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Reforming State Electoral College Laws to Depolarize American Politics

M. Akram Faizer
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REFORMING STATE ELECTORAL COLLEGE LAWS TO DEPOLARIZE AMERICAN POLITICS

M. AKRAM FAIZER*

ABSTRACT

Brnovich v. Democratic National Committee involved the Supreme Court gutting the remaining vestiges of the Voting Rights Act (VRA),¹ such that jurisdictions will

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Professor Faizer joined the LMU faculty in July 2011, was named Professor of the Year for the 2012-13 academic year, appears frequently on local media, and was awarded tenure and full professor status as of July 1, 2017. Professor Faizer has chaired and has been a member of the Law School's Inclusion and Cultural Competence and Faculty Recruitment Committees for several years and was honored to chair the law school's Dean Search Committee in Spring 2020.

Prior to joining the LMU faculty, Professor Faizer was a practicing litigator in Buffalo, NY, at the venerable law firm of Barclay Damon LLP. Professor Faizer focused his practice on real estate valuation, with special emphasis on both eminent domain and tax assessment disputes. Professor Faizer was the first person to be awarded the Hanna S. Cohn Young Lawyer Award by the New York State Bar Association for pro bono legal services.

Professor Faizer graduated from the University of Notre Dame Law School in Notre Dame, IN, with a Juris Doctor Degree in June 2000. He holds both a Bachelor of Arts Degree in International Relations and a Bachelor of Science Degree in Physiology from McGill University in Montreal, Canada.

He is a member of the New York and Tennessee bars.

¹ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); Voting Rights Acts of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1).

have free rein to impose partisan burdens on franchise rights that have a disproportionate negative effect on racial minority voters who, based on racial political polarization, prefer Democratic Party candidates over their Republican opponents. Legislative enactments on franchise rights, such as Arizona's voting restrictions at issue in *Brnovich*, however, were motivated by partisan considerations over the racial hierarchy framework that first prompted the VRA in 1965.² Indeed, the *Brnovich* Court emphasized that partisan motives are not the same as racial motives for VRA purposes, even though racially polarized voting can sometimes "blur the lines."³ This blurring of the lines between partisan and racial motivation in the context of pronounced racial political polarization in a highly contested two-party election framework has left ample room for partisans on both sides of the two-party divide to be incentivized to exacerbate the racial, regional, and socioeconomic cleavages that have systematically undermined national cohesion in recent years, especially since the 2008–09 financial crisis.⁴

Brnovich follows the highly divisive 2020 presidential election that Joe Biden won against former President Trump based on very narrow margins in highly contested swing states, notwithstanding a nationwide popular margin of more than 8 million votes.⁵ The very narrow margins in swing states, in conjunction with politicization of the delay in declaring a winner caused by the extended time needed to tabulate the exceedingly high number of mail-in ballots from urban precincts due to the COVID-19 pandemic,⁶ has worsened partisan and ethnic cleavages in an already divided

² The District Court "distinguished between partisan and racial motives, while recognizing that 'racially polarized voting can sometimes blur the lines.'" *Brnovich*, 141 S. Ct. at 2335.

³ *Id.*

⁴ "For instance, the 2008 financial crisis disproportionately affected Black communities—wiping out fifty-three percent of total Black wealth— . . . and approximately \$17,000 in net wealth, while median White families possess over ten times that amount." Julia F. Hollreiser, *Closing the Racial Gap in Financial Services: Balancing Algorithmic Opportunity With Legal Limitations*, 105 CORNELL L. REV. 1233, 1243 (2020); see also André Douglas Pond Cummings, *Post Racialism?*, 14 J. GENDER, RACE & JUST. 601, 601–02 (2011).

⁵ Philip Bump writes:

How does Biden gain 1 percent White support while Trump loses 3 percent? Remember that we're talking about the composition of Biden's 81 million votes and Trump's 74 million after the surge in turnout in 2020. Trump earned 7 million to 8 million more votes from Whites than he got in 2016, according to the Pew analysis, while Biden picked up nearly 10 million. At the same time, nonvoters were more likely to be White than they were in 2016, a year when turnout was down among some non-White voting groups relative to 2012.

Philip Bump, *New Data Expands Our Understanding of How Biden Won in 2020*, WASH. POST (June 30, 2021, 4:05 PM), <https://www.washingtonpost.com/politics/2021/06/30/biden-trump-2020-analysis/>.

⁶ Joanne Lipman & Edward B. Foley, *If We Don't Dispel the Falsehood of an Election 'Delay' Now, We Risk Chaos in November*, WASH. POST (Aug. 19, 2020), https://www.washingtonpost.com/opinions/there-wont-be-official-results-on-election-night-there-never-have-been/2020/08/19/be890f6a-e22e-11ea8dd2d07812bf00f7_story.html.

country.⁷ Divisions surrounding the election result were exemplified by the events of January 6, 2021, when Trump, while still president, incited a large mob of his supporters to storm the Capitol Building in Washington to prevent the House of Representatives from finalizing the Electoral College in Biden's favor.⁸ Although this led to President Trump's subsequent impeachment by the House of Representatives for Incitement to Insurrection,⁹ his partisan acquittal by the U.S. Senate¹⁰ and subsequent developments evidence the extent of the nation's worsening partisan divide. These developments include polling evidence demonstrating how most Republican voters believe the 2020 presidential election was stolen,¹¹ and actions by several Republican-controlled legislatures, including Georgia, to enact restrictions on early voting and ballot access that disproportionately exclude Democratic-leaning racial minority voters.¹² The problem of hyper-partisanship is not solely the fault of Republicans. After candidate Trump lost the nationwide popular vote but won the presidency in 2016 based on very narrow popular vote margins in key swing states, a sizable number of Democrats refused to accept the legitimacy of his election over Hillary Clinton.¹³ They then pressured the Justice Department to investigate the extent of Russian election interference on Trump's behalf,¹⁴ which led to the Deputy Attorney General's appointment of Special Counsel Robert S. Mueller, III, whose invasive investigation deprived Trump of needed political capital to pursue a legislative agenda for the first two years of his presidency.¹⁵

⁷ Michael Dimock & Richard Wike, *America is Exceptional in Its Political Divide*, PEW (Mar. 29, 2021), <https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide>.

⁸ Matt Viser, *For Anti-Trump Americans, Calamity Spurs a Muted Sense of Vindication*, WASH. POST (Jan. 10, 2021, 6:00 AM), https://www.washingtonpost.com/politics/capitol-riot-vindication-trump/2021/01/09/4195a966-5216-11eb-bda4-615aaefd0555_story.html.

⁹ *Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors*, H.R. Res. 24, 117th Cong. (2021).

¹⁰ 167 Cong. Rec. S. 717, 733 (2021) (Rollcall Vote No. 59).

¹¹ Chris Jackson & Jocelyn Duran, *Majority of Republicans Still Believe the 2020 Election was Stolen from Donald Trump*, IPSOS (Apr. 2, 2021), <https://www.ipsos.com/en-us/news-polls/majority-republicans-still-believe-2020-election-was-stolen-donald-trump>.

¹² Ruth Marcus, *Georgia's Shameful New Voting Laws are a Product of GOP Desperation*, WASH. POST (Mar. 26, 2021, 6:38 PM), https://www.washingtonpost.com/opinions/georgias-repulsive-new-election-law-is-exhibit-a-in-the-gops-war-on-voting-rights/2021/03/26/5878a942-8e63-11eb-a6bd-0eb91c03305a_story.html.

¹³ Ed Rogers, *The Democrats Aren't Learning from Their Defeat*, WASH. POST (Nov. 29, 2016), <https://www.washingtonpost.com/blogs/post-partisan/wp/2016/11/29/the-democrats-arent-learning-from-their-defeat/>.

¹⁴ ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 5 (2019).

¹⁵ Fred Wertheimer & Donald Simon, *Sessions' Recusal and Rosenstein's Appointment of a Special Counsel – Both Were Legally Required*, JUST SECURITY (Sept. 17, 2018), <https://www.justsecurity.org/60757/sessions-recusal-rosensteins-appointment-special-counsel->

Something must be done to remedy the chasm that divides the country. Some reflexively blame the two-party system and argue for its replacement with a multi-party framework as found in western Europe.¹⁶ However, replacing the two-party system, which has endured for most of the country's history,¹⁷ will be complicated and inordinately difficult to effectuate consistent with freedom of association that is protected by the First Amendment. Though understandable, the country's two-party system does not explain why partisanship is escalating, especially since the two-party system was consistent with a bipartisan approach to domestic and foreign policy for much of the 20th Century.¹⁸ From today's vantage point, it is easy to forget that it was the Republican former Governor of California and 1948 Vice-Presidential candidate, Earl Warren, whose court ordered an end to segregated public schooling and commenced the modern era of voting rights by judicially invalidating legislative malapportionment nationwide.¹⁹ With respect to Congress, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 were enacted with higher rates of Republican than Democratic support in both Houses.²⁰

Many, including myself, blame the country's reliance on single-member plurality districting, which encourages partisan gerrymandering and vote dilution of minority

both-legally-required/; *see also* Scott Horsley & Miles Parks, *Trump's Refusal to Back U.S. Intel Over Russia at Putin Summit Sparks Bipartisan Ire*, NPR (July 16, 2018, 7:13 PM), <https://www.npr.org/2018/07/16/628973563/trump-putin-to-meet-after-new-charges-over-russias-2016-election-interference>; Abby Vesoulis, *Mueller's Investigation Lasted 674 Days. Here's How That Compares to Other Probes*, TIME (Mar. 22, 2019, 8:27 PM), <https://time.com/5557332/mueller-report-length-special-counsels/>.

¹⁶ Christopher Ingraham, *How to Fix Democracy: Move Beyond the Two-Party System, Experts Say*, WASH. POST (Mar. 1, 2021, 3:14 PM), <https://www.washingtonpost.com/business/2021/03/01/break-up-two-party-system/>.

¹⁷ David A. Dulio & James A. Thurber, *America's Two-Party System: Friend or Foe?*, 52 ADMIN. L. REV. 769, 771 (2000).

¹⁸ PEW RSCH. CTR., *PARTISAN ANTIPATHY: MORE INTENSE, MORE PERSONAL*, (2019); *see also* Michael E. Flynn, *The International and Domestic Sources of Bipartisanship in U.S. Foreign Policy*, 67 POL. RSCH. Q. 398, 398–99 (2014).

¹⁹ *Earl Warren (1891–1974)*, EARL WARREN COLL. UC SAN DIEGO <https://warren.ucsd.edu/about/biography.html> (last visited Oct. 18, 2021); *see* Philip P. Frickey & Gordon Silverstein, *Congress and the Earl Warren Court*, 57 BULL. AM. ACAD. ARTS AND SCI. 6, 6 (2004).

²⁰ *The Civil Rights Movement and the Second Reconstruction, 1945–1968*, U.S. H.R. HIST., ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/> (last visited Oct. 19, 2021) [hereinafter *The Civil Rights Movement*]; *Remember Bipartisanship? It Happened in '65, With Voting Rights Act*, ST. LOUIS DISPATCH (Mar. 10, 2015) https://www.stltoday.com/remember-bipartisanship-it-happened-in-65-with-voting-rights-act/article_f45cc05a-ecdc-55b8-99a9-e005ad0ce776.html; Richard H. Sander, *50 Years After the Fair Housing Act, Bipartisanship is Still Hard, but Possible*, THE HILL (Apr. 5, 2018, 4:31 PM), <https://thehill.com/opinion/civil-rights/381861-50-years-after-the-fair-housing-act-bipartisanship-is-still-hard-but>.

party votes.²¹ This, however, fails to explain the dramatic growth of partisanship at the presidential level, which has worsened dramatically in recent elections. A legitimate explanation for the growth in presidential partisanship is the inordinate democratization of contested caucuses and primaries to choose the major party candidates, with the focus being on choosing the ideologically “pure” as opposed to the most electable candidate. However, primaries and caucuses became the sole means of delivering major party nominations since John F. Kennedy won the Democratic nomination in 1960.²² Primaries and caucuses also were consistent with the high arc of bipartisanship that characterized the Civil Rights and Cold War eras.²³ A more likely explanation for the growth in partisanship at the presidential level is the replacement of Madison’s Congressional system of government with a more democratic presidential system in which the White House, the federal administrative agencies, and the White House-nominated federal judiciary have taken a hegemonic role in American government.²⁴

Because presidential governance, more than its Congressional counterpart, relies on democratic legitimacy, a potential means of increasing national cohesion is for state legislatures to reform their means of awarding their states’ Electoral College votes from the current “winner-take-all” framework to one that awards Electoral College votes in rough approximation to the percentage of the two-party vote won by the major candidates, with a bonus vote for the state winner where the popular vote result would otherwise indicate an even split of Electoral College votes (“Apportionment Proposal”). For example, rather than awarding Biden all of Georgia’s 16 Electoral College votes, based on an extremely narrow popular vote margin of .2%, Georgia’s Electoral College votes would be awarded such that Biden obtains 9 votes and Trump 7, i.e., an equal distribution of votes between the candidates plus an additional vote to Biden for winning the statewide popular vote. If legislatively or conditionally enacted by enough states, it will result in an Electoral College result that more closely reflects the nationwide popular vote tally and therefore is more likely to be viewed as democratically legitimate.

The Apportionment Proposal will also engender national cohesion by depolarizing the legitimacy of the election outcome in each state, thereby disincentivizing voter suppression and foreign election interference²⁵ in highly contested swing states because the popular vote outcome in each state will be less outcome determinative. Limiting the award of Electoral College votes to the two leading candidates also

²¹ See, e.g., M. Akram Faizer, *Ressurecting Congress to Reduce Administrative Chaos*, 14 TENN. J.L. & POL. 19 (2019).

²² *Kennedy’s Nomination Was a Big Moment for the Primary System*, Article in *Constitution Daily*, NAT’L CONST. CTR. (July 13, 2017), <https://constitutioncenter.org/blog/kennedys-nomination-was-a-big-moment-for-the-primary-system/>.

²³ *Id.*

²⁴ Sarah Binder, *Revisiting and Restoring Madison’s American Congress*, Essay in *A Madisonian Constitution for All Essay Series*, NAT’L CONST. CTR., <https://constitutioncenter.org/debate/special-projects/a-madisonian-constitution-for-all/essay-series/revisiting-and-restoring-madisons-american-congress> (last visited Oct. 19, 2021).

²⁵ MUELLER, *supra* note 14, at 11.

protects against the proliferation of splinter and regional party candidates that would undermine national cohesion. Finally, unlike replacement of the Electoral College with a French-style nationwide popular vote, or the often mooted proposal to award bonus Electoral College votes to the nationwide popular vote winner, the Apportionment Proposal does not require a constitutional amendment and protects a key advantage of the original Electoral College, namely to encourage nationwide campaigning by candidates in lieu of monographic focus on the country's major population centers. This also explains its advantage over the national popular vote compact, whereby each state would award its Electoral College votes to the nationwide popular vote winner.

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I. INTRODUCTION

During the 2020 presidential election, former Vice President Biden prevailed against President Trump in the Electoral College by a 306 to 232 margin, based on a nationwide popular vote margin of 4.5% or more than 8 million popular votes.²⁶ The

²⁶ Biden won 81.3 million votes nationwide as compared to 74.2 million votes for Trump. David Wasserman et al., *2020 National Popular Vote Tracker*, COOK POL. REP.,

margin seems so decisive that it may well flummox future generations as to how President Trump, claiming a stolen election, was able to incite a mob of his supporters to storm the Capitol Building on January 6, 2021 to prevent an official count of the Electoral College in Biden's favor.²⁷ A sizable majority of Republicans nationwide are still convinced the election was stolen.²⁸

However, we easily forget the peculiar facts that make the perception of a stolen election understandable if not condonable. First, the 2020 election was affected by the COVID-19 pandemic, which, because of Trump's demotic characterizations of the disease prior to the election, disproportionately led more Democratic-leaning voters to fear pandemic spread by way of in-person voting.²⁹ This fear was especially prevalent among racial minority voters because the COVID-19 pandemic was far deadlier in urban racial minority communities than in the country as a whole.³⁰ As a result, a historically high number of votes could not be exit-pollled by the Associated Press ("AP"), which precluded it from projecting a victor by close of election day due to the very high number of contested states.³¹ Indeed, the very high number of Democratic-leaning urban votes that were cast by mail and had not been counted by close of election day, November 3, 2020, prompted Trump, who, at the time, led Biden in the swing state vote count, to prematurely and improperly claim reelection.³² Trump did this notwithstanding a clear likelihood that he would lose the election based on the gigantic volume of uncounted mail-in ballots in the urban areas of Arizona, Georgia, Nevada, Michigan, North Carolina, Pennsylvania, and Wisconsin that had not been

<https://cookpolitical.com/2020-national-popular-vote-tracker> (last visited Oct. 19, 2021). This translates into a 51.3% to 46.9% margin nationwide. *Id.*

²⁷ Dan Berry et al., *'Our President Wants Us Here': The Mob That Stormed the Capital*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html>.

²⁸ Chris Jackson & Jocelyn Duran, *Majority of Republicans Still Believe the 2020 Election was Stolen from Donald Trump*, IPSOS (Apr. 2, 2021), <https://www.ipsos.com/en-us/news-polls/majority-republicans-still-believe-2020-election-was-stolen-donald-trump>.

²⁹ Mackenzie Lockhart et al., *There's a Growing Gap in How Democrats and Republicans Plan to Vote*, WASH. POST (Oct. 8, 2020), <https://www.washingtonpost.com/politics/2020/10/08/more-democrats-than-republicans-plan-vote-by-mail-our-study-finds-that-could-affect-results/>.

³⁰ *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTR. FOR DISEASE CONTROL & PREVENTION (Apr. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

³¹ Nicholas Riccardi, *AP Explains: The Election Result May be Delayed. That's OK.*, AP NEWS (Nov. 2, 2020), <https://apnews.com/article/election-2020-Biden-Trump-delayed-result-d9208787554db4c4575579f6b75a7cde>.

³² Christina Wilkie, *Trump Tries to Claim Victory Even as Ballots are Being Counted in Several States – NBC Has Not Made a Call*, CNBC (Nov. 6, 2020, 6:37 AM), <https://www.cnn.com/2020/11/04/trump-tries-to-claim-victory-even-as-ballots-are-being-counted-in-several-states-nbc-has-not-made-a-call.html>.

called by AP for either candidate.³³ In the end, based on a counting of the mail-in ballots, all these states, save North Carolina, were won by Biden by very close margins. Biden ended up winning Arizona by only 0.3% of the vote, Georgia by only 0.2%, Nevada by 2.4%, Pennsylvania by 1.2%, Michigan by 2.8%, and Wisconsin by 0.6%.³⁴

To illustrate the importance of absentee ballots in determining the election outcome in these close-margin races, 1.3 million Georgians or 26% of the Georgia electorate voted by mail-in absentee ballot, and 65% of these voters chose Biden, whereas 34% chose Trump.³⁵ The very narrow margin of victory, in conjunction with the fact that more than a quarter of the votes were mail-in ballots that delivered Georgia to Biden more than two weeks after election day, led many Republican-leaning voters to question the legitimacy of the result and, in frustration, to improperly allege voter fraud by Democrats and state election officials.³⁶

This Republican frustration is undoubtedly a concomitant of the fact that Biden was awarded all of Georgia's 16 Electoral College votes, notwithstanding the unusually high level of contestation and the very narrow vote count differential between the two major-party candidates. The whole election, characterized by very narrow margins in conjunction with a "winner-take-all" framework for awarding Electoral College votes, worsened the political and racial cleavages that already undermined state and national cohesion. After the presidential election, Democrats Raphael Warnock and Joel Ossoff narrowly won both Georgia U.S. Senate seats in run-off elections against incumbent Republican Senators, Kelly Loeffler and David Perdue, by 2 and 1.2 percentage points, respectively, the result of which delivered nominal control of both Houses of Congress to Biden's Democratic Party.³⁷

All told, if President Trump was able to narrowly hold his election day leads in Georgia, Pennsylvania, and Wisconsin, he would have prevailed in the Electoral College 278-260, while losing the nationwide popular vote by approximately 8

³³ Colby Itkowitz, et al., *Vote Counts Continue in Georgia, Arizona: Trump Mounts Legal Challenges*, WASH. POST (Nov. 5, 2020, 1:40 AM), <https://www.washingtonpost.com/elections/2020/11/04/trump-biden-election-live-updates/>.

