What role do States have when the Electoral College disappears? With the enactment of the National Popular Vote on the horizon and an imminent presidential election in which a nationwide popular vote determines the winner, States would continue to do what they have done for hundreds of years—administer elections. The Constitution empowers States to decide who votes for president, and States choose who qualifies to vote based on factors like age or felon status. This power of States, a kind of “invisible federalism,” is all but ignored in Electoral College reform efforts. In fact, the power of the States to distinguish between voters and non-voters precludes reform.

Such barriers to reform are both theoretical and practical. Theoretical because the Constitution is committed to a government in which the president represents all citizens of the States, voters and non-voters alike—and the maxim “one person, one vote” reinforces the notion that the president represents voters and non-voters. And the United States is not a single constituency in which one ignores States borders, but a number of smaller constituencies administering elections and determining voter eligibility. Practical because State decisions to enfranchise or disenfranchise a group of voters would no longer affect just that State, but would affect the national total—and States would have an incentive to manipulate voter eligibility laws to affect interstate vote totals. States would lower the voting age, disenfranchise felons, or redefine mental illness in order to add or subtract votes from a national vote tally. And any efforts to create a uniform federal standard for voting would stifle potential expansion of enfranchisement and inevitably disenfranchise some citizens who, today, have the right to vote. Presidential elections need States to continue to decide who votes, which precludes Electoral College reform.
INTRODUCTION

The United States is hurtling toward effectively abolishing the Electoral College, closer than at any time in nearly 50 years and on pace for an overhaul by 2016.1 After the presidential election of 2000, in which Governor George W. Bush won a majority of electoral votes but Vice President Al Gore won a plurality of the popular vote,2 renewed interest in reforming the Electoral College took place in both the academy3 and in

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1 The last serious effort to reform the Electoral College peaked in 1970, when the House of Representatives had passed a constitutional amendment for direct election of President, but the Senate failed to garner the two-thirds majority required to pass it and send it to the States. See Senate Puts Off Direct Vote Plan, N.Y. TIMES, Sept. 30, 1970, page 1; see also Sanford Levinson, Is Moderation Sufficient When Addressing the Ills of the Electoral College?, 6 ELECTION L.J. 220, 222 (2007).


3 See, e.g., Robert W. Bennett, Popular Election of the President Without a Constitutional Amendment, 4 GREEN BAG 2D 241 (2001); Jennings “Jay” Wilson, Bloc Voting in the Electoral College: How the Ignored States Can Become Relevant and Implement Popular Election Along the Way, 5 ELECTION L.J. 384, 385-86 (2006); Akhil Reed Amar & Vikram David Amar, How to Achieve Direct National Election of the President Without Amending the Constitution, FindLaw.com, December 28, 2001,
The most recent and, so far, most successful reform effort proposes an interstate compact in which the compacting States agree to award their electoral votes to the winner of the national popular vote, effectively converting the Electoral College into a direct election for president. It only takes effect, however, when 270 electoral votes worth of States—a majority of the Electoral College—enact it. As of March 2012, nine States had enacted it in less than five years: Maryland, New Jersey, Illinois, Hawaii, Washington, Massachusetts, the District of Columbia, Vermont, and, most recently, California. These nine States have 132 electoral votes, nearly halfway to 270 when it would take effect. The speed of its enactment, and substantial progress in larger States like New York (29 electoral votes) and Pennsylvania, portend that a fundamental transformation of the Electoral College is not simply a real possibility, but a new way in which the United States will elect its president by 2016.

But these reform efforts fail to consider what this Article calls the


See generally NATIONAL POPULAR VOTE, http://nationalpopularvote.com (last visited Mar. 10 2012) (run by National Popular Vote Inc., a non-profit corporation organized, according to the site, “to study, analyze and educate the public regarding its proposal for the nationwide popular election of the President,” which tracks the progress of the National Popular Vote).

See Muller, supra note 2, at 375.

See id. For more details about how the proposed compact operates, see generally id.


The bill, S.4208, see NEW YORK STATE ASSEMBLY, http://assembly.state.ny.us/leg/?default_fld=&bn=S04208&term=2011&Summary=Y&Actions=Y (last visited Mar. 10, 2012), passed the New York Senate in 2011, and there were indications of support from Governor Andrew Cuomo, see Dan Amira, Will New York Help Kill the Electoral College?, NEW YORK MAGAZINE (June 14, 2011), http://nymag.com/daily/intel/2011/06/will_new_york_help_kill_the_el.html, but died in the Assembly. It has been reintroduced in the Senate and Assembly in the 2012 session.

The bill has been introduced in the House of Representatives, H.B. 1270, with 37 co-sponsors as of March 9, 2012 in a body with 203 representatives, see http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2011&sind=0&type=B&bn=1270; and in the State Senate, S.B. 1116, with 10 co-sponsors as of March 9, 2012, in a body with 50 representatives, see http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2011&sind=0&type=S&bn=1116. It earned the support of, among other groups, the League of Women Voters of Pennsylvania, see League of Women Voters of PA, PA League of Women Voters Endorses National Popular Vote, PR NEWswire, (June 10, 2011), http://www.prnewswire.com/news-releases/pa-league-of-women-voters-endorsest-national-popular-vote-123644109.html.
“invisible federalism” protecting the Electoral College—that is, the power of States to administer elections, and more specifically to determine voter eligibility. As presently constituted, the Electoral College includes a mechanism that accounts for voters and non-voters alike, something that a winner-take-all popular election would not do. Additionally, it ensures that States do not game their voter eligibility standards to affect the national election outcome. And even if one were to consider eliminating the role of States in electing a president—a fairly dramatic step generally unmentioned in present Electoral College reform discussions—there are serious issues when it comes to federal decisions of enfranchisement, too. This Article is the first examination of the implications of failing to consider, or outright abolishing, the role of States in determining voter eligibility in presidential elections.

For over 200 years, individual States have selected slates of presidential electors without regard to the selection processes of other States. States, the Supreme Court has emphasized, have an extraordinary power to select the manner in which it appoints members of the Electoral College. But the Electoral College has little public support: a 2011 Gallup poll found that 62% of Americans support amending the United States Constitution so that the candidate with the most total votes nationwide wins the election. A transformation from the Electoral College to a popular vote system, whether through an interstate compact or through a constitutional amendment, would turn elections administered in fifty States and the District of Columbia into an accumulated national popular vote total, which in turn would give a candidate the presidency.

Part I concludes that, as a theoretical matter, there are good reasons to preserve the system. Beginning with first principles, Part I.A notes that the Founders deliberately allocated political power based on total population,


12 See generally Muller, supra note 2, at 375–76 (describing the history of proposals to use an interstate compact among States comprising at least 270 electoral votes to award their electors to the winner of the national popular vote).

13 See, e.g., S.J. Res. 11, 109th Cong. (2005) (proposing an amendment to the Constitution of the United States to abolish the electoral college and to provide for the direct popular election of the President and Vice President of the United States).

14 Occasionally, this Article will refer to “States,” which, for purposes of discussing jurisdictions with electoral votes, will include the District of Columbia.
The Founders valued the concept that elected officials represented voters and non-voters alike. Apportioning representation in the House of Representatives, and by extension the Electoral College, on the basis of total population helped protect this broad view of a political constituency. Part I.B then describes another element of this system: States held the power to decide how to appoint electors, and if they decided to hold a popular vote, they could also decide who was eligible to vote. States administered presidential elections and eventually uniformly held popular votes for presidential electors. The Constitution deliberately gave that responsibility to the States.

Calls for Electoral College reform, however, often argue that the Supreme Court’s requirement of “one person, one vote,” first articulated in *Gray v. Sanders*, is a good basis for reform. It is easy to administer and intuitive concept that every vote ought to have equal value. Part I.C examines the Court’s “one person, one vote” jurisprudence and finds it lacking. First, as commonly understood in most of the Supreme Court’s redistricting cases, “one person, one vote” refers to the idea that representatives should represent equal numbers of constituents—both voters and non-voters alike. That is a fundamentally different concept than the idea that the United States should have winner-take-all elections, which represent solely what voters want. In fact, such an argument actually undermines calls for reform, because the Electoral College allocates electors predominantly by accounting for total population, including voters and non-voters. And even though *Gray* defends winner-take-all contests for “single constituency” elections, election of the president is not a single constituency election because of the unique role of States deciding who is eligible to vote. Because States enfranchise some and disenfranchise others, their role in our federal system precludes reform unless one takes that power away from them. Regardless of how one views “one person, one vote,” the Electoral College values the constituency of both voters and non-voters, and it gives the States the power to determine who qualifies as a voter or a non-voter.

After examining these federalism-based theoretical defenses of the Electoral College, this Article identifies the practical problems of Electoral College reform in Part II. If the Electoral College were reformed to give the

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15 See infra Part I.A.
16 See infra Part I.B.
18 See infra Part I.C.2.
19 See infra Part I.C.3.
winner of a national popular vote the presidency, States would still control who votes and who does not. Part II.A concludes that the disparities in States’ treatment of voters precludes reform of the Electoral College, because a single State’s definition of voter eligibility would affect the entire national popular vote total—including definitions based on age, felon status, alien status, and mental incapacity. The Article calculates how even one State’s enfranchising or disenfranchising of a small set of its citizens could dramatically affect national elections.

Accordingly, if single States could manipulate the national popular vote by tinkering with voter eligibility, then Electoral College reform should not allow the States to continue to administer presidential elections. Reform cannot exist without a comprehensive federal election policy defining qualifications of voters at a minimum, and perhaps an entire election scheme for presidential elections, as leaving the electoral process to 51 independent jurisdictions with effects spilling across jurisdictional boundaries would not work. There have been occasional mentions in Electoral College reform literature noting that this may be a problem, but generally dismissing it curtly or simply acknowledging that uniform federal voting standards may need to be established.20

Part II.B examines what a federal system of voter eligibility would look like, and concludes that it, too, fails to permit Electoral College reform. First, universal federal standards of voter eligibility would stifle innovation and expanded enfranchisement at the State level, where such expansion traditionally occurs.21 National standards historically lagged State expansion of the right to vote, and stripping that power from the States would limit those opportunities. Second, the federal government would have intractable difficulties in setting uniform federal standards.22 If, say, it decided to disenfranchise a set of ex-felons, it would need to define felony by referring to the different crimes in the 50 States, and it would disenfranchise individuals in one jurisdiction for conduct that would not disenfranchise them in another. A federal standard would almost certainly disenfranchise individuals currently given the right to vote, as the varying eligibility standards would find a political compromise in the center, enfranchising voters in some States while disenfranchising them in others.

But there has not been an examination of whether State-based voting eligibility, and a model where the Electoral College includes voters and

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20 See infra notes 232–234 and accompanying text.
21 See infra at Part II.B.1.
22 See infra at Part II.B.2.
non-voters as a part of the president’s constituency, is actually a valuable virtue of our federalism, as reform proponents treat this “invisible federalism” as simply a barrier to reform rather than a potential good, or, at the very least, a lesser of two evils.

I. THEORETICAL ISSUES FACING REFORM

Despite heavy contemporary criticism of, and debate surrounding,\(^\text{23}\) the Electoral College, at the time of the founding, the mechanism received almost no sustained criticism.\(^\text{24}\) Alexander Hamilton went so far as to claim, “if the manner of it be not perfect, it is at least excellent.”\(^\text{25}\) As originally devised, the Electoral College served a number of functions. And while many of those reasons are no longer viable, one does remain—the idea that the Electoral College counts both voters and non-voters, and that it was up to the States to decide who, if anyone, in those States voted for presidential electors.

The Founders saw a number of functions they hoped the Electoral College would yield. First, it would provide an intermediary between the voters and the office of the presidency to ensure that the president would not be elected simply by the “extraordinary or violent movements” of an election campaign.\(^\text{26}\) Second, the electors chosen on a state-by-state basis insulated them from the “heat and ferments” that might sway them if they convened in one place for a vote.\(^\text{27}\) Third, the electors would rarely reach a

\(^{23}\) Compare TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE (2005) (defending the Electoral College because, among other reasons, it strengthens the two-party system, requires cross-regional coalitions for victory, and promotes definitive election results) with ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE (2006) (calling for Electoral College reform because of its perilous complexity and threat to certainty in election outcomes).

\(^{24}\) Perhaps the only notable criticism arose in an anti-Federalist letter in the Kentucky Gazette in 1788, where Republicus wrote, “Is it then become necessary, that a free people should first resign their right of suffrage into other hands besides their own, and then, secondly, that they to whom they resign it should be compelled to choose men, whose persons, characters, manners, or principles they know nothing of?” Republicus, The Kentucky Gazette, Mar. 1, 1788 (Antifederalist No. 72).


\(^{26}\) See id. 458; see also Robert G. Dixon, Jr., Electoral College Procedure, 3 W. POL. Q. 214, 214 (1950) (“The presidential elector, as originally conceived, was apparently designed to be a noble, non-partisan figure who, in company with his fellow-electors in his state, would perform the high political function of choosing a president and a vice-president.”); Paul Diller, Habeas and (Non-)Delegation, 77 U. CHI. L. REV. 585, 644 n.360 (2010) (“This system, however, was designed to restrain the worst impulses of majoritarianism.”).

\(^{27}\) THE FEDERALIST No. 68, supra note 25, at 458–59.
majority decision and turn the process over to the House of Representatives. Finally, the Electoral College was founded upon a kind of republican vision of virtual representation in which a number of residents (including women, children, aliens, non-property owners, and, in part, slaves) would be included in a State’s population tally for the allocation of electoral votes (and for that State’s representation in the House of Representatives).

These justifications fell away one by one as the nation benefited from the wisdom gleaned from actually experiencing presidential elections. As to the role of electors as thoughtful intermediaries, most States refuse to reveal the names of electors on the ballot; in some States, faithless electors face a penalty for voting contrary to the preference of the voters. Votes are cast for a presidential candidate at the polls, and those preferences are almost always, particularly in recent presidential elections, faithfully cast by electors. Furthermore, state legislatures no longer directly appoint

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28 Id. at 460; see Adam M. Samaha, On Law’s Tiebreakers, 77 U. CHI. L. REV. 1661, 1681 (2010) (“House participation was expected to happen frequently enough that the Electoral College would tend to function as a screening device rather than the decisive stage of an election.”); see also NEAL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE’S PRESIDENT 17 (rev. ed. 1981); Note, Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote, 114 HARV. L. REV. 2526, 2528 (2001).

