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## The Origins and Constitutionality of State Unit Voting in the Electoral College

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# The Origins and Constitutionality of State Unit Voting in the Electoral College

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### I. INTRODUCTION

On November 1, 2000, a Joint Resolution was introduced in Congress proposing a constitutional amendment to change the Article II system of electing the President and Vice President<sup>1</sup> by abolishing the Electoral College.<sup>2</sup> Acknowledging the fact that “there have been more congressionally proposed constitutional amendments on this subject than any other,”<sup>3</sup> the sponsoring Senator noted that the issue “could become supremely important in a few days,” because “we have the possibility that the winning candidate for President might not win the popular vote in our country.”<sup>4</sup> One prominent legal scholar has described the mere possibility of such an event as “a constitutional accident waiting to happen.”<sup>5</sup>

Six days later, on election day 2000, the Senator proved to be a prophet (the issue was not fully resolved for over a month).<sup>6</sup> Governor George W. Bush won the presidency with 271 electoral votes, despite Vice President Al Gore tallying more popular votes.<sup>7</sup> The possibility of a split between the electoral vote and the popular vote moved from the province of mere academic speculation to political reality,<sup>8</sup> and the Electoral College debate moved with it to the fore-

1. “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .” U.S. CONST. art. II, § 1, cl. 2.

2. S.J. Res. 56, 106<sup>th</sup> Cong. (2000); 146 CONG. REC. S11494-04 (daily ed. Nov. 1, 2000) (statement of Sen. Durbin). The amendment would replace the apportionment of electors among the states with a direct national popular vote. *Id.*

3. 146 CONG. REC. S11494-04 (daily ed. Nov. 1, 2000) (statement of Sen. Durbin).

4. *Id.*

5. Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, 12 CONST. COMMENT. 143, 143 (1995).

6. SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000*, at 1 (2001) (“For the first time in over a century, the presidential election was not decided in the first week of November.”).

7. Then-Governor Bush won 271 electoral votes, or 51% of the total, but only won 47.88% of the total number of popular votes cast. See NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, OFFICIAL RESULTS OF THE 2000 ELECTION, at <http://www.nara.gov/fedreg/elctcoll/index.html> (last visited Oct. 9, 2001). Vice President Gore won 269 electoral votes, and 48.40% of the total number of popular votes. *Id.* While still not a majority, his popular vote total exceeded that of Then-Governor Bush by over 300,000. See *id.*

8. NEIL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 116 (1981) (“Careful analysis shows that the danger of an electoral college misfire is not just historical but immediate in any close contest.”).

front of public consciousness.<sup>9</sup> From the media to politicians to scholars, no one seemed without an opinion on whether the Electoral College should be totally discarded, or meticulously preserved.<sup>10</sup>

This Note does not attempt to make any judgments on the value of the Electoral College as an institution. Whether as a constitutional procedure the Electoral College ought to be preserved, altered, or eliminated is a question left for other scholars to address. Instead, this Note analyzes legal issues that would confront any attempt to change the Electoral College by lawsuit or legislation.<sup>11</sup> It will do so by comparing the historical underpinnings of the institution to the legal status of the electoral voting systems currently practiced in the states. The analysis will focus on two separate, but ultimately related, areas of inquiry: (1) the inception of the Electoral College as a product of the Constitutional Convention, and (2) how that origin relates to possible challenges to the "winner-take-all" allocation of electoral votes, or what is commonly known as the "unit rule."<sup>12</sup> This Note examines the Electoral College debate in light of two recent developments: the controversial 2000 election and the decision in *Bush v. Gore*,<sup>13</sup> and the Supreme Court's recent jurisprudence on state sovereignty.<sup>14</sup>

The Constitution leaves the decision on how to allocate its electoral votes completely to the discretion of each state.<sup>15</sup> There are a number of different methods from which the states could choose; an overwhelming majority of states employ the unit rule.<sup>16</sup>

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9. See, e.g., Robin Toner, *Election Quandary Prompts Pop Civics Test*, N.Y. TIMES, Nov. 9, 2000, at B8.

10. In the wake of election day, newspapers devoted lead editorials to the Electoral College, politicians declared their stance, and leading scholars rushed to contribute op-ed pieces commenting on the institution. See Akhil Reed Amar, *The Electoral College, Unfair from Day One*, N.Y. TIMES, Nov. 11, 2000, at A19; *The Case for the Electoral College*, N.Y. TIMES, Dec. 19, 2000, at A34; Charles Fried, *How to Make the President Talk to the Local Pol: Why We Need to Keep the Electoral College*, N.Y. TIMES, Nov. 11, 2000, at A19; Dean B. Murphy, *In Upstate Victory Tour, Mrs. Clinton Says Electoral College Should Go*, N.Y. TIMES, Nov. 11, 2000, at B1.

11. See, e.g., Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935 (1996) (arguing that the Article II delegation to the states is not exclusive and does not preclude the enforcement of the Voting Rights Act).

12. The practice has also been known as the "general ticket." ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 48 (1994).

13. 531 U.S. 98 (2000) (per curiam).

14. E.g., *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144 (1992).

15. U.S. CONST. art. II, § 1, cl. 2; see *supra* note 1.

16. Currently forty-eight states and the District of Columbia employ the unit rule. See LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 2000, at 106 (1999). Maine and Nebraska allocate two electors to the statewide popular vote winner (repre-

This method has become unpopular with many commentators and has been the subject of much criticism.<sup>17</sup> Included in the bill of charges against the method are that it amplifies the effect of the imbalanced allocation of electoral votes,<sup>18</sup> and that it fails to “count” the votes within a state that were cast for a losing candidate.<sup>19</sup> It is also controversial because it is the mechanism that enhances the possibility of having an electoral vote winner, and hence a president, who received fewer popular votes than the electoral runner-up.<sup>20</sup>

Although the Electoral College has indeed been the subject of hundreds of proposed constitutional amendments throughout history,<sup>21</sup> many, if not most, commentators believe that the possibility of getting the required two-thirds of the states to ratify any constitutional modification of the process is highly unlikely.<sup>22</sup> That recognition forces critics of the unit rule to operate within the existing constitutional structure, but there are still avenues by which to seek change: altering the status quo through either federal legislation or judicial action.<sup>23</sup> Both a court challenge and a congressional mandate to the states to change their unit voting schemes would most likely be based on the Equal Protection Clause.<sup>24</sup>

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senting the two electoral votes allocated for the states' seats in the U.S. Senate), and the remaining votes are given to the winner in each congressional district. ME. REV. STAT. ANN. tit. 21-A, § 805.2 (West 1994); NEB. REV. STAT. § 32-714 (1994).

17. See generally PEIRCE & LONGLEY, *supra* note 8 (advocating the replacement of the Electoral College system with a direct popular vote); Hoffman, *supra* note 11 (arguing that the Electoral College significantly disadvantages minority voters).

18. Victor Williams & Allison 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).

19. Hoffman, *supra* note 11, at 938.

20. Because the winner of a mere plurality within a state receives all of that state's electoral votes, a candidate can win a majority of the electoral votes by winning enough states, without even a plurality of total popular votes cast—as the events of 2000 have brought into dramatic focus. See Toner, *supra* note 9, at B8. The so-called “wrong winner” possibility strikes critics as undemocratic and countermajoritarian. See PEIRCE & LONGLEY, *supra* note 8, at 8-9. Defenders of the unit rule had dismissed the scenario as unlikely ever to happen, as an acceptable risk at worst, and as a misnomer, asserting that the electoral vote winner is always the “right” one. See JUDITH A. BEST, *THE CHOICE OF THE PEOPLE? DEBATING THE ELECTORAL COLLEGE* 20-28 (1996).

21. See, e.g., 146 CONG. REC. S11494-04 (daily ed. Nov. 1, 2000) (statement of Sen. Durbin).

22. See William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 151 (1996).

23. See Williams & MacDonald, *supra* note 18, at 253; Michael J. O'Sullivan, Note, *Artificial Unit Voting and the Electoral College*, 65 S. CAL. L. REV. 2421, 2440-47 (1992) (advocating both judicial and legislative challenges to the unit rule).

24. U.S. CONST. amend. XIV, § 1. There are two arguments that the unit rule violates the Fourteenth Amendment's guarantee of equal protection, to be discussed in greater detail *infra* at Part IV. One is based on the apportionment of electoral votes among states. See Williams &

Despite compelling arguments employing the established “one person, one vote” jurisprudence<sup>25</sup> and *Bush v. Gore*,<sup>26</sup> the practice of unit voting remains beyond the reach of a court challenge. Furthermore, any contemplated congressional action interfering with the states’ use of the unit rule would be unenforceable, if not unconstitutional.<sup>27</sup> Not only does the Constitution make a clear textual commitment of discretion to the states, but the state role in the Electoral College is itself an essential part of the larger federal system. Therefore, the practice of unit voting may be changed only by a constitutional amendment or by the states individually.

This Note will focus on two themes: first, the Electoral College’s origin and place in the constitutional order, and second, how that order informs both the jurisdictional and substantive aspects of challenging the unit rule. Part II of this Note will outline the constitutional origins of the Electoral College, primarily through a close reading of the original debates of the Constitutional Convention. In addition to providing a fresh, thorough interpretation of the original record on the topic,<sup>28</sup> Part II will establish the Electoral College as a fundamental component of the larger constitutional compromise between competing state interests—a compromise that is still relevant today.

Part III will review the evolution of state practices culminating in the present system. Part III will also briefly discuss how the unit rule operates in national elections today and the alternatives that states have in selecting their electors. This analysis will show that the determination to leave the method of appointing electors to the states was part of the overall federal-state balance achieved in the Constitution and that state discretion has functioned as a facet

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MacDonald, *supra* note 18, at 243-50. The other argument is that the unit rule “disenfranchises” voters who cast their vote for a candidate other than the eventual plurality winner. See LAWRENCE D. LONGLEY & ALAN G. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* 19 (2d ed. 1975); see also O’Sullivan, *supra* note 23, at 2440-47 (advocating both judicial and legislative challenges to the unit rule).

25. See *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

26. 531 U.S. 98 (2000) (per curiam).

27. Recent Supreme Court cases have held that even some legislation that might otherwise be within Congress’s powers under the Fourteenth Amendment cannot be enforced against the states if it violates their sovereignty. See *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001) (holding that the Americans with Disabilities Act (ADA) violated state sovereign immunity); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act (ADEA) violated state sovereign immunity). This point is discussed fully *infra* at Part V.

28. Most of the current legal scholarship on the Electoral College relies on older secondary accounts of the Convention by historians and political scientists. PEIRCE & LONGLEY, *supra* note 8, at 10-30.

of the Electoral College through two centuries and twenty-seven subsequent amendments.

After presenting this interpretation of the Electoral College's origins, this Note shifts to an analysis of challenges to state practices that could potentially be mounted today. Part IV considers the possibility of a court challenge to a state's use of the unit rule. Such a case would most likely be brought under the Fourteenth Amendment's Equal Protection Clause.<sup>29</sup> Part IV will examine the "one person, one vote" line of cases that have challenged electoral practices on equal protection grounds<sup>30</sup> and will consider whether this analysis may be extended to the unit rule. While courts have suggested that it may not,<sup>31</sup> the question of whether the Fourteenth Amendment could prevent states from employing the unit rule has not been directly considered. Next, this Note considers *Bush v. Gore*, which might be interpreted as raising new equal protection implications for the unit rule.<sup>32</sup> However, even that decision does not bring the Electoral College within the reach of the Fourteenth Amendment.

Part V explores the constitutionality of potential congressional legislation attempting to restrict the employment of the unit rule. The key obstacle preventing such action is the Supreme Court's current understanding of state sovereignty. The resurgent federalism in the Court's recent Tenth and Eleventh Amendment decisions presents a newly developed (and as yet unacknowledged)<sup>33</sup> hurdle for legislative challenges to the Electoral College. This brand of federalism accurately reflects the original understanding of the Electoral College. The recent case law, while controversial, definitely forecloses action by the federal government to constrain states' electoral discretion. In concluding, this Note reasserts that

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29. See Williams & MacDonald, *supra* note 18, at 253.

30. See *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Baker v. Carr*, 369 U.S. 186, 207-08 (1962).

31. *Gray*, 372 U.S. at 378 ("The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality . . .").

32. *Bush v. Gore*, 531 U.S. 98, 107 (2000) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.") (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)).

33. This connection between the Electoral College and sovereign immunity has not yet been made, perhaps since the scholarly literature on the Electoral College tends to flourish around an election year, and the full implications of the Supreme Court's federalism jurisprudence have only been established since the Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). See also Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 76 NOTRE DAME L. REV. 1011, 1012 (2000) (criticizing the Court for enforcing its "vision of constitutional federalism" by restricting the ability of Congress to legislate).

the principle of federalism that underlies both the larger constitutional system and the Electoral College that it produced, protects each state's discretion to employ the unit rule in the "Manner as the Legislature thereof may direct"<sup>34</sup> for appointing electors.

## II. THE ORIGIN OF THE FEDERAL ELECTORAL COLLEGE

Central to the role of unit voting in today's federal election system is an understanding of the origin and subsequent evolution of the institution. A simple snapshot of the current near-uniformity belies the complex development of the constitutional system and state electoral practices.<sup>35</sup> Reflecting this truism, it seems that almost no study of the presidential electoral system, for scholarly or popular audiences, begins without some treatment of the history of the Electoral College.<sup>36</sup> Due to the wide variance in opinions among the founders and in systems employed by the states in the gradual shift towards popular elections and expansion of the franchise, history provides a rich source of quotations to support just about any thesis on the Electoral College.<sup>37</sup> A deeper examination is therefore necessary to locate the unit rule properly in the American constitutional system.

This Part will discuss the emergence of the Electoral College system from the Constitutional Convention of 1787. It focuses on the debates themselves, as they depict the framers' struggle over the manner in which to select the President, what alternatives were considered, and the solution that was finally reached.<sup>38</sup> This contextual approach minimizes the danger of relying too heavily on selective citations from the vast contemporary commentary.<sup>39</sup> Further-

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34. U.S. CONST. art. II, § 1.

35. Even the term "Electoral College" is a misnomer because the process is kept completely within the borders of each state, where the electors "meet in their respective States" to cast their votes. *Id.* § 1, cl. 3.

36. See, e.g., HARDAWAY, *supra* note 12, at 69-96; PEIRCE & LONGLEY, *supra* note 8, at 10-30; Josephson & Ross, *supra* note 22, at 151-55; Jack Rakove, *The Accidental Electors*, N.Y. TIMES, Dec. 19, 2000, at A35.

37. HARDAWAY, *supra* note 12, at 85 ("Depending upon the audience . . . many statements were made after the Convention purporting to explain why one provision or another of the Constitution would be for the good of the nation.").

38. *Id.* at 84 (stating that the Electoral College must be understood as a compromise if one is to "appreciate the context in which the constitutional debate over presidential election took place") (citing MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 166 (1913) (noting that "the compromise does not appear on the surface," but that "it was referred to in the course of the debates"))).

39. Given the extensive deliberations on the topic of selecting the President during the Philadelphia Convention, it is possible to select a quotation expressing just about any opinion on the matter, and present it as an example of the "framers' intent." But a source that is even more



more, the majority of scholarship on the Electoral College undertakes no analysis of the Constitutional Convention record itself, but instead relies on secondhand historical summaries.<sup>40</sup> In addition to providing a fresh analysis of the primary sources, this study will show that the story of the Convention, taken as a whole, shows a more complex picture of the motives, controversies, and decisions that operated to create the electoral system than most secondary surveys recognize.<sup>41</sup> This knowledge is central to understanding how the original system, and the Supreme Court's recent interpretations of it, will preclude any legislative or judicial interference with the Electoral College without a constitutional amendment.<sup>42</sup>

This Note has three objectives in undertaking such a historical examination. First, it attempts to dispel some of the myths and generalizations that are commonly used to construct a critique or defense of the Electoral College.<sup>43</sup> The complex operation of the current system requires more than cursory assertions about the framers' intentions or beliefs, or the political theory underlying early state practices.<sup>44</sup> One popular theory is that the framers chose the Electoral College because they did not trust the people.<sup>45</sup> A more common scholarly assessment is that electors were deemed necessary in eighteenth century America because it was unlikely that the people would be sufficiently informed of the character of men of national reputation.<sup>46</sup>

However, these assumptions imply that the Electoral College was settled upon because of concerns with popular election—concerns that seem antiquated, undemocratic, and less relevant to the modern eye.<sup>47</sup> The second objective of this Note is to show that the Electoral College system, a system of allocating electoral votes

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subject to abuse by selective quotation is *The Federalist Papers*. See *THE FEDERALIST* (Clinton Rossiter ed., 1961). As a polemical series intended to garner support for ratification, *The Federalist Papers* are much cited, but less authoritative as to the purpose of the Electoral College. The intent of this Note is to provide a more holistic picture of the complex process behind the final product.

