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Importing Democracy: Can Lessons Learned from Germany, India, and Australia Help Reform the American Electoral System?

- I. INTRODUCTION
- II. REMEMBERING OUR ROOTS: EXPLORING THE HISTORICAL BEGINNINGS OF ARTICLE II, SECTION 1
 - A. *The Constitutional Convention*
 - B. *Putting the System to the Test: The Elections of 1800 and 1876*
- III. JUDICIAL INTERPRETATION OF ARTICLE II, SECTION 1 AND THE CREATION OF PRECEDENT
- IV. RECENT EVENTS: THE 2000 ELECTION AND THE HELP AMERICA VOTE ACT
 - A. *The Help America Vote Act*
 - B. *Reactions to the Act*
 - C. *Elections of 2004 and 2008*
- V. A LOOK AROUND THE GLOBE
 - A. *Germany*
 - B. *India*
 - C. *Australia*
- VI. IMPROVING THE AMERICAN SYSTEM WITHIN THE CONFINES OF ARTICLE II, SECTION 1
 - A. *Creation of a Non-Partisan Electoral Commission*
 - B. *Use of the Mixed-System in U.S. Presidential Elections*
 - C. *National Standards for Election Administration*
- VII. CONCLUSION

I. INTRODUCTION

“Selecting an electoral system is not a purely technical decision. It may have huge consequences for the operation of the political system.”¹ This was certainly true during the 2000 election, when the popular vote supported Al Gore for President,² but the Electoral College did not.³ Ultimately, the U.S. Supreme Court decided the election and hailed George W. Bush as the 43rd President of the United States.⁴

Calls for electoral reform can be heard after controversial elections.⁵ Some call for an overhaul of the Electoral College,⁶ while others criticize voting technology and the lack of a uniform ballot.⁷ Yet for better or for worse, the Electoral College is not going anywhere.⁸ However, this does not mean changes cannot be made. In fact, the opposite is true.

1. Andre Blais & Louis Massicotte, *Electoral Systems*, in *COMPARING DEMOCRACIES 2: NEW CHALLENGES IN THE STUDY OF ELECTIONS AND VOTING* 40, 40 (Lawrence LeDuc et al. eds., 2002).

2. Democratic candidate Al Gore received 50,999,897 votes (or 48.38%) while Republican candidate George W. Bush received 50,456,002 votes (or 47.87%). Federal Election Commission, 2000 Official Presidential General Election Results, <http://www.fec.gov/pubrec/2000presgeresults.htm> (last visited Oct. 13, 2009) [hereinafter 2000 Results].

3. A candidate needs 270 electoral votes to win the Presidency. 2000 Results, *supra* note 2. Al Gore received 266 electoral votes and George W. Bush received 271. *Id.* Before Florida was decided, neither candidate had enough votes to win. ABNER GREENE, *UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 2–3* (2001). George W. Bush ultimately received Florida’s electoral votes with a lead of 537 popular votes over Al Gore. *Id.* at 3. Besides the 2000 election, three other times in America’s electoral history—1824, 1876, and 1888—the popular vote winner lost to the Electoral College winner. NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 5 (1981).

4. GREENE, *supra* note 3, at 111.

5. Donald Lutz et al., *The Electoral College in Historical and Philosophical Perspective*, in *CHOOSING A PRESIDENT: THE ELECTORAL COLLEGE AND BEYOND* 31, 41 (Paul D. Schumaker & Burdett A. Loomis eds., 2002); Jacob Tanager, *Election of President*, in *DIRECT ELECTION OF THE PRESIDENT* 7, 7 (Julia E. Johnsen ed., 1949) (compiling many essays discussing the potential pitfalls and possibilities of reforming the Electoral College); Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 *ELECTION L.J.* 425, 425 (2006) (noting increased interest in election administration after the 2000 and 2004 elections).

6. Paul Schumaker, *Analyzing the Electoral College and Its Alternatives*, in *CHOOSING A PRESIDENT: THE ELECTORAL COLLEGE AND BEYOND*, *supra* note 5, at 10, 15. Despite calls to abolish the Electoral College, this institution has “emerged as a natural extension of the principles of federalism, separation of powers, and a deliberative process that informed the design of all the institutions of the U.S. Constitution.” Lutz et al., *supra* note 5, at 45.

7. Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 *WM. & MARY L. REV.* 851, 872–73 (2002).

8. The Electoral College was established by the Constitution “as a compromise between two alternative methods for selecting the president.” Schumaker, *supra* note 6, at 13. The only way to change Article II, Section 1 is through a constitutional amendment. Richard L. Hasen, *When “Legislature” May Mean More than “Legislature”*: *Initiated Electoral College Reform and the*

America's system is extremely decentralized and highly partisan, leaving much room for improvement.⁹ The political landscape is undoubtedly molded by the electoral system in place. America's system allows for "Loser Presidents"¹⁰ and "hanging" chads.¹¹ This Comment seeks to address pitfalls like these by presenting changes—fully in line with the constitutional mandate in Article II, Section 1¹²—to the current electoral system in an effort to positively shape our democratic landscape.

Part II explores the history of Article II, Section 1, beginning with the Constitutional Convention and the Framers' debates over what type of electoral system would best serve America, and ends with a discussion of the 1800 and 1876 elections and the changes to the system that arose from these controversial elections.¹³ Part III dissects the various Supreme Court decisions interpreting the Framers' intent when they created Article II, Section 1.¹⁴ Part IV provides an overview of recent events, including the 2000, 2004, and 2008 elections,¹⁵ specifically analyzing the Help America Vote Act (HAVA) and how this new piece of legislation fits into the overall history of Article II, Section 1.¹⁶ Part V looks to international law as a possible answer to some of America's election problems¹⁷ by focusing on Germany, India, and Australia and how the electoral systems of these nations have shaped the way reformers approach the task of redefining the manner in which a country elects its officials.¹⁸ Part VI brings together the history of the Electoral College and the innovations from Germany, India,

Ghost of Bush v. Gore, 35 HASTINGS CONST. L.Q. 599, 603 (2008). This tends to be an unrealistic reform because amendments require an approval of two-thirds of Congress and three-fourths of the state legislatures, making them difficult to pass. *Id.* Small states would be reluctant to vote for an amendment that changes the Electoral College because it "confer[s] a special advantage on citizens of small states by allocating two electors to each state regardless of their population." Schumaker, *supra* note 6, at 26.

9. See *infra* notes 249–55 and accompanying text.

10. See *infra* notes 240–41 and accompanying text.

11. "A chad is 'hanging' if it hangs onto the ballot by one of its corners and is detached at three corners." GREENE, *supra* note 3, at 32. The "hanging" chad made a grand appearance during the 2000 election. *Id.* "Swinging," "tri-chad" and "dimpled" chads were other anomalies Florida dealt with when deciding the fate of the Presidency. *Id.*

12. "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.

13. See *infra* notes 21–85 and accompanying text.

14. See *infra* notes 86–128 and accompanying text.

15. See *infra* notes 129–74 and accompanying text.

16. See *infra* notes 139–62 and accompanying text.

17. See *infra* notes 175–78 and accompanying text.

18. See *infra* notes 179–239 and accompanying text.

and Australia, and proposes three solutions for America’s system—creating a non-partisan electoral commission, incorporating a mixed electoral system into the current system, and ensuring national standards for election administration.¹⁹ Finally, Part VII concludes this Comment.

II. REMEMBERING OUR ROOTS: EXPLORING THE HISTORICAL BEGINNINGS OF ARTICLE II, SECTION 1

A. *The Constitutional Convention*

The main issue addressed at the Constitutional Convention²⁰ was how to balance the competing interests of the small states and the large states.²¹ In fact, the tension surrounding this issue almost destroyed the Framers’ goals.²² However, through the “Great Compromise,”²³ “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.”²⁴ The Compromise mainly addressed how the states would be represented in Congress; however, the same struggle colored the debates about who should elect the Executive.²⁵ Three viable options were presented

19. See *infra* notes 240–316 and accompanying text.

20. The Constitutional Convention, or also known as the Philadelphia Convention, occurred from May 25 through September 17, 1787. TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804*, at 7 (1994). Fifty-five delegates from twelve states were in attendance, all of whom were white men and most of them lawyers. *Id.* These delegates “represented a political elite with years of experience in the affairs of their states and nation. . . . They were knowledgeable, astute, pragmatic, and bold individuals” *Id.*

21. Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2108 (2001) (noting that “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”).

22. *Id.* at 2108 n.55 (noting the “Great Compromise” was the turning point of the Convention and before the Compromise was reached, “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.’ ‘[W]ithout the Great Compromise . . . it is hard to see how the Federal Convention could have proceeded further.’” (quoting CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 185 (1966)) (citation omitted)).

23. Also known as the Connecticut Compromise. Lutz et al., *supra* note 5, at 33.

24. Festa, *supra* note 21, at 2108.

25. See William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 151 (1996) (noting the debates concerning election of the President and Vice President reflected the large state versus small state struggle that formed the structure of Congress).

[T]he electoral college was established as a device to boost the power of southern states in the election of president. The same ‘compromise’ that gave southern states more House members by counting slaves as three-fifths of a person for purposes of apportioning representation . . . gave those states electoral college votes in proportion to their Congressional delegation.

at the Convention: appointment by Congress, popular election, and an intermediate system using state officials and electors.²⁶

On May 29, 1787, just days before the Great Compromise, James Madison of Virginia delivered the first proposal, the “Virginia Plan,” which advocated that the “National Legislature” choose the “National Executive.”²⁷ The plan favored large states by allocating power proportionately according to a state’s size.²⁸ Small states, not keen on the idea of the large states holding all the power, responded with their own plan, the “New Jersey Plan.”²⁹ Like the Virginia Plan, the Legislature would elect the Executive; however, in this plan power would be distributed equally amongst state representatives in both the House and the Senate.³⁰ These two plans set the tenor of the ensuing debates with all subsequent discussions assuming the Legislature would choose the Executive.³¹

Despite this early thought, some delegates expressed reservations about the idea of an executive tied to the legislature.³² James Wilson of Pennsylvania proposed a plan whereby the people³³ would choose “Electors”³⁴ who would elect the “Executive magistracy,”³⁵ otherwise the

Lani Guinier, *And to the C Students: The Lessons of Bush v. Gore*, in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 231, 236 (Ronald Dworkin ed., 2002).

26. Martin J. Siegel, *Congressional Power over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VT. L. REV. 373, 378 (2003); Schumaker, *supra* note 6, at 13; PEIRCE & LONGLEY, *supra* note 3, at 19.

27. Lutz et al., *supra* note 5, at 31. The Virginia Plan stated:

Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of [unspecified] years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be eligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.

JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 31 (1987).

28. Festa, *supra* note 21, at 2109.

29. *Id.*

30. *Id.*

31. *Id.* “At this point the convention appeared to be in real deadlock as the large states insisted on population-based apportionment and the small states held firm for equal representation.” PEIRCE & LONGLEY, *supra* note 3, at 15. The delegates conducted a vote on June 19, and seven states favored the Virginia Plan over the New Jersey Plan as a blueprint for the new government. *Id.*

32. GREENE, *supra* note 3, at 18.

33. “People” meant adult white males and excluded women and blacks. KURODA, *supra* note 20, at 9.

34. Some delegates felt that if the electors had to all gather in one place, the inconvenience and expense of doing so would mean some electors would not attend and this would lead to a loss of influence in elections. *Id.* at 11. Others felt electors would be partial to local candidates forcing

Executive “would be too dependent [on Congress] to stand the mediator between the intrigues [and] sinister views of the Representatives and the general liberties [and] interests of the people.”³⁶ Pierce Butler of South Carolina agreed with Wilson, stating, “The two great evils to be avoided are cabal at home, [and] influence from abroad. It will be difficult to avoid either if the Election be made by the Nat[iona]l Legislature.”³⁷ Wilson’s plan provided a point of departure from the Virginia and New Jersey plans, but was ultimately rejected.³⁸

Like election by Congress, popular election also met fierce opposition.³⁹ States’ rights advocates feared a popular election “would incite and empower partisan groups and political factions, leaving no role for state governments.”⁴⁰ Roger Sherman opposed popular elections because the people could “never be sufficiently informed of [the candidates’] characters, and besides will never give a majority of votes to any one man. They will

“[t]he whole body of electors . . . to sit a long time and ballot more than once in order to determine the victor. Such a process would invite deals among electors and subject them to temptations and influence.” *Id.*

35. Festa, *supra* note 21, at 2110. Wilson’s plan proposed dividing states into districts and each district would elect one elector. Lutz et al., *supra* note 5, at 32. This “proposal bypassed state governments and retained a unitary system.” *Id.*

36. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 30 (Max Farrand ed., 1911) [hereinafter Farrand, CONVENTION RECORDS], available at http://files.libertyfund.org/files/1786/0544-02_Bk.pdf. Hugh Williamson, from North Carolina, felt critics would think this plan “too elaborate, expensive, and redundant, and that they placed an unnecessary additional barrier between the people and their rulers.” KURODA, *supra* note 20, at 10.

37. Farrand, CONVENTION RECORDS, *supra* note 36, at 112. The delegates’ concern was that an executive elected by the Legislature would become dependent on them, unable to take any initiative apart from the Legislature, and would want to please the members of Congress to gain re-election. KURODA, *supra* note 20, at 8. To overcome these concerns, the delegates thought about making the Presidency seven years with no possibility of re-election. *Id.* The delegates expressed concerns over this plan, thinking that if the Legislature impeached the Executive then he would not have the opportunity to serve his full seven years. *Id.* Additionally, if the Executive was denied re-election then the country could possibly run out of competent candidates. *Id.* “Finally, a Congress, composed of persons known to powerful interests and foreign nations and gathered conveniently at the nation’s capital, could be corrupted by promises of favor from foreign countries and political parties, and engage in horse-trading votes for President.” *Id.* at 9.

38. Festa, *supra* note 21, at 2111. The delegates voted on the direct vote proposal twice—once on July 17 and then again on August 24. PEIRCE & LONGLEY, *supra* note 3, at 22. The first vote rejected the proposal by a one-to-nine vote (James Wilson’s Pennsylvania being the only “for” vote) and the second vote rejected the proposal by a two-to-nine vote (this time Delaware and Pennsylvania the only supporters). *Id.*

39. Small states and southern states formed a loose coalition in support of the legislative mode. KURODA, *supra* note 20, at 9. Small states felt that direct election “would give an insuperable advantage to large states like Massachusetts, Pennsylvania, and Virginia, which would likely provide most of the successful presidential candidates.” *Id.* Southern states were opposed to direct election because of the slaves in their states who were disenfranchised. *Id.*

40. Siegel, *supra* note 26, at 381. The states’ rights delegates felt that direct election would erase the geographical and physical boundaries between the states and would “supersede altogether the state authorities.” KURODA, *supra* note 20, at 9 (citing Farrand, CONVENTION RECORDS, *supra* note 36, at 80).

generally vote for some man in their own State, and the largest State will have the best chance for the appointment.”⁴¹

A third view emerged that suggested using electors and state governors.⁴² Elbridge Gerry of Massachusetts proposed a plan in which state legislatures would select the presidential candidates and then electors, chosen by state governors, would make the final choice.⁴³ Madison supported the use of electors, but unlike Gerry, he favored a smaller role for the states.⁴⁴ Butler sided more with Gerry than Madison, noting, “[T]he [Government] should not be made so complex [and] unwieldy as to disgust the States. This would be the case, if the election sh[oul]d be referred to the people.”⁴⁵ Butler preferred the use of electors who were chosen by the states’ legislatures.⁴⁶

The delegates quickly came to the conclusion that this decision could not be made until they decided how the legislature would be elected.⁴⁷ The Great Compromise provided much needed structure for the executive debate because it incorporated both the Virginia Plan—proportionate representation in the House, and the New Jersey Plan—equal representation in the Senate.⁴⁸

41. Farrand, CONVENTION RECORDS, *supra* note 36, at 29. The only two men at the time who had national reputations were George Washington and Benjamin Franklin. KURODA, *supra* note 20, at 9. Opponents of direct election saw more problems with this system: “(1) [A] census as a prelude to the first election could not be taken, (2) states had varying suffrage requirements, (3) registration and supervision of a national election would be expensive and time-consuming, and (4) a national election might produce disturbances, even riots, which would destabilize the republican experiment.” *Id.*

42. Lutz et al., *supra* note 5, at 32. This third view was the most plausible of dozens of others that were mentioned. For example, one delegate proposed a plan whereby three executives would be elected—one executive for the northern states, one for the middle states, and one for the southern states. KURODA, *supra* note 20, at 10. The delegates were fortunate to have these debates “without daily public reports of their speeches. They were able to express their views freely, listen to each other’s arguments, and to change their minds without fear of immediate public scrutiny of their work and without having to answer charges of vacillating on issues.” *Id.*

43. Siegel, *supra* note 26, at 382.

44. *Id.* at 382–83. When the convention began, few delegates supported the intermediate view as their first choice; however, many liked the idea as a strong second choice. PEIRCE & LONGLEY, *supra* note 3, at 22.

