Willamette University College of Law
Law 384: Presidential Elections

Black Enfranchisement: A Case for Electoral College Reform

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Table of Contents

I. INTRODUCTION 2
II. THE ELECTORAL COLLEGE, THE VOTING RIGHTS ACT, AND THE 15TH AMENDMENT 8
III. THE HISTORY OF THE ELECTORAL COLLEGE AND BLACK DISENFRANCHISEMENT 15
IV. OPTIONS FOR REFORMING THE ELECTORAL COLLEGE 25

I. INTRODUCTION

From the very beginning, Black people in the United States have been engaged in an ongoing struggle to secure their right to vote. One institution, more than any other, has prevented this marginalized group from having any meaningful say in the candidate ultimately chosen to be the nation's chief executive; the Electoral College.[1] As Charles Wallace Collins—a former Librarian of the Supreme Court, former Law Librarian for the U.S. Congress, and avowed Dixiecrat and segregationist[2]—stated in 1947: "The Electoral College has served its purpose under the Constitution for more than 150 years. It has operated quietly, smoothly and effectively—so much so that the general public is hardly aware of its existence;"[3] stating further that "[n]either the Negroes nor any of the groups which support them can alone, or in conjunction with each other, give assurance of control of a single vote in the Electoral College."[4] Unsurprisingly, due to the winner-take-all method of selecting presidential electors used in every state with the exception of Maine and Nebraska,[5] Mr. Collins' sentiments are as trenchant

[1] Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L. J. 935, 936 (1996) (available at https://openyls.law.yale.edu/handle/20.500.13051/8934) ("African-American voters in the United States have never held much sway in the election of the President. Although they often exert considerable influence in presidential primaries, their status as a racial minority ensures that, in the general election, their voices are frequently drowned out by the majority. In the electoral college, where the President is actually chosen, the preferences of minority voters count for almost nothing. The overwhelming majority of states provide that the presidential candidate who wins the popular vote in the state claims all of its electoral votes. Thus, so long as minority voters have different political preferences than the majority—a fact that is almost self-evident in many parts of the country—their votes will be virtually meaningless in the final selection of the President. This problem is perhaps most acute in the South, where the political disparities between African-American and white voters have historically been most pronounced.").

[2] Univ. of Maryland, *Charles Wallace Collins Papers*, https://archives.lib.umd.edu/repositories/2/resources/975 (last visited Oct. 24, 2024).

[3] CHARLES WALLACE COLLINS, WHITHER SOLID SOUTH? A STUDY IN POLITICS AND RACE RELATIONS, 279 (1947).

[4] *Id*. at 258.

[5] Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L. J. 173, 181 (2011) (available at https://heinonline.org/HOL/Page?handle=hein.journals/glj100&id=175&collection=journals&index=journals/glj) ("In the twentieth century, states moved to a true winner-take-all system with the adoption of the so-called short ballot, which removed the electors' names

today as when he made those statements in 1947; especially in relation to the former Confederacy,[6] where the majority of Black people in the United States lives and votes.

Figure 1: Map of the United States and the Confederacy circa 1861[7]

from the ballot and listed only the presidential and vice presidential tickets. With the short ballot, regardless of the number of electors possessed by the state, citizens would cast only one vote for the presidential and vice presidential ticket of their choice; the state would then award the winning ticket all of that state's electors. Today, all states use the short ballot, and all but two states use this winner-take-all system. The two exceptions, Maine and Nebraska, award their two senatorial electors to the winner of the statewide election, but, in each state, the voters in each congressional district select an elector for that district." (internal citation omitted)).

[6] *See* Hoffman, *supra* note 1, at 939-940 ("Racial appeals, some direct and some more covert, have been a recurring feature of presidential campaigns during the last fifty years, from the "Dixiecrat" campaign of Strom Thurmond in 1948 to the third-party challenge of arch-segregationist George Wallace in 1968 to the infamous "Willie Horton" advertisements of George Bush's campaign in 1988. Such carefully orchestrated racial appeals virtually ensure that voting in presidential elections will be polarized along racial lines. And the winner-take-all system works in conjunction with that polarization to shut the voices of African-American voters out of the political process. *As noted above, this problem is most acute in the states of the former Confederacy, where racially polarized voting is particularly severe. In these states, African-American voters have little or no hope of choosing even a single member of the electoral college. Although they can step into a booth and pull a lever, their votes never really count. With respect to presidential elections, they are completely disenfranchised—just as they were for so many years in the eras of slavery and segregation*." (emphasis added)). *See also* David Schultz, *Minority Rights and the Electoral College: What Majority, Whose Rights?*, 55 GA. L. REV. 1621, 1644 (2021) (available at https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1152&context=glr) ("[T]he winner-take-all system has perpetuated Jim Crow at the Electoral College level despite the fact that people of color are an increasing portion of the electorate, including in the states that were part of the Confederacy.").

[7] National Park Service, *War Declared: States Secede from the Union!*, https://www.nps.gov/kemo/learn/historyculture/wardeclared.htm (last visited Oct. 24, 2024).

According to Pew Research, as of 2022, 56 percent of Black people live in the South, with the largest Black populations living in Texas and Florida.[8] In Texas for example, an analysis of the electoral college results since the 1972 presidential election reveals that all of that state's

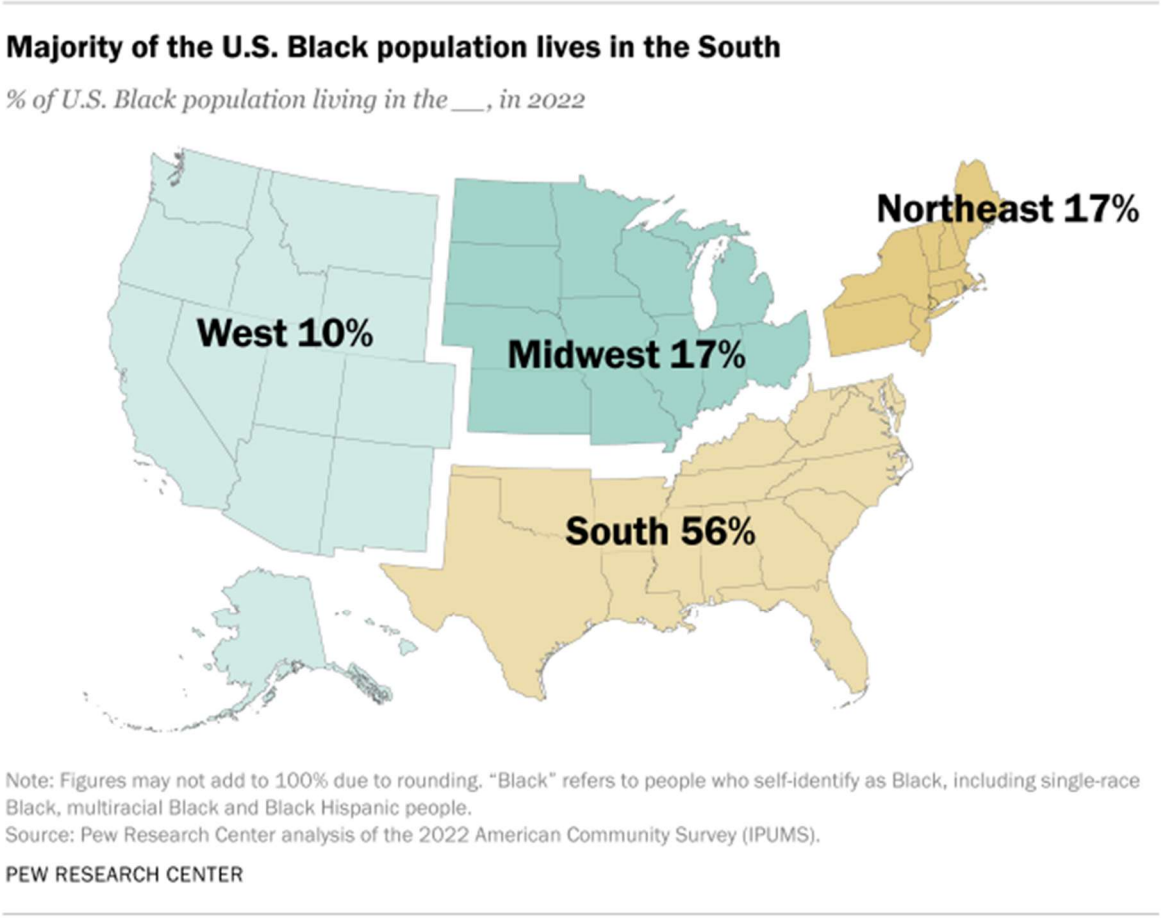

Figure 2: Map of Distribution of Black Population in the United States as of 2022.[9]

electoral college votes have gone to the Republican nominee in all but one election.[10] Similarly, all of the electoral college votes in South Carolina, Mississippi, and Alabama have gone to the

[8] Mohamad Moslimani, Christine Tamir, Abby Budiman, Luis Noe-Bustamante, & Lauren Mora, *Facts About the U.S. Black Population*, PEW RESEARCH CENTER (Jan. 18, 2024), https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/.
[9] *Id*.
[10] *See generally* 270toWin, *Historical Presidential Elections*, https://www.270towin.com/historical-presidential-elections/ (last visited Nov. 9, 2024); 270toWin, *2024 Presidential Election Live Results*, https://www.270towin.com/2024-election-results-live/president/ (last visited Nov. 9, 2024).

