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## The Electoral College: Appendicitis of American Democracy

Mitchell W. Berger\*

Zachary P. Hyman†

\*Berger Singerman LLP, MBerger@bergersingerman.com

†Berger Singerman LLP, ZHyman@bergersingerman.com

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## THE ELECTORAL COLLEGE: APPENDICITIS OF AMERICAN DEMOCRACY

MITCHELL W. BERGER<sup>\*</sup>  
ZACHARY P. HYMAN<sup>\*</sup>

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### I. INTRODUCTION

In the United States of America, our Chief Executive is not selected by the people, he—or someday she—is elected by electors, through the Electoral College system.<sup>1</sup> Under this system, electors, or special designees appointed under state law, vote for their choice of President.<sup>2</sup> Each elector may cast two votes, one for the President and one for the Vice President.<sup>3</sup> In most states, a winner take all system is used to select electors so that the

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\* Mitchell W. Berger is a partner and founder of Berger Singerman, and he serves as Co-Chair of the firm. Mr. Berger would like to thank Omar Perez and Stephen Ayeni for their assistance in the drafting and editing this Article.

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1. *What Is the Electoral College?*, NAT'L ARCHIVES & RECORDS ADMIN.: U.S. ELECTORAL C., <http://www.archives.gov/federal-register/electoral-college/about.html> (last visited May 1, 2019).

2. *Id.*

3. *Id.* Some states require electors to pledge that they will vote for the party that appointed them. *See* Ray v. Blair, 343 U.S. 214, 215, 227 (1952). Such a requirement is constitutional. *Id.* at 231.

political party that wins the majority of individual votes in that state gets to appoint all of the electors that will vote for the President—though in Maine and Nebraska electors are decided on a pro rata basis.<sup>4</sup> With rare exception, electors vote along party lines and in some states they are prohibited from voting against the candidate who did not receive the majority of votes.<sup>5</sup>

The number of electors in each state is based on the number of representatives and senators allocated to it.<sup>6</sup> This is based on the population of that state during the United States Census, and each state has a minimum number of votes, regardless of its population.<sup>7</sup> There are a total of 538 Electoral College votes and a presidential candidate must receive 270 Electoral College votes to win the election.<sup>8</sup> Thus, under the Electoral College system, the President's selection is not by a popular vote, but is based on an antiquated system that dates back to the country's founding.<sup>9</sup> Because the Electoral College system can result in inequity with respect to the election of a President, between 1889 and 2004, 595 amendments were proposed on the topic of Electoral College reform—which means that more proposed constitutional amendments have been introduced regarding Electoral College reform than on any other subject.<sup>10</sup>

In 2016, President Donald J. Trump received 62,984,825 votes—which is nearly three million votes less than his opponent, Hillary Clinton,

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4. Jonah Engel Bromwich, *How Does the Electoral College Work?*, N.Y. TIMES (Nov. 8, 2016), <http://www.nytimes.com/2016/11/09/us/politics/how-does-the-electoral-college-work.html>; *What Is the Electoral College?*, *supra* note 1.

5. See THOMAS H. NEALE, CONG. RESEARCH SERV., RL32611, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 8 (2017). In the 2016 election, seven electors voted for candidates other than those chosen by their state's voters in the popular election. *Id.* at 9. There have been a total of eight electors who did not vote for the presidential candidate selected by their party prior to 2008. David Strömberg, *How the Electoral College Influences Campaigns and Policy: The Probability of Being Florida*, 98 AM. ECON. REV. 769, 772 n.7 (2008).

6. *What Is the Electoral College?*, *supra* note 1.

7. Bromwich, *supra* note 4.

8. *Id.*; *What Is the Electoral College?*, *supra* note 1.

9. *What Is the Electoral College?*, *supra* note 1.

10. L. PAIGE WHITAKER & THOMAS H. NEALE, CONG. RESEARCH SERV., RL30804, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 17 (2004). However, “no proposal to reform the [E]lectoral [C]ollege has been introduced since the 107<sup>th</sup> Congress (2001–2003).” THOMAS H. NEALE, CONG. RESEARCH SERV., R43824, ELECTORAL COLLEGE REFORM: CONTEMPORARY ISSUES FOR CONGRESS 20 (2017). “[T]he candidate who got the most votes won every election from 1896 to 1996.” *America's Electoral System Gives the Republicans Advantages over Democrats*, ECONOMIST (July 12, 2018), <http://www.economist.com/briefing/2018/07/12/americas-electoral-system-gives-the-republicans-advantages-over-democrats>.

who received 65,853,516 votes—yet won the election.<sup>11</sup> President Trump won because he received 74 more votes from the Electoral College than his opponent.<sup>12</sup> President Trump was elected, notwithstanding the will of the majority of voting citizens.<sup>13</sup> This result, in addition to the 2000 presidential election, demonstrates why the Electoral College no longer serves a legitimate purpose.<sup>14</sup> As a result of the most recent election, four proposals to “replace the [E]lectoral [C]ollege with direct popular election” were introduced, but no action beyond committee referral was taken on them.<sup>15</sup> Two resolutions proposing a constitutional amendment to establish a direct popular vote have been introduced to date in the 115th Congress.<sup>16</sup> Such efforts should be advanced, as the Electoral College cannot be reformed to ensure *one person, one vote*, and, like an infected human appendix, it is a vestige of the past that must be removed before it bursts.<sup>17</sup>

## II. THE CONSTITUTIONAL CONVENTION

The Articles of Confederation, the predecessor to the United States Constitution, established an ineffective form of government.<sup>18</sup> As a result of the inefficiencies of the Articles of Confederation, representatives of the

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11. *Presidential Results*, CNN: POL., <http://www.cnn.com/election/2016/results/president> (last visited May 1, 2019).

12. See Tom Kertscher, *Despite Losing Popular Vote, Donald Trump Won in Electoral Landslide, GOP's Reince Priebus Says*, POLITIFACT (Nov. 21, 2016, 5:00 AM), <http://www.politifact.com/wisconsin/statements/2016/nov/21/reince-priebus/despite-losing-popular-vote-donald-trump-won-elect/#>.

13. *Id.* “Hillary Clinton’s lead of 2.1 percentage points was larger than those enjoyed by the victorious John F. Kennedy in 1960, Richard Nixon in 1968, and Jimmy Carter in 1976.” *America’s Electoral System Gives the Republicans Advantages over Democrats*, *supra* note 10.

14. See *id.* “[I]n 2000, Bush won by 271 to 266 electoral votes. The margin was so close that all, and only, the [twenty-eight] states that voted for Bush were *decisive* in the Electoral College.” Strömberg, *supra* note 5, at 786.

15. NEALE, *supra* note 10, at 20.

16. *Id.*; see also H.R.J. Res. 7, 116th Cong. (2019).

17. Gray v. Sanders, 372 U.S. 368, 381 (1963); Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation’s Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 205 (1994); see also Jamelle Bouie, *The Electoral College Is the Greatest Threat to Our Democracy*, N.Y. TIMES (Feb. 28, 2019), <http://www.nytimes.com/2019/02/28/opinion/the-electoral-college.html>.

18. See *Constitutional Topic: The Constitutional Convention*, U.S CONST. (Mar. 12, 2012), [http://www.usconstitution.net/consttop\\_ccon.html](http://www.usconstitution.net/consttop_ccon.html). James Madison had a few problems with the Articles of Confederation. *Id.* “The states were under no obligation to pay their fair share of the national budget; they violated international treaties with abandon; they ran roughshod over the authority of the Congress; and they violated each other’s rights incessantly.” *Id.*

states met during the Constitutional Convention to reconfigure the framework of the United States National Government.<sup>19</sup>

James Madison and other Virginian delegates met before the Constitutional Convention to create the Virginia Plan, which mirrored the then-existing form of government in Virginia.<sup>20</sup> The Virginia Plan called for “[a] bicameral legislature—two houses.”<sup>21</sup> Both house memberships would be represented in proportion to each state’s population.<sup>22</sup> The lower house would be elected by the people, via popular election, and the upper house would be elected by the lower house.<sup>23</sup> The Virginia Plan also called for the election of a National Executive through a vote of the members of the lower house.<sup>24</sup>

“The [Virginia] Plan corrected the inequality that the *one state, one vote* [or equal state suffrage] notion inflicted upon the large states” by the Articles of Confederation.<sup>25</sup> However, states could not agree on how to apportion representation.<sup>26</sup> Smaller states wanted to maintain the status quo and maintain the equal state suffrage rule of the Articles of Confederation.<sup>27</sup> Larger states viewed the equal state suffrage system as being “inherently unfair, and were going to do everything they could to abolish it.”<sup>28</sup>

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19. *Id.* “No one seemed to want to debate this issue because of the presence in the Convention of George Washington, who everyone assumed would be the first [C]hief [E]xecutive of the nation.” Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1151 (2002).

20. *Constitutional Topic: The Constitutional Convention*, *supra* note 18.

21. *Id.*

22. *Id.* In James Madison’s notes on debates in the Federal Convention of 1787, “the rights of suffrage in the [n]ational [l]egislature [were] to be proportioned to the [q]uotas of contribution, or to the number of free inhabitants.” H.R. Doc. No. 398, at 953 (1927).

23. *Constitutional Topic: The Constitutional Convention*, *supra* note 18.

24. Finkelman, *supra* note 19, at 1151. Madison believed that the lower house should be chosen by popular vote and should therefore have the power to determine the President. *Id.* Madison believed that in order to establish a free government, the legislature, executive, and judiciary powers should be both separately and independently exercised. *Id.* at 1154–55. He believed an Executive determined by the legislature would form a coalition that “would be more immediately [and] certainly dangerous to public liberty.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 56–57 (Max Farrand ed., rev. ed. 1966). However, while he thought the people were *the fittest*, there would be difficulty in reaching a consensus because “[t]he people generally could only know [and] vote for some [c]itizen whose merits had rendered him an object of general attention [and] esteem.” *Id.* This led to his assertion that a *substitution of electors*, in the form of the lower house chosen by popular vote, would be the best solution. *Id.* at 57.

25. *Constitutional Topic: The Constitutional Convention*, *supra* note 18.

26. *Id.*

27. *Id.*

28. *Id.*

On the other hand, smaller states, such as “New Jersey, New Hampshire, Maryland, Delaware, Connecticut, and even New York, felt they had to fear any attempt by the large states of Virginia, Pennsylvania, and Massachusetts to take away equal [state] suffrage” between the states.<sup>29</sup> More importantly, they “feared the Southern [S]tates because of the general belief . . . that [those states] . . . would soon grow to Pennsylvanian-sized populations,” and if slaves were counted that those populations would grow even more quickly.<sup>30</sup>

The disagreement over the terms of state representation in the Senate was hotly contested and there were even “[t]hreats to dissolve the Convention.”<sup>31</sup> Fortunately, Roger Sherman from Connecticut proposed the Connecticut Compromise.<sup>32</sup> Sherman sided with the two-house national legislature of the Virginia Plan but proposed “[t]hat the proportion of suffrage in the [first] branch, [or House,] should be according to the respective numbers of free inhabitants; and that in the second branch, or Senate, each State should have one vote and no more.”<sup>33</sup> This quelled some of the tension and led to an eventual agreement.<sup>34</sup> The small states were steadfast in their stance on “equal suffrage in the Senate.”<sup>35</sup> However, slave-owning states were not willing to agree to such a system unless they could maintain political power derived from slave ownership.<sup>36</sup> As Madison observed: “It seemed now to be pretty well understood that the real difference[s] . . . lay, not between the large [and] small [states], but between the [Northern and Southern] States. The institution of slavery [and] its consequences formed the line of discrimination.”<sup>37</sup>

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29. *Id.*

30. *Constitutional Topic: The Constitutional Convention*, *supra* note 18.

