

2018

## Electoral Votes, the Senate, and Article V: How the Architecture of the Constitution Promotes Federalism and Government by Consensus

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### Recommended Citation

Richard F. Duncan, *Electoral Votes, the Senate, and Article V: How the Architecture of the Constitution Promotes Federalism and Government by Consensus*, 96 Neb. L. Rev. 799 (2017)

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Richard F. Duncan\*

# Electoral Votes, the Senate, and Article V: How the Architecture of the Constitution Promotes Federalism and Government by Consensus

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“Federalism was the means and price of the formation of the Union.”<sup>1</sup>

## I. INTRODUCTION

The government created by the U.S. Constitution is a federal republic or a federation of states, not a unitary national democracy. Federalism—and its protection of the political liberties of we the people of the several states—is secured in three distinct ways by the Constitution: First, the Constitution preserves the states as sovereign political entities<sup>2</sup> and binds only those states that chose to ratify the Constitution.<sup>3</sup> Second, the Constitution limits national power by enumeration and specifically reserves to the states and we the people of the several states all “powers not delegated to the United States by the Constitution.”<sup>4</sup> Third, the Constitution “[gives] the states a role of great importance in the composition and selection of the central government.”<sup>5</sup> The primary focus of this Article is on this third point concerning the structural provisions of the Constitution which give to the states—and to we the people of the several states—the power to protect liberty and local self-government by controlling the selection of those who would wield national authority.

Elections in the United States are federally democratic as opposed to nationally democratic. We have no national elections in the United States. Every election for national office is held in the states. Congress is elected in districts in the states, and members represent not America but the citizens who reside in their individual districts in their particular states.<sup>6</sup> Senators are elected in the states, and each senator represents the citizens of his or her particular state.<sup>7</sup> Moreover, there is no national popular election for President; rather, there are fifty separate state elections for the Presidential Electors from

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1. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). Professor Wechsler’s short but seminal article has been a wonderful source of inspiration for my work on this Article. It should be widely read today by anyone interested in federalism and the structural architecture of the Constitution.

2. *Id.* (noting that the Constitution “preserved the states as separate sources of authority and organs of administration”).

3. Article VII of the U.S. Constitution provides: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” U.S. CONST. art. VII.

4. U.S. CONST. amend. X. As Professor Wechsler puts it, the makers of the Constitution “undertook to formulate a distribution of authority between the nation and the states.” Wechsler, *supra* note 1, at 543–44.

5. Wechsler, *supra* note 1, at 543.

6. *See* U.S. CONST. art. I, § 2.

7. U.S. CONST. art. I, § 3, amended by U.S. CONST. amend. XVII.

each state.<sup>8</sup> Thus, there is no such thing under the Constitution as a national “popular vote” for President. When members of the media write stories about the “popular vote,” they arrive at this number only by adding up the votes of the state elections.<sup>9</sup> However, since the President is not elected in a national election but by fifty-one separate elections in the fifty states plus the District of Columbia, there is no national “popular vote” for President.

The purpose of this Article is to consider how the structural architecture of the Constitution delicately balances the incredible power of a central government wielding the sword of the Supremacy Clause<sup>10</sup> against the continued sovereignty of the states and the liberty of we the people of the several states. These “political safeguards”<sup>11</sup> of the Constitution not only protect us from the danger of too much concentrated national power being imposed on the people and the states, but they also balance the relative power of large-population, medium-population, and small-population states, as well as of states that may not share the political and cultural values of economically and culturally powerful states.

The genius of the Constitution is that it created a national government which, although supreme within its enumerated powers, is checked by the interests and liberties of we the people of the states by the requirement of a strong consensus among the states with respect to the selection of all three branches of the national government. Indeed, even the text of the Constitution itself is law only because it has been ratified in the states, with each state having an equal vote.<sup>12</sup>

The primary focus of this Article will be to attempt to understand how the electoral vote system for the Presidency, the structure of representation in the U.S. Senate, and the ratification process of Article V protect federalism and the rights, interests, and liberties of we the people of the several states. This Article argues that these political guardrails are not obsolete appendages of the eighteenth century but

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8. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII. As Madison put it, “The immediate election of the President is to be made by the states in their political characters.” THE FEDERALIST NO. 39, at 197 (James Madison) (Gideon ed., 2001).

9. See GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 34–35 (2004). “As reported and generally understood in the United States, the popular vote is determined by taking the number of votes cast by the people on Election Day for each slate of electors in each state . . . and then adding up the totals on a national basis.” *Id.* at 34. Thus, there is no such thing as a formal national “popular vote” for President because there is no national popular election for the Presidency.

10. Article VI of the Constitution provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .” U.S. CONST. art. VI, cl. 2.

11. See Wechsler, *supra* note 1.

12. U.S. CONST. art. V; *id.* art. VII.

are as—or more—important today in our coast-to-coast, pluralistic, diverse, and hopelessly divided states of America.<sup>13</sup>

## II. CONSTITUTIONAL ARCHITECTURE AND FEDERALISM BY CONSENSUS

The U.S. Constitution was conceived and negotiated under the shadow of the Supremacy Clause.<sup>14</sup> Going back to 1787, when the Constitutional Convention was getting underway, there were thirteen sovereign states, some of which were large-population states, some of which were medium, and some of which were small. And the people in these states were asked to ratify a Constitution pursuant to which they would yield some of their sovereignty to a new national government under a Supremacy Clause that makes clear that laws enacted by the national government “shall be the supreme Law of the land.”<sup>15</sup>

Although the thirteen states were already loosely joined together under the Articles of Confederation, it was obvious that the Articles were incapable of creating a true nation of united, sovereign states. Indeed, “barely a decade after declaring independence, nearly all Americans agreed that the system under the Articles was failing. The Congress, lacking any true powers, could accomplish next to nothing, and the states squabbled like so many petty fiefdoms.”<sup>16</sup> With the young nation “on the verge of collapse,” the Constitutional Convention was called “out of a sense of urgency and desperation.”<sup>17</sup>

There were many fundamental differences and disagreements among the colonies that became the thirteen original states.<sup>18</sup> However, perhaps the most crucial difference among the states at the Con-

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13. The cover of *Time* magazine’s “Person of the Year” issue in December 2016 declared Donald Trump, “President of the Divided States of America,” as its person of the year. *The Choice*, TIME, Dec. 19, 2016, <http://time.com/magazine/us/4594940/december-19th-2016-vol-188-no-25-26-u-s> [https://perma.unl.edu/XWH8-5V43].

14. See U.S. CONST. art. VI, cl. 2.

15. *Id.* To be more precise, the Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

16. MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 3 (2015). For a thorough discussion of the flaws in the Articles of Confederation, see MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 11–72 (2016).

17. PAULSEN & PAULSEN, *supra* note 16, at 8.

18. See KLARMAN, *supra* note 16, at 13. These differences included economic, religious, and ethnic differences, as well as strong disagreements over the issue of slavery. See *id.*

vention was the issue of “how to apportion representation in the national legislature” among the large-population and small-population states.<sup>19</sup> The large-population states, of course, favored “population-based representation in Congress.”<sup>20</sup> However, with the prospect of a much more powerful central government being created by the Constitution, other states were legitimately concerned about “the possible hegemony of large states in popular elections.”<sup>21</sup> These latter states wished to be “armed with some power of self-defense”<sup>22</sup> against the larger states and argued that “an equal vote in each state was essential to the federal idea and was founded in justice and freedom.”<sup>23</sup>

These fundamental differences between the large and small states concerning representation in Congress nearly caused the enterprise of the Constitutional Convention to fail.<sup>24</sup> For example, James Madison, from the large-population state of Virginia, argued that a national majority ought to have power to rule and “insisted that anything other than a population-based apportionment would be ‘confessedly unjust.’”<sup>25</sup> However, the small states “remained insistent upon securing equal state representation in at least one house of Congress, and they threatened to abandon the convention—and, if necessary, the union—rather than relinquish their position.”<sup>26</sup> The intensity of the debate is captured dramatically by the passionate rhetoric of Gunning Bedford, the delegate from tiny Delaware. Bedford responded to charges that the small states were being unreasonable by stating that the large states were seeking “an enormous and monstrous influence.”<sup>27</sup> Star-

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19. *Id.* at 127. The large-population states—“most notably, Virginia, Pennsylvania, and Massachusetts”—also relied on the self-interest of the “underpopulated southern states of Georgia and South Carolina” based upon the widely shared assumption “that southern states would soon experience large population gains.” *Id.* at 182–83.

