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Minority Rights and the Electoral College: What Minority, Whose Rights?

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MINORITY RIGHTS AND THE ELECTORAL COLLEGE: WHAT MINORITY, WHOSE RIGHTS?

David Schultz[*]

The Electoral College as a method of selecting U.S. presidents was allegedly set up to protect one type of minority rights—those of slave states and small states—but over time it has operated to deny the rights of racial and other minorities, especially given the winner-take-all system of electoral vote allocation used in forty-eight states. This Essay examines the history and current operation of the Electoral College, detailing how, despite its changes, it continues to privilege some forms of minority rights at the expense of others. The Essay also indicates how in its current form in forty-eight states, the Electoral College suppresses minority votes. Even though Georgia in 2020 appeared to show rising political efficacy for African American voters, the future of minority voting rights in presidential elections is still in trouble if the Electoral College in its present form continues to operate.

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I. INTRODUCTION

The 2020 presidential election results in Georgia represent a watershed moment in American history. To the surprise of many, when the votes were certified, Democratic nominee Joe Biden won the state, defeating the Republican candidate, Donald Trump.[1] It was only the fifth time since 1960 that a Democrat had won Georgia's Electoral College votes.[2] President Biden's victory and the flipping of two U.S. Senate seats from Republican to Democratic control were driven to a large extent by African American voters.[3] As a result, there were calls to change voting procedures and requirements to make voting in Georgia more difficult.[4] One such proposal has already become law.[5]

Historically, it seems that the U.S. Constitution and voting laws have been designed to deny people of color the right to vote and have their voice heard when they were a demographic minority.[6] Now

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[1] Kate Brumback, *Georgia Officials Certify Election Results Showing Biden Win*, ASSOCIATED PRESS, Nov. 20, 2020, https://apnews.com/article/georgia-certify-election-joe-biden-ea8f867d740f3d7d42d0a55c1aef9e69.

[2] *Presidential Voting Trends in Georgia*, BALLOTPEDIA, https://ballotpedia.org/Presidential_voting_trends_in_Georgia (last visited May 14, 2021); *Number of Electoral Votes from Georgia Designated to Each Party's Candidate in U.S. Presidential Elections from 1789 to 2020*, STATISTA, https://www.statista.com/statistics/1130234/georgia-electoral-votes-since-1789/ (last visited May 14, 2021).

[3] *See* Michelle Ye Hee Lee, Reis Thebault, Haisten Willis & Lenny Bronner, *Black Voters Powered Democrats to Victory in the Georgia Senate Runoff*, WASH. POST (Jan. 6, 2021, 7:36 PM), https://www.washingtonpost.com/politics/black-voters-powered-democrats-to-victory-in-the-georgia-senate-runoff/2021/01/06/7068411a-502a-11eb-b96e-0e54447b23a1_story.html ("Sky-high turnout among Black voters powered a pair of Democrats to Senate victories in Georgia, reshaping the balance of power in Washington as President-elect Joe Biden takes office.").

[4] *See* Nick Corasaniti & Jim Rutenberg, *In Georgia, Republicans Take Aim at Role of Black Churches in Elections*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/06/us/politics/churches-black-voters-georgia.html?smid=em-share ("Stung by losses in the presidential race and two Senate contests, the state [Republican] party is moving quickly to push through . . . measures aimed directly at suppressing the Black turnout that helped Democrats prevail in the critical battleground state.").

[5] *See* Zack Beauchamp, *Yes, the Georgia Election Law is That Bad*, VOX (Apr. 6, 2021, 1:30 PM), https://www.vox.com/policy-and-politics/22368044/georgia-sb202-voter-suppression-democracy-big-lie (discussing S.B. 202 and its effects on Georgia's election procedures).

[6] *See generally* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015) (discussing the history of voter suppression after the passage of the Voting Rights Act of 1965); DONALD GRIER STEPHENSON, JR., THE RIGHT TO VOTE: RIGHTS

that people of color are part of an emerging electoral majority, those same laws may be changing to protect a White minority.

This Essay looks at the role of minority rights in the Electoral College and argues that the institution has always concerned itself with race and minority votes. Specifically, two basic truths define the Electoral College's existence. One, the Electoral College has always been associated with anti-majoritarianism and minority rights.[7] Yet, the institution has inconsistently defined which minority and whose rights must be protected versus which must be oppressed.[8] Two, it is an institution born of slavery and racism, and it continues to perpetuate racism today.[9] From its origins in the great compromises of the Constitutional Convention of 1787 and up until today, the Electoral College has more often than not restricted the rights of people of color, while enabling the rights of a different minority.[10]

II. A SHORT HISTORY OF THE ELECTORAL COLLEGE

Classic democratic theory states that the people should select their leaders, including their president and other major officeholders.[11] A representative democracy is one where the people ultimately rule through the individuals they elect.[12] The United States, though, is unique in how it selects its president. Rather than

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AND LIBERTIES UNDER THE LAW (2004) (examining how political groups selectively expand and constrict the franchise to preserve their political power).

[7] *See generally* MICHAEL J. GLENNON, WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION (1992) (contending that the Electoral College is anti-democratic and fails to protect certain minority rights).

[8] *See generally* Lawrence D. Longley & James D. Dana, Jr., *New Empirical Estimates of the Biases of the Electoral College for the 1980s*, 37 W. POL. Q. 157 (1984) (describing the changing biases in the structure of the Electoral College over time).

[9] *See* Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1156 (2002) (describing the Electoral College as "the last constitutional vestige" of slavery).

[10] *See, e.g.*, *id.* at 1147 (discussing how the Electoral College enabled the rights of minority slaveholder interests).

[11] *See* DAVID SCHULTZ, ELECTION LAW AND DEMOCRATIC THEORY 51–52 (2014) (describing as a "requisite" of democracy the power of the people "to make the choices over who the elected leaders are"); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 112–15 (1989) (explaining that the people's "control of the agenda" is essential to a "fully democratic process").

[12] *Cf.* SCHULTZ, *supra* note 11, at 137–40 (discussing how democratic theorists have described and debated the concept of "representation").

employing a direct popular vote, the Framers opted for the Electoral College, as described in Article II of the U.S. Constitution and the Twelfth Amendment.[13]

At the Constitutional Convention of 1787—as Robert Dahl[14] and others[15] have pointed out—fear of power, especially when exercised or abused by a majority, was the primary focus of constitutional design.[16] In fact, James Madison, in Federalist No. 10, describes one of the chief tasks of constitutional design as avoiding the problem of majority factions who could oppress the rights of others or the "permanent and aggregate interests of the community."[17] Madison was defending the interests of the minority against the majority, but who constituted the minority is a matter of contest, with some arguing that it was affluent slaveholders.[18]

Yet the Constitutional Convention of 1787 was also about compromises.[19] Historian Richard Hofstadter points to the fact that the Framers were political realists and politicians, challenged by

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[13] *See* Finkelman, *supra* note 9, at 1146 (describing the Electoral College as a "unique" system that only exists in the context of presidential elections in the United States).

[14] *See, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 4–8 (1956) (outlining Madisonian democratic theory).

[15] *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 3 (1994) ("For Madison, majority tyranny represented the great danger to our early constitutional democracy."). *See generally* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

[16] *See* 1 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 82–85 (7th ed. 1991) (discussing the need for checks and balances to restrict legislative power); JAMES MACGREGOR BURNS, THE VINEYARD OF LIBERTY 15–17 (1981) (outlining the concerns of George Washington and John Adams); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 472–75 (1969) (explaining James Madison's fear that "interested majorities" in individual states would suppress minority rights without a strong federal government); THE FEDERALIST NO. 10, at 60–61 (James Madison) (Jacob E. Cooke ed., 1961) ("When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed . . . .").