40. See *supra* note 28 and accompanying text.

41. Besides the value such a study has in itself, the way in which the Electoral College operates in the federal structure bears directly on possible avenues for challenging it.

42. See, e.g., *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that the federalism embodied in the structure and history of the Constitution preserves the sovereignty of the states).

43. HARDAWAY, *supra* note 12, at 85.

44. *Id.*

45. *Id.* ("Advocates of direct election have justified their view that the Electoral College should be abolished by claiming that the framers never intended that electors . . . were to be agents of the will of the people.")

46. PEIRCE & LONGLEY, *supra* note 8, at 21.

47. HARDAWAY, *supra* note 12, at 85.

to the states and delegating the manner of selection, was a compromise finally agreed upon as an alternative not to popular election, but to selection of the President by the Congress.<sup>48</sup> Similarly, the simplistic notion that the framers intended the state legislatures to select the electors, and that the adoption of winner-take-all popular voting was a gradual, perhaps grudging, accommodation to democratic tendencies,<sup>49</sup> is undermined by the diverse array of practices employed during the first half-century.<sup>50</sup>

The fact that the Electoral College and the unit rule were ultimately pragmatic developments leads to the third, and most important, point: the compromise and its subsequent implementation are deeply embedded in the federalist framework of American constitutional government.<sup>51</sup> Although the Electoral College was not derived from a grand design of political theory, the political debate that produced it was an essential part of the system produced by the larger constitutional compromise.<sup>52</sup> The result of this compromise is the existence of a state role in electing the President of the United States<sup>53</sup>—an inescapable fact in evaluating possible challenges to the unit rule.

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48. PEIRCE & LONGLEY, *supra* note 8, at 19-20.

49. See EDWARD PESSEN, *JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS* 150-56 (2d ed. 1978) (describing the true advances toward democracy in the early nineteenth century, as well as much of the mythology). The notion that the framers somehow settled on selection by state legislatures as a particular preferred method implies, incorrectly, that the unit rule is out of sync with the historical expansion of democracy over two centuries.

50. See *McPherson v. Blacker*, 146 U.S. 1, 29-33 (1892) (reviewing the wide variety of different systems used by states in presidential elections from 1788 to 1860).

51. Critics contend that federalism is either invalid or no longer relevant as a fundamental reason for preserving the Electoral College. A recent *Harvard Law Review* note argues that federalism is not a sufficient justification. Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526 (2001). The author contends that the intent of the framers was to balance the interests of small states and large states. *Id.* at 2531. The author then undertakes a thorough empirical analysis to argue that the original large state-small state issues present in 1787 are not reflected in the actual operation of the Electoral College today. *Id.* at 2531-40. The author concludes that principles of federalism should not support keeping the Electoral College, since it "bears an imperfect resemblance to the Framers' original design . . ." *Id.* at 2549. But, it is precisely the argument of the present Note that whatever particular issues were motivating the framers in Philadelphia, the Electoral College that resulted from those compromises established a *state role* in electing the President, regardless of whether the specific conflicts between large states and small states are relevant today. The Electoral College, therefore, is a cornerstone of the federalist system enacted in the Constitution.

52. Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 57 (1986) ("Thus if political theory did not inform the creation of the Electoral College, it provided the essential backdrop to the evolution of this new instrument of government.").

53. BEST, *supra* note 20, at 34.

*A. Distribution of Sovereignty: The "Great Compromise"*

On July 16, 1787, after more than a month of intense debate and little progress, the delegates in Philadelphia reached a compromise on representation in the legislature. Seats in the lower house would be allocated according to population, but each state would retain equal representation in the Senate.<sup>54</sup> This watershed event at the convention has been lauded as the "Great Compromise" that rescued the convention from certain dissolution and saved the Union.<sup>55</sup> Celebratory rhetoric aside, historians recognize that the agreement did indeed address the central issue of the convention, that of balancing the competing interests of different states through compromise over representation in the national government.<sup>56</sup> It was a pragmatic arrangement: small states preserved their role as sovereigns through equal representation in the Senate, while the proportional representation in the House gave leverage to the larger states who were further mollified by the exclusive origination of revenue and spending bills in that body.<sup>57</sup>

The rest of the Convention, especially the debate over the method of selecting the executive, cannot be understood apart from this primary question and the compromise that was reached. Debate over national representation exposed the major dividing line of the convention, and the "Great Compromise" shaped the rest of the session.<sup>58</sup> Indeed, the delegates themselves increasingly referred to

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54. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15 (Max Farrand ed., 1966) [hereinafter 2 RECORDS].

55. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA 185-87* (1966). In her well-known popular account, Bowen describes the "Great Compromise" as the turning point of the Convention, after which the delegates felt a solution would be reached on all other questions. *See id.* Before July 16, however, the issue of representation in Congress posed such a threat to an auspicious outcome that Washington wrote Hamilton that the crisis was alarming, and he "almost despaired." *Id.* at 186. "[W]ithout the Great Compromise," writes Bowen, "it is hard to see how the Federal Convention could have proceeded further." *Id.* at 185.

56. *See* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 228* (1985) (stating that representation in the legislature was "the first and crucial question" due to the "connection between the law-making power and sovereignty"); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 57-58* (1996) (describing pragmatic compromise as a "staple theme" of accounts of the convention). Generally, the larger states such as Virginia, Massachusetts, Pennsylvania, and New York favored representation according to population because it would increase their leverage in the legislature, while the smaller states such as New Jersey, New Hampshire, and the Carolinas sought to preserve their equal role under the Articles of Confederation by emphasizing their sovereignty. *See* McDONALD, *supra*, at 228.

57. U.S. CONST. art. I, § 7. This was to protect the larger states, with most of the people and most of the wealth, from being overtaxed by the Senate. *See* McDONALD, *supra* note 56, at 236 (noting that the limitation was an important part of the compromise).

58. BOWEN, *supra* note 55, at 186.

their subsequent agreements as modeled on that "crucial decision."<sup>59</sup> The most significant such concord to follow in the same mold was the Electoral College.<sup>60</sup>

*B. State Roles in Selecting the Executive: The Electoral College Compromise*

The issue of selecting the executive first arose in the Convention on June 1, 1787.<sup>61</sup> The "Virginia Plan," Madison's proposal for a national government,<sup>62</sup> called for a "National Executive" to be chosen by the "National Legislature."<sup>63</sup> The response of the small states was the "New Jersey Plan," which also advocated selection of the executive by the legislature.<sup>64</sup> Therefore, the assumption was that the Congress would choose the "chief magistrate," and all subsequent discussion used this notion as a point of departure.<sup>65</sup>

Distinct differences, however, existed between the two proposals. The Virginia Plan allocated power among states in proportion to size, both in the legislature and in selecting the "National Executive."<sup>66</sup> The New Jersey Plan sought to preserve the equality of states that was the basis of the Articles of Confederation<sup>67</sup> by allocating an equal representation to each state in both houses of Congress.<sup>68</sup> Therefore, the states would have an equal say when the "U. States in Congs." appointed the "federal Executive"—the difference in terminology from the Virginia Plan evincing a different vision for the nation, one where the states were still the primary sov-

59. RAKOVE, *supra* note 56, at 58.

60. Slonim, *supra* note 52, at 57 (describing the Electoral College as solving "a practical problem" that faithfully reflected "the pattern of weighted voting that was an integral part" of the Congress).

61. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 68 (Max Farrand ed., 1966) [hereinafter 1 RECORDS].

62. McDONALD, *supra* note 56, at 204. The Virginia Plan generally reflected the interests of the larger states by allocating legislative seats in both houses, and therefore power, according to population. *Id.* McDonald notes that though Madison is commonly thought of as an "ardent nationalist," he was "always mindful of the interests of his state and was rarely if ever willing to do anything in the national interest which he believed to be inconsonant with the interests of Virginia." *Id.*

63. 1 RECORDS, *supra* note 61, at 20-22.

64. *Id.* at 244.

65. *Id.*

66. *Id.* at 68.

67. See U.S.C.A. ARTICLES OF CONFEDERATION (West 2000). State equality was also the basis of voting in the Constitutional Convention.

68. 1 RECORDS, *supra* note 61, at 244.

ereigns.<sup>69</sup> This underlying tension would manifest itself in the ensuing debates.

Even before the introduction of the New Jersey Plan, however, some delegates introduced a related but different set of concerns regarding selection by Congress. They feared that giving complete control to the legislative branch would compromise the independence of the executive.<sup>70</sup> Many believed that allowing Congress to select the executive would result in his being completely dependent on the legislature.<sup>71</sup> Furthermore, the selection process would inevitably be "the work of intrigue, of cabal, and of faction."<sup>72</sup> These concerns framed the debate on the executive around three factors: mode of election, term of office, and eligibility for reelection.<sup>73</sup> If the executive was to be dependent on Congress, some delegates feared that eligibility for reelection would make him completely beholden to the politics of the Congress, and that a longer, single term was warranted.<sup>74</sup> Others, such as Roger Sherman, favored shorter terms with eligibility for reelection.<sup>75</sup>

These separation of powers concerns prompted alternative proposals for the mode of election. On June 1, James Wilson of Pennsylvania declared that he was "in favor of an appointment by the people" to make the executive and the legislature "as independent as possible of each other."<sup>76</sup> The next day he proposed that "the States be divided into districts," where voters would choose "Electors" who would meet to elect the "Executive magistracy."<sup>77</sup> He deemed this "an election without the intervention of the States."<sup>78</sup> John Dickinson of Delaware countered with a proposal that the executive be made removable "on the request of a majority" of state legislatures, because he opposed "abolishing the State Governments as some gentlemen seemed inclined to do."<sup>79</sup> Both proposals were

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69. Slonim, *supra* note 52, at 37 ("[A]t the very outset of the convention, the large and small states were at loggerheads over the method of selecting an executive no less than they were over the composition of the legislature.").

70. 1 RECORDS, *supra* note 61, at 175.

71. Slonim, *supra* note 52, at 43.

72. 2 RECORDS, *supra* note 54, at 29 (statement of Gouverneur Morris, criticizing the decision to leave election to the legislature).

73. Professor Slonim describes the relationship between these factors as a "tripod, where an imbalance on one side disrupted the balance of the whole." Slonim, *supra* note 52, at 44; *see also* *McPherson v. Blacker*, 146 U.S. 1, 38 (1892).

74. 1 RECORDS, *supra* note 61, at 68-88.

75. SAUL K. PADOVER, *TO SECURE THESE BLESSINGS* 346 (1962).

76. 1 RECORDS, *supra* note 61, at 68.

77. *Id.*

78. *Id.* at 80.

79. *Id.* at 77-87.

rejected,<sup>80</sup> but we can see from the outset that the mode of election was seen as a function of the struggle over relative state power. Wilson's proto-electoral college was primarily a departure from appointment by Congress.

The discontent intimated by Dickinson on behalf of the small states came to the forefront when William Paterson presented the New Jersey Plan on June 15.<sup>81</sup> This crystallized the debate between the large and small states over the nature of sovereignty in the republic. Though the method of selecting the executive was an important part of this conflict, that discussion was largely set aside until after the delegates resolved the issue of representation in the legislature.<sup>82</sup> The composition of the Congress would be outcome-determinative for the executive, as far as the relative power of the states was concerned, because the framers contemplated that the legislature would have some role in executive selection.<sup>83</sup> When the "Great Compromise" incorporated both proportional representation in the House and equal representation in the Senate, the delegates turned back to the issue of the executive, this time with a structural model for a balance between federal and state power.<sup>84</sup>

Nonetheless, the resolution of the legislative structure gave the state delegations an added incentive in debating the election of the executive. While the larger states sought to limit any influence out of proportion to population, the small states wanted to preserve their hard-won equality in the upper house.<sup>85</sup> The small states were concerned that Virginia and Massachusetts would dominate the election process and ignore the concerns of states like Delaware and Connecticut.<sup>86</sup> Beginning July 17, the delegates turned vigorously to the election of the executive, on largely the same terms as when the issue had first been introduced.<sup>87</sup> Appointment by Congress remained the point of reference, but concerns about the independence

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80. *Id.* at 78.

81. *Id.* at 244.

82. PADOVER, *supra* note 75, at 348. The issue was resolved in the "Great Compromise." See *supra* Part II.A. One other method was floated by Elbridge Gerry of Massachusetts, who proposed "that the National Executive should be elected by the Executives of the States" with each governor's vote weighted according to representation in Congress. See 1 RECORDS, *supra* note 61, at 175. Though soundly defeated, this proposal illustrates the wide array of alternatives considered, underscoring the fact that the debate was not simply about whether or not to trust the people to make an informed choice. See *id.*

83. 1 RECORDS, *supra* note 61, at 244.

84. 2 RECORDS, *supra* note 54, at 29.

85. Slonim, *supra* note 52, at 40.

86. PEIRCE & LONGLEY, *supra* note 8, at 16.

87. 2 RECORDS, *supra* note 54, at 29-35.

of the office were now tied to the question of the proper federal balance—animated, as always, by the states' relative interests.<sup>88</sup>

Additionally, a different compromise, concerning slave states, was part of the balance struck on July 16. This agreement mandated that slaves were to count as three-fifths of a free person for representation purposes in the lower house.<sup>89</sup> This gave an advantage to the southern states, which were allocated representatives for chattel slaves with no political rights.<sup>90</sup> The three-fifths plan established a natural alliance between the small states, with power in the Senate, and the slave states, which had disproportionate leverage in the House. Each group would have benefited from keeping the election of the executive in the hands of Congress.<sup>91</sup> Nevertheless, the voting on the different proposals tended to fall along the large state versus small state pattern.<sup>92</sup> The bargain was partially incorporated into the Electoral College by assigning a number of electors equivalent to each state's representation in Congress.<sup>93</sup>

From July 17-26, the issue dominated the convention. The delegates began with the last method agreed upon—appointment by the legislature.<sup>94</sup> Gouverneur Morris of New York preferred that the executive "be elected by the people at large, the freeholders of the Country."<sup>95</sup> Roger Sherman of Connecticut countered that the people at large "will never be sufficiently informed of characters, and besides will never give a majority of votes to one man."<sup>96</sup> This sort of statement is often cited from the debates in support of the proposition that the framers chose the Electoral College because the realities of eighteenth century America prevented the people from being properly informed—considerations largely irrelevant in the

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88. *Id.* at 40-45.

89. Williams & MacDonald, *supra* note 18, at 208-10.

90. *Id.*

91. Slonim, *supra* note 52, at 41.

92. *E.g.*, 2 RECORDS, *supra* note 54, at 404 (showing the results of a vote taken over whether to elect the chief executive by joint ballot in Congress; it failed, five votes to six, with the five largest states voting together).

93. *Id.* at 497.

94. *Id.* at 401.

95. *Id.* at 29. Morris's advocacy of a vote by "the freeholders" shows that even those who wanted election by "the people" had a different idea of the extent of the franchise than we do today. *See id.* Though this sort of difference is what causes people to think of the constitutional system as archaic and irrelevant, it seems to speak more to the fact that the framers who advocated systems were less concerned with who was doing the voting, than they were with how much weight their respective states had in the process. *See* PEIRCE & LONGLEY, *supra* note 8, at 21.

96. 2 RECORDS, *supra* note 54, at 29.

twenty-first century.<sup>97</sup> Continuing, Sherman reveals his true concern that “[t]hey will generally vote for some man in their own State, and the largest State will have the best choice for the appointment.”<sup>98</sup> Others voiced their opinions on both sides, the chief concerns remaining lack of independence and “intrigue [and] cabal,” if the choice lay with the legislature; and if with the people, the “extent of the country” and the specter of “the populous states” dominating the process.<sup>99</sup> Two days later, after the delegates argued again over the issues of length of term and eligibility for reelection, the idea of popular election was raised once again.<sup>100</sup> This time, in light of the seemingly unsolvable problem of independence from the Congress, popular election was gaining support.<sup>101</sup> Oliver Ellsworth of Connecticut floated the first serious compromise proposal: instead of the “National legislature,” the executive would be “chosen by electors appointed by the Legislatures of the States” in a ratio that gave the largest states three electoral votes and the smallest states one.<sup>102</sup> Because it removed the election from Congress, but preserved a degree of state participation, the delegations voted in favor of the measure.<sup>103</sup>

This agreement, however, was short-lived. Delegates were troubled by “the extreme inconveniency [and] the considerable expense, of drawing together men from all the States for the single purpose of electing the Chief Magistrate.”<sup>104</sup> Accordingly, on July 24 the plan was tabled and appointment by the national legislature was reinstated.<sup>105</sup> But the next day, Madison spoke at length on the issue. Noting that “[t]here are objections against every mode that has been, or perhaps can be, proposed,” he discussed the various

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97. See, e.g., Rakove, *supra* note 36 (“Contrary to folk wisdom, the framers did not reject popular election because of a fear that the people might fall prey to a demagogue. They worried instead that in a provincial society, citizens would never be well enough informed to make an effective choice without multiple and expensive rounds of elections.”).