20. *Id.* at 182.

21. RICHARD CLAUDE, *THE SUPREME COURT AND THE ELECTORAL PROCESS* 226 (1970).

22. *See* KLARMAN, *supra* note 16, at 188–89 (quoting William Samuel Johnson of Connecticut).

23. *See id.* at 188 (quoting Luther Martin of Maryland).

24. *Id.* at 127.

25. *Id.* at 184. Remarkably, Madison also insisted that “too much stress was laid on the rank of the states as political societies.” *Id.* at 186.

26. *Id.* at 192; ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 77 (1994) (“The Delaware delegation warned that any suggestion that the small states might lose their equal voting power would result in Delaware’s immediate departure from the Convention.”); *see also id.* at 74 (“Rhode Island refused to send any delegates, and the Delaware delegate ominously presented credentials that ‘forbade the delegation’s participation in any attempt to change the one state, one vote provision of the Articles of Confederation.’”).

27. KLARMAN, *supra* note 16, at 192.

ing directly at the delegates from the large-population states, he continued:

[T]hey [the large states] insist that although the powers of the general government will be increased, yet it will be for the good of the whole; and although the three great states form nearly a majority of the people of America, they will never hurt or injure the lesser states. *I do not, gentlemen, trust you.*<sup>28</sup>

### A. The Great Compromise and Equal Representation in the Senate

As John Dickinson of Delaware had predicted during the early days of the Convention, the great debate between the larger states and the smaller states resulted in a “mutual concession.”<sup>29</sup> The Great Compromise of 1787—also known as the Connecticut Compromise because it was proposed by Roger Sherman of Connecticut<sup>30</sup>—was adopted after “a month of anguished deliberations.”<sup>31</sup> Under this Compromise, the U.S. Congress was created as a bicameral legislature with one house—the House of Representatives—apportioned by population<sup>32</sup> and the second house—the Senate—composed of two senators from each state, with “each Senator having one vote.”<sup>33</sup> Moreover, the Convention adopted an additional protection for the small states when “the delegates decided without debate or opposition to make unamendable, without the consent of every state, the provision guaranteeing equal state representation in the Senate.”<sup>34</sup> Although some modern scholars refer to the Senate as an “evil” and “egregious insti-

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28. WILLIAM PETERS, *A MORE PERFECT UNION: THE MAKING OF THE UNITED STATES CONSTITUTION* 96–97 (1987); see also HARDAWAY, *supra* note 26, at 77 (explaining the “emotional outbursts” exhibited by delegates on the issue). Professor Klarman calls Gunning Bedford’s outburst perhaps “[t]he low point in the convention’s proceedings” and goes on to note that he stared directly at the large-state delegates when he spoke of distrusting them. KLARMAN, *supra* note 16, at 193. However, modern friends of federalism owe a great debt of gratitude to the Gunning Bedfords of the Convention for their steadfast defense of democracy in the states, or what Martin Diamond calls “federal democracy.” See Martin Diamond & Birch Bayh, *The Electoral College and the Idea of Federal Democracy*, 8 *PUBLIUS J. FEDERALISM* 63 (1977).

29. KLARMAN, *supra* note 16, at 194–95.

30. *Id.*

31. *Id.* at 195.

32. *Id.*

33. See *id.* Article I, Section 3 of the Constitution provides: “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one Vote.” U.S. CONST. art. I, § 3, cl. 1. Under the Seventeenth Amendment, the Senate is now elected by the people of each state rather than chosen by the state legislatures. U.S. CONST. amend. XVII.

34. KLARMAN, *supra* note 16, at 201. Article V sets forth a procedure for amendments to the Constitution but explicitly states that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” U.S. CONST. art. V.

tution” created by “the extortionate demands of small states,”<sup>35</sup> other scholars recognize that since the small states were negotiating the terms of their submission to a powerful central government, they were wise to insist that they would not “cede this sovereignty without some assurance that they would be treated fairly in the new government.”<sup>36</sup> In other words, the purpose of the Senate is to protect federalism and the liberties of we the people of the several states by giving each state (whether large or small) an equal voice when the Senate considers taking action governing the citizens of each state under the Supremacy Clause.<sup>37</sup>

### **B. The Great Compromise 2.0: The Electoral System for the Presidency**

In 1787, the Americans who had fought a revolution to overthrow the tyranny of King George were “generally suspicious of executive power.”<sup>38</sup> The delegates to the Convention were creating a new type of executive for the central government, and there was much debate about how the executive should be selected. As one scholar has said: “The result was a compromise shrouded in vagueness.”<sup>39</sup>

Some delegates favored congressional selection of the President.<sup>40</sup> But others feared “the trappings of monarchy attending congressional choice.”<sup>41</sup> Direct popular election of the President was frowned upon for a number of reasons, but perhaps the principal objection was that “the smaller states would be disadvantaged” by this method of selecting a chief executive wielding so many mighty powers.<sup>42</sup>

As one scholar of the Presidency has put it, the problem facing the delegates was this: “In a nation composed of both large and small states that have ceded some, but not all, of their sovereignty to a cen-

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35. Sanford Levinson, *If We Have an Imperfect Constitution, Should We Settle for Remarkably Timid Reform? Reflections Generated by the Phenomenon of “Tea Party Constitutionalism” and Randy Barnett’s Particular Proposal for a “Repeal Amendment” Designed to Reign in an Overreaching Congress*, 105 NW. U. L. REV. COLLOQUY 271, 275 (2011).

36. TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 32 (2d ed. 2012).

37. See *supra* note 14 and accompanying text.

38. KLARMAN, *supra* note 16, at 213.

39. CLAUDE, *supra* note 21, at 225.

40. See KLARMAN, *supra* note 16, at 214 (discussing the Virginia Plan, which called for “a national executive to be chosen by the national legislature for an unspecified term of years, without eligibility for re-election”).

41. See CLAUDE, *supra* note 21, at 225.

42. See KLARMAN, *supra* note 16, at 228. Another oft-expressed reason for the Convention’s opposition to direct popular election of the President was distrust by the delegates of the electorate. *Id.* Moreover, southern states were concerned that popular election would disadvantage “southerners because their slaves would count for nothing in this method of selection.” *Id.*

tral government, how should an Executive be selected?"<sup>43</sup> The answer to this question, the "brainchild of the constitutional convention,"<sup>44</sup> was a selection process for President that, in the words of Alexander Hamilton, if "it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages the union of which was to be wished for."<sup>45</sup>

The electoral system for selecting the President was the work of a "grand committee"<sup>46</sup> of the Convention composed of one member from each state.<sup>47</sup> Basically, the electoral system was the product of mutual give and take "that incorporated the principles of the 'Great Compromise' struck earlier in the Convention."<sup>48</sup> As set forth in Article II of the Constitution, there is no national election for President.<sup>49</sup> Instead, the President is selected by a system of electors appointed in each state "as the Legislature thereof may direct."<sup>50</sup> The number of electors (i.e., of electoral votes) in each state is "equal to the whole Number of Senators and Representatives to which the state may be entitled."<sup>51</sup> To protect the federal character of the process from national influence, the Constitution further provides that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."<sup>52</sup> Once the electors are chosen, they cast their ballots, and the person having the greatest number of electoral votes is elected President, so long as that person receives a majority of all electoral votes.<sup>53</sup> If no person receives a majority of electoral votes, the President will be elected by a majority vote in the House of Representatives with each state delegation in the House having one vote.<sup>54</sup>

Interestingly, the delegates to the Convention believed that it would be rare for the President to be chosen by electoral votes because "nineteen times in twenty" no candidate would receive a majority of electoral votes.<sup>55</sup> This, of course, would result in the President being chosen in the House of Representatives on the basis of state equality of suffrage. Thus, the vote of the electors would amount to a nominat-

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43. ROSS, *supra* note 36, at 33.

44. Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 199 (2004).

45. THE FEDERALIST NO. 68, at 352 (Alexander Hamilton) (Gideon ed., 2001).

46. KLARMAN, *supra* note 16, at 230.

47. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 164 (1913).

48. ROSS, *supra* note 36, at 33.

49. See U.S. CONST. art. II.

50. *Id.* § 1.

