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RAMSHACKLE FEDERALISM: AMERICA'S ARCHAIC AND DYSFUNCTIONAL PRESIDENTIAL ELECTION SYSTEM

*Anthony J. Gaughan**

INTRODUCTION

Although the presidency is the most powerful public office in the United States, the federal government plays a modest role in presidential elections. Reflecting the nation's foundation on federalist principles, federal involvement in the presidential election system is largely limited to protecting voter rights and regulating campaign contributions.

In most other key respects, the election system is decentralized to a remarkable degree. Unique among major democracies, the American presidential election is administered by over 13,000 state and local jurisdictions.¹ Those jurisdictions have widely different rules regarding everything from the type of ballot used to the methods employed in recounts. Most remarkable of all, the President is determined not by a nationwide popular vote but rather by a complicated Electoral College formula that emphasizes winning states rather than winning a national majority of votes overall.

The extremely decentralized nature of the American presidential election system may reflect the triumph of federalism, but it is a shambolic and ramshackle version of federalism. The uncomfortable truth is that the United States relies on an archaic and dysfunctional process for electing the most powerful leader in the world. Although the Constitution has sacrosanct status in American popular imagination, the nation's founding

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1. See ALEC C. EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 3–8 (2009); MARTHA KROPF & DAVID C. KIMBALL, HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM 114 (2012); PRESIDENTIAL COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 1 (2014), <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> [<https://perma.cc/D5KW-6QYD>]; Jill Ornitz, *Donald Trump Claims the Election Might Be "Rigged." Here's How Voting Really Works*, L.A. TIMES (Aug. 12, 2016, 9:30 AM), <http://www.latimes.com/politics/la-na-pol-presidential-election-process-20160812-snap-htmstory.html> [<https://perma.cc/6GVM-JC5K>].

document is part of the problem. Article II establishes the antidemocratic Electoral College for electing the President. Since 1789, four candidates have won the presidency despite losing the popular vote, and seven other candidates have come close to achieving the same feat.² Even in routine elections, the Electoral College fails to promote the federalist cause of empowering the states. Every four years, it discriminates against forty states by making ten states singularly important in electing the President.³

The outdated nature of the Electoral College only scratches the surface of the election system's problems. For example, federal campaign contribution limits treat presidential candidates as though they are competing for local office rather than running to lead a country of 320 million people. The U.S. Supreme Court's *Citizens United v. FEC*⁴ decision compounded the problem by giving outside groups a huge fundraising advantage over candidate campaigns. Even incumbent Presidents seeking reelection must now rely on the assistance of unaccountable Super PACs.⁵ Equally problematic, the byzantine, parochial, and decentralized nature of the American presidential election system renders the country poorly prepared for resolving close contests in a fair and accurate manner. Moreover, despite many warnings, the government has failed to adequately plan for potential election disruptions such as terrorism, cyberattacks, and natural disasters.

We can and must do better. Accordingly, this Article proposes five sensible and achievable reforms to modernize the presidential election system. Each requires Congress and the federal government to play a much more proactive role in the presidential election system. The Constitution may be founded on federalist principles, but excessive decentralization is not serving us well in presidential election administration. In an age of tumultuous and accelerating change, the presidential election system must be modernized to meet the needs of twenty-first century America.

I. AN ARCHAIC AND DYSFUNCTIONAL PRESIDENTIAL ELECTION SYSTEM

America's election system has failed to keep pace with the modern age in four critical areas: (1) the financing of presidential campaigns, (2) the method of electing the President, (3) the administration of elections, and (4) the management of emergency planning. The disorganized and outdated system undermines America's status as one of the world's leading democracies.

2. GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* 57–73 (2004).

3. *See generally* PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER (Stacey Hunter Hecht & David Schultz eds., 2015).

4. 558 U.S. 310 (2010).

5. Robert Barnes, *Alito v. Obama: Reactions Split on Obama's Remark, Alito's Response at State of the Union*, WASH. POST (Jan. 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html> [<https://perma.cc/X4RJ-DZU4>].

A. *A Broken Presidential Campaign Finance System*

The problems with the presidential election system begin with federal campaign finance law. Although the public and media view the American election system as awash in money, the reality is that is only half true. In the landmark 1976 case of *Buckley v. Valeo*,⁶ the Supreme Court upheld the constitutionality of contribution limits but ruled that expenditure caps impermissibly burdened citizens' First Amendment rights.⁷ Consequently, the United States is one of the few advanced democracies in the world that imposes low contribution limits on candidates but no overall expenditure caps.⁸

American regulators' focus on low contribution limits is a product of the Watergate scandal of the 1970s. In response to the Nixon administration's scandalous fundraising practices, Congress established a \$1,000 limit on contributions to federal candidates as part of the 1974 amendments to the Federal Election Campaign Act (FECA).⁹ In the Bipartisan Campaign Reform Act of 2003 (BCRA), Congress raised the limit to \$2,000 and indexed it to inflation.¹⁰ In the 2015–2016 election cycle, the federal contribution limit for individuals was \$2,700 per election.¹¹

The extraordinarily low level of federal contribution limits is apparent when contrasted with the massive amounts spent on federal campaigns, especially in presidential races. In 2012, federal election costs reached a record high of \$7 billion.¹² Controlling for inflation, federal campaign costs were four times higher in 2008 than in 1972,¹³ and costs continue to go up. Between 1984 and 2012, federal campaign costs rose 555 percent, a faster rate than the increase in healthcare expenditures.¹⁴ The skyrocketing cost of presidential campaigns reflects the unavoidable fact that political commercials, campaign staff, and nationwide travel are exceedingly expensive in a continent-wide country of 320 million people.

The combination of low contribution limits and no expenditure caps puts presidential candidates on a relentless fundraising treadmill like no other

6. 424 U.S. 1 (1976).

7. *See id.* at 58.

8. *See* Paul Waldman, *How Our Campaign Finance System Compares to Other Countries*, AM. PROSPECT (Apr. 4, 2014), <http://prospect.org/article/how-our-campaign-finance-system-compares-other-countries> [<https://perma.cc/45MM-HNR9>].

9. *See Buckley*, 424 U.S. at 27.

10. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 41 (Anthony Corrado et al. eds., 2005).

11. *See Quick Answers to General Questions*, FEC, http://www.fec.gov/answers_general.shtml (last visited Nov. 19, 2016) [<https://perma.cc/UL5N-VZNN>].

12. *See* Press Release, FEC, *FEC Summarizes Campaign Activity of the 2011–2012 Election Cycle* (Apr. 19, 2013), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml [<https://perma.cc/L5K8-A68S>].

13. *See* Dave Gilson, *The Crazy Cost of Becoming President, from Lincoln to Obama*, MOTHER JONES (Feb. 20, 2012, 7:00 AM), <http://www.motherjones.com/mojo/2012/02/historic-price-cost-presidential-elections> [<https://perma.cc/GJ44-26QY>].

14. *See* Michael Scherer, Pratheek Rebala & Chris Wilson, *The Incredible Rise in Campaign Spending*, TIME (Oct. 23, 2014, 12:39 PM), <http://time.com/3534117/the-incredible-rise-in-campaign-spending/> [<https://perma.cc/T9AA-NJHP>].

major western democracy.¹⁵ The daunting challenge of campaign fundraising deters many worthy candidates from running for office.¹⁶ The 2016 campaign was no exception. In 2015, Hillary Clinton's presidential campaign raised \$112 million, the most ever for a Democratic presidential candidate in a preelection year.¹⁷ Clinton's fundraising advantage was a significant factor in Vice President Joseph Biden's decision not to enter the race.¹⁸

On the Republican side, Jeb Bush's failure to convert his \$130 million war chest into primary victories does not disprove the importance of fundraising.¹⁹ The vast majority of Bush's money was controlled by his Super PAC,²⁰ which could receive unlimited donations, and not by the Bush campaign itself, which was limited to contributions in amounts of \$2,700. Barred from coordinating with Bush himself, the Super PAC made the questionable decision to attack Florida Senator and GOP presidential candidate Marco Rubio rather than focus its attack on Donald Trump, the eventual Republican nominee.²¹ Jeb Bush's own campaign committee lacked the funds necessary to mount a sustained advertising onslaught on Trump when there might still have been a chance to stop the reality TV star's momentum.²² Trump's success in the Republican primaries reflected

15. Justice White predicted just such a development in his *Buckley* dissent. See *Buckley v. Valeo*, 424 U.S. 1, 265 (1976) (White, J., dissenting in part and concurring in part).