29 Whether this element is for good or ill is not without controversy. See, e.g., Sanford Levinson, Who, If Anyone, Really Trusts “We the People”? 37 OHIO N.U. L. REV. 311, 314 (2011) (“Indeed, it would appear congruent with giving slaveholding states significant extra representation in the House of Representatives (and, therefore, the electoral college) because of the three-fifths compromise that counted slaves toward representation even though, quite obviously, not only did they not enjoy the right to vote but also they lacked any semblance even of ‘virtual representation’ that was claimed to be present with regard to the mothers, wives, sisters, and daughters who were also denied the suffrage.”); Henry Paul Monaghan, Supremacy Clause Textualism, 110 COLUM. L. REV. 731, 749 (2010) (“And the three-fifths rule of Article I, Section 2, which distorted southern representation in both the Electoral College and the House of Representatives, provided (temporarily at least) additional vital protection for the South.”).

30 LAWRENCE D. LONGLEY & ALAN G. BRAUN, THE POLITICS OF ELECTORAL COLLEGE REFORM 28–3– (2d ed. 1975); see also Robert W. Bennett, The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President, 100 NW. U. L. REV. 121, 121 (2006) (“Some states have statutory provisions that explicitly purport to ‘bind’ electors to vote in accord with their prior commitments. These laws sometimes simply instruct electors to vote as committed, but sometimes they provide penalties of one sort or another.”).

31 Cf. Beverly J. Ross & William Josephson, The Electoral College and the Popular Vote, 12 J.L. & POL. 665, 667 (1996) (noting that, by 1979, “out of approximately 20,000 electors who had served in more than 45 presidential elections, only thirteen electors had cast their votes for President other than in accordance with the popular vote”). Since then, there have been at least two additional instances of faithless electors: in 2000, when an elector abstained casting any vote; and in 2004, when an elector cast a vote for Democratic
electors, as electors are now elected by popular vote in all jurisdictions, and
the electors are committed to particular presidential candidates rather than
serving as independent decision-makers. Congress has rarely involved
itself in presidential elections, and the Twelfth Amendment has had a
minimal role and is criticized even in its present limited form. A move to
a national popular vote would not terribly upset the Founders’ perceived
constitutional balance in most of these areas, as many of these elements
have already been cast aside, in some cases just years after the
Constitution’s ratification.

But it is the last point, an Electoral College that represents voters and
non-voters alike, that inspires the initial focus of this Article. Total
population has been the touchstone of most contemporary election reform
concerning redistricting for the House of Representatives. And States have
historically been tasked with the role of selecting among that pool of the
total population, subject to a handful of constitutionally-mandated floors,
which members of that population are eligible to vote. The Article explores
these two points.

A. Basis for the Electoral College

Under the originally-ratified Constitution, each State’s electors are
“equal to the whole Number of Senators and Representatives to which the
State may be entitled in the Congress.” 37 Each State would receive two Senators. Each State also would receive at least one Representative, apportioned “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 taxes, three fifths of all other Persons.” 38

But only a small percentage of the population could vote, even if the apportionment for the Electoral College occurred on the basis of free population and a portion of the slave population. While early Census figures do not record voting-eligible population, the low percentage of ballots cast in relation to total state inhabitants proves the point. For example, in 1832, New Hampshire permitted a popular vote for the electors for president, but only around 44,000 votes 39 were cast in a state of around 269,323 inhabitants, 40 just 16% of the total population. In contrast, in 2000, there were 569,081 ballots 41 cast in a population of 1,235,786 inhabitants, 42 a healthier 46%.

This incongruity of population and ballots cast at the founding relative to contemporary elections is apparent. Congressional districting, and as a result the Electoral College, was based on total population (with a caveat for additional weight for the slave population), not based on voting population. James Madison noted in the Federalist that the House of Representatives would be “founded on the aggregate number of inhabitants of each state.” 43 James Wilson articulated the principle that “equal numbers of people ought to have an equal no. of representatives.” 44

As the Framers saw it, population would serve not simply as a straightforward numerical calculation, but also as a rough proxy for wealth, labor, or some other “value” of the State to the republic. 45 During the

37 U.S. CONST. art. II, § 1.
38 U.S. CONST. art. I, § 2 (superseded by amend. XIV § 2).
40 Returns of the Fifth Census, United States Census Bureau, 1830. The Census was completed over two years before the Election 1832.
41 C.Q. POLITICS, supra note 39, at 169.
42 Returns of the 2000 Census.
43 THE FEDERALIST NO. 54 (James Madison), supra note 25, at .
44 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 180 (Max Farrand ed. 1911).
45 Scot A. Reader, One Person, One Vote Revisited: Choosing a Population Basis from Political Districts, 17 HARV. J. LAW & PUB. POL’Y 521, 528 (1994).
constitutional convention, this discussion about why to use total population arose frequently. Madison accepted that “in no situation, numbers of inhabitants were an accurate measure of wealth,” but also noted that “[t]he value of labor[] might be considered as the principal criterion of wealth and ability to support taxes,” and that population movements would approximate this.46 Wilson believed that “numbers of inhab[itants was not] so incorrect a measure of wealth.”47 William Samuel Johnson accepted that “wealth and population were the true, equitable rule of representation” because population was the best measure of wealth.”48 Rufus King, defended by Pierce Butler, argued that the “number of inhabitants was not the proper index of ability & wealth; that property was the primary object of Society; and that in fixing a ratio this ought not to be excluded from the estimate.”49

Then arose the debate over whether to include slaves in the tally for apportionment. Wilson noted that if slaves were citizens, they should receive equal representation with white citizens; and if they were property, he questioned, “why is not other property admitted into the computation?”50 William Paterson disagreed with a count that would give “a man in Virginia a number of votes in proportion to the number of his slaves.”51 Butler insisted that “the labour of a slave in South Carolina was as productive & valuable as that of a freeman in Massachusetts, that as wealth was the great means of defence and utility to the Nation they were equally valuable to it with freemen.”52

If representation were based on wealth, or proxies for wealth like population, representation in the House of Representatives, and, by extension, in the Electoral College, would not turn solely on the winner among ballots cast. Indeed, even if population alone formed the basis for apportionment, the inclusion of slaves undermines the notion that elections at the founding were to represent the interests of all those counted for drawing congressional districts and allocating electoral votes.53

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47 Id. at 275.
48 Id. at 278.
49 Id. at 247.
50 Id. at 275.
51 Id. at 259.
52 Id. at 268.
53 See Garza v. County of Los Angeles, 918 F.2d 763, 774 (9th Cir. 1990) (“The framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants,
Further, the notion of “virtual representation” strengthens this choice to count the total people, voters and non-voters alike, in allocating State strength for purposes of the Electoral College. Virtual representation included the idea that voters could, in the words of Professor Akhil Reed Amar, “speak for the larger society (which included children, incompetent, women, slaves, etc.).”54 At the time, voting was heavily restricted, and voters had to virtually represent a substantial number of individuals—sometimes with perverse incentives in which the electorate would actually vote against the interests of groups counted for purposes of apportionment.55 But even today, justification for continued disenfranchisement of certain groups includes, at least in part, a defense that voters do seek to protest the interests of the disenfranchised.56

Instead, it suggests that, perhaps as a concession to compromise at the founding,57 other values permeated the democratic values of our republic than the idea of winner-take-all popular elections. And admittedly, such elections were not esteemed highly in constructing the Constitution. The election of the president would not occur by giving the candidate with a raw plurality of the popular vote in a direct democratic election the office. Some anti-federalists saw this as a kind of violation of a principle inherent in democracy, in which the chief executive ought to be chosen by a majority of the people.58

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56 See, e.g., Robert W. Bennett, Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy, 94 NW. U. L. Rev. 503, 505 (2000) (“It is widely assumed that voters who are parents cast the single votes they now receive in part at least in pursuit of the interests of their children.”)
57 See Rethinking the Electoral College Debate, supra note 28 at 2527 (“The elaborate system they created was a delicate compromise among three sets of competing factions: between those delegates favoring direct election and those favoring congressional selection; between large and small states; and between northern free states and southern slave states.”).
58 See Michael T. Rogers, “A Mere Deception—a Mere Ignus Fatus on the People of America”: Lifting the Veil on the Electoral College, in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES 33 (Gary Bugh ed. 2010) (“Monroe felt this way, claiming the Electoral College ‘forms a departure from a principle which should prevail through the
Over time, however, the abolition of slavery converted the apportionment to a truly population-based model, and the expansion of enfranchisement to virtually all adults largely abolished any of the founding-era concerns of apportionment as a proxy for wealth. And in post-bellum America, democracy demanded that voter participation be given priority.

But, there was another virtue of this apportionment system at the time of the founding that exists to this day. By leaving to the States the power to determine voter eligibility, it permitted the Constitutional Convention to reach a fairly simple assessment of the balance of political power by counting population. Indeed, contemporary practice accepted that equal population would be the “benchmark for democracy,” ranging from the promises of the Northwest Ordinance, to the practices of state legislatures whole, but particularly in the organization of this branch, a dependence of this officer, for everything estimable among mankind, upon the people of America. William Symmes Jr. added, “[w]hose voice are we supposed to hear in public transactions?—We accurate Republicans say, the voice of ye. people. Who are ye. people? We answer, ye. majority.—But a majority of States may chuse a President.” (internal citations omitted).

See Paul Finkelman, The Cost of Compromise and the Covenant with Death, 38 PEPP. L. REV. 845, 846 n.5 (2011) (noting that the Thirteenth Amendment effectively nullified the Three-Fifths Compromise, which was the only non-population-based element in apportioning the House of Representatives).


See, e.g., CONG. GLOBE, 41st Cong. 2d Sess. App. at 479 (1870) (statement of Rep. Hoar) (“The Constitution, as now completed, provides that every person born or naturalized in the United States shall be a citizen thereof, and that the right of any citizen to vote shall not be abridged by reason of race, color, or previous servitude. By the system thus established all national questions are to be decided in the last resort by the opinion of the majority of the voters . . . . The vote of the humblest black man in Arkansas affects the value of the iron furnace in Pennsylvania, the wheat farm in Iowa, or the factory in Maine as much as does the vote of its owner.”).

See U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, 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.”); cf. U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof my direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .”).

Northwest Ordinance, Section 9 (1787) (“Provided, That, for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the
shortly after the founding. But the decision as to who among that population would vote was left to other governing bodies—an element of invisible federalism.

Despite these traits that the Article argues are virtues of the electoral system—proxies for representation to include total population beyond merely raw ballots cast—some are not so convinced. Critiques have largely discounted any serious, sustainable, legitimate purpose in the creation of the Electoral College, and they conclude that, absent any valid original justification for its existence, contemporary values compel its abandonment. More modernist perspectives argue that the Electoral College a relic of slavery. Or, perhaps it was simply a compromise inapplicable in the twenty-first century when direct election is now the standard procedure for elections, slavery has been abolished, and any balance between large States and small States, or among particular constituencies, may not even exist.

number of free male inhabitants shall the right of representation increase, until the number of representatives shall amount to twenty five; after which, the number and proportion of representatives shall be regulated by the legislature . . . .”). Note that even though the population total was restricted to males, it counted all inhabitants, not simply those eligible to vote.


65 See 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, 230 (1994) (“Just as the ‘three-fifths of a person’ status for African-American citizens was eliminated by the Civil War Amendments, the electoral systems founded upon this now unconstitutional apportionment principle should be challenged.”); see also Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 HARV. L. REV. 26, 61 (2000) (“Indeed, the electoral college was largely designed to advantage slave states such as Virginia. In a system of direct national election, Virginia would have gotten no heft from her slaves, who of course could not vote.”).

66 Cf. LONGLEY & BRAUN, supra note 30, at 83–84 (describing how defenders of the Electoral College view the federal compromise as “integral” to our federal system).

67 See infra at note 80 and accompanying text (describing expanded use of direct election of presidential electors).

68 See U.S. CONST. amend. XV.

69 See, e.g., Note, David Gringer, Why the National Popular Vote Plan Is the Wrong Way to Abolish the Electoral College, 108 COLUM. L. REV. 182, 185 (2008) (“Critics dispute whether the college benefits small states or large states, minority voters or white voters.”); Eric R.A.N. Smith v. Peverill Squire, Direct Election of the President and the Power of the States, 40 W. POL. Q. 29, 32–33 (1978) (“For instance, [one study] conclude[s] that under the Electoral College, blacks are 2.4 percent less powerful than the average voter. Yet this difference in power is dwarfed by the 21 percent difference between black turnout and the average U.S. turnout in 1980. Of course, black–white turnout
In this section, the Article resists this fairly common contemporary conclusion—but at least to many, the virtues of the Electoral College as a matter of representative theory as originally conceived, even if accepted as valid, cannot overcome contemporary the justifications for its abolition. But there is another side to the Electoral College: it is not simply a mechanism for State-based representation in selection of the president, but it is also a mechanism by which the States simultaneously administer the election and select electors as they see fit.

B. Basis for State Administration of Presidential Elections

Federalism would govern the election of the president. Even though the president was a nationally-elected figure who represented the entire United States, the selection of electors occurred on a State-by-State basis, consistent with the State-by-State allocation of electors.70

As the Federalist notes, “the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate.”71 Although this portion of the Federalist Papers is directly addressing the method for allocating congressional representatives, it illustrates a demonstrated concern “about federalism, not equal protection of individuals.”72

The electoral selection process was reserved to the States so that the States could have control over the selection of the executive.73 And it was designed to allow these States to select it in virtually any way they desired.74 This ambivalence on the theories of selecting representatives is consistent with a Madisonian concern about “factionalism,”75 where the differences vary from state to state.”); KEECH, supra note 36, at 27 (noting that since passage of the Voting Rights Act of 1965, “it is no longer clear who benefits from the assignment of electoral votes by population rather than actual voter participation”).}

71 THE FEDERALIST NO. 54 (James Madison), supra note 25, at __.
72 Reader, supra note 45, at 528.
73 Williams & MacDonald, supra note 65, at 236.
74 See McPherson v. Blacker, 146 U.S. 1 (1892) (“In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States.”); cf. Note, Michael J. Festa, The Origins and Constitutionality of State Unit Voting in the Electoral College, 54 VAND. L. REV. 2099, 2117 (2001) (“[T]he plan left the method of choosing electors entirely to the discretion of the states—in fact, it clearly committed the decision to the state legislatures.”).
75 ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW
Constitution could prevent various majority factions from usurping power and trampling minority interests. The Constitution contained “varied provisions for direct and indirect election of the different parts of the legislature and the executive, based on overlapping but distinct electorates.” The lack of a directive to the States regarding voter eligibility reflects, at least modestly, a decision to allow the sovereigns to handle voting rights as they so desired.