³⁴ *2020 Election Statistics*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/2020> (last visited Oct. 19, 2021).

³⁵ Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html>.

³⁶ Stephen Fowler, *After Attacks on Election Integrity, Georgia Officials Work to Rebuild Confidence*, NPR (Jan. 14, 2021, 7:01 AM), <https://www.npr.org/2021/01/14/956521245/after-attacks-on-election-integrity-georgia-officials-work-to-rebuild-confidence>.

³⁷ *Georgia Senate Special Runoff Election Results 2021*, NBC NEWS (Mar. 6, 2021, 10:11 PM), <https://www.nbcnews.com/politics/2020-special-elections/georgia-senate-runoff-results>; *Georgia Senate Special Runoff Election Results 2021*, NBC NEWS (Mar. 6, 2021, 10:11 PM), https://www.nbcnews.com/politics/2020-special-elections/georgia-senate-runoff-results?icid=election_nav. Warnock defeated Loeffler by 2 percentage points, while Ossoff defeated Perdue by only 1.2 percent. *Id.* The victories gave Democrats a total of 50 U.S. Senate seats, which, with Vice President Kamala Harris's tie-breaker vote, gives Democrats nominal control of both elected branches of the U.S. government. *Id.*

million. To those who think this counterfactual is too far-fetched, it must be remembered that in 2016, Trump prevailed 306-232 in the Electoral College against Hillary Clinton, despite losing the popular vote by 2.1 percent or nearly 3 million votes, and won Michigan by 0.3%, Pennsylvania by 0.7%, and Wisconsin by 0.7%.³⁸ Clinton, in turn, would have won both the popular vote and presidency by a 278-260 margin if she had won these highly contested states.³⁹ The fact that Trump lost the popular vote by a sizable margin undermined his claim to have “won big” and worsened political polarization by delivering the presidency to a minority candidate whose governing style focused monographically on his supporters and whose reelection strategy was premised on a divisive Electoral College mandate.⁴⁰

However, to those who blame Republicans alone for polarization, it is easy to forget that just as Republicans dispute the legitimacy of President Biden’s election victory in 2020, a sizable number of Democrats, if not a majority, felt similarly about former President Trump’s 2016 win over Hillary Clinton.⁴¹ It was the largely Democratic perception that Trump was illegitimately delivered the presidency that led then-Deputy Attorney General Rod Rosenstein to appoint Special Counsel Robert S. Mueller, III to verify the extent of Russian election interference in the 2016 presidential election.⁴² Mueller’s investigation undermined the first two years of Trump’s presidency and may have precluded Trump from achieving a significant domestic political agenda.⁴³

It is the Democratic Party’s very close margins of victory in the 2020 election that explains S.B. 202, enacted by the Republican-controlled Georgia legislature and signed into law by Republican Governor Brian Kemp to assist Republicans in future highly contested elections. S.B. 202 has been characterized by many Democrats, including President Biden and the African American House of Representatives’ Majority Whip, James Clyburn, as the “new Jim Crow”⁴⁴ because it could have an

³⁸ 2016 *Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/elections/2016/results/president>.

³⁹ *Id.*

⁴⁰ *The Latest: Trump Says Romney Ought to be ‘Team Player’*, AP NEWS (Jan. 2, 2019), <https://apnews.com/article/4b788f02c78c4ba5bae6c5e7dd8c4821>; Jill Colvin & Jonathan Lemire, *Trump’s Focus on His Base Complicates Path to Reelection*, AP NEWS (Apr. 27, 2020), <https://apnews.com/article/virus-outbreak-donald-trump-ap-top-news-elections-barack-obama-4d923d0a950e8f73bbec676a8322bf26>; see also Tamara Keith, *Trump Appears to be Betting on a Strategy of Division to Win Reelection*, NPR (July 7, 2020, 5:04 AM) <https://www.npr.org/2020/07/07/888102320/trump-appears-to-be-betting-on-a-strategy-of-division-to-win-reelection>.

⁴¹ Sean Davis, *Nearly Half of Democrats Think the 2016 Election Was “Rigged”*, THE FEDERALIST (Nov. 18, 2016), <https://thefederalist.com/2016/11/18/nearly-half-democrats-think-election-rigged/>.

⁴² Horsley & Parks, *supra* note 15; Wertheimer & Simon, *supra* note 15.

⁴³ Vesoulis, *supra* note 15.

⁴⁴ See Kelly Hooper, *Clyburn: Georgia Election Law is the ‘New Jim Crow’*, POLITICO (Apr. 11, 2021, 1:45 PM), <https://www.politico.com/news/2021/04/11/clyburn-georgia-election-law-new-jim-crow-480861>; see also Stephen Fowler, *What Does Georgia’s New Voting Law SB 202*

outcome determinative effect in future elections by hindering ballot access for racial minority voters who disproportionately vote for Democratic Party candidates.⁴⁵ The Supreme Court, however, in *Brnovich v. Democratic National Committee*,⁴⁶ demonstrated an unwillingness to intervene to resolve burdens placed on franchise rights. In *Brnovich*, the Court concluded that laws that disproportionately hinder ballot access for racial minority voters do not violate the Voting Rights Act (“VRA”) or the Fifteenth Amendment’s prohibition against racially discriminatory voting laws, provided the majority of racial minority voters are able to cast ballots and the voting rates between whites and racial minority voters remain similar, and because the given reasons for these laws, namely the protection against systematic voter fraud, need not be empirically observable to be valid.⁴⁷

Something must be done to end this divisive arms race to alter election outcomes by burdening franchise rights. Because Blacks, and, to a lesser extent, Hispanics and Asians, disproportionately vote for Democrats at the local, state, and national level based on racial political polarization, it is understandable, if not condonable, that Republican partisans tend to oppose measures designed to protect and enhance racial minority voter turnout, such as a reinigorated VRA or an immigration reform that would eventually naturalize and consequently provide voting rights to large numbers of non-White voters. For this reason, the Democratic Party’s call to enforce voting rights sounds to Republicans like an unfair insistence that voting rights are synonymous with Democratic Party victories at national elections. This, however, might change if racial political polarization was somehow reduced like it was during the Second Reconstruction, when both parties contested for racial minority votes, and bipartisan legislation was enacted to dramatically increase racial minority immigration and civil, voting, and housing rights.⁴⁸

How is polarization to be reduced in today’s highly contested election framework? My previous writings have focused on the problem of socioeconomic immobility that has been worsened by a relatively regressive tax code and an education system that has become a class stratifier as opposed to escalator.⁴⁹ I have also criticized our

Do?, GPB NEWS (Mar. 27, 2021, 8:50 AM), <https://www.gpb.org/news/2021/03/27/what-does-georgias-new-voting-law-sb-202-do>.

⁴⁵ *Party Affiliation Among Adults in Georgia by Race/Ethnicity*, PEW RSCH. CTR. <https://www.pewforum.org/religious-landscape-study/compare/party-affiliation/by/racial-and-ethnic-composition/among/state/georgia/> (last visited Nov. 26 2021); see Ian Weiner, *Georgia’s SB202 is a Culmination of Concerted Efforts to Suppress the Participation of Black Voters and Other Voters of Color*, LAW. COMM. FOR CIV. RTS. UNDER L. (Mar. 29, 2021), <https://www.lawyerscommittee.org/georgias-sb202-is-a-culmination-of-concerted-efforts-to-suppress-the-participation-of-black-voters-and-other-voters-of-color/>.

⁴⁶ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

⁴⁷ *Id.* at 2346.

⁴⁸ See The Immigration and Nationality Act, Pub. L. No. 89–236, 79 Stat. 911; The Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241; The Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437; The Fair Housing Act of 1968, Pub. L. No. 90–284, 82 Stat. 73; see also *The Civil Rights Movement*, *supra* note 20.

⁴⁹ See, e.g., Mohamed Akram Faizer, *Seven Steps to Truly Reform the Tax Code and Engender Socio-Economic Mobility*, 82 ALB. L. REV. 601 (2018); see also Mohamed Akram

nation's failure to statutorily increase the size of the House of Representatives and change our method of electing members of Congress from the current single-member plurality paradigm that incentivizes partisan gerrymanders that undermine minority voting power.⁵⁰ These changes, which fortuitously can be enacted by state legislatures and do not require a constitutional amendment, fail to go far enough. More is needed, especially because the Madisonian Congressional system of government that focused on federalism, has largely been replaced by a presidential system of government in which the White House, the federal administrative agencies, and the White House-nominated federal judiciary have taken a hegemonic role in American government.

I recommend another change to diminish polarization and enhance national cohesion that can be implemented without a constitutional amendment. This is for states to legislatively change or condition their laws on awarding Electoral College votes for the presidency, from today's "winner-take-all" framework, to one that awards Electoral College votes in proportion to the popular vote percentages between the two major-party candidates. Under the proposal, Electoral College votes are to be apportioned between the two major-party candidates based on the percentage of the two-party popular vote, with a potential bonus for the state winner where the popular vote differential would otherwise result in an even split of Electoral College votes ("Apportionment Proposal").

To illustrate how the Apportionment Proposal would work, rather than awarding Biden all of Georgia's 16 Electoral College votes based on an extremely narrow popular vote margin of .2%, Georgia's Electoral College votes should be awarded such that Biden is awarded 9 votes and Trump 7 votes. This is a distribution of votes that roughly approximates the two-party popular vote in the state, with an additional vote going to the prevailing candidate, Biden. If enacted by all state legislatures, it will result in an Electoral College result that more closely reflects the nationwide popular vote tally and therefore is more likely to be viewed as democratically legitimate. It will also engender national cohesion by encouraging both major political candidates to campaign nationwide as opposed to solely in the key swing states. Finally, it will minimize the risk of voter suppression and foreign election interference by making the final popular vote outcome in each state less outcome-determinative of the presidential election result.

I make this policy proposal because the Electoral College has been transformed from a means of protecting federalism and creating a unifying consensus behind the prevailing presidential candidate, into one that needlessly polarizes an already divided country. Although many have called for its abolition and replacement by a nationwide popular vote similar to France under the current Fifth Republic, this would require an elusive constitutional amendment and worsen regional and urban-rural cleavages by incentivizing presidential candidates to campaign solely in the nation's major population centers.⁵¹ Another proposal, first mooted in 1978 by the 20th Century Fund

Faizer, *Revitalizing American Democracy through Education Reform*, MEM. L. REV. (forthcoming).

⁵⁰ Mohamed Akram Faizer, *Resurrecting Congress to Reduce Administrative Chaos; Redressing Administrative overreach by Increasing the Number of Congressmen and Ending Single-Member Plurality Districting*, 14 TENN. J. L. & POL'Y 19 (2019).

⁵¹ Darrell M. West, *It's Time to Abolish the Electoral College*, BROOKINGS INST. (Oct. 15, 2019), <https://www.brookings.edu/policy2020/bigideas/its-time-to-abolish-the-electoral->

Task Force on Reform of the Presidential Election Process, is to award 102 bonus Electoral College votes to the nationwide popular vote winner to ensure that the presidential election winner has democratic legitimacy.⁵² This also problematically requires a constitutional amendment and encourages candidates to monographically focus on the nation's major population centers. It also creates a problem first anticipated by the Founders when they created the Electoral College, by giving the federal government the infeasible and altogether unenviable task of policing the states' election procedures to ensure that no state artificially affected the nationwide election outcome by illegitimately disfranchising a locally disfavored minority, or altering their election procedures to favor a particular candidate for partisan reasons.⁵³ A nationwide popular vote for the presidency would further weaken an already weak party system that worsens political polarization and incentivize the development of divisive single-issue candidates, especially in the larger states.⁵⁴

Another proposal to modify the Electoral College is the National Popular Vote Interstate Compact or NPVIC, which would bypass the constitutional amendment requirement of the nationwide popular vote frameworks by having each state enact legislation agreeing to award all their Electoral College votes to the nationwide popular vote winner.⁵⁵ This proposal would still leave an incentive for each state to disfranchise disfavored groups locally or alter election procedures to affect the national popular vote outcome that could undermine the legitimacy of the nationwide popular vote count. The NPVIC also suffers from the fact it would, like all nationwide popular vote plans, discourage nationwide focus by the major-party candidates and instead incentivize campaigning in the country's major population centers. By contrast, the Apportionment Proposal would neither require the insurmountable hurdle that is a constitutional amendment nor facilitate the election of candidates with only sectional or regional appeal by incentivizing nationwide campaigning by the major-party candidates.

A. *Article Outline*

This Article will commence with a brief analysis of the Electoral College's constitutional underpinnings. It will then discuss the Electoral College's importance in the history of American presidential elections and how it has become an outdated relic that undermines national cohesion and requires implementation of the Apportionment Proposal to further national cohesion. It will then move on to a short

college/; Thierry Leterre, *The French Presidential Election: An Assessment*, BROOKINGS INST. (Mar. 1, 2002), <https://www.brookings.edu/articles/the-french-presidential-election-an-assessment/>.

⁵² Arthur Schlesinger, Jr., *Fixing the Electoral College*, WASH. POST (Dec. 19, 2000), <https://www.washingtonpost.com/archive/opinions/2000/12/19/fixing-the-electoral-college/1326d431-966a-4d7d-af37-6b77e742162e/>.

⁵³ See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 148–59 (Random House 2005).

⁵⁴ Schlesinger, *supra* note 52.

⁵⁵ *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE (Sept. 20, 2021), <https://www.nationalpopularvote.com/sites/default/files/1-pager-npv-v221-2021-9-20.pdf>.

primer on voting rights in the United States to highlight how bipartisanship has been a necessary predicate to the expansion of the suffrage and emphasize that today's red state ballot access restrictions, which Democrats call the "New Jim Crow," are based on partisan motivations caused by racial political polarization. It will then go into detail and explain the workings of such a law, namely Georgia's S.B. 202, whose partisan intent is to favor Republican candidates for office and deliver Georgia's 16 Electoral College votes to Republican presidential candidates due to today's "winner-take-all" framework for awarding Electoral College votes. It will close after discussing how the Apportionment Proposal would engender more legitimate presidential election results and further national cohesion by applying it to the most recent closely contested presidential elections, namely those of 2020, 2016, 2004, and 2000.

II. AMERICAN PRESIDENTIAL ELECTIONS AND THE ELECTORAL COLLEGE

Unlike France, which, under the De Gaulle's Fifth Republic, elects its president based on a two-round nationwide popular vote, the United States has never used the popular vote to choose its president.⁵⁶ Rather, U.S. Constitution, Article II, Section 1, Clauses 2 and 4 provide that:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an Office of Trust or Profit under the United States shall be appointed an Elector. . .

. . .

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.⁵⁷

This means that an Electoral College chosen by the state legislatures, as opposed to a nationwide popular vote, would determine the presidential election outcome. The reasons the Framers chose to abjure a nationwide popular vote was to incentivize the states to join the Union by giving state legislatures the ability to choose the nation's chief executive.⁵⁸ An Electoral College framework was also necessary because the nascent federal government was too small to enforce the legitimacy of a nationwide popular vote, and, by limiting each state's electoral impact to the size of its Congressional delegation, no state would be incentivized to illegitimately alter its voting qualifications to affect a presidential election outcome in its favor.⁵⁹ Determining the presidency by Electoral College ideally would, like the Senate, strengthen smaller states in American federalism, by forcing presidential candidates to focus on all states and state legislatures as opposed to the nation's major population centers, and create a fortuitous appearance of national consensus behind a prevailing

⁵⁶ Leterre, *supra* note 51.

⁵⁷ U.S. CONST. art. II, § 1, cl. 2, 4.

⁵⁸ See AMAR, *supra* note 53.

⁵⁹ *Id.*

presidential candidate because the Electoral College outcome usually magnifies a popular vote victory.⁶⁰

III. THE ELECTORAL COLLEGE IN HISTORY

For much of the country's history, this system worked quite well and typically provided a consensus-building Electoral College mandate to the winner of the nationwide popular vote, bearing in mind the Constitution textually allows state legislatures to choose Electors without any requirement for public input in the form of an election.⁶¹ At the first presidential election of 1788–89, Connecticut, Georgia, New Jersey, and South Carolina held no popular vote for the presidency, New York did not choose its electors on time, and neither North Carolina nor Rhode Island had ratified the U.S. Constitution on time to participate in the election.⁶² Similarly, for the presidential election of 1792, only six of 15 states chose their electors based on some form of popular vote.⁶³ In the highly contested presidential election of 1800, which had an inconclusive result and was eventually determined by the House of Representatives in Thomas Jefferson's favor, only six of sixteen states had any form of popular suffrage for choosing its electors.⁶⁴ Even the infamous 1824 presidential election, which had the House of Representatives deliver the presidency to John Quincy Adams after an inconclusive Electoral College result, is often depicted as undemocratic because Andrew Jackson was denied the presidency even though he won a plurality of the nationwide popular vote and of the Electoral College votes.⁶⁵ What is forgotten is that even as late as 1824, six of twenty-four states had no popular vote for the presidency.⁶⁶

Arguably the first truly democratic presidential election in the United States was that of 1828, which delivered the presidency to Jackson based on a popular vote margin of 55% to 44% in the 22 of 24 states that determined their presidential electors

⁶⁰ George F. Will, *Defending the Electoral College*, ABC NEWS (Jan. 6, 2006, 5:50 PM), <https://abcnews.go.com/Politics/story?id=122601&page=1>.