16. See FRANK J. SORAU, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 188 (1992); PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM* 12–13 (2009).

17. See Reena Flores, *Hillary Clinton Raises \$55 Million in Fourth-Quarter Fundraising*, CBS NEWS (Jan. 1, 2016, 2:15 PM), <http://www.cbsnews.com/news/hillary-clinton-raises-55-million-in-fourth-quarter-fundraising/> [<https://perma.cc/JV4V-DFKY>].

18. See Gloria Borger et al., *Inside Biden's Decision Not to Run*, CNN (Oct. 22, 2015, 11:18 AM), <http://www.cnn.com/2015/10/21/politics/joe-biden-2016-decision-timeline/> (“Biden concluded there was simply not sufficient time left to raise enough money.”) [<https://perma.cc/576C-GU62>].

19. See Nicholas Confessore & Sarah Cohen, *How Jeb Bush Spent \$130 Million Running for President with Nothing to Show for It*, N.Y. TIMES (Feb. 22, 2016), <http://www.nytimes.com/2016/02/23/us/politics/jeb-bush-campaign.html> [<https://perma.cc/Q3EN-V7VJ>].

20. See Seema Mehta, *Super PAC Consultant Who Spent \$100 Million on Jeb Bush Is Unapologetic*, L.A. TIMES (Mar. 8, 2016, 3:00 AM), <http://www.latimes.com/politics/la-na-mike-murphy-20160308-story.html> [<https://perma.cc/SS6X-AB5N>]; see also Matea Gold, *Nearly \$100 Million in Super PAC Money Couldn't Save Jeb Bush*, WASH. POST (Feb. 20, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/20/nearly-100-million-in-super-pac-money-couldnt-save-jeb-bush/> [<https://perma.cc/T2FE-48XM>].

21. See Farai Chideya, *Trump Attack Ads Are Finally Popping Up, but They Might Be Too Late*, FIVETHIRTYEIGHT (Mar. 15, 2016, 5:00 PM), <http://fivethirtyeight.com/features/trump-attack-ads-are-finally-popping-up-but-they-might-be-too-late/> [<https://perma.cc/7FD B-W5XY>]; Ashley Parker & Maggie Haberman, *As Jeb Bush Struggles, Some Allies Blame His “Super PAC.”* N.Y. TIMES (Jan. 21, 2016), <http://www.nytimes.com/2016/01/22/us/politics/jeb-bush-right-to-rise-super-pac.html> [<https://perma.cc/YY7M-EGCR>]; Eli Stokols, *Republicans Warn Bush Team Against Harming Rubio*, POLITICO (Jan. 13, 2016, 5:10 AM), <http://www.politico.com/story/2016/01/republicans-warn-bush-team-against-harming-rubio-217651> [<https://perma.cc/FSX2-UM7V>].

22. See Peter Overby, Arnie Seipel & Domenico Montanaro, *As Bush Campaign Goes down, the Knives Come Out*, NPR (Feb. 23, 2016, 6:00 AM), <http://www.npr.org/2016/02/>

the potent media power wielded by celebrities. Indeed, a March 2016 study found that Trump's celebrity status and unrivaled access to the national media conferred on him free advertising that would have required nearly \$2 billion dollars in paid expenditures for a normal candidate.²³

The vast amounts of money necessary for a noncelebrity to run for the White House underscore what a paltry sum \$2,700 is for presidential candidates. Indeed, proportionally speaking, the \$2,700 contribution limit on presidential candidates is effectively far lower than the same contribution limit on congressional candidates. The average U.S. House of Representatives district has 710,000 people²⁴ and the average state has about six million people. In contrast, presidential candidates compete in an electorate of 320 million people, a task that requires vastly greater expenditures. In 2012, the average House campaign cost \$1.5 million and the average Senate campaign cost \$11 million,²⁵ whereas in the 2012 presidential election, Barack Obama spent \$1.1 billion and Mitt Romney spent \$1.2 billion.²⁶ Yet, FECA imposes the exact same contribution limit—\$2,700 per donor per election—on presidential candidates as it does on congressional candidates.²⁷

Low presidential contribution limits also contrast sharply with the higher limits that many states place on gubernatorial candidates. In California, for example, gubernatorial candidates may receive individual contributions of up to \$28,200 per election.²⁸ California is not alone; nineteen other states set their contribution limits for gubernatorial candidates above the level imposed on presidential candidates by FECA.²⁹ Moreover, twelve states—including large states like Texas and small states like Iowa—impose no contribution limits on gubernatorial and state legislative candidates.³⁰ Consequently, while a presidential candidate competing in the Iowa caucuses is limited to contributions in amounts of \$2,700 or less, a state legislative candidate running in a small district in rural Iowa may receive

23/467745559/where-did-all-that-jeb-bush-superpac-money-go [https://perma.cc/VJN2-VH LR].

23. See Nicholas Confessore & Karen Yourish, *\$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES (Mar. 15, 2016), <http://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html> [https://perma.cc/3NM6-2G3R].

24. *Proportional Representation*, HIST. ART & ARCHIVES U.S. HOUSE REPRESENTATIVES, <http://history.house.gov/Institution/Origins-Development/Proportional-Representation/> (last visited Nov. 19, 2016) [https://perma.cc/ZVD6-U5ZQ].

25. See Russ Choma, *Money Won on Tuesday, but Rules of the Game Changed*, OPEN SECRETS (Nov. 5, 2014), <http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed/> [https://perma.cc/FU7Y-EFZD].

26. See *2012 Presidential Race*, OPEN SECRETS (Mar. 25, 2013), <http://www.opensecrets.org/pres12/> [https://perma.cc/KC58-VR69].

27. *Quick Answers to General Questions*, *supra* note 11.

28. See CTR. FOR COMPETITIVE POLITICS, STATE LIMITS ON INDIVIDUAL CONTRIBUTIONS TO CANDIDATES, PER ELECTION CYCLE (2015), http://www.campaignfreedom.org/wp-content/uploads/2013/12/2015-07-15_Limit-Tables_State-Contribution-Limits-On-Individual-To-Candidate-Giving_Alphabetical-And-Ranked.pdf [https://perma.cc/88PA-P53Y].

29. See *id.*

30. See *id.*

unlimited donations. The lack of contribution limits in states like Iowa does not lead to higher levels of corruption.³¹ For example, a 2014 study in the *Public Administration Review* found that Iowa was one of the least corrupt states in the country.³²

Two recent changes to the presidential fundraising landscape have rendered the \$2,700 limit particularly inappropriate and anachronistic. The first is the demise of the presidential public funding system. When Congress adopted the 1974 FECA amendments, it attempted to lessen the fundraising burden on presidential candidates by providing federal funds for the major party nominees.³³ The public funds came with a catch: candidates who accepted the funds had to agree to an overall expenditures cap.³⁴ But in the 2008 general election, Barack Obama declined to accept public funding—a decision that dealt a deathblow to the system³⁵ because of the enormous advantage Obama gained from opting out. John McCain, Obama's opponent, agreed to limit his spending to \$84 million in order to receive public funding,³⁶ a decision that backfired on the Republican nominee's campaign. Obama ultimately raised \$337 million, an amount that permitted him to outspend McCain by a margin of four to one.³⁷ Not surprisingly, a postelection survey found that 64 percent of voters remembered seeing Obama campaign advertisements, whereas only 12 percent remembered seeing McCain ads.³⁸ The decisive financial advantage the Obama campaign gained by rejecting public funds makes it unlikely future candidates will revive the system.³⁹ Serious presidential candidates thus have no realistic choice other than to rely exclusively on privately raised funds.

The second major development is the Supreme Court's 2010 *Citizens United* decision.⁴⁰ Under *Citizens United* and the D.C. Circuit's subsequent decision in *Speechnow.org v. FEC*,⁴¹ independent expenditure groups may receive unlimited contributions.⁴² *Citizens United* gave rise to Super PACs,

31. See WALLISON & GORA, *supra* note 16, at 44 (“[T]here is no evident or prevalent pattern of corruption in . . . no-limit states.”).

