PRESIDENTIAL ELECTION REFORM:

A NATIONAL IMPERATIVE

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Donald J. Trump and his allies enthusiastically exploited two major, serious flaws in our method of choosing a president. First, we have an unnecessarily large number of procedural steps between voting and inauguration. This provided the loser and his supporters multiple, disruptive opportunities to try to change the outcome. They came frighteningly close to halting the post-election process. Had it not been for public officials and judges honorably doing their jobs, Trump might well have succeeded. Our ponderous and complicated election processes definitely helped the losing candidate and his allies to convince large segments of the citizenry that Donald Trump actually won.

Second, we only narrowly avoided yet another clash between the outcome of the national popular vote and the outcome within the Electoral College. Once again, our nation's demographic shift toward heavy concentrations of voters in a decreasing number of states made

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the irrelevance of the national popular vote a grievous threat to the unification of the entire country in support of a president and vice president elected by "We, the People."

In this essay, we discuss four principal dangers of the present system. First is the inherently dysfunctional nature of a winner-take-all approach that confounds the central virtue of our democratic system by severing the relationship between the voters and the president, rendering the votes of up to 80% of the electorate effectively meaningless. Second is the stark reality that the current presidential election system can—and in 2020 almost did—install as president a candidate who was rejected by a clear majority of the people. In the last election, the margin was a net 7 million voters. Third is the danger that voters can be excluded altogether if state legislatures assume a power to appoint electors on their own, as is now being widely proposed. Fourth involves numerous opportunities for mischief created by the cumbersome and ambiguous terms of the Electoral Count Act of 1887.

We then propose and briefly discuss three measures that will markedly improve the current system. First is the new Voter Choice Ballot system; it can be implemented on a state-by-state basis, and it empowers individual voters to express their commitment to electing the candidate who secures the approbation of the greatest number of fellow citizens. Second are measures to clarify and streamline the certification and counting of votes following election day, including a provision to create an official count of the national popular vote. Third are measures to assure that presidential elections are decided by the votes of the people, not the legislatures. These include state and federal constitutional amendments and federal legislation based on Congress's enforcement powers under Sections 2 and 5 of the Fourteenth Amendment, as well as the constitutional guarantee of congressional power to ensure republican forms of government to the states under Article 4, Section 4.

Dangers of the Present System

The core virtue of a democratic method of choosing the president is the connection of the chief executive to the people: the president gains legitimacy to govern with the consent of the governed.[1] This connection echoes Chief Justice John Marshall's vital claim that the federal Constitution was adopted by the people rather than by the states.[2] As such, Americans are generally inclined to accept executive decisions, without the need for police or military enforcement that remains so tragically common in other countries. Our acceptance is tempered, of course, by a robust tradition of dissent, as well as by our Constitution and the law in the books and the law in action. We enjoy and frequently invoke rights to complain against, assemble in protest of, publish views contrary to, and even pray for the replacement of that executive. This is fundamental in a successfully functioning democratic state: people who are divided politically nonetheless accept the decisions of others lawfully chosen to make those decisions.

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

[1] In many respects the original Electoral College intentionally distanced the process of selecting the president from the people. Oliver P. Morton, *The American Constitution, Part I*, N. AM. REV., at 341-46 (1877). The Twelfth Amendment, by requiring designation of presidential slates, rendered the original system obsolete. *Id*. It transformed presidential elections into plebiscites on presidential candidates and their policies, thus fundamentally re-casting the presidency into a truly political office and furthering the Jeffersonian world view that legitimate governmental authority rests on the consent of the governed. JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT 91-92 (2020); Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WILLIAM & MARY L. REV. 1501 (2014).
[2] McCulloch v. Maryland, 17 U.S. 316, 402-05 (1819).

The current method to choose the President and to transfer power peacefully threatens to gut this vital connection between the people and the Executive. Under our current approach, 8 out of 10 voters are taken for granted and almost entirely ignored in the general election. All but two states currently award all electors to the plurality winner in those states; in all but a handful of states, that plurality winner is basically foreordained. Thus, 80% of all Americans who vote may justifiably believe that they had no meaningful participation in the choice of the President. They voted, and for down-ballot races each vote might be critical. Yet in at least 40 states, those voting for the presidential and vice-presidential ticket of each major political party know those votes have no significant meaning; even those voting on the side of the majority party in these states know that all their votes above a bare plurality similarly have no real significance.

