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## Free Agency: The Constitutionality Of Methods That Influence A Presidential Elector's Ability To Exercise Personal Judgment

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**FREE AGENCY:  
THE CONSTITUTIONALITY OF METHODS THAT  
INFLUENCE A PRESIDENTIAL ELECTOR'S ABILITY TO  
EXERCISE PERSONAL JUDGMENT**

*Zachary J. Shapiro\**

*When the Constitution of the United States went into effect on March 4, 1789, it established a new, hybrid form of government. As such, it created a complex and multifaceted process of electing our nation's chief executive. Most notably, it granted states the power to choose a slate of presidential electors to debate the qualifications of the candidates selected by the voters. In recent history, however, certain states have established laws that severely limit the ability of presidential electors to exercise their right to vote for the candidates that they believe to be the best choice to sit in the Oval Office. In doing so, the states have essentially transformed the Electoral College from being an independent body of elected representatives, chosen to debate the merits of presidential candidates, into a toothless middleman that serves little to no purpose. This Note explores the original intended function of the Electoral College by reviewing the works of prominent Framers such as James Madison and Alexander Hamilton. Furthermore, it shows how the states, through their own election laws, can restore the integrity and effectiveness of the institution, without the need of amending our founding document.*

INTRODUCTION

Every four years, on a Tuesday in November, registered voters in the United States head to their local polling stations.<sup>1</sup> When

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handed the ballot, individuals select the name of the candidate they would like to see in the Oval Office.<sup>2</sup> However, in actuality, their votes are cast for a presidential elector.<sup>3</sup> These presidential electors, once elected, are then sent to the Electoral College to vote on behalf of the people, much like a Congressional representative does on behalf of her constituency.<sup>4</sup> The Framers of the Constitution<sup>5</sup> intended for the electors to exercise their best judgment by allowing them to cast votes for *any* individual for the Office of the Presidency.<sup>6</sup>

Since the mid-1900s, there has been a growing trend among the states to limit the ability of these presidential electors from exercising personal judgment when casting their ballots.<sup>7</sup> To date,

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also like to thank my parents and grandparents for supporting me in in my academic goals. Lastly, I would like to thank Lesley Greenberg for her constant encouragement throughout the writing and editing process.

<sup>1</sup> See U.S. CONST. art. II, § 1, cl. 1 (stating that the President shall hold a term of office of four years); see generally *Election Day*, PUBLIC HOLIDAYS GLOBAL, <https://publicholidays.us/election-day/> (last visited Dec. 15, 2017) [hereinafter *Election Day*].

<sup>2</sup> See Cate Carrejo, *What Is A Short Ballot? The Presidential Election Isn't Really Decided By Who Wins The Popular Vote*, BUSTLE (Oct. 24, 2016), <https://www.bustle.com/articles/191096-what-is-a-short-ballot-the-election-isnt-really-decided-by-who-wins-the-popular-vote>.

<sup>3</sup> See generally U.S. CONST. amend. XII (outlining the method of how the presidential electors shall choose the President and the Vice President); see also Carrejo, *supra* note 2 (explaining the voting nuances of the electoral college).

<sup>4</sup> See Carrejo, *supra* note 2; see also U.S. CONST. art. II, cl. 2–3 (showing that the text of the Constitution established the “Electoral College” as if it were a convening legislature).

<sup>5</sup> See *Meet the Framers of the Constitution*, NATIONAL ARCHIVE, <https://www.archives.gov/founding-docs/founding-fathers> (last visited Dec. 29, 2017).

<sup>6</sup> See generally THE FEDERALIST NO. 68, at 351–55 (Alexander Hamilton) (George W. Carey & James McClellan ed., 2001) (showing Hamilton’s prediction that an unfit individual could be elected president, and that the presidential electors should be endowed with the power to correct that) [hereinafter THE FEDERALIST NO. 68].

<sup>7</sup> See generally CAL. ELEC. CODE § 6906 (West 1994); HAW. REV. STAT. § 14-28 (1970); MICH. COMP. LAWS § 168.47 (1954); N.C. GEN. STAT. § 163-212 (1967); OKLA. STAT. tit. 26, §§ 10-102; 10-109 (1974); 25 PA. CONS. STAT. § 2878 (1937); WIS. STAT. § 7.75 (1979) (showing that several states have opted to use faithless elector provisions to their election law over the past 80 years).

twenty-nine states and the District of Columbia have passed laws to curb a presidential elector's ability to do so.<sup>8</sup> For example, once a presidential elector is chosen to go the Electoral College, she may be required by the state to pledge support for the presidential nominee of the political party that selected her, in order for the result to be official.<sup>9</sup> To further emphasize this trend, Alabama has seen fit to allow political parties to first secure a loyalty pledge that effectively binds the presidential elector's vote to a predetermined outcome.<sup>10</sup> Laws that restrict an elected representative's right to vote are inconsistent with the principles of our republic,<sup>11</sup> as we the people send individuals to represent our choices not only in Congress,<sup>12</sup> but also in the various state legislatures, county governments, and city councils without such preconditions.<sup>13</sup> Presidential electors are akin to these types of elected representatives, as they are selected to serve in a convening legislature to choose on behalf of their constituencies.<sup>14</sup> While a state does have the right to construct its own election laws,<sup>15</sup> those laws may at no time conflict with the Constitution,<sup>16</sup> which does not allow binding the votes of elected representatives.<sup>17</sup> This Note argues that states that have enacted laws to restrict or coerce a presidential elector's discretion in casting her ballot have violated the will of the Framers, as well as Article II of the Constitution

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<sup>8</sup> See *The Electoral College*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 22, 2016), <http://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx> [hereinafter NCSL].

<sup>9</sup> See generally *Ray v. Blair*, 343 U.S. 214 (1952).

<sup>10</sup> See *id.* at 227.

<sup>11</sup> See THE FEDERALIST NO. 68, *supra* note 6, at 351–55 (Alexander Hamilton).

<sup>12</sup> See U.S. CONST. art. I, § 1-2 (showing that the legislative power of the United States would be vested in Congress).

<sup>13</sup> See generally N.Y. CONST. art. III, § 1 (vesting the legislative function in a bicameral legislature).

<sup>14</sup> See discussion *infra* Section I.A.

<sup>15</sup> See generally U.S. CONST. amend. X (stating that, “powers not delegated to [the federal government], nor prohibited by it to the States, are reserved for the States”).

<sup>16</sup> U.S. CONST. art. VI, cl. 2 (showing that the federal constitution is the supreme law of the land).

<sup>17</sup> See discussion *infra* Section III.B.

itself. While the goal of honoring the popular determination of the people in public elections is admirable, the remedy must comply with the Constitution.