32. See Cheol Liu & John L. Mikesell, *The Impact of Public Officials' Corruption on the Size and Allocation of U.S. State Spending*, 74 PUB. ADMIN. REV. 346, 351 (2014); Chris Matthews, *The 10 Most Corrupt States in the U.S.*, FORTUNE (June 10, 2014, 1:55 PM), <http://fortune.com/2014/06/10/most-corrupt-states-in-america/> [https://perma.cc/6BD9-W6NZ].

33. See R. SAM GARRETT, CONG. RESEARCH SERV., RL34534, PUBLIC FINANCING OF PRESIDENTIAL CAMPAIGNS: OVERVIEW AND ANALYSIS 4–5 (2014); ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 139–44 (2014).

34. GARRETT, *supra* note 33, at 9.

35. See Anthony Corrado, *Financing the 2008 Presidential General Election*, in FINANCING THE 2008 ELECTION 127, 159–60 (David B. Magleby & Anthony J Corrado eds., 2011).

36. See GARRETT, *supra* note 33, at 9.

37. Corrado, *supra* note 35, at 150–51.

38. *Id.* at 159.

39. *Id.* at 159–60.

40. *Citizens United v. FEC*, 558 U.S. 310 (2010).

41. 599 F.3d 686 (D.C. Cir. 2010).

42. See RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 17–19, 29–33 (2016).

outside groups that are exempt from FECA's contribution limits as long as they do not coordinate their activities with candidate campaigns.⁴³ But lost in the controversy over *Citizens United* was the fact that the Court did not lift the contribution limits on candidate campaigns.⁴⁴ The result is presidential candidate campaigns face a significant competitive disadvantage in fundraising. Indeed, the *Citizens United* decision is precisely why Jeb Bush's Super PAC raised \$70 million more than his campaign did.

Consequently, even critics have no choice but to embrace Super PACs. In his January 2010 State of the Union address, President Barack Obama condemned the *Citizens United* decision for unleashing a flood of money into American election campaigns.⁴⁵ Yet, two years later, Obama himself supported the creation of Priorities USA, a pro-Obama Super PAC.⁴⁶ The fact that even an incumbent President needs a Super PAC demonstrates the extent to which FECA's contribution limits have failed to keep up with a rapidly changing campaign finance world.

The collapse of the public funding system and the rise of Super PACs have rendered low presidential contribution limits an anachronistic relic of the post-Watergate reforms. But the method of electing the President is even more outdated.

B. The Electoral College

Although the media devotes an inordinate amount of coverage to national presidential polls,⁴⁷ the United States does not elect its President through a nationwide popular vote. Under the Electoral College, the presidential race is determined by fifty separate state elections plus the three electoral votes at stake in the District of Columbia. The state-oriented nature of the Electoral College reflects its ad hoc origins in a political compromise at the Constitutional Convention in 1787.⁴⁸ Although politicians often boast that the nation was founded on democratic principles, the reality is that the Constitution's Framers distrusted direct democracy and embraced instead

43. *Id.* at 33–34.

44. See *Quick Answers to General Questions*, *supra* note 11.

45. Barnes, *supra* note 5.

46. Lauren Fox, *Obama Campaign Gets in the Super PAC Game*, U.S. NEWS & WORLD REP. (Feb. 7, 2012, 1:32 PM), <http://www.usnews.com/news/blogs/washington-whispers/2012/02/07/obama-campaign-gets-in-the-super-pac-game-> [<https://perma.cc/Y5NX-BY4E>]; Fredreka Schouten, *Obama Now Urges Donations to Super PAC Backing Him*, USA TODAY (Feb. 7, 2012, 11:04 PM), <http://usatoday30.usatoday.com/news/politics/story/2012-02-07/obama-super-pac-reversal/53002966/1> [<https://perma.cc/PTL5-8MSP>].

47. See Thomas E. Patterson, *News Coverage of the 2016 Presidential Primaries: Horse Race Reporting Has Consequences*, SHORENSTEIN CTR. (July 11, 2016, 6:00 AM), <http://shorensteincenter.org/news-coverage-2016-presidential-primaries/> [<https://perma.cc/5629-LLC9>].

48. For a discussion of the ad hoc nature of the Electoral College, see Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35 (1986).

the concept of a federal republic composed of sovereign states.⁴⁹ The Electoral College both promoted the Framers' federalist vision and facilitated the Constitution's adoption by attracting the support of large and small, as well as free and slaveholding, states.⁵⁰ Ever since, one of the primary defenses of the Electoral College is that the use of a state-based presidential electoral system honors the Framers' federalist vision.⁵¹

But times have changed. In 1789, the President was elected by a confederation of states that limited suffrage to white male property holders and expected citizens to pay their primary allegiance to state, not federal, authorities. In 2016, by contrast, the President leads a diverse, global superpower in which the primary allegiance of citizens is to the nation, not to one's state. The change resulted from the North's victory in the Civil War, which made clear that national authority supersedes state sovereignty.⁵² Thus, by treating the country as a mere confederation of states, the Electoral College fails to reflect the remarkable nation that America has become.

The Electoral College also is inconsistent with modern democratic norms.⁵³ Democratic values and egalitarian principles play a far more central role in American constitutional law today than they did in the 1780s. As Akhil Amar has noted, the principle of "one person, one vote" that the Supreme Court adopted in the 1964 case *Reynolds v. Sims*⁵⁴ has transformed "American constitutional practice."⁵⁵ The Electoral College, in contrast, violates the cornerstone democratic principle of majority rule. A product of a bygone age, it invests control of the selection of the President in the hands of 538 individual electors rather than the American people as a whole. Although just over half the states have enacted statutes

49. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 3–4, 21–25 (2000); TARA ROSS, *ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE* 31–59 (2004).

50. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 157–59 (2006); DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 61, 282 (2007); Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 *CARDOZO L. REV.* 1145 (2002). For a contrary view, see generally Earl M. Maltz, *The Presidency, the Electoral College, and the Three-Fifths Clause*, 43 *RUTGERS L.J.* 439 (2013).

51. See JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* 119–23, 205–18 (1971); ROSS, *supra* note 49, at 58 ("Removing states from the presidential election process would undermine the federalist nature of the American republic."); Gary L. Gregg II, *The Origins and Meaning of the Electoral College*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 1, 10–26 (Gary L. Gregg II ed., 2001).

52. See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 26–44 (2003) (discussing sovereignty and federalism). See generally CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008); FORREST McDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876* (2000); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425 (1987).

53. See, e.g., EDWARDS III, *supra* note 2, at 31–54.

54. 377 U.S. 533 (1964).

55. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 463 (2012).

to bind the electors to the state's popular vote,⁵⁶ many scholars contend that the Constitution empowers electors to vote for whomever they want, even if state law directs them to honor the will of the voters.⁵⁷ History makes clear that the problem of faithless electors is not merely conjectural. Since 1789, there have been several isolated cases in which individual electors have broken faith with their state's electorate by voting for someone other than the candidate chosen by the state's voters.⁵⁸ Potentially, therefore, a faithless elector could change the outcome of a close presidential race, a scenario that would trigger a constitutional crisis of the highest order.⁵⁹

Equally troubling, in the event that no candidate wins a majority of the electoral vote, the Constitution directs that the House of Representatives determine the presidential contest in what is known as a "contingent" election.⁶⁰ The Twelfth Amendment provides that in the contingent election, each House delegation, casting a single vote, must choose from among the top three finishers in the Electoral College.⁶¹ Balloting continues until a candidate wins a majority of state delegations. As George Edwards has observed, the contingent election in the House "represents the most egregious violation of democratic principles in the American political system" because each state's vote receives the same weight regardless of population.⁶² Thus, in the contingent election, North Dakota, a state of 756,000 people, has as much say as California, a state of 39 million.⁶³ Making matters worse, the Twelfth Amendment is so vague regarding the procedures the House should use to elect the President that scholars have described the amendment as a "ticking time bomb."⁶⁴

The possibility of a contingent election is rising. As the 2016 presidential campaign demonstrated, the American people are profoundly dissatisfied with the two major political parties. A recent Gallup poll revealed that Republican and Democratic Party identification is at an all-time low.⁶⁵ A 2015 Pew Research Center poll found that 39 percent of Americans identify as independents, the highest level in the survey's

56. See ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 97, 104–11 (2006); EDWARDS III, *supra* note 2, at 25; Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 690 (1996).