Republican nominee in every election but one since 1972.[11] Given the political realignment that occurred in the South after the Democratic Party's embrace of the civil rights movement and the passage of the Voting Rights Act of 1965,[12] Black people in those states have been effectively disenfranchised in presidential general elections there for over 50 years.[13]

According to Hoffman, "the current Republican domination of the electoral college in the South is no accident. Rather, it is in large part the result of a conscious effort by white Southern politicians—first by segregationist Democrats, and later by racially conservative Republicans—to make race a focal point of presidential politics."[14] Hoffman explains that as a key component of this effort, racially conservative Republicans "rely on the discriminatory mathematics of the winner-take-all system, which ensures that racial minorities have no voice in determining the composition of the electoral college."[15] Hoffman further emphasizes this point, stating that "[f]or nearly five decades, politicians have been relying on the primacy of the winner-take-all scheme as a means of excluding African American voters from the political process"[16]; and the "recurring emphasis on race [in presidential politics] all but guarantees the continued

[11] *Id*.
[12] *See* Hoffman, *supra* note 1, at 949 ("The political realignment of the South is unquestionably the single most striking development in American presidential politics since 1948. Once a solid bloc of Democratic electoral votes the South is now a more-or-less solid bloc of Republican electoral votes. Although the reasons for this shift are complex, it is beyond question that one of the principal forces driving it has been the violent opposition of white Southern politicians to the civil rights policies of the national Democratic party.").
[13] Schultz, *supra* note 6, at 1643-44 ("The winner-take-all system of allocating electoral votes perpetuates discrimination against people of color much in the way that the original creation of the Electoral College did. Even with the adoption of the VRA in 1965 and the switch of the South from Democratic to Republican Party control, people of color were effectively disenfranchised." (internal citations omitted)).
[14] Hoffman, *supra* note 1, at 959.
[15] *Id*. at 960.
[16] *Id*. at 962.

occurrence of racially polarized voting, and consequently ensures that minority voters will not enjoy an equal opportunity to participate in the selection of their chief executive."[17]

Astoundingly, the disenfranchisement of Black people, which occurs in large part due to the historical operation of the Electoral College, is either largely overlooked or outright refuted when debating the continued efficacy of winner-take-all as the institutional mechanism for selecting the nation's chief executive. According to Williams, "[c]riticism typically focuses on the Electoral College's malapportionment—that it distorts the popular vote by aggregating it in ways that favor smaller states over larger states."[18] According to Jacoby, "[o]ne common objection is that the current system gives disproportionate influence to so-called battleground states: those that neither party has a lock on, such as Wisconsin and Florida. Presidential candidates focus heavily on those closely contested states, whose electoral votes are up for grabs, while giving short shrift to deep-red or deep-blue states, whose outcome seems a foregone conclusion."[19] According to Braceras, "[t]he racial critique of our presidential election system is based on two contentions: first, that the framers of our constitution designed the electoral college to protect slavery. And second, that the Electoral College today privileges white

[17] *Id*.

[18] Williams, *supra* note 5, at 188. Norman Williams is the Ken & Claudia Peterson Professor of Law at Willamette University College of Law, and is the Director of the Willamette Center for Constitutional Government. Willamette University College of Law, *Faculty Bio: Norman Williams*, https://willamette.edu/people/normanw (last visited Oct. 24, 2024).

[19] Jeff Jacoby, *The Enduring Value of the Electoral College*, THE BOSTON GLOBE (Updated July 8, 2020, 3:00 AM), https://www.bostonglobe.com/2020/07/08/opinion/enduring-value-electoral-college/. Jeff Jacoby is an associate editor and op-ed columnist for the Boston Globe, and is a graduate of both George Washington University and Boston University Law School. The Boston Globe, *Staff Bio: Jeff Jacoby*, https://www.bostonglobe.com/about/staff-list/columnist/jeff-jacoby/?p1=Article_Byline (last visited Oct. 24, 2024).

votes. Both charges are false … Far from being racist, the Electoral College protects the interests of anyone in the minority—political, geographic, racial, or otherwise."[20]

This paper will present an argument for reforming the Electoral College grounded in the understanding that this institution, as currently and historically operationalized, has worked to disproportionately disenfranchise Black people. In this light, reformation of the Electoral College is imperative to achieve the promise of equal justice under law enshrined in the nation's founding documents. I will explain how the winner-take-all, general-ticket, or unit rule method for allocating presidential electors results in significant Black disenfranchisement in presidential general elections using a methodology based upon the totality-of-the-circumstances framework established by Section 2 of the Voting Rights Act of 1965. I will also discuss how this disenfranchisement is a violation the Fifteenth Amendment, giving Congress the Constitutional authority to restrict the usage of the winner-take-all method of apportioning electors.[21] In Part II, I will propose a legal framework for exploring the question of whether the winner-take-all method results in discriminatory disenfranchisement in presidential general elections. In Part III, I will examine the various myths about how the Electoral College was formed, and explain that these myths shroud the proslavery origins of the institution. I will also demonstrate how the winner-take-all method for selecting presidential electors has worked historically to perpetuate the disenfranchisement of Black people. In Part IV, I will examine some of the options for

[20] Jennifer C. Braceras, *Is the Electoral College Racist?*, THE BOSTON GLOBE (Updated Sept. 1, 2020, 3:00 AM), https://www.bostonglobe.com/2020/09/01/opinion/is-electoral-college-racist/. Jennifer C. Braceras is the director of Independent Women's Law Center, and a former member of the U.S. Commission on Civil Rights. The Federalist Society, *Bio: Jennifer C. Braceras*, https://fedsoc.org/contributors/jennifer-braceras (last visited Oct. 24, 2024).

[21] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have the power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, §§ 1-2.

reforming the Electoral College with an eye toward full and equal enfranchisement of Black people in selecting the nation's chief executive. I will also demonstrate why the proportional method for allocating Electoral College votes should be the preferred method, as it is the surest way of achieving the goal of ensuring equitable enfranchisement for marginalized peoples in presidential general elections.

II. THE ELECTORAL COLLEGE, THE VOTING RIGHTS ACT, AND THE 15TH AMENDMENT

Section 2 of the Voting Rights Act of 1965, as amended by Congress in 1982, sets forth the standards by which to adjudicate whether there is discrimination present in a voting scheme. Section 2(a) states in part:

> "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]"[22]

Section 2(a) also, by reference, incorporates Section 4(f)(2) of the Voting Rights Act, as amended in 1975. Section 4(f)(2) states:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."[23]

The term "language minority group" is defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."[24] Additionally, Section 2(b) states in part:

> "A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or

[22] The Voting Rights Act of 1965 as amended, Pub. L. No. 97-205, § 2(a), 96 Stat. 134 (1982) (codified at 52 U.S.C. § 10301(a)) (available at https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg131.pdf).
[23] The Voting Rights Act of 1965 as amended, Pub. L. No. 94-73, § 4(f)(2), 89 Stat. 401 (1975) (codified at 52 U.S.C. § 10303(f)(2)) (available at https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg400.pdf).
[24] 52 U.S.C. § 10310(c)(3).

> political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered[.]"[25]

While the Voting Rights Acts has not yet been applied to the winner-take-all method of apportioning presidential electors,[26] most likely the Supreme Court as currently constituted will hold that the text of § 2(a) unambiguously makes clear that this section only applies to "any State or political subdivision" thereof, and not to the United States in its capacity as a federal sovereignty; foreclosing the possibility that the Voting Rights Act can be applied to presidential elections. Nonetheless, the standards set forth in § 2 can help analyze the discrimination as operationalized by the winner-take-all method. Specifically, the totality-of-the-circumstances methodology utilized by the Supreme Court is useful in determining whether the winner-take-all method results in dilution of the vote of marginalized groups. If so, the text of the Fifteenth Amendment clearly gives the Congress the authority to enact legislation to mitigate the impact of this discrimination by proscribing the use of this method of apportioning electors,[27] so long as the legislation comports with other provisions of the United States Constitution.[28]

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[25] The Voting Rights Act of 1965 as amended, Pub. L. No. 97-205, § 2(b), 96 Stat. 134 (1982) (codified at 52 U.S.C. § 10301(b)) (available at https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg131.pdf).

[26] Hoffman, *supra* note 1, at 964 ("Thus far, no court has faced a claim applying §2 to the winner-take-all system of presidential electors.").