31. *Id.* “[T]he Delaware delegation [was] instructed to leave the Convention if equal suffrage in the legislature was compromised.” *Id.*

32. *Id.*

33. *Id.*

34. *See Constitutional Topic: The Constitutional Convention*, *supra* note 18.

35. *Id.*

36. *See id.*

37. Williams & MacDonald, *supra* note 17, at 208 (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 295 (1976)). “[M]any of the largest slave holders in the United States were at the Convention.” *Constitutional Topic: The Constitutional Convention*, *supra* note 18. At least a third of the Convention’s fifty-five delegates owned slaves, including all of the delegates from Virginia and South Carolina. DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 68 (2007). “But [Madison] contended that the [s]tates were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves.” Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1137 (2012) (quoting MADISON, *supra*, at 224). While the Electoral College was intended to protect the interests of small states, only three out of the forty-five

## III. THE THREE-FIFTHS COMPROMISE

In the South, slavery would not only propel the South's agricultural economy, but would help fulfill aspirations of "achieving majority control in the immediate[] foreseeable future."<sup>38</sup> James Madison had become a proponent of representation by population, with the inclusion of slaves, prior to the Convention, and recommended that representation by population "is recommended . . . to the [S]outhern [States] by *their expected superiority*."<sup>39</sup> Nonetheless, Southern delegates feared that they would be divested of representation as a result of slavery—which was the foundation of the Southern economy.<sup>40</sup> To protect its interests, "[t]he South wanted their slaves counted as whole persons [for purposes of allocating representatives], but that would never happen."<sup>41</sup>

Ultimately, the states were able to reach a compromise on legislative representation because of issues related to taxation.<sup>42</sup> During the Convention, delegates proposed that federal tax would be based on the total population of each state—inclusive of slaves.<sup>43</sup> Southern slave-states strongly opposed this, as they felt there would be a crippling tax obligation if slaves were to be counted for purposes of taxes.<sup>44</sup> Slave-owner—and future beneficiary of the Electoral College<sup>45</sup>—Thomas Jefferson maintained such taxation would be inequitable as Southern States would be taxed "according to their numbers and their wealth conjunctly, while the [N]orthern [States]

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Presidents—Zachary Taylor of Louisiana, Franklin Pierce of New Hampshire, and Bill Clinton of Arkansas—hailed from them. Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N. U. L. REV. 467, 468 (2007).

38. GARRY WILLS, *NEGRO PRESIDENT: JEFFERSON AND THE SLAVE POWER* 58 (2003).

Under the Articles, the North outnumbered the South by eight states to five . . . . Under the Constitution taking shape, . . . [t]he South had to fear an edge given to the North, both in terms of the unit vote in the Senate and the popular vote in the House, since [sixty] percent of the white population was in the North. Counting slaves fully would have made the two regions roughly equal.

*Id.* at 54.

39. *Id.* at 58.

40. *Constitutional Topic: The Constitutional Convention*, *supra* note 18.

41. *Id.*

42. WILLS, *supra* note 38, at 53.

43. *Id.* at 51. "[T]he three-fifths count was first proposed, in an entirely different context, as a measure of *taxation* under the Articles of Confederation, where *representation* was not at issue." *Id.* at 50–51.

44. *Id.* at 51. "The [S]outhern [S]tates, which would be urgent for counting slaves later on, when it would boost their representation, were opposed to counting them at all when it boosted taxes. This was, they claimed, taxation without representation." *Id.*

45. See WILLS, *supra* note 38, at 2. Historians Garry Wills, Leonard L. Richards, and William W. Freehling have written that had slaves not been counted at all, Adams would have won the electoral vote. *Id.* at 234 n.2.

would be taxed on numbers only.”<sup>46</sup> To alleviate the financial burden associated with slave ownership, reach a compromise, and ensure that the Southern slave-owning States maintained equal representation, Benjamin Harrison proposed a one-half ratio so long as slaves were also counted for purposes of determining representation in the House of Representatives.<sup>47</sup> In response, several New England delegates proposed a higher three-fourths ratio.<sup>48</sup> They eventually compromised on the three-fifths ratio proposed by James Madison.<sup>49</sup>

“Counting [slaves] at three-fifths [of a person] would give the South, which had only [forty-one] percent of the white population, [forty-seven] percent of the delegates in the House of Representatives.”<sup>50</sup> Indeed, after the Electoral College was enacted, Pennsylvania, which had ten percent more free persons than Virginia, had twenty percent fewer representative votes than its southern counterpart.<sup>51</sup> The Three-Fifths Compromise also delayed the prohibition of the slave trade in the United States, which guaranteed Southern political influence through slave-based representation.<sup>52</sup>

In exchange for this concession, the federal government’s power to regulate foreign commerce would be strengthened by provisions that allowed for taxation of slave trades in the international market.<sup>53</sup> This provision only justified a further increase in the Southern slave population.<sup>54</sup> With the

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46. *Id.* at 51–52. This is because slaves were viewed as property “comparable to such property, held in the North, as *cattle, horses, etc.*” *Id.* at 51. The authors of this Article write this piece in part to denounce the fact that the Electoral College was created as a result of slavery to preserve the power of Southern slave owners. *See id.*

47. WILLS, *supra* note 38, at 53.

48. *Id.*

This was a compromise between the one-half count favored by the South and the three-fourths favored by the North. It would count a slave’s productivity at [sixty] percent of a free person’s, as opposed to the [fifty] percent favored by the South or the [seventy-five] percent desired by the North. Madison split the difference with a tilt in the South’s favor.

*Id.*

49. *Id.*

50. *Id.* at 54; *see also* DONALD ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765–1820*, at 179–80 (1979).

51. Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME: HIST. (Nov. 26, 2018, 1:16 PM), <http://www.time.com/4558510/electoral-college-history-slavery/>.

52. Martin Kelly, *What Does the Constitution Say About Slavery?*, THOUGHTCO.: ISSUES, <http://www.thoughtco.com/what-does-constitution-say-about-slavery-105417> (last updated Sept. 5, 2018); *see also* U.S. CONST. art. I, § 2; WILLS, *supra* note 38, at 54.

53. *See* WILLS, *supra* note 38, at 50–51.

54. *See Table*, VOYAGES: TRANS-ATLANTIC SLAVE TRADE DATABASE, <http://www.slavevoyages.org/assessment/estimates> (set row field for *individual years*, then set columns field for *flag*, then set cells field for *only disembarked*, then select *show hyperlink*)



assurance of slavery's continued and strengthened existence, the South was provided opportunities to improve their voting power in both Congress and the Electoral College.<sup>55</sup> This enhanced power would ensure that if the issue of slavery was revisited, they would undoubtedly have the requisite votes in Congress and through the Electoral College, which influenced the selection of the Executive, to preserve it.<sup>56</sup>

#### IV. ORIGINS OF THE ELECTORAL COLLEGE

On May 25, 1787, James Wilson, a prominent Philadelphia lawyer and representative from Philadelphia, suggested that the people elect a single person to act as a National Executive, "giving most energy dispatch and responsibility to the office."<sup>57</sup> "The only powers [Wilson] conceived strictly Executive were those of executing the laws, and appointing officers, not—appertaining to and—appointed by the [l]egislature."<sup>58</sup> He further advocated an election of the Executive by the people, based on a popular election.<sup>59</sup> However, Wilson's proposal was not accepted by Southern delegates who wanted the legislature to select the President.<sup>60</sup> Among others, "Hugh

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(last visited May 1, 2019); Kelly, *supra* note 52. During the Trans-Atlantic slave trade, there was a noticeable increase in slaves who disembarked in the United States during this twenty-year period, beginning with 2,083 ships in 1787 and peaking at over 29,675 in the last year, 1807. *Table, supra*. In fact, from the inception of the Trans-Atlantic slave trade, in 1525 to 1786, a year before the Three-Fifths Compromise, there had been 110,749 slaves who disembarked in the United States. *See id.*; Kelly, *supra* note 52. Unsurprisingly, over the twenty-year period of 1787–1807, this number increased to 130,961 slaves. *Table, supra*.

55. *See* RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (1793); *Results from the 1860 Census*, CIV. WAR HOME PAGE, [www.civil-war.net/pages/1860\\_census.html](http://www.civil-war.net/pages/1860_census.html) (last visited May 1, 2019). The slavery population had grown from 29,264, in 1790, to 3,950,528 in 1860—roughly a 13,500% increase. RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES, *supra*, at 3; *Results from the 1860 Census, supra*. During this period, "[i]n the [United States], on average, a slave mother gave birth to between nine and [ten] children . . . [Expectantly, by] 1860, 'less than [ten] percent of the slave population was over [fifty] and only 3.5 percent was over [sixty].'" Henry Louis Gates Jr., *Slavery, by the Numbers*, ROOT (Feb. 10, 2014, 12:01 AM), <http://www.theroot.com/slavery-by-the-numbers-1790874492>.

56. *See* WILLS, *supra* note 38, at 50, 58.

57. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 912, 947 (2008) (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., rev. ed. 1966)).

58. *Id.* at 947 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57, at 66).

59. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 56.

60. Finkelman, *supra* note 19, at 1153–55. Hugh Williamson of North Carolina asserted that if a popular election was done, there would be "distinguished characters

Williamson of North Carolina openly calculated that direct election of the [E]xecutive would place the South at a clear disadvantage. He reasoned that because the South's 'slaves would have no suffrage' in a presidential election, the slave-free [N]orthern [S]tates would have a much greater voter population in comparison."<sup>61</sup> As a result, James Wilson "suggested that each state be divided into 'districts: [A]nd that the persons qualified to vote in each district' vote for '[m]embers for their respective [d]istricts to be electors of the Executive Magistracy.'"<sup>62</sup> This did not obtain much support.<sup>63</sup> However, it laid the foundation for the creation of the Electoral College.<sup>64</sup>

In response to Wilson, Charles Pinckney, a South Carolina representative, claimed that a direct election of the President would result in the largest states being able to select the President.<sup>65</sup> However, Pinckney's issue was not an issue of representation of small or large states: "The issue here was not population, but the voting population. With about half of South Carolina populated by slaves, Pinckney could not afford to support the direct election of the [P]resident because that would [ultimately harm] his state."<sup>66</sup> Similarly, James Madison, a slaveholder from Virginia, stated that "right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the

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[such as President George Washington], who [were] known perhaps to almost every man. This [would] not always be the case." *Id.* at 1154 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 32). He thought that eventually people would "vote for some man in their own [s]tate, and the largest [s]tate will be sure to succeed." *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 32).

61. Williams & MacDonald, *supra* note 17, at 209 (quoting 3 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 296 (James McClellan & M.E. Bradford eds., 2d ed. 1991)).

62. Finkelman, *supra* note 19, at 1153 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57, at 77).

63. *Id.* at 1154. "Although a conservative on many issues, [on the question of how to choose the National Executive, Wilson] proved to be a radical democrat, arguing for an *election by the people*, citing the successful experience of the popular election of governors in New York and Massachusetts . . ." *Id.* at 1152 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 57, at 68).

64. *See id.* at 1153.

65. Finkelman, *supra* note 19, at 1154; *Constitutional Topic: The Constitutional Convention*, *supra* note 18. Pinckney submitted his proposal on May 29, 1787, the same day Madison's Virginia Plan was introduced. *Constitutional Topic: The Constitutional Convention*, *supra* note 18. This position was made clear by Hugh Williamson, of North Carolina, who was less articulate than Pinckney, when he noted that Southern slave owners would always wish to vote on behalf of their slaves. Finkelman, *supra* note 19, at 1154.

