Shoring Up the Right to Vote for President: A Modest Proposal*

ALEXANDER KEYSSAR

One of the more remarkable features of election 2000 was its bringing to the surface of political life the peculiar fact that Americans do not possess a constitutionally-guaranteed right to vote for president of the United States. Even for those of us who study politics professionally, it was a bit as though a half-forgotten corpse had suddenly been jarred loose from the river bottom and floated upward into view.

This happened in two ways, both of which jolted political junkies without penetrating public consciousness very broadly. The first, of course, was when the Republican majority in Florida's legislature announced that the legislature itself would select the state's delegates to the electoral college if the outcome of the popular election remained legally unsettled on 12 December, the date by which electors were to be chosen. The legal basis of such an action, they claimed, was located in Article II, Section 1 of the Constitution, which specifies that "each state shall appoint in such manner as the legislature thereof may

* On 27 September 2002, there took place in the Iphigene Sulzberger Tower Suite at Barnard College, a symposium on various aspects of the question: "Should Americans Have the Constitutional Right to Vote for Presidential Electors?" The symposium was sponsored by the Academy of Political Science and the Barnard College Department of Political Science and was funded by the Carnegie Corporation of New York. The question addressed was provoked by the part of the Supreme Court decision in *Bush v Gore* which asserted that there is no constitutional right to vote for president, so voting directly for presidential electors can be given and taken away by state legislatures even after a popular vote. In this issue, we are publishing the paper prepared for the first panel of the symposium and the discussion that followed.

ALEXANDER KEYSSAR is the Stirling Professor of History and Social Policy at the Kennedy School of Government, Harvard University. He is the author most recently of *The Right to Vote: the Contested History of Democracy in the United States* and coauthor of *Inventing America: A History of the United States*.

direct, a number of electors" who will meet and cast ballots for president. Happily for the future reputation of the sunshine state's legislature, the Supreme Court's rapid decision in *Bush v Gore* rendered this legislative hijacking of the election unnecessary. Yet there can be little doubt that a majority of Florida's legislators were prepared to take that step—and to assert their primacy over the state's citizenry—to guarantee the election of George W. Bush; had they done so, a political firestorm would almost certainly have ensued.

The second sighting of the floating corpse was provided by the Supreme Court itself. Justice Antonin Scalia cheerfully pointed to it on 1 December 2000 during oral arguments in *Bush v Palm Beach County Canvassing Board*, the first of the two cases to be heard by the high tribunal. While interrogating Al Gore's attorney, Laurence Tribe, Scalia noted that "in fact, there is no right of suffrage under Article II." Ten days later, in *Bush v Gore*, the majority opinion drove the point home, emphasizing that "the individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." Citing the 1892 case of *McPherson v Blacker*, the Court even went a step further, pointing out that the state, "after granting the franchise in the special context of Article II, can take back the power to appoint electors." Thus had Florida's legislators acted on their own, the Supreme Court would have backed them up.[1]

The Court's flat assertion that American citizens have no constitutional right to vote for president attracted little public attention: few people ever read the convoluted opinion, and the press was understandably focused on the fact that George W. Bush had just become president-elect. As a matter of constitutional interpretation, moreover, the Court's assertion was not far-fetched and not nearly as much of a stretch as other ingredients in *Bush v Gore*. The federal Constitution never has contained any affirmative guarantee of a citizen's right to vote in federal elections. Article II, Section 1 does clearly seem to leave key decisions to state legislatures. All of the amendments to the constitution dealing with the right to vote (and they are numerous) are phrased negatively rather than positively: they prevent the states from denying people the franchise on particular grounds, but they do not directly confer the right to vote on anyone.

Yet as a statement about contemporary American political institutions, the Supreme Court's pronouncement, which is now the law of the land whether or not it was before December 2000, is extraordinary. The citizens of the nation that prides itself as the standard bearer of democracy on the world stage do not possess an unambiguous right to vote for the country's most powerful political office. The constitutions of more than a hundred nations around the world positively affirm the right of citizens to vote, but the Constitution of the United States does not. What if someone told the Taliban or China's ruling elite? What

[1] *Bush v Gore*, 121 S.Ct. 526, 529 (2000); *George W. Bush v Palm Beach County Canvassing Board*, oral arguments, 1 December 2000, 55.

if someone told Nebraska's farmers or New York's firemen or my Uncle Pat, all of whom think they have a right to vote?

At one level, of course, the issue is a technical one: in practice (and thanks to their state legislators), the vast majority of American citizens do possess a right to vote for their state's delegates to the electoral college; and that right is (at least obliquely) sheltered by a substantial array of constitutional amendments, statutes, and court decisions. Nonetheless, the events surrounding election 2000 inescapably bring the question of reform to the foreground. Should the federal Constitution be amended in order to affirmatively guarantee the right of American citizens to vote for president and to have those votes determine each state's vote in the electoral college?[2] My own answer to that is an unequivocal "yes." Such a step seems long overdue, and this is as good a time as any to make the move.

Making the Constitution Match Our Values

I should say at the outset that I personally would favor an even stronger measure: abolishing the electoral college altogether, and electing the president and vice-president by means of a national popular vote. The electoral college is a flawed and archaic institution that has wrought mischief in roughly 10 percent of our national elections. It functions at all only because it has long ceased to serve the deliberative function for which it was designed; and its granting of disproportionate weight to voters who live in the small states looms as an overt contradiction of the principle of "one person, one vote" that is at the heart of modern conceptions of democracy. That said, the chances of abolishing the electoral college (thanks in good part to the opposition of those small states) seem to be roughly on a par with the chances of Fidel Castro becoming governor of Florida.

The proposition discussed here, therefore, is more modest but more pragmatic: it might have some possibility of becoming law. As framed, the proposal would leave the small-state advantage intact while presumably permitting each state to decide how to allocate its electors—that is, by district or in one bloc. The proposal would nonetheless achieve two critical goals. It would prevent state legislatures from ever acting to select members of the electoral college on their own or in any way other than through popular election. More abstractly—but perhaps more critically—it would embed the value of a right to vote for the nation's highest office in the federal Constitution.

[2] There are, of course, a number of different types of amendments that could be proposed, some of which would affect all federal elections or all elections and others of which would abolish the electoral college outright. Here I discuss what might be regarded as a minimal constitutional intervention: an amendment that would guarantee to all American citizens the right to vote in presidential elections and to have those popular votes be decisive in selecting members of the electoral college. This would leave the electoral college untouched and presumably leave to states or state legislatures decisions about how to apportion electoral votes.

