The Electorate as More Than Afterthought

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The Electorate as More Than Afterthought

James Sample†

INTRODUCTION

Warren Buffett, in a Fortune Magazine article that became an instant classic in the world of finance, wrote that "when very human politicians choose between the next election and the next generation, it's clear what usually happens." Unfortunately, in the context of election laws, the Oracle of Omaha's comments apply a fortiori. That is to say—to borrow Mr. Buffett's framing—when very human politicians craft election laws, as between self-interested partisan ends and high-minded democratic values, it's usually clear what happens.

This article focuses on a few specific election law proposals in which voters qua voters would be the principal beneficiaries. The approach of the paper is to emphasize election law changes in which the pro-electorate characteristics of the proposals are the key criteria, rather than any partisan distributional gains. Pro-electorate is defined, for purposes of the paper, as favorable to voter participation, favorable to the electorate's increased participation being meaningful; and is specifically intended to be measured without regard to partisanship. In addition to policy ramifications, the article explores notable recent legal developments in connection with the proposals, including, in particular, the ramifications of pertinent court decisions arising out of litigation connected to the 2014 midterm elections.

The election law initiatives explored in the article include both ambitious proposals (for example, expanding early voting, no-fault absentee ballot, same-day registration, and, most ambitiously, state adoption of the national popular vote compact) and more marginal changes (for example, eliminating

† Professor of Law, Hofstra Law School. I am grateful to the editors of The University of Chicago Legal Forum and to my fellow participants in the associated symposium for their comments and suggestions. Student research assistants Peter Guinnane, Keely Lang, Amanda Senske, and Ryan Sweeney humble me with their efforts. Any errors or omissions are my own.
the highly counter-majoritarian practice of empowering a single U.S. Senator to "blue-slip" a judicial nominee, and rolling back state-specific felon disenfranchisement laws). The article intentionally excludes particularly partisan and tendentious election law topics such as redistricting methodology, controversies surrounding present-day applications of the Voting Rights Act, and broad questions of campaign finance regulation, to instead focus on the selected initiatives, precisely for their electorate-centric qualities. While any changes in election law are inherently subject to politicization, the paper attempts to take a partisan-blind approach to analyzing the potential of the proposals to further the values inherent in a republican form of government.

The article proceeds in four parts, each of which focuses on one specific change that, whether standing alone or in concert with the other proposals considered in the paper, would ultimately redound to the benefit of the electorate writ large. Part I advocates for the restoration of voting rights to individuals who, due to felony convictions, have been subjected to disenfranchisement. Part II explores several micro-proposals involving the expansion of access to the polls. Part III addresses, albeit briefly for a topic of such scope, the National Popular Vote Compact. Finally, Part IV addresses the United States Senate's blue-slip tradition, recognizing that representative governance may just as significantly be undermined by practices as opposed to laws.

I. ROLLING BACK FELON DISENFRANCHISEMENT

In the year 2000, George W. Bush became the forty-third President of the United States in one of the most divisive elections in American history. Vice-President Al Gore won the popular vote, but George W. Bush won the electoral vote, and therefore the Presidency. The election brought to the fore many issues with the voting system in the United States. Given that

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2 William Walton Liles, Challenges to Felony Disenfranchisement Laws: Past, Present, and Future, 58 ALA. L. REV. 615, 615 (2007) ("In 2000, over 4.5 million Americans, which is over two percent of the country's voting-age population, were prohibited from voting because of disenfranchisement laws.").
the 2000 election came down to the electoral votes of Florida, a state with some of the strictest felon disenfranchising laws in the country, many people believe that, had Florida’s disenfranchised felons been able to vote, Al Gore would have become the forty-third President of the United States. Moreover, felon disenfranchisement laws have “likely affected the results of seven U.S. Senate races.” Given the political nature of election law, the drawbacks of felon disenfranchisement are often emphasized by Democrats. In recent years, however, some leading Republicans have supported the restoration of voting rights to at least some individuals with felony convictions.

While felon disenfranchisement laws can be traced back to the colonies, where the laws were mostly limited to “offenses related to voting or considered ‘egregious violations of the moral code,’” they picked up steam in the years following the Civil War. Southern states saw disenfranchisement as a way of denying African Americans the vote, “and as a means of curtailing the rights they had gained after the Civil War.”

Many states tailored their disenfranchisement laws to include offenses they believed were more typically committed by African

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3 Id.


5 George Brooks, Felon Disenfranchisement: Law, History, Policy, and Politics, 32 FORDHAM URB. L.J. 851, 851 (2005); Uggen, Democratic Contradiction?, supra note 1, at 792; Liles, supra note 2, at 615 (stating that the election in Florida was decided by less than 1,000 votes, and “in Florida alone, there were as many as 620,000 citizens prohibited from voting because of felony disenfranchisement laws”).


9 Chung, supra note 6, at 2.

Americans. Felon disenfranchisement laws still have a disproportionate impact on the African American community today. Currently, one in every thirteen, or 7.7% of black adults is disenfranchised, as opposed to one in every fifty-six, or 1.8% of non-black adults. Across the United States, 2.2 million African Americans have lost their right to vote.

Disenfranchisement laws differ across the United States. All states but two, Maine and Vermont, have laws disenfranchising felons. Three states, Iowa, Florida, and Kentucky, permanently disenfranchise all people with felony convictions. Another eight states permanently disenfranchise some individuals with criminal convictions, unless the government approves the restoration of voting rights for an individual. Four states restore a felon’s right to vote after they complete their prison sentences and parole, and another twenty states will not restore a felon’s voting rights until the individual has completed both parole and probation. Felons in thirteen states and the District of Columbia will have their

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11 See Chung, supra note 6, at 3.
12 Id. at 2; Felony Disenfranchisement Laws in the United States, 1 (The Sentencing Project April 2014), available at http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf, archived at http://perma.cc/CY5E-B5KN. In Florida and Kentucky, two of the states with the strictest disenfranchisement laws, more than one in five black adults have lost the right to vote. Id.
13 Id. at 1.
14 Article I, Section 2 of the United States Constitution gives the states the power to determine the qualifications that must be met by a person wishing to vote. See U.S. CONST. art. I, § 2. "While the right of suffrage is established and guaranteed by the Constitution it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed." Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959).
16 Criminal Disenfranchisement Laws across the United States, supra note 15.
17 Alabama, Arizona, Delaware, Mississippi, Nevada, Tennessee, Virginia, and Wyoming. Id.
18 Id.
19 California, Colorado, Connecticut, and New York. Id.
20 Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Washington, West Virginia, and Wisconsin. Id.
voting rights automatically restored once they are released from prison.\(^{21}\)

Because of the dramatic increase in the prison population in the United States, there has also been a dramatic increase in the number of felons losing their right to vote. The disenfranchisement rate in 1976 was 1.17 million but grew to almost 6 million by 2010.\(^{22}\) In total, nearly six million Americans have lost their right to vote,\(^ {23}\) and 45% of the entire disenfranchised population lives in states that permanently disenfranchise all or some felons.\(^ {24}\)

A. Challenges to Felon Disenfranchisement Laws

In *Richardson v. Ramirez*,\(^ {25}\) the United States Supreme Court held that the disenfranchisement of convicted felons who had completed their sentences and paroles did not deny them equal protection.\(^ {26}\) The respondents in *Richardson* were three individuals who had been convicted of felonies and had completed their sentences and paroles. All three individuals applied to register to vote, and the county clerks in the counties where they wished to register refused to let them because of their prior felony convictions.\(^ {27}\) The respondents filed a petition for writ of mandate in the California Supreme Court, and argued that the section\(^ {28}\) at issue in the California Constitution violated the Equal Protection Clause of the Fourteenth Amendment.\(^ {29}\)

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\(^{22}\) Chung, supra note 6, at 3.


\(^{24}\) Chung, supra note 6, at 1.

\(^{25}\) 418 U.S. 24 (1974)

\(^{26}\) See generally id.

\(^{27}\) *Id.* at 32.

\(^{28}\) The section of the California Constitution at issue stated that, “laws shall be made’ to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes.” *Id.* at 27. The California Constitution further provided that, “no alien, ineligible to citizenship . . . no person convicted of any infamous crime, [and] no person hereafter convicted of the embezzlement or misappropriation of public money . . . shall ever exercise the privilege of an elector in this State. *Id.* at 27–28.

\(^{29}\) *Richardson*, 418 U.S. at 33; see U.S. CONST. amend. XIV. The California Supreme Court agreed with the respondents, and held that the “State’s denial of the franchise to
The U.S. Supreme Court disagreed with the Equal Protection argument and held that Section 2 of the Fourteenth Amendment of the United States Constitution\textsuperscript{30} "has an affirmative sanction" for the disenfranchisement of felons.\textsuperscript{31} "[W]e may rest on the demonstrably sound proposition that §1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which §2 imposed for other forms of disenfranchisement."\textsuperscript{32}

In \textit{Hunter v. Underwood},\textsuperscript{33} the Supreme Court revisited the issue of felon disenfranchisement.\textsuperscript{34} In \textit{Hunter}, the issue was the constitutionality of the Alabama Constitution which provided for "the disenfranchisement of persons convicted of, among other offenses, 'any crime... involving moral turpitude.'"\textsuperscript{35} Two individuals, one black and one white, were unable to register to vote in Alabama because both had been convicted of presenting a worthless check, a misdemeanor that was deemed a crime involving moral turpitude.\textsuperscript{36} The District Court of Alabama "certified a plaintiff class of persons who have been purged from the voting rolls or barred from registering to vote in Alabama solely because of a misdemeanor conviction."\textsuperscript{37} The plaintiffs claimed that the "misdemeanors encompassed within [the Alabama Constitution] were intentionally adopted to disenfranchise blacks on account of their race and that their

\begin{itemize}
\item the class of ex-felons could no longer withstand strict scrutiny under the Equal Protection Clause." Liles, \textit{supra} note 2, at 619.
\item \textsuperscript{30} "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each States, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, \textit{except for participation in rebellion, or other crime}, the basis of representation shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. CONST. amend. XIV, §2 (emphasis added).
\item \textsuperscript{31} \textit{Richardson}, 418 U.S. at 54.
\item \textsuperscript{32} \textit{Id.} at 55.
\item \textsuperscript{33} 471 U.S. 222 (1985).
\item \textsuperscript{34} \textit{See generally id.}
\item \textsuperscript{35} \textit{Id.} at 223.
\item \textsuperscript{36} \textit{Id.} at 224.
\item \textsuperscript{37} \textit{Hunter}, 471 U.S. at 224.
\end{itemize}
inclusion in [the Alabama Constitution had] the intended effect." The Alabama District Court found that, although the disenfranchisement of blacks was a motivation behind the Alabama Constitution section in dispute, it was not a violation of the Equal Protection Clause of the Fourteenth Amendment, but the Court of Appeals reversed. The Court of Appeals believed, and the United States Supreme Court agreed, that:

To establish a violation of the Fourteenth Amendment in the face of mixed motives, plaintiffs must prove by a preponderance of the evidence that racial discrimination was a substantial motivating factor in the adoption of [the section at issue]. They shall then prevail unless the registrars prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered.