98. 2 RECORDS, *supra* note 54, at 29.

99. *Id.* Sherman, George Mason, and Charles Pinckney favored the legislative appointment, while Wilson and Morris spoke out in support of election by the people. *Id.*

100. *Id.* at 57.

101. *Id.* at 52-54. Paterson of New Jersey and Rufus King of Massachusetts both came out for popular election, and suggested that electors be appointed by the people for that purpose. *Id.* at 55-57. The popular vote advocate, Wilson, was pleased that “the idea was gaining ground, of an election mediately or immediately by the people.” *Id.* at 55-57. Wilson evidently saw the use of electors as a proxy for, not an alternative to, election by the people. *Id.* at 55-57.

102. *Id.* at 57.

103. *Id.* The Convention left the exact ratio for future discussion.

104. *Id.* at 95. At this stage, the Electoral College was conceived as a body that would meet, deliberate, and choose a president—which would be more deserving of the “College” title the state-based institution retains today. *Id.*

105. See *id.* at 95-109.



problems presented by each alternative, and concluded that appointment by the national legislature was just too problematic.<sup>106</sup> Furthermore, election by the state legislatures or executives was also objectionable because the very reason the Convention had been called was the need to exercise some restraint over state governments.<sup>107</sup> Madison said that “[t]he option before us then lay between an appointment by electors chosen by the people and an immediate appointment by the people.”<sup>108</sup> He “thought the former mode free from many of the objections . . . and greatly preferable to an appointment by the national legislature.”<sup>109</sup> Though he personally preferred election by the people at large, he recognized as problematic “the disadvantage this [would] throw on the smaller States.”<sup>110</sup>

Other proposals were suggested as well. Hugh Williamson of North Carolina advanced the idea of an election by the people, where each voter would name three candidates, two of whom must be from states other than his own, thereby mitigating the dominance of the largest states.<sup>111</sup> John Dickinson recommended that each state legislature nominate one candidate, with Congress making the final choice.<sup>112</sup> Oliver Ellsworth proposed that the legislature appoint the executive for the first term, with reelection determined by electors appointed by the states.<sup>113</sup> These suggestions failed to win acceptance, but they demonstrate that the tenor of the Convention was primarily focused on the question of how to make the selection palatable to the spectrum of state interests by preserving a state role in the process. Left with the default proposition of selection by the national legislature, the Convention tentatively agreed on a single seven-year term of service with no eligibility for reelection.<sup>114</sup> The matter was referred to the Committee of Detail for incorporation into the draft constitution.<sup>115</sup> The Committee returned a report on August 6 declaring: “The President of the United

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106. *Id.*

107. *Id.* at 110.

108. *Id.*

109. *Id.* at 112.

110. *Id.* at 114. Madison further noted the disadvantage popular election would give to the southern states, which would lose the benefit of the three-fifths rule, but that as a southerner he was “willing to make the sacrifice.” *Id.*

111. 2 RECORDS, *supra* note 54, at 116.

112. *Id.* at 115-18.

113. *Id.*

114. *Id.* at 128.

115. *Id.* at 120-21, 128.

States [of] America . . . shall be elected by ballot by the Legislature."<sup>116</sup>

Just as the election of the President seemed finally in the hands of Congress, the small state versus large state debate erupted once again, this time over the question of which *house* of the legislature would hold the power.<sup>117</sup> The larger states proposed the report be amended to provide for election by "joint ballot," whereby the entire membership of Congress would cast votes together.<sup>118</sup> This gave the advantage to the more numerous lower house, and hence, to the large states with their greater representation.<sup>119</sup> Connecticut's Sherman vehemently opposed this plan, since it deprived "the *States* represented in the *Senate* of the negative intended them in that house."<sup>120</sup> The smaller states advocated selection by separate ballots, where both houses would have to agree—the bicameral framework of legislative operation that was the basis of the "Great Compromise."<sup>121</sup>

By August 24, the Convention was at loggerheads on the issue of state power. The Convention passed a resolution inserting "joint," over the vehement objections of Connecticut, New Jersey, South Carolina, and Georgia.<sup>122</sup> An attempt to have the joint ballot tallied by state with "each State having one vote" failed.<sup>123</sup> Governor Morris again raised his strong opposition to selection by Congress.<sup>124</sup> Several more proposals for the appointment of electors were defeated.<sup>125</sup> Finally, the delegations agreed to postpone the whole matter—possibly because of a veiled threat by some of the smaller states to back out of the agreement that revenue bills were to originate in the House, a provision the larger states regarded as crucial.<sup>126</sup> The matter was referred to the Committee of Eleven, composed (significantly) of one delegate from each state.<sup>127</sup>

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116. *Id.* at 185. (this statement was the first time the Convention used the title "President").

117. 2 RECORDS, *supra* note 54, at 401.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 402-03.

123. *Id.*

124. *Id.*

125. *See id.* at 410-20.

126. Earlier on August 24, David Brearly of New Jersey asserted that "[t]he argument that the small States should not put their hands into the pockets of the large ones did not apply" in the case of selecting the President. *Id.* at 402-03. In other words, it concerned all states and it was thus important for the Senate to have a measure of control. *See* Slonim, *supra* note 52, at 50. For the suggestion that this statement represented a "bit of backstage maneuvering," see McDONALD, *supra* note 56, at 250 (contending that New Jersey, Delaware, and Maryland strate-

When the Committee returned on September 4, it presented the following plan: the President would hold office for four years (with no mention of ineligibility for subsequent terms), along with a Vice President.<sup>128</sup> To choose these officers, it stated that “[e]ach State shall appoint in such manner as its legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives, to which the State may be entitled in the Legislature.”<sup>129</sup> The report went on to describe how the electors would meet in their states (not as a singular “college,” though this misnomer survives), and cast votes for two persons, one of whom had to be from a different state.<sup>130</sup> It further provided for a contingency election by the Senate, in the event that the electors did not reach a majority.<sup>131</sup>

The delegates discussed this plan over the next three days.<sup>132</sup> Gouverneur Morris, a member of the Committee, explained that it combined the most advantages of the various plans, with the fewest of the drawbacks.<sup>133</sup> As an alternative to legislative election, the system made the executive independent of the legislature, reduced the danger of “intrigue [and] faction” by keeping the electors within the states, allowed for reelection, and satisfied those who wanted an election by the people by allowing states to choose that method.<sup>134</sup> Those popular votes, however, would be weighted by state sovereignty, due to the two electors granted to each state for its Senate seats.<sup>135</sup> The plan seemed to impress most of the dele-

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gically withdrew their support for the Originating Clause, which they returned in exchange for the other states’ support of the Electoral College). See *supra* Part II.A (stating that the agreement to give the House of Representatives control over spending bills was a fundamental part of the “Great Compromise”).

127. 2 RECORDS, *supra* note 54, at 425.

128. *Id.* at 497 (the first time the Vice Presidency was mentioned in the Convention).

129. *Id.*

130. *Id.* The plan left the conduct of those state electoral meetings for each state to decide, subject only to the Constitution’s requirement that they meet on the day appointed by Congress. U.S. CONST. art. II, § 1, cl. 3.

131. 2 RECORDS, *supra* note 54, at 497. Though it is not in the record of the debates, McDonald gives credit for the Committee’s idea to Pierce Butler of South Carolina, based on a 1788 letter. See MCDONALD, *supra* note 56, at 251 (citing Letter from Pierce Butler to Weedon Butler, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1966)).

132. 2 RECORDS, *supra* note 54, at 497-98.

133. *Id.*

134. *Id.*

135. *Id.* at 500. Peirce and Longley argue that the compromise giving this leverage to the small states “was *not* considered crucial at the time,” because it was not mentioned in the floor debates following the Committee reports, nor was it an issue in the state ratifying conventions. PEIRCE & LONGLEY, *supra* note 8, at 17. They contend that the major concession to the small states was the contingency plan that gave each state equal voting power. See *id.* The contingency

gates as a workable solution. On September 5, seven attempts to alter it were all defeated, most by margins of nine votes to two.<sup>136</sup>

Interestingly, no mention was made at Philadelphia of the fact that the plan left the method of choosing electors entirely to the discretion of the states—in fact, it clearly committed the decision to the state legislatures.<sup>137</sup> As is explained in Part III, states were free to appoint electors in the legislature, to create electoral districts for the people to vote, to run a statewide “general ticket” (the unit rule), or to employ any other device.<sup>138</sup> Some modern commentators assume that this means the Convention assigned this responsibility to the states in order to avoid a difficult decision.<sup>139</sup> This assumption, however, takes for granted the idea that the delegates would have even thought such uniformity to be of great importance.<sup>140</sup> As this discussion has shown, the central issue of the Convention, and the one that drove the debate over electing the President, was the extent of the role the states would have, not the identity of the voters.<sup>141</sup> Once the formal power structure of how many electoral votes each state would cast was decided, the lesser issue of choosing a method was left to the discretion of the states. The plan implicitly recognized that the states would be exercising a degree of sovereignty by choosing their electors as they saw fit.

There had been several different suggestions for electors already proposed. Wilson’s proposal made on June 2 called for dividing the states into districts; Oliver Ellsworth’s plan called for the

plan was the subject of subsequent debate because the composition of the respective houses of Congress made the selection of one or the other an irreconcilable issue in the central large state-small state dispute. *See id.* When compromise was reached on the contingency plan, it likewise subsided as a hot-button issue. *See RAKOVE, supra* note 56, at 265 (“Sherman’s amendment passed with hardly a word of debate.”). The fact that on the apportionment of electors the Committee was able to find middle ground that was generally unobjectionable should not be taken to mean that it can be dismissed as unimportant.

136. 2 RECORDS, *supra* note 54, at 511-21.

137. *Id.*

138. *See infra* Part III.

139. *See* PEIRCE & LONGLEY, *supra* note 8, at 24 (“This knotty problem, which would cause endless debates and maneuvers in the state legislatures in the ensuing years, was completely ignored.”).

140. “No question was raised . . . that a single method, applicable without exception, must be pursued.” *McPherson v. Blacker*, 146 U.S. 1, 29 (1892). It was not for another half century that commentators began to opine in favor of electoral uniformity among the states. *See* 3 JUSTICE JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1466 (1833), reprinted in 3 THE FOUNDERS’ CONSTITUTION 557 (Philip B. Kurland & Ralph Lerner eds., 1987).

141. *See* LUCIUS WILMERDING, JR., THE ELECTORAL COLLEGE, at xi (1958) (stating that the reason the Electoral College provided such deference to the respective states was due to the wide variance in the suffrage laws in the states—since every state had a different conception of who would vote, the important issue for the Convention was how to distribute power among those states).

state legislatures to decide.<sup>142</sup> Elbridge Gerry continued to insist that state governors choose according to a weighted vote, and Morris defended the Committee report by stating that it would please those who wanted "an immediate choice by the people."<sup>143</sup> It is reasonable to suggest that the Committee of Eleven delegated the choice to the states not out of despair, but because (1) it recognized that, with the diversity of opinions already known, the different states might prefer, and should not be prevented from, employing different practices; and (2) with the critical issue of how much power each state would have in the election already decided, it may have been deemed proper to leave the exercise of that power to the states. After the report was presented on September 4, there is no record in the debates of any discussion on the issue.<sup>144</sup> The debate remained centered on issues of relative state power.

The last facet of the system that caused major concern was the contingency procedure.<sup>145</sup> With the electoral system already accounting for the small states in the allocation of electoral votes, the large states were unhappy with the Senate alone having the final say if there was no majority.<sup>146</sup> George Mason voiced his "strong

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142. 1 RECORDS, *supra* note 61, at 80.

143. *Id.*; 2 RECORDS, *supra* note 54, at 57, 109, 500.

144. See PEIRCE & LONGLEY, *supra* note 8, at 24. It is possible, once again, to extract opinions from letters written sometimes decades later, and make a claim about "the framers' intent" regarding the procedure the states would employ. See, e.g., Letter from James Madison to George Hay (Aug. 23, 1823), reprinted in 3 THE FOUNDERS' CONSTITUTION 556-57 (Philip B. Kurland & Ralph Lerner eds., 1987) ("The district mode was mostly, if not exclusively in view when the Constitution was framed and adopted"). But in the definitive record (based on Madison's own notes) of what actually took place in the convention—the diversity of opinions before the plan, and the complete lack of debate thereafter—indicates that no one method was universally favored when the compromise was crafted. 2 RECORDS, *supra* note 54, at 511-21.

145. The procedure for contingency elections is also a popular subject for contemporary discussion on what the "framers' intent" was, presumably to undermine the relevance of the Electoral College by showing that the framers believed the process would normally result in a contingency election of the legislature. See, e.g., LONGLEY & PEIRCE, *supra* note 16, at 21-22. Like any attempt to divine the framers' alleged intent, there is evidence that some of the delegates believed that would indeed be the case: for example, George Mason's oft-quoted statement that "nineteen times in twenty" the President would be chosen by the legislature. 2 RECORDS, *supra* note 54, at 501. But there is countervailing evidence that many delegates thought otherwise, particularly because the pre-Twelfth Amendment requirement that the elector cast two votes for President, one of which must be for someone from another state, would serve to increase the chance of a national majority for one candidate. *Id.* at 525. Abraham Baldwin added that "the increasing intercourse among the people of the States" would make the contingency "less [and] less likely." *Id.* at 506. Since the convention spent over a month trying to devise a better alternative than selection by the legislature, as this analysis has shown, it would seem unlikely that they would settle for a system that would effect Mason's dire prediction.

146. *Id.* at 520.

objection.”<sup>147</sup> James Wilson discussed the balance between the House and Senate, arguing that since the Senate already had authority over appointments of officials and judges, treaties, and impeachments, giving that body exclusive influence in a contingency election would be too dangerous.<sup>148</sup> The last major compromise of the Constitutional Convention occurred on September 6, when the delegations agreed that if no candidate received a majority of electoral votes “[t]he House of Representatives shall immediately choose by ballot one of them for President, the Representation from each State having one vote.”<sup>149</sup> This forms the basis of the current Electoral College.

Once again, the Convention balanced the interests of the large states by having the House decide, with an equality principle to mollify the fears of the small states. This compromise directly replicated the logic of the earlier, and more famous, decision to allocate representation in Congress according to a federal principle.<sup>150</sup> In its creation of the Electoral College, the Convention produced a compromise that was essentially a pragmatic response to competing interests, but one that was nonetheless a manifestation of the larger conflict between national power and state sovereignty that the convention was called to address.<sup>151</sup> The result may not have been a grand product of political theory, but it was certainly the product of an intricate web of interests and many complicated decisions. As a package deal, it was ratified and operated to elect the federal executive of the United States.

Even historians who acknowledge that the Electoral College was more than a scheme to keep the election out of the hands of the people or the Congress, and that it was fundamentally part of this system of competing interests, downplay the central importance of that fact. Jack Rakove writes that since “the political logic of the Electoral College almost exactly replicated the debate over representation,” it completed “the framework of compromises and bargains the delegates now knew they were constructing.”<sup>152</sup> He argues, however, that this underpinning is less relevant today be-

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147. *Id.* The Virginia delegate objected to the dilution of his state's power that would occur if the contingency vote took place in the Senate.

148. *Id.* at 500, 522.

149. *Id.* at 529 (later ratified as part of U.S. CONST. art. II, § 1, cl. 3).

150. *Id.* at 20; see also Joyce Appelby, *Presidents, Congress, and Courts: Partisan Passions in Motion*, 88 J. AM. HIST. 408 (2001) (“In crafting the mechanism for selecting a president the convention delegates plunged into another one of their balancing acts.”).

151. 2 RECORDS, *supra* note 54, at 533.

152. RAKOVE, *supra* note 56, at 89.

cause it was based on the "dubious expectation that the division between small and large states would persist beyond 1787."<sup>153</sup> Whether or not the particular issues that divided the small states and large states, and motivated the delegations, did indeed fade,<sup>154</sup> the actual interests that the delegates held to be at stake are not what is most important about the story of compromise and balance told by the Convention records.<sup>155</sup> The large state versus small state conflict only dominated the Convention because the states were being asked to give up some of their hitherto complete sovereignty.<sup>156</sup> The crucial point is that the debates embodied the larger, and still quite relevant, issue of what role the states were going to play in the new federal system and its presidency. The compromise reflected decisions about how to allocate political power between those states and the national government. The result ensured that their different interests *as states* could be asserted and considered.

