have an impact on federal structure since it does not purport to change the Constitution or any aspect of the federal government, nor does it seek to enhance states' power at the expense of the federal government;[154] it strictly has to do with states'

Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 176 (1985) (holding that the state bank statute at issue was constitutional, since "[t]o the extent that the state statutes might conflict in a particular situation with other federal statutes . . . they would be pre-empted by those statutes, and therefore any Compact Clause argument would be academic[]").

144 *See supra* note 143.

145 434 U.S. 452 (1978).

146 *U.S. Steel Corp*., 434 U.S. 452.

147 The definition of quoad is "with respect to" or "regarding." *Quoad*, COLLINS ENGLISH DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/quoad (last visited Apr. 17, 2017).

148 *U.S. Steel Corp*., 434 U.S. at 473.

149 *Id*.

150 *Id*. at 469–70.

151 *Id*. at 470–71.

152 *Structure*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2016).

153 *Federal*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2016).

154 *See infra* note 206.

rights.[155] The Court in multiple instances has deemed certain compacts, even those that result in reciprocal state legislation—a political effect—not to have an impact on the federal structure.[156]

C. *The NPVIC Does Not Encroach on Federal Supremacy, or on the Rights of Non-Compacting Sister States*

This section of the Note will directly respond to arguments against the NPVIC,[157] in which opponents primarily argue that the NPVIC is unconstitutional because it encroaches on federal supremacy and on the rights of non-compacting sister states.[158] This Note argues that these arguments are flawed and outdated, and that the NPVIC does not encroach on federal supremacy or on the rights of non-compacting sister states. The NPVIC does not concern federal supremacy or a federal interest because it would not change the system at all, and the NPVIC is not radical enough of a compact to overturn hundreds of years of Supreme Court precedent, since the Supreme Court has never invalidated a compact based upon the effect on non-compacting sister states.[159]

1. Federal Supremacy? No Encroachment.

In analyzing whether or not the NPVIC encroaches on federal supremacy, it is important to define what exactly federal supremacy means. This definition can be found in the Supremacy Clause of the Constitution.[160] The Supreme Court has interpreted this provision in many ways; one of the landmark cases is *M'Culloch v. Maryland*.[161] The Court held that the state of Maryland could not tax a federal bank because if it had the power to do so, it would have the power to destroy the federal institution, and that states would effectively become more powerful than the federal government.[162] This logic regarding the

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155 U.S. CONST. art. II, § 1, cl. 2.

156 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 478 (1978).

157 *See* Muller, *supra* note 112; Williams, *supra* note 39; Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 197 (2008); Tara Ross, *Legal and Logistical Ramifications of the National Popular Vote Plan*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 37 (2010).

158 *See* Muller, *supra* note 112, at 372.

159 *See infra* note 188 and accompanying text.

160 "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

161 17 U.S. 316 (1819).

162 *See id*.

Supremacy Clause does not follow to the NPVIC—the NPVIC has no threat on the federal government, and it certainly does not make the states more powerful than the federal government.[163] The federal government has no control when it comes to presidential elections.[164] Thus, if the NPVIC were to be put into effect, there would be no disturbance in the balance of power—the states are simply exercising a right they already have under the Constitution, and that has no effect on federal authority.[165] There is no relationship between the states and the federal government here as there was in *M'Culloch*, when a state directly tried to lessen the power of the national federal government.[166] Additionally, if the Constitution is the supreme law of the land,[167] then the states' plenary power under Article II is included in the Supremacy Clause.[168] The states that have enacted the NPVIC do not seek to impose anything on the federal government; rather, they seek to exercise the power they already have under the Constitution.[169]

One opponent to the NPVIC claims that all political compacts need congressional consent, and that the Court in *Virginia* laid out all possible types of non-political compacts:[170] land purchases, contracting to use a canal, draining a disease-causing swamp, and uniting to resist pestilence.[171] However, this argument fails to take into account the time period in which *Virginia* was decided. This case was decided in 1893,[172] at which point there was no way for the Court to know the effect the Electoral College would have on American government, or that states would eventually want to compact to allocate their electoral votes differently.[173] There was no way for the Court in 1893 to be able to

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163 The states would not have more power than the federal government if the NPVIC were to be enacted. It merely gives states a mechanism to enact electors in the manner they see fit, a right explicitly granted in the Constitution. U.S. CONST. art. II, § 1, cl. 2.

164 Except in the event of a tie, at which point the House of Representatives has the deciding vote. U.S. CONST. amend. XII.

165 *See supra* note 163.

166 *See M'Culloch*, 17 U.S. 316.

167 U.S. CONST. art. VI, cl. 2.

168 U.S. CONST. art. II, § 1, cl. 2.

169 *Id*.

170 "Non-political"—meaning that the compact at issue does not affect national sovereignty. Muller, *supra* note 112, at 382.

171 *Id*. at 383 (citing Virginia v. Tennessee, 148 U.S. 503, 518 (1893)).

172 *Virginia*, 148 U.S. 503.

173 1893 was over 100 years ago; needless to say the state of the country looked very different than it does today. This was right at the beginning of the Industrial Revolution. *See* EDWARD C. KIRKLAND, INDUSTRY COMES OF AGE, BUSINESS, LABOR, AND PUBLIC POLICY, 1860–1897 (1961). It was additionally during the woman's suffrage movement. *See* REBECCA J. MEAD, HOW THE VOTE WAS WON: WOMAN SUFFRAGE IN THE WESTERN UNITED STATES, 1868–1914 (2006). Because of these historical differences, hindsight is not 20/20. For the Supreme Court in 1893 to imagine what the state of the country would be like today would be comparable to the Supreme Court now trying to imagine what the state of the country will be like in the year 2130.

create an exhaustive list of all non-political compacts.[174] The NPVIC is not a political compact, despite the fact that it may seem like one on its face. A political compact is not one that has to do with politics, but rather one that affects national sovereignty.[175]

Some argue that Article II of the Constitution does not give the states the plenary power suggested to appoint their electors in the manner they see fit—rather, although they have this power, it cannot be used in ways that change the structure of the federal government.[176] There have been attempts to compare the NPVIC to the congressional term limits at issue in *U.S. Term Limits, Inc. v. Thornton*,[177] but these are of no avail. First, a congressional term limit is incomparable to the Electoral College, since they are two completely different constitutional provisions.[178] Additionally, the states' power to impose congressional limits on Congress has nothing to do with the states' power to appoint electors in a presidential election—we are dealing with two completely different branches of government.[179] Opponents have attempted to argue that analogizing these two provisions is possible because the wording of the constitutional provisions can be compared. Thus, the Framers would believe that the NPVIC would irrevocably change the face of federal government, which is not what was intended.[180] However, this argument is flawed. The Constitution is structured to guarantee a separation of powers so there is no threat of tyranny to the federal government.[181] Nothing relating to the NPVIC suggests that there is a threat of tyranny[182]—if the Framers truly intended for these two provisions to be so similarly worded that they can be compared, it seems as though that these two provisions would at least be in the same section of the Constitution—or at least, relating to the same branch of government.[183]

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174 1893 was right before the start of the Progressive Era—which lasted roughly from 1903–1917—a period of time in which the United States saw new forms of government regulation, bipartisanship, socialism, and collective action. *See* Elizabeth Sanders, Symposium, *Rediscovering the Progressive Era*, 72 OHIO ST. L.J. 1281 (2011). With a time period like the Progressive Era on the Court's heels, it's difficult to imagine that the Court could find a way to create a list of all non-political compacts.

175 Muller, *supra* note 112.

176 Williams, *supra* note 39.

177 514 U.S. 779 (1995).

178 The two provisions are not even in the same Article of the Constitution. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. art. I, § 4.

179 Article I of the Constitution deals with legislative powers, whereas Article II of the Constitution deals with executive powers. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. art. I, § 4.

180 *See* Williams, *supra* note 39; Ross, *supra* note 157.

181 *See* United States v. Nichols, 784 F.3d 666 (10th Cir. 2015).

182 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

183 This is especially true since, as analyzed above, the Electoral College was one of the most hotly debated topics during the Constitutional Convention. *See* Heather Green, Comment, *The National Popular Vote Compact: Horizontal Federalism and the Proper Role of Congress Under the Compact Clause*, 16 CHAP. L. REV. 211, 232–33 (2012); *supra* Part I.

Another argument is that even if the states do have the ability to exercise the rights laid out in Article II, the Guarantee Clause[184] would prevent the NPVIC's enactment, since the NPVIC does not guarantee a federal republic government.[185] Specifically, allowing a national popular vote without a constitutional amendment does not guarantee a republican form of government.[186] However, this is a flawed argument, because the Guarantee Clause protects a *representative democracy*, and a national popular vote election of the president is perhaps the most direct form of a representative democracy this nation has seen—each person being represented equally, more so than in the Electoral College.[187]

2. Non-Compacting Sister States' Rights? No Encroachment.

It is important to note that the Supreme Court has never invalidated a compact based on the effect on non-compacting sister states.[188] Thus, for the Court to do so, it would take an extremely invasive and radical compact for the Court to depart from hundreds of years of precedent.

Some opponents argue that the NPVIC seeks to make larger compacting states more powerful at the expense of smaller, non-compacting states.[189] They mistakenly attempt to compare a compact involving a border dispute to the NPVIC, and in the wake of *Virginia*, make a sweeping generalization that the Court "would" ultimately define a political compact as one that "aggrandiz[es] the political power of the compacting states[,]"[190] and conclude that if the Court were deciding on the NPVIC, it would deem it unconstitutional on these grounds.[191] This claim is a big jump from discussing compacts that deal with border disputes.[192] Additionally, this argument fails to take into consideration the fact that the NPVIC would not increase the political

184 U.S. CONST. art. IV, § 4.

185 *See* Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009).

186 *Id*. at 1444.

187 *See*, *e.g*., Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941 (2012).

188 *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978); Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985) (determining that while non-compacting sister state interests are an important inquiry in evaluating whether or not a compact violates the Compact Clause, it is not dispositive).

189 Muller, *supra* note 112, at 385.

190 *Id*. at 384.

191 *Id*.

192 A compact dealing with border disputes has virtually nothing to do with a compact like the NPVIC—they are from two different realms.

power of compacting states.[193] While it is true that presidential candidates may visit these states more often if the NPVIC were to go into effect, this does not mean that their political power will be "aggrandized." More presidential candidate visits do not mean that a state's political power is increased.[194] The states are not seeking to increase the number of electoral votes they allocate; in fact, these states' political influence would arguably remain the same.[195]

Another argument opponents make is that since the NPVIC goes into effect when it has the majority number of electoral votes, if it were to go into effect, it would "guarantee" the winner of the presidential election by the national popular vote—thus, non-compacting minority states could lose their appointment of electors.[196] This is simply not the case. The NPVIC does not take away the constitutional rights of other non-compacting states to appoint their electors in the manner they see fit.[197] Nor does the NPVIC guarantee the winner of the presidential election by national popular vote—there have been times in the nation's history where the president won the election by only a narrow margin of national popular vote votes.[198] Thus, this argument does not show that non-compacting sister states would become irrelevant, unless opponents want to claim that fewer presidential visits to states makes states completely irrelevant, which has no factual basis.[199] If this logic were to

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193 KOZA, *supra* note 59, at 457 (explaining that smaller states are currently disadvantaged by the winner-take-all system and if smaller states were to compact, they would arguably have more political influence than they do now).

194 *Id*.

195 *Id*. at 473–74 (explaining that the equal representation of the states in the Senate is protected by the Constitution and cannot be changed by any kind of compact, and that the NPVIC does not affect this equal representation laid out in the Constitution—the mechanism that creates the Electoral College).

196 Muller, *supra* note 112, at 391.

197 U.S. CONST. art. II, § 1, cl. 2. Other scholars have also taken this approach. In an Article that was written in 2002 (before the NPVIC was formulated), Robert Bennett saw something like the NPVIC coming, and he determined that:

> [I]t is far from clear that 'compacting' states could be seen as 'enhancing' their political power. . . . A state's influence after the suggested change . . . is highly contingent and unpredictable, providing only the most fragile basis for making any 'enhancement' judgment. . . . [A] degree of state coordination in the move to a nationwide popular vote would likely survive a Compact Clause challenge.

Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 GREEN BAG 2d 141, 145–46 (2002).

198 *See supra* Section I.A.

199 Presidential campaign visits do not equal political influence. The political influence a state has resides in the amount of electoral votes it has—for this is what ultimately decides the outcome of an election. U.S. CONST. art. II, § 1, cl. 2. Additionally, studies conducted have concluded that political campaigns generally have little influence on the outcome of the election. *See* Henry E. Brady, Richard Johnston & John Sides, *The Study of Political Campaigns*, http://home.gwu.edu/~jsides/study.pdf (last visited Nov. 20, 2015). It is generally very difficult to change a voter's mind once he has decided which candidate he is voting for, and campaigns won't

be applied to the Electoral College today, it can be said that large or battleground states take away the constitutional rights of small non-swing states, since the latter are disadvantaged by the actions of the former; if this logic were applied, there would be no solution to the problem of how to elect the president.

Justice White's dissent in *U.S. Steel Corp.*—regarding the expansion of the *Virginia* rule—says that groups of states cannot take action collectively even if they are permitted to do so individually.[200] However, proponents who use this argument fail to take into account that this is a dissenting opinion—thus, it is by no means law—and there is no other evidence to support this argument. In fact, state collective action can arguably be beneficial for both the federal government and its individuals.[201] They argue that the Compact Clause concerns the relationship of non-compacting sister states in addition to the general federal interest.[202] While the NPVIC may "concern" the relationship of non-compacting sister states, this concern alone is not sufficient to deem it an unconstitutional compact.[203] In addition, the NPVIC does not concern the federal interest—there would be absolutely no change in the federal system at all.[204]

In *U.S. Steel Corp.*, the Court held that the compact at issue (a tax compact) did not affect non-compacting sister states especially with regards to the Privileges and Immunities Clause,[205] since the pressure of the Multistate Tax Compact was not great enough to deem the rights of these states so affected.[206] In interpreting this section, scholars have noted that a secondary effect is not enough for a non-compacting sister

change that bias. *See id*. This shows that just because a presidential candidate makes a certain number of visits to certain states does not mean that particular states have greater political influence.

200 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 482 (1978) (White, J., dissenting).

201 *See* Note, *State Collective Action*, 119 HARV. L. REV. 1855 (2006). Additionally, it can maximize social welfare by creating benefits and without imposing costs on others. *See id*.

202 Muller, *supra* note 112, at 385 (citing the opinion set out in Rhode Island v. Massachusetts, which said that the Compact Clause intended to "guard against the derangement of [the states'] federal relations with the other states of the Union, and the federal government . . . ." (Rhode Island v. Massachusetts, 37 U.S. 657, 726 (1838))).

203 Since the NPVIC has not gone into effect yet, it is impossible to say what the effect on non-compacting sister states will be. *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

204 *See* KOZA, *supra* note 59; *see generally* NATIONAL POPULAR VOTE, *supra* note 8.

205 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

206 The Court stated, "Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause . . . it is not clear how [the] federal structure is implicated." U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 478 (1978); *see* Bradley T. Turflinger, Note, *Fifty Republics and the National Popular Vote: How the Guarantee Clause Should Protect States Striving for Equal Protection in Presidential Elections*, 45 VAL. U. L. REV. 793, 812–13 (2011).

state to claim that its rights have been infringed upon due to the effect of a compact.[207] In the case of the NPVIC, non-compacting states would not suffer a secondary effect because the NPVIC does not take away any of their rights or attempt to diminish them in any way.[208] Just because an effect of the NPVIC may be that smaller states get less presidential candidate attention, this is not a primary, or even a secondary, effect.

In light of the relevant case law, constitutional provisions, and scholarly commentary, it is clear that the National Popular Vote Interstate Compact passes the Compact Clause tests set out by the Court since it does not encroach on federal supremacy and it does not so gravely encroach on the rights of non-compacting sister states.[209] The NPVIC passes both the *Virginia* and the *U.S. Steel Corp*. tests,[210] and the states are not exercising any constitutional right they would not have had.[211] It does not matter if the NPVIC is in place or not; states choosing to allocate their electoral votes in a different way is a power they have under Article II Section 1.[212]

III. IN THE CASE OF CITIZENS OF A NON-COMPACTING SISTER STATE VERSUS CITIZENS OF A COMPACTING STATE: THE FORMER IS LEFT WITHOUT A LEG TO STAND ON

This Part will provide an important solution to the problem set out in the preceding sections: since the NPVIC passes all Compact Clause tests—thus, it does not need congressional consent for its enactment—and the states have plenary power under Article II to appoint their electors in the manner they see fit, one of the only ways for the NPVIC to be challenged and/or abolished is if a non-compacting sister state chose to bring suit against a compacting state in order to get rid of the law. However, this Note argues that even if the merits of the claim are constitutional, courts should dismiss these cases because the non-compacting sister state would not have standing to bring such a suit.[213] Since the NPVIC does not require congressional consent and a lawsuit of this type would not survive, there is virtually nothing stopping the

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207 Turflinger, *supra* note 206, at 833–34.

208 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

209 *See infra* Part III.

210 *See U.S. Steel Corp*., 434 U.S. 452.

211 *See generally* U.S. CONST. art. II, § 1, cl. 2.

212 *Id*.

213 Standing is required for any litigant to bring a suit—this means that a party must have injury, causation, and redressability in order for the case to be heard. *See infra* notes 215–217 and accompanying text. This Note will further analyze these doctrines and conclude that a non-compacting sister state attempting to bring suit would have no standing in such a case.

NPVICs enactment if it were to acquire the necessary 270 electoral votes needed for it to pass.[214] Because the NPVIC passes all constitutional tests, a state could not go before a court and assert that the statute is unconstitutional—it would have to attempt to assert a different argument.

In order for a plaintiff to have Article III standing, it must show three elements: injury-in-fact (a specific injury—meaning that a plaintiff cannot simply go to court wanting to change the law), causation[215] (the law that is being challenged must have caused the injury and/or the defendant must have caused the injury), and redressability (the issue must be capable of being redressed by the court).[216] One of the most frequently litigated prongs that arise in cases is the injury-in-fact prong.[217] The United States Supreme Court has stated that in order to meet the standing requirements outlined in Article III,[218] a plaintiff must prove that he has a "personal stake" in the dispute and the alleged injury is particularized to him.[219]

Prudential standing issues arise when the plaintiff may have Article III standing, but a court still should not take the case whether it is for policy reasons, or that the dispute would be more effectively resolved with another branch of government.[220] One instance of when this

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214 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

215 This Note will not evaluate the causation prong of constitutionally-required standing.

216 For example, when an issue is better suited with the legislature rather than with the court. *See* Allen v. Wright, 468 U.S. 737 (1984); Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992) (holding that although the plaintiffs had constitutionally-required standing in challenging the actions of the Endangered Species Act of 1973, they did not have prudential standing because they were asserting a "generalized grievance" since they could not prove that they were directly affected by the statute at issue).

217 *See, e.g.*, Conservation Law Found. v. EPA, 964 F.Supp.2d 175, 186, 188 (D. Mass. 2013) (holding that citizens that petitioned the Environmental Protection Agency in order to change their policies on certain climate change issues did not have constitutionally-required standing because they did not allege a specific injury in fact that directly affected them); Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 39–40 (1976) (holding that organizations that sought to promote health service access to the poor could not establish constitutionally-required standing simply by this goal alone). Courts have even determined that there are instances where State Senates do not have constitutionally-required standing. *See* Favors v. Cuomo, No. 11-cv-5632, 2013 WL 5818773 (E.D.N.Y. Oct. 29, 2013) (holding that the Senate Minority did not have a personal interest in alleging that a certain Senate plan violated the equal population requirement of the Fourteenth Amendment).

218 U.S. CONST. art. III, § 2.

219 *See* Raines v. Byrd, 521 U.S. 811, 818–19 (1997) (citing *Allen*, 468 U.S. 737); *see also* Coastal Outdoor Advert. Grp. v. Township of E. Hanover, 630 F.Supp.2d 446, 450 (D.N.J. 2009) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004)) ("In addition to the constitutionally-required standing factors, prudential factors also apply, which constitute 'judicially self-imposed limits on the exercise of federal jurisdiction.'").

220 "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–74.

happens is when the plaintiff is asserting a "generalized grievance," rather than a specific injury.[221] In the case of the NPVIC, the plaintiffs in such a case would be asserting a generalized grievance, and would simply be going to the court to complain about how the political arena has arrayed itself, rather than alleging a specific, direct injury.[222] Additionally, the citizens of a non-compacting sister state would not be able to claim that they have standing because they are taxpayers of a state, since the Court has struck down this idea.[223] The rest of this Part will focus on how a hypothetical plaintiff in the case of the NPVIC would have neither constitutionally-required nor prudential standing to succeed in a case.

A. *Article III Standing Fails*

First, a non-compacting state seeking to bring suit would not have Article III standing because it would not have an injury-in-fact. As the Court in *Raines* said, the state would not be able to allege a specific, personal injury that is directly particularized.[224] For example, a state would go before a court asserting that the NPVIC has adversely affected them because they now do not have as much political influence, presidential candidates are not visiting their state as much, etc. However, as this Note previously explored, there is nothing to support these arguments and there is no evidence to suggest that presidential candidate visits are directly correlated with political influence.[225] In addition to not having an injury-in-fact, the plaintiffs would also not satisfy the redressability requirement of constitutionally-required standing.[226] If a suit such as this were to arise, the court would determine that it could not redress the injury that the plaintiff is

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221 *Id*.; *see also Allen*, 468 U.S. 737 (explaining that parents of children in private segregated schools do not have standing because they are simply coming to the Court with a problem that the political area has arrayed itself). The Court explains that in order to solve this problem, the plaintiffs should have gone to the legislature. *Lujan*, 504 U.S. at 606. *But see* Flast v. Cohen, 392 U.S. 83 (1968) (explaining that the only exception in the generalized standing principle is when government expenditures are being challenged under the Establishment Clause of the Constitution). This is the only exception to standing that's been addressed by the Supreme Court, and the NPVIC does not fall within this exception. *Id*. at 105.

222 Since the party would not go to the Court asking for a change in the laws, that is not a specific injury; that is a proper question for the legislature, not the Court. *Allen*, 468 U.S. at 761.

223 United States v. Richardson, 418 U.S. 166 (1974) (holding that a taxpayer cannot go to the Court asking how the CIA spends tax dollars, since that is not a direct injury since all members of the public share the injury and the judiciary can't act as a "second guessing mechanism").

224 *Raines*, 521 U.S. at 829–30.

225 *See supra* note 199.

226 Additionally, the Ninth Circuit has defined redressability as requiring "an analysis of whether the court has the power to right or to prevent the claimed injury." Gonzales v. Gorsuch, 688 F.2d 1263, 1267 (9th Cir. 1982).

claiming it has, since it is not certain whether or not the court's remedy would fix the plaintiff's injury.[227]

B. *Prudential Standing Fails*

Even in the rare occurrence that a court does determine that the plaintiff has constitutionally-required standing, it would still dismiss the case on the grounds that the plaintiff does not have prudential standing, meaning that the alleged injury is a generalized grievance that is more capable of being remedied by another branch of government—here, the legislature.[228] The plaintiff would have to allege something more than the "generalized interest of all citizens in constitutional governance."[229] There could not be a more perfect generalized grievance than the fact that the citizens of the non-compacting sister state do not like the law. Hypothetically, their argument would go something along the lines of the following: "The National Popular Vote Interstate Compact adversely impacts us as citizens because if it were to go into effect we would have less political influence in presidential elections than we do today under the Electoral College." The plaintiff would effectively be alleging that they did not like the law because of the effect it has on *all citizens*, which is prohibited under traditional prudential standing principles.[230]

Thus, the entire argument of citizens attempting to oppose the National Popular Vote Interstate Compact in court would first try to rely on Article III standing. This would fail since they would not be able to allege a specific injury-in-fact that directly affects the plaintiff alone, since they would not be able to successfully argue that their political influence would be diminished if the NPVIC were to go into effect. The plaintiffs would additionally not satisfy the redressability prong of constitutionally-required standing, since the issue is not capable of being redressed by the court and would be more appropriately by the legislature.[231] Next, even if a court were to find that the plaintiff did have Article III standing, the plaintiff would not have prudential

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227 *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) (holding that the "mental displeasure" injury alleged by the plaintiff is not capable of being redressed by the Court).

228 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 761 (1984); Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1387–89 (2014).

229 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974); *see, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); United States v. Richardson, 418 U.S. 166 (1974). "[A] 'generalized grievance,' no matter how sincere, is insufficient to confer standing." Hollingsworth v. Perry, 133 S.Ct. 2652, 2662 (2013).

230 *Hollingsworth*, 133 S.Ct. at 2662.

231 *See supra* note 220.

standing since it would be asserting a generalized grievance that affects "all citizens in constitutional governance."[232] A court would have no choice but to hold that, although the generalized grievance is sincere, the alleged injuries and the generalized grievances the plaintiffs allege do not amount to satisfy any prong of standing[233]—and the case would be dismissed.

C. *What About the Candidates?*

Another standing argument briefly worth addressing is, after the NPVIC gets enacted, what if a presidential candidate wins in a state using the Electoral College, but does not win the national popular vote? That is, the flip side of what happened in the infamous 2000 presidential election. This would mean that they would effectively have to give up their electoral votes. If that candidate were to bring a suit, would that candidate have standing, and would it be a successful suit? It is likely that a candidate would have a better argument for standing than a state would, considering they effectively lost the presidency because of the NPVIC—thus, a direct injury.[234] However, it would have to depend on the results of the election: if losing those electoral votes cost the candidate the election, there is a better argument for standing.

However, even if standing could be established, there will likely be no remedies available for such a candidate, and they would likely lose the suit, just as in 2000.[235] While the Court in 2000 did not specifically address the Electoral College issue, the result was the same in that the Electoral College system remained unchanged, and Gore did not assume the presidency as a result of this case.[236]

CONCLUSION

It is no secret that the Electoral College is one of the most controversial and one of the most challenged constitutional provisions in the Constitution.[237] After the infamous 2000 election, this became even more so—people were appalled that a presidential election could turn out this way, voters felt as if their votes did not count, and people

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232 *See supra* Section III.B.
233 *See supra* Sections III.A. & B.
234 *See supra* note 217.
235 *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).
236 *See id*.
237 *See supra* Part II.

sought reform.[238] There have been many attempts to abolish the amendment[239]—all unsuccessful—and there have been many proposed solutions to the problem—all unavailing or impossible to enact.[240] The National Popular Vote Interstate Compact is leading the way—a compact that would change the system, without changing the system.[241]

The most common criticism of the NPVIC is that it is an unconstitutional compact since it does not have congressional consent.[242] However, as this Note shows, congressional consent is not needed in the case of the NPVIC because it does not encroach on federal supremacy[243] or on the rights of non-compacting sister states.[244] As it passes both the *Virginia* and *U.S. Steel Corp*. compact tests, congressional consent is not necessary.[245]

With all of this in mind, the next avenue opponents of the NPVIC could attempt to travel down is seeking a remedy from a court. However, it would quickly be determined that citizens of non-compacting sister states do not have a leg to stand on—they have neither constitutionally-required nor prudential standing to bring such a suit.[246] They would not be able to allege a specific injury in fact capable of redressability by a court (since lesser political influence should not be considered an injury), and their assertion of a generalized grievance would further reinforce the fact that the courts are not the place for these citizens to be challenging the NPVIC.[247]

Since the National Popular Vote Interstate Compact is not an unconstitutional compact because it does not require congressional consent and it does not encroach on federal supremacy or the rights of non-compacting sister states, and since citizens of non-compacting sister states would not have standing to bring suit, there is virtually nothing stopping the NPVICs enactment. This is not harmful or threatening to democracy since the NPVIC would be wholly more democratic than the Electoral College system today. Once the number of states that enact the compact electoral votes reaches 270, the National Popular Vote Interstate Compact will largely determine the outcome of the election of the president of the United States.

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238 *See supra* Section II.C.
239 *See supra* Section II.A.
240 *See supra* Section II.C.
241 *See* KOZA, *supra* note 59; *see generally* NATIONAL POPULAR VOTE, *supra* note 8.
242 *See supra* Part II.
243 *See supra* Section II.C.1.
244 *See supra* Section II.C.2.
245 *See* Virginia v. Tennessee, 148 U.S. 503 (1893); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978); *supra* Section II.C.
246 *See supra* Part III.
247 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); *supra* Section III.B.

Loyola University Chicago Law Journal

Volume 36
Issue 4 *Summer 2005*

Article 5

2005

Uncertainty Maintained: The Split Decision over Partisan Gerrymanders in *Vieth v. Jubelirer*

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Note

Uncertainty Maintained: The Split Decision Over Partisan Gerrymanders in *Vieth v. Jubelirer*

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I. INTRODUCTION

Since the early years of the Republic, legislators have redrawn electoral districts to achieve the greatest benefit to their political party, but recently this practice has become more malicious.[1] For example, in the 2002 Congressional elections, 356 out of the 435 House of Representatives members' districts were decided by margins of more than twenty percent and only four incumbents who faced non-incumbent challengers were defeated.[2] Only in the last forty years has the judiciary entered the political thicket of apportionment.[3] Despite the

* J.D. expected May 2006. I would like to thank the members and editorial board of the Loyola University Chicago Law Journal for all of their advice and hard work, without which, this article would not have been possible. Special thanks to Sarah Smith and Carina Segalini for making the writing and editing process much more enjoyable. I also thank my family for their constant support and all those who allowed me to discuss the finer details of legislative apportionment.

1. *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196 (2004) (providing one example of the actions of the Governor and state legislature of Texas creating a new electoral map simply based on political considerations and not on new census data or a judicial order).

2. Fred Hiatt, *Time to Draw the Line*, WASH. POST, May 3, 2004, at A21.

3. *See infra* Part II.C (outlining the Court's role in apportionment related issues). The Court first entered into the political thicket of apportionment in *Baker v. Carr*, 369 U.S. 186 (1962); *infra* Part II.C.1 (discussing the decision in *Baker* and its aftermath). In subsequent decisions, the Court established the one person, one vote standard to resolve apportionment disputes. Reynolds v. Sims, 377 U.S. 533, 568 (1964). Based on Fourteenth Amendment grounds, the Court affirmed that equal numbers of voters should elect equal numbers of representatives. *Id.* at 560–61; *infra* Part II.C.2 (discussing the one person, one vote standard and the relevant cases). Beyond the mathematical formula of one person, one vote, the Court developed the concept of fair and effective representation when dealing with apportionment issues such as racial or partisan gerrymandering. *See infra* Part II.C.3 (discussing the concept of fair and effective representation); *infra* Part II.C.4 (discussing the development of racial gerrymandering jurisprudence).

United States Supreme Court's activity, the Court has largely avoided the apportionment-related issue of partisan gerrymandering.[4] In 2002, a federal district court faced the issue of partisan gerrymandering in *Vieth v. Pennsylvania,*[5] where Pennsylvania Democrats brought suit alleging that the Pennsylvania Legislature's redistricting plan violated their constitutional rights.[6]

The case eventually reached the United States Supreme Court, and commentators viewed it as one of the more important cases in recent memory.[7] However, the Court failed to live up to expectations.[8] A fractured Court wrote five opinions, ultimately dismissing the claim.[9] A four-Justice plurality dismissed the political gerrymandering claim, holding it was a non-justiciable political question.[10] The five other Justices disagreed as to the plurality's view of justiciability, but failed to establish a majority standard for the lower courts.[11] Instead of resolving an important problem facing the nation, the Court created greater

4. *See infra* Part II.D (discussing the Court's history with partisan gerrymandering). The Court's major decision dealing with partisan gerrymandering occurred in *Davis v. Bandemer*, 478 U.S. 109 (1986). A majority of six Justices determined partisan gerrymandering justiciable. *Bandemer*, 478 U.S. at 119–20. The Court found plans that dilute the vote of political groups to be constitutionally suspect. *Id.* However, the Court failed to establish a majority standard to adjudicate these claims. *Id.*; *see infra* Part II.E. (discussing *Davis v. Bandemer*).

5. Vieth v. Pennsylvania, 188 F. Supp. 2d 532 (M.D. Pa. 2002).

6. *Id.* at 534. A number of Pennsylvania Democrats alleged the new state congressional redistricting plan violated the one person, one vote requirement and that it constituted an unconstitutional partisan gerrymander. *Id.* at 536. The complaint stated that the plan trampled the protections of the First and Fourteenth Amendments. *Id.* at 537. A three-judge district court initially found the plan unconstitutional, but a revised plan passed constitutional muster. *Id.*

7. Vieth v. Jubelirer, 124 S. Ct. 1769 (2004). *See* J. Clark Kelso, *Vieth v. Jubelirer: Judicial Review of Political Gerrymanders*, 3 ELECTION L.J. 47, 51 (2004) ("*Vieth* may be one of the most revealing and important voting cases since *Baker v. Carr.*"); Jeffrey Toobin, *The Great Election Grab*, THE NEW YORKER, Dec. 8, 2003, at 63. ("[*Vieth*] could well become the court's most important foray into the political process since Bush v. Gore.").

8. Charles Lane, *Justices Order New Look at Tex Redistricting Case, GOP-Crafted Plan Stays in Effect for this Election*, WASH. POST, Oct. 19, 2003, at A21. "[*Vieth*] was a monumental non-decision, a case in which five justices said partisan gerrymandering cases can go forward, but also said there is no standard by which to judge them." *Id.* (quoting Richard Hasen, election law specialist, Loyola Law School in Los Angeles); John B. Anderson & Robert Richie, *A Better Way to Vote*, LEGAL TIMES, May 17, 2004 (arguing that the Court could have taken dramatic action that would have established an unambiguous standard for the country).

9. *Vieth*, 124 S. Ct. at 1773. Justice Scalia announced the judgment of the Court and delivered an opinion. *Id.* Justice Kennedy filed an opinion concurring in the judgment. *Id.* at 1792. Justices Stevens, Souter and Breyer each filed separate dissenting opinions. *Id.* at 1784; *see infra* Part III.C (discussing the opinions of the Justices).

10. *Vieth*, 124 S. Ct. at 1773. Justice Scalia wrote for the plurality, in which the Chief Justice and Justices O'Connor and Thomas joined. *Id. See infra* Part III.C.1 (discussing the plurality opinion); *infra* Part II.B (discussing the concept of non-justiciable political questions).

11. *See infra* Part III.C.2 (discussing the concurring opinion of Justice Kennedy); *infra* Part III.C.3 (discussing the dissenting opinions of Justices Stevens, Souter and Breyer).

confusion and prolonged the fight over partisan gerrymandering.[12] In the short term, the *Vieth* decision will alter neither the acts of the partisan gerrymander nor the struggle to stop it.[13] Regardless, the decision did open new avenues to explore the creation of judicially manageable standards.[14]

Part II of this Note will provide an overview of partisan gerrymandering in the United States and the concept of the political question doctrine.[15] Part II will also explain the development of judicially manageable standards used to adjudicate claims related to apportionment.[16] Part III will discuss the plurality, concurring, and dissenting opinions from the United States Supreme Court's decision in *Vieth v. Jubelirer*.[17] Part IV will argue that the dissenting Justices correctly held partisan gerrymandering is not a political question.[18] Part IV will reason that Justice Stevens's dissenting opinion provided the best judicially manageable standard with which to resolve partisan gerrymandering disputes.[19] Part V will examine the effects that *Vieth* created for lower courts struggling to resolve partisan gerrymandering cases.[20] This Note will conclude by asserting that *Vieth* failed to provide a resolution, but laid a foundation for one in the future.[21]

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12. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 578 (2004); *see infra* Part IV (analyzing the decision in *Vieth*).

13. *See infra* Part V.A (discussing the short term impact of *Vieth*); *infra* note 425 (discussing the Supreme Court decision of *Cox v. Larios*, 124 S. Ct. 2806 (2004), rendered shortly after *Vieth*, which dealt with legislative apportionment).

14. Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated by*, 1235 S. Ct. 351 (2004) (involving the longstanding feud over the redistricting plan in Texas). The Supreme Court ordered a three-judge panel to take into account the *Vieth* decision and review the court's decision allowing a gerrymandered congressional districting plan to be implemented. Charles Lane, *Justices Order New Look at Texas Redistricting Case*, WASH. POST, Oct. 19, 2003, at A21. *See infra* Part V.B (discussing the long term impact of *Vieth*); *infra* note 61–62 & 435 (discussing the *Session* decision).

15. *See infra* Part II (outlining the concept of gerrymandering and the doctrine of political question).

16. *See infra* Part II (discussing the development of judicial standards dealing with gerrymandering and apportionment claims).

17. *See infra* Part III.C.1 (discussing the plurality opinion in *Vieth*); *infra* Part III.C.2 (discussing the concurring opinion in *Vieth*); *infra* Part III.C.3 (discussing the dissenting opinions in *Vieth*).

18. *See infra* Part IV.A (analyzing the correctness of the dissenting opinions).

19. *See infra* Part IV.C (analyzing Justice Stevens's dissenting opinion).

20. *See infra* Part V (discussing the effects of *Vieth* upon lower courts attempting to adjudicate partisan gerrymandering claims).

21. *See infra* Part V (explaining how Court precedent provided the foundation to develop manageable standards).

II. BACKGROUND

The development of partisan gerrymandering jurisprudence in the United States laid the foundation for the Court's decision in *Vieth*.[22] This Part will explain the path the Court reached in declaring partisan gerrymandering justiciable and the Court's struggle with establishing standards of review.[23] Part II.A will provide a brief history of partisan gerrymandering in the United States.[24] Part II.B will discuss the political question doctrine, a doctrine used for many years to exclude partisan gerrymandering from judicial review.[25] Part II.C will trace the judicial steps of creating manageable standards that ultimately lead to the decision in *Vieth*.[26] Part II.D will review the Court's treatment of the partisan gerrymander before it was declared justiciable.[27] Part II.E will explore the Supreme Court decision of *Davis v. Bandemer*,[28] which made partisan gerrymandering judicially reviewable, and its effect on partisan gerrymandering claims.[29]

A. The Gerrymander in the United States

While the Court's role in gerrymandering disputes developed only in the last forty years, gerrymandering has been part of the United States' political process since the Nation's founding.[30] Part II.A.1 will define the concept of gerrymandering.[31] Part II.A.2 will review the history of gerrymandering in the United States.[32]

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22. *See infra* Part II (discussing the development of apportionment law jurisprudence).

23. *See infra* Part II.A–E (discussing the history of gerrymandering in the United States and the courts' attempts to develop judicial standards to counter the harms).

24. *See infra* Part II.A (discussing the history and the concept of gerrymandering in the United States).

25. *See infra* Part II.B (discussing the political question doctrine).

26. *See infra* Part II.C (discussing the application of judicially manageable standards to apportionment and other election disputes involving the Equal Protection Clause).

27. *See infra* Part II.D (reviewing the first Supreme Court cases dealing with partisan gerrymandering).

28. Davis v. Bandemer, 478 U.S. 109 (1986).

29. *See infra* Part II.E (discussing *Davis v. Bandemer*, which established that partisan gerrymandering claims were justiciable, and lower court decisions attempting to apply the *Bandemer* standards).

30. ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER (Leon Stein ed., AmoPress 1974) (1907) (providing a comprehensive history of gerrymandering from the colonial period until 1842 and the advent of wide-spread use of single-member districts in the United States).

31. *See infra* Part II.A.1 (discussing the general concept of gerrymandering and its impact on elections).

32. *See infra* Part II.A.2 (discussing the history of gerrymandering in the United States).

1. What is a Gerrymander?

Gerrymandering is the method of creating electoral districts that provide the greatest electoral benefit to the political party drawing the boundaries.[33] It is normally viewed as a dishonest activity and has been criticized for a variety of reasons.[34] The main criticism arising from the actions of the gerrymander is the ability of the minority to dilute the will of the majority.[35] The scope of what gerrymandering encompasses is not always clear.[36] Traditionally, the power of apportionment has been

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33. Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas J., concurring) (describing gerrymandering as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes"). "[G]errymandering should be taken to encompass *all* apportionment and districting arrangements which transmute one party's actual voter strength into the maximum of legislative seats and transmute the other party's actual voter strength into the minimum of legislative seats." ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 460 (1968).

34. GRIFFITH, *supra* note 30, at 8 ("One of the most unpatriotic acts of legislation possible is a gerrymander."). Griffith argues gerrymandering is "a species of fraud, deception, and trickery which menaces the perpetuity of the Republic of the United States . . . for it deals . . . with representative government." *Id.* at 7. Griffith viewed gerrymandering as evil because "it is cloaked under the guise of law" and "[a] political injustice is given the stamp of government and is embodied in a law." *Id.* at 8.

35. *See id.* at 21 (viewing gerrymandering as "a system of political discrimination"). Griffith viewed gerrymandering as a fraudulent political trick, which can destroy the principles of republican government. *Id.* at 7. For Griffith, gerrymandering is a "flagrant wrong that threatens the perpetuity and stability of our political institutions." *Id.*; *see also* Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 407 (1993) (discussing the various criticisms of gerrymandering and specifically partisan gerrymandering). *But see*, MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? 3 (1993) (arguing the real difficulty is the Court's idea that political groups are entitled to equal representational opportunities despite the inequalities inherent in a winner-take-all single-member district system).

> "[I]n [a single member plurality district] system, the opportunity to be represented is for all intents and purposes the opportunity to vote with a group of like-minded voters large enough to be a majority in a given district. When, therefore, does losing become tantamount to denial of representational opportunity?"

Id.

36. BLACK'S LAW DICTIONARY 708 (8th ed. 2004) (defining gerrymandering as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."); *see* Robert G. Dixon, Jr., *The Court, The People, and "One Man, One Vote"*, *in* REAPPORTIONMENT IN THE 1970S 29 (Nelson W. Polsby ed., 1971) [hereinafter Dixon, *One Man, One Vote*] ("Gerrymandering is simply discriminatory districting which operates unfairly to inflate the political strength of one group and deflate that of another."); ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 46 (1963) ("Gerrymandering in short, is the art of political cartography."). The term gerrymander incorporates a number of meanings. Gordon E. Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, *in* REAPPORTIONMENT IN THE 1970S 122 (Nelson W. Polsby ed., 1971). A silent gerrymander is when the legislature fails to redistrict at all, which was the situation in *Baker v. Carr*, 369 U.S. 186 (1962). *Id.*; *see infra* Part II.C.1 (discussing the Supreme Court case of *Baker v. Carr*). An incumbent-protecting gerrymander or bipartisan gerrymander arises when leaders of both parties agree to create districts in order "to preserve or enhance the electoral

part of the legislative branch and controlled by the political party in power.[37] Usually, those charged with creating voting districts create districts that give a benefit to a specific group in elections.[38] These districts are labeled gerrymandered when they do not conform to traditional districting principles.[39] Districts are usually gerrymandered on the basis of race or politics.[40] Occasionally, gerrymandering can be

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prospects of current officeholders." GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 18 (2002). Nevertheless, the most notorious type of gerrymander happens when district lines are created in a manner that benefits the party or faction in charge of the process. Baker, *supra*, at 131. Mark Rush concluded that gerrymandering is a problematic concept because of ambiguity regarding: (1) the identity of the injured parties; (2) the meaning of representation; and (3) what constitutes a denial of the fair opportunity to be represented. RUSH, *supra* note 35, at 2. A number of models have been established in an attempt to assess fair representation. *Id.* at 59 (discussing some standard criteria used to assess gerrymandering).

37. Dixon, *One Man, One Vote*, *supra* note 36, at 35. "[T]he responsibility for revising election districts is almost always placed, at least initially, with an elected legislative body." Richard L. Engstrom, *The Political Thicket, Electoral Reform, and Minority Voting Rights*, *in* FAIR AND EFFECTIVE REPRESENTATION? 7 (Mark E. Rush & Richard L. Engstrom eds., 2001). Redistricting is the redrawing of district lines, usually maintaining the same number of electoral districts. RICHARD K. SCHER ET AL., VOTING RIGHTS & DEMOCRACY: THE LAW AND POLITICS OF DISTRICTING 4 (1997). Reapportionment implies a change in the number of seats, as well as the redrawing of lines. *Id.* The U.S. House of Representatives, state legislatures, and many local legislatures are based on the idea of equal representation of the population, which requires continual reapportionment to ensure population equity is achieved. *Id.* The creation of Congressional district boundaries occurs in two phases. DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 43 (1992). The first phase is the constitutionally and statutorily mandated decennial U.S. census, which measures changes in the population. SCHER, *supra* at 4. After the census is completed, the number of Congressional seats are allotted based on population to the fifty States. *See* BUTLER & CAIN, *supra*, at 43–46 (describing the mathematical formulation used to allocate Congressional seats). Next, the States adjust the congressional district boundaries to comply with the allocation. *Id.* at 44.

38. *See* Dixon, *One Man, One Vote*, *supra* note 36, at 29 (considering all redistricting to involve gerrymandering); *see also* Robert N. Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution*, 59 IOWA L. REV. 1, 3 (1973) ("The gerrymander problem obviously arises from our geographic base for political representation.").

39. *See* SCHER, *supra* note 37, at 40 (listing principles involved in the redistricting and reapportionment process). Traditional districting principles include minority fairness, political fairness, contiguity, compactness, preservation of communities of interest, continuity of representation and district cores, avoidance of pairing, and respect for political boundaries and topographical features. *Id. See also* J. Gerald Hebert, *The Realists' Guide to Redistricting*, 2000 A.B.A. SEC. ADMIN. L. & REG. PRAC. 59–65 (describing the different traditional districting principles). However, not all commentators believe these traditional principles are necessary in order to provide proper representation. *E.g.*, Dixon, *One Man, One Vote*, *supra* note 36, at 29–30 (owing to modern technology, the standards of contiguity and compactness are not as necessary as the other principles to achieve legitimate representation).

40. NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING TASK FORCE, *at* http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/Ch3part2.htm (updated Oct. 31, 2003) [hereinafter Redistricting Task Force] (discussing the concept of racial gerrymandering); *see* Lewyn, *supra* note 35, at 405 (defining partisan gerrymandering as "gaining through

used as a positive tool when serving the interests of historically under-represented minority groups.[41] In these cases, the inherent evil of gerrymandering must be tempered with the historical need to empower under-represented groups.[42]

Two techniques are employed to gerrymander districts: packing and cracking.[43] Packing occurs when the boundaries of an electoral district are changed in order to create an area that incorporates a majority of people who vote in a similar way.[44] Packing "wastes" votes by creating a few districts with super-majorities of like-minded voters, making it easier for the party in power to win or maintain control in the majority of the other districts.[45] Cracking arises when an area with a high concentration of similar voters is split among several districts, ensuring that these voters have a small minority in several districts rather than a large majority in one, thereby diluting the voting power of the group.[46] Regardless of the method employed, the outcome of gerrymandering is

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discretionary districting an unjustifiable advantage for one political party as opposed to the others.") (quoting Charles Backtrom et al., *Issues in Gerrymandering: An Explanatory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1129 (1978)).

41. Redistricting Task Force, *supra* note 40 (discussing the use of gerrymandering to benefit minority voters). This type of gerrymandering, such as the creation of minority-majority districts, is done when electoral districts are developed in order to redress a long overlooked imbalance in representation of minority groups. T. Thomas Singer, *Reappraising Reapportionment*, 22 GONZ. L. REV. 527, 533–34 (1987); *see infra* Part II.C.4 (discussing the impact of affirmative action racial gerrymandering on minorities).

42. *See* Singer, *supra* note 41, at 533–35 (discussing the Voting Rights Act of 1965 and the Court's attempt to protect minority representation). This balancing act is one reason why gerrymandering is viewed as a difficult issue for the courts. Dixon, *One Man, One Vote*, *supra* note 36, at 29–30. "The primary difficulty in forming standards is that the familiar criteria, even including that of equal population, tend to fail at the outset by not recognizing the complexity of the ultimate goal of fair and effective political representation for all significant groups." *Id.* at 30.

43. Issacharoff & Karlan, *supra* note 12, at 551–52 (providing examples of how packing and cracking is used to create gerrymandered districts); *see* Clinton, *supra* note 38, at 3–4 (discussing the various tools used by the gerrymander); Lewyn, *supra* note 35, at 406 (discussing the specific concepts of packing and cracking).

44. *See* BLACK'S LAW DICTIONARY 1140 (8th ed. 2004) (defining packing as "[a] gerrymandering technique in which a dominant political or racial group minimizes minority representation by concentrating the minority into as few districts as possible."). The goal of packing is to "waste" minority votes. SOUTHERN REGIONAL COUNCIL, VOTING RIGHTS GLOSSARY, *at* http://www.southerncouncil.org/helpnet/glossary (last visited Apr. 23, 2005) [hereinafter Voting Rights Glossary].

45. Issacharoff & Karlan, *supra* note 12, at 552.

46. BLACK'S LAW DICTIONARY 395 (8th ed. 2004) (defining cracking as "[a] gerrymandering technique in which a geographically concentrated political or racial group that is large enough to constitute a district's dominant force is broken up by district lines and dispersed throughout two or more districts"). Cracking "diminishes the ability of minority voters to elect representatives of their choice to office by separating the minority population in the redistricting process into two or more districts each with insufficient minority population to constitute an electoral majority." Voting Rights Glossary, *supra* note 44.

to draw boundaries in such a way that the groups opposing the new boundaries are concentrated so as to minimize their representation and influence.[47]

2. History of the Gerrymander

Vieth is not the first time Pennsylvania residents argued over apportionment.[48] During the colonial period, Pennsylvania counties fought over equitable representation, foreshadowing the future problems of apportionment.[49] Even with the colonial disputes, it took another hundred years for the term gerrymander to be coined in the United States.[50] The term combines the word "salamander" with the last name of Vice President Elbridge Gerry, who served under President Madison and was the former Governor of Massachusetts.[51] This term developed in 1812 when Massachusetts redistricted its electoral boundaries, and some thought an illustration of one of the new districts resembled a salamander.[52] Elbridge Gerry, who was then the Governor of Massachusetts, signed the plan into law, forever attaching his name to the term.[53] The term quickly entered into the lexicon of American

47. Issacharoff & Karlan, *supra* note 12, at 551–53; *see* HACKER, *supra* note 36, at 54 (providing an example how gerrymandering worked in the 1962 elections).

48. GRIFFITH, *supra* note 30, at 26.

49. *Id.* In 1701, the Charter of Privileges for colonial Pennsylvania decreed the assemblies should consist of four people from each county and two from the city of Philadelphia. *Id.* The number of representatives from each county increased from four to eight in 1705. *Id.* Eventually, this structure created animosity between the counties of Bucks, Chester, and Philadelphia against the city of Philadelphia. *Id.* at 27. As the population of Philadelphia grew, the counties political supremacy was threatened. *Id.* at 28. Three counties forced the city of Philadelphia to maintain the charter provision until 1771. *Id.* at 27–28. The continuation of the provision prevented equal representation of the city in the assembly based on population. *Id.* at 29. However, Pennsylvania also became the first state to limit the workings of the political gerrymander. *See, e.g.*, *id.* at 43–45 (describing the state constitutional provision that attempted to restrain gerrymandering).

50. *See id.* at 16–17 (providing a detailed account of the creation of the term gerrymander). The term first appeared in a Boston Gazette article entitled "The Gerrymander" on March 26, 1812. *Id.* at 17 n.1. The article described districts recently created by a Massachusetts apportionment act. *Id.* at 16–17. The Massachusetts Democrat-Republican (Jeffersonian) party created the districts in the apportionment act in order to dilute the strength of the Federalist Party. RUSH, *supra* note 35, at 2.

51. GRIFFITH, *supra* note 30, at 17. Governor Gerry contributed to the United States more then just providing the "Gerry" to gerrymander. *Id.* at 19. Governor Gerry was a member of the Continental Congress, signed the Declaration of Independence, was elected to Congress, became Governor of Massachusetts and served as the fifth Vice President of the United States. *Id.* Representative Gerry also made the first motion in Congress to establish the Library of Congress. *Id.*

52. *Id.* at 17. The districts created by the apportionment act formed bizarre shapes that separated single towns from their proper counties. *Id.* One district, specifically the outer district of Essex county, formed what many considered a very unusual shape. *Id.*

53. *Id.*

politics.[54]

Over the last two hundred years, gerrymandering has thrived, and continues to do so today.[55] Recent Congressional elections illustrate the continued success of the gerrymander.[56] The 2004 election of the House of Representatives was the fourth consecutive election in which the incumbent success rate was at least ninety-eight percent.[57] In general, due to gerrymandering, races for seats in the House of Representatives have become less and less competitive over the years.[58]

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54. *Id.* at 19. The Boston Gazette went so far as to declare the term was synonymous with deception. *Id.* "When a man has been swindled out of his rights by a villain, he says he has been gerrymandered." *Id.* (quoting from the Boston Gazette, April 8, 1813). However, the general understanding of the word referred to the creation of districts for partisan advantage based on artificial and arbitrary delineation. *Id.* at 20.

55. *See* Sasha Abramsky, *The Redistricting Wars*, THE NATION, Dec. 11, 2003, at 15 (illustrating how new technology allows sophisticated mapping programs to generate devastatingly accurate district maps designed to pack or crack specific groups); *see also* Cox v. Larios, 124 S. Ct. 2806 (2004) (dealing with a challenge to Georgia's legislative reapportionment plan for the State House of Representatives and Senate). The Supreme Court rendered its decision on June 30, 2004, only a few months after the *Vieth* decision. *Id.* at 2806. The lower court in *Cox* struck down a redistricting plan for the Georgia legislature on grounds that it failed to comply with one-person, one-vote requirements. *Id.* at 2807. The Supreme Court summary affirmed the *Cox* decision. *Id.* at 2806. Justice Stevens wrote, "after our recent decision in [*Vieth*], the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength." *Id.* at 2808. *See infra* notes 425–28 (discussing the impact of *Vieth* on the *Cox* decision); *infra* Part II.C.1–4 (discussing the Supreme Court cases involving gerrymandering).

56. Steve Chapman, *Can Arnold Help to Restore True Democracy?* BALT. SUN, Jan. 11, 2005, at 11A. "In 2004, 95 percent of all victors won by more then 10 percentage points, and 83 percent won by more then 20 percent." *Id.* In the 2002 Congressional elections, out of the 435 seats, 356 races were decided by margins of more then twenty percent. Fred Hiatt, *Time to Draw the Line*, WASH. POST, May 3, 2004, at A21. Only four incumbents who faced non-incumbent challengers were defeated. *Id.* Only forty-three House incumbents won reelection "narrowly" defined as winning by less than sixty percent of the vote, while 338 House incumbents enjoyed victory margins of twenty percent or more, including seventy-eight incumbents who ran unopposed by a major party challenger. Daniel R. Ortiz, *Got Theory?* 153 U. PA. L. REV. 459, 477 (2004). More than a third of all State House delegations remained the same after the election. *Id.* In the same election, numerous U.S. Senate elections were extremely competitive. *Id.* at 486. Congressional gerrymandering in California fashioned an election without one competitive race. Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10 (2003). In California, not a single challenger in the general election received as much as forty percent of the vote. Ortiz, *supra*, at 477.

57. JOHN SAMPLES & PATRICK BASHAM, CATO INSTITUTE, ONCE AGAIN, INCUMBENTS ARE THE BIG WINNERS, *available at* http://www.cato.org/pub_display.php?pub_id=2889 (Apr. 23, 2005) [hereinafter INCUMBENTS].

58. *See* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179 (2003) (discussing how "redistricting has helped to transform the U.S. House of Representatives into a body that will no longer accurately reflect majority will"). Historically, redistricting after the census creates more competitive Congressional races in the '02 years. Jacobson, *supra* note 56, at 10. However, only four non-incumbent challengers won in the 2002 U.S. House of Representatives election, which

Only sixteen of the 435 seats in the House of Representatives shifted from one party to the other following the 2004 election.[59] The dispute over gerrymandering has become a battle for political survival, with each new districting plan more wantonly partisan than the last.[60] Some redistricting plans have even moved beyond the traditional gerrymander and taken the form of the so-called "perrymander," named after Governor Rick Perry of Texas.[61] A perrymander occurs when a political party controls both houses of the state legislature and the governor's office and redistricts the state's electoral boundaries without new census data or a judicial order requiring a new plan.[62] Many viewed the Texas plan as the zenith of partisan gerrymandering since it intended to create an additional seven safe Republican seats in the

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was the lowest number of successful challenges in any U.S. general election. *Id.* at 11. The number of races classified as "tossup" or "leaning" prior to the 2002 election amount to only fourty-eight. *Id.* at 10. This is compared to the 1992 election that had 103 tossup races and the 1982 election that had eighty-four tossup races. *Id.*

59. Patrick O'Connor, *Dems Waited for Breeze that Never Came*, THE HILL, Dec. 15, 2004, at 14. The sixteen party changes included two Democrats who switched parties before the election and four Texas Democrats who lost the election mainly due to the redistricting plan implemented in Texas. *Id.*; *see infra* note 62 (discussing the Texas redistricting plan). Outside of Texas, only three incumbents lost reelection in 2004. O'Connor, *supra*, at 14. Nearly a third of the incumbents faced either no challenger or one without campaign funds. INCUMBENTS, *supra* note 57.

60. CONGRESSIONAL QUARTERLY, JIGSAW POLITICS: SHAPING THE HOUSE AFTER THE 1990 CENSUS 3 (1990) [hereinafter JIGSAW POLITICS]. Issacharoff identified the relatively new technique of "shacking" as a method to reduce voter representation. Issacharoff & Karlan, *supra* note 12, at 552. Shacking does not focus on the voter, but on the actual incumbent representative. *Id.* Shacking occurs when redistricting excludes an incumbent's residence from the district of the incumbent's current constituents. *Id.* Shacking can also occur when redistricting places two incumbents, normally from the same party, into one district forcing them to compete against each other. *Id.* at 552–53.

61. John Ratliff, *Texas Republicans Crossed the Line This Time*, WASH. POST, Oct. 19, 2003, at B1. As governor of Texas, Perry helped to promote the Texas redistricting plan challenged in *Session v. Perry*. *Id.*

62. *A New Map: Partisan Gerrymandering as a Federalism Injury*, *supra* note 1, at 1196 (viewing perrymandering as the "ultimate partisan gerrymander"). Traditionally, state legislatures redraw Congressional and other legislative districts after the national Census, which occurs every ten years. JIGSAW POLITICS *supra* note 60, at 3. Recently, the decennial tradition has been broken through the introduction of redistricting plans in Colorado and Texas outside the ten-year period. Abramsky, *supra* note 55. The Texas gerrymander saga involved Democrat state senators fleeing to Okalahoma and New Mexico to prevent a quorum, while the Republicans contacted local federal law enforcement officials to track down the Senators. *Id.* The Colorado Supreme Court struck down that state's gerrymandered plan. *Id.* The Colorado Supreme Court ruled that the state constitution only allowed redistricting to occur once per census, and nullified the new redistricting plan. *Id.*; *see* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1237 (2003) (striking down Colorado General Assembly's attempt to redistrict outside the usual decennial census process); *see generally* Michael A. Carvin, *"A Legislative Task": Why Four Types of Redistricting Challenges are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L. J. 2, 40–50 (2005) (providing an in-depth discussion of the Colorado decision).

closely-divided U.S. House of Representatives, outside the usual decennial process.[63] Regardless, even in the current environment, some have attempted to find new ways to combat gerrymandering.[64] The possible ability of legislatures to rein in the gerrymander lends support to the idea that partisan gerrymandering is a non-justiciable political question, making the role of the courts unnecessary and redundant.[65]

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63. Richard L. Hasen, *Looking For Standards (In All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 627 (2004). Following the 2002 election, Texas Republicans gained unified control of the State's legislature. Linda Greenhouse, *Justices Revive Texas Districting Challenge*, N.Y. TIMES, Oct. 19, 2004, at A4. Under prodding from Republicans House Majority Leader Tom DeLay, the state Republicans redistricted the congressional seats of Texas outside the normal ten-year period. Toobin, *supra* note 7, at 63. Less then two years before, the existing district plan had been implemented following the 2000 census. Greenhouse, *supra*, at 14. Holding successive special legislative sessions, the Republicans over strong objections by the Democrats, passed a new plan shifting more then eight million people into new districts, splitting one Democratic district into five pieces, and pairing six Democratic and Republican incumbents in district redrawn to favor the Republican. *Id.* The map included a district that stretched 340 miles from Rio Grande City near the Mexican border to the State Capitol in Austin. Ratliff, *supra* note 61, at B1; *see* Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated by*, 125 S. Ct. 351 (2004) (considering the Texas redistricting plan).

