

# Oklahoma Law Review

---

Volume 66 | Number 1

*Symposium: Legislative Issues in Election Law*

---

2013

## The Posterity Project: Developing a Method for Long-Term Political Reform

Edward B. Foley

*Ohio State University - Main Campus*, [foley.33@osu.edu](mailto:foley.33@osu.edu)

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Law and Politics Commons](#)

---

### Recommended Citation

Edward B. Foley, *The Posterity Project: Developing a Method for Long-Term Political Reform*, 66 OKLA. L. REV. 1 (2013).

This Introduction is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact [Law-LibraryDigitalCommons@ou.edu](mailto:Law-LibraryDigitalCommons@ou.edu).

# OKLAHOMA LAW REVIEW

---

VOLUME 66

FALL 2013

NUMBER 1

---

## THE POSTERITY PROJECT: DEVELOPING A METHOD FOR LONG-TERM POLITICAL REFORM

EDWARD B. FOLEY\*

The primary obstacle to improving political processes in the United States is what Heather Gerken has succinctly called “the here to there” problem.<sup>1</sup> Ideas abound for how to eliminate gerrymandering,<sup>2</sup> for example, or modernize voter registration databases,<sup>3</sup> but these ideas are difficult to implement because they face resistance from politicians whose short-term interests are to oppose them. Our existing political system, with its separation of powers and checks and balances, is famous for imposing hurdles designed to prevent one political party from enacting into law its particular vision of political reform just because it has captured a majority of seats in a single legislative chamber at any particular time. But as long as each of the two major political parties exercises an effective veto over the other’s reform agenda, and either is unwilling to compromise based on a calculation that it currently benefits from the status quo, then reform is

---

\* Chief Justice Thomas J. Moyer Professor for the Administration of Justice and the Rule of Law, Ohio State University Moritz College of Law.

This paper is based on a presentation given at the 2013 McAfee & Taft *Oklahoma Law Review* Symposium on Election Law, held at the University of Oklahoma College of Law, Norman, Oklahoma, on February 15, 2013. For discussions on this topic, I wish to especially thank Akhil Amar, Bruce Cain, Kathleen Clark, Josh Douglas, John Fortier, Heather Gerken, Steve Huefner, Mike Pitts, Nick Stephanopoulos, and Charles Stewart.

1. Heather K. Gerken, *Getting From Here to There in Election Reform*, 34 OKLA. CITY U. L. REV. 33, 33 (2009).

2. *See, e.g.*, Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012).

3. *See, e.g.*, S.B. 37, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013); *see also* PEW CTR. ON THE STATES, *INACCURATE, COSTLY, AND INEFFICIENT: EVIDENCE THAT AMERICA’S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE* (Feb. 2012), *available at* [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Pew\\_Upgrading\\_Voter\\_Registration.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Upgrading_Voter_Registration.pdf).

impossible—and this is true even when both parties would tacitly acknowledge that from the public’s perspective the existing political system contains defects in need of repair.

Aware of this problem, the Progressive Era (a time when pursuit of the public interest briefly was able to transcend the existing two-party system) invented the ballot initiative, a procedural device by which the populace would be able to bypass the conventional legislative process and take the reins of government into its own hands.<sup>4</sup> Theoretically, then, the people themselves should be able to use the ballot initiative to adopt a political reform proposal that they think desirable but which one political party blocks in the legislature.<sup>5</sup> Yet this theory has not worked so well in practice. To be sure, sometimes use of the initiative in this way is successful, as when independent-minded Governor Arnold Schwarzenegger of California urged the state’s voters in 2008 to adopt the creation of a nonpartisan redistricting commission.<sup>6</sup> But more often than not, such efforts fail because voters are skittish about adopting any initiative that receives vociferous opposition from either major party.<sup>7</sup> For example, in Ohio, redistricting reform measures on the ballot in 2005 and 2012 were defeated both times because the Republican Party loudly opposed them, and associated groups spent ample money to scare voters away from the proposals.<sup>8</sup> These defeats do not mean that Ohio voters favor gerrymandering. On the contrary, even in its opposition the Republican Party both times acknowledged the evil of gerrymandering; it argued, instead, that each reform proposal on the ballot was horribly flawed in its particular details and thus should be rejected in

---

4. See, e.g., RICHARD HOFSTADER, *THE AGE OF REFORM* (1955); see also DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 5-10 (1989).

5. See generally Tom Pryor, *A More Perfect Union? Democracy in the Age of Ballot Initiatives*, 97 *MINN. L. REV.* 1549 (2013) (introducing a symposium issue addressing the relationship between the theory and practice of direct democracy in the United States today).

6. Jennifer Steinhauer, *Plan on California Ballot for New Districting Panel*, *N.Y. TIMES*, Oct. 28, 2008, at A17.

7. According to the National Conference of State Legislatures, only 45% of ballot initiatives were successful in the decade from 2000 to 2010, and in 2012 the percentage was even lower. *2012 Ballot Measures: Election Results*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/ballot-measures-2012-homepage.aspx> (last visited Aug. 10, 2013). That national data supports the conventional wisdom that voters are more likely to vote “no” on a ballot initiative, especially one that has been subject to a large amount of negative campaign advertising.