The most fundamental reason for amending the Constitution in this way is to bring a late eighteenth-century Constitution into harmony with late twentieth- or twenty-first-century ideals and values. The phrase "the right to vote" did not appear in our original Constitution, an omission that was only partially a consequence of the Founding Fathers' decision to leave most suffrage matters to the states. The phrase was absent, both from the first Constitution and, notably, from the Bill of Rights, because there was substantial uncertainty and disagreement among the Framers about whether voting was in fact a right. The more conservative among them (probably a majority) believed it to be a privilege; and even those who did call it a right were generally quick to point out that it was not by any means a universal right. As is well known, voters in nearly all states of the early republic were adult (usually white) male property owners or tax payers.

A great deal changed over the next century and three-quarters. Property and taxpaying requirements were stripped away during the first half of the nineteenth century, although they made some surreptitious returns thereafter. The Fourteenth and Fifteenth Amendments added the phrase "the right to vote" to the language of the Constitution, while giving formal (if contested and then flagrantly ignored) protection to the political rights of African Americans. The exclusion of women was prohibited in the first decades of the twentieth century. And the 1960s witnessed a stunning expansion of voting rights at the hands of both Congress and the Supreme Court, effectively ending discrimination based on race, literacy, poverty, and residential mobility. As I have recounted in detail elsewhere, these changes took a great deal of time; they were always contested; they were often rolled back in partial and incomplete ways. But the legal, political, and cultural environment did change profoundly.[3] Few Americans today would openly advocate disenfranchising blacks, Natives Americans, women, or poor people.[4]

The intellectual or ideological history of suffrage in the United States can be viewed as a prolonged process through which Americans came to view voting as a right rather than a privilege and also as a right similar to other rights, adhering to all citizens or at least all adult citizens. The two prongs of this issue infused debates about the franchise for many decades, leading, among other things, to distinctive contortions of language, argument, and rhetoric. As early as the revolutionary period, advocates of franchise expansion (to include those without property, for example) defended their position on the grounds that vot-

[3] See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).

[4] I use the word "openly" deliberately. I do not think that the embrace of genuinely democratic values is universal by any means; and I suspect that many Americans view universal suffrage as E. L. Godkin did in 1894: "it has, in spite of its imperfections and oddities, something of the majesty of doom." Quoted in Keyssar, *Right to Vote*, 126. Among other signs of something less than a full-scale embrace were the hundreds of thousands of Massachusetts and Rhode Island voters who opposed constitutional changes sanctioning the enfranchisement of paupers in the early 1970s.

ing was a right or even a natural right. Conservatives commonly sought to rebut such claims by pointing out that if voting were a right, then all men, even African Americans, should have it—and women and children too, as John Adams famously noted. On the other hand, if suffrage could reasonably be denied to any category of persons (and few were willing to argue the contrary), then it must not be a right but a privilege. As a privilege, it could reasonably and legitimately be restricted to those who would wield it "responsibly." Such arguments led throughout the nineteenth century to often murky claims that suffrage was an "earned" right or a "conferred" right, or one that could only be exercised by people with particular capacities or qualities. A delegate to the Indiana constitutional convention of 1850 announced that he believed in "the right of universal suffrage," which he asserted belonged only to "all free white male citizens over the age of twenty-one."[5] So much for universal.

It was during the cauldron of Reconstruction that prominent political leaders first began to openly embrace the full logic of the claim that suffrage was a right: as Senator Henry Wilson put it in words eerily predictive of public debates that would occur a century later, "Let us give all citizens equal rights, and then protect everybody in the United States in the exercise of those rights." His colleague, Oliver Morton, maintained that the same ideals that led him to favor enfranchising African Americans obliged him to oppose suffrage restrictions based on property, literacy, or nativity. In the 1870s and 1880s, numerous male delegates to state constitutional conventions applied that logic to women as well. "Women's right to the ballot seems so clear," noted an Ohioan in 1874, "that it is like some of the mathematical axioms." "Whatever rights are given to one citizen ought to be given . . . to every other citizen," claimed a California delegate four years later.[6]

These were not the views of most Americans in the 1860s and 1870s. Nor did they quickly become predominant: the latter decades of the nineteenth century witnessed a stunning backlash against franchise expansion in the North as well as the South. But the spectrum of public opinion had shifted enormously since the 1780s or even the 1830s, and the view that every adult citizen ought to be enfranchised had made its way into the ideological mainstream. There it has remained, gaining ground in fits and starts, until it was eventually catapulted into a majority ideal thanks to the combustible mix of World War II, the cold war, and the transformation of southern agriculture. The notion that suffrage was a right that belonged to all adults (with the noted exception of convicted felons) undergirded the passage of the Voting Rights Act and the Twenty-fourth Amendment, as well as the Supreme Court's repeated invocation of the equal protection clause to loosen numerous restrictions on the franchise. "It is wrong—deadly wrong—to deny any of your fellow Americans the right to vote," a president from Texas told Congress in 1965.[7]

[5] Keyssar, *Right to Vote*, 1, 44, 53, 172.
[6] Ibid., 98–99, 188.
[7] Ibid., 256–281.

It would be pollyannish to presume that everyone in the United States whole-heartedly believes that voting is a right belonging to all adult citizens. During election 2000 I found myself called a "democracy pimp" on a radio show in Dallas, and just months ago at a polling place a neighbor adamantly promoted the resuscitation of property requirements. But our nation's political, legal, and cultural embrace of democracy is unquestioned, and democracy has come to mean that all adult citizens participate in the selection of government leaders. In the words of Chief Justice Earl Warren, "the right to vote freely for the candidate of one's choice is of the essence of a democratic society." Amending our Constitution to bring it in line with our values, thus, hardly seems controversial. It would also follow a strong current of American history. In the 1860s, Charles Sumner acknowledged that racial bars to the franchise may have been "'republican' according to the imperfect notions of an earlier period," but that they were no longer appropriate in a changed world. His Republican colleagues in Congress argued for a broadened franchise with the lovely phrase (now gone from the language) that the Constitution should be amended according to "the lights we have before us," or "all the lights of our modern civilization."[8] In the year 2003, the lights we have before us make clear that all American citizens ought to possess a constitutionally guaranteed right to vote for president.

States' Rights and Democracy

One likely objection to an amendment of the type proposed here is that it would represent yet another incursion of the national government into an arena traditionally controlled by the states. State legislatures would relinquish the ability to select the manner in which delegates to the electoral college are chosen; all states would be compelled to hold popular elections.

One response to such an objection might, of course, be to point out that all states hold popular elections for president now and thus relatively little would change. But the historical record suggests a more powerful answer. Put simply, the cry of "states' rights," with respect to the breadth of the franchise, has almost invariably been a rhetorical and legal shield deployed to protect discriminatory behavior and a narrowing of the franchise. For most of our history, to be sure, the loosening of suffrage requirements came at the hands of state legislatures and constitutional conventions. In one notable instance—the alien declarant voting laws of the nineteenth century—the states were out ahead of the national government. (So far ahead that they eventually crept back into line.) But whenever the states and the federal government have been in overt conflict, it has been because Washington insisted on more democratic processes.