[27] *See* Michael J. O'Sullivan, *Artificial Unit Voting and the Electoral College*, 65 S. CAL. L. REV. 2421, 2447 (1992) ("The electoral college's artificial statewide unit voting procedure is no different from any other deprivation of the right to vote. Because the Constitution does not require the statewide unit vote, the practice is not exempt from judicial or congressional invalidation under the Fourteenth Amendment. We can, therefore, prohibit the statewide unit rule without the need for a constitutional amendment.) (available at https://heinonline.org/HOL/Page?public=true&handle=hein.journals/scal65&div=96&start_page=2421&collection=usjournals&set_as_cursor=0&men_tab=srchresults).

[28] *Willams v. Rhodes*, 393 U.S. 23, 29 (1968) ("[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.").

To start, it would be helpful to examine the scope of Constitutional authority granted to Congress by § 2 of the Fifteenth Amendment. Unlike the Voting Right Acts, which, as previously noted, will likely only apply to voting schemes of States or political subdivisions thereof, § 1 of the Fifteenth Amendment proscribes discriminatory voting schemes that impinge on the voting rights of all American citizens by the United States itself in its capacity as a federal sovereignty.[29] Thus, the text of the Fifteenth Amendment itself clearly applies to presidential elections. Consequently, if discrimination is found to be present in the winner-take-all method of selecting presential electors, Congress may invoke its lawmaking authority in § 2 to mitigate its discriminatory impact.[30] However, the Constitutional grant of authority in § 2 is necessarily limited by other provisions of the Constitution.

For example, Article II, § 1 states in part: "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators

[29] U.S. CONST. amend. XV, § 1, *supra* note 21.

[30] In *South Carolina v. Katzenbach*, the Court stated the lawmaking authority granted by the Framers of the Fifteenth Amendment "indicated that Congress was to be chiefly responsible for implementing the rights created in § 1," and thus "in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). Some insight can be drawn about what the intent of the framers of the Reconstruction Amendments was by examining what the Supreme Court stated about the plenary powers granted to the Congress by the Thirteenth Amendment. In the *Civil Rights Cases*, the Supreme Court stated that the lawmaking authority granted to Congress by that Amendment "may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). The Court further stated that this authority "clothes the Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Id*. Jack Balkin, the Knight Professor of Constitutional Law and the First Amendment at Yale Law School, has argued that the Thirteenth Amendment granted Congress "the power to make people free *in practice* by wiping out the legal, social, and economic aspects of slavery." Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1817 (2010). Professor Balkin further argued that "[s]lavery was not just legal ownership of people; it was an entire system of conventions, understandings, practices, and institutions that conferred power and social status and maintained economic and social dependency," concluding that "[t]o enforce the Thirteenth Amendment, Congress must disestablish all the institutions, practices, and customs associated with slavery and make sure they can never rise up again. This means that Congress has the power to dismantle the interlocking social structures and status-enforcing practices that were identified with slavery or that rationalized and perpetuated it. The way this insight is usually expressed is that Congress has the power to identify and eliminate the 'badges and incidents of slavery.'" *Id*.

and Representatives to which the State may be entitled in the Congress[.]"[31] This clause of Article II operates to effectively limit the grant of Congressional authority granted by § 2 of the Fifteenth Amendment because it clearly grants to each *state legislature* the primary authority to designate the method for apportioning its presidential electors.[32] However, the Court stated in *McPherson v. Blacker* that "[w]henever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the [proportionate representation reduction penalty in § 2 of the Fourteenth Amendment.]"[33] By extension then, if there is a discriminatory impact upon of the right to vote for presidential electors enshrined in § 2, there is a violation of the Fourteenth Amendment that would invoke the § 5 grant of Congressional authority "to enforce, by appropriate legislation, the provisions" of that amendment.[34] Likewise, if there is a discriminatory denial of the right to vote for presidential electors by the United States in its capacity as a federal sovereignty, there would be a similar violation of the protections set forth in the Fifteenth Amendment; invoking the identical grant of Congressional authority in § 2 of that amendment.

To bolster this point, the Court stated in *Katzenbach v. Morgan* that "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth

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[31] U.S. CONST. art. II, § 1 (emphasis added).
[32] Hoffman, *supra* note 1, at 973 ("Article II does place some important limits on the power of the federal government to determine the manner of appointment of presidential electors. Even under a loose reading of [*McPherson v. Blacker*, 146 U.S. 1 (1982)], it would be hard to argue that Congress or the federal courts have the authority to supersede the state legislatures entirely and require a particular mode of election. The principle that the ultimate responsibility for adopting a valid electoral scheme rests with the state is well established in voting rights cases involving both the Voting Rights Act and the Equal Protection Clause")
[33] *McPherson v. Blacker*, 146 U.S. 1, 39 (1982).
[34] U.S. CONST. amend. XIV, § 5

Amendment."[35] The Court further stated that "[b]y including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18."[36] In expounding upon this broad authority granted to Congress under the Necessary and Proper Clause, the *Katzenbach* Court referenced *Ex parte Com. of Virginia*, which was "decided just 12 years after the adoption of the Fourteenth Amendment."[37] There, the Court stated:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the [Thirteenth and Fourteenth Amendments] have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."[38]

Considering that the Constitutional grant of authority set forth in § 2 of the Fifteenth Amendment is identical to that granted to Congress in the Fourteenth Amendment, it follows that Congress has the same broad discretion in securing the right to vote for every citizen of the United States regardless "of race, color, or previous condition of servitude."[39]

All this taken together means that, while Congress has broad authority to mitigate the discriminatory impact of the winner-take-all method of selecting presidential electors under the Fifteenth Amendment, it may do so only by limiting or restricting its usage and may not impose any specific mechanism of selecting electors upon the legislatures of the several States.[40] It is

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[35] *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).
[36] *Id*. at 650.
[37] *Id*.
[38] *Ex parte Com. of Virginia*, 100 U.S. 339, 345-346 (1879)
[39] U.S. CONST. amend. XV, § 1, *supra* note 21.
[40] *See* Hoffman, *supra* note 1, at 973 ("Proper respect for principles of federalism would dictate that, while Congress might place restrictions on the electoral system, neither Congress nor the federal courts could dictate that all states employ a particular system-say, for example, the proportional system. Restricting the use of racially discriminatory voting systems, however, is well within the scope of congressional power." (internal citation omitted")).

important to note, that should Congress utilize its § 2 authority to proscribe the use of winner-take-all, that legislation would become the supreme law of the land under the Supremacy Clause of the United States Constitution.[41]

As stated above, the totality-of-the-circumstances methodology utilized by the Supreme Court can be adapted to determine whether the winner-take-all method perpetuates discrimination of marginalized groups in presidential elections. This methodology was articulated by the Supreme Court in *Thornburg v. Gingles*, which was the first time the Court considered § 2 of the Voting Rights Act of 1965, as amended in 1982.[42] The *Gingles* Court, in determining whether in the totality-of-the-circumstances members of a marginalized group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice",[43] stated that "[t]he Senate Judiciary Committee majority Report accompanying [that bill], elaborates on the circumstances that might be probative of a § 2 violation[.]"[44] According to the *Gingles* Court, that report states "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."[45]

Below is the list of some of the "typical factors"[46] set forth by the *Gingles* Court, adapted for the present purpose of analyzing the current and historical discriminatory operation of the

[41] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. 6, cl. 2.
[42] *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986).
[43] 52 U.S.C. § 10301(b).
[44] *Thornburg v. Gingles*, 478 U.S. at 36.
[45] *Id*. at 45.
[46] *Id*. at 36.

winner-take-all method for allocating presential electors.[47] It is important to note that, because the lawmaking authority granted to Congress by the Fifteenth Amendment is identical to that granted by the Nineteenth Amendment, it may be possible that this framework could be used to conduct a similar historical analysis of gender-based discrimination in presidential general elections.[48]

1. The extent of any history of official discrimination that touched the right of the members of the marginalized group to register, to vote, or otherwise to participate in the process of selecting presidential electors.
2. The extent to which voting in presidential elections is racially polarized.
3. The extent to which the winner-take-all method may enhance the opportunity for discrimination against the marginalized group.
4. Whether the members of the marginalized group have been denied access to the process of apportioning presidential electors.
5. The extent to which members of the marginalized group bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process.
6. Whether political campaigns have been characterized by overt or subtle racial appeals.

[47] *Id*. at 36-37.
[48] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIX, §§ 1-2.

7. The extent to which members of the marginalized group have been elected president.

Keeping these factors in mind, in the next section, I will focus on the origins of the Electoral College, as well as its historical operation, to demonstrate how the winner-take-all method of apportioning presidential electors perpetuates disenfranchisement of Black people in American presidential general elections.