8. Jim Siegel & Darrel Rowland, *\$16 Million Spent on Fight over Issue 2*, *COLUMBUS DISPATCH*, Dec. 15, 2012, at B1.

favor of an alternative solution to be developed later.<sup>9</sup> But some key Ohio Republicans are in no particular hurry to adopt that alternative, as their party currently controls the legislative process in the state and would benefit from retaining the power to draw redistricting maps that favor its candidates.<sup>10</sup>

Thus, whether because it lacks the education necessary to understand the issue of redistricting reform or otherwise, the citizenry has difficulty using the initiative process to adopt reform proposals that are strenuously opposed by sophisticated political elites. Moreover, the initiative process is not available for reforming federal rules that govern national politics. Only an amendment to the United States Constitution could change, for example, the antiquated and awkward requirement that the Vice President preside over the counting of electoral votes to choose the next President<sup>11</sup>—when the Vice President is often a presidential candidate (as Al Gore was in 2000, and Richard Nixon in 1960) and therefore has an inherent conflict of interest. Yet amending the Constitution is notoriously difficult and cannot be accomplished by means of a nationwide ballot initiative.<sup>12</sup> Consequently, even when the American people strongly and persistently want to adopt a particular national reform, they lack a method by which to effectuate their will. To take the most glaring example of this fact, for a half-century the American people have wanted to replace the Electoral College with direct election to the presidency.<sup>13</sup> Public opinions throughout this period have consistently reported this overwhelming popular sentiment, sometimes as high as 80% of those surveyed.<sup>14</sup> Yet the Electoral College has not been replaced. Even if one personally favors its retention, all should agree that

---

9. Joe Hallett, *Bennett to Seek Top GOP Post in January*, COLUMBUS DISPATCH, Dec. 1, 2012, at B1.

10. Andrew J. Tobias, *Redistricting Reform Stalls*, DAYTON DAILY NEWS, Mar. 10, 2013, at B1.

11. See U.S. CONST. amend. XII.

12. See *id.* art. V.

13. See Alexander Keyssar, *It's Time to Retire the Electoral College*, COGNOSCENTI (Nov. 6, 2012), <http://cognoscenti.wbur.org/2012/11/06/electoral-college-alex-keyssar>.

14. *Id.*; see also *Gallup Polls: Consistent Super-Majority Support for National Popular Vote*, FAIRVOTE, [http://archive.fairvote.org/electoral\\_college/Gallup\\_Polls.pdf](http://archive.fairvote.org/electoral_college/Gallup_Polls.pdf) (last visited Sept. 29, 2013). In Gallup's most recent survey, conducted after the 2012 election, over 60% of Republicans, Democrats, and independents said that they would vote for a law that would "do away with the Electoral College and base the election of the president on the total vote throughout the nation." Lydia Saad, *Americans Call for Term Limits, End to Electoral College*, GALLUP POLITICS (Jan. 18, 2013), <http://www.gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx>.

the situation is one in which the American people have been systematically frustrated in the achievement of their own sustained preference.

What is to be done? The only possible solution is to shift gears and adopt a long-term perspective. To invoke an idea that Professor Akhil Amar raises at the end of his new book,<sup>15</sup> we should create a bipartisan mechanism whereby the nation's contemporary political elites consider the pros and cons of potential political reforms, subject to the constraint that none of these proposals are to be implemented in the near term. Instead, if adopted, these proposals would become operative only in the long term—the very long term. Imagine a deliberative body whose reforms would take effect not immediately, or even in the following year, but instead far in the future, perhaps as long as a half-century later. The advantage of this approach, as Professor Amar explains, is that it would put the contemporary deliberators behind a Rawlsian “veil of ignorance,” whereby they are unable to make decisions to benefit their own self-interest, or even the interest of their own direct descendants as they cannot foresee the socioeconomic circumstances that their descendants will occupy.<sup>16</sup> This “veil of ignorance” is the only feasible way to induce contemporary political elites to set aside self-interest and act impartially on behalf of the public as a whole.

It might seem frustrating to have to wait fifty years to implement a reform that people today, if they set aside self-interest, would recognize as benefiting the public. But the basic point is that without the mechanism of long-term implementation delay, the reform will not be adopted at all. Waiting fifty years, then, is better than never.

In any event, the idea is worth serious consideration. Thus, the purpose of this essay is to consider more systematically what Professor Amar only mentioned very briefly at the end of his book.

### *I. The Idea of the Posterity Project*

Suppose Bill Clinton and George W. Bush, as our two most recent past Presidents, one from each of the two major parties, agreed to serve as co-chairs of a new Posterity Project designed to develop a series of specific amendments to the United States Constitution. (If the Posterity Project did

---

15. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 474-77 (2012).