Part I of this Note explains who presidential electors are and how they play a vital role in our election process. Part II reviews the insights of two prominent Framers regarding the need for a system of presidential electors, as well as the language creating the Electoral College itself. Part III is a discussion of the Supreme Court's decisions regarding the right to vote as well as its encounter with the Electoral College. Part IV categorizes the various states that seek to influence the abilities of presidential electors when casting their ballots. Part V determines the proper action a state may take to encourage presidential electors to vote a certain way, short of stripping their right to exercise personal choice. This Part also implements the solution into a contemporary hypothetical. Finally, this Note concludes by reemphasizing that while states may craft their election laws, at no time may they violate the Constitution.<sup>18</sup>

## I. THE PRESIDENTIAL ELECTORS

### A. *Who They Are and What They Do*

Presidential electors are the representatives elected every four years on the Tuesday after the first Monday in November, commonly known in the United States as Election Day.<sup>19</sup> To become a presidential elector, one must first be nominated to the ballot, a process which varies throughout the country.<sup>20</sup> To date, virtually every state in the Union has delegated the power of nominating presidential electors to political parties.<sup>21</sup> Some states employ the use of primaries, similar to our presidential primary

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<sup>18</sup> U.S. CONST. art. VI, cl. 2.

<sup>19</sup> See *Election Day*, *supra* note 1.

<sup>20</sup> See generally NCSL, *supra* note 8 (showing that when voters in each state select their presidential candidate, they are also casting a vote for the electors—a process which varies by state).

<sup>21</sup> See *id.* (showing that every state in the Union has delegated the process of selecting presidential electors to political parties).

system.<sup>22</sup> Other states nominate electors through party conventions.<sup>23</sup> Pennsylvania, in contrast, has individualized the process by allowing each presidential nominee to select their own presidential electors.<sup>24</sup>

Once elected, presidential electors convene on the “first Monday after the second Wednesday in December.”<sup>25</sup> However, they do not meet in a unified body, but in their respective states.<sup>26</sup> Essentially, they are fifty-one separately-convening legislatures.<sup>27</sup> While meeting in their respective states, they are charged with one constitutional duty: to elect the President and Vice President of the United States.<sup>28</sup>

### B. “Faithless Electors”

When a presidential elector casts her vote for an individual either from another party, or one that was not predetermined by her party, she is classified as a “faithless elector.” In our nation’s history, there have been 167 instances of “elector faithlessness” in

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<sup>22</sup> See *id.*; see generally Josh Putnam, *Everything You Need to Know About How the Presidential Primary Works*, WASH. POST (May 12, 2015), [https://www.washingtonpost.com/news/monkeycage/wp/2015/05/12/everything-you-need-to-know-about-how-the-presidential-primaryworks/?utm\\_term=.5613252752b3](https://www.washingtonpost.com/news/monkeycage/wp/2015/05/12/everything-you-need-to-know-about-how-the-presidential-primaryworks/?utm_term=.5613252752b3) (showing that throughout the spring of a presidential election year, registered voters in the various states take part in internal party elections to determine a candidate to run in the general election).

<sup>23</sup> See NCSL, *supra* note 8.

<sup>24</sup> See 25 PA. CONS. STAT. § 2878 (1937).

<sup>25</sup> *Five Things You Need to Know About the Electoral College*, CONST. CENTER (Oct. 17, 2016), <https://constitutioncenter.org/blog/five-things-you-need-to-know-about-the-electoral-college>.

<sup>26</sup> See Emmarie Huetteman, *The Electoral College Meets on Monday. Here’s What to Expect.*, N. Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/2016/12/18/us/politics/the-electoral-college-meets-monday-heres-what-to-expect.html>.

<sup>27</sup> See *id.*; see also U.S. CONST. amend. XXIII (granting the District of Columbia electoral votes that it would be entitled to if it were a state, but no more than the least populous state).

<sup>28</sup> See Huetteman, *supra* note 26.

presidential elections.<sup>29</sup> The term “faithless elector” is a bit misleading, in that it implies that presidential electors have maliciously changed their vote to sway an election, but this could not be further from the truth.<sup>30</sup> For example, in the Election of 1872, the United States witnessed its largest example of “elector faithlessness” when sixty-three presidential electors refused to cast their vote for the Democratic nominee for President, Horace Greenly.<sup>31</sup> They did so because Greenly had died after the general election but before the Electoral College convened.<sup>32</sup>

In fact, of these 167 votes, seventy-one were changed because of a candidate’s death.<sup>33</sup> The “faithless elector” should therefore be viewed as a free agent, who may change her vote based on evolving circumstances.<sup>34</sup> Furthermore, if the Electoral College was viewed more as a legislature of individuals congregating to cast votes using not only personal judgment, but collective wisdom,<sup>35</sup> presidential electors would be able to evaluate additional, important variables when voting for our nation’s chief executives.<sup>36</sup>

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<sup>29</sup> *Faithless Electors*, FAIRVOTE, [http://www.fairvote.org/faithless\\_electors](http://www.fairvote.org/faithless_electors) (last visited Dec. 29, 2017).

<sup>30</sup> See generally *id.* (showing that electors primarily change their votes based on the death of a candidate).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See *infra* Section IV.A, B.

<sup>35</sup> See generally U.S. CONST. art II, § 1, cl. 3; Stephanie Dubie Dwilson, *When is the Electoral College Election?*, HEAVY (Nov. 8 2016), <http://heavy.com/news/2016/11/when-is-electoral-college-election-dates-schedule-state-meeting-of-electors-december-congress-count-vote-january-how-long/> (explaining that the presidential electors convene in their home states to cast their ballots for president).

<sup>36</sup> A couple of these variables are: the candidate’s qualifications and the national popular vote. THE FEDERALIST NO. 68, *supra* note 6, at 351–55 (Alexander Hamilton); see also *Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, <http://www.nationalpopularvote.com/written-explanation> (last visited Dec. 29, 2017) [hereinafter *Agreement Among the States*].

### C. Electoral Inaction

To further demonstrate the importance of presidential electors, consider the 2000 presidential election, in which the Republican nominee, Governor George W. Bush, won with 271 electoral votes<sup>37</sup> (one more than the required threshold).<sup>38</sup> In that election, Barbara Left-Simmons, one of three presidential electors from the District of Columbia, abstained from voting for the Democratic presidential and vice-presidential nominees, incumbent Vice President Al Gore and Senator Joe Lieberman,<sup>39</sup> to protest the District's lack of voting representation in Congress.<sup>40</sup> Al Gore, who was awarded 266 electoral votes,<sup>41</sup> would not have won the election with the addition of that single vote;<sup>42</sup> however, he could have, if all four of New Hampshire's presidential electors<sup>43</sup> had voted for him instead of Governor Bush in response to *Bush v. Gore*.<sup>44</sup> The presidential electors of New Hampshire, or any other state that does not bind votes,<sup>45</sup> could have weighed several factors

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<sup>37</sup> *Electoral College Box Scores 2000-2016*, U.S. ELECTORAL COLLEGE, <https://www.archives.gov/federal-register/electoral-college/scores2.html#2000> (last visited Dec. 29, 2017) [hereinafter *Electoral College Box Scores*].