III. THE HISTORY OF THE ELECTORAL COLLEGE AND BLACK DISENFRANCHISEMENT

In examining the history of official discrimination perpetuated by the winner-take-all method, one must first start by dismantling the various myths that shroud the underpinnings of the Electoral College as an institution. According to Finkelman, there are generally two myths taught in American schools about why the original Framers of the Constitution chose to create the Electoral College to select the nation's chief executive.[49] The first myth is that the original Framers were generally elitists who distrusted the average American voter, and believed that, should the chief executive be chosen by direct popular vote, the people would choose to select a demagogue to lead the country.[50] Elbridge Gerry, a Massachusetts delegate to the Constitutional Convention of 1787, when debating whether the members of the national legislature should be directly elected by the people stated: "The evils we experience flow from the excess of democracy. The people do not want virtue; but are the dupes of pretended

[49] *See* Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1147 (2002) (available at https://people.uncw.edu/lowery/pls101/wilson_chapter_outlines/The%20Proslavery%20Origins%20of%20the%20Electoral%20College.pdf) ("Textbooks and primers offer us two common explanations for the creation of the electoral college. Both are wrong, and both miss one of the central purposes of the electoral college, which was to insure that the largest state, Virginia, would be able to elect the national president, and that the slave states would be able to use their slave population to influence the election of the president.")

[50] *Id*. at 1148.

patriots. [In Massachusetts] they are daily misled into the most baneful measures and opinions by the false reports circulated by designing men, and which no one on the spot can refute."[51] However, the truth is Gerry was almost alone in that view during that debate.[52] In reality, the majority of voters in the late 18th century were themselves elite, literate, property-owning, White, Protestant men who likely would have been "well aware of the issues and the candidates,"[53] and were "on average better informed than those who vote today."[54] Finkelman further emphasizes this point: "Most of the delegates at the Convention were accomplished and successful politicians who had held elective office in their states. Thus, they knew all too well that people were not incompetent to choose who to vote for."[55]

The second, more pervasive, myth is that the Electoral College was designed to protect the smaller, less populous states from the political domination of the larger.[56] To the contrary, according to Finkelman, "in all the debates over the executive at the Constitutional Convention, this issue never came up. At one point the convention considered allowing the state governors to choose the president but backed away from this in part because it would allow the small

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[51] *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1911). Vol. 1. (available at https://oll.libertyfund.org/titles/farrand-the-records-of-the-federal-convention-of-1787-vol-1)
[52] Finkelman, *supra* note 49, at 1148. *See also The Records of the Federal Convention of 1787*, ed. Max Farrand, *supra* note 51.
[53] Finkelman, *supra* note 49, at 1149. *See also* Schultz, *supra* note 6, at 1628 (2021) ("There was never a serious debate about providing a universal right to vote in the U.S. Constitution. This was simply too divisive of an issue and was complicated by slavery, among other issues. If there had been a discussion of voting rights, then it would have had to address thorny questions such as property qualifications and the franchise for women and freed slaves. The Constitutional Convention avoided a tumultuous and lengthy debate by leaving voting rights up to the states-largely where the issue remains today. The Framers effectively left franchise in the hands of White, property owning, adult males who are largely of a mainline religious faith-the classic stereotype of the White Anglo-Saxon Protestant." (internal citations omitted))
[54] Finkelman, *supra* note 49, at 1149-50.
[55] *Id*. at 1150.
[56] *Id*.

states to choose one of their own."[57] In fact, the nature of the mechanism to select the nation's chief executive ultimately settled upon by the original framers also belies that assertion. At the Constitutional Convention, there were three proposals for the structure of the new federal government. The first was the New Jersey Plan, proposed by William Petterson of New Jersey, Alexander Hamilton of New York, and Gouverneur Morris of Pennsylvania.[58] According to Maggs, this plan "would have benefited small states by giving all states equal representation in a unilateral legislature."[59] Alexander Hamilton proposed a second plan which would have created a federal government more powerful than the one ultimately adopted by the Constitutional Convention, "with an executive elected for life."[60] Hamilton's plan would have also allowed this quasi-king to "appoint executives for each state government."[61]

The original framers rejected both plans, and chose to adopt a proposal based on the Virginia Plan put forward by Edmund J. Randolph of Virginia, which "reflected the ideas of James Madison."[62] The original version of the Virginia Plan called for a bicameral legislature, with one chamber elected directly by the people and the other chosen by the state legislatures.[63] According to Maggs, "[t]he plan generally favored the states with large populations (Massachusetts, Pennsylvania, New York, and Virginia) because it called for proportional representation in both houses."[64] During the debate of the Virginia Plan as originally outlined,

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[57] *Id*.
[58] Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1713-14 (2012) (available at https://scholarship.law.gwu.edu/faculty_publications/693/).
[59] *Id*. at 1714.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 1717-18.
[63] *Id*. at 1717.
[64] *Id*. at 1717-18.

the delegates from the small states stood in opposition because "they believed that it eliminated state equality."[65] To quote Maggs once again:

> "The large and small states initially could not agree on the composition of the legislative branch. Ultimately, a modified version of the Virginia plan became acceptable to the Convention after the deputies agreed to what has become known as the "Great Compromise" (or alternatively as the "Connecticut Compromise"). In this compromise, the states would have equal representation in the Senate, while the House would have proportional representation. This compromise balanced the interests of large and small states. The Convention as part of this compromise adopted the 3/5ths rule, under which only 3/5ths of the slave populations would be counted for determining representation in the House."[66]

In other words, the Great Compromise prevented the Convention from ending in deadlock, and was based entirely on the continued subjugation of Black lives and bodies through the institution of chattel slavery.[67]

The institution of chattel slavery that undergirded the representation debate also shaped the Constitutional mechanism for selecting the nation's chief executive.[68] After over a month of debate—which included consideration of a three-man executive council, appointment

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[65] *Id*. at 1718.
[66] *Id*. at 1719.
[67] *See* Schultz, *supra* note 6, at 1627-28 ("While these dueling plans [The New Jersey and Virginia plans] are mostly viewed as a debate between the more and less populous states, the two plans also indicate a divide between free states and slave states. Simple representation based on population would generally favor the more populous free states, especially if only free White people were counted; the slave states disfavored such an arrangement because they feared that this system would lead to emancipation … The slave states wished to include slaves in the count for representation, while the northern free states opposed such inclusion and wanted slaves counted only for purposes of taxation. Convention attendees, including James Madison, recognized that not counting slaves for representation would hurt the South and urged their inclusion for congressional representation. The result was the infamous Three-Fifths Compromise, which counted slaves at that ratio for both representation and taxation purposes." (internal citations omitted)).
[68] *See Id*. at 1626. ("The Constitutional Convention was marked by disputes between the more populous and less populous states over the issue of representation. Those disputes were made more challenging by the divide over slavery. Free and slave states feared that, depending on the representation schema selected for Congress, the other side would prevail and that there would be a United States of all slave states or all free states. The South, possessing the vast majority of slaves, would have had a clear advantage if slaves were counted for the purpose of representation. ¶ The tension surrounding slavery precipitated a series of fights that ultimately impacted the procedure for presidential selection." (internal citations omitted)).

of a single executive by the national legislature, and direct popular election of the executive—Oliver Ellsworth of Connecticut proposed that the nation's chief executive be elected by a college of electors appointed by the legislatures of the several states, with the number of electors apportioned to each state tied directly to their representation in Congress; representation that included disenfranchised enslaved Black people.[69] This proposal was supported by the convention's most influential delegate, the slave-owning Virginian James Madison, whose support for the Electoral College was based on his belief that it would "guarantee that the nonvoting slaves could nevertheless influence the presidential election,"[70] despite their subjugation and disenfranchisement. According to Finkelman, "Hugh Willamson of North Carolina was more open about the reasons for southern opposition to a popular election of the president. He noted that under a direct election of the president, Virginia would not be able to elect her leaders president because '[h]er slaves will have no suffrage.'"[71] Indeed, due the representation scheme adopted by the original framers based on the three-fifths clause, the slave-holding states in the South received an additional 10 votes in the Electoral College.[72] It is important to note that at the time, Virgina was the most populous slave-owning Southern state

[69] Finkelman, *supra* note 49, at 1153-55.
[70] *Id*. at 1155.
[71] *Id*.
[72] Schultz, *supra* note 6, at 1629 ("The resulting compromises, including the two-house Congress with equal and per capita representation, the Three-Fifths Compromise, and the delay on the halt on slave trade, all spoke to the compromises to overcome polarization and division caused by slavery. Thus, a quick look at the representation scheme in Congress and voting rights reveals that both were skewed in favor of the slave states. Allowing slave states to count three-fifths of slaves for the purposes of representation provided those states with approximately ten additional House members, and the equal representation in the Senate provided more representation in that chamber than would have been afforded given their population vis-a-vis the free states. The system of representation in Congress did not favor majority rule. It enabled minority rule by a limited number of wealthy individuals, protecting slaveholder interests and excluding rights for just about anyone else." (internal citations omitted)).