16. *Id.* at 475 (citing JOHN RAWLS, *A THEORY OF JUSTICE* (1971)). Current political decision makers cannot even anticipate whether their own great-grandchildren will win the genetic lottery, as the risks of birth defects and other development diseases, like autism, are unpredictable enough that there is as much a chance of one's own family being afflicted by such misfortunes as there is that other families will be affected.

not get started until after the end of the Obama presidency, then Bush and Obama could serve as the co-chairs as the two immediate past Presidents, each from opposite political parties.) Upon submission of the amendments by the Posterity Project, Congress would vote on these constitutional amendments and, if they receive the necessary two-thirds vote in each house, they would be sent immediately to the States for ratification soon thereafter by three-fourths of the legislatures.<sup>17</sup> But a distinct feature of each constitutional amendment recommended by this Posterity Project and sent to the States by Congress would be an explicit provision that the amendment would not become effective until fifty years after formally becoming part of the Constitution upon ratification by the necessary three-quarters of the States.<sup>18</sup>

*A. The Composition of the Project*

Who should serve on this Posterity Project and how should it be structured? I suggest making this body resemble the Electoral College: the same number of members from each state as the state has presidential electors, for a total of 538 (counting the three presidential electors from the District of Columbia). The advantage of this approach is that it starts with the status quo, and therefore any changes that this body recommends will not be seen as prompted by the design of the body itself. To be sure, one might say that this design for the body biases it in favor of the status quo and against change. But there is no entirely neutral way to design the body, and if its purpose is to recommend changes with the aim of its recommendations having some chance for consideration by existing institutions, then it is better to start with a design that reflects existing institutions in this way. By contrast, a recommendation to eliminate the Electoral College by an entity that was designed in such a way that did not reflect the existing role of the States in presidential elections would likely be “dead on arrival.” Conversely, a design that reflected the existing arrangement but called for its elimination in fifty years might have a chance of receiving more respectful consideration.

It would be best if Congress appointed the 538 members of the Posterity Project’s deliberative assembly. That way, the Project would begin with Congress having already invested in the enterprise. Congress thus would be

---

17. See U.S. CONST. art. V.

18. Amending the United States Constitution with a provision that does not immediately take effect is not a new concept. See, e.g., *id.* amend. XX, § 5 (preventing part of the amendment from taking effect until “the 15th day of October following the [amendment’s] ratification”).

predisposed towards making it successful. But if not, the Posterity Project could get up and running on its own. As long as Presidents Clinton and Bush agreed to serve as co-chairs, they could jointly select the 538 members based on recommendations from staff and nominations from the public. The resulting selections would be inherently bipartisan, given the different party affiliations of the two co-chairs. (The same would be true if Presidents Bush and Obama were co-chairs; only if the Posterity Project were started after a time in which the two most recent past Presidents were from the same party would it be necessary to reach further back to an ex-President from the opposite party to serve as one of the two co-chairs.<sup>19</sup>)

The goal should be to appoint leading figures from each of the states: scientists, clergy, business executives, scholars, doctors, journalists, and so forth. Even some respected attorneys and politicians would be appropriate candidates, although the body should not be dominated by professional politicians. Rather, a mix of political insiders and outsiders would make it more reflective of the public at large.

But for this body, I would not recommend random selection from the entire public.<sup>20</sup> There will be enough opportunity for the public as a whole to weigh in on the merits of whatever long-term reforms this body recommends, as its recommendations would need to be approved by two-thirds of each house of Congress and three-fourths of the state legislatures before becoming officially adopted as constitutional amendments.<sup>21</sup> Rather, membership in the Posterity Project's deliberative assembly should be something of a meritocracy: the individuals appointed should be seen as worthy, based on their prior contributions to society, to participate in this process for making recommendations for the long-term improvement of our nation's system of government. To be sure, appointments should be made in such a way that the overall composition of the body reflects multiple facets of American diversity—including gender, race, and religion—and not just the geographic representation of all fifty states.

Because it is designed as an appointed rather than elected body, the Posterity Project's deliberative assembly should be populated with thoughtful members regardless of their ability to run for office under contemporary conditions of campaign finance and practices. This advantage would allow the body to consider whether adjustments should be made to

---

19. For example, had the Posterity Project started during the Clinton administration, Jimmy Carter would have been one of the two co-chairs along with George H.W. Bush.

20. *But see* Edward B. Foley, *The Separation of Electoral Powers*, 74 MONT. L. REV. 139 (2013).

21. *See supra* note 17 and accompanying text.

the rules that govern campaign finance and practices, without regard to whether the members as a group personally benefit from the existing rules.<sup>22</sup> True enough, this body would still need to convince Congress and the state legislatures of any proposed changes to these rules, and that might be a tall order even if the proposed changes would not take effect for fifty years. Nonetheless, for this project, it is better to start with a group of well-respected public figures appointed for the task of making long-term recommendations, rather than electing delegates to the assembly using existing electoral procedures. But to give this appointed body the kind of public respect and stature it would need to be successful, it would be necessary that many of its members are well-known to the public and considered worthy of this enterprise. For example, one can imagine public figures like Colin Powell and Sandra Day O'Connor as the kind of candidates that are considered for this body. Moreover, a primary reason for making Presidents Clinton and Bush the co-chairs is their instantly recognized level of gravitas, as the nation's two most recent ex-Presidents, and thus worthy of leading this endeavor to improve the long-term civic health of our country.<sup>23</sup>

---

22. It is common knowledge, for example that some political figures and public intellectuals are more telegenic than others; a system of campaign spending that emphasizes thirty-second television spots obviously tends to favor these more telegenic individuals. Likewise, some individuals are simply better at making fundraising phone calls than others. Call it the "schmooze" factor, or whatever, but a regime that requires public leaders to make fundraising phone calls for four hours each day obviously favors those individuals with a special talent for this kind of fundraising activity. The key point then is to populate the Posterity Project with thoughtful individuals who will deliberate wisely about what long-term constitutional reforms would benefit the nation, without regard to whether they would make successful political candidates in an era when electoral politics is dominated by the need to raise huge sums of money to spend on thirty-second television ads.