64. Joe Hadfield, *Arnold Takes on the Gerrymander*, CAMPAIGNS & ELECTIONS, Feb. 2005, at 21 (highlighting that states using an independent approach in redistricting created twice as many competitive races then gerrymandered states). In 1981, Iowa created a nonpartisan arm of the legislature that creates the congressional districts for the state. Adam Clymer, *Why Iowa Has So Many Hot Seats*, N.Y. TIMES, Oct. 27, 2002 §4, at 5. The organization uses computer programs to create compact, contiguous districts that disregard partisanship and incumbency. *Id.* However, some criticize the plan since it does not focus on incumbent protection. *Id.* This lack of protection could lead to a senior member of Congress being removed from office, which for a small state like Iowa could reduce its overall influence in Congress. *Id.* Justice Souter's dissent in *Vieth* even attempted to find a new method to combat gerrymandering by incorporating the *McDonnell Douglas* burden-shifting method used in discrimination cases. Vieth v. Jubelirer, 124 S. Ct. 1769, 1817 (2004) (Souter, J., dissenting). The *McDonnell Douglas* test initially was used in Title VII claims alleging racial discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the *McDonnell Douglas* test, the plaintiff is required to establish a prima facie case of discrimination. *Id.* at 802. The plaintiff must show: (1) the plaintiff is a member of a racial minority; (2) the plaintiff applied for and was qualified for an open position; (3) the plaintiff did not receive the position; and (4) after refusing to hire the applicant, the employer kept the position open and continued to seek applicants with similar qualifications to the plaintiff. *Id.* Once the plaintiff established a prima facie case, the burden then shifted to the employer to articulate a legitimate, nondiscriminatory reason why the plaintiff was not hired. *Id.* If the employer articulated a legitimate reason, the plaintiff was allowed to show the proffered reason is pretextual. *Id.* at 804; *see infra* Part III.C.3.b (discussing Justice Souter's new method to combat partisan gerrymandering).

65. *Vieth*, 124 S. Ct. at 1775 (plurality opinion) (finding the "power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant"); *see infra* note 267 (providing a list of the various congressional acts); *see also* Joseph C. Coates, III, *The Court Confronts the Gerrymander*, 15 FLA. ST. U. L. REV. 351, 366–71 (1987); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 679 (2002).

B. The Political Question Doctrine

The political question doctrine normally refers to subjects the courts deem not applicable to judicial consideration.[66] Under the doctrine, the question is whether the advocated constitutional provisions provide rights that the courts can enforce against parties in litigation.[67] Political questions fall within the principle of justiciability.[68] The justiciability requirement places an obligation on parties to litigate an actual "case or controversy."[69] The doctrine is closely connected to the separation of powers principle, in that political questions exclude from judicial review controversies which revolve around determinations constitutionally committed for resolution to Congress, state legislatures,

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66. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 76 (2001). However, the desire to seek protection of a political right does not automatically mean the issue is a political question. 16A AM. JUR. 2D *Constitutional Law* § 265 (2004) [hereinafter *Constitutional Law* § 265]; *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 99 (2d ed. 1988) ("An issue is political not because it is one of particular concern to the political branches of government but because the constitutional provisions which litigants would invoke as guides to resolution of the issue do not lend themselves to judicial application."). *See generally* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (providing a detailed account of the rise and fall of the political question doctrine).

67. TRIBE, *supra* note 66, at 98.

68. *Id.* (noting political question cases delve into the limits of judicial competency making them part of the justiciability doctrine). "The justiciability of a controversy depends not upon the existence of a federal statue, but upon whether a judicial resolution of that controversy would be consistent with the separation of powers principles embodied in the Constitution, to which all courts must adhere even in the absence of an explicit statutory command." *Constitutional Law*, *supra* note 66, § 265; *see* Poe v. Ullman, 367 U.S. 497 (1961) (plurality opinion).

> Justiciability is of course not a legal concept with a fixed content or susceptible to scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought.

Id. at 508–09. *See generally* TRIBE, *supra* note 66, at 67–72 (outlining the doctrine of justiciability).

69. Article III of the United States Constitution limits the judicial power to only "cases and controversies." U.S. CONST. art. III, § 2, cl. 1. This requirement limits federal jurisdiction to issues capable of being resolved by the courts and maintains a separation of powers between the branches of government. *See* Flast v. Cohen, 392 U.S. 83 (1968) (defining the role and jurisdiction of federal courts in a tripartite government).

> In part those words [case and controversy] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Id. at 95.

or the executive branch.[70] The essential quality of a political question is the court's desire to avoid conflict with a co-equal branch of the government in violation of the primary authority of that coordinate branch.[71] The doctrine is a mixture of constitutional interpretation and judicial discretion.[72]

The Supreme Court's development of the political question doctrine dates back to *Marbury v. Madison*.[73] *Marbury* is famous for establishing the authority of the judiciary to review the constitutionality of executive and legislative acts.[74] The *Marbury* Court also sketched the notion of a political question.[75] The Court first applied the political question doctrine in *Luther v. Borden*.[76] There, the Court faced the prospect of determining the legitimate government of Rhode Island and whether the state government violated the Guaranty Clause of the Constitution.[77] The Court concluded that the issue fell outside the

70. *Constitutional Law* § 265, *supra* note 66; *see* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The non-justiciability of a political question is primarily a function of the separation of powers."); TRIBE, *supra* note 66, at 107 (judging the political question doctrine "reflects the mixture of constitutional interpretation and judicial discretion which is an inevitable by-product of the efforts of federal courts to define their own limitations"). *See generally* Themes Karalis, *Foreign Policy and Separation of Powers Jurisprudence: Executive Orders Regarding Export Administration Act Extension in Times of Lapse as a Political Question*, 12 CARDOZO J. INT'L & COMP. L. 109, 140–47 (discussing the history and development of the separation of powers doctrine).

71. *See* United States Dep't. of Commerce v. Montana, 503 U.S. 442, 458 (1992) (invoking the political question doctrine acknowledges the possibility that a constitutional provision may not be judicially enforceable, but that decision is far different from determining that the specific action does not violate the Constitution); 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE DESKBOOK § 15 (2002) ("[P]olitical-question doctrine purports to establish that a particular question is beyond judicial competence no matter who raises it, how immediate the interest it affects, or how burning the controversy. Judicial incompetence to decide is in effect found to be beyond the help or needs of any adversaries.").

72. TRIBE, *supra* note 66, at 107.

73. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). At issue was whether Congress acted unconstitutionally in conferring upon the Court authority to issue original writs of mandamus, which was not included in the Court's original jurisdiction as defined by the Constitution. TRIBE, *supra* note 66, at 23.

74. CHEMERINSKY, *supra* note 66, at 39. The case confirmed the "basic assumption that the Constitution is judicially declarable law." TRIBE, *supra* note 66, at 97.

75. *Marbury*, 5 U.S. at 170 (stating "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court").

76. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

77. *Luther*, 48 U.S. at 34–37. The dispute followed the Dorr Rebellion in which a number of Rhode Island citizens unsuccessfully challenged the charter government to adopt a new and more democratic constitution. *Id.* The specific issue involved the actions of charter government soldiers in ending the rebellion. *Id.* The Guaranty Clause mandates "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." U.S. CONST. art. IV, § 4.

realm of judicial competence and that Congress, through the power of the Guaranty Clause, had the capacity to make the proper determination.[78] Through the development of the political question doctrine, the Supreme Court established areas that fell within the doctrine; however, the boundaries of these areas have not always been clear.[79] Importantly, claims involving "political issues" have normally fallen outside of the political question doctrine.[80]

The Court delineated the boundaries of the political question doctrine in *Baker v. Carr*.[81] The case involved the apportionment of the Tennessee Assembly.[82] The Assembly had not been reapportioned in

78. *Luther*, 48 U.S. at 41–44.

79. *See* Charles M. Lamb, *Judicial Restraint on the Supreme Court*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 21 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (noting the meaning of a political question can be expanded or contracted to meet the conditions of the time). Political questions "are at least as real as Santa Clauses in department stores before Christmas. We have to know what to do about them even if we believe they ought not to be there." WRIGHT & KANE *supra* note 71, § 15 (quoting Zechariah Chafee, Jr.). *Bush v. Gore*, 531 U.S. 98 (2000) is a recent example of the lack of clarity related to the political question doctrine. Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformational Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1229 (2002) (stating the issue of justiciability was never truly raised in *Bush v. Gore*).

80. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000) (finding no political question related to determining a State's proper method in selecting electors); United States Dep't of Commerce v. Montana, 503 U.S. 422, 458 (1992) (reversing a judgment holding unconstitutional a 1941 statute prescribing method of "equal proportions" as the method to be used for determining the number of representatives to which each State was entitled, and concluding that the issue was "political" only insofar as it "raised an issue of great importance to the political branches"); United States v. Munoz-Flores, 495 U.S. 385 (1990) (holding a dispute under the Origination Clause, which mandates that all bills for raising revenue originate in the House of Representatives, did not present a non-justiciable political question); United States v. Nixon, 418 U.S. 683 (1974) (holding that the intra-executive nature of the dispute between President Nixon and a special prosecutor did not give rise to a political question); Powell v. McCormack, 395 U.S. 486 (1969) (concluding that the political question doctrine did not bar review of the House of Representatives' exercise of the Article I, section 5 power to judge the qualifications of its members). *But see, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (concluding the Constitution's textually demonstrable commitment to the Senate of the conduct of impeachment trials prevented court review of the specific Senate impeachment procedures); Goldwater v. Carter, 444 U.S. 996 (1979) (per curiam) (summarily vacating the decision of a court of appeals holding that the President had the power to terminate a treaty with Taiwan without the approval of the Senate, but dividing over the extent that the political question doctrine controlled in the case); Gilligan v. Morgan, 413 U.S. 1 (1973) (invoking the political question doctrine by finding a lack of standards for the court to determine the validity of training of the Ohio National Guard under the Fourteenth Amendment); Coleman v. Miller, 307 U.S. 433 (1939) (finding no basis in the Constitution to determine the length of time allowed to ratify an amendment to the Constitution); *Luther*, 48 U.S. at 41–44 (holding the Guaranty Clause providing a republican form of government fell within the powers of another branch).

81. Baker v. Carr, 369 U.S. 186 (1962).

82. BUTLER & CAIN, *supra* note 37, at 27. Tennessee city voters brought the suit arguing the gross inequalities in district populations for the state assembly violated the Tennessee constitution and the Fourteenth Amendment. *Id.* at 29. The lack of reapportionment created a 23 to 1

sixty years, despite a state constitutional requirement that representation be based on population, and significant changes in population had occurred since the last reapportionment in 1901.[83] For many years, the Court had maintained that reapportionment was a political question, and the Court had no role in settling disputes.[84] Regardless of the past, the Court in *Baker* determined apportionment was no longer a political question.[85] The Court articulated six factors to determine whether the issue in dispute was a non-justiciable political question.[86] These six factors gave the Court a structure in which to analyze political question issues.[87] Since *Baker*, the Court has continued to apply these factors, rarely finding an issue to be a non-justiciable political question.[88] The *Baker* decision initiated and established the Court's role in

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disparity between the largest and smallest district in the Tennessee House and a 6 to 1 disparity in the Tennessee Senate. *Id.*

83. *Baker*, 369 U.S. at 190–91; *see* RICHARD CLAUDE, THE SUPREME COURT AND THE ELECTORAL PROCESS, 154–55 (1970) (discussing the issues raised by the plaintiffs and defendants in *Baker*); Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, *in* THE SUPREME COURT AND THE CONSTITUTION, 189–90 (Philip B. Kurland ed., 1965) (providing a background to the situation in Tennessee at the time of the case).

84. *See* TRIBE, *supra* note 66, at 98–100 (providing an overview of Supreme Court cases leading to *Baker*); *see also* Wood v. Brown, 287 U.S. 1, 8 (1932) (involving, for the first significant time, the question of apportionment justiciability); *see generally* WRIGHT & KANE, *supra* note 71, at § 15 (describing earlier Supreme Court cases involving the political question doctrine). *Wood* involved the refusal of the Court to invalidate a Mississippi law that had created districts of unequal populations. *Wood*, 287 U.S. at 8. Four Justices asserted that the Court did not have jurisdiction over redistricting. *Id.*

85. *Baker*, 369 U.S. at 210.

86. *Baker*, 369 U.S. at 217. The Court's factors included:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

87. TRIBE, *supra* note 66, at 100–02. Justice Brennan continually underlined the concern that the doctrine focus on separating the proper sphere of federal judicial power from the appropriate spheres of federal executive and legislative power. *Baker*, 369 U.S. at 217.

88. *See* TRIBE, *supra* note 66, at 105 (discussing the use of political question doctrine as a basis to hold an issue as non-justiciable); Barkow, *supra* note 66, at 268–73 (discussing the cases involving political question doctrine following *Baker*); *supra* note 80 (listing a number of Supreme Court cases involving the doctrine). *But see* Gilligan v. Morgan, 413 U.S. 1, 11 (1973) (stating that simply "because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise"). *Gilligan* is one of the only cases since *Baker* to invoke the political question doctrine and find the issue non-justiciable. TRIBE, *supra* note 66, at 105.

apportionment disputes.[89]

C. The Reapportionment Revolution

Once the Court entered the political thicket, it wasted no time in making its mark.[90] The Court first developed the "one person, one vote" standard requiring legislatures to create districts with equal populations.[91] Even with the mathematical formula, the Court focused on the qualitative idea of fair and effective representation.[92] As a result, the jurisprudence continued to develop from the Voting Rights Acts of 1965 and a series of racial gerrymandering cases.[93]

1. Entering the Political Thicket

While *Baker* is famous for establishing the factors which determine a political question, the decision also established the Court's role in apportionment controversies.[94] Previously, the Court refused to enter the political thicket of apportionment, most notably in the case of *Colegrove v. Green*.[95] The *Baker* decision changed this direction.[96] In *Baker*, Tennessee voters brought a claim alleging that the failure of the Tennessee Assembly to readjust the electoral districts violated their

89. Dixon, *One Man, One Vote*, *supra* note 36, at 385.

90. *See infra* Part II.C.1 (outlining the apportionment revolution).

91. *See infra* Part II.C.2 (discussing the one person, one vote standard).

92. *See infra* Part II.C.3 (discussing the search for fair and effective representation).

93. *See infra* Part II.C.4 (discussing the racial gerrymandering cases and the related standards).

94. Baker v. Carr, 369 U.S. 186 (1962); TRIBE, *supra* note 66, at 100 n.32 (deeming *Baker* began the series of cases that "effectively restructured most of the nation's legislatures").

95. Colegrove v. Green, 328 U.S. 549, 556 (1946). Justice Frankfurter writing for the Court believed "[c]ourts ought not to enter this political thicket [of legislative apportionment]." *Id.* at 556. In *Colegrove*, Illinois' voters challenged the constitutionality of the state's apportionment of congressional districts. *Id.* at 550. Colegrove was a professor of political science at Northwestern University. BUTLER & CAIN, *supra* note 37, at 26. The professor contested the population variances between the 7th district, where he resided and that included 914,000 citizens, and the neighboring 5th district, which had a population of 112,000. *Id.* The Court asserted the issue beyond the scope of the judicial branch, squarely within the power of Congress and affirmed the lower court by dismissing the suit. *Colegrove*, 328 U.S. at 556. Justice Frankfurter viewed the right asserted as falling under Article IV, Section 4, the Guaranty Clause, which made it a political question. CLAUDE, *supra* note 83, at 150; *see* RUSH, *supra* note 35, at 16–17 (arguing beyond the avoidance of the political thicket, the case dealt with several notions about state power to administer elections, individual voting rights, and the power of a state to form and redefine the boundaries of its districts). The Court used *Colegrove* to dismiss a number of apportionment claims. CLAUDE, *supra* note 83, at 151; *see, e.g.*, South v. Peters, 339 U.S. 276 (1950) (confirming the Court's opinion that electoral issues, this one involving the county unit system of voting in Georgia, to beyond the Court's jurisdiction).

96. *See supra* notes 81–86 and accompanying text (discussing the Supreme Court decision of *Baker v. Carr*, 369 U.S. 186 (1962)).

equal protection rights granted by the Fourteenth Amendment to the United States Constitution.[97] Since an alleged violation of the Equal Protection Clause was the sole basis for the claim, the Court asserted that the political question doctrine should not be invoked without first making an inquiry into the precise facts and posture of the particular case.[98] However, the challenge on Fourteenth Amendment grounds was not a new legal theory, and the Court before *Baker* had continually rejected it.[99] Nevertheless, the *Baker* Court applied the newly developed factors to determine the existence of a political question, and held that the issue of apportionment did not fall within the bounds of a political question.[100] By placing apportionment issues under the Equal Protection Clause, the Court used the Fourteenth Amendment's judicially manageable standards to determine the validity of the claim.[101] The application of the Fourteenth Amendment did not focus

97. *Baker*, 369 U.S. at 187–88. The appellants originally brought a narrow Fourteenth Amendment claim based on the violation of the Tennessee Constitution, but the Court focused on the amicus curiae brief of the Solicitor General, which presented a broader version of the Fourteenth Amendment issue. Neal, *supra* note 83, at 195; *see supra* notes 81–86 and accompanying text (discussing the Supreme Court decision of *Baker v. Carr*, 369 U.S. 186 (1962)).

98. *Baker*, 369 U.S. at 217; *see* CLAUDE, *supra* note 83, at 157.

99. *See* Neal, *supra* note 83, at 191 (providing details to earlier challenges to apportionment under the Fourteenth Amendment); *see, e.g.*, Radford v. Gary, 352 U.S. 991 (1957) (refusing to hear an apportionment challenge from Okalahoma based on political question doctrine); Kidd v. McCanless, 352 U.S. 920 (1956) (refusing to hear an apportionment challenge from Tennessee based on political question doctrine); Anderson v. Jordan, 343 U.S. 912 (1952) (refusing to hear an apportionment challenge from California based on political question doctrine); Cox v. Peters, 342 U.S. 936 (1952) (refusing to hear an apportionment challenge from Georgia based on political question doctrine); Tedesco v. Board of Supervisors, 339 U.S. 940 (1950) (refusing to hear an apportionment challenge from Louisiana based on political question doctrine); South v Peters, 339 U.S. 276 (1950) (refusing to exercise the courts equity powers in cases posing political issues arising from a Georgia's geographical distribution of electoral strength among its political subdivisions); MacDougall v. Green, 335 U.S. 281 (1948) (challenging a statute requiring a petition to form and to nominate candidates for a new political party be signed by at least 25,000 qualified voters, and contain 200 signatures from each of at least 50 counties within the state).

100. *Baker*, 369 U.S. at 226; *see* Neal, *supra* note 83, at 195–201 (providing an overview of the six opinions filed in *Baker*); *supra* note 86 (discussing the six factors to determine a political question). Justice Frankfurter dissented believing the Court's decision was "empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope." *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting). Many commentators had the same worries as Justice Frankfurter. Dixon, *One Man, One Vote*, *supra* note 36, at 32 (observing a "detailed judicial policing of gerrymandering would be a Herculean task bordering on the impossible," but "there can be no total sanctuaries in the political thicket, else unfairness will simply shift from one form to another"); Neal, *supra* note 83, at 188 (observing the decision in *Baker* "start[ed] from a. . .precarious base—a fragmented Court, an abrupt reversal of position, unexplored and debatable substantive principles, and the contemplation of remedies as novel as they are drastic").

101. *Baker*, 369 U.S. at 226 ("Judicial standards under the Equal Protection Clause are well developed and familiar. . . ."). The Fourteenth Amendment states in relevant part that "[n]o state

on harm to the individual voter, but rather on the need for equality of voting strength.[102] The decision in *Baker* began the so-called apportionment revolution, in which redistricting became primarily driven by legal decisions.[103]

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shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law. U.S. CONST. amend. XIV, § 1. The Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) ushered in the modern era of Equal Protection jurisprudence. CHEMERINSKY, *supra* note 66, at 527; *see* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding segregation is a deprivation of the Equal Protection of laws guaranteed by the Fourteenth Amendment). The Court has relied on the Equal Protection Clause as a significant provision in the struggle to end invidious discrimination and preserve fundamental rights. CHEMERINSKY, *supra* note 66, at 527. The basic question posed by the Equal Protection Clause is whether the government's classification of a certain group is justified by a sufficiently related purpose. *Id.* The sufficient justification depends on the type of discrimination employed by the government. *Id.* at 528. The Court established three levels of scrutiny depending on the group affected by the discrimination. *Id.* at 529. Discrimination based on race or national origin is subject to strict scrutiny. *Id.* Strict scrutiny requires the government to show a compelling purpose for the discrimination and it is unable to achieve its objective through any less discriminatory alternative. *Id*; *see* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (finding strict scrutiny "strict in theory and fatal in fact"). Intermediate scrutiny focuses on discrimination based on gender. CHEMERINSKY, *supra* note 66, at 529. To be upheld, the law must be related to an important government purpose, and the discrimination must have a substantial relationship to the end being sought. *Id.*; *see, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny for gender classifications). The final level of review is labeled the rational basis test. CHEMERINSKY, *supra* note 66, at 529. All laws not subject to strict or intermediate scrutiny are subject to the rational basis test. *Id.* Under this test, a law will be upheld if it is rationally related to a legitimate government purpose, and the means selected is a rational manner to accomplish the end. *Id.* at 529–30.

102. Neal, *supra* note 83, at 209.

> What is at stake in the reapportionment cases is not. . .an individual concern with equality, the interest of man in being treated like fellow man. In this respect the cases differ from those that have been the traditional concern of the Equal Protection Clause. Denial, or dilution, of the vote of a particular racial group, for example, offends the Fourteenth or Fifteenth Amendment not primarily if at all because it weakens the legislative influence of the voter as an individual or even of all the affected class as a group. Such discrimination harms the individual directly by singling him out for different treatment on grounds that are offensive and that degrade him. No comparable personal injustice or injury can be asserted by a. . . voter who enters the polling booth knowing that his vote will weigh less than that of [another voter].

Id.; *see* CLAUDE, *supra* note 83, at 146 (finding the main concern with apportionment was the wide population differences between the electoral districts). The under-representation this created, especially in urban centers, undermined the credibility of fair and effective representation while allowing legislatures to ignore the needs of these underrepresented voters. *Id.* at 148–49. Distinctions between residents of a state on the basis of geographical location are not insulated from the prohibitions of the Fourteenth Amendment. *Id.* at 147.

103. BUTLER & CAIN, *supra* note 37, at 28 (noting after *Baker* the power to determine the "broad approach to redistricting passed from Congress and the state legislatures to the courts"). *Baker* and its progeny reversed decades of court decisions that held redistricting beyond the court's purview. GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 4 (2002). These decisions did not just change the court's involvement, but sparked a massive wave of redistricting

2. The Principle of One Person, One Vote

Baker opened the floodgates for judicial challenges to the apportionment of state legislatures and federal congressional districts.[104] These decisions led to the "one person, one vote" principle, articulated in *Wesberry v. Sanders*[105] and *Reynolds v. Sims*.[106] This principle, based on the Equal Protection Clause, prohibited dilution of a person's vote through the apportionment process.[107] It required the electoral districts of the state to include the same number of citizens.[108]

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in the 1960s. *Id.* *See generally id.* at 12–28 (discussing the impact on the apportionment revolution on federal and state elections).

104. *See* TRIBE, *supra* note 66, at 1065 n.12 (listing the apportionment cases before the Court in 1964). The Court considered a number of apportionment cases in 1964. *See, e.g.*, Lucas v. Forty-Fourth Colorado General Assembly, 377 U.S. 713 (1964) (finding a violation of one person, one vote standard even with a state wide referendum approving the districting plan); Roman v. Sincock, 377 U.S. 695 (1964) (finding legislative apportionment provisions of the Delaware Constitution violated the equal protection clause of the Fourteenth Amendment); Davis v. Mann, 377 U.S. 678 (1964) (finding Virginia apportionment plan that did not mandate that either of the houses of the Virginia general assembly be apportioned sufficiently on a population basis); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964) (applying equal protection to both houses of a bicameral state legislature); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) (finding New York violated the Fourteenth Amendment in its apportionment of the state legislative bodies).

105. Wesberry v. Sanders, 376 U.S. 1 (1964). *Wesberry* challenged the gross disparity in the population of Georgia's congressional districts under the Fourteenth Amendment's Equal Protection Clause. *Id.* The districts had not been reapportioned since 1931 and ranged from 272,154 in the northeastern rural 9th district to 823, 860 in the urban 5th district of Atlanta. JIGSAW POLITICS, *supra note* 60, at 23. In a 6–3 decision, the Supreme Court held that congressional districts must be substantially equal in population. *Wesberry*, 376 U.S. at 8. The Court based its decision on Article I, Section 2 of the Constitution. *Id.* Article I, Section 2 states "that representatives shall be apportioned among the states according to their respective numbers and be chosen by the people of the several states." U.S. CONST. art. I, § 2. For the Court, this article meant that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 376 U.S. at 8; *see* TRIBE, *supra* note 66, at 1063–66 (discussing the establishment of the one person, one vote standard).

106. Reynolds v. Sims, 377 U.S. 533 (1964). *Reynolds* dealt with an Alabama apportionment plan for the state legislature. *Reynolds*, 377 U.S. at 537. Based on Fourteenth Amendment grounds, the Court affirmed that equal number of voters should elect equal numbers of representatives. *Id.* at 560–61. The Court stated "achieving...fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." *Id.* at 565–66. Even though *Wesberry* or *Reynolds* were not the first to articulate the standard, the cases became the most famous symbols of the standards. TRIBE, *supra* note 66, at 1063–66; *see* Gray v. Sanders, 372 U.S. 368, 379 (1963) (holding for the first time that a unit-vote system in elections for a single office in a single constituency contravened the Equal Protection Clause and equal protection required a one person, one vote standard). Chief Justice Warren called *Reynolds* his most important opinion. Issacharoff & Karlan, *supra* note 12, at 541.

107. BUTLER & CAIN, *supra* note 37, at 28. During the 1964 term, the Court invalidated thirteen state legislative plans for having excessive population deviations. *Id.*; *see* TRIBE, *supra* note 66, at 1068–71 (discussing the mathematical requirements of the one person, one vote standard).

108. TRIBE, *supra* note 66, at 1071.

The Court distinguished between congressional districts and state legislative districts in determining the allowable variations of populations between districts.[109] The establishment of one person, one vote created the foundation for the judicially discoverable and manageable standards used by courts in future cases.[110] The one person, one vote principle dramatically corrected the deviations in congressional districts, and nullified a majority of states' electoral district maps.[111] Congressional reaction was swift, but ultimately failed to alter the one person, one vote standard established by the Court.[112] While the principle seemed to establish quantitative standards for apportionment, the formula did not deal with any of the qualitative issues of fair and effective representation.[113]

3. Fair and Effective Representation

Even before the one person, one vote standard, the Supreme Court recognized that fair and effective representation required more than just equally weighted votes.[114] Groups of voters could not be excluded

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109. *See Reynolds*, 377 U.S. at 577–78 (allowing distinctions between Congressional and state legislative representation). The Court placed a stringent requirement on deviations of populations in congressional districts. JIGSAW POLITICS *supra* note 60, at 24. The Court struck down a redistricting plan that allowed a variation of 3.1 percent between districts. Kirkpatrick v. Preisler, 394 U.S. 526 (1969). The Court held minor deviations were permissible only when the state provided substantial evidence that the variation was unavoidable. *Kirkpatrick*, 394 U.S. at 532. However, the Court declared that there was no "fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the as nearly as equal practicable standard." *Id.* at 530.

110. JIGSAW POLITICS, *supra* note 60, at 25. However, a number of commentators believed the one person, one vote actually increased the opportunity for gerrymandered districts. RUSH, *supra* note 35, at 3.

111. JIGSAW POLITICS *supra* note 60, at 25. After the 1971–72 redistricting period based on the 1970 census, 385 of the 435 congressional districts had less then one percent variance from the state average district population. *Id.* In comparison, after the 1962 election, only nine districts deviated less then one percent from the state average. *Id.*

112. *See* Dixon, *One Man, One Vote*, *supra* note 36, at 385–86 (outlining Congressional response to the Court's apportionment revolution). Over 130 resolutions and bills were introduced in Congress aimed at restoring congressional jurisdiction over redistricting, delaying or staying state compliance with the Court decisions or even proposing constitutional guidelines for redistricting. BUTLER & CAIN, *supra* note 37, at 28. Senator Dirksen of Illinois introduced a constitutional amendment that would have given states the power to apportion one house of the state legislature on a non-population basis. *Id.*

113. TRIBE, *supra* note 66, at 1074. Even though Chief Justice Warren in *Reynolds* stated "achieving. . .fair and effective representation for all citizens is . . . the basic aim of legislative apportionment," *Reynolds*, 377 U.S. at 565–66, the Court did not provide guidance to the lower courts beyond the mathematical requirement. TRIBE, *supra* note 66, at 1074.

114. *See* BUTLER & CAIN, *supra* note 37, at 33 (discussing fair representation goes beyond mathematical equality); Singer, *supra* note 41, at 532 (discussing permissible waivers to the one person, one vote); *see also* Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of Thicket at Last*, *in* 1986 SUP. CT. REV. 175, 178 n.20 (1986) (discussing individual

from influencing the government through tricks in the apportionment process, such as the method used by the defendants in *Gomillion v. Lightfoot*.[115] In *Gomillion*, the Alabama legislature redrew the city boundaries of Tuskegee, effectively eliminating African-American voters from the city.[116] The lower courts upheld the action based on long established precedent of judicial deference to state governments altering political boundaries.[117] The Supreme Court viewed the new boundaries as an illegal method of minimizing the impact of a group of voters' influence because the new boundaries did not conform to the traditional districting principles.[118] The Court based its decision on the Fifteenth rather than the Fourteenth Amendment, thus avoiding the broader issue of equal protection.[119]

Even with the *Gomillion* decision and the creation of the one person, one vote standard a few years later, questions remained as to the proper standard to be used in determining a valid apportionment.[120] For example, in *Wright v. Rockfeller*,[121] minority voters challenged

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Justices views on gerrymandering included in Supreme Court decisions).

115. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

116. *Gomillion*, 364 U.S. at 340. The Court described the new boundaries as "an uncouth twenty-eight-sided figure." *Id.* The creation of the new boundaries was in response to increased African-American voter registration. Gordon E. Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, *in* REAPPORTIONMENT IN THE 1970S 131 (Nelson W. Polsby ed., 1971) [hereinafter Baker, *Gerrymandering*]. The new boundaries excluded all but four or five of the four hundred African-American voters, but did not remove any of the white voters from the Tuskegee. *Id.* at 131.

117. *See* Baker, *Gerrymandering*, *supra* note 116, at 131. (discussing earlier cases where courts deferred to the legislature).

118. *Gomillion*, 364 U.S. at 347. The Court viewed the new city boundary has an attempt to single out a racial minority for special discriminatory treatment. *Id.* at 346. Even though reapportionment and the establishment of political boundaries is traditionally a role for legislative branch, the discriminatory nature of the defendants removed the judicial deference. *Id.* at 346–47. The Court wrote "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end." *Id.* at 347.

119. Baker, *Gerrymandering*, *supra* note 116, at 131. By avoiding Equal Protection issues, it seemed the majority wanted to avoid undermining the holding of *Colegrove*, but still strike down a clear instance of racial discrimination. *Id.* Justice Frankfurter claimed *Gomillion* was not "an ordinary geographic redistricting measure even within familiar abuses of gerrymandering." *Gomillion*, 364 U.S. at 341. However, Justice Whittaker argued that the case was better decided under Equal Protection than the Fifteenth Amendment since the right to vote was not denied, but simply the right to vote in Tuskegee. *Id.* at 349 (Whittaker, J., concurring). The Fifteenth Amendment mandates "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend XV, § 1; *see* RUSH, *supra* note 35, at 18–21 (questioning the Court's logic of finding a right to vote violation).

120. TRIBE, *supra* note 66, at 1074; *see* Singer, *supra* note 41, at 533 (discussing the judicial landscape after *Gomillion*).

121. Wright v. Rockfeller, 376 U.S. 52 (1964).

Manhattan's four congressional districts, stating that the districts were racially gerrymandered to segregate minority voters.[122] The Court simply assumed justiciability and proceeded to a resolution on the merits, finding that the plan did not violate the minority voters' constitutional rights.[123] However, *Wright* received little attention at the time because the Court released *Wesberry* on the same day.[124]

To resolve these questions, Congress attempted to assist the Court by passing the Voting Rights Act of 1965.[125] As originally passed, the Voting Rights Act sought to suspend the use of certain tests and devices that historically frustrated African-Americans from exercising their Fifteenth Amendment rights.[126] For example, section 5 of the Act attempted to limit the ability of certain states to establish new obstacles for minorities to achieve fair representation in the redistricting process.[127] Moreover, section 5 specifically related to the issue of racial gerrymandering by placing limits on the states' ability to redistrict without federal government approval.[128]

After the enactment of the Voting Rights Act, the Court refocused on other procedures that might violate constitutional standards.[129] In

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122. *Id.* at 53. The voters based the claims on the Fifteenth and Fourteenth Amendments. *Id.*

123. *Id.*; Clinton, *supra* note 38, at 11 (discussing the *Wright* decision). By affirming the district court's findings on a failure of proof instead of non-justiciability grounds, the Court implicitly accepted racial gerrymandering claims were a violation of the Fourteenth Amendment. *Id.*

124. Clinton, *supra* note 38, at 12; *see supra* note 105 (discussing the Supreme Court decision of *Wesberry v. Sanders*, 376 U.S. 1 (1964)).

125. Voting Rights Act of 1965, 42 USC § 1973 (2000).

126. 42 U.S.C. § 1973. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 30 WASH. & LEE L. REV. 1347, *reprinted in* CONTROVERSIES IN CONSTITUTIONAL LAW: COLLECTIONS OF DOCUMENTS AND ARTICLES ON MAJOR QUESTIONS OF AMERICAN LAW, 243 (Paul Finkelman ed., 2001). The Act eliminated the use of such tests or devices in states and counties. *Id. See generally* MAURICE T. CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE (2001) (reviewing the role of the Department of Justice and specifically, the Civil Rights Division in enforcing the Act).

127. 42 U.S.C. § 1973c. Section 5 applies to the entire states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia and parts of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. 42 USC § 1973.

128. 42 U.S.C. § 1973c (1965). Section 5 requires States to obtain pre-clearance from the Attorney General of the United States or from the United States District Court for the District of Columbia for any change in a "standard, practice or procedure with respect to voting." 42 U.S.C. § 1973c. To obtain pre-clearance, the State must prove that the new redistricting plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. *See* J. Gerald Hebert et al., THE REALISTS' GUIDE TO REDISTRICTING, 2000 A.B.A. SEC. ADMINISTRATIVE LAW AND REGULATORY PRACTICE 59–65 (providing an overview of Section 5 and the procedures for pre-clearance).

129. *See* TRIBE, *supra* note 66, at 1077 (discussing Court decisions after passage of the Voting

Whitcomb v. Chavis,[130] the Court evaluated multi-member districts and determined that they were not automatically discriminatory against minorities.[131] Moving beyond the one person, one vote standard, in *White v. Regester*,[132] the Court declared a legislative districting plan unconstitutional, despite the fact that the districts were equally populated.[133] However, the Court remained unclear as to the specific level of proof necessary to show an unconstitutional districting plan.[134] Consequently, a series of lower court challenges and the retirement of some Justices eventually led to the decision of *Mobile v. Bolden*.[135] The *Bolden* Court dismissed a challenge to the Mobile, Alabama at-large election system, which elected the members of the city commission.[136] Despite the fact that African-Americans composed roughly thirty-five percent of the population, no African-American had ever been elected commissioner.[137] The voters argued that they were being denied equal access to the local political system and requested the court institute a single-member district system.[138] In short, the Court

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Rights Acts); *see, e.g.*, Fortson v. Dorsey, 379 U.S. 433, 438 (1965) & Burns v. Richardson, 384 U.S. 73, 88 (1965) (finding multimember districts valid under one person, one vote as long as the district did not "operate to minimize or cancel out the voting strength of racial or political elements of the voting population"). The *Burns* and *Fortson* opinions seemed to suggest that the Fourteenth Amendment provided protection against political discrimination; however, the lower courts did not take the suggestion. *See* Clinton, *supra* note 38, at 17 (discussing lower court decisions avoiding issues of partisan gerrymandering after *Burns* and *Fortson*); *e.g.*, City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973) (affirming summarily a district court decision that at-large elections for city council held after the expansion of the city's corporate boundaries to include more white areas, thereby giving white voters a majority in the city, diluted black voters and violated the Voting Rights Act of 1965).

130. Whitcomb v. Chavis, 403 U.S. 124 (1971).

131. *Id.* (asserting multi-member state legislative districts were not per se unconstitutional). *Whitcomb* dealt with a challenge by black voters against the design on the multi-member legislative district around Indianapolis, Indiana. *Id.* at 128–29; *see* Clinton, *supra* note 38, at 19 (arguing the Court and many commentators failed to comprehend the gerrymander aspect of the case and instead treated it as another challenge to multimember districts).

132. White v. Regester, 412 U.S. 755 (1972).

133. *Id.* at 763–74 (striking down a multi-member district plan on Fourteenth Amendment grounds). The Court determined that the multi-member districts complied with the one person, one vote requirement. *Id.* However, the history of discrimination related to the multi-member districts, which provided less opportunity for minorities to participate in the electoral process, made the district unconstitutional. *Id.* at 767–79.

134. TRIBE, *supra* note 66, at 1078 (discussing the impact of the *Whitcomb* and *White* decisions on developing levels proof required in apportionment cases).

135. Mobile v. Bolden, 446 U.S. 55 (1980). Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court*, *in* THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS 25 (Lorn S. Foster ed., 1985) [hereinafter Engstrom, *Racial Vote Dilution*].

136. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 27.

137. *Id.*

138. *Id.* at 26.

ruled in favor of the current at-large system because the voters failed to show intentional discrimination.[139]

Importantly, the *Bolden* Court shifted the burden of proof to the challengers of the alleged discriminatory behavior and required them to show both discriminatory effect and intent.[140] In response, Congress amended section 2 of the Voting Rights Act and restored the burden of proof standard used by many lower courts prior to *Bolden*.[141] Furthermore, Congress amended the Voting Rights Act to prohibit election laws that unintentionally minimized minority voters' influence.[142] Before the amendment, section 2 was a general statutory prohibition against any racially based interference with the right to vote.[143] The newly amended section prohibited minority vote dilution and allowed a showing of discriminatory effect to be sufficient to prove

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139. *Id.* at 29.

140. TRIBE, *supra* note 66, at 1078–79. The Court had recently altered its approach to the Fourteenth Amendment's Equal Protection Clause. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 27. The Court in *Washington v. Davis*, 426 U.S. 229 (1976), held discriminatory treatment alone does not establish a sufficient presumption of unconstitutionality to require that such treatment be scrutinized strictly by the judiciary. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 27. The Court determined disproportionate impact can be cited as evidence supporting an inference of a discriminatory intent, but that alone is not a sufficient condition for such an inference. *Davis*, 426 U.S. at 242. In relation to apportionment cases, the Supreme Court cited *Wright v. Rockefeller*, 376 U.S. 52, 84 (1964) as supporting this new standard, but did not reference *Whitcomb* or *White* in which findings concerning racial motivation were never expressed. *Davis*, 426 U.S. at 24 (1976). In *Wright*, the Court dismissed the claim for a failure to show that the legislature was motivated by racial considerations. *Wright*, 376 U.S. at 84. The plurality opinion in *Bolden* explicitly held that the *Davis* intent standard applied to vote dilution cases. *Bolden*, 446 U.S. at 67 (finding the intent requirement clearly "applied to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination").

141. Lewyn, *supra* note 35, at 412 n.64 (1993). The congressional intent in adopting the revision to section 2 was explicit. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 35. It was "to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*." SENATE COMMITTEE ON THE JUDICIARY, VOTING RIGHTS ACT EXTENSION, S. REP. NO. 97-417, pt. 6, at 16 (1982). In fact, the *Whitcomb-White* participation standard was codified by the following addition to Section 2:

> A violation is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election. . .are not equally open. . .in that [blacks] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)). *See generally* Hebert, *supra* note 128, at 14–20 (providing an overview of Section 2).

142. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. at 134.

143. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 34. It read "no voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race and color." Voting Rights Act of 1965, Pub. L. No. 89-110 § 2, 79 Stat. 437, as enacted, 42 U.S.C. § 1973.

discrimination in redistricting.[144]

Following this amendment, the Court established a legal standard for adjudicating section 2 claims in *Thornberg v. Gingles*.[145] The chief question facing the Court in *Gingles* was whether the provisions contained in section 2 of the Voting Rights Act made multi-member districts *per se* discriminatory against African-American voters.[146] While not finding multi-member districts automatically in violation of section 2, the Court established a three-prong test to determine if a specific multi-member district violated section 2.[147] The three-prong test required a showing that: (1) the minority group was "sufficiently large and geographically compact" to constitute a majority in a differently drawn single member district; (2) the minority group was a "politically cohesive" group; and (3) the white majority voted together, which enabled it, in the absence of special circumstances, to usually defeat the minority's preferred candidate.[148] The test in *Gingles* was later expanded to single-member districts.[149] The decision affirmed Congressional desire to overturn *Bolden* and eliminated intent as a criterion for showing section 2 violations.[150] It also created a change in how state legislatures viewed racial gerrymandering.[151] The

144. TRIBE, *supra* note 66, at 1078. The amended section 2 reads:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement* of the right of any citizen of the United States to vote on account of race or color.

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. at 134 (amending 42 U.S.C. § 1973 (1965)) (emphasis added).

145. Thornburg v. Gingles, 478 U.S. 30 (1986); Hebert, *supra* note 128, at 14–20 (discussing the aftermath of *Gingles* and the effect of the three prong test on section 2 litigation); Marsha J. Tyson Darling, *Volume Introduction* to CONTROVERSIES IN CONSTITUTIONAL LAW: COLLECTIONS OF DOCUMENTS AND ARTICLES ON MAJOR QUESTIONS OF AMERICAN LAW xi, xvii (Paul Finkelman, ed., 2001). The Court decided *Gingles* and *Bandemer* on the same day. Issacharoff & Karlan, *supra* note 12, at 550.

146. *Gingles*, 478 U.S. at 48–49 (examining the creation of six multi-member districts in North Carolina).

147. *Id.* at 48 (finding multi-member districts "generally will not impeded the ability of minority voters to elect representatives of their choice"); *see* SCHER ET AL., *supra* note 37, at 76–85 (discussing the three prong test and effects *Gingles* had on section 2 litigation).

148. *Gingles*, 478 U.S. at 50–51.

149. *See* Growe v. Emison, 507 U.S. 25, 40 (1993) (holding that it would be illogical to require a challenger of a multi-member district to a higher standard of proof then a challenger to a single-member district).

150. SCHER ET AL., *supra* note 37, at 79. Regardless of the legislature's goal, *Gingles* dictates that if the district boundaries dilutes the voting strength of minorities then it constituted a violation of section 2 as well as the Fourteenth and Fifteenth Amendments. MARK MONMONIER, BUSHMANDERS & BULLWINKLES, 25 (2001); *see supra* notes 135–38 and accompanying text (discussing the Supreme Court decision of *Mobile v. Bolden*, 446 U.S. 55 (1980)).

151. *See* MONMONIER, *supra* note 150, at 25 (viewing *Gingles* as requiring legislatures to

amendment to section 2 appeared to require states to create districts that would enhance the voting power of racial minorities.[152]

4. Benign Racial Gerrymandering

In the aftermath of *Gingles* and following the 1990 census, state legislatures began to use racial gerrymandering to benefit racial minorities.[153] The Supreme Court first tackled this issue in *Shaw v. Reno*.[154] In *Shaw*, a group of white voters in North Carolina brought suit against the U.S. Attorney General, who pre-cleared the state's redistricting plan that included two minority-majority districts.[155] The white voters alleged that the district boundaries created an unconstitutional racial gerrymander.[156] The Court focused on the bizarre shape of the district and determined that the shape of the district had no other purpose than to link voters on the basis of race.[157] The *Shaw* Court restricted the use of affirmative racial gerrymandering aimed at increasing the power of racial minorities.[158] However, while the Court refused to find redistricting based on race as a *per se* violation, the state's plan did subject it to strict scrutiny,[159] and the

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create minority-majority districts if the three-prong test is satisfied since failure would allow the federal judiciary to create such districts); *see also* Marsha J. Tyson Darling, *Volume Introduction* to CONTROVERSIES IN CONSTITUTIONAL LAW: COLLECTIONS OF DOCUMENTS AND ARTICLES ON MAJOR QUESTIONS OF AMERICAN LAW xi, xvii–xviii (Paul Finkelman, ed., 2001) (determining that *Gingles* was "in large part responsible for intensifying the pressure toward creating minority single-member voting districts, because it provided specific criteria to be considered in the creation of a minority legislative district").

152. Hebert, *supra* note 128, at 14–20; Engstrom, *Racial Vote Dilution*, *supra* note 135, at 35.

153. Redistricting Task Force, *supra* note 40. After the census, the Justice Department refused to approve initial redistricting plans because alternative proposals existed that provided additional minority districts. *Id.* In response, many state legislatures attempted to maximize the number of minority districts. *Id.*

154. Shaw v. Reno, 509 U.S. 630 (1993)

155. *Shaw*, 509 U.S. at 630. The Attorney General approved the districting plan as required by section 5 of the Voting Rights Act. SCHER, *supra* note 37, at 85; *see supra* note 125–26 and accompanying text (discussing section 5 of the Voting Rights Act). The Twelfth district cut diagonally across the state, following Interstate 85 and at times was no wider then the right of way. SCHER ET AL., *supra* note 37, at 93.

156. *Shaw*, 509 U.S. at 633–34.

157. *Id.* at 644–47 (finding "appearances do matter"). The Court stated that a regular shape is not constitutionally required. Hebert et al., *supra* note 128, at 52.

158. *Shaw*, 509 U.S. at 657. Concerned racial gerrymandering may "balkanize" voters into competing racial factions Justice O'Connor, writing for the Court, deemed race-based districting, even if created for remedial purposes, subject to strict scrutiny. *Id.* Justice O'Connor worried that districts based on race would have a socially divisive impact on votes resembling "political apartheid." *Id.* at 647. According to the majority, racially motivated districts send the wrong message to elected officials suggesting their primary obligation is to represent only the members of the racially-dominated group rather than the whole constituency. *Id.* at 648.

159. *Id.* at 642 ("This Court never has held that race-conscious state decisionmaking is

Court remanded the case to the district court.[160]

After *Shaw*, the Court continued to refine the judicial standards in adjudicating racial gerrymandering disputes.[161] The Court in *Miller v. Johnson* reaffirmed that race may be a criterion in congressional districting, but only under conditions of strict scrutiny.[162] *Miller* involved a challenge to a Georgia congressional redistricting plan that created two minority-majority districts.[163] The Court established that the bizarre appearance of an electoral district is not a necessary condition for a constitutional violation.[164] *Miller* required a showing

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impermissible in all circumstances.") The Supreme Court held that racial classifications will be allowed only if the government can meet the heavy burden of demonstrating that the discrimination is necessary to achieve a compelling government purpose. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986). Under strict scrutiny, the government must show an important reason for its action and must demonstrate that the goal cannot be achieved through any less discriminatory means. *Wygant*, 476 U.S. at 280 n.6; *see* CHEMERINSKY, *supra* note 66, at 668. However, the Court had previously held that districts created to enhance minority representation were valid even though the state "deliberately used race in a purposeful manner" to create minority-majority districts. United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 165 (1977) [hereinafter referred to as "*UJO*"]. The majority in *Shaw* attempted to circumvent the holding in *UJO*. *Shaw*, 509 U.S. at 651. Justice O'Connor distinguished *UJO* by claiming *Shaw* did not involve a vote dilution claim. *Id.* The Court faced a balance between the idea that no state shall purposefully discriminate against any individual on the basis or race and members of a minority group should be free from discrimination in the electoral process. DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION 78 (1999); *see supra* notes 101 & 159 (discussing the levels of scrutiny applied by courts based on the government's classification of groups).

160. *Shaw*, 509 U.S. at 658. The Supreme Court actually revisited the *Shaw* case three more times before it was ultimately resolved. *See* Easley v. Cromartie, 532 U.S. 234 (2001) (reversing a district court decision that found the redistricting plan invalid because the district court viewed the plan as predominately based on racial consideration); Hunt v. Cromartie, 526 U.S. 541 (1999) (reversing a district court decision that granted legislature's motion for summary judgment against a change to a new redistricting plan created after *Shaw*); Shaw v. Hunt, 517 U.S. 899 (1996) (reversing a district court decision that found the redistricting plan valid after being remained by the Court in *Shaw v. Reno*, 509 U.S. 630).

161. *See* United States v. Hayes, 515 U.S. 737 (1995) (holding that a plaintiff challenging the constitutionality of a redistricting plan must have proper standing). The Court determined the "special representational harms can cause racial classifications in the voting context" only fall on the voter in the specific district being challenged. *Id.* at 745. A person in another district "does not suffer these special harms." *Id.*

162. Miller v. Johnson, 515 U.S. 900 (1995).

163. *Id.* at 913. The issue was whether the district was the result of race-based districting, which could be demonstrated through shapes, demographics and other evidence. *Id.*

164. *Id.* at 917. So long as a district is not drawn for impermissible reasons, a district may take any shape, even a bizarre one. *See* Bush v. Vera, 517 U.S. 952, 999 (Kennedy, J., concurring) (finding it not necessary for districts to pass "beauty contest in order to be constitutionally valid); *see also* Brooke Erin Moore, *Opening the Door to Single Government: The 2002 Maryland Redistricting Decision Gives the Courts too Much Power in an Historically Political Arena*, 33 U. BALT. L. REV. 123 (2003) (providing an overview of the *Vera* decision). However, it seems that shape still plays an important role since the only two districts to survive a *Shaw* challenge were relatively compact. Hebert et al., *supra* note 128, at 53; *e.g.*, Lawyer v. Dep't of Justice, 521 U.S. 567, 575 (1997) (finding Florida's Senate District 21 as "demonstrably

that race was the predominant factor in the creation of the electoral district.[165] If this burden is met, courts will apply strict scrutiny to determine if the state had a compelling governmental interest in creating the specific district and whether the district was narrowly tailored to achieve that interest.[166] The Court's recent decisions demonstrate that the determination of whether race predominated as the motivation in the creation of districts will require fact intensive analysis focusing on traditional districting principles.[167]

D. Applying the Lessons Learned to Partisan Gerrymandering

Even though the Court established standards of review for racial gerrymandering, the Court remained silent as to the issue of political

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benign and satisfactorily tidy"); DeWitt v. Wilson, 856 F. Supp. 1409, 1413–15 (E.D. Cal. 1994) (three-judge court), *summarily aff'd in relevant part*, 515 U.S. 1170 (1995) (finding the California districting plan incorporated "[n]o bizarre boundaries").

165. *Miller*, 515 U.S. at 916. The Court determined the burden required was a

> show[ing], either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominate factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including, but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district had been gerrymandered on racial lines.

Id. (internal quotations omitted).

166. Redistricting Task Force, *supra* note 40. Compliance with section 5 is not a judicially significant reason for creating minority-majority districts. CANON, *supra* note 159, at 80; *e.g.*, Abrams v. Johnson, 521 U.S. 74 (1997) (upholding the dismantling of two black majority districts in Georgia even though the legislature had shown a clear preference for keeping one of those two districts during the redistricting process); *Vera*, 517 U.S. at 972 (holding that protecting incumbents was a not a strong enough reason for the redistricting plan when race was viewed as the predominate factor); *see also supra* Part II.C.2 (discussing the search for fair and effective representation); *supra* note 150 and accompanying text (discussing the levels of scrutiny applied by courts based on the government's classification of groups).

167. Richard L. Engstrom, *The Political Thicket, Electoral Reform, and Minority Voting Rights*, *in* FAIR AND EFFECTIVE REPRESENTATION? 19 (Mark E. Rush & Richard L. Engstrom ed., 2001) [hereinafter Engstrom, *Political Thicket*]. The four traditional districting principles identified in *Shaw* & *Miller* include contiguity, compactness, respect for political subdivisions, and recognition of communities of interest. *Id.* Courts also rely on certain types of evidence such as district shape and demographics, statements made by legislators and their staff, and the nature of the data used in the districting process. Hebert et al., *supra* note 128, at 51. These principles will serve as "a crucial frame of reference" in evaluating districts. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *cf.* Engstrom, *Political Thicket*, *supra* at 20–30 (discussing the ambiguity of using traditional districting principles as constitutional principles to determine illegal gerrymandering); CANON, *supra* note 159, at 79 (arguing the Court's new analysis under Equal Protection that emphasizes traditional districting principles will cause greater confusion then the one person, one vote or voter dilution standards).

gerrymandering.[168] At first, the Court avoided trying to distinguish between districts created with politics in mind and districts created solely for partisan political gain.[169] Going forward, the Court began to talk about the possibility of dealing with partisan gerrymanders, but continued to invoke the one person, one vote standard to strike down redistricting plans viewed as violating fair and effective representation.[170]

1. The First Attempt

The first Supreme Court case directly dealing with partisan gerrymandering was *Gaffney v. Cummings*.[171] The challenge involved a 1972 Connecticut reapportionment plan for the state legislature.[172] A bipartisan apportionment board created the plan designed to insure that each party's strength in the legislature was roughly proportional to its statewide voting strength.[173] The Court upheld the plan and noted that political considerations were always part of a redistricting plan.[174] The Court held that a redistricting plan that included political factors was not automatically unconstitutional.[175] However, the Court did hint that plans, which unduly discriminated against political groups, might be unconstitutional.[176]

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168. TRIBE, *supra* note 66, at 1080. The Court did make a distinction for bipartisan gerrymandering plans designed to protect incumbents; *see, e.g.*, Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966) (holding that drawing lines to minimize contests between sitting incumbents did not in and of itself establish "invidiousness").

169. *See infra* Part II.D.1 (discussing the Court's first attempt to deal with partisan gerrymandering).

170. *See infra* Part II.D.2 (discussing the Court's second attempt to deal with partisan gerrymandering).

171. Gaffney v. Cummings, 412 U.S. 735 (1973)

172. *Id.* at 752. The plan developed by an apparently bipartisan commission had "the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." *Id.*

173. *Id.* The districting plan deliberately ignored traditional districting principles, sometimes totally disregarding political boundary lines. Alfange, *supra* note 114, at 205. The plan focused on the preservation of incumbents and necessitated a political judgment as to the effect a particular district would have on the political welfare of the political parties. *Gaffney*, 412 U.S. at 752; Alfange, *supra* note 114, at 205.

174. *Gaffney*, 412 U.S. at 752–54; *see* Carl A. Auerbach, *The Supreme Court and Reapportionment*, *in* REAPPORTIONMENT IN THE 1970S 74, 77 (Nelson W. Polsby, ed., 1971) ("Direct representation of group or interest is undesirable in a democracy. The values sought by such representation are inconsistent with those promoted by geographic districting.").

175. *Gaffney*, 412 U.S. at 752–54; Alfange, *supra* note 114, at 205.

176. *Gaffney*, 412 U.S. at 754. The Court recalled earlier decisions that held districts might be vulnerable to the Fourteenth Amendment if racial or political groups had been "fenced out of the political process" and their voting strength diluted. *Id.* However, the Court refused to attempt the "impossible task of extirpating politics from what are the essentially political processes of the

2. Second Time Around

The 1980 census provided the next opportunity for the Court to weigh in on partisan gerrymandering.[177] The incumbent Republican members of Congress from New Jersey challenged the newly adopted Congressional redistricting plan as a violation of Article I, section 2 of the United States Constitution in *Karcher v. Daggett*.[178] The New Jersey plan included a variation of 0.69 percent between the most populated and the least populated district.[179] The majority of the Court affirmed the lower court decision that invalidated the plan under the *Reynolds'* standard of one person, one vote because the variations were avoidable.[180] The Court did not specifically decide the issue on qualitative ideas of fair and effective representation, but the Justices expanded fair and effective representation beyond the quantitative aspect of numerical equality.[181] Every opinion written in *Karcher* addressed the issue of partisan gerrymandering.[182] The four dissenters went so far as to find that partisan gerrymandering might impose a greater threat to Equal Protection than electoral districts of unequal population.[183] Justice Stevens argued that vote dilution included

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sovereign states." *Id.* The Court conceded that the focus on precise mathematical equality to the exclusion of all other considerations opened the way for the denial of fair and effective representation by other means. *Id.* at 749. However, the Court implicitly noted that political gerrymandering was beyond the control of the courts, and that, while the court should avoid the adopting constitutional standards that would encourage it, they could do little to prevent it. *Id.* at 754; Alfange, *supra* note 114, at 205.

177. Singer, *supra* note 41, at 535; *see* TRIBE, *supra* note 66, at 1070, 1074 (discussing the Supreme Court cases arising from the 1980 census).

178. Karcher v. Daggett, 462 U.S. 725 (1983). Based on the 1980 census, New Jersey lost one seat in the U.S. House of Representatives. *Id.* at 727. Article I, section 2 states "that representatives shall be apportioned among the states according to their respective numbers and be chosen by the people of the several states. U.S. CONST, Art. I, § 2.

179. *Karcher*, 462 U.S. at 728. The plan included 14 districts with an average population of 526,059. *Id.* The largest district had a population of 527,472 while the smallest had a population of 523,798. *Id.* at 727. This created a deviation of 0.6984%. *Id.* The New Jersey legislature had considered a plan with a deviation of 0.4514%. *Id.* at 729.

180. *Id.* at 738. The Court held the difference between the districts "could have been avoided or significantly reduced with a good-faith effort to achieve population equality." *Id.*; *see* JIGSAW POLITICS: *supra* note 60, at 26 (discussing the Court decision in *Karcher*).

181. *Karcher*, 462 U.S. at 765 (Stevens, J., concurring); *see id.* at 781 (White, J., dissenting) (suggesting an overemphasis on numerical formulas may distort the "fair and effective representation of all citizens"); *Id.* at 787–88 (Powell, J., dissenting) (acknowledging that gerrymandering presents a threat to the legislative process that may not be remedied by adherence to quantitative figures).

182. Alfange, *supra* note 114, at 210 (reviewing the opinions of the Justices in *Karcher*).

183. *Karcher*, 462 U.S. at 765–84 (White, J., dissenting).

> Although nether a rule of absolute equality or nor one of substantial equality can alone prevent deliberate partisan gerrymandering, the former offers legislators a ready justification for disregarding geographical and political boundaries. . . . Legislatures

partisan gerrymandering and therefore violated the Equal Protection Clause.[184] He argued that simply complying with the one person, one vote standard did not automatically create a constitutionally valid redistricting plan.[185] Justice Stevens reaffirmed the imperative of population equality, but believed it should be supplemented with additional criteria.[186] The *Karcher* decision shifted the Court's focus onto the qualitative issue of partisan gerrymandering.[187]

E. Partisan Gerrymandering in Davis v. Bandemer

The decision in *Davis v. Bandemer* suggested the coming of a second reapportionment revolution.[188] *Bandemer* established a formal judicial role in partisan gerrymandering disputes.[189] However, the Justices failed to provide a clear standard to the lower courts when dealing with these issues.[190]

1. Justiciability Declared

The Court squarely focused and arranged the discussion around the issue of unconstitutional politically gerrymandered districts in *Davis v.*

> intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect.

Id. at 776 (White, J., dissenting) (internal quotations omitted). Justice Powell's separate dissent went further by stating redistricting plans that were predominately based on political considerations might be unconstitutional. *Id.* at 787–88 (Powell, J., dissenting).

184. *Id.* at 744 (Stevens, J., concurring). However, due to a deficient record, Justice Stevens refused to conclude with certainty that the plan was an unconstitutional partisan gerrymandering. *Id.* at 765 (Stevens, J., concurring).

185. *Id.* at 749 (Stevens, J., concurring).

186. *Id.* at 751 (Stevens, J., concurring).

> In evaluating equal protection challenges to districting plans, just as in resolving such attacks on other forms of discriminatory action, I would consider whether the plan has a significant adverse impact on an identifiable political group, whether the plan has objective indicia or irregularity, and then, whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole.

Id. (Stevens, J., concurring).

187. *See* Singer, *supra* note 41, at 537 (discussing the inability to explain *Karcher* on simple quantitative terms).

188. Davis v. Bandemer, 478 U.S. 109 (1986); RUSH, *supra* note 35, at 3 ("The decision constituted a significant change in the Court's behavior, opening new avenues of adjudication and case law."); *see supra*, Part II.C.1 (discussing the first reapportionment revolution ignited by *Baker*).

189. *See infra* Part E.1 (discussing the Court's decions in *Davis v. Bandemer*, 478 U.S. 109 (1986)).

190. BUTLER & CAIN, *supra* note 37, at 35 (discussing the various interpretations of the standards established in *Bandemer*).

Bandemer.[191] In that case, Indiana Democrats challenged a reapportionment plan passed by the Republican-dominated legislature.[192] The district court found the reapportionment plan to be unconstitutional because it deprived the state's Democrats of their rightful share of voting power.[193] The lower court used Justice Stevens's concurrence in *Karcher* as the basis for its opinion.[194] However, the lower court never discussed the justiciability of partisan gerrymanders.[195]

While the parties in *Bandemer* did not originally raise the issue of justiciability, the Supreme Court raised the issue in the appeal and determined the justiciability of political gerrymandering claims.[196] Once the Court determined that none of the identifying factors under *Baker* existed in *Bandemer*, a six-Justice majority promptly pronounced that claims of partisan gerrymandering were justiciable.[197] In addition

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191. *Bandemer*, 478 U.S. 109.

192. *Id.* at 115 (plurality opinion). Following the 1980 federal census, the Indiana General Assembly, as required by state law, began the process of reapportioning the State's legislative districts. *Id.* at 113. The final plan passed in both Republican controlled Houses along party lines and was signed by the Republican Governor. *Id.* at 114 n.2. The complaint contended the district boundaries and the mix of single-member and multi-member districts in the approved plan constituted a partisan gerrymander intended to disadvantage Democrats. *Id.* at 115; *see* Alfange, *supra* note 114, at 231–35 (providing a sketch of the 1981 Indiana reapportionment process).