⁶¹ In the presidential election of 1788/89, only 6 of 11 states eligible to cast Electoral College votes chose electors by a form of popular vote. MICHAEL J. DUBIN, UNITED STATES PRESIDENTIAL ELECTIONS, 1788–1860: THE OFFICIAL RESULTS BY COUNTY AND STATE 1–3 (2011).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 9–11. The states were Kentucky, Maryland, North Carolina, Rhode Island, Tennessee and Virginia. *Id.* The remaining states chose their electors appointed by the state legislature. *Id.*

⁶⁵ *Id.* at 31. Out of nearly 366,000 votes cast nationwide for president, 151,287 or 42.22% were cast for Jackson, while Adams won 111,811 or 31.23% of the vote. *Id.*

⁶⁶ *Id.* at 32–39. The states that had no popular vote for the presidency included Delaware, Georgia, Louisiana, New York, South Carolina and Vermont. *Id.*

by popular vote.⁶⁷ Accordingly his Electoral College vote margin of 178–83 against the incumbent, John Quincy Adams, was democratically legitimate, to the degree any election outcome could be in a slave society.⁶⁸ The last state to choose its Electors by popular vote was South Carolina, whose Electors were not chosen by popular suffrage until 1868, when, due to its newly enfranchised Black population, awarded its six votes to the Republican Party candidate, Ulysses S. Grant, over his Democratic Party opponent, Horatio Seymour, based on a 58% to 42% popular vote margin.⁶⁹

The 1868 election evidenced how an Electoral College vote outcome can fortuitously magnify a popular vote victory, thereby creating an appearance of national consensus behind the prevailing presidential candidate. In this instance, Grant's apparently decisive 214–80 Electoral College margin of victory masked a very slim popular vote margin of 300,000 out of 5.7 million votes cast and was attributable to the support of 500,000 Republican-leaning Black voters, mostly in the South.⁷⁰ As such, the 1868 presidential election marked the first time the White House was awarded to a presidential candidate based on overwhelming racial minority vote on behalf of a single candidate.⁷¹ Another example of the Electoral College providing an appearance of consensus behind the prevailing candidate was the 1912 presidential election, in which the Democrat Woodrow Wilson won by an Electoral College landslide of 435 out of a possible 531 votes, against the incumbent Republican President, William Howard Taft, the third-party Bull Moose candidate and former President, Theodore Roosevelt, and the Socialist Party candidate, Eugene V. Debs.⁷² This provided a salutary consensus for a very divided electorate, which gave Wilson a plurality of only 41.8% of the popular vote, as compared to 27.4% for Roosevelt, 23.2% for Taft, and 6% for Debs.⁷³ Indeed, before the narrowness of Wilson's popular vote mandate was known, Roosevelt, on November 5, 1912 conceded the election by telegraph to Wilson, writing, "the American people by a great plurality have conferred upon you the highest honor in their gift. I congratulate you thereon."⁷⁴

⁶⁷ MICHAEL J. DUBIN, *UNITED STATES PRESIDENTIAL ELECTIONS, 1788–1860: THE OFFICIAL RESULTS BY COUNTY AND STATE* (McFarland reprint ed. 2011) (The only two states to not choose the president by popular vote at the time were Delaware and South Carolina).

⁶⁸ *Id.*

⁶⁹ *Presidential Election of 1868: A Resource Guide*, LIBR. OF CONG. (Apr. 26, 2017), <https://www.loc.gov/tr/program/bib/elections/election1868.html>; see 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 236 (2000) (attributing President Grant's popular-vote victory in the 1868 election to Black voters in the former Confederacy).

⁷⁰ Travis Crum, *Reconstructing Racially Polarized Voting*, 70 *DUKE L.J.* 261, 304 (2020).

⁷¹ *See id.*

⁷² *1912 Election Statistics*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/1912> (last visited Oct. 21, 2021).

⁷³ *Id.*

⁷⁴ *Telegram to Woodrow Wilson Conceding the Presidential Election*, AM. PRESIDENCY PROJECT (Nov. 5, 1912), <https://www.presidency.ucsb.edu/documents/telegram-woodrow-wilson-conceding-the-presidential-election>.

Similarly, in 1960, the Democrat John F. Kennedy prevailed over the then-Republican Vice President, Richard Nixon, by a seemingly decisive 303–219 Electoral College vote margin.⁷⁵ On closer inspection, the apparent consensus behind Kennedy is altogether illusory — Kennedy won 49.72% of the nationwide popular vote as compared to Nixon’s 49.55%, and Nixon would most certainly have won the presidency but for Kennedy’s dubious victories in Illinois and Texas, by margins of 8,858 and 46,257 votes, respectively.⁷⁶ Indeed, Nixon may well have contested the election but for the Electoral College framework that would have required his supporters to implausibly overturn not only the Illinois result, but also that of at least one additional state.⁷⁷

In 1992, the Democratic Arkansas Governor, Bill Clinton, won a landslide Electoral College mandate against the then-Republican President, George H. W. Bush, and independent candidate, H. Ross Perot, with 370 Electoral College votes as compared to 168 for Bush and 0 for Perot.⁷⁸ This provided a salutary level of consensus in favor of the country’s first Democratic president after three straight lopsided Republican victories in the presidential elections of 1980, 1984, and 1988. On closer inspection, though, Clinton won only 43.0% of the nationwide popular vote, evidencing a dubious mandate in his favor.⁷⁹ Indeed, it is very likely that Bush, who won 37.45% of the vote, would have won reelection but for Perot’s atypically strong independent candidacy, which saw him win 18.91% of the vote, and, more importantly, campaign in a manner that had a disproportionately negative impact on Bush’s candidacy.⁸⁰

The previous examples involved the “winner-take-all” provision of Electoral College votes being a useful means for a narrow popular vote presidential election winner to claim a governing mandate based on how the Electoral College worked to

⁷⁵ *1960 Presidential General Election Data – National*, DAVE LEIP’S ATLAS OF PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/data.php?year=1960&datatype=national&def=1&f=0&off=0&elect=0> (last visited Oct. 21, 2021).

⁷⁶ *Id.*

⁷⁷ *1960 Presidential General Election Results*, DAVE LEIP’S ATLAS OF PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/national.php?year=1960&f=0&off=0&elect=0> (last visited Oct. 21, 2021). Nixon’s clearest path to victory would have been to overturn the results in Illinois and Texas, which would have resulted in a 252-vote victory for Nixon, though this would have been difficult due to the lack of institutional support for the Republican Party in Texas. *Id.*

⁷⁸ *1992 Presidential General Election Data – National*, DAVE LEIP’S ATLAS OF PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/data.php?year=1992&datatype=national&def=1&f=0&off=0&elect=0> (last visited Oct. 21, 2021).

⁷⁹ *Id.*

⁸⁰ *Id.*; Quin Hillyer, *Ross Perot Really Did Make George H. W. Bush Lose Reelection*, WASH. EXAMINER (July 10, 2019), <https://www.washingtonexaminer.com/opinion/ross-perot-really-did-make-george-h-w-bush-lose-reelection>.

create an appearance of nationwide consensus. This was a definitive benefit that would be forsaken under the Apportionment Proposal. The Apportionment Proposal, however, is timely in that the “winner-take-all” Electoral College has gone from an artificial basis for furthering national cohesion to a means of artificially delivering the presidency to the loser of the nationwide popular vote. It is to this subject that the Article turns.

IV. THE ELECTORAL COLLEGE TODAY—AN OUTDATED AND DIVISIVE RELIC THAT UNDERMINES NATIONAL COHESION

Only five times in American history has the winner of the presidential popular vote been denied the presidency, resulting in the minority presidencies of John Quincy Adams, Rutherford B. Hayes, Benjamin Harrison, George W. Bush, and Donald J. Trump.⁸¹ With the notable exception of Bush, who very narrowly lost the popular vote to Al Gore, Jr. in 2000, all these presidents served only a single term.⁸² As evidenced by former President Trump’s election, near reelection, and continued popularity with Republican partisans, the problem of divisive minority presidencies that exploit urban-rural and racial and ethnic cleavages could become paradigmatic. For a country that sees itself as the world’s leading nation, minority government in all three branches could undermine the legitimacy of the federal government. Because congresspersons are elected in increasingly gerrymandered districts that dilute the political power of urban and racial minority voters, equal suffrage in the Senate, regardless of the growing population discrepancy between states, undermines the democratic legitimacy of the bicameral legislative process, and presidents, who increasingly are elected with only minority support, appoint federal judges for life with the malapportioned Senate’s advice and consent.⁸³ In short, the Electoral College is now a potential means of systematically delivering the presidency and, concomitantly, control of the administrative agencies and the federal courts to a candidate with minority support. As exemplified by Trump’s term in office, this takes a toll on

⁸¹ See Schlesinger, *supra* note 52; *2016 Presidential Election Results*, *supra* note 38.

⁸² See Schlesinger, *supra* note 52; Ron Elving, *Club of 1-Term Presidents Awaits its Reluctant New Member: Trump*, NPR (Jan. 17, 2021) <https://www.npr.org/2021/01/17/957680066/club-of-1-term-presidents-awaits-its-reluctant-new-member-trump>; *Biography of President George W. Bush*, WHITE HOUSE ARCHIVES, <https://georgewbush-whitehouse.archives.gov/president/biography.html> (last visited Oct. 21, 2021).

⁸³ U.S. CONST. art. II, § 2, cl. 2. By way of example, Trump, who lost the popular vote in 2016 by almost 3 million votes, appointed three U.S. Supreme Court justices, while President Carter, who won the popular vote by a narrow margin against former President Ford, never nominated a U.S. Supreme Court justice. *2016 Presidential Election*, *supra* note 38; *Trump Administration Accomplishments*, TRUMP WHITEHOUSE ARCHIVES <https://trumpwhitehouse.archives.gov/trump-administration-accomplishments/> (last visited Oct. 21, 2021); *1976 Presidential General Election Results*, DAVE LEIP’S ATLAS OF U.S. ELECTIONS, <https://uselectionatlas.org/RESULTS/national.php?year=1976&f=0&off=0&elect=0> (last visited Oct. 21, 2021); Barbara Perry, *RBG: Jimmy Carter’s “Notorious” Judicial Legacy*, UNIV. OF VA. <https://alumni.virginia.edu/learn/2020/09/24/rbg-jimmy-carters-notorious-judicial-legacy/> (last visited Oct. 21, 2021).

national cohesion, worsens racial and political polarization, and jeopardizes the institutional legitimacy of the federal courts' judicial review power.

The other rationales supporting the current Electoral College are illusory. A given reason for the "winner-take-all" Electoral College is that it protects smaller states in American federalism. Additionally, it ostensibly encourages a nationwide consensus for the prevailing candidate, acting as a potential means of avoiding the regionalism and economic development discrepancies one finds in other mature democracies such as Canada, Spain, and Italy.⁸⁴ However, there is little evidence for this proposition as the U.S. struggles with regionalism and economic development discrepancies like all other mature democracies.⁸⁵ Going further, the Electoral College has not facilitated the election of presidents from smaller states as there have only been four presidents from small states, namely Pierce from New Hampshire, Taylor from Louisiana, Clinton from Arkansas, and Biden from Delaware. Far from protecting small states, the Electoral College has neither facilitated their interest in regional economic development nor facilitated the election of small-state presidents.

Another given reason in support of the "winner-take-all" Electoral College is that it encourages nationwide campaigning in lieu of monographic focus on the nation's large population centers, which is arguably the case in other mature democracies that elect their heads of government by popular vote.⁸⁶ Though this might have been the case in the past, an analysis of recent presidential elections belies the claim and instead evidences how the "winner-take-all" Electoral College acts as a disincentive to nationwide campaigning.

The 2000 presidential election between then-Vice President Gore and then-Governor George W. Bush was always acknowledged to be a contest between the then toss-up swing states of Florida, Michigan, and Pennsylvania.⁸⁷ After both campaigns focused their resources on these three states, Bush lost the nationwide popular vote, but ultimately won the presidency based on a statistically insignificant margin of victory in Florida that was mandated by the U.S. Supreme Court.⁸⁸

In the 2004 presidential election, the candidates, Bush and then-U.S. Senator Kerry, focused on a few key swing states, and primarily Ohio, because, according to

⁸⁴ See, e.g., Hans A. von Spakovsky, *Maine and Nevada Show Why the Electoral College Helps Small States, Not Red States*, HERITAGE FOUND. (July 19, 2019), <https://www.heritage.org/election-integrity/commentary/maine-and-nevada-show-why-the-electoral-college-helps-small-states>.

⁸⁵ See ORG. FOR ECON. COOP. AND DEV., OECD REGIONS AT A GLANCE 2016 60–75 (2016).

⁸⁶ See, e.g., John W. York, *Electoral College Encourages Candidates to Get to Know All Kinds of Americans*, HERITAGE FOUND. (Sep. 20, 2019), <https://www.heritage.org/election-integrity/commentary/electoral-college-encourages-candidates-get-know-all-kinds-americans>.

⁸⁷ See, e.g., Ronald Brownstein, *Bush, Gore Locked in Virtual Ties in 3 Big, Crucial States*, L.A. TIMES (Oct. 31, 2000), <https://www.latimes.com/archives/la-xpm-2000-oct-31-mn-44636-story.html>.

⁸⁸ Bush won Florida by 537 votes but lost the national popular vote by more than half a million votes. Harry J. Enten, *A Definitive Guide to the Eight Swing States That Will Decide the 2012 Election*, THE GUARDIAN (Nov. 4, 2012), <https://www.theguardian.com/commentisfree/2012/nov/04/definitive-guide-eight-swing-states-2012-election>.

political expert Larry Sabato, 40 of the 50 states were already decided such that “this election is all about 10 states and less than 10 percent of the population.”⁸⁹ The campaigns were proven right when Bush narrowly won reelection by prevailing both in the nationwide popular vote and in Ohio.⁹⁰

For the 2008 presidential election between then-U.S. Senators Obama and McCain, the predicted battleground states were Ohio, Florida, Virginia, Colorado, Nevada, Missouri, Indiana, and North Carolina.⁹¹ Obama won the presidency by a decisive 365–173 Electoral College vote margin because he prevailed in all the swing states with the exception of Missouri.⁹²

With respect to the 2012 presidential election between then-President Obama and former Governor Mitt Romney, the agreed upon key swing states were Virginia, Ohio, Florida, New Hampshire, Colorado, Wisconsin, Iowa, and Nevada.⁹³ Notwithstanding a tight race between the two candidates, Obama handily won reelection by a 332–206 Electoral College vote margin because he won all eight swing states.⁹⁴

The key swing states in the 2016 presidential election between former Secretary of State Hillary Clinton and the then-celebrity real estate developer Donald Trump were Colorado, Florida, Iowa, Michigan, Minnesota, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, and Virginia.⁹⁵ Trump lost the nationwide popular vote by 2.1 percent, but won the Electoral College by a 306–232 margin because he won Florida, Iowa, Michigan, New Hampshire, North Carolina, Ohio, Pennsylvania, and Wisconsin.⁹⁶

Most recently, before the 2020 presidential election, the acknowledged swing states were Arizona, Florida, Georgia, Michigan, Minnesota, North Carolina,

⁸⁹ Analysts: “Battleground States” Hold Key to Winning 2004 Presidential Election – 2004-10-12, VOICE OF AM. (Oct. 30, 2009, 9:12 PM), <https://www.voanews.com/a/a-13-a-2004-10-12-46-1/304502.html>.

⁹⁰ See Ted Barrett, *Bush Carries Electoral College After Delay*, CNN (Jan. 6, 2005, 6:55 PM), <https://www.cnn.com/2005/ALLPOLITICS/01/06/electoral.vote/> (showing that Bush beat Kerry nationwide 50.7% to 48.3% and prevailed in Ohio by roughly 118,000 votes, which provided him an Electoral College margin of victory of 286-252).

⁹¹ Karen Travers & Kate Barrett, *Breaking Down the Battleground States; McCain Faces an Uphill Battle in Eight Key States up for Grabs*, ABC NEWS (Oct. 23, 2008, 1:43 PM), <https://abcnews.go.com/Politics/story?id=6096271&page=1>.

⁹² FED. ELECTION COMM’N, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 13 (2009).

⁹³ See, e.g., Enten, *supra* note 88.

⁹⁴ FED. ELECTION COMM’N., 2012 PRESIDENTIAL POPULAR VOTE SUMMARY FOR ALL CANDIDATES LISTED ON AT LEAST ONE STATE BALLOT 6 (2013).

⁹⁵ Scott Bomboy, *What are the Real Swing States in the 2016 Election?*, Article in *Constitution Daily*, NAT’L CONST. CTR. (June 13, 2016), <https://constitutioncenter.org/blog/what-are-the-really-swing-states-in-the-2016-election/>.

⁹⁶ FED. ELECTION COMM’N., FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 6 (2017).

Pennsylvania, and Wisconsin.⁹⁷ Biden won the election 306–232 in the Electoral College by prevailing, by very narrow margins, in Arizona, Georgia, Michigan, Minnesota, Nevada, Pennsylvania, and Wisconsin.⁹⁸

The focus on swing states contradicts any legitimate claim that the Electoral College incentivizes nationwide campaigning. The most obvious infirmity is the current complete disregard for California in presidential politics. Over the previous twenty years, California, by far the largest state in terms of population and economic output, has been completely disregarded by the presidential candidates from both parties.⁹⁹ Although it has the largest Congressional delegation, giving it 55 Electoral College votes at each presidential election, California has become a relative pygmy for purposes of determining the presidency. Its lack of political clout is, no doubt, affected by the Constitution's provision of only two U.S. senators per state, regardless of population discrepancy, and the fact that its presidential primary is typically held long after a presumptive party nominee has been chosen.¹⁰⁰ Both of these subjects are beyond this Article's scope. California's influence is, however, needlessly undermined by the "winner-take-all" provision of Electoral College votes.

Although once the home base for Republican candidates for national office, including Richard Nixon, Earl Warren, and Ronald Reagan, California has become a Democratic Party stronghold in terms of Electoral College votes since 1992, when the Democratic nominee, Arkansas Governor Bill Clinton, defeated the incumbent Republican President, George H. W. Bush, 46% to 33%, with over 20% of the vote

⁹⁷ *The 8 States Where 2020 Will be Won or Lost: A Politico Deep Dive*, POLITICO (Sept. 8, 2020, 4:52 AM), <https://www.politico.com/news/2020/09/08/swing-states-2020-presidential-election-409000>.

⁹⁸ FED. ELECTION COMM'N., OFFICIAL 2020 PRESIDENTIAL GENERAL ELECTION RESULTS 1 (2020).

⁹⁹ California is currently the fifth largest economy in the world after the United States, China, Japan and Germany and has a population of nearly 40 million, making it, by far, the most populous state. See Kieran Corcoran, *California's Economy is Now the 5th-Biggest in the World, and has Overtaken the United Kingdom*, INSIDER (May 5, 2018), <https://www.businessinsider.com/california-economy-ranks-5th-in-the-world-beating-the-uk-2018-5>; see also *Abolish the Electoral College or Award Electors on a Proportional Basis*, CAL MATTERS (Sept. 2, 2020), <https://calmatters.org/commentary/my-turn/2020/09/abolish-the-electoral-college-or-award-electors-on-a-proportional-basis/>. See generally *QuickFacts: California*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/CA>.