In 1789, the first presidential election, Pennsylvania and Maryland held statewide popular election of presidential electors; Virginia and Delaware held district-by-district popular election of electors; legislatures Connecticut, Georgia, New Jersey, New York, and South Carolina selected the electors; and New Hampshire and Massachusetts had hybrid arrangements involving both popular election and legislative selection. That arrangement fluctuated for several election cycles until around 1828, when nearly every State selected electors by a popular vote. And by 1836, nearly every State chose its electors by statewide popular vote, as opposed to district-by-district election.

There was a fear among delegates at the Constitutional Convention that that executive election would occur without State involvement. To satisfy “the spectrum of state interests by preserving a state role in the process,” a robust federalist system delegating the selection of the electors to the States
was conceived. 82 This system ensured that the States would maintain a role in the selection of the president, because the Constitution authorized the legislature to direct the manner of appointing electors. 83 It did not guarantee a popular vote for president. 84 And even proposals that would have guaranteed a popular vote for electors did not mandate a uniform, national standard for voter eligibility. Proposal that “qualified voters” in the several States choose electors did not specify “who were considered the ‘people’ or ‘citizens’ who would have the right to choose the president.” 85 Even these more pro-democratic proposals left to the States the discretion of participation in popular elections.

There is a shift that occurred, which, by the 1820s, allowed the United States to take into account the “democratic ideal” that had advanced so quickly, and uniformity of form followed to avoid dilution to ensure winner-take-all. 86 That is, the notion of the superiority of a popular vote for electors became the standard practice in most States, however that idea took hold. And once a State decided that a popular vote for electors should occur, States naturally, and individually, gravitated toward the same system: a winner-take-all election. It benefitted States in order to maximize their own political power. 87

But the mere fact that each State independently recognized that it was in its own best interest to shift to a popular vote does not immediately suggest that a national popular vote is the next inevitable step. Near-universal uniformity of voting method was a byproduct of the Electoral College. It was not a central issue shaping the debates over the Electoral College. Instead, the central issue was the role of the States, not the political power of the voters. 88 The discretion of choosing a method of selecting electors was ultimately left to the States, an inherently federalist element of the plan—invisible an element that it may be. 89

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82 Festa, supra note 74, at 2114.
83 See U.S. CONST. art. II, § 1, cl. 2.
84 PEIRCE & LONGLEY, supra note 28, at 19.
85 Id.
86 PEIRCE & LONGLEY, supra note 28, at 46–47.
88 See supra notes 62–64 and accompanying text.
89 Festa, supra note 74, at 2117 (“[T]he central issue of the Convention, and the one
Indeed, for whatever faults the Electoral College had, it had one important, and simple, virtue: just as all other elections were left to the States, so, too, would the election of the President. Not only would States decide whether to hold a popular election for the selection of electors in the first place, but they would also be responsible for the administration of that election, from determining voter eligibility to establishing the procedures for counting ballots.90

The importance of this virtue extends beyond the simplicity of administration. It permitted States to act as the first movers in the expansion of enfranchisement.91 Far from a theoretical possibility, States used this power to define voter eligibility to expand enfranchisement at a pace far more rapidly than federal efforts.92

And it is this framework that any seriously-considered Electoral College reform assumes. Advocates of the National Popular Vote emphasize that States will continue to control their own election systems.93 Even a constitutional amendment would largely keep the federal government out of the minutiae of administering presidential elections or establishing voter eligibility.94

that drove the debate over electing the President, was the extent of the role the states would have, not the identity of the voters. Once the formal power structure of how many electoral votes each state would cast was decided, the lesser issue of choosing a method was left to the discretion of the states. The plan implicitly recognized that the states would be exercising a degree of sovereignty by choosing their electors as they saw fit.”).

90This discretionary power is extraordinarily broad. See supra note 10 and accompanying text. And that commitment to giving States such broad discretion has its critics. See, e.g., PEIRCE & LONGLEY, supra note 28, at 33 (calling such discretion “an open invitation to manipulate the electoral system in any way they thought might satisfy their immediate partisan purposes”).

91G. Alan Tarr, Explaining Sub-National Constitutional Space, 115 PENN ST. L. REV. 1133, 1146–47 (2011) (“And since the founding, both federal statutes and amendments to the federal Constitution have drawn upon state constitutional models. For example, the right to vote for African-Americans, women, and eighteen-year-olds were pioneered in state constitutions before their incorporation into the federal charter.”).

92See infra at II.A.

93JOHN R. KOZA ET AL., EVERY VOTE EQUAL 491 (3d ed. 2011) (“Differences in state election laws resulting from our federalist system are not ‘logistical nightmares [that] could haunt the country’ but a strength of our nation’s Constitution.”).

94See, e.g., S.J. Res. 11, 109th Cong. (2005) (proposed constitutional amendment to abolish the Electoral College and authorize Congress to establish uniform residency and age voter qualifications); see also KOZA, supra note 93, at 489 (“Under the National Popular Vote plan, each state would conduct the election under its own laws—the same thing that would have occurred under the constitutional amendment that was approved by the U.S. House of Representatives in 1969.”).
But before we consider the effects of attempting to overturn the virtual representation-model of presidential elections while simultaneously maintaining State control of the process, it would be beneficial to consider the reasons why the Electoral College is, under contemporary theory, deemed anachronistic.

C. One Person, One Vote, and the Electoral College

There is some ostensible tension in a system of government that elects a truly national leader selected by a compilation of the preferences of fifty-one separate jurisdictions. One of the primary criticisms of the Electoral College stems from a growing tension over time between claims to federalism and claims to democracy, with the latter increasingly garnering public support.\(^{95}\) That is, we increasingly view elections as being about individual voters expressing preferences, then adding up those preferences and awarding the plurality winner the office.\(^{96}\) It is, after all, a national office, and Americans tend to view executive representation as substantially different from legislative representation.\(^{97}\) And, accordingly, as the election of the president is viewed more as being about individual preferences, it is viewed less as a mechanism reflecting the choices of individual States aggregated together.

And, simultaneously, although the Electoral College has controlled presidential outcomes for more than two centuries, there have been frequent attempts to abolish it.\(^{98}\) The most salient critique is succinctly offered in Every Vote Equal:

In elections for President and Vice President of the United States, every vote should be equal. Every person’s vote should be equally important, regardless of the state in which the vote is cast. The presidential and vice-presidential candidate[s] who receive the most popular votes throughout

\(^{95}\) Michael J. Korzi, “If the Manner of It Be Not Perfect”: Thinking Through Electoral College Reform, in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES 49 (Gary Bugh ed. 2010).

\(^{96}\) See, e.g., Note, supra note 28, at 2547 (“Whether individuals are running for governor, senator, congressman, mayor, or dogcatcher, it is clear to everyone that the candidate with the most votes in the defined geographic area will win the office.”).

\(^{97}\) Dixon, supra note 75, at 42; see also DIXON, supra note 75, at 571 (“The essence of the direct popular vote idea for the presidency is that we are dealing with a national election for a single national office.”).

\(^{98}\) Cf. Muller, supra note 2, at 374 (describing voluminous attempts to reform or abolish the Electoral College).
But why? It is tautological\textsuperscript{100} to say that every vote should be equal because every vote should be equal.\textsuperscript{101} Objections to the Electoral College must be grounded in some reason why the current system is problematic. And among the most common reasons given is the idea that the Electoral College violates “one person, one vote.”\textsuperscript{102}

\textsuperscript{99}KOZA, supra note 93, at 1, 20. The National Popular Vote in particular notes that it would also “make[] all states competitive,” id. at 20, but to the extent one desires a kind of improved access to candidates at, say, county fairs or cable television advertisements in a larger number of markets is beyond the scope of this article. \textit{Cf.} PEIRCE & LONGLEY, supra note 28, at 223 (“Candidates would still feel obliged to make speeches to veterans and to labor and business conventions and to show particular concern for certain specialized geographic interests. Some minor ‘prop stops’ might be cut from schedules, it was felt, but candidates would still have to ‘show the flag’ to some degree, even in relatively sparsely populated regions of the nation.”).

\textsuperscript{100}Reynolds v. Sims, 377 U.S. 533, 590 (1964) (Harland, J., dissenting).

\textsuperscript{101}See, e.g., Colin Gregory Palmer Grey, \textit{The Trouble with the Electoral College}, CGPGREY.COM, http://blog.cgpgrey.com/the-electoral-college (last visited Mar. 15, 2012) (“In a fair democracy everyone’s vote should count equally, but the method that the United States uses to elect its president, called the electoral college, violates this principle by making sure that some people’s votes are more equal than others.”).

\textsuperscript{102}See, e.g., Vikram David Amar, \textit{Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power}, 100 GEO. L.J. 237, 241 (2012) (“[M]y starting point is a strong commitment to equality that characterizes the rest of our constitutional voting jurisprudence (one-voter, one-vote), and any significant departure from this principle will require someone to ‘show me’ good reasons to deviate.”); \textit{Rethinking the Electoral College Debate}, supra note 28, at 2544 (2001) (“[T]he chief objection to the system is generally that it violates the one-person, one-vote principle.”); \textit{American Bar Association, Electing the President: A Report of the Commission on Electoral College Reform} 7 (1967) (“In summary, direct election of the President would be in harmony with the prevailing philosophy of one person, one vote.”); Keeph, supra note 36, at 32 (1978) (“Direct popular vote, of course, eliminates all of these inequalities. By definition, it counts all votes equally: one person, one vote.”); \textit{American Enterprise Institute for Public Policy Research, Direct Election of the President} 1 (1977) (“It was only a matter of time before the theory of the reapportionment cases, so pithily captured in the slogan ‘one-man, one-vote,’ would run head-on into the electoral vote system . . . .”); Birch Bayh, \textit{Foreword}, in KOZA, supra note 93, at xxv (“In the United States every vote must count equally. One person, one vote is more than a clever phrase, it’s the cornerstone of justice and equality. We can and must see that our electoral system awards victory to the candidates chosen by the most voters.”) Robert A. Holmes, \textit{Foreword}, id. at l (3d ed. 2011) (“[M]any now agree that the current system of electing the President is the antithesis of the fundamental democratic principles of ‘one person, one vote’ and ‘every vote equal.’”); Christopher Pearson, \textit{Foreword}, id. at lvi (“By the time I became familiar with the National Popular Vote bill I already liked the idea of a popular vote for president. There is something so basic about one person, one vote. I didn’t need much convincing.”).
The slogan “one person, one vote,” plucked from *Gray v. Sanders*,\(^\text{103}\) fails to justify a shift to a national popular vote for president. First, the history of the reapportionment cases illustrates that the doctrine of “one person, one vote” usually means something quite different than that articulated in *Gray*—it generally refers to assuring equal numbers of people in legislative districts, articulated in a series of cases beginning with *Wesberry v. Sanders*\(^\text{104}\) and *Reynolds v. Sims*.\(^\text{105}\) Second, to the extent one relies upon that more common understanding of “one person, one vote,” one finds that it is inherently contrary to Electoral College reform, because it values weighing both voters and non-voters among those represented, something the present Electoral College successfully achieves and that reform would undermine. Third, to the extent one relies upon *Gray*, which applies to “single constituency” elections, the presidential election—even though the president represents a national constituency—does not occur within a “single constituency,” because the responsibility for administering presidential elections occurs across fifty-one separate jurisdictions, including individualized determinations of, among other things, voter eligibility. The Article examines each in turn.

#### 1. Distinguishing “One Person, One Vote”

Having found disputes concerning election district apportionment justiciable in *Baker v. Carr*,\(^\text{106}\) the Supreme Court evaluated whether non-population-based methods of apportionment passed constitutional muster. In *Gray v. Sanders*, Georgia had a “county unit” system for political primaries. Each county received one to three representatives, depending on population, for representation in its lower legislative chamber.\(^\text{107}\) Primary elections for United States Senator and Governor were based on this system, too.\(^\text{108}\)

The Court rejected this system in memorable language: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”\(^\text{109}\) In a statewide election of a statewide constituency, “there can be room for but a

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108 *Id.* at 371.
109 *Id.* at 381
single constitutional rule—one voter, one vote.”

The Court in *Gray* emphasized that the Electoral College was exempt from its constitutional analysis. Yet the reasoning behind *Gray*, and the enticing mantra “one person, one vote,” may well motivate a shift in how we view the Electoral College as a matter of policy. And even though *Gray* applied “one person, one vote” to a statewide election, it quickly extended to legislative district apportionment cases, too. The test played out in tangible ways as the Court tried to articulate the appropriate standard for “one person, one vote.” In *Wesberry v. Sanders*, the Court examined legislative apportionment and concluded that “as nearly as practicable one man’s vote in a congressional election is to be worth as much as another’s.” The Founders had suggested that wealth could be approximated by population, but whatever the motivation, the Constitutional Convention, according to the Court, made it “abundantly clear” that representation should be based upon the “people,” “determined solely by the number of the State’s inhabitants.”

In *Reynolds v. Sims*, the Court looked to state legislative bodies and insisted upon districts drawn “on a population basis” that would not “in a substantial fashion” dilute the votes of citizens in other parts of that State. “A citizen, a qualified voter,” deserved equal protection under the law, and districts might be drawn based upon an “identical number of residents, or citizens or voters,” a question “carefully left open” by the Court.