193. Bandemer v. Davis, 603 F. Supp. 1479, 1491 (S.D. Ind. 1984) (affirming the right of fair and effective representation).

> A scheme designed to insure a predestined outcome does not accord to a vote cast that equality in elective power to which it is guaranteed under the Fourteenth Amendment. Each citizen has a right not only to cast a ballot, but to have his political decision be as meaningful as any other vote. Thus political gerrymandering is a violation of the Equal Protection Clause because it invidiously discriminates against a cognizable, identifiable group of voters.

Id. at 1492.

194. *Id.* at 1490; *see supra* notes 181–82 and accompanying text (discussing Justice Stevens's concurring opinion in *Karcher*).

195. *Bandemer*, 478 U.S. at 118.

196. *Id.* at 118–27. The defendants were the first to raise the issue on appeal. *Id.* at 118.

197. *Id.* at 127. The six Justice majority for justiciability included Justices White, Brennan, Marshall, Blackmun, Powell and Stevens. *Id.* at 113, 161 (plurality opinion). The majority opinion, written by Justice White, based their conclusion of justiciability on *Gaffney* and "repeated reference in other opinions" that found plans that dilute the vote of political groups to be constitutional suspect. *Id.* at 119–20; *see* Part II.D.1 (discussing *Gaffney*). Justice White's opinion reviewed the factors established in *Baker* to the facts in the instant case and found none of them applied. *Bandemer*, 478 U.S. at 122; *see supra* note 86 (discussing the factors of *Baker v. Carr*). Justice White noted *Baker* did not immediately establish a clear judicially manageable standard for apportionment cases. *Bandemer*. 478 U.S. at 123. However, subsequent Supreme Court cases, specifically *Reynolds v. Sims*, 377 U.S. 533 (1964), did clarify such standards. *Bandemer*, 478 U.S. at 123. Justice White concluded the inability to instantaneously perceive an "arithmetic presumption" like the "one person, one vote" standard did not oblige the Court to determine partisan gerrymandering claims non-justiciable. *Id.*; *see* Alfange, *supra* note 114, at

to *Baker*, the Court found earlier Supreme Court decisions involving apportionment provided support for determining whether partisan gerrymandering claims were justiciable.[198] The remaining three Justices argued that the Equal Protection Clause did not supply a judicially manageable standard for resolving purely political gerrymandering claims.[199] The Justices in the minority argued that resolving partisan gerrymandering disputes would require the Court to impose proportional representation.[200] Regardless of the justiciability issue, seven Justices still found the Indiana plan constitutional, but used different rationales.[201]

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237 (highlighting the fact that the Court had "hesitated to take the step for nearly a quarter of a century after *Baker* and that half of the members of the majority had expressed an unwillingness to take it scarcely more then two years earlier").

198. *Bandemer*, 478 U.S. at 123–25. Justice White analyzed the justiciability of racial gerrymander cases such as *White v. Regester*, 412 U.S. 755 (1972), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), to demonstrate the justiciability of political gerrymandering cases. *Bandemer*, 478 U.S. at 124–25. In terms of justiciability, Justice White did not see a distinction between racial and partisan gerrymandering claims. *Id.* at 125. Justice White reaffirmed the idea of fair and effective representation established in *Reynolds*. *Id.* at 123–25; *see* Alfange, *supra* note 114, at 237 (asserting at its base, the one person, one vote rule is an anti-gerrymandering rule).

199. *Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring). Justice O'Connor joined by Chief Justice Burger and Justice Rehnquist, wrote a concurring opinion finding partisan gerrymandering covered by the political question doctrine. *Id.* Justice O'Connor viewed apportionment as a straightforward political issue and, therefore, challenges to apportionment plans represented a political question "in the truest sense of the term." *Id.* at 145. Finding partisan gerrymandering as justiciable could only lead to "political instability and judicial malaise." *Id.* at 147. Justice O'Connor viewed partisan gerrymandering as a "self-limiting enterprise" that could be limited by the voters or the political parties. *Id.* at 152; *see* Alfange, *supra* note 114, at 238–43 (discussing Justice O'Connor's concurring opinion regarding the claim of justiciability).

200. *Bandemer*, 478 U.S. at 156–57 (O'Connor, J., concurring). Justice O'Connor feared the Equal Protection clause would require legislative districts to be drawn in a manner that would approximate equivalence under a vote-to-seat ratio. *Id.* at 156–57. This would require each party having the same percentage of seats in the legislature as the percentage of votes it receives in the legislative election statewide. *Id* at 156–57. The majority denied a preference for proportionality *per se*, but simply a preference for parity between votes and representation sufficient to insure fair and effective representation. *Id.* at 126 n.9; *see* Patrick Mulvaney, *Not Quite an Exact Portrait*, THE NATION, Oct. 28, 2004 *available at* http://www.thenation.com/doc.mhtml?i=20041115&c=1&s=mulvaney (discussing proportional representation).

201. *Bandemer*, 478 U.S. 109. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, wrote a concurring opinion supporting the reversal of the district court based on the political question doctrine. *Id.* at 144 (O'Connor J., concurring). The six Justices who found partisan gerrymandering a justiciable question split as to the outcome of the case. *Id.* at 113 (plurality opinion). Justice Powell and Justice Stevens urged affirming the district court finding that the redistricting plan was unconstitutional. *Id.* at 161–85 (Powell, J., concurring in part and dissenting in part). Justices White, Brennan, Marshall, and Blackmun viewed the plan as constitutional. *Id.* at 127 (plurality opinion). Even though those four Justices disagreed as to the reasoning, they joined Chief Justice Burger and Justices O'Connor and Rehnquist to form a majority for dismissal. *Id.* at 113; *see* Lewyn, *supra* note 35, at 407 (discussing the Justices' rational in *Bandemer*).

2. The Standards of *Bandemer*

Even though a majority determined the claim in *Bandemer* justiciable, the Court failed to agree on a majority standard for courts to apply when deciding political gerrymandering claims.[202] A plurality of four Justices argued for a standard that required plaintiffs to prove intentional discrimination against a political group as well as a discriminatory effect on that group.[203] Justice White, writing for the plurality, did not consider the showing of the intent prong a difficult one because districting involves political considerations.[204] However, the effects prong required a showing that the group had been repeatedly denied the opportunity to affect the political process.[205] This requirement went beyond showing that the results of an election were not proportional to the relative strength of the parties.[206] In order to show an unconstitutional gerrymander, a group of like-minded voters would need to show an inability to convert their majority numbers into an electoral victory over a number of election cycles.[207] The plurality required a showing of discriminatory effect even if the group had established discriminatory intent.[208]

In his dissent, Justice Powell took a different approach than Justice White in establishing standards.[209] Justice Powell agreed with the plurality that discriminatory intent and effect must be shown, but

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202. Singer, *supra* note 41, at 541. The six Justices in the majority for justiciability split into two camps in deciding the appropriate standard. *Id.* Justices White, Brennan, Marshall, and Blackmun argued for one standard while Justices Powell and Stevens argued for another standard. *Id.*

203. Alfange, *supra* note 114, at 243–44.

204. *Bandemer*, 478 U.S. at 129 (plurality opinion) ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."). However, the plurality did not believe it necessary for the majority party to ignore political considerations when developing district boundaries. *Id.* at 129–30.

205. *Id.* at 132–33. (stating that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a groups [sic.] of voters' influence on the political process as a whole" and that "[a] finding of unconstitutionality must be supported by evidence of continued frustration of the will of the majority of the voters or effective denial to a minority of voters of a fair change to influence the political process").

206. *Id.* at 132–33. The question for the Court was whether the members of the group whose candidates were defeated retain the opportunity to exert effective influence in the state's political process. *Id.* at 133–34; *see also* Alfange, *supra* note 114, at 245 (discussing the plurality view of election results).

207. Alfange, *supra* note 114, at 247.

208. *Bandemer*, 478 U.S. at 134 n.14 (plurality opinion) (holding the requirement of a discriminatory effect is based on the particular characteristics of partisan gerrymandering).

209. *Bandemer*, 478 U.S. at 161–85 (Powell, J., concurring in part and dissenting in part).

disagreed as to how a plaintiff could show it.[210] Justice Powell suggested a multi-faceted approach that reviewed a number of factors.[211] However, even with a *prima facie* case established, Justice Powell contended a plan would still be valid if the state had a rational basis based on permissible neutral criteria.[212]

3. The Aftermath of *Bandemer*

Lacking a majority standard to follow, the lower courts utilized Justice White's plurality opinion.[213] One of the first applications of the *Bandemer* standard occurred in *Badham v. Eu*.[214] California Republicans unsuccessfully challenged the 1982 Congressional reapportionment plan for the state as a violation of the Fourteenth Amendment's Equal Protection Clause.[215] Many viewed the redistricting plan as one of the most egregious gerrymandered plans of the decade.[216] The district court construed *Bandemer* to hold that even if plaintiffs proved a history of disproportionate results, they were also required to prove a strong indication of lack of political power and the

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210. *Id.* at 185 (supporting a need for a "heavy burden of proof" to exist).

211. *Id.* at 173. Justice Powell adopted Justice Stevens's concurrence in *Karcher* as a foundation to determine unconstitutional partisan gerrymandering). *Id. See* TRIBE, *supra* note 66, at 1082 (reviewing Justice Powell's opinion and describing the factors to be used in order to determine partisan gerrymandering). The factors Powell identified are: the shapes of voting districts, adherence to established subdivision boundaries, the nature of the legislative proceedings that resulted in the adoption of the apportionment law, legislative hisotry, and available statistics showing population disparities or vote dilution. *Id. But see* Alfange, *supra* note 114, at 252 (asserting Justice Powell provided no guidance for the lower courts to distinguish between an unconstitutional gerrymander and a plan that gives the majority party an advantage at the polls).

212. *Bandemer*, 478 U.S. at 185 (Powell, J., concurring in part and dissenting in part).

213. Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) (applying Justice White's plurality opinion because it "provides the narrowest grounds" for decision); *see* Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (stating that when a divided Court decides a case and no single rationale explaining the result obtains a majority of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .") (plurality opinion of Stewart, Powell and Stevens, JJ.).

214. *Badham*, 694 F. Supp. 664. The Court found the claim to be justiciable under *Bandemer* even though *Bandemer* dealt with state legislative redistricting and this case dealt with congressional redistricting. *Id.* at 668. The Court did not find the distinction to be valid based on *Baker* and *Bandemer*. *Id.*

215. *Id.*

216. Lewyn, *supra* note 35, at 439. The plan placed three sets of Republicans incumbents against each other and divided one Republican district into six different parts. *Id.* Before the implementation of the plan, the Democrats had a one seat lead in the California congressional delegation, but after five congressional elections held under the plan, the Democrat's won sixty percent of all congressional elections even though they had won just over fifty-two percent of the statewide two party congressional vote. *Id.*

denial of fair representation.[217] The test required the plaintiffs to show that they were effectively shut out of the entire political process.[218] In addition to Equal Protection, the Republicans raised a First Amendment claim related to the right of free association.[219] The district court rejected the allegation based on *Bandemer*, explaining that the Republicans were not completely shut out of the political process.[220] Other courts resolving partisan gerrymandering claims quickly adapted the *Badham* view.[221]

The Republicans subsequently attempted to move away from *Badham's* strict interpretation of *Bandemer* and challenged an alleged Democratic gerrymander of the Texas congressional delegation in *Terrazas v. Slagle*.[222] The Texas district court in *Terrazas* asserted that the focus of the effects prong should be on the structures of the state's political system.[223] The court held that a valid challenge to partisan gerrymandering will be satisfied when evidence is presented that shows one political group is perpetuating its power through gerrymandering and the wronged political group is unable to defeat this scheme through its influence in another relevant political structure.[224] The court upheld

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217. *Badham*, 694 F. Supp. at 670.

218. *Id.* at 672.

219. *Id.* at 675. The Republicans asserted the plan penalized Republican voters solely based on their party affiliations, political beliefs, and associations and through limiting the public debate on issues of public importance. *Id.*

220. *Id.* ("an individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. . .") (quoting *Bandemer*, 478 U.S. at 132). The *Badham* court found the Republicans did not allege Democratic representative entirely ignored the interests of Republican voters. *Id.*

221. *See, e.g.*, Pope v. Blue, 809 F. Supp. 392, 397–99 (W.D.N.C 1992) (rejecting North Carolina Republicans challenge to a Congressional redistricting plan where they could not allege that the redistricting plan caused them to be "shut out of the political process."), *aff'd mem.*, 506 U.S. 801 (1992); Republican Party of Va. v. Wilder , 774 F. Supp. 400, 405–06 (W.D. Va. 1991) (rejecting Virginia Republicans claim of partisan gerrymandering in Congressional redistricting which resulted in the pairing of Republican incumbents into the same district, for failing to show that the redistricting would consistently degrade Republican voters influence in the political process as a whole). The district court held that evidence of an anticipated history of disproportionate results did not satisfy the *Bandemer* standard. *Pope*, 809 F. Supp. at 397. The court noted that a number of safe Republican seats were created by the plan, Republicans were not precluded from influencing Democratic legislators and the Republicans First Amendment rights were not violated. *Id.* at 397–99; *see also* Lewyn, *supra* note 35, at 439–43 (discussing some of the district court decisions following *Bandemer*).

222. Terrazas v. Slagle, 821 F. Supp. 1162, 1173 (W.D. Tex. 1993) (rejecting the interpretation of discriminatory effect under Bandemer to require a showing that the voters are wholly ignored by the elected representatives).

223. *Id.* at 1174 ("The term political process as a whole means straightforwardly all the structures of the state governmental system.").

224. *Id.*

the plan, finding that the Republicans still had political influence in other branches of the government.[225] Like *Badham*, the court rejected the asserted First Amendment issues.[226]

In fact, only in *Republican Party of North Carolina v. Martin* did a court find a constitutional violation using the *Bandemer* standards.[227] North Carolina Republicans were back in court this time challenging the state's method of electing trial court judges.[228] Judicial candidates were nominated in local party primaries held in each district and then successful primary candidates from each district ran against each other in a general statewide election.[229] The Republicans argued that the at-large plan diluted Republican votes since judicial candidates had won only one election since 1900, even though they won forty-three percent of the vote in 1986 and forty-six percent in 1984 of the statewide vote in contested races.[230] The Fourth Circuit found the plan to be an unconstitutional partisan gerrymander.[231] The Fourth Circuit deemed that the Republicans had shown a valid history of disproportionate results and that the selection process reduced the likelihood that

225. *Id.* Specifically, the *Terrazas* court cited the ability of Republicans to elect candidates for the statewide position of Governor and Lieutenant Governor as well as holding forty percent of the state assembly. *Id.* at 1174–75.

226. *Id.* at 1174 ("Gerrymandering is concerned with dilution of political influence through the manipulation of elective district boundaries, not with other abuses of the electoral process or First Amendment violations."). *But cf.* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("[an] individual's freedom to speak and to petition the Government for the redress of grievances could not be vigorously protected unless a correlative freedom to engage in group effort for those ends were not also guaranteed."); NAACP v. Alabama ex rel. Patterson, 357, U.S. 449, 460 (1958) ("freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"); CHEMERINSKY, *supra* note 66, at 1180 (noting that the Supreme Court has expressly held that freedom of association is a fundamental right protected by the First Amendment).

227. Republican Party of N.C. v. Martin, 980 F. 2d 943 (4th Cir. 1992). However, that "victory" was short lived—in the elections for superior court judges, conducted just five days after the district court concluded the trial finding an unconstitutional gerrymander, every Republican candidates standing for the office of superior court judge was victorious at the state level. Vieth v. Juberlirer, 124 S. Ct. 1769, 1782 n. 8 (2004) (plurality opinion). The Fourth Circuit remanded the case for reconsideration due to the success of the Republicans even under the alleged unconstitutional gerrymandered plan. *Id.*; *see* Republican Party of N.C. v. Hunt, No. 94-2410, 1996 U.S. App. LEXIS 2029, at *2 (4th Cir. Feb. 12, 1996) (remanding the case to the district court for reconsideration).

228. *Martin*, 980 F. 2d at 951.

229. *Id.* at 947.

230. *Id.*

231. *Id.* at 957. The Fourth Circuit found the case justiciable even thought it dealt with the election of trial court judges and not legislative representatives. *Id.* However, a difference existed as to the adjudication of the claim on its merits since it did not involve a legislative districting plan. *Id.* at 952.

Republicans would run, because the chance of success was almost nonexistent.[232] The *Martin* court discussed the First Amendment claim, but found it lacked merit.[233] Even though the court seemed to apply the *Bandemer* standards and to move out of the shadows of *Badham*, the circuit court emphasized that the holding was dependent on the specific facts of the case.[234] The inability of the lower courts to eliminate partisan gerrymandering created a desire for the Supreme Court to provide new guidance in the *Vieth* decision.[235]

III. DISCUSSION

Eighteen years after *Bandemer*, the Supreme Court, in *Vieth v. Jubelirer*, faced the issue of partisan gerrymandering and again attempted to provide proper judicial standards.[236] Part III.A will provide an outline of the facts related to the case.[237] Part III.B will discuss the lower court decisions.[238] Part III.C will review the Supreme Court opinions authored in *Vieth*.[239]

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232. *Id.* The *Martin* court found the electoral system which in effect created the a statewide candidate for a local office representing a possible unconstitutional gerrymandering. *Id.* at 958. The *Martin* court found persuasive the near century long inability for a Republican to be elected superior court judge and the likely probability that the situation would remain. *Id.* However, the *Martin* court held that even a "modicum of electoral success or access to the political process" might have defeated the Republican's ability to establish a *prima facie* case. *Id.* This modicum of success was achieved in the elections conducted after the decision when every Republican candidate standing for office of superior court judge was victorious at the state level. Vieth v. Juberlirer, 124 S. Ct. 1769, 1782 n.8 (2004) (plurality opinion).

233. *Martin*, 980 F. 2d at 958. (finding the Republicans confused the protection offered by the First and Fourteenth Amendments and attempted to extend First Amendment guarantees). The *Martin* court asserted the First Amendment only protected the right to cast an effective vote by prohibiting restriction on ballot access or limit the opportunity for voters to unite in support of a candidate. *Id.* at 960. The election plan did not include direct impediments prohibited by the First Amendment. *See* Anderson v. Celebrezze, 460 U.S. 780, 787–88 (1983) (discussing limitations of First Amendment protections in the context of voting, noting certain non-discriminatory impediments are generally allowed). According to the court in *Martin*, Republican political goals are frustrated in the election of superior court judges, however, the First Amendment only guarantees a right to participate in the political process, not a guarantee of political success. *Martin*, 980 F. 2d at 958.

234. *Martin*, 980 F. 2d at 958. Regardless of it emphasis on the specific facts, *Martin* viewed partisan gerrymandering that created grossly disproportionate results and made it difficult to attract candidates or contributors as unconstitutional. Lewyn, *supra* note 35, at 442. In addition, *Martin* rejected *Badham* and *Pope's* suggestion that minority party success in statewide elections unrelated to gerrymandered districts may preclude a gerrymandering claim. *Id.*

235. *See* J. Clark Kelso, *Vieth v. Jubelirer: Judicial Review of Political Gerrymanders*, 3 ELECTION L.J. 47 (2003) (discussing the motives of the Supreme Court in hearing the case).

236. Vieth v. Jubilirer, 124 S. Ct. 1769 (2004) (plurality opinion).

237. *See infra* Part III.A (discussing the facts of *Vieth*).

238. *See infra* Part III.B (discussing the lower court decisions).

239. *See infra* Part III.C (discussing the Supreme Court opinions). The majority of the Court

A. Facts

After the 2000 census, Pennsylvania's General Assembly initiated the process to redraw the state's Congressional districts.[240] At the time of the redistricting process, the Republican Party held a majority of seats in both state Houses as well as the Governor's office.[241] Under pressure from members of the national Republican Party, the General Assembly adopted a partisan redistricting plan.[242] On January 3, 2002, the General Assembly passed a redistricting plan and a few days later the Governor signed the plan into law.[243]

Shortly thereafter, Democrat Pennsylvania voters sought to enjoin the state from implementing the redistricting plan.[244] According to the complaint, the partisan plan violated a number of constitutional principles including Article I, Section 2 of the Constitution, the Equal Protection Clause of the Fourteenth Amendment, the Privileges and

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dismissed the plaintiffs' claims, but was unable to reach consensus as to the reason behind the dismissal. *Vieth*, 124 S. Ct. at 1773. Justice Kennedy served as the fifth vote to dismiss the claim, but did not agree with all of the plurality's reasoning. *Vieth*, 124 S. Ct. at 1792 (Kennedy, J., concurring). Despite the dismissal, a majority of five Justices affirmed partisan gerrymandering claims as justiciable. *Id.* at 1799 (Stevens, J., dissenting). The remaining Justices argued the Court lacked judicially manageable standards to decide partisan gerrymandering claims making these claims non-justiciable. *Id.* at 1773 (plurality opinion). However, the five Justice who believed partisan gerrymandering justiciable fractured into four separate opinions in regards to the proper standards. *See infra* Part III.C.3.a–c (discussing the dissenting opinions).

240. *Vieth*, 124 S. Ct. at 1773. The population figures based on the 2000 census indicated that Pennsylvania was entitled to 19 Representatives in Congress. *Id.* This represented a reduction of two seats from the previous delegation. *Id.*

241. *Id.*

242. *Id.* The national party desired to adopt a partisan plan as a punitive measure in response to pro-Democrat redistricting plans developed in other states. *Id.* Republican leaders, Tom DeLay, House Majority Leader, and Dennis Hastert, Speaker of the House, urged Pennsylvania legislators to redistrict in order to maintain a Republican majority in the House. Toobin, *supra* note 7, at 63.

243. *Vieth*, 124 S. Ct. at 1773. Originally, the State House of Representatives and the State Senate passed different versions of a redistricting plan. Vieth v. Pa., 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002). A Conference Committee was formed in order to reach a compromise between the two bills. *Id.* During the deliberations of the Conference Committee, their Republican counterparts ignored the views of Democratic members. *Id.* The bill passed the Conference Committee, but all Democratic members of the committee voted against it. *Id.* The redistricting bill was designated as Act 1. *Id.*

244. *Vieth*, 124 S. Ct. at 1773. The plaintiffs were registered Democrats and Pennsylvania citizens. *Vieth*, 188 F. Supp. 2d at 535. Plaintiff Richard and Norma Jean Vieth resided in Lebanon County, which was incorporated in District 16 under Act 1. *Id.* Plaintiff Susan Furey resided in an area of Montgomery County that formed part of a new District 6 under Act 1. *Id.* The defendants included the Commonwealth of Pennsylvania and various executive and legislative officers responsible for enacting and implementing the redistricting plan. *Vieth*, 124 S. Ct. at 1773. The plaintiff filed the suit in the United States District Court for the Middle District of Pennsylvania. *Vieth*, 188 F. Supp. 2d at 537.

Immunities Clause of the Fourteenth Amendment, and the plaintiffs' right to free association protected by the First Amendment.[245] Specifically, the voters alleged the plan created malapportioned districts in violation of the one person, one vote standard.[246] The allegations also contended that the plan constituted an illegal political gerrymander.[247]

B. The District Court Decisions

A three-judge panel was convened pursuant to 28 U.S.C. § 2284.[248] The defendants filed a motion to dismiss the complaint, which the district court partially granted.[249] The district court granted the motion with respect to the political gerrymandering claim and all claims against the Commonwealth.[250] However, the district court proceeded to trial

245. *Vieth*, 188 F. Supp. 2d at 537.

246. *Vieth*, 124 S. Ct. at 1773. According to the 2000 census, Pennsylvania had a population of 12,281,054. *Vieth*, 188 F. Supp. 2d at 535. If divided equally between the nineteen congressional districts, the population per district would have been 646,371 or 646,372. *Id.* Under Act 1, District 7 included 646,380 while Districts 1, 2 and 17 each had a population of 646,361 creating a nineteen person deviation between the districts. *Id.*

247. *Vieth*, 124 S. Ct. at 1773. Allegedly, the districts were created solely on the basis of partisan advantage and paid no attention to traditional districting principles. *Id.* Under Act 1, eighty-four local governments (counties, cities, boroughs or townships) were split among different congressional districts. *Vieth*, 188 F. Supp. 2d at 535. The plan split Montgomery County, where Plaintiff Furey resided, into six different congressional districts. *Id.* Under the redistricting plan controlling before Act 1, only twenty-seven local governments were divided into different congressional districts. *Id.* at 535–36. The plaintiffs alleged the new electoral districts were designed to shut Democrats out of the political process and caused plaintiffs harm, because congressional members who do not represent their views would represent them. *Id.* at 536.

248. *Vieth*, 124 S. Ct. at 1774. A three-judge panel is required when a suit is filed challenging the constitutionality of the apportionment of Congressional districts or the apportionment of any statewide legislative body. 28 U.S.C. § 2284 (2000). Chief Judge Edward Becker of the Third Circuit Court of Appeals appointed the Honorable Richard Nygaard, United States Circuit Judge for the Third Circuit Court of Appeals, the Honorable William H. Yohn Jr., United States District Judge for the Eastern District of Pennsylvania and the Honorable Sylvia Rambo, Senior United States District Judge for the Middle District of Pennsylvania. *Vieth*, 188 F. Supp. 2d at 536.

249. *Vieth*, 188 F. Supp. 2d at 532.

250. *Vieth*, 124 S. Ct. at 1774. Regarding the Fourteenth Amendment violation, the District Court held the plaintiffs failed to demonstrate an actual discriminatory effect as required by *Bandemer*. *Vieth*, 188 F. Supp. 2d at 547. Following *Bandemer*, The court determined the plaintiffs had not been shut out of the political process. *Id.* Without much discussion, the Privileges and Immunities claim was found irrelevant to the stated cause of action. *Id.* at 548 (noting that the Privileges and Immunities Clause protects against discrimination on the basis of state citizenship and no allegation was made that the plaintiffs were citizens of another State or newly arrived citizens of Pennsylvania). The District Court found the First Amendment violation to be "coextensive" with the equal protection claim. *Id.* Since the court determined the plaintiffs failed to state a claim in regards to equal protection, the court dismissed the First Amendment claim on the same grounds. *Id.* The District Court dismissed the claims against the Commonwealth on Eleventh Amendment grounds. *Id.* at 538–39 (noting the Eleventh

with the apportionment claim.[251] In a 2–1 decision, the district court found for the plaintiffs.[252] The court required the legislature to develop a new redistricting plan in line with the one person, one vote standard.[253] The General Assembly duly passed another plan, which satisfied the court's conditions.[254] The plaintiff attempted to enjoin this plan on similar grounds as the first plan.[255] The court found that the electoral districts were not malapportioned and, citing the court's earlier ruling, rejected the political gerrymandering claims.[256]

Subsequently, the plaintiffs appealed against the dismissal of the political gerrymandering claims to the United States Supreme Court.[257] The Court noted probable jurisdiction on June 27, 2003.[258] On April 28, 2004, the Court decided whether the plaintiffs alleged a valid complaint of partisan gerrymandering and if manageable standards existed to adjudicate the complaint.[259]

C. The Supreme Court Decision

In a 5–4 decision, the United States Supreme Court affirmed the

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Amendment generally prohibits federal courts from hearing suits by private parties against States and their agencies).

251. *See Vieth*, 188 F. Supp. 2d at 541–43 (discussing the plaintiffs success in showing a prima facie case of a violation of the one person, one vote standard as required by Article I, section 2 of the United States Constitution); *supra* Part II.C.2 (discussing the one person, one vote standard).

252. Vieth v. Pennsylvania., 195 F. Supp. 2d 672 (M.D. Pa. 2002). The District Court held the defendants did not employ a good faith effort to draw districts of equal population. *Id.* Furthermore, the defendants failed to show the deviation was necessary to achieve a legitimate goal. *Id.* at 677–78. Judge Yohn, dissenting from the opinion, found that the defendants had provided sufficient justification for the deviation based on the desire to avoid splitting additional voter precinct districts. *Id.* at 679 (Yohn, J., dissenting).

253. *Vieth*, 195 F. Supp. 2d at 678–79.

254. Vieth v. Pa., 241 F. Supp. 2d 478 (M.D. Pa. 2002). On April 17, 2002, the General Assembly passed a revised congressional redistricting plan signed by the Governor the following day. *Id.* at 480. The new redistricting bill was designated Act 34. *Id.*; *see* Issacharoff & Karlan, *supra* note 12, at 555 (outling some of the clearly partisan gerrymandering techinques in the plan).

255. *Vieth*, 124 S. Ct. at 1774.

256. *Vieth*, 241 F. Supp. 2d at 478. The court found Act 34 to be a zero-deviation plan. *Id.* at 481. In addition, the court viewed Act 34 to be similar to Act 1 and stood on its earlier ruling that the plan did not effectively shut the plaintiffs out of the political process foreclosing the partisan gerrymandering claims. *Id.* at 484–85.

257. *Vieth*, 124 S. Ct. at 1774. A direct appeal to the Supreme Court is allowed if a three-judge panel adjudicates the matter. *See* 28 U.S.C. § 1253 (2000) (allowing a direct appeal to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court panel of three judges).

258. Vieth v. Jubelirer, 539 U.S. 957 (2003).

259. *Vieth*, 124 S. Ct. 1769 (plurality opinion).

district court's decision dismissing the partisan gerrymandering claim.[260] Writing for the Court, Justice Scalia determined the claim represented a political question and that the Supreme Court lacked the ability to decide the matter.[261] Justice Kennedy's concurring opinion agreed with the plurality as to the judgment, but disagreed that all partisan gerrymandering claims fall within the political question doctrine.[262] In three dissenting opinions, four Justices argued partisan gerrymandering was a justiciable issue and proposed possible standards to evaluate the claims.[263]

1. The Plurality Opinion

The plurality opinion asserted that partisan gerrymandering claims represent a non-justiciable political question lacking judicially manageable standards.[264] After a review of the relevant facts, the discussion began with a history of partisan gerrymandering in the United States tracing back to the colonial period and the Constitutional Convention.[265] Viewing Article I, Section 4 as providing a remedy for partisan gerrymandering, the plurality contended that Congressional power to restrain the gerrymander had not been idle.[266] The lack of idleness was highlighted by the fact that Congress and the states have introduced a number of bills designed to curb partisan gerrymandering.[267]

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260. *Id.* (plurality opinion).

261. *Id.* at 1778 (plurality opinion); *see infra* Part III.C.1 (discussing the plurality opinion).

262. *Vieth*, 124 S. Ct. at 1793 (Kennedy, J., concurring); *see infra* Part III.C.2 (discussing Justice Kennedy's concurring opinion).

263. *Vieth*, 124 S. Ct. at 1810 (Stevens, J., dissenting); *id.* at 1817 (Souter, J., dissenting, joined by Ginsburg, J.,); *id.* at 1825 (Breyer, J., dissenting); *see infra* Part III.C.3.a (discussing Justice Stevens's dissenting opinion); *infra* Part III.C.3.b (discussing Justice Souter's dissenting opinion; *infra* Part III.C.3.c (discussing Justice Breyer's dissenting opinion).

264. *Vieth*, 124 S. Ct. at 1773 (plurality opinion).

265. *Id.* at 1774 (plurality opinion) ("The political gerrymander remained alive and well (though not yet known by that name) at the time of the framing.").

266. *Id.* at 1775 (plurality opinion). Article I, section 4 reads "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. CONST. art. I, § 4. The plurality outlined the various requirements under the different Apportionment Acts passed by Congress. *Vieth*, 124 S. Ct. at 1775–76. At different times these Acts included a contiguous territory requirement in an attempt to defeat partisan gerrymanders. *Id.* However, today the only Congressional requirement is for single member districts. *Id.* at 1776 (plurality opinion) (citing 2 U.S.C. § 2c); *see also* BUTLER & CAIN, *supra* note 37, at 24–26 (discussing some of the provision passed by Congress related to apportionment).

267. *Vieth*, 124 S. Ct. at 1776 (plurality opinion) (identifying several bills introduced in Congress and state legislatures designed to curb gerrymandering); *see* Center for Voting And Democracy, *Redistricting Legislation in the U.S. Congress*, Jan. 2004 *at*

The plurality next turned to the origin of the political question doctrine.[268] After reviewing the six *Baker* factors used to determine whether a political question existed, the plurality applied them and reasoned that no judicially discernible and manageable standards existed for adjudicating political gerrymandering claims.[269] *Bandemer*, which established claims of partisan gerrymandering to be justiciable, had not established a majority standard for the lower courts to follow.[270] Further, the plurality noted that only one lower court since *Bandemer* found sufficient grounds to establish unconstitutional partisan gerrymandering.[271] The plurality argued that *Bandemer* and the eighteen years worth of lower court decisions since *Bandemer* had failed to establish a proper standard.[272]

In an attempt to show that a workable standard does not exist, the plurality reviewed the standards put forth by *Bandemer*, the appellants, and the other Justices.[273] The plurality concentrated first on Justice White's plurality opinion in *Bandemer,* which required a showing of intentional discrimination as well as discriminatory effect on the plaintiffs in order to show unconstitutional political gerrymandering.[274] After sketching the standard announced by Justice White, the plurality presented lower court decisions as well as the analyses of academic commentators showing the standard to be unmanageable.[275] The plurality quickly dismissed Justice White's standard as unworkable and declined to affirm it as constitutionally sufficient.[276] The plurality also discarded Justice Powell's opinion in *Bandemer* as not establishing a

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http://www.fairvote.org/redistricting/congress.htm (discussing the various bills introduced related to eliminating gerrymandering) (last visited Apr. 19, 2005).

268. *Vieth*, 124 S. Ct. at 1776 (plurality opinion).

269. *Id.* at 1776 (plurality opinion).

270. *Id.* at 1777 (plurality opinion); *see supra* Part II.E (discussing the Supreme Court decision of *Davis v. Bandemer*, 478 U.S. 109 (1986)).

271. *Vieth*, 124 S. Ct. at 1777 (plurality opinion).

272. *Id.* at 1777 (plurality opinion). "Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists." *Id.* at 1778 (plurality opinion).

273. *Id.* at 1778–92 (plurality opinion).

274. *Id* at 1778–80 (plurality opinion). "We begin our review of possible standards with that propsed by Justice White's plurality opinion in *Bandemer* because, as the narrowest ground for the decision in that case, Justice White's plurality opinion has been the standard used by lower courts." *Id.* at 1778 (plurality opinion); *see supra* notes 204–05 and accompanying text (discussing Justice White's plurality opinion in *Bandemer*).

275. *Vieth*, 124 S. Ct. at 1779–80 (plurality opinion) (noting "the legacy of the plurality's test is one long record of puzzlement and consternation").

276. *Id.* at 1780 (plurality opinion). In fact, neither the appellants nor any Justice argued to maintain the standard. *Id.* (plurality opinion).

manageable standard.[277]

The plurality next reviewed the appellants' proposed standard.[278] The appellants had preserved Justice White's intent-plus-effect requirement, but modified the evidence required to achieve the standard.[279] The appellants urged the Court to look at the mapmakers' predominant intent in creating the district boundaries and the effect of the redistricting plan on the ability of a group of voters to achieve a majority of seats if they received a majority of the votes.[280] Even with the modification, the plurality was not convinced that the standard was manageable.[281]

Moreover, the plurality rejected the appellants' attempt to employ racial gerrymandering standards as a basis for partisan gerrymandering standards.[282] Justice Scalia did not regard political affiliation as an immutable characteristic.[283] Due to the constant shift in political views and connections, the plurality failed to see how a majority party and the effects of political gerrymandering could be determined.[284]

In addition, the plurality considered the standards proposed by the dissenting Justices.[285] As initial evidence of lacking standards, the plurality noted that the four dissenters developed three different standards, which were different from the two in *Bandemer* and the one

277. *Id.* at 1784 (plurality opinion). The plurality considered Justice Powell's standard a "totality of the circumstances analysis" to determine "fairness." *Id.* (plurality opinion). The measurement of fairness also did not seem to be a judicially manageable standard for the plurality. *Id.* (plurality opinion).

278. *Id.* at 1780–84 (plurality opinion).

279. *Id.* at 1780 (plurality opinion).

280. *Id.* (plurality opinion). Predominant intent could be shown "by evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." *Id.* (plurality opinion) (quoting Brief for Appellants at 19). Regarding the effects prong, the appellants proposed to replace Justice White's effect test and show effect is established when "(1) the plaintiffs show that the districts systematically 'pack' and 'crack' the rival party's voters, and (2) the court's examination of the 'totality of circumstances confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats." *Id.* at 1781 (plurality opinion) (quoting Brief for Appellants at 20) (citations omitted).

281. *Id.* at 1780–84 (plurality opinion).

282. *Id.* at 1780 (plurality opinion). The plurality viewed redistricting based on race as being unlawful. *Id.* at 1781 (plurality opinion). However, the plurality viewed partisan gerrymandering as a "lawful and common practice." *Id.* (plurality opinion). Justice Scalia believed utilizing racial standards in political gerrymandering cases would allow disgruntled voters to almost always allege partisan advantage was the predominant motivation. *Id.* (plurality opinion).

283. *Id.* at 1782 (plurality opinion) (stating that "[a] person's politics is rarely as readily discernible—and [*never*] as permanently discernible—as a person's race") (emphasis in original)).

284. *Id.* (plurality opinion).

285. *Id.* at 1784–92 (plurality opinion).

proposed by the appellants.[286] The plurality reviewed each proposal and found each one lacked manageable standards for the lower court.[287]

Even though Justice Kennedy concurred in the judgment, the plurality still reviewed his opinion.[288] The plurality asserted that Justice Kennedy's disposition in the case was not legally available.[289] The plurality urged the lower courts to view Justice Kennedy's vote as supporting a finding that partisan gerrymandering falls within the political question doctrine.[290]

In conclusion, the plurality held that no constitutional provision provided a judicially enforceable limit on the political considerations that the states and Congress may use when redistricting.[291] The plurality advocated overruling *Bandemer* and finding partisan gerrymandering claims non-justiciable political questions.[292]

2. The Concurring Opinion

The concurring opinion, authored by Justice Kennedy, urged courts to avoid finding the use of political reasons in creating electoral districts completely unlawful.[293] For Justice Kennedy, a finding of unlawful

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286. *Id.* at 1784 (plurality opinion).

287. *Id.* at 1785 (plurality opinion). The plurality dismissed Justice Stevens's opinion by noting the standards to determine lawful racial gerrymandering and partisan gerrymandering are very different. *Id.* ("A purpose to discriminate on the basis of race receives the strictest scrutiny under the *Equal Protection Clause*, while a similar purpose to discriminate on the basis of politics does not."); *see* Bush v. Vera, 517 U.S. 952, 964 (1996) (plurality opinion) ("We have not subjected political gerrymandering to strict scrutiny.") (emphasis in original). According to the plurality, Justice Souter's "fresh start" test seems to provide a manageable standard, but in fact created too many "how" questions for the courts to answer. *Vieth*, 124 S. Ct. at 1787 (plurality opinion) ("[N]o element of his test looks to the effect of the gerrymander on the electoral success, the electoral opportunity, or even the political influence, of the plaintiff group. We do not know the precise constitutional deprivation his test is designed to identify and prevent."). Without much discussion, the plurality dismissed Justice Breyer's standard as extremely vague. *Id.* at 1788–89 ("[W]e neither know precisely what Justice Breyer is testing for, nor precisely what fails the test.").

288. *Vieth*, 124 S. Ct. at 1790–92 (plurality opinion).

289. *Id.* at 1790 (plurality opinion). The plurality maintained that the Court had two options in affirming the lower court's decision. *Id.* at 1792 (plurality opinion). The Court could have affirmed because political districting presents a non-justiciable question or because the correct standard, which identifies unconstitutional political districting, had not been met in this case. *Id.* According to the plurality, the Court could not affirm because of the inability to develop a manageable standard. *Id.* (plurality opinion).

290. *Id.* at 1792 (Kennedy, J., concurring) (stating that "[w]e suggest that [the lower courts] must treat [Justice Kennedy's vote] as a reluctant fifth vote against justiciability at district and statewide levels—a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable").

291. *Id.* (plurality opinion).

292. *Id.* (plurality opinion).

293. *Id.* at 1792–93 (Kennedy, J., concurring).

partisan gerrymandering goes beyond the use of political classifications.[294] In dealing with these issues, the Court faced two obstacles: the lack of comprehensive and neutral principles for drawing electoral boundaries and the lack of rules to limit judicial involvement.[295] The evidence presented by the appellants in *Vieth* did not prevail over these obstacles.[296] The traditional approach of redistricting through the use of contiguity and compactness was limited, especially in terms of constructing a proper remedy.[297] Justice Kennedy viewed the appellants' claim, asserting that a majority of voters should elect a majority of the congressional delegation, as unfounded.[298] However, Justice Kennedy refused to go as far as the plurality in finding all claims of partisan gerrymandering non-justiciable.[299] For Justice Kennedy, the arguments for non-justiciability and the inability to establish a standard did not foreclose further discussion in future cases.[300]

The Fourteenth Amendment standard governed, but Justice Kennedy believed that the First Amendment might provide a more relevant standard to determine unlawful partisan gerrymandering claims.[301] Under First Amendment analysis, Justice Kennedy considered whether political classifications were used to burden a group's representational rights.[302] According to Justice Kennedy, the First Amendment analysis

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294. *Id.* at 1793 (Kennedy, J., concurring) (Stating unconstitutional partisan gerrymandering occurs when political classifications are "applied in an invidious manner or in a way unrelated to any legitimate legislative objective").

295. *Id.* (Kennedy, J., concurring).

296. *Id.* (Kennedy, J., concurring).

297. *Id.* at 1794. (Kennedy, J., concurring).

298. *Id.* at 1793. (Kennedy, J., concurring).

299. *Id.* (Kennedy, J., concurring). Justice Kennedy refused to follow the plurality even though he thought the plurality had "demostrate[d] the shortcomings of the other standards that have been considered to date." *Id.* at 1794 (Kennedy, J., concurring).

300. *Id.* (Kennedy, J., concurring). ("It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied."). Justice Kennedy believed the Court had already entered the "political thicket" of apportionment through the adoption of the "one person, one vote" rule and therefore should not limit its review of other gerrymandering claims. *Id.* at 1795 (Kennedy, J., concurring). Justice Kennedy argued for caution in closing judicial review especially when the constitutional issue affected a person's right to vote. *Id.* at 1796 (Kennedy, J., concurring). Justice Kennedy worried that if the court abandoned judicial relief to parties, the partisan gerrymanders would be encouraged to enhance their unlawful activities. *Id.* at 1793 (Kennedy, J., concurring).

301. *Id.* at 1797 (Kennedy, J., concurring).

302. *Id.* (Kennedy, J., concurring). Justice Kennedy contrasted this question from the arguments of the plurality. *Id.* (Kennedy, J., concurring). The plurality discounted a First Amendment basis arguing the use "would render unlawful *all* consideration of political affiliation in districting." *Id.* at 1786 (Kennedy, J., concurring). In Justice Kennedy's view, a court could grant relief under the First Amendment if the state "impose[d] burdens and restrictions on groups

provided a greater foundation for courts since it removed the complicated question of when a generally permissible classification is used for impermissible purposes and instead it focused on whether the legislation burdens representational rights based on ideology, beliefs, or political association.[303]

Justice Kennedy noted the apparent contradiction in the plurality opinion that partisan gerrymanders are incompatible with democratic principles.[304] This inconsistency allowed for the possibility of finding manageable standards.[305] While not endorsing a standard proposed by any of the Justices, Justice Kennedy did believe workable standards might emerge in the near future.[306]

3. The Dissenting Opinions

The dissenting Justices agreed on the justiciability of partisan gerrymandering but disagreed as to the proper standards to apply.[307] Justice Stevens focused on Supreme Court precedent involving apportionment and racial gerrymandering claims to develop a standard.[308] Justice Souter discounted all earlier standards developed by the courts and adopted a new method.[309] Justice Breyer argued for a standard to eliminate the unjustified entrenchment of political parties.[310]

a. Justice Stevens's Dissent

For Justice Stevens, the main question in *Vieth* was whether partisan gerrymandering claims were justiciable.[311] Regardless of the different standards proposed, Justice Stevens found it significant that five members of the Court supported the idea that partisan gerrymandering claims were justiciable.[312] Justice Stevens believed that it would be a radical departure from Supreme Court precedent if partisan

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or persons by reason of their view . . . unless the [s]tate shows some compelling interest." *Id.* at 1797 (Kennedy, J., concurring); *see supra*, Part III.C.3 (discussing the use of the First Amendment as a basis to determine unconstitutional partisan gerrymandering).

303. *Vieth*, 124 S. Ct. at 1798 (Kennedy, J., concurring). Justice Kennedy understood this analysis to allow a more "pragmatic or functional assessment that accords some latitude to the States." *Id.* (Kennedy, J., concurring).

304. *Id.* (Kennedy, J., concurring).

305. *Id.* (Kennedy, J., concurring).

306. *Id.* at 1799 (Kennedy, J., concurring).

307. *See infra* Part III.C.3.a (discussing Justice Stevens's dissent); *infra* Part III.C.3.b (discussing Justice Souter's dissent); *infra* Part III.C.3.c (discussing Justice Breyer's dissent).

308. *See infra* Part III.C.3.a (discussing Justice Stevens's dissent).

309. *See infra* Part III.C.3.b (discussing Justice Souter's dissent).

310. *See infra* Part III.C.3.c (discussing Justice Breyer's dissent).

311. *Vieth*, 124 S. Ct. at 1799 (Stevens, J., dissenting).

312. *Id.* (Stevens, J., dissenting).

gerrymandering claims were found to be beyond judicial competence.[313] Illustrated in the dissent, the history and attitude of the Court's involvement in legislative districting disputes mandated a role for the Court.[314] For Justice Stevens, the principles of *Bandemer* and *Baker* confirmed the logic that political gerrymandering claims are justiciable.[315] Justice Stevens believed that the district court ruling should be reversed, but based his decision on narrow grounds dealing only with the single-member district partisan gerrymandering claims.[316]

Justice Stevens dismissed the plurality's claim that judicially manageable standards did not exist.[317] He noted that earlier Supreme Court decisions used a number of factors to determine the validity of districts.[318] Justice Stevens illustrated how courts had used these factors successfully in racial gerrymandering cases.[319] Since a judicially manageable standard existed for racial gerrymandering cases, Justice Stevens believed that the political question doctrine concerns had no merit.[320] For him, the plurality's distinction between racial and

313. *Id.* (Stevens, J., dissenting). "Today's plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and would give license, for the first time, to partisan gerrymanders that are devoid of any rational justification." *Id.* (Stevens, J., dissenting).

314. *Id.* (Stevens, J., dissenting). Justice Stevens stated the main goal of legislative apportionment is to "achiev[e] . . . fair and effective representation for all citizens." *Id.* at 1800 (Stevens, J., dissenting) (quoting from *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964)).

315. *Id.* (Stevens, J., dissenting). Justice Stevens quoted from the portion of *Baker* affirming the holding that "[j]udicial standards under the Equal Protection Clause are well developed and familiar. . . ." *Id.* at 1801 (Stevens, J., dissenting) (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)). Justice Stevens further affirmed the idea that political and racial gerrymandering claims are not distinguishable based on justiciability grounds. *Id.* (Stevens, J., dissenting).

316. *Id.* at 1799 (Stevens, J., dissenting). Justice Stevens believed that statewide claims alleging partisan gerrymandering were too much of an "ambitious project" for the Court to tackle in this case. *Id.* (Stevens, J., dissenting). However, Justice Stevens believed the single district claim alleging partisan gerrymandering were valid. *Id.* (Stevens, J., dissenting). Justice Stevens believed the plaintiff, Susan Furey, established proper standing, that the district-specific claim was not barred by the *Bandemer* rejection of statewide partisan gerrymandering claims, and in regards to her specific electoral district, she articulated a valid Equal Protection claim in line with earlier Supreme Court voting rights cases. *Id.* at 1800 (Stevens, J., dissenting).

317. *Id.* at 1801 (Stevens, J., dissenting).

318. *Id.* (Stevens, J., dissenting). Justice Stevens again used language from *Bandemer* to support his argument. *Id.* (Stevens, J., dissenting). ("[T]he merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting.") (quoting Davis v. Bandemer, 478 U.S. 109, 165 (1986) (Powell, J., concurring in part and dissenting in part).

319. *Id.* at 1802 (Stevens, J., dissenting).

320. *Id.* at 1803 (Stevens, J., dissenting). "The racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great of a role in the districting process." *Id.* at 1810 (Stevens, J., dissenting).

partisan gerrymandering in terms of judicially manageable standards lacked credibility.[321] Justice Stevens did not find the distinction based on the plurality's assumption that partisanship is ordinary and lawful valid in terms of justiciability.[322] He also noted that the same basic issue in both racial and partisan gerrymandering claims exists, namely, whether a single, non-neutral issue controlled the creation of the electoral districts in such a manner that it violated the Constitution.[323] Justice Stevens did not believe the plurality had put forth a valid argument distinguishing the difference between racial and partisan gerrymanders.[324]

Justice Stevens then appraised the argument of the appellants.[325] He argued that the statewide claims should be dismissed based on standing.[326] However, Justice Stevens found the specific district challenge warranted review and continued to draw a connection between racial and partisan gerrymanders.[327] Gerrymandering created a cognizable harm by disrupting the relationship between the voter and the elected representative.[328] For Justice Stevens, this harm was even

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321. *Id.* at 1803 (Stevens, J., dissenting).

322. *Id.* (Stevens, J., dissenting). Justice Stevens used a First Amendment argument to show the unconstitutionality of discrimination based on political belief and association. *Id.* (Stevens, J., dissenting); *see* Elrod v. Burns, 437 U.S. 347 (1976) (holding discriminatory governmental decisions that burden fundamental First Amendment interests are subject to strict scrutiny). Justice Stevens drew a parallel between the First Amendment patronage cases to partisan gerrymandering claims. *Vieth*, 124 S. Ct. at 1803–04 (Stevens, J., dissenting) ("[T]he relevant lesson of the patronage cases is that partisanship is not always as benign a consideration as the plurality appears to assume."). Therefore, according to Justice Stevens, political affiliation is not a proper motive to exclude voters from a electoral district. *Id.* at 1803 (Stevens, J., dissenting); *see supra* Part III.C.3 (discussing the use of the First Amendment as a basis to determine unconstitutional partisan gerrymandering).

323. *Vieth*, 124 S. Ct. at 1804 (Stevens, J., dissenting); *see also* Dixon, *One Man, One Vote*, *supra* note 36, at 32 (stating "racial gerrymandering is simply a particular kind of political gerrymandering").

324. *Vieth*, 124 S. Ct. at 1804 (Stevens, J., dissenting). Justice Stevens believed Justice White in *Bandemer* articulated the idea best by stating "[t]hat the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case." *Id.* at n. 15 (quoting Davis v. Bandemer, 478 U.S. 109, 125 (1986) (White, J., plurality opinion)).

325. *Id.* at 1805–13 (Stevens, J., dissenting).

326. *Id.* at 1805 (Stevens, J., dissenting). Justice Stevens believed that Court decisions since *Bandemer* had changed the requirements for standing which closed off the appellant's statewide partisan gerrymandering claim. *Id.* (Stevens, J., dissenting); *see also* United States v. Hays, 515 U.S. 737, 745 (1995) (imposing a standing requirement that plaintiffs to reside in the districts they are challenging).

327. *Vieth*, 124 S. Ct. at 1806 (Stevens, J., dissenting).

328. *Id.* (Stevens, J., dissenting). The harm is caused because the elected official in a gerrymandered district "will infer that [ ] success is primarily attributable to the architect of the

greater in the case of partisan gerrymandered districts.[329]

The dissent of Justice Stevens rejected the plurality's notion that partisan considerations are perfectly legitimate.[330] A total elimination of political considerations in the redistricting process was not practicable or necessary.[331] However, the creation of districts must rest on neutral criteria based on the equal protection requirements.[332] In order to assess a challenge to a specific district, Justice Stevens endorsed the standard established in *Shaw* and its progeny.[333] For Justice Stevens, a rational basis test should be used, in place of the strict scrutiny test discussed in *Shaw*, in determining the unconstitutionality of a specific district's plan.[334] Justice Stevens viewed the specific district challenge complaint as falling within this standard and argued for a reversal of the judgment and remand for further proceedings.[335]

b. Justice Souter's Dissent

Justice Souter argued for a five-part test to determine unconstitutional partisan gerrymandering.[336] The concept of fairness framed the question.[337] The interests of fairness were not served because the

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district rather than to a constituency defined by neutral principles." *Id.*

329. *Id.* at 1807 (Stevens, J., dissenting). "The problem simply put, is that the will of the cartographers rather than the will of the people will govern." *Id.*

330. *Id.* at 1801 (Stevens, J., dissenting). Justice Stevens passionately stated:

> [u]ntil today . . . there has not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line. ON THE CONTRARY, our opinions referring to political gerrymanders have consistently assumed that they were at least undesirable, and we always have indicated that political considerations are among those factors that may not dominate districting decisions.

Id. at 1810–11 (Stevens, J., dissenting) (citations omitted).

331. *Id.* at 1808 (Stevens, J., dissenting).

332. *Id.* (Stevens, J., dissenting). Justice Stevens confirmed the state must act in a neutral manner and the Equal Protection Clause deposits this requirement upon the state. *Id.* Proportional representation of various groups was not the goal of Justice Stevens. *Id.* at 1811 (Stevens, J., dissenting).

333. *Id.* at 1812 (Stevens, J., dissenting); *see supra* Part II.C.4 (discussing the Court development of judicial standards related to racial gerrymandering).

334. *Vieth*, 124 S. Ct. at 1812 (Stevens, J., dissenting). "Under my analysis, if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge." *Id.* (Stevens, J., dissenting). Hence, Justice Stevens believed that the rational basis standard would not place an undue burden on state redistricting processes, but would allow the courts to prohibit extreme partisan plans. *Id.* (Stevens, J., dissenting).

335. *Id.* at 1813 (Stevens, J., dissenting).

336. *Id.* at 1817 (Souter, J., dissenting). Justice Ginsburg joined in Justice Souter's dissenting opinion. *Id.* at 1815 (Souter, J., dissenting).

337. *Id.* at 1815 (Souter, J., dissenting). Justice Souter used the foundation of "fair and

Bandemer plurality's standard set too high a hurdle for the plaintiffs.[338] Justice Souter did not see the lower court's inability to formulate a workable standard as proof that such a standard did not exist.[339] Although Justice Souter agreed partisan gerrymandering was justiciable, he believed that the Court needed to start anew in formulating a manageable standard based on the formula devised in *McDonnell Douglas Corp. v. Green*.[340] Similar to Justice Stevens's approach, Justice Souter limited his test to challenges against specific districts and refused to extend the test to statewide challenges.[341]

Under Justice Souter's test, the plaintiff would need to show five elements in order to establish a *prima facie* case of unconstitutional partisan gerrymandering.[342] The first element required that the plaintiff demonstrate membership within a cohesive political group.[343] Next, the plaintiff would need to satisfy the requirements of standing and show that the created district of the plaintiff's residence paid scant regard to the traditional districting principles.[344] Third, the plaintiff would need to demonstrate a specific correlation between the district's deviations

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effective representation" in describing fairness. *Id.* (Souter, J., dissenting) (quoting Davis v. Bandemer, 478 U.S. 109, 162 (1986) (Powell, J., concurring in part and dissenting in part). The Justice believed that everyone understood the term fairness in reference to political gerrymandering cases, but admitted that it did not have the same "hard edge of one person, one vote." *Id.* (Souter, J., dissenting).

338. *Id.* at 1816 (Souter, J., dissenting). Justice Souter viewed the interpretation of *Bandemer* as requiring a showing of a group to be "essentially . . . shut out of the political process" in order to prove discriminatory effect to constitute an excessive burden. *Id.* (Souter, J., dissenting) (quoting *Bandemer*, 478 U.S. at 139); *see supra* Part II.E (discussing the Supreme Court decision of Davis v. Bandemer, 478 U.S. 109 (1986)).

339. *Vieth*, 124 S. Ct. at 1816 (Souter, J., dissenting). Justice Souter thought the Court created the problem in the first place, and therefore it was the responsibility of the Court to resolve it. *Id.*

340. *Id.* at 1817 (Souter, J., dissenting); *see supra* note 64 (discussing the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) burden-shifting standard).

341. *Vieth*, 124 S. Ct. at 1817 (Souter, J., dissenting). "I would limit consideration of a statewide claim to one built upon a number of district-specific ones." *Id.* at 1820 (Souter, J., dissenting).

342. *Id.* at 1817 (Souter, J., dissenting).

343. *Id.* (Souter, J., dissenting). Justice Souter rebuffed the plurality's claim that a person's political identity is rarely discernible. *Id.* (Souter, J., dissenting); *see supra* Part III.C.1 (discussing plurality's view). The fact that political gerrymandering occurs implies that the political gerrymander was able to identify relevant groups and establish district boundaries to its benefit or determent. *Vieth*, 124 S. Ct. at 1817 n.2 (Souter, J., dissenting).

344. *Vieth*, 124 S. Ct. at 1817 (Souter, J., dissenting); *see* United States v. Hays, 515 U.S. 737 (1995) (requiring residence in a challenged district for standing). Justice Souter referred to "contiguity, compactness, respect for political subdivisions, and conformity with geographic features" as principles of traditional districting. *Vieth*, 124 S. Ct. at 1817 (Souter, J., dissenting). According to Justice Souter, an exact formula that balanced the principles was not required, since courts have been able to make these determinations in earlier decisions and the specific type of method used to gerrymander is case specific. *Id.* at 1818 (Souter, J., dissenting).

from traditional districting principles and political group's population distribution.[345] The fourth element required the plaintiff to present a hypothetical district, which included his residence, more in line with the traditional principles of redistricting.[346] Finally, the plaintiff would need to show that the gerrymander acted with intent to discriminate.[347] Once the prima facie case is established, the burden would shift to the alleged gerrymander.[348] The alleged gerrymander would need to show the district was created for reasons beyond naked partisan advantage.[349]

Justice Souter discounted the plurality's claims that the test did not provide manageable standards.[350] The test was not hard-edged, but it was also not wholly subjective.[351] A precise measure of the harm was not necessary since all of the Justices agreed partisan gerrymandering taken too far is unfair.[352] The test provided a method that would assist the Court in determining when a partisan gerrymander had gone too far.[353] Justice Souter believed that the right course would be to reverse the district court and allow the plaintiff to amend the district-specific complaint in compliance with the test.[354]

c. Justice Breyer's Dissent

345. *Vieth*, 124 S. Ct. at 1818 (Souter, J., dissenting). Justice Souter provided possible examples including a showing that "when towns and communities were split, Democrats tended to fall on one side and Republicans on the other." *Id.* (Souter, J., dissenting).

346. *Id.* at 1817 (Souter, J., dissenting). For example, the proposal should have a lower or higher proportion of the plaintiff's group based on the method employed to dilute the vote. *Id.* at 1819 (Souter, J., dissenting); *see also supra* Part II.A.1 (discussing the different methods of a political gerrymander).

347. *Vieth*, 124 S. Ct. at 1819 (Souter, J., dissenting). Justice Souter did not think that meeting this element was difficult, especially with a plan devised by a single major party and if the plaintiff satisfied the third and fourth elements of the prima facie case. *Id.* (Souter, J., dissenting).

348. *Id.* (Souter, J., dissenting).

349. *Id.* (Souter, J., dissenting). Such reasons could include the avoidance of racial vote dilution, complying with the one person, one vote requirement or proportional representation among its political parties. *Id.* at 1817 (Souter, J., dissenting); *see* Bush v. Vera, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring) (finding compliance with section 2 of the Voting Rights Act of 1965 is a compelling state interest).

350. *Vieth*, 124 S. Ct. at 1821 (Souter, J., dissenting); *see supra* note 285–84 and accompanying text (discussing the plurality's criticism of Justice Souter's plan).

351. *Vieth*, 124 S. Ct. at 1821 (Souter, J., dissenting).

352. *Id.* (Souter, J., dissenting). Justice Souter even quoted Justice Scalia showing exact determinations are not always necessary. *Id.* at 1822. "To achieve what is, from the standpoint of the substantive policies involved, the 'perfect' answer is nice – but it is just one of a number of competing values." *Id.* at 1822 (Souter, J., dissenting) (quoting from Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989)).

353. *Vieth*, 124 S. Ct. at 1821 (Souter, J., dissenting).

354. *Id.* at 1822 (Souter, J., dissenting).

In his dissent, Justice Breyer asserted the idea that fair and effective representation included more than just having equally populated electoral districts.[355] A proper process must exist that allows for the will of the majority to establish an effective government.[356] Political parties and single member districts play an important role in this process.[357] For Justice Breyer, political parties function as a way for voters to express satisfaction or dissatisfaction with the elected officials' views by allowing voters to support them or vote for another party.[358] Due to the role of political parties, Justice Breyer found it natural that politics would play a role in the creation of electoral districts.[359] Justice Breyer did not believe traditional districting principles were politically neutral.[360]

The "unjustified entrenchment" of political parties served as the focal point for Justice Breyer's opinion.[361] This type of entrenchment would make it difficult for voters to remove elected officials who were no longer in line with the majority of the voters' views.[362] Court intervention would not always be necessary since other procedural solutions existed for the non-entrenched political party.[363] However, Justice Breyer did not have complete faith in the non-judicial remedies

355. *Id.* (Breyer, J., dissenting).

