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Our Eighteenth Century Constitution, the Electoral College, and Congressional Reapportionment: A Response to Professor Daniel Tokaji

ROBERT A. SEDLER

The United States lives under an eighteenth century Constitution that reflects eighteenth century notions of separation of powers and checks and balances. The United States Constitution established two houses of Congress in a “Great Compromise” between large states and small states, so that California has fifty-three representatives in the House, while Wyoming only has one, but both states each have two senators.¹ To the chagrin of Professor Amar² and many other constitutionalists throughout the years, the Constitution provides for indirect election of the President through the Electoral College.

The American constitutional system begins not with the federal government, but with the states. Upon independence, each of the newly-formed states succeeded to power over domestic matters formerly exercised by the British Crown, and as each new state was admitted to the Union, it automatically became entitled to exercise this power. Thus, according to American constitutional theory, state sovereignty is a “given” in the American constitutional system and the states do not depend on the federal Constitution for the source of their sovereignty. The states exercise full sovereignty over domestic matters except to the extent that a particular exercise of such sovereignty is prohibited or restricted by the Constitution.³ More

1. See the discussion of the “Great Compromise” in *Wesberry v. Sanders*, 376 U.S. 1, 9-16 (1964). See also U.S. CENSUS BUREAU, STATISTICAL ABSTRACTS OF THE UNITED STATES: 2003, SECTION 31—CONGRESSIONAL DISTRICT PROFILES (2004), available at <http://www.census.gov/prod/2004pubs>.

2. See Akhil Reed Amar, *Some Thoughts on the Electoral College, Past, Present, and Future*, 33 OHIO N.U. L. REV. 467 (2007).

3. The principle of state sovereignty is textually embodied in the Tenth Amendment, which provides that, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. However, since state sovereignty is a “given” in the American constitutional system, and since the federal government is in theory a government of enumerated or limited powers, the principle of state sovereignty is structurally embodied in the Constitution and is not dependent on the Tenth Amendment. Following independence, that aspect of the sovereignty of the British Crown pertaining to foreign affairs devolved upon the “Union of States” that was waging the Revolutionary War and that eventually concluded the peace with Great Britain. In American constitutional theory, sovereignty over foreign affairs was deemed to be in the federal government that was subsequently established by the Constitution. Thus, the foreign affairs power is an inherent federal power. The Supreme Court stated in *United States v. Belmont*, “in the case of all international compacts and agreements . . . complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.” 301 U.S. 324, 331 (1937). Note, however, that while the states are expressly prohibited from entering into treaties with foreign nations, the states may, with Congressional approval, enter into compacts with foreign nations, as they may with sister states. See U.S. CONST. art. I, § 10, cl. 1. Pursuant to this

significantly, with respect to the Electoral College and congressional reapportionment, the structure of the federal government itself, as Justice Blackmun has explained, was designed “to ensure the role of the States in the federal system.”⁴ According to Justice Blackmun, “the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.”⁵ He goes on to say that:

[t]he Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State.⁶

Before turning to the states and the Electoral College, I want to make some further observations about the influence of the states in Congress. Professor Tokaji’s article discusses congressional redistricting and the resulting congressional representation in terms of racial equality.⁷ Needless to say this was not the concern of the Framers, who limited the franchise to white male property owners and who counted the African-American slaves as three-fifths of a person for the purpose of congressional apportionment. The concern of the Framers, following the “Great Compromise,” was that the House of Representatives represent “people according to their respective numbers”⁸ and that the Senate represents the “states as states.”⁹ But the members of the

authorization, some American states have entered into compacts with neighboring Canadian provinces, such as the Great Lakes Compact entered into between the states bordering the Great Lakes and the Province of Ontario. 16 U.S.C. § 4723 (2008); MICH. COMP. LAWS § 324.32101 (2007).

4. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). In that case, the Court held that the structure of the Constitution did not preclude Congress from using its power over interstate commerce to regulate the “states as states.” *Id.* at 554. In this context, Justice Blackmun discussed how the structure of the federal government was designed to protect the role of the states in the federal system, and he concluded that the states’ sovereign interests “are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Id.* at 552.