51. *Id.*

52. *Id.*

53. U.S. CONST. amend. XII.

54. *Id.*

55. CLAUDE, *supra* note 21, at 226; KLARMAN, *supra* note 16, at 232.

ing process, and the final selection of the President would be in the House “where the smaller states would have equality with the larger ones.”<sup>56</sup> Although today the rise of the two-party system practically guarantees an electoral-vote majority for one of the two major-party candidates,<sup>57</sup> the Constitution was designed to go a long way toward equality for the smaller states in the selection of the President.

### C. Article V and Constitutional Change by Consensus in the States

One final feature of the beautiful architectural design of the Constitution, written by the delegates to the Convention in 1787, is Article V and its process for amending the Constitution.<sup>58</sup> What gives the Constitution legitimacy—both the original Constitution and the subsequent amendments thereto—as the highest law of the land, the one body of law that rules all other laws, is the requirement of ratification by a strong consensus of we the people of the several states.<sup>59</sup> Under Article VII, the original Constitution would only become binding law when ratified by nine of the original thirteen states, and it would bind only “States so ratifying the same.”<sup>60</sup> Moreover, under Article V, the

56. CLAUDE, *supra* note 21, at 226. “Indeed, it was only because most of the delegates assumed that most elections would finally end up in a contingency election [in Congress] that the compromise was accepted . . .” HARDAWAY, *supra* note 26, at 82. Under the original Constitution, if no candidate received a majority of electoral votes, the House of Representatives would choose the President from the five highest electoral vote recipients. U.S. CONST. art. II, § 1. Under the Twelfth Amendment, the House chooses the President from among the three highest electoral vote recipients. U.S. CONST. amend. XII.

57. See Boudreaux, *supra* note 44, at 208–11. As Professor Boudreaux observes, the “vote for electors” has today become “a choice among the *parties*, with electors being merely the conduit.” *Id.* at 209. Moreover, “[i]n every election since 1824 . . . the Electoral college has produced a winner.” HARDAWAY, *supra* note 26, at 3.

58. Article V of the Constitution provides, in the pertinent part:

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

U.S. CONST. art. V.

59. See Richard F. Duncan, *Justice Scalia and the Rule of Law: Originalism vs. the Living Constitution*, 29 REGENT L. REV. 9, 14–15 (2016).

60. U.S. CONST. art. VII. As Madison observed:

[T]he constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but . . . this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong. It is to be the

Constitution may only be revised when an amendment is proposed by a two-thirds majority of both houses of Congress and then ratified by three-fourths of the several states.<sup>61</sup> These requirements are designed to ensure that the Constitution is binding on the states and upon we the people of the several states only when there is a “strong consensus among the states” that a constitutional rule is necessary.<sup>62</sup>

This “undemocratic feature”<sup>63</sup> of the Constitution, like the Senate and the electoral system for electing the President, ensures that the central government’s power may be exercised only as a product of a strong consensus among the states, whether small or large, whether economically and culturally powerful or not, whether cosmopolitan or parochial. As Professor Klarman observes, a constitutional amendment can be blocked by “[t]hirty-four senators from the seventeen smallest states” or by “the legislatures of the thirteen smallest states, which together constitute less than 4 percent of the nation’s population.”<sup>64</sup> Moreover, this process is not “undemocratic”; it is federally democratic as opposed to nationally democratic. Rather than submit proposed constitutional revisions to a national popular referendum, the Constitution submits them to the elected representatives of the people in the several states and requires a consensus among the states before the constitutional revision becomes the law of the land.<sup>65</sup> Because the Constitution trumps state laws and even state constitutions,<sup>66</sup> Article V’s ratification requirement protects federalism and the right to be governed locally as opposed to remotely.<sup>67</sup>

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assent and ratification of the several states, derived from the supreme authority in each State, the authority of the people themselves. The act, therefore, establishing the Constitution will not be a *national* but a *federal* act.

THE FEDERALIST NO. 39, *supra* note 8, at 196 (James Madison). Moreover, Madison emphasized that only states ratifying the Constitution would be bound by it because “[e]ach State, in ratifying the constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act.” *Id.* Thus, the legitimacy of the Constitution is derived from the assent of we the people in the sovereign states that ratified the Constitution, which clearly demonstrates that it is “a *federal*, and not a *national* constitution.” *Id.*

61. U.S. CONST. art. V.

62. See Duncan, *supra* note 59, at 15. As Professor Monaghan explains: “Article V was thus a compromise between two competing policies—the Constitution must possess a sensible mechanism for change, but the terms of the union among the states were not to be readily altered.” Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 144 (1996).

63. KLARMAN, *supra* note 16, at 627.

64. *Id.* at 628.

65. U.S. CONST. art. V.

66. U.S. CONST. art. VI, cl. 2.

67. Article V reflects “a purer statement of the Founders’ ideal of constitutional change. The instrument embodied their concept of federalism. The national legislature could propose change, but any reform would have to be approved by the

### III. THE CONTEMPORARY RELEVANCE OF THE CONSTITUTIONAL “SOLAR SYSTEM” PROTECTING FEDERALISM

So the point I make is that when all these factors are considered, it is not only the unit vote for the Presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider all the others.<sup>68</sup>

—Senator John F. Kennedy

In 1956, Senator (later President) Kennedy explained how proposals designed to replace the electoral system with a national direct election of the President would strike a powerful blow against federalism: “I believe,” said Kennedy, “it would break down the Federal system under which most States entered the Union, which provides a system of checks and balances to insure that no area or group shall obtain too much power.”<sup>69</sup> Senator Kennedy’s powerful insight concerning the structural architecture of the Constitution’s allocation of power was true in 1956 when he expressed it, it was true in 1787 when the Founders created our constitutional solar system, and it is no less true today. The remainder of this Article will seek to demonstrate the persuasiveness of Kennedy’s argument in favor of the Constitution’s electoral vote system for election of the President.

Although some critics of the electoral system for selecting the President refer to its support of federalism as “meager,”<sup>70</sup> this fails to grasp the reality of Senator Kennedy’s multi-planet vision of a constitutional “solar system” of federalism. Just as there are eight planets in the solar system Earthlings physically inhabit,<sup>71</sup> there are at least eight planets protecting federalism in the constitutional solar system:<sup>72</sup>

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states . . .” DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776–1995*, at 43 (1996).

68. 102 CONG. REC. 5150 (1956) (statement of Sen. Kennedy). Then-Senator Kennedy’s powerful point—that the electoral system for the Presidency is just part of a carefully balanced “solar system” concerning the importance of the states in the selection of those who would govern us at the national level—captures the beauty of the constitutional architecture’s provision of checks and balances between national power and the rights and liberties of we the people in the several states. See HARDAWAY, *supra* note 26, at 157–58.

69. 102 CONG. REC. 5159 (1956) (statement of Sen. Kennedy); see HARDAWAY, *supra* note 26, at 157–58.

70. See generally Boudreaux, *supra* note 44.

71. *Solar System*, NEW WORLD ENCYCLOPEDIA, [http://www.newworldencyclopedia.org/entry/Solar\\_System](http://www.newworldencyclopedia.org/entry/Solar_System) [https://perma.unl.edu/N2LY-3PVF] (last modified Nov. 15, 2016).

72. See generally HARDAWAY, *supra* note 26, at 111.

1. Every election for national office is held in the states, in a federally democratic election in which each voter in each state gets one equally weighted vote;<sup>73</sup>
2. Although representation in the House of Representatives is allocated on the basis of population, each state is given an equality of suffrage in the Senate and no state may be deprived of its equal representation in the Senate—not even by a constitutional amendment—without its consent;<sup>74</sup>
3. The President is elected in fifty-one separate elections in the fifty states plus the District of Columbia under a formula that gives smaller states somewhat more representation than larger states;<sup>75</sup>
4. If no candidate for the Presidency receives a majority of electoral votes, the election is determined in the House of Representatives with each state delegation in the House having one vote;<sup>76</sup>
5. Supreme Court Justices, other federal judges, and all other officers of the United States must be nominated by a President elected in the states under the electoral system and confirmed by the Senate in which each state has two senators elected in their respective states;<sup>77</sup>
6. The President has the power to make treaties so long as “two thirds of the Senators concur”;<sup>78</sup>
7. Ordinary national laws require a majority vote in both the House and the Senate, and the President has the power to veto laws which may be overridden only by a two-thirds vote in both the House and the Senate;<sup>79</sup> and
8. The Constitution may not be amended unless three-fourths of the states ratify a proposed amendment.<sup>80</sup>

As Senator Kennedy understood, if you unravel one thread from the architecture of this carefully balanced constitutional solar system, you may create a disturbance in the force that might cause the entire structure to collapse.