<sup>38</sup> *What is the Electoral College?*, U.S. ELECTORAL COLLEGE, <https://www.archives.gov/federal-register/electoral-college/about.html> (last visited Dec. 29, 2017) (showing that 270 electoral votes are needed to win the presidency).

<sup>39</sup> See *Faithless Electors*, *supra* note 29.

<sup>40</sup> See Randy James, *A Brief History of Washington D.C.*, TIME (Feb. 26, 2009), <http://content.time.com/time/politics/article/0,8599,1881791,00.html> (showing that the congressional representative of the District of Columbia has the ability to participate on committees but has no voting power when bills come to the floor).

<sup>41</sup> *Electoral College Box Scores*, *supra* note 37.

<sup>42</sup> See *2000 Presidential Election Interactive Map, 270 TO WIN*, [http://www.270towin.com/2000\\_Election/interactive\\_map](http://www.270towin.com/2000_Election/interactive_map) (last visited Dec. 29, 2017).

<sup>43</sup> *Id.*

<sup>44</sup> See generally *Bush v. Gore*, 531 U.S. 98, 111 (2000) (showing that George W. Bush won the presidency when the Supreme Court ruled that Florida's lack of uniformity in its method of counting votes violated the Equal Protection Clause of the Fourteenth Amendment and that any recount should be halted).

<sup>45</sup> See NCSL, *supra* note 8 (showing that New Hampshire does not bind the votes of the state's presidential electors).



in their decision, such as the national popular vote, which Gore won;<sup>46</sup> the reality that poor and minority voters were systematically disenfranchised from voting in Florida;<sup>47</sup> or the notion that the Supreme Court should not have decided a presidential election.<sup>48</sup>

If the Electoral College had been entrusted to act within its originally intended capacity,<sup>49</sup> the 2000 presidential election could have turned out differently. If presidential electors were viewed as free agents, prolonged political crises like the 2000 presidential election could be avoided by deferring to the Electoral College instead of the judicial branch. The Electoral College was designed like a legislature for this exact purpose. With this in mind, it is necessary to review the works of the individuals who drafted the Constitution, as well as the language creating the Electoral College itself.

## II. A MORE PERFECT UNION

### A. *The Framers*

James Madison and Alexander Hamilton were two of the most prominent voices in the debate regarding the Constitution.<sup>50</sup> While

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<sup>46</sup> See *Electoral College Box Scores*, *supra* note 37 (showing that Al Gore won the popular vote in the 2000 presidential election).

<sup>47</sup> See Julian Borger, *Jeb Bush Blamed for Unfair Florida Election*, *GUARDIAN* (Jan. 5, 2001), <https://www.theguardian.com/world/2001/jun/06/us-elections2000.usa>.

<sup>48</sup> Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 *CONST. COMMENT.* 335, 340 (2001); see generally *Bush v. Gore*, 531 U.S. 98 (2000) (demonstrating that by deciding the recount issue, the Supreme Court had also decided the election).

<sup>49</sup> See U.S. CONST. art. II, § 1; see also *THE FEDERALIST NO. 68*, *supra* note 6, at 351–55 (Alexander Hamilton) (showing that Alexander Hamilton believed that a system of elected representatives should choose the president on behalf of the people of the United States).

<sup>50</sup> See generally *Federalist Papers*, *HISTORY*, <http://www.history.com/topics/federalist-papers> (last visited Dec. 29, 2017) (showing that James Madison and Alexander Hamilton composed a series of essays arguing for the ratification of the Constitution).

both men supported the document's ratification,<sup>51</sup> they voiced differing concerns regarding the need for presidential electors.<sup>52</sup> Madison's primary concern was a lack of faith in the populace's ability to pick a non-polarizing candidate,<sup>53</sup> which is ironic, considering his strong views in favor of individual liberty.<sup>54</sup> On the other hand, Hamilton's desire for a system of presidential electors arose out of his concerns regarding the election of an individual who would be unfit for office.<sup>55</sup>

### 1. Madison's Fear of Factions

The Framers intended for presidential electors to be able to exercise personal judgment to deal with the existence of factions.<sup>56</sup> While the evils of these factions are most famously associated with President Washington's Farewell Address, James Madison was actually the first individual to pen this idea to paper.<sup>57</sup> Madison stated that:

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<sup>51</sup> *Id.*

<sup>52</sup> Compare THE FEDERALIST NO. 10, at 44–47 (James Madison) (George W. Carey & James McClellan ed. 2001) [hereinafter THE FEDERALIST NO. 10], with THE FEDERALIST NO. 68, *supra* note 6, at 351–53 (Alexander Hamilton) (showing that Madison feared the rise of political parties while Hamilton detested the notion of an unfit man holding the office of the Presidency).

<sup>53</sup> See generally THE FEDERALIST NO. 10, *supra* note 52, at 44–47 (James Madison) (showing that Madison was especially fearful of the election of a tyrant based on an “impulse of passion” by the people of the young republic he helped create).

<sup>54</sup> See *James Madison*, HISTORY, <http://www.history.com/topics/us-presidents/james-madison> (last visited Dec. 29, 2017).

<sup>55</sup> See generally THE FEDERALIST NO. 68, *supra* note 6 (Alexander Hamilton) (showing Hamilton's concern for the selection of the appointment of chief magistrate of the United States, and the requirements for the selection of electors to put an additional check in place).

<sup>56</sup> See *id.* at 352 (Alexander Hamilton).

<sup>57</sup> Compare THE FEDERALIST NO. 10, *supra* note 52, at 52 (James Madison), with Washington's Farewell Address to the People of the United States, S. DOC. NO. 106-21, 2nd Sess. (2000), <https://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf> [hereinafter Washington's Farewell Address] (showing that Washington's warning of factions and how they can undermine a democratic government, came well after Madison wrote on the subject in the Federalist Papers).

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common *impulse of passion*, or of interest, averse to the rights of other citizens, or to the permanent and aggregate interests of the community.<sup>58</sup>

The Framers, who did not want their government run by partisan politics,<sup>59</sup> took precautions to try to quell these “impuls[es] of passion.”<sup>60</sup> They did this by establishing the United States as a federal republic, rather than a unitary system as in Great Britain.<sup>61</sup> Unfortunately for the Framers, factions, now known as political parties, would eventually form and take control of the political process.<sup>62</sup>

Before political parties formally came into existence, two distinct groups emerged in the debate around the ratification of the Constitution: the Federalists and the Anti-Federalists.<sup>63</sup> The Federalists supported a strong national government and were proponents of the Constitution.<sup>64</sup> Their opponents, the Anti-Federalists, were fearful that a powerful, central government would hinder states’ rights and personal liberty.<sup>65</sup> Madison, who

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<sup>58</sup> THE FEDERALIST NO. 10, *supra* note 52, at 43 (James Madison) (emphasis added).

<sup>59</sup> See generally Washington’s Farewell Address, *supra* note 57 (showing that President Washington’s speech, co-written by Alexander Hamilton and James Madison, makes the point that political parties would jeopardize domestic tranquility).