¹⁰⁰ What I mean here is that the key caucuses and primaries take place in Iowa, New Hampshire, and, to a lesser extent, South Carolina, Florida, and Michigan. By the time the California primary is held, a presumptive nominee has been settled upon. See, e.g., Eric W. Orts, *The Path to Give California 12 Senators, and Vermont June One*, THE ATLANTIC (Jan. 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/heres-how-fix-senate/579172/>; see also James Doubek, *California Moves Up 2020 Primary Elections to March*, NPR (Sept. 28, 2017), <https://www.npr.org/sections/thetwo-way/2017/09/28/554147818/california-moves-up-2020-primary-elections-to-march> (stating that by the time the California primary was held in 2016, Clinton and Trump were already their respective parties' nominees).

going to third-party candidate H. Ross Perot.¹⁰¹ In 1996, Clinton defeated then-Republican U.S. Senator Robert H. Dole, 51% to 38%, with seven percent of the vote going to Perot.¹⁰² In 2000, the Democrat Vice President, Al Gore, Jr., won the state against then-Texas Governor George W. Bush 53.45% to 41.65%.¹⁰³ In 2004, the Democratic nominee, U.S. Senator John F. Kerry, won the state against Bush 53% to 44%.¹⁰⁴ In 2008, the Democratic nominee, then-U.S. Senator Barack H. Obama, defeated the Republican U.S. Senator, John S. McCain, III, 61% to 37%,¹⁰⁵ and in 2012, then-President Obama defeated former Massachusetts Governor Mitt Romney 60% to 37%.¹⁰⁶ In 2016, former First Lady, U.S. Senator, and Secretary of State Hillary R. Clinton defeated the Republican Party nominee, Donald H. Trump, 61.7% to 31.6%, and in 2020, former Vice President Joe Biden defeated the then-President Trump, 63.5% to 31.3%.¹⁰⁷

California's problem is that neither political party has been solicitous of its needs either while in office or during presidential campaigns because the Democratic margins of victory have been so lopsided. To illustrate, California Governor Jerry Brown was never considered a potential Democratic nominee for president or vice president, notwithstanding the fact he had two highly successful terms of office from 2011 through 2019. President Trump, recognizing he had no chance at any of California's 55 Electoral College votes, repeatedly sought to scapegoat the nation's most populous state, issuing more than 55 negative tweets about California during his

¹⁰¹ March Fong Eu, *Statement of Vote: General Election November 3, 1992*, CAL. SEC. OF STATE (June 11, 2007, 7:19 PM), http://www.sos.ca.gov/elections/sov/1992_general/statement_of_vote_general_1992.pdf.

¹⁰² Bill Jones, *Statement of Vote: November 5, 1996*, CAL. SEC. OF STATE (July 31, 2008, 4:32 PM), http://www.sos.ca.gov/elections/sov/1996_general/sov_nov96.pdf.

¹⁰³ *2000 Presidential General Election Results – California*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/state.php?year=2000&fips=6&f=0&off=0&elect=0> (last visited Nov. 1, 2021).

¹⁰⁴ Kevin Shelley, *Statement of the Vote – California November 2, 2004*, CAL. SEC. OF STATE (July 21, 2013, 9:58 PM), http://www.sos.ca.gov/elections/sov/2004-general/sov_2004_entire.pdf.

¹⁰⁵ Debra Bowen, *Statement of Vote November 4, 2008, General Election*, CAL. SEC. OF STATE (May 6, 2013, 4:55 PM), http://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf.

¹⁰⁶ Debra Bowen, *Statement of Vote November 6, 2012, General Election*, CAL. SEC. OF STATE (Dec. 24, 2012, 2:15 PM), <http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf>.

¹⁰⁷ Alex Padilla, *Statement of Vote November 3, 2020, General Election*, CAL. SEC. OF STATE, <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf> (last visited Nov. 19, 2021); see also *Presidential Election in California, 2016*, BALLOTEDIA, https://ballotpedia.org/Presidential_election_in_California_2016 (last visited Nov. 1, 2021) (verifying that Clinton beat Trump 61.7% to 31.6%).

presidency, most plausibly for reasons of ill-discipline and opportunism.¹⁰⁸ Although the current Vice President, Kamala Harris, is a Californian and previously held office as a U.S. Senator and California Attorney General, her political appeal to President Biden had more to do with the fact she is a highly credentialed and influential biracial woman who could increase nationwide racial minority voter turnout.¹⁰⁹

If California's Electoral College votes were to be allocated according to the Apportionment Proposal, Biden, who won the state with over 63.5% of the popular vote, would have received 35 of its 55 Electoral College votes, with the remaining 20 going to Trump.¹¹⁰ Although this is a lopsided margin, apportioning the votes based on each candidate's percentage of the two-party vote would have given both major candidates an incentive to increase their campaign effort in the state. It would certainly have deterred Trump from giving up on California before the campaign even began and disincentivized his scapegoating of Californians during his term of office. Under the current "winner-take-all" framework, Trump knew he would lose all of California's Electoral College votes at the start of his term and therefore treated the state and its citizens with contempt.¹¹¹ A similar conclusion could be made regarding Illinois, Texas, and New York and their allocation of Electoral College votes in the previously discussed elections; even though George H. W. Bush and George W. Bush were both Texans when they won the White House in 1988 and 2000, respectively, and President Trump was nominally a New Yorker when elected to the presidency in 2016, these states' voters would have more influence under the Apportionment Proposal.

The Electoral College ostensibly encourages presidential candidates to campaign nationwide and not focus solely on the nation's major population centers, which arguably might be the case if the country relied on a French-style national popular vote for the presidency. Today, however, under the "winner-take-all" approach to awarding presidential Electors, candidates focus monographically on the swing states and understandably exclude the remaining states, including major population center states like California, New York, and Texas, where, based on demographics and local political culture, the likely statewide popular vote winner seems preordained.¹¹²

¹⁰⁸ See, e.g., Connie Bruck, *Inside California's War on Trump*, NEW YORKER (Mar. 19, 2018), <https://www.newyorker.com/magazine/2018/03/26/inside-californias-war-on-trump>; Ben Christopher, "Out of Control": Candidate Trump Casts California as Cautionary Tale, CAL MATTERS (Jan. 14, 2020), <https://calmatters.org/explainers/trump-vs-california-fact-check/>.

¹⁰⁹ Tessa Weinberg & Sruthi Palaniappan, *Kamala Harris: Everything You Need to Know About the New Vice President*, ABC NEWS (Jan. 20, 2021), <https://abcnews.go.com/Politics/kamala-harris-latest-democrat-run-president/story?id=60521324>.

¹¹⁰ Padilla, *supra* note 107, at 8.

¹¹¹ Bruck, *supra* note 108; Christopher, *supra* note 108; see also Robert S. Erikson et al., *Electoral College Bias and the 2020 Presidential Election*, PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. (Nov. 11, 2020), <https://www.pnas.org/content/117/45/27940>.

¹¹² *Winner Take All States 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/winner-take-all-states> (last visited Nov. 1, 2021).

Should the Apportionment Proposal be adopted, candidates will be incentivized to campaign in all states. This will facilitate national cohesion by forcing both major parties to adopt policies with nationwide, as opposed to, sectional, regional, or ethnic appeal.

V. AMENDING THE ELECTORAL COLLEGE TO DISINCENTIVIZE VOTER SUPPRESSION AND FOREIGN ELECTION INTERFERENCE

With respect to more closely contested states, shifting from a “winner-take-all” formula to the Apportionment Proposal would disincentivize voter suppression enacted under the guise of preventing voter fraud, because the stakes would be dramatically reduced. As former Seventh Circuit Court of Appeals Chief Judge Richard Posner’s dissent articulated in *Frank v. Walker*, the key to understanding voter suppression today, which is unlike the framework during the Civil Rights era, is to understand that its goal is to implement cumulative restrictions on ballot access to depress voter turnout among African Americans and other racial minorities who prefer Democratic candidates, by large margins, over their Republican opponents.¹¹³ In highly contested states such as Arizona, Georgia, Michigan, North Carolina, Pennsylvania, and Wisconsin, such restrictions can successfully alter the election outcome in favor of Republican candidates, notwithstanding a potential slight preference for Democrats among the general adult population.¹¹⁴ Recognizing that such contestation and incentives for potential suppression will remain when electing statewide candidates, including state governors and U.S. Senators, much of the move toward voter suppression can be explained by the “winner-take-all” approach that 48 of 50 states use when awarding their Electors.

Illegitimate allegations of voter fraud and concomitant restrictions placed on ballot access are incentivized by the current “winner-take-all” approach to the Electoral College because winning the statewide popular vote is so consequential in determining the presidency. To illustrate, Trump made illegitimate and divisive allegations of voter fraud with respect to the 2020 presidential election, largely because the consequence of Biden’s very small margins of victory in the swing states was so dramatic and outcome determinative.¹¹⁵ If the Apportionment Proposal had been in place, Trump and his supporters would have felt far less aggrieved by the result in each state and would therefore have been less likely to make baseless fraud allegations. It would also disincentivize ballot access restrictions that tend, for racial, geographic, and socioeconomic reasons, to disproportionately disfavor Democratic-leaning voters and worsen racial political polarization. The Apportionment Proposal will not only depolarize national politics by making narrow margins of victory in key swing states less significant in determining the presidency but will encourage national cohesion by requiring both major political parties to campaign nationwide and expand their appeal to all demographic groups. To see why, a brief understanding of how the judiciary and

¹¹³ *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (Posner, J., dissenting).

¹¹⁴ *Voting Laws Roundup: February 2021*, BRENNAN CENTER FOR JUST. (Feb. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021>.

¹¹⁵ Hope Yen et al., *AP Fact Check: Trump’s Claims of Vote Rigging Are All Wrong*, AP NEWS (Dec. 3, 2020), <https://apnews.com/article/election-2020-ap-fact-check-joe-biden-donald-trump-technology-49a24edd6d10888dbad61689c24b05a5>.

the political branches expanded voting rights is needed. It is to this subject that the Article turns.

VI. RACIAL MINORITY VOTING RIGHTS IN THE UNITED STATES—A SHORT PRIMER

The United States Constitution provides that members of the House of Representatives shall be chosen by the People of the several states based on qualifications “requisite for Electors of the most numerous Branch of the State Legislature.”¹¹⁶ In other words, there was no national right to vote as voting qualifications were specifically left to the several states, which tragically resulted in the denial of voting rights to African Americans in the American South. This was ostensibly fixed by ratification of the Fifteenth Amendment in 1870, which provided that the right to vote shall not be denied or abridged by either the United States or any state on account of “race, color, or previous condition of servitude.”¹¹⁷ The Fifteenth Amendment, moreover, was not self-executing and instead, in Section 2, provided that “Congress shall have power to enforce this article by appropriate legislation.” Dominated by southerners for much of the 20th Century, Congress never passed such appropriate legislation, such that voting qualifications were once again left to the states. This meant that the Constitution’s three-fifths clause, which gave the South extra representation in Congress for its non-voting slave population under the antebellum constitution, was effectively replaced by a 100% bonus for Black citizens who were counted by the census for purposes of Congressional apportionment but denied the franchise.¹¹⁸

This meant that many southern congressmen received fewer aggregate votes than small city northeastern mayors and explains the all-White southern jury because jurors were chosen from racially restrictive voter registration lists.

Problematically from a social justice perspective, the Democratic Party, which was the Progressive Party during most of the twentieth century, did not push for voting rights in the American South because its key constituency was Southern Whites. Southern White Congressmen, in turn, were key to passage of social welfare legislation in both the Progressive and the New Deal eras, but their insistence that the Southern racial hierarchy be preserved precluded the passage of civil and voting rights legislation.¹¹⁹

This left southern African Americans, including southern chapters of the NAACP, in an extremely vulnerable position. On the one hand, they sought to raise national awareness of their plight by means of collective action and civil disobedience to protest against segregation and the denial of their franchise rights. On the other, they knew full well that outspokenness to force the national government’s hand was unwelcome in Washington and risked a pronounced backlash and violence at the state and local level. Nationwide franchise rights for the poor were also undermined by legislative malapportionment, whereby legislative districts were allowed to have great population discrepancies because local interests, intent on preserving their power,

¹¹⁶ U.S. CONST. art. I, § 2.

¹¹⁷ *Id.* amend. XV, § 1.

¹¹⁸ See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 87–91 (2000).

¹¹⁹ SUSAN C. SALVATORE ET AL., *CIVIL RIGHTS IN AMERICA: RACIAL VOTING RIGHTS* 17 (2009).

were loath to update legislative districts to accurately reflect the growing urbanization of American life.¹²⁰ Both the denial of franchise rights to African Americans and systemic legislative malapportionment were key components of maintaining Jim Crow, which preserved the South's racial hierarchy in a manner that the federal courts deemed consistent with the Fourteenth Amendment's Equal Protection Clause.¹²¹

Jim Crow was eventually undermined due to the efforts of many, including key Republican officeholders, such as the former California Governor and 1948 vice-presidential candidate, Earl Warren, who was nominated by the Republican President, Dwight Eisenhower, to be Chief Justice of the United States Supreme Court.¹²² In *Brown v. Board of Education*,¹²³ Warren insisted on a unanimous per curiam decision that reversed the "separate but equal" understanding of equal protection in public schooling and anticipated the end of Jim Crow. In *Baker v. Carr*,¹²⁴ the Court applied the Fourteenth Amendment's Equal Protection Clause to mandate an end to legislative malapportionment nationwide.¹²⁵

President Lyndon B. Johnson signed the VRA into law after it was passed at the height of the Second Reconstruction by bipartisan supermajorities in both Congressional houses to ensure franchise rights under the Fifteenth Amendment for African Americans and other racial minorities that had systematically been denied voting rights by recalcitrant state and local government for the previous 95 years since the Fifteenth Amendment's ratification.¹²⁶ The VRA prohibited the crudest means of

¹²⁰ See, e.g., *Luther v. Borden*, 48 U.S. 1, 32 (1849) (concluding that legislative malapportionment was a nonjusticiable political question under the Guarantee Clause or Republican Form of Government Clause of U.S. Const. art. IV, § 4.); see also *Constitutional Law: A Remedy for Legislative Malapportionment*, 1964 DUKE L.J. 611, 611.

¹²¹ See *Plessy v. Ferguson*, 163 U.S. 537, 548–49 (1896) (concluding that equal protection as required by the Fourteenth Amendment was satisfied by state laws mandating the separation of the races).

¹²² *The Rise and Fall of Jim Crow*, THIRTEEN (2002), https://www.thirteen.org/wnet/jimcrow/struggle_court2.html; *Earl Warren*, HISTORY.COM (Aug. 21, 2018), <https://www.history.com/topics/us-politics/earl-warren>.

¹²³ *Brown v. Bd. of Educ.*, 47 U.S. 483, 495 (1954).

¹²⁴ *Baker v. Carr*, 369 U.S. 186, 234 (1962) (mandating an end to legislative malapportionment on Equal Protection grounds).

¹²⁵ Thomas I. Emerson, *Malapportionment and Judicial Power: The Supreme Court's Decision in Baker v. Carr*, 22 LAW IN TRANSITION 125, 132 (1962).

¹²⁶ H.R. Rep. No. 91-397 (1970), as printed in 1970 U.S.C.C.A.N. 3277, 3278. ("The Voting Rights Act of 1965 was designed by the Congress to banish racial discrimination in voting which had infected the electoral processes in parts of this nation for nearly a century. Congressional Enactments in 1957, 1960, and 1964, whose purpose was to facilitate case-by-case litigation to secure equal voting rights, encountered state and local intransigence and delays in the judicial process. It yielded insignificant gains in non-white voter registration. This history is detailed in this committee's report on the 1965 Act, House Report No. 439, 89th Congress, First Session, at 8-13. In this context the Congress, in 1965, fashioned remedial provisions to be automatically applied to certain jurisdictions on the basis of a statutory coverage formula. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Supreme Court sustained the Voting Rights Act as a valid means of effectuating the commands of the 15th Amendment. Its comments underscore

limiting ballot access by racial minorities, such as literacy tests and poll taxes, as well as new ways to implement barriers to racial minority voting and political power, including racial gerrymandering and consequent vote-dilution. Section 5 of the VRA empowered the U.S. Department of Justice to review and block any voting procedure changes proposed by recalcitrant state and local governments intent on exploiting racial polarization for political purposes.¹²⁷ Johnson called it “one of the most monumental laws in the entire history of American freedom.”¹²⁸ VRA Section 5 determines the jurisdictions, known as “covered jurisdictions,” that must seek preclearance from either the DDC or the AG before implementing voting procedure changes. From 1965 to 2006, Section 5 enabled the Department of Justice to stop state and local governments from implementing almost 1,200 regressive ballot access restrictions in covered jurisdictions.¹²⁹

The constitutionality of VRA Section 5 was initially affirmed by the Warren Court in *South Carolina v. Katzenbach*,¹³⁰ which concluded the preclearance requirements of VRA Section 5 to be valid because “Congress may use any rational means to effectuate the constitutional prohibition of discrimination in voting.”¹³¹ The Court further concluded that Congress’ coverage formula was proper because Congress had evidence of actual voting discrimination in the vast majority of covered jurisdictions and “was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by the . . . Act.”¹³²

Forty-seven years later, the Court in *Shelby County* concluded that Section 4(b)’s “covered jurisdictions” formula was based on an outdated and therefore unconstitutional Congressional determination as to the jurisdictions that have demonstrated a sufficient historical pattern and practice of racial discrimination in voting to subject them to VRA Section 5’s preclearance requirements.¹³³ The Court concluded that Congressional legislative authority under the Fifteenth Amendment

the rationale of the legislation.”); *see also* Jenee Desmond-Harris, *What is the Voting Rights Act?*, VOX (Feb. 14, 2016), <https://www.vox.com/2016/2/14/17619176/voting-rights-act-fight-explained>.

¹²⁷ *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (Kagan, J., dissenting).

¹²⁸ *Id.*; *see also* President Lyndon B. Johnson, *Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act*, 2 PUB. PAPERS 840, 841 (Aug. 6 1965).

¹²⁹ *Brnovich*, 141 S. Ct. at 2321; *see also* *Shelby County v. Holder*, 570 U.S. 529, 571 (2013) (Ginsburg, J., dissenting).

¹³⁰ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

¹³¹ *Id.*; *see also* Crum, *supra* note 70, at 296.

¹³² *Katzenbach*, 383 U.S. at 329.

¹³³ *Id.*; *see also* *Shelby*, 570 U.S. at 529, 556 (stating that 42 U.S.C.A. § 1973b(b) and the coverage formula was based on observed voting patterns in the 1964, 1968 and 1972 general elections and had remained largely unchanged in subsequent VRA reauthorizations, notwithstanding the fact ballot access has markedly changed nationwide, such that the states included within the “covered jurisdictions” quite frequently exceed non-covered jurisdictions in voter turnout levels and in the number of racial minority elected officials).

requires evidence of a presently existing constitutional violation to be valid.¹³⁴ It found that because Section 5's coverage formula was left largely unchanged since previous VRA reauthorizations that were, in turn, based on voter turnout results from the 1964, 1968, and 1972 elections, Section 5's coverage formula was dated.¹³⁵ This made it unconstitutional due to dramatic changes in voter registration rates in the covered jurisdictions.¹³⁶

Shelby County's focus on ostensible changes in voting patterns was problematic because it disregarded the reality that the voting barriers confronting racial minorities today are not premised on the racial hierarchy framework of the Jim Crow South. Rather, they are the consequence of racial political polarization in a highly contested two-party framework that leads Republican-controlled state legislatures to enact measures to both minimize the political power of racial minorities and disincentivize their turnout at the polls.