356. *Id.* at 1822–23 (Breyer, J., dissenting).

357. *Id.* at 1823 (Breyer, J., dissenting). In addition to providing greater legislative stability, Justice Breyer viewed single member districts as facilitating the ability of the voter to identify the party in power and decide if the voter wants to maintain the party power or vote them out of office. *Id.* (Breyer, J., dissenting).

358. *Id.* (Breyer, J., dissenting).

359. *Id.* (Breyer, J., dissenting). Justice Breyer believed it was necessary for politics to play a role in electoral districting since a random creation may create a larger exaggeration in election results and possibly may eliminate minority party representation. *Id.* at 1824 (Breyer, J., dissenting).

360. *Id.* (Breyer, J., dissenting). Justice Breyer viewed these boundaries as based on traditional principles, "represent[ing] a series of compromises of principle" and "an uneasy truce, sanctioned by tradition, among different parties seeking political advantage." *Id.* (Breyer, J., dissenting). *But see* Dixon, *One Man, One Vote*, *supra* note 36, at 35 (finding "[t]he idea of a so-called nonpartisan or neutral commission offers no certain path to representational virtue. Indeed, it is essentially a 'three monkeys' policy: speak no politics, see no politics, hear no politics, and hope that men are angels").

361. *Vieth*, 124 S. Ct. at 1825 (Breyer, J., dissenting). Justice Breyer defined unjustified entrenchment as the ability of the minority to maintain power "purely [as] the result of partisan manipulation and not other factors." *Id.* (Breyer, J., dissenting).

362. *Id.* (Breyer, J., dissenting). ("[P]olitical gerrymandering that so entrenches a minority party in power violates basic democratic norms and lacks countervailing justification.").

363. *Id.* at 1826. (Breyer, J., dissenting). Justice Breyer viewed statewide officials, Congress and voters as agents that could negate the power of the gerrymander. *Id.* (Breyer, J., dissenting). Justice Breyer also discussed the use of state commissions to limit the extent of partisan gerrymandering. *Id.* (Breyer, J., dissenting).

available to a gerrymandered voter.[364] Justice Breyer expressed concern that new technology would allow an entrenched gerrymander to maintain its position of unjust power.[365] Thus, under these circumstances, court action would be justified.[366]

Justice Breyer had faith that courts would be able to identify unjustified entrenchment and design a remedy for extreme cases.[367] While the determination by the Court would not be an easy one, Justice Breyer believed it was possible.[368] Finally, Justice Breyer challenged the assertion of the plurality that maintained that the numerous proposed standards implied a workable standard did not exist.[369] Justice Breyer believed that the Court, when writing a majority opinion, would be able to reconcile their differences and select a majority standard.[370]

IV. ANALYSIS

The majority of Justices in *Vieth* correctly affirmed that partisan gerrymandering claims are justiciable.[371] Part IV.A endorses the idea that the Justices were correct in confirming the justiciability of partisan

364. *Id.* (Breyer, J., dissenting). "[W]e cannot always count on a severely gerrymandered legislature itself to find and implement a remedy." *Id.* (Breyer, J., dissenting). "The party that controls the process has no incentive to change it." *Id.* at 1826–27. (Breyer, J., dissenting).

365. *Id.* at 1827. (Breyer, J., dissenting). ("The availability of enhanced computer technology allows the parties to redraw boundaries in ways that target individual neighborhoods and homes, carving out safe but slim victory margins . . . .").

366. *Id.* (Breyer, J., dissenting).

367. *Id.* (Breyer, J., dissenting). Justice Breyer highlighted the fact that after the 1980 census about one third of all redistricting was done either directly by the courts or under the courts' injunctive authority. *Id.* (Breyer, J., dissenting); *see* Samuel Issacharoff & Karlan, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1688–90, & nn. 227–33 (1993) (observing that following the 1980 census, federal courts played an active role in identifying and remedying unjustified redistricting plans).

368. *Vieth*, 124 S. Ct. at 1827–28 (Breyer, J., dissenting). In order to show that the Court could determine unjustified entrenchment, Justice Breyer provided a number of hypothetical examples of what he would consider unconstitutional partisan gerrymandering. *Id.* at 1828. (Breyer, J., dissenting). These hypothetical examples illustrated his belief that a fair inference of unconstitutional redistricting may arise in circumstances where a majority has twice failed to win a majority of legislative seats, where there is a radical departure from traditional boundary-drawing criteria, or where there has been unjustified mid-cycle redistricting. *Id.* (Breyer, J., dissenting).

369. *Id.* at 1829 (Breyer, J., dissenting).

370. *Id.* (Breyer, J., dissenting) ("[T]he more thorough, specific reasoning that accompanies separate statements will stimulate further discussion."). Justice Breyer believed the discussion necessary especially since Justice Kennedy continued to search for an appropriate standard. *Id.* (Breyer, J., dissenting) ; *see* Issacharoff & Karlan, *supra* note 12 at 561 (noting the dissenting opinions included "many common threads").

371. *See supra* Part III.C.2–3 (discussing each Justice's view on the justiciability of redistricting challenges).

gerrymandering claims.[372] Part IV.B reviews the dissenting opinions of *Vieth*, demonstrating some of their limitations.[373] Part IV.C argues that Justice Stevens's proposed standard provides the most promising judicial approach to settling partisan gerrymandering claims.[374]

A. Maintaining a Foundation: Justiciability Confirmed

The Court's affirmation of justiciability was correct because none of the factors established in *Baker*, which decide political questions, relate to partisan gerrymandering.[375] The Congressional authority to alter regulations related to elections does not remove the issue from the Court's jurisdiction.[376] In arguing non-justiciability, the main focus for the plurality was the lack of judicially discoverable and manageable standards for resolving the question of partisan gerrymandering.[377] Since *Baker*, Court precedent clearly shows that discoverable standards exist to resolve these claims under the Fourteenth Amendment.[378] The idea that the Court might have to expressly create a specific test is not new ground for the Court.[379] The prior development of a manageable standard by the Court in racial gerrymandering cases makes the Court's task that much easier.[380] The Court has already been able to distinguish

372. *See infra* Part IV.A (discussing the correctness of the majority of Justices who reaffirmed partisan gerrymandering claims as justiciable).

373. *See infra* Part IV.B (discussing the different formulations of the Justices but concluding each one lacks a certain element).

374. *See infra* Part IV.C (discussing the reasoning for applying Justice Stevens's proposed standard to partisan gerrymandering claims).

375. *See supra* note 86 (discussing the factors and analysis necessary to determine whether a particular issue constitutes a political question); *supra* notes 196–97 and accompanying text (discussing the Supreme Court's application of *Baker's* factors to partisan gerrymandering in *Davis v. Bandemer*, 478 U.S. 109 (1986), finding that none of them applied to partisan gerrymandering).

376. Michael C. Dorf, *The Supreme Court Gives Partisan Gerrymandering the Green Light — or at Least a Yellow Light*, FIND LAW'S WRIT, *at* http://writ.findlaw.com/dorf/20040512.html (last visited May 12, 2004).

377. *See id.* (defining *discoverable standards* as those that can be traced to the Constitution's text, structure, or history, and *manageable standards* as those that lead to predictable and sensible results).

378. *See supra* note 101 (discussing the application of the Fourteenth Amendment to vote dilution cases). The *Baker* majority held that "[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. 226; *see* Baker v. Carr, 369 U.S. 186, 226 (1962).

379. *See* Dorf, *supra* note 376 (arguing that in almost in every area of Constitutional law, the Court has established certain tests in order to enforce rights described in generalities by the Constitution).

380. *See supra* notes 145–48 and accompanying text (discussing the *Gingles* three prong test).

predominance on the basis of race in the creation of electoral districts.[381] In establishing a majority standard, the Court's charge will be to determine how to measure whether the predominant factor in the creation of electoral district boundaries was based on partisan politics which subordinated traditional districting principles.[382]

Beyond the creation of uniform standards, the Court has a necessary role in resolving disputes because of the cognizable harm partisan gerrymandering causes voters.[383] The goal of the partisan gerrymander is to discriminate against a particular group.[384] This discrimination violates the constitutional requirement of fair and effective representation established through Supreme Court precedent.[385] A lack of fair and effective representation reduces the overall stability of the government by encouraging greater voter apathy and indifference.[386] Partisan gerrymandering reduces the opportunity for genuinely contested general elections and places greater emphasis on primary elections, where most voters belong to the extreme partisan edge of the political party.[387] The domino effect of gerrymandering creates a more polarized House of Representatives and reduces cooperation and consensus building between parties.[388] The Supreme Court has an important role in remedying these harms and the corresponding

381. *See supra* notes 154–67 and accompanying text (discussing the *Shaw* line of cases that established and identified traditional principles for district plans and unconstitutional violations of those principles based on race).

382. *See* Dorf, *supra* note 376 (comparing partisan gerrymandering cases to racial gerrymandering cases and pointing out that in ruling on racial gerrymandering cases the Court did not simply ask whether race was a factor, but instead asked if race was the predominant factor).

383. *See* Lewyn, *supra* note 35, at 407–09 (discussing the harm caused by partisan gerrymandering); Samuel Issachroff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (exploring how partisan gerrymandering allows dominant parties to lock up political institutions to forestall competition); Sasha Abramsky, *The Redistricting Wars*, THE NATION, Dec. 29, 2003, at 15 (arguing the inaction of the Supreme Court will most likely result in a Republican stranglehold on the House of Representatives for the rest of the decade due to the party's ability to gerrymander the district maps in certain states). *But see* Carvin, *supra* note 62, at 4–5 (arguing partisan gerrymandering does not create a harm to voters since the person's right to vote is not violated).

384. *See supra* Part II.A.1 (defining gerrymandering and introducing its basic operation and effect).

385. *See* Part II.C.3 (discussing the issue of fair and effective representation).

386. Ortiz, *supra* note 56, at 478–86; *see supra* notes 55–65 and accompanying text (discussing recent outcomes and effects of partisan gerrymandering). Some commentators believe the decline of competitive races and long periods of one-party control of the House erodes the accountability and legitimacy of the chamber. *E.g.*, Hirsch, *supra* note 58, at 179 (arguing partisan gerrymandering reduces political fairness, accountability and responsiveness).

387. Toobin, *supra* note 7, at 64.

388. *Id.*

results.[389] Therefore, the Court's confirmation that partisan gerrymandering claims are justiciable is proper.[390]

B. Possible Foundations: The Dissenting Opinions of Vieth

Vieth did put an end to the impossibly high standard of *Bandemer*, but it still left the lower courts searching for the proper standard to apply.[391] A majority of the Justices found partisan gerrymandering claims justiciable, but quickly divided over the proper standard to apply in these cases.[392]

Justice Kennedy provided the swing vote in the *Vieth* decision.[393] Justice Kennedy concurred in the opinion, but he refused to follow the reasoning of the plurality, which consequently, made his opinion read more like a dissent.[394] While Justice Kennedy refused to endorse a specific standard, his opinion did provide insight as to possible standards that would be satisfactory.[395] Justice Kennedy focused on First Amendment protections, finding them to possess the necessary elements to determine unconstitutional partisan gerrymandering.[396] According to Justice Kennedy, the First Amendment analysis provided

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389. Henry J. Stern, *Political Gerrymander Upheld in 5-4 Supreme Court Decision*, New York Civic, at http://www.nycivic.org/articles/040429.html (last visited Apr. 29 2004).

390. *See* Part II.C (discussing the Court's expansion of justiciable apportionment related issues to include partisan gerrymandering).

391. Charles Lane, *Justices Order New Look at Texas Redistricting Case*. WASH. POST, Oct. 19, 2004, at A21. "*Vieth* was a monumental non-decision, a case in which five justices said partisan gerrymandering cases can go forward, but also said there is no standard by which to judge them." *Id.* (quoting Richard Hasen, election law specialist, Loyola Law School in Los Angeles); *see supra* Part II.E.3 (discussing the application of the *Bandemer* standard by the lower courts).

392. Vieth v. Jubelirer, 124 S. Ct. 1969, 1810 (2004) (Stevens, J., dissenting); *Id.* at 1817 (Souter, J., dissenting); *Id.* at 1825 (Breyer, J., dissenting); *see supra* Part III.C.3.a (discussing Justice Stevens's dissenting opinion); *supra* Part III.C.3.b (discussing Justice Souter's dissenting opinion); *supra* Part III.C.3.c (discussing Justice Breyer's dissenting opinion).

393. *Vieth*, 124 S. Ct. at 1792–93 (Kennedy, J., concurring); Richard L. Hasen, *Looking For Standards (In All the Wrong Places): Partisan Gerrymandering Claims After* Vieth, 3 ELECTION L.J. 626, 627 (2004).

394. *See* Hasen, *supra* note 393, at 640–41 (analyzing the *Vieth* decision and in particular Justice Kennedy's concurrence). "Justice Kennedy's concurrence has the virtue of shaking up the thinking in this area, throwing out a standard that no one on the current Court defends and that was no help to plaintiffs, and leaving the door open for future challenges." *Id.* at 641.

395. *Id.* Justice Kennedy suggested satisfactory standards might eventually emerge from "helpful discussions on the principles of fair districting discussed in the annals of parliamentary or legislative bodies," through better computer technology, or through an analysis of the "First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 124 S. Ct. at 1794–97 (Kennedy, J., concurring).

396. *Vieth*, 124 S. Ct. at 1797–98 (Kennedy, J., concurring); *see supra* Part III.C.2 (discussing Justice Kennedy's view of the First Amendment in resolving partisan gerrymandering claims).

a greater foundation for courts since it removed the complicated question of when a generally permissible classification is used for impermissible purposes and instead it focused on whether the legislation burdens representational rights based on ideology, beliefs, or political association.[397] By not fully joining the plurality, Justice Kennedy kept alive the voters' ability to challenge partisan gerrymandering, but he stopped short of endorsing a standard, which future courts could follow.[398]

On the other hand, Justice Souter's dissenting opinion introduced a completely new method of measuring unconstitutional partisan gerrymandering claims.[399] This standard, based on the *McDonnell Douglas* burden shifting method, may be the most familiar to litigants.[400] However, the standard completely ignores the development of the jurisprudence related to disputes over apportionment.[401] Acts of racial and political gerrymandering are closely related.[402] The creation of two distinctly different standards to measure closely related unconstitutional acts would only create further confusion for the courts.[403] A suitable standard for partisan gerrymandering should therefore build upon earlier Court decisions dealing with apportionment and racial gerrymandering.[404]

Justice Breyer's opinion deplored partisan gerrymandering.[405] The

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397. *Vieth*, 124 S. Ct. at 1798 (Kennedy, J., concurring). Justice Kennedy understood this analysis to allow a more "pragmatic or functional assessment that accords some latitude to the States." *Id.*

398. *See* Hasen, *supra* note 393, at 641 ("It is easy to criticize Justice Kennedy's concurrence, for it puts plaintiffs in an impossible position. It tells them that if they file partisan gerrymandering suits, they are almost certain to lose, unless they can come up with a partisan gerrymandering standard that meets underspecified and somewhat contradictory criteria.").

399. *Vieth*, 124 S. Ct. at 1815 (Souter, J., dissenting).

400. *See* Hasen, *supra* note 393, at 639. ("Justice Souter's standard, with its familiar vote dilution concepts and burden shifting borrowed from employment law cases, would lead to the most consistent results across cases. . . .").

401. *Vieth*, 124 S. Ct. at 1815–22 (Souter, J., dissenting). Justice Souter believed it was time to "start anew" in solving these claims. *Id.* at 1817.

402. *See* Mike Clark-Madison, *Meanwhile, at the Supreme Court. . .*, AUSTIN CHRON., Dec. 19, 2003 (observing that if the gerrymander can convince the courts that the gerrymandered plan did not intend to disenfranchise racial minority voters, even though minority voters are almost all Democrats, the plan may pass constitutional muster).

403. *See, e.g.*, Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L. J. 283, 333 (1988) (arguing that a failure of circuit courts to develop a coherent constitutional standard frustrates the Fourth Amendment's constitutional restraint on unreasonable police behavior).

404. *See* Hasen, *supra* note 393, at 639 ("What should be clear, however, is that just because a test is easily administrable and therefore likely to lead to roughly consistent results in the courts on similar sets of facts is not reason enough to adopt it.").

405. *Vieth*, 124 S. Ct. at 1822 (Breyer, J., dissenting). *See supra* Part III.C.3.c (discussing

opinion focused on the structural terms of voting and found that the self-interest of elected state legislators can undermine a healthy democratic process.[406] Further, Justice Breyer listed a series of methods used by gerrymanders that could create unconstitutional redistricting plans.[407] In identifying these he described the components of a well-functioning democracy instead of a specific standard to determine violations.[408] Due to Justice Breyer's lack of specific standards, the opinion did not provide the proper foundation for lower courts to measure unconstitutional partisan gerrymandering.[409]

C. Foundation for the Future: Justice Stevens's Standard

Justice Stevens's dissenting opinion provides a foundation to establish proper standards.[410] Justice Stevens correctly built upon the Court's racial gerrymandering cases as a foundation for resolving partisan gerrymandering claims.[411] The racial gerrymandering standards balance the constitutional requirements with the compelling state interest of affirmatively protecting the rights of minority voting groups.[412] As Justice Stevens highlights, courts have been able to establish effective methods of identifying and remedying redistricting plans when this balance has tipped in the wrong direction.[413] Applying racial gerrymandering precedents to partisan gerrymandering is appropriate because regardless of the type of gerrymandering, the result is the same: the promotion of voting power of one group over another.[414] In addition, the standard can still be sufficiently stringent so that courts will not be involved in every redistricting process, but will still be able to intervene when partisan gerrymandering has gone too

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Justice Breyer's dissenting opinion).

406. Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 510 (2004).

407. *Vieth*, 124 S. Ct. at 1828 (Breyer, J., dissenting).

408. *Id.* at 1828–29 (Breyer, J., dissenting).

409. *Id.* at 1788–89 (plurality opinion). Without much discussion, the plurality dismissed Justice Breyer's standard as extremely vague. *Id.* at 1789 (plurality opinion) ("[W]e neither know precisely what Justice Breyer is testing for, nor precisely what fails the test.").

410. *See supra* Part III.C.3.a (discussing Justice Stevens's dissenting opinion).

411. *Id.*

412. *See supra* Part II.C.4 (discussing the standards of justiciability applied to racial gerrymandering).

413. Issacharoff & Karlan, *supra* note 12, at 561–62; *see supra* Part II.C.4 (discussing relevant Supreme Court cases providing protection from vote dilution).

414. *See supra* Part II.A.2 (discussing the harm caused by partisan gerrymandering, especially the reduction in competitive elections); *supra* Part III.C.3a (discussing Justice Stevens's dissenting opinion)

far.[415]

V. IMPACT

At first, the ruling in *Vieth* appears to increase the difficulty for plaintiffs challenging partisan gerrymandering claims.[416] Part V.A argues that in the short term, partisan gerrymandering will remain unchecked by the courts.[417] The decision might increase the call for a proportional electoral system or other grassroots changes to the electoral system.[418] Part V.B asserts that in the long term *Vieth* will help establish a manageable standard and focus on areas of constitutional law that were not historically considered applicable to partisan gerrymandering claims.[419]

A. Short Term Confusion

Four Justices in *Vieth* revisited the justiciability of partisan gerrymandering claims.[420] The plurality found no judicially manageable standards applicable to partisan gerrymandering claims and invoked the political question doctrine.[421] However, no foundation existed to reapply the political question doctrine to partisan gerrymandering claims.[422] Unfortunately, this posture may encourage

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415. Issacharoff & Karlan, *supra* note 12, at 561–62.

416. *The Court Punts*, WASH. POST, May 2, 2004, at B06. ("The consequence of the splintered decision is that political gerrymandering suits remain a theoretical possibility. . . .").

417. *See infra* Part V.A (discussing the short term impact of *Vieth*).

418. *See* John B. Anderson & Robert Richie, *A Better Way to Vote*, LEGAL TIMES, May 17, 2004, at 68 (explaining that a proportional system of government will provide great accountability and competition); Patrick Mulvaney, *Not Quite an Exact Portrait*, THE NATION, *at* http://www.thenation.com/doc.mhtml?i=20041115&c=1&s=mulvaney (Oct. 28, 2004) (calling for proportional representation as is currently used in Germany, Portugal, Switzerland and Greece).

419. *See infra* Part V.B (discussing the long term impact of *Vieth*).

420. *See supra* Part III.C.1 (discussing the plurality opinion). The plurality did not simply raise the issue of justiciability, but argued that the lower court should treat this view as the majority view due to Justice Kennedy's reasoning. *See supra* note 290 (quoting the plurality's suggestion that lower courts treat Justice Kennedy's vote as a reluctant fifth vote for non-justiciability).

421. *See* RUSH, *supra* note 35, at 13 (arguing that the Court has been unable to develop manageable standards due to incorrect assumptions regarding individual and group voting behavior and questionable or unclear references to constitutional amendments); *see also supra* Part III.C.1 (discussing the plurality opinion); *supra* Part II.B (discussing the political question doctrine).

422. Issacharoff & Karlan, *supra* note 12, at 543; *see* Herman Schwartz, *Out with Gerrymanders!*, THE NATION, *at* http://www.thenation.com/doc.mhtml?i=20040719&s=schwartz (July 1, 2004) ("Most of Scalia's questions are bogus and have already been answered."); *see also supra* Part II.C (discussing the Court's progress in establishing manageable standards).

district court judges to dismiss partisan gerrymandering claims on justiciability grounds.[423]

Overall, in the short term, the decision will neither alter the acts of the partisan gerrymander nor the struggle to stop it.[424] The decision in *Cox v. Larios* essentially represents where litigants find themselves in the wake of *Vieth*.[425] In *Cox*, the district court found the redistricting plan unconstitutional based on the one person, one vote principle of the Equal Protection Clause.[426] The district court rejected the partisan gerrymandering claim, finding *Bandemer* still controlling.[427] The Supreme Court summarily affirmed the decision, seeming to base the decision on the one person, one vote rule.[428] As illustrated in *Cox*, due to the inability of the Court in *Vieth* to definitively affirm the standards

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423. *See* Shapiro v. Berger, 328 F. Supp. 2d 496, 504 (S.D.N.Y. 2004) (finding *Vieth* limited the scope of justiciability for claims of partisan gerrymandering); *supra* Part II.B (discussing the grounds of justiciability). *See generally*, Hasen, *supra* note 393 (examining the *Vieth* opinion and concluding that people aggrieved by partisan redistricting should seek political rather than judicial remedies).

424. *See* Lane, *supra* note 391, at A21 ("*Veith* was a monumental non-decision, a case in which five justices said partisan gerrymandering cases can go forward, but also said there is no standard by which to judge them." (quoting Richard Hasen, election law specialist, Loyola Law School in Los Angeles)).

425. Cox v. Larios, 124 S. Ct. 2806 (2004). The Supreme Court rendered a decision on June 30, 2004, only a few months after the *Vieth* decision. *Id. See supra* notes 13 and 55 (discussing the *Cox* case). *But see* Steven F. Huefner, *The Current Status of One-Person-One-Vote: An Overview*, ELECTION LAW @ MORTIZ, *at* http://moritzlaw.osu.edu/electionlaw/districts_reapp.html (last visited May 27, 2005) (arguing the *Cox* decision questions the validity that small deviations will still be tolerated by the Court).

426. *Cox*, 124 S. Ct. at 2806 (Stevens, J., concurring). The reasons for the deviations included "a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas" and "an intentional effort to allow incumbent Democrats to maintain or increase their delegation." *Id.* (Stevens, J., concurring) (quoting Larios v. Cox, 300 F. Supp. 2d 1320, 1327 (N.D. Ga. 2004)). The district court did not find these reasons justified deviation from the one person, one vote principle. *Id.* at 2807–08. (Stevens, J., concurring).

427. *Id.* at. 2808 (Stevens, J., concurring). The district court determined the Republicans had not been shut out of the political process. *Id.* (Stevens, J. concurring). Justice Stevens asserted the factual findings of the district court confirmed that an impermissible partisan gerrymander is "visible to the judicial eye and subject to judicially manageable standards." *Id.* (Stevens, J., concurring).

428. *Id.* Justice Stevens, writing for the Court, held "the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength." *Id.* Justice Scalia, in dissent, argued against summarily affirming. *Id.* at 2809 (Scalia, J., dissenting). Justice Scalia asserted that "politics as usual" may fall within a traditional districting principle and therefore questioned if the Georgia plan violated the Constitution. *Id.* (Scalia, J., dissenting). However, a summary affirmance normally indicates that the lower court got the result right, but not necessarily that it used the correct reasoning. Ill. State. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182–83 (1979). Justice Stevens wrote that, even though the issue was not raised by appellants in *Cox*, the Georgia districting plan constituted an unconstitutional partisan gerrymander under Justice Breyer's standards set forth in *Vieth*. *Cox*, 124 S. Ct. at 2808 (Stevens, J., concurring).

of an unconstitutional partisan gerrymandering, the Court is brought back to the *Karcher* outlook of striking down a redistricting plan based on the one person, one vote standard while arguing in dictum that the plan is an unconstitutional gerrymander.[429]

B. Long Term Benefit

Vieth did not resolve the question left open in *Bandemer*, namely, what are the judicially manageable standards to adjudicate partisan gerrymandering claims.[430] However, the Court in *Vieth* did provide more realistic standards then the Court in *Bandemer*.[431] *Vieth*'s importance lay in the fact that it ended the impossibly high standards required to challenge a partisan gerrymandering plan.[432] Furthermore, the decision opened new avenues to explore in creating judicially manageable standards.[433] The decision will allow lower courts to adopt different standards to settle these disputes.[434] The Court's desire for lower courts to move beyond *Bandemer* and use the discussion in *Vieth* to foster new thoughts is demonstrated by the Court's recent announcement in *Jackson v. Perry*.[435] In *Jackson*, the Court granted a motion for the district court to reconsider its approval of the Texas 2002 Congressional redistricting plan using *Vieth* as a basis for the

429. Issacharoff & Karlan, *supra* note 12, at 566–67.

430. *See* Stephen E. Gottlieb, *In* 'Vieth,' *Court Continues to Misunderstand Gerrymandering*, N.Y.J.J. (arguing the Justices are unable to develop a proper standard because they fail to understand the political science principles of symmetry) *available at* http://www2.als.edu/faculty/sgottlieb/vieth.pdf (Aug. 19, 2004) at 4.

431. *See supra* Part II.E (discussing the Supreme Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986)).

432. Johnson-Lee v. City of Minneapolis, No. 02-1139, 2004 U.S. Dist. LEXIS 19708, at *37 (D. Minn. Sept. 30, 2004) (concluding *Vieth* effectively overruled *Bandemer* since a majority of the Justices found the *Bandemer* standard unmanageable); *see* Hasen, *supra* note 393, at 626 (observing that the standard announced in *Bandemer* was nearly impossible for plaintiffs to meet).

433. Vieth v. Jubelirer, 124 S. Ct. 1769, 1829 (2004) (Breyer, J., dissenting) (suggesting a through discussion of the relevant theories might lead to a better understand of a workable standard). At least one commentator believes *Vieth* represents an invitation to litigants to work at the state constitutional level to develop a nationwide consensus about how such claims should be handled. James A. Gardner, *A Post-*Vieth *Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 643–44 (2004).

434. *See supra* Part II.E.3 (discussing attempts by the lower courts to interpret *Bandemer*); *see also* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004) (arguing that a procedural rule limiting the frequency of redistricting to a ten year cycle will promote partisan fairness).

435. Jackson v. Perry, 125 S. Ct. 351 (2004) (mem.) *vacating* Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex 2004) (remanding for reconsideration based on *Vieth* a district court apprival of the Texas redistricting plan); *see supra* notes 59–63 (discussing the situation in Texas).

reconsideration.[436]

Based on *Vieth*, an additional avenue to determine manageable standards in order to regulate partisan gerrymanders could include the application of the First Amendment right of association.[437] In the past, courts mainly focused on the Equal Protection Clause to provide protection to gerrymandered voters while ignoring some of the important First Amendment protections.[438] Justices Kennedy and Stevens both mentioned First Amendment rights as a possible constitutional standard to resolve partisan gerrymandering.[439] As a result, courts may now give greater consideration to the First Amendment in providing a foundation to manage partisan gerrymandering disputes.[440]

VI. CONCLUSION

The majority of the Justices correctly affirmed the justiciability of partisan gerrymandering cases in *Vieth*. Although the majority failed to provide a clear standard for the lower courts, the Justices properly

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436. Lane, *supra* note 391, at A21. The Supreme Court ordered the three-judge panel to review its January decision allowing a gerrymandered congressional districting plan to be implemented. *Id.* The action will not affect the 2004 election in Texas. *Id.* The Supreme Court told the district court to take account of the *Vieth* decision in deciding the partisan gerrymandering claims. *Id.* The decision allows the Court to avoid making a decision during the 2004 election cycle, but still deal with the issue. *Id. But see* Paul Rosenzweig, *Some Wishful Thinking on Texas Redistricting*, THE HERITAGE FOUNDATION PRESS ROOM, *at* http://www.heritage.org/Press/Commentary/ed102704c.cfm (October 27, 2004) (arguing the Court uses this procedure on a regular basis and "it means absolutely nothing about the merits of the case").

437. *See* Anderson v. Celebrezze, 460 U.S. 780, 787 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968), stating two kinds of rights: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."); *see also* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) (affirming that "[t]he First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas").

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary.

Id. at 358.

438. Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1212–13 (2003).

439. *See supra* Part III.C.2 (discussing Justice Kennedy's opinion); *supra* Part III.C.3.a (discussing Justice Stevens's dissenting opinion).

440. Schwartz, *supra* note 422 ("Thanks to Anthony Kennedy and the Court's unanimous rejection of the *Bandemer* tests, lawyers and the lower courts can still attack severe partisan gerrymandering and now have a promising First Amendment approach."); *see supra* note 226 (discussing the role of the First Amendment as a protection against partisan gerrymandering).

repudiated Justice White's plurality opinion in *Bandemer*, which set an exceedingly difficult standard for proving a claim of illegal partisan gerrymandering. Justice Stevens's dissenting opinion in *Vieth* provides the best guidance for the lower courts and should be adopted. In the short term, the jurisprudence of partisan gerrymandering will most likely not change dramatically. However, the decision in *Vieth* will continue the search for judicially manageable standards. The uncertainty in the proper standards to apply in partisan gerrymandering case may not have been fully resolved in *Vieth*, but the decision will slowly remove the uncertainty.

REFORMING THE ELECTORAL COLLEGE: FEDERALISM, MAJORITARIANISM, AND THE PERILS OF SUB-CONSTITUTIONAL CHANGE

Norman R. Williams*

Frustrated by their inability to secure passage of a federal constitutional amendment abolishing the Electoral College, its opponents have sought to establish the direct, popular election of the President by having individual states agree to appoint their presidential electors in accordance with the nationwide popular vote. Ostensibly designed to prevent elections, such as the one in 2000, in which the Electoral College "misfired" and chose the candidate who received fewer popular votes, the National Popular Vote Compact has been adopted by several states. In this article, I argue that National Popular Vote Compact is an unnecessary and dangerous reform. It is unnecessary because the Electoral College is only modestly malapportioned and less so than many other accepted features of the U.S. political process, which distort popular political preferences to a greater extent. Moreover, that malapportionment is simply the consequence of having a presidential election system that combines elements of majoritarianism and federalism, as other industrialized democracies have adopted. It is dangerous because the NPVC contains a host of defects that would make electoral misfires more likely and trigger a series of political and constitutional crises. The abolition or reform of the presidential election system requires a federal constitutional amendment; attempting to achieve some reform via a sub-constitutional agreement among several states risks creating a presidential election system that is neither workable nor fair.

The ghosts of the 2000 Presidential election continue to haunt the nation. As that election reminded everyone, the process for electing the President of the United States departs from a purely majoritarian system. Because each state has as many presidential electors as they have U.S. Representatives and Senators, smaller states have more electoral votes than their population warrants. At the same time, all but two states have adopted a "winner-take-all" system in which the winning presidential candidate receives all of the state's electors regardless of the actual vote margin in the state. As a result, the Electoral College vote does not track precisely the national popular vote. A candidate who wins many states by a few percentage points can achieve a dominating Electoral College

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vote, as Ronald Reagan did in 1980.[1] More rarely, the national popular vote winner can actually lose the election, as the 2000 Presidential election graphically demonstrated.[2]

To be sure, the Electoral College has long been the target of criticism. In the past two centuries, more proposed constitutional amendments have sought to replace or reform the Electoral College than any other feature of our constitutional order.[3] Unsurprisingly, after the 2000 election, calls for reform increased in number and vehemence. Sanford Levinson condemned the institution in unequivocal terms and proposed its abolition,[4] while the New York Times labeled the Electoral College an "antidemocratic relic."[5] More hyperbolically, Jamin Raskin fulminated that the Electoral College "directly contradicts the sovereignty of the people" and produces "the worst of all worlds from the standpoint of democracy."[6]

Since 2000, one of the most serious efforts to reform the Electoral College has quietly unfolded not in Washington, D.C., but in state capitals across the nation. Galvanized by a shared sense of outrage regarding the 2000 election, several reform-minded citizens, including Yale law professor Akhil Amar, imagined a novel way to transform the manner in which the nation elects its President that avoids the time consuming and daunting process required for a federal constitutional amendment.[7] Their idea is to have a large group of states agree to appoint their presidential electors in accordance with the national

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[1] Reagan received only 50.7% of the national popular vote but won 44 states, comprising 489 of the 538 electoral votes. DAVID LEIP, ATLAS OF U.S. PRESIDENTIAL ELECTIONS (2009), available at http://uselectionatlas.org/RESULTS/national.php?year=1980&f=0&off=0&elect=0.

[2] FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 2000 (2000).

[3] Robert P. Watson, "The State of Elections: People, Politics, and Problems," *in* COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA 3, 16-17 (Robert P. Watson ed., 2004); L. PAIGE WHITAKER & THOMAS H. NEALE, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 15 (Congressional Research Service Report, Jan 16, 2001). In fact, in the current Congress, there are no less than three bills pending that propose a constitutional amendment to replace the Electoral College with a direct, nationwide popular election.

[4] SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 81-97 (2006)

[5] Editorial, Drop Out of the College, *N.Y. Times*, March 14, 2006.

[6] Jamin B. Raskin, What's Wrong with Bush v. Gore and Why We Need to Amend the Constitution to Ensure It Never Happens Again, 61 MD. L. REV. 652, 696, 697 (2002).

[7] *See* Akhil Reed Amar & Vikram David Amar, How to Achieve Direct National Election of the President Without Amending the Constitution, FindLaw, Dec. 28, 2001, available at http://writ.news.findlaw.com/amar/20011228.html; Robert W. Bennett, State Coordination in Popular Election of the President without a Constitutional Amendment, 5 GREEN BAG 2D 141, 148 (2002).

popular vote rather than their respective statewide popular vote. Memorialized in a proposed interstate compact known as the "National Popular Vote Compact" or "NPVC,"[8] their proposal goes into effect once states comprising a majority of the Electoral College join it. From that point on, the national popular vote will conclusively decide the winner of the election regardless whether all the states agree or a constitutional amendment abolishing the college is adopted. In essence, these reformers seek to use the coordinated action of a number of states to turn the Electoral College into the vehicle of its own reform.

Not surprisingly given the hostility to the Electoral College, the NPVC has drawn substantial support. To date, six states and the District of Columbia have formally adopted the compact, and several other states have moved toward joining it.[9] Moreover, editorials in publications ranging from the venerable *New Yorker,* to urban mega-papers, such as the *New York Times* and *Los Angeles Times*, to small-town newspapers, such as the *Sarasota Herald Tribune*, proclaim its merits.[10] Reflecting this editorial onslaught, public opinion polls show widespread, bipartisan support for moving to the direct popular election of the President, as the NPVC seeks to do. By one recent poll, 72% of Americans favor dispensing with the Electoral College and moving to a direct popular election for President.[11] Seeking to build upon this support, the NPVC's proponents hope that the compact will be in force by the time of the next Presidential election in 2012.[12]

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[8] Robert Bennett, as well as the Amar brothers, originally proposed that each state implement this reform through coordinated, contingent legislation in each state. Robert W. Bennett, Popular Election of the President Without a Constitutional Amendment, 4 GREEN BAG 2D 241, 244-45 (2001); Amar & Amar, *supra* note 7. Later, John Koza championed the idea that the agreement be formally memorialized in an interstate compact. JOHN KOZA ET AL., EVERY VOTE COUNTS: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 247 (2nd ed. 2008).

[9] *See* 2010 D.C. Laws L18-0274; 2008 Hawaii Laws 62; 2008 Ill. Legis. 95-714; 2010 Mass. Legis. ch. 229; 2007 Md. Laws 43; 2007 N.J. Sess. Laws ch. 334; 2009 Wash. Leg. ch. 264.

[10] Hendrik Hertzberg, Count 'Em, *The New Yorker*, Mar. 6, 2006, Editorial, One Person, One Vote for President, *New York Times*, June 22, 2010, at A26; Editorial, Electoral College Dropout, *Los Angeles Times*, Aug. 18, 2008; Editorial, Abolish the Electoral College, *Sarasota Herald Tribune*, Jan. 10, 2009, at A16.

[11] WASHINGTON POST-KAISER FAMILY FOUNDATION-HARVARD UNIVERSITY: SURVEY OF POLITICAL INDEPENDENTS 12-13 (2007) (available at http://www.nationalpopularvote.com/resources/Wash-Post-Kaiser-Harvard-June-2007.pdf)

[12] KOZA, *supra* note 8, at 281.

Calls to replace the Electoral College with a direct popular election for President have an obvious and intuitive appeal to Americans, who have an abiding faith in the virtue and essential justice of majoritarian democracy. Surprisingly, however, despite all the popular and academic interest in the NPVC,[13] there has been no sustained investigation as to how the NPVC would alter the mechanics of Presidential elections and interact with other features of the Presidential election process. This article undertakes that analysis, filling the analytical gap. In so doing, it yields several important and counterintuitive insights routinely ignored in the debate over the Electoral College.

First, the Electoral College is not the threat to American democracy that its critics urge. While the Electoral College admittedly gives some states more electoral clout than their population would otherwise require, that "malapportionment" is both modest in degree and, more importantly, merely the price paid for having a presidential election system that combines elements of majoritarianism and federalism, as other large, federal democracies do. Moreover, when the actual operation of the Electoral College is examined, it turns out that the Electoral College blends those two values in a manner heavily weighted toward majoritarianism. In all but one election, the Electoral College has elected the candidate who won a majority of the national popular vote winner. To be sure, the Electoral College does reward candidates whose political support is spread in a more geographically broad fashion throughout the nation, but, in a federal union such as the United States, that federalism-based bias against "favorite son," sectional candidates is a desirable feature – and one that would be lost in moving to a purely majoritarian election system as the NPVC seeks to do.

Second, the current presidential election system – in particular, the state-by-state, winner-take-all process in which the prevailing candidate in the state receives all that state's presidential electors –

[13] *See, e.g.*, Mark Tushnet, Constitutional Workarounds, 87 TEX. L. REV. 1499 (2009); Kristin Feeley, Guaranteeing a Federally Elected President, 103 NW. L. REV. 1427 (2009); David Gringer, Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College, 108 COLUM. L. REV. 182 (2008); Stanley Chang, 44 HARV. J. LEGIS. 205 (2007). In addition, the Election Law Journal held a symposium devoted entirely to the NPVC. *See* 7 ELEC. L. J. 188 (2008).

discourages the election of Presidents with only plurality support across the nation. A candidate with only 30% or 35% political support is highly unlikely to win the White House under the current system; in fact, no President has ever been elected with less than 40% of the popular vote and most have received a majority. In contrast, the direct popular election system envisioned under the NPVC expressly contemplates and countenances the election of "plurality Presidents" – *i.e.*, those who are elected with less than a majority of the popular vote. Even worse, by transforming the current, state-by-state voting process, the NPVC would erode the current two-candidate system, producing more minor party candidates, which in turn would further fragment the national popular vote and produce more plurality Presidents with ever-declining levels of support. Indeed, that has been the experience of other countries with voting systems like that proposed by the NPVC, and, as those countries have experienced, plurality presidencies typically lack the legitimacy and political support necessary to effectively lead the nation.

Third, even if moving to a direct popular election for President were desirable, a sub-constitutional, interstate compact is the wrong mechanism to use to achieve that result. Unlike a constitutional amendment abolishing the Electoral College, the NPVC does not ensure a fair and workable presidential election process. To contrary, as an interstate compact which governs only those states that join it, the NPVC promises a number of political and legal fights among the states that will undermine the legitimacy of presidential elections and provoke enervating constitutional litigation of the sort witnessed in 2000. These problems fall into two, broad categories: problems of obstruction and problems of implementation.

As to obstruction, the NPVC cannot prevent non-signatory states from undermining the calculation of a national popular vote, nor can it ensure that even signatory states will not withdraw from the compact on the eve of or, worse, shortly after a presidential election. Either circumstance will

effectively preclude the determination of the national popular vote winner and may even obstruct the election of the President, resulting in political discord and divisive constitutional litigation.

As to implementation, the NPVC cannot guarantee that even those states that join the compact will employ a uniform election process that ensures that voters across the nation are treated in an equal fashion. Indeed, the same constitutional flaw that the U.S. Supreme Court identified in Florida in 2000 – the use of divergent vote tabulation standards in different counties in Florida – would be replicated fifty-fold, as different states use different legal standards and procedures for conducting the presidential election contest in their respective states. Consequently, far from preventing another 2000, the NPVC almost assuredly would produce a series of political and legal crises, along with the accompanying litigation that inevitably form a part of such imbroglios, that would make the 2000 election look like child's play.

Part I briefly describes the current system for electing the President, the modern criticism of it, and the manner and extent to which the NPVC seeks to reform it. Part II then assesses the extent to which the Electoral College departs from the majoritarian ideal of a purely population-based apportionment of political power among the states. In particular, it shows that the formal malapportionment of the Electoral College is dwarfed by that present in other, accepted features of our constitutional order, most notably the U.S. Senate and the nomination process employed by the two major political parties. Like those other institutions, the Electoral College departs from the majoritarian ideal so as to implement another vital political value: federal union. The Electoral College's malapportionment is the product of the Framers' decision to create a presidential election process that combines elements of majoritarianism and federalism. Moreover and surprisingly for majoritarians, the Electoral College combines those two goals in a way that heavily favors majoritarianism. Indeed, as this part demonstrates, the Electoral College does a better job of promoting majoritarianism than does the NPVC.

The remainder of the article then turns to the problems with using an interstate compact rather than a constitutional amendment as the mechanism to reform the Electoral College. Part III identifies the various ways in which both non-signatory and signatory states could obstruct the Presidential election. Part IV then analyzes the how the NPVC, even if adopted by all fifty states, would operate in practice. Specifically, it shows that, contrary to conventional wisdom, there is no national popular election for President; rather, there are fifty-one such elections, with each state employing different criteria for suffrage, different voting equipment, and different tabulation standards. Simply aggregating the vote totals from each state would be both unconstitutional and, equally importantly, inconsistent with the conception of political equality that is a fundamental element of majoritarian election processes. As an interstate compact, the NPVC cannot resolve these fundamental problems of constitutionality and fairness.

Finally, Part V discusses the problem of a nationwide recount. Significantly, the NPVC provides no process for conducting a nationwide recount if the popular vote is close. In such a circumstance, the absence of a nationwide recount would generate substantial popular doubt about the democratic provenance of the supposed winner. Even worse, however, would be a partial nationwide recount – *i.e.*, one in which only one or several states participated. Were one to occur and alter the outcome of the election, the ensuing political and legal battle would be devastating to the political fabric of the nation.

To their credit, several defenders of the NPVC have acknowledged some of these flaws and have suggested changes be made to the compact. The ultimate problem with the NPVC, however, is that it is a sub-constitutional, state-initiated attempt to alter the method by which the U.S. President is elected. The strength of the NPVC – its ability to go into effect based on the coordinated action of several states – is also its gravest weakness – its inability to bind other states that do not wish to move to the direct popular election of the President or that wish to conduct their election in a manner different from those of other states. Only a federal constitutional amendment can bind all the states and therefore bring

about a direct, nationwide popular election in a way that is both workable and consistent with our commitment to political equality. By employing a sub-constitutional interstate compact, the NPVC's supporters hoped to obviate the need to engage in the laborious amendment process, but, in so doing, they have created an election system that only promises to create more problems of the sort that it was meant to solve. Were the NPVC to go into effect, constitutional crisis of sort witnessed in 2000, far from being a singular event, would be a regular circumstance.

I. ELECTING THE PRESIDENT

A. The Current System.

As the U.S. Supreme Court pointedly reminded the American people in *Bush v. Gore*,[14] the President is not elected by the people but rather by electors appointed by the states – the so-called "Electoral College." The Framers adopted this system of indirect election so as to provide the President with a degree of independence from Congress. Were the President selected by Congress – the principal alternative to the Electoral College considered by the Framers – the Framers feared that he would be too dependent on Congress and that potential candidates for the office would seek congressional support by making undesirable, if not downright corrupt, promises in return for such support.[15] Moreover, further reflecting the "Great Compromise" in which legislative power was split between the popularly-apportioned House of Representatives and federally-apportioned Senate, the Framers specified in the Constitution that each state receives electors equal in number to the Representatives and Senators that state possesses in Congress.[16]

The Constitution leaves it to each state to determine how its electors are selected, specifying that the electors shall be appointed by each state "in such Manner as the Legislature thereof may

[14] 531 U.S. 98 (2000).
[15] 1 Max Farrand, The Records of the Federal Convention 69 (1911) (Madison).
[16] U.S. CONST. ART. II, §1. By virtue of the 23rd Amendment, the District of Columbia participates in the Presidential election and receives three electors.

direct."[17] Although originally many state legislatures appointed the electors directly, by the mid-1830's, all but one state (South Carolina) had moved to a system of holding popular elections to select the electors.[18] Relatedly, while states at first used different electoral systems – some states used an at-large system that effectively gave all the state's electors to the winning candidate, while others used a district system, while still others used a combination of both the at-large and district systems – all of the states ultimately adopted the at-large system in which the winner of the statewide vote typically received all of the state's electors.

In actuality, the at-large system was not a true "winner take all" system because citizens still voted for individual electors, which could result in some voters, intentionally or not, selecting electors who supported different candidates.[19] In the twentieth century, states moved to a true "winner-take-all" system with the adoption of the so-called "short ballot," which removed the electors' names from the ballot and listed only the presidential and vice presidential tickets. With the short ballot, regardless of the number of electors possessed by the state, citizens would cast only one vote for the presidential and vice-presidential ticket of their choice; the state would then award the winning ticket all of that state's electors.[20] Today, all states use the short ballot,[21] and all but two states use this winner-take-all system. The two exceptions, Maine and Nebraska, award their two "senatorial" electors to the winner of the statewide election, but, in each state, the voters in each congressional district select an elector for

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[17] U.S. CONST. ART. II, § 1.

[18] Whitaker & Neale, *supra* note 3, at 2. South Carolina's legislature continued to appoint the state's electors until the Civil War. *Id.*

[19] William Josephson & Beverly Ross, Repairing the Electoral College, 22 J. LEGIS. 145, 161 (1996). For example, in 1912, California voters elected 11 Progressive and 2 Democratic electors, and, in 1916, West Virginia voters elected 7 Republican and one Democratic elector. *Id.*

[20] *See, e.g.*, Ala. Code § 17-6-23 ("When electors for the President and Vice President of the United States are to be elected, the names of the candidates for President and Vice President shall be listed on the ballot, but not the names of the electors."); Va. Stat. Ann. § 24.2-644(B) ("The qualified voter at a presidential election shall mark the square preceding the names and party designation for his choice of candidates for President and Vice President. His ballot so marked shall be counted as if he had marked squares preceding the names of the individual electors affiliated with his choice for President and Vice President.").

[21] KOZA, *supra* note 8, at 56.

that district. As a result, the two presidential candidates can split the electors from those states, as in fact happened in Nebraska in 2008.[22]

The timing of the presidential election is not specified by the Constitution but rather by statute. Congress has set the Tuesday after the first Monday in November as the date on which the general election must take place.[23] The presidential electors then cast their vote on the first Monday after the second Wednesday in December.[24] Each elector casts two votes, one for President and one for Vice President.[25]

Although by tradition American political scientists and constitutional commentators refer to it as a "college," the Electoral College never meets as one body. Unlike Congress or other representative institutions, the Electoral College was not conceived as a deliberative body in which the electors would discuss and debate the relative merits of the candidates. Rather, the Framers feared that, were all the electors to assemble in one place, they would engage in vote-swapping and collusion.[26] To prevent that eventuality, the Framers therefore specified in the Constitution that the electors for each state should meet in their respective states.[27] The Framers further envisioned that the electors would be sage, independent men capable of evaluating the relative merits of the candidates and that, when separated into their various states, they would determine who among the presidential aspirants was best qualified in intellect and temperament to lead the nation.[28]

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[22] Barack Obama lost the state of Nebraska (and two of its three congressional districts) but won a majority of support in one of the state's congressional districts, thereby giving him one of Nebraska's five electoral votes.
[23] 3 U.S.C. § 1.
[24] 3 U.S.C. § 7.
[25] U.S. CONST. AMEND. XII. As originally enacted, the Constitution specified that the electors would cast two votes, but the electors could not designate which person they favored as President versus Vice President. As a result, in the 1800 election, Democratic-Republican electors cast the same number of votes for Thomas Jefferson and his running mate Aaron Burr, which deprived the former of an Electoral College majority and sent the election to the House of Representatives (which only selected Jefferson on the 37th ballot). That election ultimately prompted the passage of the 12th Amendment.
[26] Federalist No. 68 (Hamilton) at 412-13 (Clinton Rossiter ed. 1961).
[27] U.S. CONST. ART. II, § 1, cl. 3; *see also* 3 U.S.C. § 7 (specifying that electors shall meet at a location in the state designated by the legislature thereof).
[28] Federalist No. 68 (Hamilton) at 412-13 (Clinton Rossiter ed. 1961).

Not surprisingly, the post-Framing-era rise of party politics has produced an Electoral College much unlike that envisioned by the Framers. Far from being elite political sages, the electors are almost invariably dedicated partisans, usually prominent officials in the state party apparatus, who can be trusted to vote for the presidential candidate of their party. As a result, while there have been a handful of instances in which a "faithless elector" voted for some other candidate,[29] party loyalty typically ensures that the electors ultimately cast their vote for the candidate to which they are pledged.[30] Since 1796, there have been only 10 faithless electors out of the over 20,000 electors, and none of those faithless electors affected the outcome of the election.[31] Hence, as a practical matter, the popular vote in each state conclusively determines which candidate receives that state's electoral votes. It is for that reason that Americans typically know who has won the Presidential election the night of the general election; no one waits with baited breath for the Electoral College ballots to be counted, even though it is that act, not the popular vote, that has constitutional significance.

While the Electoral College's vote may be a formality, it is a formality that is and must be performed. After the electors cast their ballots in mid-December, the ballots are transmitted to Congress, which opens and counts the votes in early January.[32] To be elected President and Vice President, the winning candidates must receive a majority of the electoral votes of all the states. In the event that no candidate receives a majority, the election for President is thrown to the House of Representatives to determine the President from among the top three vote recipients in the Electoral College's balloting.[33] In the House's voting, each state receives one vote with a majority of states

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[29] Josephson & Ross, *supra* note 19, at 147 & n.18; Whitaker & Neale, *supra* note 3, at 10.

[30] Some states legally bind the electors to support the candidate to which they are pledged. Whitaker & Neale, *supra* note 3, at 9. The constitutionality of such provisions is hotly contested. *Id.* at 10 & n.47; *cf.* Ray v. Blair, 343 U.S. 214 (1952) (upholding requirement that elector pledge to support party's candidate but distinguishing laws that bound electors to so vote).

[31] Bradley Smith, Vanity of Vanities: National Popular Vote and the Electoral College, 7 ELEC. L. J. 196, 211 (2008).

[32] 3 U.S.C. § 15.

[33] If no Vice Presidential candidate receives a majority, the Senate elects the Vice President from among the top two vote recipients. U.S. CONST. AMEND. XII. There has been one election in which the election of the Vice President was thrown to the Senate. In 1836, Martin Van Buren's running mate, Richard Johnson, failed to receive the

necessary to elect the President. On only two occasions (1800 and 1824) has the election gone to the House under this contingent election procedure.

Today, there are 538 electors from the fifty states and the District of Columbia. As a result, a presidential candidate must receive 270 electors to be elected President. California has the most electors (55), while Alaska, Delaware, the District of Columbia, Montana, North Dakota, South Dakota, and Vermont have the fewest (3). As a theoretical matter, a candidate could win the Presidency by winning the top eleven most populous states, which collectively possess the bare minimum 270 electoral votes. In actuality, since 1960 (the first election in a fifty-state union), no candidate has won the White House with less than 22 states (John F. Kennedy in 1960).

B. The Criticism of the Electoral College.

As the foregoing summary indicates, for well over a century, the people in every state have voted in the Presidential election.[34] Moreover, with just a few exceptions, the electors selected by the people have faithfully voted the electorate's preferences. Hence, while in form the Electoral College serves as a political intermediary between the people and the President, in practice the votes of the people are transmitted almost automatically into electoral votes. In short, the popular provenance of the electors, coupled with the faithful transmittal of electoral preferences by the electors themselves, has fatally undermined any suggestion that the Electoral College is *anti-democratic*.[35] The President is truly elected by the People.

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necessary majority (because Virginia's electors balked at his qualifications), but the Senate ultimately elected him anyway.

[34] The last state to have its legislature appoint its electors was Colorado in 1876, which took place only because Colorado had been so recently admitted to the union as a state that its legislature did not have time to provide for a popular election for its presidential electors.

[35] *See* Geoffrey C. Hazard, Rising Above Principle, 135 U. PENN. L. REV. 153, 165 (1986). Some commentators continue to decry the College as "antidemocratic." *See, e.g.,* Martin Flaherty, Post-Originalism, 68 U. CHI. L. REV. 1089, 1110 (2001). That is a misnomer, however. The substance of the commentators' criticism – that the Electoral College does not guarantee the election of the candidate with the most votes – suggests that their concern is more properly viewed as one of anti-majoritarianism than anti-democracy. *Cf.* Sanford Levinson, How the United States Constitution Contributes to the Democratic Deficit in America, 55 DRAKE L. REV. 859, 868, 876 (2007) (arguing that Electoral College does not respect majority vote and noting that anti-democratic charge is

Rather, the principal charge against the Electoral College is that it is *anti-majoritarian*.[36] Specifically, the controversy surrounding the Electoral College has centered upon the allocation of political power among the people in the states resulting from the fact that electors are allocated on a state-by-state basis with each state receiving the number of electors corresponding to the number of Representatives and Senators that state has. This allocation of electors departs from the majoritarian ideal in two ways. First, because of indivisible population variances among the states, the number of Representatives allocated to each state does not map perfectly with the population of the states. Both Missouri and Minnesota, for example, have 8 Representatives (and therefore 10 electors), but Missouri has 684,000 more inhabitants than Minnesota.[37] Second, because each state receives two senatorial electors regardless of its population, less populous states receive more electors than a strict, population-based allocation would produce. Wyoming, for example, has three electors for its 563,000 residents (or one for every 187,600 residents in the state), while California has fifty-five electors for its 37 million-plus residents (or one for every 677,000 residents). If electors were apportioned strictly on the basis of population, Wyoming would have only one elector, while California would receive sixty-five.

The critics seize on this apportionment of electors and allege that, as a consequence, the Electoral College can elect a President who lost the nationwide popular vote. As evidence, the critics point to the fact the Electoral College has "misfired" at least three times in our history.[38] In 1876, Republican Rutherford Hayes won a bare majority of electoral college votes, even though Democrat Samuel Tilden received 250,000 more popular votes. In 1888, Republican Benjamin Harrison received a substantial majority of electoral votes, despite the fact that Democrat Grover Cleveland received 91,000

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synonymous with anti-majoritarian charge); Brannon P. Denning, Publius for All of Us, 26 CONST. COMM. 75, 85 (2009) (distinguishing between charges that college is anti-democratic versus anti-majoritarian and declaring that former is "more precise").

[36] KOZA, *supra* note 8, at 16; James A. Gardner, Forcing States to be Free, 35 CONN. L. REV. 1467, 1494 (2003), Levinson, *supra* note 35, at 868.

[37] U.S. CENSUS BUREAU, 2010 CENSUS (2011), available at http://2010.census.gov/2010census/data/apportionment-pop-text.php.

[38] KOZA, *supra* note 8, at 16; NEIL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE 116 (1981).

more popular votes. Finally and most recently, in 2000, Republican George W. Bush won a bare majority of electoral votes, while Democrat Albert Gore received over half a million more popular votes nationwide.[39] On this view, the Electoral College poses a danger to American democracy; even though the people vote, the Electoral College so distorts the manner in which their votes are aggregated that the loser may actually win. For this reason, the critics urge that, like legislative appointment of U.S. Senators, the Electoral College should be discarded in favor of the direct popular election of the President.[40]

To be sure, throughout American history there have been many efforts to reform or eliminate the Electoral College, but all have failed. Of the 11,000 constitutional amendments proposed in Congress, over 1,000 have dealt with the Electoral College, and many of those have sought to implement a direct popular election.[41] In the current Congress, there is one bill proposing a constitutional amendment to eliminate the Electoral College and move to a direct popular election.[42] Article V, though, imposes a high threshold for amendments: a proposed amendment must pass both houses of Congress by a two-thirds vote and then be ratified by three-quarters of the states.[43] In 1969, the House passed such an amendment, but it failed to secure the necessary two-thirds majority in the

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[39] Peter Shane, When Inter-Branch Norms Break Down, 12 CORNELL J.L. & PUB. POL'Y 503, 538 (2003) ("Gore lost not because we have an electoral college, but because we have an electoral college that is so profoundly malapportioned."). The election of 1824 is also sometimes listed as an example of an election of a minority President, but the circumstances of that election cloud the picture. *E.g.*, KOZA, *supra* note 8, at 16. Four strong candidates (John Quincy Adams, Andrew Jackson, Henry Clay, and William Crawford) split the Electoral College vote, sending the election for the second and last time to the House of Representatives. The House ultimately selected Adams, even though Jackson had won more votes. Three points distinguish this election from the others. First, it was the House, not the Electoral College, that selected the President (and therefore who deserves the blame if any). Second, the four candidates had split the popular vote too, such that Jackson received only 41% of the popular vote. Third and most importantly, six states, including the populous state of New York which heavily favored Adams over the three Southern candidates, did not conduct a popular election and instead used legislative appointment for their presidential electors. It is simply impossible to know whether Adams lost the nationwide popular vote because there was none.

[40] Levinson, *supra* note 35, at 868.

[41] JUDITH BEST, THE CHOICE OF THE PEOPLE? DEBATING THE ELECTORAL COLLEGE viii (1996); Stanley Chang, Updating the Electoral College, 44 HARV. L. REV. 205, 210 (2007).

[42] H.J. Res. 36, 112th Cong., 1st Sess. (2011).

[43] U.S. CONST. ART. V.

Senate.[44] In 1979, a similar amendment was rejected by the Senate by a vote of 51-48.[45] Since then, other proposed amendments abolishing the Electoral College have died without floor action.[46] Popular support for constitutional reform, it seems, is widespread but shallow.

C. The National Popular Vote Compact.

In the wake of the 2000 Presidential election, several critics of the Electoral College came up with a clever way to circumvent the Electoral College without, in their view at least, the need for a constitutional amendment. Noting that the Constitution assigns to the state legislatures the power to direct the manner in which each state's electors are selected, these critics imagined that each state could decide on its own to award all of its electors to the candidate who won the nationwide popular vote. Of course, were only one or two individual states to do so, there would be no guarantee that their adoption of such a appointment system would ensure that the candidate who won the popular vote would win the Electoral College vote.[47] At the same time, there could be substantial domestic political costs for states that unilaterally adopted such a system. Few states would relish appointing electors pledged to the candidate who lost that state's poll without the guarantee that the popular vote winner would actually prevail nationwide.

Appreciating this collective action problem, proponents developed the idea of an interstate compact among the states. Under the terms of this proposed National Popular Vote Compact, each state agrees to hold a statewide popular election for President, as every state already currently does.[48] After the election, each signatory state's chief election official determines the number of votes cast for

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[44] Sanford Levinson, Is Moderation Sufficient When Addressing the Ills of the Electoral College, 6 ELECTION L.J. 220, 222 (2007).

[45] 125 Cong. Rec. 17766 (Jul. 10, 1979).

[46] Josephson & Ross, *supra* note 19, at 150; Whitaker & Neale, *supra* note 3, at 15.

[47] One of the critics, law professor Robert Bennett, disagrees. Bennett argues that even if one or two large states decided to unilaterally adopt such an appointment process, the number of electors controlled by those states would make it nearly impossible for a candidate who lost the popular vote to amass an Electoral College majority out of the remaining states. Bennett, *supra* note 8, at 244.