In only a handful of states is the Democratic-Republican split close enough that every vote for President truly matters to the outcome.[3] In 2020, there were only 5 states in which the margin between Joe Biden and Donald Trump was 2% or less: Arizona, Georgia, North Carolina, Pennsylvania, and Wisconsin. Combined, these states totalled 15% of the 158 million votes cast nationally. If one includes a vote margin of 3%, this adds only Michigan and Nevada to the category of swing states, bringing the percentage of voters in the decisive battlegrounds to 20% of all votes cast.

Nationally, Joe Biden won decisively by a 4.4% margin in the popular vote. This was not a landslide, but it meant that his national vote victory was clear within a few hours after the polls closed across the nation. In other words, 80% of all voters who lived in states in which the two

[3] Indeed, in the three closest states—Georgia, Arizona, and Wisconsin—the combined margin was a mere 45,000 votes. Had Trump prevailed in these states, the Electoral College vote would have been tied, and Trump clearly would have been elected president in the House of Representatives, given the complicated process to resolve such a quandary established by the Twelfth Amendment and the Electoral Count Act of 1887. In hindsight, some 45,000 voters in three states decided the 2020 election.

national parties did not closely compete have reason to believe that they did not meaningfully participate in consenting to be governed by the candidate who won in the Electoral College—or at least that their participation was marginal and largely symbolic. This may render their willingness to be loyal to the chosen President similarly marginal.

The skimpy connection between the vast majority of voters and the actual outcome is compounded by the "otherness" of the result. For voters in 43 states in 2020, the winner was chosen by 7 other states. Their processes were opaque, and the losing party did its best to describe them as untrustworthy. The governed cannot be expected to have full faith in their own act of consenting when neither they nor their elected officials play a meaningful role in the single most important act in any democracy: the people's choice of the Chief Executive.

Equally disturbing is that the Electoral College system can be abused in a way that entirely severs the relationship between the people and the president. This can come about if state legislatures resume their power to appoint presidential electors themselves, dispensing with popular election. Under this scenario, legislators who were elected from one to four years prior to the presidential election would end up appointing presidential electors, doing away with the people—and the considered contemporary judgments of the people about the actual candidates and national policy issues raised during the presidential campaign—in the election of the President.

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

The fever has not broken. A bill introduced in Arizona in 2021 explicitly would authorize the Arizona Legislature to appoint electors by joint resolution at any time.[4] Other measures, such as Georgia's new law, might—in the name of assuring "voter integrity"—create a system of challenges and state court reviews that could not reasonably be resolved prior to the time for appointing electors, thus putting the Georgia Legislature in a position in which it would be "forced" to appoint electors at the last minute, just as the Florida Legislature threatened to do in December 2000.[5]

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[4] The threat posed by state legislative appointment of electors was considered in the midst of the congressional debates on the Fifteenth Amendment. In January and February 1869, Senator Oliver P. Morton, Chairman of the Committee on Representative Reform, warned that legislative appointment:

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

CONG. GLOBE, 40th Cong., 3d Sess. 711, 1042 (1869).

Citing universal agreement that this was a defect in the Constitution, Morton and his colleague Senator Charles Buckalew proposed an amendment (a "Sixteenth Amendment") that would require that electors to be chosen by the direct vote of the people, and it would authorize Congress to prescribe the rules for elections. The Senate combined the Fifteenth and Sixteenth Amendments as a single measure, approved by the Senate as a package. CONG. GLOBE, 40th Cong., 3d Sess. 1318 (1869) (approving with a vote of 39-16). The House declined to concur in the proposed package, and never voted on the proposed Sixteenth Amendment. CONG. GLOBE, 40th Cong., 3d Sess. 1225-26 (1869). The arguments and were reiterated in S.Rep. 271, 40thCong. 3rd Sess, March 2, 1869, reprinted in Charles Buckalew, PROPORTIONAL REPRESENTATION 65-137 (Philadelphia, J. Campbell and Son 1872) 103-112), https://quod.lib.umich.edu/cgi/t/text/text-idx?c=moa;idno=AEW4025. The Senate Report urged that, if Congress implemented the "far superior" system of proportional representation, the incentive for one race to dominate and suppress the other in the South might be avoided. *Id*. at 84-86. The draft constitutional amendment in Addendum B is based on the proposed Sixteenth Amendment of 1869.