57. See, e.g., EDWARDS III, *supra* note 2, at 25–26.

58. See BENNETT, *supra* note 56, at 96–97; EDWARDS III, *supra* note 2, at 21–24.

59. See BENNETT, *supra* note 56, at 102–04.

60. See EDWARDS III, *supra* note 2, at 55.

61. U.S. CONST. amend. XII.

62. See EDWARDS III, *supra* note 2, at 55.

63. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, U.S. CENSUS BUREAU AM. FACT FINDER, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2015_PEPANNRES&src=pt (last visited Nov. 19, 2016) [<https://perma.cc/U7EE-V3JF>].

64. See generally Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475 (2010).

65. See Jeffrey M. Jones, *Democratic, Republican Identification near Historical Lows*, GALLUP (Jan. 11, 2016), <http://www.gallup.com/poll/188096/democratic-republican-identification-near-historical-lows.aspx> [<https://perma.cc/WE8E-5ELD>].

seventy-five-year history.⁶⁶ Thus, polling trends strongly suggest that third-party candidates could be a major factor in future presidential elections, a development that will increase the chances of a three-way split in which no candidate receives 270 electoral votes.

Even from its earliest days, the Electoral College worked poorly. In 1800, Thomas Jefferson and his running mate Aaron Burr tied in the Electoral College, throwing the election into the House of Representatives and setting off a national crisis.⁶⁷ The deadlock was not resolved until February 7, 1801, after thirty-six ballots and Alexander Hamilton's instruction to his Federalist allies to support Jefferson.⁶⁸ Although the adoption of the Twelfth Amendment in 1803 prevented a recurrence of a deadlock along the lines of Jefferson-Burr,⁶⁹ the Electoral College has continued to give rise to countermajoritarian results. John Quincy Adams in 1824, Rutherford B. Hayes in 1876, Benjamin Harrison in 1888, and George W. Bush in 2000 all won Electoral College majorities despite losing the popular vote.⁷⁰ Moreover, in seven other elections—1836, 1856, 1860, 1948, 1960, 1968, and 1976—a shift of just a few thousand votes would have thrown each of the contests into the House of Representatives.⁷¹

Despite its defenders' claims, the Electoral College does little to promote the "federalist" interests of most states. Ironically, the Electoral College renders much of the country irrelevant in the general election as candidates ignore solidly blue or red states to focus instead on a handful of swing states like Florida and Ohio.⁷² Since the 1830s, almost all states have awarded their electoral votes on a winner-take-all basis,⁷³ with the sole exceptions of Nebraska and Maine.⁷⁴ The winner-take-all basis of the Electoral College renders the forty states that vote reliably Democratic or Republican an afterthought in the great majority of presidential elections. Whereas every state counts in presidential primaries, the same is not true in the general election. For example, states such as California, New York, Alabama, Michigan, Tennessee, and Illinois are routinely ignored by presidential candidates during the general election because each of those states is either safely Republican or safely Democratic.⁷⁵ Consequently, the

66. See *A Deep Dive into Party Affiliation: Sharp Differences by Race, Gender, Generation, Education*, PEW RES. CTR. (Apr. 7, 2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/> [<https://perma.cc/J3QZ-4DDL>].

67. See JON MEACHAM, *THOMAS JEFFERSON: THE ART OF POWER* 330–37 (2012).

68. See *id.* at 337–40.

69. Andrew E. Busch, *The Development and Democratization of the Electoral College*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE*, *supra* note 51, at 27, 33–35.

70. See THOMAS H. NEALE, CONG. RESEARCH SERV., R40895, *ELECTORAL COLLEGE REFORM: 111TH CONGRESS PROPOSALS AND OTHER CURRENT DEVELOPMENTS* 1 n.3 (2009).

71. See EDWARDS III, *supra* note 2, at 61–62.

72. NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES OF AMERICAN POLITICS* 153, 175–76 (12th ed. 2008).

73. See BEST, *supra* note 51, at 22–23.

74. NEALE, *supra* note 70, at 12.

75. See Stacey Hunter Hecht & David Schultz, *Swing States and Presidential Elections*, in *PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER*, *supra* note 3, at xi, xxxv.

ten “swing” states, including Ohio, Florida, Virginia, and Iowa, monopolize the presidential candidates’ attention in the general election.⁷⁶

It is also highly revealing that the states themselves do not elect their governors through an Electoral College system. All fifty states elect their governors through a direct popular vote and for good reason.⁷⁷ Electing a chief executive through a regionally based election system is an obsolete procedure that no sensible polity would embrace unless constitutionally required to do so.

In the end, the best defense of the Electoral College comes from Senator Mitch McConnell, who contends that it spares us from the “nightmare” of a fifty-state recount in the event of a close popular vote.⁷⁸ McConnell has a point. As Florida’s inept performance in the 2000 presidential election demonstrated, many states do a poor job of administering elections. Therefore, any effort to replace the Electoral College must first come to grips with the dysfunctional nature of election administration in the states.

C. Dysfunctional Election Administration

Decentralization lies at the heart of the election administration problem. As Nathaniel Persily has observed, “The first glaring institutional feature evident to even the most casual observer of the U.S. electoral system is the extreme decentralization of administrative responsibilities and policymaking.”⁷⁹ The states administer presidential elections using different registration rules,⁸⁰ different ballots and voting machines,⁸¹ different absentee and early voting laws,⁸² and different postelection audit rules.⁸³ Many states rely on aging machines and outdated technology.⁸⁴

76. See Scott L. McLean, *Purple Battlegrounds: Presidential Campaign Strategies and Swing State Voters*, in *PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER*, *supra* note 3, at 1; see also Stacey Hunter Hecht & David Schultz, *Why Swing States in American Presidential Elections*, in *PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER*, *supra* note 3, at 309.

77. AMAR, *supra* note 55, at 463.

78. Mitch McConnell, *Introduction* to *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE*, *supra* note 51, at xiii, xv.

79. Nathaniel Persily, “Celebrating” the Tenth Anniversary of the 2000 Election Controversy: *What the World Can Learn from the Recent History of Election Dysfunction in the United States*, 44 *IND. L. REV.* 85, 85 (2010).

80. *Voter Registration*, NAT’L CONF. ST. LEGISLATURES (Sept. 27, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-registration.aspx> [<https://perma.cc/KU87-9KSX>].

81. *Voting Equipment: Paper Ballots and Direct-Recording Electronic Voting Machines*, NAT’L CONF. ST. LEGISLATURES (July 7, 2015), <http://www.ncsl.org/research/elections-and-campaigns/voting-equipment.aspx> [<https://perma.cc/F2A6-26M9>].

82. *Absentee and Early Voting*, NAT’L CONF. ST. LEGISLATURES (Oct. 25, 2016), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/8YT7-2P6V>].

83. LAWRENCE NORDEN ET AL., BRENNAN CTR., *POST-ELECTION AUDITS: RESTORING TRUST IN ELECTIONS: EXECUTIVE SUMMARY* (2007), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_50228.pdf [<https://perma.cc/K4DF-JYLP>]; *Post-Election Audits*, NAT’L CONF. ST. LEGISLATURES (June 14, 2016), <http://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx> [<https://perma.cc/AH7U-X8FZ>].

Most concerning of all, the states have abdicated their constitutional responsibility to administer federal elections by delegating administrative duties to counties and municipalities in a process of hyperfederalism.⁸⁵ Although some progress has been made in recent years, the inconsistent, underfunded, and often haphazard manner⁸⁶ in which state and local authorities administer federal elections has not improved substantially enough since the controversial Florida recount in the 2000 presidential election.⁸⁷ Even in non-voter ID states with generous registration procedures, such as California, there are arbitrary, conflicting, and unpredictable voting standards. For example, a July 2016 *Los Angeles Times* investigation found that California's rules for provisional ballots vary significantly from county to county.⁸⁸

Although the states historically have been hailed as laboratories of democracy,⁸⁹ the rampant decentralization of American election administration has not led to salutary results.⁹⁰ A 2015 study by the Electoral Integrity Project ranked the states' administration of the 2012 U.S. presidential race as the most poorly administered election among Western democracies that year.⁹¹ The report concluded that American electoral procedures were inferior to those of nations all over the world, including Mexico, the Czech Republic, Japan, and Sierra Leone.⁹² As Pippa Norris has noted, "Among all mature democracies, the nuts and bolts of American contests seem notoriously vulnerable to incompetence and simple human errors arising from the extreme decentralization and partisanship of electoral administration processes."⁹³

Partisan election administration deeply undermines the system's integrity.⁹⁴ In a 2014 report, the Presidential Commission on Election Administration noted that "[o]ne of the distinguishing features of the

84. PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 1, at 11–13; *see also* LAWRENCE NORDEN & CHRISTOPHER FAMIGHETTI, BRENNAN CTR., AMERICA'S VOTING MACHINES AT RISK (2015), https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf [<https://perma.cc/GL7H-39EY>].