[8] Xi Wang, *The Trial of Democracy* (Athens: University of Georgia Press, 1997), 32; Keyssar, *Right to Vote*, 96–97, 284.

This dynamic was visible early on, as political leaders first grappled with the confusing structure that the Founding Fathers had erected for choosing a president. The Twelfth Amendment, ratified in 1804, was the work of Congress. Congress, moreover, played a key role in pressing the states to hold popular elections for president despite the latitude offered state legislatures by the Constitution. During the first decades of the nineteenth century, methods of selecting members of the electoral college varied greatly from state to state and even from election to election. Some state legislatures chose electors by themselves; six did so as late as 1824. In other states, electors were chosen in districts by popular vote; in still others, all electoral votes went to the winner of the popular vote. Practices tended to change for short-term and partisan reasons, thereby potentially undermining the legitimacy of the elections themselves. The North Carolina legislature's decision to choose electors by itself in 1812, although altogether legal, was the occasion of a "great excitement" in the state, and the last-minute decision of New Jersey's legislators to do the same for purely partisan reasons was treated as something of a scandal, even in a state which from birth seems to have been allergic to the nonpartisan enforcement of election laws. Similarly unpopular, at least in some quarters, was the congressional decision to deny Andrew Jackson the presidency in 1824 despite his having received the largest number of popular votes.[9]

This chaotic method of choosing a chief executive prompted members of Congress during the first quarter of the nineteenth century to introduce dozens of amendments calling for revamped and standardized methods of voting for president. Some called for the abolition of the electoral college, others for district voting; nearly all demanded that the people, not state legislatures, have the power to choose the president or at least presidential electors. Even after things had settled down in the early 1830s, Senator Thomas H. Benton of Missouri, with the support of his friend Andrew Jackson, continued to present to each Congress a proposed amendment mandating a national popular vote for president along district lines.[10]

Benton's rationale for such a proposal reflected both a growing faith in popular elections and a deepening distrust of intermediary institutions that could frustrate the popular will. On the floor of Congress, Benton insisted that his goal was "to keep the election wholly in the hands of the people, and to do this by giving them a direct vote for the man of their choice." Its underlying "principle"—not irrelevant to our own time—was "that liberty would be ruined by

[9] *Annual Report of the American Historical Association [AHA] for the Year 1896*, vol. II (entitled *Proposed Amendments to the Constitution, 1789 to 1889*, a prize essay by Herman V. Ames), *House Document No. 353, part 2*, 54th Congress, 2nd sess. (Washington, DC: 1897), 80–85; see also Jack N. Rakove, "The E-College in the E-Age" in Rakove, ed., *The Unfinished Election of 2000* (New York: Basic Books, 2001), 201–234; Edward Stanwood, *A History of Presidential Elections*, 4th ed. (Boston: Houghton-Mifflin, 1896), 60–61; Charles A. O'Neil, *The American Electoral System* (New York: G. P. Putnam's Sons, 1889), 106.

[10] AHA, *Annual Report*, 80–91.

providing any kind of substitute for popular election." President Jackson himself in 1835 declared that "the experience of our country, from the formation of the government to the present day, demonstrates that the people cannot too soon adopt some stronger safeguard for their right to elect the highest officers known to the Constitution." Implicit in such claims was the notion that popular voting was a national value. Opposition to the amendments was grounded, rhetorically at least, in a rejection of their assertion of national power over states' rights. Benton's proposal, according to John Tyler, "obliterated all state boundaries and dictated a course of action as if we were a nation and not a compact of states."[11]

None of these amendments passed, although several garnered a great deal of support. Yet it was in the face of action in Washington that the states moved toward a uniform method of choosing presidential electors through popular election and with the winner-take-all system that has become so grimly familiar. By 1832, only South Carolina clung to the practice of having its legislature choose electors; and only Maryland continued to use the district system.[12]

The Reconstruction amendments also, of course, constituted a federal intervention in the name of democratic values, as did the Nineteenth Amendment ratified in 1920, which gave women the right to vote. Most importantly, the transformation of voting rights law that was centered in the 1960s—but which actually unfolded a bit more gradually from the 1940s through the early 1970s—represented the self-conscious assertion of the federal government as the guarantor of democratic rights. Recognizing that the southern states, by themselves, would not undertake democratizing reforms (to enforce the Fifteenth Amendment, which had been on the books for nearly a century), Congress, the president, and the Supreme Court acted to enforce the national value of democracy. They were in effect asserting that no state or region of the United States could remain outside of a national consensus; in so doing, they acted precisely "as if we were a nation"—which, in fact, we are.

Confronting the Disenfranchisement of Felons

Tinkering with suffrage laws has throughout American history meant prying the lid open on a Pandora's box. Replacing property with taxpaying requirements meant calling into question why there should be any pecuniary qualifications for voting at all. Advocates of black suffrage after the Civil War found themselves in sharp, sometimes bitter conflict with supporters of women's suffrage. Southern suffragists in the early twentieth century encountered resistance from those who feared that any effort to change franchise requirements could break down the barriers against black voting.

[11] Ibid., 91; *Congressional Globe*, 24th Congress, 1st sess. (Washington, DC: 1836), 11; 28th Congress, 1st sess. (Washington, DC: 1844), 686.

[12] AHA, *Annual Report*, 85. See also Arthur M. Schlesinger, Jr., ed., *History of American Presidential Elections: 1789–1968* (New York: McGraw-Hill, 1985).

In a far more limited way, the Pandora's box is present here as well. Any constitutional amendment that affirmatively guarantees the right of American citizens to vote in presidential elections will bump up against at least one knotty issue—the voting rights of felons and exfelons. This is so because any clearly and simply stated guarantee ("All American citizens shall have the right to vote for presidential electors in the state in which they reside") would appear to override state restrictions on voting by those convicted of crimes.[13] Circumventing this problem, on the other hand, would require wording ("All citizens not convicted of crimes" or "All citizens eligible to vote under state laws") that would thicken the barriers against the enfranchisement of felons and exfelons.

Either position will be controversial and have detractors; it is particularly easy to imagine opponents of a simply worded amendment latching onto and making much of the fact that it would enfranchise several million people who have committed crimes. (Willy Horton goes to the ballot box.) In states like Florida, Alabama, and Texas, with large numbers of excluded felons, this issue could jeopardize ratification of an amendment. On the other hand, language that sanctioned the disenfranchisement of felons would be unpopular within the black community and among many progressives who would generally be inclined to support an amendment guaranteeing the right to vote. None of which, to my mind, is a reason to back away from the issue: a national debate about the merits and demerits of felon exclusions may be well worth provoking. The same could also be said of another issue that might rear its head—the voting rights of American citizens residing in Puerto Rico. Public debates that challenge the American people to test their stated ideals against tricky concrete issues ought perhaps to be welcomed rather than avoided.