with the most delegates present at the Constitutional Convention.[73] It is also important to note that Ellsworth, who originally proposed the Electoral College, "almost always voted with the South on slavery-related matters[.]"[74] Thus, despite the pervasive mythmaking about the how the institution of the Electoral College was designed to protect the interests of the smaller states, when taken in context, the intent of the framers to perpetuate the institution of chattel slavery is clear.[75]

The Electoral College's ties to the institution of chattel slavery were soon laid bare during the Presidential election of 1800 between the Federalist, anti-slavery incumbent John Adams,[76] and his Democratic-Republican challenger, Thomas Jefferson, who himself owned 200 enslaved Black people.[77] Within a decade after the ratification of the Constitution, and despite James Madison's warning about the dangers of political factions,[78] "political parties had emerged across America with influential figures like Thomas Jefferson urging states to create a winner-take-all system for the allocation of electoral votes."[79] According to Schultz, the idea behind the

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[73] *See generally* Lee Ann Porter, *Population Estimates Used by Congress During the Constitutional Convention*, 70 SOCIAL EDUCATION 270 (2006).
[74] Finkelman, *supra* note 49, at 1155.
[75] *See Id*. at 1146-47 ("The electoral college is of course based in part on the three-fifths clause. Thus there is an immediate connection between slavery and the electoral college."). *See also* Wilfred Codrington III, *The Electoral College's Racist Origins*, THE ATLANTIC (Nov. 17, 2019), https://www.theatlantic.com/ideas/archive/2019/11/electoral-college-racist-origins/601918/ ("Commenters today tend to downplay the extent to which race and slavery contributed to the Framers' creation of the Electoral College, in effect whitewashing history: Of the considerations that factored into the Framers' calculus, race and slavery were perhaps the foremost.").
[76] The Gilder Lehrman Institute of American History, *John Adams on the Abolition of Slavery, 1801*, https://www.gilderlehrman.org/history-resources/spotlight-primary-source/john-adams-abolition-slavery-1801 (last visited Nov. 24, 2024) ("Adams, despite being opposed to slavery, did not support abolitionism except if it was done in a 'gradual' way with 'much caution and Circumspection.'")
[77] Finkelman, *supra* note 49, at 1155.
[78] THE FEDERALIST NO. 10 (James Madison) ("AMONG the numerous advantages promised by a wellconstructed (sic) Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice.) (available at https://avalon.law.yale.edu/18th_century/fed10.asp).
[79] Schultz, *supra* note 6, at 1631.

winner-take-all method was that the "system would maximize the political influence of states. It was also appealing to the then-emerging parties because it meant that the opposition in a specific state would get no electoral votes, creating a zero-sum game for elections that rewarded partisan strength."[80] The election was decided by only eight electoral votes, with Adams receiving the majority of his 65 electoral votes from Northern free states, and Jefferson receiving 53 of his 73 electoral votes from Southern slave states.[81] According to Finkelman, "[i]f Jefferson had received no electoral votes based on counting slaves under the 3/5ths clause, John Adams would have won the election."[82] The outcome of this election demonstrates the enormous political advantage afforded by the Electoral College to the Southern slave states through the ownership of disenfranchised enslaved Black people; specifically through the winner-take-all method of selecting presidential electors.[83] Thus, from the very beginning of the republic, the winner-take-all method has been inexorably linked to the oppression and disenfranchisement of Black people.

Even after slavery was abolished following the Civil War, and the Black franchise was enshrined into the Constitution,[84] the operation of the Electoral College through the winner-take-all method continued to disenfranchise newly-freed Black voters in presidential elections. According to Schultz:

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[80] *Id*.
[81] *See* Finkelman, *supra* note 49, at 1155.
[82] *Id*.
[83] *See* Codrington, *supra* note 75 ("The South's baked-in advantages—the bonus electoral votes it received for maintaining slaves, all while not allowing those slaves to vote—made the difference in the electoral outcome. It gave the slaveholder Jefferson an edge over his opponent, the incumbent president and abolitionist John Adams. To quote Yale Law's Akhil Reed Amar, the third president 'metaphorically rode into the executive mansion on the backs of slaves.'").
[84] U.S. CONST. amend. XV, §§ 1-2, *supra* note 21.

> "The winner-take all-system for the allocation of electoral votes created a new problem for minority rights—the locking out of individuals who were part of a partisan minority within a state. This system placed the power of selecting presidents in the hands of White-dominated state legislatures, effectively disenfranchising African American voters … Even as franchise rights or eligibility expanded in the nineteenth century, these expansions continued to protect limited voting rights for a select few. As a result, no more than a few voters in each state would have any influence over the selection of presidential electors."[85]

Additionally, the Electoral College also played a significant role in the ending of the Reconstruction policies that "sought to undo the legacy of slavery and discrimination,"[86] which guaranteed newly-freed Black people their Constitutional rights.[87] According to Schultz, "in order to enforce Reconstruction efforts, the federal government maintained troops in the South and prevented many state leaders from voting, or even having representation in Congress, until they recognized the rights of the former slaves."[88] This was the political context of the election of 1876. The number of electoral votes to win was 185, and after the popular vote was totaled, the Democratic nominee, Samuel Tilden controlled 184 electoral votes, while the Republican nominee, Rutherford B. Hayes, controlled 165.[89] "Four states, including Florida, Louisiana, Oregon, and South Carolina, held a total of twenty electoral votes that were in dispute."[90] To resolve this disputed election, Congress created an electoral commission that brokered the Compromise of 1877 by which Hayes would be inaugurated—despite not winning the popular

[85] Schultz, *supra* note 6, at 1632.
[86] *Id*. at 1633.
[87] *See Id*. ("A few of these measures included extension of the Freedmen's Bureau to help former slaves and the adoption of the Civil Rights Bill of 1866, the Ku Klux Klan Act of 1871, the Civil Rights Act of 1875, and the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, 1868, and 1870, respectively. These measures sought to bring economic and political rights to emancipated slaves and, in the case of the Fifteenth Amendment, voting rights. Using their newly acquired voting rights, African American males were able to elect many Black people to public office, even across what was very recently the Confederacy. ¶ Southern leaders did not take this easily. They fought Reconstruction measures both formally and informally with the rise of the KKK.").
[88] *Id*. at 1633-34.
[89] *Id*. at 1634.
[90] *Id*.

vote[91]—in exchange for the removal of federal troops.[92] The ending of Reconstruction ushered in the Jim-Crow Era, allowing for the codification of various discriminatory laws that perpetuated the disenfranchisement of Black people throughout the South.[93] According to Schmidt, the Compromise of 1877 allowed the recalcitrant leaders of the former Confederacy to usher in "Jim Crowism and the denial of the hard won rights of freedman. This system lasted until the civil rights movement of the mid-twentieth century began to make those rights real and lasting to the freed people's descendants."[94]

Even today, the winner-take-all method prevents the Black political minority in the South from influencing the selection of their state's presidential electors. Although not the constitutionally required method for selecting presidential electors,[95] the winner-take-all method is used to select presidential electors in 48 states and the District of Columbia.[96]

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[91] 270toWin, *1876 Presidential Election*, https://www.270towin.com/1876_Election/ (last visited Nov. 24, 2024).
[92] Schultz, *supra* note 6, at 1632 ("This dispute led Congress to create the Electoral Commission on January 29, 1877 in order to resolve the election with regard to these four states. After a series of negotiations, a deal was struck. Democrats agreed to let the decision of the Commission prevail, giving the presidency to Hayes, if Hayes agreed that, upon being sworn into office, he would remove the federal troops from the South. Hayes agreed, and, in 1877, the troops were removed, thereby ending Reconstruction."). *See also* Philip R. Schmidt, *The Electoral College and Conflict in American History and Politics*, 4 SOCIO. PRACTICE: J. CLINICAL AND APPLIED SOCIO. 195, 200 (2002) ("Congressional Southern Democrats turned out to be perfectly willing to cut a deal with the Republicans, allowing the GOP to win all the contested states (and thereby victory in the electoral college by one vote, despite Democratic victory in the popular vote) in return for withdrawing federal troops from the ground.") (available at https://www.jstor.org/stable/43735851).
[93] *Id*. at 1635 ("[T]he end of Reconstruction led to the Jim Crow Era. This period, lasting up to the passage of the Voting Rights Act of 1965 (VRA), permitted the disenfranchisement of most people of color in the South and perpetuated solid Democratic control in the region until the 1960s.").
[94] Schmidt, *supra* note 91, at 200. *See also* Codrington, *supra* note 74 ("The deal at once marked the end of the brief Reconstruction era, the redemption of the old South, and the birth of the Jim Crom regime. The decision to remove soldiers from the South led to the restoration of white supremacy in voting through the systematic disenfranchisement of black people, virtually accomplishing over the next eight decades what slavery had accomplished in the country's first eight decades. And so the Electoral College's misfire in 1876 helped ensure that Reconstruction would not remove the original stain of slavery so much as smear it into the other parts of the Constitution's fabric, and countenance the racialized patchwork democracy endured until the passage of the Voting Rights Act of 1965.")
[95] *McPherson v. Blacker* 146 U.S. at 35 ("In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States.")
[96] *See* Williams, *supra* note 5.