[48] Agreement among the States to Elect the President by Nationwide Vote, art. II (available at http://www.lwv.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11957).

each presidential/vice presidential slate of candidates in her state and communicates those numbers to all other states' chief election officials.[49] Once all of the statewide popular election vote totals are ascertained and the national popular vote winner determined, the compact requires that each signatory state appoint the slate of electors committed to the candidate who won the national popular vote, regardless whether that candidate won that particular state's own poll.[50]

For a measure that seeks to profoundly alter the manner in which the nation's chief executive is selected, the NPVC is otherwise surprisingly brief and cursory. To address the collective action problem, the compact provides that it will not go into effect until states comprising a majority of the Electoral College sign on.[51] In that way, there is no obligation for a state to appoint electors contrary to its own voters' will until such time that it can be sure that, in so doing, the national popular vote winner will secure the Presidency thereby. To prevent states from triggering the validity of the NPVC late in the presidential campaign, the NPVC only governs presidential elections in which the requisite college of states has ratified the NPVC by July 20th of the election year. Correspondingly, to prevent strategic defections by individuals states late in the election cycle, the compact also specifies that a signatory state may withdraw from the compact only if it does so before July 20th in a presidential election year.[52] As to other important aspects of the election process, such as the conduct of the election in the states, the counting of ballots, or the triggering and manner of conducting recounts, the proposed compact is silent.

Proponents of the NPVC believe that it will fundamentally transform American presidential elections. In their view, once the compact goes into effect, the election of the President would become solely the product of the nationwide popular vote; whether a candidate won a particular state, such as

[49] *Id.* art. III. Moreover, to instill public confidence in the counting of ballots, the official must make public those vote totals "as they are determined or obtained." *Id.*
[50] *Id.*
[51] *Id.* art. IV.
[52] If a state attempts to withdraw after that date, the compact purports to bind the state through the upcoming presidential election.

Florida in 2000, would be irrelevant. Indeed, supporters hope that even those states that refused to sign on to the compact would find themselves powerless to produce a victory for any other candidate.[53] By virtue of their Electoral College majority, the signatory states' pledge to appoint their electors to the national popular vote winner would be conclusive. The NPVC supporters also hope that its passage will change the nature of Presidential campaigns. In their view, a few, select swing states (Ohio, Pennsylvania, Florida) currently receive too much attention from the presidential candidates, while "safe" states (California and New York for the Democrats; Texas and the South for the Republicans) receive too little.[54] By eliminating the importance of winning individual states, proponents of the NPVC believe that candidates will spend more time in other states, attempting to increase their national vote margins.

As of January 2011, six states (Illinois, Maryland, Massachusetts, New Jersey, Hawaii, Washington) and the District of Columbia have adopted the NPVC. Those states collectively possess seventy-four electoral votes, leaving the NPVC 196 electoral votes short of its necessary 270-vote majority. Nevertheless, supporters are confident that political momentum is building and moving their way. Opinion polls conducted in the past two years in thirty-one additional states, possessing collectively 363 electoral votes, indicate substantial support in those states for moving to the direct popular election of the President.[55] Moreover, the NPVC has been passed in one or both houses of the legislature in a number of states, including the electoral vote behemoth of California.[56] Together, those states comprise an additional 164 electoral votes. If those states ratified the NPVC, it would be only thirty-two electoral votes short of ratification. Based on these expressions of popular support,

[53] KOZA, *supra* note 8, at 247.
[54] *See, e.g.*, *id.* at xxix (Foreward by John B. Buchanan), Chang, *supra* note 13, at 218-19.
[55] *See* www.nationalpopularvote.com.
[56] California Senate Bill 37 (adopted by both California Senate and Assembly but vetoed by Gov. Schwarzenegger). The Connecticut House, for example, approved the NPVC on May 11, 2009.

proponents of the NPVC hope that the NPCV will gather the requisite number of states to be in effect for the 2012 Presidential election.[57]

II. MALAPPORTIONMENT, FEDERALISM, AND FALSE MAJORITARIANISM.

As noted above, the Electoral College has drawn substantial criticism, with the 2000 election prompting renewed efforts to reform the system for electing the President. Criticism typically focuses on the Electoral College's malapportionment – that it distorts the popular vote by aggregating it in ways that favor smaller over larger states. As subpart A shows, however, the malapportionment of the Electoral College is far less severe than often painted by its critics. In fact, other, commonly accepted features of the American political system distort popular political preferences to a greater extent than does the Electoral College. More importantly, as subpart B discusses, the Electoral College's deviation from a purely population-based apportionment is the price paid for having a presidential election process that combines elements of majoritarianism and federalism. By rewarding candidates who win more states than their competitors, the Electoral College promotes the elections of Presidents who have support across a broad, geographic swath of America. Finally, as subpart C demonstrates, whatever one thinks of the Electoral College, the NPVC would actually make matters worse by substituting a system that promotes neither federalism nor majoritarianism. Indeed, the NPVC promises a false majoritarianism that will produce more electoral miscarriages than the Electoral College has done in the past or could do in the future.

A. How Malapportioned?

The extent to which the Electoral College is malapportioned is often overstated. The inclusion of the "senatorial" electors results in a slight formal bias in favor of voters from smaller states, but the "senatorial" electors comprise less than one fifth of the 538-member Electoral College. Significantly, more than four-fifths of the electors are allocated on the basis of population. As a result, while

[57] KOZA, *supra* note 8, at 281.

Wyoming may have more electors than it would receive under a strict population-based allocation, it still has only three electors (compared with 55 for California and 38 for Texas). To be sure, Wyoming and the other smaller states possess disproportionately greater influence in the Electoral College as a result of the "senatorial" electors, but the extent of that disproportional influence is mitigated by the fact that the vast bulk of electors are allocated on the basis of population.[58]

The effect of that mitigation can be seen by comparing the Electoral College to that most malapportioned of all American institutions, the U.S. Senate. The smallest state in the Union, Wyoming with 563,000 residents, has the same number of Senators as the largest state in the Union, California with 37.2 million residents. To see more precisely the extent of the malapportionment that results from the equal representation of states in the Senate, we can use the same formula that the U.S. Supreme Court has developed for calculating the malapportionment of state legislative districts.[59] The formula

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[58] Some political scientists contend that the states' adoption of winner-take-all balloting overwhelms the Electoral College's formal bias in favor of smaller states and actually produces an election process that favors the larger states. *See, e.g.*, John F. Banzhaf, One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College, 13 VILL. L. REV. 304, 313 (1968). They contend that, while a citizen in a larger state has a lower probability of casting a vote that will change the electoral outcome in the state than a citizen in a smaller state, the larger-state citizen controls more electors. They argue that, as the population of a state increases, the probability of a given citizen's casting a dispositive vote declines only in proportion to the square root of the population. In other words, a tripling of the state's population does not mean that the probability of a given citizen casting the dispositive vote declines by one-third; rather, it declines by far less and is therefore outweighed by the additional electors assigned to the state by virtue of the three-fold increase in population. Hence, while a voter in a large state may have only a .0001% chance of affecting how 55 electors are determined, a voter in a small state will only have a .0003% chance of affecting how 3 electors are determined, and, in their view, a voter with a .0001% chance of controlling 55 electoral votes has more power than a voter with a .0003% chance of controlling 3 electoral votes. Based on this insight, Banzhaf determined that voters in California had more than three times the voting power than did the citizens in the smallest states in the 1960 election. *Id.* at 329; s*ee also* John F. Banzhaf, The Distribution of Voting Power of Citizens of the Individual States Under the Current Electoral College Calculated Using the Banzhaf Index, available at Banzhaf.net/ec2000.html (updating calculation for 2000 election).

The validity of Banzhaf's theory of voting power is hotly contested among political scientists. That said, at least some smaller states agree with Banzhaf and feel disadvantaged by the Electoral College. In the mid-1960s, Delaware and a group of small states sued New York in the U.S. Supreme Court, alleging that New York's and other large states' adoption of winner-take-all voting violated the Constitution. Delaware v. New York, 385 U.S. 895 (1966). As Delaware expressly argued, the winner-take-all system "debases the national voting rights and political status of [Delaware's] citizens and those of other small states by discriminating against them in favor of citizens of the larger states." Motion for Leave to File Complaint, Delaware v. New York, No. 28 Original, 1966 WL 100407, at *11 (Jul. 20, 1966). The Supreme Court, however, dismissed the suit without opinion.

[59] That formula calculates the ideal size in population of a legislative district in an apportionment in which all legislative districts have equal population. It then determines the extent to which the smallest and largest districts

focuses on the extent to which legislative districts depart from a perfect, population-based apportionment, comparing the most under-represented district to the most over-represented district. Evaluated under that formula, the U.S. Senate is horribly malapportioned. Wyoming, the most over-represented state, deviates from a perfect apportionment by 90.8%, while California, the most under-represented state, deviates by 504.5%. That means that the maximum deviation from an ideal apportionment is an eye-watering 595.3%! Even more shockingly, the average deviation from an ideal apportionment is 72.2%, and the median deviation is 55.6%, meaning that half of the states are under- or over-represented by more than 55%. In contrast, the Electoral College produces a maximum deviation of 85.3%, with an average deviation of 21.1% and a median deviation of 11.7%.

Nor is the Senate alone in deviating from the majoritarian ideal of perfect equality of population in allocating delegates to multi-member institutions. The nomination system used by the two national parties to select their candidates for President also departs from the majoritarian ideal. Voters in state primary elections and caucuses do not directly nominate the party candidates; rather, just as the Electoral College serves as an intermediary between the people and the President in the general election, the two national parties provide that their nominee will be selected by delegates to the national party conventions, which delegates are in turn selected on the basis of the primary election votes, caucus results, or conventions in each of the states. Moreover, the allocation of delegates to each state is set according to rules adopted by each party, and, here's the rub: the allocation of delegates made by both the Republican and Democratic parties deviates from a strictly population-based apportionment to a greater extent than does the Electoral College.

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by population in the apportionment under question deviate from that ideal in percentage terms. The two percentage deviations are then summed together to produce a "maximum deviation" in percentage terms. Connor v. Williams, 404 U.S. 549, 550 n.2 (1972).

The two national political parties use different formulae for allocating delegates to each state. The exact details of the formulae are not important for present purposes.[60] What is important is that both the Democratic and Republican presidential nomination process is severely malapportioned. At the 2008 Democratic National Convention, for example, Texas was the most underrepresented state, receiving only 227 delegates (5.26% of the entire Convention), even though at the time it comprised 7.8% of the nation's population and 6.3% of the Electoral College. Meanwhile, the District of Columbia was the most overrepresented, receiving 40 delegates (0.93% of the total) even though it comprised only 0.2% of the nation's population and 0.55% of the Electoral College.[61] Again, gauged by the Supreme Court's malapportionment standard, the Democratic National Convention had a maximum deviation from population equality of 118.9%.[62] Moreover, the malapportionment was pervasive: thirty-three states were under- or over-represented by 10% or more, and forty-one states were under- or over-represented by 5% or more. Perhaps most strikingly, the average deviation from perfect equality was 20.9%.

Likewise, at the 2008 Republican National Convention, Alaska was the most overrepresented state, receiving 29 delegates (1.15% of the total), even though it comprised only 0.2% of the nation's

[60] For an extensive examination of the formula, see Norman R. Williams, The Presidential Nomination Process (forthcoming 2011) (manuscript on file with author).

[61] This malapportionment nearly produced (and, according to some supporters of Hillary Clinton, did produce) a "misfire" in the Democratic nomination process in 2008. Excluding Michigan, Barack Obama received 17,535,458 votes in all of the Democratic nominating contests as against 17,493,836 for his primary challenger, Hillary Clinton. *See* 2008 Democratic Popular Vote (available at www.realclearpolitics.com/epolls/2008/president/democratic_vote_count.html). Yet, if one included the votes from the Michigan Democratic primary, in which Obama did not participate because the Michigan primary was held too early under party rules, Clinton received more popular votes than Obama. Id. Regardless of the propriety of ignoring the Michigan primary result, Obama's sizeable majority in both the total delegate count (54% of the total) and pledged delegate count (51.4% of the pledged delegate total) overstated the size of his popular vote plurality in the Democratic primaries and caucuses (48.2% versus 47.8% for Clinton). *Id.*

[62] The DNC allocated 4314 delegates to the states and DC, yielding an ideal delegate representation ratio of 1 delegate for every 65,235 individuals. Texas, with 1 delegate for every 91,858 residents, was the most underrepresented, while DC, with 1 delegate for every 14,301 residents, was the most overrepresented. This calculation credits Florida and Michigan with their full delegations, as the full Convention voted, but it ignores the delegates allocated to territories and Americans overseas. Including the latter produces an even greater malapportionment.

population and .55% of the Electoral College. Meanwhile, Michigan was the most underrepresented, receiving only 30 delegates (1.3% of the total), even though it comprised 3.5% of the population and 3.2% of the Electoral College. Again, the malapportionment is both staggering and extensive: the maximum deviation from population equality is a shocking 255.3%.[63] Moreover, 44 states were under- or over-represented by 10% or more, and 39 were under- or over-represented by 20% or more. Incredibly, the average deviation from a perfect apportionment was 42%!

Viewed in comparison to the severe malapportionment of the two parties' nomination process, the Electoral College's maximum deviation from perfect population equality – the relatively modest 85.3% -- is insignificant. That is not to suggest that Americans should therefore blithely accept the Electoral College. Rather, the critical point is that the Electoral College is not unique in misallocating political power among the states and that, when compared with how we select the presidential candidates for the two major parties, the Electoral College actually distorts popular political preferences to a much less significant degree. It may be that any malapportionment is undesirable or, more modestly, that the malapportionment of these institutions is just too great, but before either of those judgments can be made, it is first necessary to examine why the Electoral College departs from a purely population-based apportionment and then determine whether those reasons justify the deviation from a perfect population-based apportionment.

B. The Wages of Federalism.

The term malapportionment by its very name suggests something evil and wrong, and, as a consequence, defenders of particular instances of malapportionment typically find themselves bearing

[63] The RNC allocated 2,321 delegates to the states and DC, yielding an ideal delegate representation ration of 1 delegate for every 121,250 individuals. Michigan, with 1 delegate for every 331,281 residents, was the most under-represented, while Alaska, with 1 delegate for every 21,618 residents, was the most over-represented. To be sure, Michigan (along with Florida, New Hampshire, South Carolina, and Wyoming) received only half the delegates to which they would otherwise be entitled because of their violating party rules regarding the timing of their primary election, but even if that penalty were ignored, Michigan's 60 delegates would still have comprised only 2.4% of the reconstituted Convention.

the burden of proof that the malapportionment is justified.[64] A bias against malapportionment is justified, but it begs the analytically anterior question whether there is malapportionment in the first place. The mere fact that a particular apportionment deviates from a purely population-based one is not sufficient to demonstrate the existence of malapportionment, as there is no single, appropriate way to apportion voting rights for members of multi-member bodies. As a result of *Reynolds v. Sims*,[65] state legislators are now apportioned primarily on the basis of "one person, one vote," but boards of directors of corporations are typically apportioned on the basis of "one share, one vote," a rule that often leads some people (e.g., Warren Buffett) to have much greater voting power than other people (e.g., you or me). Even certain governmental bodies, such as water districts, often have apportionment and voting rules that deviate from a purely population-based one.[66] Hence, the critical question vis-à-vis the Electoral College is whether its deviation from a perfect, population-based apportionment constitutes malapportionment or, alternatively, whether it is simply a consequence of the Electoral College's legitimate implementation of some other value. As it turns out, in the same way that the deviation from population-based apportionment of corporate boards is justified in order to maximize investment and capital aggregation, the deviation from population apportionment of the Electoral College is justified in order to serve federalism.

As is often noted, the U.S. Constitution creates a political structure that combines elements of both majoritarianism and federalism.[67] That is most apparent with respect to the Congress, in which the House is apportioned on the basis of population (majoritarianism) and the Senate is apportioned on the basis of equal representation for each state (federalism). As a consequence, the Electoral College, whose numbers are tied expressly to the numbers of Representatives and Senators each state has in

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[64] *See* Karcher v. Daggett, 462 U.S. 725, 731 (1983).
[65] 377 U.S. 533 (1964).
[66] *See, e.g.*, Ball v. James, 451 U.S. 355, 359 (1981) (upholding apportionment of water district in which only property owners could vote for governing board and in which each property owner received votes on basis of amount of property owned).
[67] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

Congress, combines elements of majoritarianism and federalism. In short, by tying each state's electoral vote to its congressional representation, the Framers adopted a presidential election system that blends majoritarianism and federalism. Indeed, James Madison in Federalist 39 expressly described the Presidential election process as a "mixed" system that blended, in his words, "national" and "federal" characteristics.[68] The "malapportionment" of the Electoral College is simply a byproduct of the Framers' decision to combine majoritarian and federal elements in the election process.

Now, of course, one might take the position that the Presidential election process should be entirely majoritarian: Just add up all the popular votes and whoever has the most votes is the winner. The proposition that the President should be elected through an exclusively majoritarian process, however, is a normative claim, and, like all such claims, it must be defended, not just stated. Moreover, the United States is far from alone in departing from a strictly majoritarian election process for the chief executive. Notably, many other large, federal democracies also employ presidential election processes that combine majoritarian and federal elements. Many require candidates to demonstrate substantial support in a minimum number of states in order to prevail. For example, Indonesia, the second largest democracy after the U.S., requires a candidate to receive a majority of the popular vote nationwide *and* at least 20 percent of the vote in a majority of the provinces in order to become President.[69] Likewise, Nigeria also requires the winning candidate to receive a minimum level of support in at least two-thirds of its constituent states.[70] Of the five most populous democracies, only Brazil uses a purely majoritarian, direct popular vote to elect its chief executive.[71]

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[68] The Federalist No. 39 (Madison) at 244 (Clinton Rossiter ed. 1961).
[69] CONSTITUTION OF INDONESIA ART. VI-A.
[70] CONSTITUTION OF NIGERIA ART. 134(1), (2).
[71] CONSTITUTION OF BRAZIL ART. 77. Meanwhile, the European Union, has eschewed direct popular election for its new post of President. Pursuant to the Treaty of Lisbon, the European President is *appointed* by a supermajority vote of the European Council, which is composed of the heads of state from each member country. Treaty of Lisbon, art. 9-B(5). Specifically, the President must be elected by a supermajority of 55% of the member states representing at least 65% of the Union's population.

To be sure, there is a limit to the amount of deviation from a population-based apportionment that Americans would countenance in the name of federalism. Few people today, for example, would likely want to have the President selected on a purely corporatist basis in which each state received the same, equal number of electors.[72] Nevertheless, some modest deviation seems an acceptable cost for implementing democracy in a large, federal union such as the United States. As such, the choice between maintaining the Electoral College or abolishing it in favor of a purely majoritarian election process can only be made by assessing whether the Electoral College's deviation from a purely population-based apportionment exceeds what is necessary or desirable for the sake of federal union. Strikingly, once that assessment is undertaken, the Electoral College's deviation from a purely population-based apportionment seems perfectly reasonable.

1. Strict v. Modest Majoritarianism.

At the outset, it is useful to distinguish between two forms of majoritarianism. For some majoritarians, no derogation from a purely majoritarian political process is justified. For them, the question is not one of degree but of principle: majoritarianism is the most important value that an electoral system must abide and implement; all other values, including federalism, must yield to the demands of majoritarianism. I label this form "strict majoritarianism." Given their uncompromising approach, strict majoritarians will find much of what follows in this discussion to be beside the point. Yet, also because of its uncompromising approach to issues of constitutional design, strict majoritarianism offers a normatively unappealing account of and prescription for the American constitutional order. The same reasons proffered on behalf of a purely majoritarian presidential election process also condemn the malapportionment in the presidential nomination process and the federal legislative process (i.e., U.S. Senate), as well as a host of federal and state legislative rules that

[72] Of course, that is process envisioned by the Constitution when the Electoral College fails to produce a winner, and it is essentially the system that the Framers thought they were adopting (as they thought the Electoral College would routinely fail to produce a majority candidate).

depart from pure majoritarianism. The enduring existence of these institutions and rules suggests that few Americans are drawn to strict majoritarianism.

For other majoritarian critics of the Electoral College, some deviation from a purely population-based apportionment is acceptable in the name of federal union. For them, majoritarianism is but one value that a well-crafted political system must implement, and, therefore, some trade-off between majoritarianism and other values, such as federalism, is permissible. For them, the question is one of degree, not principle. I label this form "modest majoritarianism." Of course, the fact that the Electoral College deviates *less* from a perfect, population-based apportionment than do the U.S. Senate or presidential nomination process places modest majoritarians in a quandary: why is the comparatively smaller deviation of the Electoral College problematic but the greater deviation of the Senate and nomination process acceptable? Nevertheless, unlike strict majoritarians, modest majoritarians accept the validity of a political or electoral process that combines elements of majoritarianism and federalism. Thus, the debate between modest majoritarians and defenders of the Electoral College centers on the issue of how much political institutions and processes should tilt toward majoritarianism versus federalism.

The problem with the modest majoritarians' critique of the Electoral College, however, is that it relies too much on conclusory assertions and too little on a sustained analysis of the history and operation of the Electoral College. Conspicuously absent is any analysis as to why the Electoral College passes the permissible bounds of what is acceptable in the name of federal union. That omission is both disappointing and telling, because, on closer inspection, the Electoral College actually blends majoritarian and federalist interests in a normatively appealing fashion. Moreover, in what is sure to be a surprise to many majoritarians, the Electoral College blends those two values in a manner heavily weighted towards majoritarianism, not federalism. To see how that is true, we must look more closely at how the Electoral College determines presidential elections in practice.

2. The Electoral College in Operation.

Malapportionment, of course, is not an evil in and of itself; it is a danger because it distorts the outcomes of the ensuing political process. Thus, for example, the malapportionment of state and federal legislative districts is viewed as constitutionally problematic because the ensuing malapportioned legislature is likely to take different action than a perfectly population-apportioned legislature would have done. Unlike Congress or state legislatures, however, the Electoral College does not engage in a variety of political and legislative tasks. Rather, it exists for one day and for one purpose only: to cast two votes, one for President and one for Vice President.[73] Once that single task is done, the Electoral College dissolves to be reconstituted only four years later following another presidential election. As such, the malapportionment of the Electoral College is only consequential to the extent that it produces electoral outcomes different than would have taken place if the Electoral College were apportioned purely on the basis of population.

Evaluated on this basis, the Electoral College fares much better than most majoritarians would have you believe. The U.S. has conducted 56 presidential elections. In 39 of those elections, one of the candidates received an absolute majority of the national popular vote, and, in all but one of those elections (1876), that candidate won the White House. In the remaining 17 elections, no candidate received a majority of the popular vote.[74] Of these plurality contests, the candidate who received the most popular votes won 14 of the elections. In short, in 52 of the nation's 56 presidential elections, the Electoral College elected as President the person who won the most popular votes. Majoritarians rejoice! Despite its malapportionment, the Electoral College has selected the candidate who won a majority of the vote 97% of the time, and it has selected the candidate who won the most votes 93% of the time.

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[73] 3 U.S.C. §§ 7, 8.

[74] JAMES M. MCPHERSON, TO THE BEST OF MY ABILITY: AMERICAN PRESIDENTS (2000).

Now, in a "the glass is 93% full -- no, it's missing 7%" moment, majoritarians typically point to the four presidential elections in which the person who won the most popular votes lost the Presidency (1824, 1876, 1888, and 2000) and argue that, in those cases, the Electoral College "misfired." In fairness to majoritarians, any electoral error is problematic, particularly when what is at stake is the U.S. Presidency. Under our constitutional framework, the occupant of the White House has a tremendous amount of authority, formal and otherwise, with respect to the development and implementation of the policy program of the federal government, and, thus, a "misfire" can have significant consequences for U.S. policy, both foreign and domestic. A President Gore would undoubtedly have pursued policies much different than those of President George W. Bush. Nevertheless, the fact that, even judged on their own terms, so few misfires have occurred demonstrates that the Electoral College in fact is heavily weighted towards majoritarianism, not federalism.

The more fundamental problem with the majoritarians' argument, however, is that they assume that, just because the candidate who won the most popular votes lost the White House in those four elections, there has been some electoral error or "misfire." Implicit in that critique is an unstated belief about how elections should be conducted – specifically, about what voting rule to use to determine which candidate should be deemed to have won the election. The selection of the appropriate voting rule is a critical one, and, as the diversity of voting systems both in the U.S. and other nations indicate, there are a variety of available options.

The majoritarians' criticism of the Electoral College's "misfires" necessarily rests upon the belief that the candidate who receives the most votes should be the victor. This is the "first past the post" electoral rule.[75] To be sure, that rule appeals to many Americans' sense of fairness; if elections are a race (as the media often characterize them), surely the winner is the one who crosses the finish line first. Yet, it is both curious and ironic that majoritarians of all people would endorse the first-past-the-

[75] For a general discussion of the first-past-the-post rule, see MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 217 (Barbara North & Robert North trans., Methuen & Co. 3d ed. 1969).

post principle. To see why, suppose there were four candidates for the White House, each of who split the national popular vote such that the candidate with the most votes still only receives 30% of the vote. According to the first-past-the-post principle, that candidate – the one with only 30% of the vote – is nevertheless the victor. One would think that majoritarians especially would be aghast at such a prospect. Absent a run-off election (which there isn't in American presidential elections), there is no way to be sure that the plurality vote recipient was in fact the candidate with the greatest political support across the nation. That would be especially true in cases in which the runner-up trailed the plurality vote recipient by only a small amount. In those situations, there would be good reason to suspect that the second-place, closely-trailing candidate might in fact have greater political support and would win a run-off election if one were held.[76] Stated directly, in an election in which no candidate receives a majority of the vote, the first-past-the-post rule does not serve majoritarian interests.

Nor does the first-past-the-post principle serve the interests of a federal union. The first-past-the-post principle focuses entirely on the numeric strength of each candidate's vote; the geographic distribution of those votes among the states is entirely irrelevant. Yet, ignoring the geographic distribution of votes can be deeply problematic in a large, federal union. Suppose, for example, a candidate (Candidate A) wins by landslide amounts in states in one section of the country (which states comprise a minority of all states in the nation) but does poorly in other sections of the country. Nevertheless, Candidate A does well enough in those other sections that, at the end of the day, Candidate A has received the most popular votes nationwide. Under the first-past-the-post principle, Candidate A wins the election, but this distribution of votes is problematic for a candidate who aspires

[76] In state and local elections, where there is a run-off between two, closely-matched candidates, the candidate who came in second in the first election can often prevail in the ensuing run-off election. *See, e.g.*, 2010 Georgia Election Results, available at http://sos.georgia.gov/elections/election_results/2010_0810/swfed.htm (Georgia GOP gubernatorial primary contest; run-off election was won by candidate who came in second in first election); see also William C. Shelton, Majorities and Pluralities in Elections, 26 AM. STAT. 17, 17 (1972) (endorsing need for run-off election where there is no candidate winning a majority and the vote is close or split among three candidates).

to lead a federal union such as the U.S. Candidate A, as President, will likely be beholden to the interests of only one section of the nation. Indeed, such sectional Presidencies can produce a great deal of political tension within the union – it cannot be forgotten that the election of 1860, in which Abraham Lincoln's support came almost exclusively from northern states, produced the Civil War. It is for this reason that many, large federal democracies eschew the first-past-the-post principle and require the winning candidate to demonstrate political support across sections of the nation.[77]

In addition to concerns about sectionalism, there is another reason unique to the U.S. that cautions against the election of a President with geographically limited appeal, as the first-past-the-post principle permits. In our constitutional system with divided government, the President must work with Congress to accomplish her legislative agenda. Even if a President elected predominantly with the support of voters in only one or two sections of the nation were inclined to work in a more nation-regarding fashion, the geographically limited scope of her political support will likely undermine her ability to work with Congress, the Senate of which is composed of a majority of Senators from states that the President lost. This last point is often ignored by majoritarians. A President who owes her election to landslide victories in only a minority of states is not as likely to be a successful President as one who carried a majority of states and therefore whose "coattails" likely brought into Congress a number of legislators of like mind and party. Thus, purely for pragmatic reasons to encourage the election of Presidents who can work successfully with the Congress, the presidential election system should reward candidates whose political support is more geographically broad. In essence, because the President must work with a Congress, which is elected via a blend of majoritarian and federal processes, the President should likewise be elected through a blend of those two processes.[78] The first-past-the-post principle fails to accommodate these interests.

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[77] *See* text accompany notes 69-71, *supra*.

[78] For the same reasons, the diametrically opposite rule that the candidate who wins the most states should be deemed the victor is likewise normatively undesirable. A candidate might win a majority of small states by a

So, if the first-past-the-post rule is not the appropriate principle to use in determining the victor of American presidential elections, what rule is? What voting rule combines elements of majoritarianism and federalism in a normatively attractive way? As a first cut at the problem, let's consider the following rule: The candidate who wins a majority of the national popular vote is the President, but in those situations in which no candidate receives a majority, the candidate who wins the most states shall become President. This rule gives a preeminent role to majoritarianism – a candidate who wins a majority of the popular vote becomes President regardless of how many states she wins (or loses). At the same time, when no candidate receives a majority, this rule gives a tie-breaking role to federalism concerns.

For majoritarians, the tie-breaking component of this proposed rule – one vote per state – nevertheless might favor federalism concerns too much, such as by awarding the White House to the candidate who won more a bare majority of states even if all those states were less populated, smaller ones. To address this concern, we can tweak the tie-breaking feature to add a majoritarian component. Let's assign to each state an electoral vote that is calculated on the basis of its population; for example, each state shall receive its pro rata share of, say, 435 electoral votes. Then, to keep a federalist component to this tie-breaking rule (i.e., so that the rule gives some incentive for candidates to seek to win more states than less rather than just concentrate on the largest states), let's then give each state two more electoral votes above and beyond its population-based vote, so that each state shares in a pool of 535 electoral votes.[79] Thus, we have the following electoral rule: The candidate who wins a

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narrow popular vote margin (perhaps even a narrow plurality), but lose big in the remaining states, thereby producing a President whose national popularity is small. Such a President might be able to work well with the Senate (a majority of whose members come from states that this minority President won) but she will be unable to work with the House of Representatives (a majority of whose members come from states and districts that the President lost). In essence, this "strict federalist" voting rule is the mirror image of the first-past-the-post rule: Both rules may produce Presidents unlikely to have sufficient political support to work successfully with Congress, but, while the latter produces Presidents who may not be able to work with the Senate, the majority of states rule will produce Presidents who may not be able to work with the House.

[79] Or 538 electoral votes if the District of Columbia is treated as a state for presidential election purposes as the Constitution currently requires. U.S. CONST. amend. XXIII.

majority of the national popular vote shall become the President, but in those situations in which no candidate receives a majority, the candidate who receives more electoral votes shall become President.

Admittedly, there are other voting rules that blend majoritarianism and federalism in a more simple fashion than this one, but the key point is that only the most strict of strict majoritarians would condemn this proposed voting rule. It yields to federalism concerns only when majoritarianism offers no clear guidance as to which candidate to choose (i.e., no candidate has received a majority of the national popular vote), and even then, the tie-breaking component is heavily weighted towards majoritarianism. In fact, when no candidate has won a majority of the popular vote, selecting the candidate who won more electoral votes may actually work in service of majoritarianism. In the absence of a run-off election (which the U.S. does not conduct), such geographically broad electoral success may reasonably serve as a proxy for majority support.[80]

Now, here's the rub: with two exceptions, this voting rule produces results identical to those produced in fact by the Electoral College throughout our history. In 38 of the 39 presidential elections in which one of the candidates received a majority of the popular vote, that candidate prevailed and became President. In 16 of the remaining 17 elections in which no candidate received a majority of the popular vote, the candidate who won the most electoral votes became President. In fact, in two of the alleged misfires to which majoritarians point (1888 and 2000), the outcome of the election would have come out the same way as under this proposed voting rule. In both elections, the top vote recipient received only a plurality of the popular vote – 48.6% and 48.4% of the national popular vote, respectively. Meanwhile, the runner-up in those elections (who became President) received 47.8% and

[80] In these close, plurality elections, winning more electoral votes than one's plurality-achieving competitor could be viewed as a proxy for majoritarian support; a candidate who wins more electoral votes may be viewed as more likely to possess the majoritarian political support that would allow her to prevail in a run-off election if one were held. Obviously, that counter-factual assumption will not be true in all cases, but any plurality tie-breaking electoral rule regarding which non-majority-receiving candidate should prevail – including the majoritarians' "first past the post" rule – will fail to identify the candidate with majoritarian support in some cases. The question is whether it is a reasonable proxy, not an air-tight one, and, on that basis, it is surely reasonable to assume that, in these cases, a candidate who wins more electoral votes is more likely to have majoritarian support than her competitor in a head-to-head contest.

47.9%, respectively, of the national popular vote – a difference of less than 1%. In both elections, the prevailing candidate ultimately won the election because he received more electoral votes.[81] In only two elections (1824 and 1876) has the candidate who should have won under this proposed rule actually lost, and, even then, when one actually looks at those two elections, a more complicated picture emerges.

The 1824 election was a misfire, but the misfire was not the fault of the Electoral College and its voting system. At that time, several states did not conduct popular elections for President, making the calculation of a national popular vote an act of imagination rather than mathematics. Moreover, among those states that did hold a popular election, no candidate in the four-candidate field came close to a majority in the popular vote. Nor, unfortunately, did any candidate receive a majority of the electoral college vote, so, per Article II and the Twelfth Amendment to the U.S. Constitution, the election was thrown to the House of Representatives, where each state receives one, equal vote.[82] The House ultimately chose John Quincy Adams, the candidate who had come in second in both the popular vote and electoral vote behind Andrew Jackson. Now, admittedly this is a misfire under our proposed voting rule, but note that the cause of the misfire was not the Electoral College, which (as majoritarians demand) gave the most electoral votes to the candidate who had won the most popular votes. Rather, the cause was the contingent election process in which each state gets an equal electoral vote in the House balloting. In short, the apportionment of the Electoral College had nothing to do with the results of the 1824 election, and apportioning the Electoral College purely on the basis of population would not

[81] FEDERAL ELECTION COMMISSION, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS, available at http://www.fec.gov/pubrec/2000presgeresults.htm; 1888 Presidential General Election Data – National, available at http://www.uselectionatlas.org/RESULTS/data.php?year=1888&datatype=national&def=1&f=0&off=0&elect=0. In fact, in both elections, the prevailing candidate won more states than his competitor. In 1888, Benjamin Harrison carried a majority of the states (20 of the 38), and, in 2000, George Bush did even better, carrying 30 states and receiving an absolute majority of the vote in 26 of those states.

[82] U.S. CONST. AMEND. XII.

have changed the result. Perhaps the contingent election procedure should be abolished or reformed,[83] but that is a question independent of the apportionment of the Electoral College.

The 1876 election is a more difficult call, but, even here, there are mitigating considerations. In that election, Samuel Tilden received 51% of the national popular vote but still lost the election. Rutherford B. Hayes was a close second with 47.9% of the national vote – less than 250,000 votes out of over 8 million cast (or slightly over 3%) separated the two men – but Hayes won because he carried 20 of the 38 states, giving him a bare majority in the Electoral College.[84] Under our proposed voting rule, this is admittedly a misfire, but one should not be too quick in condemning the result. Tilden won only a handful of states outside the South and none of the Western states; meanwhile, Hayes won states in every section of the country, including the South. If one were to use a voting rule that is only slightly more generous to federalism concerns – e.g., the candidate who wins a majority of the popular vote in a majority of the states shall become President – the 1876 election comes out the same way as it did. In other words, for those who place more value on the need to have a President who obtains political support across the nation and not just be the choice of one or two sections of the nation, the 1876 election was not a misfire.

The point is not that Hayes was rightfully declared the winner in 1876. Nor is the point that the United States should adopt the hypothetical voting rule discussed above. As is readily apparent, the Electoral College system differs from the hypothetical voting rule, in that the electoral vote determines the victor without any regard to the popular vote (i.e., the electoral vote is not a tie-breaking feature but is the principal component of the Electoral College's voting rule). Rather, the central point is that the Electoral College in operation produces results almost identical to that under the hypothetical voting

[83] There are two possible reforms, each of which would require a constitutional amendment. First, the requirement of an absolute majority of the Electoral College could be eliminated in favor of a rule that the candidate who won the most electoral votes be deemed the President. Alternatively, the contingent election procedure could be retained but the voting rule in the House changed to make it more majoritarian, such as each state receives the number of votes as it possesses Representatives.

[84] 1876 Presidential General Election Data – National, available at http://uselectionatlas.org/RESULTS/index.html.

rule – a rule that blends majoritarianism and federalism in a way that heavily favors majoritarianism. In the vast majority of elections, the Electoral College selects the national popular vote winner. In a tiny minority of elections, it selects the popular vote loser, but, significantly, it only does so when the national popular vote is close and the popular vote loser demonstrated greater support across the country by winning more states with more electoral votes than his or her competitor. In close elections, the Electoral College rewards the candidate who transcends particular sections of the country and appeals to voters in a broad array of geographical areas. In a federal union, that is of no small value and – lest the whole point of this discussion be lost – it justifies the Electoral College's modest deviation from a perfect, population-based apportionment.

Majoritarians are sure to respond that, even if the Electoral College has rarely misfired in the past, there is nothing to prevent it from misfiring more often in the future. True enough, one can hypothesize numerous theoretical scenarios in which a candidate wins a slim majority of the national popular vote but still loses the White House. Other features of the presidential election process, however, operate to make such scenarios unlikely as a practical matter. Specifically, the existing partisan divisions among the states, combined with the prevalent use of the unit or "winner take all" voting rule in all but two states, make it highly unlikely for a candidate to win a majority of the national popular vote but lose the White House. Thus, while it is theoretically possible for a candidate who wins a slim plurality in each of the 40 smallest states plus DC to become President over the candidate who wins a resounding majority in the 10 largest states (and therefore wins a majority of the national popular vote), such scenarios are unlikely in practice. In the nation as it exists today, partisan affiliation does not correlate with the size of the states. Of the ten most populous states, Democrats typically carry four of them (California, New York, Illinois, and Michigan), Republicans typically carry three of them (Texas, Georgia, and North Carolina), and three are toss-ups (Pennsylvania, Ohio, and Florida). The same is true of the smallest states: Wyoming, Alaska, and the Dakotas may be reliably Republican in

presidential contests, but Vermont, Washington, DC, and Delaware are reliably Democratic. As a consequence, such "41-smallest-states-to-the-10-largest-states" misfires are far more likely to be imagined than experienced.

Again, the lessons of history cannot be ignored. True misfires (i.e., when a candidate wins a majority of the national vote but loses the White House) are exceptionally rare. In only one election in over 200 years worth of presidential contests has such a scenario transpired. That is strong evidence that the Electoral College typically tracks the majority will – that it blends majoritarianism and federalism in way heavily tilted toward the former.

C. The NPVC in Comparison.

Strict majoritarians are still unlikely to be persuaded. They are likely to respond that, even if the Electoral College typically follows popular majorities, surely the nation can do better, such as by moving to an electoral system that *guarantees* that the candidate who receives a majority of the national popular vote wins the White House. For strict majoritarians, such a electoral rule would forever eliminate the possibility of any misfire, at least as they define it. For reasons discussed above, I am dubious of the desirability of jettisoning federalism entirely from the electoral mix – that is, of having an presidential electoral system that centers exclusively on the numerical strength of each candidate's performance in the nation as a whole without giving any regard to whether the prevailing candidate's support extends across the nation. Whether or not one agrees with that conception of the role of federalism in the presidential election process, however, there should be no dispute about the desirability of the NPVC. Whatever might else be said about it, the NPVC is not the majoritarians' dream rule: it does not guarantee that the person who is elected President obtained or has the support of a majority of the American people. Indeed, it would trigger more misfires than the Electoral College.

The NPVC defines the "national popular vote winner" as the person who receives the most votes in the nation.[85] This is the first-past-the-post rule discussed above.[86] Thus, under the NPVC, a candidate need only receive a plurality, not a majority, of the national vote in order to become the "national popular vote winner" and therefore President.[87] In a multi-candidate field (as often happens in American presidential elections), the NPVC may produce a President who was elected with 45%, 35%, or even less of the national vote. In fact, the NPVC could produce Presidents with lower levels of popular support than that received by those Presidents (Hayes, Harrison, and George W. Bush) whom strict majoritarians condemn as illegitimate.

For majoritarians, such plurality presidencies should be a grave source of concern. A candidate that wins only a plurality of the vote may be opposed, perhaps vehemently, by a majority of the electorate. The 2002 French Presidential election is illustrative. The French President is elected on a nationwide popular vote of the sort that the NPVC seeks to introduce in the U.S. In the 2002 French election, the Gaullist incumbent, Jacques Chirac, received 19.8% of the vote, while the radical right-wing National Front candidate, Jean-Marie Le Pen, came in second with 16.8% of the vote. A host of other candidates, including that of the Socialist Party, split the remaining votes. Under French law, when the winning candidate receives less than a majority of the popular vote, a run-off election between the top two vote recipients must be held.[88] In the ensuing run-off, Chirac won with 82% of the vote against Le Pen's 18%, demonstrating that the vast majority of French voters (even those who had supported candidates other than Chirac in the first round) did not wish Le Pen to be President. Of course, the requirement of a run-off ensured that Le Pen would not become President of France, but this episode illuminates the danger of allowing a mere plurality vote determine the winner of an election. In a highly

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[85] NPVC, *supra* note 48, at art. III (designating "national popular vote winner" as "the presidential slate with the largest national popular vote total").
[86] *See* text accompanying notes 75-78, *supra*.
[87] *See also* Md. Elec. Law § 8-505(c) (adopting NPVC and directing, when it comes into force, state's presidential electors to vote for candidate who received plurality of national popular vote).
[88] FRENCH CONSTITUTION OF 1958 TIT. II, ART. VII.

fragmented race, a fringe candidate can potentially capture the Presidency with a small plurality of the vote. Indeed, under a plurality voting system, had Le Pen received just 862,000 more votes in the first round, he would have been elected President of France despite the widespread and vehement opposition to him. The idea of an American "Le Pen" winning the White House thanks to the NPVC should give everyone (and especially majoritarians) pause.

Ah, but just as the French run-off election prevented Le Pen from winning the Elysèe Palace, surely the United States could require a run-off election to prevent similarly unpopular candidates from winning the White House, right? Wrong. The NPVC does not require a run-off election when no candidate receives an outright majority of the popular vote in the general election. Indeed, it cannot require one. Federal law specifies only one election for presidential electors.[89] True, Congress could in theory delete that requirement and allow states that wish to conduct a second, run-off election to do so, but conducting a run-off election would be quite costly, both for the state governments that would have to carry it out and for the two candidates who would have to raise money to fund a post-general-election campaign. Indeed, one of the unsung virtues of the current process is that it obviates the need for such costly run-off elections. More importantly, those states that do not join the NPVC – and there could be many of them – could still refuse to participate in the run-off election, making the whole enterprise pointless. In this respect, the NPVC's strength – its ability to become law on the basis of unilateral action by several states – also is its weakness. Signatory states cannot force non-signatory states to adopt any particular form of election process, such as a run-off election when the general election fails to produce a majority winner. As such, the NPVC cannot guarantee that the "national popular vote winner" is in fact the choice of a majority of the American people. To the contrary, it virtually ensures that some Presidents will not be.[90]

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[89] 3 U.S.C. § 1.

[90] As an alternative solution to the plurality presidency problem, Sanford Levinson has proposed that states use a system of ranked voting in which voters rank all of the candidates in order of preference on a single ballot.

Implicitly conceding that the NPVC cannot preclude such plurality presidencies, its supporters instead respond that such presidencies are unlikely to happen in the U.S.[91] That confidence, however, is gravely misplaced. Even under the current, Electoral College system, plurality Presidencies are somewhat common. In 17 of the 56 presidential elections that have taken place – more than 30% of the time – the candidate who won the White House received only a plurality of the popular vote.[92] Critically, however, the current system actually discourages plurality presidencies (and places a floor on the level of support that, in practice, a plurality President can possess and still win the White House) by making the presidential contest a two candidate affair. Specifically, the winner-take-all, "unit" rule, according to which the winner of the statewide vote receives all of that state's presidential electors discourages third party or independent candidacies.[93] Third-party or independent candidates can rarely muster sufficient support to win one state, let alone a sufficient number of states to capture the Presidency, which depresses support for those candidates.[94] In 1992, for example, Ross Perot received 18.9% of the votes nationwide, but he did not receive a plurality of the vote in any state, which meant

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Levinson, *supra* note 44, at 222. In this balloting system, when no candidate receives an outright majority, the candidate with the lowest number of votes is eliminated and the ballots that listed that candidate first are retallied to identify those voters' second preference. This process continues until one of the remaining candidates receives a majority. Ranked voting, however, could confuse voters, who might not understand the ballot or what was being asked of them. Rainey & Rainey, *supra* note 96, at 186. The notorious "butterfly" ballot fiasco in Florida in 2000, in which many voters in Palm Beach erroneously voted for Pat Buchanan because they could not understand the design of the ballot, comes to mind. Moreover, even if the NPVC required signatory states to use ranked-order ballots – which it doesn't – non-signatory states could simply refuse to use such ballots, thereby again precluding the determination of which candidate had the support of a national majority.

[91] KOZA, *supra* note 8, at 404-05.

[92] *See* text accompanying note 74, *supra*.

[93] Ann Althouse, Electoral College Reform: Déjà Vu, 95 NW. L. REV. 993, 1005 (2001); Josephson & Ross, *supra* note 19, at 189. In fact, both national major political parties capitalize on this feature of the current system and seek to depress support for other candidates by stressing that a vote for a minor-party or independent candidate is a "wasted" vote.

[94] In the 20th Century, the only minor-party or independent candidates to receive a substantial number of electors were Theodore Roosevelt in 1912, Strom Thurmond in 1948, and George Wallace in 1968. In the 1912 election, former Republican President Roosevelt challenged the incumbent Republican President Howard Taft for the Republican nomination, and, after failing in that mission, he formed a separate party that split the Republican electorate in the general election. *See* Norman R. Williams, Revisiting Pacific Telephone, 87 OR. L. REV. 979, 1016-17 (2009). Roosevelt nevertheless captured six states. Meanwhile, Thurmond and Wallace both ran regional (and racially tinged) campaigns that drew support in the South but nowhere else. In 1968, Wallace received 46 electoral votes by winning five southern states (Arkansas, Louisiana, Mississippi, Alabama, and Georgia). In 1948, Thurmond received 39 electoral votes by winning four southern states (Alabama, Louisiana, Mississippi, and South Carolina).

that he received no electors. By disfavoring third-party and independent candidacies in this way, the current system makes the Presidential race essentially a two-party contest. As a result, in a race dominated by the two, major-party candidates, the winning candidate typically receives a majority of the popular vote or close thereto. Since the Civil War, no President has been elected with less than 40% of the popular vote.[95]

In transforming the state-by-state, winner-take-all voting system, the NPVC would eliminate this bias against third-party or independent candidates, thereby producing more "plurality" Presidents with lower levels of popular support than previously experienced. A vote for a minor party or independent candidate would no longer necessarily be meaningless if that candidate had widespread support throughout the country. Indeed, minor party or independent candidates would undoubtedly campaign on the basis that all they need do is receive a plurality of the national vote, not a majority of the national vote nor even a plurality in a number of states, to win the Presidency. Moreover, as minor party and independent candidates proliferated and received ever more support, the percentage support for the candidates of the two major parties would correspondingly decline, which would in turn further encourage minor party and independent candidates (because the threshold for winning a plurality would correspondingly decrease). As a result, a minor-party or independent candidate might win the White House but lack the popular legitimacy and support necessary to govern the nation.[96]

While supporters of the NPVC doubt the likelihood of such plurality Presidencies, the experience of other nations with voting systems similar to that established by the NPVC confirms that elections of plurality Presidents with the support of ever smaller political minorities will take place. Among those

[95] Woodrow Wilson received the lowest vote margin for a prevailing candidate in 1912 with 41.8%. In fact, that election witnessed the last strong, nationwide third party candidacy for the Presidency – that of former President Theodore Roosevelt who ran on the Progressive or "Bull Moose" party ticket – which split Republican support.
[96] Glenn W. Rainey & Jane G. Rainey, "The Electoral College: Political Advantage, the Small States, and Implications for Reform," *in* COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA 170, 186 (Robert P. Watson ed., 2004).

major, industrialized democracies that elect their President according to a popular vote,[97] most countries require either a run-off election if no candidate receives a majority of the popular vote in the first election (such as Brazil, France, and Indonesia)[98] or set some minimum threshold of plurality support that a candidate must secure in order to avoid a run-off election (such as Argentina).[99] Of the so-called "G20" group of industrialized countries, only Mexico, Russia, and South Korea elect their presidents according to a direct popular vote in which a mere plurality of the popular vote is sufficient.[100] That so few countries elect their presidents based on a mere plurality shows that the fear of plurality presidencies is a genuine and widely shared one.

More importantly, the actual experience of those few nations that do permit plurality presidencies should give pause to even the most ardent majoritarian. For much of their recent histories, Mexico, Russia, and South Korea have been one-party states in which one political party effectively controlled the political system and ensured its candidate won the Presidency with a substantial majority of the vote. Russia continues to be such a state.[101] Since the restoration of democracy and development of a multi-party political system in South Korea and Mexico, though, those two countries have witnessed the election of numerous plurality presidencies. In South Korea, since the end of the military dictatorship in the early 1980s, no President has ever been elected with a majority of the vote. The current President, Lee Myung-bak, was elected in 2007 with 48.7% of the vote, and his predecessor, Roh Moo-hyun, was elected in 2002 with 48.9%. Yet, in 1997, Kim Dae-jung, was elected with only 40.3%; in 1992, Kim Young Sam, was elected with only 42%; and, in 1987, Roh Tae-woo was elected with only 36.6% of the popular vote. Mexico has fared even worse. The current President, Felipe Calderon,

[97] Of the so-called "G20" countries, many are parliamentary democracies in which the head of government is selected by the national legislature. *See, e.g.*, CONST. OF SOUTH AFRICA art. 86, § 1. There are also several non-democratic nations among the G20. See CONST. OF THE PEOPLE'S REPUBLIC OF CHINA art. 62(4) (providing that the President is selected by National People's Congress, which is not elected).
[98] CONST. OF BRAZIL art. 77, para. 3; CONST OF FRANCE OF 1958 art. 7; CONST. OF INDONESIA art. 6A (3), (4).
[99] CONST. OF ARGENTINA, art. 94-98 (specifying that a candidate who wins 45% of the vote or at least 40% of the vote with a 10% margin of victory shall become President; otherwise, a second, run-off election must be held).
[100] CONST. OF MEXICO, art. 81; CONST. OF THE RUSSIAN FEDERATION art. 81; CONST OF REP. OF SOUTH KOREA art. 67.
[101] In the 2008 Russian presidential election, for example, Dmitri Medvedev won with over 70% of the vote.

was elected in 2006 with only 36% of the vote, and his predecessor, Vicente Fox, was elected in 2000 with only 42%. In short, in both South Korea and Mexico, no President has ever been elected with a majority, and, in both countries, there have been presidents elected with as little as 36% -- a little more than a third – of the vote.

In short, the NPVC will undoubtedly produce more Presidents elected with less than a majority of the vote (and some with significantly less than majority support) than the current system. Whatever might be said of the current system with its bias in favor of the two-major parties, it effectively precludes fringe candidates, such as a Le Pen, from making serious runs for, let alone winning, the Presidency. For that reason, even opponents of the Electoral College, such as Sanford Levinson, view the NPVC's endorsement of plurality Presidents as a significant flaw.[102]

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In sum, the Electoral College deviates from a purely population-based apportionment of political power among the states, but that deviation is the byproduct of the admirable desire to blend both majoritarianism and federalism in the presidential election process. In a federal union, like the United States, sectional Presidents are a constitutional and political danger, and, therefore, the electoral system should prevent candidates (as the current Electoral College system does) from winning the White House by merely racking up huge support in a few states in one or two areas of the country.

Moreover, even for those strict majoritarians who reject the role of federalism in the presidential election process, the NPVC represents a normatively undesirable change. The NPVC would replace the current electoral system that produces Presidents whose support is both substantial and geographically spread across the nation with an electoral system that would produce Presidents whose support is both insubstantial and geographically limited. That is not reform – it is a recipe for disaster.

III. OBSTRUCTING THE NATIONAL POPULAR VOTE

[102] Levinson, *supra* note 44, at 225; Brandon H. Robb, Making the Electoral College Work Today, 54 LOY. L. REV. 419, 460 (2008).

For the foregoing reasons, one should be deeply skeptical of the desirability of, if not outright opposed to, moving to a purely majoritarian, first-past-the-post presidential election system, but, even if that were the best of all possible presidential election systems, a subconstitutional, interstate compact is the wrong way to bring it out. The National Popular Vote Compact goes into effect once states comprising a majority of the Electoral College sign on to the compact. At that point, the success of the NPVC depends on two, crucial events: (1) every state in the union continues to conduct a popular election for President from which the national popular vote winner can quickly and easily be determined; and (2) every signatory state honors its commitment to appoint as electors those individuals pledged to the national popular vote winner. As this part shows, states can fatally obstruct the NPVC at precisely those points. As subpart A shows, states that never sign on to the NPVC may seek to obstruct the determination of the national popular vote winner. As subpart B shows, even signatory states may opt to withdraw from the compact immediately prior to or, worse, immediately after the presidential election.

A. Obstruction by Non-Signatory States.

The fundamental linchpin on which the NPVC hangs is the existence of a "national popular vote winner" selected by the citizens in the fifty states and District of Columbia. That feature of the NPVC raises the troubling question of what happens if one or more non-signatory states decide to eliminate their statewide popular elections for President and return to appointment of their Presidential electors by the legislature or some other manner that does not involve a statewide popular election. As even supporters of the NPVC concede, such a move is not entirely implausible.[103] After all, there is no legal obligation for all fifty states to continue to use popular elections to select their presidential electors. In fact, in the first few decades of the nation's history, many states selected their electors by legislative appointment.

[103] *See* Adam Schleifer, Interstate Agreement for Electoral Reform, 40 AKRON L. REV. 717, 727 (2007).

The NPVC addresses this problem, though in a way that is, quite frankly, astounding. The NPVC specifies that the chief election official of each member state shall determine the national popular vote winner by adding all the votes from states "in which votes have been cast in a statewide popular election."[104] The unstated but clear implication is that signatory states are free – indeed, commanded by the NPVC – to ignore non-signatory states that refuse to conduct a statewide popular election for President. That's an effective way to avoid non-signatory states from blocking the NPVC, but it does so in a way that is fundamentally inconsistent with the political theory on which the NPVC is ostensibly based. If there has been no nationwide popular vote, by definition there can be no national popular vote winner among the candidates. Moreover, for the NPVC to declare by legislative fiat that the winner of a 40- or 45-state contest is the "national popular vote winner" makes a mockery of that term and would raise serious questions about the democratic provenance of the declared victor.

To illustrate, suppose, for example, that the NPVC had gone into effect in 2008 but that the ten most populous states had refused to join the NPVC and repealed their system of popular elections for the Presidency. The NPVC would still have gone into effect in the 40 least-populous states, which comprise a bare majority of the electoral college and which, in this scenario, would have been the only states conducting a popular election for President. In the 2008 Presidential election, 131 million votes were cast nationwide, but, the ten most populous states cast over 68 million (over 51%) of the votes.[105] The remaining 40 states cast 63 million votes collectively. It would surely be strange to declare the winner of an election involving little more than one fifth of the nation's population – an election that could be won with little more than 10% of the population – to be the "national" popular vote winner and therefore President. A President who wins an election conducted in only 40 states comprising less than half of the nation's population is no more the choice of the American people than a President who

[104] NPVC, *supra* note 48, at art. III.

[105] FEDERAL ELECTION COMMISSION, 2008 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS 3 (Jan. 22, 2009) (available at http://www.fec.gov/pubrec/fe2008/2008presgeresults.pdf).

wins an election held in only ten states or one. To be sure, this scenario is an extreme one, but the principle remains the same – the refusal of even one small state to hold an election potentially jeopardizes the NPVC's ability to declare as President the winner of the vote in the remaining states.

Indeed, the NPVC's willingness to anoint a "national popular vote winner" in the absence of an actual national vote potentially undermines its raison d'être – to prevent electoral "misfires." It is not hard to imagine situations in which the candidate who would win a 40-state, 45-state, or even 49-state contest would lose a full 50-state election. Several past, close presidential elections would have come out differently under the NPVC if certain states had failed to conduct a statewide popular election and selected their electors through some other mechanism. For example, in 1960, Richard Nixon would have beaten John Kennedy in the "national" popular vote if any *one* of a handful of pro-Kennedy states (such as Georgia, Louisiana, New York, or Pennsylvania) had failed to participate in the election.[106] In 1968, Hubert Humphrey would have beaten Richard Nixon if just a couple of the pro-Nixon states (such as Florida, Indiana, Nebraska, or Oklahoma, just to name a few) had failed to participate in the election.[107] On the other hand, the 2000 Presidential election – the election "misfire" that prompted the NPVC – would have come out the same way if any one of a handful of pro-Gore states (such as California, New York, Illinois, or Massachusetts) had refused to participate in the election.[108] So much for the NPVC necessarily preventing "misfires."

The proponents of the NPVC understandably do not wish to allow one or more non-signatory states to block their reform, but that instinct cannot justify twisting the definition of what constitutes a "national popular vote winner" to mean something other than what it purports to mean. The

[106] Kennedy won the nationwide vote by less than 115,000 votes. His margin of victory was greater than that the identified states. *See* http://psephos.adam-carr.net/countries/u/usa/pres/1960.txt.

[107] Nixon won the nationwide vote by slightly over 511,000 votes. His margin of victory in just the identified states alone ranged from 223,000 in California to 148,000 in Oklahoma. *See* http://uselectionatlas.org/RESULTS/data.php?year=1968&datatype=national&def=1&f=0&off=0&elect=0.

[108] FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 2000 (available at http://www.fec.gov/pubrec/fe2000/cover.htm). Incidentally, had the 2008 election been conducted in only the 40 least populous states, Barack Obama would have still beaten John McCain in the popular vote but his winning vote margin would have been reduced from ten million to approximately two million.

underlying foundation of the NPVC is that the current Electoral College system is fatally flawed because it does not treat all Americans as political equals. To replace the Electoral College system with its modest malapportionment with a system that both contemplates and countenances the disenfranchisement of entire states is hardly a move forward for democracy and political equality. Perhaps a recalcitrant non-signatory state's refusal to conduct an election would be anti-democratic, but that does not justify adopting a system that is even more anti-democratic.

Less dramatically but more likely, non-signatory states could continue to hold popular elections for President but block the determination of the national popular vote winner. Troublingly for supporters of the NPVC, such obstruction could take many forms. For example, non-signatory states could stop tabulating their own state's ballots after one of the candidates obtained an unsurpassable lead in the counted ballots in that state. For example, suppose that, in a strongly Republican state such as Utah or Texas, it is determined that the Republican candidate has received a majority of all ballots cast after only 75% of the state's ballots have been opened and counted.[109] At that point, the state can honestly declare the Republican candidate the statewide victor even though not all ballots have been counted. Nothing in federal law or the NPVC prevents such partial tabulations, which could, in a close national race, preclude determining which candidate won the national popular vote.

Even worse, such states could (and likely would) use such partial tabulations for partisan ends. A Republican-dominated, non-signatory state could tabulate only those ballots in known Republican districts until the statewide vote produced an insurmountable lead for the Republican candidate. In that scenario, neither the Democratic Presidential candidate nor, for that matter, the rest of the country would know exactly how many votes the Democrat received in the untabulated ballots. In a close national race, such untabulated ballots, of course, could be determinative of whether the Democratic or Republican presidential candidate is the national popular vote winner. And, here's the rub: other states

[109] For example, in the 2000 election, favorite son George W. Bush received 59% of the vote in Texas compared to 38% for John Kerry. *Id.*

would still be obligated to count this partial, partisanized tabulation because the NPVC requires that other states include the vote counts from every state that conducts a statewide election, not just those that count every ballot.

Alternatively, non-signatory states could refuse to publicly announce their states' vote totals prior to the Electoral College vote in mid-December. Although the NPVC requires signatory states to announce their vote totals at least six days before the Electoral College votes so that the national popular vote winner can be determined, the NPVC obviously does not and cannot command non-signatory states to do likewise. Moreover, there is no obligation under federal law for states to announce or communicate to other states their state vote totals prior to the meeting of the Electoral College.[110] Even a supporter of the NPVC, Robert Bennett, concedes (in something of an understatement) that such action would create "difficulty" for signatory states.[111]

Instead, the NPVC's supporters discount the likelihood of such obstruction, pointing to the federal Electoral Count Act. One section of that act, 3 U.S.C. § 5, provides that states that appoint their electors pursuant to a law adopted prior to Election Day and that resolve disputes regarding the appointment of their electors more than six days prior to the meeting of the Electoral College are entitled to have Congress treat their decision as "conclusive."[112] The NPVC's supporters contend that, in order to make use of this "safe harbor" provision, non-signatory states will necessarily have to make

[110] The NPVC's proponents point to 3 U.S.C. § 6, which requires each state to mail a "certificate of ascertainment" to the Archivist of the United States listing the electors and any state popular vote totals "as soon as practicable." KOZA, *supra* note 8, at 453. The Archivist, in turn, must treat all such certificates as public records and make them available for inspection at the Archivist's office, *id.*, which would offer signatory states the opportunity to learn the popular vote totals in the recalcitrant, non-signatory states. Significantly, however, there is nothing to prevent non-signatory states from mailing the certificate so late that it will not arrive at the Archivist's office until after the Electoral College votes, thereby precluding the determination of the national popular vote winner in time for the College's election.