This tendency to reduce racial minority ballot access for partisan purposes was most recently given the "green light" in *Brnovich*, where the Court dramatically reduced the scope of voting rights protections afforded by VRA Section 2 and the Fifteenth Amendment. *Brnovich* resulted in the reinstatement of a district court decision to uphold Arizona's HB 2023, which disallowed voters from casting a ballot in any place but their assigned precinct, and, in the case of mail-in voting, made it a crime for any person other than a postal worker, elections official, caregiver, family member, or household member to "knowingly collect an early ballot."¹³⁷ The Court reversed the Circuit Court and reinstated the District Court's finding that HB 2023 was not enacted with discriminatory purpose by minimizing the fact that twice as many racial minority Arizona voters cast out-of-precinct ballots as compared to Whites.¹³⁸ The Court concluded that both prohibitions imposed no more than the "usual burdens of voting" when considering Arizona's political processes as a whole and refused to require Arizona to demonstrate these prohibitions were either absolutely necessary or the least restrictive means of furthering the state interest in preventing voter fraud.¹³⁹ This is in spite of manifest evidence that both restrictions would disproportionately hinder ballot access for racial minority voters and, in the case of prohibition against ballot harvesting, disproportionately hinder ballot access for Arizona's indigenous citizens, many of whom often lived great distances from a U.S. Mailbox.¹⁴⁰ This is because Arizona has a compelling interest in preserving the integrity of its election procedures, including the risk of election fraud, even though

¹³⁴ *Shelby*, 570 U.S. at 529, 556.

¹³⁵ *Id.* at 550–51.

¹³⁶ *Id.*

¹³⁷ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2334 (2021); *see also* ARIZ. REV. STAT. ANN. § 16–452(C)–(D) (2021).

¹³⁸ *Brnovich*, 141 S. Ct. at 2344 (concluding that only 1% of African American, Hispanic and Native American Arizona voters cast out-of-precinct votes as compared to .5% of White voters).

¹³⁹ *Id.* at 2346.

¹⁴⁰ *See, e.g.*, Nicolas Vadun-Lemp, *The Tyranny of Distance*, ARCGIS STORYMAPS (Apr. 29, 2021), <https://storymaps.arcgis.com/stories/9544a82782684cf8a449350f3c35ccd9>.

there is a complete lack of empirical evidence as to the existence of voter fraud in the state.¹⁴¹ *Brnovich* narrows the scope of VRA Section 2 and the Fifteenth Amendment to enable “red state” legislative enactments to implement ballot access restrictions that disproportionately hinder racial minority voters as compared to Whites, and therefore potentially alter the result of closely contested statewide elections in favor of Republican candidates.

Brnovich followed *Rucho v. Common Cause*,¹⁴² which concluded that partisan gerrymanders are nonjusticiable as a matter of law, even if such gerrymanders make altering the legislative balance of power almost impossible regardless of voter preferences.¹⁴³

Shelby County, *Rucho*, and *Brnovich* signal a conservative court’s retreat from voting rights enforcement, plausibly because a majority of the Court’s justices were appointed by Republican presidents,¹⁴⁴ but also because state legislatures have implemented burdens on franchise rights for partisan purposes that the federal courts would struggle to police in a country with thousands of voting jurisdictions and a history and practice of racial political polarization.¹⁴⁵ Indeed, it is this polarization that explains the proliferation of second-generation voting barriers by “red state” legislatures that Democrats characterize as the “New Jim Crow,” not only to highlight how these franchise restrictions disproportionately burden racial minorities, but presumably to motivate their voting base.

This back and forth in a highly contested two-party framework for office is not based on a goal of preserving racial hierarchy. Rather, it is entirely explained by racial political polarization that has developed since the Second Reconstruction.¹⁴⁶ Crucially, this level of polarization was lacking at the time the Court used the Fourteenth Amendment’s Equal Protection Clause to end malapportionment and Congress used its Fifteenth Amendment legislative powers to enact the VRA because both parties thought expanding the franchise to African Americans in the South would be politically beneficial.¹⁴⁷ To illustrate, Republicans were hopeful that African Americans, long precluded from voting by a historically racist Democratic Party in the South, would lean Republican and form Republican Party’s support base in the

¹⁴¹ *Id.* at 2346.

¹⁴² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

¹⁴³ *Id.*

¹⁴⁴ See Ian Millhiser, *How America Lost Its Commitment to the Right to Vote*, VOX (July 21, 2021), <https://www.vox.com/22575435/voting-rights-supreme-court-john-roberts-shelby-county-constitution-brnovich-elena-kagan>; see also *Current Members*, SUP. CT., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 15, 2021, 6:40 PM).

¹⁴⁵ Millhiser, *supra* note 144; *Current Members*, *supra* note 144.

¹⁴⁶ Lee Drutman, *America is Now the Divided Republic the Framers Feared*, THE ATLANTIC (Jan. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/two-party-system-broke-constitution/604213/>.

¹⁴⁷ Francesca L. Procaccini, *Reconstructing State Republics*, 89 FORDHAM L. REV. 2157, 2220 (2021).

South.¹⁴⁸ Northern and Midwestern Democrats, in turn, supported voting rights because African Americans and liberal Whites formed a key part of their constituency that could no longer be subordinated to the interests of southern Democrats and their goal of preserving the South's racial hierarchy.¹⁴⁹ Ending malapportionment and enacting voting rights was not just about doing the right thing, regardless of partisan consequence, because, at the time, both parties thought enfranchising racial minorities would benefit them electorally.¹⁵⁰

Today's era of attempted voter suppression and vote dilution is distinguished from the civil rights-era by the discomfiting reality that today's pronounced racial political polarization was not anticipated at the time.¹⁵¹ When the VRA was enacted in 1965, Black voters did not skew so heavily in favor of the Democratic Party and much of the VRA's Congressional support stemmed from Republicans in Congress who took a more liberal view of race as compared to conservative Democrats in the South.¹⁵² This support is partly explained by the fact that in 1932, former President Hoover won a staggering 77 percent of the Black vote in a losing bid for reelection against Franklin Roosevelt,¹⁵³ and President Eisenhower won a sizable 39 percent of the Black vote in 1956 against the Democrat Adlai Stevenson. As late as 1960, former Vice President Nixon won 32 percent of the Black vote against then U.S. Senator John F. Kennedy, and Republicans had hopes for a higher rate of Black support with voting rights because Blacks were systematically denied the franchise by Democrats in the South.¹⁵⁴

It was Eisenhower who nominated arguably the two most consequential liberal Republicans to ever serve on the Court, namely the Republican Governor of California, Earl Warren, who served as Chief Justice of the United States Supreme Court, and the New Jersey Republican, William Brennan, who served as an associate justice from 1956 until his retirement in 1990.¹⁵⁵ Even as late as 2010, the most liberal

¹⁴⁸ *Id.* at 2188.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ Sam Tanenhaus, *Original Sin: Why the GOP is and will Continue to be the Party of White People*, THE NEW REPUBLIC (Feb. 10, 2013), <https://newrepublic.com/article/112365/why-republicans-are-party-white-people>; Vishal Agraharkar, *50 Years Later, Voting Rights Act Under Unprecedented Assault*, BRENNAN CTR. FOR JUST. (Aug. 2, 2015), <https://www.brennancenter.org/our-work/research-reports/50-years-later-voting-rights-act-under-unprecedented-assault>.

¹⁵² *See, e.g.*, Tanenhaus, *supra* note 151.

¹⁵³ Daphney Daniel, *How Black Became Blue: the 1936 African American Voting Shift from the Party of Lincoln to the New Deal Coalition* (2012) (Pell Scholars and Senior Theses, Salve Regina University) (on file with McKillop Library).

¹⁵⁴ Leah Wright, *Conscience of a Black Conservative: the 1964 Election and the Rise of the National Negro Republican Assembly*, 1 FED. HIST. J. 32, 32 (2009).

¹⁵⁵ Tanenhaus, *supra* note 151; *William Brennan (U.S. Supreme Court)*, BALLOTPEDIA, [https://ballotpedia.org/William_Brennan_\(U.S._Supreme_Court\)](https://ballotpedia.org/William_Brennan_(U.S._Supreme_Court)) (last visited Oct. 20, 2021).

member of the Court, John Paul Stevens, was a Republican presidential nominee.¹⁵⁶ In fact, at the time of *Brown v. Board of Education*,¹⁵⁷ the Eisenhower Administration thought that the Court's decision mandating desegregation in public schooling might enable Republicans to shatter FDR's New Deal coalition by regaining majority Black support, especially in the cities of the industrial northeast.¹⁵⁸

After Eisenhower improved his share of the African American vote in 1956, his administration, at a time when only 20% of Blacks were registered to vote, pushed for and enacted the first major piece of national civil rights legislation enacted since 1875, namely the Civil Rights Act of 1957.¹⁵⁹ The Act created the U.S. Commission on Civil Rights and the Department of Justice's Civil Rights Division, but failed to provide for national voting rights and was largely gutted of effectiveness in committee by a coalition of conservative Democrats that included then-Senator John F. Kennedy, who needed the support of southern Democrats for his 1960 presidential campaign.¹⁶⁰ Although the 1957 law passed with bipartisan support, the evidence demonstrates that House Republicans were overwhelmingly supportive of the Act, voting in favor of its passage by a 167–19 margin, while Democrats voted for the bill by a very narrow 118–107 margin.¹⁶¹ The margins were similar in the Senate, with Republicans voting 43–0 for the bill and Democrats 29–18.¹⁶² President Eisenhower also federalized the National Guard and ordered an additional 1,000 paratroopers from the 101st Airborne Division to forcibly integrate the Little Rock, Arkansas public schools after Arkansas Governor Orval Faubus defied a federal court public school desegregation order.¹⁶³

¹⁵⁶ Erin Blakemore, *How John Paul Stevens' Views Evolved Over 34 Years on the Supreme Court*, HISTORY, <https://www.history.com/news/john-paul-stevens-supreme-court-justice-shift> (last visited Oct. 20, 2021); see also *John Paul Stevens*, BALLOTEDIA, https://ballotpedia.org/John_Paul_Stevens (last visited Oct. 20, 2021) (explaining that Justice Stevens was nominated by President Ford in 1975 to replace William O. Douglas).

¹⁵⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁵⁸ Tanenhaus, *supra* note 151.

¹⁵⁹ Bernard Fraga, *The Voting Rights Act Turns 50 Today. Here are Three Trends in Minority Voting you Should Know About*, WASH. POST (Aug. 6, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/08/06/the-voting-rights-act-turns-50-today-here-are-three-trends-in-minority-voting-you-should-know-about/>. See generally Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended 42 U.S.C. §§ 1975-1975e (1958)).

¹⁶⁰ Tanenhaus, *supra* note 151.

¹⁶¹ *HR 6127. Civil Rights Act of 1957.*, GOVTRACK, <https://www.govtrack.us/congress/votes/85-1957/h42> (last visited Oct. 22, 2021); *HR 6127. Civil Rights Act of 1957.*, GOVTRACK, <https://www.govtrack.us/congress/votes/85-1957/s75> (last visited Oct. 22, 2021); see 103 CONG. REC. H16,085 (discussing Civil Rights bill).

¹⁶² *HR 6127. Civil Rights Act of 1957.*, GOVTRACK, <https://www.govtrack.us/congress/votes/85-1957/h42> (last visited Oct. 22, 2021); *HR 6127. Civil Rights Act of 1957.*, GOVTRACK, <https://www.govtrack.us/congress/votes/85-1957/s75> (last visited Oct. 22, 2021); see 103 CONG. REC. H16,085 (daily ed. Aug. 27, 1957) (discussing Civil Rights bill).

¹⁶³ Tanenhaus, *supra* note 151.

Republicans were also key to passage of omnibus and more effective Civil and Voting Rights legislation during the Johnson Administration.¹⁶⁴ Proponents of the Civil Rights Act of 1964 overcame a Southern Democratic filibuster and the legislation passed, on a bipartisan basis, 290–130 in the House and 73–27 in the Senate.¹⁶⁵ Like with the Civil Rights Act of 1957, Congressional Republican support was more solid than that of Democrats, e.g. Republican support for the law was 136–35 in the House and 27–6 in the Senate, while Democratic support was 153–91 in the House and 46–21 in the Senate.¹⁶⁶ A similar framework was evidenced with the VRA, which was passed the following year, and supported by House Democrats and Republicans by 221–62 and 112–23 majorities, respectively, and 47–17 and 30–2 majorities in the Senate.¹⁶⁷

The bipartisan support for civil and political rights for racial minorities first came under stress in 1964 when Barry Goldwater won the Republican nomination for the presidency by taking a Calhoun-like rejectionist posture on the issue.¹⁶⁸ The result, supported as it was by high-profile “movement” conservatives such as William F. Buckley, Jr. and the *National Review*, was to gradually shift the allegiance of southern and working class Whites away from the Democratic coalition and further the trend whereby African Americans and other racial minorities aligned themselves with the Democratic Party.¹⁶⁹ The complained of abusive election practices stemming from extreme partisanship originates from local level divergences in sociocultural outlook that became national and overtook the “four-party” system of southern Dixiecrats, liberal Democrats, conservative Republicans, and liberal Republicans that dominated American politics from the Progressive era through the end of Lyndon B. Johnson’s Presidency.¹⁷⁰ It explained the development of “movement” conservatism that, as described by Sam Tanenhaus, was wary of the federal government’s growth and aligned itself with Calhoun’s nullification ideology at the very moment when Blacks

¹⁶⁴ Michael O’Donnell, *How LBJ Saved the Civil Rights Act*, THE ATLANTIC (April 2014), <https://www.theatlantic.com/magazine/archive/2014/04/what-the-hells-the-presidency-for/358630/>.

¹⁶⁵ See 103 CONG. REC. H16,085; *H.R. 7152. Passage.*, GOVTRACK, <https://www.govtrack.us/congress/votes/88-1964/h128> (last visited Oct. 20, 2021); *H.R. 7152. Passage.*, GOVTRACK, <https://www.govtrack.us/congress/votes/88-1964/s409> (last visited Oct. 20, 2021).

¹⁶⁶ See 103 CONG. REC. H16,085; *H.R. 7152. Passage.*, GOVTRACK, <https://www.govtrack.us/congress/votes/88-1964/h128> (last visited Oct. 20, 2021); *H.R. 7152. Passage.*, GOVTRACK, <https://www.govtrack.us/congress/votes/88-1964/s409> (last visited Oct. 20, 2021).

¹⁶⁷ *Senate Vote #78 in 1965: To Pass S. 1564, the Voting Rights Acts of 1965*, GOVTRACK, <https://www.govtrack.us/congress/votes/89-1965/s78> (last visited Oct. 21, 2021); *To Pass H.R. 6400, the 1965 Voting Rights Act.*, GOVTRACK, <https://www.govtrack.us/congress/votes/89-1965/h87> (last visited Oct. 21, 2021).

¹⁶⁸ Tanenhaus, *supra* note 151.

¹⁶⁹ *See id.*

¹⁷⁰ BROOKINGS INST., *DEMOCRACIES DIVIDED: THE GLOBAL CHALLENGE OF POLITICAL POLARIZATION* 65–72 (Thomas Carothers & Andrew O’Donahue eds., 2019).

and other racial minorities were effectively franchised due to the federal courts and the VRA.¹⁷¹

The consequence has been stark racial political polarization that anticipated a broader political polarization framework that explains the current paradigm where Republicans have become an ideologically cohesive coalition of economic and social conservatives while Democrats represent an ideologically heterodox movement of historically excluded groups, including racial and sexual minorities, immigrants, and self-identified liberals.

Importantly, though, that inordinate racial minority support for Democrats is not born of ideology, but the historical accident that was the Goldwater campaign for the presidency and lamentable racial polarization that explains non-college-educated White support for authoritarian candidates.¹⁷² To demonstrate, after Nixon won 32 percent of the Black vote in 1960, Goldwater won only six percent in 1964 and in the 14 presidential elections since then, Republicans have never won more than 20 percent of the Black popular vote and won as little as four, six, and eight percent of the nationwide Black vote in the elections of 2008, 2012, and 2016.¹⁷³ This atypically high racial political polarization that originated with the Goldwater campaign of 1964 is attributable today to political culture and not ideological discrepancies based on race because White, Black, and other racial minority voters tend to have broadly similar ideological inclinations.¹⁷⁴

It is this political polarization and not the ideology of racial hierarchy that explains the current framework whereby Republican state legislatures have enacted voter identification laws and other second-generation voting barriers to racial minority voting. This is because depressing the aggregate number of racial minority votes will inordinately benefit Republicans and harm Democrats in a highly contested and racially polarized political system.

Unlike today, Republican support for racial minority civil and political rights during the Second Reconstruction was attributable to the relative bipartisanship of the Cold War era, when racial minority voting rights did not alter the relative balance of

¹⁷¹ See *id.* at 82–83; Tanenhaus, *supra* note 151.

¹⁷² MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH*, 230–32 (2006).

¹⁷³ Theodore R. Johnson, *What Nixon can Teach the GOP about Courting Black Voters*, POLITICO MAG. (Aug. 15, 2015), <https://www.politico.com/magazine/story/2015/08/what-nixon-can-teach-the-gop-about-courting-black-voters-121392/>; Wright, *supra* note 154, at 32; *How Groups Voted in 2008*, ROPER CTR. FOR PUB. OP. RSCH., <https://ropercenter.cornell.edu/how-groups-voted-2008> (last visited Oct. 21, 2021); *How Groups Voted in 2012*, ROPER CTR. FOR PUB. OP. RSCH., <https://ropercenter.cornell.edu/how-groups-voted-2012> (last visited Oct. 21, 2021); *How Groups Voted in 2016*, ROPER CTR. FOR PUB. OP. RSCH., <https://ropercenter.cornell.edu/how-groups-voted-2016> (last visited Oct. 21, 2021).

¹⁷⁴ The evidence demonstrates that racial minorities tend to have similar ideological viewpoints as White voters. See *Political Ideology Among the Unaffiliated by Race/Ethnicity (2014)*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/compare/political-ideology/by/racial-and-ethnic-composition/among/religious-tradition/unaffiliated-religious-nones/> (last visited Oct. 22, 2021).

political power between the major parties.¹⁷⁵ Indeed, the immediate consequence of racial minority suffrage rights did not advantage Democrats over Republicans in the American South because Democrats already controlled the majority of seats at the local, state, and Congressional levels.¹⁷⁶ Today's extreme racial political polarization, however, means that decreasing racial minority turnout can alter the outcome of a highly contested two-party election as evidenced by the fact President Biden defeated his opponent by 306–232 in the Electoral College by winning the states of Arizona, Georgia, Michigan, Nevada, and Pennsylvania by very small popular vote margins, largely due to racial minority voters.¹⁷⁷

This hyper-partisan and highly contested framework explains why today's Republican Party continuously seeks to implement ballot access restrictions on dubious election security and fraud prevention grounds.¹⁷⁸ Although the Voting Rights Act did provide needed ballot access for African Americans in the South and beyond, it must be remembered that its political consequences should not be overstated in that it coincided with a dramatic uptick in racial political polarization such that the states with the highest proportion of African Americans became solidly “red” Republican and Democratic Black elected officials tended to lack political power as members of the minority party.¹⁷⁹

Because racial minority voters today form the Democratic Party's most important constituency, it must be understood that today's second-generation voting barriers, as exemplified by Georgia's S.B. 202, are born of intense political polarization due to contestation for office at the national and state levels.¹⁸⁰ Recognizing the Apportionment Proposal does not alter or affect incentives to limit polarization at the state and local level; it must be recognized that political polarization at the national level and heightened contestation for the presidency, as opposed to a quest to reimpose a White racial hierarchy, explains the tendency for Republican-controlled legislatures to enact ballot access restrictions that Democrats, including President Biden, caricature as the “new Jim Crow.”¹⁸¹

The Supreme Court's recent decisions on voting rights have been criticized for allowing Republican partisans to depress racial minority political power for partisan

¹⁷⁵ John David Skrentny, *The Effect of the Cold War on African-American Civil Rights: American and the World Audience, 1945–1968*, 27 *THEORY AND SOC'Y* 237, 258 (1998).