66. *Id.*

Negroes.”<sup>67</sup> Ultimately, the concern over slave-derived political power carried the day, and an election of the Executive by popular vote was rejected by the Constitutional Convention, with only six or seven delegates out of forty-two delegates speaking favorably on the issue.<sup>68</sup> This occurred because, among other reasons, Southern States would not permit their slaves to vote and be counted towards the election of the Executive, yet slave owners wanted to exercise political influence through their ownership of slaves.<sup>69</sup>

Ultimately, the Convention agreed to permit the states to select electors to vote for the Executive.<sup>70</sup> The number of electors allocated to each state was based on the representation of Congress, provided slave owners with more power, and had been previously agreed to by the Convention as a fair mechanism to apportion representation.<sup>71</sup> The Electoral College was formed, and as one delegate to the Virginia delegation would say, “seems rather founded on accident than any principle of government I [have] ever heard of.”<sup>72</sup>

#### V. THE CONSTITUTIONAL CRISIS OF 1800 AND THE FORMATION OF THE MODERN ELECTORAL COLLEGE

In its original iteration, the candidate who received the most electoral votes would become the President, and the candidate who received the second most votes would become the Vice President, and each elector was permitted to cast two votes, one for President, and one for Vice President.<sup>73</sup> If no candidate received a majority of votes, the decision of who to elect as President would be left to the House of Representatives, with each state casting a single vote in favor of their chosen candidate, and the majority of votes for the House of Representatives would carry the day.<sup>74</sup>

The 1796 election laid the foundation for the involvement of political parties in the Electoral College.<sup>75</sup> Despite the fact that the

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67. *Id.* at 1154–55 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 57).

68. *See* Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1515 (2014).

69. Finkelman, *supra* note 19, at 1155.

70. *Id.* at 1154–55.

71. *Id.*

72. Hawley, *supra* note 68, at 1520 (quoting 3 THE FOUNDERS’ CONSTITUTION 516 (Phillip B. Kurland & Ralph Lerner eds., 1987)).

73. U.S. CONST. art. II, § 1, cl. 3.

74. *Id.*; *see also* U.S. CONST. amend. XII.

75. Sanford Levinson & Ernest A. Young, *Who’s Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 928–29 (2001). Federalists, led by Alexander

Federalist candidate, John Adams, received a majority of votes, Federalist electors did not garnish sufficient electoral votes for their intended vice presidential candidate to become Vice President.<sup>76</sup> As a result, Thomas Jefferson, a Democratic-Republican and John Adams' opponent in the election, became the Vice President, and used the position to undermine Adams' authority.<sup>77</sup>

After learning their lesson from the 1796 election, Federalists and Republicans were prepared for the 1800 election, and electors from the different political parties voted for their top two candidates based on party lines to ensure that the Vice President would not be from a different political party.<sup>78</sup> However, the electors did not contemplate the fact that unless the intended presidential candidate received more votes than the vice presidential candidate, there would be a run-off election in the House of Representatives.<sup>79</sup> As a result, Aaron Burr and Thomas Jefferson, two Republican candidates who received an equal number of electoral votes, were forced to have a run-off election in the House of Representatives, which—at the time—was comprised mainly of Federalists.<sup>80</sup>

The House of Representatives met for thirty-six hours casting thirty-five ballots, as Federalist congressmen refused to vote for Jefferson, who they viewed as an enemy to the Republic, or Burr who they viewed with equal disdain.<sup>81</sup> The process was viewed with such hostility that Pennsylvania and Virginia's governors made preliminary preparations to mobilize their "states' militia[s] in the event [that] congressional Federalists

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Hamilton, favored a strong central government with the power to control commerce, while Republicans favored a strong local government with a weak federal government. *See id.* at 929–30; Hawley, *supra* note 68, at 1524.

76. Levinson & Young, *supra* note 75, at 928. At this time, American politics was dominated by two political parties: The Republicans and the Federalists. *Id.*; Hawley, *supra* note 68, at 1524, 1530.

77. Hawley, *supra* note 68, at 1536; Levinson & Young, *supra* note 75, at 928–29.

78. Hawley, *supra* note 68, at 1536; Levinson & Young, *supra* note 75, at 929.

79. Levinson & Young, *supra* note 75, at 928–29. There are some historical accounts which indicate that Thomas Jefferson, who presided over the counting of electoral votes as the Vice President, manipulated the results of the Electoral College to improperly count certain votes, avoiding a five-person run off. Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 614–15 (2004).

80. Hawley, *supra* note 68, at 1536–37. Federalists, on the other hand, were more coordinated, and one Republican elector voted for John Jay, instead of Charles Pickney. Levinson & Young, *supra* note 75, at 929 n.16. Republican electors, who were unaware of how their contemporaries voted, wanted to avoid the results of the 1796 election and all voted for both Burr and Jefferson. *Id.* at 1536.

81. Hawley, *supra* note 68, at 1536–37; Williams & MacDonald, *supra* note 17, at 215.

prevented the ascension of one of the Republican [Presidents].”<sup>82</sup> Before a constitutional crisis could occur, the House of Representatives broke for a weekend, and after a weekend of “fierce back room politicking and deal making” the House returned for another vote and Jefferson was elected President.<sup>83</sup>

The Federalist congressmen’s conduct during the 1800 election created significant concerns as to whether the legislature could usurp the will of the people through the run-off process originally contemplated in the Electoral College.<sup>84</sup> As a result, Congress began to discuss a meaningful reform to the Electoral College, based on the Republican argument that “it was the right of popular majorities to choose the President.”<sup>85</sup> To effectuate such a policy, Republicans proposed that votes for the Vice President be cast separately from those for the President, which consolidated presidential authority in the executive branch and reduced the possibility of having elections decided by Congress.<sup>86</sup> Federalists opposed this proposal because they knew that “they were unlikely to be able to muster a majority of the electors in the foreseeable future, [and therefore] did their best to preserve the unholy possibility that they might be able to choose between their opponents in the House.”<sup>87</sup> In furtherance of their position, Federalists claimed that tying the Vice President’s duties to those of the President would result in a Vice President being selected to curry political favor.<sup>88</sup>

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82. Hawley, *supra* note 68, at 1537.

83. Williams & MacDonald, *supra* note 17, at 215. Historians believe that Alexander Hamilton played a critical role in preventing Aaron Burr from being elected President. See “Jefferson Is in Every View Less Dangerous than Burr”: Hamilton on the Election of 1800, GILDER LEHRMAN INST. AM. HIST.: HIST. NOW, <http://www.gilderlehrman.org/content/jefferson-every-view-less-dangerous-burr-hamilton-election-1800> (last visited May 1, 2019). Indeed, Hamilton is quoted as stating:

Mr. Jefferson, though too revolutionary in his notions, is yet a lover of liberty and will be desirous of something like orderly Government — Mr. Burr loves nothing but himself — thinks of nothing but his own aggrandizement — and will be content with nothing short of permanent power [*struck: and*] in his own hands — No compact, that he should make with any [*struck: other*] passion in his [*struck: own*] breast except [*struck: his*] Ambition, could be relied upon by himself — How then should we be able to rely upon any agreement with him? Mr. Jefferson, I suspect will not dare much Mr. Burr will [*inserted in margin: dare every thing in the sanguine hope of effecting every thing —*].

*Id.* (alterations in original).

84. Hawley, *supra* note 68, at 1540.

85. *Id.* at 1543–44.

86. *Id.* at 1550–51.

87. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829, 41 (2001); Levinson & Young, *supra* note 75, at 930.

88. See Hawley, *supra* note 68, at 1552.

Ultimately, the argument that the President should be a *man of the people* carried the day, and the Twelfth Amendment was enacted.<sup>89</sup> The Twelfth Amendment provided, in relevant part, that each elector could cast one vote for the President and one vote for the Vice President, and that if no presidential candidate received the required majority, then the President would be selected by the House of Representatives and the Vice President would be selected by the Senate.<sup>90</sup>

The Twelfth Amendment transformed the nature of the executive branch and, thus, the importance of the Electoral College.<sup>91</sup> Because the Twelfth Amendment eliminated the possibility of having a politically independent Vice President, it consolidated power for the President by making it difficult for the Vice President “to establish a compelling identity apart from the party apparatus,” and prevented any person, aside from the President, from being the leader of any major political faction within the President’s party.<sup>92</sup> As a result, the Twelfth Amendment transformed the way that a President would campaign and act.<sup>93</sup> Because the President’s power was consolidated, he had the ability to promulgate policy without interference from an opposition Cabinet.<sup>94</sup> Similarly, presidential elections became a nationwide spectacle focused solely on the identity of the presidential candidates, as opposed to the elections of 1796 and 1800, where vice presidential candidates received some attention.<sup>95</sup>

The political power vested in the President through the enactment of the Twelfth Amendment was not contemplated by delegates at the Convention, who envisioned an Executive with limited powers of enforcing legislation of Congress.<sup>96</sup> Had the framers of the Twelfth Amendment realized that the National Executive would have the independent role that he—or she—enjoys today, they may not have compromised and agreed to select the National Executive through the reformed Electoral College system as proscribed by the Twelfth Amendment.<sup>97</sup>

Despite the fact that the Twelfth Amendment was intended to give the voting population an opportunity to participate in the presidential election, prevent the trading of political favors for positions in the President’s Cabinet, and prevent Congress from exercising power over the

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89. *Id.* at 1550.

90. WHITAKER & NEALE, *supra* note 10, at 5; *see also* U.S. CONST. amend.

XII.

91. Hawley, *supra* note 68, at 1501.

92. *Id.* at 1560–61.

93. *See id.* at 1555.

94. *See id.* at 1552.

95. *See id.* at 1555.

96. Hawley, *supra* note 68, at 1506, 1514, 1528.

97. *See id.* at 1506, 1528.

election of Presidents, it did not serve that purpose.<sup>98</sup> The 1824 election, which was decided under the deadlock provisions of the Twelfth Amendment, resulted in the very conduct that the Amendment sought to prohibit.<sup>99</sup>

In 1824, John Quincy Adams, Andrew Jackson, and Henry Clay all ran for President and, unlike modern third party candidates, Clay was able to acquire enough votes to prevent Adams or Jackson from winning the Electoral College outright, causing the election to go to the House of Representatives.<sup>100</sup> During the run-off election, Clay, who was disqualified from consideration as President in the run-off because he did not receive sufficient votes to qualify, agreed to use his position and influence in the House of Representatives to help Adams gain enough votes to be elected in exchange for being appointed as the Secretary of State.<sup>101</sup> Other representatives traded political favors for votes in the run-off election as well and, as a result of back room politics, John Quincy Adams won the run-off election of 1824 without receiving the majority of popular or electoral votes.<sup>102</sup>

## VI. THIRTEENTH AMENDMENT

Despite Congress's prohibition of importation of slaves in 1808, slavery continued to grow, increasing the political influence of Southern States.<sup>103</sup> In 1812, slave states had 76 out of 143 members of the House of Representatives—instead of the 59 they would have had, but for the Three-Fifths Compromise—and, in 1833, 98 out of 240 instead of 73.<sup>104</sup> In 1820, slavery continued to expand geographically as the Missouri Compromise permitted slavery in new territories, so long as they were located below the Mason-Dixon Line.<sup>105</sup> As a result, Southern proslavery positions dominated United States policy, and the well-being of Southern interests was preserved

98. See *id.* at 1501, 1506–07.

99. See Jeffery A. Jenkins & Brian A. Sala, *The Spatial Theory of Voting and the Presidential Election of 1824*, 42 AM. J. POL. SCI. 1157, 1158–59 (1998). Henry Clay only won thirty-seven electoral votes. *Id.* at 1160. There is a dispute as to whether John Quincy Adams actually offered Clay and other representatives a Cabinet position in exchange for electoral votes. *Id.* at 1158; Jamie L. Carson & Erik J. Engstrom, *Assessing the Electoral Connection: Evidence from the Early United States*, 49 AM. J. POL. SCI. 746, 748 (2005).