<sup>60</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 43 (James Madison).

<sup>61</sup> See *Difference Between Federal and Unitary Government*, DIFFERENCE BETWEEN (Jan. 21, 2015), <http://www.differencebtw.com/difference-between-federal-and-unitary-government/> (explaining that unitary systems have one central governing authority that contains all the power while federal republics have subunits with power as well as a superior national authority).

<sup>62</sup> See Brian Hendricks, *Political Parties (Origins, 1790s)*, THE ENCYCLOPEDIA OF GREATER PHILADELPHIA, <http://philadelphiaencyclopedia.org/archive/political-parties-origins-1790s/> (last visited Dec. 29, 2017).

<sup>63</sup> See *Anti-Federalist vs. Federalist*, DIFFEN, [http://www.diffen.com/difference/Anti-Federalist\\_vs\\_Federalist](http://www.diffen.com/difference/Anti-Federalist_vs_Federalist) (last visited on Dec. 29, 2017).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

supported the Federalist cause of ratification,<sup>66</sup> also sympathized with the Anti-Federalist fear regarding the centralization of power.<sup>67</sup> The Constitution allows presidential electors to exercise personal judgment in order to entrust the states with a check on a potential tyrant,<sup>68</sup> a concept which appeased the Anti-Federalists.<sup>69</sup> It also satisfied many Federalists, who shared Madison's concerns regarding factions.<sup>70</sup> In Madison's view, the presidential electors would act as counterweights to avoid tipping the scales towards a monarchy or a mobocracy.<sup>71</sup>

In a nation as large as the United States,<sup>72</sup> it is easy to see not only the appeal, but the necessity of political parties in organizing national campaigns. But the fact remains that there might be too much power and control given to the party itself, rather than the presidential electors, elected by the people to choose on their behalf. In essence, by binding or coercing votes on predetermined political primaries, political factions are stripping the power of

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<sup>66</sup> See *James Madison, supra* note 54.

<sup>67</sup> See generally *id.* (showing that although Madison supported the ratification of the Constitution, he also was concerned with state sovereignty).

<sup>68</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 45 (James Madison); see also *James Madison, supra* note 54 ("Madison composed the first drafts of the U.S. Constitution and the Bill of Rights and earned the nickname 'Father of the Constitution'").

<sup>69</sup> See THE ANTIFEDERALIST NO. 9 (Montezuma) reprinted in THE FEDERALIST PAPERS PROJECT, <http://thefederalistpapers.org/antifederalist-paper-9> (last visited Dec. 29, 2017).

<sup>70</sup> See Walter Williams, *Abhorrence of Democracy and Mob Rule*, CAPITALISM MAGAZINE (Apr. 15, 2009), <http://capitalismmagazine.com/2009/04/abhorrence-of-democracy-and-mob-rule/> ("the Constitution's framers inserted several anti-majority rules. One such rule is that election of the president is not decided by a majority vote but instead by the Electoral College."); see also *James Madison, supra* note 54 (explaining that many of the Framers and early supports of the Constitution were Federalists).

<sup>71</sup> See THE FEDERALIST NO. 68, *supra* note 6, at 352–53. A mobocracy is when political power is concentrated with the people as a whole, often characterized as a "mob." *Mobocracy*, THEFREEDICTIONARY, <http://www.thefreedictionary.com/mobocracy> (last visited Dec. 29, 2017).

<sup>72</sup> *U.S. and World Population Clock*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Dec. 29, 2017) (placing the current population of the United States at roughly 325,000,000 people).

presidential electors from protecting the citizenry from either dangerous, unpopular, or unfit individuals for the office.<sup>73</sup>

## 2. Hamilton's Concerns About Unfit Leaders

In reviewing the concerns of Alexander Hamilton, it is apparent that he was interested in preventing an unfit individual's election to office.<sup>74</sup> Hamilton stated in Federalist No. 68 that:

[T]he immediate election [of the President] should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favourable to deliberation, and to a judicious combination of all the reasons and inducements that were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.<sup>75</sup>

Hamilton further stated that "this process of election affords a moral certainty, that the office of president will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications."<sup>76</sup> He believed that the presidential electors would act as guardians of democracy against the rise of an individual either unfit or unwilling to executing the duties of the office.<sup>77</sup> However, despite Hamilton's desire for safeguards, he did not advocate for presidential electors to maliciously disregard the will of the people.<sup>78</sup> Rather, his intention was to add a procedure to the electoral process that would prevent the election of an

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<sup>73</sup> See generally David Catanese, *Republicans Abandon Trump Over Lewd Video*, U.S. NEWS (Oct. 8, 2016), <http://www.usnews.com/news/articles/2016-10-08/republicans-abandon-trump-over-lewd-video> (showing that elected officials had begun to abandon the Republican nominee for President shortly before the general election).

<sup>74</sup> See THE FEDERALIST NO. 68, *supra* note 6, at 351–55 (Alexander Hamilton).

<sup>75</sup> *Id.* at 352.

<sup>76</sup> *Id.* at 354.

<sup>77</sup> See *id.* at 351–55.

<sup>78</sup> See *id.*

individual too dull to understand the role of the office.<sup>79</sup> In his view, presidential electors would act as a filtration system to prevent the election of unfit individuals.<sup>80</sup>

This very situation came to fruition during the most recent presidential election. With the election of Donald J. Trump as President of the United States, we have seen a departure from recent past elections, in which candidates artfully and diligently conveyed meaningful policy proposals to the American people.<sup>81</sup> In addition, we watched then-candidate Trump verbally attack reporters,<sup>82</sup> degrade women,<sup>83</sup> and even talk about ejecting an infant from his campaign rally.<sup>84</sup> Unfortunately, presidential electors were unable to act as correcting agents in over half the states,<sup>85</sup> allowing Hamilton's greatest fears to come true.<sup>86</sup>

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<sup>79</sup> See *id.* at 354.

<sup>80</sup> See *id.*

<sup>81</sup> See generally Danielle Kurtzleben, *The Most 'Unprecedented' Election Ever? 65 Ways It Has Been*, NPR (July, 2, 2016), <http://www.npr.org/2016/07/03/484214413/the-most-unprecedented-election-ever-65-ways-it-has-been> (showing the then-candidate Donald Trump greatly shocked the political landscape with his unorthodox policy proposals and offensive rhetoric).

<sup>82</sup> See Daniel Arkin Carmon, *Donald Trump Criticized After He Appears to Mock Reporter Serge Kovaleski*, NBC NEWS (Nov. 26, 2015), <https://www.nbcnews.com/politics/2016-election/donald-trump-criticized-after-he-appears-mock-reporter-serge-kovaleski-n470016>.

<sup>83</sup> See David A. Fahrethold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html?utm\\_term=.5ee6ad21bd63](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.5ee6ad21bd63).

<sup>84</sup> See Nick Gass, *Trump at Rally: 'Get the Baby Out of Here'*, POLITICO (Aug 2, 2016), <http://www.politico.com/story/2016/08/trump-kicks-out-baby-rally-226566>.