¹⁷⁶ Merle Black, *The Transformation of the Southern Democratic Party*, 66 *J. POL.* 1001, 1003–04 (2004).

¹⁷⁷ 2020 *National Popular Vote Tracker*, *THE COOK POL. REP.*, <https://cookpolitical.com/2020-national-popular-vote-tracker> (last visited Oct. 21, 2021).

¹⁷⁸ See, e.g., *Frank v. Walker*, 733 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting).

¹⁷⁹ Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 *OHIO ST. L.J.* 868, 870 (2016).

¹⁸⁰ Meg Cunningham, *'The New Jim Crow': Republicans and Democrats at Odds Over Voting Rights*, *ABC NEWS* (Apr. 20, 2021), <https://abcnews.go.com/Politics/jim-crow-republicans-democrats-odds-voting-rights/story?id=77188460>.

¹⁸¹ *Id.*

ends.¹⁸² *Shelby County v. Holder*,¹⁸³ discussed above, invalidated the VRA's coverage formula on the grounds that it was outdated and therefore unconstitutional. *Rucho v. Common Cause* concluded that extreme partisan gerrymanders are nonjusticiable as a matter of law.¹⁸⁴ *Brnovich* largely gutted VRA Section 2 of its effectiveness by concluding that the VRA was not violated by ballot access restrictions that had a disproportionate effect on racial minority voters.¹⁸⁵ These decisions, however, should not be conflated with the Court taking a deferential posture to a reimposition of Jim Crow. Perhaps these decisions reflect the limitations of judicial review in a country with over 5,000 voting jurisdictions.¹⁸⁶

Although voter suppression is definitively problematic, the importance of the Court's recent jurisprudence should not be overstated. For example, the VRA's preclearance regime was dramatically underinclusive in that it did not apply to the bulk of highly contested states, namely Florida, Michigan, Nevada, Ohio, Pennsylvania, and Wisconsin,¹⁸⁷ and the fact the same coverage formula that applied in 1982 was reauthorized in 2006, without any amendment, demonstrated that Congress was disinclined to revisit the coverage formula for obvious partisan reasons.¹⁸⁸ Although useful in protecting against ballot access restrictions in much of the South, it also did not textually preclude implementation of second-generation voting barriers such as voter identification laws, the purging of voter registration lists, or partisan gerrymanders that resulted in racial minority vote dilution. The VRA, in other words, did not prevent against legislative maneuvers that diluted Democratic and, by implication, racial minority political power.

However, unlike the Jim Crow American South, where Blacks were denied the franchise to preserve a regional racial hierarchy, the basis for racial voter suppression today is pronounced political partisanship in a highly contested two-party framework for achieving office.¹⁸⁹ Expecting Congress to enact legislation such as a revised Voting Rights Act or an amended coverage formula for purposes of preclearance, that would expand ballot access for Democratic-leaning voters, would require partisan legislation that is unlikely to pass in today's closely divided Congress. Indeed, the

¹⁸² See, e.g., Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, THE ATLANTIC (Jul. 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>.

¹⁸³ *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

¹⁸⁴ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

¹⁸⁵ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021).

¹⁸⁶ *Shelby Cnty.*, 570 U.S. 529.

¹⁸⁷ *Id.* at 557.

¹⁸⁸ *Jurisdictions Previously Covered by Section 5*, THE U.S. DEP'T OF JUST., <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last visited Oct. 21, 2021); *About Section 5 of the Voting Rights Act*, THE U.S. DEP'T OF JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> (last visited Oct. 21, 2021).

¹⁸⁹ *What was Jim Crow*, FERRIS ST. UNIV., <https://www.ferris.edu/jimcrow/what.htm> (last visited Oct. 21, 2021); Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSPECTIVES ON POL. 1088, 1092 (2013).

Biden Administration's failure to get the support of moderate Democratic Senators, Joe Manchin and Kyrsten Sinema, to vote for a repeal of the filibuster for purposes of enacting voting rights legislation by majority vote, evidenced the difficulty of the task.¹⁹⁰ Expecting the courts to intervene in these matters on behalf of Democratically-inclined voters would, over time, undermine the Court's institutional legitimacy.

This enables continued partisan-motivated voter suppression techniques by state legislatures that facilitate racially-tinged and regressive fiscal policies that exacerbate income and wealth inequality nationwide.¹⁹¹ American democracy risks becoming distorted because election winners may increasingly be unreflective of public opinion.¹⁹² This is a real and substantive problem that both worsens racial polarization and distorts democracy. However, unlike the Second Reconstruction, this problem's source is partisan in origin and its intent is to distort democratic outcomes as opposed to affirm a racial hierarchy. An obvious example is Georgia's S.B. 202, and other state laws, designed to hinder racial minority ballot access in a highly contested two-party system.¹⁹³

VII. GEORGIA'S S.B. 202—A PARTISAN BILL MOTIVATED BY THE WINNER TAKE ALL ELECTORAL COLLEGE

Since the 2020 election, Georgia has enacted a partisan voter identification law, S.B. 202, that was signed into law by the Republican Georgia Governor, Brian Kemp.¹⁹⁴ It is designed to lower racial minority voter turnout and deliver Georgia's Electoral College votes to the Republican presidential candidate in 2024.¹⁹⁵ Although this is a lamentable form of voter suppression, it is, because of racial political polarization, understandable if not commendable. Indeed, in a country with over five

¹⁹⁰ Carl Hulse, *Sinema Rejects Changing Filibuster, Dealing Biden a Setback*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/us/politics/sinema-voting-rights-bill.html>.

¹⁹¹ Edward Lempinen, *Stacking the Deck: How the GOP Works to Suppress Minority Voting*, BERKELEY NEWS (Sept. 29, 2020), <https://news.berkeley.edu/2020/09/29/stacking-the-deck-how-the-gop-works-to-suppress-minority-voting/>; see, e.g., Andrew Solender, *GOP Governors Rejected Medicaid Expansion, but Red State Voters are Passing it Anyway*, FORBES (Aug. 5, 2020, 03:27 AM), <https://www.forbes.com/sites/andrewsolender/2020/08/05/gop-governors-rejected-medicaid-expansion-but-red-state-voters-are-passing-it-anyway/?sh=3f3614af4a17> (showing an example of the refusal of "red" states to expand their Medicaid programs accordingly).

¹⁹² Richard Wike & Shannon Schumacher, *Attitudes Toward Elected Officials, Voting and the State*, PEW RSCH. CTR. (Feb. 27, 2020), <https://www.pewresearch.org/global/2020/02/27/attitudes-toward-elected-officials-voting-and-the-state/>.

¹⁹³ Zack Beauchamp, *Georgia's Restrictive New Voting Law, Explained*, VOX (Mar. 26, 2021, 2:40 PM), <https://www.vox.com/22352112/georgia-voting-sb-202-explained>.

¹⁹⁴ *Id.*

¹⁹⁵ Richard Fausset et al., *Georgia Takes Center Stage with New Battlers over Voting Rights*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/03/us/politics/georgia-voting-laws.html>. See generally GA. CODE ANN. § 21-2 et seq. (2021).

thousand voting jurisdictions and pronounced racial and political polarization, ballot access limitations are to be expected, especially in states with large racial minority populations such as many of the key swing states in presidential elections like Arizona, Florida, Georgia, Nevada, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin. The key thing is that the incentive to depress the aggregate racial minority vote count is so pronounced nationwide, and the means available to voting jurisdictions are so nuanced and complicated, that it would be infeasible for the courts to police, even if the courts were to apply a far broader interpretation of equal protection and voting rights.

S.B. 202 was enacted after the very close 2020 Georgia presidential election and the U.S. Senate runoff election that helped place Joe Biden in the White House and gave Democrats narrow control of the U.S. Senate. It is very likely that its provisions, which are designed to depress turnout by Democratic-leaning voters, will deliver a similarly closely contested election to Republicans.¹⁹⁶ This distinguishes S.B. 202 from voter suppression in the American South before *Baker v. Carr*¹⁹⁷ and the VRA's enactment.

The 2020 presidential election results evidenced the correlation between race and partisanship and why Republicans have a partisan, as opposed to racist motivation, to minimize racial minority ballot access. To illustrate, a full 73% of Black Georgians, as compared to only 25% of White Georgians, are Democrats or lean Democratic.¹⁹⁸ By contrast, 59% of White Georgians, as compared to only 12% of Black Georgians, are Republicans or lean Republican.¹⁹⁹ As a result, S.B. 202's partisan goal is to increase the likelihood of Republican candidates prevailing in the highly contested elections by reducing the likelihood of voting by those who lean Democratic, including African Americans. It has a racially discriminatory effect because it disproportionately reduces ballot access for urban and racial minority voters as compared to Whites.

To explain how it works, after *Shelby County*,²⁰⁰ Georgia, like other states that were no longer subject to federal preclearance, shuttered more than 214 voting precincts statewide, leading many voters to arrive at the wrong polling places on election day.²⁰¹ During the 2020 election, these voters were allowed to vote by provisional ballot.²⁰² This measure, which accounted for 44% of all Georgia provisional ballots, and 66% in Democratic-leaning Fulton County, tended to enhance the Democratic Party vote; e.g. Biden won 64% of the 11,120 provisional ballots

¹⁹⁶ Fausset et al., *supra* note 195.

¹⁹⁷ *Baker v. Carr*, 369 U.S. 186 (1962); *see supra* text accompanying notes 118–20.

¹⁹⁸ *Party Affiliation Among Adults in Georgia by Race/Ethnicity*, PEW RSCH. CTR. (2014), <https://www.pewforum.org/religious-landscape-study/compare/party-affiliation/by/racial-and-ethnic-composition/among/state/georgia/>.

¹⁹⁹ *Id.*

²⁰⁰ *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

²⁰¹ Corasaniti & Epstein, *supra* note 35.

²⁰² *Id.*

counted in the 2020 presidential election.²⁰³ S.B. 202 changes the law to disallow provisional ballots for out-of-precinct voters, who, going forward, must arrive at their assigned polling place to cast a vote.²⁰⁴ S.B. 202 also restricts court discretion to extend voting hours based on unanticipated problems and disallows precincts from counting absentee ballots until the polls close, which will delay the vote count and potentially undermine the legitimacy of close election results.²⁰⁵ S.B. 202 creates a new chair of the State Election Board, a position directly appointed by the legislature that strips power previously held by the Secretary of State.²⁰⁶ It also entitles the legislature to suspend county election officials, which could harm voting rights in Democratic-leaning counties such as Fulton, and expedites the run-off election process, which could burden election administrators and affect early and overseas voting.²⁰⁷

S.B. 202 also ends the automatic mailing of absentee ballot applications to all Georgia voters, a framework which explained why more than one-quarter of Georgia voters cast absentee ballots in 2020.²⁰⁸ Under S.B. 202, voters must apply for an absentee ballot from local boards of election.²⁰⁹ This will undoubtedly depress absentee voting, which, as detailed above, skewed 65% to 34% in Biden's favor during the 2020 Georgia presidential election.²¹⁰ The Georgia law goes further by cutting in half, from six to three months, the time period before an election during which voters can request to vote absentee and disallows third-party groups from prefilling absentee ballot application forms on voters' behalf.²¹¹ These measures are anticipated to depress the number of absentee ballot applications, and therefore favor Republican candidates.²¹² The shorter time-frame for absentee-ballot requests will also limit opportunities for get-out-the-vote efforts and, according to the *New York Times*, put greater strain on local election boards that may be overwhelmed by the volume of expedited absentee ballot requests.²¹³ S.B. 202 also requires absentee voters to provide either a driver license or state issued identification number on each ballot request, a measure which could depress African American voter turnout because a far

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2020–21); *id.*

²⁰⁹ Corasaniti & Epstein, *supra* note 35.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See *id.*; Ga. S.B. 202.

²¹³ Corasaniti & Epstein, *supra* note 35.

higher percentage of African Americans, as compared to Whites, lack access to state-issued photo identification for historical and socioeconomic reasons.²¹⁴

S.B. 202 dramatically reduces the number of absentee ballot drop boxes and their availability in metropolitan Atlanta, where a disproportionate percentage of racial minorities live.²¹⁵ To illustrate the significance of this measure, during the 2020 election, metro Atlanta provided 94 drop boxes that were 24-hour accessible for purposes of depositing absentee ballots.²¹⁶ S.B. 202 drops this number to, at most, 23, based on the latest voter registration data, and limits drop box availability to regular business hours only.²¹⁷ The law also bans counties, such as metro-Atlanta's Fulton County, from providing recreational vehicles to bring polling sites to voters at churches, parks, and public libraries.²¹⁸ This measure is highly probative of partisan intent because 11,200 Georgians voted this way during the 2020 election, which is slightly less than Biden's aggregate margin of victory against Trump.²¹⁹ The law also takes away county discretion in setting early voting schedules and requires counties to hold early voting during weekday working hours, with no discretion to allow for early voting before 7 AM or after 7 PM, thereby making voting more difficult for those with non-flexible schedules.²²⁰

Most controversially, S.B. 202 bars non-election workers from providing food and water to voters waiting in line.²²¹ This provision, enacted on dubious voter intimidation grounds, could have a partisan effect because long voting lines are more common in densely populated Georgia polling areas that tend to be disproportionately populated with racial minorities and, accordingly, vote Democratic.²²² The partisan motivation for the measure is illuminated by the fact S.B. 202 disallows philanthropic groups from helping poorer Georgia jurisdictions pay for elections, which, in turn, means that wealthier jurisdictions that lean Republican will have more resources to provide food and water to voters. Economically distressed polling places will lack the ability to provide such assistance to Democratic-leaning voters.

To those who think laws of S.B. 202's type are unconstitutional, especially in view of the Department of Justice's decision to sue Georgia and enjoin S.B. 202 under the

²¹⁴ Thirteen percent of African Americans, ten percent of Hispanics and only five percent of Whites lack government-issued photo identification, *see* Vanessa M. Perez, *American with Photo ID: A Breakdown of Demographic Characteristics*, *Project Vote Research Memo* (Feb. 2015), <http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf>.

²¹⁵ *See* Corasaniti & Epstein, *supra* note 35; Ga. S.B. 202.

²¹⁶ *See* Corasaniti & Epstein, *supra* note 35; Ga. S.B. 202.

²¹⁷ *See* Corasaniti & Epstein, *supra* note 35; Ga. S.B. 202.

²¹⁸ *See* Corasaniti & Epstein, *supra* note 35; Ga. S.B. 202.

²¹⁹ *See* Corasaniti & Epstein, *supra* note 35; Ga. S.B. 202; *see also* Wasserman et al., *supra* note 26.

²²⁰ Corasaniti & Epstein, *supra* note 35.

²²¹ *Id.*

²²² *Id.*

VRA's "bail in" provision,²²³ it must be remembered that the Supreme Court has recently upheld quite similar franchise burdens in *Brnovich*.²²⁴ There, the Court concluded that burdens placed on racial minority franchise rights based on dubious election security claims are constitutional.²²⁵ The Court has also concluded that voter identification laws satisfy equal protection, and that extreme partisan gerrymanders that could preordain election outcomes are nonjusticiable.²²⁶

As of June 2021, 17 states have enacted 28 new laws that restrict ballot access since the 2020 presidential election.²²⁷ Due to the opposition of Senators Manchin and Sinema, Senate Democrats failed to cohere as a group to repeal the Senate filibuster rule to enable for passage of either the Freedom to Vote Act or the John Lewis Voting Rights Advancement Act by majority vote, both of which would have sought to address state restrictions on ballot access such as S.B. 202 as well as partisan gerrymanders that result in racial minority vote dilution.²²⁸ This is after Congressional Democrats' previous failure to enact an updated voting rights bill, called the For the People Act, because Senate Republicans voted in unison to procedurally block the law from being debated on the Senate floor.²²⁹ The Act, which Democrats and voting rights advocates argued was a necessary counterweight to red state laws such as S.B. 202, would have applied only to federal elections and ostensibly remediated many of the problems that depress racial minority voting power at the national level, namely partisan districting, obstacles to voter registration, non-disclosure of campaign

²²³ *Justice Department Files Lawsuit Against the State of Georgia to Stop Racially Discriminatory Provisions of New Voting Law*, DEP'T OF JUST. (June 25, 2021), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-georgia-stop-racially-discriminatory>. Section 3 of the VRA, or the bail in provision, allows courts to bring jurisdiction in suits not covered by preclearance requirements. See Edwards K. Olds, Note, *More Than "Rarely Used" A Post-Shelby Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185, 2193 (2017).

²²⁴ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

²²⁵ *Id.*

²²⁶ See *Crawford v. Marion Cnty. Bd. of Elections*, 553 U.S. 181, 209 (2008) (concluding that voter identification laws that burden franchise rights are constitutional); see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (concluding that extreme partisan gerrymanders are nonjusticiable).

²²⁷ *Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>; Elise Viebeck, *Here's Where GOP Lawmakers Have Passed New Voting Restrictions Around the Country*, WASH. POST (July 14, 2021), <https://www.washingtonpost.com/politics/2021/06/02/state-voting-restrictions/>.

²²⁸ Nick Corasaniti & Reid J. Epstein, *A Voting Rights Push, as States Make Voting Harder*, N.Y. TIMES (Jan. 11, 2022), <https://www.nytimes.com/2022/01/11/us/politics/biden-voting-rights-state-laws.html>.

²²⁹ See Barbara Sprunt, *Senate Republicans Block Democrats' Sweeping Voting Rights Legislation*, NPR (June 22, 2021), <https://www.npr.org/2021/06/22/1008737806/democrats-sweeping-voting-rights-legislation-is-headed-for-failure-in-the-senate>.

spending, and, of course, limitations on vote-by-mail and early voting.²³⁰ Republicans, including Minority Leader McConnell, objected to it on the grounds that it would be a complete federal takeover of elections, which historically have been under state and local control.²³¹ Democrats, including Majority Leader Schumer, alleged that Republicans were targeting ballot access by non-White, younger, poorer, and typically Democratic voters.²³² However, because the Act would facilitate the election of Democratic candidates in highly contested elections, expecting anything but Republican opposition to it would be phantasmagoric. It is, for the same reason, highly unlikely for Congressional Republicans to agree to a revised coverage formula for VRA preclearance purposes.

Addressing voting disparities between demographic groups requires the effectuation of policies to reduce racial political polarization. This is because dramatically facilitating racial minority ballot access, in the absence of addressing polarization, is altogether infeasible in today's America. The first step would be for states to cease awarding their Electoral College votes on a "winner-take-all" basis.