23. Some might worry that 540 members, counting the two co-chairs, might be too large a group to conduct thoughtful deliberations on future political reforms. But the experts who have developed the science and art of "deliberative polling," including Professor James Fishkin (who initiated and developed this concept), maintain that high-quality deliberations can be conducted with up to 600 participants and, indeed, a group of this size permits the deliberative assembly to be more thoroughly representative of the polity as a whole (particularly when the polity itself is large, as the United States certainly is). See, e.g., Alice Siu, *Deliberative Polling*, PG EXCHANGE, [http://www.pgexchange.org/index.php?option=com\\_content&view=article&id=132&Itemid=121](http://www.pgexchange.org/index.php?option=com_content&view=article&id=132&Itemid=121) (click "How is it done?" tab) (last visited Aug. 11, 2013).



*B. The Structure of the Project's Deliberations*

For how long should the Posterity Project's assembly deliberate before submitting recommendations to Congress? On this point, there is a tradeoff. On the one hand, it would be better if the assembly had ample time with which to educate itself about the issues on which reforms might be proposed. Many of the potential topics for consideration—such as gerrymandering, the use of the filibuster in the Senate, the role of primary elections in fostering polarization in Congress, the currently chaotic process of presidential primaries, and campaign finance regulation—would benefit from years of careful study. Indeed, one could even call the project's assembly “the Posterity College” and think of its 538 members (plus two co-chairs) as receiving an extensive education on the issues relating to political reform before they undertake to decide what reforms to recommend. If time were not a scarce commodity, one could make membership in this Posterity College a full-time commitment for a year or even two.<sup>24</sup>

On the other hand, however, time is a precious resource, and it might be unrealistic to expect the kind of dignitaries one would wish to serve in this body to commit full-time to this project for a year or more. Even though the goal of the Posterity Project is to improve American government for the sake of the future—and thus anyone asked to serve would be inclined to do so out of a basic sense of patriotism (the members of the Posterity College might be looked upon by future generations as the modern moral equivalent of the original Founding Fathers)—it would be prudent to contemplate a less demanding time commitment. Perhaps the Posterity College could meet for one weekend per month for a year, with the expectation that members would do their “homework” between meetings, and then, when the body is ready to debate and vote on specific proposals, it could meet full-time for two weeks. If these meetings are well organized, taking place in attractive resort-type locations around the country—maybe Miami Beach in January and Aspen in July, for example—the members would not consider service to be too onerous. Indeed, they might be willing to set aside the whole month of August for the final set of debate and votes on specific proposals if these deliberations occurred in a place like Cape Cod or northern Michigan.

Should the Posterity College deliberate in secret or in public? The constitutional convention of 1787 in Philadelphia met behind closed doors,

---

24. Congress or, if necessary, the philanthropic community could pay the members adequate compensation for serving full-time over an extended period.

and many attribute its success (at least in part) to its ability to deliberate with candor.<sup>25</sup> Others also observe that the United States Supreme Court succeeds in part because of the privacy of its own deliberations and, more generally, that the increased demand for open meetings has the unfortunate effect of undercutting the ability of government officials to compromise and to explore constructive solutions to difficult problems.<sup>26</sup> Nonetheless, current political culture makes it unrealistic to think that this body could operate entirely in secret. Instead, perhaps it would be possible for the Posterity College to have a series of both public and private sessions. Some of the earliest sessions, when the College's members are first learning about the issues on which they will deliberate, would be ones most suitable to being conducted in public; that way, interested members of the public could join in the learning process and perhaps contribute their own ideas for the College's consideration. But when it gets to the point where the College begins debating some specific proposals, perhaps it could go into a set of private sessions so that members feel free to express opinions without those opinions immediately becoming matters of public record. Yet when it comes time for the College to hold its final debates and votes on the recommendations it will adopt, it could reemerge into public view so that the public could hear the considered arguments for and against the items to be voted upon. Just as the Supreme Court releases written opinions after its private deliberations, so too the Posterity College could offer public reasons for its recommendations after the opportunity for some behind-closed-doors discussion of these matters.

Should the Posterity College itself operate according to the principle of majority rule? Or, instead, should it take a supermajority of its members to adopt a formal recommendation to submit to Congress? This question is a difficult one. Arguably, majority rule is the most straightforward expression of democratic principles because a minority should not be entitled to defeat the considered judgment of a majority. But to become constitutional amendments, the Posterity College's recommendations will need to receive approval of two-thirds of each house of Congress. Therefore, it makes sense to require any proposal to receive the same level of support from the Posterity College. Any measure that did not receive two-thirds support of

---

25. See, e.g., RICHARD BEEMAN, *PLAIN, HONEST MEN* 83 (2009) (quoting James Madison's subsequent reflection that "no Constitution would ever have been adopted by the convention if the debates had been public").