[17] THE FEDERALIST NO. 10, *supra* note 16, at 57 (James Madison).

[18] *See* Finkelman, *supra* note 9, at 1155 (discussing the slaveholding interests in the Electoral College).

[19] *See* RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 3–17 (1973) (discussing the many interests the Framers balanced when crafting the U.S. Constitution).

the need to forge compromise among diverse interests.[20] The Constitutional Convention was marked by disputes between the more populous and less populous states over the issue of representation.[21] Those disputes were made more challenging by the divide over slavery.[22] Free and slave states feared that, depending on the representation schema selected for Congress, the other side would prevail and that there would be a United States of all slave states or all free states.[23] The South, possessing the vast majority of slaves, would have had a clear advantage if slaves were counted for the purpose of representation.[24]

The tension surrounding slavery precipitated a series of fights that ultimately impacted the procedure for presidential selection. First, it influenced how representation in Congress was determined.[25] This was a twofold question: one concerned the states, while the other related to individuals. In terms of the states, the question revolved around how representation would be allocated in Congress. Under the Articles of Confederation, each state had equal

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[20] *See id.* at 3–9 (discussing the political and ideological backgrounds of the Framers and how that informed their ability to compromise).

[21] *See, e.g.*, 1 KELLY ET AL., *supra* note 16, at 90–91 (comparing the Virginia and New Jersey Plans); 1 DUMAS MALONE & BASIL RAUCH, EMPIRE FOR LIBERTY: THE GENESIS AND GROWTH OF THE UNITED STATES OF AMERICA 227–36 (1960) (discussing the debate between large and small states about the proper form of representation in Congress).

[22] *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 13–14 (2006) (noting the compromises that the Framers made regarding slavery in order to create "the political union of the thirteen states"); 1 KELLY ET AL., *supra* note 16, at 93–96 (explaining the Great Compromise); MALONE & RAUCH, *supra* note 21, at 235–37 (discussing how the three-fifths rule benefited slave states and increased their representation in Congress).

[23] *See* Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 414–15 (2001) (noting that the Framers "gave the slave owners at the Convention virtually everything they asked for").

[24] *See* Kathryn L. Mackay, *Statistics on Slavery*, WEBER ST. UNIV., https://faculty.weber.edu/kmackay/statistics_on_slavery.htm (last visited May 18, 2021) (illustrating how much of the population of southern states was comprised of enslaved individuals); *Free and Slave Populations by State (1790)*, TEACHING AM. HIST., https://teachingamericanhistory.org/resources/the-constitutional-convention-free-and-slave-populations-by-state-1790/ (last visited May 18, 2021) (showing the vast difference between the states in terms of enslaved populations in 1790).

[25] *See* JOHN R. VILE, THE WRITING AND RATIFICATION OF THE U.S. CONSTITUTION: PRACTICAL VIRTUE IN ACTION 82–87 (2012) (detailing the debates about state and individual representation).

representation in Congress.[26] Shortly after the 1787 Convention began, a series of reforms were offered. First was the plan offered by Virginia, often referred to as the big state plan, under which states would receive representation in Congress based on population.[27] In response, New Jersey offered the alternative, small state plan premised on equal representation, similar to the Articles of Confederation schema.[28] While these dueling plans are mostly viewed as a debate between the more and less populous states, the two plans also indicate a divide between free states and slave states.[29] Simple representation based on population would generally favor the more populous free states, especially if only free White people were counted; the slave states disfavored such an arrangement because they feared that this system would lead to emancipation.[30]

Finally, the Connecticut Plan emerged, offering a bicameral legislature—parallel to the British House of Commons and House of Lords—where the former would be based on population and represent the people's interests, while the latter would have equal representation and represent the states' interests.[31] Yet this compromise did not resolve the problem. It left open the issue of whom to count for the purposes of representation.[32] The slave states wished to include slaves in the count for representation, while the northern free states opposed such inclusion and wanted slaves counted only for purposes of taxation.[33] Convention attendees,

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[26] *See* ARTICLES OF CONFEDERATION of 1777, art. V, para. 4 ("In determining questions in the United States, in Congress assembled, each State shall have one vote.").

[27] *See* 1 KELLY ET AL., *supra* note 16, at 88–91 (outlining the Virginia Plan).

[28] *See id.* at 91–93 (summarizing the New Jersey Plan).

[29] *Cf.* VILE, *supra* note 25, at 89 (arguing that, in the debates over the three-fifths clause, "[t]he earlier fault line between large states and small states was . . . replicated among free states and slave states with respect to the representation and taxation of slaves").

[30] *See* Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1088 (2018) (noting that "the Northern states had many more qualified, free white male voters than the slave South," so their "greater political power under representative democracy posed an unacceptable threat to slavery").

[31] *See* 1 KELLY ET AL., *supra* note 16, at 93–95 (describing the "Great Compromise" as "acceptable" because "[the North] expected in the future to be outnumbered by the South and it . . . looked on equal state representation in the Senate as providing needed long-range protection").

[32] *See id.* at 95–96 (providing background on the three-fifths clause).

[33] VILE, *supra* note 25, at 88–89.

including James Madison,[34] recognized that not counting slaves for representation would hurt the South and urged their inclusion for congressional representation.[35] The result was the infamous Three-Fifths Compromise, which counted slaves at that ratio for both representation and taxation purposes.

Next, there was the debate over voting. There was never a serious debate about providing a universal right to vote in the U.S. Constitution.[36] This was simply too divisive of an issue and was complicated by slavery, among other issues.[37] If there had been a discussion of voting rights, then it would have had to address thorny questions such as property qualifications and the franchise for women and freed slaves.[38] The Constitutional Convention avoided a tumultuous and lengthy debate by leaving voting rights up to the states—largely where the issue remains today.[39] The Framers effectively left franchise in the hands of White, property owning, adult males who are largely of a mainline religious faith—the classic stereotype of the White Anglo-Saxon Protestant.[40] Moreover, the U.S. Senate was appointed by state legislatures, thereby leaving little for the people to vote for beyond the House members.[41]

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[34] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 322, 486 (Max Farrand ed., 1911).

[35] *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 225–29 (Ohio Univ. Press 1966) (demonstrating Madison's proposal that slaves be counted in some proportion for representation in Congress).

[36] *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 4 (rev. ed. 2000) ("The convention's debates about suffrage . . . were brief, and the final document made little mention of the breadth of the franchise.").

[37] *Cf.* Perea, *supra* note 30, at 1091 ("In general, suffrage was limited to property-owning white males. The original Constitution was silent on the right to vote, except to specify that state legislatures would determine the 'manner' of selection of electors for the presidency." (footnote omitted)).

[38] *See, e.g.*, KEYSSAR, *supra* note 36, at 13–17 (explaining how the states initially allocated the right to vote).

[39] *See* Perea, *supra* note 30, at 1091 ("[U]nder the Constitution states retained their original colonial powers to determine the qualifications of voters. While subsequent amendments forbade state discrimination with regard to race, sex, age, and poll taxes, states remained free to decide for themselves all other qualifications for voters." (footnote omitted)).

[40] *See* KEYSSAR, *supra* note 36, at 23–26 (discussing the changes made in voting requirements throughout the first century of the United States).

[41] *See* David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1050–53 (2014) (describing the Framers' decision to have Senators be appointed by state legislatures and for the House to be directly elected).