VIII. AMENDING STATE ELECTORAL COLLEGE LAWS WOULD ENGENDER NATIONAL COHESION

Currently, 48 of 50 states award their Electoral College votes on a "winner-take-all" basis. Maine and Nebraska award an Electoral College vote to the popular vote winner in each congressional district and two votes to the statewide popular vote winner.²³³ I do not advocate taking either Maine or Nebraska's approach to awarding Electoral College votes because apportioning them based on Congressional district would still result in racial minority vote dilution due to partisan gerrymandering. A typical state electoral college law is my home state of Tennessee's provision regarding the election of electors, which provides, in relevant part:

[A]t the regular election immediately preceding the time fixed by the law of the United States for the choice of president and vice president, as many electors of president and vice president as this state may be entitled to shall be elected. Each registered voter in this state may vote for the whole number of electors. The persons, up to the number required to be chosen, having the highest number of votes shall be declared to be duly chosen electors.²³⁴

Because federal law grants Tennessee eleven Electoral College votes based on its population, Tennessee law allocates an elector for each of its nine congressional districts, and two electors that may be residents of any part of the state.²³⁵ The electors

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Wasserman et al, *supra* note 26; see also *Summary: State Laws Regarding Presidential Electors*, NAT'L ASS'N OF SEC'YS OF STATE (Oct. 2020), <https://www.nass.org/sites/default/files/surveys/2020-10/summary-electoral-college-laws-Oct20.pdf> (indicating the current electoral voting rules on a state-by-state basis).

²³⁴ TENN. CODE ANN. § 2-15-101 (LEXIS through 2021 First Extraordinary Sess.).

²³⁵ *Id.* at § 2-15-102.

for the candidates winning the statewide popular vote are then to convene in the state capital of Nashville and, on a date prescribed by United States law, “cast their ballots in the electoral college for the candidates of the political party that nominated them as electors.”²³⁶ This framework means that Tennessee, like 47 other states, awards the entirety of its Electoral College votes to the candidate winning a plurality of the presidential popular vote. This leads to worsening polarization that incentivizes voter suppression and facilitates the election of divisive presidential candidates whose focus is on narrow partisan appeal. It also increases the likelihood of election interference by foreign and domestic entities, including hostile foreign governments, because the statewide popular vote in a narrow collection of swing states can determine the president.

If the Apportionment Proposal were implemented, the incentive toward voter suppression or, at the very least, taking a recalcitrant approach to minority ballot access, would dramatically decrease. The risk of illegal foreign election interference would also decrease. For example, if Georgia’s 16 Electoral College were to be apportioned based the Apportionment Proposal, Biden would have been awarded nine votes and Trump would have been awarded seven. Though this margin is still greater than the overall popular vote margin, the consequences of a 0.2% popular vote margin are no longer quite as stark.

To those who question whether this will be a non-starter because it will weaken the potential political power of electorally significant “swing” states, the reality is that the benefits to the swing states themselves tend to be illusory, while the upside of the policy change is to dramatically increase the aggregate political power of all states by encouraging presidential candidates to campaign nationwide. The Apportionment Proposal will incentivize voter participation and inclusive campaigning by major candidates from both major political parties to depolarize American politics. Unlike a French-style national popular vote or often-mooted popular vote compact among the states, the Apportionment Proposal would also protect smaller states by encouraging nationwide campaigning and, because it is based on a proportion of the two-party vote, discourage the development of fringe or splinter parties.

Finally, because the proposal disjoins the likely presidential election outcome from any one state election result, while still preserving a decentralized system of election procedures, the Apportionment Proposal disincentivizes illegal foreign election interference of the type effectuated by Russia during both the 2016 and 2020 presidential elections.²³⁷ Ideally, over time, the changed approach to presidential elections will reduce political polarization by encouraging nationwide campaigning in a framework that incentivizes voting. The result could be a dramatic revitalization of American democracy.

The Apportionment Proposal will increase the political saliency of all 50 states, as compared to “swing” and early caucus/primary states, without sacrificing the political power of smaller states. It would also reduce the partisan incentive to voter suppression because a statewide election result would be less important. Political and

²³⁶ *Id.* at § 2-15-104(a), (c)(1).

²³⁷ See MUELLER, *supra* note 14; see also Julian E. Barnes, *Russian Interference in 2020 Included Influencing Trump Associates, Report Says*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/03/16/us/politics/election-interference-russia-2020-assessment.html>.

racial polarization would also be reduced under the Apportionment Proposal by incentivizing consensus-based politics focused on the ideologically median voter and not ideological partisans. By placing more Electoral College votes at play for each election cycle, presidential candidates and their campaigns will have every incentive to, paraphrasing Richard Nixon, move to the center come general election based on broad regional divergences in political culture.²³⁸ Finally, because broad geographic appeal will become more relevant to voters in party primaries and caucuses, moderate candidates that engender national cohesion will be advantaged.

How would the Apportionment Proposal have altered the outcome of the 2020 presidential election that Biden won against former President Trump by a 306–232 margin in the Electoral College based on a 51.3% to 46.9% margin in the popular vote?²³⁹

As demonstrated in the chart included in Appendix A, President Biden would still have won the presidency under the Apportionment Proposal, but his Electoral College margin would have been slightly narrower, 279–259, which, by giving Biden 51.8 percent of the Electoral College vote, makes the margin of victory closer to that of the popular vote.²⁴⁰ Although the Apportionment Proposal would take away a potential advantage of the “winner-take-all” framework, namely, the creation of an apparent nationwide consensus in favor of the Electoral College vote winner, this advantage is certainly outweighed by the risks to national cohesion in maintaining the status quo. These risks are outlined above and, in the case of Trump and his supporters, include an outright rejection of election results. Notice also that the Apportionment Proposal would not necessarily have resulted in a Biden victory—had Trump known of the changed rules in advance, he would have changed his mode of governing and campaigning and picked up additional Electoral College votes in populous liberal strongholds such as California, Illinois, Massachusetts, and New York.

As set forth in the chart included in Appendix B, Trump, who prevailed against former Secretary of State, U.S. Senator, and First Lady, Hillary Clinton, in 2016, would have seen his 306–232 Electoral College victory be replaced by a 270–268 loss, under the Apportionment Proposal, which is consistent with Clinton winning the popular vote.²⁴¹ This outcome is definitely more democratically legitimate and consistent with the national interest in that candidate Trump may well have prevailed in the Electoral College due to Russian election interference on his behalf, especially in the “swing” states that he won by very narrow margins, and where the Russian Government had a particular interest in affecting the outcome.²⁴² It bears repeating though, that Trump may still have prevailed under the Apportionment Proposal because his campaign would have undoubtedly campaigned differently and less

²³⁸ MARION T. DOSS, JR. & ROBERT NORTH ROBERTS, FROM WATERGATE TO WHITEWATER: THE PUBLIC INTEGRITY WAR 119 (1997).

²³⁹ Wasserman et al, *supra* note 26.

²⁴⁰ *See infra* App. A.

²⁴¹ *See infra* App. B.

²⁴² Tim Meko et al., *How Trump Won the Presidency with Razor-Thin Margins in Swing States*, WASH. POST (Nov. 11, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/swing-state-margins/>; *see also* Barnes, *supra* note 237.

divisively if he had a chance of winning Electoral College votes in populous Democratic-leaning states.

The 2004 election was another very close election in recent history. The Republican incumbent president, George W. Bush, narrowly prevailed against the Democratic Party nominee, former U.S. Senator John Kerry. Bush won reelection by a 286–251 margin in the Electoral College and a popular vote margin of 50.8% to 48.3%.²⁴³ The results, including what they would have been under the Apportionment Proposal, are provided for in the chart included in Appendix C.²⁴⁴

The 2004 presidential election would still have been won by Bush under the Apportionment Proposal, albeit by a narrower 274–264 Electoral College vote margin. Such a result would have been more consistent with national cohesion because “swing states,” such as Ohio, would have been less critical to the election outcome. It would have also disincentivized partisan misadventures such as the divisive referenda on gay marriage prohibition in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah, all of which were designed to increase Republican voter turnout.²⁴⁵ Moreover, even if Senator Kerry had prevailed by a narrow margin in Ohio, Bush, the popular vote winner, would have still prevailed in the Electoral College, which would have been the democratically legitimate outcome.

The narrowest election margin in recent history, the 2000 presidential election between then-Vice President Al Gore Jr. and then-Governor George W. Bush, was determined in Bush’s favor after the U.S. Supreme Court reversed a Florida Supreme Court decision mandating a manual recount of votes in select Democratic-leaning Florida counties to deliver Florida’s Electoral College votes to Bush based on Bush’s narrow lead in the popular vote count.²⁴⁶

As set forth in the chart provided for in Appendix D, implementation of the Apportionment Proposal would have resulted in Gore narrowly prevailing over Bush by a 270–268 margin, which, in percentage terms, narrowly approximates Gore’s margin in the popular vote. This, in turn, would have had the fortuitous benefit of having a president take office with greater democratic legitimacy, especially in view of the crises that the country would soon be facing due to Al Qaeda’s terrorist attacks against the United States on September 11, 2001.²⁴⁷

The Apportionment Proposal also does not implicate an obvious concern with any proposal to replace the Electoral College with a popular vote framework for choosing the nation’s chief executive, namely, the Constitution’s protection of a republican, as

²⁴³ *Turnout Boom*, WALL ST. J. (Jan. 18, 2005), <https://www.wsj.com/articles/SB110601241172928488>. It really should have been 286–252. Kerry won 251 votes and not 252 because one of Minnesota ten Electors voted for Kerry’s running mate, then U.S. Senator John Edwards. *2004 Electoral College Results*, NAT’L ARCHIVES (Nov. 27, 2019), <https://www.archives.gov/electoral-college/2004>.

²⁴⁴ See *infra* App. C.

²⁴⁵ *Same-Sex Marriage Bans Winning on state Ballots: 11 States Approve Constitutional Amendments to Outlaw Gay Nuptials*, CNN (Nov. 3, 2004), <https://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/>.

²⁴⁶ See *Bush v. Gore*, 531 U.S. 98 (2000).

²⁴⁷ See *infra* App. D.

opposed to democratic, governmental framework. By retaining the Electoral College, albeit in a reformed manner, the Apportionment Proposal still ensures a republican system that protects the several states' role in American federalism by incentivizing all presidential candidates to campaign nationwide as opposed to regionally.

The current framework, which has been unreformed under the guise of protecting federalism as well as small states, does neither job very well. With respect to protecting federalism, the current framework, especially with improved polling and enhanced media coverage, leads presidential candidates to campaign solely in the consensus of "swing states" and completely disregard states that are likely to be won by the opposing candidate. This is unfair to small states because they carry so few Electoral College votes, and smaller states with smaller population centers are less ideologically diverse and therefore less likely to be swing states for Electoral College purposes.²⁴⁸ This is especially the case for small states that have only three Electoral College votes, namely Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming because their one member of the House of Representatives comes from the same major political party.²⁴⁹

The Apportionment Proposal would invigorate these states because both political parties will have an incentive to campaign because the dominant political party will seek to win all three votes and the minority party will seek at least one. Presumably, the current Electoral College, which ostensibly favors smaller states over larger states would also facilitate the election of small state presidents. However, the only presidents from small states during U.S. history are Presidents Biden (Delaware), Clinton (Arkansas), Pierce (New Hampshire), and Taylor (Louisiana)—hardly evidence that small states are favored by the current framework. As Amar Reed has persuasively argued, the real reason for the Electoral College is that policing the states' ballot access requirements would have been too daunting a challenge for the United States at the birth of the republic.²⁵⁰ This remains a daunting challenge for voting rights advocates in a country with over 4,678 voting jurisdictions, especially in view of the subtle ways jurisdictions can obstruct ballot access under the guise of election security.²⁵¹

It therefore must be conceded that the "winner-take-all" framework that was adopted by the Framers has inadvertently become a means of polarizing the electorate and incentivizing restrictions on ballot access to the detriment of national cohesion. Seeking to protect voting rights for racial minority voters without first addressing racial political polarization is, in effect, to proverbially "put the cart before the horse."

²⁴⁸ See, e.g., Sara Savat, *The Divide Between Us: Urban-Rural Political Differences Rooted in Geography: Research Finds How Partisan Affiliation Gets Shaped by People's Proximity to a City*, WASH. UNIV. ST. LOUIS THE SOURCE (Feb. 18, 2020), <https://source.wustl.edu/2020/02/the-divide-between-us-urban-rural-political-differences-rooted-in-geography/>.

²⁴⁹ What I mean here is that the very small states tend to elect candidates from one of the two major political parties at each election cycle.

²⁵⁰ See AMAR, *supra* note 53, at 148–59.

²⁵¹ See *Shelby County v. Holder*, 570 U.S. 529, 571 (2013). See also Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1999 (2010).

The Apportionment Proposal would be a major step forward in democratizing and cohering a bitterly divided country.

IX. CONCLUSION

Brnovich involved the Supreme Court gutting the remaining vestiges of the Voting Rights Act such that, going forward, jurisdictions will have free rein to impose partisan burdens on franchise rights that have a disproportionate negative effect on racial minority voters. Indeed, legislative enactments burdening franchise rights such as Arizona's voting restrictions at issue in *Brnovich* were motivated by partisan considerations over the racial hierarchy framework that first prompted the VRA in 1965, and the *Brnovich* Court emphasized that partisan motives are not the same as racial motives for VRA purposes, even though, according to the Court majority, "racially polarized voting can sometimes 'blur the lines.'"²⁵² This blurring of the lines between partisan and racist motivation in the context of pronounced racial political polarization in a highly contested two-party election framework has left ample room for partisans on both sides of the two-party divide to exacerbate the racial, regional, and socioeconomic cleavages that have systematically undermined national cohesion since the Cold War and especially since the 2008–09 financial crisis.

The U.S is stuck in a cycle of hyper-partisanship whereby Republican-controlled legislatures implement increasing burdens on franchise rights for partisan purposes under the guise of election security that Democrats mischaracterize as being no different from the Jim Crow enactments of the early Twentieth Century. From today's vantage point, it is easy to forget that it was the Republican former Governor of California and 1948 Vice-Presidential candidate, Earl Warren, whose court ordered an end to segregated public schooling and commenced the Second Reconstruction, which included the judicial invalidation of legislative malapportionment under the Fourteenth Amendment, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.²⁵³ All these "superstatutes" were enacted with higher rates of Republican than Democratic support in both Houses of Congress.²⁵⁴ How then to retrace our steps and revive bipartisanship and national cohesion in an increasingly multi-ethnic America?

A potential means of advancing national cohesion and reducing polarization is for state legislatures to reform their means of awarding their Electoral College votes from the current "winner-take-all" framework to the Apportionment Proposal that awards them in rough approximation to the percentage of the two-party vote won by the major

²⁵² *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

²⁵³ See *The Civil Rights Movement and The Second Reconstruction, 1945–1968*, HISTORY, ART & ARCHIVES U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/> (last visited Oct. 28, 2021); see also William D. Pederson, *Earl Warren*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1370/earl-warren> (last visited Oct. 28, 2021). See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

²⁵⁴ See Brad Sylvester, *Fact Check: 'More Republicans Voted for the Civil Rights Act as a Percentage Than Democrats Did'*, THE DAILY SIGNAL (Dec. 17, 2018), <https://www.dailysignal.com/2018/12/17/fact-check-more-republicans-voted-for-the-civil-rights-act-as-a-percentage-than-democrats-did/>.

candidates, with a bonus for the state winner where the popular vote result would indicate an even split of Electoral College votes. If legislatively enacted or conditionally implemented by enough states, it will result in an Electoral College result that more closely reflects the nationwide popular vote tally and therefore is more likely to be viewed as democratically legitimate. It will engender national cohesion by deemphasizing election outcome in each state and disincentivize voter suppression because the popular vote outcome in the state will be less outcome determinative. The Apportionment Proposal, by limiting the award of Electoral College votes to the two leading candidates in each state, also protects against the proliferation of splinter and regional party candidates that would undermine national cohesion. By eliminating the notion of “swing states” for purposes of determining the presidential election winner, the Plan also disincentivizes foreign election interference of the type successfully effectuated by the Russian Federation during the 2016 presidential election.²⁵⁵

The Apportionment Proposal is far from perfect—after all, polarization is an inherent concomitant of a two-party system that is worsened by single member plurality districting in the House of Representatives and the “winner-take-all” framework for determining U.S. Senate seats. However, contestation for the White House and the increasing powers conferred on a president drives much of the partisan and racial polarization that divides an increasingly multi-ethnic and heterogeneous country. Today each political camp, to paraphrase the great Canadian political philosopher, Charles Taylor, partakes in an irreconcilable solitude that brooks no compromise with the opposing party or perspective.²⁵⁶ If state legislatures take the initiative to implement the Apportionment Proposal, we may begin the process of bridging our divides and reconciling the solitudes.

²⁵⁵ MUELLER, *supra* note 14.

²⁵⁶ See generally CHARLES TAYLOR, RECONCILING THE SOLITUDES: ESSAYS ON CANADIAN FEDERALISM AND NATIONALISM (1993).