45. Farrand, CONVENTION RECORDS, *supra* note 36, at 112.

46. *Id.*

47. Festa, *supra* note 21, at 2111 (“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.”). “Members of the convention did not invest much time and energy in the debate over executive selection, primarily because other matters were seen as more important, but also because they were in uncharted waters greatly complicated by crosscurrents of other issues.” Lutz et al., *supra* note 5, at 33.

48. Festa, *supra* note 21, at 2111. Choosing an Executive was a particularly difficult proposition

On July 17, the delegates returned to the discussion about how the Executive should be elected with appointment by Congress remaining the “point of reference.”⁴⁹ However, throughout the debates, delegates were mainly concerned with the lack of independence if the legislature chose, and the dominance of the “populous states” if the people chose.⁵⁰ Oliver Ellsworth of Connecticut introduced the first serious compromise between these competing interests.⁵¹ In his proposal, state legislatures appointed the electors who would choose the Executive, with the largest states receiving three electors and the smallest states receiving one.⁵² The proposal was eventually set aside because some of the 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.”⁵³

Madison stepped into the fray on July 25 and addressed the other delegates: “There are objections ag[ain]st every mode that has been, or perhaps can be proposed. . . . The option before us then lay between an appointment by electors chosen by the people—and an immediate appointment by the people.”⁵⁴ Though many proposals failed, they show “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.”⁵⁵ Finally, the delegates referred the matter to the Committee of Eleven.⁵⁶

for the framers because many of them had fought in the revolutionary war to overthrow a King and establish a republican government. KURODA, *supra* note 20, at 8. “[T]hey feared that executive authority harbored monarchical tendencies and did not want a new King George, even if a Virginian and not a Hanoverian.” *Id.*

49. Festa, *supra* note 21, at 2111.

50. *Id.* at 2113. The framers were also concerned that “candidates selected through direct election would not be ‘worthy’ because the people at large had no simple way to identify such candidates.” Lutz et al., *supra* note 5, at 33.

51. PEIRCE & LONGLEY, *supra* note 3, at 22–23.

52. Festa, *supra* note 21, at 2113.

53. Farrand, CONVENTION RECORDS, *supra* note 36, at 95.

54. *Id.* at 109–10.

55. Festa, *supra* note 21, at 2114. Kuroda explains a vote taken on August 24:

[The vote] showed clearly the division between large and small states. On this occasion, John Rutledge of South Carolina proposed a joint, rather than concurrent, ballot of the two houses of the legislature as an amendment to the legislative mode, seven-year term, and ineligibility. . . . Rutledge’s motion gave advantage to the more populous states over the lesser ones.

KURODA, *supra* note 20, at 13–14. Seven states (Virginia, Massachusetts, Pennsylvania, North and South Carolina, New Hampshire and Delaware) voted for the motion and four (Connecticut, New Jersey, Maryland, and Georgia) voted against. *Id.* at 14. “After these votes on August 24, the large states and their allies had little reason to support any mode which gave more weight to the smaller ones in the selection of the President.” *Id.*

56. Festa, *supra* note 21, at 2115. The Committee was composed of one delegate from each state. *Id.*

The Committee returned on September 4 and presented the delegates with a plan.⁵⁷ The plan⁵⁸ “created the office of presidential elector and assigned to states a number of electors equal to the total number of Representatives and Senators each had in Congress. Presidents were to serve for four years and be eligible for re-election.”⁵⁹ The plan provided a working compromise between the various proposals previously debated.⁶⁰ Though attempts were made to alter the proposal, only slight changes were made and the Committee’s plan was included in the Constitution.⁶¹

Throughout the Convention, the central issue focused on the states’ role in electing the Executive and never on the manner in which the Executive would be chosen.⁶² Once the decision was made as to how many electoral

57. KURODA, *supra* note 20, at 14.

58. The Committee’s plan became Article II, Section 1 of the Constitution: “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. The Constitution further outlines Congress’s role in presidential elections. First, “Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.” *Id.* Second, “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.” *Id.*

59. KURODA, *supra* note 20, at 14. Ultimately, “[t]he final provisions drew upon many different ideas, and almost every aspect can be traced to earlier arguments and counterarguments presented over a period of several months—some theoretical, political, personal, and mundane.” *Id.* at 25.

60. Schumaker, *supra* note 6, at 13–14 (“The Founders anticipated that the Electoral College would work as follows. Unlike Congress, the College would be an ad hoc and dispersed body, constituted by different members every four years. It would never convene collectively. Rather, state delegations would meet within their states, deliberate among themselves, and vote as individual electors. . . . [T]he founders assumed that the electors would exercise independent judgments about who, among notable figures, was most qualified to serve as president.”).

61. PEIRCE & LONGLEY, *supra* note 3, at 25. The main change made to the proposal dealt with whether the House or Senate should decide a tie between the electors. *Id.* The delegates proposed “the contingent election be decided in the House but that each state have but a single vote.” *Id.* at 26. The compromise proposal was put to a vote and passed ten-to-one. *Id.* During the ratification debates, some states like Pennsylvania and New York barely discussed Article II, Section I, while in other states, like Virginia and New York, the issue was hotly contested. KURODA, *supra* note 20, at 17. In these latter states an amendment was proposed to alter the four-year term and re-election clauses in the Constitution. *Id.*

62. Festa, *supra* note 21, at 2117 (“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.”). For the first four elections, the majority of the states chose to have their legislatures choose the electors rather than the people. PEIRCE & LONGLEY, *supra* note 3, at 45. The choice between state legislature and direct election was so fluid that if the legislature felt their candidate would be defeated by the popular vote, then the legislature would pass laws to revoke direct election and put the choice back in the legislators’ hands. *Id.* Eventually all but two states turned toward a popular vote system under a general ticket. *Id.* at 47. “The adoption of the general ticket in some states, moreover, virtually compelled the others to follow suit so that their strength in the electoral college would not be diluted.” *Id.*

votes each state would receive, “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.”⁶³

“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.”⁶⁴

B. *Putting the System to the Test: The Elections of 1800 and 1876*

The election of 1800⁶⁵ between Thomas Jefferson and Aaron Burr resulted in a deadlock because all the members of the Republican Party voted for the two men intending Jefferson to be President and Burr Vice President.⁶⁶ At the time, the Constitution provided that if the state electors failed to elect the President by a majority vote, then the House of Representatives would elect the President from the candidates who received

63. Festa, *supra* note 21, at 2117.

64. *Id.* at 2119. The framers had three federalist goals when they designed the electoral system. First, they were concerned about distributing power equally between the large and small states. Second, they wanted to make sure power was distributed equally between the state governments and the national government. Third, they wanted to ensure presidential legitimacy was based on federalist—rather than populist—principles. See Donald Haider-Markel et al., *The Role of Federalism in Presidential Elections*, in CHOOSING A PRESIDENT: THE ELECTORAL COLLEGE AND BEYOND, *supra* note 5, at 53, 54. Overall, the Electoral College was less about distrust of the people and more about assuring federalist ideals, for it’s not about who gets the most votes but how the votes are distributed. *Id.* at 56. Using federalist principles, the President would be the candidate with “the most widespread support across all the states in the nation.” *Id.* One could argue these ideals underlying the original design of the Electoral College are no longer in play today. *Id.* at 57. For instance, two parties (Republicans and Democrats) now dominate the system and these parties have electors who pledge to vote for one party or the other (rather than individual candidates). *Id.* The original compromise was meant to place large states and small states on an equal playing field. See *supra* notes 28–29. However, today large states tend to dominate “because voters in competitive states have greater odds of altering the way that their state’s electoral votes are cast and because large states are more likely to cast a bloc of electoral votes that are decisive to the outcome.” Haider-Markel et al., *supra*, at 57.

65. Prior to the election, the Electoral College was witnessing change. KURODA, *supra* note 20, at 73. First, several states were revising how electors were chosen to guarantee one party or the other would have an advantage. *Id.* “Second, the course of the campaign made the constitutional provision for presidential electors a major issue. Third, in the . . . Senate, Federalists initiated a measure to allow the Congress to review the returns from electors and to accept or reject those votes.” *Id.* In this election, most states had their legislators appoint electors while five states had a popular vote to determine electors. *Id.* at 83.

66. Coenen & Larson, *supra* note 7, at 855. Before this election, the party system had been mostly the elite competing for top positions, whereas in 1800 the system moved toward mass participation. Lutz et al., *supra* note 5, at 37.

the most electoral votes.⁶⁷ Thus, the decision rested with the House,⁶⁸ filled with Federalists who had recently lost the election and “saw an opportunity to frustrate their opponents by electing Burr . . . over Jefferson.”⁶⁹ In response to the electoral chaos, Congress passed the Twelfth Amendment, “specifying that electors must separately designate their votes for President

67. U.S. CONST. art. I, § 2.

In the framers’ original formulation, the U.S. Senate opens and counts the ballots, and the person with the greatest number of votes becomes president, as long as that person wins a majority of the electors. If there is a tie, or if no one has a majority, the House of Representatives’ makes the selection. In the case of an even split of electoral votes, House balloting is limited to the two candidates. If no one has a majority, the House selects from among the five with the highest vote totals. After choosing the president, the remaining person with the most electoral votes becomes vice president. If there is a tie, or if no candidate has a majority, the U.S. Senate selects between the two. When the House votes, each state has one vote to cast, which it casts in accord with the majority of its House delegation. The president must have the votes of a majority of the states.

Lutz et al., *supra* note 5, at 34.

68. Each state received only one vote that could be lost if the state’s representatives were equally divided between the candidates. PEIRCE & LONGLEY, *supra* note 3, at 39.

69. Coenen & Larson, *supra* note 7, at 855.

Some Federalists preferred Burr to Jefferson; others thought a deadlock might induce Jefferson to make policy concessions in exchange for the presidency; still others were willing to engage in the high-risk route of adjourning without electing anyone in hopes that in the interregnum a Federalist could be installed in the office.

Lutz et al., *supra* note 5, at 37. Federalist James Bayard from Delaware broke the deadlock by informing the other Federalists he would be voting for Jefferson rather than Burr. KURODA, *supra* note 20, at 105. Bayard supported Jefferson because the alternative was destroying the Constitution. *Id.* Though he was met with harsh criticisms from the other Federalists, most of the other congressmen agreed to vote for Jefferson. *Id.* Finally, with the thirty-sixth vote occurring on February 17, Federalists from several states cast blank ballots so that their colleagues could cast a ballot for Jefferson. PEIRCE & LONGLEY, *supra* note 3, at 40–41. For instance, Federalist Lewis Morris from Vermont cast a blank ballot so that Matthew Lyon—the second of two Vermont delegates—could cast a vote for Jefferson. *Id.* Had Morris cast his ballot for Burr, then the votes from Vermont would have been lost. See *supra* note 68. Thus, Jefferson received votes from ten states and Burr four states (Connecticut, Massachusetts, New Hampshire, and Rhode Island). PEIRCE & LONGLEY, *supra* note 3, at 40–41. Ultimately, the House voted for Jefferson to become the President “without the vote of a single Federalist.” KURODA, *supra* note 20, at 105.

and for Vice President.”⁷⁰ The Twelfth Amendment is the only constitutional change to the electoral process ever to have passed.⁷¹

Major electoral problems resurfaced again in the 1876 election between Democratic candidate Samuel J. Tilden and Republican candidate Rutherford B. Hayes.⁷² Tilden received fifty-one percent of the popular vote to Hayes’ forty-eight percent.⁷³ Despite Tilden’s clear lead over Hayes, Republican leaders refused to accept his victory.⁷⁴ Instead, Republican-controlled election boards in three former Confederate states—Florida, Louisiana, and South Carolina—used their “power to disqualify votes tainted by fraud or intimidation . . . [to throw] out enough democratic votes to allow Republican electors to win in all three states.”⁷⁵ Congress

70. Coenen & Larson, *supra* note 7, at 855. See also KURODA, *supra* note 20 (offering a comprehensive analysis of the road that led to the Twelfth Amendment and its subsequent ratification). “The Twelfth Amendment shows the adaptability of the Electoral College to changing political circumstances. The amendment accommodated party competition by ensuring the election of a president and vice president from the same party, and it ended the complex plotting by electors on how to cast their two votes.” Lutz et al., *supra* note 5, at 37–38. The amendment created an environment in which political parties could flourish and these parties led to the eventual situation present today in which every state employs popular election of the electors—a situation not mandated by the Constitution. *Id.* at 38.

71. Lutz et al., *supra* note 5, at 35–36. The Twelfth Amendment effected the following changes:

1. The presidential electors must vote separately for president and vice president, instead of casting two undifferentiated votes.
2. If an election is thrown into the House of Representatives because no candidate has a majority, the House shall pick from the three top electoral vote recipients, rather than the five stipulated in the original Constitution.
3. If the House is called on to pick the president and does not make a selection by March 4 . . . then the new vice president will become president. . . .
4. A majority of electoral votes is also required for the election of the vice president
5. The age, citizenship, and residence requirements for a vice president are to be the same as those for a president

PEIRCE & LONGLEY, *supra* note 3, at 44.

72. Coenen & Larson, *supra* note 7, at 860–63. See Josephson & Ross, *supra* note 25, at 184–85, for a detailed account of the problems experienced in this election.

73. Coenen & Larson, *supra* note 7, at 863. The early returns on election night showed that once-Republican strongholds—Connecticut, New York, New Jersey, and Indiana—were all going for Tilden. PEIRCE & LONGLEY, *supra* note 3, at 52–53. Coupled with the expectation that southern democratic states would also go Tilden’s way, “Hayes admitted his defeat in his diary.” *Id.*

74. PEIRCE & LONGLEY, *supra* note 3, at 53. Republicans were renewed when they realized Hayes could win by one electoral vote if South Carolina, Florida, and Louisiana all went his way. *Id.*

In each of the disputed southern states, Reconstruction was still in force, and the Republicans controlled the state governments and election machinery. Republicans counted on masses of Negro votes to win, while the Democrats employed threats and intimidation and even violence on occasion to prevent the Negroes from casting ballots.”

Id.

75. Coenen & Larson, *supra* note 7, at 863. South Carolina certified a slate of Hayes electors because the army personnel stationed at various polls throughout the state prevented a fair election thereby showing a slight lead for Hayes. PEIRCE & LONGLEY, *supra* note 3, at 53. However, on the same day Democratic elector candidates met and sent their ballots for Tilden to Congress. *Id.* In Florida, both the Republicans and the Democrats accused the other of fraud. *Id.* The canvassing

eventually accepted these Republican electors and Hayes was elected President.⁷⁶

As a result of the election,⁷⁷ Congress “tried to lay out rules that would guide and constrain its future role in counting electoral votes.”⁷⁸ Ten years later Congress came to a consensus and passed the Electoral Counting Act of 1887.⁷⁹ The legislation addressed two main issues: when electors were considered certified and which slate—if more than one was certified—should be counted.⁸⁰ The Act leaves much to the states, but limits their

board and governor certified a slate of Hayes electors but the Democrats won a challenge in court and were able to submit electors for Tilden. *Id.* at 53–54. Louisiana was a complete mess as there were two sets of everything: governors, canvassing boards, election returns showing different results, and electoral colleges. *Id.* at 54.

76. PEIRCE & LONGLEY, *supra* note 3, at 54. At the time, Democrats controlled the House and Republicans controlled the Senate. *Id.* No clear precedent existed as to how electoral disputes should be resolved because the law that would have disqualified returns from states where one house of Congress objected, had lapsed. *Id.* Congress needed to act immediately so they formed a joint committee to create a law on resolving electoral disputes. *Id.* The committee drafted the Electoral Commission Law—to be used only for this specific election, which passed both the House and the Senate. *Id.*

77. The election demonstrated a grave defect in the Constitution: its failure to spell out exact responsibility for counting the electoral votes and resolving disputes, so that the resolution of the entire presidential election can swing on the intrigues and maneuvers in a partisanly motivated Congress, to the detriment of the people and presidency alike. *Id.* at 56–57.

78. Coenen & Larson, *supra* note 7, at 865.

79. 3 U.S.C. §§ 5, 15 (2006). The Act “was narrowly crafted to address the specific problem of post-election rule changes that had triggered the Hayes-Tilden debacle.” Coenen & Larson, *supra* note 7, at 866. This legislation is oddly reminiscent of the band-aid Congress created in 2002—the Help America Vote Act. *See infra* notes 139–55 and accompanying text. Congress found the power to enact this legislation based on their enumerated Article I power to count electoral votes. *Id.* Furthermore, Congress relied on their constitutional power “[t]o make all Laws which shall be necessary and proper” to carry out its enumerated powers.” Coenen & Larson, *supra* note 7 at 867; *id.* at 868 (citing U.S. CONST. art I, § 8). Coenen contextualized this reasoning into a present day argument for a national ballot and equipment laws:

First, Congress may pass laws that are “necessary and proper,” that is “convenient” or “useful,” for carrying into execution the counting power. Second, mandated state use of a national ballot and of high-quality equipment is conducive to a proper count because it eliminates difficulties in counting that might otherwise arise.