As the delegates were signing the proposed Constitution, Benjamin Franklin made his legendary comment that the engraving on Convention President George Washington's chair portrayed "a rising and not a setting sun."<sup>157</sup> His optimism was informed not by any idea that they had come up with a perfect system of republican government, but because, as the doctor stated: "I expect no better and because I am not sure that it is not the best."<sup>158</sup> In other words, it was a plan that reflected a vast network of compromises and one that would actually work. When the citizens, through their respective states, ratified the plan it included this unique method of electing the chief executive.

### *C. Ratification and Contemporary Opinions of the Electoral College*

The foregoing analysis focused on recounting the story of the actual debates in the Constitutional Convention, as that is the best

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153. *Id.* at 268.

154. While party politics soon gained primacy, sectional issues certainly became paramount in presidential politics in the nineteenth century, and the urban-suburban-rural factor might be most important today, it can be argued that by structurally preserving the states in their sovereign capacities, there are still important issues derived from the competition between states as corporate entities. See BEST, *supra* note 20, at 54; ALEXANDER M. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 7 (1971).

155. HARDAWAY, *supra* note 12, at 84.

156. *Id.* at 83 ("The states were not paper entities dreamed up by some bureaucrat on a flow chart. Upon winning independence from Great Britain, the states were sovereign, functioning governments, each with its own history and culture.")

157. BOWEN, *supra* note 55, at 256.

158. *Id.* at 263.

way properly to understand the complex set of issues that informed the decisions made in Philadelphia.<sup>159</sup> A fresh reading is more informative than relying on another abbreviated secondary account,<sup>160</sup> or selecting isolated quotes from the delegates' correspondence or from *The Federalist* to ascertain the "framers' intent." A fresh look imparts a more complete sense of the context in which the Electoral College was devised.<sup>161</sup> Furthermore, the selective use of quotations from contemporary opinion, or from the debates themselves, obscures the fact that one could find another piece of evidence from a different delegate directly controverting the proposition.

For example, different framers stated views at different instances about what methods they expected the state legislatures to employ in choosing electors for the state. James Madison wrote in *The Federalist* that the state legislatures "will, perhaps, in most cases, of themselves determine" the election of the President.<sup>162</sup> Thirty-six years later, however, he recalled that "the district mode was mostly, if not exclusively in view when the Constitution was framed and adopted."<sup>163</sup> Alexander Hamilton, writing under the same "Publius" *nom de plume* as Madison, repeatedly expressed his belief that the President would be elected "by electors chosen for that purpose by the people."<sup>164</sup> With three different opinions posited by two of the most influential framers on the same subject, it is

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159. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 152, 162-68 (Jack N. Rakove ed., 1990) (noting that while using the "legislative history" of the Constitution is problematic, Madison's convention notes are largely reliable).

160. Though many books and articles about the Electoral College contain brief discussions of the origins of the institution, they rarely examine the historical record itself, relying almost exclusively on previous summaries. *E.g.*, PEIRCE & LONGLEY, *supra* note 8, at 10-30 (providing a description of the record that is often cited by others).

161. HARDAWAY, *supra* note 12, at 83 ("Any notion that the agreements, compromises, and principles that provided the foundation for the creation of our system of federalism are irrelevant . . . comes at least 200 years late.").

162. THE FEDERALIST NO. 45, at 259 (James Madison) (Clinton Rossiter ed., 1961). Madison was not in favor of the state legislatures' selecting the electors themselves, instead preferring a vote by the people; he may have been less than happy with the final arrangement of the Electoral College produced by the Convention. See MCDONALD, *supra* note 56, at 252-53. Nonetheless, in *The Federalist No. 39*, he was defending the Constitution for protecting the "residual and inviolable sovereignty" of state governments, and he generally supported the balance struck by the "partly federal, partly national" Constitution. See THE FEDERALIST NO. 39, at 213-14 (James Madison) (Clinton Rossiter ed., 1961).

163. Letter from James Madison to George Hay (Aug. 23, 1823), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 556-57 (Philip B. Kurkland & Ralph Lerner eds., 1987).

164. THE FEDERALIST NO. 60, at 336 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 77, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing as one of the limits on executive power the fact that he would be elected "once in four years by persons immediately chosen by the people for that purpose").



more productive and credible to rely on the actual record itself. Perhaps all that can truly be agreed upon is that the Convention records show no consensus on this matter, and hence, it was left to the individual states to decide for themselves. The record also shows that as part of the overall bargain struck by the Convention, the Electoral College engendered little controversy in the ratification debates.<sup>165</sup> When Hamilton gushed about "The Mode of Electing the President," he stated that he would "hesitate not to affirm that if the manner of it be not perfect, it is at least excellent," because "[i]t unites in an eminent degree all the advantages" of the different systems.<sup>166</sup> Hamilton may have been interested mostly in selling the Constitution to the New Yorkers who could ratify it. He was correct in asserting that it was "almost the only part of the system, of any consequence, which has escaped without severe censure or which has received the slightest mark of approbation from its opponents."<sup>167</sup> In fact, only a handful of antifederalist writers made any complaint about the Electoral College at all.<sup>168</sup>

Some would conjecture that this lack of comment perhaps indicates some uniform assumption by the founders on the way it would operate, or the notion that the device was simply an after-thought.<sup>169</sup> In light of the long struggle over the issue that took place in the Convention, this Note suggests that the method received little attention in the ratification controversies because it appeared to combine, in an unobjectionable manner, a balance of competing interests with a degree of discretion reserved to each of the states. It may indeed have been understood as a fundamental part of the larger and more hotly contested issue of the role of states as sovereigns in the federal union.

### III. THE DEVELOPMENT OF THE UNIT RULE

Continuing the historical analysis, Part III will briefly sketch the early electoral practices of the states from a very diverse array of practices in the earliest elections toward the eventual widespread application of the unit rule. The Electoral College also weathered its first Supreme Court challenge in the nineteenth cen-

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165. JACKSON TURNER MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788*, at 140 (1961).

166. *THE FEDERALIST* NO. 68, at 379-80 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

167. *Id.*

168. MAIN, *supra* note 165, at 140.

169. *Id.*

ture.<sup>170</sup> A brief discussion of the unit rule as it operates today follows, along with some of the alternatives that some opponents of unit voting would like state legislatures to adopt. Viewing the current status of the Electoral College in light of its intellectual origins and practical development provides a more accurate understanding of its integral place in the constitutional framework.<sup>171</sup> Because the state role in electing the President emerged from an intricate, compromise and developed over two centuries alongside the larger constitutional balance, it remains an essential component of the federalist underpinnings of the system.

### *A. Early State Practices and the Emergence of the Unit Rule*

The Constitutional Convention left the actual choice of which method to use in selecting electors to the complete discretion of the state legislatures.<sup>172</sup> The fact that the framers contemplated no uniform method is underscored by the incredible variety of practices employed by the various states in the early years of the republic.<sup>173</sup> When the Supreme Court first entertained a challenge to a state's choice of method in 1892, the Court provided a short but useful summary of this history in order to support its holding that the selection was completely within the plenary power of the state.<sup>174</sup>

In the first presidential election, five states chose their electors in the state legislature.<sup>175</sup> Four states chose by a popular vote, but each by a different method: one by a straight general ticket ("winner-take-all"); one by dividing the state into special districts with one elector each; one by nominating one elector in each congressional district from which the legislature would make the final selection (plus two at-large electors); and one by splitting the state into two units, each with a certain number of electors.<sup>176</sup> The remaining two states lost their electoral votes when their respective state legislatures could not agree on a method.<sup>177</sup>

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170. *McPherson v. Blacker*, 146 U.S. 1 (1892).

171. *HARDAWAY*, *supra* note 12, at 83-85.

172. U.S. CONST. art. II, § 1, cl. 2.

173. *McPherson*, 146 U.S. at 29 ("No question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the constitution.")

174. *Id.* at 29-33.

175. *Id.* at 29.

176. *Id.* at 29-30.

177. *Id.* at 30. The states that lost their electoral vote were New Hampshire and New York. Only eleven states took part in the election, since North Carolina and Rhode Island had not yet ratified the Constitution. *Id.*

The second election in 1792 saw a shift towards direct legislative appointment, with nine states selecting their electors without any popular vote.<sup>178</sup> Three states used the unit system, and two states selected electors by district (using two different districting methods).<sup>179</sup> One state used a mixed method of legislators meeting by district and choosing three electors in each district.<sup>180</sup> In the third election, seven states chose electors in the legislature, two by the unit rule, four by popular vote in districts (again, with four different districting plans), and three with mixed systems.<sup>181</sup>

These first three examples should be sufficient to spare the reader a recitation of the breakdown in every election until the popular vote and unit rule became universal. In the early years, the states employed a variety of different systems, and the spectrum of methods was much more diverse than a simple "popular vote versus legislature" dichotomy.<sup>182</sup> Between the various district plans, and the mixed popular and legislative methods, there were almost as many different methods as there were states in some elections.<sup>183</sup> The states certainly took advantage of the discretion granted to them under Article II in determining their method of choice.<sup>184</sup>

The trend, however, was toward adoption of the "general ticket," or unit rule.<sup>185</sup> Thomas Jefferson, perturbed at having lost the 1796 election partly because Virginia had split its electoral votes, convinced the state legislature to adopt the unit rule.<sup>186</sup> His victory in 1800 is evidence that aggregating a state's electoral votes as a unit can operate to the state's political advantage. By marshaling all of the state's electoral votes behind Jefferson, Virginia forced a tie in the Electoral College. By 1824, half of the states used the general ticket, and only one-fourth still appointed electors in their respective legislatures.<sup>187</sup> Aside from the political pragmatism be-

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178. See PEIRCE & LONGLEY, *supra* note 8, at 247. This trend, which occurred *after* the Bill of Rights was passed, belies the notion that the framers intended to keep the vote from the people, but were thwarted by the demand for democracy.

179. See *McPherson*, 146 U.S. at 30.

180. See *id.*

181. PEIRCE & LONGLEY, *supra* note 8, at 247. Tennessee, having just entered the Union, divided the state into three districts, and the legislature appointed specific persons in each of the districts to meet and choose electors. See *McPherson*, 146 U.S. at 32.

182. *Id.* at 29.

183. *Id.* at 30-33.

184. See *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622, 628 (E.D. Va. 1968) (noting that Virginia had historically used its discretion to select the method that gave it the best political advantage).

185. *McPherson*, 146 U.S. at 32.

186. Josephson & Ross, *supra* note 22, at 154.

187. PEIRCE & LONGLEY, *supra* note 8, at 247.

hind the states' consolidation of electoral votes,<sup>188</sup> the move toward the popular vote coincided with an expansion of suffrage and general democratic sentiment in the early nineteenth century.<sup>189</sup> By 1832, all states except one determined their electoral votes as a unit by a popular election on a general ticket.<sup>190</sup>

The states' respective Electoral College practices have evolved over time under the basic framework of the federal balance crafted by the Convention and the direct grant of discretion under Article II. This Note concludes that those principles continue to guarantee that liberty to the states today.<sup>191</sup> However, there have been several developments that have altered the overall constitutional balance in the intervening two centuries.<sup>192</sup> The first of these developments, and most directly pertinent to the Electoral College, is the Twelfth Amendment.<sup>193</sup> The Twelfth Amendment changed the balloting system of the Electoral College by requiring electors to cast separate ballots for President and Vice President.<sup>194</sup> The Amendment preserved, however, the essential attributes of the Article II Electoral College by giving discretion to the states and allocating electors by congressional seats.<sup>195</sup>

The Reconstruction Amendments truly altered the original federal-state balance.<sup>196</sup> Because their substantive reach has been employed to restrict greatly the original powers of the states in order to expand protections of civil liberties, this Note will focus in great detail on the impact of the Fourteenth Amendment on the

188. The political effect of having all the state's electors could be as easily accomplished by having the legislature select a general ticket as it would by a popular vote with the unit rule.

189. PESSEN, *supra* note 49, at 155; ROBERT V. REMINI, *THE REVOLUTIONARY AGE OF ANDREW JACKSON* 15 (1976).

190. *McPherson*, 146 U.S. at 32. South Carolina continued selecting electors in the legislature until 1860. *Id.* In 1876, Colorado chose its electors in the territorial legislature, on the eve of its admission to statehood. *Id.* at 33.

191. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.") (citing U.S. CONST. art. II, § 1); see also discussion *infra* Part IV.D.

192. See *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (noting that the Fourteenth Amendment, for example, altered the original federal-state balance such that it can be held to affect the interpretation of the powers granted in the original articles of the Constitution).

193. U.S. CONST. amend. XII.

194. *Id.* The amendment was passed in response to the 1800 election, in which Thomas Jefferson tied with running mate Aaron Burr for electoral votes, since the original Article II provided that each elector would cast two votes, and the second-highest vote-getter would become Vice-President. The 1800 election was thrown into the House of Representatives, where the Federalists almost prevented Jefferson's election. LONGLEY & PEIRCE, *supra* note 16, at 26-27.

195. U.S. CONST. art. II, § 1.

196. *Seminole Tribe*, 517 U.S. at 59.

Electoral College.<sup>197</sup> The Seventeenth Amendment requires Senators to be elected by popular vote rather than by state legislatures.<sup>198</sup> It also changes the original federal structure, though its implications for the Electoral College are more by way of analogy.<sup>199</sup>

As the Electoral College operates today, all fifty states plus the District of Columbia select electors by popular vote, and forty-eight states plus the District of Columbia use the unit rule.<sup>200</sup> There are many advocates both for and against the current system from a normative perspective.<sup>201</sup> Some favor a constitutional amendment to abolish the Electoral College in favor of a direct national election.<sup>202</sup> Other critics, perhaps recognizing the practical hurdles to amending the Constitution, favor reform within the constitutional system, often suggesting replacement of the unit rule with some alternative method of selecting the electors in the states. Such proposals include the "proportional method" (in which electoral votes are tied directly to the percentage of the popular vote each candidate receives in the state) or the "congressional district method" (like that

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197. See *infra* Parts IV-V. The primary component of the Fourteenth Amendment invoked against the Electoral College is the Equal Protection Clause. U.S. CONST. amend. XIV, § 1.

198. *Id.* amend. XVII, § 1 ("The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

199. Since the Constitution has mandated direct election of Senators, it could be argued that the Electoral College should similarly be interpreted to prohibit selection by the state legislatures. *Id.* But aside from the fact that the Seventeenth Amendment did not seek to alter presidential election systems, and that the legislatures' powers are still held to be "plenary," the fact that "[h]istory has now favored the voter" makes the issue moot. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*). It is useful to note, though, while comparing the Senate to the Electoral College, that as long as the Senate continues to provide equal representation to the states, the Electoral College's system of combining the principles of proportional representation and state equality derived from the Convention remains relevant. And the equal representation in the Senate will never change—it is the one paramount structure without which the Union could not have been formed. U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

200. See *id.* amend. XXIII (authorizing the District of Columbia to select electors "in such manner as the Congress may direct"). Maine and Nebraska employ a type of "district system," where each congressional district within the state chooses one elector, and the remaining two (from the states' representation in the Senate) are allotted to the overall state winner. ME. REV. STAT. ANN. tit. 21-A, § 805.2 (West 1994); NEB. REV. STAT. § 32-714 (1994). Note that this is different from most of the "district" plans that were employed by states in the first elections. Those plans frequently called for the drawing of special districts just for the purpose of selecting electors for President. See *McPherson v. Blacker*, 146 U.S. 1, 29-32 (1892). Therefore, the analogy drawn by reformers in favor of the Maine-Nebraska system to the original practices is inapposite. See, e.g., Hoffman, *supra* note 11, at 1011 ("One of the principal virtues of the congressional-district system is that it is firmly rooted in historical precedent.").

201. For the leading political science arguments in favor of the Electoral College, see generally BEST, *supra* note 20. For a prominent critique, see generally PEIRCE & LONGLEY, *supra* note 8.