100. Jenkins & Sala, *supra* note 99, at 1157–59. At that time, Jackson had the majority of popular votes. *Id.* at 1160.

101. *Id.* at 1158–59.

102. *Id.* at 1157–58.

103. See WILLS, *supra* note 38, at 6, 53.

104. *Id.*

105. See John Mackenzie, *A Brief History of the Mason-Dixon Line*, U. DEL., [http://www1.udel.edu/johnmack/mason\\_dixon/](http://www1.udel.edu/johnmack/mason_dixon/) (last visited May 1, 2019).

through the ability to vote on behalf of slaves, which was only possible thanks to the Electoral College.<sup>106</sup>

Prior to the American Civil War, Southern States gained a disproportionate representational advantage, compared to Northern free States.<sup>107</sup> Southern States had a disproportionate influence on the presidency, the speakership of the House, and the Supreme Court in the period prior to the Civil War.<sup>108</sup> In fact, “[f]or [thirty-two] of the Constitution’s first [thirty-six] years, a white slave-holding Virginian occupied the presidency.”<sup>109</sup>

With slavery expanding, which resulted in an increase in the South’s political power, President Abraham Lincoln and the Republican party<sup>110</sup> did not have the political ability to not interfere with slavery.<sup>111</sup> Nonetheless, President Lincoln’s election caused many Southern States to fear that they would lose the ability to control the Electoral College to maintain their way of life, and secession from the Union became the alternative.<sup>112</sup>

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106. WILLS, *supra* note 38, at 5–6. “[O]n behalf of white settlers who wanted to grow cotton on the Indians’ land, the federal government [empowered by President Andrew Jackson’s Indian Removal Act] forced [the Natives] to leave their homelands and walk thousands of miles to a specially designated *Indian territory* across the Mississippi River.” *Trail of Tears*, HIST., <http://www.history.com/topics/native-american-history/trail-of-tears> (last updated Aug. 29, 2018).

107. WILLS, *supra* note 38, at 5–6, 53. In 1860, the free population of free states was 18,807,386 in comparison to the 8,425,812 of the free population in slave-owning states. *See Results from the 1860 Census*, *supra* note 55. Thanks to the Three-Fifths Compromise, the slave states were able to increase their representation by 2.3 million, which undoubtedly assisted their influence in the legislature, as only a simple majority is needed to pass a bill—the first hurdle needed to clear in order to institute or uphold their fundamentally flawed policies. *See WILLS*, *supra* note 38, at 5–6; *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/the-house-explained/the-legislative-process> (last visited May 1, 2019).

108. WILLS, *supra* note 38, at 5–6.

109. Akhil Reed Amar, *The Electoral College, Unfair from Day One*, N.Y. TIMES, Nov. 9, 2000, at A2.

110. Louise Weinberg, Dredd Scott and the Crisis of 1860, 82 CHI.-KENT L. REV. 97, 109–10, 112 (2007). This is a different Republican party than President Jefferson’s which transformed itself to the Democratic party. *See id.*; Alana Horowitz Satlin, *Actually, Lincoln Would Be Horrified by Today’s GOP*, HUFFPOST: POL. (Feb. 15, 2016), [http://www.huffingtonpost.com/entry/lincoln-modern-gop-republicans\\_us\\_56bdea90e4b0b40245c61bb5](http://www.huffingtonpost.com/entry/lincoln-modern-gop-republicans_us_56bdea90e4b0b40245c61bb5).

111. *See* Alexander Tabarrok & Lee Spector, *Would the Borda Count Have Avoided the Civil War?*, 11 J. THEORETICAL POL. 261, 271–72 (1999). President Lincoln was elected, in part, because he did not campaign against the abolition of slavery. Weinberg, *supra* note 110, at 101. Instead, he took the position that he opposed the expansion of slavery into new states. *Id.*

112. *Id.* at 109–10. Notably, Article II of the Constitution of the Confederate States of America preserved the Electoral College system of selecting the President of the Confederacy. CONST. OF CONFEDERATE STS. of 1861, art. II, § 1. In 1861, Jefferson Davis



Many Republicans believed that slavery was a primary cause of the Civil War, and believed that for the Union to continue to exist, slavery had to be eliminated.<sup>113</sup> As a result, and since the Democratic party—which was comprised primarily of Southern slave owners—was weak in the remaining Union States because of secession, the Republican party took control of both houses of Congress in 1862 and drafted an anti-slavery amendment in 1864.<sup>114</sup> After General Robert E. Lee surrendered,<sup>115</sup> the Thirteenth Amendment, which abolished slavery, was ratified.<sup>116</sup>

It has been widely recognized that Section 2 of the Thirteenth Amendment gave Congress the power to enforce the Amendment by prohibiting legislation relating to the “badges and incidents of slavery.”<sup>117</sup> The term *incident* referred to the inability to hold property, testify in court, enforce the rights of the black man, exercise the right of freedom of speech, or obtain an education.<sup>118</sup> Although the term *badge* had a varying meaning before the Civil War, it generally referred to the skin color of a slave, as only a man of color could be a slave.<sup>119</sup> By the 1860s, the Supreme Court began using the terms to refer to a “broader set of political, civil, and legal disadvantages imposed on slaves, former slaves, and free blacks.”<sup>120</sup>

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was elected as the President of the Confederacy, receiving 109 out of 109 Confederate electoral votes. J. CONG. OF THE CONFEDERATE STATES OF AM., S. DOC. NO. 234, at 12 (1904); *Jefferson Davis Elected Confederate President*, HIST.: THIS DAY IN HIST., <http://www.history.com/this-day-in-history/jefferson-davis-elected-confederate-president> (last updated Feb. 25, 2019).

113. See Weinberg, *supra* note 110, at 98.

114. See Robert Longley, *The 13th Amendment: History and Impact*, THOUGHTCO. (Nov. 13, 2018) <http://www.thoughtco.com/thirteenth-amendment-4164032>; Leonard M. Scruggs, *Passage of the Fourteenth Amendment*, TRIBUNEPAPERS (Jan. 10, 2014), <http://www.thetribunepapers.com/2014/01/10/passage-of-the-fourteenth-amendment/>.

115. *Robert E. Lee Surrenders*, HIST., <http://www.history.com/this-day-in-history/robert-e-lee-surrenders> (last updated Feb. 20, 2018). On April 9, 1865,

Lee and Grant, both holding the highest rank in their respective armies, had known each other slightly during the Mexican War and exchanged awkward personal inquiries. Characteristically, Grant arrived in his muddy field uniform while Lee had turned out in full dress attire, complete with sash and sword. Lee asked for the terms, and Grant hurriedly wrote them out. All officers and men were to be pardoned, and they [would] be sent home with their private property — most important, the horses, which could be used for a late spring planting. Officers would keep their side arms, and Lee’s starving men would be given Union rations.

Shushing a band that had begun to play in celebration, General Grant told his officers, “The war is over. The Rebels are our countrymen again.”

*Id.*

116. U.S. CONST. amend. XIII, § 1; Longley, *supra* note 114.

117. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 563 (2012); see also U.S. CONST. amend. XIII, § 2.

118. McAward, *supra* note 117, at 572–73.

119. *Id.* at 576.

120. *Id.* at 578.

The Electoral College was not successfully challenged as a *badge of slavery*.<sup>121</sup> A plausible constitutional challenge based upon the Thirteenth Amendment may not have been mounted because the Electoral College grew out of a political compromise to allow Southern slave owners to maintain political power derived from slave ownership.<sup>122</sup> Constitutional legal challenges based upon the freshly adopted Thirteenth Amendment after a devastating and divisive civil war did not occur.<sup>123</sup> It is possible that the constitutionality of the Electoral College was not contested because the Fourteenth Amendment was intended to remedy the issues created by it, and because of “skepticism [as to] whether the Thirteenth Amendment itself, in the absence of congressional legislation,” could be enforced.<sup>124</sup>

## VII. FOURTEENTH AMENDMENT

Eliminating slavery had the effect of eliminating the provision that counted each slave as three-fifths a person for purposes of allocating taxes and representation.<sup>125</sup> As a result, the former slave states gained fifteen seats in Congress.<sup>126</sup> However, giving black citizens the right to vote did not protect them from the imposition of badges of slavery, as the Constitution did not apply to the states at the time.<sup>127</sup>

After President Lincoln was assassinated and Andrew Johnson became President, many Republicans were concerned that President Johnson would not ensure that slavery was abolished.<sup>128</sup> In the eyes of Republican leadership, President Johnson was more concerned with keeping the country together than with ending slavery.<sup>129</sup> To ensure that slavery would be eliminated before Congress would be flooded by former Confederate States’

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121. See *id.* at 577–78; Amar, *supra* note 37, at 471.

122. Amar, *supra* note 37, at 470; Christopher F. Petrella, *Slavery, Democracy, and the Racialized Roots of the Electoral College*, BLACK PERSPECTIVES (Nov. 14, 2016), <http://www.aaihs.org/slavery-democracy-and-the-racialized-roots-of-the-electoral-college/>; see also U.S. CONST. amend. XIII, § 1.

123. See Longley, *supra* note 114.

124. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1329 (2007); see also U.S. CONST. amend. XIII, § 1; Akhil Reed Amar, *Becoming Lawyers in the Shadow of Brown*, 40 WASHBURN L.J. 1, 7 (2000).

125. Scruggs, *supra* note 114; see also U.S. CONST. amend. XIII, § 2.

126. See Scruggs, *supra* note 114.

127. See U.S. CONST. amend. XIII, § 1; Scruggs, *supra* note 114.

128. See Allen Pusey, *The 14th Amendment Is Ratified*, 102 A.B.A. J. 72, 72 (2016).

129. See *id.*

representatives, Republicans would take any steps needed to fully abolish slavery, and sought to enact the Fourteenth Amendment.<sup>130</sup>

The Fourteenth Amendment was enacted to ensure that Southern States would abolish the institution of slavery even if President Johnson and others were not willing to act.<sup>131</sup> Section 1 of the Fourteenth Amendment prohibited any state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States or “den[ies] to any person within its jurisdiction the equal protection of the laws.”<sup>132</sup> Section 1 was added in order to block state legislation that would attempt to implement other forms of servitude in order to replace slavery, such as Black Codes.<sup>133</sup>

To further protect against state interference with black votes in the presidential election, Section 2 of the Fourteenth Amendment provides:

Representatives shall be apportioned among the several [s]tates according to their respective numbers, counting the whole number of persons in each [s]tate, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a [s]tate, or the members of the [l]egislature thereof, is denied to any of the male inhabitants of such [s]tate, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such [s]tate.<sup>134</sup>

This provision would reduce a state’s representation in Congress and the Electoral College if the state deprived any adult male citizen of his right to vote.<sup>135</sup> Supporters of Section 2 argued that language was necessary to

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130. See *id.*; U.S. CONST. amend. XIV, § 1.

131. See *14th Amendment*, HIST., <http://www.history.com/topics/black-history/fourteenth-amendment> (last updated Aug. 21, 2018); U.S. CONST. amend. XIV, § 1.

132. U.S. CONST. amend. XIV, § 1; *14th Amendment*, *supra* note 131.

133. *14th Amendment*, *supra* note 131; see also U.S. CONST. amend. XIV, § 1.