<sup>85</sup> See NCSL, *supra* note 8.

<sup>86</sup> See THE FEDERALIST NO. 68, *supra* note 6, at 352

### B. The Electoral College

Federalism is a core principle of our republic and has been ever since the ratification of the Constitution.<sup>87</sup> It is defined as the relationship in which power is shared by the various states and the federal government.<sup>88</sup> Article II, Section 1 of the Constitution, which established the Electoral College,<sup>89</sup> was drafted with this in mind. The text states:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.<sup>90</sup>

This text established a method of electing both the President and the Vice President of the United States in an indirect manner.<sup>91</sup> Interestingly enough, it has also resulted in the election of individuals who have failed to win a plurality of votes cast by the American people.<sup>92</sup> Although the name “Electoral College” cannot

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<sup>87</sup> See Eric Magazu, *The Importance of Federalism*, MASS. DAILY COLLEGIAN (Apr. 16, 2012), <http://dailycollegian.com/2012/04/16/importance-of-federalism/>.

<sup>88</sup> *Federalism*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>89</sup> See U.S. CONST. art. II, § 1 (prescribing the method of appointing presidential electors).

<sup>90</sup> *Id.* art. II, § 1, cl. 2.

<sup>91</sup> See generally U.S. CONST. art. II, § 1; THE FEDERALIST NO. 68, *supra* note 6, at 351–55 (Alexander Hamilton) (showing that the method of electing the President of the United States is functionally an indirect system of voting).

<sup>92</sup> See *Electoral College Box Scores 2000-2016*, *supra* note 37 (showing that George W. Bush and Donald J. Trump won the electoral vote but lost the popular vote); Daniel Nasaw, *How Hillary Clinton Won the Popular Vote But Still Lost the Election*, WALL ST. JOURNAL (Nov. 18, 2016), <http://blogs.wsj.com/washwire/2016/11/18/how-hillary-clinton-won-the-popular-vote-but-still-lost-the-election/> (showing that there are five instances in which an individual was elected to the office of President of the United States without winning the popular vote: John Quincy Adams in 1824; Rutherford B. Hayes in 1876;

be formally found in the Constitution,<sup>93</sup> the institution has been utilized in every presidential election our nation has conducted.<sup>94</sup> The original intent behind the Electoral College was to provide presidential electors with the right to exercise personal judgment in voting for the President of the United States.<sup>95</sup> The Framers actually wanted to grant the presidential electors the discretion to be “faithless.”<sup>96</sup> This desire for elector discretion can be further observed in the text of the Constitution:

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves . . . the Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed.<sup>97</sup>

The only textual limit the Framers placed on the presidential electors in casting their votes was the requirement to select the name of at least one individual who did not share their home state.<sup>98</sup> With federalism in mind, the Framers sought to devise a cooperative method of electing the president that would involve

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Benjamin Harrison in 1888; George W. Bush in 2000; and Donald J. Trump in 2016).

<sup>93</sup> See generally 3 U.S.C. § 4 (1948) (using the term “college of electors” for the first time in American history).

<sup>94</sup> See NATIONAL ARCHIVES AND RECORDS ADMINISTRATION: THE ELECTORAL COLLEGE, <https://www.archives.gov/federal-register/electoral-college/scores.html> (last Dec. 29, 2017) (showing the electoral history of Presidential election since 1789); *Electoral College Box Scores 2000-2016*, *supra* note 37 (displaying electoral college results from 2000–2016).

<sup>95</sup> See generally U.S. CONST. art. II, § 1, cl. 3 (showing that there are virtually no restrictions on how a presidential elector may cast his votes); see also THE FEDERALIST NO. 68, *supra* note 6, at 352 (Alexander Hamilton) (showing that Alexander Hamilton believed that a system of elected representatives should choose the president on behalf of the people of the United States).

<sup>96</sup> See generally THE FEDERALIST NO. 68, *supra* note 6, at 351–55 (showing that Alexander Hamilton believed that the presidential electors would guard against unfit individuals being elected to office).

<sup>97</sup> U.S. CONST. art. II, § 1, cl. 3.

<sup>98</sup> See *id.*



not only the states, but the federal government as well.<sup>99</sup> The Constitution further expands on how the process of selecting the nation's chief executives should be carried out, stating:

[I]f there be more than one [person] who have such Majority [of electoral votes], and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then [the House of Representatives shall choose from among the five candidates with the most electoral votes]. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote . . . In every Case, after the [selection] of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.<sup>100</sup>

The system that was envisioned is not unlike the British parliamentary system, in which the Prime Minister is selected by the legislature.<sup>101</sup> First, each state would be allowed to choose the method by which presidential electors would be selected.<sup>102</sup> Next, the American citizenry would elect the presidential electors to choose the President and Vice President on their behalf.<sup>103</sup> Lastly, if the presidential electors could not reach a determination, a separate legislative body, Congress, would decide the winner.<sup>104</sup> By initially entrusting the selection of presidential electors to the states, state interest would be properly considered when selecting

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<sup>99</sup> See generally *id.* (showing that the Framers expected that presidential elections would often be decided by Congress).

<sup>100</sup> *Id.*

<sup>101</sup> See Ben Moshinsky, *Britain is Getting a New Prime Minister: Here's How the Process Works*, BUS. INSIDER: POL. (June 28, 2016), <http://www.businessinsider.com/heres-how-the-process-to-pick-a-new-uk-prime-minister-works-post-referendum-brexit-2016-6?r=UK&IR=T>.

<sup>102</sup> See U.S. CONST. art. II, § 1, cl. 2.

<sup>103</sup> See *id.* § 1, cl. 3.

<sup>104</sup> *Id.*

the chief executive.<sup>105</sup> On its face, this system is similar to the process by which senators were originally elected; prior to 1914, they were chosen by their respective state legislatures, which the Framers believed would allow the states to play a part in national policymaking.<sup>106</sup> The Framers constructed the Constitution this way not only to appease the states into ratification, but also to avoid too much centralized power in the hands of undesirable men.<sup>107</sup> The Electoral College put these principles into action by introducing a system of filtration to deflate “impulses of passion,” which could produce leaders devoid of any meaningful knowledge of policy.<sup>108</sup>

The Electoral College remained unchanged from the ratification of the Constitution in 1789 until the Twelfth Amendment was passed in 1804.<sup>109</sup> The Amendment prescribed that each elector would cast one vote for a President and one vote for a Vice President.<sup>110</sup> Before 1804, the vice presidency was allotted to the individual (white, land-owning male)<sup>111</sup> who received the second-highest number of electoral votes for

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<sup>105</sup> See *id.*

<sup>106</sup> See U.S. CONST. amend. XVII; see also *Electing Senators*, U.S. SENATE, [https://www.senate.gov/general/Features/ElectingSenators\\_AHistoricalPerspective.htm](https://www.senate.gov/general/Features/ElectingSenators_AHistoricalPerspective.htm) (last visited Dec. 29, 2017), (“From 1789 to 1913, when the Seventeenth Amendment to the U.S. Constitution was ratified, senators were elected by state legislatures.”).