5. *Id.* at 550-51.

6. *Id.* at 551 (citation omitted). The influence of the states in the federal government because of the power of each state to send two Senators to the Senate is not diminished by the fact that under the Seventeenth Amendment the Senators are selected by the voters rather than by the state legislature. *See* U.S. CONST. art. I, § 2; U.S. CONST. art. II, § 1.

7. Daniel P. Tokaji, *The Sordid Business of Democracy*, 34 OHIO N.U. L. REV. 341 (2008).

8. *See* Brief for the City of Detroit as Amicus Curie in support of Respondents, at 19, *State of Wisconsin v. City of New York*, 517 U.S. 1 (1996) (Nos. 94-1614, 94-1631, 94-1985).

9. *Garcia*, 469 U.S. at 554.

House of Representatives, no less than the members of the Senate, were supposed to represent the interests of the state, or more particularly, the interests of the district of the state from which they were elected.¹⁰ Under the Constitution, the states set the voting qualifications for election of members of the House and after the Seventeenth Amendment, for the election of senators, and the states are responsible for drawing the congressional districts within the state.¹¹ The Constitution also guarantees that each state, regardless of population, will have at least one Representative in the House.¹²

The point to be emphasized here is that in the United States, the states as states are represented in Congress through senators chosen by the voters of the state and by representatives chosen by voters of congressional districts within the state. As a matter of constitutional structure, the senators and representatives are to use their power to advance the interests of their states and congressional districts. To put it another way, in our constitutional system, senators and representatives are not supposed to serve the national interest. Instead, the senators and representatives are supposed to serve the interests of their states and districts. The national interest, in constitutional theory, is the sum total of that state and congressional district interests that are embodied in the laws that emerge from the legislative process in Congress.

We turn now to the influence of the states in the Electoral College. The framers considered the office of the President too important to allow the President to be elected directly by the people.¹³ They feared that the people would elect a demagogue, which means literally “a leader of the people.” Instead the Framers set up a system by which the people in each state would elect presidential electors who in turn would choose the most qualified person to be President. Of course, the framers were thinking of George Washington, but this system determined whether George W. Bush or John Kerry would be elected as President in 2004, and it will determine who will be the next President in 2008. The Electoral College reinforces the power of the states in

10. It is interesting to note that Article I, Section 2 refers to members of the House “chosen every second Year by the people of the several States.” U.S. CONST. art. I, § 2. During the first fifty years after the Constitution was adopted, it was the widespread practice of the states to elect representatives as a group on a statewide basis, and as late as 1842, seven states still elected representative on a statewide basis. See *Wesberry*, 376 U.S. at 8-9.

11. Since the House of Representatives is designed to represent people according to their respective numbers, the Supreme Court has held that Congressional districts within each state must be drawn with strict mathematical equality, and that there can only be a variance of a few persons from one district to another. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969); *Wesberry*, 376 U.S. at 9-16.

12. U.S. CONST. art. I, § 2, cl. ii.

13. Remember that the people who could vote were limited to white, male property owners. Restricted as the electorate was, it included artisans, small farmers, and other such persons who were not part of the landed gentry from which most of the Framers came.

the American constitutional system because the electors chosen in each state then select the President. Each state selects electors equal to that state's number of representatives and senators, so California gets fifty-five electors and Wyoming gets three. There are 538 electors, and with the exception of Maine and Nebraska, which have nine electoral votes between them and choose to elect by congressional district, it is winner-take-all in the remaining forty-eight states. Two hundred seventy electoral votes wins the Presidency.