The resulting compromises, including the two-house Congress with equal and per capita representation, the Three-Fifths Compromise, and the delay on the halt on slave trade, all spoke to the compromises to overcome polarization and division caused by slavery.[42] Thus, a quick look at the representation scheme in Congress and voting rights reveals that both were skewed in favor of the slave states. Allowing slave states to count three-fifths of slaves for the purposes of representation provided those states with approximately ten additional House members, and the equal representation in the Senate provided more representation in that chamber than would have been afforded given their population vis-à-vis the free states.[43] The system of representation in Congress did not favor majority rule. It enabled minority rule by a limited number of wealthy individuals, protecting slaveholder interests and excluding rights for just about anyone else.

When the task came to selecting the president, fears of majoritarianism again prevailed.[44] In Federalist No. 68, Alexander Hamilton described the need to create a president who was above popular opinion and able to lead while remaining accountable to the

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[42] *See* 1 KELLY ET AL., *supra* note 16, at 93–96 (describing these "North-South compromises"); MALONE & RAUCH, *supra* note 21, at 235–37 (same); *see also* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 333–36 (2009) (explaining how these compromises further entrenched and protected slavery); GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 270 (2010) ("The Constitution was an obstacle to ending black slavery in America."); Finkelman, *supra* note 9, at 1155 (noting Madison's observation that the right to vote was a divisive issue between the North and the South); James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2023–27 (1996) (describing the Constitution as a proslavery document). *See generally* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (3d ed. 2014).

[43] *See* DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765–1820, at 23, 39, 180, 404 (1971) (presenting the data that support this conclusion); Perea, *supra* note 30, at 1089 ("Each state's electoral votes incorporated representation based on three-fifths of the number of slaves, therefore boosting the electoral representation of slave states.").

[44] *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 164 (1913) ("After voting down by a large majority a proposal for an election by the people, and by a majority of one a proposal for an election by electors chosen by the people, the convention divided equally upon the general proposition for an election by electors.").

people.[45] At the Constitutional Convention, similar debates occurred over the selection of the president, with little support for direct selection by the people.[46] The result was the Electoral College where the people's right to vote was largely left to the states.[47]

In the simplest terms, the U.S. Constitution originally outlined a two-stage process for the selection of the president.[48] The use of the Electoral College to elect the president was a way of avoiding the need to discuss voting rights, again a favor to the slave states.[49] Under this system, states would appoint electors who then picked the president. The candidate receiving the most electoral votes would be the President, and the runner up would be Vice President. The original U.S. Constitution was designed with the hope that political parties would not emerge[50] and that the electors would serve as elder wise sages to pick the president, ensuring that the people would not make the wrong choice.[51] Martin Diamond, perhaps the most emphatic defender of the Electoral College, saw it as yet another mechanism to check majority faction and to protect minority rights.[52] Finally, given how the electoral votes were to be allocated based on representation in Congress, it again immediately favored slaveholding states and their interests.

As anti-majoritarian as this system was, the logic of the Electoral College deteriorated quickly. Originally, the Framers did not intend to have political parties, as evidenced by the fact that the top two electoral vote recipients would become President and Vice President

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[45] *See* THE FEDERALIST NO. 68, *supra* note 16, at 443 (Alexander Hamilton) ("It was desir[]able that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided.").

[46] MADISON, *supra* note 35, at 50–52; *see also supra* note 44.

[47] *See* ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT 8–35 (2018) (criticizing the Framers' compromises); *see also supra* notes 37, 39.

[48] *See* U.S. CONST. art. II, § 1 (detailing the two-step process for electing the president).

[49] *See* Perea, *supra* note 30, at 1089 ("The only reason we have an electoral college rather than a more direct popular election was the need of slave owners to have additional representation based on their slave ownership. Without this 'slave bonus,' Southern slave states . . . would have been outvoted every time, as Madison recognized.").

[50] *See* 1 KELLY ET AL., *supra* note 16, at 129–30 (stating that the Framers did not anticipate the formation of political parties); BURNS, *supra* note 16, at 91 ("The political leadership . . . had no theory of party.").

[51] *See* MALONE & RAUCH, *supra* note 21, at 237 (noting that electors presumably would be "a group of qualified men" who "would follow their own judgment in voting").

[52] *See generally* MARTIN DIAMOND, THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY (1977) (defending the Electoral College from several criticisms).

respectively. However, by 1796, political parties had emerged.[53] Then the idea of giving electors wide-open discretion to pick presidents also collapsed. Many of the Framers urged winner-take-all allocation of electoral votes within each state to maximize their influence, and possibly reward the party in control.[54] By the middle of the 1790s, political parties had emerged across America with influential figures like Thomas Jefferson urging states to create a winner-take-all system for the allocation of electoral votes.[55] He specifically argued that for the election of 1800 in Virginia.[56] The idea was that such a system would maximize the political influence of states. It was also appealing to the then-emerging parties because it meant that the opposition in a specific state would get no electoral votes, creating a zero-sum game for elections that rewarded partisan strength.[57] With Jefferson's party in control, he was able to help his partisan interests at the expense of the Federalist Party. Winner-take-all allowed for "banking" electoral votes, meaning a party could bank the states it knew it would win, allowing it to then concentrate on the few that were uncertain and potentially decisive. Finally, turning the selection of the president and the electors into de facto party functions transformed electors from wise independent persons who would find the best president into tools of the party.[58]

The 1800 presidential election completed the transformation of presidential selection into a party-driven process when it featured

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[53] *See* Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with The District-Popular Plan*, 41 HOFSTRA L. REV. 217, 223 (2012) ("By 1796, political parties began to rise . . . . Presidential electors, originally thought to be searchers of a presidential candidate of nationwide character, became political party instruments selected for party loyalty and voted on already decided presidential candidates." (footnotes omitted)); MALONE & RAUCH, *supra* note 21, at 237 ("[Electors] came to follow party judgments rather than personal opinions after parties arose . . . .").

[54] *See* Herbst, *supra* note 53, at 226 ("The [winner-take-all] method appealed to political parties because if a party received more popular votes in a state than the opposing party, the opposing party received no electoral votes.").

[55] *See id.* ("As the election of 1800 approached, politicians in both parties created methods of choosing electors in states to maximize their own party's electoral vote totals.").

[56] *See id.* ("Virginia changed from a district voting method of selecting electors to a winner-take-all method to ensure Thomas Jefferson would receive all of Virginia's electoral votes. Jefferson's subsequent victory in 1800 signaled that allocating a state's electoral votes in a winner-take-all fashion could politically benefit a state." (footnote omitted)).

[57] *See id.* ("Over time, as party politics became increasingly entrenched in the nation, more states allocated their electoral votes on a winner-take-all basis.").

[58] *See supra* note 53.

the first fully partisan election.[59] Thomas Jefferson ran with a slate that included Aaron Burr as the Democratic-Republican Party vice-presidential candidate against the Federalist Party slate of John Adams and Thomas Pinckney. Jefferson encouraged his party members to cast their votes for his ticket with Burr, leading to a tie and eventually a tense struggle in the House of Representatives that ultimately produced Jefferson as President.[60] The emergence of party politics in the United States resulted from the disputed election of 1800. It took the adoption of the Twelfth Amendment to recognize presidential party politics,[61] but it was a crude graft onto a system that had envisioned an entirely different purpose for the Electoral College.

The winner-take all-system for the allocation of electoral votes created a new problem for minority rights—the locking out of individuals who were part of a partisan minority within a state. This system placed the power of selecting presidents in the hands of White-dominated state legislatures, effectively disenfranchising African American voters.[62] If a state was balanced in terms of party control, then perhaps the state was competitive, at least initially in terms of the selection of electors. But once the votes were cast, winner-take-all meant one side would win and the losers went home empty-handed. Even as franchise rights or eligibility expanded in the nineteenth century, these expansions continued to protect limited voting rights for a select few. As a result, no more than a few voters in each state would have any influence over the selection of presidential electors.