26. Professor Bruce Cain, for one, makes this argument in a forthcoming book, to be published by Cambridge University Press. See BRUCE E. CAIN, *FIXING AMERICAN DEMOCRACY: THE QUANDARIES OF POLITICAL REFORM* (forthcoming).

the Posterity College would be immediately suspicious upon its arrival in Congress. Moreover, as a deliberative assembly tasked with the responsibility for making recommendations on constitutional amendments that would take effect a half-century later, the Posterity College should strive for measures that receive much more of a consensus than merely bare majority support. While it would be unreasonable to expect unanimity in a body having a total of 540 members, counting its two co-chairs, it is not too much to ask that any of its specific recommendations receive the assent of two-thirds of its members. Thus, the affirmative vote of at least 360 members should be required for the Posterity College to formally send a specific proposed constitutional amendment to Congress.<sup>27</sup>

## *II. The Agenda of the Posterity Project*

Assuming that the Posterity College actually convened, what should be its agenda? It would be entitled to pursue any topic that concerns potential long-term constitutional reform; thus, its agenda cannot be identified completely in advance. Nonetheless, what follows is a list of topics that I would wish it to consider.

### *A. Congressional Redistricting*

Instead of giving state governments the power to draw district lines for seats in the United States House of Representatives, the Constitution should be amended to put this power into the hands of a national nonpartisan redistricting commission. The specific details of the commission would be worked out during the Posterity College's deliberations, but the essential

---

27. Expressed this way, the numerical assent requirement would treat any absent or abstaining members as negative votes. Alternatively, the two-thirds rule could be expressed in terms of members present and voting, subject to a quorum requirement—for example, if 360 members were necessary for a quorum, then 240 votes, or two-thirds of two-thirds, would be the minimum by which a proposal could be adopted by the body. I am inclined toward the stricter standard because all members should be expected to attend all meetings, and the whole point of the two-thirds requirement is to show the widespread support for any proposed recommendation. But I could likely be persuaded that two-thirds of the group that actually shows up to participate in the final debate and to vote is an adequate demonstration of consensus assuming that the quorum requirement is deemed strict enough.

If the quorum requirement were 75%, then two-thirds of a quorum would be 50% of the entire body. Therefore, one could adopt an “absolute majority” as the voting rule—in other words, a majority of all members, rather than just a majority of members present and voting—and achieve essentially the same effect as a two-thirds voting requirement coupled with a 75% quorum requirement. Still, I lean toward an “absolute two-thirds” voting requirement—in other words, two-thirds of the entire body—with no separate quorum rule.

idea would be to guarantee an equal number of commissioners from the two major political parties with at least one tie-breaking member in case the commission became mired in partisan deadlock.

*B. The Replacement of the Electoral College with Direct Election of the President by a National Popular Vote*

I would propose that a presidential candidate must win a majority of ballots cast nationwide in the quadrennial general election, and thus if the highest vote-getter does not reach a majority (but has only a plurality of the votes cast), then there would need to be a runoff between the top-two finishers. But instant-runoff voting is an alternative worth considering, as it avoids the necessity of voters showing up for a separate, later runoff—when turnout is likely to be lower.<sup>28</sup> The Posterity College might reach the judgment that a half-century is enough time for the public to become sufficiently educated about how instant runoff voting works to become comfortable using it for presidential elections.

Either way, the Posterity College would need to consider how a national popular vote for President would be administered. I favor creating a national nonpartisan election commission for this purpose. It could be the same commission that conducts congressional redistricting. It could piggyback on the conduct of election administration in the states, rather than setting up an entirely separate election administrative apparatus. In other words, it could rely on state and local officials to administer the casting and counting of ballots, and thus it would receive vote totals from the states to aggregate into a single national result. But it could set national standards for the proper administration of presidential (and congressional) elections—and could further require state and local officials to comply with those national standards or else be subject to replacement or other remedial measures. Furthermore, this national election commission could be empowered to conduct a recount of any presidential election, or runoff, that falls within a certain specified margin, as well as to resolve any ballot-counting disputes raised by any presidential candidate.

Thus, part of any proposed constitutional amendment to eliminate the Electoral College would also eliminate the current provisions of the Twelfth Amendment that call for the delivery of each state's electoral votes to the Vice President to be opened and counted in a joint session of the Senate and

---

28. See generally Michael Lewyn, *Two Cheers for Instant Runoff Voting*, 6 PHOENIX L. REV. 117 (2012); Brian P. Marron, *One Person, One Vote, Several Elections?: Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343 (2004).

House of Representatives.<sup>29</sup> Instead, certified popular vote totals from each state would be sent to the national nonpartisan election commission, which would have the power to certify the national popular vote results and resolve any controversies pertaining thereto, and thus also have the attendant power to declare the official winner of the presidential election.<sup>30</sup> To avoid any confusion, the Constitution would have to also make clear that neither Congress nor the Judiciary has any authority to intervene with the nonpartisan commission in its determination of the winner of a presidential election.

### *C. Presidential Primary Elections*

The Posterity College should also consider the way in which presidential candidates are nominated and thus qualify to appear on the ballot. Rather than the current process, in which states trip over themselves to hold earlier and earlier primaries and caucuses, the Constitution instead could empower the nonpartisan commission to set up a series of ten primary dates, with five states holding primaries on each date (perhaps one day each fortnight for an eighteen-week calendar from the first day of primary voting to the last). The states could be distributed among the ten dates in such a way that there is an appropriate regional balance on each date, and the sequencing of dates could be done to permit smaller states to come before larger ones, so that candidates have a chance to build support in smaller media markets before facing the challenges of competing before much larger audiences. The rules would need to be written in such a way that political parties were encouraged, but not required, to participate in this primary process; for example, participating parties could be guaranteed a spot on the general election ballot, whereas nonparticipating parties would need to meet some sort of signature requirement (or other measure of adequate support) in order for their candidates to appear on the ballot.<sup>31</sup>

It would be necessary to consider, moreover, exactly what the vote-counting rule should be to determine a winner of the primary process. Would it be simply a national plurality of votes cast for any candidate seeking a particular party's nomination (with that candidate being

---

29. U.S. CONST. amend. XII.

30. The new constitutional provisions must also assure that the commission has enough time between the close of the polls and the inauguration of the new President to conduct any needed audit or other investigation of the returns to assure the nation of the accuracy and integrity of the results.