134. U.S. CONST. amend. XIV, § 2; *14th Amendment*, *supra* note 131.

135. U.S. CONST. amend. XIV, § 2; *14th Amendment*, *supra* note 131.

allow black men an avenue to effectuate reform and preserve their rights.<sup>136</sup> It did not apply to women or convicted felons.<sup>137</sup>

The Southern States, except for Tennessee, rejected the Fourteenth Amendment.<sup>138</sup> However, readmission into the Union—and, thus, the eventual elimination of the Northern military presence in the South—was conditioned on ratification of the Fourteenth Amendment and the establishment of state constitutions that Congress deemed acceptable.<sup>139</sup> Because ratification of the Fourteenth Amendment was a condition to being readmitted into the Union, Southern States reluctantly agreed to ratify it, while openly refusing to comply with it.<sup>140</sup> The South's refusal to abide by the Fourteenth Amendment made it clear that Section 2 would not be enforced against the former slave holding states, as Northern representatives quickly realized that Southern States “and their enactment of black codes . . . made the condition of the freedmen more deplorable than slavery itself[.]” by criminalizing conduct to limited voting rights and causing former slaves to incur debts they could not pay, thereby forcing them into indentured servitude.<sup>141</sup> Moreover, if Section 2 was enforced upon enactment, Northern States would have lost significant power because they, like their Southern counterparts, did not permit black citizens to vote.<sup>142</sup>

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136. U.S. CONST. amend. XIV, § 2; Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 958 (2008). “Thaddeus Stevens told his colleagues this was the most important provision in the Fourteenth Amendment.” Curtis, *supra*, at 958.

137. See U.S. CONST. amend. XIV, § 2; Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 305 (2004); Curtis, *supra* note 136, at 958. Significant disenfranchisement of black voters occurred as a result of being convicted of crimes. Chin, *supra*, at 305.

138. Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments and the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1397 (2009).

139. *Id.*

140. *Id.*; Chin, *supra* note 137, at 261.

141. Chin, *supra* note 137, at 269 (quoting GEORGE W. JULIAN, *POLITICAL RECOLLECTIONS: 1840 TO 1872* 304 (Jansen, McClurg & Co. ed., 1884)); see also Curtis, *supra* note 136, at 1387; Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599, 599–600 (2007). These black codes subjected former slaves to harsher sentencing laws than whites, prohibited voting, restricted travel, and provided lesser educational opportunities for newly freed slaves. Curtis, *supra* note 136, at 917; Weatherspoon, *supra*, at 599–600.

142. U.S. CONST. amend. XIV, § 2; Curtis, *supra* note 136, at 917.

To avoid losing political capital as a result of the failure to grant blacks the right to vote, Northern representatives relied on the enactment of the Fifteenth Amendment, which effectively abolished Section 2.<sup>143</sup> Indeed,

Courts hold and commentators agree that “instead of prohibiting race-based voting restrictions, Section 2 merely established a price for such restrictions.” By contrast, the Fifteenth Amendment categorically prohibits . . . states from discriminating on the basis of race; it “has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice.” . . . As the Supreme Court explained in *United States v. Reese*,<sup>144</sup> before [enactment of] the Fifteenth Amendment, “[i]t was as much within the power of a state to exclude citizens of the United States from voting on [the] account of race, as it was on account of age, property or education. Now it is not.”<sup>145</sup>

As a practical matter, enforcement of Section 2 was rendered impossible by the Fifteenth Amendment.<sup>146</sup> Once a plaintiff established that he was deprived of his right to vote by a state’s legislature, the Fifteenth Amendment mandated that his rights be restored, eliminating the possibility of a state suffering the consequences built into Section 2.<sup>147</sup>

If Section 2 were enforced there would have been severe far-reaching consequences such as a state losing representation in Congress, as well as losing electoral votes for the President.<sup>148</sup> However, Section 2 was never enforced.<sup>149</sup> Polls taken to determine whether people were losing the right to vote were inaccurate.<sup>150</sup> As a result, it was impossible to determine

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143. Chin, *supra* note 137, at 274–75; *see also* U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XV.

144. 92 U.S. 214 (1876).

145. Chin, *supra* note 137, at 274–75 (alteration in original) (first quoting Henry L. Chambers, *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1418 (2002); then quoting *Reese*, 92 U.S. at 217–18).

146. *Id.* at 272. States, without specifically mentioning race, imposed onerous requirements onto voters, such as a requirement that a voter pass a literacy test, to prevent former slaves from voting. Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 108–09 (1960).

147. Chin, *supra* note 137, at 263.

148. Chambers, *supra* note 145, at 1417; *see also* U.S. CONST. amend. XIV, § 2.

149. Bonfield, *supra* note 146, at 113; Curtis, *supra* note 138, at 916.

150. George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 111 (1961). In 1871, Congress attempted to determine the number of disenfranchised voters, and determined

the amount of voters that were being disenfranchised.<sup>151</sup> Based on the holding of *Saunders v. Wilkins*,<sup>152</sup> individuals were also precluded from seeking to enforce Section 2 because courts could not address issues related to the allocation of representatives among several states because such issues fell within the exclusive purview of the legislature, notwithstanding the plain language of Section 2.<sup>153</sup>

There was no need to enforce Section 2 until 1876, when the North ended its occupation of the South as part of the agreement to resolve the 1876 Tilden-Hayes presidential election in the House of Representatives, as the occupying Union army ensured that African Americans were permitted to exercise their rights.<sup>154</sup> However, once Northern occupation ended, the South was able to deny blacks the rights the Fourteenth Amendment was meant to guarantee.<sup>155</sup> Southern States enacted laws, such as poll taxes and literacy tests, which were intended to prevent blacks from voting, and were very successful in suppressing the vote, such that in 1954, in Alabama, there were no registered black voters in nine rural counties with a large black population.<sup>156</sup>

Even until today, African Americans are disproportionately denied the right to vote because of state laws that prohibit prisoners, parolees, and ex-felons from voting.<sup>157</sup> These laws, as applied, have caused the incarceration of a significant number of African American voters and resulted in their disenfranchisement.<sup>158</sup> Nonetheless, the laws are upheld under the Fifteenth Amendment because the laws at issue do not discriminate against a person based on their race, without regard to the fact that they were accused of violating the law due to their race or other related issues.<sup>159</sup> Had such laws been analyzed under the context of Section 2, a different result

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that in “Southern States, except Texas, the number of adult male citizens who were disenfranchised amounted to less than 0.5[%].” *Id.* at 111–12.

151. *See id.* at 111. The 42nd Congress attempted to produce a census reporting the number of disenfranchised citizens and the passage of a statute authorizing enforcement of Section 2 in the future. *Id.* at 116. However, the census was deemed to be inaccurate and the Congress chose to ignore it. *Id.* Since that time no other Congress has attempted to produce a census reporting the number of disenfranchised citizens in the states. Zuckerman, *supra* note 150, at 116.

152. 152 F.2d 235 (4th Cir. 1945).

153. *Id.* at 238; Zuckerman, *supra* note 150, at 130–31.

154. Zuckerman, *supra* note 150, at 116–17; *Compromise of 1877*, HIST., <http://www.history.com/topics/us-presidents/compromise-of-1877> (last updated Aug. 21, 2018).

155. Zuckerman, *supra* note 150, at 117; *Compromise of 1877*, *supra* note 154.

156. Zuckerman, *supra* note 150, at 117, 124.

157. Chin, *supra* note 137, at 261–62.

158. *See id.* at 261–62, 312.

159. *See* U.S. CONST. amend. XV; Chin, *supra* note 137, at 262–63.

may have occurred, as the Fourteenth Amendment reduces electoral and congressional representation based on the disenfranchisement of votes, regardless of the cause.<sup>160</sup> Unfortunately, the Electoral College was used as a mechanism that deprives citizens of equal protection and disenfranchises voters without consequence as a result of the Fifteenth Amendment.<sup>161</sup>

### VIII. WHY IS THE *ONE PERSON, ONE VOTE* UNCONSTITUTIONAL FOR THE STATES BUT CONSTITUTIONAL IN CONNECTION WITH THE ELECTION OF THE PRESIDENT AND VICE PRESIDENT?

The Supreme Court of the United States' decisions in *Reynolds v. Sims*,<sup>162</sup> *Gray v. Sanders*,<sup>163</sup> and *Bush v. Gore*<sup>164</sup> highlight the constitutional infirmity of the Electoral College.<sup>165</sup> In the *Reynolds* and *Gray* decisions, the Supreme Court ruled that state law which provides for an Electoral College style of voting to choose a state's Executive was unconstitutional, even though the Electoral College is still in existence today.<sup>166</sup>

In *Gray*, the Supreme Court struck down a unit voting system used by Georgia for all statewide offices.<sup>167</sup> In that system, a governor or senator would win a unit in any county in which they won a majority.<sup>168</sup> Whoever won the most units would win their election.<sup>169</sup> The Court found that the foregoing system was unconstitutional because votes for a losing candidate in a particular county were not counted.<sup>170</sup> The Court held the electoral style voting system violated Section 1 of the Fourteenth Amendment because it gave an unfair weight to votes for the winning candidate in a particular county.<sup>171</sup>

Georgia argued that its voting system was similar to the Electoral College for the presidency.<sup>172</sup> However, the Supreme Court rejected that

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160. See U.S. CONST. amend. XIV, § 2; Chin, *supra* note 137, at 259–60, 263.

161. *Gray v. Sanders*, 372 U.S. 368, 377 n.8 (1963); Michael J. O'Sullivan, *Artificial Unit Voting and the Electoral College*, 65 S. CAL. L. REV. 2421, 2435–36 (1992); see also U.S. CONST. amend. XV.

162. 377 U.S. 533 (1964).

163. 372 U.S. 368 (1963).

164. 531 U.S. 98 (2000).

165. See *id.* at 104; *Reynolds*, 377 U.S. at 587; *Gray*, 372 U.S. at 378.

166. *Reynolds*, 377 U.S. at 585–87; *Gray*, 372 U.S. at 381; see also Jeffrey W. Ladewig, *One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125, 1138 (2011); O'Sullivan, *supra* note 161, at 2435–36.

167. *Gray*, 372 U.S. at 381.

168. *Id.* at 371.

169. *Id.* at 372.

170. See *id.* at 379–81.

171. *Id.*; see also U.S. CONST. amend. XIV, § 1.

172. See *Gray*, 372 U.S. at 370–71.

argument and noted that, because the Electoral College was established by Article II of the Constitution, it was entitled to special protection, distinguishing it from Georgia's Electoral College system.<sup>173</sup> It is counterintuitive to think the Constitution requires Georgia to disperse its gubernatorial votes equally among the members of the governor's natural constituency, but it does not require the Electoral College to disperse electoral votes as equally as possible among the members of the President's natural constituency.<sup>174</sup> Nonetheless, and despite the fact that Georgia's system was nearly identical to the Electoral College, the Court found that it was constitutionally required to uphold one system but not the other.<sup>175</sup>

Similarly, in *Reynolds*, the Supreme Court once again used the Equal Protection Clause to impose the *one person, one vote* doctrine on state legislatures.<sup>176</sup> The Court reiterated:

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.<sup>177</sup>

In both *Reynolds* and *Gray*, the Supreme Court of the United States held that an Electoral College system of voting for state officials was unconstitutional because it violated the *one person, one vote* doctrine of the Equal Protection Clause of the Fourteenth Amendment.<sup>178</sup>

Like in *Reynolds* and *Gray*, in *Bush v. Gore*, the Supreme Court found that Florida's system of selecting electors violated the Equal Protection Clause.<sup>179</sup> In *Bush v. Gore*, the Supreme Court addressed whether the Equal Protection Clause prevented a recount of the Florida vote during

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173. See *id.* at 376–78; U.S. CONST. art. II, § 1, cl. 3.

174. See *Gray*, 372 U.S. at 388 (Harlan, J., dissenting).

175. *Id.* at 376–78.

176. *Reynolds*, 377 U.S. 533, 558 (1964); Ladewig, *supra* note 166, at 1136.