It Just Might Matter

Just as generals sometimes fall prey to the impulse to fight the last war, political reformers frequently attempt to keep the last crisis from happening again. Much of the election reform legislation now pending before Congress seems to be of this type: it is designed to keep the spectacle of hanging chads, butterfly ballots, Katherine Harris, and confused news analysts from dominating the national television screen for a month after some future election. Such a spectacle would be unlikely to recur in any event, but numerous legislative proposals seem to spring from an understandable impulse to at least do something—or to avoid the charge of having done nothing after the train wreck of election 2000. That said, there is nothing particularly harmful and much that is constructive about the package of bills awaiting action in Congress. That they remain

[13] If felons and exfelons were enfranchised in presidential elections, it would put immense pressure on the states to enfranchise them for local elections also. Unless the states did so, they would have to maintain different voting rolls and possibly voting machines for presidential and for state elections. The situation would be analogous to what loomed on the horizon with the eighteen-year-old vote before passage of the 26th Amendment.

pending over two years after election 2000 has less to do with the quality or significance of the reforms proposed (the package is bland at best) than with the simple fact that all election reforms have potential partisan implications and no party wants to surrender any procedural advantage.

The constitutional amendment discussed here is somewhat different and penetrates more deeply into our political structures. It is not a response to what happened or what was publicly debated or what filled the airwaves, but to what was revealed and to what almost happened. Election 2000 and *Bush v Gore* made clear that a partisan state legislature could legally hijack a presidential election. Is this likely to occur? Certainly not. But the events of November 2000 and September 2001 remind us in ways that we should not ignore that the unlikely can happen. Moreover, a legislative hijacking of an election is unlikely precisely because it would provoke a deep crisis of legitimacy in a nation whose citizens believe in popular elections. Stated somewhat differently, the largest barrier to abuse of the current legal configuration is the fact that the vast majority of the American people are unaware that this configuration exists and would regard it as incompatible with the nation's core political values. Making the Constitution congruent with those values would thus seem to be a worthy goal in and of itself. In addition, placing the right of citizens to vote for president firmly and squarely in the Constitution could well carry weight in future legal conflicts, the contours of which we cannot quite imagine at present.

The new and somewhat unfamiliar tones of uncertainty and unpredictability that mark public life in the United States in the wake of September 11, 2001 add some depth, even perhaps some urgency, to the case for shoring up our democratic institutions. In the end, election 2000 did not prove to be a full-blown crisis of political legitimacy. Although many analysts and legal scholars found the Supreme Court's actions to be shocking, public rage diminished rapidly (except within the black community), and normal rhythms of life and politics were quickly restored. To some considerable degree, this was the case because the outcome of election 2000 did not appear as though it would make much difference to many people. The most widely discussed issues of the electoral campaign after all were the relative merits of different programs for improving education and different prescription drug plans for senior citizens, not exactly issues that would send large numbers of citizens to the barricades. That President Bush has set out since his inauguration to demonstrate that there were major differences between the two candidates is a different matter. But in the decades ahead, in a world that appears less benign, in a nation less certainly prosperous, political cleavages may sharpen. Electoral contests could well become more contentious, more bitter, more substantive, more vital. In such an environment, it will be all the more essential for the rules of democracy to be clear and the rights of the people unambiguous.

Panel Discussion

CARALEY:* Alex, everyone has read your paper. Do you want to give a short summary?

KEYSSAR: What I was asked to do was to reflect, as an historian, on this proposition regarding a constitutional amendment to guarantee the right to vote for presidential electors. I have reflected on it. I have no difficulty offering my support for it. My own views, and I have spoken about this fairly widely in the past, favor an even broader amendment, one which would guarantee the right to vote in all elections in the United States, and in so doing would also obliterate the electoral college. This comes both out of principle and out of my longstanding impossible-ist streak, which for the purposes of the present discussion I will forego. I actually do think that abolishing the electoral college would be a good idea, and as I mention in the paper, I think that the odds of doing that are roughly equal to the odds of Fidel Castro becoming governor of Florida.

CARALEY: You mean you prefer only eliminating people as electors or eliminating the whole electoral vote system of voting?

KEYSSAR: The whole electoral system of voting, the whole deal. Let me try to go over some of the reasoning that I offered behind this, and frankly I think that there are two overwhelming reasons. The first reason for doing this is in effect to bring the Constitution into harmony with the change in political values that has occurred over the last two centuries. In some sense, it's that simple. At the outset when the Constitution was written, whether or not voting was a right was a matter of substantial dispute. I think that most of the Founding Fathers did not believe that voting was a right. Voting was thought of as a privilege. And in the debate that emerged in the late eighteenth century, there was substantial disagreement about whether voting was a right or was a privilege. If it was a right, and I talk about this in the paper, the question was: Was it a right like other rights that should belong to all citizens or was it a right that only belonged to some people, in which case that made it a peculiar kind of right. That produces wonderful locutions in the language over time. For example, in a debate in the 1870s on women's suffrage, one opponent of women's suffrage stood up and said, "voting is not a natural right, it is a conferred right." And somebody stood up to respond, "if it's a conferred right, who conferred it on us?" Those kinds of debates took place throughout the nineteenth and early twentieth centuries.

One could see the intellectual history of suffrage in the United States as a lurching progression, a shift toward the notion that voting is a right and not a privilege and toward the notion that it is a right like most other rights in the sense that is adheres to all citizens. That takes a long time, and in writing

* Demetrios James Caraley, the editor of *Political Science Quarterly*, is the Janet H. Robb Professor of the Social Sciences and professor of political science at Barnard College and the Graduate School of Arts and Sciences at Columbia University.

this portion of the paper, I found myself telescoping a lot of complicated history and thus slipping into a kind of Whig version of American history that my book was written to attack. But the fact is that there was progress and change over the long run as well as a lot of backing and forthing.

The United States got universal suffrage roughly in 1970, which is rather late for the standard bearer of democracy. Even then, I think there are currents in American life and in American society that are less positive about democracy. One of my favorite examples of this is the 1972 presidential election, which some us of here remember. It was the overwhelming victory for George McGovern in Washington, DC and Massachusetts. But in the 1972 election in Massachusetts, which was the most liberal state in the country at the time, there was a rather remarkable referendum on the ballot, which was to remove from the Massachusetts state constitution the prohibition against paupers' voting. That prohibition had effectively become unconstitutional as a result of *Harper v Virginia*, but the language was in the state constitution, and so there was a referendum asking: "Should we remove this prohibition that says that paupers cannot vote?" Well, the proposition passed. But 400,000 people voted against it in Massachusetts in 1972. So I think we have to recognize that this embrace of voting even today is not universal. Still, change has occurred at some critical junctions that I have tried to outline in the paper, and the temper of political thought is quite different in the early twenty-first century society than it was in the late eighteenth century.