85. For the impact of hyperfederalism on election law, see Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752–53 (2016).

86. *See, e.g.*, Joshua A. Douglas, *A Checklist Manifesto for Election Day: How to Prevent Mistakes at the Polls*, 43 FLA. ST. U. L. REV. 353, 357–64 (2016).

87. *See* KROPF & KIMBALL, *supra* note 1, at 10–11; Persily, *supra* note 79, at 110.

88. *See* John Myers, *Some Say It's Time California Had Statewide Rules for Provisional Ballots*, L.A. TIMES (July 24, 2016, 12:05 AM), <http://www.latimes.com/politics/la-pol-ca-provisional-ballots-state-rules-20160724-snap-story.html> [<https://perma.cc/76LF-V2VJ>].

89. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

90. *See, e.g.*, Weinstein-Tull, *supra*, note 85, at 747.

91. *See* Pippa Norris, *American Elections Ranked Worst Among Western Democracies: Here's Why*, CONVERSATION (Mar. 22, 2016, 5:57 AM), <http://theconversation.com/american-elections-ranked-worst-among-western-democracies-heres-why-56485> [<https://perma.cc/5HBD-P3HY>].

92. *See* Pippa Norris et al., *Assessing the Quality of Elections*, 24 J. DEMOCRACY 124, 131 tbl. 2 (2013).

93. PIPPA NORRIS, WHY ELECTIONS FAIL 134 (2015).

94. For examples of partisan controversies over election administration, see Christian M. Sande, *Where Perception Meets Reality: The Elusive Goal of Impartial Election Oversight*, 34 WM. MITCHELL L. REV. 729, 732–41 (2008).

American electoral system is the choosing of election officials and administrators through a partisan process.”⁹⁵ It recommended that state election agencies turn to unbiased professional staffers to “bolster the voting public’s confidence in the voting process.”⁹⁶ The states’ failure to do so has left the federal judiciary with the unenviable task of adjudicating disputes over election administration.⁹⁷ The result is that courts now find themselves routinely enmeshed in partisan controversies. In an age of intense political and ideological polarization, even the Supreme Court is viewed as biased during election disputes.

The 2000 presidential election, which came down to a dispute over the election results in Florida, is a case in point.⁹⁸ The vague and contradictory nature of Florida election law, combined with the fact that the five Republican-appointed Justices ruled in favor of George Bush and the four Democratic-appointed Justices ruled in favor of Al Gore, made the Supreme Court’s ruling in *Bush v. Gore*⁹⁹ profoundly controversial. Fair or not, the ruling left many observers convinced that the Court’s decision was motivated by politics, not law.¹⁰⁰ The cynicism and bitterness that ensued was inevitable in the absence of a neutral tribunal formally tasked with resolving election disputes.

D. Lack of Security and Resiliency

Most troubling of all, the American presidential election system lacks adequate security and resiliency in the event of a national crisis.

The potential threats that could befall the nation during or immediately before a presidential election are both very real and very dangerous. Terrorism is the most obvious threat, one that has already disrupted an American election. An overlooked aspect of the devastating September 11, 2001 terrorist attacks is the fact that they occurred on New York State’s primary election day. The resulting chaos prompted Governor George Pataki to postpone the election.¹⁰¹ It is all too conceivable that terrorists might target polling places to disrupt a future presidential election.¹⁰² And terrorism is not the only means of undermining an election. The involvement of Russian hackers in the 2016 election chillingly

95. PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 1, at 18.

96. *Id.*

97. See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125, 128–29 (2009).

98. See EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 293, 304 (2016).

99. 531 U.S. 98 (2000).

100. See Stephen Holmes, *Can a Coin-Toss Election Trigger a Constitutional Earthquake?*, in *THE UNFINISHED ELECTION OF 2000*, at 235, 238–39 (Jack N. Rakove ed., 2001).

101. See Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523, 526 (2005).

102. See John C. Fortier & Norman J. Ornstein, *If Terrorists Attacked Our Presidential Elections*, 3 ELECTION L.J. 597, 598 (2004).

demonstrated that cyberattacks pose an equally grave threat to the presidential election process.¹⁰³

Natural disasters may pose the greatest threat of all. As Jerry Goldfeder has warned, a hurricane during a presidential election could prevent millions of Americans from voting.¹⁰⁴ History underscores the danger. Hurricane Andrew in 1992 and Hurricane Katrina in 2005 forced the postponement of primary elections in Florida and Louisiana.¹⁰⁵ Similar hurricanes might occur anywhere along the Gulf Coast and East Coast on a presidential Election Day because hurricane season lasts until late November. In 2012, Hurricane Sandy made landfall in late October and impacted fifteen states.¹⁰⁶ Other natural disasters, such as an earthquake on the West Coast or a tornado outbreak in a major midwestern or southern city, could have a similarly disruptive impact. Climate change will only further heighten the risk.

Nevertheless, despite the clear dangers, Congress and most states have failed to engage in systematic and coordinated contingency planning for disruptive “black swan” type events.¹⁰⁷ The lack of adequate planning undermines the ability of election officials to respond effectively to crises that occur on or shortly before Election Day. A 2013 study of the impact of Hurricane Sandy found that a lack of emergency preparations and procedures resulted in significant disruptions to local and state elections in New York and New Jersey.¹⁰⁸ The study highlighted the lack of

103. See Isaac Chotiner, *Is the DNC Hack an Act of War?*, SLATE (July 26, 2016, 8:49 PM), http://www.slate.com/articles/news_and_politics/interrogation/2016/07/is_the_dnc_hack_an_act_of_war_and_is_russia_responsible.html [https://perma.cc/CA7Z-FGD2]; Amy Chozick, *Democrats Allege D.N.C. Hack Is Part of Russian Effort to Elect Donald Trump*, N.Y. TIMES (July 26, 2016), <http://www.nytimes.com/2016/07/26/us/politics/democrats-allege-dnc-hack-is-part-of-russian-effort-to-elect-donald-trump.html> [https://perma.cc/D8V L-2QGX]; see also Richard Forno, *How Vulnerable to Hacking Is the U.S. Election Cyber Infrastructure?*, CONVERSATION (July 29, 2016, 12:58 PM), <https://theconversation.com/how-vulnerable-to-hacking-is-the-us-election-cyber-infrastructure-63241> [https://perma.cc/F6CZ-EZL7]; Michael Gregg, *Top Six Ways Hackers Could Disrupt an Election*, HUFFINGTON POST (July 21, 2016, 12:32 PM), http://www.huffingtonpost.com/michael-gregg/top-six-ways-hackers-coul_b_7832730.html [https://perma.cc/64PK-X8TN].

104. See Jerry H. Goldfeder, *In Case of Election Crisis, Congress Needs to Be Prepared*, U.S. NEWS & WORLD REP. (Oct. 15, 2008, 12:00 PM), <http://www.usnews.com/opinion/articles/2008/10/15/in-case-of-election-crisis-congress-needs-to-be-prepared> [https://perma.cc/83G8-FEM3].

105. See ERIC A. FISCHER & KEVIN J. COLEMAN, CONG. RESEARCH SERV., R42808, HURRICANE SANDY AND THE 2012 ELECTION: FACT SHEET 1 (2012), <https://www.supportthevoter.gov/files/2013/08/CRS-on-Hurricane-Sandy.pdf> [https://perma.cc/34K U-DHLB].

106. *Sandy's Impact: State by State*, CNN (Oct. 31, 2012, 9:15 AM), <http://www.cnn.com/2012/10/30/us/tropical-weather-state-by-state/> [https://perma.cc/V4G5-EE L9].

107. See Goldfeder, *supra* note 101, at 545–46; see also Andrew Cohen, *Could a Hurricane Like Sandy Postpone the Presidential Election?*, ATLANTIC (Oct. 29, 2012), <http://www.theatlantic.com/politics/archive/2012/10/could-a-hurricane-like-sandy-postpone-the-presidential-election/264254/> [https://perma.cc/DJ8V-RPCR].

