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Forward

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FORWARD

AUTHORED BY: KIMBERLY WEHLE¹

It is my great honor to pen a few words to commemorate the second year of the *American University Legislation & Policy Brief's* return. Since its reinstatement, the *Brief* has quickly become a vital part of the Washington College of Law's Program on Law and Government, in which I currently serve as a Visiting Fellow. Through its myriad activities, the *Brief* is also helping to fill a critical void in the academic and public dialogue around big picture issues in legislation and policy—one that is often drowned out by “breaking news” that floods the daily headlines.

It is no understatement to say that the separation of powers in America is in a dangerously precarious state right now, which is due in part to a lack of civic literacy regarding how the government actually works. For many years, constitutional debate in America has focused largely on the Bill of Rights, with scant attention paid to the tripartite structure's critical role in protecting individual rights. If pressed, many people articulate their understanding of constitutional rights as deriving from some version of natural law or automatic privileges of U.S. citizenship (not always realizing that constitutional rights extend to non-citizens too). Yet in fact, constitutional rights are only as vigorous as they are enforceable. The *Brief's* analyses of how government works at both the meta- and granular levels helps foster a wider dialogue around accountability in government. Without an accountable government, rights morph into mere gifts from a powerful benefactor—the very antithesis of government by “We the People.”

The current issue contains three articles that exemplify this range of discussion while delving into some of the thorniest and most controversial constitutional and ethical dilemmas of our time. In Eric T. Tollar and Spencer Kimball's, *A More Perfect Electoral College: Challenging Winner-Takes-All Provisions Under the Twelfth Amendment*, the authors puts a finger on a core problem with the Electoral College which, once again, few Americans are cognizant of: the winner-takes-all method of counting electoral votes. This problem is one of state law, not federal law—and fixing it would go a long way towards addressing the perceived problems with the Electoral College, which has put numerous presidents in office notwithstanding popular votes for competing candidates. In most states, if 51% of voters cast ballots for candidate X, all of that state's electoral votes go to candidate X, leaving candidate Y's voters effectively canceled for purposes of the final tally. If candidate X were to get only the number of electoral votes that are proportionate with her 51% voter draw, the results of the national Electoral College vote would more accurately reflect the popular vote. This can be achieved—if at all—through changes in state law, whereas abolishing the Electoral College would require a constitutional amendment. Mr. Tollar's and Mr. Kimball's piece addresses the winner-takes-all concept under the Twelfth Amendment, which was designed to remedy problems in the Electoral College's design in the original Constitution. (I'll leave it to readers to find out how.)

¹ Kimberly Wehle is a Visiting Professor of Law and Visiting Fellow in Law and Government at WCL and a Professor of Law at the University of Baltimore School of Law. She is also a legal analyst for CBS News and BBC World, and writes for Politico and the Atlantic, among other publications. She is author of the book *How to Read the Constitution—and Why* (Harper 2019) and the forthcoming *What You Need to Know About Voting—and Why* (Harper 2020).

In *The Great Holdup: How the Senate and the Filibuster Thwart Gun Legislation That Most Americans Want*, William G. Dauster tackles the Second Amendment from the standpoint of government structure: Why is it that the vast majority of Americans want gun legislation but nothing happens at the federal level? The problem underscores the dysfunction in Congress which, after all, is elected to represent constituent individuals—not gun manufacturers. The answer to this disconnect lies buried in congressional procedural rules, which are tethered neither to the Constitution’s text nor to any legislation passed by both Houses of Congress and signed into law by the president. This constitutional blind spot is one that few people recognize, yet it is central to addressing problems with how Congress works—or doesn’t. Mr. Dauster goes on to discuss similar issues relating to campaign finance and the filibuster—two additional reasons why Americans have become so disillusioned with government today.

Finally, in *Unfinished Business: How “Split Authority” Over U.S. Asylum Adjudications Highlights the Need to Relocate the Immigration Court System to the Department of Homeland Security*, Kirsten Bickelman shines a spotlight on the structure of the administrative state—the vast bureaucracy of federal government agencies within the president’s chain of command that establishes and implements policy on a massive scale—and one that dwarfs acts of Congress and adjudication of public law cases in federal courts combined. And again, she does it through the lens of a hot-button issue of our times—immigration—that is dividing much of the country in very painful ways.

The *Brief* is to be commended for not shying away from the hard stuff—and for doing it with a range of measured, thoughtful voices that include those of individuals who will no doubt be leading figures in the future of America. During my visit at WCL, I have been very fortunate to teach a seminar called Democracy at Risk, in which students will be writing op-eds on a range of public policy topics that the *American University Legislation & Policy Brief* has graciously agreed to publish on its blog. It is this kind of engagement with the most salient and important issues of our time—and through the words of our students—that makes this publication worth a very careful read. Enjoy.

Best Regards,

Kimberly Wehle