Id. at 909 (footnotes omitted).

80. 3 U.S.C. §§ 5, 15.

First . . . Congress binds itself to accept electoral votes from States that resolve any internal disputes before [the] six-day window closes. Second . . . [i]f only one return has been submitted from a state, then that is accepted unless both Houses of Congress, acting separately, agree that it should be rejected because the votes were not “regularly given.”

SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 26 (2001).

discretion “as to important matters of timing . . . [and] asserts final congressional authority in counting electoral votes.”⁸¹

The events following the 1876 election, like events following the 2000 election,⁸² allowed Congress to assert a greater role in presidential elections.⁸³ “Congress claimed a decisive role in the electoral-vote process and created a precedent for an even larger role should the need arise. Most critically, it would be a congressional statute, not only the Constitution, that set the precise parameters for state and federal control of the electoral-vote process.”⁸⁴ Put another way, Congress had effectively wedged its foot in the states’ electoral door.⁸⁵

III. JUDICIAL INTERPRETATION OF ARTICLE II, SECTION 1 AND THE CREATION OF PRECEDENT

Several prominent Supreme Court decisions have interpreted the extent of Congress’s power over presidential elections.⁸⁶ In *Ex parte Yarbrough*,⁸⁷ defendants committed acts of violence against an African-American man in an attempt to keep him from voting in a congressional election.⁸⁸ Defendants argued they should be discharged from prison because Congress had no constitutional authority to pass the laws⁸⁹ under which defendants

81. Coenen & Larson, *supra* note 7, at 867. “[T]he Act, to the extent it concerned the states at all, dealt primarily with the subject of timing; it addressed when selection rules were to be in place, when electors were to be identified, and when electoral votes were to be submitted.” *Id.*

82. *See infra* notes 129–38 and accompanying text.

83. Coenen & Larson, *supra* note 7, at 867.

84. *Id.* The Counting Act gave Congress the power to regulate all other aspects of a presidential election Congress set the date for presidential elections Congress guarantees that each state’s electors shall serve if those electors are chosen . . . at least six days prior to [the] meeting of the electors Congress further controls the federal election process by mandating when the electoral college shall meet

Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning from Florida’s Presidential Election Debacle*, 63 U. PITT. L. REV. 159, 162–63 (2001) (quoting 3 U.S.C. § 5 (2000)).

85. “Congress asserted its power to act in 1887, and that assertion of power has never been successfully challenged.” Coenen & Larson, *supra* note 7, at 871.

86. *See* *Bush v. Gore*, 531 U.S. 98 (2000); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Burroughs v. United States*, 290 U.S. 534 (1934); *McPherson v. Blacker*, 146 U.S. 1 (1892); *Ex parte Yarbrough*, 110 U.S. 651 (1884).

87. 110 U.S. at 651. *See* Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 33 (1968) (emphasizing the role Congress had played in presidential elections).

88. *Yarbrough*, 110 U.S. at 656. Berry Saunders, an African-American man, was “beat[en], bruise[d], wound[ed], and otherwise maltreat[ed]” in an attempt to intimidate him as he exercised his right to vote for a member of Congress. *Id.*

89. The laws fined and imprisoned anyone who “conspire[d] to prevent, by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal

were being held.⁹⁰ The Court held Congress did have the power to intervene in federal elections, reasoning

[t]hat a government . . . [who] has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, *it must have the power to protect the elections on which its existence depends, from violence and corruption.*⁹¹

The court rejected defendants' argument that Congress had no power over federal elections because the Constitution failed to enumerate such authority.⁹² Instead, the Court relied on the Necessary and Proper Clause:

This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent ability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted, and all other powers vested in the government or any branch of it by the Constitution.⁹³

The expansive powers given to Congress in *Ex parte Yarbrough* were quickly curtailed in subsequent cases. In *McPherson v. Blacker*,⁹⁴ nominees for presidential electors brought suit against Michigan's Secretary of State, challenging Michigan's passage of an act to nominate presidential electors by congressional districts.⁹⁵ The act repealed the previous method—statewide voting.⁹⁶ The plaintiffs' argued the state had no authority to

manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President . . .” *Id.* at 655.

90. *Id.* at 654.

91. *Id.* at 657–58 (emphasis added).

92. *Id.* at 658; Siegel, *supra* note 26, at 405.

93. *Yarbrough*, 110 U.S. at 658.

94. 146 U.S. 1 (1892).

95. *Id.* at 2.

96. *Id.*

appoint electors by district because “the appointment of electors by districts is not an appointment by the state, [and] all its citizens otherwise qualified are not permitted to vote for all the presidential electors.”⁹⁷ The Court disagreed with this argument, holding “the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States.”⁹⁸

The Court further highlighted Congress’s specific powers over presidential elections, noting Congress could determine the time of choosing the electors and the day they give their votes.⁹⁹ However, as the Court explained, “[T]he power and jurisdiction of the State is exclusive with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influences might be excluded.”¹⁰⁰ Though decided only eight years apart, the Court in *Yarbrough* accepted the notion that congressional powers could be implied,¹⁰¹ whereas the Court in *McPherson* ridiculed judicial activism and

the doctrine that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision.¹⁰²

97. *Id.* at 24–25.

98. *Id.* at 25, 35 (reasoning that if the Legislature itself can directly appoint electors then “it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts”). The reasoning in *McPherson* relied heavily on *In re Green*, 134 U.S. 377, 379–80 (1890), a case that strongly reiterated the extent of Congress’s power:

The only rights and duties, expressly vested by the Constitution in the national government, with regard to the appointment or the votes of presidential electors, are by those provisions which authorize Congress to determine the time of choosing the electors, and the day on which they shall give their votes, and which direct that the certificates of their votes shall be opened by the President of the Senate in the presence of the two houses of Congress, and the votes shall then be counted.

Id. at 379. Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the now general usage) the mode of appointment prescribed by the law of the state is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the states.

99. *McPherson*, 146 U.S. at 35.

100. *Id.*

101. *See supra* notes 91–93 and accompanying text.

102. *McPherson*, 146 U.S. at 36. Ironically, the concurrence in *Bush v. Gore* “amended” Article II, Section 1 relying mainly on *McPherson* for support, interpreting this case as meaning that the state legislature has the last word regarding election administration. *See infra* note 127 and accompanying text; Robert A. Schapiro, *Article II as Interpretive Theory: Bush v. Gore and the Retreat from Erie*, 34 LOY. U. CHI. L.J. 89, 97 (2002). Even Judge Posner—the concurrence’s chief supporter—“has candidly acknowledged the tepid support for this theory in text and precedent: ‘The interpretation that I am suggesting is not compelled by case law, legislative history, or constitutional

The Court had to wait until 1934 to address this issue again. Though *Burroughs v. United States* dealt with campaign finance laws and not the extent of congressional power over presidential elections, the Court noted in its opinion that “[n]either in purpose nor in effect does [the congressional act under review] interfere with the power of a state to appoint electors or the manner in which their appointment shall be made.”¹⁰³ However, the *Burroughs* Court mirrored the reasoning in *Yarbrough* more than it did the Article II analysis found in *McPherson*.¹⁰⁴ The Court, in its holding, concluded:

The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are *matters for congressional determination alone*.¹⁰⁵

language.” *Id.* at 99 (citing RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 156 (2001)).

103. 290 U.S. 534, 544 (1934). *Burroughs* violated the Federal Corrupt Practices Act of 1925 that required “any political committee accepting contributions or making expenditures in two or more states for the purpose of influencing the election of candidates for presidential elector to render certain financial reports.” Rosenthal, *supra* note 87, at 34. *Burroughs* was the treasurer of a political committee and as treasurer he was supposed to produce statements when contributions were made to the committee. *Burroughs*, 290 U.S. at 543. *Burroughs*, in furtherance of a conspiracy with the chairman of the committee, failed to file these statements required under the Act. *Id.*

104. *Burroughs*, 290 U.S. at 545 (noting in the dicta: “To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.” (emphasis added)).

105. *Id.* at 547–48 (emphasis added). “*Burroughs* by its terms suggests that federal legislation should stand if it genuinely ‘seeks to preserve the purity of presidential and vice presidential elections.’” Coenen & Larson, *supra* note 7, at 894 (citing *Burroughs*, 290 U.S. at 544). Arguments have been levied against congressional control over the “manner” of presidential elections. *Id.* at 899. One argument draws on Congress’s power to control the “Time Places, and Manner” of congressional elections found in Article I, Section 4, and the “time” of selecting presidential electors in Article II, Section 1. *Id.* “The argument that arises is one from negative implication. If Congress may govern the ‘Times, Places and Manner’ of congressional elections, but only the ‘Time’ of presidential elections, then Congress should not be able to control the ‘Manner’ of presidential elections, including the manner in which citizens cast their votes.” *Id.* For a rebuttal to this argument, see *supra* note 65. Additionally, Coenen and Larson argue that Article I, Section 4 may

In *Oregon v. Mitchell*,¹⁰⁶ the Court had to consider whether the Voting Rights Act of 1970 was constitutional because the Act “proscribed states’ disqualifications of voters in presidential and vice presidential elections on the grounds that they failed to meet residency requirements.”¹⁰⁷ Justice Black, who provided the Court’s fifth vote, noted:

Acting under its broad authority to create and maintain a national government, *Congress unquestionably has power under the Constitution to regulate federal elections.* The Framers of our Constitution were vitally concerned with setting up a national government that could survive. Essential to the survival and to the growth of our national government is its power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent.¹⁰⁸

Since *Burroughs* and *Mitchell*, a few cases have attempted to change the tide of congressional control over presidential elections and revert back to the *McPherson* court reasoning.¹⁰⁹ The first case, *Cousins v. Wigoda*,¹¹⁰ supported congressional control in the majority opinion, reasoning “[t]he

be a source of power for Congress to control the manner of presidential elections. *Id.* at 916–17. They posit that if Congress uses its power to create a uniform national ballot for senators and representatives then it may be able to include presidential candidates too. *Id.* “The Necessary and Proper Clause suggests that [Congress] may do so as a means to accomplish the purposes of its power to regulate congressional elections.” *Id.*

106. 400 U.S. 112 (1970).

107. Siegel, *supra* note 26, at 409–10. The Voting Rights Act made discriminatory practices in relation to voting illegal. U.S. Department of Justice, Civil Rights Division, Voting Section, Frequently Asked Questions, <http://www.usdoj.gov/crt/voting/misc/faq.php#faq03> (last visited Oct. 8, 2009). Some of the laws the Act banned were compulsory literacy tests and requiring a registered voter to vouch for the prospective voter’s “good character.” *Id.* The Act “gave private citizens the right to sue in federal court to stop” discriminatory practices. *Id.* The Court upheld most of the Act’s provisions. *Mitchell*, 400 U.S. at 118 (holding “Congress can enfranchise 18-year-old citizens in national elections, but . . . cannot extend the franchise to 18-year-old citizens in state and local elections”).

108. *Mitchell*, 400 U.S. at 134 (emphasis added).

109. See *supra* note 98 and accompanying text.

110. 419 U.S. 477 (1975). During the 1972 Illinois primary, voters elected the Wigoda delegates to the Democratic National Convention. *Id.* at 478–79. However, some of the delegates (Cousins delegates) challenged the seating of the Wigoda delegates on the grounds that the “slate-making procedures under which the Wigoda delegates were selected violated Party guidelines incorporated in the Call of the Convention.” *Id.* at 479. The Credential Committee agreed with the Cousins delegates and ordered the Wigoda delegates to be unseated and the Cousins delegates seated in their place. *Id.* The Wigoda delegates received an injunction against the Cousins delegates, which the Cousins delegates ignored and took their seats as the rightful delegates. *Id.* at 480–81. The Illinois Appellate Court affirmed the injunction, holding “that ‘the right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Election Code.’” *Id.* at 481 (citing *Wigoda v. Cousins*, 302 N.E. 2d 614, 626 (Ill. App. Ct. 1973)).

States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates.”¹¹¹ However, Justice Rehnquist, in his concurrence, disagreed with the majority, citing Article II, Section 1 of the Constitution as specifically granting states the power to appoint presidential electors.¹¹²

Similarly, in *Anderson v. Celebrezze*, Justice Rehnquist dissented from the majority again citing Article II, Section 1 and this time adding language from *McPherson v. Blacker*:

This provision, one of few in the Constitution that grants an express plenary power to the States, conveys “the broadest power of determination” and “[i]t recognizes that [in the election of a President] the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.”¹¹³

Regardless of Justice Rehnquist’s impassioned reading of the Constitution, the majority in *Anderson* felt “the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State’s boundaries.”¹¹⁴

The most recent return to state supremacy over presidential elections came in the 2000 decision, *Bush v. Gore (Bush II)*.¹¹⁵ This decision arose after a number of state court decisions, namely *Bush v. Palm Beach County*

111. *Id.* at 489–90.

112. *Id.* at 495. Interpreting the Article too strictly would rule out congressional control as found in *Burroughs*. See *supra* notes 103–05 and accompanying text. “[I]f states, and states alone, have power to control every aspect of the ‘Manner’ of voting, even this starkly permissible exercise of the Burroughs power would become unconstitutional.” Coenen & Larson, *supra* note 7, at 903.

113. *Anderson v. Celebrezze*, 460 U.S. 780, 806–07 (1983) (Rehnquist, J., dissenting) (citing *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)) (alteration in original). In *Anderson*, the Ohio Secretary of State refused to accept Anderson’s statement of candidacy on the grounds that the statement had not been filed within the timeframe required by Ohio’s statute. *Id.* at 780.

114. *Id.* at 795.

115. 531 U.S. 98 (2000). “*Bush* goes where no prior Court had gone: it applies broad and novel equality norms to the way governments count votes.” Marshall Camp, Note, *Bush v. Gore: Mandate for Electoral Reform*, 58 N.Y.U. ANN. SURV. AM. L. 409, 420 (2002). Generally, the Supreme Court has no jurisdiction over how a state court interprets its own laws. Ronald Dworkin, *Introduction*, in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY*, *supra* note 25, at 1, 16–17. However, the Court used Article II, Section 1 as permission to investigate whether Florida courts “usurped the Florida legislature’s power by, in effect, changing the election statute after the election was over.” *Id.* at 17.

Canvassing Board (Bush I).¹¹⁶ In *Bush I*, the Supreme Court reviewed a decision issued by the Florida Supreme Court resolving Florida election code problems by mandating certain recounts.¹¹⁷ The Court took notice of the fact that the Florida Supreme Court had relied on Florida's Constitution in addition to the statutes issued by the state legislature.¹¹⁸ The Court held this was problematic because Article II, Section 1 specifically grants the state legislature the authority to regulate elections.¹¹⁹ The Court remanded the decision because it was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority" under Article II, Section 1.¹²⁰

The case returned to the Supreme Court in *Bush II*.¹²¹ The per curiam opinion relied heavily on the principles established in *McPherson*, stating broadly at the beginning of its analysis:

[T]he state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for many years after the framing of our Constitution When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental. . . . The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.¹²²

116. 531 U.S. 70 (2000). See *infra* notes 131–38 and accompanying text, for a brief history of the events leading up to the Supreme Court's ultimate decision in *Bush v. Gore*.

117. *Bush I*, 531 U.S. at 73–77.

118. *Id.* at 77. One author argues the Court intentionally injected itself into the election by issuing this decision to stay the recount and remand the decision to the Florida Supreme Court. Elizabeth Garrett, *Leaving the Decision to Congress*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT* 38, 48 (Cass R. Sunstein & Richard A. Epstein eds., 2001). Garrett argues the Florida Supreme Court would have issued a decision providing "more specific standards for determining a voter's intent in a recount . . . had it not been convinced that such routine statutory interpretation would be struck down by [the Court] under an Article II analysis." *Id.* at 46. Thus, the Court's remand in *Bush I*, basically guaranteed a *Bush II* overturning the Florida Supreme Court's decision on an "equal protection argument not deemed worthy of certiorari at the time the Court considered [*Bush I*]." *Id.*

119. *Bush I*, 531 U.S. at 76. "The most dramatic suggestion in *Bush I* is the possibility that Article II, Section 1 of the U.S. Constitution might immunize state legislatures, when they enact presidential elector statutes, from the state constitutional limitations that would otherwise channel and circumscribe the state legislature." ISSACHAROFF ET AL., *supra* note 80, at 48.

120. *Bush I*, 531 U.S. at 78. "The Supreme Court thus sketched a rough outline of an Article II 'independent legislature' doctrine. Under this doctrine, a state legislature directing the manner of appointing electors pursuant to Article II operates with independence from its own state constitution." Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 734 (2001).