The second point that I tried to address, as cued by the organizers of this symposium, was the potential objection to a "right to vote" amendment that might be raised by those claiming to protect states' rights: if we had such a constitutional amendment, it would eliminate the hallowed right of state legislatures to hijack elections. This is, we all know, a very valued state right. But rather than simply poke fun at that, the reflections I give to that as a historian are really twofold. One is that in contrast to the situation at the end of the eighteenth century or the early nineteenth century, we are now fully a nation. There were numerous constitutional amendments proposed between 1810 and 1830 that would have federalized the right to vote. Thomas Hart Benton introduced one every year into Congress, and John Tyler's opposition to it was to say that such a proposition was as if or as though we were a nation and not a compact of states. Well, at this point in our history I am comfortable saying that we are a nation and not a compact of states. And I think most other people accept this as well.

The other thing that the historical background sheds light on is that throughout American history, voting issues have been the subject of more constitutional amendments than any other single subject, occasioning frequent tension between the states and the federal government. With possibly one or 1.5 exceptions, in conflicts between the states and the federal government, the federal government has always been on the side of greater democracy and expanding the right to vote, while the cry of states' rights has almost invariably been a

demand to restrict the suffrage and to discriminate in one form or another. The one broad exception was that in part of the nineteenth century, in a very interesting development, a lot of the states got way out ahead of the federal government in granting the right to vote to people who were not citizens. But then they crept back into the fold in the late nineteenth and early twentieth century as they realized that these noncitizens weren't any longer the kinds of folks they wanted to have vote in the first place. The other interesting case about this is the Supreme Court's action and the federal government's stance during and just after the 1842 Dorr War in Rhode Island, when the federal government certainly took an emphatically conservative position. In general the story about voting rights is largely about the South, but not exclusively so, as is revealed by the evolution of Native-American rights in the West. Thus states' rights has generally been a rhetorical shield behind which lay a desire to discriminate: usually to discriminate against people of color.

Let me make two more comments, again about things that are in the paper in a somewhat more coherent form. One is that any amendment of this type is bound to bump into the issue of felons. How you word the amendment will in one form or another play into the debate about whether felons and exfelons should be, are, or ought not be enfranchised. I am not sure one can find a wording that does not either enfranchise people who are currently incarcerated or in postincarceration, or that does not thicken the legal barriers against their enfranchisement by providing a federal constitutional sanction for it. I think that if there were a public debate over this constitutional amendment, the question of felons would come to the fore; Puerto Rico in some places might also emerge. And my reaction to that is to welcome it. That is not a reason to back away from it. It is an issue that needs public debating.

The last thing I would say, and I don't think this is just a rhetorical flourish, is that in the post-September 11 world there's a new measure of urgency about questions of rights and certain questions of politics. I don't think that it is an artificial attachment of one thing to another. Everyone in this room found election 2000 to be a massive crisis. But in the end it really was not much of a crisis. It did not go very deep. It was a legal crisis and a minor political crisis. But the water settled over it very quickly. I think that occurred precisely because there did not appear to be much difference between the two candidates. After all, the single most debated issue in the last weeks of the campaign was exactly which prescription drug plan to have for seniors. That is not an issue that was going to send a lot of people to the barricades when their candidate lost. The whole structure, the way the campaign was conducted really minimized any sense of difference between the candidates. We have learned since then that there was an enormous difference. Moreover, in a world where we feel a sense of threat, in an international environment that may feel substantially less warm and fuzzy, and in an economy which may have less promise of continuous growth, we may start seeing the emergence of a more contentious and conflic-

tual politics in which making the right to vote less ambiguous becomes all the more important.

CARALEY: Yes, and post-September 11, when our government is debating whether to start a potentially large war in the Middle East, that's all the more reason to know who has a right to vote for the person who has most to do in making that kind of decision.

SMITH:* I agree completely with every point in Alex's paper. I am, therefore, glad that he kept it short, because otherwise he might have gone on to say everything that I have to say. But perhaps by making some further points, I can reach some fruitful disagreements with him or, I'm sure, with some of the rest of you.

Alex notes that he would really like to see the electoral college abolished. So would I. During the *Bush v Gore* controversy, I briefly tested the waters of cyberspace to see if there might be some rising public sentiment to do so. I found none, a point to which I will return.

But first let me give my reasons for disliking the electoral college. It is not only that the power to appoint electors actually belongs to the state legislatures, undemocratic as that is in terms of modern notions of democracy. And it's also not only that it apportions electors via a state's number of senators plus representatives and thereby reproduces the least democratic features of Congress, bad as I think that is. I also dislike building state representation into the electoral college, because that system did not simply arise from the desires of small states to balance out the power of big states. It also won support in part from the desire of slave states to balance out the power of free states, because the slave states rightly expected the free states would grow in population more rapidly. So the electoral college was designed to give the slave states disproportionate power in selecting presidents—and it worked. Apart from the two troubled one-term presidencies of the two Adamses, presidents from slave states governed the nation for the first forty-seven years of its existence—the years when slavery was allowed to spread and tighten its cancerous hold on the body politic.

So I see the electoral college as in part an ugly relic of slavery, and I hate that. But, I know that slavery is in the distant past, so that's not a reason to abolish it today. It is probably more prudent to do as Alex and Jim Caraley suggested—to leave the electoral college intact but to establish a constitutional right of citizens to vote for presidential electors. More minimal though this proposal is, it does still raise troubling and important questions that should be raised, and Alex has just identified the key ones. It would raise the question of whether we can and should disenfranchise felons; and let me add some points on this issue. No nation in the world disenfranchises felons to anything like the extent that the United States does. We are at the far extreme in this

* Rogers M. Smith is the Christopher H. Browne Distinguished Professor of Political Science at the University of Pennsylvania.

pattern. And the United States today disenfranchises many more felons than it used to, because over the last thirty years we've added many more criminal laws; we've added disenfranchisement as a penalty for more crimes and have made many more acts into felonies that bring disenfranchisement and incarceration instead of lesser penalties. This recent period represents the second time in our history that we've had a large surge in new criminal laws and heightened incarcerations. The first such period came in the late nineteenth century, and it resulted primarily in the imprisonment and disenfranchisement of large numbers of newly freed and newly enfranchised black men. In our time, of course, matters are very different. The surge in criminalization over the past thirty years has resulted primarily in the imprisonment and disenfranchisement of large numbers of long-freed and newly-enfranchised black men. It should be evident from that description why I think the question of whether we should be doing this is one that definitely merits deep consideration and debate today.