[111] Bennett, *supra* note 8, at 148.

[112] 3 U.S.C. § 5.

their vote totals public in time for any judicial contest to be resolved in early December and that, at that point, the signatory states will know every state's vote totals.[113]

As an initial matter, the NPVC supporters over read the safe-harbor provision. The ECA does not require the vote totals be made public for the state to avail itself of the safe harbor, only that any judicial disputes be resolved six days prior to the Electoral College balloting. Significantly, states could comply with that requirement without making their actual vote totals public, such as by releasing the vote totals only to the candidates on the condition that the totals are kept confidential until after the Electoral College meets. Such selective release would allow the losing candidate to pursue a judicial election contest, which itself could be kept closed to the public to ensure the vote total's confidentiality, but it would frustrate the NPVC by keeping other states from knowing the official vote tally. And, even if the numbers leaked, such unofficial revelation of the numbers would not suffice even under the express terms of the NPVC. The NPVC provides that members states can treat as conclusive only "an official statement containing the number of popular votes." Of course, some signatory states could ignore that requirement and calculate the national popular vote winner based on the leaked numbers, but imagine the litigation (and constitutional crisis) if the certified vote count from the non-signatory state announced after the Electoral College met differed from the leaked number to such an extent as to swing the national vote to the other candidate. Even worse, imagine the chaos if different signatory states credited different, unofficial tabulations in the non-signatory states, such that the signatory states could not agree who is the "national popular vote winner."

More importantly, even if the safe harbor provision effectively requires a state to make its vote totals public a week before the Electoral College meet, a state could simply choose to forego the benefit of the safe harbor provision and keep its vote total secret until after the Electoral College vote. The only

[113] Rami Fakhouri, The Most Dangerous Blot in our Constitution: Retiring the Flawed Electoral College "Contigent Procedure," 104 NW. L. REV. 705, 725 (2010). *See also* ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 53-54 (2006).

price would be that the state would not be guaranteed that Congress would treat its electors' votes as valid, but, unless the statewide popular vote in the non-signatory state was close or there was some other flaw in the appointment of its electors, Congress would have no ground for disqualifying that state's electors. Merely eschewing the safe harbor provision is not grounds itself for refusing to count a state's electors.[114] Thus, foregoing the safe harbor provision would not impose any cost and would therefore be a small price to pay for some non-signatory states wishing to block the NPVC.

To be sure, refusing to conduct a statewide election, conducting only a partial tabulation, or concealing the vote totals until mid-December, right before the meeting of the Electoral College, might strike many as an unneighborly response by non-signatory states. The NPVC's proponents dismiss such a response as unlikely because, in their view, the public in the obstructing states would never stand for such electoral shenanigans.[115] Yet, the NPVC seeks to fundamentally alter the method in which the nation selects the President, and therefore it seems naïve to believe that non-signatory states will simply acquiesce in this transformative change in our constitutional structure without doing all in their power to prevent its operation. Indeed, history suggests otherwise. In the early nineteenth century, states switched from district to at-large elections for their presidential electors because they feared that adhering to the district system left them at a comparative disadvantage vis-à-vis states that switched to the at-large election process, which maximized the state's electoral influence. This same desire to preserve their own electoral influence will surely encourage those states that benefit from the current system – the large swing states that receive great attention from the presidential candidates, for example – to do their utmost to forestall the NPVC's operation.

More importantly, whether non-signatory states are likely to respond in the foregoing ways and whether they are being reasonable in doing so are beside the point. The key consideration is that the

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[114] In 1961, for example, Congress counted the votes from the duly-appointed electors from Hawaii, even though their appointment was not confirmed by the state court until after the safe harbor time period had elapsed. Josephson & Ross, *supra* note 19, at 166.

[115] KOZA, *supra* note 8, at 453; Fakouri, *supra* note 113, at 725.

NPVC has not and cannot overcome these obstructive actions by non-signatory states if and when they do take place. As such, in a close national election, it would take only one state refusing to conduct an election, conducting a partial tabulation, or failing to release its vote totals to trigger a profound constitutional crisis and whirlwind of litigation.

B. Obstruction by Withdrawing States.

The NPVC will inevitably require some states to appoint electors pledged to the candidate who lost those states' popular vote. In some of those states, there will be enormous political pressure placed on the state legislature to pull out of the NPVC and appoint electors to the candidate who won the statewide poll. Had the NPVC been in force in Massachusetts in 2004, for example, Massachusetts would have been forced to appoint electors committed to George W. Bush, even though native son John Kerry won the state's popular vote by over 25 percentage points – a prospect that would surely trouble that state's heavily Democratic legislature. Indeed, in every state where the state legislature is controlled by the party of the national popular vote loser, there will be calls by disaffected constituents to withdraw from the NPVC. While that may appear to be sour grapes, such after-the-fact partisan machinations do happen. In Oregon in 1876, for example, the Republican Hayes won a resounding victory, but the Democratic Governor LaFayette Grover disqualified one of the Republican electors and appointed a Democratic replacement.[116]

In fairness, the NPVC foresees this problem and attempts to address it by forbidding states from withdrawing from the compact after July 20th in a presidential election year.[117] States that are signatories as of July 20th are mandated by the NPVC to adhere to the compact and its rules for

[116] The Electoral Commission authorized by Congress ultimately rejected Governor Grover's action, helping produce a bare electoral vote majority for the Republican Hayes.
[117] NPVC, *supra* note 48, at art. IV.

appointing electors.[118] Depending on whether Congress ratifies the NPVC, however, that provision is either toothless or fraught with difficulties.

1. In the Absence of Congressional Consent.

Article I, Section 10 of the U.S. Constitution requires Congress to consent to any interstate compact before it can go into operation.[119] Let's suppose Congress does not consent to the compact, as its supporters urge is unnecessary despite the seemingly categorical command of the Compact Clause.[120] In that case, the compact does not acquire the force of federal law, as congressionally-endorsed compacts do,[121] and therefore, it remains merely the law of the state.[122] Its status as state law, however, makes it no different from any other statute enacted by the state legislature. And, like any other state statute, a subsequent legislature can amend or repeal the NPVC consistent with the state's own constitutionally-prescribed legislative process.[123] A prior legislature may not bind subsequent legislatures through subconstitutional measures, such as statutes or congressionally-unratified interstate compacts.

In response, the NPVC's supporters invoke the Contracts Clause of the U.S. Constitution, which forbids states from "impairing the obligations of contracts."[124] In their view, the Contracts Clause forbids a state from withdrawing from the NPVC except as permitted by the NPVC itself.[125] Strikingly, however, the federal courts have never held that the Contracts Clause applies to unratified interstate

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[118] *Id.* at art. III.
[119] U.S. CONST. ART. I, § 10.
[120] KOZA, *supra* note 8, at 439; Schleifer, *supra* note 103, at 471. *See also* Tushnet, *supra* note 13, at 1500 n.5 (proclaiming himself "skeptical" that NPVC requires congressional consent).
[121] New York v. Hill, 538 U.S. 110, 111 (2000); Cuyler v. Adams, 449 U.S. 433, 438, 440 (1981).
[122] Washington Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982).
[123] *Cf.* West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 33-34 (1951) (Reed, J, concurring) (arguing that state constitution provides no authority to state to avoid obligation under interstate compact to which Congress has consented).
[124] KOZA, *supra* note 8, at 424.
[125] *Id.*

agreements, let alone ordered a state that withdrew from an interstate agreement lacking Congress's approval to adhere to its terms after the fact.[126]

To be sure, the Supreme Court has never squarely addressed the issue whether the Contracts Clause applies to interstate agreements, but the Court has signaled that states retain the freedom to withdraw from interstate compacts to which Congress has not consented. In *United States Steel Corp. v. Multistate Tax Commission*,[127] the Court upheld the Multistate Tax Compact, even though Congress had not ratified it. Significantly, among the reasons identified by the Court for why Congress's consent was not constitutionally necessary was the fact that signatory states could withdraw from the compact at any time.[128] That implicitly suggests that, as a federal constitutional matter, states are free to withdraw from interstate agreements to which Congress has not consented. Stated differently, the price of foregoing congressional consent is, if not the invalidity of the compact itself, at least the right of member states to withdraw at will.

Moreover, to hold that the Contracts Clause applies to unratified interstate agreements would be a novel and constitutionally dubious expansion of the scope of the Contracts Clause. The Contracts Clause was adopted by the Framers to address the problem posed by state interference with private contracts, particularly those between creditors and debtors. Although the Clause has been read to

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[126] The three interstate agreements to which the NPVC supporters point were all ratified by Congress. *See* C.T. Hellmuth & Assoc., Inc. v. Washington Metro. Area Trans. Auth., 414 F.Supp. 408, 409 (D. Md. 1976); Aveline v. Pennsylvania Bd. of Prob. & Parole, 729 A.2d 1254, 1258 (Pa. Com. Pl. 1999); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 277 (1959)); *see also* KOZA, *supra* note 8, at 425-26 (relying on these three decisions). Moreover, in none of the three was the issue of the Contract Clause's applicability to states withdrawing from interstate compact even remotely presented. *C.T. Hellmuth* addressed whether the Maryland public information act applied to a congressionally approved interstate compact, not whether Maryland could withdraw from the compact. 414 F.Supp. at 409. *Aveline* addressed whether the state parole board had discretion to deny residence to an out-of-state parolee. 729 A.2d at 1256-57. And, *Petty* addressed whether the terms of the interstate compact waived the sovereign immunity of the agency created by the compact. In fact, the pertinent quote upon which the NPVC supporters rely – that "a compact is a contract" – comes not from the Court's opinion but from Justice Frankfurter's dissent, and even then Justice Frankfurter meant only that compacts should be interpreted like contracts, not that the Contract Clause applied to them, let alone prohibited states from withdrawing from unratified compacts. *See* 359 U.S. at 285 (Frankfurter, J., dissenting).

[127] 434 U.S. 452 (1978).

[128] *Id.* (noting that states could unilaterally withdraw from compact to which Congress had not consented).

protect contracts other than those involving private debts,[129] interstate agreements among the states, particularly one appertaining to the election of the President, fall far outside the range of agreements with which the Framers were concerned. Like state constitutions, which the Court has ruled do not constitute a constitutionally enforceable contract between the state government and its citizens,[130] interstate agreements are typically political, not commercial, instruments.[131] That is certainly the case with respect to the NPVC.

Moreover, as a functional matter, endowing unratified interstate agreements with constitutional protection under the Contracts Clause would conflict with the Compact Clause, which delegates to Congress the exclusive authority to review interstate agreements. There would be little point in having Congress review interstate agreements if the Constitution required the federal courts to enforce those agreements to which Congress had refused its assent. Indeed, judicial enforcement of an interstate agreement, which would necessarily depend on a finding that the agreement was valid, would be a slap in the face to Congress, whose refusal to ratify the agreement signified its contrary view of the agreement's validity. Hence, as a matter of interbranch comity, it would be far better to read the Contract Clause's applicability to interstate agreements as coterminous with the Compact Clause: only those interstate agreements to which Congress has consented are protected by the Contract Clause, while those interstate agreements to which Congress has not consented are not protected by the Contract Clause.

Finally, whatever one thinks about the merits of the Contract Clause, it surely counts against the desirability of the NPVC that it necessarily relies on lawsuits raising novel constitutional points. The

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[129] Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) (applying Contract Clause to law regulating natural gas contracts). Equally, it has also been construed to permit substantial state interference with contracts. Home Building & Loan Ass'n v. Blaisdell, 298 U.S. 398 (1934) (upholding state mortgage foreclosure moratorium). Hence, even if the NPVC did fall within the scope of the Contracts Clause, it is uncertain whether withdrawal from the NPVC would constitute impermissible state action. *Id.*

[130] Church v. Kelsey, 121 U.S. 282, 283-84 (1887).

[131] To be sure, a congressionally approved interstate compact is enforceable against a state that violates its terms, but not because of the Contracts Clause but rather because of the Supremacy Clause: Congress's consent transforms the agreement into federal law, which supersedes any inconsistent state law.

litigation that would be necessary to establish that the Contract Clause forbids states from withdrawing from the NPVC in an untimely fashion could arise only in the context of a state having withdrawn from the compact on the eve of or shortly after the Presidential election. A lawsuit at any other time would be either unripe or moot. Moreover, such a lawsuit would likely take place only when the withdrawing state's action was critical to the outcome of the election, as there would be little incentive for anyone to go to the expense of suing the state if its actions were inconsequential. Thus, the necessary lawsuit would likely be filed right before or immediately following the general election, and it would involve a state whose action was critical to the election's outcome. In short, it would be another *Bush v. Gore*, albeit one dressed in Contracts Clause rather than Equal Protection garb. And, whatever one may think of the merits of *Bush v. Gore*, it is surely better for the stability of the republic if the Supreme Court does not again decide the outcome of the Presidential election.

2. With Congressional Consent.

Even if Congress does consent to the compact, it is not clear that the NPVC is valid and enforceable against a state that decides to withdraw from it after July 20th in a presidential election year. Article II of the U.S. Constitution entrusts the method of appointment of the presidential electors to the state legislature. For some, that federal constitutional delegation of authority must be read literally, meaning that the state legislature's power cannot be circumscribed to any extent or in any manner. In *McPherson v. Blacker*,[132] the paradigmatic U.S. Supreme Court decision involving the state legislature's power to select the manner of appointing presidential electors, the Supreme Court upheld the Michigan legislature's decision to change its system for selecting presidential electors. As the Court viewed it, the state legislature's power was "plenary." Emphasizing that point, the Court endorsed a U.S. Senate report that declared that "there is no doubt of the right of the legislature to resume the

[132] 146 U.S. 1 (1892).

power [of appointment] at any time, for it can neither be taken away nor abdicated."[133] More recently, in *Bush v. Gore*, three Justices viewed *McPherson* as establishing that Article II's delegation of power to the state legislatures cannot be circumscribed even by the state constitution.[134]

Read in this strict sense, Article II would divest Congress of the power to impose federal legislative restrictions on the state legislatures, for if the constitutional delegation to the state legislature is exclusive, neither Congress nor the state constitution nor a prior state legislature can interfere with the current state legislature's appointment authority. Hence, on this view, even a congressionally ratified interstate compact cannot limit the state legislature's Article II power to appoint electors in the manner it so chooses, regardless of when the legislature exercises that power.

Again, this expansive reading of *McPherson* is not free from doubt, but the important point is that it is not so absurd that states will refrain from invoking it in defense of their untimely withdrawals from the NPVC. Hence, even if Congress ratifies the NPVC, that alone may not deter states from withdrawing from the NPVC after July 20th. And, again, the ensuing litigation to decide whether the states' expansive reading of Article II is the correct one would likely arise in the midst of a disputed Presidential election, plunging the nation into another round of Supreme Court litigation.

3. Remedy.

Finally, even if the NPVC legally precludes state legislatures from withdrawing from the NPVC after July 20th, it is far from clear that there is a workable remedy when states do withdraw after the deadline. Suppose, for example, that a state legislature repeals the NPVC on the eve of the election and specifies instead that the winner of the statewide vote shall receive that state's slate of electors. Would a court issue an injunction directing the state's chief election officer to certify a different slate of electors than that mandated under state law? There is more than bit of skepticism among constitutional commentators that courts would actually intervene and enjoin the state to comply with

[133] *Id.* at 35.
[134] 531 U.S. at 114 (Rehnquist, C.J., concurring).

the NPVC.[135] Even if a court were inclined to intervene, would it do so if the state's electors have already been appointed and received the federally-mandated certificate of ascertainment? At that point, even if the state elections official complied with the court order – itself a questionable proposition[136] – the court's action would produce two competing sets of electors. Perhaps in theory the court could "disqualify" one set, but that eventuality is not free from doubt – the Constitution entrusts to Congress the responsibility to count the electors' votes, a responsibility that both entails the power to judge the qualifications of the electors and arguably renders non-justiciable any demand that a court disqualify a particular slate of electors.[137]

Matters become only more complicated if the withdrawal of one state reduces the number of electors controlled by the bloc of signatory states below the 270-elector threshold set by the NPVC for its operational validity, thereby prompting other states to withdraw from the compact. Under the terms of the NPVC, all the other signatory states would still be obligated to conform to the NPVC, but it is not hard to imagine other states defending their withdrawal on the ground that the original state's withdrawal rendered the NPVC ineffective as a practical matter. Divergent judicial decisions (one court ordering Withdrawing State A to comply with the NPVC, another court allowing Withdrawing State B to go its own way) would only serve to deepen the resulting constitutional crisis, particularly if the election outcome hinged on the actions of these withdrawing states. To be sure, the U.S. Supreme Court could ultimately produce a uniform binding resolution, but, again, American democracy is better off if the Supreme Court does not pick the winner of the Presidential election.

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[135] *See* Smith, *supra* note 182, at 215 (questioning whether federal court would stop state from withdrawing from NPVC).

[136] One can easily imagine a Secretary of State from the same party as the statewide winner defiantly refusing to comply with such an order, proclaiming instead his or her willingness to "protect the rights of the voters of this state." Though risking being held in contempt of court, the Secretary could potentially conclude that the long-term political benefits to his or her career outweighed the immediate legal costs.

[137] U.S. CONST. amend. XII. *Cf.* Nixon v. United States, 506 U.S. 224, 233-35 (1993). *But cf.* Bush v. Gore, 531 U.S. 98 (2000) (adjudicating constitutional challenge to counting of *popular*, not electoral, ballots in presidential election).

In the event that the federal courts did not intervene in a sufficiently timely fashion, Congress could resolve the matter, but, depending on whether there are one or two (or more) slates of electors from the withdrawing state, Congress's choices are both limited and unappealing. Suppose that there are two slates of electors appointed by the withdrawing state, one pledged to the statewide winner and another pledged in accordance with the NPVC to the national popular vote winner. Perhaps Congress would enforce the NPVC and count the votes of the electors from the slate pledged to the national popular vote winner, but there is no guarantee that it would do so. In fact, if the legislature withdrew from the NPVC after July 20th but still prior to the election, the safe harbor provision of 3 U.S.C. § 5 *requires* Congress to count the votes of the "statewide" electors since those electors were appointed in accordance with the terms of the safe-harbor provision. What action Congress ultimately takes, of course, is likely to depend less on the merits of the particular legal arguments and more on the partisan affiliations of the Representatives and Senators and their views regarding how their decision will impact the election outcome.[138]

On the other hand, suppose that there is only one slate of electors from the withdrawing state, who are pledged to and voted for the statewide winner. After all, there is no guarantee that state officials will act contrary to extant state law and certify a competing slate of electors pledged to the national popular vote winner (or that a court will require them to do so). In this scenario, Congress has only one option: either count the electors' votes or don't, the latter of which "enforces" the NPVC in the sense of depriving the state of the benefit of its untimely withdrawal. Significantly, Congress cannot appoint electors pledged to the national popular vote winner on the state's behalf or require the state to do so. Yet, refusing to count the state's electors effectively disenfranchises that state. Viewed from the standpoint of democratic theory, the cure (statewide disenfranchisement) is worse than the disease

[138] If the safe harbor provision of Section 5 is inapplicable and if the two chambers then disagree as to which electors are the lawful ones, the Electoral Vote Count Act specifies that the electors certified by the executive of the state shall be counted, which (depending on the particular circumstances) may be the statewide or national popular vote winner. 3 U.S.C. § 15.

(untimely withdrawal from the NPVC). Moreover, because both Article II and the Twelfth Amendment require an absolute majority of the entire Electoral College, not just a majority of the states whose electors are accepted by Congress as qualified to vote, the disqualification of the state's electors could potentially produce a situation in which no candidate has the requisite Electoral College majority, thereby sending the election to the House of Representatives where each state receives only one vote – perhaps the worst of all worlds for majoritarians.

Once again, the point here is not that such imbroglios are likely – though no one should overconfidently assume they will not occur – or that Congress cannot sort it out when they do occur – though Congress's decision will almost assuredly be shaped by its partisan composition. Rather, the point is that the NPVC cannot prevent the constitutional crisis and politically polarizing litigation that would assuredly follow a state's untimely withdrawal from the NPVC. As a subconstitutional, state-initiated measure, the NPVC simply cannot ensure that either signatory or non-signatory states abide by its requirements.

IV. THE MYTH OF THE NATIONAL ELECTION.

Even if non-signatory states helpfully go along with the NPVC or, more optimistically, even if all states join the compact, the troubles do not end. Perhaps even more disturbing than the ways in which states can obstruct the NPVC's operation are the ways in which the NPVC, if actually implemented, will affect the presidential election system and do so in an adverse manner. Somewhat surprisingly, all of the discussions regarding the NPVC ignore the critical fact that the NPVC relies on a fictional institution – a nationwide popular vote for President. Despite the media-hyped fascination with election night, there has never been a true national election for President, and, critically, the NPVC does not create one. Rather, even after the NPVC goes into effect, there will still be fifty-one separate state elections for President, each with its own qualifications for voting, each with its own voting machinery, and each with its own legal regime regarding the initial tabulation and, if necessary, the recounting of votes. Subpart A

catalogues some of the more significant differences among the states with regard to electoral processes. Subparts B and C then explore the constitutional and philosophical problems that those interstate differences entail.

A. The National Election that Isn't.

The NPVC appeals to many majoritarians and others because it is based on a very simple idea – that one can simply amalgamate votes from all the states, sum them up, and then declare the candidate with the most votes the "national popular vote winner." That simple idea, however, ignores the fact that the Presidential election is not conducted by federal officials operating under a federal electoral statute that lays out uniform processes and procedures for conducting the election. Rather, the Presidential election is conducted by state officials operating under state election laws, each of which differ from the laws of other states in significant ways.

Take suffrage qualifications. As a result of several constitutional amendments, suffrage has been extended to virtually all adults. Virtually all, not all. Forty-eight states prohibit prison inmates from voting, thirty-five states prohibit individuals on parole from voting, and thirty states prohibit individual on probation from voting.[139] Moreover, eleven states deny voting rights to at least some former convicts even after they have fully completed their sentence.[140] As a result, 5.3 million mentally-competent adult citizens are not eligible to vote, many of them for life.[141] The U.S. Supreme Court upheld these felon disenfranchisement statutes in *Richardson v. Ramirez* on the ground that the 14th Amendment contemplates the disenfranchisement of criminals by expressly excusing their

[139] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2010) (available at http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cfd_bs_fdlawsinus.pdf).
[140] *Id.* at 1, 3. The eleven states that disenfranchise at least some ex-felons are Alabama, Arizona, Delaware, Florida, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, and Wyoming. *Id.* at 3; *see also* Simmons v. Galvin, _ F.3d _ (1st Cir. 2009) (upholding Massachusetts' denial of voting rights to currently incarcerated felons).
[141] *Id. See also* Raskin, *supra* note 6, at 688 (decrying disenfranchise of ex-felons for life).

disenfranchisement in apportioning Representatives in Congress.[142] Even so, the fact remains that, in some states, felons and parolees are able to vote for President and in other states they are not.

Similarly, most – but not all – states ban some individuals from voting because of mental incapacity.[143] Even among those states that disqualify voters on this basis, there are significant differences among the laws of the states as to the requisite level of mental illness or incapacity to trigger disenfranchisement. Many states use catch-all, general language, disenfranchising those who have been determined by a court of law to be "incapacitated" or "incompetent" without further defining what that precisely means.[144] Six states ban "idiots" and "insane" persons from voting;[145] three states ban those of "unsound mind;"[146] and, three states prohibit those who are "non compos mentis" from voting.[147] Meanwhile, four states ban those who are "under guardianship" for mental disability or illness from voting,[148] while one state prohibits those "under guardianship" or "insane or not mentally competent" from voting.[149] Complicating matters further, some states provide that the establishment of a guardianship or conservatorship itself presumptively disqualifies a person from voting, while others provide that even confinement in a state mental hospital is not sufficient reason to disqualify a

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[142] 418 U.S. 24, 55-56(1974).

[143] Colorado, Idaho, Illinois, Indiana, Kansas, Michigan, New Hampshire, and Pennsylvania are among the states that do not disenfranchise individuals because of mental incapacity. BAZELON CENTER FOR MENTAL HEALTH LAW, STATE LAWS AFFECTING VOTING RIGHTS OF PEOPLE WITH MENTAL DISABILITIES (Jun. 2008), available at http://www.bazelon.org/LinkClick.aspx?fileticket=1kgFTxMFHZE%3d&tabid=315; Sally Hurme and Paul Applebaum, Defining and Assessing Capacity to Vote, 38 MCGEORGE L. REV. 931, 975-79 (2007) (cataloguing state laws).

[144] ALA. CONST. art. 8, § 177(b); ARIZ. CONST. art. 7, § 2(C); ARK. CONST. amend. 51, § 11(a)(6); CAL. ELEC. CODE § 2208(a); CONN. GEN. STAT. § 9-12(a); DEL. CONST. art. 5, § 2; FLA. CONST. art. 6, § 4(a); GA. CONST. art. 2, § 1; LA. CONST. art. 1, § 10(a); NEV. CONST. art. 2, § 1; N.Y. ELEC. CODE § 5-106(6); N.D. CONST. art. 2, § 2; OKLA. STAT. TIT. 26, § 4-101(2); ORE. CONST. art. 2, § 3; S.C. CODE ANN. § 7-5-120(B)(1); S.D. CONST. art. 7, § 2; TENN. STAT. § 33-3-102(a); TEX. CONST. art. 6, § 1; UTAH CONST. art. 4, § 6; VA. CONST. art. 2, § 1; WASH. CONST. art. 6, § 3; WISC. CONST. art. 3, § 2(4)(B); WYO. CONST. art. 6, § 6.

[145] IOWA CONST. art. 2, § 5; KY. CONST. § 145(3); MISS. CONST. art. 12, § 241; N.J. STAT. ANN. § 19:4-1(1); N.M. CONST. art. 7, § 1; OHIO CONST. art. 5, § 6.

[146] AK. CONST. art. 5, § 2; MONT. CONST. art. 4, § 2; W. VA. CONST. art. 4, § 1.

[147] HI. CONST. art. 2, § 2; NEB. CONST. art. 6, § 2; R.I. CONST. art. 2, § 1. *See also* Hurme and Applebaum, *supra* note 143, at 935.

[148] ME. CONST. art. 2, § 1; MD. CONST. art. 1, § 4; MASS. CONST. amend. art. 3; MO. CONST. art. VII, § 2.

[149] MINN. CONST. art. 7, § 1.

prospective voter.[150] The exact number of individuals disenfranchised by these laws is unknown, but some sense of the scale of the issue can be inferred from the fact that, according to the U.S. Census Bureau, there were over 12 million voting-age adults with a mental disability in 2006.[151] For many of these individuals, whether they are entitled to vote in the presidential election depends critically on their state of residence.

Or take voter registration and ballot systems. Different states use different registration and voting systems, each of which impacts voting behavior and tabulation in different ways. For example, states that allow voters to register and vote on the same day typically have a higher turnout rate than states that require voters to register well in advance of the election.[152] Likewise, mail-in voting, which is used in Oregon, results in a higher voter turn-out rate than election systems in which voters must go to a polling station or request an absentee ballot well in advance of the election.[153] As a result of these differences, voter turnout rates vary significantly from state to state. One recent study of voter participation in the 2010 general election found that voter participation rates varied from a low of 28.2%

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[150] *Compare* CAL. ELEC. CODE §§ 2208, 2209 (disqualifying those under conservatorship) and ME. CONST. art. 2, § 1 (same) *and* MASS. CONST. amend. art. 3 (same) *with* COLO. REV. STAT. 1-2-103(5) (providing that guardianship is not sufficient reason to disqualify ward from voting) *and* HAW. REV. STAT. § 334-61 (same).

[151] U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY, tbl. B18005, available at http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=01000US&-ds_name=ACS_2006_EST_G00_&-_lang=en&-_caller=geoselect&-state=dt&-format=&-mt_name=ACS_2006_EST_G2000_B18005.

[152] Craig Leonard Brians & Bernard Grofman, Election Day Registration's Effect on U.S. Voter Turnout, 82 SOC. SCI. Q. 170, 170 (2001).

[153] In the 2010 general election, nearly 72% of all registered voters in Oregon turned out to vote. *See* OREGON SECRETARY OF STATE, STATISTICAL SUMMARY 2010 GENERAL ELECTION, available at http://www.sos.state.or.us/elections/nov22010/g2010stats.pdf. In contrast, in that same election, only 59.6% of the registered voters in California, which allows any voter to vote by mail but requires that they affirmatively request such ballots prior to the election, actually voted. *See* CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE, NOVEMBER 2, 2010 GENERAL ELECTION 3 (2011), available at http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf. Meanwhile, New York, which substantially restricts voters ability to cast absentee ballots and therefore requires most voters to go to polling stations, experienced a voter turnout of 40%. *See* Sam Roberts, New York State's Voter Turnout this Year was Lowest in U.S., *N.Y.Times*, Nov. 17, 2010, at A28.

of all voting-eligible adults in the District of Columbia to a high of 55.5% of all such adults in Minnesota.[154]

Moreover, even if voter participation rates were the same in all the states, there would still remain statistically significant disparities among the states in the tabulation, recording, and reporting of votes as a result of the use of different types of voting machinery. One study that investigated "undervoting" in the 2000 Presidential election – the number of ballots cast in which there was no recorded vote for President – found that the percentage of undervotes varied from county to county across the nation, ranging from as much as 15% of the ballots to as little as 0.02%.[155] To be sure, there are multiple causes for these disparities. Some voters may choose simply not to vote in the Presidential race, although it seems improbable that 15% of the people who take the time to go to the polls to vote would intentionally choose not to vote in the presidential race. Instead, most studies focus on the use of different voting machines in different localities as the key explanation. In the aftermath of the "hanging chad" fiasco in the 2000 election, several studies investigated the extent to which different voting systems failed to record a vote. In 2000, counties that used punchcard voting systems had an undervote rate of 2.8%, while counties that used optical scan voting systems had a 0.9% undervote rate.[156] Another study found that lever machines had an error rate of 2.2%, optical scan machines a 2.7% rate, and electronic machines a 3.1% rate.[157] Meanwhile, a federal court reviewing the Illinois election system found that precincts in Illinois that used optical scan ballots with error notification backup systems failed to record a vote less than 1% of the time, while precincts that used optical scan

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[154] UNITED STATES ELECTIONS PROJECT, 2010 GENERAL ELECTION TURNOUT RATES (2010), available at http://elections.gmu.edu/Turnout_2010G.html.

[155] David C. Kimball, Chris T. Owens, and Katherine Keeney, "Unrecorded Votes and Political Representation," *in* COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA 135, 137 (Robert P. Watson ed., 2004).

[156] *Id.* at 139.

[157] *See* Martha E. Kropf & Stephen Knack, "Balancing Competing Interests: Voting Equipment in Presidential Elections," *in* COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA 121, 124 (Robert P. Watson ed., 2004).

ballots without backup systems or that used punch card ballots failed to do so over 4% of the time.[158] Hence, whether one's ballot is accurately read depends significantly on what vote equipment is used, which differs from state to state.

Finally, take vote tabulation standards. Different states employ different definitions of what constitutes a valid vote. For example, California expressly forbids the counting of ballots that are "not marked as provided by law."[159] In contrast and more generously, Florida provides that even mismarked ballots must be counted so long as there is "a clear indication on the ballot that the voter has made a definite choice."[160] Even more generously, Massachusetts requires ballots to be counted where the intent of the voter "can be determined with reasonable certainty from an inspection of the ballot."[161] And, most generously of all, Oregon and other states provide that votes must be counted unless "it is impossible to determine the elector's choice for the office or measure."[162] These differences in tabulation standards have led courts in the respective states to opposite conclusions regarding the validity of mismarked ballots. For example, in *Escalante v. City of Hermosa Beach*, a California appeals court threw out ballots in which the voters had punched an incorrect chad, even though the voter's intent was discernable.[163] Likewise, a Georgia appeals court declared that ballots in which the voter failed to fully punch out the chad were invalid.[164] Yet, in *Delahunt v. Johnston*, the Massachusetts

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[158] Black v. McGuffrage, 209 F.Supp.2d 889, 893 (N.D. Ill. 2002). Although Congress has passed the Help America Vote Act, which requires the Federal Election Commission to establish error standards for voting machines, states retain the authority to choose different systems so long as they comply with the federal requirement. 42 U.S.C. § 15301(a)(5).
[159] Cal. Elec. Code § 15154.
[160] Fla. Stat. Ann. § 102.166(4)(a). *See also* Tex. Elec. Code § 65.009 (requiring ballot to be counted "if the voter's intent is clearly ascertainable unless other law prohibits counting the vote"); Va. Stat. Ann. § 24.2-644(A) ("Any ballot marked so that the intent of the voter is clear shall be counted").
[161] Delahunt v. Johnston, 671 N.E.2d 1241, 1243 (Mass. 1996).
[162] Or. Stat. Ann. § 254.505(1). *See also* S.C. Stat. Ann. § 7-13-1120 (prohibiting counting of ballots where "for any reason it is impossible to determine the voter's choice"); Ala. Code § 17-12-13 (same); S.D. Stat. § 12-20-7 (same).
[163] 195 Cal. App. 3d 1009, 1018-19 (Cal. App. 1987).
[164] Rary v. Guess, 198 S.E.2d 879, 880 (Ga. App. 1973).

Supreme Judicial Court held that punchcard ballots in which the chad was only dimpled and had not been punched out were valid ballots required to be counted.[165]

These differences among the states have significant implications for any state-initiated effort to reform the presidential election process, as the NPVC seeks to do. Those implications operate along two dimensions, one constitutional and the other philosophical.

B. Constitutional Consequences.

Simply aggregating votes from each of the 50 states and District of Columbia raises severe problems under the Equal Protection Clause of the 14th Amendment. In *Bush v. Gore*,[166] the U.S. Supreme Court held that the Equal Protection Clause requires that states not discriminate among voters in tabulating votes for elective offices. As the Court noted in that infamous case, there is no right to vote for presidential electors, but, once a state chooses to vest the people with the right to vote for such, the Equal Protection Clause attaches and forbids the states from allocating voting power in ways that, in the Court's words, "value one person's vote over that of another."[167] There, the Supreme Court ruled that the use of different standards in different Florida counties for tabulating votes for President violated the Equal Protection Clause.[168]

The disparities in voting qualifications and processes from state to state identified above have been accepted as constitutional only because, until the NPVC goes into effect, each state counts only the votes of its own citizens in determining which candidate wins that state's slate of presidential electors. *Bush v. Gore* required uniformity only within Florida because that was the relevant voting community for the office of presidential elector *from Florida*. Once the relevant voting community is expanded to

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[165] Delahunt, 671 N.E.2d at 1243. *See also* Duffy v. Mortenson, 497 N.W.2d 437 (S.D. 1993) (holding that ballot in which chad was indented and had two corners separated but which was not displaced was valid vote); Wright v. Gettinger, 428 N.E.2d 1212, 1225 (Ind. 1981) (holding that ballot in which chad was partially attached and not fully displaced – a "hanging" chad – was valid vote).
[166] 531 U.S. 98 (2000).
[167] *Id.* at 104-05.
[168] *Id.* at 106-07.

include the entire nation, however – as the NPVC seeks to do – it is hard to see how the disparate voting qualifications and systems in each state would be constitutionally tolerable.

Take the suffrage disparities. Surely it would be unconstitutional for a state to agree to treat as valid the votes of individuals in other states who would not be entitled to vote in the original state if they lived there. For example, while Oregon permits ex-felons to vote, Virginia does not for at least five years after they have completed their sentence.[169] For states to include the votes of felons from those states that enfranchise them in determining the national popular vote winner – as the NPVC requires them to do – would be unfair to felons in those states that disenfranchise them and to non-felons in all states (whose votes would thereby be diluted by the felons' votes). Likewise, while Illinois allows mentally disabled individuals under guardianship to vote, Missouri does not.[170] For states to include the votes of mentally incapacitated individuals from several states in determining the national popular vote winner – as the NPVC requires them to do – would be unfair to both mentally disabled adults in states that disenfranchise them and to mentally competent voters in all states (whose votes are diluted by including other states' mentally incapacitated voters).

Or take the differences in voting machinery and tabulation standards. Although *Bush v. Gore* acknowledged that states often delegate to local officials the authority to choose their voting machinery,[171] the Court did not suggest that any resulting disparity among voting equipment and their error rates was acceptable. At some level, such disparities, particularly those that exist from state to state, could be viewed as irrational or arbitrary and therefore violate equal protection. More importantly, the Court in *Bush v. Gore* did require the deployal of a uniform statewide standard for evaluating and tabulating votes for presidential electors, as well as a system of training election

[169] Sentencing Project, *supra* note 140, at 2-3.
[170] MO. CONST. art. VIII, § 2; *see also* Hurme & Applebaum, *supra* note 143, at 958-60 (describing disenfranchisement of Steven Prye, a person with schizoaffective disorder, when he moved from Illinois to Missouri).
[171] Bush, 531 U.S. at 109.

personnel to ensure such uniformity.[172] If the differences in voting standards between Palm Beach and Miami-Dade counties violated the Equal Protection Clause,[173] so too must the differences between states that count mismarked ballots as valid, such as Massachusetts, and those states, such as California, that typically do not.

These examples merely give a taste of the problems that are likely to arise. Ultimately, the fundamental problem with the NPVC in this respect arises from the fact that it requires each signatory state to appoint its electors based on votes in other states. In essence, signatory states are enfranchising as voters of those states all of the voters in the United States. The notion that states may enfranchise voters in other states is of questionable constitutionally in its own right.[174] Even if the states may do so, however, the Equal Protection Clause requires that they do so in a manner that treats voters equally. Critically, the NPVC omits any requirement that signatory states adopt a uniform system of suffrage, voting, or tabulation, and, even if the NPVC were amended to provide for one, the non-signatory states would be under to no obligation to conform to the NPVC standards. In short, while the NPVC purports to give effect to a national popular election, there has never been such an election for President, and the NPVC neither does nor can provide for one. As such, it is both misleading and ultimately unconstitutional to anoint a "national popular vote winner" based on the raw aggregation of votes among fifty-one disparate voting jurisdictions, each with its own legal regime governing voting qualification, processes, and tabulation.

C. Philosophical Considerations.

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[172] *Id.* at 109.

[173] *Id.* at 106-07.

[174] *Cf.* Brown v. Chattanooga Bd. of Comm., 722 F. Supp. 380, 399 (E.D. Tenn. 1989) (invalidating city measure that gave voting rights in municipal elections to nonresident property owners from outside the city limits). Comity among the states has been understood in other contexts as limiting the power of the states to concern themselves with the interests or desires of citizens of other states. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) (noting that Illinois has no legitimate interest in regulating tender offers for the benefit of out-of-state shareholders); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524 (1935) (noting that New York has no legitimate interest in setting minimum price for milk for the benefit of Vermont dairy farmers).

Given the nation's propensity to view election issues through a legal lens, these differences among voting systems are likely to be fought over in constitutional terms, but such legalism should not overshadow the deeper, philosophical problem posed by the NPVC in this respect. The NPVC rests upon the notion that the most just way to elect the President is to allow the American people to decide the matter free of any distorting effects resulting from the state-by-state election process currently in use. As one supporter of the NPVC tersely puts it, the NPVC stands "for a simple principle: every vote is equal."[175] Yet, what proponents of the NPVC fail to appreciate is that these differences among voting regimes in the states produce more subtle but equally significant distortions of voting power. In essence, by leaving each state's voting system intact, the NPVC replaces one form of malapportionment with another. Citizens in states that have generous voting qualification laws, that encourage voter turn-out, and that employ voting machinery with low tabulation and recording error rates are more likely to participate in the presidential election and have their vote counted than citizens in states that have strict voting qualification laws, that depress voter turn-out, or that use voting machinery with high error rates. In short, the political influence of a particular citizen is dependent on that person's state of residence, just as it is in the current system. The NPVC simply replaces one system biased in favor of citizens from smaller states with one biased in favor of citizens from states with more generous voting qualifications and processes.

Moreover, unlike the Electoral College's slight bias in favor of smaller states, the differences in voting regimes among the states can produce significant disparities in actual voting power among citizens in different states. These disparities can be seen graphically by comparing state population figures to the number of votes cast and recorded in each state. Kentucky and South Carolina, for

[175] Chang, *supra* note 13, at 229.

example, have virtually identical state populations,[176] yet there were almost 95,000 more votes cast and recorded in the 2008 presidential election in South Carolina than in Kentucky.[177] Likewise, Kansas and Arkansas have almost identical populations, but there were almost 150,000 more votes cast and recorded in Kansas than Arkansas. And, not to belabor the point, Oregon and Connecticut have virtually identical state populations, yet there were 181,000 more votes cast and recorded in Oregon, which uses mail-in voting to increase voter participation, than in Connecticut, which does not. Meanwhile, New York, which has almost twice the population of Michigan, cast and recorded only 52% more votes. To be sure, the disparity between state population and vote totals is not exclusively the product of differences in the states' voting systems. There are undoubtedly other cultural, social, economic, and political factors at work, but these disparities are too great to simply pass off simply on the ground that citizens of Michigan and Oregon are more civically active and inclined to vote than citizens of New York and Connecticut – differences in the legal regime regarding elections do matter.[178]

As should be obvious, these disparities among the states undermine the central rationale of the NPVC – that adoption of the NPVC will equalize political power among citizens in different states. As the

[176] The state population figures for the states mentioned here all come from the U.S. Census Bureau, 2000 Census (available at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-PH1-R&-ds_name=DEC_2000_SF1_U&-format=US-9S).

[177] The total number of votes cast and recorded in each state in the 2008 presidential election for each of the states discussed here come from FEC 2008 Election Results, *supra* note 105.

[178] Once the political implications of these differences are recognized, some states could seek to maximize their citizens' electoral power. Suppose, for example, that California were to extend the franchise to all adult residents, including illegal aliens. There is nothing in the U.S. Constitution or the NPVC that would prevent such a move, as federal law imposes no limits on who a state may affirmatively enfranchise. In 2010 in California, there were 17.2 million registered voters, of which 10.3 million (or 59%) actually voted. According to the 2010 Census, there were 26.86 million adults resident in California. If the newly enfranchised voters voted at that same rate as registered voters, California would experience an increase of 5.5 million additional voters. If other states did not respond, Californians could easily account for over 16% of all votes cast nationally, even though the state comprises only 12% of the nation's population. For majoritarian critics of the Electoral College, such a scenario should be deeply troubling. Based on its population, California has 12.3% less power than its population warrants, but, under this scenario, California would end up with 33% more power than its population warrants. In other words, such electoral changes could produce a malapportionment of power greater than that under the Electoral College. Furthermore, as should be obvious, California's additional 5.5 million votes could easily swing the Presidential election. And, not to gild the lily, California would have every incentive to act in this fashion, even if it does not become a signatory state, because such a move would augment California's influence in the Presidential election. Critically, nothing in the NPVC prevents states from acting in this fashion and tailoring their electoral regimes to augment their citizens' influence in the Presidential election at the expense of citizens in other states.

foregoing statistics indicate, citizens in some states are more likely to vote and have their votes counted and recorded than citizens in other states, giving the former greater opportunity to influence the Presidential election than the latter. Thus, while the Electoral College gives Wyoming's citizens slightly more influence in Presidential elections than California's citizens, the NPVC would produce a presidential election system that gives Oregon's citizens more influence than Connecticut's and California's citizens more influence than New York's. In practice, the political power of citizens would still depend upon and vary according to state residence.

To be sure, these disparities among the states exist today, but their impact is both geographically confined and minimized by the fact that citizens in each state are voting only for their state's presidential electors, whose votes are then tallied in accordance with the Electoral College formula. No matter how difficult (or easy) a state makes it for its citizens to vote for President, voters within each state are competing only with other voters in that state, who are subject to the same legal regime. It is for that reason that, under the current Presidential election system, voters in one state have no reason to care about the voting regime employed in other states; Californians and Oregonians are not affected by the fact that Virginia disenfranchises its felons or Missouri its mentally incapacitated adults. Moreover, it is for that reason that states have no incentive to expand the franchise in the hypothetical manner described above. Under the current system, enfranchising illegal aliens or others would not give any state any greater influence in the Presidential election than it already has in the Electoral College.

Were the NPVC to go into effect, however, the legal regimes of every state would be vitally important to voters in every state, both signatory and non-signatory alike. A Californian (or resident of any state for that matter) would have every reason to be upset by the fact that Illinois allows its mentally incompetent adults to vote, that Oregon employs a mail-in voting system, or that Massachusetts counts dimpled chads as valid ballots because those voters and their ballots will be

counted in determining which candidate is the national popular vote winner and therefore President. Moreover, that will be true even if California were not a signatory state, because signatory states would be obligated to count the votes cast in other states in determining the national popular vote winner.

In short, there is simply no way to equalize voting power among the people in the various states while each state is allowed to set its own rules regarding suffrage, voting procedures, and tabulation standards. Disparity in voting power does not result solely from the apportionment of the Electoral College; rather, it is primarily the result of a system that confides to the states the responsibility for conducting the Presidential election. As a result, adopting the NPVC would not help; in fact, it would only exacerbate political differences among voters in different states.

V. THE MOTHER OF ALL RECOUNTS (OR NOT).

Related to the problem of voting system disparities is the issue of recounts. Because of the inherent flaws in tabulating and recording votes, states typically provide for a recount when the initial tabulation is close so as to ensure that the right candidate is declared the winner. Again, different states have different legal regimes regarding recounts. Forty states permit candidates to request a recount.[179] Moreover, eighteen states provide for an automatic recount if the vote margin in the state is less than a specified amount, ranging from 1% of all votes cast (on the high end) to a tie vote (on the low end).[180] The problem here, however, goes beyond just the fact that disparities among the states exist. Rather,

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[179] *See, e.g.*, Cal. Elec. Code § 15621; 21-A Me. Rev. Stat. § 737-A; Wy. Stat. § 22-16-110. *See also* Daniel P. Tokaji, The Paperless Chase: Electronic Voting and Democratic Values, 73 FORDHAM L. REV. 1711, app. B (2005) (summarizing state laws regarding recounts); NCSL, Recounts (2004), available at http://www.ncsl.org/default.aspx?tabid=16526 (same).

[180] Specifically, two states (Georgia and South Carolina) use 1% of all votes cast. Ga. Stat. Ann. § 21-2-495(c); S.C. Code § 7-17-280. Two states (Nebraska and Wyoming) use 1% of the votes cast for the winning candidate as the requisite vote margin to avoid an automatic recount. Neb. Rev. Stat. § 32-1119; Wy. Stat. § 22-16-109. Three states (Alabama, Florida, and Minnesota) use 0.5% of all votes cast. See, e.g., Ala. Code § 17-16-20(a); Fla. Stat. Ann. § 102.141(7); Minn. Stat. § 204C.35(b)(1). Two states (Colorado and North Dakota) use 0.5% of the votes cast for the winning candidate. Co. Rev. Stat. § 1-10.5-101(b); N.D. Code § 16.1-16-01(1)(b). One state (Ohio) uses 0.25% of all votes cast. Oh. Rev. Code § 3515.011. One state (Oregon) uses 0.2% of the votes cast for the top two candidates. Or. Rev. Stat. § 258.280(1)(b). Finally, one state (Arizona) uses 0.1% of the votes cast for the top two candidates. Az. Rev. Stat. § 16-661(A)(1). The other states specify either an absolute vote margin, 2000 votes (Connecticut, Michigan, and Washington) or a tie vote (South Dakota, Tennessee, Texas). Tokaji, *supra*, at app. B. Tex. Elec. Code § 216.001.

the critical issue is that no state provides for a recount if the *national* popular vote for President is close. And, inexplicably, the NPVC does not require signatory states to amend their recount statutes to provide for a recount in those states when a close election does take place.

The NPVC's failure in this regard is truly baffling. In a close national election, there would be no obligation for any state, except those with automatic recount statutes and in which the *statewide* vote was close, to conduct a recount. The national popular vote loser could petition for a recount in those states that authorize them, but there is no guarantee that the state election officials in every state would order one, particularly in those states in which the recount is paid for by the government. Moreover, several states do not provide for statewide recounts. As a result, even if the national popular vote was close, it is likely that only a few states would conduct a recount, and it is entirely possible that no state would conduct a recount if the statewide vote tally was not close in any of the states. As one might imagine, the failure to conduct a nationwide recount could fatally undermine the public's confidence in the vote totals and, therefore, the election. In a close national election, only by conducting a recount in every state could the nation be confident in the outcome of the election.

Even worse, the NPVC would not prevent some states from conducting a recount – in other words, it does not prevent a partial nationwide recount confined to particular states. A partial recount limited to some states, however, could severely undermine the public's confidence in the election if those recounts narrowed the national vote margin or, perhaps even more dramatically, switched the outcome of the election. Imagine if a recount took place in five states, the result of which was to give the election to the candidate who was initially behind in the national voting (i.e., the candidate who looked initially to have lost the election gains enough votes in the recount in those five states to become the national popular vote winner). The other candidate could plausibly respond that, had a recount taken place in the other 45 states, she would have gained even more votes than the "loser" gained in

the five states and would have therefore remained the national popular vote winner.[181] In that case, a partial recount could actually produce an election in which the wrong candidate – the candidate who actually received fewer votes nationally – won the White House. In short, the NPVC's failure to require a nationwide recount opens the door to the same "misfires" that its proponents decry.[182]

In the best (and most unlikely) of all worlds, all the states, signatory and non-signatory alike, would amend their recount laws to provide for a mandatory recount if the national election is a close one, say, within 1% of all votes cast, but that only raises a different set of problems. If such a nationwide recount were to take place, what procedure would be used? Would it be a machine or hand recount? What ballot tabulation standards would apply? Would a ballot that violates state election law but nevertheless reveals the voter's intent qualify as a valid ballot? What if some states applied a different standard? Who would be in charge of overseeing the nationwide recount to ensure a uniform system of tabulation? Even putting aside *Bush v. Gore* and the related constitutional concerns,[183] state administered recounts operating under different rules and administrative processes would only serve to undermine the public's confidence that the national popular vote winner was in fact the more popular candidate among the voters. If differences in vote tabulation standards among Florida's sixty-seven counties caused concern in 2000, imagine the outcry resulting from the deployment of different vote tabulation procedures and standards in the 3,141 counties throughout the nation.

Proponents of the NPVC respond that this is all needless fear-mongering – that the likelihood of a national election being decided by a few thousand votes is nil.[184] The supporters, however, miss the point – it's not the absolute vote spread that matters but the percentage vote margin. Precisely

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[181] *Cf.* Gore v. Harris, 772 So.2d 1243, 1261-62 (Fla. 2000) (ordering statewide recount to ensure that all votes are recounted to ensure accuracy of election result).
[182] Bradley A. Smith, Vanity of Vanities: National Popular Vote and the Electoral College, 7 ELECTION L.J. 196, 207 (2008).
[183] *See id.* (noting that local variation in recount procedures and standards raise Equal Protection issue).
[184] KOZA, *supra* note 8, at 391 (arguing that a close national election would likely occur only once every 1,328 years).

because the number of missed or miscounted ballots rises in proportion to the number of ballots cast, the threshold for triggering mandatory recounts in those states that provide for them is typically specified in percentage terms. Of course, in a nation in which 130 million votes are cast for President (as happened in 2008), a 1% recount threshold would justify a recount where the winning vote margin is 1.3 million votes or less. Moreover, judging by past experience, national elections within that margin are more common than the NPVC supporters misleadingly suggest. The 2000 Presidential election was well within that 1% margin (a 543,000 vote margin out of almost 100 million votes cast), as were the 1880, 1884, 1888, 1960, and 1968 elections. In fact, the 1880 election was decided by less than 2,000 votes out of almost nine million cast (a 0.02% vote margin).[185] Moreover, as Presidential campaigns adapt to the new system, such close elections would become more common – the large popular vote margins of recent elections are in part a product of the fact that campaigns do not focus on the popular vote but rather the electoral vote.[186]

Admittedly, there might be less need for a nationwide recount under the NPVC than statewide recounts in individual states under the current system, but, when a close national election happened, it would be catastrophic, requiring a nationwide recount for which the NPVC has not provided and cannot mandate in any event. Even if the NPVC required signatory states to amend their recount statutes to provide for recounts when the national vote is close, non-signatory states would still remain free to keep their current recount procedures (or lack thereof) in place. And, in the absence of a true nationwide recount, there could be no certainty that the "national popular vote winner" had actually

[185] NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, HISTORICAL ELECTION RESULTS, available at http://www.archives.gov/federal-register/electoral-college/scores.html#1888.

[186] Smith, *supra* note 182, at 207. The NPVC supporters dismissive attitude is undermined by the NPVC itself, which expressly addresses the even more (and *extraordinarily*) unlikely situation in which there a perfect tie in the national popular vote. NPVC art. III (providing that in the case of a tie in the national vote, each state will appoint its electors in accordance with the statewide vote). That the framers of the NPVC thought it necessary and advisable to address that unthinkable scenario makes it all the more inexcusable for the NPVC to fail to address the problems associated with the much more likely scenario of a close election.

won the election, as recounts often produce a different winner.[187] Again, that serves only to emphasize the extent to which the NPVC affirmatively courts constitutional crises.

There is a larger lesson to be drawn here too. These problems of obstruction and implementation identified here are not unique to the NPVC; they would accompany any subconstitutional, state-initiated effort to reform the Presidential election system. No one state or group of states can create a presidential election system in which every citizen is guaranteed to be subject to a uniform legal regime regarding suffrage, voting procedure, and ballot tabulation. Only a federal constitutional amendment abolishing the Electoral College can provide for such a uniform, federal electoral system.[188] As a consequence, all state-initiated efforts to reform the Presidential election system entail significant constitutional difficulties and invite politically paralyzing litigation of the sort witnessed in 2000. The problem is not simply with the NPVC; it is with any state-by-state effort to transform a Presidential election process in which citizens in every state have a vested interest.

CONCLUSION

None of this is to defend the current system for electing the President in Panglossian terms as the best of all possible worlds. There is little doubt that, if we as a nation were drafting the Constitution anew today, we would not choose the current system in its exact form. The pertinent question, though, is not whether we would choose the current system if we were writing on a clean slate, but whether we should abandon the system we currently have in favor of a purely majoritarian election process and, more importantly, whether we should do so via subconstitutional, state-initiated electoral reform.

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[187] A recent example of this is the 2008 Minnesota U.S. Senate race. Norm Coleman was initially declared the winner, but, after a recount, Al Franken was determined to have received more votes.

[188] *See, e.g.*, S.J. Res. 4, *supra* note 42 (authorizing Congress to determine "the manner in which the results of the election shall be ascertained and declared"). Robert Bennett, one of the original proponents of the idea of states using their elector-appointment power to bring about a national popular election for President, concedes that there is "no obvious way" to ensure the correctness of the national vote tally in a close election. Bennett, *supra* note 8, at 184. Bennett suggests instead that in a close election, if no nationwide recount were possible, the NPVC should revert to the current system, requiring member states to appoint their electors in accordance with the state tally. *Id.*

The Electoral College, though modestly malapportioned, has worked far better than its detractors are willing to admit. The Electoral College departs from a purely population-based apportionment to a far less degree than other, accepted features of our constitutional order, and it does so only in order to create an electoral system that combines elements of both majoritarianism and federalism. In a federal union spanning thousands of miles and comprising fifty constituent states, the latter is of no small value. Indeed, only the most strict of majoritarians desire a purely majoritarian presidential election system, and those individuals should be deeply troubled by the prospect of plurality Presidencies, which the NPVC expressly countenances. Indeed, the NPVC promises to create more difficulties and "misfires" in its own way than the Electoral College system its proponents so earnestly seek to replace.

Moreover, even if a more majoritarian system is sought, it is vital to design the system so as to ensure that Presidential election system is a truly fair and workable one. There are many features of the presidential election process, such as the rules regarding voter eligibility, ballot design and tabulation, recounts, run-off elections, etc., that must be addressed. Simply asking state officials to count up all the votes cast in each state under the current rules established by state officials – as the NPVC contemplates – is not reform; it is an invitation to constitutional crisis and unending politically motivated litigation.

In short, true reform, if it is to be undertaken, must be made at the level of constitutional amendment. Sub-constitutional efforts, particularly those that are state-initiated, cannot guarantee the participation of all the states. To the contrary, such efforts are sure to lead to even greater problems as different states continue to employ different legal regimes regarding the election process. In short, true reform cannot be done on the cheap. Attempts to do so, like NPVC, promise only a repeat of 2000.

No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

—v.—

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR *COMMON CAUSE* APPELLEES

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QUESTIONS PRESENTED

1. Whether the District Court correctly held that Appellees have Article III standing to challenge the 2016 North Carolina Congressional Plan and its individual districts as partisan gerrymanders?

2. Whether the District Court correctly held that, on the facts of this case, Appellees' claims are justiciable and not "political questions"?

3. Whether the District Court correctly held that the 2016 Plan and 12 of its 13 individual districts violate the First Amendment, Equal Protection Clause, and/or Article I?

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INTRODUCTION

The 2016 North Carolina Congressional Plan ("2016 Plan" or "Plan") is the most overt, and likely the most extreme, partisan gerrymander this Court has ever seen. The official written criteria that governed its creation expressly dictated pursuit of "Partisan Advantage" for the Republican Party and specified a quota of "10 Republican" districts and just "3 Democrat[ic]" ones—despite a near-equal split among the State's voters. To implement this directive, the map-drawer admittedly "packed" as many Democrats as possible into three overwhelmingly blue districts and "cracked" the remainder across ten red ones. The heads of the Joint Redistricting Committee, Appellants here, publicly declared that the Plan enshrined into law their view that "electing Republicans is better than electing Democrats." One even proclaimed: "I acknowledge freely that [the Plan is] a political gerrymander." As the District Court noted, with appropriate distaste, Appellants "d[id] not argue—and never have argued—that [this] express partisan discrimination advances any democratic, constitutional, or public interest." J.S. App. ("A") 110.

Unsurprisingly, the resulting map was extreme in every respect—whether viewed statewide or district-by-district. The only reason the Plan did not contain even fewer Democratic districts, one Appellant admitted, was because it was "not … possible to draw [such] a map." By using computers to generate and analyze thousands of alternative districting plans, *Common Cause* Appellees' experts confirmed that it was all but impossible for a 10-3 split to arise under neutral districting criteria. Just as importantly, they confirmed that the particular districts where the

Common Cause voter-plaintiffs live were extraordinarily packed and cracked. Indeed, the votes of many of those plaintiffs would have carried greater weight in *over 99%* of alternative maps.

Appellants barely even pretend to defend the challenged Plan. They take no issue with any of the District Court's fact-finding and largely ignore the evidence that *Common Cause* Appellees adduced below. Their brief also contains no meaningful discussion of applicable First Amendment, Equal Protection, or Elections Clause doctrine, let alone any attempt to square those doctrines with the obviously illegal features of the Plan. Perhaps this is understandable: for Appellants, the Plan itself is beside the point. This appeal is merely a vehicle for their policy arguments seeking a green-light for *all* partisan gerrymanders.

But Appellants pay a price for ignoring the facts. Justiciability turns not on abstract arguments, but on "the precise facts and posture of the particular case." *Baker v. Carr*, 369 U.S. 186, 217 (1962). And on the facts of this case, judicially manageable standards are easy to articulate and understand. Indeed, in last Term's gerrymandering cases, counsel for all parties acknowledged before this Court that a plan constructed under an *express* policy to favor one party—as the 2016 Plan was—would be unconstitutional. As Justice Alito recognized at the time, that is a "perfectly manageable standard." To hold that the 2016 Plan must nevertheless remain in effect because other cases with other facts might present more complex issues would be the opposite of the judicial caution and minimalism that Appellants profess to value.

Appellants' "political question" arguments also fail on their own terms. On countless occasions, including *Baker* itself, this Court has rejected the notion that the Elections Clause is a textual bar to judicial review of State election regulations. And this Court's existing precedents provide perfectly "discoverable and manageable standards" for adjudicating partisan-gerrymandering claims. Specifically, by burdening the political expression and associational rights of *Common Cause* Appellees, including the North Carolina Democratic Party and individual voters, based on viewpoint and identity, Appellants violated the First Amendment. By intentionally discriminating against Appellees without adequate justification, Appellants violated the Equal Protection Clause. And by nakedly seeking to dictate the outcomes of federal elections, Appellants exceeded the Elections Clause's limited grant of power to the States.[1]

None of these principles is novel, and nothing in this Court's jurisprudence suggests that they are inapplicable to redistricting, alone among all forms of State election regulation. To the contrary, it has long been settled that "[a] statute which is alleged to have worked unconstitutional deprivations of [plaintiffs'] rights is not immune to attack simply because the

[1] *Common Cause* Appellees' method of adapting these generally applicable standards to the present context differs in some respects from that of *League of Women Voters* Appellees. That is to be expected given the "unsettled … contours" of this Court's case law. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). *Common Cause* Appellees believe in their own approach, but either of Appellees' approaches would provide a "manageable standard," grounded in the Constitution, for resolving partisan-gerrymandering claims.

mechanism employed by the legislature is a redefinition of [political] boundaries." *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

In the end, Appellants' argument for judicial abdication comes down to this: partisan-gerrymandering claims are "politically fraught," and entertaining them would therefore lead the public to view the Court as a partisan body. App. Br. 60-61. Appellants have it backwards. Elected officials of *both* parties commit this sin. *Cf. Lamone v. Benisek*, No. 18-726. And ordinary Americans of *both* parties detest it. *See* Lake Research Partners & WPA Intelligence, *Partisan Redistricting – New Bipartisan National Poll*, Sept. 11, 2017, https://bit.ly/2T24muW (finding that supermajorities of both parties favor this Court acting against partisan gerrymandering, "even if it means their party might not win as many seats").