<sup>107</sup> See generally U.S. CONST. art. II, § 1, cl. 2; THE FEDERALIST NO. 68, *supra* note 6 (Alexander Hamilton) (showing that by giving the states to power to select the presidential electors, states could fight back against potential tyranny as well as express their interests in national policy).

<sup>108</sup> See generally Rebecca Savransky, *GOP Senator Under Impression Trump Doesn't Have Clear Understanding of Health Care Bill: Report*, THE HILL (Jun. 28, 2017), <http://thehill.com/policy/healthcare/339787-gop-sen-feels-trump-doesnt-have-clear-understanding-of-healthcare-bill> (showing that the President of the United States does not understand basic principles or policy that are fundamental towards health care legislation); see also THE FEDERALIST NO. 10, *supra* note 52, at 43 (James Madison) (describing how a faction of citizens may elect an unqualified leader when united by an “impulse of passion”).

<sup>109</sup> See U.S. CONST. amend. XII.

<sup>110</sup> *Id.*

<sup>111</sup> Beth Rowan, *U.S. Voting Rights*, INFOPLEASE, <http://www.infoplease.com/timelines/voting.html> (last visited Dec. 29, 2017).

President.<sup>112</sup> The requirement that the presidential electors cast a vote for someone not from their home state remained in effect.<sup>113</sup> Significantly, the Twelfth Amendment was passed to remedy procedural issues and was not passed with any intention of changing the Electoral College's function.<sup>114</sup> The Congress that passed it, and the subsequent fifteen states that accepted those changes, understood that the Electoral College would remain intact.<sup>115</sup> Precisely because political parties were well-established by the time that the Twelfth Amendment was ratified,<sup>116</sup> the procedural safeguards to prevent anyone from taking control of the nation on an "impulse of passion" were left in place.<sup>117</sup> This was done to quell the concerns that both Madison and Hamilton had about an unchecked system in choosing a national leader.<sup>118</sup>

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<sup>112</sup> James R. Whitson, *The Electoral Process Before the 12th Amendment*, PRESIDENT ELECT (May 2000), [http://presidentelect.org/art\\_before12.html](http://presidentelect.org/art_before12.html) ("The person with the next highest number of votes was named vice president.").

<sup>113</sup> U.S. CONST. amend. XII.

<sup>114</sup> The election of 1800 saw Thomas Jefferson and Arron Burr locked in an electoral tie, despite each belonging to the same party; Jefferson was elected President by the House of Representatives. See *February 17, 1801: Deadlock Over Presidential Election Ends*, HISTORY, <http://www.history.com/this-day-in-history/deadlock-over-presidential-election-ends> (last visited Dec. 29, 2017); see also *12th Amendment*, FAIRVOTE, <http://archive.fairvote.org/?page=981> (last visited Oct. 6, 2017) ("[T]he 12th Amendment was adopted to fix a flaw in the Constitution that had allowed Thomas Jefferson to tie in the Electoral College with his vice presidential candidate Aaron Burr.").

<sup>115</sup> See Sanford V. Levinson, *The Twelfth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xii> (last visited Dec. 29, 2017).

<sup>116</sup> Brian Hendricks, *Political Parties (Origins 1790s)*, ENCYCLOPEDIA OF GREATER PHILA., <http://philadelphiaencyclopedia.org/archive/political-parties-origins-1790s/> (last visited Dec. 29, 2017).

<sup>117</sup> THE FEDERALIST NO. 10, *supra* note 52, at 43 (James Madison); see generally U.S. CONST. amend. XII (showing the large parts of the original system of electing our nation's chief executives were left in place).

<sup>118</sup> Compare THE FEDERALIST NO. 10, *supra* note 52, at 44–47 (James Madison), with THE FEDERALIST NO. 68, *supra* note 6, at 351–53 (Alexander Hamilton) (showing the differences between the fears Madison had with factions to the fears Hamilton with undesirable men in office).

### C. *The Hybrid System*

In setting out to establish a new form of government, the Framers of the Constitution envisioned ours to be a “hybrid system.”<sup>119</sup> James Madison explained that the American system of government would blend principles from both republics and democracies, incorporating both the delegation of power and the exercise of power directly.<sup>120</sup> Madison, who acknowledged that a republic could come in the form of an oligarchy,<sup>121</sup> argued that by adding a democratic element to the selection of representatives, the interests of the people would be respected without the hassles of direct participation.<sup>122</sup>

Madison further wrote that republics were systems of government in which the power to draft legislation was delegated to representatives.<sup>123</sup> The problem with a pure republic, however, is that there are no procedural safeguards to check the power of a representative.<sup>124</sup> Similarly, Madison and the Framers did not want to establish a pure democracy,<sup>125</sup> which would require every citizen to directly participate in the legislative process.<sup>126</sup> The

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<sup>119</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 46–47 (James Madison).

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*; see also Donald L. Wasson, *Roman Republic*, ANCIENT HIST. ENCYCLOPEDIA (April 7, 2016) [http://www.ancient.eu/Roman\\_Republic/](http://www.ancient.eu/Roman_Republic/) (showing that the Roman Republic consisted of many assemblies, one of which was the Senate, whose members served for life and were often appointed rather than elected).

<sup>122</sup> See generally Mark Cartwright, *Athenian Democracy*, ANCIENT HIST. ENCYCLOPEDIA (Oct. 13, 2014), [http://www.ancient.eu/Athenian\\_Democracy/](http://www.ancient.eu/Athenian_Democracy/) (detailing the democratic process and the philosophy behind representation in Ancient Greece).

<sup>123</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 46 (James Madison).

<sup>124</sup> See generally Wasson, *supra* note 121 (showing that before the creation of the United States, the most prominent example of a republic was Rome. While the Senate of Rome was not the only legislative assembly, its members wielded the most power, were not elected directly by the people, and served life terms. These Senators were not beholden to the people of Rome and therefore this model would prove inappropriate for a new nation with concerns about power held by the few).

<sup>125</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 47 (James Madison).

<sup>126</sup> See generally Cartwright, *supra* note 122 (showing that the most prominent example in history of a direct democracy is the Greek city-state

Framers disliked this model because it was simply too impractical in a nation that spanned a continental coast line.<sup>127</sup> As Madison stated, “A democracy . . . must be confined to a small spot. A republic may be extended over a large region.”<sup>128</sup>

In a representative democracy, elected officials in the legislature have the ability to exercise personal judgment in drafting and passing laws.<sup>129</sup> The American people, who are endowed with certain “inalienable rights,”<sup>130</sup> willingly delegate their right to decide on matters of government through democratic elections, with the assurance that their fundamental freedoms will be respected.<sup>131</sup> This notion was cemented with the passage of the Bill of Rights.<sup>132</sup> Presidential electors are no different than any other elected representative in the United States, as their office was designed to allow them choose on behalf of the people.<sup>133</sup> To say that presidential electors’ judgment should be restricted based on preconditions would be inconsistent with the principles of a representative democracy.<sup>134</sup> When sent to cast their votes for

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Athens. The Athenian form of direct democracy was a system in which all citizens took part, directly, in the drafting and ratification of all legislation. While it is true that they elected leaders from among their ranks, these leaders were simply presiding officers of the legislative functions. The system was effective only because it was confined to a small space, with a homogeneous population of citizens).