The Supreme Court has evaluated these redistricting claims for equality of “total population.” But it has never explicitly addressed alternative mechanisms for drawing voter districts, including “citizen voting age population.” That is, when dividing up districts for a political office

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110 Id. at 382 (Stewart, J., concurring).
111 *Gray*, 372 U.S. at 808; see id. at 810–11 (Harlan, J., dissenting) (“[A]ny such distinction finds persuasive refutation in the Federal Electoral College whereby the President of the United States is chosen on principles wholly opposed to those now held constitutionally required in the electoral process for statewide office.”).
113 Id. at 13 n.33.
114 Id. at 13; see also id. at 13 n.30 (describing breadth of inclusion of total population in apportionment).
116 Id. at 568.
117 Id. at 577.
119 *Chen v. City of Houston*, 532 U.S. 1046 (Thomas, J., dissenting from denial of petition for writ of certiorari).
(whether federal congressional districts, State legislative districts, or even local governmental districts), does the equality mandated in “one person, one vote” require districts with equal numbers of people, or districts with equal numbers of people who are citizen voting-age population?

Some courts of appeals have concluded that the decision to use total population or citizen voting-age population in apportionment is a political question left to the legislature; one has concluded that equal protection requires total population. In practice, total population has been the guiding principle in apportionment. Instead, it appears that each political district is not supposed to have the same number of voters, but that any given representative has the same number of constituents.

But note that this discussion yields two separate examinations of “one person, one vote” that have un tethered us from our original examination of Gray and the Electoral College. The Wesberry-Reynolds line of cases is predominantly concerned with representatives representing roughly equal populations of both voters and non-voters, which has dominated the examination of the “one person, one vote” principle. Indeed, Wesberry barely cited Gray for the proposition, using the signal “cf.” for reliance on Gray. And Gray applies only in those limited instances of “single constituency” elections.

There are few commentaries that meaningfully recognize that Gray and Wesberry-Reynolds represent competing theories, and instead most attempt to synthesize them, or to pull Gray aside as an example parallel to the Electoral College. But it is important to recognize that “one person, one

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120 See Avery v. Midland County, 390 U.S. 474 (1968).
121 Chen, 532 U.S. at 1046.
122 Daly v. Hunt, 93 F.2d 1212 (4th Cir. 1996); Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000).
123 Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990).
124 See infra at 131 and accompanying text.
125 Wesberry cites Gray twice, both times using “cf.” See 376 U.S. 1, 8, 18 (1964) (citing Gray v. Sanders. 372 U.S. 368 (1963)).
127 See, e.g., Festa, supra note 74, at 2136–39 (“Gray appears to frame perfectly an
“vote” means something different in each. Gray is a “single constituency” case. The ensuing equipopulation principles from Wesberry, Reynolds, and their progeny, which have dominated the “one person, one vote” discussion for the last half-century, relate to “the more common question of a multi-member governmental body.”

Yet neither supports the case for converting the Electoral College into a winner-take-all national election.

2. “One Person, One Vote” Under Wesberry-Reynolds

Wesberry-Reynolds examines what Professor Sanford Levinson calls a “one voting representative/one constituent” model. Constituents include voters and non-voters alike. And so, according to Wesberry, Reynolds, and their progeny, States are supposed to divide districts for multi-member governmental bodies among constituents, voters and non-voters alike. The power of “one person, one vote” did not reside in the equal weight of a person’s vote; the Supreme Court specifically rejected that in Gaffney v.
Cummings, acknowledging that district populations could vary significantly because “census persons” for purposes of reapportionment may not be voters.

Consider the impact that current Census bureau population figures, calculated into the Electoral College, have when we compare total population to some smaller subset of potential, or actual, voters. The United States has around 310 million residents as of the 2010 Census. Of those, around 206 million are in the 18-and-over citizen population, or 66.7%—the population we might ordinarily consider to be “voter-eligible.”

But some States have far more children or non-citizens in their population, and some have far more. Among Texas’s 25 million residents are nearly 7 million children, over 27% of the State’s population; compare that to the aging State of Florida, with nearly 19 million residents but just 4 million children, 21% of the population. Utah has just 2.76 million residents, but over 31% of its population is children; Maine and its population of 1.33 million have a meager 20.7% of its total population under the age of 18.

The same holds true for non-citizens. There are around 19.4 million resident non-citizens over the age of 18 as of the 2010 Census, about 6.3% of the total population. But in California, nearly 5.2 million residents are non-citizens over 18, almost 14% of the population. Texas has almost 2.3 million in that demographic, 9% of the population. But Ohio has just 132,000 adult non-citizens, only 1.1% of its population; in Missouri, it is 104,000, or 1.7% of its population.

As the bulk of the Supreme Court’s discussion of “one person, one vote” has centered upon this understanding of the doctrine, it is perhaps rash to conclude that such a proposition calls for abolition of the Electoral College and a winner-take-all election in which the preferences of voters are the only matter considered. This understanding of the principles of “one person, one vote” under Wesberry-Reynolds recognizes a need for representation for all individuals, voters and non-voters alike. Indeed, it

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134 Id. at 746–48; accord Burns v. Richardson, 384 U.S. 73, 91–92 (1966).
135 Returns of the 2010 Census, at DP1.
136 Of course, felon voting, mental capacity may actually reduce this amount. But as those can vary widely between States, and the standards of 18 and citizen are universal in the United States at the moment, we start here.
137 Returns of the 2010 Census, at DP1.
138 See supra note 129 and accompanying text.
may even assure a kind of procedural equality by ensuring that non-voters are directly accounted for in the mechanism by which the President is selected.\footnote{Reader, supra note 45, at 560.} Its principle of equal numbers of people in a district is hardly actually “equal representation” or “equally-weighted votes.”\footnote{DIXON, supra note 75, at 269; see also Gerken at 1431–32 (“As the Court’s remaining voting-rights jurisprudence moved into the second generation of legal challenges, it had become clear that districts of equal population could not guarantee equally weighted votes”); \textit{id.} at 1453 (“If the one-person, one-vote rule were designed to vindicate a purely individualist definition of equality, it would forbid the use of single-member districts and mandate a system in which every individual vote is counted the same way.”). Indeed, later cases suggested that a commitment to majoritarianism or winner-take-all elections was not even always required for purposes of “one person, one vote.” See Hayden, supra note 64, at 228–29 (arguing that “one person, one vote” might best be explained by a commitment to majoritarianism); \textit{William Poundstone, Gaming the Vote} 47 (2008) (“Americans are so used to ‘one person, one vote’ that they often imagine this is the only sensible way to vote. It’s not. (In fact, we’ll see that it’s about the least sensible way to vote!) ‘One person, one vote’ is known as a plurality vote because the winner is the candidate who receives the largest number of votes.”); Gerken at 1447 (“Thus, as long as we agree that equality means that fifty-one percent of the people should not decide things one hundred percent of the time, equal protection requires us to worry about vote dilution.”); cf. Jesse H. Choper, \textit{The Supreme Court and the Political Branches: Democratic Theory and Practice}, 122 U. PA. L. REV. 810, 830, 847 (1974) (contending that antimajoritarianism serves as a check on popular majorities rather than producing laws contrary to majority sentiment and that, despite the counter-majoritarian nature of the Electoral College, concluding that it “comes closer to the majoritarian ideal than practically any other national office in the modern western democracy”). Indeed, “special purpose district” cases suggest that the Court will allow the “parsing” out of votes based on the voter’s interest in the outcome of the election rather than on a democratic ideal of equally-weighted votes. Hayden, supra note 64, at 254–55; cf. Levinson, supra note 131, at 1276–77. Greater deviation is tolerated outside of congressional district apportionment. \textit{Id.} at 1281 & nn. 41–42 (2002). \footnote{See Levinson, supra note 131, at 1280 n.40 (evaluating Samuel Issacharoff’s interpretation of \textit{Baker} and \textit{Reynolds} as “prophylactic”); see \textit{generally} Melissa Saunders, \textit{Reconsidering Shaw: The Miranda of Race-Conscious Districting}, 109 YALE L.J. 1603 (2000) (calling the rules for evaluating racial gerrymandering “prophylactic”). See \textit{also} Heather K. Gerken, \textit{The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny}, 80 N.C. L. REV. 1411, 1413–14 (2002) (concluding that the “equality” concerns of the Court were undertheorized and remarking that “the one-person, one-vote cases did little to define the conceptual terrain in voting-rights cases”).}

And perhaps \textit{Baker} and \textit{Reynolds} are not intended to go so far as to suggest that “equally-weighted votes” are the primary concern of the Court. Perhaps the equipopulation principles are simply “prophylactic” measures designed to root out racial gerrymandering and say nothing about the “individual right” for each person’s vote to be weighted equally.\footnote{See \textit{Levinson, supra} note 131, at 1280 n.40 (evaluating Samuel Issacharoff’s interpretation of \textit{Baker} and \textit{Reynolds} as “prophylactic”); see \textit{generally} Melissa Saunders, \textit{Reconsidering Shaw: The Miranda of Race-Conscious Districting}, 109 YALE L.J. 1603 (2000) (calling the rules for evaluating racial gerrymandering “prophylactic”). See \textit{also} Heather K. Gerken, \textit{The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny}, 80 N.C. L. REV. 1411, 1413–14 (2002) (concluding that the “equality” concerns of the Court were undertheorized and remarking that “the one-person, one-vote cases did little to define the conceptual terrain in voting-rights cases”).} The Electoral College considers a combination of both the equiproportional...
allocation of the House and the counter-majoritarian allocation of the Senate.\textsuperscript{142} And, at least for the bulk of electors allocated under the Electoral College, assigned on the basis of total population, it is more consistent with “one person, one vote,” understood by \textit{Wesberry-Reynolds}, than Electoral College reform proponents have acknowledged.

3. “One Person, One Vote” Under \textit{Gray}

But, perhaps we can assuage some of these concerns of equipopulation principles embodied in \textit{Wesberry-Reynolds} and “one person, one vote.” Perhaps one could adhere to the principles of \textit{Gray}, in which, despite the fact that they cannot bind the Electoral College,\textsuperscript{143} one might find a compelling moral claim for reform efforts.

\textit{Gray} applied to divisions among voters drawn within a “single consistency.” There have been ipso facto claims that presidential elections are “single constituency” elections.\textsuperscript{144} That is, similar to the residents of New York electing members of a city council,\textsuperscript{145} or residents of Georgia electing a governor,\textsuperscript{146} American residents are a single constituency when selected the President of the United States—or, as the present Electoral College presently fails to treat voters as a part of a single constituency, it ought to be reformed to reflect that reality.

\textsuperscript{142} See Hayden, \textit{ supra} note 64, at 230. Although there is what some call a “distortion” in the Electoral College in its assignment of electoral votes based on the two senators each State receives, see Allan P. Sindler, “Basic Change Aborted: The Failure to Secure Direct Popular Election of the President, 1969–70,” \textit{in} POLICY AND POLITICS IN AMERICA: SIX CASE STUDIES (Allan P. Sindler ed. 1973), at 45, the distortion of that element of the Electoral College is minimal, \textit{see} Rethinking the Electoral College Debate, \textit{ supra} note 28, at 2540. \textit{See also} Paul D. Schumaker, “The Good, the Better, the Best: Improving on the ‘Acceptable’ Electoral College,” \textit{in} ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES (Gary Bugh ed. 2010) at 209 (describing that Electoral College proponents characterize this allocation as “relatively inconsequential, because the value of a vote is miniscule for voters everywhere”).


\textsuperscript{144} O’Sullivan, \textit{ supra} note 127, at 2430 (“The natural unit, or constituency, of a presidential election is the entire country.”); DIXON at 565 (“With a single constituency and one office to be filled, any system of vote weighting by unit vote or electoral vote device raises the possibility of denying the prize of office to the person most preferred on a simple head-count plurality basis.”); Timothy A. Fischer, \textit{The Case Law and the Constitution: A Legal Analysis}, 40 CIN. L. REV. 32, 42-44 (1971) (identifying the presidential election as a single constituency election); \textit{cf.} John F. Banzhaf III, \textit{One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College}, 13 VILLANOVA L. REV. 303, 322 (1968) (“[T]he direct election is the only plan which guarantees to each citizen the chance to participate equally in the election of the President.”).


\textsuperscript{146} See \textit{Gray}, 372 U.S. 368.
But this claim stretches the meaning of “constituency” as used in these cases. A single constituency is part of a single political unit, and some political subdivisions, like a county or a borough in these cases, are not, strictly speaking a “single constituency” in the eyes of the Court, but artificially created constituencies. A single constituency may not have a single, or even a predominant, political or ideological philosophy. Indeed, as Gray and the like point out, the State certainly thought that a statewide election ought to reflect the decision of county units, not of a statewide gauge of support.

In contrast, the United States, when it comes to presidential elections, is not a single political unit, but fifty-one separate States. And that is not simply an aspirational statement, or a generic platitude regarding our federal structure; instead, it is fundamentally descriptive in terms of the functionality of government. That is, the electoral processes are divided piecemeal and apportioned to fifty-one entities. And each of those entities engages in a political process independent of all others, subject to a handful of federally-mandated ceilings and floors. But until we reject the State-based administration of elections for the President in favor of a one-size-fits-all federally-created standard that transcends existing state political boundaries, American voters cannot be described, in any real sense, as a “single constituency.” It is neither a “single constituency” as a theoretical matter, as understood by the framers and as exists today, nor is it a “single constituency” as a practical matter, in terms of voter eligibility and enfranchisement.