[5] Morton revisited the danger in an 1874 Senate Report on a proposed constitutional amendment and in re-introducing the amendment in 1875. S. Rep. No. 43-395; JOHN HAMPDEN DOUGHERTY, THE ELECTORAL SYSTEM OF THE UNITED STATES 344 (1906). In President Benjamin Harrison's Dec. 9, 1891 Annual Message to Congress (Appendix C), Harrison, who was Morton's one-time Indiana protégé, reiterated the danger. He echoed Morton's points that if such a "trick" were to decide a close election, it could lead to civil unrest. The state legislators casting the votes would not have been elected in the same election, or on the same issues, as the president.

Finally, the plodding pace of confirming the outcome of the presidential vote over the course of more than nine weeks between the election and the inauguration creates many opportunities—not limited even to all those taken by the incumbent in 2020—for defeated presidential candidates to persuade their supporters that the method of selecting the president was unfair. We just witnessed a game plan for monkey-wrench tossing, facilitated by the slow-moving gears of the system established by the Electoral Count Act of 1887. Instead of merely hoping no one will emulate former President Trump's tactics, the process for electing our President cries out for reform.

We should strive to make every vote truly count. To choose our President by a single national vote would make every vote equal. The national political parties would need to pay much more attention to every voter everywhere. If every vote mattered, every vote would be sought. To be sure, as in any election for any position, candidates would focus in the final days on undecided voters, including those who remain undecided about whether to vote. But these actually would be swing voters, not swing states. The November election itself would be a national event, in which every voter and indeed every person could play a meaningful role—trying to persuade friends and family members to vote, driving neighbours to the polls, and engaging directly within their local communities. All those who vote would do so with the knowledge that millions of others were doing the same thing all across America. This national event would give more meaning to the act of consent regarding the winner of the election, no matter how close the national margin.

Even without major reform, the national popular vote need not itself be made determinative of the outcome for our current system to be improved significantly. To help us to emerge from our current electoral mess, it would be a substantial improvement if the national

vote were to become at least relevant—to become a factor in the outcome—especially in a swing state. The people could be assured that presidential elections actually will be decided by the people.

Possible Remedies

An ideal remedy would be a constitutional amendment to replace the current system with a national popular vote system. A constitutional amendment would require ratification by 3/4 of the states, or through an unprecedented Constitutional Convention initiated by 2/3 of the states. Neither is realistic today. However, some remedies are constitutionally and politically possible today. States can enact reform at the level of the individual ballot, Congress can reform the process of counting the votes, and states can require that electors for president be appointed solely based on the outcome of the popular vote in their state. Separately or together, these reforms provide realistic options for how to safeguard the will of the people in presidential elections.

Reform at the level of individual ballots

Over nearly two years, the non-profit and non-partisan organization, Making Every Vote Count (MEVC) has developed a state-by-state voter choice reform proposal (called the Voter Choice Ballot (VCB)), through which any state can adopt a system to give its voters the *option* to choose as their preferred candidate, the candidate who wins the national popular vote. Even if their preferred candidate did not win the national popular vote, however, their own presidential

votes would still count for the candidate who did win the national popular vote when their home state assigns its Electoral College votes.[6]

This reform would not change the Electoral College system. Each voter would still get only one vote, but that vote would be counted differently. It would be included in tallying the national popular vote winner as well as in tallying each voter's state Electoral College vote. In other words, the proposal would expand the individual voter's expression of her or his voting preferences without disturbing the existing federal Electoral College system.[7] As has been the case in almost all other election reforms in the United States (women's suffrage, lowered age limit for voting, and election of U.S. senators), a national reform can be started by a single state.