Moreover, the operation of the Electoral College in practice interacts with the two-party political system that has long prevailed in the United States. The framers did not contemplate political parties, which they called factions. They assumed that the leaders of the new government would be men like themselves, generally born to wealth and privilege with a strong sense of public service. But political parties emerged early in the Nation's history, coming to the forefront in the election of 1796, and being firmly established in the election of 1800, with the Jeffersonian-Democrats and the Federalists. Following the confusion regarding the electoral voting for President and Vice-President in the 1800 election, the Twelfth Amendment was adopted in 1804 and provided for separate candidates for President and Vice-President. Professor Amar maintains that the Twelfth Amendment "transformed the Framers' framework, enabling future presidential elections to be openly populist and partisan affairs featuring two competing tickets."¹⁴ After the election of 1860, it was the Democrats and the Republicans that emerged as the two major parties and this two-party system has continued to the present day. Third parties and independent candidates may be significant in a particular election—such as Ross Perot in 1992 and Ralph Nader in 2000—but the structure of the federal government, including the Electoral College method of electing a President, single-member districts for Congress, and statewide elections of senators, is not conducive to the survival of third parties.¹⁵

14. Amar, *supra* note 2, at 469.

15. A third party may tip a particular election, as Ralph Nader's Green Party presumably did in the 2000 election, but Nader and the Green Party are no longer a factor in national politics. In the 2000 election Nader received 2,882,995 votes or 2.74% of the total. He received 97,488 votes in Florida, most of which were presumed to be at the expense of Al Gore. So if Nader had not been running, Gore likely would have carried Florida and would have won the election. Nader ran again in 2004, and this time received only 406,924 votes out of some 118 million cast. The high water mark of third party candidacy for the Presidency would appear to be the 1992 Presidential election, where Ross Perot captured 19% of the popular vote, compared to Bill Clinton's 43% and George Bush's 38%. However, it appears that Perot drew votes away from Clinton and Bush in roughly equal numbers. In the 1996 election, Perot ran again, this time receiving 9% of the vote compared to 49% for Bill Clinton and 41% for Bob Dole. Perot and the party that he formed to support his candidacy have since disappeared from the American political scene. The last time that a third party candidate received electoral votes was in the 1968 election, when George Wallace, running as the candidate of the American Independent Party, carried five states for a total of forty-six electoral votes: Arkansas, Louisiana, Mississippi, Alabama, and Georgia.

At the present time, and in retrospect, through much of the last century, the Nation has been equally divided between both parties when it comes to electing a President. Of the twenty-five presidential elections between 1900 and 1996, the Republicans won thirteen, and the Democrats won twelve. This division was reflected in the very close elections of 2000 and 2004. Moreover, one party or another is the dominant party, at least when it comes to Presidential elections, in the great majority of American states. The “blue states” that are likely to vote Democratic include California, New York, Illinois, Pennsylvania, New Jersey, and most of the New England states, and the “red states” that are likely to vote Republican include Texas, Oklahoma, Kansas, Nebraska, the Dakotas, most of the southern states, and most of the mountain states. Because so many states are likely to vote for one party over another in the Presidential race, that race, which is based on winning a majority of the electoral votes, comes down to less than twenty battleground states, such as Florida, Ohio, Michigan, Minnesota, Wisconsin, Missouri, Iowa, Washington, Oregon, and Colorado. It is in the battleground states where the candidates concentrate their campaigning and the parties concentrate their resources.

Professor Amar has done a very thorough historical analysis of the factors leading to what he has called an “intricate [E]lectoral [C]ollege contraption.”¹⁶ This analysis concludes that the framers’ primary reason for electing the President by means of an Electoral College was not so much, as I have suggested, a lack of confidence in the ability of the people to make a good choice, or an effort to balance the interests of large and small states, but to give an advantage to the southern states who received more votes in the Electoral College because their slaves counted as three-fifths of a person.¹⁷ This not only increased their representation in the House of Representatives, but as Professor Amar demonstrates, it increased their ability to elect a President. Therefore, he submits, the Electoral College had a pro-slavery tilt, and legislatures were aware of this pro-slavery tilt at the time of the Twelfth Amendment.¹⁸ Professor Amar believes the Twelfth Amendment “fixed” the Electoral College, stating “[o]nce again, the North caved to the South by refusing to insist on [a] direct national election.”¹⁹