II. PRACTICAL ISSUES FACING REFORM

But suppose one rejected all of these philosophical reasons for opposing Electoral College reform and instead embraced an alternative theory, a defense of a kind of raw democratic winner-take-all plurality ballot winner. After all, Gray did mandate this type of election for a single constituency-wide office, and elections for State governors or federal Senators occur this

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147 O’Sullivan, supra note 127, at 2435.
149 See infra at note 185 and accompanying text.
150 See supra Part I.A (examining the Framer’s understanding that the constituency of the presidential election would be the States, not individuals).
151 See infra Part II.A (discussing the power of individual States to decide, in some circumstances, who qualifies as a voter).
way.152

Fundamental, even insurmountable, practical concerns would remain. First, intrastate enfranchisement provisions would affect a national popular vote total because, as votes would be tabulated across State lines, States would have the incentive to game the voting base, either by enfranchising or disenfranchising blocs of potential voters to provide political advantage.153 Second, a federal standard would prevent the States from serving as the institutions that are most inclined to extend suffrage to new voters, as is historically the case, and would stifle the opportunity for new enfranchisement.154 Third, a federal standard would almost certainly disenfranchise individuals currently given the right to vote, as the varying eligibility standards would probably find a political compromise in the center, enfranchising voters in some States will disenfranchising them in others.155

A. State Gamesmanship of the Voting Base

Federalism is a serious restriction upon a national popular vote. Currently, Senators, Representatives, and electoral votes are allocated to the States. In turn, the States, subject to a constitutional floor, are permitted to supervise elections as they see fit. Although there are vigorous debates over the standards regulating the act of voting,156 this Article focuses on voter qualifications, as they are directly related to the concept of “one person, one vote.” We may see that State voting qualifications relate to whether a voter is eligible; in contrast, State regulations affect the means by which eligible voters go about voting.157

152 Cf. supra note 96 and accompanying text.
153 See infra at II.A.
154 See infra at II.B.1.
155 See infra at II.B.2.
156 See, e.g., Williams, supra note 60, at 224 (2011) (“Different states use different registration and voting systems, each of which influences voting behavior and tabulation in different ways.”); compare Hans A. von Spakovsky, Protecting the Integrity of the Election Process, 11 Elect. L.J. 90 (2012) (defending increased State use of voter photo identification laws), with Justin Levitt, Election Deform: The Pursuit of Unwarranted Electoral Regulation, 11 Elect. L.J. 97 (2012) (arguing that such laws appear unwarranted). Some of these State-based regulations, from registration to voting by mail to voter identification requirements, in all likelihood dramatically affect voter turnout. But these federalism aspects of voting administration are beyond the scope of this Article.
157 Recent proposed federal legislation seeks uniformity in the area of voting regulations, too. See, e.g., Weekend Voting Act, H.B. 4183, 112th Cong. 2d Sess. (2012) (mandated that all polling places in the presidential general election in the continental United States remain open for twelve hours on the first Saturday and Sunday after the first
A State may decide to expand or contract its voter eligibility qualifications for its own partisan advantage. There is, perhaps unsurprisingly, “a long history in American politics of enfranchising and disenfranchising voters for partisan gain.” Massachusetts, for instance, altered its method for choosing presidential electors seven times in the first ten presidential elections—and many of these changes were for short-term partisan reasons rather than long-term ideals on elections.

In the contemporary era, States continue to consider reforms to their role in the Electoral College to satisfy partisan interests. Prior to the 2008 presidential election, Republicans in California and Democrats in North Carolina each made efforts to turn their winner-take-all electoral vote system into a system that divided electors among congressional districts in an effort to give their own preferred candidates electors in a State where they had recently lacked success. Never mind that North Carolina, which had supported the Republican candidate in every election from 1980 to 2004, ultimately supported the Democratic candidate in 2008, which meant that a successful reform effort would have backfired from the legislature’s original intended goal. Instead, it illustrates that States regularly consider short-term partisan interests that they perceive to be to their electoral advantage, whether or not they actually yield an advantage. Similar Electoral College efforts were proposed in 2011 by Republicans in Pennsylvania and Wisconsin, again despite evidence suggesting that such efforts may, in the long term, not benefit the proposing party.
Decisions to enfranchise or disenfranchise a bloc of voters would similarly be calculated to benefit the controlling political party’s preferred presidential candidate and its short-term interests, whether or not long-term demographic trends may support that voter eligibility determination. And, of course, a State may always reevaluate its decision and revert to an earlier definition of voter eligibility.\footnote{Such political battles over enfranchisement are not uncommon in the present era. For instance, a Democratic governor in Iowa issued an executive order granting ex-felons the right to vote in 2005. When a Republican governor took office in 2011, he rescinded the order. Marc Meredith & Michael Morse, The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa, DOUGLAS S. HARLAN PROGRAM IN STATE ELECTIONS, CAMPAIGNS AND POLITICS 7 (Feb. 12, 2012), http://2012sppconferenceblogs.rice.edu/files/2012/02/Meredith-and-Morse.pdf; cf. infra at notes 238–244 and accompanying text (noting early States’ back-and-forth treatment of enfranchising and disenfranchising black voters and women).}

But the most salient point regarding Electoral College reform is this: these intrastate decisions on voter eligibility now affect the national vote. How one State defines who may or may not vote results in a decision that adds or subtracts votes from the national pool. And other States are either helpless to prevent such changes or now have incentives to change their own eligible voting population as a reaction to what another State has done.

Important to this analysis is that a State’s incentive to extend suffrage would no longer affect just that State.\footnote{Indeed, as emphasized here and throughout, States have manipulated their electoral vote allocation, or their voter eligibility standards, to benefit their own perceived interests. But the problem now arises when State decisions are not limited to that State but can affect, and infringe upon, the policy-making decisions of other States, as all of their votes would be combined into a single tally.} At present, the polls are open to citizens enfranchised in that State, with little concern that those intrastate electoral processes might affect the decisions of other states, except, at the very most, indirectly.\footnote{Cf. Complaint at ¶ 14, Delaware v. New York, 385 U.S. 895 (1966) (no. 28), 1966 WL 100407 at *11 (arguing that the large states using the unit-vote system meant that “[a] citizen of a small state is in a position to influence fewer electoral votes than a citizen of a larger state, and therefore his popular vote is less sought after by major candidates”); John E. Jackson, Election Night Reporting and Voter Turnout, 27 AM. J. POL. SCI. 615 (1983) (concluding that election projections by media networks in the 1980 presidential election depressed voter turnout in States whose polls closed later than others).} But in a national popular vote model for the direct election of the president, a single State’s decision to enfranchise (or disenfranchise) a group of citizens would have the potential to turn a national election.\footnote{See, e.g., Tara Ross, Legal and Logistical Ramifications of the National Popular Vote, FiveThirtyEight, N.Y. TIMES, available at http://fivethirtyeight.blogs.nytimes.com/2011/09/15/pennsylvania-electoral-college-plan-could-backfire-on-g-o-p.}

State is given a handful of electors, and that State enfranchises its population as it sees fit for a popular vote. But in a national popular vote system, one State’s decision to enfranchise a group of voters suddenly dumps that new group’s preferences into the national bucket of votes. The potential for meddling might be too great a temptation.\textsuperscript{170}

Perhaps States would not feel compelled to change given the uncertainties of things like voter turnout, or the unpredictability of how blocs of voters may react in a particular election. Perhaps they would fear a short-term political gain at the risk of losing that newly-enfranchised demographic in a realigning election or a shift in the positions of political parties. But States gaming elections for even potentially tenuous advantage is a deep part of our electoral system.\textsuperscript{171}

Practical examples are in order.\textsuperscript{172}

1. Children

Assume a fairly modest proposal: permitting 16- and 17-year-olds to vote.\textsuperscript{173} Such proposals have been called “utopian” or “bizarre,”\textsuperscript{174} but

\textit{Vote Plan,} 11 \textit{ENgage} 37, 39 (2010) (“There are other inconsistencies among states’ ballots that would skew the election results. Some states allow felons to vote. Others do not.”).

\textsuperscript{170} See \textit{Peirce} \& \textit{Longley, supra} note 28, at 166 (“Several witnesses expressed concern that direct national voting would prompt the states to lower their voting qualifications, especially those of age, to swell their vote total and their influence in the presidential balloting.”); \textit{cf. James A. Michener, Presidential Lottery} 164–65 (1969) (“Today, if the officials of State X run a crooked election, it affects the electoral vote of that state but can be otherwise quarantined. If State X’s corrupt votes were tossed into the general balloting, they might corrupt the entire procedure and bring our whole election system into discredit.”).

\textsuperscript{171} \textit{Cf. supra} at notes 158–166 and accompanying text (discussing State manipulation of voting to accomplish preferred anticipated outcomes).

\textsuperscript{172} In examining alternative scenarios for voter eligibility, it is notable that the figures assume all other circumstances are equal. That is, had a dramatic number of children or felons or other changes in voter eligibility changed, we may have seen alternative non-eligibility-based voter regulations, or political candidates altering their messages and strategies accordingly. But, of course, the mere potential for an advantageous political position may be enough to get States to tinker with eligibility. \textit{See also} Hasen, \textit{supra} note 10, at 102 (“States have not always passed laws expanding the franchise, and indeed legislators have no doubt sometimes been influenced by partisan considerations in the drafting of ballot access, voter registration, and other election laws.”).

\textsuperscript{173} \textit{Cf. Dixon, supra} note 75, at 570–71 (“But under direct popular voting the impact would be immediate, direct, and national. Could we expect the people to remain unconcerned if a bloc of 16-21-year-old voters in one or two states provided the winning margin for the presidency; or if the winning margin were provided by a bloc of 100,000
serious proposals do exist, and they have been recently pursued among interests groups and asked of candidates for public office.

In the 2008 presidential election, turnout was 44.3% among 18- to 24-year-olds (and 48.5% among citizens in that demographic). That group preferred Democratic Senator Barack Obama over Republican Senator John McCain, 66% to 32%.

2010 Census data show there are about 8.7 million residents in that demographic. If they turn out at the same rate as the 18 to 24-year-old group and express the same preference, it would have netted Mr. Obama around 1.3 million popular votes (in addition to his 9.5 million popular vote victory).

Of course, in the biggest popular vote victory for a Democratic presidential candidate in almost 50 years, topping off the popular vote total with a handful of newly-minted youth votes wouldn’t appear terribly remarkable. And 2008 had a higher young voter turnout than 2004, and young voters were more sharply favorable to the Democratic candidate in votes in one or two large boss-run cities?

176 See, e.g., 3 of 4 Democrats running for Kennedy’s Senate seat say they support lowering federal voting age, Associated Press, Nov. 30, 2009.
179 See 2010 U.S. Census Factfinder DP1.
180 This Article links them with the closest peer group and assumed they will share similar traits to that group. They may well be less likely to vote if high school-aged citizens are less motivated to vote than college-aged citizens; or, they may well be more likely to vote if they do not face the barriers of college-aged citizens, who are often absent from the polls in their home district on Election Day.
181 Again, for simplicity, this Article links them with their closest peer group.
183 Turnout was 41.9% among all 18- to 24-year-olds (and 46.7% among citizens in that demographic). See Voter Registration in the Election of November 2008, U.S. Census Bureau, available at http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html, at Table 4b.
2008 than in 2004.\textsuperscript{184}

Whether these results are sustainable, or replicable, is debatable. But one need not assume that they are sustainable or replicable, much less that we might have a nationwide change in voter eligibility. After all, in our federalist system, and under current proposals to alter the Electoral College, either by constitutional amendment or by interstate compact, States would continue to run elections. And, States would continue to have the primary responsibility, subject to a few federally-mandated floors,\textsuperscript{185} of determining voter eligibility. Instead, we may assume that the legislatures of individual States believe it is in their best interests to act and, in this case, enfranchise a number of new voters.\textsuperscript{186}

In California alone, according to 2010 Census data, there are over 1.1 million 16- and 17-year-olds, more than 3\% of the State’s population and 12\% of all 16- and 17-year-olds in the United States.\textsuperscript{187} 18- to 24-year-olds in California had a 41.5\% turnout (among all residents, citizen and non-citizen) in the 2008 presidential election and preferred Mr. Obama to Mr. McCain by a wide margin, 80\% to 18\%.\textsuperscript{188} If California decided to extend suffrage to 16- and 17-year-olds, and they voted at a similar pace with a similar preference, Mr. Obama would have netted around 288,000 additional votes.

While 288,000 votes may not appear significant in a sea of over a hundred million votes, narrow popular vote margins in recent memory aren’t unprecedented. The 1960 presidential election had a national popular vote margin of 112,702 with more than 75 million votes cast,\textsuperscript{189} and the 1968 presidential election had a national popular vote margin of 502,478 out of more than 73 million votes cast.\textsuperscript{190} And 2000 had just as narrow an election of 543,000 votes separating candidates in more than 100 million

\begin{itemize}
\item[184] 18- to 24-year-olds preferred Democratic Senator John Kerry to President George W. Bush by a margin of 56\% to 43\%. See How Groups Votes in 2004, \url{http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_04.html}.
\item[186] See supra notes 160–165 and accompanying text.
\item[187] See 2010 U.S. Census Factfinder DP1.
\item[188] See National Exit Poll 2008 data, available at \url{http://www.cnn.com/ELECTION/2008/results/polls/#CAP00p1}.
\item[190] Id. at supplementary table 135.
\end{itemize}
votes cast.\textsuperscript{191} Adding a few hundred thousand new voters into the eligible voter pool might tighten a close election or provide a cushion to a candidate.\textsuperscript{192}

Or if a few of States, like New York and Illinois following California’s lead, decided to give their 16- and 17-year-olds the opportunity to vote, the cumulative effect would have netted Mr. Obama almost 500,000 votes.\textsuperscript{193}

The principle may work in reverse. It may benefit the Republican presidential candidate to add 16- and 17-year-olds in certain jurisdictions.\textsuperscript{194} Or, States may be reluctant to expand—or, having expanded, may contract—enfranchisement to 16- and 17-year olds because of resultant perceived advantage that demographic gives to a particular political party.

Examining these scenarios suggests that larger States have the most to gain from potential expansion or restriction of voter eligibility. As larger States tend to have the largest raw population in a given demographic—here 16- and 17-year-olds—those larger States would have some of the most muscle to flex in a decision to enfranchise or disenfranchise that demographic. While smaller States may be able to affect a national popular vote total, the larger the State’s potential voter demographic, the more influence it could wield in a national election. In the Electoral College, the division of electoral votes is static after each census. States’ decisions to enfranchise or disenfranchise voters within their own borders have no direct impact. But, with a national popular vote system, it would redound to the greatest benefit of States like California, Illinois, and New York\textsuperscript{195} to craft

\textsuperscript{192} All data discussed comes with caveats. The margin of error for state-specific narrowly-defined groups can be significant. Exit polls can be unreliable. And it is often impossible to project the preference of any voting group from election to election. See supra notes 183–184 and accompanying text. But, while unpredictability or uncertainty may limit the strength of empirical conclusions, that may not dissuade State legislators from taking the risk to alter enfranchisement.
\textsuperscript{193} New York’s 2010 Census data reports about 535,000 16- and 17-year-olds. The 18-to 24-year-old demographic in New York preferred Mr. Obama to Mr. McCain 73% to 23%, turning out at a rate of 40.4% among all residents in that demographic. Assming similar turnout for 16- and 17-year-olds, Mr. Obama would have netted about 108,000 votes. Illinois has about 371,000 16- and 17-year olds. The youngest demographic preferred Mr. Obama, 74% to 25%, at 46.1% turnout. That would have netted around 84,000 16- and 17-year-old votes in Mr. Obama’s favor.
\textsuperscript{194} Had 16- and 17-year-olds voted in Kentucky and Georgia, for instance, Mr. McCain would have gained a few thousand votes, using the same examination of the 2008 exit polls and 2010 Census data.
\textsuperscript{195} See supra note 193 and accompanying text.
voter eligibility as they see fit.