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

<u>Reform the Process of Counting Votes</u>

[6] See Appendix A for a sample ballot and more specifics about how the Voter Choice Ballot (VCB) would work.
[7] The VCB system aligns with the values of all three versions of the Electoral College. The original Electoral College was based on the hope that the President would be a consensus figure such as George Washington, somewhat above the partisan fray. Morton, *supra* note 1; Hawley, *supra* note 1. The original voting structure—two votes of equal value, for individuals from different states—was intended to direct the Electors' attention to figures of national stature and, it was hoped, to assure a consensus/majority outcome that would avoid a contingent election in the House of Representatives. The "yes" choice under VCB empowers individual voters to throw their weight behind a national consensus choice, while also expressing a preference for a "favorite son" or third-party ticket. The Twelfth Amendment transformed the idea of the presidency from a consensus figurehead to a truly political leader, whose person and policies would be the subject of a national plebiscite every four years. Hawley, *supra* note 1. Again, a "yes" choice under VCB empowers the voter to throw her weight behind the national choice. Section 2 of the Fourteenth Amendment requires elections, and the VCB—combined with measures to assure elections—also is aligned with the Fourteenth Amendment.

With respect to how we now count votes, reform of the 1887 Electoral Count Act is badly needed. That measure was intended to stop the calamitous 1876 election scenario from recurring, as well as to address the broader problem of the absence of any mechanism within the states or within Congress to resolve controversies about presidential election results. In 1876, several states submitted alternative slates of electors, leaving it to Congress to decide which slate to count for those states. The choice of the President then became an extremely messy, prolonged negotiation between the Republicans and Democrats in Congress, as opposed to paying attention to the actual votes of actual voters. The tragic bargain that followed was that the Republicans agreed fully to abandon Reconstruction in the South in exchange for their candidate, Rutherford B. Hayes, becoming President and succeeding Ulysses S. Grant. This happened even though the Democratic candidate, Samuel Tilden, clearly had won the national vote. He also might well have won the never-quite-decided counts in those states that submitted multiple slates.

The broader problem of counting Electoral College votes had been investigated and reported about by a Senate committee as early as 1873-74.[8] Then Congress held hearings in every Congress from 1877 to 1885 without any resolution. Finally, in 1886-87 the political alignment in Congress accommodated adoption of a compromise measure.[9] The Electoral Count Act is notoriously opaque, and some key issues were not clearly resolved. Overall, the Act created incentives for states to establish dispute resolution mechanisms—whose results would be given "safe harbor" treatment if finalized six days prior to the date presidential electors vote—and also established rules for how Congress would count votes, particularly if more than one

[8] Oliver P. Morton, *The American Constitution, Part II*, N. AM. REV. (July-August 1877, 68-78). *See generally*, ALEX KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 120-131 (2020).
[9] See Stephen Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004). *See also* Eric Schickler, *Safe at any Speed: Legislative Intent, The Electoral College Count Act of 1887, and* Bush v. Gore, 16 J. L. & POL. 717 (2000); L. Colvin and Edward B. Foley, *Lost Opportunity: Learning the Wrong Lessons from the Hayes-Tilden Dispute*, 79 FORDHAM L. REV. 1043 (2011).

slate of purported electors was submitted by a state and the House and Senate did not concur as to which to count.

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

Congress can and should pass a law accelerating the determination of the outcome of the election in every state within a time span much shorter than that provided in the 1887 statute: it still would be much longer than in any other major democracy.[10] This reform law should include counting the national tally. Absent direct Electoral College reform, this would be nothing other than the total of each state's count (and that of the District of Columbia).[11] In fact, however, no official national count has ever been declared before. To depend on the media to do this job, as we now do, is to rely on weak reeds, especially now that we know there are major political leaders and their supporters who have no compunction about declaring news they do not like to be "fake news."

The main virtue of declaring a national count is twofold. First, if the national vote were relevant in a state or in many states, as would be the case either with the Voter Choice Ballot or through a constitutional amendment, a directly relevant system already would be in place.

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

[11] The Twenty-Third Amendment (1963) granted U.S. citizens who reside in the District of Columbia the right to vote in presidential elections, albeit they have no vote for regular congressional representatives. U.S. citizens residing in Puerto Rico and other U.S. Territories have neither vote.

Second, an official, indisputable national count might dispel some of the fantastical thinking that currently causes many people to believe the counterfactual claim that their losing candidate won the election.