In upholding the Court of Appeals decision, the United States Supreme Court noted that, while the section of the Alabama State Constitution was racially neutral on its face, after only two years of the enactment, ten times as many blacks had been disenfranchised than whites. "Official action will not be held unconstitutional solely because it results in a racially disproportionate impact... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment." The Supreme Court held that because the section's "original enactment was motivated by a desire to discriminate against blacks on account of race," and the section continued to have that effect, it was a violation of the Equal Protection Clause.

Following Hunter, it seemed clear that state constitutions or legislation disenfranchising felons enacted with a discriminatory purpose violated the Equal Protection Clause of the Fourteenth Amendment. However, there are circuits that disagree. For example, in Johnson v. Governor of the State of Florida, the

38 Id.
39 Id. at 224–25.
40 Id. at 225 (quoting Underwood v. Hunter, 730 F.2d 614, 617 (11th Cir. 1984)).
42 Id. at 232.
43 405 F.3d 1214 (2005).
Eleventh Circuit evaluated the felony disenfranchisement provision of Florida’s Constitution. Under Florida’s Constitution, a person convicted of a felony who has completed their prison sentence, probation, and parole can only regain their right to vote if Florida’s Clemency Board grants him clemency. The plaintiffs in Johnson filed a class action on behalf of all of Florida’s disenfranchised felons. They argued that the disenfranchising law was created because of a racial motivation and was therefore a violation of the Equal Protection Clause. In 1868, Florida was required to revise its Constitution in order to be readmitted to the Union. The 1868 Constitution contained the disenfranchising provision. In 1968, Florida again revised their Constitution, and again the Constitution contained a felony disenfranchisement provision. Plaintiffs argued that the 1868 Constitution’s provision was motivated by racially discriminatory goals. While the Eleventh Circuit assumed that the plaintiffs were correct about the 1868 Constitution, the court upheld the disenfranchisement provision and affirmed the district court’s granting of summary judgment because the 1968 Constitution was not enacted based on discriminatory intent. The court noted that “the current Florida provision was passed one hundred years after the alleged intentional discrimination occurred,” and, clearly, none of the legislatures who passed the 1968 provision were the same as those who passed the 1868 provision. The Supreme Court denied certiorari in the case therefore leaving open the question of the proper way for lower courts to evaluate legislation tainted by enactment based on a

44 The felony disenfranchisement provision provides that, “[n]o person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.” FLA. CONST. art.VI, § 4 (amended 1968).
45 405 F.3d at 1216 n. 1 (citing FLA. STAT. § 940 (2003)).
46 Id. The district court granted summary judgment for the defendant. Id. at 1217. The Eleventh Circuit reversed the district court’s decision, but then the Eleventh Circuit vacated that opinion and granted a rehearing en banc. Id. at 1217.
47 Id. at 1217.
48 The Eleventh Circuit was not convinced that the earlier Constitution’s provision was motivated by race, but, because the case was on appeal, they assumed, without deciding, that it was motivated by race. The Court looked at the facts most favourable to the Plaintiffs. Id. at 1223.
49 Id. The plaintiffs in Governor of the State of Florida conceded that there was no racially discriminatory intent behind on the 1968 Constitution. Id.
50 Governor of the State of Florida, 405 F.3d at 1225–1226.
discriminatory motivation. Johnson highlights a pattern of disagreement in the circuits about how courts should evaluate legislation that has been reenacted after the original legislation was motivated by discriminatory intent.

B. Recent Policy Changes on Felon Disenfranchisement

There has been a recent movement towards restoring this right to vote. Since 2000, Connecticut and Kansas have extended the right to felons on probation, Delaware and Nebraska repealed their lifetime ban on all felons, and Wyoming restored the rights of first-time non-violent offenders. These changes to state laws have led to an estimated 800,000 felons regaining the right to vote. Recent research has shown that 80% of Americans are in favor of restoring the voting rights of felons who have completed their sentences, and almost two thirds of Americans favor restoring the rights of felons who are on probation or parole. The United States is the only Western country that disenfranchises individuals once they have completed their prison sentences. Most Western countries allow all incarcerated felons to vote, some impose restrictions for a limited period of time on prisoners serving lengthy sentences, and a small number restrict all prisoners from voting, but in every country, the felon's right to vote is immediately restored at the end of the prison sentence.

Unfortunately, not all policy changes reflect a desire to restore a felon's right to vote. In 2007, the then Governor of Florida, Republican Charlie Crist, issued an executive order expanding voting rights to nonviolent felony offenders.

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52 See also Hayden v. Paterson, 594 F.3d 150, 168 (2010) (holding that New York's felony disenfranchisement laws and constitutional provisions did not violate the Equal Protection Clause because the amendments and revisions to the laws were not enacted with discriminatory intent even though previous versions of the laws were).
53 "Since 1997, 23 states have modified felony disenfranchisement provisions to expand voter eligibility." Chung, supra note 6, at 4.
54 Id. For a complete list of policy changes across the country, see id.; Felony Disenfranchisement Laws in the United States, supra note 12, at 2-3.
55 Chung, supra note 6, at 4.
56 Id.
57 Ghaelian, supra note 10, at 790.
58 Id.
59 Susan Greenbaum, Restoring Voting Rights to Ex-Felons, ALJAZEERA.COM (Feb.
remained in office for three years, and during that time almost 150,000 felons had their right to vote restored. A 2011 study conducted by the Florida Parole Commission found that the rate of recidivism among the felons whose rights had been restored was 33% lower than the rate of those who did not. Although the order was a positive step and seemed to have a beneficial effect, when the new Governor, Rick Scott, took office, he rescinded Crist’s order and imposed stricter regulations. Under the new restrictions imposed by Scott, a felon must wait between five and seven years after completing their sentence, including prison time, parole and probation, before they may apply for the restoration of their voting rights. Then, the application processing could take up to six years. Even after the possible eleven-year wait, the felon’s chances of regaining his right to vote is estimated to be less than 1%. Currently, Florida’s rate of disenfranchisement is the highest in the country, and over 10% of Florida’s voting age population has lost their right to vote. More recently, Kathy Castor, the Democratic Representative from Tampa, reached out to former Attorney General Eric Holder seeking an investigation of Florida’s disenfranchisement laws. “Castor said the [disenfranchisement] process is now ‘intentionally time-consuming and expensive,’ ‘serves no rational purpose’, and ‘harkens back to the Jim Crow era of discrimination.’” Castor argued that the restrictions violate due process. Presently,
Florida has some of the most restrictive felon disenfranchisement laws in the country.

As in Florida, Iowa has enacted stricter restrictions on the restoration of voting rights to felons. In 2011, Governor Terry Branstad took office and issued an executive order requiring felons to apply to have their voting rights restored.68 Along with the application, felons are required to submit a credit report.69 Critics of the restrictions say, “Iowa’s process disenfranchises the poor, who don’t have money to pay off debts... [and] requiring a credit report is likely scaring off felons with financial problems.”70 In 2012, after only a year of the stricter restrictions, eight thousand felons in Iowa had completed their sentences, yet less than twelve have had their voting rights restored.71

C. The Future of Felon Disenfranchisement Laws

In February 2014, former Attorney General Eric Holder gave a speech urging states to restore the voting rights of felons.72 Holder argued that, “[b]y perpetuating the stigma and isolation imposed on formerly incarcerated individuals, these laws increase the likelihood they will commit future crimes.”73 While the Attorney General does not have the authority to enact laws to expand the restoration of felon’s voting rights, his belief is one that is gaining bipartisan support. Republican Senators Rand Paul of Kentucky and Mike Lee of Utah, are interested in expanding voting rights by lessening or repealing restrictions.74 Senator Paul, who opposes his own State’s laws, stated that, “the punishment and stigma continues for the rest of their life; harming their families and hampering their ability to re-enter society.”75 In June, Senator Paul introduced the Civil Rights

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69 Id.

70 Id.

71 Id.


73 6 Million Americans Without a Voice, supra note 23.

74 Id.

75 Id.
Voting Restoration Act of 2014. The Act would restore a felon’s voting rights, in Federal elections, after the felon completed his prison sentence and completed one year of probation, if the felony was a nonviolent offense.

The legislation proposed by Senator Paul is similar to the Democracy Restoration Act proposed in April 2014. The Democracy Restoration Act was proposed by Michigan’s Democratic Representative John Conyers, Jr. and the Democratic Representative from Maryland, Senator Ben Cardin. The Democracy Restoration Act seeks to restore the voting rights of 4.4 million Americans in Federal elections. The Act would restore the voting rights of all individuals released from prison or serving probation sentences.

II. EXPANDING ACCESS TO THE POLLS

Once, the people who founded the United States of America waged war against the greatest empire the world has seen for the freedom to establish a representative government. When writing the Constitution, the drafters sought to institute a government composed of officials selected by the people who were to be governed. If the idea of an election is to calculate the collective opinion of the people being governed, the primary goal of election laws should be to collect as many of those people’s votes as possible. Simply, when more people vote, the election process more closely resembles a selection by the people as a whole, and a truer expression of the country’s beliefs emanates from the political branches.

One key to increased voter participation is access. Theoretically, if it is easier for eligible voters to vote, then more

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77 See id.


79 Id.

80 Pedro De Oliviera, Note, Same Day Voter Registration: Post-Crawford Reform to Address the Growing Burdens on Lower Income Voters, 16 GEO. J. ON POVERTY L. & POL’Y 345, 346 (Spring 2009).

81 See id. at 346-47.

82 In eradicating a durational residency requirement as a precondition of voting in a presidential election, Congress stressed the importance of access to voting, finding that lack of access can unconstitutionally “den[y] or abridge[] the inherent . . . right of citizens
of those voters will vote. There are numerous methods available that increase the likelihood of voters casting their ballots. Nevertheless, perspectives as to where the appropriate balance of participation and convenience should lie are increasingly divergent. This article asserts that given current technological advances, and in a nation on the verge of its 250th anniversary, the trend in many jurisdictions to restrict, rather than expand, the franchise is, at the very least, anachronistic. It is time for all jurisdictions to undertake concerted efforts aimed at implementing voter-friendly election laws.

In analyzing the future of election laws, a number of preliminary questions must be answered. How does one vote? Can, and if so, how should this ability be restricted? Why should it be restricted? When can a voter vote? Why must a voter register prior to casting a ballot? Can these two functions be fulfilled simultaneously?

This article first considers the policy goals of elections and voter participation in the context of registration and time restrictions on voting. The article proposes adopting early voting in conjunction with same-day registration to increase voter participation in a manner that will not overburden local governments or incur substantial risk of election fraud.

A. How Easy Should It Be to Vote?

When analyzing election rules restricting voter access, the pertinent question is how convenient should the government make the process of fulfilling one's right to vote? "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." The Constitution grants the right to vote to every free man and woman who is a citizen of the United States and has attained the age of eighteen.