108. See LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, EXPECTING THE UNEXPECTED: ELECTION PLANNING FOR EMERGENCIES 1 (2013), <https://lawyerscommittee.org/wp-content/>

contingency plans “detailing what should be done to preserve the election process in the event of an emergency.”¹⁰⁹

In response, some states have enacted new legislation providing for emergency election procedures during terrorist attacks or natural disasters.¹¹⁰ California, for example, authorizes the state government to cancel and reschedule an election in the event of a major disaster.¹¹¹ However, like the rest of the presidential election system, the state laws governing emergency election procedures are far from uniform.¹¹² A 2014 survey by the National Association of Secretaries of State only found twelve states with laws permitting the postponement or rescheduling of an election in the event of an emergency.¹¹³

Unfortunately, Congress has failed to promote standard, uniform policies for handling emergencies during presidential elections.¹¹⁴ Nor has Congress offered a comprehensive federal plan for assisting states in safeguarding polling places against terrorist attacks or electronic hacking. The result is a nation dangerously unprepared for a major crisis during a presidential election.

II. FIXING A BROKEN SYSTEM

Congress must take responsibility for modernizing our presidential election system. In light of the piecemeal nature of state election law reform and the pressing need for uniform laws in presidential election administration, Congress is the only government institution in a realistic position to promote comprehensive reform. The time for Congress to act has arrived.

A. Constitutional Obstacles to Reform

The Constitution does not make it easy for Congress to reform the presidential election system. The nation’s founding document provides for a relatively small role for the federal government in the administration of

uploads/2015/07/Emergency-Planning-Report-10-29-13.pdf [https://perma.cc/E7H7-KWR2].

109. *See id.* at 18.

110. Thomas Kaplan, *Using Hurricane Sandy as a Lesson for Future Elections*, N.Y. TIMES (Nov. 12, 2013), <http://www.nytimes.com/2013/11/13/nyregion/lessons-from-hurricane-sandy-being-applied-to-election-planning.html> [https://perma.cc/GRJ8-G2U9].

111. *See Procedures and Guidelines for Voting in a State of Emergency or Natural Disaster*, CAL. SECRETARY ST., <http://www.sos.ca.gov/elections/additional-elections-information/publications-and-resources/voting-emergency-natural-disaster/> [https://perma.cc/2NWX-WMWC]; *see also* CAL. ELEC. CODE § 8571 (West 2016).

112. *See, e.g.*, OFFICE OF THE MINN. SEC’Y OF STATE, ELECTIONS EMERGENCY PLANNING TASK FORCE: REPORT TO THE LEGISLATURE (2015), <https://www.leg.state.mn.us/docs/2015/mandated/151344.pdf> [https://perma.cc/XYB4-4THM].

113. *See* NAT’L ASS’N OF SEC’YS OF STATE, STATE LAWS & PRACTICES FOR THE EMERGENCY MANAGEMENT OF ELECTIONS 5–6 (2014), http://www.nass.org/component/docman/?task=doc_download&gid=1512&Itemid=515 [https://perma.cc/VW5R-35GP].

114. *See* JACK MASKELL, CONG. RESEARCH SERV., RL32623, POSTPONEMENT AND RESCHEDULING OF ELECTIONS TO FEDERAL OFFICE (2004).

presidential elections.¹¹⁵ Congress is authorized to guard against discrimination on the basis of race, gender, and age, and it may enforce due process and equal protection rights against state violations.¹¹⁶ It also may set the day on which the presidential election occurs and the day that the electors meet to formally select the President.¹¹⁷ In addition, the Supreme Court has held that Congress may regulate campaign contributions to prevent quid pro quo corruption.¹¹⁸ In virtually all other respects, state and local authorities play the central role in American presidential elections.¹¹⁹

But history shows that sweeping reform to the American election system is still possible. One hundred years ago, the United States implemented major election changes, including adopting primary elections, providing for the direct election of Senators, and enfranchising women. The anti-status quo spirit of the 2016 election suggests that American politics are once again ripe for a new era of systemic reform.

B. Five Reform Proposals

There are many potential changes that could be made to the presidential election system, but five stand out as particularly necessary and pressing.

1. Higher Contribution Limits

In an election system characterized by privately financed campaigns and no expenditure limits, it is unreasonable to require presidential candidates to raise money in the same increments—\$2,700 per donor per election—that candidates for House seats do. A far higher contribution threshold, such as a \$50,000 per-election limit indexed to inflation, is a much more sensible approach in a nation of 320 million people. After all, presidential candidates are not merely running for statewide office or a local congressional seat. They are running to lead the United States, the single most expensive media market in the world. Accordingly, candidates should be permitted to raise funds in amounts proportionate to the cost of presidential campaigns.

Raising contribution limits also will help ensure that Super PACs do not supplant candidate campaigns in presidential elections. As scholars such as Raymond La Raja¹²⁰ and Nathaniel Persily¹²¹ have argued, the fundraising

115. See U.S. GEN. ACCOUNTING OFFICE, GAO-01-470, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION 2 (2001).

116. See U.S. CONST. amends. XIV, XV, XIX, XXVI.

117. See U.S. CONST. art. II, § 1.

118. See *Buckley v. Valeo*, 424 U.S. 1, 12 (1976).

119. Goldfeder, *supra* note 101, at 546.

120. Ray La Raja, *The McCutcheon Decision Could Be Good News After All*, WASH. POST (Apr. 3, 2014) [hereinafter La Raja, *The McCutcheon Decision*], <https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/03/the-mccutcheon-decision-could-be-good-news-after-all/> [https://perma.cc/684F-WTGV]; Ray La Raja, *The Supreme Court Might Strike Down Overall Contribution Limits: And That's Okay*, WASH. POST (Oct. 9, 2013), <https://www.washingtonpost.com/news/monkey-cage/wp/2013/10/09/the-supreme-court-might-strike-down-overall-contribution-limits-and-thats-okay/> [https://perma.cc/5BH3-RB5Y].

power of shadowy and unaccountable outside groups threatens to push candidate campaigns and political parties to the margins of the American election system. A \$50,000 limit would mitigate the fundraising power currently exercised by Super PACs by facilitating candidate campaigns' ability to quickly raise funds.

The corruption risk posed by large contributions in presidential campaigns is far less than that posed by donations to House and Senate campaigns. Once elected, Presidents have unrivalled access to free media, making them less dependent on continuing donor support than other federal officeholders. Moreover, a \$50,000 donation constitutes a modest contribution in the context of billion-dollar presidential campaigns. The special scrutiny presidential campaign contributors receive provides an additional safeguard. The Federal Election Commission (FEC) publicly discloses contributions made to federal candidates¹²² and presidential campaign donations elicit intense media coverage and public interest. In contrast, federal law permits section 501(c)(4) public advocacy groups to engage in independent political expenditures without publicly disclosing their contributors.¹²³ Encouraging donors to contribute to presidential candidates thus increases the transparency of our campaign finance process by diverting some funds that might otherwise have gone to section 501(c)(4) "dark money" groups.¹²⁴

To be sure, raising contribution limits will no doubt be unpopular with the public. But that unpopularity will be lessened by the fact that Congress would not be raising its own contribution limits, only those of presidential candidates. Moreover, Congress seems receptive to the idea of raising limits. In December 2014, Congress quietly raised contribution limits for the national party committees,¹²⁵ evidence that a bipartisan approach to increased contribution limits is politically viable.

Although the massive cost of presidential campaigns has been a fact of American political life for more than half a century, absurdly low contribution limits for presidential candidates should not be. Congress needs to adjust to the realities of the modern fundraising landscape by significantly raising contribution limits for presidential candidates.

2. Direct Election

The reforms should not stop at increased contribution limits. Structural changes are also necessary. In order to modernize the American

121. Nathaniel Persily, *Bringing Big Money out of the Shadows*, N.Y. TIMES (Apr. 2, 2014), <http://www.nytimes.com/2014/04/03/opinion/bringing-big-money-out-of-the-shadows.html> [https://perma.cc/8YAP-4ZHG].

122. See *Campaign Finance Disclosure Portal*, FEC, <http://www.fec.gov/pindex.shtml> (last visited Nov. 19, 2016) [https://perma.cc/RGE6-DM3T].