177. *Reynolds*, 377 U.S. at 567.

178. *Id.* at 586–87; see also *Gray*, 372 U.S. at 381.

179. *Bush v. Gore*, 531 U.S. 98, 109–10 (2000); *Reynolds*, 377 U.S. at 586–87; *Gray*, 372 U.S. at 376–78.



the 2000 presidential election.<sup>180</sup> Under the circumstances presented by the facts in *Bush v. Gore*, Florida election law mandated a recount in the counties for state electors who were elected under Florida state election laws.<sup>181</sup>

The Supreme Court found that, because Florida's procedure for recounting votes for their electors was not being uniformly conducted, it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>182</sup> Despite the fact that each county had a different ballot and different voting machines, the Supreme Court found that the recount procedures utilized by the Florida Legislature did not provide "the minimum procedures necessary to protect the fundamental right of each voter" to have his vote counted in the same manner as other similarly situated voters.<sup>183</sup> Thus, the Supreme Court found that, where different counties are being treated differently with respect to the re-tabulation of individual votes in connection with the selection of electors, there was an equal protection violation.<sup>184</sup> In making its determination, the Supreme Court ignored the fact that different voters in different states, using different voting mechanisms, had already been subjected to equal protection violations—such as the violation described in *Reynolds*.<sup>185</sup>

As further evidence of the constitutional infirmity of the Electoral College, a coalition led by David Boies, of Boies Schiller Flexner and the League of Latin American Citizens, have filed lawsuits in Massachusetts, California, South Carolina, and Texas, challenging the system enacted by those states to select their electors.<sup>186</sup> The concern expressed in the lawsuit is exacerbated by the fact that in 2020, a significant number of immigrants may not be part of the census, further diminishing the voting power of more urban states.<sup>187</sup> Although the foregoing lawsuits may have the effect of modifying how the Electoral College is implemented on a state by state

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180. *Bush*, 531 U.S. at 110.

181. *Id.*; Mitchell W. Berger & Candice D. Tobin, *Election 2000: The Law of Tied Presidential Elections*, 26 NOVA L. REV. 647, 675–76 (2002).

182. *Bush*, 531 U.S. at 110.

183. *Id.* at 109.

184. *Id.* at 109–10.

185. *See id.* at 105, 109; *Reynolds v. Sims*, 377 U.S. 533, 540–41 (1964).

186. *Legal Team Led by LULAC and David Boies File Lawsuits Challenging Winner-Take-All Approach to Selecting Electors in Presidential Elections*, LULAC, [http://www.lulac.org/news/pr/LULAC\\_File\\_Lawsuits\\_Challenging\\_Winner-Take-All\\_Approach/](http://www.lulac.org/news/pr/LULAC_File_Lawsuits_Challenging_Winner-Take-All_Approach/) (last visited May 1, 2019); Bill Whalen, *Go Ahead and Change the Electoral College, but There's Still a Trump Presidency*, FORBES (Aug. 12, 2018, 7:52 PM), <http://www.forbes.com/sites/billwhalen/2018/08/12/go-ahead-and-the-change-the-electoral-college-but-theres-still-a-trump-presidency/>.

187. Paul Hond, *Ballot Breakdown*, COLUM. MAG., Fall 2018, at 28, 35.

basis, it is unclear as to whether they will cause a change in how the Electoral College system is operated nationally in light of *Bush v. Gore*.<sup>188</sup> Other proposed solutions to the winner-take-all system of the Electoral College, such as agreements among states to select electors based on who wins the majority of the popular vote, are also unlikely to result in a national change in the Electoral College either.<sup>189</sup>

#### IX. IS THE ELECTORAL COLLEGE BIASED?

The Electoral College gives some states a disproportional level of representation in the presidential election.<sup>190</sup> To illustrate, in 2016, “[i]n Wyoming, one electoral vote represented 72,000 ballots cast by actual citizens,” while in California, the same electoral vote represented 270,000 actual votes, “giving a Wyoming citizen nearly four times more power than a California citizen in allocating votes from the Electoral College.”<sup>191</sup>

By way of example, as a result of the Electoral College, “Donald Trump won Pennsylvania and Florida by a combined margin of about 200,000 votes to earn 49 electoral votes. Hillary Clinton, meanwhile, won

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188. See *Bush*, 531 U.S. at 109; *Legal Team Led by LULAC and David Boies File Lawsuits Challenging Winner-Take-All Approach to Selecting Electors in Presidential Elections*, *supra* note 186. *Bush v. Gore* provided, in relevant part, that it was not to be considered binding precedent. *Bush*, 531 U.S. at 109. “Our consideration is limited to the present circumstances.” *Id.*

189. See Ethan J. Leib & Eli J. Mark, *Democratic Principle and Electoral College Reform*, 106 MICH. L. REV. FIRST IMPRESSIONS 105, 105–06 (2007). “In 2007 Maryland passed the National Popular Vote Interstate Compact, . . . a law that obliges the state’s . . . electors to vote for the winner of the nationwide popular vote . . . so long as states representing an overall majority of the [E]lectoral [C]ollege have approved an identical bill.” *America’s Electoral System Gives the Republicans Advantages over Democrats*, *supra* note 10. To date, twelve democratic states and the District of Columbia have adopted the bill. *Status of National Popular Vote Bill in Each State*, NAT’L POPULAR VOTE INC., <http://www.nationalpopularvote.com/state-status> (last visited May 1, 2019). The bill also passed both legislative chambers in New Mexico and Delaware. *Id.* Further, in Michigan, a bipartisan group of senators introduced Senate Bill 1117, joining the compact. See S.B. 1117, 99th Leg., Reg. Sess. (Mich. 2018).

190. See *id.*

In 1988, for example, the combined . . . population, 3,119,000, of the seven least populous jurisdictions of Alaska, Delaware, the District of Columbia, North Dakota, South Dakota, Vermont, and Wyoming carried the same voting strength in the Electoral College [twenty-one] Electoral votes as the 9,614,000 persons . . . in the State of Florida.

WILLIAM C. KIMBERLING, NAT’L CLEARINGHOUSE ON ELECTION ADMIN., THE ELECTORAL COLLEGE 1, 11 (1992).

191. William H. Chafe, *One Person, One Vote Is a Myth*, NEWS & OBSERVER: OP-ED (Dec. 21, 2016, 10:40 PM), <http://www.newsobserver.com/opinion/op-ed/article122328279.html>.

Massachusetts by almost a million votes but earned only 11 electoral votes.”<sup>192</sup> Similarly, “Clinton won California by over 3 million votes, netting 55 electoral votes. [President] Trump’s combined popular vote margin in Pennsylvania, Florida, Michigan, and Wisconsin was under 250,000, but those victories netted him 75 electoral votes.”<sup>193</sup>

The Electoral College favors Republican candidates—candidates who are generally favored by rural, less populated regions, giving them a head start in the election process.<sup>194</sup> There are eleven states where the “support for the [Republican party] outstrips support for the Democratic party by at least [ten] percent. These states have [sixty-five] percent more representation in the Electoral College than . . . if . . . votes were distributed evenly.”<sup>195</sup> The existence of a Republican bias in the Electoral College is further supported by the fact that the past two Republican Presidents, George W. Bush and Donald J. Trump, lost the popular election by five hundred thousand and almost three million votes respectively, but were elected President thanks to the Electoral College.<sup>196</sup> Indeed, in 2000,

[H]ad there not been a two-seat bonus for senatorial seats, even with a [President] Bush victory in Florida, a 435 seat Electoral College—without D.C.—would have elected Gore by a margin of 224–211 (51.9%), while a 436 seat Electoral College—with D.C.—would have elected Gore by a margin of 225–211

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192. Robert Speel, *Three Common Arguments for Preserving the Electoral College — and Why They’re Wrong*, CONVERSATION (Nov. 14, 2016, 9:55 PM), <http://www.theconversation.com/three-common-arguments-for-preserving-the-electoral-college-and-why-theyre-wrong-68546>.

193. Sean Darling-Hammond, *The Electoral College Is Even More Biased than You Think. But Democrats Can Beat It.*, NATION (Jan. 19, 2017), <http://www.thenation.com/article/the-electoral-college-is-even-more-biased-than-you-think-heres-how-democrats-can-beat-it/>.

194. See *American Democracy’s Built-In Bias*, ECONOMIST (London), July 14, 2018, at 16. “Places where people live close together vote Democratic, places where they live farther apart vote Republican, . . . [and] nearly half the variance in the county-level vote shares in the presidential election of 2016 could be explained solely by their number of voters per square kilome[ter].” *The Minority Majority*, ECONOMIST, July 14, 2018, at 21, 22. Candidates from the Republican party have 191 projected electoral votes from Southern and other conservative-leaning States without even having to campaign in those states. Nate Silver, *Why a Plan to Circumvent the Electoral College Is Probably Doomed*, FIVETHIRTYEIGHT: POL. (Apr. 17, 2014, 5:49 PM), <http://www.fivethirtyeight.com/features/why-a-plan-to-circumvent-the-electoral-college-is-probably-doomed/>.

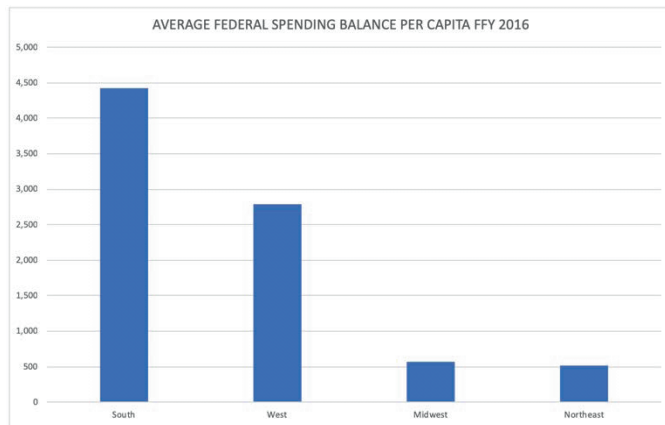
195. Darling-Hammond, *supra* note 193.

196. See *id.*; Drew Desilver, *Trump’s Victory Another Example of How Electoral College Wins Are Bigger than Popular Vote Ones*, PEW RES. CTR. (Dec. 20, 2016), <http://www.pewresearch.org/fact-tank/2016/12/20/why-electoral-college-landslides-are-easier-to-win-than-popular-vote-ones/>.

(51.6%)—which was used to argue that that the Electoral College now has a—small—built-in bias toward the Republicans based solely on greater Republican strength in the smaller states.<sup>197</sup>

Since 1977, Republicans have appointed ten United States Supreme Court Justices compared to four which were appointed by Democrats, yet without the Electoral College, there would be eight Democratic Supreme Court appointees compared to only six Republican ones.<sup>198</sup> Because these judges are appointed by politicians, the Electoral College “embeds this rural bias in the courts as well.”<sup>199</sup>

In addition, Southern States, the majority of which have voted for a Republican President since 2000, receive significantly more benefits than their Northern counterparts.<sup>200</sup>

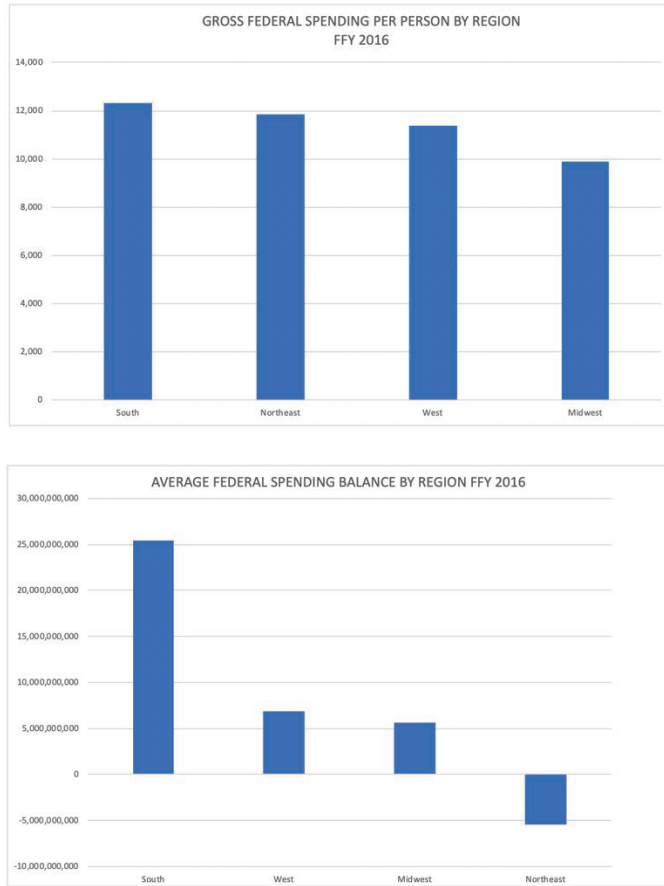


197. Bernard Grofman & Scott L. Feld, *Thinking About the Political Impacts of the Electoral College*, 123 PUB. CHOICE 1, 3 (2005).