85 Id. Instead of uniform protocols, every state has a different collection of election and registration laws. Id.
86 Wesberry v. Sanders, 376 U.S. 1, 17 (1964).
87 U.S. CONST. (multiple provisions).
constitutional amendments and laws have extensively increased the breadth of American suffrage.\textsuperscript{88} However, an individual's possession of this right does not prevent the government from implementing the procedures by which citizens must cast their votes.\textsuperscript{89} The U.S. Constitution empowers the states to pass laws that allow the state to administer elections.\textsuperscript{90} Furthermore, to maintain the integrity of an election, states must minimize potential fraud.\textsuperscript{91} The principal goal of an election is to have eligible voters elect representatives that actually represent the opinions and values of the people whom they govern.\textsuperscript{92} To accomplish this end, voters should be encouraged and assisted in participating. Thus, efforts should be made to bring in as many eligible voters as possible to the polls.

State and federal legislators have recognized the importance of generating voter turnout.\textsuperscript{93} The Voting Rights Act of 1965,\textsuperscript{94} and the National Voter Registration Act of 1993 ("NVRA"),\textsuperscript{95} simplified the registration process and increased voter access. By enacting the Help America Vote Act 2002 ("HAVA"), Congress provided a clear directive to states to modernize their election and registration policies and protocol.\textsuperscript{96} Two methods of increasing voter access and easing the election process are same day Registration and early voting.\textsuperscript{97} A number

\textsuperscript{88} U.S. CONST. amend. XV; U.S. CONST. amend. XIX.

\textsuperscript{89} Marston v. Lewis, 410 U.S. 679, 680 (1973) (citing Dunn v. Blumstein, 405 U.S. 330, 349 (1971)). "A person does not have a federal constitutional right to walk up to a voting place on Election Day and demand a ballot." Id. "While the right of suffrage is established and guaranteed by the Constitution it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed." Lassiter, 360 U.S. at 51.

\textsuperscript{90} "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. CONST., art.I, §4, cl. 1.

\textsuperscript{91} Election fraud can manifest itself in the form of single voters casting multiple votes or ineligible voters accessing the polls.


\textsuperscript{93} Steven F. Huefner, Remediing Election Wrongs, 44 HARV. J. LEGIS. 265, 265 (2007).


\textsuperscript{95} 42 U.S.C. §1973gg et seq.


\textsuperscript{97} There are a number of other methods relaxing election and registration policies
of states have already implemented each of these procedures, and, while causation is impossible to establish, the changes seemingly result in increased voter participation.

B. Registration

American voting is a two-step process: registering and then casting a ballot.98 A prospective voter must both actively seek inclusion and satisfy the registration conditions. Registration requires that an individual is (1) eighteen years old at the time of the next election, (2) a U.S. citizen, and (3) a resident of the jurisdiction where registering.99 Supporters point to registration as an effective method of collecting important administrative data,100 avoiding confusion on Election Day, and reducing the threat of election fraud.101 The U.S. Supreme Court has held that states have a legitimate interest in establishing adequate voter records and preventing voter fraud.102 However, preregistration laws inherently limit certain people’s ability to vote, and thus restrict their right to do so.103

Registration originally served to disenfranchise foreigners and transient people in the early 1800s.104 Later, most jurisdictions adopted registration systems to avoid the conflicts between disenfranchised people and election officials.105 By the late 1900s, registration had become more complex than actual

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98 R. Michael Alvarez et al., How Hard Can it Be: Do Citizens Think it is Difficult to Register to Vote?, 18 STAN. L. & POL’Y REV. 382, 383 (2007). Every state other than North Dakota requires some form of registration before an individual can vote. Id.
102 Marston v. Lewis, 410 U.S. 679, 680 (1973) (approving a registration cutoff date before Election Day as a way to protect the state’s interest). Some courts have accepted wider limitations as long as the statutes do not preclude an eligible person’s right to vote entirely. See Marston, 410 U.S. at 680; Diaz v. Cobb, 541 F. Supp. 2d 1319, 334 (S.D. Fla. 2008); Barilla v. Ervin, 886 F.2d 1514, 523 (9th Cir. 1989).
103 Zitter, supra note 101, at 524.
105 Id.
voting procedures. It had become an insurmountable hurdle for many who were unable to navigate the systems or who were uninformed about the requirements.

In enacting NVRA and HAVA, Congress aimed to push back against the cryptic nature of registration laws. By mandating states offer new registration locations and procedures, these voter-friendly laws opened new doors to those who were previously disenfranchised under the old systems. These voter-friendly laws signify the federal government's policy choice to increase voter participation through more lenient registration practices. In recent years, however, states have walked back many of these practices in the name of preventing voter fraud.

C. Voting Period

In drafting the federal Constitution and creating the foundations of our political system, the Framers made no mention of conducting our elections in a single day. Actually, the Constitution's text has no indication of preferred election practices. The task of administering federal elections was expressly left to the states. A state's ability to establish the method by which representatives are elected is broad; as long as selected methods conform to all substantive federal election law, states hold a high level of discretion in choosing election procedures.

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106 R. Michael Alvarez et al., How Hard Can it Be, supra note 98, at 389 (citing Thomas Quinlivan, One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration, 137 U. PA. L. REV. 2361, 2370 (1989)).


110 Id.

111 U.S. v. Classic, 313 U.S. 299, 311 (1941). "[T]he states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress." Id. at 311.

112 Classic, 313 U.S. at 311. Specifically, the Fifth Circuit court has established federal law does not explicitly preempt Texas early voting statutes. See Voting Integrity Project, Inc. v. Bomer, 199 F.3d 773, 777 (5th Cir. 2000).
A few state constitutions have designated a specific day for elections to be completed; local courts have interpreted this to preclude voting procedures on any other day. For example, Maryland's constitution mandates that all elections shall be held on the Tuesday after the first Monday of November. Furthermore, the Sixth Circuit reasoned that to read a provision to require an entire election process be completed in a single day would categorically preempt the practice of absentee balloting, and therefore cannot be interpreted in that manner.

D. Recent Election Participation

In the 2012 Presidential Election, only 64% of the eligible population voted. The 2014 midterm elections featured the lowest voter turnout since World War II, with participation rates drastically falling in many states from the previous midterm election. As of September 10, 2014, approximately 70% of the population were registered to vote. The most common reason most people give for not voting is that they were too busy or had conflicting schedules. The second most common excuse for not participating is illness or disability. Another 9% said they were out of town, while 6% said they had general registration issues. There is a direct correlation of increases in voter turnout percentage to that of increased levels

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113 Lamone v. Capozzi, 912 A. 2d 674, (Md. 2006) (holding that an election statute allowing early voting violated Maryland's state constitution's choice of election day because the language dictates the day is mandatory).

114 Millsaps v. Thompson, 259 F.3d 535, 544-45 (6th Cir. 2001).


117 There are 206,072,000 eligible voters in the United States, but only 146,311,000 registered American voters. See Voting Statistics, supra note 115.

118 Id.

119 Id.

120 Id.
Similarly, the percentage of voter turnout steadily increases with the increase in income range.122

Recently a number of states have implemented more restrictive election protocols.123 The mid-2000s marked a noticeable shift towards preventing fraud in lieu of fostering access. This change in policy towards more restrictive systems, however, has strained a system that has stripped over two million people in 2008 of their ability to vote.124 Fortunately, the trend towards restriction does not permeate to every state.125 Since the start of 2013, sixteen states have implemented voter friendly legislation to increase voter access.126 Still, the fact that in 2012, over 35% of the eligible population did not vote shows that election turnout has significant untapped potential.

E. Adopting Methods Targeting Increased Voter Participation

Inherently, effective election processes include a significant role by state governments in facilitating the casting of votes.127 Thus, one focal point of efforts to increase voter turnout is making it easier for citizens to access the polls.128 State legislatures and advocacy groups have proposed numerous reforms to election laws with the goal of growing voter-turnout.129 Two such measures that have already been...

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121 Id.
122 Id.
123 Weiser & Opsal, supra note 84, 2-4.
124 Issues: Voter Registration, supra note 99 (errors in registration systems deprived eligible and willing voters).
126 Id.
127 See generally Elmendorf, supra note 92 (discussing a balancing standard to determine the constitutionality of “electoral mechanisms” implemented by state election laws). “[R]egulations of the electoral process may be said to burden rights of political participation.” Id. at 654. “The more cumbersome and difficult an administrative requirement is for certain citizens to comply with, the more that requirement resembles a categorical denial of the franchise to the most burdened citizens.” Id. at 660–61.
128 See generally id.
implemented in a number of states are same-day registration and early in-person voting.\footnote{National Conference of State Legislatures, Election Laws and Procedures Overview, supra note 129.}

1. Same-day registration.

Traditional registration systems afford citizens unequal opportunities to vote.\footnote{DENNIS THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES, 28 (2002) (examining how registration cutoff dates more greatly affect the poor and uneducated population compared to other citizens).} While some jurisdictions justify these inequities as a trade-off for administrative convenience, same-day registration ("SDR") emphasizes the importance of voter participation. The premise of SDR, sometimes referred to as Election Day Registration, is that an eligible voter may come to the polls on the day of the election without having already registered within the jurisdiction as a voter, and yet still cast a legitimate and calculated vote.\footnote{Same Day Voter Registration, National Conference of State Legislatures (May 6, 2014), available at http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx, archived at http://perma.cc/976G-8CQK.} Federal law requires that states allow voters to register until at least thirty days before Election Day, but states may offer registration right up until Election Day.\footnote{Issues: Voter Registration, supra note 99.} SDR effectively opens up the polls to a number of citizens who otherwise would be unable to vote.\footnote{Craig Leonard Brians & Bernard Grofman, Election Day Registration’s Effect on U.S. Voter Turnout, 82 SOC. SCI. Q. 170 (2001), available at http://www.socsci.uci.edu/~bgrofman/18%20Brians-Grofman-Election%20day%20registration%20effect.pdf, archived at http://perma.cc/HEGP-GKNZ.}

In 1973, Maine became the first state to enact laws that allowed for same-day registration.\footnote{Glenn Davis, History of “Same Day” Voter Registration in Maine, BANGOR DAILY NEWS (Nov. 5, 2011), available at http://bangordailynews.com/2011/11/05/politics/history-of-same-day-voter-registration-in-maine/, archived at http://perma.cc/U6L8-QAA5.} In the state legislature, the issue was not hotly contested, as the Republican-sponsored bill featured support from both political parties.\footnote{One member said, “[I]f we have an opportunity to give some people the right to vote, there is no reason why we can’t.” “Same Day” Voter Registration in Maine, supra note 135.} At the time, the idea was novel, but many states have since adopted same-day registration laws that have expanded the ability of citizens to
cast their vote.\textsuperscript{137} Ten states and the District of Columbia offer SDR, but most other states continue to impose a registration deadline prior to Election Day.\textsuperscript{138}

Voters may be unable to register in the months leading up to an election for a variety of reasons, such as complications with registration process, moving, or misunderstanding.\textsuperscript{139} For citizens of districts that do not permit SDR, once the pre-Election Day registration deadline has passed, the opportunity to vote is lost. SDR mitigates the issue of disenfranchisement for late registrants. However, when considering registration policy, states must consider the effect on fraud prevention and logistical issues.\textsuperscript{140}