III. THE ELECTORAL COLLEGE IN OPERATION

The origin of the Electoral College is rooted in slavery. It both entrenched minority rights by empowering White males who owned property—and, more specifically, slaveholders in the southern

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[59] *See* Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959, 1963 (1999) (discussing letters between Thomas Jefferson and John Adams where Jefferson described "political parties and their role in American politics" following the election of 1800).

[60] *Id.* at 1962–63.

[61] *See* U.S. CONST. amend. XII (establishing the Electoral College).

[62] *See* Perea, *supra* note 30, at 1092 ("White-controlled state legislatures enacted ostensibly race-neutral, yet racially targeted voting qualifications and rules to disqualify African Americans, and, in the Southwest, Mexican Americans.").

states—while also suppressing the minority rights of people of color. But its anti-majoritarianism did not end there. The system's anti-majoritarian nature is evidenced by the fact that one can win the presidential popular vote but lose the electoral vote, which has happened five times in U.S. history—in 1824, 1876, 1888, 2000, and 2016.[63] This popular and electoral vote split alone speaks to the anti-majoritarianism of the institution.

The 1876 presidential election featured Democratic nominee Samuel Tilden challenging the Republican nominee Rutherford B. Hayes.[64] This election took place within the constraints of Reconstruction.[65] During Reconstruction, Republicans in Congress sought to undo the legacy of slavery and discrimination with numerous measures. A few of these measures included extension of the Freedmen's Bureau to help former slaves and the adoption of the Civil Rights Bill of 1866, the Ku Klux Klan Act of 1871, the Civil Rights Act of 1875, and the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, 1868, and 1870, respectively.[66] These measures sought to bring economic and political rights to emancipated slaves and, in the case of the Fifteenth Amendment, voting rights.[67] Using their newly acquired voting rights, African American males were able to elect many Black people to public office, even across what was very recently the Confederacy.[68]

Southern leaders did not take this easily. They fought Reconstruction measures both formally and informally with the rise of the KKK.[69] However, in order to enforce Reconstruction efforts, the federal government maintained troops in the South and

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[63] *See generally* ROBERT M. ALEXANDER, REPRESENTATION AND THE ELECTORAL COLLEGE (2019) (listing 1824, 1876, 1888, 2000, and 2016 among its discussion of "electoral college misfires").

[64] Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 RUTGERS J.L. & PUB. POL'Y 340, 349–50 (2016).

[65] *See id*. at 349–51 (describing the election as "grounded in lingering feelings of sectionalism and the bitter legacy of the Civil War" and under the control of "Reconstruction-era Republican governors").

[66] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 228–80 (1988) (providing a history of Reconstruction and the first wave of Black suffrage).

[67] *See* U.S. CONST. amend. XV (securing the right to vote for African American men).

[68] *See* FONER, *supra* note 66, at 351–55 (elaborating upon Black elected officials' electoral success during Reconstruction); *see also* Michael D. Cobb & Jeffery A. Jenkins, *Race and the Representation of Blacks' Interests During Reconstruction*, 54 POL. RSCH. Q. 181, 185 (2001) ("[Twenty-two] different blacks were elected to Congress between 1869 and 1901 . . . .").

[69] *See* FONER, *supra* note 66, at 425–44 (discussing the KKK's anti-Black violence).

prevented many state leaders from voting, or even having representation in Congress, until they recognized the rights of the former slaves.[70] The 1876 election took place amidst these tumultuous circumstances. At that time, the total number of electoral votes was 369, with 185 needed to win.[71] After the popular vote was completed, Tilden had a majority but held only 184 electoral votes to Hayes's 165.[72] Four states, including Florida, Louisiana, Oregon, and South Carolina, held a total of twenty electoral votes that were in dispute.[73]

This dispute led Congress to create the Electoral Commission on January 29, 1877 in order to resolve the election with regard to these four states.[74] After a series of negotiations, a deal was struck.[75] Democrats agreed to let the decision of the Commission prevail, giving the presidency to Hayes, if Hayes agreed that, upon being sworn into office, he would remove the federal troops from the South.[76] Hayes agreed, and, in 1877, the troops were removed, thereby ending Reconstruction.

The 1877 deal stands for several propositions when it comes to the Electoral College. First, a presidential election was resolved by lawmakers capitulating to racism and selling out the rights of a minority group.[77] Second, the commission that was created to resolve the 1876 election eventually led to the passage of the Electoral Count Act of 1887.[78] The Electoral Count Act is still in

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[70] *See* John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 105 (1972) ("Under the supervision of military rulers in five districts, established to replace the former White southern governments, more than 700,000 blacks were registered to vote within a year.").

[71] Land & Schultz, *supra* note 64, at 350.

[72] *Id.*

[73] *See id.* at 351 ("[B]y December 1876, Florida, Louisiana, South Carolina, and Oregon each submitted multiple sets of electoral votes to Congress for consideration.").

[74] *See id.* at 356 (explaining that the Electoral Commission served as a "fact-finder operating on behalf of Congress").

[75] *See id.* at 352 ("President Grant and the House and Senate approved the creation of a statutory commission in the Electoral Commission Act by wide majorities in January 1877.").

[76] *See id.* at 353 (describing the "backroom deal" between Southern Democrats and Republican leaders to end Reconstruction); FONER, *supra* note 66, at 581–87 (discussing Hayes's abandonment of Reconstruction). *See generally* MICHAEL F. HOLT, BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876 (2008).

[77] FONER, *supra* note 66, at 582–83.

[78] *See* Land & Schultz, *supra* note 64, at 368–69 (comparing the Electoral Commission Act of 1877 and the Electoral Count Act of 1887); Stephen A. Siegel, *The Conscientious*

place and potentially could serve as a tool to resolve disputes in the counting of electoral votes.[79] Yet this Act itself amplifies the anti-majoritarianism of the Electoral College by setting up a commission that favors a small number of states and only represents a small number of interests.[80] Third, the end of Reconstruction led to the Jim Crow Era.[81] This period, lasting up to the passage of the Voting Rights Act of 1965 (VRA), permitted the disenfranchisement of most people of color in the South and perpetuated solid Democratic control in the region until the 1960s.[82]

IV. THE ELECTORAL COLLEGE AND THE SWING STATE PHENOMENA

When the Framers created the U.S. Constitution, they presupposed the absence of political parties, or at least they hoped to discourage them.[83] But they did arise, and the resulting partisanship has ebbed and flowed over time. Simultaneously, state electoral vote allocation shifted to a winner-take-all system, with forty-eight of the fifty states allotting their electoral votes in that fashion.[84] This process has historically disenfranchised individuals belonging to their state's non-majority party, leaving them with no electors even if they win a substantial amount of the popular vote in a state.[85] This renders minority voices near speechless. This

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Congressman's Guide to the Electoral Count Act of 1887, 56 FLA. L. REV. 541, 554–56 (2004) (describing the creation of the Electoral Commission and its influence on the resulting congressional debate regarding the Electoral Count Act).

[79] *See* 3 U.S.C. § 15 (2018) (outlining the process for counting electoral votes in Congress).

[80] *See* Land & Schultz, *supra* note 64, at 356–60 (discussing potential constitutional challenges to the Electoral Commission).

[81] *See generally* HENRY LOUIS GATES JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW (2020) (describing the rise of Jim Crow, segregation, and the loss of African American voting rights after the end of Reconstruction).