202. See, e.g., PEIRCE & LONGLEY, *supra* note 8, at 235-36.

of Maine and Nebraska).<sup>203</sup> These are the reform proposals that those who might mount a constitutional challenge to the unit rule in court or Congress would seek to require states to adopt.<sup>204</sup>

### *B. Constitutional Protection of State Discretion*

The Supreme Court issued its first ruling on the states' power to choose the method of selecting electors in the 1892 case *McPherson v. Blacker*.<sup>205</sup> This landmark case established that, under the Constitution, the states have absolute plenary power to choose the manner of elector appointment.<sup>206</sup> Ironically, it was a party who was in favor of the unit rule, and was challenging Michigan's decision to abandon the unit rule for a district system, who brought the case.<sup>207</sup> Chief Justice Fuller held that the Constitution "leaves it to the legislature exclusively to define the method" of effecting the state's power.<sup>208</sup> After reviewing the different methods employed by the states before the unit rule became predominant,<sup>209</sup> the Court determined that Article II conceded "plenary power" in the matter, so that a state could even replace popular election with legislative appointment if it so chose.<sup>210</sup> Even though popular election had become universal in America, the question was "not one of policy, but of power."<sup>211</sup>

Having firmly established that the states' discretion in the Electoral College was derived from the federal structure and text of the original Constitution, the Court turned to consider whether the Reconstruction Amendments had altered that federal-state balance so as to inhibit the states' unfettered power.<sup>212</sup> The Court held that when a state chooses electors through a popular election, the Fourteenth Amendment applies to the right to vote in that election.<sup>213</sup> As for the structural matters of federal-state relations, Chief Justice

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203. See, e.g., Hoffman, *supra* note 11, at 1011-15.

204. See *infra* Parts IV-V. The states are free, of course, to adopt any of these reform proposals on their own.

205. *McPherson*, 146 U.S. 1 (1892).

206. *Id.* at 25.

207. *Id.* at 24. This underscores the fact that the issues examined in this Note are not so much about the unit rule *per se*, but about the underlying structural issues providing for the states' discretion.

208. *Id.* at 27.

209. *Id.* at 29-33.

210. *Id.* at 35.

211. *Id.* at 36.

212. *Id.* at 37.

213. *Id.* at 39.

Fuller held that the amendment was not designed “to radically change the whole theory,” and that equal protection only applied to prevent a person or class of persons from being singled out for discrimination.<sup>214</sup> The Court’s interpretation of the Fourteenth Amendment has undergone tremendous evolution since Chief Justice Fuller’s day,<sup>215</sup> and the modern relevance of this aspect of *McPherson* must be reevaluated.<sup>216</sup> The importance of *McPherson* is that it was the first, and remains the only, definitive Supreme Court pronouncement on the Electoral College’s delegation to the states of the power to choose electors “in such Manner as the legislature thereof may direct.”<sup>217</sup>

In fact, new life has been breathed into *McPherson* because the case “loomed so large in the U.S. Supreme Court’s treatment of Election 2000.”<sup>218</sup> In addition to being cited in *Bush v. Gore*,<sup>219</sup> the case was examined in the prior opinion of *Bush v. Palm Beach County Canvassing Board*.<sup>220</sup> The Court in that opinion affirmed that in selecting electors, a state acts by “a direct grant of authority” from the Constitution.<sup>221</sup> Citing *McPherson*, the Court held that the language of Article II made an unambiguous and complete commitment of the power to the state legislatures.<sup>222</sup> Though the Court was primarily considering the issue of separation of powers within a state, rather than the structural federalism that is the focus of this Note, the recitation of the *McPherson* rationale in the 2000 election cases<sup>223</sup> has solidified the central premise that a state is free to employ the unit rule, or any other method, in exercising its discretion granted by the Constitution.

#### IV. CHALLENGING THE UNIT RULE IN THE COURTS

Having explored the origin of the Electoral College in depth, and its place in the constitutional order, this Note will now turn to

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214. *Id.* In other words, the Court held that equal protection did not implicate any of the options available to the state for choosing electors. *Id.*

215. In the area of voting rights, the Fourteenth Amendment has been expanded to guarantee the right to “one person, one vote.” *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); see *infra* Part IV.B.

216. See *infra* Part IV.

217. U.S. CONST. art. II, § 1, cl. 2.

218. ISSACHAROFF, *supra* note 6, at 5.

219. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

220. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam).

221. *Id.*

222. *Id.* (citing *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)).

223. ISSACHAROFF, *supra* note 6, at 5.

an analysis of potential challenges to the unit voting system practiced by most states. There are four possible avenues for change: constitutional amendment, unilateral action by state legislatures, lawsuit, or federal legislation.<sup>224</sup> Since the first two options are deemed unlikely to occur<sup>225</sup> (and are more the province of a normative evaluation), this Note will analyze the latter two options. This Part will examine the issues of a challenge to the unit rule in court, and Part V will consider a challenge in Congress.

This Part examines potential constitutional litigation by first delineating the equal protection argument against unit voting. It then reviews the "one person, one vote" line of cases that in the 1960s established voting as a fundamental right, and continues by analyzing attempts to extend that logic to the Electoral College.<sup>226</sup> It ends with a brief discussion of possible implications to unit voting raised by *Bush v. Gore*.<sup>227</sup> The overall conclusion is that the equal protection argument against the unit rule falls short of overcoming the same constitutional roadblocks that have prevented a general challenge to the Electoral College.<sup>228</sup> The Fourteenth Amendment does not alter the original federal-state balance<sup>229</sup> so as to remove the states from their constitutional role in selecting the President. In addition to the Article II text, the system of dual sovereignty places a state's choice of the unit rule, or any other method, above the reach of any judicial interference. Only unilateral action by state legislatures or a constitutional amendment will alter the practice.

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224. The constitutional foundation for the four avenues, while subject to dispute, would be as follows. Constitutional amendments are provided for in Article V. State legislation to change its Electoral College practice is permissible under Article II, section 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct. . ."). A lawsuit could be contemplated under Article III ("The judicial Power shall extend to all Cases . . . arising under this Constitution). And the Fourteenth Amendment authorizes federal legislation in section 5 ("The Congress shall have power to enforce, by appropriate legislation. . .").

225. Commentators deem an amendment unlikely because Article V requires the consent of three-fourths of the states, and because none of the hundreds of proposed amendments on the Electoral College since the Twelfth Amendment have succeeded. See Josephson & Ross, *supra* note 22, at 151. Unilateral state action is not expected to occur because a collective action problem inhibits it. As long as other states continue to maximize their electoral influence by aggregating all electoral votes into a single state bloc, there is a strong disincentive—or fear—preventing a single state from abandoning the unit rule. See O'Sullivan, *supra* note 23, at 2443. At least eight other states have considered following the lead of Maine and Nebraska, but none have come close to passing such legislation. See Josephson & Ross, *supra* note 22, at 161 n.104.

226. *E.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622, 628 (E.D. Va. 1968).

227. See *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

228. *McPherson v. Blacker*, 146 U.S. 1, 7 (1892).

229. *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996).



*A. The Equal Protection Argument Against Unit Voting*

Regardless of the merits of any alternative method for selecting the President, the Constitution has been interpreted to place the liberty of the state legislatures to choose the method beyond the reach of a legal challenge on general majoritarian grounds.<sup>230</sup> In addition to the textual commitment in Article II that the electors are to be appointed in the states "in such Manner as the Legislature thereof may direct,"<sup>231</sup> the federalist structure of the Constitution contemplates a distinct role for the states in national elections, and thereby places the Electoral College outside the framework of a challenge on general democratic principles.<sup>232</sup>

What remains for those displeased with states' use of the unit rule is to make an argument not that the nationwide result is wrong, but that the practice within a state violates a specific constitutional provision, so that Congress has or the courts have a basis for altering the law.<sup>233</sup> Hence, the equal protection argument is that the selection of the unit rule by a state violates the Fourteenth Amendment's guarantee of "one person, one vote," as interpreted by the Supreme Court.<sup>234</sup> In the context of a court challenge, there have been two theories suggested under which a litigant could claim that the Electoral College violates the Equal Protection Clause.<sup>235</sup> One is based on the apportionment of electoral votes among states: that by giving each state two electoral votes for its Senators, regardless of population, the formula gives unequal weight to voters in different states.<sup>236</sup> This argument, however, besides not technically falling within the Fourteenth Amendment,<sup>237</sup>

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230. *McPherson*, 146 U.S. at 7 ("The constitution . . . leaves it to the legislature exclusively.").

231. U.S. CONST. art. II, § 1, cl. 2.

232. See *Gray v. Sanders*, 372 U.S. 368, 378 (1963) ("The inclusion of the electoral college in the constitution . . . validated the collegiate principle despite its inherent numerical inequality.").

233. Josephson & Ross, *supra* note 22, at 163-65 (describing proposed court and legislative challenges to the unit rule under the Fourteenth Amendment).

234. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) ("[A]s nearly as is practicable[,] one man's vote in a congressional election is to be worth as much as another's."); *Gray*, 372 U.S. at 381 ("[A]ll who participate in the election are to have an equal vote. . . . This is required by the Equal Protection Clause of the Fourteenth Amendment.").

235. Williams & MacDonald, *supra* note 18, at 255.

236. *Id.* (arguing that the "malapportioned" Electoral College should be challenged because it burdens the fundamental right of "one person, one vote").

237. Apportionment is not technically a Fourteenth Amendment problem, since the issue is the equality of voters *between* states because of the national government's distribution, rather than any action by the state. While Williams and MacDonald propose that "[t]he federal courts could be asked to recognize that the equal protection component of the Fifth Amendment 'amends' the structurally malapportioned electoral systems of Article II, section 1," they fail to

is ultimately a structural concern that would require a constitutional amendment.<sup>238</sup>

The other argument is that the unit rule "disenfranchises" a voter who casts her vote for a candidate other than the eventual plurality winner.<sup>239</sup> In other words, critics argue that since the winner receives the entire electoral vote of the state, those who voted for a different candidate are not represented in the Electoral College, and their votes are "counted only for the purpose of being discarded."<sup>240</sup> While this very premise is subject to challenge on constitutional and general political science grounds,<sup>241</sup> the argument does fit more accurately within the framework of a viable equal protection claim.<sup>242</sup>

The theory of the challenge is that Article II's grant of discretion does not direct the use of a particular method, but the method chosen must comport with the rest of the Constitution.<sup>243</sup> Therefore, a state's choice to employ the unit rule would be impermissible if the unit rule is indeed inconsistent with the Fourteenth Amendment.<sup>244</sup> In other words, the argument is that while the states' discretion is constitutional, the particular exercise of that

remember that the Article II system was preserved in the Twelfth Amendment, which came *after* the Fifth Amendment. Williams & MacDonald, *supra* note 18, at 255; *see also* Josephson & Ross, *supra* note 22, at 165 (arguing that the claims of Williams and MacDonald are untenable). Only the Fourteenth Amendment can be alleged to have "fundamentally altered the balance of state and federal power struck by the Constitution" in the case of the Electoral College. *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996).

238. The issue of apportionment of electoral power does seem to get to the heart of some critics' concerns with the system. *See* WILMERDING, *supra* note 141, at 97. It can also be argued that the unit rule increases the voting power of the citizens of a state and exacerbates such disparities of voting power between states. *See* John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304, 313 (1968) (using a quantitative analysis to allege that the different ratios of voter-per-electoral vote in the different states results in a disparity in what each person's vote is "worth"). Even so, the question of apportionment is not one for the courts. *See id.* at 315-16. While the unit rule itself is not mandated by the Constitution (thus opening the door for a challenge), the apportionment of electors is unambiguously set forth in Article II, section 1. U.S. CONST. art. II, § 1.

239. *See* LONGLEY & BRAUN, *supra* note 24, at 19; Hoffman, *supra* note 11, at 938; Williams & MacDonald, *supra* note 18, at 254 ("[A] state's winner-take-all system always disenfranchises a minority of the voters. . .").

240. Hoffman, *supra* note 11, at 938 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 n.12 (1963) (holding that a county-by-county unit rule practiced in state elections was unconstitutional)).

241. *See* BEST, *supra* note 20, at 31-34 (arguing that according to the "federal principle," the President is selected by the Electoral College as the result of separate state elections for choosing electors, and that therefore the voters who supported a losing candidate are no different from those in any other election).

242. Josephson & Ross, *supra* note 22, at 162-65.

243. Williams & MacDonald, *supra* note 18, at 253.

244. *Id.* (arguing that the Fourteenth Amendment "amends" Article II, section 1).

discretion to employ the unit rule is not.<sup>245</sup> The relief sought by the actual and proposed lawsuits is for the courts to declare a state's use of the unit rule unconstitutional and to require the employment of a different method.<sup>246</sup> Though ultimately unsuccessful, this "disenfranchisement" argument is the one made by most critics<sup>247</sup> and has been litigated on several occasions.<sup>248</sup> It is likewise the argument that will be compared against the Supreme Court's interpretations of the Fourteenth Amendment later in this Part.

*B. "One Person, One Vote": A Fundamental Fourteenth Amendment Right*

In order for a court—state or federal—to interfere with legislative enactments, such as state voting procedures, and find a violation of the Equal Protection Clause, there must be (1) an action by the state,<sup>249</sup> and (2) a valid inequality.<sup>250</sup> The unit rule by definition meets the first criterion—while selected pursuant to the Constitution, the state legislatures are the decision makers.<sup>251</sup> The second criterion is more of an open question. Those arguing against the unit rule contend that the alleged "disenfranchisement" of the political minority in the winner-take-all determination of electoral votes is an unequal treatment of citizens within a state, drawing support from the line of cases developed below.<sup>252</sup> Ultimately, however, it is a question of constitutional interpretation, not yet fully resolved, whether the structural inequalities found in the voting procedures in these cases may be extended to the Article II discre-

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245. *Id.*

246. *Penton v. Humphrey*, 264 F. Supp. 250, 251 (S.D. Miss. 1967).

247. *Hoffman*, *supra* note 11, at 940 (arguing alternatively that the unit rule violates the right of racial minorities under section 2 of the Fourteenth Amendment); *Williams & MacDonald*, *supra* note 18, at 253-54; *O'Sullivan*, *supra* note 23, at 2440-41.

248. *See Delaware v. New York*, 385 U.S. 895 (1966); *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968); *Penton*, 264 F. Supp. at 250; *Hitson v. Baggett*, 446 F. Supp. 674 (M.D. Ala. 1978); *Lowe v. Treen*, 393 So.2d 459 (La. Ct. App. 1980).

249. *See Marsh v. Alabama*, 326 U.S. 501, 508 (1946) (holding that even a private entity acting under the authority of the state is subject to scrutiny for violating the constitutional rights of individuals).

250. *See Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (holding that a regulatory classification is valid if it is reasonably related to the purpose for which it was enacted, and is not the kind of discrimination against which the Equal Protection Clause affords protection).

251. U.S. CONST. art. II, § 1, cl. 2.

252. *PEIRCE & LONGLEY*, *supra* note 8, at 111-12 (arguing that the unit rule's "massive disenfranchisement" of voters "demonstrates its inherent inequality"). Defenders reply that since the Electoral College provides for a system of state elections, the citizens who voted for a losing candidate are no different than the supporters of a losing candidate in any election. *See BEST*, *supra* note 20, at 34.

tion given to the states under the federal balance struck by the Constitution.<sup>253</sup>

Even if the state action constitutes a valid inequality, a legislature's decision to employ the unit rule will receive only the most deferential rational basis review,<sup>254</sup> unless a plaintiff can establish that the method affects a "fundamental interest."<sup>255</sup> If a fundamental interest is implicated, the state's action receives stricter judicial scrutiny: it must serve a compelling governmental interest and be narrowly tailored to provide the least inequality toward reaching that end.<sup>256</sup> The line of cases beginning with *Baker v. Carr*<sup>257</sup> has firmly established a general rule that voting is indeed a fundamental constitutional right and that the principle of "one person, one vote" is the basis of our representative government.<sup>258</sup>

Prior to *Baker v. Carr*, the constitutionality of state decisions on how to operate elections was considered a nonjusticiable political question, reserved to the discretion of the political branches of government.<sup>259</sup> In *Baker*, the Supreme Court ruled that the petitioner's challenge to the scheme of apportionment for the Tennessee legislature was indeed subject to judicial review because it was within the

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253. HARDAWAY, *supra* note 12, at 111 ("Despite the obvious intent of the framers, the historical context in which the principle of equal state representation was adopted, and the specific design of the Electoral College as set forth in the Constitution, serious efforts have been made to challenge the Electoral College, and specifically its general ballot feature, on grounds that it violates the Equal Protection Clause of the Fourteenth Amendment.").

254. Under rational basis scrutiny, a court will not invalidate state action as long as the unequal treatment of citizens is pursuant to a legitimate state interest, and the means of achieving it are reasonably related to that end. *Ry. Express Agency*, 336 U.S. at 106. The practical effect is that a constitutional claim will rarely prevail.

255. *Skinner v. Oklahoma*, 316 U.S. 541 (1942) (holding that the federal courts could strike down a state law providing unequal punishments for similar offenses because the sterilization required by the statute affected the "fundamental interest" of procreation). Alternative to a finding of "fundamental interest," a court could use a higher level of scrutiny if it determined that the inequality affected a member of a "suspect class" or classification, such as race. *Id.* This has been applied to strike down electoral practices, but is not really at issue here. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that a state poll tax violated the Equal Protection Clause). Matthew Hoffman argues that unit voting specifically violates the Fourteenth Amendment rights of racial minority voters, but his argument regards it as a violation of the Voting Rights Act, 42 U.S.C. § 1973 (1994) (enacted pursuant to section 5 of the Fourteenth Amendment), that prohibits interference with voting rights of racial minorities. Hoffman, *supra* note 11, at 937. This Note deals with the more general structural question of whether the Electoral College can be reached by the Fourteenth Amendment at all.