16. Amar, *supra* note 2, at 467.

17. *Id.* at 470-71. He notes that “the Framers required that the House be elected directly every two years,” and says that “[m]any leading Federalists supported direct election of governors.” *Id.* at 469. He then points out that the key objection to direct election of the President was “not democracy per se, but democracy based on inadequate voter information.” *Id.* However, he maintains that “[t]he early emergence of national presidential parties rendered this objection obsolete . . . by linking presidential candidates to slates of local candidates and national platforms that explained to voters who stood for what.” *Id.*

18. Amar, *supra* note 2, at 471.

19. *Id.*

Regardless of the primary factor or factors influencing the adoption of the Electoral College as the means of electing the President, it is difficult to justify such a method today. Professor Amar counters all of the arguments made in favor of retaining the Electoral College, and demonstrates convincingly that in terms of democratic values, direct election of the President is far preferable to the out-moded Electoral College method that is in use today.²⁰

Professor Amar concludes by addressing what he calls the "futility argument:" that adopting a direct popular election would require a constitutional amendment, and that no such amendment is likely given the high hurdles set out in Article V that two-thirds of both houses of Congress and three-quarters of the states approve it.²¹ And of course, in general terms, it is very difficult to amend the Constitution. The men who drafted the Constitution were incredible egotists. They believed they had developed the perfect document for representative government, and made the Constitution very difficult to amend. Most proposed amendments fail to get the necessary two-third votes in both houses. A politically-popular amendment, such as one banning flag-burning or same sex marriage, can pass the House, since Representatives have to run for election every two years and do not want to give their potential opponent an easy shot. But that same proposed amendment will most likely be defeated in the Senate, where there are enough senators who are in safe seats or are enough years away from having to run for reelection that they can safely vote against the amendment. Even when an amendment manages to get the two-thirds vote in both houses of Congress, it may flounder on the "three-fourths of the states" approval requirement, as happened with the Equal Rights Amendment. It should not be surprising, therefore, that apart from the ten amendments of the Bill of Rights, which is considered a part of the original Constitution because it was promulgated "practically contemporaneous with the adoption of the original,"²² there have only been seventeen other amendments to the Constitution in its 200 year history.²³

Conceding the virtual impossibility of amending the Constitution to provide for direct national election of the President, Professor Amar maintains that this could be achieved without amending the Constitution.²⁴ He asks the reader to join him "in an exercise of legal imagination" and proposes both a

20. *Id.*

21. *Id.* at 476

22. *The Slaughterhouse Cases*, 83 U.S. 36, 67 (1873).

23. Two of these amendments, the Eighteenth Amendment, establishing Prohibition, and the Twenty-First Amendment, repealing it, cancel each other out.

24. Amar, *supra* note 2, at 476-79.

“key state” and a “key persons” scenario.²⁵ Under the “key state” scenario, the eleven most populous states, having 271 votes between them (one more than the 270 needed to win the Electoral College vote) would enact the following statute: “[t]his state shall choose a slate of electors loyal to the Presidential candidate who wins the national popular vote.”²⁶ In order to avoid a claim of “unilateral disarmament,” the statute would go into effect “if and only if” other states, whose electors taken together with this state’s electors total at least 270, also enact laws guaranteeing that they will choose electors loyal to the Presidential candidate who wins the national popular vote.²⁷ The “key persons” scenario would have both sets of candidates for President and their running mates pledge that if they lose the national popular vote, they will ask their electors to vote for the winner of the national popular vote.²⁸

Of course, Professor Amar does not suggest that either of these scenarios is likely to happen in the real world. He recognizes it is highly unlikely that the Constitution will be amended to provide for direct national election of the President, and the United States will continue to elect our President under what he calls the “intricate [E]lectoral [C]ollege contraption.”²⁹ Professor Amar obviously considers this a bad thing.