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73. *See supra* notes 6–9 and accompanying text.

74. U.S. CONST. art. I; *id.* art. V; *id.* amend. XIV, § 2; *see supra* notes 29–37 and accompanying text.

75. *See* U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

76. U.S. CONST. amend. XII.

77. U.S. CONST. art. II, § 2, cl. 2; *id.* art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

78. U.S. CONST. art. II, § 2, cl. 2.

79. U.S. CONST. art. I, § 7.

80. U.S. CONST. art. V. Each state, of course, has an equal vote when ratifying proposed constitutional amendments.

### A. The United States Senate: Veto Points and Federalism

Under the Great Compromise of the Constitutional Convention, the United States Senate was to be “composed of two Senators from each State, chosen by the Legislature thereof . . . ; and each Senator shall have one Vote.”<sup>81</sup> Thus, the Senate was designed to protect federalism and state equality in two respects: First, each state—no matter how large or how small—has an equality of suffrage in one house of our national legislature.<sup>82</sup> Second, the Constitution was designed to give state legislatures a direct role in the selection of U.S. Senators, essentially giving the states a veto of national laws through selection of their ambassadors to the Senate.<sup>83</sup> Madison put it this way in the *Federalist Papers*:

The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is *national*, not *federal*. The senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the senate, as they now are in the existing congress. So far the government is *federal*, not *national*.<sup>84</sup>

Although under the Supremacy Clause national law trumped state law, the states were given a powerful check on national law through appointment of one house of the Congress. No national law could be enacted unless the representatives of the states in the Senate concurred.

However, in 1913 the Seventeenth Amendment was ratified and altered the selection process of U.S. Senators. It provides, in the pertinent part, that “[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof.”<sup>85</sup> Essentially, the Seventeenth Amendment democratized the selection process for the Senate by removing the power from the state legislatures and transferring it to the citizens of each state. Nevertheless, in the words of Madison, the Senate still derives its powers from the states “as coequal societies”;<sup>86</sup> however, now the source of those powers is “the supreme authority in each State,”<sup>87</sup> the “people thereof.”<sup>88</sup>

Progressive legal scholars hold the Senate in contempt precisely because of its embrace of federalism and the equality of the states. Professor Sanford Levinson, for example, refers to the Senate as an

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81. U.S. CONST. art. I, § 3, cl. 1.

82. *Id.*

83. *Id.*

84. THE FEDERALIST NO. 39, *supra* note 8, at 197 (James Madison).

85. U.S. CONST. amend. XVII, cl. 1.

86. THE FEDERALIST NO. 39, *supra* note 8, at 197 (James Madison).

87. *Id.* at 196. In the language quoted in the text, Madison was referring to ratification of the Constitution by the people in each state.

88. U.S. CONST. amend. XVII.

“evil”<sup>89</sup> and “egregious institution”<sup>90</sup> that bestows too much influence on the small states, particularly on the “small parochial rural states in which most Americans do not live.”<sup>91</sup> Professor William Eskridge argues that state equality in the Senate is undemocratic and “distributes political benefits from the rest of the country to the fourteen ‘sagebrush states’ of the West and Great Plains.”<sup>92</sup> No doubt these rural, parochial states with their “[s]agebrush values”<sup>93</sup> are the kinds of places President Obama was thinking of in 2008 when he spoke of “bitter” small-town voters who “cling to their guns or religion or antipathy to people who aren’t like them.”<sup>94</sup> Suzanna Sherry even ventured so far as to refer to the Senate as an institution that “is in conflict with the most basic principles of democracy underlying our Constitution and the form of government it establishes.”<sup>95</sup> Never mind that the Constitution established the Senate as an institution designed to preserve federalism and state equality<sup>96</sup> and explicitly provides “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate,” not even by means of a constitutional amendment.<sup>97</sup> Levinson has attempted to delegitimize the Great Compromise and the solar system of checks and balances that it established concerning the larger and smaller states by describing the principal of equal representation in the Senate as resulting from “the extortionate demands of Delaware and other small states.”<sup>98</sup>

Perhaps Levinson’s real problem with the Senate is that it enables smaller states and their “parochial” values<sup>99</sup> to block national legislation favored by larger states and their cosmopolitan values. For example, Levinson actually complains about the checks and balances that are a “central reality of the American Constitution” because they create “many different veto points with regard to blocking the wishes of

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89. Levinson, *supra* note 35, at 275.

90. *Id.*

91. Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES, Dec. 20, 2010, at A14 (quoting Sanford Levinson), <http://www.nytimes.com/2010/12/20/us/politics/20states.html>.

92. William N. Eskridge Jr., *The One Senator, One Vote Clauses*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 35, 36 (William N. Eskridge & Sanford Levinson eds., 1998).

93. *Id.* at 37.

94. Katharine Q. Seelye & Jeff Zeleny, *On the Defensive, Obama Calls His Words Ill-Chosen*, N.Y. TIMES, Apr. 13, 2008, at A1, <http://www.nytimes.com/2008/04/13/us/politics/13campaign.html>.

95. Suzanna Sherry, *Our Unconstitutional Senate*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 92, at 95, 95.

96. *See supra* notes 81–84 and accompanying text.

97. U.S. CONST. art. V.

98. Sanford Levinson, *So Much to Rewrite, So Little Time . . .*, 27 CONST. COMMENT. 515, 520 (2011).

99. *See supra* note 91 and accompanying text.

even an energized majority.”<sup>100</sup> If only California had 140 senators to outvote Wyoming’s two senators,<sup>101</sup> national majorities could enact national legislation that, under the Supremacy Clause, would be the law of all fifty states.<sup>102</sup> But of course, that is precisely the point of the Constitution’s many veto points and checks and balances. As Justice Scalia once said, we “should learn to love gridlock”<sup>103</sup> in Congress because the Constitution was designed to prevent “an excess of legislation”<sup>104</sup> by checking the power of national majorities. In other words, the Senate is designed to protect we the people in the several states from excessive national legislation by requiring a strong national consensus among the larger and the smaller states before new national laws are enacted. The checks and balances of the American Constitution were created under the shadow of the Supremacy Clause to protect the people in the states from precisely the kind of controversial majoritarian laws that Levinson and Eskridge celebrate.

But what of the argument that the Senate violates fundamental values of the Constitution because it is undemocratic and not consistent with the norm of one person one vote?<sup>105</sup> The short answer is that the Senate was designed to be “federally democratic” as opposed to “nationally democratic.”<sup>106</sup> Elections for the Senate “are as freely and democratically contested as elections can be—but in the states.”<sup>107</sup> The candidate with the most votes always wins an election for the Senate—“but in the states.”<sup>108</sup> Each voter in Wyoming and each voter in California has an equal vote in Senatorial elections—but in her respective state! As Jay Bybee observes:

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100. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 52 (2006).

101. *Id.* at 51 (noting the unfairness of the Senate’s bestowing two senators on both California and Wyoming even though “California has just short of seventy times the population of Wyoming”).

102. *Id.* at 52. Levinson bemoans the fact that “*the Senate can exercise a veto power on majoritarian legislation passed by the House that is deemed too costly to the interests of small states, which are overrepresented in the Senate.*” *Id.* Similarly, Professor Eskridge complains that the “Sagebrush values” of the small states do not embrace national laws supported by “sexual-orientation minorities.” Eskridge, *supra* note 92, at 37. Finally, Sherry objects that “Justice Thomas still sits on the United States Supreme Court, despite the fact that the representatives [in the Senate] of a majority of the population voted against him.” Sherry, *supra* note 95, at 96.

103. David G. Savage, *Justice Scalia: Americans “Should Learn to Love Gridlock,”* L.A. TIMES (Oct. 5, 2011), <http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005> [<https://perma.unl.edu/63Q9-T2XZ>].

104. *Id.*

105. *See supra* notes 92–95 and accompanying text.

106. *See* MARTIN DIAMOND, *THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY* 7 (1977) (emphasis omitted). Diamond refers to elections for the President; however, the same is true for Senate elections.