31. Independent candidates, unaffiliated with any party, would also need to satisfy a signature or comparable requirement.

designated as the party's nominee on the general election ballot)? Or, instead, should there be some more complicated formula by which a candidate would receive bonus points for winning a certain number of states or congressional districts? I favor the simpler formula, as long as the schedule of presidential primaries is regionally balanced so that candidates have to compete in all states in order to win the most votes nationally. But reasonable arguments can be advanced for alternative formulas, and the Posterity College should be permitted to make whatever recommendation it thinks best, including leaving to the national nonpartisan election commission the authority to revise the voting rules for presidential primaries from time to time.

Likewise, it would be necessary to consider exactly who gets to vote for a particular party's candidates in a primary election. Do voters have to be members of the party?<sup>32</sup> Or may independent voters, unaffiliated with any political party, choose which party's primary they would like to participate in? Would voters in one party even be permitted to "cross over" and cast ballots in another party's primary? Or, would they at least have to "de-affiliate" from their prior party for the day? The Posterity College could be guided by the Supreme Court's previous jurisprudence relating to these questions,<sup>33</sup> although those judicial precedents would not bind the Posterity College because it would be considering a proposed constitutional amendment for the future.

#### *D. Congressional Primaries*

Though not involving the multi-state dynamics of the presidential primary process, congressional primaries raise some of the same issues as presidential primaries—for example, which voters get to participate in each party's primary—and are worthy of the Posterity College's consideration. Moreover, if the Posterity College proposed instant runoff voting for congressional elections, it would change the role that primary elections play in the overall electoral process. No longer would winning a party's primary in a "safe" congressional district give a candidate reasonable assurance of winning the general election. Instead, the possibility would exist that a centrist candidate, who could not win the party's primary, would be able to prevail in the instant runoff voting system.<sup>34</sup> Although I hesitate to say that

---

32. Furthermore, by what date must a voter be a member of the party? Would the date of the primary itself suffice? And by what standard would party membership be determined?

33. See, e.g., *Clingman v. Beaver*, 544 U.S. 581, 589-98 (2005) (collecting cases).

34. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 303-04 (2011).

the Posterity College definitely should recommend instant runoff voting for congressional elections—the Posterity College instead should be open to various proposals designed to improve congressional elections—the current concerns about hyperpolarization in Congress and the evidence that the current primary process is a major contributing factor are reasons that some such reform measures should be high on the Posterity College’s agenda.

*E. An Explicitly Recognized Constitutional Right to Vote*

It is often observed that the United States Constitution does not expressly guarantee citizens the right to vote but instead only protects the franchise from certain specified forms of discrimination.<sup>35</sup> Filling this gap need not be merely symbolic. Instead, the national nonpartisan election commission could be empowered to promulgate rules protecting each citizen’s right to vote.<sup>36</sup> Indeed, the Constitution could specify that the polls must be open for an adequate amount of time to give each citizen a reasonable chance to cast a ballot, a provision which would go a long way to eliminating the exclusivity of voting only on a single Tuesday.<sup>37</sup> The Constitution could also guarantee each voter’s right to a secret ballot, free from coercion or undue influence, and thus provide a predicate for giving the nonpartisan election commission authority to take steps to reduce the risk of absentee ballot improprieties. Likewise, the commission could have the power to adopt voter registration rules and voter identification procedures that collectively provide a reasonable effort at assuring that all eligible voters, but only eligible voters, have a fair opportunity to cast a ballot in each election.

*F. The Role of the United States Senate in Enacting National Legislation*

Turning to a potentially much more controversial topic, but one that deserve a place on the Posterity College’s agenda, the question arises of

---

35. See, e.g., Joshua A. Douglas, *Is The Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 144-46 (2008); see also Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2234762](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2234762).

36. See, e.g., Richard L. Hasen, *End the Voting Wars: Take Our Elections Out of the Hands of the Partisan and the Incompetent*, SLATE: THE HIVE (June 13, 2012, 6:09 PM), <http://hive.slate.com/hive/how-can-we-fix-constitution/article/end-the-voting-wars>; see also Heather Gerken, *The Missing Right to Vote: What We’d Get from Amending the Constitution to Guarantee It*, SLATE: THE HIVE (June 13, 2012, 10:48 PM), <http://hive.slate.com/hive/how-can-we-fix-constitution/article/the-missing-right-to-vote>.