[82] *See generally* V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION (1949) (outlining the development of the political landscape of the American South); KARI FREDERICKSON, THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932–1968 (2001) (describing the impact of the Dixiecrat movement on southern politics).

[83] *See supra* note 50 and accompanying text.

[84] *See* Herbst, *supra* note 53, at 219 ("Currently, every state, except Nebraska and Maine, uses a winner-take-all approach to allocate all of its electoral votes . . . .").

[85] *See* Wilfred U. Codrington III, *The Electoral College's Racist Origins*, BRENNAN CTR. FOR JUST. (Apr. 1, 2020), https://www.brennancenter.org/our-work/analysis-opinion/electoral-

disenfranchisement has also produced the presidential swing state phenomena.[86] Partisanship is not geographically balanced across the United States. There are unequal percentages of Democrats and Republicans across all 435 congressional districts and among the fifty states.[87] There are some areas where one party dominates and has done so for many years.[88] This "big sort" of political parties[89] has yielded a situation where, increasingly, one party holds the clear numerical majority in a state.[90] In theory this is not a problem, but, at least in the current configuration of presidential politics, it creates an Electoral College perversity due to the hardened partisanship in American politics.[91] This problem stems from

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colleges-racist-origins (arguing that racial disenfranchisement was a key motivation behind the creation of the Electoral College).

[86] *See* Stacey Hunter Hecht & David Schultz, *Introduction: Swing States and Presidential Elections* (examining the relationship between the "swing-state phenomena" and the winner-takell Electoral College system), *in* PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER ix, xxxiii–xxxvi (Stacey Hunter Hecht & David Schultz eds., 2015); Perea, *supra* note 30, at 1090 ("Because of our electoral system, candidates concentrate their attention only on a few swing states and essentially ignore the rest of the country.").

[87] *See* Hecht & Schultz, *supra* note 86, at xxxv (distinguishing "swing" from "safe" states).

[88] *See, e.g.*, *id.* ("[A]t present, New York and Massachusetts seem like safe Democrat states, whereas Texas and Oklahoma seem safe for the Republicans.").

[89] *See generally* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2009) (arguing that internal migration based on political preference is creating self-sorted "red" and "blue" states that are increasingly polarized).

[90] *See* MORRIS P. FIORINA, HOOVER INST., THE POLITICAL PARTIES HAVE SORTED 1 (2020), https://www.hoover.org/sites/default/files/research/docs/fiorina_3_finalfile.pdf (arguing that while the public "has not polarized, it is better sorted than a generation ago").

[91] *See generally* ZOLTAN L. HAJNAL, DANGEROUSLY DIVIDED: HOW RACE AND CLASS SHAPE WINNING AND LOSING IN AMERICAN POLITICS 101–11 (2020) (finding that candidates most favored by Black voters enjoy the least amount of electoral success in American elections); EZRA KLEIN, WHY WE'RE POLARIZED (2020) (explaining how partisan identity has merged with other forms of identity politics in ways that have increased partisan polarization); MORGAN MARIETTA & DAVID C. BARKER, ONE NATION, TWO REALITIES: DUELING FACTS IN AMERICAN DEMOCRACY (2019) (studying the causes of why Americans are increasingly divided over how they perceive reality); NOLAN MCCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 134–39 (2019) (discussing the impact partisan polarization has on public policy and governance); RYAN D. ENOS, THE SPACE BETWEEN US: SOCIAL GEOGRAPHY AND POLITICS (2017) (examining how social geography affects partisan polarization); LYN RAGSDALE & JERROLD G. RUSK, THE AMERICAN NONVOTER (2017) (arguing that nonvoters choose not to vote when they perceive little uncertainty about the nation's trajectory and therefore see little difference between candidates); THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012) (arguing that conservative partisans have asymmetrically polarized); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS:

combining hardened partisanship, partisan geographic sorting, and a winner-take-all method for selecting presidential electors. The result is a situation where only a handful of states matter, as seen in recent elections.[92] Therefore, the outcome of presidential elections gets determined by a mere handful of swing voters in a few swing states.[93] A minority of a minority decides a presidential race because most voters do not matter.

What do we mean by "matter"? Before the 2020 election took place, one could have argued that the presidential election was effectively over in most states. Over time, a partisan rigidity has formed, leaving the voting outcomes in the vast majority of states predictable.[94] In 2012 and 2016 there were between ten and twelve swing states, and in 2020 the number may have been as small as seven.[95] The geographic distribution of partisan voters in forty-three states and the hardening of partisan preferences give minority party voters little say in the presidential election because of the winner-take-all method for allocating electoral votes. For example, Republicans in New York or Democrats in Oklahoma are effectively permanent minorities who are disenfranchised in the presidential race. In 2016, less than 80,000 votes decided the presidential

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HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 137–41 (2010) (explaining the decline of "middle-class democracy"); MICHAEL S. LEWIS-BECK, WILLIAM G. JACOBY, HELMUT NORPOTH & HERBERT F. WEISBERG, THE AMERICAN VOTER REVISITED 60–82 (2008) (studying how individual voters' perceptions of parties and candidates affects their voting behavior); SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 107 (2003) (finding only "mixed evidence" regarding whether legislative gridlock affects legislators' electoral success); WARREN E. MILLER & J. MERRILL SHANKS, THE NEW AMERICAN VOTER 494–525 (1996) (studying how voters' social and economic backgrounds impact their choices for President); SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY (1972) (studying participation in the American political process in the areas of voting, campaigning, communal activity, and engagement with public officials); ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER & DONALD E. STOKES, THE AMERICAN VOTER (1960) (examining voting behavior with a comprehensive study of election survey data).

[92] *See supra* notes 86–91 and accompanying text.

[93] *See, e.g.*, Nate Cohn, *A Sliver of the Electorate Could Decide 2020. Here's What These Voters Want.*, N.Y. TIMES (Nov. 5, 2019), https://www.nytimes.com/2019/11/05/upshot/swing-voters-2020-election.html ("[T]hese 'mythic,' 'quasi-talismanic,' 'unicorn' swing voters are very real, and there are enough of them to decide the next presidential election.").

[94] *See, e.g.*, *supra* notes 87–88 and accompanying text.

[95] Kellie Pantekoek & David Schultz, *The Electoral College History and What it Means for Future Elections*, FINDLAW (Aug. 21, 2020), https://www.findlaw.com/voting/how-u-s--elections-work/electoral-college-history-with-professor-david-schultz.html.

outcome, with Donald Trump winning Michigan, Pennsylvania, and Wisconsin.[96] In 2020, despite Joe Biden winning the popular vote by more than seven million votes, Donald Trump would have won the electoral vote again had he flipped or received approximately 43,000 more votes.[97]

V. THE ELECTORAL COLLEGE AND RACE

Among the most consequential series of U.S. Supreme Court decisions issued in the second half of the twentieth century were those addressing malapportionment and redistricting. Beginning in the 1946 case of *Colegrove v. Green*, the Court first declared that matters of reapportionment were nonjusticiable.[98] The Court found that failure to reapportion and redraw congressional districts despite migration patterns over several decades did not violate the Equal Protection Clause because this issue was preempted by congressional authority under the Guarantee Clause.[99]

Colegrove did not stand long. In 1960, the Court ruled in *Gomillion v. Lightfoot* that efforts to draw legislative districts in a way that discriminated against African Americans violated the Fifteenth Amendment.[100] Two years later, in *Baker v. Carr*, the Court reversed *Colegrove*, ruling that claims of malapportionment were justiciable.[101] *Baker* launched the reapportionment revolution where the U.S. Supreme Court ruled that congressional, legislative,

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[96] *See* Dave Leip, *2016 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. ELECTIONS, https://uselectionatlas.org/RESULTS/ (last visited May 20, 2021) (showing that, in 2016, Trump won Michigan, Pennsylvania, and Wisconsin respectively by 10,704, 44,284, and 22,748 votes or, collectively, 77,736 votes).