121. *Bush v. Gore (Bush II)*, 531 U.S. 98 (2000).

122. *Id.* at 104 (citations omitted).

The rest of the per curiam opinion deviated from this analysis of Article II, Section I and instead discussed how the recount procedures in Florida violated equal protection.¹²³

In their concurrence,¹²⁴ Chief Justice Rehnquist, Justice Scalia, and Justice Thomas did not cite equal protection as the reason to overturn the Florida Supreme Court; instead, their decision relied heavily on a state's right to conduct presidential elections:

[I]n a Presidential election the clearly expressed intent of the legislature must prevail. . . . For the [Florida Supreme Court] to step away from this established practice, prescribed by the Secretary, the state official charged by the legislature with "responsibility to . . . [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," . . . was to depart from the legislative scheme.¹²⁵

123. *Id.* at 104–10. "In the scramble to find a suitable constitutional principle on which to rest its distrust of the Florida events, the Court finally settled on a sweeping but rather vague rendition of equal protection." Samuel Issacharoff, *Political Judgments*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT*, *supra* note 118, at 55, 68. This was the first Supreme Court decision to apply an equal protection analysis to election administration. DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW* 299 (2008). "As a result, black Americans—the people the equal protection clause was designed to protect—had their ballots disqualified at shockingly high rates in Florida." Guinier, *supra* note 25, at 237.

Generally, an equal protection case deals with a "class" or "group" of people. *Camp*, *supra* note 115, at 420–21. However, *Bush v. Gore* is unique because the Florida voters whose votes were affected cannot be categorized into a specific group or class; "in other words, there is no classification effected by the judicial recount scheme." *Id.* at 423. The novelty of the opinion is that the equal protection holding found "that uneven treatment of voters, even if not occurring on the basis of group or class membership, may violate the Constitution." *Id.* at 424. One author notes the absurdity of the holding by arguing that the same standard was used for both Bush voters and Gore voters. Richard A. Epstein, "In such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v. Gore Defended*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT*, *supra* note 118, at 13, 17.

124. *Bush II*, 531 U.S. at 111 (Rehnquist, C.J., concurring). "[T]he fairest way to characterize the vote is 7–2 to hold unconstitutional the Florida system for manual recounts, but only 5–4 to stop the recounting, rather than remand to Florida for further counting under a revised, and constitutional, system." GREENE, *supra* note 3, at 117. Besides this concurrence, Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer each wrote separate dissents (although they were also joined in some degree by the other dissenting Justices). *Id.* "Justices Souter and Breyer, although dissenting from the disposition of the case halting further manual recounts, were in substantial agreement with the majority's conclusion that the Florida system violated the equal protection clause." *Id.*

125. *Bush II*, 531 U.S. at 120 (Rehnquist, C.J., concurring) (citation omitted). The Chief Justice's concurrence argued for a super-strong independent legislature doctrine language not found in the Constitution: "After all, the Framers did not confer on Article II legislatures the power to 'chuse' [sic] electors, as they had given Article I, Section 3 legislatures, but only the power to 'direct' the

Ultimately, the Court decided to stop the manual recount “because there was insufficient time to establish satisfactory vote-counting rules and still complete the recount by December 12, 2000.”¹²⁶

The various cases extending Congress’s power, tempered by the Delegates’ concern about an executive controlled by Congress,¹²⁷ have created a situation today where “states have initial authority, but Congress serves as a backstop, able to change existing state rules whenever it deems necessary.”¹²⁸

IV. RECENT EVENTS: THE 2000 ELECTION AND THE HELP AMERICA VOTE ACT

Following the greatly debated 2000 presidential election, Congress passed the Help America Vote Act (HAVA)¹²⁹ as a means to fix the

‘manner’ of their appointment.” Smith, *supra* note 120, at 736, 754. An alternative reading of Article II, Section 1 is that “reference to ‘the Legislature’ denotes the lawmaking power of the state, as that is customarily exercised” rather than the strict reading from the concurrence in which “Article II confers a federal shield on the state legislature’s command.” Schapiro, *supra* note 102, at 92. In the concurrence’s opinion, “State legislation, not the state constitution, constitutes the ultimate state authority governing presidential elections.” *Id.* The concurrence created a hierarchy of state law where state courts were the authoritative interpreters of the state’s law only if their decision relied on statutes rather than the state’s constitution. *Id.* at 114.

126. Jed Rubenfeld, *Not as Bad as Plessy. Worse., in BUSH V. GORE: THE QUESTION OF LEGITIMACY* 20, 21 (Bruce Ackerman ed., 2002). See *Bush II*, 531 U.S. at 111 (Rehnquist, C.J., concurring). The December 12 date was not a deadline per se but a “safe harbor” date created by federal law. Rubenfeld, *supra*, at 22. If states submit their votes by this date then their resolution will not be challenged when Congress counts the votes in January. *Id.* However, the December 12 deadline is not required by federal law, but Florida state law. *Id.* The majority was honoring the deadline “out of deference to . . . the Florida Supreme Court, . . . that august authority to which the United States Supreme Court refused to defer on virtually any other point of law in the entire controversy.” *Id.* at 23. Yet the Florida Supreme Court never declared December 12 as the deadline. *Id.* The majority maneuvered around this discrepancy by reasoning “[t]he Florida Supreme Court . . . had held that Florida law was designed so that Florida could ‘participate fully in the federal electoral process.’” *Id.* at 24 (quoting *Bush II*, 531 U.S. at 110).

In other words, to decide *Bush v. Gore* the way it did, the majority had to do something it pretended it *wasn’t doing* and *couldn’t* do (decide a matter of state law) by pretending that the Florida justices had done something they *hadn’t done* and, supposedly, *couldn’t* do (set a deadline of December 12 for the completion of the election contest, even though this deadline was nowhere expressed or even implied by Florida’s election code).

Id. at 25–26.

127. See *supra* notes 37–38 and accompanying text.

128. Siegel, *supra* note 26, at 422; see Michael M. Uhlmann, *Federalism and Election Reform*, 6 TEX. REV. L. & POL. 491, 502–03 (2002) (noting Congress’s expanded power over election administration). For instance, Congress felt it necessary to protect presidential elections from violence and corruption in *Ex parte Yarbrough*, see *supra* notes 87–93 and accompanying text.

129. Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15306 (2006); see Robert A. Pastor, *The US Administration of Elections: Decentralized to the Point of Being Dysfunctional, in ELECTORAL MANAGEMENT DESIGN: THE INTERNATIONAL IDEA HANDBOOK* 274 (2006), available at http://www.idea.int/publications/emd/upload/EMD_CS_USA.pdf (noting “HAVA is the only national law addressing the issue of electoral administration”).

problems from the 2000 election.¹³⁰ In that election, the focus shifted to Florida because the electoral count was so close that whoever won Florida would win the election.¹³¹ However, the election was far from smooth in Florida mainly because of the type of technology used.¹³²

Several precincts used the “punch card balloting” system in which the voter had to punch through the ballot next to the candidate of his or her choice. Many of these ballots “did not register in the vote-counting machines because voters failed to punch entirely through the card or selected more than one candidate.”¹³³ Other Florida precincts used the “butterfly ballot,” whose design confused voters many of whom “inadvertently cast a ballot for a candidate whom they did not prefer, or had chosen more than one candidate for President, thereby voiding the ballot altogether.”¹³⁴

Despite the faulty technology, the real problems arose when the ballots were recounted because of the closeness of the election.¹³⁵ “The recounts, and the procedures associated with them, resulted in both political campaigns filing numerous suits in state and federal court.”¹³⁶ Eventually, the Supreme Court granted certiorari and delivered a decision in *Bush v. Gore*.¹³⁷ The HAVA was created to address these problems, but some critics believe the Act does not go far enough.¹³⁸

130. R. Bradley Griffin, Note, *Gambling with Democracy: The Help America Vote Act and the Failure of the State to Administer Federal Elections*, 82 WASH. U. L.Q. 509, 523 (2004). “Perhaps the most important lesson learned in the aftermath of the 2000 elections was that an election controversy could easily recur if voting systems, registration, and administration are not thoroughly improved on a national basis.” Brian Kim, *Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 595 (2003).

131. Griffin, *supra* note 130, at 518.

132. GREENE, *supra* note 3, at 29.

133. Griffin, *supra* note 130, at 519.

134. *Id.* As a result of faulty technology, “approximately 2.9% of all ballots cast in Florida (approximately 180,000 of 6 million) did not contain a valid vote for president.” Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1209 (2005). In addition to technological blunders, “countless eligible voters’ were wrongly denied the opportunity to vote or purged from registration lists due to errors on the part of state and local election officials in Florida.” *Id.* at 1209–10.

135. “The final official tally gave Bush the edge by fewer than 1000 votes, with over ten times that many disputed ballots in Miami-Dade County alone.” Coenen & Larson, *supra* note 7, at 872.

136. Griffin, *supra* note 130, at 519.

137. See *supra* notes 121–26 and accompanying text.

138. Griffin, *supra* note 130, at 526 (noting “[t]he Act leaves too much power in the hands of the very governments historically proven to be incompetent in securing adequate voting procedures: the states”); Tokaji, *supra* note 134, at 1207 (arguing “[the] changes in federal law have arguably made things worse instead of better, at least in the short term”).

A. *The Help America Vote Act*

Title I of the Act authorizes Congress to distribute \$650 million to the states to improve election administration and replace punch card and lever voting machines.¹³⁹ “States that choose not to accept federal funds must either certify to the [Election Assistance Commission] that they have established state administrative complaint procedures or submit to the Attorney General a ‘compliance plan’ that explains how the state will satisfy Title III’s requirements.”¹⁴⁰

Title II establishes the Election Assistance Commission (EAC) to “serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections”¹⁴¹ The members of the EAC are appointed by the President and confirmed by the Senate.¹⁴² To achieve a bipartisan Commission, the Senate Majority Leader, Senate Minority Leader, Speaker of the House, and the House Minority Leader may all submit a candidate recommendation to the President.¹⁴³ “Despite the broad grant of duties, and its intentional bipartisan composition, the EAC does not have the ability to make rules binding upon the states.”¹⁴⁴ Thus, the EAC is largely a toothless body.¹⁴⁵

Title III, arguably the most important section in the Act,¹⁴⁶ outlines the standards for voting technology, provisional voting, voting identification, and creation of a statewide voter registration database.¹⁴⁷ “To comply with

139. Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15306 (2006). In addition to replacing voting machinery, states can use the money to educate voters, train election officials and poll workers, improve the accessibility and quantity of polling places, and establish hotlines voters may call to report fraud or voting rights violations. Audra L. Wassom, *The Help America Vote Act of 2002 and Selected Issues in Election Law Reform*, 29 T. MARSHALL L. REV. 357, 360 (2004).

140. Kim, *supra* note 130, at 589. Many reformers felt Congress should have mandated these reforms rather than incentivizing them. Wassom, *supra* note 139, at 361. The incentive plan was included because many thought enforcement of mandates would be too costly and difficult, plus states’ rights advocates lobbied hard against them. *Id.*

141. § 15322. The EAC is “responsible for accrediting laboratories to test and certify voting systems throughout the country.” Wassom, *supra* note 139, at 363. The EAC must also conduct studies regarding election administration, including what kind of system and technology will be the most convenient and accessible for voters, the most accurate and secure, nondiscriminatory and the most efficient and cost-effective. *Id.*

142. § 15323(a)(1).

143. § 15323(a)(2). To carry out an action, the EAC needs approval from three of its four members. Wassom, *supra* note 139, at 362.

144. Griffin, *supra* note 130, at 524. HAVA gave the EAC little power, yet states are still calling for its demise. Elmendorf, *supra* note 5, at 427 (“In 2005, the National Association of Secretaries of State passed a resolution calling on Congress to dissolve the EAC.”).

145. “The EAC is not an electoral management body but primarily a mechanism for transferring funds from the federal to the state governments to invest in new voting equipment and statewide registration lists.” Pastor, *supra* note 129, at 274.

146. Wassom, *supra* note 139, at 365.

147. §§ 15481–15485. Section III is Congress’s attempt to mitigate future problems similar to

Title III, a voting system must enable the voter to review his or her vote selection before the ballot is cast and counted and allow the voter, if necessary, to change or correct his or her vote.”¹⁴⁸

The Act requires voters to provide identification if they register to vote by mail.¹⁴⁹ “If the new voter wishes to vote in person at the polling station, the voter must present a valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows his or her name and address.”¹⁵⁰ Additionally, one of these documents must be submitted with a mail-in ballot if the person is a new voter.¹⁵¹ Despite these detailed provisions, states and local governments have the discretion as to how they implement Title III’s provisions.¹⁵²

Title IV allows the Attorney General to enforce the Act through declaratory and injunctive relief.¹⁵³

If state and local authorities fail to comply with voting systems standards, provisional voting rules, statewide voter registration list requirements, and procedures for registering by mail, the Attorney General can bring a civil action against the state or local jurisdiction in federal district court for declaratory and injunctive relief to compel violators to comply.¹⁵⁴

Title V establishes the college program to encourage students to help in the administration of elections.¹⁵⁵

those in Florida during the 2000 election. Wassom, *supra* note 139, at 365–66.

148. Kim, *supra* note 130, at 590.

149. § 15483(b).

150. Kim, *supra* note 130, at 593.

151. § 15483(b)(2)(A)(ii).

152. Kim, *supra* note 130, at 594. “[T]he new law aims to help the states retrieve authority over the conduct of elections and to exercise it in a way that will permit some uniformity at the national level.” Pastor, *supra* note 129, at 274.

153. Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 430 (2004). One author believes these enforcement provisions “are not strong enough to adequately monitor the reform of federal elections in this country.” Wassom, *supra* note 139, at 376.

154. Kim, *supra* note 130, at 594. Additionally, the Act provides for the “[e]stablishment of state-based administrative complaint procedures to remedy grievances.” § 15512(a).

155. Wassom, *supra* note 139, at 368.

B. Reactions to the Act

While *Bush v. Gore* has been fairly controversial,¹⁵⁶ the HAVA has not.¹⁵⁷ One scholar believes the Act will likely not come under constitutional attack because “[t]he changes Congress adopted are relatively modest and give states a certain degree of flexibility in achieving compliance.”¹⁵⁸ Generally, if any criticism is rendered against the bipartisan legislation, it is that the Act does not go far enough in changing how elections are conducted.¹⁵⁹ But if Congress were to enact a more aggressive proposal for electoral reform, it would be dangerously close to doing exactly what the Framers sought to avoid.¹⁶⁰

The HAVA attempted to take control of the reigns and dictate how presidential elections should be administered without moving too far into the states’ territory.¹⁶¹ “By simply assuming authority over the manner of presidential elections and setting new rules, the [HAVA] ignores the arguments made at ratification and alters that balance, at least as foreseen by the ratifiers.”¹⁶² Little by little, Congress has delegated more power to itself to amend and ratify legislation that effectively changes *who* controls the manner of elections.

156. Many books and articles have been written on the subject. See BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 126 (presenting a collection of articles debating the impact of *Bush v. Gore*); GREENE, *supra* note 3 (dissecting every event that led up to the fateful decision in *Bush v. Gore*); THE VOTE: BUSH, GORE & THE SUPREME COURT, *supra* note 118 (noting that many view the court’s decision “as a travesty of constitutional law incapable of rational defense”); Uhlmann, *supra* note 128, at 503 (stating *Bush v. Gore* is a case that “bothers almost everyone”).

157. For criticism against the Act, see Kim, *supra* note 130, at 597 (“On the whole, very few legislators opposed the Help America Vote Act. Despite some controversial provisions, the Act is the product of bipartisan compromise. The main thrust of opposition to the [Act] centered on the identification requirements for first-time voters who registered by mail.”); Pastor, *supra* note 129, at 274 (“It is clear that the law did not provide for sufficient uniformity or give the EAC sufficient strength to ensure that all states would assure the voting rights of citizens.”); Shambon, *supra* note 153, at 431 (“HAVA has the effect of moving from an environment of local control with loose state and limited federal oversight to an environment of strong state control and loose federal oversight.”).

158. Siegel, *supra* note 26, at 417.

159. See Wassom, *supra* note 139, at 398 (“HAVA must only be considered a first step in reforming the many problems with our election system.”); Griffin, *supra* note 130, at 526 (“Furthermore, the Act does not contain sufficient measures to ensure that states will comply with even the Act’s mandatory provisions, or what the penalties are if states fail to comply.”).