Alex is also right to say that the denial of the franchise in presidential elections to U.S. citizens residing in Puerto Rico would also be called into question by this proposal; and that, too, is a good thing. The history of the debates over what to do with the Spanish American War acquisitions in 1900, the debates over the Foraker Act, which initially structured American colonial governance in Puerto Rico, the debates over the Jones Act of 1917, which gave Puerto Ricans U.S. citizenship over the objections of their leadership, all show that the main reason that this kind of U.S. citizenship did not include voting rights in U.S. elections was that Puerto Ricans were considered culturally and racially unfit for the franchise. Of course, like slavery, that's well in our past. That cannot be the reason why U.S. citizens residing in Puerto Rico do not vote in presidential elections now. But then, what is the reason? That is a question that merits deep consideration, and if this proposal helps spur that discussion, I think that would be a good thing.

But I have to say, even though I think discussing these questions would be valuable and important, I very much fear that if these questions are raised, even this modest, minimal proposal might fail to win the supermajority support needed for a constitutional amendment. I'm afraid, even though we tell ourselves in all sincerity that governing in accordance with racial prejudices belongs to our past, we are still often reluctant to change policies and institutions that we have inherited from those days, including those I've just described, even if they perpetuate many of the old injustices in our own time, as I think they often do.

Since even this modest proposal for a constitutional right to vote in federal elections may well be defeated anyway, let me mention that I would like to see it made slightly less modest. Alex indicates that under this proposal the states would still have leeway to indicate whether the voters choose electors as a bloc in a statewide winner-take-all election or by districts. I'd like the amendment to require that electors be assigned by some system of proportional representation, with the candidate getting a plurality nationwide winning the

White House. I realize that this is a radical addition that would probably make prospects for change even grimmer, so I will understand if no one here wants to go along with it.

But I mention it because the thing I found most discouraging about the election of 2000 and *Bush v Gore* was not that the candidate with fewer votes nationwide took office with the help of the electoral college and the U.S. Supreme Court. The thing that I found most discouraging was that after a few months, nobody much cared. They didn't care enough to want to reform the electoral college. They didn't care enough to be concerned with whether in some way we should curb the power of the Supreme Court. Now, it may have been because the election was essentially a tie, so that this was as good as flipping a coin. Some arbitrary means seemed the best possible under the circumstances. It may have been because the candidates didn't seem all that different anyway, as Alex suggests. Some would dispute that, but it's possible. It may also have been, however, because Americans have gotten used to the idea that our democratic processes are mostly just rituals anyway and that some subset of our mainstream elites ends up governing no matter what. So it's not really worth worrying too much about how they get there, we just worry whether they're doing all right for us or not. And for most Americans, Bush has been doing all right for us; that's all that matters, so we don't need to worry about the election of 2000 and how democratic or undemocratic it may have shown our institutions to be.

Maybe things have to be that way in such a vast country as ours; maybe real democracy, if we're honest, is a pipedream under modern circumstances. But I also think that people don't care too much about whether our democratic processes are really all that democratic, because those processes provide such limited avenues for real democratic participation and efficacy. Therefore, they don't nourish or encourage democratic commitments substantially. I think perhaps if we build an element of proportional representation into presidential voting, even if we keep what I see as the ill-conceived electoral college and even though in the end only one person would get elected president, that change would still encourage the growth of third-party candidacies; for it would provide more visible evidence of their strength, which can encourage them. It also might serve as an example that would help legitimate changes in other electoral systems to make them less biased in favor of the two major parties in other elections. That in turn might mean that with a more robust and diverse party system reflecting more different types of view, more people would really feel represented, would feel that they have a real chance for a voice and an impact in our political system. And more people might think it worthwhile to engage in democratic politics; and then more people might become more committed to democratic values and to the actual realization of them; and more people might get upset if the electorally-registered democratic will were thwarted on occasion and if some citizens were locked out of democratic participation altogether.

If we can't get that kind of more radical reform to affirm and strengthen the reality of our system's professed commitments to democracy, let us at a minimum try to do so by insuring that all citizens gain a constitutional right to vote for president of the United States. What real democratic reason is there not to do so?

CARALEY: Thank you. Linda, do you want to weigh in?

GREENHOUSE:* Yes. I think Bush against Gore was certainly a wake-up call for those of us not in the scholarly community. Until Bush against Gore, I had no idea that I didn't have a direct right to vote. And it's possible, if people reflect back on it, that even short of a constitutional amendment there may be a way of addressing the problem. Remember what happened in Florida, how close the legislature came to trumping the peoples' right to vote. I don't know if it's a practical idea to have debates in state legislatures to bring the popular democracy point to the fore and achieve by legislation, state by state, the kind of guarantee that would be achieved nationwide by an amendment.

Let me make one micropoint also in focusing on the felon issue. One other kind of glaring hole in the franchise that was brought to the fore in Florida was the question of military ballots. If you remember, that was a very tricky issue because there was a lot of game-playing among the Florida electoral apparatus as to how closely to look at the time stamp on the absentee ballots that had been mailed from ships beyond the deadline. There was a debate in the Gore camp over whether to challenge ballots that were, at least facially, invalid. Then the Gore people decided at the end of the day not to do that, because they didn't want to look unfriendly to the military. But that's something that I think, if we're talking national picture, certainly has to be regularized and taken out of the hands of partisan state electoral officials.

CARALEY: But if the state legislatures do it, why can't they change their minds and undo it whenever they feel like it?

GREENHOUSE: I think Alex's point about harmonizing the Constitution with prevailing political and social values also applies there. Once the issue is joined and people are aware of what the issue is, as few were until now, I think it would be, as a political matter, impossible for legislatures to take back this sleeping giant's power.

CARALEY: But the Florida state legislature was about to do just that, was about to choose the Bush electors on its own if Gore came out ahead in the popular vote. So they were going to take back the power to choose electors from the people.

GREENHOUSE: Sure. But what I was proposing would be state-by-state legislation where there would be a state law in the exercise of the legislature's federal constitutional power to determine this. The legislature would give up its power and make it clear that there's no set of circumstances under which what was about to happen in Florida would happen.

* Linda Greenhouse is a Pulitzer Prize-winning Supreme Court correspondent for the *New York Times*.

KEYSSAR: Where do you see the resistance to a federal constitutional amendment coming from?

GREENHOUSE: The problem I see with a constitutional amendment is that it would get very complicated and very encrusted with the wish lists of other groups. I mean, whether we get back to the term limits debate, although that moment, I guess, seems to have passed. Who knows what would come out of the woodwork once there's an amendment process on the floor? A few years ago, when there were lots of various amendments floating around, a couple of blue-ribbon panels were convened. The Century Foundation had one to warn of the dangers in this kind of climate, of quote, "tinkering with the Constitution." I can see some things getting encrusted and more complicated than we'd like to deal with.