If Appellants' warning sounds familiar, it should: the exact same argument was made for judicial inaction in *Baker*. *See* 369 U.S. at 267 (Frankfurter, J., dissenting) (asserting that "public confidence" in the Court requires "abstention from … the clash of political forces"). Fortunately, the *Baker* Court rejected that argument and upheld a nonpartisan constitutional principle that virtually all Americans now embrace. As a result, "[n]ational respect for the courts" was greatly "enhanced." *Id.* at 262 (Clark, J., concurring). The Court should do the same here.

STATEMENT OF THE CASE

A. Factual Background

1. The 2011 Plan

North Carolina is a true "purple state," its voters split almost equally between Democratic and Republican congressional candidates. A13-14. Its delegation once reflected this, often dividing 7-6 or 6-7. That changed markedly when the Republican Party captured the General Assembly in 2010, "giving [it] exclusive control over" redistricting. A10. On a party-line vote, it adopted a new map (the "2011 Plan") that yielded a 9-4 Republican supermajority in the 2012 election, even though Democratic candidates received more votes statewide. A13. That advantage grew to 10-3 in 2014, even though Republican candidates received only 54% of the vote. A13-14.

This Court reviewed the 2011 Plan in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which alleged that two districts were racially gerrymandered. The State's "defense" was that the 2011 Plan was a *partisan* gerrymander, not a racial one. The map-drawer, Dr. Thomas Hofeller, testified that partisanship "was the primary … determinant in the drafting" of that plan, both overall and on a district-specific basis. Hofeller explained that his "primary goal" was "to create as many districts as possible in which GOP candidates would be … successful[]" and "to minimize the number of districts in which Democrats … [could] elect a Democratic candidate." A180. Before this Court, the State's counsel explained that Hofeller "drew the map to draw the Democrats in[to 'packed' districts] and the Republicans out [of them]." Oral Argument Tr.,

Cooper v. Harris, No. 15-1262 (Dec. 5, 2016) at 10-11 (argument of Paul D. Clement).

This Court affirmed the judgment invalidating the two challenged districts as predominantly race-motivated, without disputing the State's admission that its intent regarding the remaining districts and the 2011 Plan overall was "primar[ily]" partisan.

2. Creation Of The 2016 Plan

In February 2016, the District Court in *Harris* ordered a remedial map. The heads of the Joint Redistricting Committee, Rep. David Lewis (R) and Sen. Robert Rucho (R), instructed Hofeller to remedy the two invalidated districts' racial infirmities while "maintain[ing]" a predetermined partisan split of "10 Republicans and 3 Democrats." A14-15; *see also* JA331-32; 336-37.

Hofeller used past election results "to create a composite partisanship variable indicating whether, and to what extent, a particular precinct was likely to support a Republican or Democratic candidate." A16, 157-58. As he testified, this variable is highly predictive of future voting patterns. *Ibid.* Hofeller then used that partisanship index to guide his line-drawing, with the goal of "crack[ing]" and "packing" Democrats to minimize their voting strength. A17, 158-59; *see also* JA315. Proceeding district-by-district, Hofeller "divide[d] counties and communities of interest along partisan lines, and join[ed] sections of the state that have little in common." A252.

Lewis then presented for the Joint Redistricting Committee's retroactive approval a set of written "cri-

teria" that Hofeller had employed. A19-21. Several were explicitly partisan. Most obviously, the criterion labeled "Partisan Advantage" stated that "the Committee shall make reasonable efforts to construct districts … to maintain" a "partisan makeup … [of] 10 Republicans and 3 Democrats." JA329. Another criterion, labeled "Political data," stated that "[t]he only data other than population data to be used … shall be election results in statewide contests since January 1, 2008…." JA329; A20. The Committee adopted these partisan criteria on party-line votes. A23. The 2016 Plan, Hofeller agreed, "adhered" to them. JA457; A23.

Lewis proclaimed the intentions behind the Plan on the record, both during Committee hearings and on the House floor:

- "[W]e want to make clear that … to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage."

- "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."

- "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."

- "I acknowledge freely that [the 2016 Plan] would be a political gerrymander, which is not against the law."

JA313, 310, 460, 308. Rucho agreed, stating that there is "nothing wrong with political gerrymandering" because "[i]t is not illegal." JA337; A22-24.[2]

Based on these statements, both chambers of the General Assembly then approved the 2016 Plan, also "by party-line votes." A24. All these findings of the District Court are undisputed.

3. Effect Of The 2016 Plan

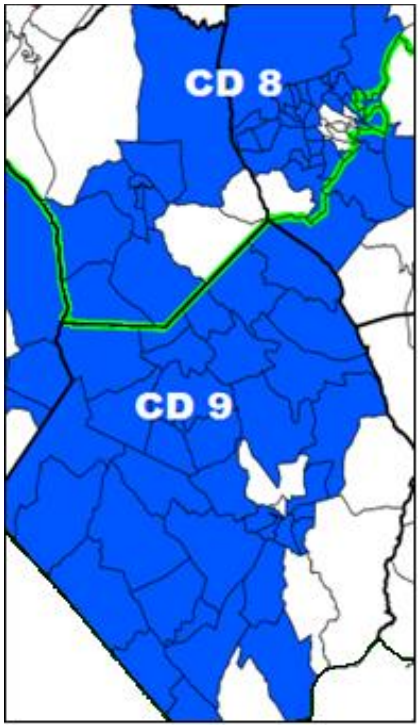
In the 2016 election, Republicans prevailed in all ten cracked districts where the mapmakers "intended and expected [them] … to prevail," and Democrats prevailed in all three packed districts drawn to be "predominantly Democratic." A26. Republican candidates thus won 77% of the total seats despite receiving just 53% of the statewide vote. *Ibid.*

The 2016 Plan's intentional packing and cracking harmed the *Common Cause* voter-plaintiffs by diluting their voting strength in the districts where they live. A51-65, 74, 82-83. The extensive proof of cracking and packing and its resulting dilutive effect was uncontroverted at trial, and the District Court's findings accepting this proof are not challenged on ap-

[2] Appellants now contend that these damning admissions were made "[i]n response to the district court's holding" in *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). App. Br. 9. Appellants never made this argument below, and it is baseless. In *Harris*, as a defense to the charge of racial gerrymandering, Appellants argued—without success—that politics, not race, dictated the boundaries of the two relevant districts. *Ante* at 5-6. But no court instructed Appellants to execute an invidious partisan gerrymander, and no court "faulted" them for failing to make their invidious intent "evident in the record." App. Br. 9.

peal. *See* A188-91 (statewide findings), 209-14 (same), 223-74 (district-specific findings).

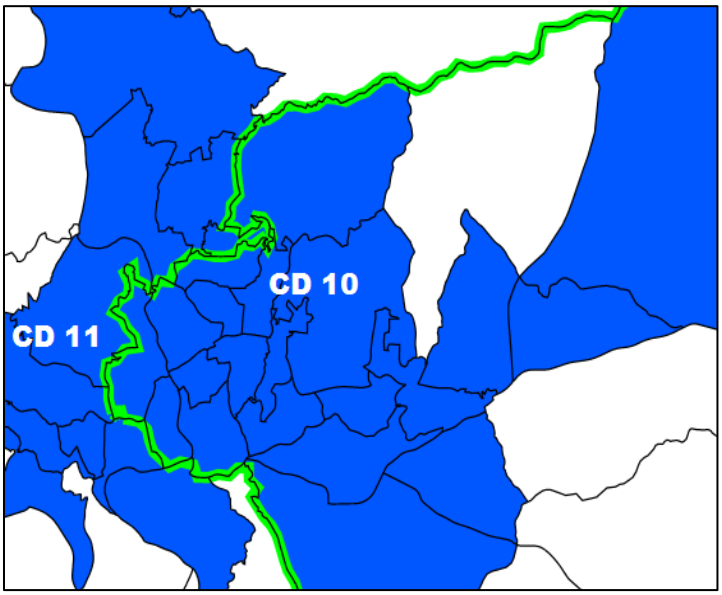
For example, *Common Cause* Appellees Coy E. Brewer, Jr. and John McNeill are Democratic voters in the heavily Democratic Fayetteville area. A57-59. The Plan intentionally cracked that area (shown in blue on the map below) and submerged the pieces within heavily Republican Congressional Districts ("CDs") 8 and 9:

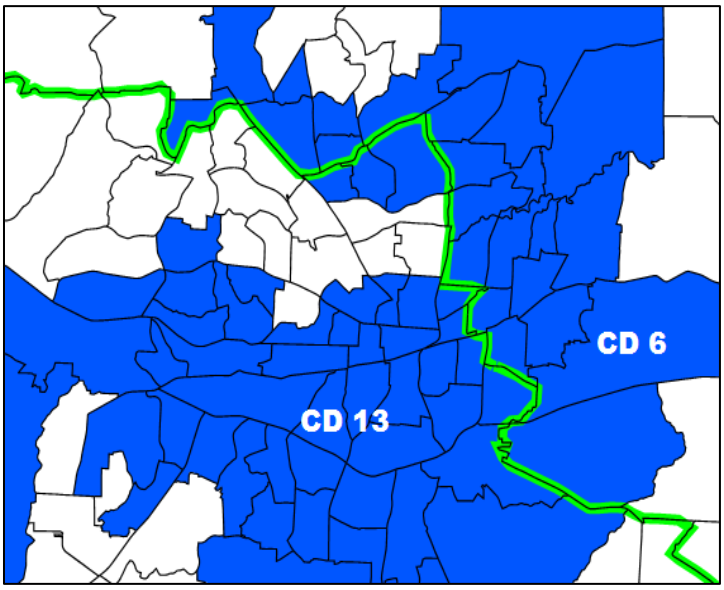


Appellants' own expert "conceded … that [this] area constituted a 'cluster of Democratic' [voters], that the 2016 Plan 'split,'" and that absent this "crack[ing],"

either CD8 or CD9 "would not have been a safe Republican district." A252-53. Due to this cracking, Brewer was relegated to CD8 and McNeill to CD9, intentionally diluting their votes. A57-59, 251-55.

Similar district-specific harms were visited on *Common Cause* voter-plaintiffs across the State. For example, both Appellant Lewis and Appellants' expert conceded that the 2016 Plan "split Buncombe County and the City of Asheville, where Democratic voters are concentrated, between [safe-Republican] Districts 10 and 11" (first map below), A25, and "'cracked' … the Democratic city of Greensboro between Republican Districts 6 and 13" (second map below), A158, 186-87, 216-17, 271.





Common Cause Appellees residing in the resulting districts had their votes diluted, including Democratic voters Robert Warren Wolf (CD10), Jones P. Byrd (CD11), Melzer A. Morgan, Jr. (CD6), and Russell G. Walker, Jr. (CD13). A56-57, 60-61, 62-63, 70, 243-48, 259-66, 270-73.

The 2016 Plan, and the shape of its individual districts, also caused Appellees "associational injury." *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring). This proof, too, was uncontroverted at trial, and the District Court's findings accepting it are not challenged on appeal. A69-71. The Plan made it more difficult for the voter-plaintiffs living in cracked districts to raise money, recruit candidates, and enlist volunteers for activities like canvassing.[3] The burden on the North

[3] *See*, *e.g.*, Deposition of Elizabeth Evans, ECF 101-7, at 12-16; Deposition of Melzer Morgan, ECF 101-16, at 23-27; Deposition of John Quinn, ECF 101-22, at 24, 38; Deposition of Douglas

Carolina Democratic Party was even greater. Its representative gave unrebutted testimony that "the way the congressional districts were drawn … ma[de] it extremely difficult" to "get the attention of the national congressional campaign committees and other lawful potential funders for congressional races in those districts." 30(b)(6) Deposition of N.C. Democratic Party, ECF 110-07, at 97-98. He also testified that the way the Plan's districts were drawn made it "harder to recruit candidates" to run in those districts, "given that the deck seems to be stacked." *Id.* at 27; *see also id.* at 41-42 (identifying specific districts in which the Party had difficulty recruiting candidates), 56-57 (identifying fundraising burden), 65-66 (identifying organizational and direct electoral burden). Indeed, in the 2018 election cycle, the Party was unable to recruit any candidate willing to run in the cracked CD3, and so the Republican ran unopposed. *See* N.C. State Board of Election, *11/06/2018 Unofficial General Election Results – Statewide*, https://bit.ly/2JD5HjT.

B. Proceedings Below

1. Trial and Appeal

In August 2016, *Common Cause* Appellees—15 voters from all 13 districts in the 2016 Plan, the North Carolina Democratic Party, and the nonpartisan organization Common Cause—filed a challenge to the Plan under the First Amendment, Equal Protection Clause, and Article I, §§ 2 and 4. JA205-31. The

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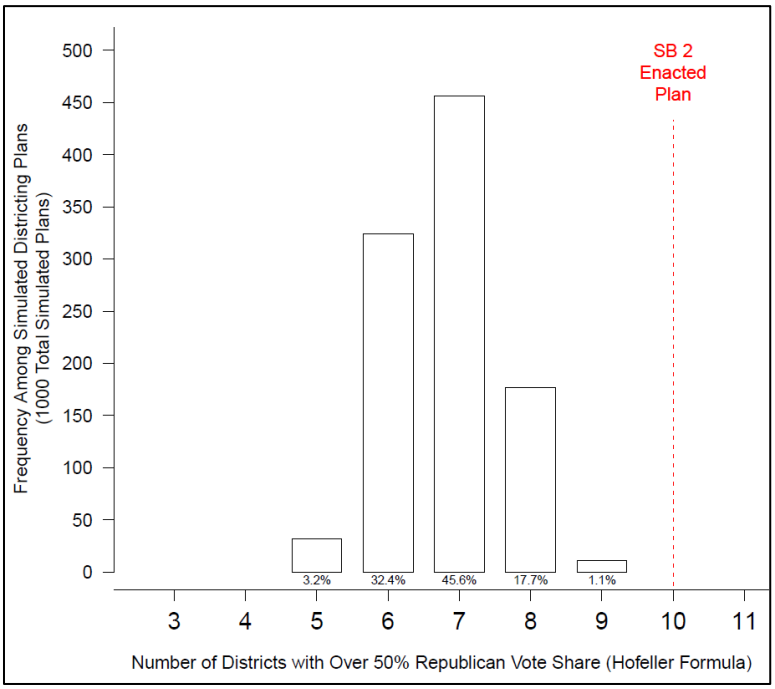
Berger, ECF 101-8, at 6-7, 73-74, 79; Deposition of John McNeill, ECF 110-09, at 21-27.

case was consolidated with *League of Women Voters of North Carolina v. Rucho*, No. 1:16-cv-1164 (M.D.N.C.) ("*League*"). JA232-66.

In October 2017, the District Court held a four-day bench trial. As the facts were essentially undisputed, the trial focused on experts. *Common Cause* Appellees presented testimony from Dr. Jonathan C. Mattingly, a mathematician at Duke University, and Dr. Jowei Chen, a political scientist at the University of Michigan. A160, 167; JA364-412 (excerpted testimony). Drs. Mattingly and Chen used computer algorithms to generate thousands of alternative districting maps using only traditional criteria and disregarding partisan data. They then used actual election results from each precinct in North Carolina to simulate elections under each alternative map. The results of these analyses were striking, demonstrating the extreme nature of Appellants' gerrymander. *See* Brief of Eric S. Lander as *Amicus Curiae* (discussing Mattingly's methodology and findings).

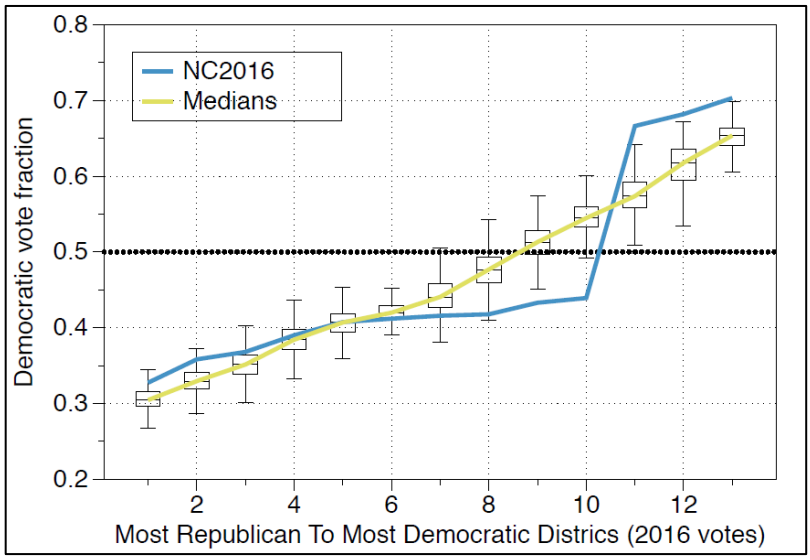
Dr. Chen generated 3,000 alternative maps, under which the composition of North Carolina's delegation formed a bell curve (shown below), mostly split 7-6 or 6-7. JA278. *None* of the 3,000 maps yielded a Republican advantage as great as the 10-3 split of the 2016 Plan (shown by the dashed red line). A167-71; JA276.



Dr. Mattingly, meanwhile, generated over 24,000 alternative maps using traditional nonpartisan criteria. Fewer than 0.7% of them resulted in a Republican advantage as lopsided as 10-3. Thus, on a statewide basis, the 2016 Plan was literally off the charts—an "extreme statistical outlier" that could not be explained by reference to traditional districting criteria. A162, 171; JA378, 395, 410-11.

Dr. Mattingly's work also confirmed the cracking and packing of individual districts. He showed this by plotting the partisan vote share of each district on a graph, with the most Republican on the left and the most Democratic on the right. With no packing or cracking, the median map in Dr. Mattingly's simulation set yields a straight line (in yellow below). By contrast, the plot for the 2016 Plan (in blue) resem-

bles an "S" curve, with Democratic voters packed into overwhelmingly Democratic districts at the top of the "S" or cracked across safe Republican districts at the bottom. A163-66; JA360. Dr. Mattingly explained that this "S" curve is the "signature" of gerrymandering. JA380, 382, 389.



This analysis showed the extreme nature of the gerrymander on a district-specific level. As Appellants conceded, they intentionally packed Democrats into CDs 1, 4, and 12. On the chart above, those districts appear on the far right, as they are the three most Democratic. As reflected by the blue line's placement well above the yellow line for those three districts, the percentage of votes cast for Democratic candidates in the packed CDs 1, 4, and 12 was significantly *higher* than the percentage of votes that would have been cast for Democratic candidates in the corresponding districts in the overwhelming ma-

jority of Dr. Mattingly's 24,000 neutrally-drawn maps. The gerrymander, in other words, rendered those packed districts extreme outliers. A163, JA378-80, 389.

The same is true for the Plan's cracked districts. Consider the blue line's location well below the yellow line for the next three districts from the right (corresponding to the cracked CDs 2, 9, and 13, which had the fourth-, fifth-, and sixth-highest Democratic vote shares). This shows that the percentage of votes cast for Democratic candidates in these Plan districts was, as Appellants intended, significantly *lower* than in the corresponding districts in the vast majority of Dr. Mattingly's 24,000 alternative maps. A163-64.

This district-specific proof was coupled with Appellants' admissions of district-specific cracking and packing, including admissions of cracking "natural Democratic clusters" in CDs 6, 8, 9, 10, 11, and 13. A216. The original trial record thus demonstrated widespread district-specific cracking and packing—and therefore, vote dilution—in districts where the *Common Cause* voter-plaintiffs reside.

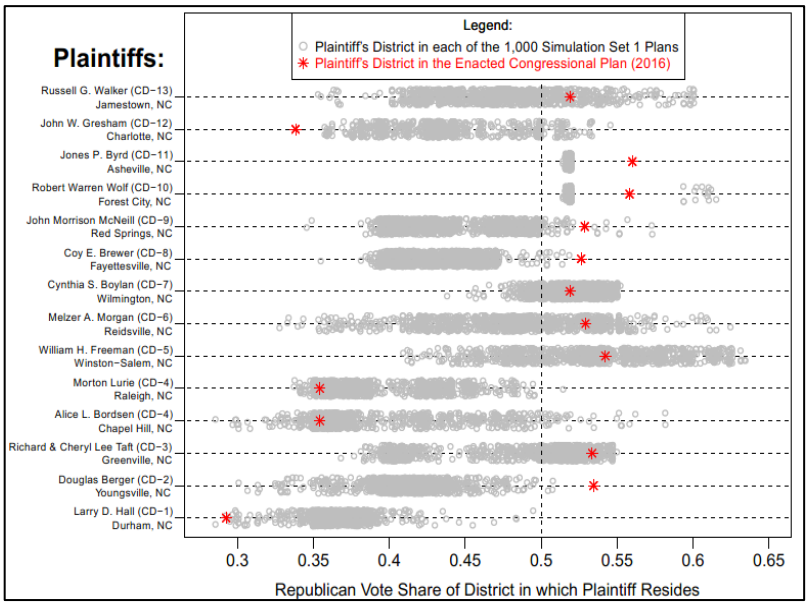
In January 2018, the District Court held the Plan an unconstitutional partisan gerrymander. *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). This Court stayed that judgment pending appeal. On June 25, 2018, this Court vacated and remanded for further consideration in light of *Gill*.

2. Remand

On remand, the District Court requested briefing on *Gill*'s impact. *Common Cause* Appellees highlight-

ed the ample evidence of district-specific packing and cracking already in the record—as admitted by Appellants and Dr. Hofeller, and as testified to by Dr. Mattingly. They also submitted a supplemental declaration from Dr. Chen. JA265-75. He used each *Common Cause* voter-plaintiff's residential address to determine the district in which that plaintiff would have resided in 2,000 of his alternative maps. He then determined how the partisan vote split of each plaintiff's actual district under the 2016 Plan compared to the vote split of the array of "hypothetical district[s]" in which he or she might have been placed. A51 (quoting *Gill*, 138 S. Ct. at 1931).

The results for one set of 1,000 maps are shown below. JA269. For each plaintiff, the gray horizontal band—actually 1,000 individual gray circles—depicts the range of vote splits across all the alternative districts containing that plaintiff's residential address. The dotted vertical line represents a 50% Republican vote share, with the gray band to the left of that line representing minority-Republican alternative districts and the gray band to the right of that line representing majority-Republican alternative districts. Lastly, the red star indicates the vote split of each plaintiff's *actual* district under the 2016 Plan.



This analysis provides further evidence of the extreme packing and cracking of the 2016 Plan and links it directly to each *Common Cause* voter-plaintiff. The Plan's packed districts (CDs 1, 4, and 12) are identified by red stars to the left of the dotted vertical line. As indicated by the relative positions of these red stars and the corresponding gray bands, each of the *Common Cause* voter-plaintiffs who resides in a packed district under the 2016 Plan would have resided in a less Democratic-leaning (*i.e.*, less packed) district in almost all alternative maps. A51-52, 54, 62; JA270-71, 274. Larry Hall, who lives in CD1, would have been placed in a less Democratic-leaning district in all but three of Dr. Chen's 2000 maps—*i.e.*, 99.95% of the time. A51-52. John Gresham, who lives in CD12, would have been placed in a less Democratic-leaning district over 99% of the time. A62. And in CD4, Alice Bordsen would have been

placed in a less Democratic-leaning district approximately 80% of the time. A54. This shows that the votes of the *Common Cause* voter-plaintiffs in these packed districts were diluted—essentially wasted—exactly as Appellants intended.

The results for the Plan's cracked districts were just as egregious. Each of the *Common Cause* voter-plaintiffs placed in a majority-Republican district under the 2016 Plan (where the red stars are to the right of the dashed line) would have resided in a more Democratic-leaning (*i.e.*, less cracked) district in the overwhelming majority of alternative maps. A52-53, 57-59, 61; JA270-74. And again, for most of these plaintiffs, their actual districts are extreme outliers. For example, Jones Byrd (CD11) would have been placed in a more Democratic-leaning district in *all* 2,000 of Dr. Chen's alternative maps. A61. Douglas Berger (CD2) and Coy Brewer (CD8) would have been placed in more Democratic-leaning districts in 99% of those maps. A53, 57-58. Similarly, Robert Warren Wolf (CD10) would have been placed in a more Democratic-leaning district in 98% of Dr. Chen's alternative maps; John McNeill (CD9), in 97%; Richard and Cheryl Lee Taft (CD3), in 95%; and Russell Walker (CD13), in 90%. A58-59, A53, A62.

Indeed, the chart above shows that many of these cracked voter-plaintiffs would likely have been placed in Democratic-*majority* districts had neutral criteria been used. For each plaintiff's row on the chart, consider how much of the gray mass lies to the left of the dotted 50% line. Each gray circle to the left of that line represents a Democratic-majority district in which the voter-plaintiff would have been placed un-

der one of Dr. Chen's neutrally drawn alternative maps. To take one example, John McNeill, who lives in CD9, was placed in a district gerrymandered to have a 53% Republican vote share. But had neutral criteria been used, he would have been placed in a Democratic-majority district over 80% of the time.

On August 27, 2018, the District Court issued a new opinion. The majority held that at least one plaintiff had standing to challenge each of the Plan's 13 districts under a vote-dilution theory and that the plaintiffs further had non-dilutionary standing to challenge the Plan as a whole. A3. Judge Osteen agreed that at least one plaintiff had standing to challenge 10 of the Plan's 13 districts under a vote-dilution theory, but disagreed that voters living in packed districts suffer dilutionary injury. A330. The District Court also held unanimously that Appellees' claims were justiciable under this Court's precedents. A33-35.

On the merits, the majority held that 12 of the Plan's 13 districts (all except CD5) violate the Equal Protection Clause, because they were drawn with the predominant intent to discriminate against Democratic voters, and did so, without any legitimate justification. A227. Judge Osteen agreed that the nine of those 12 districts that were cracked violate the Equal Protection Clause. A365 n.4. The majority also held that the Plan violates the First Amendment because, *inter alia*, it constitutes viewpoint discrimination without legitimate justification. A283. Finally, the Court held unanimously that the Plan violates Article I, §§ 2 and 4, because it was nakedly intended to "dictate [federal] electoral outcomes." A303.

Because it was impracticable to redistrict in time for the November 2018 elections, the District Court stayed its judgment on the condition, accepted by Appellants, that this appeal be pursued expeditiously.

C. The 2018 Election

The 2018 election was a nationwide "blue wave." Democrats added 40 seats in the House of Representatives, their largest gain since the Watergate election of 1974, and a larger gain than the wave elections of 1982 and 2004. The Democratic popular-vote margin was 8.6%, the greatest on record for a party in the minority heading into an election.[4] But the red wall in North Carolina largely stood fast, thwarting democratic self-correction; election-night returns indicated yet another 10-3 result.[5] *See* Brief of Political Science Professors as *Amici Curiae* (discussing 2018 election results in gerrymandered states).

Later, however, irregularities emerged regarding CD9, where the Republican was initially reported to have prevailed by just 900 votes. On February 21, 2019, the election was set aside and a new election was ordered as to CD9. This will give *Common Cause* Appellee John McNeill another chance to vote for the candidate of his choice (albeit with the deck still stacked against him). Meanwhile, Mr. McNeill has no representative in Congress. But for the 2016 Plan's

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[4] Harry Enten, *Latest House results confirm 2018 wasn't a blue wave. It was a blue tsunami*, CNN Politics, Dec. 6, 2018, https://cnn.it/2QxAHb5.

[5] N.C. State Board of Election, *11/06/2018 Unofficial General Election Results – Statewide*, https://bit.ly/2JD5HjT.

extreme partisan gerrymandering, this situation is unlikely to have occurred, as Mr. McNeill would have been placed in a Democratic-majority district over 80% of the time.

SUMMARY OF ARGUMENT

As the District Court correctly held, *Common Cause* Appellees have standing to bring their claims; those claims are justiciable; and the 2016 Plan—as a whole and in all but one of its individual districts—is unconstitutional.

Standing. Appellants' standing argument boils down to ignoring this Court's unanimous holding in *Gill* and ignoring *Common Cause* Appellees' evidence.

Gill held that an individual establishes vote-dilution standing by showing that he was "place[d] in a 'cracked' or 'packed' district" so that "his vote … carr[ies] less weight" than it would have carried in an alternative, neutrally-drawn district. 138 S. Ct. at 1930-31. Appellants admitted—indeed, bragged—that the Plan intentionally packed and cracked Democratic voters, and *Common Cause* Appellees proved it was true. Using only traditional, neutral criteria, their experts generated tens of thousands of alternative maps and showed that the Plan's individual districts were extreme statistical outliers, causing extreme dilution of the voter-plaintiffs' votes. *Gill* approved of this technique; the District Court found the evidence compelling; and Appellants do not challenge it here. Indeed, they do not mention *Common Cause* Appellees' expert analyses at all.

As the *Gill* concurrence recognized, partisan gerrymanders also inflict cognizable burdens on voters' and political parties' rights of expression and association. *Common Cause* Appellees, who include the North Carolina Democratic Party, provided unrebutted evidence of these harms. These included markedly diminished ability to fundraise and to recruit candidates and volunteers. Indeed, North Carolina's CD3 was so extreme that, in 2018, no Democrat was willing to run in it.

Justiciability. Without saying so directly, Appellants argue that the Court should overrule its holding in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan-gerrymandering claims are justiciable. They maintain that the Court may not hear this case—or any other case challenging a partisan gerrymander—pursuant to the "political question" doctrine. But this argument is unmoored from the doctrine as this Court defined it in *Baker* and has applied it since. In particular, the doctrine provides no license for the Court to turn away claims because (in Appellants' words) they are "politically fraught" or "divisive." App. Br. 34. Nor does it permit a preemptive bar on entire *categories* of disputes—*e.g.*, "partisan-gerrymandering cases"—without a "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217.

Appellants argue that partisan-gerrymandering claims present political questions because the Elections Clause (Art. I, § 4) "textually commits" the remedying of unconstitutional districting plans to State legislatures and Congress alone. But the Court has rejected this argument, either expressly or implicitly,

every time it has reviewed a State election regulation since *Baker* and *Wesberry v. Sanders*, 376 U.S. 1 (1964). Accepting it now would not only turn partisan-gerrymandering claims out of court; it would raze this Court's election-law jurisprudence *in toto*.

Appellants also argue that this case presents a political question because there is "a lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217. But whatever may be true in other cases, the claims in *this* case could not be simpler or more "manageable." As Justice Kennedy observed in *Vieth*, and as oral argument in last Term's gerrymandering cases demonstrated, extreme districting plans such as the 2016 Plan that require partisan discrimination *on their face* are *per se* unconstitutional.

More broadly, "discoverable and manageable" standards *do* exist in partisan-gerrymandering cases: namely, this Court's well-settled precedents under the First Amendment, Equal Protection Clause, and Elections Clause. The "standards" that *Common Cause* Appellees offer here are just as understandable and applicable as those that this Court applies in any number of constitutional and statutory contexts. And the types of evidence that *Common Cause* Appellees offered to satisfy those standards—alternative maps and probability distributions derived from such maps—are both objective and familiar.

Appellants have one central "manageability" argument that they return to time and again: the District Court's tests do not draw a bright line between a permissible amount of politics and "too much" politics. App. Br. 2, 22. But this complaint misconceives

Common Cause Appellees' claims. The infirmity in the 2016 Plan is not that "political considerations" *per se* played an "excessive" role in its creation. It is that the Plan, and its individual districts, were drawn with the predominant intent to *discriminate invidiously* on the basis of political expression and association. The question, in other words, is not one of degree (how much "politics" is "too much?"), but one of kind (were political considerations used for invidious ends?). If invidious intent is present, harm sufficient to establish standing is all that is required. Contrary to Appellants' claims, while the Court has permitted benign uses of political data in districting, it has never blessed *invidious* political discrimination in districting in any amount—let alone where it predominates over all other motivations, as it did here.

Merits. The 2016 Plan is unconstitutional under three different bodies of well-established case law. The Plan's express imposition of burdens on the basis of political expression and association violates the First Amendment. Its intentional invidious discrimination violates the Equal Protection Clause. And its naked intent to "disfavor a class of candidates" and "dictate electoral outcomes" violates the Elections Clause. Appellants do not even engage with this Court's substantive doctrine on these issues, let alone distinguish the binding precedents on which the District Court properly relied.

ARGUMENT

I. *COMMON CAUSE* APPELLEES HAVE STANDING

The District Court correctly held that *Common Cause* Appellees, including both individual voters and the North Carolina Democratic Party, have standing. First, the voter-plaintiffs pleaded and proved that 12 of the Plan's 13 districts were packed or cracked, establishing vote-dilution injury under *Gill*. A3. Second, *Common Cause* Appellees pleaded and proved tangible burdens on their rights of political speech and association, both on a district-specific and statewide level. A74. Because all of these plaintiffs "allege[d] [and proved] facts showing disadvantage to themselves as individuals," they all "have standing to sue to remedy that disadvantage." *Gill*, 138 S. Ct. at 1920 (quoting *Baker*, 396 U.S. at 206).

Appellants maintain that *Common Cause* Appellees lack standing because this case is really just about an "abstract interest in policies adopted by the legislature"—a "nonjusticiable 'general interest common to all members of the public.'" App. Br. 24-25. Not so. This case is about the burdens the 2016 Plan imposed on *Common Cause* Appellees' personal votes and personal rights of political speech and association. Appellants' contrary argument both misreads *Gill* and distorts—or outright ignores—*Common Cause* Appellees' allegations and proof.

A. *Common Cause* Appellees Proved Vote-Dilution Injury

Gill expressly recognized that partisan gerrymandering results in vote dilution, and that this is a harm cognizable under Article III. As the Court noted, "the harm asserted by the plaintiffs" in such a case "aris[es] from the burden on those plaintiff's own votes." 138 S. Ct. at 1931. And "that burden arises through a voter's placement in a 'cracked' or 'packed' district." *Ibid.* Because the *Gill* plaintiffs had failed to adduce district-specific proof of packing or cracking, the Court remanded to afford them "an opportunity to prove" that they "live in districts where Democrats … ha[d] been packed or cracked," and thereby establish standing. *Id.* at 1934.

Here, by contrast, *Common Cause* Appellees "alleged, argued, and prove[d] district-specific [vote-dilution] injuries *throughout* the course of this litigation." A41. This proof included the admissions of Appellants themselves and their map-drawer, Dr. Hofeller, that the Plan intentionally cracked and packed the specific districts where the voter-plaintiffs live. It also included the analyses of Drs. Mattingly and Chen, who used tens of thousands of alternative maps to show that the districts in which the voter-plaintiffs live are severely packed and cracked. *Cf. Gill*, 138 S. Ct. at 1930-31 (a voter establishes standing by proving that "the particular composition of [his] district … causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district"). This proof was not "retrofit[ted]" after *Gill,* App. Br. 20, and the District Court's meticulous findings accepting it are not chal-

lenged on appeal. Indeed, Appellants barely even mention *Common Cause* Appellees' evidence, and to the extent that they do, they distort the record.

Appellants falsely analogize this case to *Gill*, where lead plaintiff William Whitford's "ideal map" itself showed that his own district had not been packed or cracked. 138 S. Ct. at 1924-25. That is plainly not true here: as discussed above, the undisputed evidence showed that the *Common Cause* voter-plaintiffs live in districts with Democratic vote shares markedly higher or lower than in the vast majority of alternative maps.

Muddying the waters, Appellants mix and match evidence offered by *Common Cause* Appellees and *League* Appellees, indiscriminately referring to them all as "plaintiffs." But there is an important difference. To prove standing, *Common Cause* Appellees offered tens of thousands of maps showing the full range of alternative possibilities. *League* Appellees relied on one map ("Plan 2-297"), which reflected one alternative scenario. Both are valid ways to show standing, but Appellants cannot simply ignore the thousands of alternative maps offered by *Common Cause* Appellees and base their arguments about the *Common Cause* voter-plaintffs on *League* Appellees' Plan 2-297 alone.

For example, Appellants argue that *Common Cause* plaintiff Alice Bordsen has no standing because the Democratic vote share in her CD4, one of the packed districts, approximately equals the Democratic vote share in the single hypothetical map relied upon by *League* Appellees. App. Br. 26. This cherry-picking ignores Dr. Hofeller's testimony that CD4

was intentionally "packed" with extra Democrats, and it ignores the thousands of alternative maps relied on by *Common Cause* Appellees (and the District Court) that confirm this. Thus, Dr. Chen found that the Democratic vote share in Bordsen's CD4 was higher than the Democratic vote share in 80% of hypothetical districts containing Bordsen's home address. A54; JA271; *see also* A163 (discussing similar results for Dr. Mattingly's 24,000 maps).[6]

Appellants play the same game with *Common Cause* plaintiffs Richard and Cheryl Taft of CD3, comparing the vote share of their actual district under the Plan to the vote share of the corresponding district in *League* Appellees' single Plan 2-297 (which they misleadingly call "*plaintiffs'* proposed plan"). App. Br. 27. But *Common Cause* Appellees did not rely on Plan 2-297 to establish the Tafts' standing; we relied on tens of thousands of alternative maps generated by Drs. Chen and Mattingly. That evidence—which Appellants do not challenge—showed that the Tafts would have been placed in a more Democratic district in over 95% of alternative maps, and that they would have been placed in a Democratic-*majority* district 75% of the time. A53, JA271. Instead, they found themselves in a district that was so rigged it could not even generate a Democratic candi-

[6] Appellants offer a different argument as to *Common Cause* plaintiffs Larry Hall and John Gresham in CD1 and CD12, the other two packed districts. They do not contend that the Democratic vote shares of these plaintiffs' districts were unaffected by the gerrymander, but merely that "their districts would remain majority-Democratic under their own proposed maps." App. Br. 27. But that is true of any packed district, and *Gill* plainly holds that packing, as well as cracking, inflicts vote dilution.

date for Congress in 2018. Any "concessions" *League* Appellees may have made about their own plaintiffs under their single alternative map are immaterial to the standing of the Tafts or any other *Common Cause* voter-plaintiff.

More generally, as discussed above, Appellants admitted that they intentionally cracked ten districts where *Common Cause* plaintiffs reside for the purpose of subordinating Democrats and guaranteeing the election of Republicans. The extreme effects of this cracking were shown by overwhelming evidence on a district-specific basis. Notwithstanding Appellants' verbal sleight of hand, they challenge none of the District Court's extensive fact-findings on packing and cracking in this Court.

Finally, Appellants argue that, in some districts, the 2016 gerrymander may not have changed the outcome of the election. App. Br. 28. But *Gill* did not hold that the injury in a vote-dilution claim is the deprival of one's preferred election result. The injury, rather, is that the "composition of [a] voter's own district … causes his vote—having been packed or cracked—to *carry less weight*…." 138 S. Ct. at 1930-31 (emphasis added); *see also id.* at 1936 (Kagan, J., concurring); *cf. N.E. Fla. Chapter, Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury-in-fact' in an equal protection case … is the denial of equal treatment …, not the ultimate inability to obtain the [desired] benefit."). Moreover, although Appellees are not required to show that their preferred candidates would have won absent the gerrymander, Drs. Chen and Mattingly's analyses show clearly that under a map drawn with-

out partisan discrimination, there would be more than three Democratic districts. Indeed, based on the bell curves they generated, there would likely be six or seven, and maybe more. *Ante* at 13-14.

B. *Common Cause* Appellees Proved Associational Injury

"[P]artisan gerrymanders inflict other kinds of constitutional harm" beyond vote dilution. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *see also Vieth*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). The District Court found such non-dilutionary injury here based on undisputed evidence, and it correctly held that these injuries establish standing. Specifically, it found—and Appellants do not dispute—that the 2016 Plan intentionally burdened Appellees' rights of political speech and association.

The *Common Cause* voter-plaintiffs gave unopposed testimony that the Plan "decreased [their] ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70. These are classic injuries-in-fact. *See Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (election law inflicted cognizable "burden" on association by making "[v]olunteers … more difficult to recruit," "contributions … more difficult to secure," and "voters … less interested in the campaign").

And "what [was] true for" the voter-plaintiffs was "triply true" for the North Carolina Democratic Party. A71 (quoting *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring)). The Party's entire *raison d'être* is to engage in political activity and association and to compete for

seats. It is undisputed that the Plan "weaken[ed]" its capacity "to perform all [these] functions." *Ibid.* The Party was so weakened that it could not even recruit a candidate to run in CD3 in the 2018 election. It is hard to imagine a more concrete injury-in-fact to a political party. *See, e.g.*, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615-16 (1996) (striking down law that hampered party's ability to "convince others to join").

Rather than dispute the District Court's fact-finding, Appellants suggest that these burdens do not constitute injuries-in-fact because Appellees remain "free … to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise [engage in political] expression." App. Br. 19. On countless occasions, however, this Court has found that voters, candidates, and parties have standing to challenge laws that stop short of altogether denying them the franchise, completely barring their candidacy, or flatly forbidding them to speak. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011) (public "matching funds" law injured opponents of candidates receiving such funds, even though they remained free to speak as they wished).

These non-dilutionary effects injured *Common Cause* Appellees both in their individual districts and on a statewide basis. Ignoring the district-specific injury, Appellants dispute that these injuries afford standing to challenge the 2016 Plan as a whole. But this argument fails to acknowledge the difference between vote dilution, at issue in *Gill*, and associational harms. Vote-dilution claims by individuals are dis-

trict-specific because citizens vote only in one district—their own. *Gill*, 138 S. Ct. at 1930. Nondilutionary harms, on the other hand, may be district-specific or statewide, particularly for a political party. Unlike vote dilution, "the associational injury flowing from a statewide partisan gerrymander … has nothing to do with the packing or cracking of any single district's lines." *Id.* at 1938-39 (Kagan, J., concurring). Democrats from Asheville fundraise for candidates in Fayetteville; Democrats from Raleigh conduct voter outreach in Charlotte; and the Party itself does these things statewide—and has a critical organizational interest in the statewide outcome. Where, as here, "the harm alleged is not district specific, the proof needed for standing should not be district specific either." *Ibid.*

II. *COMMON CAUSE* APPELLEES' CLAIMS ARE JUSTICIABLE

Appellants' chief plea is that any partisan-gerrymandering case—whatever its legal theory, and however compelling its facts—should be nonjusticiable. They ask this Court to overrule *Bandemer* and take this momentous step on the flimsiest of bases: a "textual commitment" argument that this Court has rejected ever since *Baker* itself, and a "manageable standards" argument that misconstrues the evil of which Appellees complain and the ability of the courts to redress it.

"[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012). The "political question" doctrine is "a narrow exception to that rule." *Id.* at 195. Indeed, it is so nar-

row that this Court "has relied on [it] only twice in the last [58] years." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (Kavanaugh, J., dissenting). *See Nixon v. United States*, 506 U.S. 224, 226 (1993) (precluding judicial review of Senate impeachment trial); *Gilligan v. Morgan*, 413 U.S. 1, 5 (1973) (precluding judicial exercise of continuing supervisory jurisdiction over National Guard).[7] This case is a far cry from those.

Appellants repeatedly characterize the claims in this case as "politically fraught," "politically charged," and "politically divisive." App. Br. 2, 4, 21, 34, 36, 61. But the political question doctrine is not implicated "merely because [a suit] ha[s] political implications." *Zivotofsky*, 566 U.S. at 196. This Court *must* resolve a properly presented constitutional claim, even when the presidency itself hangs squarely in the balance. *See Bush v. Gore*, 531 U.S. 98, 111 (2000) ("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.").

In any event, none of *Baker*'s potential signs of "political question" status is "inextricable from" this case. 369 U.S. at 217. Appellants raise just two of them: (1) a "textually demonstrable … commitment"

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[7] *See also* John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457, 459 (2017) (explaining that this Court has invoked the political question doctrine in only "two contexts": where the Constitution requires a coordinate branch "to apply legal rules to particular facts," *e.g.*, *Nixon*, and where plaintiffs seek "mandatory prospective relief … concerning military and national security matters," *e.g.*, *Gilligan*).

to another decisionmaker; and (2) a lack of "discoverable and manageable standards" for decision. *Ibid.* Neither applies here.

A. The Elections Clause Is Not A "Textually Demonstrable Commitment" That Precludes Judicial Review

Although they did not raise it below, Appellants' "political question" argument now begins with the first *Baker* factor: "a textually demonstrable constitutional commitment of the issue" to another branch. In particular, they maintain that the Elections Clause, which "delegat[es] … power to the States" to regulate the "Times, Places and Manner" of congressional elections subject to congressional modification, *U.S. Term Limits v. Thornton*, 514 U.S. 779, 804-05 (1995), strips the courts of jurisdiction to address claims that a State has exercised this power unconstitutionally. App. Br. 31-36.

This argument does not leave the starting gate. It was definitively rejected in *Baker*—the same case that established the modern political question doctrine. There, the Court surmised that the lower court's nonjusticiability holding might have turned on "the argument" that "Art. I, § 4" (the Elections Clause) renders "congressional redistricting problems … a 'political question' the resolution of which was confided to Congress." 369 U.S. at 232-33. But this Court found otherwise, concluding that "Article I, … [§] 4 … plainly afford[s] no support for the District Court's conclusion." *Id.* at 234. Two years later, this Court again held that "nothing in the language of" the Elections Clause "immunize[s] state congressional apportionment laws which debase a citizen's right

to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Wesberry*, 376 U.S. at 6-7.

In the half-century since *Baker* and *Wesberry*, this Court has "continually stressed" that, while the Elections Clause gives States "a major role to play in structuring … the election process," they "must act within limits imposed by the Constitution." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000); *see also Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) ("A State's broad power to regulate the time, place, and manner of elections does not extinguish the State's responsibility to observe the limits established by … the First and Fourteenth Amendments."); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) ("The power to regulate the time, place, and manner of elections does not justify … the abridgment of fundamental rights, such as the right to vote … or … the freedom of political association."). Moreover, this Court has repeatedly invalidated State regulations of congressional elections that exceed constitutional limits. *See, e.g.*, *Jones*, 530 U.S. 567 (striking down "blanket primary" law); *Eu*, 489 U.S. 214 (striking down ban on party endorsements); *Tashjian*, 479 U.S. 208 (striking down restriction on primary voting). In fact, far from construing the Elections Clause as a grant of unreviewable discretion to the States or Congress, this Court has treated the Clause as a fount of judicial *authority* to invalidate State electoral regulations. Point III.C, *infra*.

To now accept Appellants' theory that the Elections Clause is a "textual commitment" that bars ju-

dicial review of State action taken under color of its authority would uproot this Court's entire election-law and voting-rights jurisprudence concerning State regulation of federal elections. Not just *partisan*-gerrymandering cases would become nonjusticiable; so would *racial*-gerrymandering and vote-dilution cases, one-person-one-vote cases, and challenges to everything from white primaries to ballot-access laws. After all, nothing in the text of the Elections Clause singles out partisan gerrymandering and treats it differently from any other theory under which State action taken pursuant to the Clause's authority might be challenged.[8]

With this Court's precedents squarely against them, Appellants resort to two arguments for their "textual commitment" thesis: (1) no one expressly raised the possibility of judicial review of districting legislation at the time of the Founding, App. Br. 32-33; and (2) partisan gerrymandering has taken place for a long time, *id.* 3-4. Neither argument is convincing—let alone compelling enough to jettison generations of settled precedent.

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[8] In a vague footnote, Appellants suggest that *racial*-gerrymandering claims would somehow escape unscathed "[i]n light of the Reconstruction Amendments." App. Br. 36 n.1. But they say the exact opposite in the body of their brief, arguing that "nothing in the Reconstruction Amendments suggests a revisiting of the original allocation of authority" under the Elections Clause. *Id.* 36. In any event, it is the Fourteenth Amendment that provides the basis for Appellees' Equal Protection claim and, through its incorporation of the Bill of Rights, Appellees' First Amendment claim. Thus, to the extent the Reconstruction Amendments supersede "the textual commitment … in the Elections Clause," *id.* 36 n.1, they do so with respect to the claims in this case.

The first argument proves too much. The courts routinely hear all sorts of challenges to electoral regulations (and other types of government action) that the Founders did not, and could never have, specifically foreseen. And what the Founders *did* say is far more illuminating than what they did not: they explained that the courts "were designed to be an intermediate body between the people and the legislature, in order … to keep the latter within [constitutional] limits" and to prevent "oppressions of the minor party" by "the major voice of the community." Federalist No. 78 (Hamilton). That is precisely what Appellees ask the courts to do here.

Nor does the sordid history of partisan gerrymandering make it nonjusticiable. First, "[n]either the antiquity of a practice nor the fact of steadfast legislative … adherence to it through the centuries insulates it from constitutional attack." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)). As this Court explained in another Elections Clause case, "[o]ne may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States." *Thornton*, 514 U.S. at 823. Second, while it is true that "various instances of partisan gerrymandering have indeed occurred throughout American history," it "has never been regarded as acceptable … as part of our constitutional tradition or as a feature of democratic governance." Brief of Historians as *Amici Curiae* 33, *Gill v. Whitford*, No. 16-1161. "To the contrary, from its inception to the present day, it has been harshly condemned as an unconstitutional

mechanism for denying voters' essential rights to equal representation." *Ibid.*[9]

B. This Case Does Not Lack "Manageable Standards" For Resolution

Appellants' "manageable standards" argument fares no better. It bears emphasis, as the District Court noted, that this Court has never deemed a case (let alone an entire category of cases) nonjusticiable *solely* because of a purported lack of "manageable standards." A97 n.19; *see* Brief of Constitutional Law Professors as *Amici Curiae* 4-9, *Gill v. Whitford*, No. 16-1161. Nor should the Court take that unprecedented step here. The political question doctrine requires a *case-specific* assessment of manageability—and whatever may be true of other cases involving partisan gerrymanders, there is nothing "unmanageable" about a case such as this. More generally, the legal principles that should govern partisan-

[9] For example, the first gerrymander after the formation of the United States—Patrick Henry's effort to shape the newly-formed congressional districts in Virginia to deny seats to James Madison and other Federalists—was bitterly condemned by the Framers. *See* PAPERS OF JAMES MADISON 11:302 (R. Rutland et al., eds. 1962). George Washington "dreaded" that Henry's districting plan would be "so arranged as to place a large proportion of those who are called Antifederalists" in the new Congress. DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790 2:374 (M. Jensen et al., eds. 1976). General Henry "Light Horse Harry" Lee warned that Henry's gerrymander "menace[d] the existence of the govt." by designing "the districts … to conform to the anti-federal interest." *Id.* 2:378. And Edmund Randolph feared that Henry's effort "to arrange the districts" would "tend to the subversion of the new government." PAPERS OF JAMES MADISON, *supra*, 11:339.

gerrymandering claims are well-established, and federal courts apply them successfully in other cases every day. Meanwhile, the unchallenged evidence that *Common Cause* Appellees adduced below is of the type routinely relied upon in judicial proceedings.

1. The Extraordinary Facts Of This Case Demonstrate A Violation Under Any Standard

Appellants ask the Court to use this case as a vehicle to "declare partisan gerrymandering claims nonjusticiable once and for all." App. Br. 2. But "all" partisan gerrymanders are not now before this Court—*this* one is. And however manageable or unmanageable other cases might be, the facts of this case make out a clear constitutional violation under any conceivable standard.

The political question doctrine calls for "case-by-case inquiry," not "blanket rule[s]" or "semantic cataloguing." *Baker*, 369 U.S. at 210-11, 215-16. Courts must make a "discriminating inquiry into the precise facts and posture of the particular case" and determine the issue's "susceptibility to judicial handling … in *th[at] specific case*." *Id.* at 211-12, 217 (emphasis added); *cf. Gilligan*, 413 U.S. at 11-12 (holding that "no justiciable controversy [was] presented … *in this case*," but recognizing that the Court was "neither hold[ing] nor imply[ing] that the conduct of the National Guard is always beyond judicial review"). To go beyond the facts and legal theories raised in a case and rule that an entire category of cases is nonjusticiable would violate "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v.*

DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in the judgment).

The claims in *this* case are plainly judicially determinable. Invidious intent is clear—indeed, admitted. North Carolina formally adopted binding written criteria that expressly required preserving a Republican "Partisan Advantage," with a preset quota of "10 Republicans" and "3 Democrats." The declared "intent" was to maximize Republican power because "electing Republicans is better than electing Democrats." Equally clear is the discriminatory effect. Undisputed facts show that Appellants' gerrymander was extreme, both statewide and in its individual districts—a clear statistical outlier. No "value-laden judgments," App. Br. 2, are necessary to decide this case; the constitutional violation is plain for all to see.

As several Justices have suggested, at minimum, districting plans designed under a *facially* discriminatory mandate—as the 2016 Plan was—are unconstitutional. In *Vieth*, for example, Justice Kennedy observed that if "a State passed an enactment that declared" expressly that districts "shall be drawn … to burden" one party, "we would surely conclude"—without further inquiry—"that the Constitution had been violated." 541 U.S. at 311-12.

At oral argument last Term, Justice Kennedy asked again whether a law expressly requiring partisan favoritism in districting would violate the Constitution. *See* Oral Argument Tr., *Gill v. Whitford*, No. 16-1161 (Oct. 3, 2017) at 26; Oral Argument Tr., *Benisek v. Lamone*, No. 17-333 (Mar. 28, 2018) at 45. In both cases, counsel for the State parties agreed

that it would. So did counsel for the legislative *amici* in *Gill*:

> JUSTICE KENNEDY: … If the state has a law … saying all legitimate factors must be used in a way to favor party X or party Y, is that … an equal protection violation or a First Amendment violation? …
>
> MS. MURPHY: Yes. It would be … unconstitutional, if it was on the face of it.

Gill Tr. 26-27.

Justice Kagan asked a similar question and received the same answer from the defendants' counsel:

> JUSTICE KAGAN: … Suppose the Maryland legislature passed a statute and said, in the next round of reapportionment, we're going to create seven Democratic districts and one Republican district[?]
>
> MR. SULLIVAN: … It would be [viewpoint discrimination] on its face.

Benisek Tr. 47.

Thus, as Justice Alito observed, if nothing else, cases like *this* one can be resolved "manageably":

> JUSTICE ALITO: … It's not a manageable standard that you cannot have a law that [expressly] says draw maps to favor one party or the other[?] *That seems like a perfectly manageable standard.*

Gill Tr. 20:8-15 (emphasis added). That cases with different facts might present different manageability questions is no reason to "stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker*, 369 U.S. at 217. This Court can easily condemn the extraordinary combination of express invidious intent and extreme discriminatory effect present here.

2. Appellants' "Line-Drawing" Argument Is A Red Herring

Appellants' chief argument as to why partisan-gerrymandering cases are not "manageable" is that it is impossible for courts to draw an "identifiable constitutional line" between an acceptable and an excessive amount of politics in districting. App. Br. 22. Courts, they insist, are not institutionally suited to "mak[e] value-laden judgments about how much politics is too much." *Id.* 2.

For starters, Appellants' argument is irrelevant in *this* case. Even if some partisan-gerrymandering cases required line-drawing of this sort, this case does not: the Court need only look at the face of the criteria that the Redistricting Committee formally adopted and the admitted packing and cracking that implemented their plan.

More generally, however, Appellants' argument misconceives the evil in a partisan-gerrymandering claim. *Common Cause* Appellees do not assert—and the District Court did not find—that the 2016 Plan is unconstitutional because "politics" *per se* played too great a role in its creation. Rather, they assert—and the District Court found—that the Plan is unconsti-

tutional because it was enacted with the intent to discriminate invidiously on the basis of political viewpoint and association. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (distinguishing mere use of "political classifications" from use of such classifications "in an invidious manner"). Thus, the question that courts are called upon to answer is not one of degree (was "politics" considered "too much?") but one of kind (were political classifications applied in an invidious manner?). *See generally* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993 (2018); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017). If the classification is invidious, that is all a plaintiff who has suffered resulting injury-in-fact must show.

This Court has recognized the distinction between invidious and non-invidious uses of political classifications. For example, it has held that "political considerations" may be taken into account in districting to "provide … proportional representation," *Gaffney v. Cummings*, 412 U.S. 735, 753-54 (1973), or to "avoid[] contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). At the same time, the Court has warned that the use of political classifications must be "nondiscriminatory." *Ibid.* In other words, the map-drawers may not employ them to "invidiously minimiz[e]" the "voting strength" of any "political group." *Gaffney*, 412 U.S. at 754; *see also Whitcomb v. Chavis*, 403 U.S. 124, 143-44 (1971) (districts are "subject to challenge" where they "operate to minimize or cancel out the voting strength of racial *or political* [groups]" (quot-

ing *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)) (emphasis added)); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1347 (N.D. Ga. 2004) (striking down plan where "the policy of protecting incumbents" was "applied in a blatantly partisan and discriminatory manner, taking pains to protect only Democratic incumbents"), *summarily aff'd*, 542 U.S 947 (2004).

Appellants would have the Court believe that it has already blessed both the benign *and* the invidious use of political criteria in districting. App. Br. 47. This is simply not true. There is no decision of this Court holding that "a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 336-37 (Stevens, J., dissenting). *Gaffney* expressly turned on the fact that the Legislature's purpose in employing political data was benign rather than "invidious[]." 412 U.S. at 754 ("[C]ourts have [no] constitutional warrant to invalidate a state plan … because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it."). *Hunt v. Cromartie*, 526 U.S. 541 (1999), and *Easley v. Cromartie*, 532 U.S. 234 (2001), both recognize that a plaintiff cannot prevail on a *racial*-gerrymandering claim when in fact the State's predominant motive was political. But neither *Cromartie* opinion "held" that the invidious use of political classifications to subordinate a minority party is ever constitutional, *cf.* App. Br. 7, and in *Easley*, political data was expressly used (as in *Gaffney*) to achieve "partisan balance throughout the State." 532 U.S. at 253. Nor could either case have held anything about partisan-gerrymandering claims, since none were before the Court in those cases.

Because the claims in this case challenge invidious partisan discrimination, rather than the presence of "political considerations" *per se*, Appellants' manageability concerns evaporate. Courts are well equipped to decide claims that a challenged action was invidiously motivated. They decide such claims routinely. Determinations of invidious intent do not require courts to assume the role of legislatures or make "value-laden judgments." App. Br. 2. When invidious intent and injury sufficient to establish standing are present, no more is needed.

Appellants demur that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan." App. Br. 48 (quoting *Vieth*, 541 U.S. at 344 (Souter, J., dissenting)). That may be true, but only in the same meaningless sense that it is impossible to eliminate racism from all human hearts or to prevent all tax cheating. That is no excuse for refusing to adjudicate race-discrimination or tax-fraud cases. The same goes here: public officials sworn to uphold the Constitution should be capable of refraining from invidious conduct, if they are told that is the law.[10]

At the same time, if the Court desires to limit judicial intervention to the most extreme cases of invid-

[10] For comparison's sake, when *Shaw v. Reno*, 509 U.S. 630 (1993), was decided, many (including the dissenters) predicted that *Shaw*'s open-ended "bizarreness" standard would spawn constant litigation. But map-drawers quickly got the Court's message, and in the 2000 round of redistricting that followed, there was virtually no *Shaw* litigation. *See* S. Issacharoff, P. Karlan, R. Pildes, & N. Persily, LAW OF DEMOCRACY 937 n.4 (5th ed. 2016).

ious intent, the District Court offered a solution: require the plaintiff to show that invidious intent *predominated* over all other considerations in the redistricting process. A119-20, 142-46. Appellants do not challenge the District Court's factual finding that this was the case here. *See*, *e.g.*, JA146 n.23, 166, 171. Indeed, it is indisputable that minimizing Democrats' political strength was the overriding purpose to which all other considerations were subordinated.

After complaining that a plain "invidious intent" standard is too demanding, Appellants turn around and criticize a "predominant invidious intent" standard as too inexact. App. Br. 48. But "courts routinely engage" in predominant-purpose inquiries "in many areas of constitutional jurisprudence." *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000). Especially relevant here, this Court has manageably applied a predominant-intent standard to *racial*-gerrymandering claims for over 20 years. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). In fact, given the frequency with which States raise "party, not race" defenses to racial-gerrymandering claims, courts are already adept at determining whether pursuit of partisan advantage was the predominant force behind the drawing of an individual district's lines. *See, e.g.*, *Harris*, 137 S. Ct. at 1503.

3. The Legal Principles Governing This Case Are Well-Settled And Within The Judiciary's Competence To Apply

Once *Common Cause* Appellees' claims are properly understood, it becomes clear that "judicially discoverable and manageable standards" exist for resolving them. As set forth in Point III, those "standards"—

e.g., the prohibition on unjustified invidious discrimination—come directly from this Court's well-established First Amendment, Equal Protection, and Elections Clause precedents. *Cf. Baker*, 369 U.S. at 226 ("Nor need … the Court … enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar….").