[97] *See* Dave Leip, *2020 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. ELECTIONS, https://uselectionatlas.org/RESULTS/ (last visited May 20, 2021) (showing that, in 2020, Biden won Arizona, Georgia, and Wisconsin by 10,457, 11,779, and 20,682 votes respectively, or, collectively, by 42,918 votes).

[98] *See* 328 U.S. 549, 552 (1946) (plurality opinion) (stating that the petitioners are asking for relief "beyond [the Court's] competence to grant" because the issue of reapportionment is "of a peculiarly political nature and therefore not [appropriate] for judicial determination").

[99] *See id.* at 356 ("Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.").

[100] *See* 364 U.S. 339, 346 (1960) (distinguishing *Colegrove* and holding that "[w]hen a legislature . . . singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment").

[101] *See* 369 U.S. 186, 237 (1962) ("[A]llegations of a denial of equal protection present a justiciable constitutional cause of action . . . .").

and local government elected bodies must conform to the "one person, one vote" standard.[102]

Following the reapportionment revolution, the Court heard a second wave of redistricting cases, addressing claims that the drawing of boundaries based on race also violated the Equal Protection Clause or the VRA. There is a rich history of the U.S. Supreme Court and lower federal courts using the VRA to root out practices that denied people of color their rights to vote and to representation.[103] For instance, in *Thornburg v. Gingles*, the Court ruled that in situations where racially polarized voting existed, states may be required to draw district lines in a way to protect minority voting rights.[104] But the Court vacillated over the degree to which states could consider race when redistricting. While the Court held that race could not be the sole[105] or predominant factor,[106] it eventually allowed states to consider race when drawing lines.[107] Between the Equal Protection Clause and the VRA claims, the Court effectively rooted out many forms of racial discrimination in districting, while also improving minority representation in both Congress and state and local governments.[108] In terms of the VRA, the Section 5 preclearance provisions and the Section 2 anti-dilution

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[102] DAVID SCHULTZ, ELECTION LAW AND DEMOCRATIC THEORY 148–49 (2014); *see also* Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("[A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is . . . diluted when compared with votes of citizens living in other parts of the State.").

[103] *See generally* TINSLEY E. YARBROUGH, RACE AND REDISTRICTING: THE *SHAW-CROMARTIE* CASES (2002) (describing the role of the VRA in addressing racial gerrymandering).

[104] 478 U.S. 30, 52–60 (1986).

[105] *See* Shaw v. Reno, 509 U.S. 630, 645 (1993) ("[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption.").

[106] *See* Bush v. Vera, 517 U.S. 952, 980 (1996) (plurality opinion) ("Significant deviations from traditional districting principles . . . cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial.").

[107] *See* Easley v. Cromartie, 532 U.S. 234, 249 (2001) ("[The Constitution] simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations.").

[108] *See* Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations* (discussing how the VRA successfully enabled more Black officeholders to win elections), *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 335, 335–36 (Chandler Davidson & Bernard Grofman eds., 1994).

requirements improved representation and eliminated many practices that disenfranchised minority voters.[109]

The point here is not to provide a comprehensive review of minority voting rights jurisprudence. Rather, at one point the federal courts were, at least in theory, interested in promoting or protecting minority voting rights. However, at no point was the U.S. Supreme Court willing to apply the Equal Protection Clause or VRA to the Electoral College to address practices that have disenfranchised racial minorities or those who hold minority party status within a state. In theory, the Court could.

Race continues to divide America.[110] Some argue that race is the "most important driving force in American electoral democracy."[111] The Black-White divide is greater than class, gender, or any other variable.[112] There is clear evidence of racially polarized voting in presidential elections,[113] with race overlapping with party affiliation,[114] rendering Blacks "super losers" in these elections.[115] Effectively, in the United States, an electoral scheme that favors one party probably favors a specific race, too. The racial gap is not disappearing, but may be wider now than ever before,[116] and evidence suggests that the racial gap is calcifying.[117] Despite this reality, the courts have ignored this issue when it comes to how states allocate electoral votes.

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[109] *See* Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction* (explaining how VRA Sections 2 and 5 have increased minority representation and voting power), *in* QUIET REVOLUTION IN THE SOUTH, *supra* note 108, at 378, 381–86.

[110] *See* HAJNAL, *supra* note 91, at 13 ("Race is a powerful demographic force dividing Americans.").

[111] *Id.* at 57.

[112] *See id.* ("The 52-point Black-White divide overshadows every other demographic divide . . . .").

[113] *See id.* at 13 (finding that the majority of White voters and the majority of minority voters disagree on candidates "from the highest to the lowest office").

[114] *Id.* at 53.

[115] *See id.* at 107 ("Overall, 41 percent of all Black voters can be characterized as 'super losers,' meaning that they choose the loser in all three [elections for President, the Senate, and governor].").

[116] *Id.* at 65.

[117] *See generally* CHRISTOPHER D. DESANTE & CANDIS WATTS SMITH, RACIAL STASIS: THE MILLENNIAL GENERATION AND THE STAGNATION OF RACIAL ATTITUDES IN AMERICAN POLITICS (2020) (arguing that, even with a generational shift, there is mixed evidence at best of a narrowing or changing of racial attitudes, especially among younger Whites).

In *McPherson v. Blacker*, the Court considered a challenge to a Michigan state law that allocated electoral votes on the basis of congressional districts.[118] Upholding the law, the Court ruled that states have broad plenary power to distribute electoral votes in the way their state legislatures desire.[119] However, the Court seemed to suggest a possible limit to this plenary power in situations involving discrimination.[120] The Court suggested that violations of the Fourteenth and Fifteenth Amendments might constrain the allocation of state electors.[121] For example, if a state were to allocate electoral votes in a manner that declared that no persons of color were eligible to become electors, one would hope that such a direct pronouncement would violate the U.S. Constitution. Yet, to this day, the Court has not directly addressed this issue, but it seems to have exempted the states' allocation of electoral votes from Equal Protection Clause, Fifteenth Amendment, and VRA analysis.[122]

In 1966, the State of Delaware challenged the winner-take-all system for the allocation of electoral votes.[123] In its brief asking the U.S. Supreme Court to accept the case, it referred to the winner-take-all system as a state-unit system.[124] Central to its challenge against the states using winner-take-all systems, was that the system operates "to deny and abridge fundamental rights of plaintiff, its citizens and large numbers of persons in other states."[125] The winner-take-all system did so by violating the Equal

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[118] 146 U.S. 1, 24–25 (1892).

[119] *Id.* at 25.

[120] *See id.* at 40 ("If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote the same as any other citizen has, no discrimination is made.").

[121] *See id.* at 37–40 (discussing how state legislatures can no longer appoint "in such manner as [they] may direct" due to the Fourteenth Amendment).

[122] *See generally* Charles S. Bullock III, Ronald Keith Gaddie & Justin Wert, *Electoral College Reform and Voting Rights*, 1 FAULKNER L. REV. 89 (2009) (arguing that had the VRA been applied to the use of winner-take-all system for allocating electoral votes it would have been invalidated by the courts under tests used by them to strike down other forms of representation such as at-large seats).

[123] *See generally* Delaware v. New York, 385 U.S. 895 (1966) (mem.).