2. Felons and Ex-Felons

States have widely divergent laws on whether felons are permitted to vote. Some permanently disenfranchise essentially all felons and ex-felons, while others disenfranchise only a subset of felons and ex-felons. Some restore voting rights after completing parole and probation, some allow probationers to vote, and some allow all parolees and probationers to vote. Two states permit felons to vote without qualification.

Felon disenfranchisement laws are nothing new. Many predate the Civil War. The Fourteenth Amendment expressly concedes that States may disenfranchise felons. Court challenges to felon disenfranchisement laws routinely fail.

One statistical analysis found that Democratic presidential candidates between 1972 and 2000 would generally have received between 70% and

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197 Alabama, Arizona, Delaware, Maryland, Mississippi, Missouri, Nevada, New Jersey, Tennessee, and Wyoming. See ProjectVote.org policy paper at 2.

198 Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Nebraska, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Washington, West Virginia, and Wisconsin. See id.


201 Maine and Vermont. See id.


203 U.S. CONST. amend. XIV, § 2 (altering basis of representation if right to vote is denied “to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States . . . except for participation in rebellion, or other crime”); see Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

204 See, e.g., Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (en banc) (affirming grant of summary judgment rejecting a challenge to the Washington felon disenfranchisement law under Section 2 of the Voting Rights Act because there was no intentional discrimination in the State’s criminal justice system).
80% of felon and ex-felon support.\textsuperscript{205} In the 2000 presidential election, in which Republican candidate George W. Bush won Florida by 537 votes, Florida’s felon voting status proved decisive. Had ex-felons been allowed to vote, one study estimates that Democratic candidate Al Gore would have netted an estimated 63,079 votes.\textsuperscript{206} Had both felons and ex-felons been allowed to vote, Mr. Gore would have netted 85,050.\textsuperscript{207}

Of course, the razor-thin margin of the Florida election\textsuperscript{208} and its decisiveness\textsuperscript{209} in a narrow Electoral College victory for Mr. Bush make it a prime choice for post hoc close scrutiny and reexamination. But for present purposes, the significance of felon or ex-felon voting status should not be glossed over as a one-time element of a rare Electoral College event. Instead, it should serve as an example of how modest adjustments to felon voter laws can affect the outcome of an election. Political candidates might benefit from the enfranchisement or disenfranchisement of felons or ex-felons, and when such voting decisions can affect a national pool, it is very possible that States would engage in further gamesmanship.\textsuperscript{210}

\textsuperscript{205} MANZA & UGGEN, LOCKED OUT, supra note 158, at 190–91. They filter National Election Study data through modeling of the characteristics of felons.
\textsuperscript{206} Christopher Uggen and Jeff Manza, Democratic Contraction?: Political Consequences of Felon Disenfranchisement in the United States, 67 AM. SOC. REV. 777, 793 (2002) [herinafter Uggen & Manza, Democratic Contraction?].
\textsuperscript{207} Id.
\textsuperscript{210} In Professor Norman Williams’s examination of this issue, he concludes that “the NPVC would simply replace 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.” See Williams, supra note 60, at 231–32. That claim, however, at least in my analysis, is not entirely accurate. First, as noted earlier, there are conflicting claims as to whether the Electoral College redounds to the benefit of smaller States over larger States. See supra note 69 and accompanying text. Second, even granting that premise, it is not always case that the State with “more generous voting qualifications and processes” benefits. If one views a presidential election as evaluating the distinctive preference of States, such that the more voters a State has the better that State’s preferences are reflected, then generosity of voting qualifications would give larger States a bigger advantage. But, if one views a presidential election, as the Article has suggested here, as a mechanism for State legislatures to advance their own policy preferences, it may be that their own policy preferences would be advanced by having highly restrictive voting qualifications. And third, it may be the case that, for some, more generous voting qualifications are a desired outcome of any electoral reform, as expanded enfranchisement has been a recurring effect of such reform efforts, as Professor Williams himself concedes. See supra at note 60 and
3. Resident Aliens

“Alien suffrage was quite common during the nineteenth century, coming to a peak in 1875 when twenty-two states and territories granted aliens the right to vote.” That ended in the 1920s, at which point all States required citizenship as a condition to voter eligibility. Today, every State prohibits non-citizens from voting in federal elections. Federal law, too, prohibits aliens from voting in federal elections.

There are, however, jurisdictions that allow, or seek to allow, noncitizens to vote in local elections. And as resident aliens have a significant interests in the locales where they reside, and are subject to other political obligations like taxation, there have been particularly strong arguments in favor of extending suffrage to at least a set of them.

Presumably, there exists little political will to permit unauthorized immigrants to vote, even though nearly 11 million reside in the United States. But overall, DHS estimates 21 million legally resident foreign-born accompanying text.

211 Hayden, supra note 64, at 263 n.237.
213 Stanley A. Renshon, Allowing Non-Citizens to Vote in the United States? Why Not, 26 CENTER FOR IMMIGRATION STUDIES 7 (2008); see also Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, 141 U. PA. L. REV. 1391, 1460–61 (1993) (“[A]liens are not presently permitted to vote, or run for office, in any state election, and are therefore shut out from formal political participation at both the state and national level.”).
215 For instance, New York City and Chicago allow noncitizens limited opportunities to vote in school board elections. Several localities in Maryland also enfranchise noncitizens for all local elections. See Raskin, supra note 213, at 1461–62.
217 Hayden, supra note 64, at 262–63 (“Resident aliens have vital political, economic, and social interests in the towns, states, and country in which they live. They thus have much at stake in most elections, and we would reasonably expect them to have preferences about the outcomes that are no less (or little less) strong than those of citizens.”); see also Raskin, supra note 213, at 1441–45 (noting that traditional democratic arguments for extending suffrage to noncitizens include the fact that they are subject to taxation).
born individuals residing in the United States. And despite such large numbers, the annual inflow of population is significant.

There are over one million legal permanent residents in the United States awarded that status in 2010, about 800,000 of whom are over the age of 18. California alone has over 200,000 of them annually, 165,000 of them adults. 50,000 are of Mexican birth, 24,000 are from the Philippines, and almost 19,000 from China. New York has nearly 150,000 (120,000 adults), the bulk of whom hail from the Dominican Republic and China. Annual refugee and asylee arrivals are smaller, but non-trivial. The United States accepted 73,293 refugees and 21,113 asylees in 2010. 11.7% of those refugees arrived in California; 10.8% in Texas. 37.1% of those asylees arrived in California; New York and Florida took around 15% each. And these figures are fairly stable over the last few years.

In total, California has 3.3 million legal permanent residents, over 26% of the 12.6 million of the total LPR in the United States. New York has almost 1.6 million; Texas and Florida, 1.2 million each. Of these groups, 3.3 million are from Mexico, by far the largest number. The Dominican Republic has 440,000; Cuba, 370,000.

A 2008 exit poll with Latin American immigrant voters in Miami-Dade County, Florida, and Los Angeles County, California, sought to glean voting trends for immigrant voters. Those from Mexico preferred Barack Obama 83% to 17%; those from the Dominican Republic preferred him 79% to 21%. Cuban-born refugees preferred McCain 69% to 31%.

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221 Id.
226 Id.
Extrapolating such results to all legal permanent residents, enfranchising lawfully permanent resident Cubans could have netted Mr. McCain over 140,000 votes; and for Mexicans and Dominicans, Mr. Obama could have netted over 2.1 million votes and 230,000 votes, respectively.

4. Mentally Incapacitated

Figures regarding disenfranchisement on the basis of mental incapacity are perhaps the least easily-ascertainable of the four categories listed in this section. Recent data suggest over 12 million voting-age adults in the United States have a mental disability.229 How many of those adults are disenfranchised is an even bigger challenge to identify. States have divergent tests defining mental incapacity, including prohibiting “disable persons,” “idiots,” “unsound mind,” and other terms of art; and some States have a presumption of disenfranchisement for those “under guardianship.”230

As there is little data surrounding how many disenfranchised mentally incapacitated individuals there are in the United States, much less in each State; and as there is no readily-identifiable polling data for those with mental disabilities to identify how they might vote, there is less concern than in these other three areas above that States would game the voting base. It is, however, still yet another area in which similarly-situated voters would be treated differently depending upon their State of residents—yet all would be a part of the same national pool for purposes of a national popular vote.

B. The Problems of Nationalizing Voter Eligibility

Having summarized the very real differences between States in their voter eligibility standards, and the very real opportunities available for them, at a fairly specific level, to enfranchise or disenfranchise a particular group of voters for particular political advantage, it is apparent that invisible federalism helps protect the stability of presidential elections. States continue to legislate at the local level, establishing their voter eligibility standards, and enfranchising or disenfranchising based upon intrastate concerns or effects.

Federalism is not merely an inconvenient barrier to a national vote; it is,

229 See Williams, supra note 60, at 224.
fundamentally, an asset. Theorizing what a federal voting standard would be, we see that it would need to set a ceiling, not simply a floor. And because a federal mandate would set that ceiling, States would be prevented from expanding the right to vote until the federal government could muster consensus to expand it. Although reform efforts so far resist calling for uniform voting standards, opponents of reform efforts as far back as 1816 cited this State-based administration of voter eligibility to oppose Electoral College reform. Occasional—and usually brief—acknowledgment of the need for federal standards or the potential of State gaming of the voting base has arisen from both proponents of reform and its opponents, and

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231 See supra note 94 and accompanying text (noting that neither the National Popular Vote nor proposed constitutional amendments permit uniform voter qualifications).

232 In one debate proposing direct election of the president, Senator Jeremiah Mason of New Hampshire called the plan “wholly impracticable. The qualifications of voters in the different States were so entirely different, that the whole election would be unequal in its bearing on the different States. One State has not, in some instances, according to its population, one-fourth of the votes which another State may give, &c. If there were no other objection to this new proposition, this would be of itself conclusive.” 29 ANNALS OF CONGRESS 223 (March 20, 1816); see PEIRCE & LONGLEY, supra note 28, at 161.

233 See, e.g., Amar, Response, supra note 102, at 252 (“If and when the NPVC comes into being, I would forcefully urge Congress to supplement it with a system of uniform rules for tallying sentiment in all fifty states.”); PEIRCE & LONGLEY, supra note 28, at 233 (“Senator Bayh stated the case in less formal language: ‘If we see some mad scramble by the states to lower voter qualifications willy-nilly, then Congress can step in and establish uniform standards.’”); BENNETT, supra note 23, at 176 (“[A]ny full move to a nationwide popular voute would have to take seriously the definition of eligibility to vote for president.”); WALLACE S. SAYRE & JUDITH H. PARRIS, VOTING FOR PRESIDENT 87–88, 145 (1970) (“What is far more important is that the national government would intervene directly in the administration of presidential elections, which is now a state function.”); “National administration of presidential elections would probably be necessary.”); MICHENER, supra note 170, at 126–27 (“To stop this kind of basement bargaining, federal laws would pretty surely be required, and they would dictate such things as voting age, registration procedures, and polling practices. Opponents of federal control hold that this is too high a price to pay for the admitted advantages that otherwise flow from direct popular voting.”); Brian J. Gaines, “Compact Risk: Some Downsides to Establishing National Plurality Presidential Elections by Contingent Legislation,” in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES (Gary Bugh ed. 2010) at 119–20 (“If the national vote total suddenly matters, however, expect a string of legal battles over efforts to impose uniform rules on a system never meant to be uniform.”); Robert W. Bennett, “Current Electoral College Reform Efforts Among the States,” in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES 193 (Gary Bugh ed. 2010) (“Making the nationwide popular vote decisive also highlights state variations in who is eligible to vote, and might put pressure on states to expand that eligibility—for instance by lowering the voting age below eighteen. State variations in registration and other procedural requirements might also come under scrutiny.”); Paul D. Schumaker, “The Good, the Better, the Best: Improving on the ‘Acceptable’ Electoral College,” in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES (Gary Bugh ed. 2010) at 207 (“The compact allows somewhat more complexity than the popular plurality systems used to elect
cited as a contrast to other reform proposals that did not call for a national aggregation of votes or direct election of the president.234

If the federal government decided to take upon itself the challenge of defining the voter base, it would face its own problems. First, it would stifle innovation and the expansion of enfranchisement, as States often were the first movers in expanding enfranchisement, and federal regulations often lagged State voter eligibility laws. Indeed, without a constitutional amendment, perhaps there is a national consensus disapproving of a particular group of voters being enfranchised, or at the very least a consensus that there is no consensus.235 Second, it would be difficult to overlay a national standard of voter eligibility upon a system of State rules defining felonies and mental capacity, and it would inevitably disenfranchise some who presently have the right to vote.236

state officials, because states could set different rules regarding voter eligibility (such as voting rights of former felons) and adopt different procedures for casting votes (such as the extensive use of the mail ballot in Oregon).”); DIXON, supra note 75, at 571 (“In short, a natural next step in our developing ‘one-man-one vote’ theory would be a constitutional amendment setting up a uniform and nationally policed system for presidential elections.”).

234 See, e.g., SAYRE & PARRIS, supra note 233, at 133 (examining the “proportional plan” for the Electoral College, in which each State’s electoral votes are awarded proportionately among candidates instead of the current winner-take-all, and acknowledging that it contains the strength resided in fact that it preserved the existing “sharing of powers by the national and state governments”).

235 See, e.g., 42 U.S.C. § 1973gg-6(a)(3)(B) (federal law expressly permitting that States may remove eligible voters from official list “by reason of criminal conviction or mental incapacity”).