107. *Id.*

108. *Id.*

Federalism and democracy are not in opposition in Congress any more than they are in the Electoral College; they work in concert to hold the relationships among the national government, the states, and the people in constitutional equipoise. Neither is federalism a competitor to democracy, but its willing servant. Federalism suggests to the democratic impulse that it should confine itself to local rather than to national resolution; that uniformity of government is not required and may, therefore, not be demanded. Thus, federalism is a different manifestation of democratic will: Democracy demands that individual voices be heard; federalism asks, "How great the din?"<sup>109</sup>

The Constitution creates the Senate to check national power and to advance federalism by ensuring that each state in the union has an equal voice in one branch of the national government.<sup>110</sup> Indeed, a federally democratic Senate is more "democratic" than a nationally democratic Senate in at least one important respect—election of Senators at the state level ensures that each Senator is more likely to represent his statewide electorate than would be the case if we had a national election for the Senate. Each Senator elected to represent Wyoming in the Senate is a resident of Wyoming and was elected by the people of Wyoming. Thus, she is more likely to reflect the regional and cultural values of her electorate—the people of Wyoming—than would be the case if Senators were elected by a national electorate. And the same is true for California and Colorado and Nebraska and North Carolina. State equality in the Senate gives an equal voice to "sagebrush values"<sup>111</sup> in Wyoming and Hollywood values in California. In the words of Justice Scalia, the Constitution establishes a national government in which "power contradict[s] power"<sup>112</sup> to ensure that national laws are only enacted when they represent a consensus among the larger and smaller states and the respective cultural and political values of the various regions of our large and pluralistic nation. Thus, rather than contradict the fundamental values of the American Constitution, the Senate's embrace of federalism and state equality in one house of Congress reflects and embodies the checks and balances that protect the liberty of we the people of the several states.

## B. The Electoral Vote System, Democracy, and Federalism

In a thinly reasoned but widely cited report on the electoral vote system, the American Bar Association Commission on Electoral College Reform criticized the "electoral college method" for electing the President as "archaic, undemocratic, complex, ambiguous, indirect,

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109. Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 Nw. U. L. REV. 500, 504 (1997).

110. U.S. CONST. art. I, § 3, cl. 1.

111. See *supra* note 93 and accompanying text.

112. See *supra* note 103 and accompanying text.

and dangerous.”<sup>113</sup> The ABA report recommended amending the Constitution to provide for direct election of the President and Vice President by a “nationwide popular vote.”<sup>114</sup> Similarly, Sanford Levinson has attacked the Electoral College as “an undemocratic and perverse part of the American system of government.”<sup>115</sup> This criticism of the electoral vote system as “undemocratic” basically tracks the attack on the Senate and its guarantee of equal representation of the states. As Levinson puts it, both parts of the Constitution’s structural architecture provide “indefensible advantages . . . to low-population states.”<sup>116</sup> Moreover, the electoral vote system “allows a person to become President with fewer popular votes than his major opponent.”<sup>117</sup>

As in the case of the Senate, it is important to realize that the real issue is whether the Presidential election should be “nationally democratic” or “federally democratic.”<sup>118</sup> Under Article II, Section 1, the legislature of each state is given nearly plenary power over the appointment of presidential electors.<sup>119</sup> Thus, the electoral system is to the Presidency what the Senate was to Congress before ratification of the Seventeenth Amendment.<sup>120</sup> However, the legislature of every state has decided to have democratic state elections for the Presidency in which electoral votes are decided based upon which candidate wins the popular vote in each particular state.<sup>121</sup> Moreover, with the exception of two states, these elections are “winner-take-all” contests in which the winner of the popular vote in each state receives all that state’s electoral votes.<sup>122</sup>

The Presidential elections in each of the fifty states are not anti-democratic; they are federally democratic—each voter in each state election gets one vote, and each vote counts the same within each state. “Victory always goes democratically to the winner of the raw popular vote—but in the states.”<sup>123</sup> The purpose of having individual

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113. AM. BAR ASS’N COMM’N ON ELECTORAL COLLEGE REFORM, ELECTING THE PRESIDENT 3–4 (1967) [hereinafter ELECTING THE PRESIDENT].

114. *Id.* at 3.

115. LEVINSON, *supra* note 100, at 82.

116. *Id.* at 89.

117. ELECTING THE PRESIDENT, *supra* note 113, at 4.

118. *See supra* notes 105–112 and accompanying text.

119. U.S. CONST. art. II, § 1.

120. *See supra* note 85 and accompanying text.

121. Although in the early days of the republic “most state legislatures chose to select the electors themselves” without an election, since 1865 every state legislature has chosen to allow direct election of presidential electors by the eligible voters of each respective state. HARDAWAY, *supra* note 26, at 45–46.

122. *Id.* at 48–49. This “winner-take-all” feature is not mandated by the Constitution; rather, it was enacted by the state legislatures in the forty-eight states that employ it. *Id.* The two states that have not adopted this “unit” rule for electoral votes—Maine and Nebraska—have instead chosen to allow voters to vote for electors “on a district basis rather than on a statewide basis.” *Id.*

123. DIAMOND, *supra* note 106, at 7.

states decide electoral votes is to require a candidate to appeal to the citizens of many states across the country—in multiple regions representing people with a diversity of values and ideas about the “good life”—and to ensure that the small states in flyover country have an important role in electing the President. In other words, the electoral system functions as a counterweight against the powerful forces of nationalization of law and politics. In the words of Professor Diamond, “When all forces tend to homogenization and centralization, we have a saving remnant of decentralization in the Federal aspect of the election of the American President.”<sup>124</sup>

Together with the constitutional structure for Congress (and especially the U.S. Senate), the electoral vote system ensures that the states—and we the people of the states—have a vital role in selecting all three branches of the national government.<sup>125</sup> In the *Federalist Papers*, Alexander Hamilton praised the electoral system for the presidency as “excellent,” and explained its excellence as follows:

This process of election affords a moral certainty, that the office of president will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honours of a single state; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States.<sup>126</sup>

Thus, election to the Presidency ordinarily requires a candidate to appeal to we the people in many states and regions of the country. Or, as Professor Wechsler once put it, the Constitution assigns to the states a “crucial role in the selection and the composition of . . . national authority” in order to ensure that “the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, [and] the separate geographical determinants of national as well as local politics.”<sup>127</sup>

In other words, the road to the White House passes through the states. The people of Wyoming may be few in number and they may embrace parochial Sagebrush values, but on Election Day they get to determine who wins the three electoral votes that Wyoming is allocated under the Constitution. Regardless of what happens in Califor-

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124. Diamond & Bayh, *supra* note 28, at 69.

125. See Wechsler, *supra* note 1, at 546.

126. THE FEDERALIST NO. 68, *supra* note 45, at 54 (Alexander Hamilton).

127. Wechsler, *supra* note 1, at 546. As Professor Wechsler further observes, in order to win the Presidency, candidates “must appeal to some total combination of allegiance, choice or interest that will yield sufficient nation-wide support to win elections and make possible effective government.” *Id.* at 557; see also Ross, *supra* note 36, at 81 (noting that the electoral system requires presidential candidates to “achieve a consensus among enough groups, spread out over many states, to create a broad-based following among the voters”).

nia, New York, or any other state, the people of Wyoming get to determine who wins their state's three electoral votes.

Of course, since the states have chosen to adopt a "winner-take-all" unit rule for state elections for the Presidency, this necessarily means that in state presidential elections the votes of those who support losing candidates are unsuccessful. Critics of the electoral vote system assert that this results in "cancelling all minority votes cast in the state."<sup>128</sup> This argument is totally without merit. As in all elections, the votes for unsuccessful candidates for the presidency do not bear fruit. But these votes are not "cancelled." Each vote in each state is counted in each state. The winning candidate in each state is awarded all that state's electors.<sup>129</sup> The unit rule serves federalism by ensuring that presidential elections in the states, even in small, parochial states such as Wyoming, have maximum impact on the election of the president. Forty-eight state legislatures have adopted the unit rule for this very reason.<sup>130</sup> It is a feature—not a fault—of the Presidential electoral system as a vital cog in the Constitution's protection of federalism and the rights and liberties of we the people of the states.

Some modern critics of the electoral system attack it because state legislatures no longer directly appoint electors but rather have empowered the people in each state to elect presidential electors pledged to particular candidates nominated by the political parties.<sup>131</sup> Although the Framers may not have anticipated this process of democratization of presidential selection, they carefully designed an electoral system that delegated to state legislatures "the task of developing the methods and criteria for electing [presidential] electors."<sup>132</sup> Thus, the electoral vote system in operation today is "the final result of 200 years of evolution and trial and error, made possible by the flexibility the Constitution so wisely provided."<sup>133</sup> Both federalism and democracy have been enhanced by these changes because the current process for choosing the president now clearly "safeguards democracy where it is, and can be, most genuinely democratic, namely, in the states."<sup>134</sup> This flexibility of the electoral system is a strength, not a

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128. ELECTING THE PRESIDENT, *supra* note 113, at 4.