[124] *See* Motion for Leave to File Complaint, Complaint and Brief, Delaware v. New York, 385 U.S. 895 (1966) (mem.) (No. 28), 1966 WL 100407, at *2 ("The suit challenges the constitutionality of the . . . 'state unit-vote' system, by which the total number of presidential electoral votes of a state is arbitrarily misappropriated for the candidate receiving a bare plurality of the total number of citizens' votes cast within the state.").

[125] *Id.* at *6.

Protection Clause: it arbitrarily misallocated the elective power of some states and voters and denied partisan minority voting rights in some states.[126] The U.S. Supreme Court declined to hear the case and, as Lawrence Lessig has contended, the nature of presidential elections might be different had the Court taken the case and stricken down the winner-take-all allocation method.[127]

In *Williams v. Virginia State Board of Elections*, a district court upheld the winner-take-all allocation process, rejecting claims that it violated the one person, one vote rule.[128] The U.S. Supreme Court summarily affirmed the decision.[129] Then, in *Hitson v. Baggett*, another district court rejected challenges by persons of color who claimed that the winner-take-all system discriminated against them.[130] The court rejected their claim, arguing, in part, that this discrimination was contemplated by the U.S. Constitution[131] and that their votes were not cancelled.[132]

In *League of United Latin American Citizens v. Abbott*, a district court dismissed claims that Texas's winner-take-all allocation of electoral votes violated the Equal Protection Clause, the First

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[126] *See id.* at *7 ("In every election the state unit system abridges the political rights of substantial numbers of persons by arbitrarily awarding all of the electoral votes of their state to the candidate receiving a bare plurality of its popular votes.").

[127] *See* Lawrence Lessig, *Exactly 50 years Ago, the Supreme Court Ducked the Question Whether the "Winner Take All" System for Allocating Electors Violates the Equal Protection Clause*, MEDIUM (Nov. 22, 2016), https://medium.com/@lessig/exactly-50-years-ago-the-supreme-court-ducked-the-question-whether-the-winner-take-all-system-234daf281ef2 ("How different the world would have been if the Court had taken up Delaware's request, and tested whether . . . 'winner take all' is consistent with the principle of 'one person, one vote'—because it plainly is not.").

[128] *See* 288 F. Supp. 622, 627 (E.D. Va. 1968) ("[I]t is difficult to equate the deprivations imposed by the unit rule with the denial of privileges outlawed by the one-person, one-vote doctrine . . . .").

[129] Williams v. Va. State Bd. of Elections, 393 U.S. 320 (1969) (per curiam).

[130] *See* 446 F. Supp. 674, 676 (M.D. Ala. 1978) ("No minority group has a right under the Constitution to insist that state electoral systems be designed . . . to give its members electoral control over the selection of persons for particular political offices."), *aff'd*, 580 F.2d 1051 (5th Cir. 1978) (unpublished table decision).

[131] *See id.* at 676 ("The discrimination of which plaintiffs complain . . . is a product of the constitutional mandate that our president be elected through an 'Electoral College.' As such, it is a type of 'discrimination' specifically sanctioned by the Constitution.").

[132] *See id.* ("[T]here is no contention that Alabama's electoral scheme for the selection of presidential electors operates [to nullify minority voters' voting strength].").

Amendment, and the VRA.[133] It granted the motion to dismiss for failure to state a claim, arguing that existing precedent governed.[134] Challenges to other state winner-take-all allocation systems have met a similar fate.[135] Thus, the U.S. Supreme Court and lower federal courts have been unwilling to extend the one person, one vote standard to the allocation of electoral votes, thereby permitting the same type of minority disenfranchisement as the one found in prior districting cases.[136] These decisions rejecting the application of the one person, one vote standard to states' winner-take-all systems have left states free to disenfranchise political minorities.

The U.S. Supreme Court could have reached a different conclusion and declared that the winner-take-all system was constrained by *Reynolds v. Sims*[137] and other cases.[138] It chose not to do so.[139] Similarly, others have argued that the winner-take-all system racially discriminates against people of color.[140] One can look at the jurisdictions previously covered by the VRA and find that many of the minority votes are lost there. *McPherson* offers precedent to argue that state allocation of electoral votes could be limited if it discriminated against people of color.[141] Even though the Court declared the VRA's Section 4 coverage formula unconstitutional, rendering Section 5 preclearance unenforceable,[142] there is still no reason why the VRA, the Equal Protection Clause, or the Fifteenth Amendment cannot apply.

What does all this mean? The winner-take-all system of allocating electoral votes perpetuates discrimination against people

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[133] *See* 369 F. Supp. 3d 768, 787 (W.D. Tex. 2019) (dismissing the Fourteenth Amendment "one person, one vote," First Amendment freedom of association, and VRA Section 2 claims).

[134] *Id.*

[135] *See, e.g.*, Baten v. McMaster, 967 F.3d 345, 348 (4th Cir. 2020) (affirming the dismissal of plaintiffs' complaint against South Carolina's winner-take-all system); Lyman v. Baker, 352 F. Supp. 3d 81, 84 (D. Mass. 2018) ("[T]he Court concludes that the Massachusetts winner-take-all system of selecting electors in presidential elections is constitutional.").

[136] *See supra* notes 100–102 and accompanying text.

[137] *See* 377 U.S. 533, 568 (1964) ("[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

[138] *See supra* notes 100–102 and accompanying text.

[139] *See generally* Estes Kefauver, *The Electoral College: Old Reforms Take on a New Look*, 27 LAW & CONTEMP. PROBS. 188 (1962) (arguing that *Baker v. Carr* and the reapportionment cases could be used to challenge the winner-take-all electoral college allocation method).

[140] *See, e.g.*, *supra* notes 7–11.

[141] *See supra* notes 120–121 and accompanying text.

[142] Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

of color much in the way that the original creation of the Electoral College did. Even with the adoption of the VRA in 1965 and the switch of the South from Democratic to Republican Party control,[143] people of color were effectively disenfranchised. Voting occurred in a racially polarized fashion consistent with what the U.S. Supreme Court has said constitutes a Section 2 VRA violation,[144] yet the courts remain unwilling to apply it to the electoral vote allocation system. But the winner-take-all system has perpetuated Jim Crow at the Electoral College level despite the fact that people of color are an increasing portion of the electorate, including in the states that were part of the Confederacy.

VI. WHAT 2020 MEANS

Georgia's flip to the Democratic Party in both the presidential and U.S. Senate races came as a surprise to many. On one level, perhaps the flip vindicates Chief Justice Roberts's majority opinion in *Shelby County v. Holder* when he pointed to statistics indicating parity in voter registration for Blacks and Whites across the South, insinuating that perhaps the VRA might no longer be needed.[145] Maybe Georgia in 2020 is proof that Jim Crow and voter suppression are relics of a bygone era and that the Electoral College is no longer an anti-majoritarian institution.

Georgia was a surprise, but it was also a product of a perfect storm that may not be replicable, and these recent results may not serve as a harbinger for the rest of the South. What happened in 2020 was a product of a concerted, multiyear organizing strategy by Democrats and Stacey Abrams.[146] It also benefitted from a large

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[143] Charles S. Bullock III, *Introduction: Southern Politics in the Twenty-First Century*, *in* THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS, 1, 1–2 (Charles S. Bullock III & Mark J. Rozell eds., 4th ed. 2010).

[144] *See* Ben Boris, Note, *The VRA at a Crossroads: The Ability of Section 2 to Address Discriminatory Districting on the Eve of the 2020 Census*, 95 NOTRE DAME L. REV. 2093, 2096 (2020) (explaining the elements of a Section 2 violation).

[145] *Shelby Cnty.*, 570 U.S. at 547–49.