256. *Skinner*, 316 U.S. at 535.

257. 369 U.S. 186 (1962).

258. *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969). The actual language used by Justice Stewart was that the fundamental principle is "one man, one vote." *Id.*

259. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (refusing to decide a state congressional districting dispute on the grounds that as a political question it was not proper for the courts to intervene).

scope of protection provided by the Fourteenth Amendment.<sup>260</sup> In establishing that voting rights were fundamental, the Court noted the importance of “[a] citizen’s right to a vote free of arbitrary impairment by state action.”<sup>261</sup>

Having opened the door for constitutional challenges to state electoral practices, the Warren Court continued to expand on the relationship of voting and constitutional rights. In 1964, the Court ruled in *Wesberry v. Sanders* that the Equal Protection Clause requires states to ensure that its congressional districts are roughly equal in population.<sup>262</sup> According to the Court, the Constitution requires that “one man’s vote in a congressional election is to be worth as much as another’s”; otherwise, the state would be practicing “vote-diluting discrimination.”<sup>263</sup> In finding voting to be a fundamental right, the Court deemed that “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.”<sup>264</sup>

Later that term, the Court affirmed this reasoning in *Reynolds v. Sims*, striking down Alabama’s legislative apportionment scheme because it was not based on equal representation.<sup>265</sup> If this “fundamental principle” was not preserved under the Fourteenth Amendment, the Court stated, each citizen would be prevented from having an “equally effective voice” in government.<sup>266</sup> Voting was held to be a “fundamental political right, because preservative

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260. *Baker*, 369 U.S. at 237.

261. *Id.* at 208.

262. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (holding that it was the “Constitution’s plain objective” to make “equal representation for equal numbers of people the fundamental goal of the House of Representatives”). The reference to the House, however, limits the analogy to the Electoral College, since as has been shown, the Electoral College incorporates the representation theories behind both the House (population) and the Senate (state equality). *Id.*

263. *Id.* at 8.

264. *Id.* at 17.

265. *Reynolds v. Sims*, 377 U.S. 533, 587 (1964). The Court held that a state legislature must be apportioned according to population, which has led commentators to draw the analogy to the “malapportioned” argument against the Electoral College. See Josephson & Ross, *supra* note 22, at 245. But the *Reynolds* Court itself was careful to distinguish the state legislatures from the federal scheme of representation in Congress, from which the Electoral College apportionment is derived: “The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government.” 377 U.S. at 574.

266. *Id.* at 560, 566.

of all rights,"<sup>267</sup> and therefore equal protection guarantees would be violated if a citizen's votes suffered "debasement or dilution."<sup>268</sup>

This reasoning was further applied to state practices in presidential elections in *Williams v. Rhodes*.<sup>269</sup> In *Rhodes*, the Court considered a constitutional challenge to an Ohio law that made it difficult for third parties to place their presidential candidates on the state ballot.<sup>270</sup> The petitioners alleged that this denied the state's voters the equal protection of the laws.<sup>271</sup> The state claimed that under Article II, Section 1, it had absolute power to place any burdens it pleased on the selection of electors.<sup>272</sup> The Court disagreed. While it acknowledged that the Constitution granted extensive power to the states on this issue, it stated that "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."<sup>273</sup> The Court continued, "[n]or can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands . . . we must reject the notion that [Article II] gives the States the power to impose *burdens* on the right to vote."<sup>274</sup> The Court held that "no State can pass a law regulating elections that violates the Fourteenth Amendment's command" against denying the equal protection of the laws.<sup>275</sup> Turning to the merits of the equal protection claim, the Court determined that the burden placed on voters did not satisfy the "compelling interest" test.<sup>276</sup>

The Supreme Court has continued to hold, in its occasional decisions on the issue, that "one person, one vote" is a fundamental Fourteenth Amendment right,<sup>277</sup> the application of which extends to

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267. *Id.* at 562 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

268. *Id.* at 555.

269. 393 U.S. 23 (1968).

270. *Id.* at 27.

271. *Id.*

272. *Id.* at 28-29.

273. *Id.* at 29.

274. *Id.* (emphasis added). It is worth noting that the Court's scrutiny extends to "burdens" and "restrictions" that a state imposes pursuant to its affirmative grant of power under Article II, in this case, restrictive procedural rules about who can be on the ballot. *Id.* It is not clear that this scrutiny would extend to the manner in which the legislature chooses the electors. *Id.*

275. *Id.*

276. *Id.* at 31.

277. *Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (affirming the *Wesberry* principle that congressional districts must be drawn in order to achieve representative equality, but upholding the state's plan because it conformed to the principle "as nearly as practicable"); *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) (striking down a system that unequally distributed electoral power based on counties).

presidential elections.<sup>278</sup> The line of cases holding this has been the basis for several court challenges to states' use of the unit rule, as well as continued challenges suggested by scholars.<sup>279</sup> In addition to the clear rule that voting rights are fundamental, and warrant strict scrutiny if a valid inequality can be established, the logic of *Rhodes* is especially appealing: Article II, Section 1 must comport with the Fourteenth Amendment.<sup>280</sup> The next section will consider the question of whether this analysis can be extended to the actual manner the states choose for selecting electors. The courts that have considered the issue have determined that it does not.

### C. Equal Protection and the Unit Rule

Included in the Warren Court's "one person, one vote" line of cases was the 1963 decision in *Gray v. Sanders*.<sup>281</sup> This case provides a popular analogy for those who seek to challenge the unit rule in the Electoral College.<sup>282</sup> In *Gray*, the issue was whether the use of a "county unit system" in a primary election for state officers violated the Equal Protection Clause.<sup>283</sup> Georgia had a system for counting primary votes<sup>284</sup> that aggregated the votes by county, and the winner in each county received, "winner-take-all," a predetermined amount of unit votes towards the statewide totals.<sup>285</sup> The Court struck down this system as a violation of the Fourteenth Amendment because it diluted votes based on geography.<sup>286</sup> In a

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278. See *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). The *Anderson* Court ruled that an early filing deadline that prevented the independent candidate, John Anderson, from being listed on the ballot violated the Equal Protection Clause. *Id.* at 806. The state was subjected to strict scrutiny not only for the impact on general suffrage rights, but because a presidential election implicates a "unique national interest," where a state's action "has an impact beyond its own borders." *Id.* at 794-95. However, like *Rhodes*, *Anderson* did not extend this scrutiny beyond "state-imposed restrictions." *Id.* (emphasis added). In the context of the unit rule, it is not clear that a legislature's choice of this method, granted by Article II, would constitute a restriction.

279. See, e.g., *Hitson v. Baggett*, 446 F. Supp. 674 (M.D. Ala. 1978); Williams & MacDonald, *supra* note 18, at 254.

280. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

281. 372 U.S. 368 (1963).

282. See, e.g., Williams & MacDonald, *supra* note 18, at 247-49; O'Sullivan, *supra* note 23, at 2433-36.

283. *Gray*, 372 U.S. at 370.

284. It was the state's regulation of the otherwise private political primary election that made it qualify as "state action" for the purposes of the Fourteenth Amendment. *Id.* at 374.

285. *Id.* at 370-71.

286. *Id.* at 379, 381. Though *Gray* was decided before *Wesberry*, *Reynolds*, and *Rhodes*, the reasoning was on the same principles as the "one person, one vote" rule articulated by those subsequent cases. *Id.* at 380-81; see also Williams & Rhodes, 393 U.S. 23, 29 (1968); Reynolds v. Sims, 377 U.S. 533, 587 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). The *Gray* Court

footnote, Justice Douglas added that because of the unit rule, the votes of those within a county who voted for a candidate other than the winner were "worth nothing and . . . counted only for the purpose of being discarded."<sup>287</sup>

*Gray* appears to frame perfectly an equal protection challenge to the Electoral College—if the unit rule is unconstitutional at the county level, why not at the national level as well? Shortly after the *Gray* decision, a group of reformers<sup>288</sup> organized just such a suit in *Delaware v. New York*,<sup>289</sup> invoking the Supreme Court's original jurisdiction to hear suits between states.<sup>290</sup> The petitioners, on behalf of Delaware and twelve other States, alleged that the unit rule denies the equal voting rights of those who vote for a losing candidate by "totally canceling their effects when the state's entire electoral vote is awarded to the winner," and by analogizing the unit rule to the "internal denial of equal protection" found in *Gray*.<sup>291</sup> The Supreme Court dismissed the complaint per curiam without issuing an opinion,<sup>292</sup> but other subsequent attempts at challenging the Electoral College have employed the reasoning in *Gray* in exactly the same manner.<sup>293</sup>

Although *Gray* is undoubtedly an important part of the "one person, one vote" expansion of Fourteenth Amendment protection for voting rights, it may be just as important in this context for what it did *not* reach.<sup>294</sup> In response to Georgia's defense that its county unit system was analogous to the Electoral College, Justice Douglas went to great lengths to distinguish the two, asserting that "one person, one vote" does not apply to the federal system.<sup>295</sup> "We

rejected the reasoning of the district court, which held that the county unit system was permissible in theory, but unconstitutional here because the mathematical disparities exceeded those in the federal Electoral College. See *Gray v. Sanders*, 203 F. Supp. 158, 170 (N.D. Ga. 1962). The Court nonetheless noted that under Georgia's system, due to the differences in population between certain counties, the residents of one county had ninety-nine times the "influence" of another county. *Gray*, 372 U.S. at 371. This logic is similar to the "malapportionment" argument made against the Electoral College. *E.g.*, *Williams & MacDonald*, *supra* note 18, at 255.

287. *Id.* at 381 n.12. This language is cited by those who claim the unit rule in the Electoral College "disenfranchises" all of the voters who do not vote for the winner. See *Hoffman*, *supra* note 11, at 938.

288. Apparently this group brought the lawsuit because they were frustrated in attempts to bring about a constitutional amendment. See *HARDAWAY*, *supra* note 12, at 115.

289. 385 U.S. 895 (1966) (per curiam).

290. U.S. CONST. art. III, § 2, cl. 2.

291. See *HARDAWAY*, *supra* note 12, at 115 (discussing the arguments in *Delaware* case); *O'Sullivan*, *supra* note 23, at 2440 (same).

292. *Delaware*, 385 U.S. at 895.

293. See *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622, 624 (E.D. Va. 1968).

294. *HARDAWAY*, *supra* note 12, at 113.

295. *Gray v. Sanders*, 372 U.S. 368, 378 (1963).



think the analogies to the electoral college," he wrote, "are inapposite."<sup>296</sup> The Court held that the Electoral College was different from the Georgia system because it was explicitly provided for in the Constitution, which "validated the collegiate principle despite its inherent numerical inequality."<sup>297</sup> Furthermore, "[t]he only weighing of votes sanctioned by the Constitution concerns matters of representation, such as . . . the use of the electoral college in the choice of a President."<sup>298</sup> The Electoral College analogy of *Gray*, so appealing to unit rule challengers, was thus explicitly cut off by the opinion itself.

That language has likewise been used to undermine subsequent court challenges to the unit rule (and perhaps the same reasoning underlay the Supreme Court's refusal to hear *Delaware v. New York*).<sup>299</sup> The next challenge was *Penton v. Humphrey*,<sup>300</sup> brought in federal district court in Mississippi. The court denied the plaintiff's request for an injunction against the state's unit rule and for a mandate that the electors cast their votes according to the statewide percentages of popular votes.<sup>301</sup> The district court, citing the *Gray* opinion's constitutional analysis of the Electoral College, held that the "one person, one vote" doctrine did not apply to federal unit voting.<sup>302</sup> It further stated that the Supreme Court's dismissal of *Delaware v. New York* was a decision on the merits, binding on all federal courts.<sup>303</sup>

In *Williams v. Virginia State Board of Elections*, another federal court rejected a similar argument asking for a district method of choosing electors, alleging that the state's unit rule "accords no representation" to a minority of the voters.<sup>304</sup> The court, using a constitutional analysis, held that the choice of the method was clearly within the discretion of the states, and that absent a constitutional amendment, the unit rule was not unlawful.<sup>305</sup> The

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296. *Id.*

297. *Id.*

298. *Id.* at 380.

299. *Delaware v. New York*, 395 U.S. 385 (1966) (per curiam).

300. *Penton v. Humphrey*, 264 F. Supp. 250, 251 (S.D. Miss. 1967).

301. *Id.*

302. *Id.* The district court also cited *Baker* and *Reynolds*, but the *Penton* case came before *Rhodes*. *Id.*

303. *Id.* at 252.

304. 288 F. Supp. 622, 623 (E.D. Va. 1968).

305. *Id.* at 628-29. The district court's only error in its exegesis of the constitutional framework was to list Thomas Jefferson as among "the Brahmins of the Constitutional Convention." *Id.* at 626. In 1787, Jefferson was in Paris, serving as Minister to France. See BOWEN, *supra* note 55, at 4.

court also addressed the contention that unit voting “disenfranchised” voters by stating that the “one person, one vote” doctrine does not have an impact on the unit rule; that the selection of electors does not “denigrate” any citizen’s ballot; and that in a democratic society the majority must rule. Unless there is invidious discrimination, simply voting for the losing candidate does not constitute a deprivation of the franchise.<sup>306</sup> Unlike *Penton*, the *Williams* court held that it was not bound by the Supreme Court’s dismissal of *Delaware v. New York*.<sup>307</sup> However, the *Williams* decision itself would obtain a degree of precedential force, as it was reviewed by the Supreme Court on the merits and affirmed.<sup>308</sup>

Despite a solid line of cases holding that elections are subject to the protections of the Fourteenth Amendment, no case has allowed an equal protection claim to reach the Article II power of selecting the manner of appointment by the state legislatures. The question, however, has not been settled dispositively. There have been very few attempts to challenge the unit rule in court since *Williams*.<sup>309</sup> Yet, judicial reform is still suggested by many commentators who are frustrated with the practical difficulty of amending the Constitution.<sup>310</sup> Perhaps in the wake of the controversial 2000 election, a movement for reform will gain momentum.<sup>311</sup> If that momentum is still not enough to sustain a constitutional amendment, as many predict,<sup>312</sup> perhaps a court challenge will once again be taken as the only option available to a private reformer. In case that event does come to pass, the next section briefly examines the latest case on equal protection and voting rights.

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306. *Williams*, 288 F. Supp. at 627.

307. *Id.* at 625.

308. *Williams v. Va. State Bd. of Elections*, 393 U.S. 20 (1969) (per curiam).

309. The only subsequent cases have had the same result—unit voting was upheld because of the Electoral College’s specific placement in the Constitution. *Hitson v. Baggett*, 446 F. Supp. 674, 677 (M.D. Ala. 1978) (alleging that unit voting violated the civil rights of racial minorities under 42 U.S.C. § 1983); *Lowe v. Treen*, 393 So.2d 459, 461 (La. Ct. App. 1980) (trying the equal protection argument in a state court, but rejected under the same line of federal constitutional cases as the preceding cases).

310. See *Williams & MacDonald*, *supra* note 18, at 253.

311. See, e.g., Katharine Q. Seelye, *Liberals Discuss Electoral Overhaul*, N.Y. TIMES, Jan. 21, 2001, at A25.

312. See Rakove, *supra* note 36 (“We may not love the Electoral College . . . but that doesn’t mean we can ever get rid of it.”).

*D. Bush v. Gore and Beyond*

During the fewer than forty years since *Baker v. Carr*, the Supreme Court has gone from deciding whether election law is even subject to judicial review to playing a key role in the outcome of the presidential election itself.<sup>313</sup> More than a month after the 2000 election, the Court issued the controversial *Bush v. Gore* opinion.<sup>314</sup> In addition to ending the presidential contest for practical purposes, seven justices agreed that the Florida recount raised a valid equal protection problem.<sup>315</sup> Though the Court tried to cabin the equal protection holdings to the specific facts of the case,<sup>316</sup> analysts suggest that the case may indeed open up questions about the implications of this "Newest Equal Protection."<sup>317</sup>

The Court's per curiam opinion<sup>318</sup> was squarely in line with the trend of the Warren Court's constitutionalization of voting rights and may be seen as expanding these precedents into new terrain.<sup>319</sup> The opinion began by restating the holding in *McPherson v. Blacker*: employing a popular vote for the purposes of choosing presidential electors is completely at the discretion of each state. However, it continued to assert that once a state decided to hold an election, that election must comply with equal protection principles because the right to vote in such an election is fundamental.<sup>320</sup>

The majority then continued to analyze the facts in light of that very line of Warren Court jurisprudence, including *Reynolds*, *Gray*, and *Moore*, reaffirming that any dilution of an individual's voting power was inconsistent with the "one-person, one-vote" prin-

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313. ISSACHAROFF, *supra* note 6, at 29.