I take a somewhat different view. My view on this and many other constitutional governance issues is shaped by the fact that we live under an eighteenth century Constitution that is very difficult to amend. A new nation starting out today and seeking to achieve democratic governance would not borrow from our eighteenth century Constitution. Certainly, the new nation would provide for the direct national election of its President or head of government, either by way of a “winner take all plurality,” or more likely, if neither candidate obtains a majority during the first round, by a runoff between the two candidates receiving the highest number of votes.³⁰ Indeed, this is how most modern democratic countries operating under constitutions that are not 200 years old elect their President or head of government.

But we are not a new Nation. We are a Nation that began with sovereign states and promulgated a Constitution that “in all of its provisions, looks to an

25. *Id.* at 476.

26. *Id.*

27. *Id.* at 478.

28. *Id.*

29. Amar, *supra* note 2, at 467.

30. The recent French Presidential election serves as a model: there were three major candidates, and neither candidate received a majority in the first round, so a second round was held between the two candidates receiving the highest number of votes in the first round. *2007 French Presidential Elections*, WASH. POST, Apr. 13, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041301401_pf.html.

indestructible Union, composed of indestructible states.”³¹ This Constitution gives the states as states a role in the election of the President through the Electoral College.³² We have conducted fifty-four Presidential elections under this “intricate [E]lectoral [C]ollege contraption.” I would submit that this method of electing a President has worked tolerably well for us and that we can continue to elect our President by this method without creating any kind of serious risk to our system of constitutional governance.

The problem with the Electoral College method of electing the President, as Professor Amar sees it, is that the national popular vote loser can win the Electoral College vote.³³ According to Professor Amar, this is what happened in the 2000 election when the Democratic candidate, Al Gore, received about 600,000 more popular votes than the Republican candidate, George W. Bush.

Bush received a majority of the electoral votes and was elected President. It could also have happened in the 2004 election if the Democratic candidate John Kerry had carried Ohio. This would have given Kerry a majority of the electoral votes, although Bush had a three-million vote advantage in the popular vote.³⁴

With all due respect, I submit that this formulation of the issue by Professor Amar is structurally flawed because there is no national popular vote for the Presidency. What we call the national popular vote for the Presidency is not the kind of vote that would be taking place if there were a direct election of the President. In Presidential elections, we do not run a separate popular vote for the President and a separate vote for electors in the Electoral College; we only run one vote in which the voters vote for electors in each state. The so-called national popular vote for the Presidency is not a popular vote at all, but only the total of the votes that each candidate received when voters were voting state by state for electors from each state. There is no way of knowing what the national popular vote would look like if voters were voting directly for the President, because this is not how the system presently works.

If voters were voting directly for the President, not only would every voter’s ballot count equally in a single nationwide vote, as Professor Amar

31. *Texas v. White*, 74 U.S. 700, 725 (1869). Because of this, the Court held that during the civil war the Confederate states were still a part of the Union, although they were trying to secede from it.

32. See the discussion *supra* notes 3-4, and accompanying text.

33. Amar, *supra* note 2, at 467.

34. Bush won the electoral vote, 286 to 251. He carried Ohio, with its twenty electoral votes, by only 118,599 votes out of over 5,600,000 votes cast. If Kerry had prevailed in this very close vote in Ohio, he would have received 271 electoral votes to Bush’s 266 electoral votes and would have been elected President. In the highly disputed Hayes-Tilden election of 1876, the loser Tilden had more popular votes than Hayes, and in the 1888 election, the loser Cleveland had more popular votes than Harrison, who won the electoral vote.

maintains it should,³⁵ but every voter's ballot would count period. There would be no "lost votes" by those voting in the state that their candidate failed to carry, including states where their candidate lost by a large margin. At the present time, the votes of Republicans in California, New York, Massachusetts and a number of other "blue states," and the votes of Democrats in Texas, Oklahoma, Mississippi and a number of other "red states," do not count at all.