One of the challenges of effectively implementing SDR is averting potential fraudulent voter activity.\textsuperscript{141} States that offer SDR still must verify the residency of registrants and the identity of the voters present.\textsuperscript{142} While the integrity of an election is paramount, the seriousness of the threat of fraud remains unsupported.\textsuperscript{143} Typically, concerns of voter fraud

\textsuperscript{137} "Same Day" Voter Registration, supra note 132.
\textsuperscript{138} Id. Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, North Carolina, Wisconsin, Wyoming, and Washington D.C. offer SDR for all elections and Connecticut and Rhode Island offer SDR for Presidential elections. Id.
\textsuperscript{142} "Same Day Voter Registration, supra note 132. Each state offering SDR has a different method for verifying the address and identity of voters. Id. For address verification, some states require utility bills or paychecks, while others are satisfied with another eligible voter vouching for a same-day registrant. Id. For voter identity verification, some states require photo identification; others do not require an ID with a photo. Id.
\textsuperscript{143} Brooke Lierman, supra note 139, at 174; Minnite, , supra note 141, at 3 (defining voter fraud as “knowingly and willingly giving false information to establish voter eligibility, and knowingly and willingly voting illegally or participating in a conspiracy to encourage illegal voting by others”); Jane Mayer, The Voter Fraud Myth, THE NEW YORKER (Oct. 29, 2012), available at http://www.newyorker.com/magazine/2012/10/29/the-voter-fraud-myth, archived at http://perma.cc/BT37-DADN (demonstrating the fallacies of the fear of voter fraud by showing a lack of documented cases of such issues);
involve the specter of a single individual casting multiple votes or ineligible voters casting ballots. To illustrate, busloads of ineligible voters, dropped off at the poll, may potentially swing the pendulum of the election in their direction, unless there are adequate methods of verification. This scenario is not entirely unfathomable, but in practice, such malevolent acts have rarely been seen. In fact, the concern over voter fraud is largely unsubstantiated. Studies have shown negligible occurrences of fraud in elections past, including in jurisdictions where SDR was available. Nevertheless, states retain a duty to ensure the election process is not infected with fraudulent behavior, even if the threat is minimal.

An obvious challenge exists in verifying voter eligibility. Preregistration statutes necessarily limit some people’s right to vote. Some courts accept this limitation as a trade-off for state administrative convenience as long as the statutes do not preclude an eligible person’s right to vote entirely. In order to register, voters must present documentation verifying identity and eligibility. Furthermore, states offering SDR have a number of fraud prevention mechanisms in place to impede


Claire Foster Martin, Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly Over Voters & the Dilemma of How to Prevent It, 43 CUMB. L. REV. 95, 97 (2013).


Benson, supra note 145, at 2.

Levitt, supra note 140; Lierman, supra note 139, at 174; see also Voting Rights Restoration Efforts in Florida, supra note 61.

Levitt, supra note 140 ("[V]oter fraud is extraordinarily rare."); Lierman, supra note 139, at 174.

Barilla v. Ervin, 886 F.2d 1514, 1525 (9th Cir. 1989).

See Martin, supra note 144, at 98–99; Zitter, supra note 101, at 523.

Zitter, supra note 101.

Id. States accept the following forms of proof to verify residence and eligibility: a current driver’s license or ID card (all SDR states); documents such as a paycheck or utility bill with an address (some states); or an already-registered voter vouching for the residency of a registrant (few states). National Conference of State Legislatures, Same Day Voter Registration, supra note 132.

National Conference of State Legislatures, Same Day Voter Registration, supra note 132. Some states require photo ID, while others accept ID without photo. Id.
nefarious acts such as fraud in the registration or casting multiple ballots.\textsuperscript{153} Since the risk of the specific types of voter fraud is statistically minimal, or at least unlikely to have a profound effect on election results, and methods to verify eligibility and identity are adequate, states should not avoid SDR in the name of maintaining election integrity.

The threat of voter fraud, even if more significant than data seem to indicate, has been elevated as a political and partisan specter to keep certain voters away from the polls.\textsuperscript{154} Each party will naturally favor voting laws that are most likely to result in a successful result for own-party candidates.\textsuperscript{155} If fraud is not a real issue, more restrictive registration laws merely disenfranchise parts of the eligible population.\textsuperscript{156} More restrictive registration laws and elections laws have a disproportionate effect on those with less flexible schedules and less education.\textsuperscript{157} Thus, lower economic class citizens and minorities experience the biggest reductions in voter turnout with more restrictive voting and registration laws.\textsuperscript{158}

Even if the threat of fraud is not dispositive, jurisdictions may have secondary reasons disfavoring implementation of SDR. Key among these secondary reasons are logistical considerations, including, in particular, the physical requirements of labor and locations.\textsuperscript{159} When a state adopts SDR, it can expect a larger number of voters to turn out.\textsuperscript{160} Because many of these new voters will need to register as well

\textsuperscript{153} Id. (e.g., Iowa and New Hampshire use non-forwarding mail sent to each Election Day registrant—if the mail is undeliverable, the case is forwarded to law enforcement; in Montana, Election Day registrants unable to fulfill ID requirements vote on a provisional ballot and later verify identity before the ballot can be counted).

\textsuperscript{154} Martin, supra note 144, at 98.


\textsuperscript{156} Id.

\textsuperscript{157} Lee, supra note 139, at 248.

\textsuperscript{158} See Oliviera, supra note 80, at 346.


as vote, the process requires more time than for those voters who simply cast a ballot. Accordingly, lines and waiting times increase, or, to keep this process both organized and efficient, more poll workers must be hired and trained. If, however, SDR expands the franchise, then the resulting cost-benefit analysis is simply a question of values: do we, as a society, value the expansion of the franchise more than the cost of the investment?

2. Early voting.

Federal law establishes the Tuesday following the first Monday in the month of November as Election Day. Courts have determined that this federal law does not preclude states from collecting votes prior to that date. A number of jurisdictions have enacted laws that allow voters to cast their ballots in advance of Election Day. Currently, more than half of the states have adopted Early Voting in some form. Early Voting has proved to be popular in the states in which it is offered, as longer lines can be avoided and trips to the polls can be made at convenient times.

Early in-person voting ("EIPV") allows voters to come to actual polling places and cast their votes. Among the many

161 Montopoli, supra note 159.
162 2 U.S.C. §7 (2012) (setting the date of the popular election to choose Congress delegates); 3 U.S.C. §1 (2012) (setting the popular election for selecting the representatives who select the President and Vice President).
167 Kasdan, supra note 165, at 2–3. Another available method for Early Voting is the early mail-in option. Id. Some mail-in early voting is treated exactly the same as absentee voting, which is highly scrutinized by election officials in many jurisdictions.
benefits, EIPV, at the very least, increases the election’s accessibility to voters. EIPV certainly does not diminish voter turnout. Because the primary goal of an election is generating voter participation, EIPV is an effective method at furthering an election’s value. Typically, the key concerns raised regarding EIPV are the increased costs in polling administration and campaigns and the lack of a fully-informed decision by early voters. To adopt EIPV is to incur new administrative costs not present when operating a single-day voting period. Opening polling places for more days, compensating election officials, and recruiting volunteers all will push the price of administration north. EIPV supporters, however, stress that EIPV should not be adopted as a budget saving measure. Supporters instead laud the advantages of the program. Aside from any benefits to the overall voter participation, EIPV reduces stress on the voting system on Election Day by relieving the high number of voters in one day. Election administrators are less inundated with people seeking assistance. Furthermore, voters who can come to the polls during EIPV are doing so at more convenient

See id. EIPV does not necessarily involve going to a polling place; EIPV may take different forms. Id.

168 Some argue that EIPV increases voter turnout. Id. at 5. However, the effect of Early Voting on turnout is difficult to gauge because there are so many other factors that also affect turnout, such as candidates’ efforts to get-out-the-vote. Id. By offering more time for citizens to vote, more people will be available to make it to the polls. Id. at 5.


170 See Kasdan, supra note 165, at 8.

171 Id.

172 Id. at 5–8.

173 Id. at 5. EIPV also allows for early identification and correction of registration errors and voting system glitches, and increases voter satisfaction. Id. at 6–7.

174 See Kasdan, supra note 165, at 6.
times, so they are more willing to wait in line.\textsuperscript{175} Again, the cost-benefit analysis yields a value-laden judgment: do potential, and perhaps even negligible increases in marginal costs outweigh the potential increased voter participation? More bluntly, is our democracy worth this modest investment? The second of the concerns is that those early voters may not be privy to information regarding a candidate that is learned after an early voter has already visited the polls. While such a concern is valid, no early in-person voter is \textit{required} to vote prior to Election Day, and the individual, rather than the state, is surely better positioned to evaluate this risk, and to measure the risk against the reward of casting a vote—especially a vote they might not be as able to cast if limited to election day itself.

3. The pushback against more permissive voting systems.

Voters have seen monumental shifts in their districts over the past decade with respect to voting law.\textsuperscript{176} To the detriment of a bipartisan goal of increasing overall turnout and education, Democrats and Republicans have manipulated election laws and policies to benefit their own candidates.\textsuperscript{177} Many states have passed laws that decrease participation by restricting voter rights, including cutting back on EIPV and eliminating SDR.\textsuperscript{178} This dissension leads to voter confusion and disenfranchises eligible voters.\textsuperscript{179}

In 2014, litigation around the country, and particularly involving the states of Ohio, North Carolina, Texas and Wisconsin, highlighted both the nexus of the political and legal battles over voter access laws.\textsuperscript{180} The U.S. Supreme Court

\textsuperscript{175} Id. at 5–6.


\textsuperscript{177} Id. Restrictions on the voting population by voter ID laws generally benefits republican candidates. \textit{Id}.

\textsuperscript{178} \textit{Id}.

\textsuperscript{179} \textit{Id}.

mostly has left lower court decisions undisturbed. For example, in *Veasey v. Perry*, the Supreme Court denied petitioners' application to vacate a stay entered by the Fifth Circuit Court of Appeals on a Southern District of Texas decision striking down Texas election law.\textsuperscript{182}

While the Supreme Court largely has stayed on the sidelines, it has not done so entirely. Notably, the Supreme Court reversed the Sixth Circuit Court's refusal to stay an Ohio district court's order preventing Early Voting cuts before the 2014 mid-term election.\textsuperscript{183} Ohio's Senate Bill 238 read in conjunction with Directive 2014–17 would retain an extensive Early Voting period, but merely decreased the period by a few days.\textsuperscript{184} The district court applied a balancing test to determine the plaintiff's likelihood of success in showing the reduction of early voting violated the Equal Protection Clause and Section 2 of the Voting Rights Act and wrongfully disrupted equal protection.\textsuperscript{185} The District Court found that "SB 238 and Directive 2014–17 combine to significantly burden the right to vote of the enumerated groups."\textsuperscript{186} After balancing the burden imposed by the measures against the offered justifications, the Court held "that the offered justifications fail to outweigh the burdens imposed."\textsuperscript{187} Had the Ohio restrictions been found unconstitutional, it would have been a significant mark of approval for voter access, particularly because relative to laws in other states, Ohio's restrictions were not overly burdensome.\textsuperscript{188} 

\footnotesize{\textsuperscript{181} 135 S. Ct. 9 (2014).  
\textsuperscript{182} \textit{Id.} At trial in the District Court, advocacy groups successfully argued that Texas' Voter ID law violated the Voting Rights Act and Fourteenth and Fifteenth Amendments. *Veasey*, 71 F. Supp. 3d 627 (S.D. Texas 2014).  
\textsuperscript{184} \textit{Id.}  
\textsuperscript{187} \textit{Id.}  
\textsuperscript{188} Rick Hasen, \textit{Breaking News and Analysis: Federal Court Grants Injunction Restoring Early Voting in Ohio}, ELECTION LAW BLOG (Sept. 4, 2014, 7:58 AM), available
In passing election legislation, states should be primarily concerned with increasing voter access. To achieve the most representative election process with the least amount of burden on the system, jurisdictions should implement both SDR and EVIP. Doing so would have the effect of allowing voters to vote to the last minute with SDR, yet would also assuage the congestion at polls with EVIP.