160. Siegel, *supra* note 26, at 418. “The Framers strove to avoid congressional control of the Executive and believed that removing Congress from the process of presidential selection was the best guarantee of independence from the legislature.” *Id.*

161. See *supra* notes 139–55 and accompanying text.

162. Siegel, *supra* note 26, at 419.

C. Elections of 2004 and 2008

The Act was very much a reaction to the specific problems from the 2000 election.¹⁶³ Indeed, many of the pitfalls from the 2004 and 2008 elections highlight the need for a more fundamental change in voting procedures.¹⁶⁴ Florida was at the center of election chaos during the 2000 election, but managed to avoid controversy in the 2004 election.¹⁶⁵ Instead, Ohio was the eye of the storm, experiencing “intense controversy over six issues: (1) voting equipment, (2) registration forms, (3) provisional voting, (4) the ID requirement, (5) challenges to voter eligibility, and (6) long lines.”¹⁶⁶ Before Election Day, Democrats were litigating decisions made by the Republican Secretary of State, Kenneth Blackwell.¹⁶⁷ In the end, “the focus on Ohio turned out to be correct because the election results hinged on Ohio’s 20 electoral votes.”¹⁶⁸

The 2008 presidential election also experienced the downsides of ineffective administration. During the election, long lines forced voters in Virginia to wait more than five hours to vote.¹⁶⁹ In addition to long lines, “some voters received automated phone calls sending people to the wrong polling place” and students at George Mason University received a fake email stating the election had been moved to November 5.¹⁷⁰ Florida was not without its problems, as it experienced breakdowns with its electronic voting machines.¹⁷¹ Though the Supreme Court did not decide the outcome

163. “The Help America Vote Act is not simply about making federal elections more accessible and efficient; it also places an equally important emphasis on preventing voter fraud.” Kim, *supra* note 130, at 593.

164. See Griffin, *supra* note 130, at 527–28 (discussing the 2004 election).

165. See generally Tokaji, *supra* note 134, at 1209.

166. *Id.* at 1220. “Rather than representing a step forward in improving our broken voting process, we now realize that the flaws and gaps in HAVA and its implementation, coupled with a highly charged campaign season in 2004, led to continued obstacles for the American voting process.” Tova Andrea Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 SEATTLE U. L. REV. 353, 358 (2005).

167. LOWENSTEIN ET AL., *supra* note 123, at 303–04 (noting that Secretary Blackwell’s decisions included “provisional votes cast by a voter in the wrong precinct would not be counted and that voter registration forms printed on paper not of sufficient weight were to be rejected . . .”).

168. *Id.* at 304 (noting the preliminary results had Bush with a 136,000-vote lead over Kerry, with only 153,000 provisional ballots yet to be included in the total).

169. Melissa Block & Pam Fessler, *On Election Day, Some Glitches Reported*, NAT’L PUB. RADIO, Nov. 4, 2008, <http://www.npr.org/templates/story/story.php?storyId=96588511>.

170. *Id.*

171. Ari Shapiro, *Roundup: Voting Snags in Key States*, NAT’L PUB. RADIO, Nov. 4, 2008, <http://www.npr.org/templates/story/story.php?storyId=96588511> (“[P]oll workers responded to

of the 2008 election, glitches such as these emphasize the need for fundamental reform.

Many reformers focus on the Electoral College and the need for a new system.¹⁷² However, converting to direct election or some other kind of system will not fix the problems experienced during the last three elections.¹⁷³ These problems are fundamentally related to the lack of proper administration of presidential elections.¹⁷⁴ A change in the type of system will not eliminate long lines at the polls or fix recount procedures, but reforming *how* elections are administered and *who* is responsible for the logistics will go a long way in effectuating real change.

V. A LOOK AROUND THE GLOBE

One way to find new ways of administering elections is to analyze the electoral systems¹⁷⁵ of other countries. The practice of looking abroad is embodied in the term “comparative law.”¹⁷⁶ Studying other cultures and

those breakdowns appropriately by issuing paper ballots and placing the completed ballots in lockboxes, but when those boxes filled up, poll workers started storing ballots in duffel bags or in piles on the floor.”)

172. See, e.g., George W. Norris, *Abolition of the Electoral College*, in DIRECT ELECTION OF THE PRESIDENT, *supra* note 5, at 195, 195 (advocating for direct election rather than the Electoral College); Burdett A. Loomis et al., *Electoral College Reform, the Presidency, and Congress*, in CHOOSING A PRESIDENT: THE ELECTORAL COLLEGE AND BEYOND, *supra* note 5, at 74 (arguing for a plurality vote system as the best possibility for a clear and legitimate winner).

173. See *supra* notes 132–38, 163–71 and accompanying text.

174. The Electoral College determines *how* many votes a candidate wins, but not the *manner* in which these votes are collected. See *supra* note 62 and accompanying text.

175. “[E]lectoral systems are devised to accommodate a diversity of concerns, but no particular electoral system, no matter how sophisticated, can accommodate them all in their entirety. Choices have to be made. On what basis are such choices to be made?” Nicholas Aroney, *Democracy, Community, and Federalism in Electoral Apportionment Cases: The United States, Canada, and Australia in Comparative Perspective*, 58 U. TORONTO L.J. 421, 423 (2008).

176. “Comparative constitutional law is a complex, multifaceted, and contested undertaking. Its emphasis can be either descriptive or normative, and many different approaches can be adopted.” *Id.* at 424. Aroney goes on to explain the various approaches to comparative constitutional law. First, he describes an approach that takes into account each system’s “particularity” and “uniqueness.” *Id.* With this approach, “[e]ach system of law is seen as the unique ‘expression’ of the culture, history, and traditions of the particular people from whom it emerges.” *Id.* However, under this approach the ability to “borrow” from another culture’s legal system is lessened and “the capacity of comparative inquiry to provide guidance for the resolution of practical problems of constitutional design and interpretation is radically undermined.” *Id.* at 425.

A second approach emphasizes the universal norms and values in each culture’s system—an approach quite opposite to the first. *Id.* Rather than focusing on differences between systems, legal anthropologists expect similarities. *Id.* This approach “also provides strong grounds upon which to think that comparative constitutional law can provide guidance for the resolution of problems of interpretation under particular constitutions.” *Id.*

A third intermediate approach provides for the possibility of a genuine comparison between legal systems, but roots its study of these systems in historical facts. *Id.* This approach looks for situations where one system has influenced another, “so that the constitutional law of other countries

modes of being is important for various reasons and can be especially beneficial when studying the law.¹⁷⁷ For instance, comparative law allows scholars to know what kinds of legal systems are currently in use, how these systems can be perfected, and how to contribute to or create a body of unified legal study.¹⁷⁸ This section seeks to accomplish these goals by examining the electoral systems of Germany—because of its innovative use of a mixed electoral system, India—because of its well-known electoral commission, and Australia—because of its use of compulsory voting.

A. *Germany*

After World War II, the Parliamentary Council¹⁷⁹ established a new electoral system borrowing ideas from two different systems:¹⁸⁰ proportional

can possess no authority except where a genealogical or genetic relationship can be demonstrated.” *Id.* at 425–26.

The fourth approach “takes as its starting point the assumption that there are particular kinds of problems of human coordination and social ordering that arise in all societies and that it is possible and meaningful to compare how different societies address those problems.” *Id.* at 426. This view is more functional in nature and posits that cultures can improve their own systems by learning from and looking at other cultures’ systems. *Id.* This Comment follows the fourth approach, as the author believes systems can learn from and adapt to other ways of being.

177. This does not mean the process is easy “since true comparisons must allow for differences in political development and culture.” Graeme Orr et al., *Australian Electoral Law: A Stocktake*, 2 ELECTION L.J. 383, 401 (2003).

178. This is not a new notion; for instance, the European Union has codified many laws that are applied to all the countries that make up the Union. See Europa, Treaties and Laws, http://europa.eu/abc/treaties/index_en.htm (last visited Oct. 13, 2009).

179. The West German Constitution, otherwise known as the “Basic Law” created the electoral system: “It was thus a result of inter-party bargaining between democratic forces in West Germany.” Michael Krennerich, Germany: The Original Mixed Member Proportional System, <http://aceproject.org/regions-en/countries-and-territories/DE/case-studies/germany-the-original-mixed-member-proportional-system> (last visited Oct. 13, 2009). The Basic Law does not delineate a specific type of system, but “does require such a system to be general, direct, free, equal and secret (Article 38).” GEOFFREY K. ROBERTS, GERMAN ELECTORAL POLITICS 11–12 (2006).

180. The three basic systems are: (1) *plurality*—the winning candidate receives more votes than the other candidates; (2) *majority*—the winning candidate receives more than half the votes cast; and (3) *proportional representation*—where political parties are represented in parliament proportionately to the percentage of votes they received. Blais & Massicotte, *supra* note 1, at 41. “The dominant debate in the literature has been between plurality and PR systems. The basic argument in favor of the plurality rule is that it produces one-party majority government, while PR is advocated because it produces broad and fair representation.” *Id.* at 61. One-party majority governments are thought to be better because they are more stable than coalition governments. *Id.* However, research is still inconclusive as to whether there is a relationship between government and political stability. *Id.* One-party majority governments are also thought to be more accountable because their elections are decisive. *Id.* “An election is decisive when it has a direct and immediate impact on the formation of government.” *Id.*

representation¹⁸¹ and single-member district voting.¹⁸² While revolutionary at the time, the “Mixed Member Proportional” (MMP)¹⁸³ system has gained popularity in recent years.¹⁸⁴

Every four years, Germans gather to vote for the 612 seats in the Bundestag.¹⁸⁵ The system is unique in that each voter casts two votes.¹⁸⁶

On the other side, advocates of proportional representation argue their system is fair and responsive. *Id.* at 62. “Almost by definition, PR is fair since it is intended to give each party a share of seats more or less equal to its share of votes.” *Id.* Thus choosing between systems is more about what the government deems the most important—accountability and stability, or fairness and responsiveness. *Id.*

As for the majority rule system, advocates propose this system because the very heart of democracy is the majority principle. *Id.* “In a direct democracy, the majority wins and in a representative democracy, most decisions are made by legislators through the majority rule. It would thus seem natural to apply the same logic to the selection of representatives.” *Id.* Another argument in favor of the majority rule is that it “offers a reasonable degree of both responsiveness and accountability.” *Id.* at 63. However, it may be a less satisfactory system with respect to fairness. *Id.*

181. Ace Project, Germany: Delimiting Districts in a Mixed Member Proportional Electoral System, http://aceproject.org/ace-en/topics/bd/bdy/bdy_de (last visited Oct. 13, 2009) [hereinafter Germany: Delimiting Districts]. Around sixty percent of democracies in place today use this type of system. Blais & Massicotte, *supra* note 1, at 41. The proportional representation system is further delineated into the *list system* and the *single transferable vote*. *Id.* at 45. “Devising a PR list system involves making five major decisions as to districting, formula, tiers, thresholds, and preferences for candidates. There are many different ways of combining these variables, which explains why no PR systems are exactly alike.” *Id.*

182. Germany: Delimiting Districts, *supra* note 181. This system has been defined in many ways. DAVID M. FARRELL, ELECTORAL SYSTEMS: A COMPARATIVE INTRODUCTION 98 (2001). Some scholars believe this is a combination of the three electoral systems (plurality, majority, and proportional representation) for the election to a single body, while others pose a more narrow definition in which the mixed system is a variant of the two-tier system. *Id.*

183. In New Zealand, the system is known as a “Mixed Member Proportional” system whereas in Germany the electoral system is called a “personalized proportional system” (“Personalisierte Verhältniswahl”). Krennerich, *supra* note 179. See Robert Johns, *AMS in Germany – and in Britain?*, DEMOCRATIC AUDIT, 2004, <http://www.democraticaudit.eu/download/C-German-AMS.doc>. Johns asserts these mixed member systems are popular because they offer the “best of both worlds”: a direct line of accountability between voters and their local representatives, and proportionality in order to represent a full range of party preferences.” *Id.*

184. Germany: Delimiting Districts, *supra* note 181. New Zealand and Albania have adopted similar systems, while Japan, Russia, and Italy have created electoral systems “involv[ing] a similar mix of single-member districts and list mandates.” Kathleen Bawn, *Voter Responses to Electoral Complexity: Ticket Splitting, Rational Voters and Representation in the Federal Republic of Germany*, 29 BRIT. J. POL. SCI. 487, 488 n.5 (1999). Germany’s system is not the only way to create mixed systems. Blais & Massicotte, *supra* note 1, at 54. “The simplest way . . . is to apply PR in some parts of the national territory, and either plurality or majority everywhere else.” *Id.* Another way to create a mixed system is to have two tiers of members some of whom are elected by the PR system and the others elected through the plurality or majority systems. *Id.* A third type is best exemplified by the German electoral system “where PR seats are distributed in a *corrective* way, so as to compensate weaker parties that did poorly in single-member seats and to produce a parliament where each party gets its fair share of seats.” *Id.* at 54–55. For a comprehensive review of Germany’s unique system, see FARRELL, *supra* note 182, at 97–112.

185. The Bundestag is Germany’s Parliament, “stand[ing] at the centre of the country’s political life and is its supreme democratic organ of state.” German Bundestag, The German Parliament,

The first vote (Erststimme)—similar to the American system—is cast for “an individual candidate running to represent a particular electoral district.”¹⁸⁷ The candidate who receives the largest number of votes from the district’s constituency is elected.¹⁸⁸ The second vote (Zweitstimme) is cast for a particular party¹⁸⁹ rather than an individual candidate.¹⁹⁰ These votes are tallied at the state level rather than nationwide.¹⁹¹ Party candidates will only be seated if the party passes the legal threshold.¹⁹² If the party passes the five percent threshold, then Bundestag seats are distributed proportionately to the total number of votes the party received;¹⁹³

http://www.bundestag.de/htdocs_e/parliament/index.html (last visited Dec. 21, 2009). The members of the lower house are directly elected whereas the members of the upper house are appointed by the states. Germany: Delimiting Districts, *supra* note 181. The electorate votes for the German parliament and not the Chancellor: “Every four years, after national elections and the seating of the newly elected Bundestag members, the federal president nominates a chancellor candidate to that parliamentary body; the chancellor is elected by majority vote in the Bundestag.” German Culture, The Chancellor of Germany, http://www.germanculture.com.ua/library/facts/bl_chancellor.htm (last visited Oct. 8, 2009).

186. Krennerich, *supra* note 179. The two-vote system allows voters to split their votes between two parties, a common practice for those who support smaller parties. *Id.*

Since candidates of smaller parties have little chance of winning a single-member district, their supporters frequently give their first vote to a constituency candidate from the larger coalition party. Similarly, supporters of bigger parties may ‘lend’ their second vote to a minor party within the coalition, in order to ensure that it will pass the legal threshold.

Id. For an excellent article examining voters’ ability to strategically split their votes, see Bawn, *supra* note 184.

187. Germany: Delimiting Districts, *supra* note 181. The candidates voted for represent one of Germany’s 328 single-member constituencies. *Id.* The first vote represents the single-member district representation style of electoral systems. *Id.* The purpose of the personal vote is to “ensure a close relationship between voters and their representatives.” Krennerich, *supra* note 179.

188. Germany: Delimiting Districts, *supra* note 181.

189. Even though this is considered a party vote, “[c]andidates are allowed to compete in single-member districts as well as simultaneously for the party list.” Krennerich, *supra* note 179.

190. *Id.* “[E]ach party will receive a percentage share of Bundestag seats corresponding to its percentage share of list votes (sometimes called ‘second’ votes).” ROBERTS, *supra* note 179, at 14.

191. Bawn, *supra* note 184, at 489. “Winning a large number of districts thus does not generally increase a party’s seat share beyond its proportional allocation, so that the mechanical effect of district races is wiped out.” *Id.*

192. For a party to pass the threshold, it needs to receive at least five percent of all the second votes that were cast, “except for parties which have won at least three constituency seats. A party winning one or two constituency seats retains these . . . but receives no additional seats.” ROBERTS, *supra* note 179, at 15. This five percent threshold distinguishes the German system from pure proportional representation because very small parties are excluded from parliamentary representation. Krennerich, *supra* note 179.

193. ROBERTS, *supra* note 179, at 14. One complicating factor is that it is possible for a party to win *more* seats than are available. This happens

[b]ecause any constituency seats won cannot be taken away from a candidate or party, and because calculation of seats awarded to party lists is done on a Land-by-Land basis, it

“[h]owever, the *total seats allocated include any constituency seats won by the party.*”¹⁹⁴

B. India

India shares several similarities with the United States. First, India has a federal form of government.¹⁹⁵ The central government is patterned after the British parliamentary system granting the national government greater power in relation to its states.¹⁹⁶ Second, India elects its President using an electoral college.¹⁹⁷ Third, India’s branches of government resemble those of the United States whereby “[e]xecutive power is exercised by the government. Federal legislative power is vested in both the government and

is possible for a party to have won more constituency seats in a Land than its total allocation of seats in that Land. . . . Such *surplus seats* [Ueberhangmandate] are additional to the total proportional allocation for that party.

Id. at 15.