SMITH: That would have been an argument against the Fifteenth Amendment and against enfranchising women as well, though, which were both attempted at some degree at the state level.

POMPER:* There's something about this discussion that seems to me off in space. If you take it in its bold terms that there should be a constitutional amendment or there should be language that says Americans should vote for president, or should have the right to vote directly for president, that seems like an obvious proposal. If you put it straight on the table and nothing else, nobody would disagree with it, nobody would have the nerve to disagree with it politically. But, of course, it wouldn't just be that, and Rogers Smith illustrates exactly what would happen. He said, well this is okay, but what I really want is proportional representation of the electoral votes or proportional representation of the direct popular vote; somebody else will want the district system; Arthur Schlesinger will want his particular kind of hybrid. And so, it will not be just that. An amendment that says "the right of the American people to vote for electors shall not be infringed," raises the question, "Who are the American people?" Are they under 18 years old? Are they alien permanent residents? Particularly, are they felons? It seems to me that if you want to do something serious, you ought to, and you don't need a constitutional amendment for this. You need legislation to deal with the largest disenfranchisement in the country.

There are four million Americans who could not vote in 2000 because of the exclusion of exfelons. In Florida, a couple of sociologists have done a wonderful study. In Florida, if exfelons had been enfranchised, Gore would have carried the state by 71,000 votes. We wouldn't have had this conference. You wouldn't have had the grant from Carnegie.

CARALEY: Yes, Gerry. Since I'm the convener I guess I should talk to that. Without some change, I think you could have a political crisis. If this were in the middle of a war, as the elections of 1864 and 1944 were, and

* Gerald Pomper is the Board of Governors Professor Emeritus of Political Science at the Eagleton Institute of Politics at Rutgers University.

one person seemed to be getting the popular vote plurality and there was skullduggery in the ballots in another state headed by a governor who's the brother of the opposing presidential candidate, it wouldn't be accepted as readily as it got accepted when we thought that there was really no difference between Bush and Gore.

KEYSSAR: In any case, I think the felon issue is what is the setting or context. How do you want to bring that issue up into a public debate? It would seem to me, and I'm not saying there are no other ways, that bringing it up in the context of a statement of universal rights may be a good way to do it. The second point is that in many states, you could not do it just by legislation. These things are in state constitutions. The felony exclusions are in state constitutions. You could not simply do it by legislation.

POMPER: May I ask you or Linda Greenhouse a question? There was something I dimly remember in 2000. The Florida constitution says something about "the people shall determine all offices" or something like that. And that raises the prospect that if the Florida legislature had hijacked the election, they might have been sued by somebody, which of course would have gone to the Florida Supreme Court and then ultimately the U.S. Supreme Court. But maybe this problem doesn't even exist in Florida.

KEYSSAR: Florida's constitution opens with a very strong declaration, an affirmation of the right to vote for all public offices. As I recall, that was part of what Larry Tribe was trying to use as the tie breaker in interpreting conflicting statutes: he pointed toward this strong Florida right to vote to which Supreme Court Justice Antonin Scalia responded, "But there is no right to vote under Article II, section I," which trumps the state constitution. I think that's the way that argument evolved.

CARALEY: What about something else? I would not prefer a straight national popular election of the president, because of psychological reasons. I voted for presidential candidates who most of the time lost elections, but they carried either New York, when I was voting in New York, or Connecticut, where I now vote. And that gives me a sense of "Okay, at least I helped carry my state." Am I the only one who gets any kind of gratification out of that? I see Bob Shapiro laughing.

SHAPIRO:* I haven't seen any public opinion data on that in particular. I think it's an interesting question. The question I had for you, Jim, was in framing this question about the amendment were you thinking in terms of broader issues of the definition of who the electorate is, who the voters are as opposed to simply dealing with problems of renegade state legislatures? Because one political solution here is just to think about this in normal incremental political terms and just focus on that as the issue and be silent on all the other kinds of things. With regard to felons, just one small footnote, as

* Robert Shapiro is professor of political science and chair of the Department of Political Science at Columbia University.

more elected officials and politicians go to jail, maybe they'll become more concerned about it.

RAKOVE:** I think this issue of the Florida legislature, or any legislature, being able to hijack an election really is a specious one. The Constitution is clear, and federal statutory law is clear, that electors have to be appointed within a certain time and then to vote on a certain day. Notwithstanding these guys, who I really regard as constitutional hookers, who told the Florida legislature that they could go ahead and appoint this slate of electors after 7 November, on the simple face of it that would be a blatantly unconstitutional and illegal action in terms of the text of the Constitution and the statute. So I think it's problematic to ground this proposal on the danger of the Florida scenario, which is unlikely to repeat itself, both in terms of the circumstances and in terms of the existing constitutional and legal norms.

What I think would be more interesting, Alex, and it's a point you develop in your book, is to think about the implications of stating a positive right to vote for the presidency as distinguished from all those amendments, which as you certainly argue in your book, have never been phrased in robust positive terms, but have simply involved the removal of prohibitions or restrictions. Thinking about the democratic implications of expressing a right to vote for the presidency in the most positive terms as possible may not solve the Puerto Rican problem or the problem of felons, but it would represent an interesting advance beyond the way in which these amendments have previously been drafted. This is an interesting idea fraught with all kinds of implications. I'm aware of all of the dangers that arise here. But it would be interesting to see a debate about the basis on which we disenfranchise felons, and also why Puerto Ricans are citizens but can't vote in presidential elections. I think most Americans would not realize Puerto Ricans really are citizens.

CARALEY: Well, they also don't have House members and they don't have Senate members.

PILDES:* I want to express a little skepticism about the constitutional route, because, Alex, when you say that the history of the federal government has been one of the expansion of the suffrage, we have to remember that there's a difference between the political and judicial branches of the federal government. I was reminded of this by a conversation with Linda this morning. Once you constitutionalize the issue, you're doing something other than nationalizing it; you're turning over control of that issue to the courts to a significant extent. And if you look at the history of judicial action with respect to the vote and democracy, it's a pretty mixed history. There is an expansive period of time, but it's been twenty years or so in American history, and there are lots of moments when courts have been very—and I think this is such a moment—aggressive in dampening down democratic processes through constitutional

** Jack Rakove is the Coe Professor of History and American Studies at Stanford University.

* Richard H. Pildes is professor of law at New York University School of Law.

law. I think it's quite easy to anticipate or predict that the courts will bring a kind of ideological conservative sensibility about changes to democracy.