According to Schultz, the winner-take-all method "has historically disenfranchised individuals belonging to their state's non-majority party, leaving them with no electors even if they win a substantial amount of the popular vote in a state."[97] According to Codrington:

> "[The operation of the winner-take-all method] has a distinct, adverse impact on black voters, diluting their political power. Because the concentration of black people is the highest in the South, their preferred presidential candidate is virtually assured to lose their home states' electoral votes. Despite black voting patterns to the contrary, five of the six states whose populations are 25 percent or more black have been reliably red in recent presidential elections. Three of those states have not voted for a Democrat in more than four decades. Under the Electoral College, black votes are submerged. [This is] the precise reason for the success of the southern strategy."[98]

Not to belabor the point, but the historical evidence is clear—the Electoral College was originally designed to perpetuate the institution of chattel slavery; and even after slavery was abolished, and the Black vote enshrined into the Constitution, the winner-take-all method of selecting presidential electors has systematically operated to oppress and disenfranchise Black people. When taken together with the well documented disparities in health,[99] education,[100]

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[97] Schultz, *supra* note 6, at 1635.

[98] Codrington, *supra* note 75.

[99] *See e.g.*, Samantha Artiga, Latoya Hill, & Marley Presiado, *How Present-Day Health Disparities for Black People Are Linked to Past Policies and Events*, KFF (Feb. 22, 2024), https://www.kff.org/racial-equity-and-health-policy/issue-brief/how-present-day-health-disparities-for-black-people-are-linked-to-past-policies-and-events/ ("Today's health and health care disparities are rooted in a long history of U.S. policies and events and reflect the ongoing impacts of racism at multiple levels, including in systems, structures, policies, and interpersonal interactions.")

[100] *See e.g.*, Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), https://www.brookings.edu/articles/unequal-opportunity-race-and-education/ ("[E]ducational outcomes for minority children are much more a function of their unequal access to key educational resources, including skilled teachers and quality curriculum, than they are a function of race. In fact, the U.S. educational system is one of the most unequal in the industrialized world, and students routinely receive dramatically different learning opportunities based on their social status."); Clea Simon, *How COVID Taught America About Inequity in Education*, THE HARVARD GAZETTE (July 9, 2021), https://news.harvard.edu/gazette/story/2021/07/how-covid-taught-america-about-inequity-in-education/ ("The pandemic has disrupted education nationwide, turning a spotlight on existing racial and economic disparities, and creating the potential for a lost generation. Even before the outbreak, students in vulnerable communities — particularly predominately Black, Indigenous, and other majority-minority areas — were already facing inequality in everything from resources (ranging from books to counselors) to student-teacher ratios and extracurriculars. ¶ The additional stressors of systemic racism and the trauma induced by poverty and

and employment[101] within the Black community—due in large part to their inability to participate in the political process on equal terms—Congress has broad discretion to invoke its lawmaking authority granted to it by § 2 of the Fifteenth Amendment to remedy the disproportionate discriminatory impact of the winner-take-all method by proscribing its continued use.

IV. OPTIONS FOR REFORMING THE ELECTORAL COLLEGE

Were Congress to utilize its Fifteenth Amendment authority to proscribe the use of winner-take-all, the question becomes what form do American presidential elections take? There are, of course, several options, with some having a more realistic pathway to becoming law, and others being more appropriate for remedying the current racialized inequities in presidential general elections. One option is a Constitutional amendment utilizing the mechanisms set forth in Article V to eliminate the Electoral College and completely restructure how presidential elections take place.[102] A second option is for states to adopt a single-member-district system for apportioning presidential electors to the Electoral College.[103] A third option is for states to adopt the congressional-district method currently in place in Nebraska and

violence, both cited as aggravating health and wellness as at a Weatherhead Institute panel, pose serious obstacles to learning as well.").

[101] *See e.g.*, Jhacova Williams & Valerie Wilson, *Black Workers Endure Persistent Racial Disparities in Employment Outcomes*, ECON. POL'Y INST. (Aug. 27, 2019), https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment/ ("In particular, the fact that the country's most highly educated black workers are still less likely to be employed than their white counterparts, and when they are employed, are less likely to be employed in a job that is consistent with their level of education, strongly suggests that racial discrimination remains a major failure of an otherwise tight labor market.").

[102] "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[.]" U.S. CONST. art. 5.

[103] *See* Hoffman, *supra* note 1, at 946 ("In a pure single-member-district scheme, a state would be divided into a number of districts equal to the number of electors it appoints, and each district would choose one elector.").

Maine.[104] A fourth option is for the states to apportion their electors to the Electoral College in direct proportion to the popular vote received by each candidate on election day.[105] Another option is for states legislatures to return to choosing electors directly.[106] This method for apportioning electors is highly unlikely to be acceptable by the vast majority of the American people who have become accustomed to voting for the nation's chief executive directly, and thus is extraordinarily unrealistic as an option.[107] Regardless of any of the above options that each the several States could choose, yet another option for reforming American presidential elections is for enough States to pass legislation entering into the National Popular Vote Interstate Compact.[108]

Under Article V, there are two avenues for amending the United States Constitution to abolish the Electoral College entirely and effectuate a wholesale redesign of the mechanisms for

[104] *See Id*. ("Under the congressional-district system, by contrast, two electors are chosen at large to represent the state, and one additional elector is chosen for each congressional district. As in the winner-take-all system, the parties nominate a slate of candidates for the presidential-elector positions … [V]oters do not vote for individual candidates, but rather for one slate or another. The difference lies in the way the votes are counted. A vote for one party's slate is counted as a vote for that slate's two statewide candidates and the slate's candidate for that district. The winning candidates are the two at-large candidates who receive the most votes statewide, and the district candidates who receive the most votes within each district. Thus, one state may elect candidates from two or more different party slates."). *See also*, Williams, *supra* note 5, at 181 ("Maine and Nebraska, award their two senatorial electors to the winner of the statewide election, but, in each state, the voters in each congressional district select an elector for that district.")

[105] *See Id*. ("Under [the proportional system], the parties would choose slates of candidates for elector and rank them in order of preference. Again, voters would not vote for individual electors, but for party slates. Under this system, however, the electoral seats would be allocated among the parties in proportion to the statewide vote. Thus, if a state had ten electoral votes, and the Republican presidential candidate received 60% of the vote, while the Democratic presidential candidate received 40% of the vote, the first six electoral candidates from the Republican slate and the first four from the Democratic slate would be appointed as electors.").

[106] *See, e.g.*, *McPherson v. Blacker* 146 U.S. at 29-30 ("At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina … Fifteen states participated in the second presidential election, in nine of which electors were chosen by the legislatures.").

[107] Hoffman, *supra* note 1, at 1010 ("In an age in which citizens are accustomed to voting for President, legislative appointment is no longer a viable system for choosing electors.").

[108] *See generally* THOMAS H. NEALE, CONG. RSCH. SERV., IF11191, NPV—THE NATIONAL POPULAR VOTE INITIATIVE: PROPOSING DIRECT ELECTION OF THE PRESIDENT THROUGH AN INTERSTATE COMPACT (2019) (available at https://crsreports.congress.gov/product/pdf/IF/IF11191).

choosing the nation's chief executive.[109] To quote Williams, "In the past two centuries, more proposed constitutional amendments have sought to replace or reform the Electoral College than any other feature of our constitutional order."[110] The closet Congress ever came to passing such an amendment was on September 18, 1969, when the U.S. House of Representatives voted overwhelmingly, 338-70, to send an amendment abolishing the Electoral College to the Senate.[111] This effort, however, died in the Senate, when that the bill was "filibustered by a cadre of Southern lawmakers intent on preserving the majority's grip on electoral power in their states."[112] "Despite widespread bipartisan support for the amendment in both large and small states, the Senate came five votes shy of breaking the filibuster."[113]

Unfortunately, due to the rampant political tribalism currently being experienced in the United States,[114] neither of the two pathways to a Constitutional amendment are particularly likely to occur in the foreseeable future. First, Congress can propose an amendment to this effect; however, two-thirds of both chambers would need to agree on every provision, as well as the specific language, of the amendment.[115] Given that the incoming 119th Congress, set to be sworn in on January 3, 2025, is almost evenly divided between the nation's two largest political parties,[116] and considering the extraordinarily divisive nature of the 2024 presidential campaign