198. *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., <http://www.fjc.gov/history/judges/search/advancedsearch> (last visited May 1, 2019); see also *American Democracy’s Built-In Bias*, *supra* note 194. The Republican party will soon be appointing an eleventh Supreme Court Justice. See *American Democracy’s Built-In Bias*, *supra* note 194.

199. *Id.*

200. See *id.*; Toni Monkovic, *50 Years of Electoral College Maps: How the U.S. Turned Red and Blue*, N.Y. TIMES: UPSHOT (Aug. 22, 2016), <http://www.nytimes.com/2016/08/23/upshot/50-years-of-electoral-college-maps-how-the-us-turned-red-and-blue.html>. Part of the favoritism could be caused by the fact that as of the census of 2010, “the five most rural states wielded about [fifty percent] more electoral votes, and three times as many senators, per resident as the five most urban ones did.” *America’s Electoral System Gives the Republicans Advantages over Democrats*, *supra* note 10.



As set forth in the tables above, Southern States received approximately \$25,441,931,402 more in federal aid than they paid in taxes.<sup>201</sup> Western and Midwestern States, which are similarly more rural than the Northeastern States, received \$6,881,823,032 and \$5,584,135,059 more than they paid in taxes respectively, as well.<sup>202</sup> Thus, in the South, citizens received, in 2016, on an average per capita basis \$4,425 per year more than they paid in taxes, which is nearly double what citizens in Western States received, \$2,789, on average per capita and nearly ten times what citizens in the Northeast, \$516, and Midwest, \$569, received on average on a per capita basis, in 2016, in exchange for the taxes they paid.<sup>203</sup> This means that the federal government pays approximately \$6,982,535,112 on average

201. See *infra* app. A.

202. See *infra* app. A.

203. See *infra* app. A.

to Southern States per elector, while spending \$5,480,817,164 per elector in the Northeastern States, and \$5,124,592,838 per elector in the Midwest.<sup>204</sup>

The politicized nature of the Electoral College has further decreased equal political activity and participation amongst states.<sup>205</sup> If a candidate is likely to win in one state, then that candidate will not spend much time there, enabling him to spend time in swing states, or states where the population demographics are diverse, creating uncertainty with respect to how that state's electors will vote.<sup>206</sup> In fact, in 2012, the swing states—Ohio, New Hampshire, Colorado, Florida, Virginia, Nevada, Iowa, Wisconsin, and Pennsylvania—“collectively had a 98.6 percent chance of determining the Electoral College winner in 2012,” making these nine states seventy times more powerful with respect to the presidential election “than the other [forty-one], which collectively had a 1.4 percent chance of determining the winner combined.”<sup>207</sup> As a result, candidates spend more time in those states.<sup>208</sup> Data from the 2016 campaign shows that:

[Fifty-three] percent of campaign events for [President] Trump, Hillary Clinton, Mike Pence, and Tim Kaine in the two months before the November election were in only four states: Florida, Pennsylvania, North Carolina, and Ohio. During that time, 87 percent of campaign visits by the four candidates were in [twelve] battleground states, and none of the four candidates ever went to [twenty-seven] states, which includes almost all of rural America.<sup>209</sup>

Not only do swing states receive more attention in campaigns, but they also receive significantly more funding.<sup>210</sup> In fact, the gross average federal spending in the swing states is \$6,517,873,233 per electoral vote compared to \$5,659,705,613 per electoral vote in non-swing states.<sup>211</sup> Despite the fact that the Electoral College has caused significant disparate treatment amongst the states, it is still being used today.<sup>212</sup>

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204. See *infra* app. A.

205. See Strömberg, *supra* note 5, at 786.

206. *Id.* at 781, 786. For example, in 2000, California was forecasted to have a fifty-two percent democratic vote share and a fifty-five percent democratic vote share in 2004. *Id.* at 781. As a result, much less attention was given to California in 2000 than in 2004. *Id.*

207. Silver, *supra* note 194.

208. See Strömberg, *supra* note 5, at 790.

209. Speel, *supra* note 192.

210. See Strömberg, *supra* note 5, at 786, 798; *infra* app. A.

211. See *infra* app. A.

212. Darling-Hammond, *supra* note 193.

## X. CONCLUSION

Like an infected appendix, the Electoral College serves no legitimate purpose and must be removed.<sup>213</sup> It was originally intended to create a federal government, which included Southern slaveholding States by allowing slave owners to have a disproportionate say in the Electoral College compared to those permitted to vote, in exchange for the right to tax them based on their slaves.<sup>214</sup> The compromise was carried over from congressional representatives and is now being used to allow rural, less-populated states to have a disproportionate say in the election of the Executive.<sup>215</sup> Those states already exercise a sufficient veto over the more populated states by way of the unequal representation in the Senate, and in some instances, the House of Representatives.<sup>216</sup> If the Executive continues to consistently fall into the hands of the candidate receiving less votes than their opponent, as has been the case in 2000 and 2016, and those casting less votes continue to disproportionately receive greater say in judicial appointments, the majority should take action to eliminate the Electoral College in the Twenty-First Century, considering the significant impact that the Electoral College has on federal spending, as well.<sup>217</sup>

The best mechanism to remedy the problem caused by the Electoral College is the enactment of a constitutional amendment eliminating the Electoral College and replacing it with a direct election of the Executive.<sup>218</sup> Direct election would ensure that the Executive is a person of the people, consistent with the values of a modern democracy.<sup>219</sup> Moreover, the historical justifications of the Electoral College—the need to protect small states’ interests or, originally, the interests of slave owners in rural states—no longer exist; slavery and its vestiges were supposed to be abolished through the Thirteenth Amendment, which was to be enforced through the Fourteenth and Fifteenth Amendments.<sup>220</sup> Although the Fourteenth and Fifteenth Amendments should have ensured that there is not a disproportionate treatment of people in connection with the Electoral College, those amendments, because of our post-civil war history, never fully

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213. Amar, *supra* note 109; Silver, *supra* note 194.

214. See WILLS, *supra* note 38, at 6.

215. Darling-Hammond, *supra* note 193.

216. *Id.*

217. See *id.*; Desilver, *supra* note 196.

218. See Amar, *supra* note 109.

219. *Id.*

220. U.S. CONST. amend. XIII, § 1; Amar, *supra* note 37, at 471; Carter, *supra* note 124, at 1347–48; *Constitutional Topic: The Constitutional Convention*, *supra* note 18; Finkelman, *supra* note 19, at 1154–56; see also U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XV.

accomplished their purpose.<sup>221</sup> The rural land mass and small states with less population will still exercise a sufficient check over the majority through the Senate.<sup>222</sup>

The Electoral College should be eliminated.<sup>223</sup> The time to excise the infected appendix is now.<sup>224</sup>

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221. Carter, *supra* note 124, at 1368 n.210; Finkelman, *supra* note 19, at 1156; *see also* U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XV. One interesting alternative is to use a *ranked-choice voting* system, where “voters list candidates in order of preference. After a first count, the candidate with the least support is eliminated, and his or her [voters] are reallocated to those voters’ second choice. This continues until someone has a majority.” *American Democracy’s Built-In Bias*, *supra* note 194.

222. *See The Small-State Advantage in the United States Senate*, N.Y. TIMES: POL. (Mar. 10, 2013), <http://archive.nytimes.com/www.nytimes.com/interactive/2013/03/11/us/politics/small-state-advantage.html>.

223. *See* Tyler Lewis, *Why We Should Abolish the Electoral College*, HUFFPOST (Jan. 12, 2016, 4:38 PM), [http://www.huffingtonpost.com/tyler-lewis/why-we-should-abolish-the\\_1\\_b\\_8961256.html](http://www.huffingtonpost.com/tyler-lewis/why-we-should-abolish-the_1_b_8961256.html). “Although he has vacillated on the institution, [President] Trump continues to say that he supports a national popular vote over the Electoral College process.” Robert M. Alexander, *We Could Be Headed for Another Electoral College Mess*, CNN (Jan. 10, 2019, 7:47 AM), <http://www.cnn.com/2019/01/10/opinions/we-could-be-headed-for-another-electoral-college-mess-alexander/index.html>.

224. *See* Lewis, *supra* note 223; Silver, *supra* note 194. In the 2009 Dunwody Lecture, Akhil Reed Amar spoke at the prestigious University of Florida and expressed his hope that “the Dunwody Lecturer of 2019 . . . [would] be able to say to [his or her] audience, with truth in [his or her] voice and a smile on [his or her] lips, that the right to vote has made great strides in the new millennium.” Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 968 (2009).



## Appendix A – Electoral College Model

Swing State	Census Region	U.S. State	Federal Spending	Fed. Spending Per Capita	Rank Per Capita
Non-swing	South	AL	33,881,189,324	6,967	5
Non-swing	West	AK	3,489,076,519	4,703	11
Non-swing	West	AZ	29,124,597,576	4,202	13
Non-swing	South	AR	13,852,243,174	4,636	12
Non-swing	West	CA	(6,359,640,090)	(162)	39
Swing	West	CO	2,404,289,383	434	35
Non-swing	Northeast	CT	(7,739,471,054)	(2,164)	48
Non-swing	South	DE	499,543,573	525	33
Non-swing	South	D.C.	37,553,107,729	55,130	X
Swing	South	FL	60,660,393,037	3,943	22
Non-swing	South	GA	26,712,213,596	2,591	24
Non-swing	West	HI	9,619,388,984	6,734	6
Non-swing	West	ID	6,677,694,565	3,967	16
Non-swing	Midwest	IL	(16,761,147,441)	(1,309)	43
Non-swing	Midwest	IN	13,610,322,910	2,052	28
Swing	Midwest	IA	3,026,815,364	966	31
Non-swing	Midwest	KS	1,451,182,678	499	34
Non-swing	South	KY	27,900,047,223	6,288	8
Non-swing	South	LA	14,572,253,433	3,113	21
Non-swing	Northeast	ME	7,816,056,654	5,870	9
Non-swing	South	MD	39,515,351,186	6,568	7
Non-swing	Northeast	MA	(12,563,198,372)	(1,844)	45
Non-swing	Midwest	MI	25,848,002,229	2,603	23
Non-swing	Midwest	MN	(7,600,361,450)	(1,377)	44
Non-swing	South	MS	21,766,950,868	7,283	3
Non-swing	Midwest	MO	25,183,266,825	4,133	14
Non-swing	West	MT	3,669,092,613	3,519	18
Non-swing	Midwest	NE	(995,851,610)	(522)	41