314. *Bush v. Gore*, 531 U.S. 98, 100-11 (2000) (per curiam).

315. *Id.* at 111; see also Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657 (2001) (calling the Court's Fourteenth Amendment holding "sensible and persuasive."). But see *Bush*, 531 U.S. at 113 (Rhenquist, J., concurring) (arguing that reversal was warranted because of an Article II violation). Many commentators find the concurring opinion and its Article II rationale a more convincing justification for the Court's decision. See, e.g., Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001).

316. *Id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

317. ISSACHAROFF, *supra* note 6, at 28, 48 ("There are important questions of Equal Protection and the right to vote that *Bush v. Gore* opens up.").

318. *Bush*, 531 U.S. at 100-11. The dissenting opinions of Justices Souter and Breyer agree with the equal protection rationale of the Court. *Id.* at 129 (Souter, J., dissenting); *id.* at 145 (Breyer, J., dissenting).

319. ISSACHAROFF, *supra* note 6, at 47.

320. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

ciple and a violation of the Fourteenth Amendment.<sup>321</sup> Wielding this concept of a fundamental right to require strict scrutiny, the Court held that the recount mechanisms did not satisfy equal protection requirements because of the alleged arbitrariness inherent in the lack of specific standards.<sup>322</sup> The Court felt that equal protection was being denied because the differing standards caused the voters in different geographic areas of the state to be treated differently and possibly to have their votes "diluted."<sup>323</sup>

The Court further hinted that "uniformity" would have prevented the equal protection problem.<sup>324</sup> It concluded that the recounts did not comply with the Fourteenth Amendment because they lacked "adequate statewide standards," "practicable procedures," and "orderly judicial review."<sup>325</sup> *Bush v. Gore* expands on the "one person, one vote" precedents by extending the doctrine beyond the mere structures and procedural designs of elections to include the actual management of the election itself.<sup>326</sup> The next logical question is what exactly will now be required to ensure an equally weighted vote.<sup>327</sup>

Opponents of the unit rule may see some support for their cause in the equal protection reasoning of the opinion. *Bush v. Gore* supports the notion that the Constitution requires voters to be treated equally and seems to hold the "one person, one vote" principle to require the vigorous scrutiny of presidential election practices at the micro-level.<sup>328</sup> While not explicitly citing *Rhodes*, it reaffirms the principle that Article II cannot be isolated from the Fourteenth Amendment, perhaps suggesting an even greater reach for the Equal Protection Clause than before.<sup>329</sup> It certainly seems plausible to argue that given the high degree of equal protection required by *Bush v. Gore* to ensure that citizens' votes are not weighted differently,<sup>330</sup> and the fact that the Court used that re-

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321. *Id.* at 105-07.

322. *Id.* at 105-06.

323. *Id.* at 107.

324. *Id.* at 109.

325. *Id.* at 110.

326. ISSACHAROFF, *supra* note 6, at 47.

327. *Id.* at 48.

328. *Id.* at 47; see also Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1426 (2001) ("The majority's equal protection argument . . . extends the principle of 'one person, one vote' from the question of how districts are apportioned before the election to the question of how the votes are tabulated after the election.").

329. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

330. *Bush v. Gore* actually analogizes better to the "malapportionment" argument, by focusing on the weighing of votes, than it does to the "disenfranchisement" argument. See *id.* But since the open question is whether its application of the Fourteenth Amendment to Article II

quirement to strike down a state's election procedure in an Article II presidential election,<sup>331</sup> it could also be proper to enjoin a state from employing a unit voting practice for selecting electors.

Nevertheless, the argument against the unit rule, even after *Bush v. Gore*, will still likely be unsuccessful. The Court's recapitulation of the *McPherson v. Blacker* holding, before it launched into its analysis of equal protection and the Warren Court voting rights jurisprudence, undercuts the argument. As far into Article II as it may reach, any notion that the Fourteenth Amendment could extend far enough to reach a state's discretion to choose the manner of selecting its electors is not supported by *Bush v. Gore*.<sup>332</sup> The Court takes care to note that "the State legislature's power to select the manner for appointing electors is plenary" and that even though the Equal Protection Clause applies when a state chooses to have an election, the state still has a right to "take back the power to appoint electors" in the legislature.<sup>333</sup>

In the end, it appears unlikely that a court challenge to the unit rule would be successful. However, such a possibility still exists, especially while there is still uncertainty over exactly how courts will deal with the *Bush v. Gore* interpretation of equal protection.

#### V. CHALLENGING THE UNIT RULE IN CONGRESS: THE STATE SOVEREIGNTY BARRIER

Having caused much controversy during the intervening two centuries since the Philadelphia Convention, the Electoral College continues to be an integral part of the constitutional system, as the 2000 election so bluntly demonstrated.<sup>334</sup> We can expect renewed calls to change the system, including the unit rule.<sup>335</sup> Given the likelihood that a constitutional amendment will not pass, this Note in Part IV discussed the issues facing a legal challenge to a state's use of the unit rule. Part V will examine the possibilities for legislation by Congress.

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practices extends to the Electoral College, a plaintiff could feasibly make either argument (or both, as some of the cases have done). See, e.g., *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622, 624 (E.D. Va. 1968).

331. *Bush*, 531 U.S. at 104.

332. *Id.* at 103-04.

333. *Id.*

334. ISSACHAROFF, *supra* note 6, at 1.

335. See *Electoral College Faces the Future*, N.Y. TIMES, Dec. 3, 2000, at A35.

Assume for the purposes of this Part that a reformer introduces a bill in Congress that specifically prohibits the use of the unit rule, but does not prescribe *which* method of choosing electors the states must use.<sup>336</sup> First, a challenge needs to surmount the hurdle posed by state sovereign immunity. This sticking point is largely ignored by the scholarship on the Electoral College. But given the complex web of state interests that informed the original compromise, as discussed above,<sup>337</sup> and especially with the Supreme Court's recent jurisprudence on state sovereignty,<sup>338</sup> it is an important hurdle for any federal legislation, and one that congressional action against the Electoral College could probably not clear.

#### *A. Federal Authority: The Tenth Amendment and State Sovereignty*

Congress's authority to legislate is limited only to those subjects where it has a valid grant of power.<sup>339</sup> One of the reasons this Note undertook such a close reading of the records of the Constitutional Convention<sup>340</sup> is because the creation of the Electoral College is but one chapter in the larger narrative of how the Constitutional Convention provided for the ordering of the respective powers of the state and national governments. While the agreement required the states to cede more authority than they had previously possessed, it left them with a "residual and inviolable sovereignty" that operates not only in elections and representation arrangements, but also as the main principle that determines the scope of federal power.<sup>341</sup> Therefore, any attempt in Congress to preclude states' use of the unit rule will have to comply with the Tenth Amendment and the dual sovereignty enacted by the Constitution.<sup>342</sup>

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336. This argument will put aside any political assessment of the likelihood of such legislation being enacted into law. Since such legislation, *supra* has been suggested, it is valuable to analyze the legal issues it would raise. See O'Sullivan, *supra* note 23, at 2447.

337. See *supra* Part II.

338. See, e.g., *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

339. See, e.g., U.S. CONST. art. I, § 8.

340. See *supra* Part II.

341. THE FEDERALIST NO. 39, at 213 (James Madison) (Clinton Rossiter ed., 1961). This phrase has been quoted in many of the recent Supreme Court decisions favoring state sovereignty. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999); *Printz v. United States*, 521 U.S. 898, 919 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

342. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."). Most scholarly commentary on the Electoral College simply proceeds to this policy discussion of whether Congress should legislate, without considering that the proposals have to pass the high bar of sovereign immunity. E.g., O'Sullivan, *supra* note 23, at 2447 (calling for congressional legislation banning state use of the unit vote).

### 1. Congress's Limited Power to Legislate

The Tenth Amendment,<sup>343</sup> by expressly reserving to the states all attributes of sovereignty not expressly given to the national government, has been held to embody the principles of federalism that limit the scope of Congress's lawmaking power.<sup>344</sup> If the legislation is not made pursuant to a specifically enumerated power, Congress's enactments are not constitutional.<sup>345</sup> Therefore, any attempt by Congress to alter the state practices in the Electoral College must avoid infringing on any prerogatives of the states. As discussed below, several Supreme Court rulings of the last ten years have read the Tenth Amendment to invalidate federal laws that encroached on the states' sphere.

The Court ruled in 1992 that a congressional act requiring states to accept ownership of radioactive waste or regulate according to instructions of Congress was a violation of the Tenth Amendment. The case, *New York v. United States*,<sup>346</sup> commenced a trend towards upholding state sovereignty against federal regulation. Significantly, it read the Tenth Amendment to be a confirmation of the overall federal structure of the Constitution.<sup>347</sup> Therefore, congressional legislation has to pass scrutiny from two directions. It not only has to be a valid exercise of power, pursuant to an affirmative grant by the Constitution, but it also has to refrain from invading any state prerogatives.<sup>348</sup> In *New York*, the Court found that regulating radioactive waste would have been permissible by either the states or by Congress under the Commerce Clause.<sup>349</sup> But, here, Congress actually directed the states to regulate it, and

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343. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

344. *Reno v. Condon*, 528 U.S. 141, 151 (2000) (noting that, while the Driver's Privacy Protection Act (DPPA) was valid under Congress's Commerce Clause power, the Tenth Amendment does contain principles of federalism that limit congressional legislation to those subjects expressly granted to the federal government in the Constitution).

345. Most enumerated powers are found in Article I (e.g., Commerce Clause, Necessary and Proper Clause, U.S. CONST. art. I, § 8), and there are others scattered around the Constitution. Significant to this discussion are the Article II, section I power to "determine the Time of chusing the Electors, and the Day on which they give their votes," U.S. CONST. art. II, § 1, and the power to enforce the Fourteenth Amendment, U.S. CONST. amend. XIV, § 5.

346. 505 U.S. 144 (1992).

347. *Id.* at 156-57.

348. *Id.*

349. *Id.* at 159.

even prescribed the substance of the regulations.<sup>350</sup> The Court found that this effectively “commandeered the legislative process of the states” in violation of the Tenth Amendment.<sup>351</sup> Noting that “[s]tates are not mere political subdivisions of the United States,” the Court held that “[t]he Federal Government may not compel the states to enact” a federal directive.<sup>352</sup>

The 1997 case of *Printz v. United States*<sup>353</sup> further strengthened this understanding of the Tenth Amendment’s protection of state sovereignty. In *Printz*, the Court invalidated a provision of the Brady Act,<sup>354</sup> enacted pursuant to the Commerce Clause, that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers.<sup>355</sup> After discussing the general principles of state sovereignty in the constitutional structure, the Court applied the logic of *New York* and found that the provision violated the Tenth Amendment by forcing state executive officials to administer the federal program, noting that the law operated to “compromise the structural framework of dual sovereignty.”<sup>356</sup> Though the dissent claimed that it was valid under the Necessary and Proper Clause,<sup>357</sup> the majority held that it was not “proper” because it invalidly intruded on the sovereignty of the states.<sup>358</sup>

Given the clear Article II textual commitment to the state legislatures of the right to choose the manner of appointing electors,<sup>359</sup> any legislation that impinges on the states’ discretion to use the unit rule would seem to run into this very same Tenth Amendment problem. For example, in 1968, a prominent legal scholar suggested that to prevent a “faithless elector” from casting a vote against the state’s plurality winner, Congress should enact a law, pursuant to the Necessary and Proper Clause,<sup>360</sup> binding electors to

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350. *Id.* at 168. Under the Supremacy Clause, Congress could have pre-empted state regulation in the area, but chose not to, opting instead for laws compelling the states to act. *Id.*; U.S. CONST. art. VI.

351. *New York*, 505 U.S. at 176 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981)).

352. *Id.* at 188.

353. *Printz v. United States*, 521 U.S. 898 (1997).

354. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

355. *Printz*, 521 U.S. at 933.

356. *Id.* at 932.

357. *Id.* at 941 (Stevens, J., dissenting).

358. *Id.* at 923.

359. U.S. CONST. art. II, § 1, cl. 2.

360. U.S. CONST. art. I, § 8, cl. 18. Pursuit of such a plan under the Fourteenth Amendment would be less likely to be stopped by these obstacles, though not with any certitude. Beverly J.



vote in accordance with the popular vote.<sup>361</sup> While that clause is certainly a valid font of authority, this type of legislation would entail commanding the state legislatures to pass a particular law, in violation of *New York*. Or, if it purported to act directly on the electors themselves, it would run afoul of *Printz*, since it has been established that the electors are indisputably state, and not federal, officials.<sup>362</sup>

The very same logic would apply to any attempt to legislate against the states' discretion to employ the unit rule in exercising their right to determine the manner of choosing electors. The Court's current Tenth Amendment jurisprudence strongly militates against any abridgment of a state's sovereign authority as it is set forth in the Constitution.<sup>363</sup> Certainly none of Congress's Article I powers would suffice to direct state legislatures to enact a certain policy. The only possible avenue would be under Section 5 of the Fourteenth Amendment,<sup>364</sup> which authorizes Congress to make laws to enforce the other provisions of the amendment.<sup>365</sup> Even though the Equal Protection Clause, in light of the "one person, one vote" case law described above,<sup>366</sup> might currently be the intuitive choice for enacting such legislation in the first place, this still might not ensure that the legislation would circumvent the Tenth Amendment sovereignty problem.<sup>367</sup> First, there is the unresolved issue, however unlikely, of whether the Fourteenth Amendment can supersede the

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Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 740-41 (1996).

361. Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 32-36 (1968).

362. See *Ray v. Blair*, 343 U.S. 214, 223 (1952); *Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937) ("Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than . . . the people of the states when acting as electors of representatives in congress.").

363. See *Reno v. Condon*, 528 U.S. 141, 151 (2000).

364. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

365. The federal-state balance enacted in the Constitution is only alterable by subsequent amendments, such as the Fourteenth. See *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996).

366. See *supra* Part IV.B.

367. One proposed congressional statute contained a section stating that it "specifically bans the use of statewide unit vote counting for presidential elections." O'Sullivan, *supra* note 23, at 2447. The article containing this proposal, published a month after the *New York* ruling, did not discuss whether simply proscribing one particular method as a Fourteenth Amendment violation should be seen differently, for Tenth Amendment purposes, than an affirmative direction to choose a particular method. *Id.* *New York*, however, focuses not on the specific requirements of the regulatory scheme, but on the simple fact that because it *required* the state legislatures to enact one, it "commandeers the legislative processes of the States." *New York v. United States*, 505 U.S. 144, 176 (1992).

unequivocal grant of constitutional power to the states under Article II.<sup>368</sup> Second, even where the Congress might otherwise validly legislate under the Fourteenth Amendment, the Supreme Court has recently placed severe constraints on its ability to infringe on state sovereignty in doing so.<sup>369</sup>

## 2. Alternative Legislative Possibilities

The Fourteenth Amendment remains as the only possible constitutional authority available to reformers who want Congress to legislate on the unit rule. Though this Note analyzes the substantive question of whether the Fourteenth Amendment suffices to allow Congress to legislate without an impermissible intrusion on sovereignty,<sup>370</sup> it is worth noting that there are two alternative possibilities for Congress to effect change, largely unnoticed in the scholarship, without implicating the Tenth Amendment. First, the Twenty-Third Amendment, which gave the people of the District of Columbia the right to choose electors in presidential elections, provides that the appointment shall be “in such manner as the Congress may direct” (parroting the language of Article II).<sup>371</sup> Therefore, Congress has the power to abolish the unit rule in the nation’s capital and implement one of the alternative methods, such as a proportional allocation of electoral votes.

If simply setting the example is not enough, and what is desired is a plan to encourage uniformity with reduced collective action problems, Congress could provide an incentive through its spending power.<sup>372</sup> In *South Dakota v. Dole*,<sup>373</sup> the Court held that “Congress may attach conditions on the receipt of federal funds” to

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368. See *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622, 629 (E.D. Va. 1968).

369. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (restricting application of federal age discrimination statute to states). This issue is discussed in detail *infra* Part V.B.