[109] U.S. CONST. art. 5, *supra* note 102.
[110] Williams, *supra* note 5, at 175.
[111] Dave Roos, *How the Electoral College Was Nearly Abolished in 1970*, HISTORY (updated Aug. 25, 2020), https://www.history.com/news/electoral-college-nearly-abolished-thurmond.
[112] *Id*.
[113] *Id*.
[114] *See generally* STEVE KORNACKI, THE RED AND THE BLUE: THE 1990S AND THE BIRTH OF POLITICAL TRIBALISM (2018).
[115] U.S. CONST. art. 5., *supra* note 102; U.S. CONST. art. 1, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States[.]").
[116] As of this writing, the Republican Party holds a slim six-seat majority over the Democratic Party in the House of Representatives (220-214), with one seat left to be decided; and with the two Independent Senators caucusing

waged by Donald Trump and his political allies,[117] any political consensus on such an amendment is practically impossible. Second, the Congress may convene a Constitutional Convention to consider an amendment to this effect "on the Application of the Legislatures of two-thirds of the several States."[118] Again, given the current deeply rooted political disharmony of the country, merely selecting delegates to such a Convention would prove to be contentious; and finding consensus on the design of a new mechanism for selecting the nation's chief executive would be even more so. Furthermore, a proposal for amending the Constitution in any fashion could be introduced at such a Convention,[119] which would further impede the possibility of finding agreement on an amendment to abolish the Electoral College. Additionally, with either of these avenues, the amendment, once passed, would need to be submitted to the state legislatures for ratification, and would only be incorporated into the Constitution if ratified

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with the Democratic Party, only a six-seat majority in the Senate (53-47). 270toWin, *2024 House Election Live Results*, https://www.270towin.com/2024-election-results-live/house/ (last visited Nov. 27, 2024); 270toWin, *2024 Senate Election Live Results*, https://www.270towin.com/2024-election-results-live/senate/ (last visited Nov. 27, 2024).

[117] *See e.g.*, Gloria Oladipo, *Six Racist and Bigoted Comments You Might Have Missed from Trump's New York Rally*, THE GUARDIAN (Oct. 31, 2024, 12:56 PM EDT), https://www.theguardian.com/us-news/2024/oct/31/six-racist-bigoted-comments-trump-madison-square-garden; Marya T. Mtshali, *The Racist 'One-drop Rule' Lives on in How Trump Talks About Black Politicians and Whiteness in America*, THE CONVERSATION (Nov. 3, 2024, 11:17 AM EST), https://theconversation.com/the-racist-one-drop-rule-lives-on-in-how-trump-talks-about-black-politicians-and-whiteness-in-america-236467 ("Calls to 'Make America Great Again' hearken back to colonialism, when whiteness — particularly white, male power — was at its peak. The period from 1500 to the 1960s was a time when white men could exercise control over people of color by racially classifying their bodies. And they protected whiteness by passing laws that declared 'one drop' of Black blood as enough to declare someone Black. ¶ Whiteness is property, as the legal scholar Cheryl Hines has argued. It's an asset for those who possess it. It offers benefits like white privilege and the idea of being white as moral and superior.").

[118] U.S. CONST. art. 5., *supra* note 102.

[119] *See* THOMAS H. NEALE, CONG. RSCH. SERV., R42589, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS 15 (2016) ("Concern that an Article V Convention might 'run away' has been a recurring theme in consideration of the convention alternative for many years; as one scholar noted—'it is an age old fear.' The 'runaway convention' has been generally defined as an Article V Convention summoned to consider a particular issue or issues (e.g., a balanced federal budget requirement) that ventures beyond its original mandate to consider policy questions and potential amendments contemplated neither in relevant applications by the state legislatures nor in its congressional summons" (internal citation omitted)) (available at https://crsreports.congress.gov/product/pdf/R/R42589/15).

by "the three-fourths of the several States."[120] For the same reasons that either pathway to a Constitutional amendment is unlikely to occur, finding the requisite votes to ratify such an amendment in three-fourths of state legislatures is also a practical impossibility at present.

The single-member-district method for apportioning presidential electors would also prove to be unrealistic presently, despite its potential to design Electoral College districts that would be truly representative of the country's rich diversity. Nonetheless, this method of apportioning presidential electors could take two possible forms. One, the candidate that receives the most popular votes from a district within a state would be able to assign one elector from their predetermined slate of electors for that state. Two, instead of electors being assigned from a slate of electors chosen by party insiders, the people in each district could vote directly for the specific elector they want to represent them at the Electoral College meeting at the state capitol. This form of the single-member-district method would be a significant departure from how Americans have become accustomed to choosing the nation's chief executive, and would require a herculean effort to educate the modern American voter.

The single-member-district method also has a few levels of impracticability. First, "[b]ecause every state has two more presidential electors than it has Representatives"[121], each state legislature that adopts this method would be required to pass legislation to create brand new districts separate and apart from the U.S. House of Representative districts already in place. Next, after each decennial census, the state legislatures that adopt this method would need to "develop two redistricting plans: one for its House districts and one for its presidential

[120] U.S. CONST. art. 5., *supra* note 102.
[121] Hoffman, *supra* note 1, at 982.

electors."[122] According to Hoffman, "[t]his would be a very expensive proposition, for redistricting is almost always a time-consuming, politically charged process, and it frequently leads to lengthy litigation."[123] Both the congressional-district and proportional methods, on the other hand, "impose almost no additional expense and would not require states to develop new redistricting plans."[124]

As for the congressional-district method, the strongest arguments for state legislatures to adopt this method are that it is historically and constitutionally precedented, and would largely keep the current political status quo in place. To the first point, as stated above, this method is currently in place in both Nebraska and Maine, and according to Hoffman, "good historical evidence suggests that the Framers contemplated that a district system would be the prevalent mode of election in states that instituted a popular vote."[125] Also, when the Michigan legislature switched from the winner-take-all method to a hybrid single-member/congressional-district method in 1891, the Supreme Court expressly held that change constitutionally valid.[126] To the second point, this method of apportioning electors would be the easiest for state legislatures to pass for two reasons. The first is best articulated by Hoffman:

> "[T]he congressional-district system allows a state to keep a bloc of two statewide votes, thus increasing that state's influence in the electoral college, if only marginally. As Akhil Amar and Vik Amar have argued, the dominance of the winner-take-all scheme can largely be attributed to a 'prisoners' dilemma.' No state wants to be the first to break up its bloc of electoral votes. Thus, the same factors that have led states to prefer the winner-take-all system over the congressional-district system might lead them to favor the congressional-district system over the proportional system."[127]

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[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] *Id*. at 1011.
[126] *See generally McPherson v. Blacker*, 146 U.S. 1 (1982). *See also* Hoffman, *supra* note 1, at 1011 ("Moreover, the Supreme Court has expressly upheld the constitutionality of the congressional-district system.").
[127] Hoffman, *supra* note 1, at 1015.

Second, for reasons I will outline below, the two largest political parties are more likely to view the adoption of this method as less of a threat to their entrenched political power, and would thus be less likely to engage in political maneuvering to block the passage of reform bills in state legislatures.[128]

However, the fatal flaw of this method is that it is wholly inadequate as a remedy to the generations-long disenfranchisement of Black people in presidential general elections. This would very likely lead to a lack of political support for this method from the majority of Black community in most states. Again, according to Hoffman:

> "The problem lies in the fact that each state has two more electoral votes than it does congressional districts. The district system addresses this disparity by providing that two electors will be chosen statewide. Thus, for two of a state's electoral votes, a winner-take-all system would be in effect. To the extent that the winner-take-all system dilutes minority voting strength, the district system would retain a discriminatory component. Hence the remedy would be incomplete."[129]

This means that as a remedy to the current discriminatory winner-take-all method, the congressional-district method would be better suited as a remedy in larger states than in the smaller ones; including those in the South.[130] In other words, in smaller states with fewer congressional districts, the two Electoral College votes apportioned at-large would account for a larger percentage of the state's total electoral votes, and would thus be more dilutive of marginalized votes. For example, in Alabama, two-ninths of the state's electors would be apportioned statewide, while in New York, two-twenty-eighths would be apportioned

[128] *See Id*. ("[T]he congressional-district system would tend to be less disruptive of the existing two-party system. The two major political parties are therefore likely to see it as less of a threat.").
[129] *Id*. at 1012.
[130] *Id*.

likewise.[131] Furthermore, this method of apportioning presidential electors depends entirely on the existence of congressional districts where a political cohesive marginalized group composes the majority of voters.[132] "If there are no such districts, the system will not work."[133] Additionally, apportioning electors in this manner would likely make the statewide decennial congressional redistricting increasingly partisan, and more acrimonious and politically divisive.[134] For example, in states, like California, with two or more distinct politically cohesive marginalized groups vying for the creation of representative districts during the decennial redistricting process, "a legislature's decision to draw a majority-minority district for one group may result in the failure to draw a majority-minority district for another group."[135]

Conversely, in terms of rectifying the generations of historical harm to the Black community wrought in part by winner-take-all, the proportional method would be best able to effectuate full and equal enfranchisement of Black people in selecting the nation's chief executive. To quote Hoffman again: "Its basic virtue is its fairness. A proportional system treats every voter within a state almost exactly alike. The dilutive effect of the two at-large seats is eliminated. Every voter has roughly the same ability as every other voter in that state to influence the outcome of the election."[136] In addition to providing a realistic pathway for remedying the dilution of the Black vote, this method "would allow members of any cohesive political minority—not just racial minorities—within a state to gain a seat in the electoral