Reform That, Directly or Indirectly, Bars State Legislatures From Appointing Electors

The most direct means to assure that state legislatures do not seize the authority to appoint presidential electors for themselves is through state constitutional amendments that require direct appointment of electors by popular election. The main objection to this reform is the so-called Independent State Legislature Doctrine, which posits that state legislatures are not bound by their own state constitutions regarding the appointment of electors. This claim has been rejected in a long line of U.S. Supreme Court decisions construing Article I, Section 4.[12] The

[12] *See, e.g.,* Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787 (2015); Smiley v. Holm, 285 U.S. 355 (1920); Ohio *ex rel.* Davis v. Hildebrandt, 241 U.S. 565 (1916); Hawke v. Smith, 253 U.S. 221 (1920). *See generally* Mark Bohnhorst, "The Constitutionality of Citizen Initiative for Reforming the Presidential Election 146 U.S. 1 System," [hereinafter, "CCI"] at 36-41 in MAKING EVERY VOTE COUNT (2020,)https://static1.squarespace.com/static/5a7b7d95b7411c2b69bd666f/t/5fcc232874a40730fb894414/1607213876032/Constitutionality+of+an+Initiative.pdf.
The leading case construing Art II, Sec. 1 is McPherson v. Blacker, 146 U.S. 1 (1892), in which Chief Justice Fuller's unanimous opinion stressed that state legislatures are bound by their state constitutions. Id. at 25. The claim that state legislatures have discretion to disregard their own state constitutions is traceable to an 1874 U.S. Senate Report, which was cited in Chief Justice Fuller's review of the historical record, but not as part of the Court's analysis in *McPherson*. CCI at 34-35.
That 1874 Senate Report was mischaracterized in the litigation that led up to Bush v. Gore, 531 U.S. 98 (2000) and in dicta within the Court's per curiam opinion, id. at 104. *See also* Chief Justice Roberts's dissent in Arizona State Legislature v. Arizona Independent Redistricting Commission, *supra* at 839-40., CCI at 42-45, 50-51, 59-64.
Not only has no state legislature ever purported to have authority to disregard that state's constitution in appointing electors, but there are early historical examples that further undermine such a claim. For example, in 1800 Alexander Hamilton proposed that New York Governor John Jay call the pro-Federalist lame duck state legislature into special session to adopt a district plan for the appointment of electors so that the newly-elected pro-Jeffersonian legislature could not cast all New York's votes for Jefferson, as it did pursuant to New York law. If Hamilton or Jay thought that the incoming legislature could ignore a new district plan, this proposed strategy would have made no sense, CCI at 33. In addition, a study of the first presidential election in 1788 found that, in every instance, state legislatures complied fully with each state's constitutional requirements regarding electors. Even in states that did not yet have written constitutions, the legislatures complied with analogous provisions in their colonial charters. *See* Grace Brosofsky, Michael C. Dorf, and Lawrence F. Tribe, "State Legislators Cannot Act Alone in Assigning Electors," in *Dorf on La*w, September 25,2020, http://www.dorfonlaw.org/2020/09/state-legislatures-cannot-act-alone-in.htmlm, with links to a longer memorandum, at https://drive.google.com/file/d/109FpcfXzXwcpJL43pgaTBmh-PD9pgDLx/view.

Constitution of Colorado already contains such a provision, and other states may wish to consider following suit. (A draft amendment is in Appendix B.) Such an amendment could be submitted to the people through legislative referral or by initiative petition.[13]

While state constitutional amendments would furnish only a patchwork of remedies,[14] federal legislation could and should resolve the issue nationwide. The long-overlooked provisions of Section 2 of the Fourteenth Amendment[15]—combined with Congress's enforcement powers under Section 5—might authorize such legislation. Under the plain language of Section 2, if the right to vote with respect to presidential elections is "abridged" in "any manner," the abridging state "shall" lose—on a proportional basis—its representation in the House and in the Electoral College. "Proportionality" does not present a problem; in the case of exclusive legislative appointment of a state's presidential electors, all of the people in that state would be deprived of the right to vote for president. Because the only office for which the right to vote would have been abridged is that of President/Vice President, "appropriate" legislation could limit the penalty to presidential electors.