## Appendix A – Electoral College Model

Population	Electoral Votes (EV)	Votes/1M Population	Gross Fed Spending	Gross Fed Spending/Person	Gross Fed Spending/EV
4,863,300	9	1.85	65,983,068,864	13,568	7,331,452,096
741,894	3	4.04	11,157,856,782	15,040	3,719,285,594
6,931,071	11	1.59	78,229,597,927	11,287	7,111,781,630
2,988,248	6	2.01	33,924,912,852	11,353	5,654,152,142
39,250,017	55	1.40	407,006,802,740	10,370	7,400,123,686
5,540,545	9	1.62	57,551,189,375	10,387	6,394,576,597
3,576,452	7	1.96	49,669,485,830	13,888	7,095,640,833
952,065	3	3.15	10,679,952,890	11,218	3,559,984,297
681,170	3	4.40	48,990,201,991	71,921	16,330,067,330
20,612,439	29	1.41	235,914,265,299	11,445	8,134,974,665
10,310,371	16	1.55	106,960,628,616	10,374	6,685,039,288
1,428,557	4	2.80	21,000,160,331	14,700	5,250,040,083
1,683,140	4	2.38	17,234,269,332	10,239	4,308,567,333
12,801,539	20	1.56	120,239,483,639	9,393	6,011,974,182
6,633,053	11	1.66	65,306,761,478	9,846	5,936,978,316
3,134,693	6	1.91	29,063,858,276	9,272	4,843,976,379
2,907,289	6	2.06	27,705,171,964	9,530	4,617,528,661
4,436,974	8	1.80	57,088,361,766	12,867	7,136,045,221
4,681,666	8	1.71	50,569,747,712	10,802	6,321,218,564
1,331,479	4	3.00	17,297,790,512	12,991	4,324,447,628
6,016,447	10	1.66	104,966,019,555	17,447	10,496,601,955
6,811,779	11	1.61	80,366,233,804	11,798	7,306,021,255
9,928,300	16	1.61	107,485,248,203	10,826	6,717,828,013
5,519,952	10	1.81	51,846,731,659	9,393	5,184,673,166
2,988,726	6	2.01	38,374,253,268	12,840	6,395,708,878
6,093,000	10	1.64	73,604,892,841	12,086	7,364,089,284
1,042,520	3	2.88	11,351,822,748	10,889	3,783,940,916
1,907,116	5	2.62	17,219,642,103	9,029	3,443,928,421

## Appendix A – Electoral College Model

Swing State	Census Region	U.S. State	Federal Spending	Fed. Spending Per Capita	Rank Per Capita
Swing	West	NV	4,454,455,602	1,515	30
Swing	Northeast	NH	(855,204,488)	(641)	42
Non-swing	Northeast	NJ	(27,509,105,476)	(3,076)	50
Non-swing	West	NM	20,172,131,492	9,693	1
Non-swing	Northeast	NY	(40,871,429,785)	(2,070)	47
Non-swing	South	NC	32,293,429,847	3,183	20
Non-swing	Midwest	ND	(1,795,452,676)	(2,369)	49
Swing	Midwest	OH	23,144,198,358	1,993	29
Non-swing	South	OK	13,639,334,449	3,476	19
Non-swing	West	OR	9,850,959,730	2,407	25
Swing	Northeast	PA	27,319,492,370	2,137	27
Non-swing	Northeast	RI	2,532,067,609	2,397	26
Non-swing	South	SC	26,463,810,527	5,271	10
Non-swing	Midwest	SD	(170,389,496)	(197)	40
Non-swing	South	TN	23,463,810,527	3,528	17
Non-swing	South	TX	(1,771,144,694)	(64)	38
Non-swing	West	UT	965,144,473	316	37
Non-swing	Northeast	VT	2,522,204,333	4,038	15
Swing	South	VA	60,587,009,281	7,203	4
Non-swing	West	WA	6,551,639,674	899	32
Non-swing	South	WV	13,348,485,458	7,290	2
Swing	Midwest	WI	2,069,035,012	358	36
Non-swing	West	WY	(1,155,131,107)	(1,973)	46
Total Spending			551,748,742,077		

## Appendix A – Electoral College Model

Population	Electoral Votes	Votes/1M Population	Gross Fed Spending	Gross Fed Spending/Person	Gross Fed Spending/EV
2,940,058	6	2.04	28,482,677,176	9,688	4,747,112,863
1,334,795	4	3.00	14,283,701,422	10,701	3,570,925,355
8,944,469	14	1.57	88,987,259,328	9,949	6,356,232,809
2,081,015	5	2.40	33,037,900,799	15,876	6,607,580,160
19,745,289	29	1.47	214,124,006,387	10,844	7,383,586,427
10,146,788	15	1.48	108,619,980,655	10,705	7,241,332,044
757,952	3	3.96	7,199,445,717	9,499	2,399,815,239
11,614,373	18	1.55	119,955,556,555	10,328	6,664,197,586
3,923,465	7	1.78	43,814,699,106	11,167	6,259,242,729
4,093,465	7	1.71	43,036,724,519	10,514	6,148,103,503
12,784,227	20	1.56	150,141,568,554	11,744	7,507,078,428
1,056,426	4	3.79	12,707,098,112	12,028	3,176,774,528
4,961,119	9	1.81	58,436,605,411	11,779	6,492,956,157
865,454	3	3.47	8,781,546,721	10,147	2,927,182,240
6,651,194	11	1.65	74,144,673,351	11,148	6,740,424,850
27,862,596	38	1.36	264,266,982,768	9,485	6,954,394,283
3,051,217	6	1.97	22,691,867,727	7,437	3,781,977,955
624,594	3	4.80	7,819,941,645	12,520	2,606,647,215
8,411,808	13	1.55	148,395,970,439	17,641	11,415,074,649
7,288,000	12	1.65	83,785,682,678	11,496	6,982,140,223
1,831,102	5	2.73	24,509,800,398	13,385	4,901,960,080
5,778,708	10	1.73	53,829,425,727	9,315	5,382,942,573
585,501	3	5.12	5,791,585,048	9,892	1,930,529,349
Total Gross Spending			3,613,669,112,596		

Appendix A – Electoral College Model

WITH DC		WITHOUT DC	
Row Labels	Average of Fed Spending Balance	Row Labels	Average of Fed Spending Balance
South	26,154,353,539	South	25,441,931,402
West	6,881,823,032	West	6,881,823,032
Midwest	5,584,135,059	Midwest	5,584,135,059
Northeast	-5,483,176,468	Northeast	-5,483,176,468
Grand Total	10,818,602,786	Grand Total	10,283,912,687
Row Labels	Average of Fed Spending Balance Per Capita	Row Labels	Average of Fed Spending Balance Per Capita
South	7,408	South	4,425
West	2,789	West	2,789
Midwest	569	Midwest	569
Northeast	516	Northeast	516
Grand Total	3,405	Grand Total	2,371
Row Labels	Average of (Votes/Million PPL)	Row Labels	Average of (Votes/Million PPL)
Northeast	2.53	Northeast	2.53
West	2.43	West	2.43
Midwest	2.13	Midwest	2.13
South	2.00	South	1.84
Grand Total	2.23	Grand Total	2.19
Row Labels	Average of Gross Fed Spending/Person	Row Labels	Average of Gross Fed Spending/Person
South	15,832	South	12,326
Northeast	11,829	Northeast	11,829
West	11,370	West	11,370
Midwest	9,889	Midwest	9,889
Grand Total	12,590	Grand Total	11,403
Row Labels	Average of Gross Fed Spending/Electoral vote	Row Labels	Average of Gross Fed Spending/Electoral vote
South	7,532,389,949	South	6,982,535,112
Northeast	5,480,817,164	Northeast	5,480,817,164
West	5,243,519,915	West	5,243,519,915
Midwest	5,124,592,838	Midwest	5,124,592,838
Grand Total	6,020,369,736	Grand Total	5,814,175,785

## Appendix A – Electoral College Model

WITH DC		WITHOUT DC	
Row Labels	Average of Fed Spending Balance	Row Labels	Average of Fed Spending Balance
Swing	20,312,275,991	Swing	20,312,275,991
Non-swing	8,784,244,242	Non-swing	8,082,564,645
Grand Total	10,818,602,786	Grand Total	10,283,912,687

Row Labels	Average of Fed Spending Balance Per Capita	Row Labels	Average of Fed Spending Balance Per Capita
Non-swing	3,732	Non-swing	2,479
Swing	1,879	Swing	1,879
Grand Total	3,405	Grand Total	2,371

Row Labels	Average of (Votes/Million PPL)	Row Labels	Average of (Votes/Million PPL)
Non-swing	2.32	Non-swing	2.27
Swing	1.82	Swing	1.82
Grand Total	2.23	Grand Total	2.19

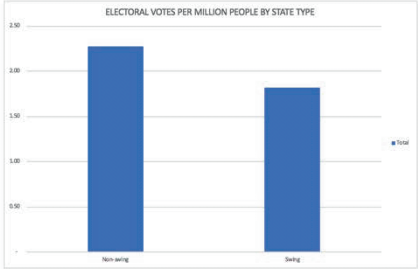
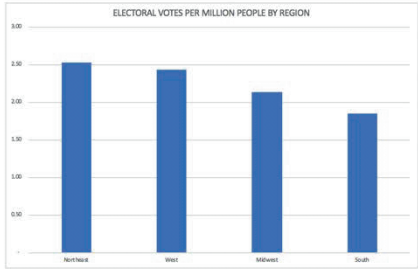
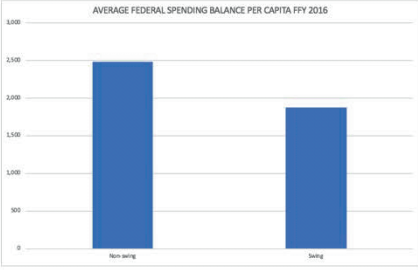
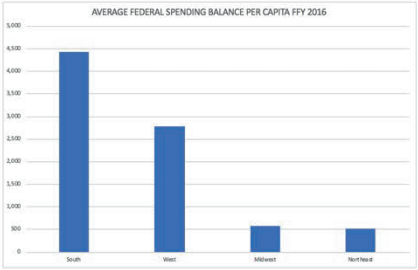
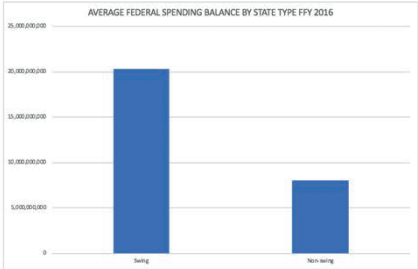
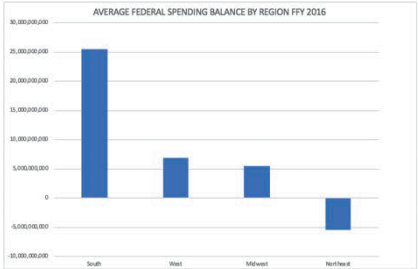
  

Row Labels	Average of Gross Fed Spending/Person	Row Labels	Average of Gross Fed Spending/Person
Non-swing	12,894	Non-swing	11,455
Swing	11,169	Swing	11,169
Grand Total	12,590	Grand Total	11,403

Row Labels	Average of Gross Fed Spending/Electoral vote	Row Labels	Average of Gross Fed Spending/Electoral vote
Swing	6,517,873,233	Swing	6,517,873,233
Non-swing	5,913,761,844	Non-swing	5,659,705,613
Grand Total	6,020,369,736	Grand Total	5,814,175,785

Appendix A – Electoral College Model



Appendix A – Electoral College Model