This is going on internationally now. For example, the German Constitutional Court was asked whether the entry into the Maastricht Agreement by Germany violated the right to vote of German citizens. The argument was that there is a constitutional right to vote in the German Constitution. This is a dilution of sovereignty, and the German Court didn't say that this is not a question that the courts ought to address at all; they said that this is a serious issue. This could become problematic. Maastricht itself is not yet the point at which the right to vote has been diluted. But the whole idea that the courts would have anything to do with a judgment about the expansion of the European Union strikes me as a very mistaken path to go down.

Even historically, it's true that when we constitutionalize things like the Fourteenth Amendment, there's a conservative tendency, like the felon issue we're talking about. It becomes embedded as an area that states can continue to address through Section II of the Fourteenth Amendment. Women's suffrage gets taken off the table, in part by the adoption of the Fourteenth Amendment, because that's the first time the word "male" was inserted into the Constitution. Even with respect to the Fourteenth Amendment, there can be countervailing, conservatizing tendencies. When you have mass political movements for change, I think it's a much better way to change political process, because it allows a lot more flexibility and accommodation over time. It keeps issues in a political context, as opposed to licensing courts to address these kinds of issues.

ISSACHAROFF:* Usually for alphabetical reasons, I get to go before Rick and I don't like coming after him. I would say two things, and it follows up on what Rick says. Alex gave one and a half of those reasons already and he was right. I was going through my head and I was thinking *California Democratic Party v Jones*, *Shaw v Reno*, a number of cases where federal law has intervened to restrict the gambit of state political activity in areas where states gave greater latitude to political accommodations of the will of the majority than the federal courts were willing to read into the Constitution. I am not quite so confident that the federalization will push necessarily in the direction which you want it to push. Beyond that, my primary reaction is that there's always the tendency to fight the last fight and to view the last fight as being the most significant. But if you think about what is missing in the American context from the rights domain with regard to the franchise, I would argue that it's basically tinkering at the margins. It is true that the felon disenfranchisement issue is a significant one. It is true that Puerto Rico has all kinds of complications and that the District of Columbia has complications. But is that really where the main inquiry should be? I think this is a point that I make in my paper—if you think about the distortions of the electoral

* Samuel Issacharoff is the Harold R. Medina Professor in Procedural Jurisprudence at Columbia University Law School.

college in the last election, I don't think the rights claim is particularly salient. I don't think that, for example, in given the structure of the campaign where neither candidate campaigned nor spent money in New York or Texas, two of the three largest states, that the electoral results are very meaningful in terms of who actually won and who had more popular support. It's an artifact of the rules of the game, and if the rules had been changed, they would have campaigned differently. We have no confidence about how that would have come out. What is significant is that the winner-take-all feature of the electoral college division of the electors in each state, even if we have the electoral college and everything else, radically changes the terms of political discourse in this country.

Why in the world did we have an election about prescription drugs in 2000? It is impossible even to remember what the discussion was. And it's certainly impossible to remember why that should have any salience except that everybody knew that the election was going to turn on Florida and Pennsylvania, and those are numbers one and two in terms of elders in their population. So we ran an entire national campaign on what was the narrowest form of sectional interest. Now Rogers makes the point that the electoral college grew out of the sectional interests of the slave holders; we had a repeat of that, not at the rights domain but rather a structural distortion of what should be the way in which the Americans select the president. So I would suggest that the federal route is not necessarily the panacea that it's held out to be. It may be that focusing on this as a question of the expansion of the rights domain really misses the issue of what the actual effect of the electoral college is.

CARALEY: What you spoke about the electoral college requiring winner take all, you didn't mean to say that because not every state requires winner take all.

ISSACHAROFF: No, every state but two requires winner take all.

CARALEY: Right, but that's not in the Constitution.

ISSACHAROFF: No, it's not in the Constitution.

CARALEY: If my memory is correct, it was the Virginia legislature that established winner take all first. I think it was in 1796 so that John Adams would not get a single elector from Virginia. So it was to disenfranchise the minority. But I think basically I agree with you, because the other thing you didn't bring in, except inferentially, is the high cost of television advertising. Because Connecticut, Massachusetts, New York, New Jersey, the only states where I watched television, were certain as to how they would go, I didn't see a single ad for Gore or Bush. So we, now sitting in New York, are being ignored by presidential campaigns. The whole winner take all of the populous states was supposed to give them disportionately large influence by casting a large block of electoral votes to one candidate over the other. This kind of influence has evaporated, because the campaigns have to ration money. They don't have unlimited television money, and they ignore people in states that are deemed not to be in play but certain for one or another of the candidates.

SMITH: I think these are very important considerations. I don't disagree with you at all about the history and the Supreme Court's rule and all that. But, two things: one is that we have come to a point in the system in which constitutionalization is viewed as empowering the courts, but that shouldn't necessarily be the case. To some degree, it's an analytically separate problem if we have overly privileged the courts as opposed to other institutions and democratic politics in saying what the Constitution means. I don't think we should just embrace that feature of the contemporary system, and I agree there are problems with a constitutional rights route. I am most struck by the general lack of any political movement on any of these fronts that we're talking about, and if debating a constitutional amendment were a way to get debates going in democratic processes, that would be a good thing.

CARALEY: Let me try to sum up the thinking of our panel. Everyone believes that every American citizen should have the constitutional right to vote for presidential electors. Some didn't even realize that the Constitution does not now give such a right and that popular voting for electors is dependent on the actions of the various state legislatures. While a few of the colleagues preferred a nationwide, straight, popular election of the president, we did not discuss this with any depth, because everyone agreed that a constitutional amendment trying to eliminate the electoral vote system completely could never be adopted. There was also broad consensus, however, that electors as persons should be taken out of the system and that electoral votes should be assigned by a state according to the popular vote without any further human, discretionary intervention.

Even for this minor change of the system, various participants thought the wording of an amendment would not be easy, because the pro-democratic changes in the Constitution for presidential voting are all worded as prohibitions from depriving the right to vote on the basis of race, gender, or age above eighteen years. There is no language for affirmatively granting the right to vote. Also there was some concern that once a constitutional amendment is being considered, the whole system might be opened up. Anti- rather than pro-democratic language might find itself into the amendment. There was also concern over the denial by states of the right to vote to the substantial numbers of persons convicted of felonies.

We all realized that the Constitution itself does not provide for the winner-take-all system of allocating electoral votes that is used in forty-eight states and the District of Columbia. What the winner-take-all system does is to deny statewide minorities any influence in the outcome of the presidential election. Ordinary state or federal legislation could change that system, but there was no consensus on what should replace it: winner take all by congressional district or proportional vote allocation of electoral votes by congressional district or statewide. . . . Only the last variation would put all states "in play" and not have any written off before the general election campaigns even begin.

Thank you everybody.