236 Whether federal voter eligibility mandates would need a constitutional amendment is beyond the scope of this Article. See generally Amar, supra note 102, at 249–61 (examining the potential bases for congressional authority and concluding, “My tentative sense is that a constitutional amendment is not necessarily required, and that congressional action could suffice”). The Court has held that Congress lacked the authority to impose age requirements on eligible voters without a constitutional amendment. See Oregon v. Mitchell, 400 U.S. 112, 117–18, 125 (1970); see also U.S. CONST. amend. XXVI. But Congress has used its spending power to leverage States to accept federal standards in areas where it otherwise lacks power. See, e.g., South Dakota v. Dole, 483 U.S. 203, 207 (1987) (“[O]bjectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.” (citations omitted)). This use of the spending power must be in pursuit of the general welfare, must give the States an opportunity exercise their choice knowingly, must tie to a federal interest, and cannot violate other constitutional provisions. Id.

Congress currently conditions that States comply with minimum election administration standards in order to receive federal funding. See, e.g., 42 U.S.C. § 15301(c) (requiring State certification that funds comply with provisions of the Help America Vote Act of 2002, Pub. L. 107-252). But conditioning federal funding for State administration of elections may not necessarily carry over to attempts to condition federal funding for State
1. Federal Enfranchisement Laws Would Stifle Expansion of Enfranchisement

The virtue of federalism in voter eligibility is that the federal government may set a floor, and the States may continue to innovate and

voter eligibility in federal elections. Cf. Amar, supra note 102, at 259 n.99 (“One could argue that [42 U.S.C. § 1973aa, which abolished durational residency requirements for presidential elections] deals not with who may vote but rather the procedures for voting registration.”); see also Bennett, supra note 3, at 242 (calling such a plan dubious). Might the Court view that condition as different in kind than, say, federal funding for roads? Cf. Dole, 483 U.S. 203. Could Congress invoke the Guarantee Clause as a basis for establishing voter eligibility standards? Cf. S. REP. AND MINORITY VIEWS FROM COMM. ON THE JUDICIARY (1943) (examining whether a statutory ban on poll taxes would be valid and finding that “[t]he most sacred right in our republican form of government is the right to vote. It is fundamental that that right should not be denied unless there are valid constitutional reasons therefore”). Might the inquiry be context-specific if the funding were “so coercive as to pass the point at which ‘pressure turns into compulsion’”? Dole, 483 U.S. at 211 (quoting Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). Would the Article II provision that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors,” or broad principles of federalism and allocation of power among sovereigns, be deemed the kind of constitutional provisions that Congress cannot supplant to coerce a State to turn over to a federally created standard? Cf. Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 270–71 (1991) (holding that, notwithstanding a statute’s permissibility under Article IV, Section 3, Clause 2 of the Constitution, its failure to fit within established separation-of-powers principles rendered it unconstitutional). Could Congress invoke the Reconstruction Amendments as a basis for legislating in this area? See 148 Cong. Rec. 797–809, Amendment 2879 to S. 565, Martin Luther King, Jr. Equal Protection of Voting Rights Act of 2002, amendment rejected Feb. 14, 2002 (proposing enfranchisement of all felons in all federal election, citing “[b]asic constitutional principles of fairness and equal protection,” the disproportionate impact on ethnic minorities in felon disfranchisement laws, and Congress’s “ultimate supervisory power of Federal elections”). Or might the Reconstruction Amendments actually specially protect State regulation in this area from federal advances? See Richard M. Re & Christopher M. Re, Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments, 121 YALE L.J. 2000, 2083 (2012) (“On balance, Congress’s experiences during Reconstruction suggest that federal regulation of criminal disenfranchisement laws pose unique constitutional difficulties.”). Might Congress rely on the Necessary and Proper Clause and its power to count electoral votes? Dan T. Coenen & Edward J. Larson, Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future, 43 WILLIAM & MARY L. REV. 851, 865–71 (2002) (describing Congress’s reliance on the Necessary and Proper Clause in electoral reform legislation in the late-1800s). These and other questions may well prompt robust debate over whether Congress could establish voter eligibility standards by statute rather than by constitutional amendment. For purposes of this Article, however, these questions only serve as a notation that even if Congress sought to establish a uniform, national standard of voter eligibility, it would have to address an entirely separate inquiry as to the mechanism by which it might do so.
extend the ceiling of that right.\textsuperscript{237}

The Fifteenth Amendment, enacted after the Civil War, prohibits denying or abridging the right to vote “on account of race, color, or previous condition of servitude.”\textsuperscript{238} But in 1787, free blacks could vote in Massachusetts, New Hampshire, New Jersey, New York, North Carolina, and Pennsylvania.\textsuperscript{239} And when the Civil War began, six northern States enfranchised black voters.\textsuperscript{240}

The Nineteenth Amendment was ratified in 1920, guaranteeing women the right to vote.\textsuperscript{241} But New Jersey allowed some women to vote from 1790 until 1807.\textsuperscript{242} Wyoming had extended suffrage to women as a territory

\textsuperscript{237} Cf. Gerhard Casper, \textit{Apportionment and the Right to Vote: Standards of Judicial Scrutiny}, 1973 SUP. CT. REV. 1, 4 (“To be sure, by the middle of the nineteenth century the right to be a voter had generally been granted to all white adult males, but this was the result of state, not national command.”). One contra, raised by Akhil and Vikram Amar, is that the enfranchisement was women was delayed because of the nature of the Electoral College. States could have doubled their cloud by enfranchising women, adding those voters to the national pool. See Akhil Reed Amar & Vikram David Amar, \textit{History, Slavery, Sexism, The South, and The Electoral College: Part One of a Three-part Series on the 2000 Election and the Electoral College}, FINDLAW (Nov. 30, 2011), http://writ.news.findlaw.com/amar/20011130.html. Of course, this belies two important points. First, States did enfranchise women, even without that incentive, well before the Nineteenth Amendment. Second, it fails to recognize the negative; that is, States may also disenfranchise individuals whom they believe would be inclined to vote against the perceived interests of the State—entirely within the prerogative of the State, as nefarious a purpose as it may be. The abolition of the Electoral College does not remedy that problem. \textit{See supra} Part II.A.

\textsuperscript{238} U.S. CONST. amend. XV.

\textsuperscript{239} \textit{See} Dred Scott v. Sandford, 60 U.S. 393, 572–73 (1856) (Curtis, J., dissenting) (“At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.”); Paul Finkelman, \textit{Coming to Terms with Dred Scott: A Response to Daniel A. Farber}, 39 PEPP. L. REV. 49, 59 (2011) (“[F]ree blacks voted on the same basis as whites in about half the states when the Constitution was ratified.”); \textit{see also} \textit{THOMAS G. WEST, VINDICATING THE FOUNDERS} 17 (1997) (“Many blacks voted during the founding era and afterwards in several states.”); \textit{cf.} \textit{CHRISTOPHER MALONE, BETWEEN FREEDOM AND BONDAGE} 3–5 (2008) (describing historical background and patchwork voting eligibility for blacks in the antebellum North).

\textsuperscript{240} KEYSSAR, \textit{supra} note 212, at 69 (“At the outset of the war, only five states, all in New England, permitted blacks to vote on the same basis as whites; a sixth, New York, enfranchised African Americans who met a property requirement.”).

\textsuperscript{241} U.S. CONST. amend. XIX.

\textsuperscript{242} \textit{Cf.} KEYSSAR, \textit{supra} note 212, at 43-44 (emphasizing that New Jersey’s “enfranchisement of women was definitely not inadvertent”).
in 1869, affirmed upon receiving statehood in 1890—more than three decades before the Nineteenth Amendment.243 In 1916, the presidential election before the Nineteenth Amendment was introduced in Congress, women in eleven States were allowed vote for president.244

The minimum voting age was lowered from 21 to 18 in 1971 after adoption of the Twenty-Sixth Amendment.245 But Georgia had first lowered its voting age to 18 in 1943, nearly thirty years earlier.246 Kentucky lowered its age to 18 in 1955, and Alaska (at 19) and Hawaii (at 20) each had lower voting ages when they entered the Union in 1959.247

Poll taxes, too, varied widely over the course of American history. At the founding, a number of States had taxing requirements.248 Starting in 1890, States began enacting a variety provisions, including poll taxes, that had the effect of disenfranchising black voters, and most States had some poll tax provision.249 The States, however, retreated from this position, and between 1920 and 1941, most States had repealed poll taxes for general elections, including the entire North, along with a number of Southern States including Georgia, Florida, Louisiana, and North Carolina.250 By the time the Twenty-Fourth Amendment was enacted in 1964, the issue of poll taxes was no longer a “burning civil rights issue,” as few States had such laws applicable to federal elections anyway.251

243 Ward Farnsworth, Women Under Reconstruction: The Congressional Understanding, 94 NW. U. L. Rev. 1229, 1260 (2000); see also Amasa M. Eaton, Recent State Constitutions, 6 HARV. L. REV. 53, 61 (1892) (“Wyoming bears the palm in liberality, and is the first State to adopt female suffrage.”).
245 U.S. CONST. amend. XXVI. The Fourteenth Amendment required a minimum voting age of 21. See id. at amend. XIV § 2.
247 Id. at 6.
248 See KEYSSAR, supra note 212, at 306–07, Table A.1 (describing the property ownership or taxpayer requirements for nearly all States between 1776 and 1790, including requirements in Georgia, New Hampshire, North Carolina, Pennsylvania, and South Carolina).
249 Id. at 89; Table A.10.
250 Id. at 182–83.
251 Id. at 218.
At the same time, federal regulations stifled innovation at the national level. Black citizens and women saw federal laws that prohibited them from voting at a time when some States enfranchised, or attempted to enfranchise, them. And existing federal laws prohibit all non-citizens from voting.

We see a consistent pattern. The States were the first movers in the expansion of the right to vote, in some instances nearly a hundred years before a federal standard was adopted. The expansion of the enfranchised population, whether one attributes it to a “single courageous State” serving as “laboratory” or simply as the inevitable output of our federal system, regularly occurs. The States, of course, have not unilaterally and uniformly expanded suffrage. Certainly, our constitutional amendments have done so. There have been contrary State movements, including the dramatic reduction in opportunities for resident aliens to vote, or a period of disenfranchisement of felons. Some States revoked suffrage, trended away from expanded enfranchisement, or resisted until a constitutional amendment obligated them to enfranchise a group. But in at least some places, at least some times, we saw States acting well before the federal government obligated that all States follow suit.

2. The Disenfranchising Effect of a Federal Standard

But suppose that we reject the concept that States innovate in any meaningful sense when it comes to enfranchisement. After all, the innovation at the State level has been mixed at best, particularly since passage of the Twenty-Sixth Amendment in 1971. Because the right to vote extends to most citizens over the age of 18, there are few enclaves of

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252 See id. (“[T]he federal government also prohibited blacks from voting in the territories it controlled . . . .”).

253 See, e.g., Edmunds-Tucker Act, 24 Stat. 635 (1887), section 20 (“That it shall not be lawful for any female to vote at any election hereafter held in the Territory of Utah for any public purpose whatever, and no such vote shall be received or counted or given effect in any manner whatever . . . .”); Farnsworth at 1260 (“In 1866 . . . the Senate voted down, thirty-seven to nine, an attempt to give women the right to vote in the District of Columbia.”).

254 See supra note 214 and accompanying text.


256 Cf. AKHIL REED AMAR, AMERICA’S CONSTITUTION (2005).

257 Cf. supra notes 211–217 and accompanying text; see generally Raskin, supra note 213.

258 See supra notes 196–204 and accompanying text.

259 See, e.g., KEYSSAR, supra note 212, at 44–45 (explaining that formal exclusion of black voters increased between 1790 and 1850).
disenfranchisement left. But, those remaining enclaves are still significant. There are over 5 million disenfranchised felons and ex-felons and 21 million resident aliens. There are 8.7 million 16- and 17-year-olds, and 12 million with mental incapacities, among whom unknown thousands are disenfranchised.

Despite the fact that enfranchisement extends widely to a number of federal constitutional guarantees, additional federal rules would need to address the enfranchisement status of these classes of people, whether they are currently eligible to vote or not. The discretion States currently possess would need to be converted in a uniform federal system to avoid potential gamesmanship, acknowledging that the cost is a potential loss of innovation and expansion of enfranchisement. The decision to create uniform voting standards, however, has fairly significant consequences that are not regularly examined in national popular vote proposals.

As noted above, larger States have larger youth populations, and some States have disproportionately high or low youth populations. A decision to extend or to preclude enfranchisement of a portion of the youth population, even only 16- and 17-year-olds, could yield a dramatic increase, absolutely or proportionately, in the power of some States at the expense of others.

This issue never arose to quite the level of severity in the context of previous constitutional amendments because its effects remained in-state—the Electoral College had always accounted for all residents, voters and non-voters, and any increase in the State’s voting population would not directly affect its might in the Electoral College. And, to the extent that in-state political officials feared the repercussions of expanded enfranchisement, they tended to embrace them rather than alienate a newly-

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260 See supra note 136 and accompanying text.
261 See supra note 158.
262 See supra notes 218–219 and accompanying text.
263 See supra note 179 and accompanying text.
264 See supra note 229 and accompanying text.
265 See supra Part II.A.
266 See supra Part II.B.1.
267 See supra notes 187–195 and accompanying text; see also 2010 U.S. Census Factfinder DP1 (California, 9,295,040; Texas, 6,865,824; New York, 4,324,929).
268 Cf. 2010 U.S. Census Factfinder DP 1 (reporting Utah’s under-eighteen population, citizen and non-citizen, as 871,027, or 31.51% of its total population; Idaho, 429,072, 27.37% of its total population; Texas, 6,865,824, 27.3% of its total population).
269 See id. (reporting the District of Columbia’s under-eighteen population as 100,815, or 16.75% of its total population; Vermont, 129,233, 20.65%; Maine, 274,533, 20.67%).
enfranchised in-state constituency.\textsuperscript{270}

But, as we have previously decided to shift away from these territorial notions of enfranchisement toward a national popular vote model, perhaps we might conclude that these disparities in State voting power are less a concern, because, after all, we have moved toward a more individualistic model,\textsuperscript{271} in which we value tallying the individual preferences of voters, even if it means that we have to admit that the

A national uniform set of voting eligibility standards would still require a federal standardization of the \textit{existing} disparities in enfranchisement between States. After all, some States enfranchise felons and ex-felons, and some disenfranchise; some enfranchise those with certain kinds of mental disabilities, and some disenfranchise; and States have their own definitions of who qualifies for these categories. A federal standard would need to select which enfranchisement standard to adopt, and adopt it across all States. This standardization would have two practical problems. First, federal standards dependent upon State adjudications of individuals, such as felon status or mental incapacity, would still result in disparities based upon State application of those standards. Second, universal federal standards, if developed, would inevitably, in the spirit of compromise, not only stifle State innovation and potential expansion of suffrage, but also likely disenfranchise some who currently have the right to vote.