129. Interestingly, a national popular election for the Presidency would also result in minority votes being "wasted" or "cancelled" in the sense that votes for losing candidates never bear fruit. Losing votes count, but they do not prevail. This is how elections work, and it is not a case of disenfranchisement of losing voters.

130. See *supra* notes 121–22 and accompanying text.

131. See Boudreaux, *supra* note 44, at 208 ("Most of the eighteenth century rationales for the electoral college have been rendered irrelevant by the rise of parties and laws generated by modern partisan politics.")

132. HARDAWAY, *supra* note 26, at 87.

133. *Id.*

134. James R. Stoner Jr., *Federalism, the States, and the Electoral College*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 43 (Gary L. Gregg ed., 2001). Moreover, for most Americans, the states are where they live their lives,

weakness, of the constitutional design. It is the opposite of being archaic and obsolete; it allows for change and the “refining [of] the electoral process”<sup>135</sup> without sacrificing the checks and balances of federalism. It is indeed an excellent system that has resulted in meaningful and federally democratic elections for president in each of the several states.

Thus, the electoral system promotes federalism in two important respects. It promotes federalism as state sovereignty by making clear that the state legislature of each state has nearly plenary power to determine the selection process for presidential electors. And because all fifty states now provide that presidential electors are to be chosen by popular elections in each state,<sup>136</sup> it protects the “supreme authority” of we the people in the states by giving the citizens of each state the power to determine the electoral votes from their particular state.<sup>137</sup> This is not “meager” federalism as some commentators assert.<sup>138</sup> Rather, it is a critically important “means of preserving Federal democracy, or a Federal element in the electoral process.”<sup>139</sup>

Moreover, the political benefits of electoral-system federalism do not depend upon the states in which Presidential candidates physically campaign or place political advertisements.<sup>140</sup> The benefits that matter are those that deeply protect federalism by assuring that an appeal to the people of many states and regions of the country is necessary for a candidate to win the presidency. The electoral system ensures that all fifty states matter because federally democratic

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worship their God, and raise their families. For these Americans, their “states are most emphatically home.” *Id.* at 51. This is true even in a mobile society in which many of us move from place to place. Eventually, most of us put down roots and live our lives in the particular state we call home. *See id.* As for me, I was born in Massachusetts, spent a few years in New York, and eventually put down deep roots in a “Sagebrush” state, my beloved Nebraska. I am an American by birth, but my home (and the place where I vote and where I wish my vote to count) is Nebraska. Go Big Red!

135. HARDAWAY, *supra* note 26, at 97.

136. ELECTING THE PRESIDENT, *supra* note 113, at 23.

137. As Madison declared, the “supreme authority in each State” is that of we the people in the relevant state. THE FEDERALIST No. 39, *supra* note 8, at 196 (James Madison).

138. *See generally* Boudreaux, *supra* note 44 (“[T]oday’s electoral college allows for at best a *meager federalism*, in which states are merely addresses in the national government.”).

139. Diamond & Bayh, *supra* note 28, at 69. As Diamond explains, the President is best understood not as our “chief national executive officer,” but rather as “our chief Federal officer” elected by fifty-one separate elections in each of the fifty states plus the District of Columbia. *Id.*

140. Some critics of the electoral system argue it fails to protect the interests of the states because candidates limit campaign activities to competitive states. *See, e.g.,* GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 151 (2004). As discussed in the text, this misses the point about what really matters in a federalist republic.

elections in each state determine which candidate receives each state's electoral votes. This forces candidates to seek consensus by taking account of the values, policy preferences, and opinions of those who live in rural areas as well as urban areas, in coastal areas as well as in the heartland of America. In other words, "[h]aving to go to the people, not as an undifferentiated mass, but in their states, makes candidates aware of, if not always sympathetic to, the whole array of interests articulated principally at the local level."<sup>141</sup> The 2016 Presidential election, for example, primarily concerned what Americans from coast to coast think about important national issues such as nominations to the Supreme Court, religious liberty, illegal immigration, trade policy, jobs for the working class, and gun rights. Although these issues are in one sense national, they are viewed very differently in sagebrush America than in cosmopolitan America. The genius of the Framers in designing the architecture of the Constitution to submit issues like these to voters in the states is enduring, and the most recent presidential election is powerful evidence of that genius.

### C. The Electoral System Works Well: The 2016 Presidential Election as a Case in Point

Although many supporters of Hillary Clinton probably believe she "won" the 2016 election because she won a plurality of the so-called popular vote by approximately three million votes, the 2016 election is actually a powerful example of the enduring value of the electoral system established by the Constitution in 1789. As discussed above, the Constitution creates the electoral system in order to ensure that the chief executive of the United States represents not just a few heavily populated regions of the country but rather an electoral-vote majority representing many states in and multiple regions across the country.<sup>142</sup> In the election of 2016, President Trump won the "popular vote" in thirty of fifty states and in over 2600 counties from coast to coast, while Hillary Clinton won only twenty states and less than five hundred counties.<sup>143</sup> Clinton was the choice of the wealthy, culturally powerful, and heavily populated east and west coastal regions and a few urban areas in between,<sup>144</sup> whereas President Trump was the

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141. Stoner, *supra* note 134, at 51–52.

142. See *supra* notes 125–27 and accompanying text.

143. *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017) [hereinafter *Election Results*], <https://www.nytimes.com/elections/results/president> (state map).

144. "We know the basic facts about 2016. Thriving metropolitan areas leaned toward Hillary Clinton while less affluent and less diverse places in the interior of the country voted for Donald Trump." E.J. Dionne Jr., *Is America Getting Lonelier*, WASH. POST (Aug. 6, 2017), [https://www.washingtonpost.com/opinions/is-america-getting-lonelier/2017/08/06/411522a6-7933-11e7-8f39-eeb7d3a2d304\\_story.html?utm\\_term=.822ed355557a](https://www.washingtonpost.com/opinions/is-america-getting-lonelier/2017/08/06/411522a6-7933-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.822ed355557a) [https://perma.unl.edu/3JQZ-K7YB]. Another

choice of thirty states and more than 2600 counties covering the entire expanse of America.<sup>145</sup> Remarkably, President Trump's victory over Clinton in the counties was a victory of more than five to one, with the President winning the vote in 2626 counties and Clinton winning only 487 counties.<sup>146</sup>

Another way of looking at the "popular vote" argument for Clinton is this: Clinton won a plurality (not a majority, but a plurality) of the so-called popular vote by 2,868,519 votes—call it a three million vote lead over Trump.<sup>147</sup> But if we subtract her margin in California of 4,269,978 votes,<sup>148</sup> Trump actually won the "popular vote" in the other forty-nine states by approximately 1.5 million votes. And if we subtract Clinton's margin in both California and New York of a little over six million votes, Trump wins the other forty-eight states by more than three million votes.<sup>149</sup> This is not meant to imply that votes in New York and California do not count; they very much count to determine who won the electoral votes in California and New York. Rather, my purpose is merely to demonstrate that two large, coastal states can dominate a national election for the presidency, which is exactly what Gunning Bedford of Delaware feared in 1787 when he told the delegates from the large states that he could not allow his state to submit

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commentator put it more dramatically: "Of all the overlapping generational, racial, and educational divides that explained Trump's stunning upset over Hillary Clinton last week, none proved more powerful than the distance between the Democrats' continued dominance of the largest metropolitan areas, and the stampede toward the GOP almost everywhere else." Ronald Brownstein, *How the Election Revealed the Divide Between City and Country*, ATLANTIC (Nov. 17, 2016), <https://www.theatlantic.com/politics/archive/2016/11/clinton-trump-city-country-divide/507902> [<https://perma.unl.edu/QG8G-ZBRW>]. Rasmussen Reports provided a much more detailed analysis of the urban–rural divide in the 2016 election. See Rhodes Cook, *The 2016 Presidential Vote: A Look Down in the Weeds*, RASMUSSEN REPORTS (Jan. 26, 2017), [http://www.rasmussenreports.com/public\\_content/political\\_commentary/commentary\\_by\\_rhodes\\_cook/the\\_2016\\_presidential\\_vote\\_a\\_look\\_down\\_in\\_the\\_weeds](http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_rhodes_cook/the_2016_presidential_vote_a_look_down_in_the_weeds) [<https://perma.unl.edu/MR6P-QDGD>].