123. See HASEN, *supra* note 42, at 34–35, 153–54.

124. See La Raja, *The McCutcheon Decision*, *supra* note 120.

125. See R. SAM GARRETT, CONG. RESEARCH SERV., R43825, INCREASED CAMPAIGN CONTRIBUTION LIMITS IN THE FY2015 OMNIBUS APPROPRIATIONS LAW: FREQUENTLY ASKED QUESTIONS 1, 3 (2015).

presidential election system, the time has come to replace the Electoral College with a direct popular vote for President.

The idea of repealing the Electoral College is not a pipe dream. It has had strong support in the past. In 1969, the U.S. House of Representatives voted by an overwhelming margin of 338 to 10 to adopt a constitutional amendment to replace the Electoral College with a direct election of the President.¹²⁶ National polls continue to find high levels of support for replacing the Electoral College with a nationwide popular vote. A 2013 Gallup poll found that 63 percent of Americans overall, and 69 percent of Americans under thirty, support amending the Constitution to provide for direct election of the President.¹²⁷

Ultimately, there are two ways to do so. The first is through a constitutional amendment, which offers the best long-term solution. A constitutional amendment for a direct election would be simple and straightforward to draft and explain to voters. Many advocates of a direct election have promoted a runoff system if no candidate carries at least 40 percent of the popular vote in a multicandidate field.¹²⁸ It is worth noting, however, that the states' experience in gubernatorial elections suggests that a minimum number of votes is not a necessity for electing a chief executive. In any case, runoff or no runoff, a direct election would be a far more democratic method of electing the President than the Electoral College.

The reality, however, is that constitutional amendments do not happen overnight. In the meantime, therefore, the "National Popular Vote Compact" is a potentially viable short-term alternative. The compact is an agreement by individual states to award their electoral votes to whichever candidate wins the national popular vote.¹²⁹ The compact will go into effect when states possessing 270 electoral votes—the minimum necessary to elect the President—sign onto the plan.¹³⁰

But whichever comes first—constitutional amendment or National Popular Vote Compact—any shift to a direct popular vote for President must be accompanied by comprehensive reform of election administration in the states.

3. Uniform Election Administration

Defenders of the Electoral College make two important points that must be addressed. The first is that the American election administration system as it currently exists is not capable of producing a clear-cut popular vote

126. See John B. Anderson, *The Electoral College Flunks the Test in an Age of Democracy*, A.B.A. HUM. RTS. MAG., Spring 2005, at 17, 18 (2005).

127. Lydia Saad, *Americans Call for Term Limits, End to Electoral College*, GALLUP (Jan. 18, 2013), <http://www.gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx> [<https://perma.cc/LZU5-AXSD>].

128. See NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES OF AMERICAN ELECTORAL POLITICS* 249–50 (5th ed. 1980).

129. See Aaron Blake, *The National Popular Vote Effort, Explained*, WASH. POST (July 25, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/07/25/the-national-popular-vote-effort-explained/> [<https://perma.cc/W5TG-GXLT>].

130. See *id.*

winner in a close election.¹³¹ The second is that abolition of the Electoral College would open the door to state manipulation of voting standards to game the election results.¹³²

Those warnings should be taken seriously by advocates of Electoral College repeal. A direct popular vote will work smoothly only if all fifty states adopt uniform voting laws in presidential elections, particularly with respect to voter registration, ballot standards, early voting periods, and voting machine technologies. Clearly, a uniform standard nationwide will not come without a fight. Local and state bureaucratic interests will resist efforts to reform the system. In 2014, the Presidential Commission on Election Administration (“the Commission”) noted that, when it began its work, multiple election administrators at the state and local level insisted that “one size does not fit all.”¹³³ But as the Commission justifiably emphasized in its final report, “most jurisdictions that administer elections confront a similar set of challenges” and jurisdictions “can learn from each other about the best solutions to common problems.”¹³⁴ Accordingly, the bipartisan commission proposed sweeping and uniform reforms, including nationwide online voter registration, improved management of polling place location and design, expanded early voting, enhanced mail balloting security, and modernized voting machines.¹³⁵

The U.S. Constitution does not expressly grant Congress the power to mandate that the states adopt uniform standards in presidential elections.¹³⁶ The Elections Clause, however, gives Congress sweeping authority over congressional elections.¹³⁷ Consequently, by requiring uniform standards in congressional elections, Congress could indirectly achieve the same result for presidential elections.

Moreover, through its spending power authority,¹³⁸ Congress has tremendous leverage over the states. State election costs are high and rising.¹³⁹ In an age of tight budgets, states may not be as wedded to idiosyncratic local practices as their federalist rhetoric would otherwise suggest. Indeed, through the strategic use of financial incentives, Congress very likely could persuade the states to adopt uniform standards for

131. See Anderson, *supra* note 126, at 17–18.

132. See Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1265–78, 1291–92 (2012).

133. See PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 1, at 9.

134. *Id.*

135. See *id.* at 2; Scott Wilson, *Bipartisan Election Commission Releases List of Suggested Fixes*, WASH. POST (Jan. 22, 2014), https://www.washingtonpost.com/politics/bipartisan-election-commission-releases-list-of-suggested-fixes/2014/01/22/76902880-8374-11e3-bbe5-6a2a3141e3a9_story.html [<https://perma.cc/U9XA-DE2S>].

136. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 115.

137. See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253–54 (2013); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2670 (2015).

138. See U.S. CONST. art. I, § 8.

139. Robert S. Montjoy, *The Changing Nature . . . and Costs . . . of Election Administration*, 70 PUB. ADMIN. REV. 867, 868 (2010); see also *Election Costs: What States Pay*, NAT’L CONF. ST. LEGISLATURES (June 16, 2016), <http://www.ncsl.org/research/elections-and-campaigns/election-costs.aspx> [<https://perma.cc/C73R-6DFG>].

presidential election administration rather than delegating those duties to local authorities. The states would still be free to use state-specific registration and voting laws for their local and state elections.

There are historical precedents for the use of federal financial incentives to promote uniform state laws. For example, the threat to withdraw federal highway funds was highly effective at achieving a nationwide legal drinking age of twenty-one. In *South Dakota v. Dole*,¹⁴⁰ the Supreme Court held that the Spending Clause authorized Congress to use financial incentives to promote national standards.¹⁴¹ There are of course limits to the spending power. As the Supreme Court made clear in the 2012 Affordable Care Act case, *National Federation of Independent Businesses v. Sebelius*,¹⁴² Congress may not coerce the states by threatening to withdraw funds they have grown dependent upon.¹⁴³ But in the context of uniform voting laws, the use of financial incentives would not be coercive at all. Instead, the federal financial assistance would be offered on a purely voluntary basis. The power of the purse thus provides Congress with a powerful tool for promoting uniform standards in presidential elections.

But uniform standards are not possible until the country resolves the debate over voter ID laws. Republican-controlled states, such as Kansas, Georgia, and Mississippi, have adopted strict photo ID laws that contrast sharply with the less burdensome voter identification policies employed in Democratic-controlled states, such as New York, Minnesota, and California.¹⁴⁴ The diversity in state laws would be particularly dangerous during a nationwide popular vote for President. As Derek Muller has warned, in a direct election, states could manipulate their voting laws to promote a partisan advantage in the presidential race.¹⁴⁵

Accordingly, any move to a direct election must be made contingent upon nationwide voting standards that reject strict voter ID laws. The argument that photo ID requirements prevent fraud in any significant way is simply no longer sustainable. In the most comprehensive study ever undertaken of in-person voter fraud, Justin Levitt found only thirty-one credible cases nationwide out of one billion votes cast since 2000.¹⁴⁶

The evidence is increasingly compelling that the drive for strict voter ID laws by Republican legislatures was not inspired by an effort to preserve electoral integrity but rather by the indefensible and unconstitutional goal of

140. 483 U.S. 203 (1987).

141. *Id.* at 212.

142. 132 S. Ct. 2566 (2012).

143. *See id.* at 2602.

144. *See* Wendy Underhill, *Voter Identification Requirements: Voter ID Laws* (Sept. 26, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [https://perma.cc/7WMH-RQW4].

145. *See* Muller, *supra* note 132, at 1266.