[13] An initiative could also prevent legislators from giving themselves the authority to appoint electors regardless of the state's election outcome, which would provide a safeguard in states like Arizona where a bill is currently pending that expressly authorizes the Legislature to appoint electors at any time.

[14] In the long term, an amendment to the U.S. Constitution that requires the direct election of electors based on the popular vote would be a complete remedy. A draft amendment is set out in Appendix B. This essay concerns near-term remedies, however, and discussion of such an amendment is beyond the scope of this essay.

[15] Peter Shane developed a similar Section 2 argument in. Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 Fla.St.U.L.Rev. 535, 539-50 (2001-02). Shane claimed an unconditional right to vote anchored in Section 2 sufficient to empower a court to enjoin legislative usurpation. Shane's point was critiqued in the same symposium in Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in Bush v. Gore*, 29 Fla.St.U.L.Rev. 587, 589-93 (2001-02). State legislative actions both before and, increasingly, since the 2020 election belie Karlan's hope that Section 2 might not matter much because state legislatures would be unlikely to deny their citizens the right to vote for president.

Congress has the ultimate power to count electoral votes, and legislation governing that process is an appropriate means to implement the Fourteenth Amendment's requirements. It might suffice to add a definition to the current Electoral Count Act. (This is set out in Appendix B.) The substance could be incorporated into other bills for amending the Electoral Count Act.

The Supreme Court's decision in *McPherson v. Blacker*[16] poses some serious challenges to this theory, however. The Court held unanimously, in an opinion by Chief Justice Fuller, that Section 2 of the Fourteenth Amendment does not itself create a right to vote—the right to vote is established in state laws and constitutions. The Court said there was "no color for the contention" that Section 2 itself establishes a right to vote for all (males) upon turning 21. Yet this point—declared in an era of strong states' rights and the tightening stranglehold of Jim Crow—overlooks the plain text of the Constitution and the history of its adoption. While Section 2 does not create a "right" of universal suffrage as such, the Constitution, as amended, establishes universal suffrage as the yardstick against which denial or abridgment of the right is to be measured—and as the starting point for Congress when drafting "appropriate legislation." Once a state establishes a right to vote, any denial or abridgement, for any reason, should put at risk that state's representation in Congress and all but three of its electoral votes. The question of whether a state, having established a general right to vote, could, consistent with Section 2 of the Fourteenth Amendment, then deprive the people of the right to vote for President was not an issue in *McPherson*. [17]

The text of Section 2, by delineating all the offices for which the right to vote is to be protected, implies strongly that federal elections and state elections will be treated on an equal

[16] 146 U.S. 1, 38-39 (1892),

[17] The *McPherson* Court did state that in cases of legislative appointment of electors, there can be no discrimination, under Section 1 of the Fourteenth Amendment, between classes of voters. 146 U.S. at 39-40. That *dictum* is a reading of Section 1, not Section 2.

basis. Indeed, in the congressional debates, the example given to answer the question of what the term "abridged" means, was when voters are allowed to vote in some elections but not in others.[18]

A supplemental source of congressional power may further be found in the responsibility of the United States to assure to all the states a "republican form of government," per Article IV, Section 4 of the Constitution.[19] The Fourteenth Amendment itself was adopted in furtherance of that power, setting forth terms that states which did not have proper governments would need to fulfill in order to be re-admitted to the Union.[20]

State legislators chosen in elections several years before a presidential election cannot be considered representative of the people (in any reasonable sense of the term "representative") when it comes to voting for candidates whose identity may not have been known at the time their state legislative elections occurred. While such a system was part of the original design—with its hope of consensus choices who would be above the fray—it runs counter to the transformation of the presidency through the emergence of partisan politics and the structure of the presidential

[18] CONG. GLOBE, 38th Cong., 1st Sess. 2767 (1868). *See* George D. Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 104 (1961).

[19] President Benjamin Harrison's December 9, 1891 Address to Congress (Appendix C) made the point well. The address devoted 10 paragraphs to the "Miner Law" that gave rise to *McPherson*, in which the Fourteenth Amendment and its language referring to elections for president were in issue. Even self-proclaimed textualists almost surely would have to concede that Article 4's reference to "Republican form of government" did not foreshadow preference for a particular political party.