<sup>127</sup> See Gar Alperovitz, *Democracy: Is a Continent Too Big?*, TRUTHOUT (Sept. 7, 2012), <http://www.truth-out.org/opinion/item/11391-democracy-is-a-continent-too-big>.

<sup>128</sup> THE FEDERALIST NO. 14, at 63 (James Madison) (George W. Carey & James McClellan ed. 2001).

<sup>129</sup> See generally U.S. CONST. art I, § 8, cl. 18 (showing that by allowing Congress to make all laws that are “necessary and proper” there is room for discretion and personal choice by the elected representatives).

<sup>130</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (noting where Jefferson is referring to the natural rights of man which cannot be taken away by the laws of man).

<sup>131</sup> See U.S. CONST. amend. I-X (showing that despite delegating powers to elected representatives, the people of the United States maintain specific rights that cannot be infringed).

<sup>132</sup> See *id.*

<sup>133</sup> See U.S. CONST. art. II, § 1 (showing that the presidential electors are to convene in their respective states to cast votes).

<sup>134</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 42–49 (James Madison).

President and Vice President of the United States, presidential electors should be unencumbered by laws that bind or coerce their decision.<sup>135</sup> For a state to do so is a constitutional violation.<sup>136</sup> Nowhere else in the United States is an elected representative forbidden from exercising personal judgment when voting on measures;<sup>137</sup> presidential electors should not be treated any differently.

The freedom of choice among democratically elected representatives is of the utmost importance in our “hybrid system” of government.<sup>138</sup> The trust given to our representatives by the people is secured by the notion that if they do not satisfy our interests, they can be removed from power, peacefully, and by political means.<sup>139</sup> However, nowhere is it written that an elective representative must bind his or her vote based on preconditions.<sup>140</sup> Therefore, when a state seeks to bind or coerce a presidential elector’s vote, limiting her freedom to exercise personal judgment, it is an unconstitutional act. That being said, there are constitutional methods to encourage presidential electors to vote in specific ways.<sup>141</sup>

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<sup>135</sup> See *infra* Section IV.A, B.

<sup>136</sup> See generally U.S. CONST. art. II, § 1 (showing that the only power delegated to the states regarding the Electoral College is the method of selecting the presidential electors to office).

<sup>137</sup> See *infra* Section IV.B.

<sup>138</sup> See U.S. CONST. art. I, § 8, cl. 18.

<sup>139</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 47 (James Madison) (stating that the democratic process makes it “difficult for unworthy candidates to practise [sic] with success the vicious arts . . . and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit.”); see also Amy B. Wang, *Pelosi: ‘Peaceful Transfer of Power is the Cornerstone of our Democracy’*, WASH. POST (Nov. 9, 2016), <https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-updates-on-the-2016-election-voting-and-race-results/pelosi-peaceful-transfer-of-power-is-the-cornerstone-of-our-democracy/> (“The peaceful transfer of power is the cornerstone of our democracy.”).

<sup>140</sup> See U.S. CONST. art. II, § 1 (showing that nowhere in the text of the Constitution does it either explicitly state, or imply, that the various states can restrict the way in which a presidential elector casts her ballot).

<sup>141</sup> See discussion *infra* Section IV.C.

## III. JUDICIAL GUIDANCE

Before analyzing the current methods that states use to restrict and bind the votes of presidential electors, it is necessary to review Supreme Court decisions concerning the right to vote. It is also necessary to review the Guarantee Clause of the Constitution, which promises a “republican form of government” to all American citizens.<sup>142</sup> In addition, it is crucial to review a landmark Supreme Court decision regarding the Electoral College,<sup>143</sup> a case that they mishandled.

*A. The Right to Vote*

Because the Constitution does not specify who possesses the right to vote in public elections,<sup>144</sup> this responsibility has been left to the states.<sup>145</sup> In the early days of the Republic, states implemented standards for voting which were often based upon racial and economic qualifications.<sup>146</sup> While property requirements were eliminated in nearly all states before the Civil War,<sup>147</sup> real progress on the universal expansion of the right to vote did not begin until after its conclusion.<sup>148</sup> The Fifteenth Amendment provides that the right to vote cannot be “denied or abridged [based on] race, color, or previous condition of servitude.”<sup>149</sup> The Nineteenth Amendment prohibited the denial of the right to vote “on account of sex.”<sup>150</sup> The Twenty-third Amendment granted the District of Columbia three electoral votes, and by proxy, the

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<sup>142</sup> U.S. CONST. art IV, § 4, cl. 1.

<sup>143</sup> See generally *Ray v. Blair*, 343 U.S. 214 (1952) (showing that a presidential elector must be certified by a state’s Secretary of State for the election to become official).

<sup>144</sup> Rowan, *supra* note 111.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Dec. 29, 2017).

<sup>149</sup> U.S. CONST. amend. XV.

<sup>150</sup> U.S. CONST. amend. XIX.

citizens of the City of Washington the right to vote for President.<sup>151</sup> The Twenty-fourth Amendment prohibits the implementation of a poll tax.<sup>152</sup> And lastly, the Twenty-sixth Amendment granted the right to vote to all American citizens above the age of eighteen.<sup>153</sup> Over the course of nearly one hundred and fifty years, these amendments to the Constitution, as well as legislation such as the Voting Rights Act of 1965,<sup>154</sup> ultimately expanded the right to vote.<sup>155</sup>

The Supreme Court has also weighed in on this debate throughout the years, more often than not expanding the right to vote.<sup>156</sup> The Court held in *Baker v. Carr* that the reapportionment of election districts is not a political question and may be reviewed by the courts for their validity under the Fourteenth Amendment.<sup>157</sup> *Reynolds v. Sims* introduced the principle of “one person, one vote,”<sup>158</sup> requiring election districts to be comprised of an equal number of peoples, based on the most current census.<sup>159</sup> *Shaw v. Reno* held that redistricting based on race must be held to strict

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<sup>151</sup> See U.S. CONST. amend. XXIII.

<sup>152</sup> U.S. CONST. amend. XXIV.

<sup>153</sup> U.S. CONST. amend. XXVI.

<sup>154</sup> Voting Rights Act of 1965, 52 U.S.C. § 10101 (1965) (The Voting Rights Act was signed by President Lyndon B. Johnson at the height of the Civil Rights Movement to prevent racial discrimination at the voter booth); see also *Shelby County v. Holder*, 570 U.S. 2 (2013) (gutting Sections 4(b) and 5 of the Voting Rights Act which required specific states to seek preclearance in enacting new election laws).