III. THE NATIONAL POPULAR VOTE COMPACT

When George W. Bush defeated Al Gore in the 2000 Presidential election, he became the fourth president elected in American history who failed to win the national popular vote. Vice President Gore had received 540,000 more votes then President Bush; however, President Bush won the Electoral College 271 to 266 and therefore won the presidency. The race ultimately came down to four counties in Florida undergoing a vote recount that the U.S. Supreme Court later held unconstitutional in the contentious Bush v. Gore.

That controversy brought the intricacies of the curious Electoral College system into the national discourse and revived a movement to ensure our president would only win after receiving the majority of the popular vote. As Bush v. Gore demonstrated, the president is technically not elected by a vote of the people, but by a group of "electors" determined by the state legislatures. The state legislatures were granted this constitutional right, and they in turn have enabled or authorized their respective citizens to cast votes which essentially tell the states' appointed electors how their official vote shall be cast.

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192 Muller, supra note 189, at 374.
193 Bush, 531 U.S. at 104.
194 Id.
The 2000 election also caused dissatisfaction and a desire to have the election determined by the national popular vote. In light of the difficulties of amending the Constitution, several states have passed legislation called the “National Popular Vote Compact,” which would lead to the same result without actually amending the Constitution.\textsuperscript{195} This Compact provides that a state’s electors would vote for the winner of the national popular vote instead of the winner of the popular vote within the state. This Compact, which so far been passed by ten states and the District of Columbia, will become effective if enough states pass it. After that point, each of the compacting state’s electors would vote for the winner of the national popular vote, even if that candidate did not win their state’s popular vote. The great irony of this Compact is that the power of the states to cast their vote for the winner of the national popular vote is evidenced by and may be authorized as constitutional by the same Supreme Court opinion, as well as the concurring opinion of Chief Justice Rehnquist, which led to a popular vote winner losing the election.\textsuperscript{196}

A. The Electoral College Dysfunction and the Constitution

The relevant constitutional provision at issue in both the Electoral College and \textit{Bush v. Gore} is Article II, Section 1, Clause 2.\textsuperscript{197} This clause reserves to the states, specifically the state legislatures, the power to choose the President and Vice President.\textsuperscript{198} The state legislature determines how their state electors vote for the President and Vice President; one option is a popular vote. The Constitution does not prevent a state from

\textsuperscript{195} See Muller, supra note 189, at 375–76.

\textsuperscript{196} See Bush, 531 U.S. at 104, 113 (finding the State Legislature has plenary power to appoint their electors).

\textsuperscript{197} See US CONST. art II, §1, cl. 2; Bush, 531 U.S. at 102.

\textsuperscript{198} US CONST. art II, §1, cl. 2. The Electoral College was a compromise developed by the Framers to ensure a form of equality between the states regardless of size: for example, by giving each state two Senators regardless of their respective populations, and then having a separate house of the legislature based on population. Tara Ross & Robert M. Hardaway, The Compact Clause and National Popular Vote: Implications for the "Federal Structure", 44 N.M. L. REV. 383, 390 (2014). The Framers followed the same compromise in deciding how to choose the President; each state would have two electors and then additional electors based on their populations. Id. The system developed largely in response to slavery, for if slaves were counted as part of the population the power of the slaves States would increase at the expense of the non-slave States and vice versa. Charles S. Doskow & David A. Sonner, Vox Populi Is It Time to Reform the Electoral College?, 55 FED. LAW., 33, 34 (July 2008).
abolishing its citizens' popular vote for president; indeed, the Framers of the Constitution determined that the people would not vote for president, except if the individual state's legislature enacted a popular vote.\textsuperscript{199} The Constitution grants the state legislature this decision, and shortly after ratification the people of the several states determined, through their legislators, that the people should have the right to cast their vote for president.\textsuperscript{200}

The Founders decided that the number of electors in each state should correspond to their representation in the federal congress, and that each state legislature would be free to determine its own method of choosing electors.\textsuperscript{201} In addition, the Twenty-third Amendment to the Constitution granted the District of Columbia the same right to appoint electors for President, with the same number of electors as Senators and Representatives that they would have if it was a state.\textsuperscript{202} The District is limited, however, to having no more electors than the least populous state.\textsuperscript{203} While the number of the state's electors is equivalent to the number of the state's federal representatives, it is important to note that they are different and distinct from the federal representatives whom have a different role in deciding the president. The state first counts its popular vote, which is then used by the state-determined electors to cast their electoral vote for president. The Secretary of the State then transmits the electoral votes to the president pro tempore of the federal Senate, who subsequently tallies them and announces the president and vice president elect.\textsuperscript{204}

Having granted the citizens of their states the ability to cast their vote, the states are still bound by the Constitution to have their electors officially cast their vote.\textsuperscript{205} The states are free,

\textsuperscript{199} \textit{Bush}, 531 U.S. at 104. The Seventeenth Amendment to the Constitution in contrast provides for direct election of Senators, while permitting the State Executive to fill vacancies that may arise. \textit{See} U.S. Const. amend. XVII.

\textsuperscript{200} \textit{McPherson v. Blacker}, 146 U.S. 1, 11 (1892). States began having popular elections in the early 1800's and the final two States to appoint their electors were Florida in 1868 and Colorado in 1876. \textit{See} Doskow, supra note 198, at 37.

\textsuperscript{201} \textit{See} U.S. CONST. amend. XXIII.

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} \textit{Id.}

\textsuperscript{204} \textit{See} U.S. CONST. amend. XII (providing how the electoral votes shall be counted and that in the event of an electoral tie the House of Representatives chooses the President and the Senate chooses the Vice President).

however, to determine the way in which its electors shall vote and its connection to the states popular vote. In doing so, the states are bound by the Equal Protection Clause of the Fourteenth Amendment, which prohibits the differential treatment of votes based on voter identity. Moreover, the states may determine that their electors shall base their decision on something besides their citizens' votes: for example, their own political opinion of what is best for the state or the nation.

Forty-eight states, as well as the District of Columbia, have developed a "winner take all" system, whereby the electors of the state unanimously vote for the candidate who won the state's popular vote, or what we will call the "intra-state" popular vote. Maine and Nebraska, however, are the exceptions to this rule. Their electors cast only two of their votes for the intra-state popular winner, and the remaining electors vote for the popular vote winner of individual districts, or the intra-district popular vote winner.

The Electoral College system, combined with the unanticipated factions of political parties, has created many eccentricities, widespread dissatisfaction, and a decreased interest in voting. A Republican in New York or Democrat in Texas may have little incentive to vote for the president because they cannot win the intra-state vote and therefore their electors will not vote for their candidate. Perhaps an even greater national dissatisfaction exists with the creation of the "battleground states." Candidates develop Electoral College strategies by focusing on states with both sufficient electoral

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206 See Blacker, 146 U.S. at 41. Assuming, of course, the State Legislature authorizes such a vote. However, this statement is the general holding of the case.

207 Bush, 531 U.S. at 104–05.

208 It may not be entirely clear that once the State does grant their citizens the right to vote that they are not permitted to determine the election on something else despite the Legislature providing so in a law prior to the election, it at least as not been addressed.

209 Ronak Patel, Chapter 188: Forget College, You’re Popular! A Review of the National Popular Vote Interstate Compact, 43 McGEOGE L. REV. 645, 647 (2012); Doskow, supra note 198, at 37.

210 Patel, supra note 209, at 647. It should also be noted that there is nothing preventing a "faithless electors," or an elector who does not cast his vote in accord with the State rule, indeed there have been nine such electors, although none has changed the result of an election. Id.

211 Id.
votes to win and states where they can win the majority of its citizen's vote in the intra-state popular vote, thereby gaining all the state's electoral votes.\textsuperscript{212} Democrats will spend little time or money in Texas, and Republicans will spend little time or money in New York because they are pre-determined to elect one parties' candidate over another. This has resulted in increased campaigning and interest in a relatively few states, the battleground states, because these few states are not predetermined they are the true players in the election game.\textsuperscript{213}

One example of the Electoral Colleges' eccentricities is what took place in Michigan in the 1890's. In \textit{McPherson v. Blacker},\textsuperscript{214} the Supreme Court took up a challenge to Michigan's districting system. Democrats had taken temporary control of the state legislature, and in an effort to win some electoral votes for a Democratic Presidential candidate, the legislature adopted a districting system as opposed to the "winner take all" system.\textsuperscript{215} The electoral votes would no longer all go to the Republican nominee and instead the Democratic nominee would win some of Michigan's electoral votes.\textsuperscript{216} The Supreme Court upheld the districting system as part of the state legislature's "plenary" power over its electors, thus allowing a "winner take all" system or some other districting mechanism.\textsuperscript{217} At the time, all of the states had long adopted the "winner take all" system, and thus it was a rare event when an alternative method was used.\textsuperscript{218} For example, shortly after Colorado entered the Union in 1876, the state legislature chose the electors for President, directly saving the expense and trouble of another election.\textsuperscript{219} The Democratic Party's victory in the State Legislature was short lived, however, because the Republican Party shortly regained power in the state legislature and re-adopted a "winner take all" system, thereby winning all the electoral votes for their candidate.\textsuperscript{220}

\begin{footnotes}
\item[212] Robert W. Bennett, \textit{Popular Election of the President Without A Constitutional Amendment}, 4 \textit{GREEN BAG 2d} 241, 244 (2001).
\item[213] Patel, supra note 209, at 647; Silver, supra note 190.
\item[214] 146 U.S. 1 (1892).
\item[215] Doskow, supra note 198, at 34.
\item[216] \textit{Id.}
\item[217] Blacker, 146 U.S. at 26 (1892). Importantly the Court also found that question to be a cognizable judicial question and not a non-judicial political question. \textit{Id.} at 23–24.
\item[218] See \textit{id.} at 8–11.
\item[219] \textit{Id.} at 9–10.
\item[220] Doskow, supra note 198, at 34. Needless to say this is a perfectly constitutional
\end{footnotes}
Maine and Nebraska are the current technical exceptions to the “winner take all” rule; however, due to their popular vote, their electors have all been unanimous.221 These are “technical” exceptions because all their elections have been electoral “sweeps,” except for Nebraska in the 2008 election where Senator McCain won four electoral votes and President Obama received one.222 The vast majority of states have adopted this “winner take all” system in an implicit attempt to win as much influence as possible in the national election.223 Political parties do not want to lose the election—not to mention their national influence—by allowing some of the electors in their territory to vote for the opposition and then lose the election by that margin. As a result of the current system, the presidential election in 2000 was determined in effect by a few voters in a few counties in Florida. The national popular vote was close; but the people of Georgia are unlikely to be inspired to vote or have an increased interest in voting if the people believe that only their southern neighbors have the power to decide the presidency. Therefore, a system where the president was elected based on the national popular vote could potentially increase voting, as well as interest and satisfaction in voting, in all states as opposed to those few battlegrounds.224

While there are many dissatisfied citizens who may want a national popular vote operating under the principle of “one person, one vote,”225 there is little chance of amending the Constitution in this way. Thus, the American people are forced to work within the Electoral College system to effectuate the same result. The Constitution has granted individual state legislatures wide discretion, even “plenary power,” in arranging

outcome, if not one designed to, in some respects, disenfranchise the State’s own minority voters as well to compete with the influence of other State electors when counted by the Senate.