145. See *Election Results*, *supra* note 143 (select "President," then navigate to the "Counties" map).
146. *Trending Story that Clinton Won 57 Counties is Untrue*, AP NEWS (Dec. 6, 2016), <https://apnews.com/fb5a5f7da21d460bbffb6985cb01cb2c> [<https://perma.unl.edu/33RF-UYH2>] ("The Associated Press finds that Clinton won 487 counties nationwide, compared with 2,626 for President-elect Donald Trump.").
147. Clinton's "popular vote" total was 65,853,625 votes (48.0%) and President Trump's was 62,985,106 votes (45.9%). Clinton's advantage was thus 2,868,519 votes. See *Election Results*, *supra* note 143.
148. Clinton's vote total in California was 8,753,788. President Trump's vote total in California was 4,483,810. Thus, Clinton won in California by 4,269,978 votes. *Id.*
149. Clinton's vote total in New York was 4,556,124. President Trump's vote total in New York was 2,819,534. Thus, Clinton won in New York by 1,736,590. *Id.*

to the “enormous and monstrous influence” of a few large-population states.<sup>150</sup>

Moreover, Trump won the vote in the Electoral College by a comfortable majority of 304 Electoral Votes to 227 for Mrs. Clinton—basically a fifty-five percent majority.<sup>151</sup> So rather than a President Clinton who won a “popular vote” plurality by dominating in a handful of large and powerful states and urban centers, we have a President Trump who won an electoral vote majority based upon an overwhelming consensus in the states and counties that comprise this large and diverse nation.

Clearly the best case scenario is when a presidential candidate wins both an electoral vote majority and a “popular vote” majority. However, in elections like that of 2016, in which one candidate wins only a “popular vote” plurality and another wins a strong consensus in the states and counties together with a solid electoral vote majority, the electoral system created by the Constitution works well. Whatever your views about President Trump’s character and populist agenda, when you look at the remarkable 2016 electoral map of the United States depicting how the counties voted,<sup>152</sup> it is clear that President Trump was the nationwide-consensus choice of the American presidential election of 2016.

#### **D. A Narrative from the Classroom: Is the Constitution’s Structural Architecture Archaic and Obsolete?**

The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. The constitutional protections that this case involves are protections of structure. Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.<sup>153</sup>

An ABA Report calls the electoral system for the presidency “archaic.”<sup>154</sup> A distinguished constitutional scholar calls it “a brilliant

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150. PETERS, *supra* note 28, at 97; *see supra* notes 26–28 and accompanying text.

151. *See Election Results, supra* note 143.

152. *See infra* Appendix.

153. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 707 (2012) (Scalia, J., dissenting).

154. ELECTING THE PRESIDENT, *supra* note 113, at 3.

eighteenth-century invention that makes no sense today.”<sup>155</sup> Likewise, Sanford Levinson believes that state equality in the Senate is obsolete because “there is no such present necessity to submit to the extortionate demands of small states lest they torpedo the entire constitutional project.”<sup>156</sup>

The point of the critics seems to be that the political compromises made in 1789 to create a constitutional union are no longer necessary to preserve that constitutional union. But the compromises that formed the structural protections of the Constitution are enduring, and the political guardrails of federalism and national government by consensus continue to protect the vital political liberties of we the people of the states.

When I teach about the structural protections of federalism, I often ask students to think about what would happen if, as Jefferson suggested,<sup>157</sup> the Constitution had an expiration date of, for example, December 31, 2018. Thus, all fifty states would become free and independent states once again unless all fifty states could be convinced to ratify a new national Constitution.

I then ask the students to assume the roles of delegates from the state of California at the Second Constitutional Convention of 2018 and ask, What would they want in terms of the composition of the national government and the election of the President? What would be the price of California’s vote to ratify?

But then I ask them to imagine they represent Wyoming or Nebraska or South Dakota or Mississippi at the Convention. Now what would they want? Remember, if all fifty states do not agree to ratify the new Constitution, there will not be a United States of America. Thus, we need a compromise that will work for all fifty states—small and large and in between; rural, suburban, and urban; red and blue and purple. What would that compromise look like?

Of course, all of the delegates from all of the states would have knowledge of how divided the nation has become and how large states

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155. Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES*, *supra* note 92, at 15.

156. Levinson, *supra* note 35, at 275.

157. 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826*, at 634 (James Morton Smith ed., 1995). Jefferson believed that the dead have no right to govern the living. *Id.* at 632. Thus, each generation has the right to govern itself. Writing to Madison, from Paris, on September 6, 1789, Jefferson put it this way:

The constitution and the laws of their predecessors [are] extinguished then in their natural course with those who gave them being. Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.

*Id.* at 634; see also DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 304 (1994) (discussing Jefferson’s argument that “no society can make a perpetual constitution, or even a perpetual law”).

such as California and New York can dominate a national popular election.<sup>158</sup> Moreover, the delegates would be aware of the chasm that exists today between Hollywood values and sagebrush values, between cosmopolitan values and rural values. Although all of the delegates to this hypothetical constitutional convention would be Americans, differences in values, religion, and ideology would make it difficult for them to accept being governed by those representing the other side of the chasm. As Gunning Bedford of Delaware said in 1787 to the delegates from the large-population states, we do not trust each other enough to submit to a political hegemony of one group or the other.<sup>159</sup>

Even setting aside hot-button issues such as abortion, same-sex marriage, gun rights, and the scope of religious liberty, it is not clear today that all fifty states could agree to a plan about the structure of the national government. Restoration of the union of all fifty states might prove elusive. But if a compromise acceptable for ratification by all fifty states could be worked out at the Constitutional Convention of 2018, it would probably look a lot like the Great Compromise of 1789—larger states get representation by population in the House, smaller states get equal representation in the Senate, and there would be some type of compromise in how the President is elected. In fact, the current allocation of electoral votes—California is allocated fifty-five electoral votes and Wyoming only three—is too favorable to the large population states. For example, in 1789, the largest state to smallest state electoral-vote ratio was ten to three; in 2016, it was fifty-five to three.<sup>160</sup> The delegates representing Wyoming or Nebraska in the Second Constitutional Convention of 2018 would be wise to demand that small states have a minimum number of electoral votes, perhaps no fewer than 10 or 15. Of course, delegates from large states would be opposed to that demand. It would indeed be no small

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158. *See, e.g., supra* notes 147–50 and accompanying text.

159. *See supra* notes 26–28 and accompanying text.

160. In 1789, the largest state, Virginia, had ten electoral votes, and the smallest state, Delaware, had only three. *See* U.S. GEOLOGICAL SURVEY, PRESIDENTIAL ELECTIONS 1789–1808 (Feb. 6, 2017), [https://nationalmap.gov/small\\_scale/printable/images/pdf/elections/elect01.pdf](https://nationalmap.gov/small_scale/printable/images/pdf/elections/elect01.pdf) [<https://perma.unl.edu/ZEA3-WESK>]; *Electoral Votes for President & Vice President 1789–1821*, U.S. NAT'L ARCHIVES & REC. ADMIN. (Dec. 10, 2010), [https://www.archives.gov/federal-register/electoral-college/votes/1789\\_1821.html#1788](https://www.archives.gov/federal-register/electoral-college/votes/1789_1821.html#1788). In 2016, the largest state, California, had fifty-five electoral votes, and the smallest state, Wyoming, had only three. *See Distributions of Electoral Votes*, U.S. NAT'L ARCHIVES & REC. ADMIN. (Dec. 10, 2010), <https://www.archives.gov/federal-register/electoral-college/allocation.html> [<https://perma.unl.edu/8BXX-JLEC>]. There were six other states (in addition to the District of Columbia)—Alaska, Delaware, Montana, North Dakota, South Dakota, and Vermont—with only three electoral votes in 2016. *Id.* Thus, California by itself had fifty-five electoral votes and the seven smallest states combined had only twenty-one electoral votes.

task to find an electoral system for the presidency that could be ratified by all fifty states in today's bitterly divided America. It is a blessing that Jefferson's idea about an expiration date for the Constitution did not prevail.

Thus, the electoral-vote system is most definitely not obsolete in contemporary America—small-population states in flyover country would be irresponsible to submit to a national government dominated by large-population centers in a handful of states. The electoral-vote system is not perfect, but it is excellent—it ensures that we get a president who represents a broad, multi-regional, electoral majority of our nation, as opposed to only a few large-population centers. As one scholar of the electoral system has explained, the structure embodied in the Constitution “prevents local needs from being ignored, controls dangerous factions, and requires a balancing of interests.”<sup>161</sup> It is perhaps even more relevant in today's bitterly divided America than it was in 1789.