194. *Id.* For example, if a hundred seats are available and party “A” receives sixty percent of the vote, then that party would receive sixty seats. However, if fifteen party “A” members were elected directly by the district’s constituents (i.e., they received a plurality of the first votes that were cast), then these fifteen seats would be subtracted from the party’s total of sixty seats. The party would then receive forty-five list seats in addition to their fifteen constituency seats. *Id.*

195. Ace Project, India: Description of Electoral System, <http://aceproject.org/regions-en/eci/TN> (last visited Oct. 8, 2009) [hereinafter India: Description of Electoral System]. Like the United States, India’s constitution grants significant control to the states over their own governments. “The Vidhan Sabhas (legislative assemblies) is [sic] directly elected bodies set up to carrying [sic] out the administration of the government in the 25 States of India.” Indian Elections, The Electoral System of India, <http://www.indian-elections.com/electoralsystem/reservationofseats.html> (last visited Oct. 8, 2009) [hereinafter Reservation of Seats].

196. India: Description of Electoral System, *supra* note 195. In fact, the national government can—and has—impose direct federal rule over the states, otherwise known as President’s rule. *Id.*

197. *Id.* However, unlike the United States that vests the manner of voting in the states, *see infra* Part II, India’s Constitution vests the power in its parliament and state legislative assemblies to indirectly elect the President and Vice President. Mahesh Rangarajan & Vijay Patidar, India: First Past the Post on a Grand Scale, <http://aceproject.org/regions-en/eci/IN/case-studies/india-first-past-the-post-on-a-grand-scale-1997> (last visited Oct. 8, 2009). “A formula is used to allocate votes so there is a balance between the population of each state and the number of votes assembly members from a state can cast, and to give an equal balance between state and national assembly Parliament members.” Indian Elections, The Electoral System of India, <http://www.indian-elections.com/electoralsystem/presidentandvicepresident.html> (last visited Oct. 8, 2009) [hereinafter President and Vice President].

The United States’ use of the Electoral College to elect its President is rare in the world’s democracies. Lutz et al., *supra* note 5, at 47. While some countries utilize this method, they usually vest the power to elect the chief executive in the legislative body (for example, India, Germany, and Australia). *Id.*

[T]he political system of the United States is just as unusual for its relentless separation of powers, for its popularly elected executive, and for its two-party system as it is for its Electoral College. Other democracies have not so much rejected the Electoral College, as they have rejected an executive separate from the legislature.

Id.

two chambers of the Parliament of India. The judiciary is independent of the executive and the legislature.”¹⁹⁸

India uses the single transferable vote system¹⁹⁹ to elect both the President and the members of the Rajya Sabha.²⁰⁰ On election day, voters²⁰¹ receive a ballot that lists all the candidates up for election.²⁰² Voters then list the candidates in order of preference.²⁰³ Candidates must receive the designated “quota” to win.²⁰⁴ With presidential elections, the candidate who receives more than half the number of votes wins.²⁰⁵

The Vidhan Sabhas²⁰⁶ and Lok Sabha²⁰⁷ are elected using the first-past-the-post electoral system—a system quite different than the single transferable vote system.²⁰⁸ This electoral system is like the United States’ system because it uses “single member districts and candidate-centred voting.”²⁰⁹ Voters receive a ballot with the candidates’ names and vote by

198. India: Description of Electoral System, *supra* note 195. The Parliament is made up of the Lok Sabha (House of the People) and the Rajya Sabha (Council of States). The President, who is the head of state, appoints the Prime Minister “who runs the government, according to the political composition of the Lok Sabha.” *Id.* Whereas citizens directly elect the members of the Lok Sabha, the members of the Rajya Sabha “are elected by each state Vidhan Sabha using the single transferable vote system. Unlike most federal systems, the number of members returned by each state is roughly in proportion to their population.” *Id.* In addition to these elected members, twelve members of the Rajya Sabha are “nominated by the President as representatives of literature, science, art and social services.” Reservation of Seats, *supra* note 195.

199. Commentators and researchers tend to advocate for this type of system because it “does away with party lists, thus giving voters more freedom” compared to the list system which gives parties more control over which candidates are selected. Blais & Massicotte, *supra* note 1, at 53.

200. President and Vice President, *supra* note 197.

201. “Voters” in presidential elections are elected members of the Vidhan Sabhas (state governments), and the Lok Sabha and Rajya Sabha (Parliament). *Id.*; see *supra* note 198 and accompanying text (describing who elects the members of the Rajya Sabha).

202. President and Vice President, *supra* note 199.

203. *Id.*

204. *Id.*

205. *Id.*

For the Rajya Sabha the quota is set at the number of votes that can be attained by just enough MPs to fill all the seats but no more. Votes that are deemed surplus, those given to candidates who have already got a full quota of votes, or votes given to candidates who are deemed to be losing candidates, are transferred according to the voter’s listed preferences, until the right number of candidates have been elected.

Id.

206. See *supra* note 195 and accompanying text.

207. See *supra* note 198 and accompanying text.

208. Reservation of Seats, *supra* note 195.

209. Ace Project, First Past the Post, <http://aceproject.org/ace-en/topics/es/esd/esd01/esd01a/default/?searchterm=first%20past%20the%20post> (last visited Oct. 12, 2009). The U.S. system is slightly different because of the Electoral College. Blais & Massicotte, *supra* note 1, at 42. Even

choosing only one of the candidates.²¹⁰ The candidate who receives the most votes, wins.²¹¹

India's system of elections is unique because of its Election Commission.²¹² The Commission has vested constitutional power²¹³ for the "superintendence, direction and control of the entire process for conduct of elections to Parliament and Legislature of every State and to the offices of President and Vice-President of India."²¹⁴ The Commission determines the election schedule, polling place locations, voter polling stations, vote counting locations, and all of the logistics in and around the various locations.²¹⁵

The Commission is composed of the Chief Election Commissioner as well as two Election Commissioners.²¹⁶ These Commissioners appoint a Chief Electoral Officer of the State to oversee, direct, and control elections

when a state employs the first-past-the-post system, the winner receives *all* of that state's electors (also known as the *bloc vote*). *Id.* The two exceptions are Nebraska and Maine, which use proportional representation and allocate electors based on the percentage of votes each candidate receives. Schumaker, *supra* note 6, at 12. Until recently, Argentina also used the plurality system coupled with an electoral college. Blais & Massicotte, *supra* note 1, at 43. However, in 1994 it dissolved the electoral college and now the candidate who receives a plurality wins—but only if the plurality is equal to or greater than forty-five percent of the vote or if the plurality exceeds forty percent plus a lead of at least ten points over the next candidate. *Id.* at 43.

210. First Past the Post, *supra* note 209.

211. *Id.*

212. "The Election Commission of India is perhaps the leading real-world example of [an independent commission]." Elmendorf, *supra* note 5, at 429. Many countries have sent election officials to India to gain a better understanding of the Indian electoral process. These countries include Russia, Sri Lanka, Nepal, Indonesia, South Africa, Bangladesh, Thailand, Nigeria, Australia and the United States. Ace Project, India: About the Election Commission, <http://aceproject.org/ero-en/regions/asia/IN/About%20Election%20Commission.htm> (last visited Oct. 12, 2009) [hereinafter India: About the Election Commission].

213. The Election Commission was established by the Constitution on January 25, 1950 and is a permanent constitutional body. India: About the Election Commission, *supra* note 212.

[T]he founding fathers of the Indian constitution, while debating the position of the election commission in the Constituent Assembly, ensured that the body responsible for conducting elections in independent India should be a distinct one, separate from the government of the day, and that it should have ample financial and administrative autonomy to conduct its affairs.

Vijay Patidar & Ajay Jha, India: A Model of an Independent EMB 1, http://aceproject.org/ero-en/regions/asia/IN/India%20-%20The%20Embodiment%20of%20EMB%20Independence.pdf/view?set_language=fr.

214. India: About the Election Commission, *supra* note 212.

215. *Id.* "Conduct of General Elections in India for electing a new Lower House of Parliament (Lok Sabha) involves management of the largest event in the world. The electorate exceeds 670 million electors in about 700,000 polling stations spread across widely varying geographic and climatic zones." *Id.*

216. *Id.* These commissioners are appointed by the President and are similar in status to Indian Supreme Court Judges. *Id.*

on a state level.²¹⁷ Along with state-level commissioners, the Commission has access to district level officers during election time.²¹⁸

One compelling aspect of Indian elections is the Model Code of Conduct.²¹⁹ The Code is designed to ensure an even playing field for the parties and “is intended to maintain the election campaign on healthy lines, avoid clashes and conflicts between political parties or their supporters and to ensure peace and order during the campaign period and thereafter, until the results are declared.”²²⁰ The Commission periodically meets with the various political parties to make sure they are complying with the Model Code.²²¹

C. *Australia*

The Australian Constitution established the procedure by which the first federal election took place in 1902.²²² The Commonwealth Franchise Act of 1902 and the Commonwealth Electoral Act of 1902 were passed shortly

217. *Id.* Each state has its own appointed officer who is generally full time with a small support staff. *Id.*

218. *Id.* “The key officials at state level are the state chief electoral officers, who are selected by the [Election Commission] from a shortlist of federal civil servants posted to the state drawn up by the state government.” Patidar & Jha, *supra* note 213, at 1. Overall, about five million polling personnel and civil police forces are under the Commission’s “supervision, discipline, and control . . . for the duration of an election.” *Id.*

219. ELECTION COMMISSION OF INDIA, MODEL CODE OF CONDUCT FOR THE GUIDANCE OF POLITICAL PARTIES AND CANDIDATES (2007), <http://india.gov.in/allimpfirms/alldocs/11949.pdf>. “During the election campaign the political parties and contesting candidates are expected to abide by a Model Code of Conduct evolved by the Election Commission on the basis of a consensus among political parties.” Indian Elections, The Electoral System of India, <http://www.indian-elections.com/electoralsystem/campaign.html> (last visited Feb. 12, 2009) [hereinafter Campaign].

220. Campaign, *supra* note 219. “The [Election Commission] has done an excellent job of enforcing its provisions and reining in the governing parties during election periods. At times it has used this code to postpone elections in certain disputed electoral districts in the face of gross violations of the code of conduct.” Patidar & Jha, *supra* note 213, at 2.

221. India: About the Election Commission, *supra* note 212. The Commission also performs an advisory function to “ensure[] that the electoral process can be completed on schedule, without getting bogged down in judicial hearings.” Patidar & Jha, *supra* note 213, at 2. Once the electoral process is under way, courts cannot stop the process. *Id.*; *cf. supra* notes 115–26 and accompanying text (describing the role the U.S. Supreme Court played in the 2000 presidential election).

222. Australian Electoral Commission, A Short History of Federal Election Reform in Australia, http://www.aec.gov.au/Elections/Australian_Electoral_History/history.htm (last visited Oct. 12, 2009) [hereinafter A Short History]. The Australian electoral system is “widely considered one of the most professionalized and efficient in the world . . .” Kenneth R. Mayer, Comparative Election Administration: Can We Learn Anything from the Australian Electoral Commission? 3 (Aug. 30, 2007), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/1/0/4/4/pages210440/p210440-1.php.

thereafter, establishing crucial aspects of Australia's electoral system.²²³ The Commonwealth Electoral Act was rewritten in 1918,²²⁴ introducing the alternative vote system (AV)²²⁵ for the House, and in 1948 voting for the Senate changed to the single transferable vote system (STV).²²⁶ In 1924,

223. A Short History, *supra* note 222 (“[T]aken together [these acts] provided for a secret ballot, votes for men and women (but not for aboriginals), and plurality (“first-past-the-post”) voting for both the Senate and the House of Representatives.”). Aboriginals were finally given the right to vote in 1962. *Id.*

224. Today, this Act is the main source of election law in Australia. David Bamford, *Current Issues in Australian Electoral Law*, 1 ELECTION L.J. 253, 253 (2002). “The main characteristic of the statute is its uniform and unitary nature: it applies to every federal election, implements identical procedures in each legislative district . . . and covers every element of the electoral process.” Mayer, *supra* note 222, at 10.

225. Australia is known to have the most well-established and best-known AV system. Ben Reilly, *Australia: The Alternative Vote*, <http://aceproject.org/regions-en/usp/AU/case-studies/australia-the-alternative-vote-1997> (last visited Oct. 12, 2009). With this system, voters rank in order of their preference all the candidates on the ballot. DAVID M. FARRELL & IAN MCALLISTER, *THE AUSTRALIAN ELECTORAL SYSTEM: ORIGINS, VARIATIONS AND CONSEQUENCES* 3 (2006). To win, a candidate must receive a majority of the votes—greater than fifty percent. *Id.* If no candidate receives a majority of every voter's first preference, then the candidate with the *least* amount of votes is eliminated and his or her votes are distributed to the remaining candidates in order of the voters' next preferences. *Id.* The process will continue until one candidate receives a majority of the votes. *Id.* See Manuel Álvarez-Rivera, *Election Resources on the Internet: Federal Elections in Australia – The House of Representatives*, <http://www.electionresources.org/au/house.html> (last visited Oct. 12, 2009) [hereinafter *Australia's House of Representatives*]; SCOTT BENNETT & ROB LUNDIE, *DEP'T OF PARLIAMENTARY SERV., AUSTRALIAN ELECTORAL SYSTEMS* 4–12 (2007), <http://www.aph.gov.au/library/pubs/RP/2007-08/08RP05.pdf>. While many commentators have argued the unimportance of this type of system in Australian elections, these arguments were based on 1950s and 60s federal elections. Reilly, *supra* note 225; FARRELL & MCALLISTER, *supra* note 225, at 7. Today, preferences do impact the outcome of elections: “The decline of what was a very stable two party system, the rise of minor parties, and the increasing influence of independent candidates have all meant that the impact of preference voting has been higher during the 1990s than at any time in the past.” *Id.*

226. A Short History, *supra* note 222. The STV system is a type of proportional representation. BENNETT & LUNDIE, *supra* note 225, at 12. The process of electing a candidate is similar to the AV system except for one main difference. FARRELL, *supra* note 182, at 4. Instead of having only single districts, STV occurs in multi-seat districts. *Id.* With multiple seats up for election, a quota is established that determines the number of votes each candidate needs to be elected. *Id.* The quota system, while complicated, is explained below:

In each state and territory, Senate seats are awarded to candidates who attain the state or territory quota, calculated by dividing the number of formal first preference votes cast in the state or territory by one more than the number of seats to be filled, and then adding one to the result. A candidate whose first preference vote totals equal or exceed the quota is immediately elected; if the candidate obtained more first preference votes than the quota, the surplus is distributed among the remaining candidates, in proportion to the second preferences of all votes cast for the successful candidate. The surplus transfer may result in the election of one or more candidates, in whose case the described procedure is repeated. However, if there are unallocated seats after transferring surplus votes from elected candidates, the candidate with the lowest number of votes is eliminated, and the preferences of the eliminated candidate are transferred to the remaining candidates. These two processes are repeated until all seats are filled, with surplus transfers taking precedence over the exclusion of unsuccessful candidates.

Manuel Álvarez-Rivera, *Election Resources on the Internet: Federal Elections in Australia – The*

Australia established compulsory voting “with criminal penalties for those who fail to vote.”²²⁷ Finally, the last round of reforms occurred in 1983: “The [Electoral Reform] Committee’s work gave rise to such changes as the printing of party affiliations on ballot papers, the introduction of party financing laws, and the creation of the independent Australian Electoral Commission.”²²⁸

Compulsory voting²²⁹ is one of the most controversial aspects of Australia’s electoral system.²³⁰ The rationale behind compulsory voting was to eliminate voter apathy.²³¹ Australian officials proved to be correct, and

Senate, <http://www.electionresources.org/au/senate.html> (last visited Feb. 12, 2009) [hereinafter Australia’s Senate]; *see also* BENNETT & LUNDIE, *supra* note 225, at 13–18.

227. Bamford, *supra* note 224, at 253.

All Australian citizens over the age of 18 (except those of unsound mind or those convicted of serious crimes) must be registered to vote and show up at the poll on election day. Australians who do not vote are subject to fines although those who were ill or otherwise incapable of voting on election day can have their fines waived.

Matt Rosenberg, Compulsory Voting: Australia Is Well-Known for Its Compulsory Voting Laws, <http://geography.about.com/od/politicalgeography/a/compulsoryvote.htm> (last visited Dec. 21, 2009).

228. A Short History, *supra* note 222. While Australia has been on the cutting edge of electoral law in many ways, electronic voting is not one of them. FARRELL & MCALLISTER, *supra* note 225, at 1. Today, Australia uses paper ballots and pencils rather than other more advanced voting technologies. *See* Bamford, *supra* note 224, at 253; Phillip Green, The Politics of the Future: The Internet and Democracy in Australia (Oct. 5, 2000), <http://aceproject.org/ero-en/regions/pacific/AU/PolFut.pdf> (noting concerns with internet voting or voting on electronic machines stems from the lack of security and high introductory costs); Mayer, *supra* note 222, at 10–11 n.15 (noting the Commission’s acceptance of the fact that Australia was no longer the leading nation on electoral issues).