370. See *infra* Part V.B.

371. U.S. CONST. amend. XXIII, § 1.

372. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power . . . [to] provide for the common Defence and general Welfare of the United States . . .”); see also *New York*, 505 U.S. at 166 (indicating that the goals of the invalidated legislation could have been achieved though means short of outright coercion, such as holding out incentives to the states “as a method of influencing a State’s policy choices” consistent with federal interests); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 196 (2001) (calling for judicial review of congressional action under the Spending Clause, because “[n]o matter how narrowly the Court might read Congress’s powers under the Commerce Clause and [S]ection 5 of the Fourteenth Amendment, and no matter how absolute a prohibition the Court might impose on Congress’s ‘commandeering’ of state and local officials, the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power”).

373. 483 U.S. 203 (1987).

achieve federal goals.<sup>374</sup> The conditions must be related to the purpose of the federal spending.<sup>375</sup> In the wake of the controversy over the 2000 election, politicians of all stripes are calling for legislation to provide massive grants to states in order to support modernized and standardized voting equipment.<sup>376</sup> Pursuant to a stated federal interest in “electoral uniformity,” Congress could try to condition these grants on state legislatures implementing the “manner” of selecting electors favored by Congress. While these proposals do not enact the complete overhaul desired by some reformers,<sup>377</sup> perhaps incremental change would be the best approach in light of the difficulty of amending the Constitution.

*B. Back into Court: The Eleventh Amendment and Sovereign Immunity*

The federalist structure of the Constitution also presents another preexisting obstacle to any legislative or judicial involvement in the Electoral College and the unit rule—sovereign immunity. Congress’s legislative power regarding the states depends on the federal government’s ability to enforce those laws in court.<sup>378</sup> The doctrine of sovereign immunity operates to prohibit lawsuits by individuals against the federal or state governments.<sup>379</sup> What this means in the context of the Electoral College is that there is a presumption against court jurisdiction for a suit seeking to enforce a federal statute proscribing the unit rule as a method for choosing electors—a fact that is ignored in the literature.<sup>380</sup> It would be im-

374. *Id.* at 206.

375. *Id.* at 208. The spending at issue in *Dole* was a federal statute directing the Secretary of Transportation to withhold federal highway funds from states that did not adopt a twenty-one-year-old drinking age. *Id.*

376. See, e.g., *Steps for Ballot Reform*, N.Y. TIMES, Feb. 5, 2001, at A22; NAT’L COMM’N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 69 (2001) (advocating that “the national government should become a limited partner in financing our federal election system”).

377. It is curious that these two possible alternatives have been completely overlooked by the scholarship. Perhaps that is due in part to a preference among writers to focus on the larger, more comprehensive suggestions for reform. At any rate, conditional spending by Congress could help reduce the collective action concerns that might prevent a willing state from exercising its Article II discretion, and encourage other states to serve as “laboratories” for Electoral College experiments. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

378. Meltzer, *supra* note 33, at 1015 (arguing that the recent sovereign immunity decisions sharply limit Congress’s power to enforce legislation that it may otherwise validly enact).

379. *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

380. Articles that deal with challenges to the Electoral College tend to go directly to analysis of the substantive claim itself (usually the Fourteenth Amendment), without making this neces-

possible to legislate effectively against the unit rule without being able to enforce it against the state in its sovereign capacity.<sup>381</sup> There are exceptions that can be pursued, but the Supreme Court's federalism jurisprudence has strengthened state sovereign immunity in recent years, even more than it has the Tenth Amendment.<sup>382</sup>

### 1. Exceeding the Limits of Authority

Sovereign immunity is a doctrine that extends back to the common law tradition, which posits that immunity from private suits is a central aspect of sovereignty.<sup>383</sup> Using a "framers' intent" analysis, the Supreme Court has pronounced that the idea that the states would be immune from suit by private individuals was universally held when the Constitution was ratified.<sup>384</sup> Whether or not the expectation was that the states would retain sovereign immunity in the federal system, the Supreme Court's reading of Article III concluded that they did not. In 1793, it allowed a South Carolina citizen to bring suit against the State of Georgia.<sup>385</sup> The holding of *Chisholm v. Georgia*, that states were not constitutionally immune from lawsuit, "fell upon the country with a profound shock."<sup>386</sup> The controversy that attended the *Chisholm* reading of the federal judicial power was so great that the Eleventh Amendment to the Con-

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sary logical step of clearing the sovereign immunity hurdle. See, e.g., Josephson & Ross, *supra* note 22, at 162-64; Williams & MacDonald, *supra* note 18, at 252-55; O'Sullivan, *supra* note 23, at 2442-44.

381. Meltzer, *supra* note 33, at 1012.

382. The Court issued its latest decision in the post-*Seminole Tribe* line of cases in February of 2001. See *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001) (finding that Congress did not identify a pattern of irrational state discrimination in employment against the disabled to support abrogation of the Eleventh Amendment).

383. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (citing *Nevada v. Hall*, 440 U.S. 410, 414 (1979) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries.")).

384. *Id.* at 716-19. The Court cited much contemporary opinion to support this conclusion, including the ratification debates, and *The Federalist Papers*. See THE FEDERALIST NO. 8, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent* . . . . Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . ."). Previously, the Court had asserted that "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-39 n.2 (1985).

385. See *Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419 (1793) (holding that the literal text of Article III granted jurisdiction over controversies "between a State and the Citizens of another State").

386. *Alden*, 527 U.S. at 720.

stitution, the first amendment since the Bill of Rights, was passed in response.<sup>387</sup>

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State. . . .”<sup>388</sup> It has long been held to affirm that the states are sovereign entities in the federal system and that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a state’s] consent.”<sup>389</sup>

Since 1996, however, the Court has handed down a series of decisions that aggrandize the effect of the sovereign immunity doctrine even further. The first of these cases was *Seminole Tribe v. Florida*.<sup>390</sup> In *Seminole Tribe*, a suit was filed against the State of Florida to compel negotiations under the Indian Gaming Regulatory Act, which in part provided that a tribe may sue a state in federal court to compel good-faith negotiations toward a compact to allow gambling activities.<sup>391</sup> The Court held that this provision was an unconstitutional abrogation of Florida’s sovereign immunity from suit in federal court.<sup>392</sup> Though the Act was passed pursuant to an enumerated power—the Indian Commerce Clause<sup>393</sup>—the Court overturned an earlier case<sup>394</sup> that held Congress could validly abrogate sovereign immunity under Article I.<sup>395</sup> “The Eleventh Amendment restricts the judicial power under Article III,” the Court stated, “and Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction.”<sup>396</sup>

*Seminole Tribe* articulated a clear test for when a state’s Eleventh Amendment sovereign immunity from a lawsuit may be

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387. *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934). The Court has repeatedly held that it was *Chisholm*, not the Eleventh Amendment, that deviated from the original understanding that the states’ traditional immunity should be preserved, and that the Amendment was intended to restore, not change, the constitutional understanding of sovereignty. See *Alden*, 527 U.S. at 722; *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

388. U.S. CONST. amend. XI.

389. *Hans v. Louisiana*, 134 U.S. 1, 13 (1889) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

390. 517 U.S. at 44.

391. *Id.* at 49.

392. *Id.* at 72.

393. “The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes.” U.S. CONST. art. I, § 8, cls. 1, 3.

394. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 39 (1989) (holding that the Interstate Commerce Clause was sufficient grounds to abrogate state sovereign immunity).

395. *Seminole Tribe*, 517 U.S. at 72 (overruling *Union Gas*, 491 U.S. 1 (1989)).

396. *Id.* at 72-73.

overcome.<sup>397</sup> Congress may abrogate the states' sovereign immunity if (1) it has unequivocally expressed its intent to do so in the statute under which the suit is brought, and (2) it has acted pursuant to a valid exercise of legislative power.<sup>398</sup> Furthermore, in a 1999 case, the Court rejected the notion that there could be an implied waiver of immunity on the part of a state.<sup>399</sup> Since the Court held that Article I is not a valid exercise of legislative power for sovereign immunity purposes, there are accordingly few bases for a suit against a state to proceed. The exception, once again, is the Fourteenth Amendment, with its Section 5 enforcement power. Because the Reconstruction Amendments were enacted after the Eleventh Amendment and had "fundamentally altered the balance of state and federal power struck by the Constitution," Congress might be able to use the Fourteenth Amendment to validly abrogate state sovereign immunity.<sup>400</sup>

The Court has had even more to say about sovereign immunity since *Seminole Tribe*. Even though neither Article III nor the Eleventh Amendment extend state sovereign immunity to state courts by their text, *Alden v. Maine* held that states may not indeed be subject to suit in their own courts.<sup>401</sup> Even though this principle does not directly appear in the text of the Constitution, the Court held that immunity from suit in the sovereign's own courts is so fundamental an aspect of sovereignty<sup>402</sup> that it is an inseparable part of the residual sovereignty the states brought with them into the Union.<sup>403</sup> In *Alden*, the Court went beyond the Eleventh Amendment as the source of state sovereignty, reasoning that the doctrine derives not so much from the Amendment, but "from the structure of the original Constitution itself," and that the scope of

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397. *Id.* at 55.

398. *Id.*

399. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). The Court stated that it would only find a waiver of sovereign immunity if a state voluntarily invokes the court's jurisdiction, or if there is a clear declaration of intent to waive on the part of the state. *Id.*

400. *Id.* at 672; *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). However, the Court's post-*Seminole Tribe* decisions have severely restricted even the Fourteenth Amendment exception. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82 (2000) (restricting application of federal age discrimination statute).

401. *Alden v. Maine*, 527 U.S. 706, 754 (1999).

402. *Id.* at 745 ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.") (quoting *Beers v. Arkansas*, 20 U.S. (1 How.) 527, 529 (1857)).

403. *Id.* at 748 ("The principle of sovereign immunity preserved by constitutional design 'thus accords the States the respect owed them as members of the federation.' ") (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

immunity is determined by “fundamental postulates implicit in the constitutional design.”<sup>404</sup>

## 2. The Limited Fourteenth Amendment Exception

Even though *Seminole Tribe* left open the possibility of abrogating state sovereign immunity by legislating pursuant to the Fourteenth Amendment, subsequent decisions have severely limited this already narrow exception.<sup>405</sup> In a 2000 case, *Kimel v. Florida Board of Regents*, the Court expounded on just what it required for a valid Fourteenth Amendment abrogation of sovereign immunity.<sup>406</sup> Following the reasoning of *City of Boerne v. Flores*,<sup>407</sup> the Court averred that “Congress cannot ‘decree the substance of the Fourteenth Amendment’s restrictions on the States’ [because] . . . [i]t has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”<sup>408</sup> To determine whether a congressional enactment qualifies as appropriate remedial legislation under the Fourteenth Amendment’s Enforcement Clause, the Court adopted the test from *Flores*, stating that “there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>409</sup> In other words, to sue a state (e.g., over unit voting in the Electoral College), the legislative authority has to provide the party with not just a clear statement abrogating sovereign immunity, but an actual remedial measure of a violation of the Fourteenth Amendment as determined by the courts.<sup>410</sup>

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404. *Id.* at 728-29; see also Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1602-04 (2000) (arguing that in *Alden*, the Rehnquist Court shifts the methodology of its federalism jurisprudence to an understanding of overall structure, away from its previous reliance on originalism and textualism).

405. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that the Violence Against Women Act did not validly abrogate state sovereign immunity under the Fourteenth Amendment in order to permit a suit against a state to enforce its provisions); *Fla. Prepaid Post-secondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999).

406. 528 U.S. 62 (2000).

407. 521 U.S. 507, 536 (1997) (holding that the Religious Freedom Restoration Act violated the Constitution because it was not a valid exercise of congressional power under Section 5 of the Fourteenth Amendment).

408. *Kimel*, 528 U.S. at 81 (quoting *Flores*, 521 U.S. at 519).

409. *Id.* at 63 (quoting *Flores*, 521 U.S. at 520). Applying that “congruence and proportionality” test, the Court held that the Age Discrimination in Employment Act did not validly abrogate state sovereign immunity. *Id.* at 83.

410. *Id.* at 81.

Since the Court does not permit Congress to determine the substance of the Fourteenth Amendment's restrictions on the states, it becomes difficult for that body to pass any meaningful legislation. It is limited to "enforcing" the guarantees of the Fourteenth Amendment.<sup>411</sup> Even since *Kimel*, there have been two subsequent cases where the Court has struck down legislation enacted to prohibit discrimination pursuant to the Fourteenth Amendment because the abrogation of sovereign immunity was not "congruent" or "proportional" to the discrimination it was trying to prevent.<sup>412</sup> In *United States v. Morrison*, the Court held that the Violence Against Women Act, while perhaps enacted to remedy a valid Fourteenth Amendment type of discrimination, was not sufficient to allow a suit to enforce the Act against a state.<sup>413</sup> The most recent in this line of cases was decided in February 2001. In *Board of Trustees v. Garrett*, the Court held that the Fourteenth Amendment basis of the Americans with Disabilities Act was insufficient to abrogate state sovereign immunity.<sup>414</sup> The Court made this ruling despite a large legislative record amassed by Congress purporting to demonstrate a pattern of discrimination in the states.<sup>415</sup>

Constitutional sovereignty does *not* operate, however, to immunize states from lawsuits brought by other states or by the federal government. These possibilities are nowhere precluded by the text of Article III or by the Eleventh Amendment. In fact, the Court has recently observed that "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."<sup>416</sup> In the 2001 Term, the Court in *Kansas v. Colorado* confirmed that the Eleventh Amendment does not bar a state from bringing an action against another state under the Court's original jurisdiction.<sup>417</sup> Delaware once tried to challenge the unit rule in the Electoral College this way, by suing New York under the Supreme Court's original jurisdiction to hear cases between states, but the Court declined to hear the suit.<sup>418</sup>

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411. *Id.*

412. *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598, 626 (2000).

413. *Morrison*, 529 U.S. at 626-27.

414. *Garrett*, 531 U.S. at 356.

415. *Id.*

416. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

417. 121 S. Ct. 2023, 2028 (2001) (holding that Kansas may invoke the Court's original jurisdiction in a suit against Colorado, as long as it is the real party in interest, and is not simply acting as an agent for one or more of its citizens).

418. *Delaware v. New York*, 385 U.S. 895 (1966). This has been explained as a tactic meant to invoke the Supreme Court's original jurisdiction under Article III, Section 2. U.S. CONST. art.



The bottom line of the sovereignty doctrine, however, is that it is now extremely difficult for Congress to pass or enforce any legislation, even based on its enforcement powers under the Fourteenth Amendment, that operates against the states.<sup>419</sup> This robust doctrine has several implications in the context of a challenge to unit voting by the states in the Electoral College. By protecting the states from lawsuits without their consent, the current reading of the Eleventh Amendment makes such a challenge an uphill climb, for the only way to enforce a statute limiting the unit rule is to sue a state, and a state would be unlikely to consent to such a suit. It effectively eliminates any constitutional basis for legislating against the unit rule other than the Fourteenth Amendment.<sup>420</sup> Furthermore, as *Kimel* demonstrates, the Fourteenth Amendment has become very limited in its ability to overcome sovereign immunity, in spite of the "fundamental right" established in the "one person, one vote" doctrine.<sup>421</sup>

## VI. CONCLUSION

In 1787, the Constitutional Convention met to decide how to structure the new nation. The plan that was designed, ratified, and implemented was not the product of one grand vision, but of a series of compromises that produced a structure capable of creating an effective national government while preserving the sovereignty of the respective states. This compromise is reflected in the Electoral College system that provides for a state role in electing the chief executive. Then-Senator John F. Kennedy opposed a 1956 plan that would have abolished state unit voting, stating that the constitutional balance achieved in the Electoral College represented "a whole solar system of governmental power."<sup>422</sup> In 2000, that system once again came under scrutiny for the results it produced. The

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III, § 2 ("In all cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction"). See O'Sullivan, *supra* note 23, at 2440-41. It is also possible, however, that it was a tactic to avoid a sovereign immunity problem.

One is left to wonder why, if Delaware felt so strongly, it has never chosen to exercise its Article II rights to change the method of appointing the three electors from Delaware. Perhaps they might have had collective action concerns that, if they were to jettison the unit rule, they might lose influence in presidential elections if other states did not follow suit.

419. See Meltzer, *supra* note 33, at 1015; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 443 (2000).

420. See *Seminole Tribe v. Florida*, 517 U.S. 44, 57 (1996).

421. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000). See *supra* Part IV for discussion of the "one person, one vote" doctrine.

422. 102 CONG. REC. 5150 (1956) (statement of Sen. John F. Kennedy).

original balance of federal and state interests, and the importance of voting rights, both greatly evolved during the intervening two centuries, but not enough to erode the original structure. In spite of the strength of the modern Equal Protection Clause and its application to electoral practices, a state's discretion to use the unit rule in appointing electors cannot be overcome by a court challenge or by legislation. Only unilateral state action or a constitutional amendment will effect any change in the states' use of unit voting in the Electoral College.

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