[20] In his "Great Reconstruction Speech," Sen. Oliver P. Morton decried the state governments that had been set up by President Johnson on the ground that they had failed to fulfill the first duty of republican government, that of protecting the people from mob violence in the exercise of their rights. There had been widespread murders of loyal Americans, both Black and white, and not one case had been successfully prosecuted. Both the Fourteenth Amendment and the Reconstruction statutes were aimed at restoring truly republican government. Some 2 million copies of Morton's January 1868 address were printed and distributed in the course of Grant's presidential campaign. The speech is set out in full in WILLIAM DUDLEY FOULKE, LIFE OF OLIVER P. MORTON VOL. II 15-43 (1899), https://archive.org/details/lifeofoliverpmor02foul/page/7/mode/2up. The address was delivered while the Fourteenth Amendment was pending before the states, and Morton played key roles in the adoption of both the Fourteenth and Fifteenth Amendments, *id*.; A. JAMES FULLER, OLIVER P. MORTON AND THE POLITICS OF THE CIVIL WAR AND RECONSTRUCTION (2017). Leading historians (1906 and 2020) continue to identify Morton as the 19th Century's "most assiduous and convincing exponent" for the cause of presidential election reform. Dougherty, *supra*, note 5, 344-349; Keyssar, *supra* note 7, 124.

selection process created by the Twelfth Amendment.[21] In turn, the Fourteenth Amendment, Section 2, furnishes a textual basis for requiring that elections for President be conducted on an equal basis with other elections—on pain of loss of all but three Electoral College votes. Not only this constitutional text, but the underlying purpose of Section 2—that southern states would be admitted on the basis of equality, under which the value of votes in the North and South would be generally equal—require that presidents be chosen by the people through elections.[22]

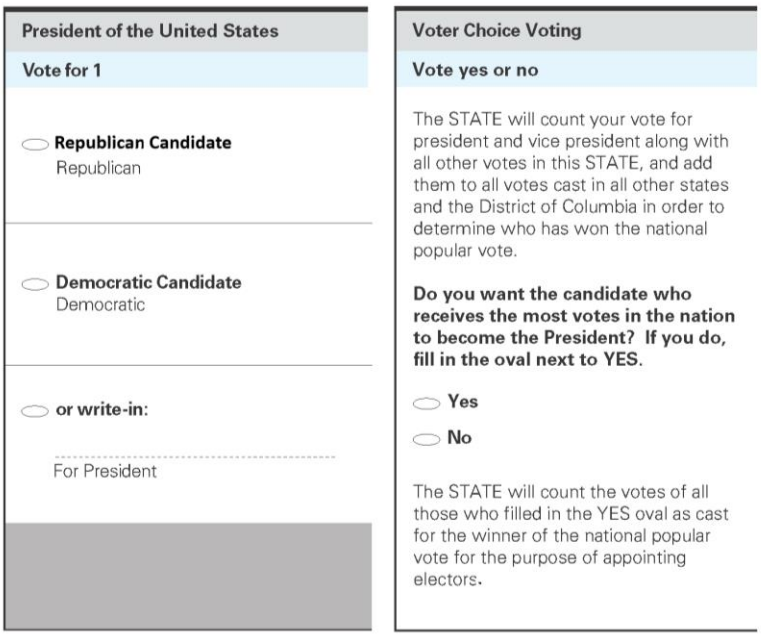
Conclusion

Making every vote count is no longer simply a progressive call for change to a centuries-old system. It is the only effective way to maintain our democratic system, which is currently under siege. We must protect the individual voter's decision placed inside the ballot box by strengthening the vote counting process, by preventing federal interference with elections, and by making the national popular vote relevant to the outcome of the election for the nation's Chief Executive. Even without a constitutional amendment, meaningful presidential election reform is feasible through both federal and state governments. The people—the ultimate sovereigns of the Republic—will choose the president through reforms such as the Voter Choice Ballot. Yet Congress must ensure that the people are heard by their state governments as well. After the 2020 election, opportunities for authoritarian exploitation of the holes in our current electoral system seem almost boundless. Safeguarding presidential elections is required to ensure that America is more democratic and bound by the rule of law.