222 Id.


225 See Bush, 531 U.S. at 104–07 (finding it inconsistent with the Equal Protection Clause for a State by arbitrary and disparate means to value one person’s vote over another’s as it is hostile to our notion of government).
how their electors will vote. State legislatures may decide that the national popular vote winner would receive their electoral votes, thereby accomplishing the same goal without an arduous constitutional amendment process. States have been unwilling to do so without support from other states, because in the event the national popular vote winner is not the same candidate as an intra-state popular vote winner, then that state's electors would vote for a candidate whom their citizens had opposed.

The states would do so without any guarantee that the opposite would happen where they would benefit by having another state vote for their preferred candidate. The party in control of the state would effectively be ceding their power and influence to other states. This idea of a "unilateral disarmament" presents a "prisoner's dilemma" to the states, ultimately preventing an individual state from devaluing their votes when other states have not followed suit. The solution to both the "prisoner's dilemma" and the national popular vote movement is for the states to communicate and work together for the common good or general welfare. In working together, by enacting this compact, and perhaps by eventually setting up more uniform systems for recounts, the states embrace the motivations behind

226 Id. Indeed there is some debate over whether such state laws are subject to gubernatorial veto, for even though as a matter of state law the Governor may veto any proposed bill, the Constitution, as a matter of Federal power, reserves the power specifically to the state legislatures. The Constitution also reserves ratifying constitutional amendments, and appointing prior to the Seventeenth Amendment appointing senators. Doskow, supra note 198, at 36. The Supreme Court in Leser v. Garnet, found that ratifying an Amendment is a federal function, derived from the Federal Constitution transcending limitations imposed by the State or the people of the state. Leser v. Garnet, 258 U.S. 130 (1922). In addition, in Bush, the concurring Justices found it was the State Legislature that determines the election process, and the state court interpreting that state law was due less deference then would otherwise be required under the Erie doctrine and principles of federalism. Bush, 531 U.S. 112-14 (Rehnquist, C.J., concurring).

227 Muller, supra note 189, at 374-76.

228 Ultimately a state agreeing to the National Popular Vote Compact is requiring the same result, they will vote against the will of their citizens for the will of the nation's citizens. See id. In the compact however, they are gaining the possibility that other states will vote with them when their intra-state popular vote corresponds with the national popular vote. More fundamentally, however, as discussed herein the States are expressing that as a policy matter the Electoral College is flawed and by altering it in this manner they are making their citizens' votes matter and as important as the citizens in Miami-Dade County, Florida. See Hertzberg, supra note 224. As shown, the national popular vote winner has only lost four times, while their citizens might lose every election because they are not a battleground State. Id.

229 Muller, supra note 189, at 375.
the Constitutional Convention arising from the failures and in-fighting between states under the Articles of Confederation.230

B. The Compact and Its Challenges

On April 15, 2014, New York became the most recent State to pass the National Popular Vote Compact (NPVC or Compact).231 The National Popular Vote Compact is the proposed alternative to amending the U.S. Constitution and still ensures the winner of the popular vote will be elected President.232 Under the Compact, the compacting states’ electors would vote for the winner of the national popular vote as opposed to the intra-state popular vote winner.233 There are now ten states, along with the District of Columbia, that have passed the NPVC.234 With New York’s twenty-nine electoral votes the compact has the support of 165 electoral votes.235 While these states have passed the Compact, it is not actually in effect until enough states enact it in “substantially the same form” to bring the total number of compacting electoral votes to 270.236 This guarantees that the national popular vote determines the election and therefore the individual states do not need to “unilaterally disarm” themselves.237 The Compact has currently reached 61.1% of the required 270 electoral votes to implement its provisions and control the outcome of the presidency.238

When enacting the Compact, withdrawing from the Compact, or when the Compact takes effect, the chief executive member of each state must promptly notify the chief executives
of the other states. Any state may withdraw from the agreement, except within six months of a presidential election. Each state makes its own final determination for the number of popular votes cast in the state and must communicate such number to the other states within twenty-four hours. In addition, the state must "immediately release to the public all vote counts or statements of votes as they are determined or obtained," and each state must treat the other states' intra-state popular vote winner as conclusive.

At two pages, the NPVC is wonderful in its simplicity and purpose, but as such it is susceptible to several objections. The Compact does not provide for recounts, instead leaving it to the several states. The Compact does not arrange for any oversight in confirming counts, uniformity in voting standards, uniformity in voter qualifications, preventing fraud, or a uniform system for recounts and challenges. Of course, this arrangement is no change from the current system, which already leaves it to the independent several states.

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239 The six month rule might not pass constitutional muster because the State Legislature cannot abdicate their constitutional duties. Bush, 531 U.S. at 104. Once the people have voted the State cannot then take away that ability, such would be a deprivation of Due Process, unless the law provided certain scenarios like the instant one. Cf. Reich v. Collins, 513 U.S. 106 (1994) (finding Due Process requires a State to provide the remedy it has promised, in that context once the State promised post deprivation remedy for collecting taxes the State cannot take away that remedy after taking the taxes, it's an obligation arising from the Constitution itself). For instance in Bush, the problem was "voters went to the polls in Florida in 2000 with Procedure A in place; after the election, Procedure B was instituted. That, to the per curiam majority, was the fundamental problem." Jonathan H. Adler, Sixth Circuit Upholds Injunction Against Ohio's Voting Law Changes, THE VOLOKH CONSPIRACY (Sept. 25, 2014), available at http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/25/sixth-circuit-upholds-injunction-against-ohios-voting-law-changes/, archived at http://perma.cc/N93B-MNMH. The question is where that line is: how far before the election can the Legislature change the law? In September of 2014 the Supreme Court issued a stay to a lower court's order providing that polls be opened for more days than the state leaders had planned; however, there would still be several weeks of voting in Ohio. Lyle Denniston, Early Voting in Ohio Blocked (updated), SCOTUSBLOG (Sept. 29, 2014), available at http://www.scotusblog.com/2014/09/early-voting-in-ohio-blocked/, archived at http://perma.cc/CAV4-FE9K.

240 N.Y. Elec. Law § 12-402 (McKinney).

241 See id.


243 Discussed briefly supra at note 224 and accompanying text.

244 See N.Y. Elec. Law § 12-402 (McKinney)

245 See Dryden & Klein, supra note 242, at 5.
The NPVC also cannot alter how compacting states, or non-compacting states for that matter, conduct their elections, or the potential for non-compacting states to frustrate the Compact in various ways. The non-compacting states have the ability to simply refuse to make their intra-state popular election results known, or known in time for the compacting state’s electors to vote accordingly. Additionally, the states may change their voter qualifications to increase their voting power. A Compact that attempts to address these issues may prove impossible to pass, but these concerns do not currently present themselves. In the event such an issue arises, the states are capable of withdrawing from the Compact or adapting to it through further negotiation. The elegance of the Compact is its fluidity and adaptability, as compared to an amendment which may very well need to address all these concerns and countless other practicalities. An amendment would have to explicitly memorialize such issues as voter qualifications, registration, and early voting or provide for a radical shift in authority from the individual states to the United States.

One concern opponents of the Compact have involves its shift in power. The Constitutional Convention created the Electoral College system out of a fear that a national popular vote would lead to the more populous states having more power than the smaller states and being able to take political advantage. Those who oppose the Compact opine that under a national popular vote the candidates would focus on the cities and other dense population centers. This is as opposed to the current system as discussed which focuses on those few counties in Florida and other current battleground states. The solution in the Compact is the same “one person, one vote” protection in intra-state elections. All voters are franchised under the Compact, thereby encouraging voters in Maine just as much as

246 For a list and discussion of such possibilities see Norman R. Williams, Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change, 100 GEO. L.J. 173, 209 (2011).
248 These same problems would have to be addressed in attempting to change the Electoral College by constitutional amendment.
249 See Ross & Hardaway, supra note 198, at 388–91.
250 Id. at 395.
voters in Wyoming. The truth is that only four times in the nation’s history has the national popular vote winner lost the election and so such a change will rarely alter the final outcome per se. A popular vote is unlikely to change elections or power among the states; it will hopefully change voter turnout and interest.\(^{251}\) The NPVC thereby encourages the entire electorate in all states and from all political parties to exercise their right to vote because no matter where they live, their vote matters.\(^{252}\)

As a policy matter, it must also be asked that if do candidates do focus on a high population density area, is a negative change, or just a change in the status quo? In addition, will candidates really neglect a state as high in density as Ohio? The candidate will not want to lose a voter in Maine because that voter is as important as the voter in Ohio. Moreover, the eleven states that have joined the Compact are equally divided between large, small, and medium sized states.\(^{253}\) Perhaps this expresses that as a policy matter all states would do better under this system, because their votes would be sought after. The states for whom this Compact would be “bad” are those battleground states who currently receive all the attention.\(^{254}\) Under the NPVC the battleground states would receive the same attention as the other states, and therefore relatively less attention than they presently receive.\(^{255}\)

The states that have passed the NPVC are largely those who are ignored and never see the nominees or their television ads.\(^{256}\) The presidential nominees are happy to take their money, only to then funnel it to those lucky few battleground

\(^{251}\) See Hertzberg, supra note 224.


\(^{253}\) For the large States there are New York, California, New Jersey, and Illinois; for the medium there are Maryland, Washington, and Massachusetts; and for the small there are Rhode Island, Vermont, Hawaii, and the smallest—the District of Columbia.

\(^{254}\) See Green, supra note 252, at 225–27.

\(^{255}\) Id.

\(^{256}\) At present all the compacting States are considered “blue” States and a foregone conclusion for the Democratic party; however, this might be due to the Democrats feeling particularly rebuffed in the Bush election and Republican politicians suspicion that the Compact is therefore being utilized to gain political power of those States who disagreed with the Republicans winning the election without winning the popular vote. Hertzberg, National Popular Vote: New York State Climbs Aboard, supra note 224. Notwithstanding that opinion the Republican rank-and-file strongly favor the idea of popular election. Id.
states, and people in the non-battleground states are ignored and disadvantaged. The politicians in those non-battleground states, no matter their party, are equally ignored. These compacting states have determined that the current system is untenable.