#### IV. CONCLUSION

In a far flung, free society, the federalist values are enduring. They call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without undue sacrifice of their diversities and the creative energies to which diversity gives rise.<sup>162</sup>

The U.S. Constitution was created under the shadow of the Supremacy Clause. Since it would unite only those states which chose to ratify it, it had to be designed in a way that took account of the interests of all thirteen original states, whether small or large, rich or poor, cosmopolitan or parochial. The result was an architectural masterpiece—a Constitution that tempered a powerful national government, supreme within the scope of its authority, with the political safeguards of federalism, of the checks and balances that assigned to each state a powerful role in the selection of those governmental officials who would wield national authority.

Under the electoral system for the presidency, candidates understand that although the large-population states are prizes to chase, they must also seek victory in a sufficient number of the smaller states to “yield sufficient nation-wide support to win elections and make possible effective government.”<sup>163</sup> However, the electoral system for the presidency is just one planet in a solar system of structural checks and safeguards created by the Constitution to balance the supreme power of the central government against the interests of the

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161. Ross, *supra* note 36, at 39. Moreover, the Framers believed that the “federalist republic” created by the Constitution “would be the best protection for individual freedom.” *Id.*

162. Wechsler, *supra* note 1, at 543.

163. *Id.* at 557.

several states and the rights and liberties of we the people of the several states.<sup>164</sup> This constitutional solar system of political guardrails protects federalism and liberty by delegating to the states, and to the voters in each state, the power to select public officials who would wield national authority.

Although critics of the U.S. Senate—in particular of its unamendable principle of state equality—and the electoral system for the presidency argue that these structural provisions of the Constitution are undemocratic and anti-majoritarian, these arguments fail to recognize the distinction between institutions that are nationally democratic and those that are federally democratic. All elections for national office are based upon democratic elections *in the states* in which the voters of each state have an equal voice in the election of candidates who seek to represent the relevant state in the national government. The voters of each state vote for that state's representatives in the House, the Senate, and the presidential Electoral College. Each citizen's vote counts the same within each state.

This Article has shown the many ways in which the structural architecture of the Constitution delicately balances the incredible power of a central government wielding the sword of the Supremacy Clause against the continued sovereignty of the states and the liberty of we the people of the several states. These checks and balances of the Constitution protect Americans not only from the danger of too much concentrated national power being imposed on the people and the states, but they also balance the relative power of large-population, medium-population, and small-population states, as well as of states that may not share the political and cultural values of economically and culturally powerful states. The genius of the Constitution is that it created a national government which, although supreme within its enumerated powers, is checked by the interests and liberties of we the people in the states by the requirement of a strong consensus among the states with respect to the selection of all three branches of the national government. These structural checks and balances are not obsolete appendages of the eighteenth century but are as—or more—important today in our coast-to-coast, pluralistic, diverse, and hopelessly divided states of America.

It is important to recognize that these process protections of federalism, although critically important and enduring in their relevance, are but part of the Constitution's protection of federalism and the liberties of we the people in the states. The Constitution also limits national power by enumeration and specifically reserves to the states and to we the people of the several states all "powers not delegated to

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164. See *supra* notes 68–80 and accompanying text.

the United States by the Constitution.”<sup>165</sup> Reserved-powers federalism, although beyond the scope of this Article, is critically important to liberty because it allows many issues to be decided locally and, thus, closer to the people subject to local laws and local lawmakers. It also allows citizens to choose among fifty different shopping carts filled with different arrangements of laws, taxes, benefits, and protected liberties. “Instead of centrally designed and enforced regimes, federalism offers choice. Instead of a voice, it offers citizens an exit—and, in due course, better government.”<sup>166</sup> Process federalism gives states a say in how national power is exercised. Reserved-powers federalism—“fifty shades of federalism” as one might label it—gives citizens the right to be consumers of government, to run toward states with laws they like and from states with laws they dislike.<sup>167</sup> Both process federalism and reserved-powers federalism protect liberty by localizing political power.

To end this Article where it began with the words of Herbert Wechsler, the structural architecture of government created by the Constitution “and especially the role of the states in the composition and selection of the central government” is enduringly valuable and “intrinsically well adapted to retarding or restraining new intrusions by the[national government] on the domain of the states.”<sup>168</sup> Like all great architectural masterpieces, the structural architecture of the Constitution should be preserved and protected from those who would tear it down and replace it with a parking lot.

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165. U.S. CONST. amend. X.

166. MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 8 (1999).

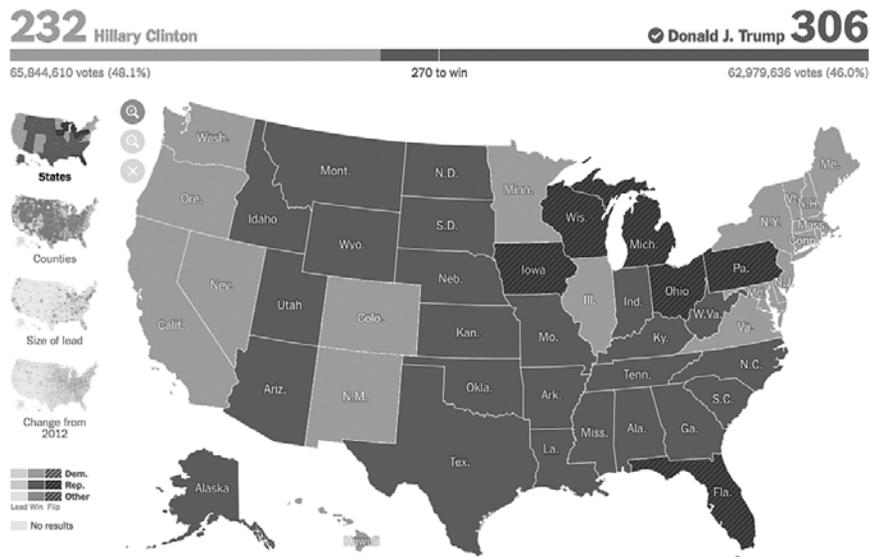
167. *Id.* at 2–9. As Greve observes, “the advantages of citizen choice extend not only to economic matters, but also, and with equal force, to social or lifestyle issues.” *Id.* at 4.

168. Wechsler, *supra* note 1, at 558.

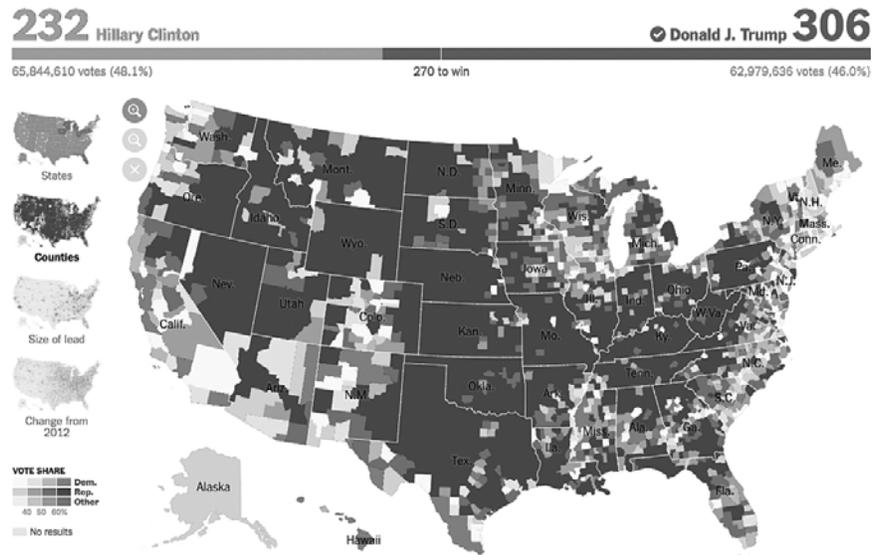
APPENDIX

The following maps, generated by the *New York Times*, illustrate the strong national consensus in favor of President Trump in the 2016 presidential election, both at the state and county levels.

Figure 1: 2016 Presidential Election State Map<sup>169</sup>



169. *Election Results*, *supra* note 143 (state map).

Figure 2: 2016 Presidential Election County Map<sup>170</sup>

170. *Election Results*, *supra* note 143 (select “President,” then navigate to the “Counties” map).