Importantly, *Baker*'s "discoverable and manageable standards" prong does not require an algorithmic test devoid of all human judgment. *See id.* at 283 (Frankfurter, J., dissenting) ("Questions have arisen under the Constitution to which adjudication gives answer although the criteria for decision are less than unwavering bright lines."). If it were otherwise, many—perhaps most—areas of constitutional and statutory jurisprudence would be nonjusticiable. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (forfeiture "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense"); *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (probable cause is "a fluid concept … not readily, or even usefully, reduced to a neat set of legal rules"); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977) (practice violates § 1 of Sherman Act if, "weigh[ing] all the circumstances," it "impos[es] an unreasonable restraint on competition").

Baker's "standards" prong asks only whether the controversy literally "defies judicial treatment," 369 U.S. at 212, in that it would require the courts to dictate "policies … for matters not legal in nature," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S.

221, 230 (1986)—for example, whether to recognize a foreign government, *Baker*, 369 U.S. at 212-14, or the appropriate "standards for the training … of the National Guard," *Gilligan*, 413 U.S. at 6. None of the tests advanced in this case resembles these quintessentially nonjudicial determinations. Instead, they call for the same familiar modes of inquiry—a search for invidious intent and adverse impact on the plaintiff—that courts make in racial-gerrymandering cases, employment-discrimination cases, and any number of others. These standards "hardly leave[] courts at sea." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

4. The Evidence That *Common Cause* Appellees Adduced To Satisfy These Legal Principles Was Familiar And Compelling

Not only are the proper legal standards well-known to the courts, but the evidence necessary to prove a partisan-gerrymandering claim is also familiar. The alternative maps relied upon by *Common Cause* Appellees are tools regularly used by courts in racial-gerrymandering and vote-dilution cases for analogous purposes. They can provide evidence not only of the district-specific effects of a gerrymander, but also of invidious intent and absence of legitimate justification. *See* Brief of Eric S. Lander as *Amicus Curiae*; Brief of Bernard Grofman and Ronald Keith Gaddie as *Amici Curiae* 18-24. And they are intuitive and easy for the courts and the public to understand.

Appellants ignore altogether the tens of thousands of alternative maps created by Drs. Mattingly and Chen and the District Court's fact-finding based on them. Instead, they focus on *other* forms of statistical evidence relied upon by *League* Appellees, such as the

efficiency gap, the mean-median difference, and other measures of plan-wide partisan bias. Appellants criticize these measures as lacking a baseline, as prone to false positives, as disguised measures of proportionality, and as unable to provide district-specific evidence. App. Br. 42-46. Because *Common Cause* Appellees did not rely on this evidence below, we leave it to *League* Appellees to respond.

But, crucially, these criticisms are completely irrelevant—*they cannot possibly apply*—to the large-scale simulations based on alternative maps relied upon by *Common Cause* Appellees. Those maps were all drawn atop the actual geography of North Carolina, taking the location of its voters and their voting histories as given. Thus, these alternative maps necessarily account for any natural "clustering" of partisans in particular regions (*e.g.*, urban areas). They are inherently district-specific, because they allow the comparison of a plaintiff's actual district to the full gamut of alternative districts in which that plaintiff's residential address might have been placed. And they do not in any way "measure deviations from proportional representation." App. Br. 50.[11]

[11] In the district court, Appellants lodged only two objections to the maps of Drs. Mattingly and Chen. They allude to just one here: that the premise underlying the hypothetical maps is that voters vote for a party and not a candidate. App. Br. 45-46. Of course, partisan preferences and turnout can vary from year to year, and candidates and issues do matter. But as the District Court noted in rejecting this argument, the challenged premise is the exact "same assumption" on which Appellants drew the gerrymandered 2016 Plan in the first place—and it works. A175; *see* Brief of Political Science Professors as *Amici Curiae*. Appellants, in any event, did not appeal this finding.

In *Gill*, this Court unanimously approved the use of one or more "hypothetical district[s]" to demonstrate cracking or packing on a district-by-district basis. 138 S. Ct. at 1931. As the concurrence explained, it is "not … hard" to demonstrate packing or cracking via "an alternative map (or set of alternative maps) … under which [the plaintiff's] vote would carry more weight." *Id.* at 1936. Notably, the concurrence approvingly cited the *amicus* brief of Dr. Chen and others doing similar work. *See* Brief of Political Geography Scholars as *Amici Curiae* 12-14, *Gill v. Whitford*, No. 16-1161 (describing computer simulation techniques for devising alternative maps). Multiple courts have found Dr. Chen's computational alternative-map analyses persuasive. *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 344-45 (4th Cir. 2016); *League of Women Voters of Mich. v. Johnson*, 2018 U.S. Dist. LEXIS 202805, at *20-25 (E.D. Mich. Nov. 30, 2018); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 943 (M.D.N.C. 2017); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018). And, more generally, alternative maps are routinely used as "key evidence" in racial-gerrymandering cases. *Harris*, 581 U. S. at 1477-79; *Easley*, 532 U. S. at 258.

Where a single alternative map is used, as *League* Appellees did, it shows that it is possible to achieve a different electoral result than the map under attack. But because it is just one reference point, it cannot prove that the challenged map is itself discriminatory. On the other hand, the vast array of hypothetical maps generated by Drs. Mattingly and Chen, and relied upon by *Common Cause* Appellees, provides compelling evidence of invidious intent, dilutive ef-

fect, and lack of justification. By taking a large random sample from the universe of all available maps, such a collection establishes a baseline—a bell curve—of what the electoral landscape should look like absent partisan gerrymandering, and it permits the fact-finder to measure the deviation of the challenged map (and its individual districts) from that baseline. Here, the district court found, and Appellants do not dispute, that the 2016 Plan was an "extreme statistical outlier." A171. When the maps are analyzed on a district-specific level, they provide direct evidence of the burden that the gerrymander imposes on particular voters in individual districts. A51-65. Extreme deviations like those found here also permit the inference that the gerrymander was intentional. A165-66. Finally, the array of available neutral alternatives also proves the lack of justification for the gerrymander.[12]

There is nothing unusual about using statistical evidence to show the improbability that a given result was due to chance, or to prove the extremity of a practice's impact. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986) (use of statistical evidence to identify correlation between race and preferred candidates); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (use of statistical evidence to demonstrate intentional exclusion of blacks from grand jury); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (use of statistical evidence to demonstrate intentional racial discrimination in hiring). Alternative maps, and probability

[12] *League* Appellees agree that alternative maps can be used for all of these purposes, but relied upon them principally for the lack-of-justification prong.

distributions associated with large groups of them, are familiar and no more difficult to understand than a bell curve. Courts can use this evidence and draw correct conclusions from it. And most importantly, the District Court did so here—and Appellants do not claim otherwise.

III. THE 2016 PLAN AND ITS INDIVIDUAL DISTRICTS ARE UNCONSTITUTIONAL

For all their potshots at the District Court's legal tests, it is striking that Appellants offer practically no argument that the 2016 Plan is actually constitutional. They do not challenge any of the District Court's fact-finding (let alone as clearly erroneous), and they make no attempt to square the Plan's undisputedly invidious intent and undisputedly extreme effect with settled First Amendment, Equal Protection Clause, and Article I doctrine. Nor could they.

A. The Plan And Its Districts Violate The First Amendment

The First Amendment "safeguards" the "right" of all Americans to "participate in … political expression and political association." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014). It protects "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968), and it prohibits the governing majority from "prescrib[ing] what shall be orthodox in politics," *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). In this way, the First Amendment serves as "a vital guarantee of democratic self-government." *U.S. Telecom Ass'n v.*

FCC, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

In particular, the First Amendment does not permit the government "to restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon*, 572 U.S. at 191. It therefore prohibits State action that distorts "[t]he free functioning of the electoral process" or "tips the electoral process in favor of the incumbent party." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). This includes retaliating against public employees who belong to the out party, *see ibid.*; or permitting "[g]overnment funds [to] be expended for the benefit of one political party," *Branti v. Finkel*, 445 U.S. 507, 517 n.12 (1980); or even "ordering the removal of … books written by" opposing partisans from public libraries, *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982).

"[T]here is no redistricting exception to this well-established First Amendment jurisprudence." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016). Indeed, as six Justices have agreed, partisan gerrymandering strikes at the heart of these First Amendment values. *See Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *id.* at 324-25 (Stevens, J., dissenting); *see generally* Brief of Floyd Abrams Institute for Freedom of Expression as *Amicus Curiae*.

Here, as the District Court held, the 2016 Plan runs afoul of at least four well-established lines of First Amendment precedent. A275-279. First, the Plan expressly burdens protected activity based on the "motivating ideology … of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.

819, 829 (1995). Second, the Plan expressly regulates protected activity "based on the identity of the speaker." *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). Third, by "penalizing" individuals "because of … their association with a political party[] or their expression of political views," the Plan constitutes unlawful retaliation for exercise of First Amendment rights. *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *see Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016). And fourth, the Plan does not constitute a "reasonable, non-discriminatory" election regulation. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Appellants make no attempt to reconcile the Plan with these well-established precedents; indeed, they cite no First Amendment case law at all.

The District Court correctly found that these violations caused the North Carolina Democratic Party and the voter-plaintiffs to suffer well-recognized First Amendment harms to political expression and association, including "decreased ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70; *ante* at 11-12, 31-32. These findings were not disputed below and are not challenged here.

Lastly, the District Court correctly held that this burdening of First Amendment rights was not narrowly tailored to a compelling State interest. A111. Indeed, no Justice of this Court has ever suggested that partisan gerrymandering affirmatively serves any such interest. In the District Court, Appellants "never ... argued … that the 2016 Plan's express partisan discrimination advance[d] *any* democratic, constitutional, or public interest." A110. In a footnote,

Appellants now concoct the notion that the Plan "avoids the concentration of majority-party voters in a small number of districts." App. Br. 50 n.9. This newfound and fanciful "interest" is nothing less than the claim that it is a positive good to crack Democratic constituencies in order to increase Republican power. Nakedly seeking partisan advantage is not a legitimate State interest.

Appellants' criticisms of the District Court's First Amendment analysis miss the mark. First, for the reasons described above, it would not "render unlawful *all* consideration of political affiliation in districting." App. Br. 52, 54. It would ban only *invidious* discrimination on the basis of political expression and association, when not narrowly tailored to a compelling State interest. *See Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring). Second, the District Court did not err by refusing to require some heightened demonstration of effect or burden. "This Court's decisions have prohibited" State action that unjustifiably burdens First Amendment rights, "however slight[ly]." *Elrod*, 427 U.S. at 358 n.11. Harm sufficient to constitute standing is all that is required.

In any event, the injury to *Common Cause* Appellees' First Amendment interests was far from "*de minimis*." App. Br. 55. The voter-plaintiffs and the North Carolina Democratic Party had their voting power diluted to an extreme degree and were significantly impaired in their ability to fundraise and to recruit candidates and volunteers. *See Anderson*, 460 U.S. at 792 (election law inflicted First Amendment harm by making "[v]olunteers … more difficult to re-

cruit," "contributions … more difficult to secure," and "voters … less interested in the campaign").

B. The Plan And Its Districts Violate The Equal Protection Clause

The Equal Protection Clause requires "that all persons similarly situated … be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It has long prohibited State action that intentionally disfavors a class of citizens absent sufficient justification. Where a constitutional right is burdened, that means narrow tailoring to a compelling State interest. *Id.* at 440. The District Court faithfully applied this precedent via its "three-step framework," which required "discriminatory intent," "discriminatory effects," and lack of justification in terms of a "legitimate redistricting objective." A138-39.

The District Court correctly found that the cracking and packing of 12 of the 13 districts in the 2016 Plan was motivated—not just in part, but *predominantly*—by the invidious intent to burden Democrats' political rights. A35. This was not meaningfully disputed below, and Appellants themselves, their mapdrawer, and their experts have all admitted as much. Moreover, Drs. Mattingly and Chen's simulations controlled for both "clustering" of Democrats and incumbent protection and showed that neither could explain the extreme partisan deviation of these districts. A211-12.

The District Court also correctly found that the 2016 Plan had a "discriminatory effect." The easy-to-understand evidence of Drs. Mattingly and Chen's alternative maps—unchallenged on appeal—proved

this convincingly. The District Court believed that the effect prong required a showing of long-term harm—*i.e.*, "that the dilution of the votes of supporters of [the] disfavored party … is likely to persist in subsequent elections." A152. It found that requirement met based on the actual election results under the 2016 Plan and its predecessor plan, as well as the statistical and simulation analyses of multiple highly qualified experts. A168-70. Appellants do not challenge these factual findings.

If anything, this "effect" analysis was too demanding. Setting aside *Davis v. Bandemer*—whose "consistent degradation" test has been roundly criticized—the "effect" inquiry in this Court's Equal Protection cases has been whether the challenged intentional discrimination caused the plaintiff to suffer an Article III injury-in-fact. Faithful application of an invidious-intent requirement (especially with a predominance gloss) will appropriately limit judicial intervention; there is no need to engraft a "durability" requirement foreign to Equal Protection doctrine. Indeed, such a requirement would perversely give legislators *carte blanche* to enact *seriatim* the most extreme gerrymanders, one for each new election cycle.

Finally, the District Court correctly held that Appellants' intentional discrimination was not tailored to any rational—let alone compelling—State interest. A222. Appellants did not contend otherwise below.

Appellants' chief complaint with the District Court's Equal Protection test is that it does not "answer the … question of how much [politics] is too much." App. Br. 47. However, as noted above, *Common Cause* Appellees do not complain of "too much"

politics in the districting process; they complain of invidious discrimination. Appellants also protest that the District Court did not select a quantitative threshold for "[h]ow much [vote] dilution must occur," "[h]ow likely … the dilutive effect [must] be to persist," and "for how lon[g]." *Id.* 50 (emphases deleted). As discussed above, these questions are beside the point. There is no requirement in Equal Protection case law that a violation be of long duration. Similarly, there is no requirement that it be extreme. Injury-in-fact sufficient to establish standing should suffice. But even if these requirements were grafted onto the test, the District Court found, based on undisputed evidence not challenged on appeal, that the dilutive effects of the 2016 Plan were both extreme and enduring. Those findings make this case one of clear unconstitutionality.

C. The Plan And Its Districts Violate Article I

"Through the Elections Clause [Art. I, § 4], the Constitution delegated to the States the power to regulate the 'Times, Places and Manner of holding Elections for Senators and Representatives,' subject to a grant of authority to Congress to 'make or alter such Regulations.'" *Cook v. Gralike*, 531 U.S. 510, 522 (2001). By contrast, Article I, § 2 grants "the People"—and *not* State legislatures—the power to "cho[ose]" representatives. Together, these clauses provide a "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves," thus "ensur[ing] to the *people* their rights of election." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015) (citation omitted).

As this Court has made clear, the Elections Clause is not merely a grant of power; it is also a limitation. States have no "reserved" powers to regulate federal elections; they may do only what "the exclusive delegation of power under the Elections Clause" permits them to do. *Gralike*, 531 U.S. at 522-23; *Thornton*, 514 U.S. at 805. Beyond the boundaries of that Clause's delegated authority, "the [S]tates can exercise no powers whatsoever" to regulate congressional elections. *Gralike*, 531 U.S. at 519 (quoting Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858)). When States attempt to do so, their acts are *ultra vires* and "void." *Id.* at 528 (Kennedy, J., concurring).

Although the Elections Clause grants "broad power" to "issue procedural regulations," several limits are clear. *Id.* at 523-24. Namely, the Clause is "not … a source of power" (1) "to dictate electoral outcomes"; (2) "to favor or disfavor a class of candidates"; or (3) "to evade important constitutional restraints." *Ibid*. These limits follow from Article I, § 2, which keeps political officials electorally accountable by assigning the task of "cho[osing]" representatives to "the People" alone. *See Thornton*, 514 U.S. at 833 & n.47. As the District Court unanimously found, the 2016 Plan is *ultra vires* under each of these three tests. A303; *see also A. Philip Randolph Inst. v. Householder*, 2019 U.S. Dist. LEXIS 24736, at *27-31 (S.D. Ohio Feb. 15, 2019) (recognizing that, in partisan-gerrymandering context, Elections Clause provides a basis for challenging both individual districts and "the entire districting plan").

The comparison with *Gralike* is inescapable: there, Missouri adopted a law requiring candidates' positions on term limits to be included on the ballot. This exceeded Missouri's "delegated power" under the Elections Clause because it was "designed to favor candidates" with one position and "disfavor those" with an opposing view—and thereby, to "dictate electoral outcomes." 531 U.S. at 523-26. But Missouri's attempt to bias voters' choices by providing them with selected information was subtle compared to North Carolina's approach. The 2016 Plan *literally* sought to "dictate" the outcome of North Carolina's congressional elections, establishing quotas for the State's delegation ("10 Republicans" and "3 Democrats"), and selecting the party of each individual district's representative, before a single vote was cast.

Appellants make no attempt to explain how the 2016 Plan can satisfy the Elections Clause if the amendment struck down in *Gralike* could not. Indeed, their brief does not even cite *Gralike* (or its predecessor, *Thornton*). Rather than addressing this Court's Elections Clause jurisprudence, Appellants revert to their perennial theme that Article I, §§ 2 and 4 do not specify a quantitative "limit" on "political considerations … [in] districting." App. Br. 56. As explained above, this "line-drawing" critique misses the mark. Appellants also suggest that Appellees' Elections Clause claims are *really* non-justiciable Guarantee Clause claims. But *Common Cause* Appellees' claims are premised on Article I, §§ 2 and 4 and this Court's decisions in *Gralike* and *Thornton*, not the Guarantee Clause. As this Court made clear in *Baker*, the fact that Appellees "might conceivably have added a claim under the Guarant[ee] Clause" does not mean that

they "may not be heard" on the claims "which in fact they tender." 369 U.S. at 226-27.

D. Appellants Offer No Colorable Defense Of The Plan On The Merits

Almost as an afterthought, Appellants assert that the 2016 Plan is constitutional—despite its undisputed invidious motivation, its express viewpoint discrimination, and its extreme packing and cracking—because the resulting map divided fewer counties and precincts than two previous maps did. But this argument is doubly flawed.

First, Appellants fail to mention that the "maps from the 1990s and 2000s" that they supposedly improved upon were horrendously misshapen. App. Br. 58. In North Carolina's 1992 map, for example, eight of the 12 districts were among the most bizarrely shaped in the country. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 571-73 & tbl. 6 (1993) (perimeter measure). One of them—the infamous CD12 that spawned *Shaw v. Reno*—was the second "worst [district] in the nation." *Id.* at 566. That the 2016 Plan may look better than this, at least superficially, is not saying much.

Second, and more importantly, compliance with "traditional redistricting principles" such as compactness and preservation of political subdivisions is no defense to a charge of gerrymandering. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798-99 (2017). The Constitution "does not prohibit misshapen districts. It prohibits unjustified … classifica-

tions." *Ibid.* The infirmity of a gerrymander, in other words, "stems from the [improper] purpose," not the "manifestation" of that purpose in the form of divided counties or irregular borders. *Ibid.*; *see also Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) ("With [modern] tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements.").

Appellants also argue—again, as an afterthought—that they "did not set out to pursue partisan advantage at all costs." App. Br. 59-60. Even if true, "at all costs" is not the standard, and Appellants do not dispute the District Court's unanimous finding that invidious partisanship was the Legislature's predominant motivation. In any event, Appellants' assertion is demonstrably false. Appellant Lewis openly admitted that he proposed a 10-3 map only "because [he] d[id] not believe it's possible to draw a map with 11 Republicans and 2 Democrats." Drs. Chen and Mattingly's tens of thousands of alternative plans confirm for all to see that what Lewis said was true: Appellants could not have drawn a more extremely partisan map if they had tried.

CONCLUSION

For the reasons above, this Court should affirm the District Court's judgment.

Respectfully submitted,

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March 4, 2019

NO. 18-422

In the

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

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March 19, 2019

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For three decades and counting, this Court has struggled to determine "what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines." *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018). Plaintiffs' briefs underscore why that endeavor has proven fruitless. Plaintiffs cannot even agree amongst *themselves* on who has standing, which constitutional provisions govern, or what standard applies. Indeed, of the four tests the district court proposed, there is not a single one that both sets of plaintiffs squarely embrace.

Plaintiffs' discord is a product of two basic realities: The framers assigned the inherently political task of districting to political actors, and they gave the judiciary no tools or text to discern judicially manageable standards. The Common Cause plaintiffs embrace the view that no amount of districting for partisan advantage is permissible, but that radical proposition is inconsistent with decades of judicial precedent and the framers' decision to assign the task to state legislatures and Congress. The League plaintiffs concede that some partisan motivation is inevitable and permissible, but they fail to answer "the original unanswerable question": "How much political motivation and effect is too much?" *Vieth v. Jubelirer*, 541 U.S. 267, 296-97 (2004) (plurality op.). The Constitution does not provide an answer to that question because the framers protected the essential independence of the Article III courts by wisely shielding them from an issue that is "root-and-branch" a political question. *Id.* at 285.

ARGUMENT

I. Plaintiffs Lack Standing.

Federal courts have neither the responsibility nor the power to vindicate "group political interests" or "generalized partisan preferences." *Gill*, 138 S. Ct. at 1933. That principle suffices to dispose of this case, as plaintiffs have not identified any concrete and particularized individual injury.

The League plaintiffs prudently decline to defend the district court's holding that they suffered so-called "non-dilutionary" injuries, JS.App.69-74, which suffers all the same problems as the amorphous standing theories rejected in *Gill*. The Common Cause plaintiffs' efforts to defend that holding prove the point. In their view, they have standing to challenge any law that impedes their ability to "mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." CC.Br.31. Indeed, they blithely insist that a Democrat who lives in Asheville *should* be able to challenge alleged gerrymandering in a district across the State because "Democrats from Asheville fundraise for candidates in Fayetteville." CC.Br.33.

This Court has never accepted such a radical conception of Article III injury and squarely rejected it in *Gill*, concluding that "[a] plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" 138 S. Ct. at 1930 (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)). As *Gill* recognized, the notion that a plaintiff has

standing simply because gerrymandering—whether in his own district or another—allegedly has impeded his "ability to engage in campaign activity," *id.* at 1925, has breathtaking implications. All manner of laws could plausibly be alleged to impede someone's ability to persuade people to engage in the political process. Indeed, if that were enough, why stop in Asheville: A Virginia or California voter with a keen interest in North Carolina politics would suffer comparable "injuries." In short, "non-dilutionary" is a useful shorthand for generalized injuries that do not suffice under *Gill*.

The League plaintiffs focus exclusively on their alleged "dilutionary" injuries, but to no avail. They concede that they lack "dilutionary" injuries in four districts—CD3, CD5, CD10, and CD11—because those districts remained heavily Republican under their own proposed map. LWV.Br.9 n.2. But they insist that various (still-unidentified) members have standing to challenge the nine remaining districts—even those that elected their preferred candidates. Take CD4, in which Democrat David Price has handily won 12 elections straight. According to the League, a Price-supporter has standing to challenge that district because it could have been drawn so that Price could secure a narrower win with 53% of the vote instead of 63%. LWV.Br.33.

That contention is fundamentally at odds with *Gill*. The only benefits to a Price-supporting CD4 resident of having Price re-elected more narrowly are benefits from redeploying likely Democratic voters outside the district to "influenc[e] the legislature's *overall* 'composition.'" *Gill*, 138 S. Ct. at 1931

(emphasis added). This Court has never "found that this presents an individual and personal injury of the kind required for Article III standing." *Id.* To the contrary, *Gill* squarely rejected the notion that such extra-district interests sufficed. "A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative." *Id.* Plaintiffs' interest in seeing voters of their preferred political persuasion more efficiently distributed elsewhere is a classic "nonjusticiable 'general interest common to all members of the public.'" *Id.*

This Court's vote dilution cases do no suggest otherwise. The kind of "vote dilution" alleged here bears no relationship to vote dilution in the one-person-one-vote context, where an individual's vote is diluted in the concrete sense that it actually carries less weight than it would in the less-populated district next door. And while plaintiffs try to analogize to §2 claims, they misunderstand the role that "vote dilution" plays in that context. Unlike overpopulating a district, "cracking" and "packing" does not "dilute" an *individual*'s vote. *See City of Mobile v. Bolden*, 446 U.S. 55, 67-69 (1980) (plurality op.). It dilutes only the voting strength of a *group* of voters.

That suffices in the §2 context because Congress has prohibited laws that give "members of a class protected by" §2—*i.e.*, racial minorities—"less opportunity than other members of the electorate … to elect representatives of their choice." 52 U.S.C. §10301(b). But neither the Voting Rights Act nor the Constitution extends the same protection to members of mainstream political parties. "Clearly,

members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group." *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring). And to conclude that individuals suffer an individualized injury whenever the voting strength of *any* group with which they affiliate has been diluted would effectively empower every voter in the State to bring a lawsuit every time her district is redrawn.

That leaves (at most) three districts in which a different map might have allowed a district resident to elect his favored candidate. CC.Br.14. But even that does not state a cognizable Article III injury under the logic, if not the holding, of *Gill*. Someone who is not divvied up by race and whose vote is weighted equally does not suffer an individualized injury just because his preferred candidate is not elected. Voters are not entitled to have their districts drawn so that their preferred candidate wins, and few voters are lucky enough to live in such districts. Even a voter in a safe district favoring his own party may prefer a more conservative or moderate candidate, but being denied that opportunity, even when a different map would enable it, simply does not constitute Article III injury. Again, "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative." *Gill*, 138 S. Ct. at 1931. As long as that right is afforded, he does not have any constitutionally protected interest in a district drawn to promote his favored outcome.

II. Partisan Gerrymandering Claims Are Nonjusticiable.

Plaintiffs' claims face the even more substantial obstacle that they are nonjusticiable. Plaintiffs' first line of defense is to insist that this Court has already resolved justiciability in their favor. CC.Br.33; LWV.Br.33. That is difficult to square with this Court's conclusion just last Term that "[o]ur considerable efforts … leave unresolved … whether [partisan gerrymandering] claims are justiciable." *Gill*, 138 S. Ct. at 1929. In *Vieth*, a plurality of this Court decried "eighteen years of judicial effort with virtually nothing to show for it." 541 U.S. at 281. The tally has now reached 33 years, and the courts are no closer to divining judicially administrable standards. The time has come to replace plurality opinions with a definitive holding of the Court that partisan gerrymandering claims are nonjusticiable.[1] The two most important nonjusticiability factors—a textual commitment to another branch and a lack of judicially manageable standards—point in the same direction and make clear that "the judicial department has no business entertaining" partisan gerrymandering claims. *Id.* at 277.

[1] To the extent *Bandemer* needs to be formally interred, *stare decisis* considerations fully justify that course. As the *Vieth* plurality observed, there are no meaningful reliance interests at stake, and *Bandemer*'s claim to *stare decisis* is "triply weak." 541 U.S. at 305-06.

A. The Framers Textually Committed to Congress Federal Oversight Over Excessive Partisanship in Districting.

In Article I, §4, Clause 1, the framers textually committed the power to draw congressional districts to state legislatures, and they textually committed federal oversight of whether state districting laws are "too political" or "too partisan" to Congress. In expressly delegating primary responsibility to the entity most susceptible to political and partisan influences, and delegating oversight to the federal body most subject to those same influences, the framers recognized that districting was "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality op.). The framers thus not only textually delegated federal oversight of claims of excessive partisanship to Congress, but recognized that such a role would be affirmatively inappropriate for Article III courts that depend on their independence from partisan politics to discharge their core function.

Plaintiffs' principal responses to this argument are to deem it novel and (somewhat paradoxically) "definitively rejected" in *Baker v. Carr*, 369 U.S. 186 (1962). CC.Br.35; LWV.Br.41-42. But there is nothing novel about recognizing that the framers adopted a structural solution to the inherently political problem of partisan gerrymandering. The *Vieth* plurality emphasized that "[t]he Constitution clearly contemplates districting by political actors, see Article I, § 4," and that Congress has not been shy about exercising its oversight responsibility. 541 U.S. at 285. And *Baker* certainly did not resolve—or even

address—whether there was a textual delegation with respect to partisan gerrymandering claims.

In insisting otherwise, plaintiffs miss *Baker*'s central lesson: Justiciability depends on the precise nature of the claim asserted. *Baker* reaffirmed decades of precedents finding malapportionment claims under the Guarantee Clause nonjusticiable, but nonetheless held a malapportionment claim premised on the Equal Protection Clause justiciable. *See* 369 U.S. at 226-27. And *Baker* clarified that not every "Fourteenth Amendment claim" is justiciable, as some will be "enmeshed with … political question elements." *Id.* Similarly, in *Nixon v. United States*, this Court found a textual commitment to the Senate in the Impeachment Clause for a complaint about the Senate's use of a committee in conducting an impeachment trial, but did not suggest that a complaint about the Senate's failure to follow the Clause's "quite precise" requirements that Senators be under oath and conviction occur by a two-thirds vote would be nonjusticiable. 506 U.S. 224, 230 (1993). The central lesson of *Baker* and *Nixon* is that the existence of a textual commitment depends on the precise nature of the claim asserted.

Plaintiffs' hyperbolic claims that finding a textual commitment in this context would render nonjusticiable every case involving federal elections therefore ring hollow. LWV.Br.44; CC.Br.37. Partisan gerrymandering claims are fundamentally different from racial gerrymandering and malapportionment claims, on both the textual-commitment question and the bottom-line issue of justiciability. In the racial gerrymandering context,

the textual commitment in the Elections Clause must be reconciled with the Equal Protection Clause's clear command "to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). In the malapportionment context, the Elections Clause must be weighed against "the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964).

Again, *Nixon* is instructive. *Nixon* distinguished *Powell v. McCormack*, 395 U.S. 486 (1969), on the basis that judicial intervention was necessary there to vindicate the Qualifications Clause. 506 U.S. at 240. Here, by contrast, as in *Nixon*, "there is no separate provision of the Constitution that could be defeated," *id.* at 237, by recognizing a textual delegation to Congress when it comes to amorphous claims that the political entity assigned responsibility for districting acted too politically. To the contrary, no provision of the Constitution suggests any textual limits, let alone judicially enforceable limits, on how much politics or partisanship is too much. And as *Nixon* recognized, the first two *Baker* factors are "not completely separate." *Id.* at 228. A textual delegation to another branch may explain the lack of any textual source for judicially manageable standards, and "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* at 228-29.

Plaintiffs' efforts to resist the history underscoring that textual commitment fall flat. Invoking *The Federalist* No. 78, the Common Cause

plaintiffs try to infer from general statements about the role of the judiciary as "an intermediate body between the people and the legislature" that Alexander Hamilton would have welcomed judicial supervision of partisan gerrymandering claims. CC.Br.38. But far more relevant is *The Federalist* No. 59, in which Hamilton directly addressed the Elections Clause and its textual delegations of power. There, Hamilton "readily conceded[] that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former." *Id.* at 360 (A. Hamilton) (Charles R. Kesler ed., 1961). Conspicuously absent from that list is any role for the judiciary—presumably because Hamilton himself recognized (in none other than *The Federalist* No. 78) that such a role would threaten the judiciary's essential independence, as "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *Id.* at 465 (A. Hamilton) (quoting Montesquieu, *Spirit of Laws*, vol. i, p.181).

The League plaintiffs suggest that, during the Virginia ratifying convention, James Madison hinted at federal-court oversight of state election laws. *See* LWV.Br.45. In fact, the "sufficient security against abuse" that Madison identified was none other than *Congress*' control under the Elections Clause. 3 *Debates on the Federal Constitution* 408 (J. Elliot 2d ed. 1836); *see also id.* at 367; *cf.* Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 Harv. J.L. & Pub. Pol'y 341, 351 (2016). They also point to James Steele's comments at the North Carolina

ratifying convention. LWV.Br.45. But Steele was suggesting only that courts could intervene if *Congress* abused its Elections Clause power by passing laws that eliminated or impeded *the right to vote*. *See* 4 *Debates* 71. That neither Steele nor anyone else even hinted at the notion that federal courts could examine state districting maps for excessive partisanship is powerful evidence that "the judicial department has no business entertaining" partisan gerrymandering claims. *Vieth*, 541 U.S. at 277 (plurality op.).

B. There Are No Judicially Discernible or Manageable Standards for Adjudicating Partisan Gerrymandering Claims.

The second nonjusticiability factor points just as strongly in the same direction: As decades of unproductive "judicial effort" and "essentially pointless litigation" have confirmed, *id.* at 306, there are no "judicially discoverable and manageable standards for resolving" partisan gerrymandering claims, *Baker*, 369 U.S. at 217. The fundamental problem is that, given that the framers delegated districting authority to "political entities," virtually no one, save the district court and the Common Cause plaintiffs, thinks that *any* amount of political or partisan motivation is *malum in se*. But as a result, such claims inevitably devolve into "the original unanswerable question": "How much political motivation and effect is too much?" *Vieth*, 541 U.S. at 296-97 (plurality op.).

Predictably, plaintiffs try to duck that question. They first make the puzzling claim that this Court can hold the 2016 Map unconstitutional without deciding whether partisan gerrymandering claims are

justiciable. CC.Br.40; LWV.Br.48. But this Court cannot invalidate a state law while remaining *dubitante* on the justiciability of the doctrine that does the invalidating. Nor can this Court plausibly declare the 2016 Map "the most extreme[] partisan gerrymander," CC.Br.1, without developing a scale for what makes a partisan gerrymander problematic. Not surprisingly, plaintiffs' most-extreme-ever claim mirrors comparable claims in prior partisan gerrymandering cases almost verbatim. Last Term, the *Gill* plaintiffs insisted that Wisconsin's map was "by any measure, one of the worst partisan gerrymanders in modern American history." Compl. ¶1, *Whitford v. Gill*, No. 3:15-cv-00421-bbc (W.D. Wis. July 8, 2015), ECF No. 1. The *Vieth* plaintiffs similarly described Pennsylvania's plan as "the paradigmatic example of an extreme partisan gerrymander." Br. for Appellants 41, *Vieth*, No. 02-1580 (U.S. Aug. 29, 2003) ("*Vieth* Appellants Br.").

These repeated hyperbolic claims suggest that claiming extremity by any measure is no substitute for having a discernible standard for measurement. Certainly, the North Carolina map is not the most extreme when it comes to deviation from traditional districting principles, as it outperforms any North Carolina congressional map in recent memory on that standard. *See infra* Part IV. Instead, plaintiffs seem to view it as extreme largely because the legislature forthrightly acknowledged that it considered partisan advantage in drawing the map. But that hardly distinguishes this case from *Vieth*, in which the plaintiffs emphasized that the legislature "frankly admitted" its goal "to maximize the number of Republicans elected to Congress." *Vieth* Appellants

Br.1; *see also Bandemer*, 478 U.S. at 116 n.5 (recounting deposition testimony from Speaker that "operative" goal of map was "to save as many incumbent Republicans as possible"). More fundamentally, there can be no constitutional violation in acknowledging partisan motivation if such motivation is not unconstitutional.

Plaintiffs insist that this Court has never held that "raw partisan advantage is a permissible—as opposed to merely a common—motivation" in districting. LWV.Br.53-54; CC.Br.45. This Court has long begged to differ. *See, e.g.*, *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541, 551 (1999) ("[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering" (collecting cases)); *see also Vieth*, 541 U.S. at 286 (plurality op.) ("partisan districting is a lawful and common practice"); *Bandemer*, 478 U.S. at 164-65 (Powell, J., concurring in part and dissenting in part) (distinguishing "unconstitutional gerrymander[ing]" from "the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls"). Tellingly, the best authority plaintiffs can muster for their contrary claim is Justice Stevens' solo *dissent* in *Vieth* and a decision that "assum[ed], *without deciding*, that partisanship is an illegitimate redistricting factor." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (emphasis added).

Moreover, this Court's racial gerrymandering jurisprudence has been premised largely on the notion that racial considerations are generally impermissible, while partisan and political

considerations are fair game. *See, e.g., Cromartie I*, 526 U.S. at 551. If political considerations are off the table as well, then districting will be radically transformed. That underscores the fundamental difference between trying to eliminate an impermissible consideration like race and trying to eliminate a consideration deemed all but inevitable for two centuries. The notion that judicially manageable standards for policing the latter have been lurking unnoticed in the Elections Clause and First and Fourteenth Amendments for centuries beggars all belief.

At any rate, even plaintiffs cannot deny that this Court has repeatedly rejected the proposition that districting for partisan advantage alone renders a map unconstitutional. If partisan gerrymandering claims depended merely on determining whether the legislature districted for "raw partisan advantage," then both *Bandemer* and *Vieth* should have come out the other way. Instead, the plurality in both cases squarely rejected the proposition that "redistrict[ing] with the specific intention of disadvantaging one political party's election prospects" is itself enough to violate the Constitution, *Bandemer*, 478 U.S. at 138; *see also Vieth*, 541 U.S. at 286, and none of their colleagues disagreed.

The Common Clause plaintiffs thus fundamentally miss the mark with their strained analogy that courts do not "refus[e] to adjudicate race-discrimination or tax-fraud cases" because it "is impossible to eliminate racism from all human hearts or to prevent all tax cheating." CC.Br.46. Racism and tax-cheating are wrong even in small doses, with the

challenge being detecting impermissible motivation. The problem with partisan motivation is not that it is difficult to detect in institutions that divide themselves into partisan caucuses across literal aisles. It is that "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage" played some role in the map (and virtually all other legislation). *Vieth*, 541 U.S. at 286 (plurality op.). "As long as redistricting is done by a legislature," at least some degree of such motivation "should not be very difficult to prove." *Bandemer*, 478 U.S. at 129 (plurality op.). A test that invalidated a map any time the legislature "overt[ly]" or "[n]akedly" sought *any* "partisan advantage," CC.Br.1, 56, 58-59, thus would "commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 478 U.S. at 306 (Kennedy, J., concurring).

That is particularly true now that *Gill* has clarified that partisan gerrymandering claims, like racial gerrymandering claims, must proceed district by district. Even when legislatures are not explicit about having a statewide goal to maximize seats, they routinely draw particular district lines to advantage or disadvantage an incumbent or to capture additional Republican or Democratic voters. Thus, if this Court goes down the road of entertaining partisan gerrymandering claims, there will be no shortage of lawsuits claiming "naked," "raw," or "extreme" partisan gerrymandering.

The League plaintiffs do not defend the Common Cause plaintiffs' radical proposition that partisan gerrymandering is *malum in se*. But that leaves them in the unenviable position of trying to identify a

limited, precise, and objective test for determining "[h]ow much political motivation and effect is too much." *Id.* at 296-97 (plurality op.). Unsurprisingly, their efforts come up short. Indeed, they inevitably resort to a "form of rough proportional representation" as the constitutional baseline from which deviations can be deemed extreme, *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), proposing a "partisan asymmetry" standard that turns on whether "supporters of each of the two parties are able to translate their votes into representation with equal ease," LWV.Br.15.

But proportional representation is not "consistent" with "our history, our traditions, or our political institutions," *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), and it does not become any more so by shifting the focus to whether each of the major political parties has a sufficiently "symmetrical" opportunity to achieve it.[2] Simply put, nothing in the Constitution or our Nation's history supports the novel proposition that the constitutionality of a map turns on how well Republicans and Democrats perform in districts as compared to their statewide numbers. If voters naturally distributed themselves into perfectly square districts at a uniform 60% Democratic and 40% Republican rate, so that

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[2] The League plaintiffs never explain why this Court should embrace a constitutional rule that assumes—indeed, effectively enshrines—a two-party system. This would be a particularly odd moment to do so given that "voters' rising partisanship," LWV.Br.25, could very well lead to fractures within that system. *See, e.g.*, Thomas L. Friedman, Opinion, *Is America Becoming a Four-Party State?* N.Y. Times (Feb. 19, 2019), https://nyti.ms/2ElO5bd.

Democrats won every district and left 40% of the State's population without representation by their preferred candidates, there would be no constitutional problem—because proportional representation is not a value enshrined in the Constitution. Intentionally drawing lines to produce the same effect neither violates the Constitution nor deviates from any constitutionally valid baseline.

Plaintiffs' efforts to measure forbidden effects are no more successful than their efforts to detect forbidden intent. To the contrary, they concede that "candidates and issues do matter," CC.Br.50 n.11, that "voters' preferences can change from one election to the next," and that "electoral shifts" can cause a plan's anticipated "asymmetry" to "evaporate," LWV.Br.59. Those concessions are unavoidable, as the subsequent history of *Bandemer*, *Vieth*, and other cases have proven the wisdom of Justice O'Connor's observation that "there is good reason to think that political gerrymandering is a self-limiting enterprise." *Bandemer*, 478 U.S. at 152; *see also Vieth*, 541 U.S. at 287 n.8 (plurality op.); Op.Br.45-46; Republican Nat'l Comm. Br.6-20. Courts' woeful inability to meaningfully measure how "extreme" or "enduring" a gerrymander is has been borne out yet again in this case: The district court declared CD9 an unconstitutionally "safe" Republican district just a few months before the Republican candidate failed to secure even 50% of the vote.[3]

[3] CD9 is hardly the only district that deviated from the experts' predictions in 2018. CD2 had a predicted Republican vote share of 56.20%, but an actual Republican vote share of 51.27%. And CD4 had a predicted Democratic vote share of 62.32%, but an

In short, time and again it has proven "impossible to assess the effects of partisan gerrymandering" with any real confidence, which makes it just as impossible "to fashion a standard for evaluating a violation." *Vieth*, 541 U.S. at 287 (plurality op.). That is unsurprising given the framers' decision to assign that politically fraught task elsewhere. *See Nixon*, 506 U.S. at 228-29. And it reinforces the ultimate conclusion that partisan gerrymandering claims are nonjusticiable.

III. The District Court's Standards Are Not Judicially Discernible And Manageable.

The insuperable problems with the district court's four proposed tests confirm as much. Indeed, that plaintiffs themselves cannot agree on which (if any) of those tests is workable "goes a long way to establishing that there is no constitutionally discernible standard." *Vieth*, 541 U.S. at 292 (plurality op.).

1. Equal Protection Clause

The League plaintiffs defend only the district court's Equal Protection Clause test, while claiming that it somehow also manages to "capture[] … the First Amendment injury of intentional viewpoint discrimination." LWV.Br.51. The Common Cause plaintiffs, meanwhile, defend the district court's other tests while complaining that its equal protection test is "too demanding." CC.Br.58. Plaintiffs contend that the "predominant-purpose" standard must be workable here because it has proven workable in the

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actual Democratic vote share of 72.37%. *Compare* JA290 *with* Op.Br.20 n.3.

racial gerrymandering context. CC.Br.47. Setting aside the highly debatable premise, that ignores the fundamentally different role of the inquiry in each context. Drawing districts predominantly on the basis of race is presumptively impermissible because "the purpose of segregating voters on the basis of race is not a lawful one." *Vieth*, 541 U.S. at 286 (plurality op.). "Politics is quite a different matter." *Id.* at 307 (Kennedy, J., concurring). In this context, a predominance standard identifies only "an ordinary and lawful motive," *id.* at 286 (plurality op.)—indeed, one that has often been a basis for showing that impermissible considerations, like race, did not predominate.

As for the effects prong, the League plaintiffs maintain that "a map is dilutive if" it "create[s] a large and durable advantage for the line-drawing party." LWV.Br.55. But while they have no shortage of methods by which a plaintiff may try to make this showing, they never explain how "large" or "durable" the advantage must be. Instead, they contend that it "would … have been odd" for the district court to flesh out these seemingly critical details. LWV.Br.59. But the district court not only announced this test but purported to apply it to invalidate a duly enacted map, so supplying some details does not seem too much to ask.

Finally, no plaintiff seriously grapples with the problem that the district court's "justification" prong just reverses the burden of proof. That might work if its intent and effects tests were demanding tests that isolated rare instances of presumptively unconstitutional behavior. But shifting the burden to

the legislature based on an intent test that asks only whether legislators acted like legislators and an effects test that asks whether they were any good at implementing their intent (to some undefined degree) looks a lot more like judicial preclearance than any readily administrable test that comports with the presumption of good faith and constitutionality. Demanding that state legislatures come into court and explain why they did not draw "fairer" maps is not our usual mode of adjudication, and it is certainly not what the framers envisioned in granting districting authority to state legislators.

2. First Amendment

Unlike the League plaintiffs, the Common Cause plaintiffs wholeheartedly embrace the district court's First Amendment test, insisting that the 2016 Map "burdens protected activity" on various impermissible bases. CC.Br.54-55. But they conveniently ignore the glaring problem that partisan gerrymandering does not even regulate—let alone "restrict" or "enhance," CC.Br.54—any activity protected by the First Amendment. "Plaintiffs are every bit as free under the new [redistricting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." JS.App.344. Their only complaint is that the map purportedly has made those First Amendment activities *less effective*. If that were enough to convert a law into a presumptively unconstitutional burden on speech or association, then there would be no end to the laws that could be challenged on First Amendment grounds.

Plaintiffs cannot escape that problem by trying to reconceptualize partisan gerrymandering as a form of viewpoint discrimination or retaliation, as that path "would render unlawful *all* consideration of political affiliation in districting." *Vieth*, 541 U.S. at 294 (plurality op.). Plaintiffs insist that their test is meant to capture only "*invidious* discrimination," by which they mean considering political affiliation to achieve partisan advantage. CC.Br.56. But "adding the modifier" invidious (or "raw" or "extreme"), *Vieth*, 541 U.S. at 298 (plurality op.), does not explain how a practice that the framers not only tolerated but encouraged (by assigning responsibility for districting to political actors) has suddenly become an abridgment of free speech.

The First Amendment, moreover, does not draw any distinction between "benign" and "invidious" viewpoint discrimination or retaliation. "What cases such as *Elrod* v. *Burns*, 427 U.S. 347 (1976), require is not merely that Republicans be given a decent share of the jobs in a Democratic administration, but that political affiliation *be disregarded*." *Id.* at 294. Accordingly, if sorting voters based on political affiliation to help the prospects of one political party is unconstitutional, then so is sorting voters based on political affiliation to make districts "more competitive." Plaintiffs cannot take what they like of First Amendment doctrine and discard the rest.

These defects are compounded by the problem that the district court's test does not even require plaintiffs to prove that a districting map had a meaningful impact on First Amendment activity; anything more than a "*de minimis*" "chilling effect"

will suffice. JS.App.287-88. Plaintiffs applaud the court's refusal to adopt a "heightened demonstration of effect or burden." CC.Br.56. But a test that would let virtually any plaintiff in the door and would invalidate any map that sought any degree of partisan advantage would require nothing short of "the correction of all election district lines drawn for partisan reasons." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

3. Sections 2 and 4 of Article I

The Common Cause plaintiffs likewise stand alone in defending the district court's Article I tests. JS.App.35. No other court in history has endorsed those tests—likely because it strains credulity to claim that the very same constitutional text that clearly contemplates districting by partisan entities is the font of administrable limits on partisanship. Indeed, when the *Vieth* plaintiffs suggested that partisan gerrymandering violates the Elections Clauses, the plurality resoundingly rejected the argument, 541 U.S. at 305, and Justice Kennedy agreed "that the standards proposed … by the parties before us … are either unmanageable or inconsistent with precedent, or both," *id.* at 308. No other Justice hinted that Article I supplied any answers.

The Common Cause plaintiffs nonetheless claim that partisan gerrymandering violates Article I because it allows legislatures to "dictate electoral outcomes" and "favor or disfavor a class of candidates." CC.Br.60. But if intentionally altering district lines amounts to unconstitutionally "dictating electoral outcomes," it is hard to understand how legislatures could try to achieve even proportional representation

consistent with the Constitution, as that too involves the "wiggl[ing] and joggl[ing]" of "boundary lines." *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973).

More fundamentally, plaintiffs overlook the problem that, under their theory, *any* map unconstitutionally "dictates electoral outcomes." After all, the legislature has to draw district lines *somewhere*, and "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *Id.* at 753. By their logic, then, "All Districting is 'Gerrymandering.'" *Vieth*, 541 U.S. at 289 (plurality op.). This Court has not struggled for three decades only to embrace such a patently overinclusive and ahistoric test.

IV. The 2016 Map Is Not An Unconstitutional Partisan Gerrymander In All Events.

Even if the Court were inclined to leave the door to partisan gerrymandering claims ajar, the 2016 Map should still stand. Plaintiffs do not dispute that the map beats every other North Carolina congressional districting map in recent memory as a matter of traditional districting principles. Op.Br.57-60. The map thus would survive even under the tests proposed by the dissenting Justices in *Vieth*, as each of those tests would have put maps that substantially adhere to traditional districting principles on the constitutional side of the lines they endeavored to draw. *See* 541 U.S. at 318 (Stevens, J., dissenting); *id.* at 347-48 (Souter, J., dissenting); *id.* at 360 (Breyer, J., dissenting). The Common Cause plaintiffs insist that since compliance with traditional districting principles does not necessarily save a map in the racial

gerrymandering context, it should not suffice here either. CC.Br.62. But that once again draws the false equivalence between race and politics that a majority of this Court has repeatedly rejected. *See, e.g.*, *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring).

Ultimately, plaintiffs' argument reduces to the claim that this Court should condemn the 2016 Map simply because the redistricting committee "overt[ly]" stated that partisan advantage was one of its criteria. CC.Br.1; LWV.Br.3. But while plaintiffs attempt to equate that to "an official state policy to maximally degrade the representation of disfavored voters," LWV.Br.3, that is wrong as a matter of fact. As is evident on the face of the committee's actual criteria, the committee sought merely to "make reasonable efforts ... to maintain the current partisan makeup of North Carolina's congressional delegation," while complying with traditional districting criteria. JS.App.20. The committee could have sought to increase Republican seats at all costs—but that would have required abandoning the traditional districting principles that plaintiffs conveniently neglect to mention were part of the same "official state policy." *See* Dkt.110-3:167-68.

Plaintiffs' argument also ignores the context in which the partisan advantage criterion was adopted, which confirms that it was overt not because the legislature sought to maximize partisan advantage at all costs, but because the legislature wanted to avoid once again falling into the trap of being accused of *racial* gerrymandering if their embrace of political considerations was insufficiently clear. Op.Br.59. The 2016 Map is thus hardly the "extreme" gerrymander

that plaintiffs contend; indeed, it is not materially different from the maps this Court upheld in *Bandemer* and *Vieth*, which were backed with similarly hyperbolic claims. Moreover, adopting a prohibition not against partisan gerrymandering, but against forthright acknowledgement of a partisan motive, would not address the problems plaintiffs perceive going forward. Instead, it would just punish the legislature for relying on *this Court's own assurance*—to the North Carolina General Assembly itself, no less—that a legislature may "engage in constitutional political gerrymandering." *Cromartie I*, 526 U.S. at 551.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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March 19, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, et al., Plaintiffs, -v- UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	18-CV-5025 (JMF) MEMORANDUM OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

In this action, familiarity with which is assumed, five nongovernmental organizations challenge the decision of Secretary of Commerce Wilbur L. Ross, Jr. to reinstate a question concerning citizenship status on the 2020 census questionnaire. *See generally New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018).[1] In their operative Complaint, Plaintiffs name as Defendants the United States Department of Commerce; Secretary Ross; the Bureau of the Census (the "Census Bureau"), which is part of the Department of Commerce; and Acting Director of the Census Bureau, Ron S. Jarmin. (Docket No. 1 ("Orig. Compl.")). Plaintiffs now move, pursuant to Rule 15 of the Federal Rules of Civil Procedure, for leave to file an Amended Complaint adding additional defendants and plaintiffs as parties. (Docket No. 98). Specifically, Plaintiffs seek to name as defendants the Department of Justice ("DOJ"), as well as Attorney General Jefferson Beauregard Sessions III and Acting Assistant Attorney

[1] In a related case, which has been informally consolidated with this one for purposes of scheduling and discovery, various states, cities, counties, and mayors raise similar claims. (*See* 18-CV-2921, Docket No. 214).

General John Gore in their official capacities (collectively, the "DOJ Defendants"); and as plaintiffs the Family Action Network Movement and the Florida Immigrant Coalition. (*See* Docket No. 99 ("Pls.' Mem."), Ex. 1 ("Proposed Am. Compl.")). Defendants oppose the motion. (Docket No. 108 ("Defs.' Opp'n")). For the reasons that follow, Plaintiffs' motion is DENIED.

Rule 15 provides that courts should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2); *see Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 603 (2d Cir. 2005). A district court, however, "has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). "[L]eave to amend will be denied as futile only if the proposed new claim cannot withstand a 12(b)(6) motion to dismiss for failure to state a claim." *Milanese v. Rust–Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991)). To survive a Rule 12(b)(6) motion, a plaintiff must plead sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). More specifically, a plaintiff must allege facts showing "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. If a plaintiff has not "nudged [its] claims across the line from conceivable to plausible, [those claims] must be dismissed." *Id.* at 570.

Applying those standards here, the Court concludes that Plaintiffs' proposed amendments would be futile as to the DOJ Defendants. Plaintiffs propose to bring the same two claims

against the DOJ Defendants that they press against the existing Defendants: first, under the Administrative Procedure Act ("APA"); and second, under the Due Process Clause of the Fifth Amendment. (Proposed Am. Compl. ¶¶ 264-71, 206-10).[2] Plaintiffs' first claim — under the APA — is premised on a letter sent from DOJ to Defendant Jarmin "requesting that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship." (Proposed Am. Compl. ¶ 226 (internal quotation marks omitted)). Plaintiffs contend that the letter was "a substantial factor in Secretary Ross's decision and ability to add the citizenship question." (Docket No. 115 ("Pls.' Reply Br.") at 6). That contention, however, is in some tension with Plaintiffs' own allegations, which largely depict DOJ as doing Secretary Ross's bidding and providing cover for a decision that he had already made. (*See, e.g.*, Proposed Am. Compl. ¶ 227 (alleging that the DOJ letter was "spurred by several months of efforts by Secretary Ross . . . to make it appear as though DOJ needed census citizenship data"); *id.* ¶ 246 (alleging that "the decision to add the citizenship question had already been made in early 2017, *months before* the DOJ request" (emphasis added))). But be that as it may, any APA claim against the DOJ Defendants would fail because they merely "request[ed]" that the Census Bureau reinstate the citizenship question. (Proposed Am. Compl. ¶ 226). At all relevant times, Secretary Ross retained exclusive authority to grant or deny that request. *See* 13 U.S.C. § 141(a).

Notably, Plaintiffs cite — and the Court has found — no authority for the proposition that a party challenging final agency action under the APA may seek relief from anyone who contributed to the deliberative process leading to that action, let alone someone from another

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[2] The paragraph numbering in the Proposed Amended Complaint includes two separate sets of paragraphs numbered 197-210. The Proposed Amended Complaint also includes a claim for violation of the Enumeration Clause, U.S. Const., art. I, § 2, cl. 3, but the Court previously dismissed that claim. *See New York*, 315 F. Supp. 3d at 799-806.

agency (or that other agency itself). To the contrary, the APA provides that an "action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. § 703. And applying that provision, courts have dismissed APA claims brought against those whose conduct, "while underlying" the actions ultimately being challenged, were not themselves "final agency action[s] subject to judicial review." *Serotte, Reich & Wilson, LLP v. Montante*, No. 05-CV-284S (WMS), 2009 WL 3055294, at *6 (W.D.N.Y. Sept. 21, 2009); *see, e.g.*, *Brezler v. Mills*, 220 F. Supp. 3d 303, 306 n.1 (E.D.N.Y. 2016) (dismissing claims under the APA against an intermediate agency and official on the ground that they were not "proper" defendants, but denying a motion to dismiss claims against the "Assistant Secretary of the Navy," who took "the final agency action at issue"). As in those cases, "[e]ach of" the DOJ Defendants' "alleged actions was interlocutory in nature, subject to further review by" the Census Bureau, the Department of Commerce, or Secretary Ross, and did not constitute "final agency action." *Serotte, Reich & Wilson, LLP*, 2009 WL 3055294, at *6. It follows that the DOJ Defendants are not proper defendants under the APA.

Plaintiffs' proposed due process claim fares no better. That claim is futile for the simple reason that Plaintiffs fail to allege any facts plausibly suggesting that the DOJ Defendants acted with the requisite discriminatory intent. As the Court explained in its prior Opinion in this case, Plaintiffs' due process claim "turns on whether they plausibly allege" that Defendants acted with "a 'racially discriminatory intent or purpose.'" *New York*, 315 F. Supp. 3d at 807 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). Plaintiffs fail to do so with respect to the DOJ Defendants. In fact, as noted, Plaintiffs' Proposed Amended Complaint suggests that the DOJ Defendants acted at the behest of Secretary Ross and the Department of Commerce — for example, by quoting an email from an official at DOJ to an

official at the Department of Commerce stating that "it sounds like we can do whatever you all need us to do. . . . The AG is eager to assist." (Proposed Am. Compl. ¶ 250). Plaintiffs ask the Court to infer from the Proposed Amended Complaint that the DOJ Defendants "shared a common purpose [with the original defendants] in seeking to diminish the political power of immigrant communities of color." (Pls.' Reply Br. 10). But put simply, Plaintiffs allege no facts from which one could reasonably make that inference. *See, e.g.*, *Hayden v. Paterson*, 594 F.3d 150, 159, 169 (2d Cir. 2010) (holding that dismissal of the plaintiffs' claim was required because their complaint included "no specific factual allegations of discriminatory intent"); *see also, e.g.*, *Burgis v. N.Y.C. Dep't of Sanitation*, 798 F.3d 63, 68 (2d Cir. 2015) (affirming dismissal of equal protection claims where the "plaintiffs fail[ed] to allege in other than conclusory fashion any specific instances of discrimination with respect to any individual plaintiff or others similarly situated").[3]

Finally, Plaintiffs seek to add the Family Action Network Movement and the Florida Immigration Coalition — two organizations that work on behalf of communities in Florida (*see* Proposed Am. Compl. ¶¶ 97-117) — as additional Plaintiffs. Plaintiffs claim that adding these organizations will "serve the interests of justice by allowing the Court to consider the impact of the citizenship question on [Florida]." (Pls.' Mem. 6). Plaintiffs, however, offer no argument in response to Defendants' contention that adding these organizations as plaintiffs would cause undue delay, given that discovery is already well underway. (*See* Defs.' Opp'n 11). Nor do Plaintiffs supply any explanation at all, let alone a compelling explanation, for the two-and-a-half-month delay between the filing of their original Complaint and the Proposed Amended

[3] Because the Court concludes that Plaintiffs' proposed amendments would be futile as to the DOJ Defendants for these reasons, the Court need not and does not address Defendants' alternative arguments for denial of Plaintiffs' motion for leave to amend.

Complaint. On top of that, the lone argument offered by Plaintiffs — that adding Florida plaintiffs would serve the interests of justice — does not hold much water, as Plaintiffs themselves recognize (*see* Pls.' Mem. 6) that one of the existing Plaintiff organizations already alleges injuries on behalf of Floridians. As detailed in the operative Complaint, the American-Arab Anti-Discrimination Committee ("ADC") includes members in Florida, and Plaintiffs expressly assert that the citizenship question will harm ADC members in "Miami-Dade, Broward, and Orange Counties, Florida, [because] the differential undercount will cause ADC's members to be placed in malapportioned congressional and state legislative districts." (Orig. Compl. ¶ 36). Thus, the Court concludes that adding the new proposed plaintiffs would result in undue delay and would not serve the interests of justice.

Accordingly, Plaintiffs' motion to file an amended complaint is DENIED.[4] Notably, that result may not have much practical impact on Plaintiffs' claims or how the Court ultimately resolves them. First, Plaintiffs seek the same relief in their original Complaint and the Proposed Amended Complaint — namely, (1) a declaratory judgment that the reinstatement of the citizenship question is unconstitutional and a violation of the APA and (2) an injunction against the inclusion of the question (*compare* Orig. Compl. at 67, *with* Proposed Am. Compl. at 104)) — relief that can be granted only by the existing Defendants. Second, DOJ's conduct is ultimately within the scope of the Court's review of Secretary Ross's final decision, as the APA

[4] Plaintiffs indicate in a footnote that their Proposed Amended Complaint "also updates information about the existing Plaintiffs using primarily information from the declarations filed along with Plaintiffs' opposition to the motion to dismiss." (Pls.' Mem. 6 n.1). The parties' briefing does not address those proposed changes. To the extent that Plaintiffs still wish to amend their Complaint to make those changes, Plaintiffs shall, within **one week** of the date of this Memorandum Opinion and Order, provide Defendants with a new Proposed Amended Complaint and a redlined document reflecting their proposed changes. Within **one week** of that production, the parties should confer and submit a joint letter advising the Court whether Defendants would oppose those amendments and, if so, proposing a briefing schedule.

provides that "[a] preliminary, procedural, or intermediate agency action . . . is subject to review on the review of the final agency action." 5 U.S.C. § 704; *see also Serotte, Reich & Wilson, LLP*, 2009 WL 3055294, at *6. And third, in part because of ADC's involvement in the case, the Court can presumably consider the impact of Defendants' conduct on Florida and grant relief that would extend to Florida even in the absence of the proposed new Plaintiffs. But whether that is the case or not, there is no basis to add the DOJ Defendants as new defendants and the Family Action Network Movement and the Florida Immigration Coalition as new plaintiffs.

The Clerk of Court is directed to terminate Docket No. 98.

SO ORDERED.

Date: September 7, 2018
New York, New York

JESSE M. FURMAN
United States District Judge