APPENDIX A (BIDEN V. TRUMP IN 2020)

	Biden Popular Vote (%)	Trump Popular Vote (%)	Total Electoral College Votes Available	Electoral College Votes Awarded Currently	Electoral College Votes Awarded to Biden Under the Apportionment Proposal	Electoral College Votes Awarded to Trump Under the Apportionment Proposal
Alabama	36.6	62	9	9-0 Trump	3 Biden	6 Trump
Alaska	42.8	52.8	3	3-0 Trump	1 Biden	2 Trump
Arizona	49.4	49.1	11	11-0 Biden	6 Biden	5 Trump
Arkansas	34.8	62.4	6	6-0 Trump	2 Biden	4 Trump
California	63.5	34.3	55	55-0 Biden	35 Biden	20 Trump
Colorado	55.4	41.9	9	9-0 Biden	5 Biden	4 Trump
Connecticut	59.3	39.2	7	7-0 Biden	4 Biden	3 Trump
Delaware	58.7	39.8	3	3-0 Biden	2 Biden	1 Trump
District of Columbia	92.1	5.4	3	3-0 Biden	3 Biden	0 Trump
Florida	47.9	52.1	29	29-0 Trump	14 Biden	15 Trump
Georgia	49.5	43.3	16	16-0 Biden	9 Biden	7 Trump
Hawaii	63.7	34.3	4	4-0 Biden	3 Biden	1 Trump
Idaho	33.1	63.9	4	4-0 Trump	1 Biden	3 Trump
Iowa	44.9	53.1	6	6-0 Trump	2 Biden	4 Trump
Illinois	57.5	40.6	20	20-0 Biden	12 Biden	8 Trump
Indiana	41	57	11	11-0 Trump	5 Biden	6 Trump
Kansas	41.6	56.2	6	6-0 Trump	2 Biden	4 Trump
Kentucky	36.2	62.1	8	8-0 Trump	3 Biden	5 Trump
Louisiana	39.9	58.5	8	8-0 Trump	3 Biden	5 Trump
Maine	53.3	44.4	2	1-1	n/a	n/a
Maine 1st	60.1	37.0	2	2-0 Biden	n/a	n/a
Maine (Apportionment Proposal)	n/a	n/a	4	n/a	3 Biden	1 Trump

Maryland	65.4	32.2	10	10-0 Biden	7 Biden	3 Trump
Massachusetts	65.6	32.1	11	11-0 Biden	7 Biden	4 Trump
Michigan	50.6	47.8	16	16-0 Biden	9 Biden	7 Trump
Minnesota	52.4	45.3	10	10-Biden	6 Biden	4 Trump
Mississippi	41.1	57.6	6	6-0 Trump	2 Biden	4 Trump
Missouri	41.4	56.8	10	10-0 Trump	4 Biden	6 Trump
Montana	40.5	56.9	3	3-0 Trump	1 Biden	2 Trump
Nebraska	39.4	58.5	3	3-0 Trump	n/a	n/a
Nebraska 1 st	41.3	56.4	1	1-0 Trump	n/a	n/a
Nebraska 3 rd	22.4	75.6	1	1-0 Trump	n/a	n/a
Nebraska (proposed)					2 Biden	3 Trump
New Hampshire	52.7	45.4	4	4-0 Biden	3 Biden	1 Trump
New Jersey	57.3	41.4	14	14-0 Biden	8 Biden	6 Trump
New Mexico	54.3	43.5	5	5-0 Biden	3 Biden	2 Trump
Nevada	50.1	57.7	6	6-0 Biden	4 Biden	2 Trump
New York	60.7	37.7	29	29-0 Biden	18 Biden	11 Trump
North Carolina	48.6	49.9	15	15-0 Trump	7 Biden	8 Trump
North Dakota	31.8	65.1	3	3-0 Trump	1 Biden	2 Trump
Ohio	45.2	53.3	18	18-0 Trump	8 Biden	10 Trump
Oklahoma	32.3	65.4	7	7-0 Trump	2 Biden	5 Trump
Oregon	56.5	40.4	7	7-0 Biden	4 Biden	3 Trump
Pennsylvania	50.0	48.8	20	20-0 Biden	11 Biden	9 Trump
Rhode Island	59.4	38.6	4	4-0 Biden	3 Biden	1 Trump
South Carolina	43.4	55.1	9	9-0 Trump	4 Biden	5 Trump
South Dakota	35.6	61.8	3	3-0 Trump	1 Biden	2 Trump
Tennessee	37.5	60.7	11	11-0 Trump	4 Biden	7 Trump
Texas	46.5	52.1	38	38-0 Trump	18 Biden	20 Trump

Utah	37.6	58.1	6	6-0 Trump	2 Biden	4 Trump
Vermont	66.1	30.7	3	3-0 Biden	2 Biden	1 Trump
Virginia	54.1	44.0	13	13-0 Biden	7 Biden	6 Trump
Washington	58.0	38.8	12	12-0 Biden	7 Biden	5 Trump
Wisconsin	49.4	48.8	10	10-0 Biden	6 Biden	4 Trump
Wyoming	26.6	69.9	3	3-0 Trump	1 Biden	2 Trump ²⁵⁷
2020 Presidential Election Result (Total)	51.3	46.9	538	306-232 Biden	279 Biden	259 Trump

APPENDIX B (CLINTON V. TRUMP IN 2016)

	Clinton Popular Vote (%)	Trump Popular Vote (%)	Total Electoral College Votes Available	Electoral College Votes Awarded	Electoral College Votes Awarded to Clinton Under the Apportionment Proposal	Electoral College Votes Awarded to Trump Under the Apportionment Proposal
Alabama	34.4	62.1	9	9-0 Trump	3 Clinton	6 Trump
Alaska	36.	51.3	3	3-0 Trump	1 Clinton	2 Trump
Arizona	44.6	48.1	11	11-0 Trump	5 Clinton	6 Trump
Arkansas	33.7	60.6	6	6-0 Trump	2 Clinton	4 Trump
California	61.5	31.5	55	55-0 Clinton	37 Clinton	18 Trump
Colorado	48.2	43.3	9	9-0 Clinton	5 Clinton	4 Trump
Connecticut	54.6	40.9	7	7-0 Clinton	4 Clinton	3 Trump
Delaware	53.1	41.7	3	3-0 Clinton	2 Clinton	1 Trump
District of Columbia	91	4	3	3-0 Clinton	3 Clinton	0 Trump

²⁵⁷ *Id.*

Florida	47.4	48.6	29	29-0 Trump	14 Clinton	15 Trump
Georgia	45.3	50.4	16	16-0 Trump	7 Clinton	9 Trump
Hawaii	62.2	30.0	4	4-0 Clinton	3 Clinton	1 Trump
Idaho	27.5	59.2	4	4-0 Trump	1 Clinton	3 Trump
Iowa	41.7	51.1	6	6-0 Trump	2 Clinton	4 Trump
Illinois	55.5	38.4	20	20-0 Clinton	12 Clinton	8 Trump
Indiana	37.5	56.5	11	11-0 Trump	4 Clinton	7 Trump
Kansas	35.7	56.2	6	6-0 Trump	2 Clinton	4 Trump
Kentucky	32.7	62.5	8	8-0 Trump	3 Clinton	5 Trump
Louisiana	38.4	58.1	8	8-0 Trump	3 Clinton	5 Trump
Maine	47.8	44.9	2	2-0	n/a	n/a
Maine 1st	n/a	37.0	2	1-1 Clinton	n/a	n/a
Maine (Apportionment Proposal)	n/a	n/a	4	n/a	3 Clinton	1 Trump
Maryland	60.3	33.9	10	10-0 Clinton	7 Clinton	3 Trump
Massachusetts	60.0	32.8	11	11-0 Biden	7 Clinton	4 Trump
Michigan	47.0	47.3	16	16-0 Trump	7 Clinton	9 Trump
Minnesota	46.4	44.9	10	10-0 Clinton	6 Clinton	4 Trump
Mississippi	40.1	57.9	6	6-0 Trump	2 Clinton	4 Trump
Missouri	37.9	56.4	10	10-0 Trump	4 Clinton	6 Trump
Montana	35.4	55.6	3	3-0 Trump	1 Clinton	2 Trump
Nebraska	33.7	58.7	3	3-0 Trump	n/a	n/a
Nebraska 1 st			1	1-0 Trump	n/a	n/a
Nebraska 3 rd			1	1-0 Trump	n/a	n/a
Nebraska (proposed)					2 Clinton	3 Trump

New Hampshire	46.8	46.5	4	4-0 Clinton	3 Clinton	1 Trump
New Jersey	55.0	41.0	14	14-0 Clinton	8 Clinton	6 Trump
New Mexico	48.3	40.0	5	5-0 Clinton	3 Clinton	2 Trump
Nevada	47.9	45.5	6	6-0 Clinton	4 Clinton	2 Trump
New York	59	36.5	29	29-0 Clinton	18 Clinton	11 Trump
North Carolina	46.2	49.8	15	15-0 Trump	7 Clinton	8 Trump
North Dakota	27.2	63.0	3	3-0 Trump	1 Clinton	2 Trump
Ohio	43.2	51.3	18	18-0 Trump	8 Clinton	10 Trump
Oklahoma	28.9	65.3	7	7-0 Trump	2 Clinton	5 Trump
Oregon	50.1	39.1	7	7-0 Clinton	4 Clinton	3 Trump
Pennsylvania	47.5	48.2	20	20-0 Trump	9 Clinton	11 Trump
Rhode Island	54.4	38.9	4	4-0 Clinton	3 Clinton	1 Trump
South Carolina	40.7	54.9	9	9-0 Trump	4 Clinton	5 Trump
South Dakota	31.7	61.5	3	3-0 Trump	1 Clinton	2 Trump
Tennessee	34.7	60.7	11	11-0 Trump	4 Clinton	7 Trump
Texas	43.2	52.2	38	38-0 Trump	16 Clinton	22 Trump
Utah	27.2	45.1	6	6-0 Trump	2 Clinton	4 Trump
Vermont	56.7	30.3	3	3-0 Clinton	2 Clinton	1 Trump
Virginia	49.8	44.4	13	13-0 Clinton	7 Clinton	6 Trump
Washington	52.5	36.8	12	12-0 Clinton	7 Clinton	5 Trump
Wisconsin	46.5	47.2	10	10-0 Trump	4 Clinton	6 Trump
Wyoming	21.9	68.2	3	3-0 Trump	1 Clinton	2 Trump ²⁵⁸

²⁵⁸ *Id.*

2016 Presidential Election Result (Total)	48.0	45.9	538	306-232 Trump	270 Clinton	268 Trump ²⁵⁹
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APPENDIX C (BUSH V. KERRY 2004)

	Kerry Popular Vote (%)	Bush Popular Vote (%)	Total Electoral College Votes Available	Electoral College Votes Awarded	Electoral College Votes Awarded to Kerry Under the Apportionment Proposal	Electoral College Votes Awarded To Bush Under the Apportionment Proposal
Alabama	36.84	62.46	9	9-0 Bush	3 Kerry	6 Bush
Alaska	35.52	61.07	3	3-0 Bush	1 Kerry	2 Bush
Arizona	44.4	54.87	10	10-0 Bush	4 Kerry	6 Bush
Arkansas	44.55	54.31	6	6-0 Bush	2 Kerry	4 Bush
California	55.31	44.36	55	55-0 Kerry	31 Kerry	24 Bush
Colorado	47	51.7	9	9-0 Bush	4 Kerry	5 Bush
Connecticut	54.31	43.95	7	7-0 Kerry	4 Kerry	3 Bush
Delaware	53.35	45.75	3	3-0 Kerry	2 Kerry	1 Bush
District of Columbia	89.2	9.34	3	3-0 Kerry	3 Kerry	0 Bush
Florida	47.1	52.1	27	27-0 Bush	13 Kerry	14 Bush
Georgia	41.37	57.97	15	15-0 Bush	6 Kerry	9 Bush
Hawaii	54.01	45.26	4	4-0 Kerry	3 Kerry	1 Bush
Idaho	30.26	68.38	4	4-0 Bush	1 Kerry	3 Bush
Illinois	54.82	44.48	21	21-0 Kerry	12 Kerry	9 Bush
Indiana	39.26	59.94	11	11-0 Bush	4 Kerry	7 Bush
Iowa	49.23	49.90	7	7-0 Bush	3 Kerry	4 Bush
Kansas	36.6	62.0	6	6-0 Bush	2 Kerry	4 Bush
Kentucky	39.7	59.6	8	8-0 Bush	3 Kerry	5 Bush
Louisiana	42.2	56.7	9	9-0 Bush	4 Kerry	5 Bush
Maine	53.57	44.58	2	2-0 Kerry	n/a	n/a
Maine 1st	55.07	43.14	1	1-0 Kerry	n/a	n/a

²⁵⁹ *Id.*

Maine 2nd	51.95	46.13	1	1-0 Kerry	n/a	n/a
Maine (Apportionment Proposal)	n/a	n/a	4	n/a	3 Kerry	1 Bush
Maryland	55.91	42.93	10	10-0 Kerry	6 Kerry	4 Bush
Massachusetts	61.94	36.78	11	11-0 Kerry	7 Kerry	4 Bush
Michigan	51.23	47.81	17	17-0 Kerry	9 Kerry	8 Bush
Minnesota	51.09	47.61	10	10-0 Kerry	6 Kerry	4 Bush
Mississippi	39.76	59.45	6	6-0 Bush	2 Kerry	4 Bush
Missouri	46.1	53.3	11	11-0 Bush	5 Kerry	6 Bush
Montana	38.56	59.07	3	3-0 Bush	1 Kerry	2 Bush
Nebraska	32.68	65.90	2	2-0 Bush	n/a	n/a
Nebraska 1 st	35.7	62.97	1	1-0 Bush	n/a	n/a
Nebraska 2nd	38.52	60.24	1	1-0 Bush	n/a	n/a
Nebraska 3 rd	23.73	74.92	1	1-0 Trump	n/a	n/a
Nebraska (proposed)					2 Kerry	3 Bush
Nevada	47.88	50.47	5	5-0 Bush	2 Kerry	3 Bush
New Hampshire	50.24	48.87	4	4-0 Kerry	3 Kerry	1 Bush
New Jersey	52.92	46.24	15	15-0 Kerry	8 Kerry	7 Bush
New Mexico	49.05	49.84	5	5-0 Bush	2 Kerry	3 Bush
New York	58.37	40.08	31	31-0 Kerry	19 Kerry	12 Bush
North Carolina	43.6	56.02	15	15-0 Bush	7 Kerry	8 Bush
North Dakota	35.5	62.86	3	3-0 Bush	1 Kerry	2 Bush
Ohio	48.71	50.81	20	20-0 Bush	9 Kerry	11 Bush
Oklahoma	34.43	65.57	7	7-0 Bush	2 Kerry	5 Bush
Oregon	51.35	47.2	7	7-0 Kerry	4 Kerry	3 Bush
Pennsylvania	50.92	48.42	21	21-0 Kerry	11 Kerry	10 Bush
Rhode Island	59.52	38.76	4	4-0 Kerry	3 Kerry	1 Bush
South Carolina	40.90	57.98	8	8-0 Bush	3 Kerry	5 Bush
South Dakota	38.44	59.91	3	3-0 Bush	1 Kerry	2 Bush
Tennessee	42.53	56.80	11	11-0 Bush	5 Kerry	6 Bush
Texas	38.22	61.09	34	34-0 Bush	13 Kerry	21 Bush
Utah	26.00	71.54	5	5-0 Bush	1 Kerry	4 Bush

Vermont	58.94	38.8	3	3-0 Kerry	2 Kerry	1 Bush
Virginia	45.48	53.68	13	13-0 Kerry	6 Kerry	7 Bush
Washington	52.82	45.64	11	11-0 Kerry	6 Kerry	5 Bush
West Virginia	43.2	56.06	5	5-0 Bush	2 Kerry	3 Bush
Wisconsin	49.7	47.32	10	10-0 Kerry	6 Kerry	4 Bush
Wyoming	29.07	68.86	3	3-0 Bush	1 Kerry	2 Bush
2004 Presidential Election Result (Total)	48.3	50.7	538	286-252 Bush	264 Kerry	274 Bush

APPENDIX D (2000 PRESIDENTIAL ELECTION: AL GORE, JR. (DEM) V. GEORGE W.
BUSH (REP))

	Gore Popular Vote (%)	Bush Popular Vote (%)	Total Electoral College Votes Available	Electoral College Votes Awarded	Electoral College Votes Awarded to Gore Under the Apportionment Proposal	Electoral College Votes Awarded to Bush Under the Apportionment Proposal
Alabama	41.57	56.48	9	9-0 Bush	4 Gore	5 Bush
Alaska	27.67	58.62	3	3-0 Bush	1 Gore	2 Bush
Arizona	44.73	51.02	8	8-0 Bush	3 Gore	5 Bush
Arkansas	45.86	51.31	6	6-0 Bush	2 Gore	4 Bush
California	53.45	41.65	54	54-0 Gore	31 Gore	23 Bush
Colorado	42.38	50.75	8	8-0 Bush	3 Gore	5 Bush
Connecticut	55.91	38.44	8	8-0 Gore	5 Gore	3 Bush
Delaware	54.96	41.90	3	3-0 Gore	2 Gore	1 Bush
District of Columbia	85.15	8.95	3	3-0 Gore	3 Gore	0 Bush
Florida	48.84	48.85	25	25-0 Bush	12 Gore	13 Bush
Georgia	42.98	54.67	13	13-0 Bush	6 Gore	7 Bush
Hawaii	55.79	37.46	4	4-0 Gore	3 Gore	1 Bush
Idaho	27.64	67.17	4	4-0 Bush	1 Gore	3 Bush
Illinois	54.60	42.58	22	22-0 Gore	13 Gore	9 Bush
Indiana	41.01	56.65	12	12-0 Bush	5 Gore	7 Bush
Iowa	48.54	48.22	7	7-0 Gore	4 Gore	3 Bush
Kansas	37.24	58.04	6	6-0 Bush	2 Gore	4 Bush

Kentucky	41.37	56.50	8	8-0 Bush	3 Gore	5 Bush
Louisiana	44.88	52.55	9	9-0 Bush	4 Gore	5 Bush
Maine	49.09	43.97	2	2-0 Gore	n/a	n/a
Maine 1st	50.52	42.59	1	1-0 Gore	n/a	n/a
Maine 2nd	47.43	45.46	1	1-0 Gore	n/a	n/a
Maine (Apportionment Proposal)	n/a	n/a	4	n/a	3 Gore	1 Bush
Maryland	56.57	40.18	10	10-0 Gore	6 Gore	4 Bush
Massachusetts	59.80	32.50	12	12-0 Gore	8 Gore	4 Bush
Michigan	51.28	46.15	18	18-0 Gore	10 Gore	8 Bush
Minnesota	47.91	45.50	10	10-0 Gore	6 Gore	4 Bush
Mississippi	40.70	57.62	7	7-0 Bush	3 Gore	4 Bush
Missouri	47.08	50.42	11	11-0 Bush	5 Gore	6 Bush
Montana	33.36	58.44	3	3-0 Bush	1 Gore	2 Bush
Nebraska	33.25	62.25	2	2-0 Bush	n/a	n/a
Nebraska 1 st	35.92	58.90	1	1-0 Bush	n/a	n/a
Nebraska 2nd	38.52	56.92	1	1-0 Bush	n/a	n/a
Nebraska 3 rd	24.94	71.35	1	1-0 Bush	n/a	n/a
Nebraska (proposed)					2 Gore	3 Bush
Nevada	45.98	49.52	4	4-0 Bush	1 Gore	3 Bush
New Hampshire	46.80	48.07	4	4-0 Bush	1 Gore	3 Bush
New Jersey	56.13	40.29	15	15-0 Gore	9 Gore	6 Bush
New Mexico	47.91	47.85	5	5-0 Bush	3 Gore	2 Bush
New York	60.21	35.23	33	33-0 Gore	21 Gore	12 Bush
North Carolina	43.2	56.03	15	15-0 Bush	6 Gore	9 Bush
North Dakota	35.5	62.86	3	3-0 Bush	1 Gore	2 Bush
Ohio	46.46	49.97	21	21-0 Bush	10 Gore	11 Bush
Oklahoma	38.43	60.31	8	8-0 Bush	3 Gore	5 Bush
Oregon	46.96	46.52	7	7-0 Gore	4 Gore	3 Bush
Pennsylvania	50.60	46.43	23	23-0 Gore	12 Gore	11 Bush
Rhode Island	60.99	31.91	4	4-0 Gore	3 Gore	1 Bush
South Carolina	40.90	56.84	8	8-0 Bush	3 Gore	5 Bush
South Dakota	37.56	60.30	3	3-0 Bush	1 Gore	2 Bush
Tennessee	47.28	51.15	11	11-0 Bush	5 Gore	6 Bush

Texas	37.98	59.30	32	32-0 Bush	12 Gore	20 Bush
Utah	26.34	66.83	5	5-0 Bush	1 Gore	4 Bush
Vermont	50.63	40.70	3	3-0 Gore	2 Gore	1 Bush
Virginia	44.44	52.47	13	13-0 Bush	6 Gore	7 Bush
Washington	50.16	44.58	11	11-0 Gore	6 Gore	5 Bush
West Virginia	45.59	51.92	5	5-0 Bush	2 Gore	3 Bush
Wisconsin	47.83	47.61	11	11-0 Gore	6 Gore	5 Bush
Wyoming	27.70	67.76	3	3-0 Bush	1 Gore	2 Bush
2000 Presidential Election Result (Total)	48.38	47.87	538	271-267 Bush	270 Gore	268 Bush