[131] *See Id*.
[132] *Id*.
[133] *Id*.
[134] *See Id*. at 1012-13
[135] *Id*.
[136] *Id*. at 1013 (internal citation omitted).

college."[137] This could mean that climate activists, women, pro-abortion activists, members of the LGBTQIA+ community, and "numerous other political special interest groups"[138] may be able to secure an electoral college vote with a concerted political effort within a state. With the possibility of capturing at least some electoral college votes now open, this may also increase turnout in presidential elections. The proportional method also includes a built-in limitation for small fringe or extremist political groups seeking to influence the outcome of presidential elections. "In this respect, the smaller the state, the more difficult it will be for a political fringe group to capture an electoral college seat. In a state with 40 electoral votes, for example, a candidate receiving 2.5% of the vote would be entitled to one elector. In a state with 10 electoral votes, that same candidate might need to receive as much as 10% of the vote."[139]

Consequently, because of the massive shift in the way various political actors would likely approach presidential campaigns, there is potential for a significant realignment in American politics.[140] First, it is very likely the elimination of winner-take-all would break the hold the Republican Party has had on the South since the Civil Rights era by shifting more than a few electoral votes to the Democratic Party.[141] According to Hoffman, "[a] move to a proportional system in the South … might give Republican presidential candidates an incentive to court African-American voters more aggressively, while encouraging Democratic candidates to be less protective of their base." This possibility may curb the inclination of both major parties to

[137] *Id*.
[138] *Id*.
[139] *Id*. at 1014.
[140] *Id*. at 1016-18.
[141] *Id*. at 1016.

engage in what has been derisively termed "identity politics,"[142] and engage more fully with the actual substantive issues facing the American people.

Furthermore, there is also the possibility that a new political party could emerge that better represents the interests of marginalized groups than the current iteration of either party, thus weakening both parties in presidential elections.[143] As Hoffman points out, in a close election, such a political party "might be able to elect enough presidential electors to deprive either of the major-party candidates of an electoral majority."[144] While this possibility may throw the final decision as to whom ultimately becomes the nation's chief executive to Congress more frequently, it could also potentially mean that candidates from such a party would be strongly positioned to throw the support of their electors to one of the major-party candidates in exchange for a Cabinet seat or concessions on one or more policy priorities.[145] Again quoting Hoffman: "The concept of deal making between political parties to determine who will become President may seem alien to many Americans. Of course, similar arrangements take place all the time in multiparty parliamentary systems such as those in Europe."[146] This type of dealmaking should work to increase the visibility of the issues that affect marginalized groups. However, as stated above, because these possibilities potentially threaten the entrenched political power of

[142] *See* Frank Newport, *Identity Politics in Context*, GALLUP (Dec. 3, 2021), https://news.gallup.com/opinion/polling-matters/357812/identity-politics-context.aspx ("Identity politics generally refers to people evaluating issues through the lens of their association with a specific group. This in turn means that approaches to issues, politicians and political parties revolve around how those things affect the relevant group or groups. This can include the conviction that one's group is being oppressed or discriminated against either by larger groups or by society as a whole. Identity politics can also create backlashes among those who disagree with what it means for the rest of society.").
[143] *See* Hoffman, *supra* note 1, at 1016 (The elimination of winner-take-all "might give minority voters an incentive to break away from the Democratic party and run their own candidates for President.").
[144] *Id*. at 1016-17.
[145] *Id*. at 1017.
[146] *Id*.

the established political order, this may make it more likely that both major political parties would work to dissuade states from selecting this method. Nevertheless, for the reasons stated above, the proportional method of apportioning presidential electors is both adequate as remedy for the generational harm wrought by the Electoral College, and realistically politically attainable in some states should Congress decide to act to proscribe winner-take-all with its Fifteenth Amendment lawmaking authority.

There is one additional possibility to consider should the winner-take-all method be proscribed by Congress. Due to the differing political realities in each of the several States, it is likely there would be "a patchwork of different plans [to apportion presidential electors utilized] in different states."[147] This may increase the push in some states to circumvent the Electoral College entirely by adopting the National Popular Vote Interstate Compact (NPVC). Neale provides a succinct overview of how the NPVC would operate if adopted:

> "[The NPVC is] an agreement among the states that would effectively achieve direct popular election of the President and Vice President without a constitutional amendment. Each state that joins the NPV agrees to appoint electors pledged to the candidates who won the nationwide popular vote. Election authorities in the member states would count and certify the vote, which would be aggregated and certified as "the nationwide popular vote." Member state legislatures would then appoint the slate of electors pledged to the nationwide popular vote winner. They would do this regardless of who won the popular vote in their state. The compact would come into effect only if its success were assured—that is, only after states controlling a majority of electoral votes (270 or more) had joined the compact. States could withdraw from the compact, but if they did so within six months of a presidential election, the withdrawal would not take effect until after that election."[148]

[147] *Id*. at 1016.
[148] NEALE, *supra* note 108, at 1.

While on the surface, the NPVC appears to be an idea worth considering, Williams makes a cogent and compelling argument about why this particular method for reforming the American presidential election system would be unwise.[149] First, as Williams points out:

> "Whatever might else be said about it, the NPVC is not the majoritarians' dream rule: it does not guarantee that the person who is elected President obtained or has the support of a majority of the American people. Indeed, it would trigger more misfires than the Electoral College. ¶ The NPVC defines the 'national popular vote winner' as the person who receives the most votes in the nation … Thus, under the NPVC, a candidate need only receive a plurality, not a majority, of the national vote in order to become the 'national popular vote winner' and therefore President. In a multicandidate field (as often happens in American presidential elections), the NPVC may produce a President who was elected with 45%, 35%, or even less of the national vote."[150]

Williams continues, "[a] candidate that wins only a plurality of the vote may be opposed, perhaps vehemently, by a majority of the electorate"[151] Additionally, there is currently no legal mechanism for the states that adopt the NPVC to force a nationwide recount in the event of a close election.[152] Moreover, the recount laws in the several States vary wildly, and "[i]n a close national election, there would be no obligation for any state, except those with automatic recount statutes and in which the *statewide* vote was close, to conduct a recount."[153] Also, several states do not have a legal framework for statewide recounts at all.[154]

Second, under the NPVC, the possibility exists that nonsignatory states could obstruct the determination of the "national popular vote winner" in a variety of ways. As Williams points out, "the NPVC seeks to fundamentally alter the method by which the nation selects the President, and it therefore seems naïve to believe that nonsignatory states will simply acquiesce

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[149] *See generally* Williams, *supra* note 5.
[150] *Id*. at 203.
[151] *Id*. at 204.
[152] *Id*. at 204-205.
[153] *Id*. at 233 (emphasis in original).
[154] *Id*.

in this transformative change in our constitutional structure without doing all in their power to prevent its operation."[155] According to Williams, "[t]he most dramatic way [of obstruction] is for the state to eliminate its statewide popular elections for President and have its legislature (or some body other than the state's voters) appoint its Presidential electors."[156] Another manner of obstruction is for nonsignatory states, for partisan purposes, to "stop tabulating their own state's ballots after one of the candidates obtained an unsurpassable lead in the counted ballots in that state … Nothing in federal law or the NPVC prevents such partial tabulations[.]"[157] Not only that, there is currently no mechanism in federal law that requires states to communicate their popular vote totals with one another prior to the meeting of electors in each state; nor can the NPVC command nonsignatory states to do so.[158] This loophole could also be exploited to obstruct the determination of the "national popular vote winner" for partisan purposes.[159] Any one of these outcomes would prevent the NPVC from operating as its proponents intend. There is also the very real possibility that disputes arising from the provisions and constitutional underpinnings of the NPVC would produce "politically paralyzing litigation of the sort witnessed in [Bush v. Gore]."[160]

Furthermore, there is no indication that attempting to implement a national popular vote by circumventing the established mechanisms for amending the Constitution through the NPVC would have any substantive effect on guaranteeing Black enfranchisement in presidential elections. As Williams points out: "No one state or group of states can create a presidential

[155] *Id*. at 214.
[156] *Id*. at 209-210.
[157] *Id*. at 212.
[158] *Id*.
[159] *See Id*.
[160] *Id*. 235.

election system in which every citizen is guaranteed to be subject to a uniform legal regime regarding suffrage, voting procedures, and ballot tabulation. Only a federal constitutional amendment abolishing the Electoral College can provide for such a uniform, federal electoral system."[161] Nor can the NPVC ensure that presidential politics are no longer plagued by racially polarizing campaigns. As Hoffman points out: "If voting continue[s] to be polarized along racial lines, the white majority would *always* be able to choose the President."[162]

[161] *Id*.
[162] Hoffman, *supra* note 1, at 1020.