Whereas the previous objections and concerns are mainly policy-based, there are two potential constitutional hurdles to the Compact. The text of Article II, as well as the Supreme Court’s interpretation of it, indicate that state legislatures have plenary power to determine how their electors’ vote; however, there may be some limits to that power. One scholar, for example, has argued that the history of the relevant constitutional provision and its wide-spread use by state legislatures reveal that the states may not base their elections on election results outside their states. This seems to contradict recent precedent permitting “plenary authority,” but if the argument is expounded upon, can the state legislature consider a vote in England, or Iran, or on the Internet in determining how their electors vote?

Perhaps such an argument creates a straw man or expands it to an absurdity, and so is objectionable on that basis. The point is while the state’s power is plenary, that does not mean or cannot mean the states may be irrational or absurd. Chief Justice Rehnquist’s opinion in Bush, while upholding the

257 Hertzberg, supra note 224.


259 It is not as far-fetched to imagine, outside the Compact discussion, that a State may authorize non-citizens, or younger citizens, within the State to vote. Norman R. Williams, Reforming the Electoral College, supra note 246, at 230. This authorization might not be objectionable either to many people or to the State’s citizens, but it may be highly contentious, to say the least, in current national politics. The national government may regulate time, place, and manner of Federal elections, but have no power in who may vote in the election. Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2258 (2013) (quoting FEDERALIST No. 60, at 371 (A. Hamilton)) (finding that the States have authority to determine who may vote in federal elections because a Congress who can control the qualifications of its own electorate could by degrees subvert the Constitution). Although, the Civil War Amendments recognize that the States may be as abusive or tyrannical as the Federal government and provided the federal government with the “sweeping new enforcement powers” against the States. See Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2637, (2013) (Ginsburg, J., dissenting) (quoting A. AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 361, 363, 399 (2005)). Such discussions may properly be reserved for another day and perhaps when a State actually makes such a proposal to extend the right to vote beyond uniformly accepted practices in the rest of the states. Indeed this might benefit the Compact because it is more flexible then a constitutional amendment.
legislature's plenary power, found: "[t]he importance of [the Presidential] election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."\textsuperscript{260} State control can "implicate a uniquely important national interest," for what is more important than the "only elected officials who represents all the voters in the Nation."\textsuperscript{261}

While a State may have plenary power, it seems that there may be an upper limit to that discretion. The rationale behind that upper limit is not implicated when the election is based on a national popular vote. As Chief Justice Rehnquist found, the president represents all the voters in the nation, and the welfare of the people as a whole is immensely important.\textsuperscript{262} When the people of the United States, as a whole, have the power to so choose, then the Chief Justice's concern that the president represents the entire nation is satisfied; indeed, the Compact seems to reflect the Chief Justice's principle.

The values underpinning the Voting Rights Act may also be implicated in this Compact, in ensuring an open, free, and fair election.\textsuperscript{263} In order to make the Compact effective, Congress may have to use that authority to overcome any state obfuscation. Congress may also have an even bigger role in this "Compact." If this is indeed a "Compact," under the Constitution, Congress has to consent to any state "enter[ing] into any Agreement or Compact with another state."\textsuperscript{264} Whether the Compact Clause invalidates how a state chooses to use their plenary power to choose their electors under Article II is unclear.

Under current Compact Clause jurisprudence, this "Compact" probably does not require Congressional approval. First, the categorical language of Article I indicates the plenary power of the states to determine their electors.\textsuperscript{265} This "Compact" may just be parallel legislation among the states directing how their electors vote under certain conditions or

\textsuperscript{260} Bush, 531 U.S. at 112 (Rehnquist, C.J, concurring) (quoting Burroughs v. United States, 290 U.S. 534, 545 (1934)).
\textsuperscript{261} Id. (quoting Anderson v. Celebrezze, 460 U.S. 780, 794–95 (1983)).
\textsuperscript{262} See Bush, 531 U.S. at 112 (Rehnquist, C.J. concurring) (quoting Burroughs, 290 U.S. at 545).
\textsuperscript{263} See Shelby Cnty., 133 S. Ct. at 2636.
\textsuperscript{264} U.S. CONST. art. I §10 cl 3.
\textsuperscript{265} See Bush, 531 U.S. 98 at 104.
voting results.266 "The prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."267

The Compact Clause requires those compacts that "interfere with either federal or non-compacting state sovereignty interests—to receive congressional approval."268 The NPVC does not implicate federal sovereignty interests, as it would not undermine the power of the federal government by having the totality of the people elect its executive.269 The NPVC, however, may face challenges under the interests of the non-compacting states analysis prong.270 The failures of the Articles of Confederation in preventing state infighting created the need for a strong national government with the power to prevent state factions.271 The fear was that a few states joining together could do great damage to non-compacting states by creating "divergent allegiances."272

The NPVC may be a compact that requires congressional approval under the Constitution if it affects the interests of non-compacting states by enhancing the political power of the compacting states at the expense of the other states.273 The NPVC, however, as discussed above, does not enhance the political power of the compacting states; it takes into account the votes of all the states including the non-compacting states.274 The Compact shifts power to the nation's people as a whole as opposed to a particular battlefield state. In addition, the

266 See Robert W. Bennett, State Coordination in Popular Election of the President without a Constitutional Amendment, 5 GREEN BAG 2D 141 (2002). But 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, 232 (2008).


268 See Muller, More Thoughts on the Compact Clause, supra note 266, at 232.

269 Green, supra note 252, at 222–25; contra Ross & Hardway, supra note 198, at 428 (arguing against this position because the NPVC alters the constitutional structure in a manner that could only be possible by a constitutional amendment, which would require Congressional approval and undermine the amendment process).

270 See Ross & Hardway, supra note 198, at 428.

271 See id. at 385–87.


273 See Green, supra note 252, at 224–31.

274 See id. at 225–27 (arguing the NPVC shifts power from the battleground States to the safe States, or the compacting States).
candidates pay attention to the elected officials in all states, not just the current swing states.\textsuperscript{275}

The NPVC does not change the electoral votes, influence, or representation of non-compacting states in the Congress. There is no argument that the Compact grants the compacting states additional power because it does not make them the new battleground states, even if there is a change in influence from the battleground states to the people as a whole. Furthermore, clearly the Compact does not increase the power of the populous states to the disadvantage of the smaller states, as the Framers feared when the Electoral College system was designed.\textsuperscript{276} In addition, much has changed since that system was designed including an increase in the power and importance of the federal government, a constitutional amendment providing for direct election of senators, and every state allowing a popular vote for president.

The compacting states would have the electoral votes to control any election; however, they have not compacted to consider only the wishes of the compacting states, but the whole nation. The Compact provides that the President is the only official representing the nation as a whole to actually be elected by the entire nation by popular vote. Moreover, as discussed above, just one non-compacting state can frustrate the Compact in various ways. Should a non-compacting state determine its influence is diminished, it is within that state’s sole power to frustrate the Compact.\textsuperscript{277}

While the NPVC may be called a “Compact,” the states are completely free to unilaterally withdraw or repeal it.\textsuperscript{278} The NPVC itself requires that a state cannot withdraw six months before the election but, as discussed above, such a limitation may violate Article II’s mandate that the state legislature have plenary control over their electors, and that power cannot be abdicated.\textsuperscript{279} The NPVC further provides that should one provision be invalid, the remaining will be upheld, and of course

\textsuperscript{275} Hertzberg, \textit{National Popular Vote}, \textit{supra} note 224.

\textsuperscript{276} Cf. Muller, \textit{The Compact Clause and the National Popular Vote Interstate Compact}, \textit{supra} note 189.

\textsuperscript{277} See Norman R. Williams, \textit{supra} note 246, at 209.

\textsuperscript{278} See Ross & Hardway, \textit{supra} note 198, at 422–26 (citing Supreme Court precedent for the proposition that a State’s ability to freely withdraw from an agreement is an important factor to find that congressional approval is not required).

\textsuperscript{279} See Green, \textit{supra} note 252, at 215.
should one provision fall the states always have the ability to repeal it.\textsuperscript{280}

An additional question arises if the Supreme Court determines that this is in fact a Compact under the Constitution, and it does not receive Congressional consent: does the Court have the power to enjoin it? In \textit{Bush}, the Court did not interfere with Florida's control over its electors; the Court determined that Florida Supreme Court's recount violated the Equal Protection Clause.\textsuperscript{281} Therefore, the Court enjoined the recount but did not interfere with the State's Article II power over its electors, instead upholding the original count.\textsuperscript{282} Would the Court then determine that the states would have to cast their electors as they would without the Compact, or would the Court go to the level of commanding or commandeering how the compacting states cast their Electoral College votes?

The Compact is an elegant solution to enable the popular election of the President without ceding control of elections to the federal government. The NPVC works within the Electoral College system as constitutionally required and the federalist system where the states exist in a sphere of sovereignty apart from the federal government.\textsuperscript{283} The weakness of the NPVC may be its success, in that the NPVC works within the Electoral College, leaving it to the desire of the states to evaluate and re-evaluate the solution in changing circumstances. Should a national popular vote system fail or prove undesirable, there would not need to be another constitutional amendment to reinstate the Electoral College system or create some alternative. The states still have the power to withdraw, and more than that they have the ability to adapt and work together in a way the Constitution envisioned out of the failures of the Articles of Confederation, while enfranchising the electorate.

\textbf{IV. THE BLUE SLIP TRADITION}

As the third branch of government, the Judiciary plays an important and active role in every aspect of government, policy, and the daily lives of Americans. The importance of the Supreme

\textsuperscript{280} See N.Y. Elec. Law § 12-402 (McKinney).
\textsuperscript{281} See \textit{Bush}, 531 U.S. at 103.
\textsuperscript{282} See \textit{id.} at 109–11
\textsuperscript{283} See Williams, \textit{Why the National Popular Vote Compact Is Unconstitutional}, supra note 259, at 1525.
Court of the United States in shaping law, rights, and the nature and power of the federal government and the several States cannot be understated. The most heated political questions may first be played out in the political sphere of the legislatures and executive branches, but when a legislature passes a law regarding anything from campaign finance to abortion, it is understood that it may ultimately be decided by the judiciary and, eventually, the nine justices of the Supreme Court. The people therefore, have as strong an interest in who these nine Justices are as they do for their elected officials, but they are unable to vote for them. Instead, the people may vote for the officials who will appoint justices with a desired ideology. The purpose of this paper has been to examine how well election law serves the electorate, and this section follows that same theme but approaches it from a slightly different angle. This section asks how well the laws and procedures of judicial appointments serves the electorate, as the unelected judiciary is just as influential as the elected branches of government.