Let us return to felon voting rights and examine felon voting in Delaware and Maryland. Delaware law prohibits felons convicted of a sexual offense from ever voting.\textsuperscript{272} Maryland law disqualifies an individual who “has been convicted of a felony and is actually serving a court-ordered

\textsuperscript{270} \textit{KEYSSAR, supra} note 212, at __ (“The second dynamic was that of the ‘endgame,’ the dynamic of possible or impending victory: once it seemed likely or even possible that a woman’s suffrage eventually would be achieved, either nationally or in an individual state, the potential political cost of a vote against enfranchisement rose dramatically. Such a vote all too easily could earn the enmity of a large group of future constituents. The invariable upshot of such circumstances (and a clear sign that a suffrage contest had entered its endgame) was pressure on political leaders to jump on the bandwagon, or at the very least, to get out of the road.”).

\textsuperscript{271} \textit{See supra} notes 95–96 and accompanying text.

\textsuperscript{272} \textit{DELAWARE CONSTITUTION} Art. V § 2. (“Any person who is disqualified as a voter because of a conviction of a crime deemed by law a felony shall have such disqualification removed upon being pardoned, or five years after the expiration of the sentence, whichever may first occur. . . . The provision of this paragraph shall not apply to . . . (3) those persons who were convicted of any felony constituting a sexual offense, or any like offense under the laws of any state or local jurisdiction or of the United States or of the District of Columbia.”) [verify that statute does not allow five-year waiting period in a post-2000 law]
sentence of imprisonment, including any term of parole or probation, for the conviction.” Maryland criminalizes incest as a felony. Delaware criminalizes it as a misdemeanor.

Identical conduct, in bordering States with comparable felon disenfranchisement laws, results in radically different results because of how each State defines a felony. Conduct in Delaware that would not affect disenfranchisement results in permanent disenfranchisement in Maryland—even though both States generally permanently disfranchise felons.

If a federal law decided to adopt the State definition of “felony,” then conduct in Maryland would result in disenfranchisement, when identical conduct in Delaware would not. And if a federal law decided to define incest as a “felony” or a “misdemeanor” for purposes of disenfranchisement, it would enfranchise a new class of felons in Delaware, or it would disenfranchise a class of felons in Maryland who could previously vote.

Examples of varying definitions of felony throughout the country are easy to find. Theft of satellite cable programming can be a felony in Wisconsin, but it would never be a felony in Idaho. Animal cruelty may be prosecuted as a felony in Virginia, but not in Mississippi. And when faced with new chemical substances, like synthetic cannabinoids like “K2” or substituted cathinones like “bath salts,” States adopt laws criminalizing possession and distribution at different rates, which renders the conduct a felony in one State while perfectly legal in another until every State gets around to criminalizing it.

Federal attempts to synthesize the felony laws of all fifty States for purposes of criminal sentencing have not gone particularly well. Sentencing statutes that formerly referred to a “felony” have been amended to address offenses “punishable by imprisonment for more than one year” to eliminate

273 MARYLAND CODE, ELECTION LAW § 3-102(b)(1) (2011) (“An individual is not qualified to be a registered voter if the individual: (1) has been convicted of a felony and is actually serving a court-ordered sentence of imprisonment, including any term of parole or probation, for the conviction . . . .”)
274 MARYLAND CODE, CRIMINAL LAW § 3-323 (2011) (citing MARYLAND CODE, FAMILY LAW § 2-202 (2011)).
278 VA. CODE ANN. § 3.2-6570 (2011).
280 See NCSL cites (38 enacted laws as of 8/12/11, 11 pending; 30 banned, 9 pending).
“disparities based on divergent state classifications of offenses,” regardless of whether the State calls it a felony, a misdemeanor, or something else.\textsuperscript{281} This standardized definition, of course, does not solve the issue of disparate treatment of activity across States, where some activity is a punishable with more than one year’s imprisonment, some less, and some not criminalized at all.

A similar peril can be seen in criminal sentencing laws. The Armed Career Criminal Act (ACCA) provides that an armed defendant convicted of three prior “violent felony” convictions may be subject to a 15-year mandatory minimum term of imprisonment.\textsuperscript{282} The term “violent felony” has yielded little more than “ad hoc judgment[s]” from the Supreme Court in its attempt to decipher its meaning.\textsuperscript{283} Drunk driving in New Mexico is not a “violent felony,”\textsuperscript{284} but attempted burglary in Florida is.\textsuperscript{285} Failure to report for penal confinement in Illinois is not a “violent felony,”\textsuperscript{286} but felony vehicle flight in Indiana is.\textsuperscript{287} And the confusion in the lower courts has not ceased.\textsuperscript{288} Any federal effort to define crimes subject to disenfranchisement would face these same problems in ACCA of uncertainty and yield a veritable cottage industry of definitional quibbling over a new federal term of art.\textsuperscript{289}

It is not simply felon status in which the divergent views of the States and the federal government are most apparent. In terms of mental capacity, federal laws like the Americans with Disability Act\textsuperscript{290} are designed to


\textsuperscript{282} 18 U.S.C. § 924(e).


\textsuperscript{287} Sykes v. United States, 564 U.S. ___, 131 S.Ct. 2267, 2277 (2011).


\textsuperscript{289} See Note, Abigail M. Hinchcliff, The “Other” Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement, 121 YALE L.J. 194, 232 (2011) (“Courts may be justifiably uncomfortable pegging their constitutional sanction of a state-specific practice to terms of art in federal statutes. . . . Equally troubling are the federalism issues this strategy poses for state disenfranchisement statutes and the fact that federal criminal laws are not known for their clarity of draftsmanship.”).

\textsuperscript{290} 42 U.S.C. § 12101–12213.
increase public participation of those with disabilities; but State policy conflict “dramatically” with this access-oriented view of recent federal legislation, suggesting an “ambiguity with which we regard the role of people with disabilities within democratic governments.”

Even if we were to overcome this definitional problem of “felon” (which, in a real way, defies reality, as it is a problem that Congress continues to find perplexing in other contexts), there is another problem with federal standards defining voters. Any definition of enfranchisement that seeks compromise or some consensus of standards across fifty-one jurisdictions will result in the disenfranchisement of individuals currently able to vote.

Returning to felon status, at least 80% of States have disenfranchised some set of felon or ex-felon voters almost unrelentingly since the 1870s, and over 90% over the last 50 years. It is difficult to think that any proposal from Congress would result in a dramatic expansion of the right to vote to all felons.

It is, of course, possible that Congress decides on granting a net increase in the total number of felons and ex-felons on the national level by reaching some compromise. It might decide that all ex-felons who have completed their terms of imprisonment, parole, and probation should vote. This is the least remarkable expansion of the right to vote, but it would be a major reform: fourteen States disenfranchise this subset of ex-felons. In the eleven States that disenfranchise a non-trivial number of ex-felons, a 2004 estimate puts the total of disenfranchised ex-felons in these States at around 1.7 million, and probably more. Creating a federal floor, even a modest


292 It is not necessarily the case that Congress would compromise—it might, after all, conclude that it ought to expand enfranchisement in all areas through a fairly surprising decision of national consensus. Given the division among the States themselves, however, coupled with the federal government’s historical resistance to many forms of enfranchisement, such an outlook seems unlikely. See supra note 214 and accompanying text (discussing federal ban on resident aliens from voting); id. notes 238–259 and accompanying text (discussing federal resistance to expanded enfranchisement of women and black citizens).

293 See Uggen & Manza, Democratic Contraction, supra note 206, at 795.

294 See supra at notes 196–197.

295 See Uggen & Manza, LOCKED OUT, supra note 158, at Table A3.3 at 248–50. Of the eleven, the ex-felon population includes Alabama, 178,516; Arizona, 77,136; Delaware, 28,028; Kentucky, 128,775; Maryland, 52,275; Mississippi, 97,550; Nevada, 51,612; Tennessee, 25,899; Virginia, 297,901; and Wyoming, 14,304, for a total of around
one, would result in a dramatic expansion of the right to vote for nearly two million Americans.

But a net increase would, in all likelihood, arrive as a result of a compromise that would disenfranchise some subset of felons or ex-felons currently eligible to vote in some States. Suppose Congress continues in the model of compromise and adopts a federal standard that ex-felons on parole cannot vote. Thirty-five States prohibit felons on parole from voting, and a federal standard adopting the rules from nearly three-quarters of the States seems logical. Drawing upon 2004 numbers, there are currently around 477,704 disenfranchised felons on parole, but the total parole population was 775,875. That leaves a gap of around 300,000 paroled felons currently eligible to vote in sixteen States, but who would now be disenfranchised under a federal ceiling of voter eligibility.

In order for the federal government to add 1.7 million disenfranchised ex-felons to the roll of eligible voters, it would likely, in the process, horse-trade to disenfranchise another 300,000 paroled felons—a net increase of 1.4 million eligible voters. But in this projected compromise, it would take away the franchise from 300,000 individuals who currently possess the right to vote, and flatly undermine the efforts of sixteen States to enfranchise paroled felons. And, of course, Congress would still have to decide how to address felons on probation (eligible to vote in 26 States, not eligible in 25), felons currently serving a sentence (eligible to vote in 2

920,000. Additionally, as of 2004, Florida had 957,000 disenfranchised ex-felons, but after reform efforts instituted in 2007, later repealed in 2011, see supra note 196, around 150,000 ex-felons were enfranchised, reducing that total in Florida to around 800,000. See Nicole D. Porter, Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010, at 9, available at __ (Oct. 2010). There are a few idiosyncratic exceptions along the way, too. Missouri and New Jersey only prohibit ex-felons who commit crimes in relation to violation of the election code, which are, according to the analyses, too few to count in a tally of the disenfranchised. Iowa’s governor issued an order returning voting rights to ex-felons in 2005, but in 2011 the governor rescinded the order and reinstated an application process. See supra note 166 and accompanying text. The total, then, is probably larger than 1.7 million, but in numbers not as readily calculable. Among those that do not, as a general matter, prohibit ex-felon disenfranchisement, Nebraska, for instance, allows ex-felons to register to vote two years after completing a sentence, including parole. Washington repealed its ex-felon disenfranchisement law, but those convicted prior to its repeal remain disenfranchised.

298 See supra notes 199–201 and accompanying text.
States, not eligible in 49),\textsuperscript{299} and other blocs among which States remain divided.

Perhaps from a raw utilitarian perspective, we conclude that the net benefit is worth it. Perhaps Congress would reach a consensus in which, on the whole, more voters are enfranchised than disenfranchised—which, given the federal government’s history of enfranchisement, may be a fairly optimistic assumption.\textsuperscript{300} Similar complications have been observed in another federal system, Switzerland. There, the Swiss Constitution provides, “The Confederation shall regulate the exercise of political rights in federal matters; and the Cantons shall regulate their exercise at cantonal and communal matters.”\textsuperscript{301} And at present, Switzerland does not authorize felons to vote in federal elections, even if cantons allow them to vote in cantonal or local elections. In the United States, felons and ex-felons may vote in federal elections—but if the United States were to create a uniform system, it would almost assuredly create the kind of hard-and-fast national rules, often difficult to change, at the federal level that would disenfranchise a number of individuals, some of whom previously held the right to vote.

But, there is no question that virtually any uniform national system would result in the disenfranchisement of some individuals, who currently, and perhaps have for their entire adult lives, have the right to vote. Furthermore, such actions would take place retroactively in order to ensure a level playing field across the States, which bears its own set of complications in revoking the right to vote from someone who may have had it for most of that person’s life.

\textbf{CONCLUSION}

When proponents of Electoral College reform advocate for a direct election of the president or for a modification in which the candidate with a plurality of the popular vote wins, they address a narrow element of the Electoral College. It does not directly elect the president with votes weighed equally across States. That, they criticize, is its flaw, and a national popular

\begin{footnotes}
\item[299] See \textit{supra} note 201 and accompanying text.
\item[300] See \textit{supra} notes 252–254 and accompanying text.
\end{footnotes}
vote would remedy that flaw.

But the Electoral College is more than that perceived flaw. It represents more than simply the concept that there are 538 electors who vote for the president and that sometimes the winner of the Electoral College fails to carry a plurality of the popular vote. It also represents a mechanism for giving States the opportunity to decide who votes. It gives extra political power to States with larger populations, even if some of those people cannot vote. And it allows States to continue to innovate with enfranchisement without directly implicating the voting decisions of other States.

Reforming the Electoral College and awarding the presidency to the winner of a plurality of the national popular vote has been an oft-discussed proposition—and one that has, since 2000, seen some serious advancement in actual legislation designed to implement such a proposition. But these reform efforts have failed to consider the invisible federalism protecting the Electoral College—that is, the power of States to determine voter eligibility. As presently constituted, the Electoral College includes a mechanism that accounts for both voters and non-voters alike, something that a winner-take-all popular election would not do. Additionally, it ensures that States do not game their voter eligibility standards to affect the national election outcome. And even if one were to consider eliminating the role of States in electing a president—a fairly dramatic step generally unmentioned in present Electoral College reform discussions—there are serious issues when it comes to federal decisions of enfranchisement, too.

In all, the invisible federalism that has gone largely unnoticed in present presidential election debates serves a valuable purpose. It accounts for non-voters, it maximizes enfranchisement, and it discourages interstate meddling. Federalism is not simply an impediment to Electoral College reform—it is a foundational element of its defense, one that precludes reform.

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302 See Derek T. Muller, More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks, 7 ELECTION L.J. 227 (2009) (describing serious State consideration of the National Popular Vote compact); see also supra notes 1–9 and accompanying text.