229. Though this is the term used, voters are not required to actually *vote*; they are only compelled to show up at the polling booth and take a ballot. *See* Chris Puplick, The Case for Compulsory Voting, <http://www.mind-trek.com/writ-dtf/votehoax/c-puplic.htm> (last visited Dec. 21, 2009); SCOTT BENNETT, DEP’T OF PARLIAMENTARY SERV., COMPULSORY VOTING IN AUSTRALIAN NATIONAL ELECTIONS 6 (2008), *available at* <http://www.aph.gov.au/library/pubs/RB/2005-06/06rb06.pdf>.

230. *See* BENNETT, *supra* note 229, at 2, 7–11 (arguing compulsory voting “will become a major issue for public debate within the next two years”); Rosenberg, *supra* note 227; Derek Chong et al., *Whichever Way You Dice It, Compulsory Voting Is Evil*, CENTER FOR INDEP. STUD., Jan. 23, 2006, http://www.cis.org.au/executive_highlights/EH2006/eh32906.html; Economicexpert.com, Australian Electoral System, <http://www.economicexpert.com/a/Australian:electoral:system.htm> (last visited Dec. 21, 2009) [hereinafter Economic Expert]; Mayer, *supra* note 222, at 13 (stating that criticism of Australia’s system stems from equality and representation issues because in America “compulsory voting would face enormous opposition as an infringement of individual liberties”). Despite its controversial nature, compulsory voting is used in a number of countries: Belgium, Cyprus, Greece, Liechtenstein, Luxembourg, Argentina, Bolivia, Brazil, Chile, Ecuador, Peru, Uruguay, Costa Rica, Dominican Republic, Panama, Singapore, Thailand, Fiji, Nauru and Egypt. BENNETT, *supra* note 229, at 6.

231. *See* BENNETT, *supra* note 229, at 3. Sydney Sampson supported compulsory voting in 1918

“[i]n the decades since 1924, voter turnout has hovered around 94% to 96%,”²³² whereas voting prior to 1924 was as low as 59.38%.²³³ Despite the compulsory nature, Australia has tried to make elections as easy as possible for voters by nominating Saturday as election day, providing easy-to-find polling stations, and allowing absentee voting.²³⁴

Similar to India, Australia’s elections are administered by a federal body called the Australian Electoral Commission.²³⁵ The Commission regulates the manner and process by which elections are conducted, leaving no room for state or local governments to intervene.²³⁶ The Commission is completely independent from political bias and has the reputation amongst voters as being nonpartisan.²³⁷ The Commission is made up of three members—a federal judge, the head of the Commission, and someone who holds an administrative position in the government.²³⁸ A Parliamentary minister is ultimately responsible for the oversight of this federal body and holds the Commission accountable.²³⁹

“lament[ing] that many voters would not vote unless carried to the polling booth . . . [and] if all people were to have equal electoral rights there was an obligation upon them to record their votes.” *Id.* Sampson’s amendment was defeated because at the time 78.3% of voters were voting. *Id.* However, in 1922 only 59.4% voted. *Id.* This sorry number “seemed to change the attitudes of many . . . there was now ‘a spirit abroad that something should be done to compel people who are indifferent . . . to go to the poll.’” *Id.* (citing Albert Gardiner, Debates 2182 (July 17, 1924)).

232. Rosenberg, *supra* note 227.

233. See Economic Expert, *supra* note 230; BENNETT, *supra* note 229, at 12.

234. BENNETT, *supra* note 229, at 6.

235. Bamford, *supra* note 224, at 253.

236. *Id.*

237. “[The] electoral commissions are staffed with expert public servants. By law they cannot be candidates, but more importantly, by strongly held convention they must renounce any formal party membership. As a rule, as career public servants they have traditionally been exceptionally apolitical.” Orr et al., *supra* note 177, at 400. Additionally, “[t]here has never been a ‘credible [instance] of bias on the part of [the Commission] administrators.’” Mayer, *supra* note 222, at 12–13 (citing Bryan Mercurio & George Williams, *Australian Electoral Law: ‘Free and Fair’?*, 32 FED. L. REV. 365, 382 (2004)).

238. Mayer, *supra* note 222, at 11. The Governor-General appoints these three members. *Id.* at 12. The Governor-General “is the Queen’s Representative in Australia and Head of State. . . . In practice, the Governor-General has little independent authority, and in almost all cases makes decisions with the approval of the Prime Minister and Cabinet.” *Id.* at 12 n.18.

239. *Id.* at 18 (“[T]he accountability of the strongly independent [Commission] is enforced by a convention of ministerial responsibility, in which the minister responsible for overseeing the [Commission] is held responsible for its conduct, and consistent parliamentary oversight by a legislative committee (called the Joint Standing Committee on Electoral Matters).”).

VI. IMPROVING THE AMERICAN SYSTEM WITHIN THE CONFINES OF
ARTICLE II, SECTION 1

Akhil Amar believes the Electoral College was a “constitutional accident waiting to happen.”²⁴⁰ The accident waiting to happen is what he called “a clear Loser President,” a situation in which a presidential candidate loses the popular vote but wins the Electoral College, thus becoming America’s Loser President.²⁴¹ Unfortunately, Amar’s prediction in 1995 was all too accurate, and in 2000 we saw how a Loser President could be elected.²⁴² There is no doubt that the current system is broken and must be fixed,²⁴³ but the mountain that reformers must climb is steep and firmly embedded in American jurisprudence—Article II, Section 1.²⁴⁴

The following proposals for reform attempt to stay within the constitutional boundaries created by Article II,²⁴⁵ case law,²⁴⁶ and legislation enacted by Congress.²⁴⁷ Though the history of America’s electoral system is deep and well-settled, recent events have proven the possibility of enacting change within the system.²⁴⁸ These proposals build upon HAVA in an effort to create a system similar to those abroad but still maintain a uniquely American fingerprint—the Electoral College.

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

241. *Id.* at 145.

242. *See supra* notes 2–4 and accompanying text.

243. Ultimately, an electoral system should represent the will of the people, be transparent and available to both voters and political parties, and work in an inclusive manner (including suffrage and proper mechanisms, such as voting machines). Ace Project, *Guiding Principles of Electoral Systems*, <http://aceproject.org/ace-en/topics/es/es20> (last visited Oct. 12, 2009).

244. *See supra* Parts II, III. Though the Electoral College is fraught with problems, it appears to have one major and one minor advantage over any alternative. The major advantage is its tendency, especially when combined with use of the general ticket and ‘unit rule,’ to marginalize third parties and exert a moderating influence on the political delegates of the two predominant parties. The minor, but potentially crucial, advantage is the safety valve of elector discretion, if only to respond to events between election day and the casting of the electors’ ballots.

Josephson & Ross, *supra* note 25, at 189.

245. *See supra* Part II.

246. *See supra* Part III.

247. *See supra* Part IV.A.

248. *See supra* Part IV.A.

A. *Creation of a Non-Partisan Electoral Commission*

The U.S. electoral system is incredibly decentralized.²⁴⁹ Instead of one central body controlling election administration—as seen in the Indian and Australian systems—the U.S. system is conducted not only by individual states,²⁵⁰ but even more so by the local governments in each state.²⁵¹ One commentator noted that “[v]irtually every variable in the voting process . . . varies depending on where [the voter] live[s].”²⁵² With this vast decentralization, it is not surprising that ballots were confusing in the 2000 election;²⁵³ voters were turned away from the polls in 2004;²⁵⁴ and long lines accompanied by voting machine failures occurred in the 2008 election.²⁵⁵

Before HAVA, the Federal Election Commission (FEC) oversaw federal elections.²⁵⁶ However, this Commission was virtually useless as it served “mostly to regulate the campaign finance system for federal elections.”²⁵⁷ The Act established a new body to oversee elections, the EAC,²⁵⁸ but this

249. See LOWENSTEIN ET AL., *supra* note 123, at 281 (noting the limited role the federal government has played in administering elections); Pastor, *supra* note 129, at 273 (noting elections in the U.S. are more decentralized than in any other country). For a different view, see Uhlmann, *supra* note 128, at 501 (arguing the benefits of having state and local governments administer federal elections as a necessary component of radical decentralization).

250. Local governments may administer elections, but states create the statutory requirements for election administration. Pastor, *supra* note 129, at 274. See Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 424–27 (2002), for examples of the types of laws states pass.

251. Mayer, *supra* note 222, at 5 (noting that over 10,000 different jurisdictions “with enormous variation in the methods used from one place to another” conduct federal elections).

252. *Id.* at 5–6 (noting examples of variation in each locale are: “eligibility for ballot access; the structure and design of the ballot; registration requirements to establish voter eligibility; distribution of polling places; oversight mechanisms and authorities; the hours of voting; the physical process of marking and submitting a ballot; counting methods; definition of a valid vote; standards for recounts; [and] methods of resolving disputes”).

253. See *supra* notes 133–34 and accompanying text.

254. In Ohio, if voters went to the wrong precinct, they were only allowed to cast a provisional ballot if they were eligible to vote within that precinct. Tokaji, *supra* note 134, at 1229.

255. See *supra* notes 169, 171 and accompanying text; Mayer, *supra* note 222, at 2 (noting elections are an administrative nightmare as they “are typically run on a single day (making it impossible to make adjustments once problems are identified); involve hundreds of thousands of one-time, underpaid, and poorly trained poll workers (making it nearly impossible to screen workers or monitor their performance); are conducted at facilities rarely controlled by election administrators (intensifying the monitoring problem); and require local officials to make millions of on-the-spot decisions about whether a particular voter is qualified to cast a ballot”).

256. Wassom, *supra* note 139, at 371–74 (noting the FEC has largely been a failure, deserving of its nickname the “Failure-to-Enforce Commission”).

257. Mayer, *supra* note 222, at 7. See Pastor, *supra* note 129, at 274. In 1971, the FEC passed an Act—the Federal Election Campaign Act of 1971—making public funding unavailable “as candidates and their parties try to influence the votes of the electors, the counting of their ballots at the joint session of Congress, or any votes of the House and Senate for President or Vice President, respectively.” Josephson & Ross, *supra* note 25, at 186.

258. See *supra* notes 141–45 and accompanying text. The passage of HAVA is really the first

body is relatively weak and lacks the teeth to truly enforce election reform amongst the states.²⁵⁹

The Constitution presents difficulties when establishing a strong federal body to oversee presidential elections.²⁶⁰ Any commission must navigate through these stormy waters to have legitimate power. Recent jurisprudence has been favorable towards allowing Congress more control over presidential elections²⁶¹ and the enactment of HAVA is an illustration of this broad power.²⁶² However, the concurrences and dissents in the most recent Supreme Court decisions have favored a return of complete oversight and administration to state legislatures.²⁶³ Within this somewhat tenuous framework, changes to the EAC can—and should—be made.

India and Australia illustrate the need for an independent electoral commission.²⁶⁴ In both countries, one central body controls every aspect of electoral administration.²⁶⁵ The HAVA attempted to create a central clearinghouse with the EAC.²⁶⁶ However, without real power this commission cannot serve a vital purpose in election administration.²⁶⁷ The EAC is a great starting point, but it needs additional provisions before American elections near the efficiency and satisfaction of elections in other democracies.²⁶⁸

First, the EAC should be given the power to decide election disputes.²⁶⁹ Instead of thousands of judges in hundreds of jurisdictions deciding minute details of the election process,²⁷⁰ federal elections would be more consistent

time America has had a regulatory body oversee federal elections. Pastor, *supra* note 129, at 274.

259. See *supra* note 144 and accompanying text. “The Election Assistance Commission is aspirational, offering guidelines and suggestions; it has no authority to issue binding regulations.” Mayer, *supra* note 222, at 7.

260. See *supra* Part II.

261. See *supra* Part III.

262. See *supra* note 162 and accompanying text.

263. See *supra* notes 112–17, 124–26 and accompanying text.

264. See *supra* notes 212–18, 235–39 and accompanying text.

265. See *supra* notes 215–21, 235–39 and accompanying text.

266. See *supra* note 141 and accompanying text.

267. See *supra* notes 144–45 and accompanying text.

268. See *supra* Part V.

269. Allowing the EAC to decide disputes also helps keep the process independent of political influences. Elmendorf, *supra* note 5, at 431–32 (“[I]n the election law context, where voters . . . may suspect their representatives of improperly elevating partisan advantage or personal security-in-office above the overall health of the political process, voters may well develop a presumptive preference for policymaking by a politically insulated body.”).

270. “[T]he establishment of an independent electoral commission with a role in law reform lowers the cost of judicial intervention in the political process.” *Id.* at 440.

if one central body decided election disputes.²⁷¹ The EAC official in each state would be responsible for assembling a team of trained and certified district election officials to help make these determinations.²⁷² Once election officials decide a dispute, that decision would be binding in all future cases decided in the district. The officials would make their decisions based on the laws set forth in HAVA and other legislation created by the EAC.²⁷³ These decisions would apply only during presidential elections.

Second, Congress ought to grant the EAC more remedial power than it currently has. The EAC has very little power to effectuate real reform,²⁷⁴ whereas India's commission has broad constitutional power and because of this mandate is able to properly administer elections and follow up on problems.²⁷⁵ Both the government and voters view the commission as the final authority on election disputes.²⁷⁶ For the EAC to be taken seriously, it must be able to enforce the mandate laid out in HAVA as well as decisions made in regards to election disputes.

Currently, HAVA is merely a carrot—offering money to those states that choose to change the type of technology used during presidential elections.²⁷⁷ If states choose not to comply with voting technology standards, the EAC has little power to make them comply.²⁷⁸ States would likely comply with the changes in HAVA if the EAC were allowed to refuse all federal funding to the states for its elections or limit the number of

271. See *id.* at 434–40 (outlining the benefits of allowing commissions to adjudicate election issues); Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 376–79 (2007) (advocating for the creation of specialized courts to handle election disputes rather than having state courts decide “inherently political enterprises”).

272. A trained team is absolutely necessary. “For the presidential election in 2000, approximately 100 million people voted in 200,000 polling districts. This required 1.4 million election workers, most with little training, supervised by 20,000 election administrators.” Pastor, *supra* note 129, at 275.

273. A great way to get a Commission involved in election administration is to authorize the Commission a reviewing role over election laws that originate from somewhere else (and not with the Commission itself). Elmendorf, *supra* note 5, at 430. In addition to upholding HAVA, the EAC official would also review the proposed laws the state issues and could submit proposals for modification of those laws if they do not comport with federal guidelines. *Id.*

274. See *supra* notes 145–46 and accompanying text.

275. See *supra* note 214, 220–21 and accompanying text.

276. This is not to say they are without oversight. Both countries have provided a checks and balances system that oversees the commissions and the decisions they make. Elmendorf, *supra* note 5, at 429 (noting that “[t]he Commission may not override parliamentary enactments. . . .”). In Australia, the Electoral Commission's accountability is “enforced by a convention of ministerial responsibility, in which the minister responsible for overseeing the AEC is held responsible for its conduct, and consistent parliamentary oversight by a legislative committee. . . .” Mayer, *supra* note 222, at 18. Under HAVA, “[t]he EAC . . . is accountable to the Congress, the executive branch and the courts.” Pastor, *supra* note 129, at 275.

277. See *supra* note 140 and accompanying text.

278. See *supra* notes 143–44, 153–54 and accompanying text (describing the powers of the Attorney General to enforce HAVA).

electors a state could elect in that election cycle. For example, in the 2008 election the Democratic National Committee punished Florida and Michigan for moving its primary election date to an earlier time slot.²⁷⁹ Even if these recommendations are adopted, a reformed EAC is patently weaker if the members of the EAC and state election officials act in a partisan manner.

Third, members of the EAC and state election officials should be less partisan and more independent. Currently, members of the EAC are chosen in such a way that two members of the four-member board are from the Republican Party, and the other two members are from the Democratic Party.²⁸⁰ Though the board is *bi-partisan*, “[t]his structure has not erased concerns that the commission is behaving in a partisan manner.”²⁸¹ This is an area where the EAC could fashion itself after the Australia Election Commission—which is truly independent²⁸²—and have a Chief Electoral Officer (CELO) and two (or more) Election Commissioners.

The CELO would be a long-term, President-appointed position without the possibility of reappointment.²⁸³ In a sense, the position is akin to that of a Supreme Court Justice, in that once the person is appointed, he or she is not beholden to a specific president or political party. The CELO would be able to create electoral standards and would have the time to implement these standards. If the position was for a shorter term—say, four years—then a situation could arise where a Republican president appoints a Republican and then four years later a Democratic president replaces the CELO with a Democrat. This type of uncertainty and partisan positioning undermines the desire to reduce the amount of partisanship currently in the electoral process. Thus, the position should be for an extended period of time and without reappointment so as to deter the CELO from campaigning or seeking political favors. Furthermore, to decrease the possibility that the President might appoint a partisan official, the CELO would follow similar

279. *Democrats Punish Michigan for Early Primary*, MSNBC, Dec. 1, 2007, <http://www.msnbc.msn.com/id/22054151/>. Michigan scheduled its primary for January 15, 2007 even though “Democratic Party rules prohibit states other than Iowa, New Hampshire, Nevada and South Carolina from holding nominating contests before Feb. 5.” *Id.* The DNC stripped Michigan of all its 156 delegates. *Id.* Florida scheduled its primary for January 29 and faced a similar penalty. *Id.*

280. See Mayer, *supra* note 222, at 22.

281. *Id.* at 21 (citing a study in which the draft report found little evidence of widespread voter fraud, but the final report noted the question of voter fraud was “still open to ‘a great deal of debate’” (citing Ian Urbina, *Panel Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007)).