37. See WHY TUESDAY?, <http://www.whytuesday.org/> (last visited Aug. 26, 2013); see also 2 U.S.C. §§ 1, 7 (2012); 3 U.S.C. § 1 (2012).

how much power the United States Senate should have to defeat legislation supported by both the House of Representatives and the President, given how geographically skewed the Senate is in favor of less populous states. As Adam Liptak recently observed in *The New York Times*, this geographic skew is much greater today than it was at the time the Constitution was originally adopted, and of course the nation is much more economically and culturally integrated than it was back then.<sup>38</sup> Thus, it is reasonable to ask whether fifty years from now the small states should still be able to use their power in the Senate to block legislation supported by a large majority of the American people, as represented both by the House and the President.

It is true that the small states cannot be denied their “equal suffrage” in the Senate—not even by a constitutional amendment. As Article V of the Constitution explicitly stipulates, each State must be willing to give up its equal voting power in the Senate in order to change the Constitution in this way.<sup>39</sup> But Wyoming or Alaska is unlikely to agree to give up this power, and thus there is no point in the Posternity College attempting to propose a constitutional amendment to achieve this result.

But instead, without depriving any state of its two Senators, what if the Constitution was amended to change the role that the Senate plays in the process of adopting national legislation? I do not think the role of the Senate could, or should, be eliminated completely. In other words, I do not think the Senate could, or should, become merely advisory. But suppose a proposed constitutional amendment would provide that a bill could become law, without an affirmative majority of the Senate, if passed by two-thirds of the House of Representatives and signed by the President—unless, within ten days of receiving the President’s signature, two-thirds of the Senate voted against the bill, in which case it would not become law. Although this proposal would significantly change the role that the Senate plays in the adoption of national legislation—giving the House and President the opportunity to pass a law without Senate approval—the proposal would not be so fundamentally out of step with the overall design of the original Constitution, including Article V, that the Supreme Court should feel authorized to invalidate this constitutional amendment even if it

---

38. Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N. Y. TIMES, <http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html> (last visited Aug. 14, 2013).

39. U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).



were approved by two-thirds of each house and three-fourths of the state legislatures.

Consequently, I think the Posterity College would be warranted in taking up consideration of this, or some similar measure, designed to alter—but not abolish—the role of the Senate in national government for the sake of the future.

### *G. Campaign Finance*

Also extremely controversial, and unlikely to win the necessary bipartisan support to achieve adoption by the Posterity College (much less the process for securing a constitutional amendment) even considering that implementation would be delayed for fifty years, would be any attempt to overturn *Citizens United* and other interpretations of the First Amendment that protect campaign spending from government regulation.<sup>40</sup> Supporters of *Citizens United* think that the First Amendment principles on which it and related decisions are based reflect timeless verities and are not merely transient rulings to be repudiated subsequently.<sup>41</sup> A better strategy would be to advocate that the Posterity College recommend a proposal for some novel approach to public financing of presidential and congressional campaigns without prohibiting ancillary private financing. For example, the idea of a voucher that citizens could use to support the candidates of their choice would be a decentralized mechanism that could provide seed capital for candidates attempting to get off the ground.<sup>42</sup> Such an approach might be able to win over enough libertarians and conservatives concerned that the electoral process always remains appropriately competitive, even a half-century or more into the future.

### *H. Fixed Terms for Supreme Court Justices*

Linda Greenhouse has written that, despite her initial instincts, she favors a constitutional amendment that would fix the tenure of each Supreme Court Justice to a single eighteen-year term.<sup>43</sup> I share her sentiment, and for

---

40. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365-66 (2010).

41. Bradley A. Smith, *Newsflash: First Amendment Upheld*, WALL ST. J. (Jan. 22, 2010, 6:53 PM), <http://online.wsj.com/article/SB10001424052748704509704575019112172931620.html>.

42. Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 5-6 (1996); cf. Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1206 (1994).

43. Linda Greenhouse, *The 18-Year Bench*, SLATE: THE HIVE (June 7, 2012, 10:08 PM), <http://hive.slate.com/hive/how-can-we-fix-constitution/article/the-18-year-bench>.

the same reason: the replacement of Justices with new appointees should be more predictable and not so susceptible to strategic calculations.<sup>44</sup> True, a Justice might be tempted to resign after only fifteen years, rather than serving the full eighteen, if the Justice fears that the next presidential election will be won by an objectionable candidate. But that temptation could be averted by a rule providing that vacancies prior to the completion of a full term will be filled by temporary replacements entitled to serve only for the remainder of the uncompleted term. Rather than guessing when each Justice will leave the Court, it would be better to know that each President could be expected to appoint two new Justices during each four-year presidential term.

While contemplating this possible change, the Posterity College should also consider whether each Supreme Court appointment should require a two-thirds confirmation vote of the Senate. Presently, the risk of a filibuster hangs over a nominee, along with the debate about whether a filibuster would be procedurally appropriate (and, if so, according to what standard). A two-thirds confirmation requirement would reflect a constitutional judgment that Supreme Court nominees should be acceptable to both major political parties (or at least a wide swath of public opinion, in those rare circumstances in which one of the two major parties has become so uncompetitive to hold fewer than one-third of the seats in the Senate). Over time, constitutional law likely would become more moderate and stable, with major precedents less subject to frequent overrulings as currently occurs when the composition of the Court lurches back and forth between the control of one side or the other.

#### *I. Changing the Procedures for Constitutional Amendments*

One of the most useful functions the Posterity College could serve would be to recommend a constitutional amendment that would update the procedures for adopting new constitutional amendments. No one should want the process to become too easy; but it is reasonable to ask whether the process has become too difficult. Although the nation is governed by the same requirements as those set forth in the original Constitution, securing ratification of thirty-eight states is procedurally more burdensome than securing the ratification of ten.

