AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Voting/One Person, One Vote

**Baten v. McMaster, No. 19-1297 (4th Cir. 2020)**

*Like most states have done since early in the nation’s history, South Carolina awards all of its presidential electors to a single candidate by what is known as a “unit rule.” Since the mid-nineteenth century, that has meant that the presidential candidate receiving the most votes in statewide balloting on election day receives the state’s entire electoral vote and the losing candidate receives no electoral votes from the state. The winner-take-all formula is embodied in state legislation under the federal Constitution’s directive that presidential electors be appointed by the state “in such Manner as the Legislature thereof may direct.” In recent years, South Carolina the Republican presidential candidate has typically won the majority of the statewide popular vote and received all of the state’s electoral votes.*

*A group of Democratic voters, including some black Democratic voters, challenged South Carolina’s election statute in federal district court, arguing that the unit rule violated their constitutional rights and the requirements of federal voting rights statutes on the grounds that their presidential votes were effectively meaningless in a safe Republican-majority state. The district court dismissed the suit. In a divided decision, the three-judge panel for the circuit court affirmed that decision, holding that the winner-takes-all formula is constitutionally valid.*

JUDGE NIEMEYER.

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. . . . [A]s it became understood that a unified slate of Electors would give the States the greatest influence in the Electoral College, States made the political decision that the selection of a “general ticket” of Electors pledged to the winning candidate —the winner-take-all approach —was advantageous. As of 1836, all States except South Carolina appointed their Electors by statewide popular vote. And following the Civil War, South Carolina followed suit. At the present time, every State but Maine and Nebraska awards all of its electoral votes to the presidential ticket that received a plurality of the votes statewide. And in Maine and Nebraska, two Electors are selected by statewide election and the remainder are selected by districts.

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For their main argument on appeal, the plaintiffs contend that South Carolina’s winner-take-all method of selecting presidential Electors violates the Equal Protection Clause. They explain that at the first stage of the two-step presidential election process, use of winner-take-all “dilutes votes” by not giving a voice to the political minority in selecting Electors and, at the second stage, the process “discards” the minority votes because only the Electors chosen by the plurality cast votes in the Electoral College. . . .

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As to the plaintiffs’ first argument, it cannot be disputed that each State has plenary authority to determine through its legislature how to appoint Electors. And the power includes the authority to require Electors to vote for the presidential ticket that received the plurality of votes in the State. As the Supreme Court noted recently,

Article II, § 1’s appointments power gives the States far-reaching authority over presidential electors. . . . [A] State can insist (as *Ray* [*v. Blair* (1952)] allowed) that the elector pledge to cast his Electoral College ballot for his party’s presidential nominee, *thus tracking the State’s popular vote*.

*Chiafalo v. Washington* (2020). Thus, nearly every State, including South Carolina, has validly exercised its authority in adopting a system for appointment of Electors that involves a statewide election for a slate of electors pledged to vote for the presidential ticket that wins the plurality vote — the very system that the plaintiffs contend is constitutionally barred because it fails to give effect to votes cast for other candidates. It is plaintiffs’ position, nonetheless, that a State *may not adopt*, as a political calculation, a plan that maximizes the State’s influence at the Electoral College election, as the winner-take-all plan does. And if the plaintiffs are correct, the only permissible methods of appointment would necessarily incorporate proportional or district-level allocation, methods that are not prescribed by the Constitution. The plaintiffs argue that only in this way may the State “give effect” to votes cast for the losing candidates.

The plaintiffs’ argument, however, runs headlong into the fundamental democratic principle that the one who receives the most votes wins, and the others lose, thus leaving them with no voice. While this argument is obviously untenable, it does not, of course, follow that an electoral mechanism can trample the fundamental electoral requirements that everyone entitled to vote be given the vote and that each vote be given equal weight. . . . Despite the plaintiffs’ argument to the contrary, no vote in the South Carolina system is diluted. Every qualified person gets one vote and each vote is counted equally in determining the final tally. In the end, the presidential ticket that receives the most votes wins. That the system results in both winners and losers is inherent in our electoral process and does not give rise to a constitutional violation. This was precisely the position articulated by the three-judge district court in *Williams v. Virginia State Board of Elections* (1969) while rejecting a challenge to the winner-take-all system, which we find persuasive. . . .

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. . . . The essential problem that they identify is one that we cannot remedy —the fact that they did not have enough votes to achieve the outcome they desired. As the Supreme Court has observed, “we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called ‘safe’ districts where the same party wins year after year.” *Whitcomb v. Chavis* (1971).