282. See *supra* notes 237–38 and accompanying text.

283. See Mayer, *supra* note 222, at 23 (noting the CELO should be “formally unconnected to any political party, or who has a reputation for fairness and administrative competence”).

legislative confirmation as current presidential cabinet picks, wherein the President nominates a person who is then confirmed by the Senate.²⁸⁴

On the other hand, the Election Commissioners, unlike the CELO, would be appointed for a fixed term with the possibility of reappointment. In essence, these are junior officers who report directly to the CELO. In the Indian system, the President appoints the CELO and the two Election Commissioners.²⁸⁵ However, given the Framers' concern with an overly powerful Executive,²⁸⁶ the more prudent approach would be to have the two Houses of Congress each appoint one or two Election Commissioners. Allowing the President and all the members of the two Houses of Congress to appoint the members of the EAC will likely result in a less partisan and more independent board than currently exists.²⁸⁷

With the current system, the EAC does not oversee the presidential election process. This job is generally left to each state's Secretary of State and, whether this person is elected or appointed, the process tends to be partisan.²⁸⁸ "In most states and counties, the official (or officials) who administer the election process belongs to one of the major political parties."²⁸⁹ These officials tend to aspire to higher political office and often make decisions along partisan lines.²⁹⁰

284. Stephen Hess, *A Checklist for New Presidents*, Dec. 4, 2008, [http://www.america.gov/st/usg-english/2008/December/20081208133137wrybakcu0.7936365.html](http://www.america.gov/st/usg-english/2008/December/200812081208133137wrybakcu0.7936365.html) (noting "[p]residents now make an effort to pick a cabinet that 'looks like America'"). If presidents are concerned with choosing a diverse—and potentially non-partisan—cabinet, then it is more than possible to have a non-partisan CELO appointed and confirmed by the Senate. See U.S. CONST. art. II, § 2, cl. 2.

285. See *supra* note 216.

286. See *supra* note 50.

287. Center for Democracy & Election Management, Non Partisan Model Legislation, <http://www.american.edu/ia/cdem/usp/npl.cfm> (last visited Dec. 21, 2009) [hereinafter Center for Democracy].

288. See LOWENSTEIN ET AL., *supra* note 123, at 281. The Secretary's office oversees election administration but the local governments actually administer them. Pastor, *supra* note 129, at 275. Local officials are generally appointed by political party officials rather than elected. *Id.* at 273–74 ("Most officials are appointed by mayors, who are themselves elected at the local level; others are appointed by political party officials; some are civil servants."). One argument in favor of having a partisan electoral commission is that partisan officials can be more accountable to the voters who elected them. Mayer, *supra* note 222, at 20.

289. Mayer, *supra* note 222, at 7. See *infra* note 290 and accompanying text.

290. "For much of US [sic] history, election officials' posts were viewed as patronage jobs to be handed out by the party in power. To a great extent, this has not changed." Pastor, *supra* note 129, at 275. The National Association of Secretaries of State argues that being elected and openly partisan is fairer because then opposing parties can monitor the partisan official. Mayer, *supra* note 222, at 19. They argue non-partisan officials may still be biased but if they are under the guise of "independent," this label may obscure the fact that they favor one party over another. *Id.*

Despite this grand argument, examples from recent elections tend to argue otherwise. In 2000, Florida's Secretary of State, Katherine Harris, administered the recount while at the same time she was intimately involved with the Bush campaign. *Id.* "The manual recounts were not completed by [the deadline], and though one provision of the election statute appeared to give the secretary of state discretion to extend the deadline, Harris refused to do so." Dworkin, *supra* note 115, at 5. She then

As an alternative based on the Indian Election Commission, the CELO and Election Commissioners would appoint an equivalent to the Secretary of State who would actually—not just in appearance—be a non-partisan, impartial professional.²⁹¹ This appointed official would answer to the EAC and would be responsible for the administration of laws relating to elections and election campaigns,²⁹² originally the responsibility of the Secretary of State.²⁹³ The EAC should appoint officials that are known non-partisans,

became a representative in the House. *Id.* at 23. In 2004, Ohio's Secretary of State, Kenneth Blackwell, "rul[ed] on the validity of voter registration forms, provisional vote procedures, and polling place challenges, while serving as co-chair of President Bush's Ohio organization." Mayer *supra*, note 222, at 19. California's Secretary of State, Kevin Shelley—a Democrat—diverted "federal funding provided to upgrade California's balloting process, for partisan purposes." *Id.* In the 2006 election, provisional ballots were less likely to be counted if the local election official in a Democratic precinct was Republican and in the Republican precincts they were less likely to be counted if the official was a Democrat. *Id.* at 21. "Given the manifest failure of the partisan administrative model, the benefits of neutral administration and independence 'are so obvious that one would think that almost anyone could aggress as to its virtues.'" *Id.* at 23.

291. For instance, Australia's Commission members are completely independent because the government goes to great lengths to ensure their independence. *See supra* note 237 and accompanying text. If some feel this proposal encroaches upon State sovereignty, then another idea would be to give the decision to each state's governor to appoint the Chief Election Officer. Mayer, *supra* note 222, at 23. The Officer would serve a long term without reappointment and would need supermajority legislative confirmation before being appointed. *Id.* "The result . . . should be a professional administration, devoted to a fair process rather than favoring a particular outcome." *Id.* at 24.

292. NONPARTISAN ELECTION ADMINISTRATION MODEL LEGISLATION § 2(c)-(d) (2005), available at <http://www.american.edu/ia/cdem/pdfs/NonpartisanModelLegislationFull08-09.pdf>.

293. The Carter-Baker Commission's Draft Legislation proposes a similar system whereby the governor of each state appoints a Chief Election Officer for the state. The following are examples of some of the duties the Officer would have, an excellent example of the kinds of duties an EAC appointed official could have:

- (1) Supervise the conduct of . . . all . . . elections as provided by law;
- (2) Develop and implement uniform training programs for all election officials . . . ;
- (3) Prepare information for voters on voting problems;
- (4) Publish and distribute an election calendar, a manual on election procedures, and a map of all legislative districts;
- (5) Convene a state election conference of county and municipal election administrators . . . to discuss uniform implementation of state and federal election policies;
- (6) Prescribe the form [and wording] of all ballots . . . ;
- (7) Investigate . . . the nonperformance of duties or violations of election laws by election officers; . . .
- (9) Administer oaths, issue subpoenas, summon witnesses, compel the production of . . . evidence, and fix the time and place for hearing any matters relating to the administration and enforcement of the election laws;
- (10) Aggregate, certify and announce results of state and federal elections; . . .
- (12) Establish standards for voting precincts and polling locations . . . and provide forms and supplies, including but not limited to ballots, poll books, and reports;
- (13) Establish uniform, nondiscriminatory statewide standards for distribution of voting

who have served in the public sector with integrity and credibility and preferably have a strong organizational background.²⁹⁴ These individuals would also need to be cooperative because they would be the liaison between the EAC and the state's Secretary of State.

The EAC appointed officials would serve year-round as election officials for each state, but during federal presidential elections they would be available for the EAC and for whatever needs arise in the state during the specific election time period.²⁹⁵ During the presidential election, these state officers would also have access to the staff and resources at the county and city level where much of the U.S.'s presidential election takes place.²⁹⁶ Having an EAC appointed official at the state level to oversee the local operations would ensure a more uniform election, granting more legitimacy to the election's results. Appointing non-partisan officers would lend greater legitimacy to election officials, especially when these officials must make controversial decisions regarding electoral disputes.

B. Use of the Mixed-System in U.S. Presidential Elections

One change states could make that would greatly alter the political landscape is the manner in which they appoint electors. States are currently able to choose the manner in which their electors are chosen and all states have chosen direct election.²⁹⁷ Most states allot all of their electoral votes to the candidate who receives a majority of the popular vote (winner-take-all method).²⁹⁸ However, two states allot electoral votes proportionally.²⁹⁹ Germany's system was radical at the time it was created because it mixed the proportional representation system and single-member district voting.³⁰⁰

The U.S. system could never be exactly like the German system because the German legislature, the Bundestag, elects the Chancellor.³⁰¹ However, a modified version of the mixed system could be achieved if states chose the

equipment . . .

(17) Develop a budget for the Commission . . .

(19) Maintain accurate and integrated statewide voter registration lists; . . .

(21) Certify voting technology;

(22) Ensure compliance with the Help America Vote Act of 2002

Id. § 2(c).

294. See Center for Democracy, *supra* note 287.

295. This is very similar to the Indian system that has state appointed officers who work full time overseeing, directing, and controlling elections on the state level. See *supra* note 218 and accompanying text.

296. See *supra* notes 249–51 and accompanying text.

297. GREENE, *supra* note 3, at 16.

298. Hasen, *supra* note 8, at 602.

299. *Id.* (citing Maine and Nebraska as the two states).

300. See *supra* notes 181–84 and accompanying text.

301. See *supra* note 185 and accompanying text.

proportional representation method.³⁰² If states were to choose a proportional system,³⁰³ then the state's electorate would vote for a certain slate of electors (representing a specific candidate) and those electors would receive a *proportion* of the state's allotted electoral votes. For example, if the electorate in California voted sixty percent for the Democratic candidate and forty percent for the Republican candidate, the Democratic electors would receive sixty percent of California's fifty-five electoral votes³⁰⁴ and the Republican electors would receive the other forty percent. Then, the electors would elect the President from the various candidates based on the majority rule system whereby the candidate receiving a majority of the electoral votes—in the U.S. system 270—³⁰⁵ would win the Presidency.

Though this system would not be exactly like the German system, it would incorporate the revolutionary use of two electoral systems in one election. By switching to this type of system, elections would have a better chance of achieving fairness and consistency.³⁰⁶ In addition, candidates

302. A similar proposal already in action is the National Popular Vote plan. Hasen, *supra* note 8, at 603. The tenets of this plan “would have states agree to allocate all of their electors to whoever was declared the winner of the popular vote for President in the entire United States.” *Id.* The main problem with relying on the states to change the way electoral votes are acquired is that if states choose to not participate in the winner-take-all model, its electoral votes count *less* than those that have the winner-take-all model. *See supra* note 62. Legislators in California recently entertained the idea of switching from a winner-take-all model to the proportional representation models of Nebraska and Maine. Hasen, *supra* note 8, at 605. Not surprisingly, the measure was backed by Republicans and loathed by Democrats. *Id.* Ultimately the measure failed to collect enough signatures because of insufficient funds. *Id.* The initiative has been harshly criticized as an unconstitutional violation of Article II, Section 1. *Id.* at 607–08. Opponents of the initiative believe the state legislature is the only way for states to change the manner in which their electoral votes are apportioned; meaning, states cannot initiate legislation for the people to vote on. *Id.* So what does “Legislature” in the clause—“each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors”—really mean? Hasen believes the issue is undecided, stating, “A strict textual view suggests that initiated reform is unconstitutional; case law and policy arguments show the question is more uncertain. Reasonable judges could reach opposite conclusions on the question.” *Id.* at 629.

303. Congress or the EAC would not be able to mandate how a state chooses electors because Article II, Section 1 and subsequent case law have clearly established this as a state's prerogative to choose the manner of elections. *See supra* Parts II, III. However, states could, on their own choosing, enact this type of system. *See supra* Parts II, III. Given the constitutional limits inherent in the current electoral system, this proposal is mainly idealistic and could only effectuate real reform if *every* state or *near-every* state chose to adopt the proportional representation system.

304. Michael R. Blood, *California Electoral-Vote Plan Could Sway 2008 Presidential Race*, N. COUNTY T., Aug. 1, 2007, http://www.nctimes.com/articles/2007/08/01/news/state/13_2_567_31_07.txt.

305. About.com, *How Many Electoral Votes Does a Candidate Need to Win?*, <http://12educators.about.com/cs/polisciresource/f/votestowin.htm> (last visited Oct. 15, 2009).

306. *See* GREENE, *supra* note 3, at 25–26. Germany was on the forefront of election reform when they established a mixed system of voting. *See supra* note 184 and accompanying text. As

would be forced to campaign in all states rather than focusing on a few key states and overlooking other states (for example, California—the state with the greatest number of electors—is virtually invisible to candidates).³⁰⁷

C. National Standards for Election Administration

The HAVA attempted national standards for election administration when it mandated states adopt new voting machines and voter registration lists.³⁰⁸ Currently, the Constitution bestows the power upon states to determine the manner in which presidential elections are conducted.³⁰⁹ As seen from the convention and ratification debates, “manner” referred to *who* elected the electors and not *how* they were elected.³¹⁰ Over the years states have handled the *how*,³¹¹ but this is not necessarily a constitutional mandate.³¹² Considering HAVA’s detailed provisions concerning voting machines, voter registration lists, and provisional ballots, it seems Congress could move more into a position of authority on these aspects of election administration.

One needed change is a uniform national ballot. This means each state would receive the same ballot so that voters in Florida are not voting on butterfly ballots³¹³ while voters in California use optical scan and punch card ballots.³¹⁴ Use of a uniform national ballot would eliminate the discrepancies experienced between ballots in the 2000 election. If every state and district were using the same ballot, then user error would be the main source of voter problems rather than a confusing ballot. Additionally,

previously noted, mixed systems generally combine plurality or majority voting with proportional representation. See *supra* notes 181–84 and accompanying text. Currently Maine and Nebraska have a “mixed-system” in the sense that the people vote appointing electors based on proportional representation. See *supra* note 209 and accompanying text. These electors then join together with other states’ electors to form a majority for one candidate over the other candidates. The two systems combined—one at a state level and one at a national level—form a “mixed-system” of voting.

307. Schumaker, *supra* note 6, at 24.

308. See *supra* note 139–44 and accompanying text.

309. See *supra* Part II.

310. See *supra* notes 62–63 and accompanying text.

311. One could argue somewhat poorly considering the most recent elections. See *supra* Part IV.

312. Pastor, *supra* note 129, at 273.

313. See *supra* note 133–34.

314. California Secretary of State, Voting Systems Approved for Use in California (Oct. 14, 2008), http://www.sos.ca.gov/elections/vs_election.htm. The type of ballot used affected the readability of votes in the 2000 election. COENEN & LARSON, *supra* note 7, at 873 (“[A]n unofficial recount found that 3061 ballots bore some kind of marking that could be interpreted as a vote for either Bush or Gore . . . ; 4892 ballots bore no markings for President; 527 ballots bore markings for more than one presidential candidate; and 1912 . . . bore clean punches in vacant ballot positions, with 1667 of these just below the numbers corresponding to one of the two major candidates.” (citations omitted)).

if every district were to use a uniform national ballot, then they would also be forced to implement the same—or similar—type of voting technology to support the uniform ballot.³¹⁵ Not surprisingly, national standards for voting technology are one of the main provisions of HAVA.³¹⁶ Thus, a uniform ballot would reduce errors between districts, create a more standardized national system, and help fulfill a vital aspect of Congress's most sweeping legislation regarding election reform.

VII. CONCLUSION

Within the confines of Article II, Section 1, one can find a certain amount of breathing room for congressional control over election administration. The Supreme Court opened the way for Congress when it articulated the need for a certain amount of control to ensure elections were free from fraud and irregularities. Following the disastrous 2000 election, Congress passed bipartisan legislation, asserting itself in a greater way over presidential elections. Though the HAVA was a bold move on Congress's part to assert power granted by the Supreme Court, the Act did not go far enough to ensure free and fair elections. Looking abroad for help, one can apply the lessons learned from Germany, India, and Australia to create a better, more efficient American electoral system. A system that creates a non-partisan electoral commission with real power to oversee elections, incorporates a proportional representation system with a majority rule system, and focuses on national standards for ballots and voting technology. The proposed reforms are merely a stepping-stone in the history of electoral reform and will hopefully make the U.S. system more consistent across state lines.

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315. One way to increase participation and ensure national standards is compulsory voting. See *supra* notes 229–33 and accompanying text, for a discussion of the benefits of compulsory voting in Australia. Currently the United States does not compel its citizens to vote, but one article seeks to change this by advocating for the use of compulsory voting in America. Notes, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 592–93 (2007) [hereinafter *Case for Compulsory Voting*]. The article argues “that compulsory voting is a legitimate infringement upon individual liberty for the purpose of ensuring that political outcomes reflect the preferences of the electorate.” *Id.*

316. See *supra* note 146–47 and accompanying text.

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