While this point buttresses Professor Amar's argument in favor of a direct national election of the President, it also emphasizes the structural flaw which he claims only exists in the Electoral College method: that the popular vote winner can nonetheless lose in the Electoral College. There is no popular vote winner under the Electoral College method of electing the President for the simple reason that there is no direct popular vote. The voters are voting for electors on a state-by-state basis, and the reported popular vote is nothing more than a report of the total vote cast for electors in all the states. It bears no resemblance at all to the mythical popular vote that would exist if the voters were voting for the direct election of the President, where every vote counted in every state, and both candidates campaigned to win every vote in every state.

Whatever may be wrong with the Electoral College system, it cannot be that the popular vote loser can nonetheless win the Electoral College because the election is not about winning the popular vote. It is about winning the Electoral College, and the popular vote is completely irrelevant in light of this primary objective.³⁶ Candidates and political parties do not think or operate in terms of winning more popular votes than the other side. They think only in terms of electoral votes and "carrying a state" so that they reach the all-important number of 270 electoral votes needed to win the Presidency.

Because we have elected our President by the Electoral College through fifty-four elections, and the Presidential election is conducted by our political parties with reference to the operation of the Electoral College, I submit that this method of electing the President is an integral part of the American political system and is fully accepted by the American people. If John Kerry had carried Ohio in the 2004 election and had been elected President despite George Bush's 3,337,000 vote advantage in the popular vote, we may ask what would have happened. The Republican Party would have cried foul, just as the Democratic Party cried foul, after the Supreme Court's decision in *Bush*

35. Amar, *supra* note 2.

36. Contrary to the claims of some of his opponents, Bill Clinton was not a minority President in 1992 when he received only 43% of popular vote, because he received a large majority in Electoral College. It is also irrelevant that Al Gore received more popular votes than George Bush in 2000, since Bush, carried Florida and received more electoral votes.

*v. Gore*³⁷ effectively awarded the 2000 Presidential race to Bush. But the Republican Party, President Bush, and the American people would have accepted the result just as the Democratic Party, Al Gore, and the American people accepted the result in the 2000 election. There would have been cries to eliminate the Electoral College and a flurry of proposals to provide for direct popular election of the President, but the cries would have died down in a few weeks, and the flurry of proposals would have been debated by academics, but not even considered by our Congress. This is how we elect our President; it is certainly not the best way, but it is *our* way.

There is another reason why the Electoral College is here to stay: all of the states like the system. The system ensures that every state has some measurable say in the election of the President; Wyoming with its three electoral votes has a small say while California with fifty-five electoral votes has a larger say, but every state has some say. The three electoral votes of Wyoming and the other small states could tip an otherwise close Presidential election. At a minimum, the electoral votes of the small states are recorded. If there were a direct popular election of the President, the small popular vote in the small states would go unnoticed; it would be swallowed up in the grand total. This may explain why senators or representatives do not make proposals for the replacement of the Electoral College with a form of direct election of the President. Those proposals would not sit well with the political leaders of both parties in their home states. For better or for worse, the American people elect their President through the Electoral College. This is an essential feature of the American constitutional system.

We now turn to Professor Tokaji's discussion of congressional redistricting and racial equality.³⁸ Professor Tokaji discusses what he calls the "sordid" history of voting rights in the United States, a history that he says is "intertwined with the struggle for racial equality, particularly by African-Americans."³⁹ He goes on to point out that roughly contemporaneous with the Supreme Court's decisions on minority voting rights, "the Court has struggled to come up with a workable solution to the problem of partisan gerrymandering."⁴⁰ Professor Tokaji does an excellent job of identifying the four norms of democracy implicated by the minority voting rights and partisan gerrymandering cases and demonstrating the tensions between them.⁴¹ The four norms are minority representation, race-blindness, anti-entrenchment, and

37. 531 U.S. 98 (2000).

38. Tokaji, *supra* note 7.

39. *Id.* at 342.

40. *Id.* at 348.