[21] *See* note 1.

[22] In the congressional debates on Section 2 of the Fourteenth Amendment, Ohio Republican Representative Ephraim Eckley pointed out that without Section 2, two white rebels in South Carolina would have the same political power as five white loyalists in Ohio, Pennsylvania, or New York. CONG. GLOBE, 39th Cong., 1st Sess. 2535 (1869).

APPENDIX A: VOTER CHOICE BALLOT



President of the United States

Vote for 1

- **Republican Candidate**
  Republican
- **Democratic Candidate**
  Democratic
- **or write-in:**
  For President

Voter Choice Voting

Vote yes or no

The STATE will count your vote for president and vice president along with all other votes in this STATE, and add them to all votes cast in all other states and the District of Columbia in order to determine who has won the national popular vote.

Do you want the candidate who receives the most votes in the nation to become the President? If you do, fill in the oval next to YES.

- **Yes**
- **No**

The STATE will count the votes of all those who filled in the YES oval as cast for the winner of the national popular vote for the purpose of appointing electors.

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

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

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

Second, the Ballot asks whether you would like your vote to count for the winner of the national vote, whoever that may be. If you vote "yes," then your state will count your vote for whichever candidate won the national popular vote, whether or not that candidate was your expressed preference. If you vote "no," then your state will count your vote for your expressed preferred ticket, even if that candidate did not win the national popular vote.

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

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

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

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

APPENDIX B: DRAFT LEGISLATION

State Constitutional Amendment

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

Federal Legislation
3 U.S.C. § 1(a):

> Definitions:
> The terms "regularly given by electors whose appointment has been so certified," "lawful electors appointed in accordance with the laws of the State," and "lawful votes of legally appointed electors" (Section 15) apply only to electors appointed as the result of an election by the state's qualified voters or an election based in whole or in part on the result of the nationwide popular vote; provided, a state whose electors are appointed by the legislature shall be entitled to three (3) electoral votes, to be chosen by lot, unless the electoral votes of electors chosen by direct vote of the people are counted.

Amendment to the U.S. Constitution

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

> Each State, by a vote of the people thereof qualified to vote for Representatives in Congress, shall cast a Number of whole or fractional Electoral Votes, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. Each State shall prescribe by law the manner of holding such elections; but Congress may at any time by uniform law approved by two thirds of each chamber make or alter such regulations and may, by law approved by two thirds of each chamber, prescribe that Electoral Votes shall be awarded to the presidential/vice presidential candidates who receive the largest number of direct votes of the people among all of the states and the District of Columbia.
>
> Provisions relating to the office of elector and counting the votes of electors in Article II, Section 1 and in the 12th Amendment are repealed.

APPENDIX C: EXCERPTS FROM PRESIDENT HARRISON'S DECEMBER 9, 1891 ANNUAL MESSAGE TO CONGRESS[23]

> An election implies a body of electors having prescribed qualifications, each one of whom has an equal value and influence in determining the result. So when the Constitution provides that "each State shall appoint" (elect), "in such manner as the legislature thereof may direct, a number of electors," etc., an unrestricted power was not given to the legislatures in the selection of the methods to be used. "A republican form of government" is guaranteed by the Constitution to each State, and the power given by the same instrument to the legislatures of the States to prescribe methods for the choice by the State of electors must be exercised under that limitation. The essential features of such a government are the right of the people to choose their own officers and the nearest practicable equality of value in the suffrages given in determining that choice. . . .
>
> . . . Respect for public officers and obedience to law will not cease to be the characteristics of our people until our elections cease to declare the will of majorities fairly ascertained without fraud, suppression, or gerrymander. If I were called upon to declare wherein our chief national danger lies, I should say without hesitation in the overthrow of majority control by the suppression or perversion of the popular suffrage. . . .
>
> . . . . If a legislature chosen in one year upon purely local questions should, pending a Presidential contest, meet, rescind the law for a choice upon a general ticket, and provide for the choice of electors by the legislature, and

[23] https://www.presidency.ucsb.edu/documents/third-annual-message-14.

this trick should determine the result, it is not too much to say that the public peace might be seriously and widely endangered.