[146] *See* Karen L. Owen, *Georgia: The Rebirth of Two-Party Competition in a Growing, Deep South State* (describing the events leading up the 2020 election), *in* PRESIDENTIAL SWING STATES (Rafael Jacob & David Schultz eds., forthcoming 2022); Reid J. Epstein & Astead W. Herndon, *The 10-Year Stacey Abrams Project to Flip Georgia Has Come to Fruition*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/05/us/politics/stacey-abrams-georgia.html (recognizing Abrams's decade-long organizing effort to turn Georgia blue).

Black voting population, a state with significant in-migration from the North to Atlanta,[147] and college educated, suburban White voters who disliked the incumbent president Donald Trump for, among other things, his mishandling of the pandemic.[148]

Consider, first, the racial makeup of Georgia. According to the 2019 Census Bureau American Community Survey population estimates, Georgia is 57.75% White, 42.25% non-White, and 31.94% African American.[149] Of the eleven states that made up the Confederacy, no other state has as high a percentage of its population being non-White, and the only state coming close is Mississippi with 41.97%.[150] The latter, however, does not have as high a percentage of college educated voters as Georgia. In 2020, 40% of all Georgia voters had a college education, with 12% of voters being persons of color with a college degree.[151] Compare this to Mississippi where 30% of the voters had college degrees, and 7% of voters were non-Whites with college degrees.[152] In Georgia 61% of the voters were White,[153] whereas in Mississippi, 69% were White.[154] Finally, in Georgia, 69% of White voters supported Trump and 92% of Black voters supported Biden,[155] while in Mississippi,

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[147] *See* Abby Budiman & Luis Noe-Bustamante, *Black Eligible Voters Have Accounted for Nearly Half of Georgia Electorate's Growth Since 2000*, PEW RES. CTR. (Dec. 15, 2020), https://www.pewresearch.org/fact-tank/2020/12/15/black-eligible-voters-have-accounted-for-nearly-half-of-georgia-electorates-growth-since-2000/ (stating that migration into Georgia from other parts of the country was a major source of growth for the state's Black electorate).

[148] *See* William H. Frey, *Biden's Victory Came from the Suburbs*, BROOKINGS (Nov. 13, 2020), https://www.brookings.edu/research/bidens-victory-came-from-the-suburbs/ (discussing the increasing support in Georgia's suburbs for Democrats).

[149] Zoe Manzanetti, *State Population by Race, Ethnicity Data*, GOVERNING (Nov. 20, 2020), https://www.governing.com/now/State-Population-By-Race-Ethnicity-Data.html; *cf. also QuickFacts: Georgia*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/GA (last visited May 23, 2021) (providing a table of Georgia's population estimates that states the 2019 total population was 60.2% White).

[150] Manzanetti, *supra* note 149.

[151] *Georgia Voter Surveys: How Different Groups Voted*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/ap-polls-georgia.html (last visited June 22, 2021) [hereinafter *Georgia Voter Surveys*].

[152] *Mississippi Voter Surveys: How Different Groups Voted*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/ap-polls-mississippi.html (last visited May 23, 2021) [hereinafter *Mississippi Voter Surveys*].

[153] *Exit Polls: Georgia*, CNN, https://www.cnn.com/election/2020/exit-polls/president/georgia (last visited May 23, 2021).

[154] *See Mississippi Voter Surveys*, *supra* note 152.

[155] *See Georgia Voter Surveys*, *supra* note 151.

81% of White voters supported Trump and 94% of Black voters supported Biden.[156]

This brief comparison shows that while racially polarized voting exists in both of these states, the presence of more voters with a college degree somewhat mediated the partisan split in Georgia, but not as much in Mississippi. Nationally, in 2020, college educated voters were much more likely to support Biden,[157] and Georgia's voting patterns followed that trend.[158] Yet Georgia's unique combination of racial demographics and education distinguished it from Mississippi and other former Confederate states in setting the stage for the 2020 election results.

Given this, one should not necessarily expect that Georgia's Electoral College vote in 2024 will produce similar results and protect minority rights. Voter suppression of people of color has not disappeared in Georgia.[159] Except for in Georgia, non-White votes across the former Confederacy largely did not matter in the 2020 Electoral College. The persistence of racially polarized voting in 2020 does not bode well for 2024. Additionally, following the 2020 election, many states are changing their voting laws in order to make it harder for people of color to vote,[160] including Georgia[161] and

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[156] *See Mississippi Voter Surveys*, *supra* note 152.

[157] *See Exit Polls: National Results*, CNN, https://www.cnn.com/election/2020/exit-polls/president/national-results (last visited May 23, 2021) (finding a 55% to 43% split in support for Biden versus Trump among college educated voters).

[158] *See Georgia Voter Surveys*, *supra* note 151 (showing that 52% of Georgia college educated voters voted for Biden whereas only 46% voted for Trump).

[159] *See* P.R. Lockhart, *The Lawsuit Challenging Georgia's Entire Elections System, Explained*, VOX (May 30, 2019, 5:00 PM), https://www.vox.com/policy-and-politics/2018/11/30/18118264/georgia-election-lawsuit-voter-suppression-abrams-kemp-race ("[T]he Associated Press reported that 53,000 voter registrations, 70 percent of them from black applicants, were being held by Kemp's office for failing to clear an 'exact match' process that compares registration information to Social Security and state driver records.").

[160] *See Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021 ("In a backlash to 2020's historic voter turnout, . . . state lawmakers have introduced a startling number of bills to curb the vote. As of March 24, legislators have introduced 361 bills with restrictive provisions in 47 states."); S.V. Date, *Forget Dr. Seuss and Cancel Culture – The Real GOP Agenda Is Rolling Back Voting*, HUFF POST (Mar. 12, 2021, 6:00 AM), https://www.huffpost.com/entry/republicans-voting-restrictions_n_604a76dcc5b6cf72d094e37e ("[T]here are already 253 such bills in 43 states and counting.").

[161] *See* Kevin Morris, *Georgia's Proposed Voting Restrictions Will Harm Black Voters Most*, BRENNAN CTR. FOR JUST. (Mar. 6, 2021), https://www.brennancenter.org/our-work/research-

Arizona.[162] The U.S. Supreme Court seems prepared to support these laws,[163] and a nearly dismantled VRA will not be able to stop these changes. Just as racial minorities begin to overcome obstacles to voting and hurdles presented by the Electoral College, the proverbial rug may be pulled out from under them. Yet again, as people of color approach becoming the demographic majority, the law might adapt to protect a White minority.

VII. CONCLUSION

The Electoral College is an institution born of racism, meant to entrench anti-majoritarianism, while also suppressing minority interests. The history of its operation has confirmed this claim. While the 2020 Georgia general election results suggest that perhaps the racist legacy of the Electoral College may finally be in the process of being dismantled, rumors of its death may be greatly exaggerated.

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reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most (describing the "regressive legislation" proposed by Georgia Republicans).

[162] *See* Timothy Bella, *A GOP Lawmaker Says the 'Quality' of a Vote Matters. Critics Say That's 'Straight out of Jim Crow*,*'* WASH. POST (Mar. 13, 2021, 12:06 PM), https://www.washingtonpost.com/politics/2021/03/13/arizona-quality-votes-kavanagh/ ("[T]he Arizona Senate approved a bill that would require voters to submit identification as part of their mail-in ballots.").

[163] *See* Leah Litman & Jay Willis, *Will the Supreme Court Gut the Voting Rights Act?*, N.Y. TIMES (Mar. 2, 2021), https://www.nytimes.com/2021/03/02/opinion/voting-rights-act-supreme-court.html (warning that "the Supreme Court could open the floodgates to efforts across the country to restrict the franchise").