Without eliminating the current methods of amending the Constitution, it would be possible to add a new method. For example, Congress could be entitled to put a national referendum on the ballot. Perhaps it should take a

---

44. *Id.*

two-thirds vote of the entire national electorate for the provisions presented in such a referendum to be added to the Constitution. Or, as some have suggested, perhaps it should be necessary for the electorate to approve the same referendum in two successive presidential elections, in order to demonstrate persistent (and not merely fleeting) support for the measure.<sup>45</sup> Alternatively, there could be some complicated formula to require that enough voters in enough states approve the measure so that (for example) large populations on both coasts do not override the legitimate interests of the more sparsely populated Great Plains and Mountain states. The Posterity College could constructively deliberate the pros and cons of these various alternatives and make whatever recommendation it thinks best for the long-term future of the nation.<sup>46</sup>

### *III. Some Concluding Observations*

It is possible that the Posterity College could recommend congressional statutes as well as constitutional amendments. But because none of its recommendations take effect for fifty years, it seems a little odd to enact an ordinary piece of statutory legislation that would wait a half-century before implementation. Rather, the whole concept of the Posterity Project is to consider fundamental long-term reforms designed to last for generations, and any such reform would be more suitable to adopt as a constitutional amendment; this is true even if Congress would be empowered to enact the same reform by means of a conventional statute.

---

45. 2 BRUCE ACKERMAN, *WE THE PEOPLE* 415 (1998).

46. Once one of the Posterity College's proposals is adopted by a constitutional amendment according to the current requirements of Article V, it could not be undone by an ordinary act of Congress even during the fifty-year period prior to its taking effect. *See* U.S. CONST. art. V. Instead, a new constitutional amendment would be necessary to repeal the Posterity College's adopted proposal. This necessity would apply even if, forty years down the road, a large number of Americans did not want the proposal to take effect in ten years. But in this respect the Posterity College's proposals would be no different than any other constitutional amendment under the current rules of Article V. Moreover, if the Posterity College were successful in recommending a less rigorous method of constitutional amendment, once that proposal goes into effect fifty years into the future, then opponents of any other of the Posterity College's adopted proposals could take advantage of the more lenient method in an effort to undo it. (Obviously, any of the Posterity College's proposals that are subsequently determined to be misguided by an overwhelming consensus of public opinion, in light of changed circumstances fifty years into the future, could be undone even with the currently rigorous method of constitutional amendment—in the same way that Prohibition was repealed once it was widely seen as misguided. *See id.* amend. XXI, § 1.)

But if the Posterity College is to confine itself to recommending constitutional amendments, why not just make it a constitutional convention under Article V, and have its recommendations sent directly to the States for ratification (rather than requiring them to be approved by two-thirds of the Senate and the House before sending them to the States)? This alternative approach would be possible under Article V, provided that two-thirds of the state legislatures called for the creation of a Posterity Convention.<sup>47</sup>

But this alternative approach raises potential issues that likely are more trouble than they are worth. For one thing, would it be possible to organize the convention-calling process under Article V to establish in advance that Presidents Bill Clinton and George W. Bush would serve as co-chairs of the convention? Likewise, would it be possible under Article V that the members of the convention would be appointed by these two co-chairs, or even appointed by Congress, rather than elected by the populace in some manner? Similarly, once a convention was established, would it be possible to confine its function to proposing amendments that would not take effect for fifty years after ratification? Instead, would not a convention established under the method set forth in Article V feel entitled to propose amendments to take effect immediately, thereby clouding the distinctive purpose of the Posterity Project and arguably undermining the spirit of the enterprise (an agreement to consider in good faith proposals to be adopted much later in the future, in exchange for a refusal to attempt to implement any of the proposed changes immediately)? Since the Philadelphia Convention of 1787 itself transgressed its original charter, which was merely to propose amendments to the Articles of Confederation, Americans are understandably wary of the idea of calling another constitutional convention—for fear that it, too, would become a runaway enterprise exceeding its original mandate.

Consequently, it seems safer and simpler to establish the Posterity College as an advisory body to Congress, which would retain the power under Article V to turn the Posterity College's recommendations into official constitutional amendments to be sent to the States for ratification. If Congress refused to adopt the Posterity College's recommendations, perhaps there would be impetus to call a constitutional convention in order to bypass Congress's recalcitrance. But it seems that first it would be worth giving Congress a chance to send to the States whatever recommendations the Posterity College, through its well-structured process, developed.

---

47. *See id.* art. V.

Conversely, just because a particular proposal was recommended by the Posterity College would not preclude it being considered for immediate adoption pursuant to a different process. In other words, suppose redistricting reform was recommended by the Posterity College, and a constitutional amendment was ratified that would implement this recommendation a half-century later. Imagine, then, that a decade into this fifty-year wait Congress decided to send to the States a new constitutional amendment that would adopt the same redistricting reform immediately. That option would be legally available. The Posterity Project thus does not preclude other avenues of constitutional reform. Rather, it is simply a separate mechanism altogether. But it is a mechanism worth trying because the conventional means of constitutional reform have not shown themselves to be efficacious recently.