The political desire to appoint Supreme Court justices and the confrontational obfuscation in the Senate is perhaps widely known, especially in the nominations starting with and following the failed appointment of Judge Bork to the Supreme Court. The nomination of Supreme Court justices is a deeply divided process that, while not meant to, does ensure that the party in power puts in a true believer or a justice who will vote its way on issues ranging from abortion to campaign finance and to prevent the opposing party from doing the same. Currently, this may be best evidenced by strong criticism of Justice Ruth Bader Ginsburg for not retiring during the Obama administration in order to ensure she is replaced by the Democratic Party. Under the U.S. Constitution, federal judges are appointed by the President with the advice and consent of the Senate and have life tenure, instead of being elected by the people to a set term. A president has the ability to leave a thirty year ideological legacy and continue to have their policies

285 Id.
287 See U.S. CONST. art. II § 2.
"irrevocable imbedded in government" through appointing a particular judge or justice who will continue to decide cases and controversies for the remainder of the judge's life.288

A. The Power of the Lower Courts

The elected officials also know, perhaps better than the people, the important role the lower courts play.289 The vast majority of controversies that end up going to trial are fully litigated and resolved by the lower courts, because the Supreme Court has discretion to hear cases on a writ of certiorari and only decided seventy-five cases in the October 2013 term.290 In the ordinary course, the Supreme Court takes cases after at least two lower courts and at least four judges have narrowed the issues in the particular case and determined the facts of that controversy. The power of these inferior tribunals greatly impacts the scope and breadth of any Supreme Court decision, as well as if there will be any decision at all.291 Furthermore, because the Court takes so few cases, it often takes cases that multiple inferior courts have already decided, providing the Court with a lengthy record and a rich background of potential decisions that it may adopt since the different appellate courts often reach different conclusions.292 When a person seeks redress for an injury or a deprivation of their constitutional rights, it is the district court judge who hears the case and determines whether the law entitles the person to a remedy. The circuit judges then handle the vast majority of appeals, and usually the Supreme Court takes a case after appellate courts have decided a particular issue differently.293 “Circuit courts wield

288 Id. at 485.
289 Id. at 489–90.
291 The Supreme Court's role is primarily to "resolve conflicts of federal law that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, treaties of the United States, and to exercise supervisory power over lower federal courts." Ryan Stephenson, Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis, 102 GEO. L.J. 271, 273 (2013) (quoting Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949)).
292 See id. at 273–75.
tremendous power because they rule on nearly every issue before the federal judiciary and are rarely audited by the Supreme Court,” and therefore play the “greatest legal policymaking role in the U.S. judicial system.”

Both district court and circuit court judges have tremendous power to develop the law and have a great impact on the people within their jurisdiction, providing persuasive precedent for judges in neighboring jurisdictions. Many litigants who enter the court system never have their case decided by a higher judge and rely on the district court or the circuit court for a final disposition of their rights. Therefore, any vacancy on these lower courts may impede and obstruct the people when they have been injured in some manner and seek redress. At present there are fifty-four vacancies in the judiciary, or around a ten percent vacancy percentage.

Although federal judges are not elected, the people have some influence in their appointments through the election of their elected representatives. The President, who is elected by the whole nation, nominates a candidate to the bench while the Senate, also elected by the people, investigates and then conducts an up or down confirmation vote. The government has a strong incentive to ensure a fully staffed judiciary; as Chief Justice Rehnquist noted, “the Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry, it should vote him up or down... vacancies cannot remain at such high levels indefinitely without eroding the quality of justice.”

Around the time of the Chief Justice’s comments, President Clinton was in office facing challenges to many of his appointments, and when he left office forty-two of his nominees were unconfirmed, most without a hearing, and with nearly one

294 Id. at 374.
295 See Seymour, supra note 284, at 702
297 See U.S. CONST. art. II §2; see also Sarah Binder & Forrest Maltzman, Advice and Consent During the Bush Years: The Politics of Confirming Federal Judges, 92 JUDICATURE 320, 324 (2009).
hundred vacancies on the federal bench. Should the Senate not want to confirm a nominee they may simply cast a negative or down vote; however, there is yet another procedure, the “blue slip” that they may use.

B. The Blue Slip Courtesy

The blue slip is a procedure of the Senate Judiciary Committee that arises out of senatorial courtesy, and not from the Constitution or any law. Admittedly, the senators of the state where the district court sits do have a unique or heightened interest in that nomination because that judge will primarily be deciding their citizens’ rights and the validity of their state and local laws. The impact of the district judge is much greater on the state in which the judge sits than elsewhere because that court will hear challenges to state laws and state action from Section 1983 suits to petitions for habeas corpus. The blue slip procedure is designed to extend these senators a courtesy by receiving their individual input in the appointment process. The senators also have an interest in the circuit court judges that review district courts within the state’s territory because they will handle the appeals concerning their people and their state’s laws. The blue slip procedure also applies to appointing these appellate judges, because by tradition each state in a circuit has at least one seat, where that particular seat is reserved for a judge from that state. As a courtesy, this system functions appropriately by taking into account the views of those who will be most directly affected, as it most directly concerns that Senator’s home state.

Some also suggest the courtesy enables an “early warning system” to help avoid certain embarrassing and acrimonious controversies. The blue slip, as a senatorial courtesy, might encourage the President to work more closely with the Senate and individual Senators on the appointment procedure, but it

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299 Seymour, supra note 284, at 702.
300 David S. Law, supra note 287, at 493–97.
302 Id.
303 Id.
might also lead to the opposite result. The procedure where the blue slip acts as a "silent veto" of the president's nominee may instead lead to increased animosity and partisanship between the parties.\textsuperscript{305} The question then becomes: when does this courtesy go too far and grant a single Senator, or pair of Senators, such authority that is constitutionally delegated to the President?

The precise extent of this procedure changes with each committee, however, the basic procedure remains the same. After the President sends a name to the Senate for a district court, the committee sends a blue slip to the Senators from the state in which that district court is located.\textsuperscript{306} The courtesy and the blue slip tradition arises when the Senators fail to return the blue slip to the committee, which results in a silent veto where the nomination proceeds no further, without a hearing or an up or down vote.\textsuperscript{307}

C. The Blue Slip as a Silent Veto

The strength of this denial varies depending on the times and the Senate; however, at its strongest the Senate may use the blue slip procedure as a complete veto of a nomination before any other vote or inquiry while at other times it may just slow down the process for more investigation. At times, both home state Senators must support the nominee in order for the appointment process to continue.\textsuperscript{308} Ordinarily, the President needs to nominate a candidate who he believes will receive a majority of votes in the Senate; however, as shown under this strong version where the blue slip acts as a complete and silent veto, a single Senator can veto a presidential nominee.\textsuperscript{309} Moreover, even one Senator, elected by a limited number of people, acting alone may take on the power of the President, who is elected by the whole union. This blue slip power may enable one Senator to effectively nominate his own federal

\textsuperscript{305} See Sheldon Goldman, Clinton’s Judges: Summing Up the Legacy, 84 JUDICATURE 228, 238 (2001).


\textsuperscript{307} Goldman, Clinton’s Judges, supra note 305, at 238.

\textsuperscript{308} Tuan Samahon, supra note 301, at 12.

\textsuperscript{309} See id. (finding that the Senate’s power to confirm means the President must moderate his choice to one whom the Senate would be willing to confirm).
The President then may not simply choose a candidate who will receive a majority vote. Instead the President must consult with, and convince, the two Senators of that state to allow his nominee to go forward, and often this ability enables the Senators to advise the President to nominate their own preferred candidate. Moreover, even after the blue slips are returned the chairman of the committee can simply decide not to schedule or conduct a hearing, thereby permanently evading the nomination.

The strong version of this blue slipping courtesy, or this silent veto, has been rarely utilized since its origin and, “the approach that simply promotes pre-nomination presidential consultation with home state senators—has prevailed over two-thirds of the time since the blue slip’s 1917 debut.” The strong version of the procedure has often been used in highly partisan times, including after Brown v. Board of Education, to keep the Mississippi District Courts free of Brown sympathizers. Historically, the blue slip has most often been found to be a delaying tactic “which allowed senators to make further inquiry and to negotiate on the vacancy—the classic use of the blue slip.” An examination of recent years, however, may reveal “the fears of the blue slip’s critics have been realized,” as it is increasingly being used as a silent veto.

In 2009, Senate Republicans, after losing control of the presidency and Senate, threatened to block any nominee who failed to pass muster with key Republican senators. Senator Pat Leahy took notice of this filibuster and decided to uphold the strong version of the blue slip courtesy. Likewise in 2002, when the Republicans were in control of the Senate and the

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310 See Seymour, supra note 284, at 702.
311 See Seymour, supra note 284, at 702.
313 Samahon, supra note 301, at 12.
315 Samahon, supra note 301, at 12.
316 Denning, supra note 304, at 221 (quoting Elliot E. Slotnick, Reforms in Judicial Selection: Will They Affect the Senate’s Role?, 64 Judicature 60, 69–73 (1980)).
317 Id. at 222.
318 Binder & Maltzman, New Wars of Advice and Consent, supra note 296, at 49.
319 Id. at 53.
strong version of the blue slip was not followed, the Democrats turned to the filibuster in order to block Bush’s nominations.320

In recent years, the strong version of the blue slip has prevailed. For example, when Senator Arlen Specter was chairman he required both senators to return the blue slip, and so has Chairman Leahy during the Bush Presidency.321 This strong version of the blue slip unduly enables a single Senator to take on powers more properly and constitutionally reserved for the President and the advice and consent of the entire Senate. The Senator can delay a district or circuit judge from being appointed to a particular seat, leading to the current crisis of an understaffed federal Judiciary. As Chief Justices Rehnquist and Roberts have pointed out, the failure to appoint judges has unduly delayed cases and prevented the people from an orderly judicial system to decide their cases.322 The lower courts are the first judges to address important issues, as well as the run of the mill cases of the people, and therefore the district courts are actively making public policy, determining the rights and remedies of the people, and deciding complex issues in interpreting both the Constitution and laws on a daily basis.323

When a single Senator can interfere with this process and make it harder for a person to have their injury heard and redressed, they upset the constitutional framework and harm the electorate and American people. The problem with the blue slip in particular is that it is silent; as a Senate procedure, the nomination simply pauses or stops indefinitely. The qualified candidate the duly elected President nominates never receives an up or down vote by the Senators elected by the people, and the people are often unaware their Senator has acted in such a manner. A Senator who gives a down vote or engages in a filibuster has made a public stand that their constituents may judge them on, and should the public agree that the nominee was wrong for them, then that Senator will be supported by his constituents. After proper inquiry, investigation, and hearings a nominee should face a vote by the national electorate and not

320 Id.
321 Id. at 49.
322 Binder & Maltzman, New Wars of Advice and Consent, supra note 298, at 48.
323 See generally Binder & Maltzman, Advice and Consent During the Bush Years, supra note 297.
just one individual segment thereof.\textsuperscript{324} The crisis the blue slip creates is not only an understaffed judiciary but it is an incendiary tool that can lead to one Senator obstructing the President's power to appoint judges, the elected Senate's power to confirm the nominee, and increased partisanship.

CONCLUSION

This article has approached the question of whether election law serves the electorate with a multifaceted approach. Attempting to remain non-partisan, or perhaps voter-partisan, this article asserts that through some or all of the proposals herein, as well as others, we can inch closer to prioritizing, or at least to treating, as more than an afterthought, the very electorate that makes the country great.

\textsuperscript{324} Samahon, \textit{supra} note 301, at 12.