41. *Id.* at 342.

state sovereignty.⁴² He says these tensions came together in the *LULAC* case.⁴³ As a result of these tensions, in each of the four areas a similar pattern of development may be discerned. The Court starts off with a sweeping articulation of a core principle of democratic governance, only to pull back on that principle in subsequent cases.⁴⁴ He concludes that, “[t]he tension between these norms . . . is undoubtedly part of the explanation for this phenomenon. To fully realize any one of these norms would require an abdication of one or more of the others.”⁴⁵

While the Court indicated that claims of unconstitutional partisan gerrymandering might be justiciable, the result in *LULAC* was that the Court majority rejected this claim. At the same time, a different Court majority, with Justice Kennedy casting the deciding vote on both issues, held that the redrawing of one of the districts to eliminate its Latino, voting age majority impermissibly diluted Latino votes in violation of section 2 of the Voting Rights Act.⁴⁶ In commenting on the Court’s Voting Rights Act holding in this case, Professor Tokaji states that, “it embraces constitutional law’s traditional preoccupation with the protection of minorities who cannot adequately protect their interests through ordinary political channels,”⁴⁷ and that it “represents a worthy effort to incorporate a traditional concern of constitutional adjudication into the interpretation of a civil rights statute.”⁴⁸ He concludes that the likely role of the federal courts in the redistricting process will be to “view with an especially skeptical eye attempts by a legislative majority to advance its own partisan self-interest, at the expense of a racial minority group, as did the majority in *LULAC*.”⁴⁹

I now want to come back to our eighteenth century Constitution and the role of the states in our federal system, in particular their role with respect to congressional redistricting. While our Constitution gives states the power to control voter qualifications and to establish congressional districts within the state, subsequent amendments, beginning with the Fourteenth and Fifteenth and continuing through the Nineteenth, Twenty-fourth, and Twenty-sixth, qualify this power by prohibiting the states from discriminating against racial minorities, women, the poor and young voters with respect to the right to vote. The implementation clauses of these amendments gives Congress the specific

42. *Id.*

43. *League of United Latin American Citizens v. Perry (LULAC)*, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part, dissenting in part).

44. Tokaji, *supra*, note 7, at 349.

45. *Id.* at 353.

46. 42 U.S.C. § 1973; *LULAC*, 126 S. Ct. at 2626; Tokaji, *supra* note 7, at 342.

47. Tokaji, *supra* note 7, at 357.

48. *Id.* at 358.

49. *Id.* at 359.

power to enforce their requirements with appropriate legislation.⁵⁰ The Fourteenth Amendment's Equal Protection Clause has been interpreted as embodying the principle of equal representation for equal numbers of people and therefore prohibiting legislative malapportionment.⁵¹ Article I, Section 2 requires that congressional districts within each state must be drawn "as nearly as is practicable [so that] one man's vote in a congressional election is to be worth as much as another's."⁵² The Constitution, as amended, significantly restricts the ability of the states to discriminate against discrete groups with respect to the right to vote and imposes significant limitations on the power of the states to draw congressional districts.

Given our two-party system, congressional redistricting is necessarily a partisan political matter. At the present time, the Court has not imposed any constitutional limits on the power of Congress to engage in partisan political redistricting. The only realistic limit, as addressed in *LULAC* and as Professor Tokaji explains, is that the states cannot use their power over congressional redistricting in such a way as to dilute the political power of racial minorities.⁵³ The remaining question, which is only partially answered by the holding in *LULAC*, is how to determine whether a particular redistricting dilutes the political power of racial minorities.

The United States lives under an eighteenth century Constitution. Under this Constitution, we elect a President by means of an Electoral College. Under this Constitution, with its voting rights amendments, the states control congressional redistricting except to the extent that a particular redistricting improperly dilutes the political power of racial minorities. For better or for worse, this is the American way of electing a President and of drawing congressional districts.

50. The Voting Rights Act was enacted pursuant to Congressional enforcement power under section 2 of the Fifteenth Amendment. U.S. CONST. amend XV, § 2; *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966).

51. *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964); *Baker v. Carr*, 369 U.S. 186, 207-08 (1962).

52. *Kirkpatrick*, 394 U.S. at 527-28 (1969).

53. *LULAC*, 126 S. Ct. at 2626; Tokaji, *supra* note 7, at 342.