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[T]he central concern in *Gray v. Sanders* (1963)— the differential treatment of votes depending on the county in which they were cast — is not at issue here. All votes cast in presidential elections in South Carolina are treated the same, and the candidate with the most support across the State gets the State’s allocation of electoral votes in the Electoral College. Thus, there is no risk, as there was in *Gray*, that votes are treated differently based on geography.

The plaintiffs’ criticism of the unitary system — where a slate of Electors from a State votes for a single ticket — is moreover dubious in light of the fact that the Constitution itself explicitly embraces such an approach, albeit at a different stage of the electoral process. In addressing how a tie vote in the Electoral College is to be resolved, the Constitution provides that the election of the President is then committed to the House of Representatives, and in carrying out the election, “the votes [in the House] shall be taken by states, *the representation from each state having one vote*.” . . .

At bottom, South Carolina’s winner-take-all system “does not treat any particular group of [voters in the State] differently at all — it does not inherently favor or disfavor voters from any particular group (political or otherwise).” *Lyman v. Baker* (1st Cir. 2020). To be sure, when the plurality wins, it has the effect of rejecting the outcome sought by voters supporting minority parties. But that is the reality of any democratic system. Absent some invidious discrimination that infects the process, it is difficult to comprehend a challenge to the various roles exercised in the selection of a President that does not also challenge the Constitution itself. . . .

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*Affirmed*.

JUDGE WYNN, dissenting.

This matter arises from one simple yet remarkable fact: In every presidential election since 1980, the votes by South Carolinians for Democratic presidential candidates have been counted only for the purpose of being discarded because, despite representing a significant share of the state’s total votes, South Carolinians’ votes for Democratic candidates have translated into *no* votes in the Electoral College. Incredibly, South Carolina’s state-wide, winner-take-all method of selecting presidential electors has rendered more than 4 million votes for Democratic candidates over the last five presidential elections worthless.

. . . . At best, the majority opinion reflects a limited view of the judiciary’s role in addressing fairness in elections. Yet, the Electoral College itself is an undemocratic process. And states like South Carolina exacerbate its undemocratic aspects by allocating all of their presidential electors to the state-wide popular vote winner.

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The district court’s conclusion rested on the simple fact that *Williams*, like this case, involved a challenge to a state’s winner-take-all method of selecting presidential electors. But *Williams* was a summary affirmance by the Supreme Court without an opinion explaining its reasoning. Thus, we must consider the reach and controlling effect of that summary affirmance.

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[T]o assess the controlling effect of *Williams*, we must first identify the “precise issues presented and necessarily decided” in that case. And then, even if the precise issues presented and decided in *Williams* are again presented in this case, we must consider whether doctrinal developments since the *Williams* decision indicate that its controlling influence has waned.

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When courts—like the district court and like our sister circuits who have heard and rejected related cases—fail to seriously consider claims like those raised by Plaintiffs, they risk returning to Justice Frankfurter’s approach in *Colegrove v. Green* (1946)— turning a blind eye to constitutional wrongs out of fear of a political thicket. By stepping away from our responsibility to resolve the questions presented to us, we ignore that *Baker v. Carr* (1962)rejected that very approach and ushered in an era of more democratic governance. “When faced with such constitutional wrongs, courts must intervene: ‘It is emphatically the province and duty of the judicial department to say what the law is.’”

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Plaintiffs allege that here, by submerging their votes in the state-wide total and then allocating electors only on the basis of the state-wide plurality winner, South Carolina has subjected them to arbitrary and disparate treatment and created a system that is not equally open to participation by South Carolina’s Democratic voters. This is a viable claim of vote dilution in violation of the Fourteenth Amendment.

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For example, if South Carolina were to allocate its nine electors by district and draw those districts with population disparities that violated the one person, one vote principle, I suspect, and hope, courts would take a constitutional challenge to that system seriously. We should take Plaintiffs’ arguments just as seriously, and not excuse unconstitutional vote dilution simply on the basis that the Constitution—prior to the adoption of the Fourteenth Amendment—allocated electors on a state-by-state basis or gave each state one vote in the House following an Electoral College tie.

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South Carolina argues that states have used the winner-take-all system since the first presidential election and that today, 47 other states and the District of Columbia use a similar system. But the first presidential elections in this country were not governed by the Fourteenth Amendment and its Equal Protection Clause, which was not ratified until 1868. And as was demonstrated in *Baker v. Carr*, longstanding or widespread use of a particular election practice does not mean the practice complies with constitutional demands. . . .

Hundreds of thousands of South Carolinians vote in each presidential election, only to have their votes disregarded weeks later when South Carolina’s electors cast their votes for president—the only votes that matter for constitutional purposes. Through this system, these South Carolina voters are denied an “equally effective voice in the election” and their votes are not accorded equal value.

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