146. *See* Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/> [https://perma.cc/6XJ4-Q52Q].

disenfranchising the Democratic Party's minority constituencies.¹⁴⁷ Indeed, a federal judge in Wisconsin reached exactly that conclusion in a July 2016 case, holding that the Republican legislature's "objective was to suppress the reliably Democratic vote of Milwaukee's African-Americans."¹⁴⁸ Accordingly, the judicial tide is moving sharply against strict voter ID laws. In the summer of 2016, restrictive voter registration laws were struck down or blocked by the Fourth and Fifth Circuits, as well as by district courts in North Dakota, Kansas, and Wisconsin.¹⁴⁹ Although the Supreme Court upheld the constitutionality of strict photo ID requirements in the 2008 case of *Crawford v. Marion County Election Board*,¹⁵⁰ the long-term viability of that opinion seems highly questionable in light of growing evidence of the racially discriminatory motivations for such laws. *Crawford's* reversal should be welcomed by advocates of a direct presidential election because it would clear the way for the standardization of voting procedures nationwide. In the end, whether abolition of racially discriminatory voting laws occurs through the courts or the legislatures, the universal adoption of sensible and nonpartisan voting laws is essential before a nationwide popular vote can be effectively implemented.

4. Impartial Electoral Count Tribunal

Even with uniform laws nationwide, close presidential elections will still give rise to partisan disputes over the outcome. As Edward Foley has warned, the history of American elections makes clear that "ballot-counting disputes inevitably will occur despite a state's best efforts to avoid them."¹⁵¹ To address that problem, Foley proposes the creation of an "Electoral Count Tribunal."¹⁵² Under Foley's proposal, every four years—in advance of the presidential election—the Supreme Court would be responsible for appointing by unanimous vote a three-member tribunal with jurisdiction to resolve disputes over state electoral votes.¹⁵³ Congress could create the tribunal by acting under its Twelfth Amendment power to receive the electoral votes of the states.¹⁵⁴ In addition, Foley advises moving the Electoral College calendar back two weeks to give the states additional time to complete recounts.¹⁵⁵

147. See generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).

148. Patrick Marley & Jason Stein, *Judge Strikes Down Wisconsin Voter ID, Early Voting Laws*, MILWAUKEE-WIS. J. SENTINEL (Aug. 1, 2016, 11:24 AM), <http://www.jsonline.com/story/news/politics/2016/07/30/judge-strikes-down-wisconsin-voter-id-early-voting-laws/87803408/> [<https://perma.cc/D6WE-YTMD>].

149. See Camila Domonoske, *As November Approaches, Courts Deal Series of Blows to Voter ID Laws*, NPR (Aug. 2, 2016, 5:11 PM), <http://www.npr.org/sections/thetwo-way/2016/08/02/488392765/as-november-approaches-courts-deal-series-of-blows-to-voter-id-laws> [<https://perma.cc/GW4M-VFTZ>].

150. 553 U.S. 181 (2008).

151. FOLEY, *supra* note 98, at 351.

152. See *id.* at 357–62.

153. See *id.* at 355, 357.

154. See *id.* at 355.

155. *Id.* at 355–57.

Even without adopting a direct election system, Congress would be wise to adopt Foley's recommendations. But if the United States replaces the Electoral College with a nationwide popular vote, it would be critically important to adopt Foley's proposals. In a close national race in which every vote could be decisive to the outcome, an impartial body tasked with resolving recount disputes would be indispensable. Without it, we could end up with fifty disputed state recounts, an outcome far more chaotic than what the nation experienced during Florida's controversial recount in 2000.

Likewise, a longer state recount period will be absolutely necessary when the total number of popular votes—rather than the total number of electoral votes—determines the winner of the presidential election. The Supreme Court ended the Florida recount in 2000 because there was not enough time to finish it before the expiration of the safe harbor period on December 12 and the meeting of the Electoral College on December 18.¹⁵⁶ One of the lessons of *Bush v. Gore*¹⁵⁷ is that election authorities should be given sufficient time to complete recounts. As Foley notes, “two additional weeks of uncertainty during the transition period” is a reasonable price to pay to ensure that the candidate who is inaugurated on January 20 is “the candidate whom the electorate actually chose.”¹⁵⁸ The additional time will be particularly critical if a nationwide popular vote determines the winner. Therefore, extending the deadline for states to report their presidential election results must be a key component of any plan for directly electing the President.

5. Federalized Contingency Planning

Finally, before every presidential election, Congress should direct the FEC and the Department of Homeland Security to form a joint task force on election security and resiliency.¹⁵⁹ The “Joint Task Force on Presidential Elections” would engage in contingency planning for national disasters and coordinate election preparations with state authorities. It also would serve as a one-stop shop for state election authorities seeking information and assistance in advance of the presidential election.

A central priority for this Joint Task Force on Presidential Elections must be improving physical and electronic security at polling places.¹⁶⁰ To that end, Congress should provide federal funds for securing voting sites.¹⁶¹ Federal assistance also will be crucial for safeguarding state voting machines from cyberattack. As the Russian hack of the Democratic National Committee in 2016 demonstrated, election-related computer systems are a tempting target for foreign adversaries,¹⁶² particularly in

156. *See id.* at 297–98, 355–57.

157. 531 U.S. 98 (2000).

158. FOLEY, *supra* note 98, at 357.

159. *See* Goldfeder, *supra* note 101, at 563.

160. *See* Fortier & Ornstein, *supra* note 102, at 608.

161. *See id.* at 608–09.

162. *See* Erich Lichtblau & Eric Schmitt, *Hack of Democrats' Accounts Was Wider Than Believed, Officials Say*, N.Y. TIMES (Aug. 10, 2016), <http://www.nytimes.com/2016/08/11/>

jurisdictions that use electronic-only voting.¹⁶³ Thus, Congress should use federal funds to incentivize states to adopt voting machines that leave a paper trail. Congress also should amend the Digital Millennium Copyright Act to make clear that voting machine manufacturers must not shield the security of their systems from scrutiny by outside experts.¹⁶⁴

In addition, Congress would be wise to follow the advice of Jerry Goldfeder and promulgate guidelines for the states on how to proceed in the event of an emergency during a presidential election.¹⁶⁵ Belatedly, the states have begun to coordinate emergency planning through the establishment of the National Association of Secretaries of State Task Force on Emergency Preparedness for Elections.¹⁶⁶ But a congressional role in emergency planning is essential. As Goldfeder recommends, Congress should take the initiative by “establishing a national response to a national emergency, rather than leaving the constitutional crisis to be ‘managed’ by the various states.”¹⁶⁷

CONCLUSION

If individual states prefer a disorganized and underfunded process for the election of their local and state officials, they are free to continue with their present systems. And if the members of Congress choose to maintain low contribution limits on House and Senate candidates, they are within their constitutional prerogative in doing so.

But the presidency is different. As Woodrow Wilson observed more than a century ago, the President is the only officeholder “for whom the whole nation votes. . . . No one else represents the people as a whole exercising a national choice.”¹⁶⁸ Wilson’s observation remains just as true today. As the leader of a diverse, global superpower, the President represents the nation as a whole, not just a single district, state, or region. Accordingly, it is long overdue for the United States to have a presidential election system worthy of the office of President.

us/politics/democratic-party-russia-hack-cyberattack.html [https://perma.cc/2HL5-SYSG]; David E. Sanger & Eric Schmitt, *Spy Agency Consensus Grows That Russia Hacked D.N.C.*, N.Y. TIMES (July 26, 2016), <http://www.nytimes.com/2016/07/27/us/politics/spy-agency-consensus-grows-that-russia-hacked-dnc.html> [https://perma.cc/H64G-Q8CC].

163. KEVIN J. COLEMAN & ERIC A. FISCHER, CONG. RESEARCH SERV., RS20898, ELECTIONS REFORM: OVERVIEW AND ISSUES (2004); Zeynep Tufekci, *The Election Won’t Be Rigged: But It Could Be Hacked*, N.Y. TIMES (Aug. 12, 2016), <http://www.nytimes.com/2016/08/14/opinion/campaign-stops/the-election-wont-be-rigged-but-it-could-be-hacked.html> [https://perma.cc/LXK6-4V78].

164. See Forno, *supra* note 103.

165. See Goldfeder, *supra* note 101, at 562.

166. See NAT’L ASS’N OF SEC’YS OF STATE, REPORT OF THE TASK FORCE ON EMERGENCY PREPAREDNESS FOR ELECTIONS (2014), <http://www.nass.org/elections-voting/nass-task-force-on-emergency-preparedness-for-elections/> [https://perma.cc/S4FM-28TG].

167. Goldfeder, *supra* note 101, at 564.

168. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 67–68 (1908).