<sup>155</sup> See generally Rowan, *supra* note 111 (showing the various changes and expansions of the right to vote).

<sup>156</sup> See *Shaw v. Reno*, 509 U.S. 630, 657 (1993); *Reynolds v. Sims*, 377 U.S. 533, 562 (1965); *Baker v. Carr*, 369 U.S. 186, 237 (1962); see also *id.* (displaying additional instances of the Supreme Court ruling on voting rights).

<sup>157</sup> *Carr*, 369 U.S. at 198, 237 (showing that citizens of Tennessee filed an action against the state to force a redistricting effort according to the most current census, and that such action presented no political question).

<sup>158</sup> *Reynolds*, 377 U.S. at 557–58 (quoting *Gravy v. Sanders*, 372 U.S. 368, 381 (1963)).

<sup>159</sup> *Id.* at 565–66 (showing that the State of Alabama violated the federal constitution by allotting one senator per county in the state legislature instead of proportional representation).



scrutiny under the Fourteenth Amendment.<sup>160</sup> However, in all of these cases, the right to vote does not encompass anything more than the selection of a representative to choose on behalf of her constituency.<sup>161</sup>

### B. *The Guarantee Clause*

The United States was founded as a representative democracy.<sup>162</sup> Chief Justice Warren stated in *Reynolds v. Sims* that, “[a]s long as ours is a *representative* form of government . . . the right to elect legislatures in a free and unimpaired fashion is a bedrock of our political system.”<sup>163</sup> The fact that our government is a representative one means that we willingly delegate the right to choose our elected representatives.<sup>164</sup> The Guarantee Clause of the U.S. Constitution, which states that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government,”<sup>165</sup> mandates that the laws of the land must be through the consent of the people.<sup>166</sup>

When determining what the Guarantee Clause means by a “republican form of government,”<sup>167</sup> it is important to return to the writings of James Madison.<sup>168</sup> The word “republican” must be taken to mean that the right of the people to democratically choose

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<sup>160</sup> *Shaw*, 509 U.S. at 637 (showing that although North Carolina attempted to create a majority African American district from remedial measures, any redistricting on racial grounds “may balkanize [them] into competing racial factions”).

<sup>161</sup> See *Shaw*, 509 U.S. at 657; *Reynolds*, 377 U.S. at 562; *Carr*, 369 U.S. at 237.

<sup>162</sup> See *supra* Section II.C.

<sup>163</sup> *Reynolds*, 377 U.S. at 562 (emphasis added).

<sup>164</sup> See THE FEDERALIST NO. 14, *supra* note 128, at 63 (James Madison) (stating that, “in a democracy, the people meet and exercise the government in person: in a republic, they assemble and administer it by their representatives and agents”).

<sup>165</sup> U.S. CONST. art IV, § 4, cl. 1.

<sup>166</sup> See U.S. CONST. pmb. (showing that the people of the United States “ordained and established” the Constitution itself).

<sup>167</sup> U.S. CONST. art IV, § 4, cl. 1.

<sup>168</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 46–49 (James Madison).

their representatives will be respected by the Constitution.<sup>169</sup> The Guarantee Clause in no way can be read to limit a representative's right to choose on her constituency's behalf.<sup>170</sup> Because the Electoral College is functionally no different from any other convening legislature in the United States, the same logic should apply.<sup>171</sup>

### C. *Ray v. Blair*

In 1952, the Supreme Court weighed in regarding the Electoral College.<sup>172</sup> In *Ray v. Blair*, a challenge to an Alabama statute appeared on the Court's docket.<sup>173</sup> The suit revolved around a dispute between Ben Ray, the Chairman of the Alabama Democratic Party, and Edmund Blair, a presidential elector.<sup>174</sup> Blair had refused to pledge an oath, which would have bound his vote in the general election to the candidates determined by the Democratic National Convention.<sup>175</sup> Because Blair had refused to pledge the oath, Ray refused to certify him as an elector to the Alabama Secretary of State.<sup>176</sup> Justice Reed, writing for the majority, determined that a state does not violate the federal Constitution by requiring that presidential electors must pledge their support for a party's nominee.<sup>177</sup> The Court reasoned that Alabama had not violated the Twelfth Amendment, which spells out procedural remedies regarding the election of the President and

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<sup>169</sup> See *id.* at 46.

<sup>170</sup> See *id.* at 45–49.

<sup>171</sup> See U.S. CONST. art. II, §1 (showing that the Electoral College is no different than any other convening legislature).

<sup>172</sup> *Ray v. Blair*, 343 U.S. 214, 215, 231 (1952) (upholding the State of Alabama's faithless elector provisions requiring a pledge of loyalty from presidential electors before their election to office could be certified).

<sup>173</sup> *Id.* at 216–18.

<sup>174</sup> *Id.* at 215.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 231.

Vice President, as well as contingencies in the event that no candidate receives a majority of electoral votes.<sup>178</sup>

The Court therefore determined that a state, through its delegation of power to political parties, may determine that an individual may be declared unfit to be a presidential elector based on the elector's refusal to sacrifice personal discretion in casting her vote.<sup>179</sup> In a dissenting opinion, however, Justice Jackson remained unconvinced.<sup>180</sup> He wrote that:

No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be *free agents*, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices. Certainly under that plan no state law could control the elector in performance of his federal duty, any more than it could a United States Senator who also is chosen by, and represents, the State.<sup>181</sup>

By looking at the intent of the Framers though the implicit language of the Constitution, Justice Jackson could not identify any reason why the majority would side with Ray.<sup>182</sup> In addition, Justice Jackson also recognized that the principles of the Constitution would in no way allow limitations on any other elected representative in performing his or her duties.<sup>183</sup> Justice Jackson further wrote that, “[w]hen chosen, [the presidential electors] perform a federal function of balloting for President and Vice President, federal law prescribing the time of meeting, the manner of certifying ‘all the votes given by them,’ and in detail how such certificates shall be transmitted and counted.”<sup>184</sup>

This federal function that Justice Jackson is referring to is perhaps the most significant factor that the majority neglected to

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<sup>178</sup> See *id.* at 228; see also U.S. CONST. amend. XII (outlining the mechanisms surrounding presidential elections and any contingencies in the result of ties or other electoral problems).

<sup>179</sup> See *Blair*, 343 U.S. at 231.

<sup>180</sup> See *id.* (Jackson, J., dissenting).

<sup>181</sup> *Id.* at 232 (emphasis added).

<sup>182</sup> *Id.* at 231–32.

<sup>183</sup> *Id.* at 231.

<sup>184</sup> *Id.*

sufficiently consider.<sup>185</sup> When electing a President of the United States, the people are selecting a leader based on national interest.<sup>186</sup> The electors should be able to refer to factors such as the national popular vote or even see how other, more diverse states have voted.<sup>187</sup> Therefore, presidential electors should be able to take federal matters into consideration, unencumbered, when performing their federal function.

#### IV. THE STATE OF THE UNION

When considering the states that employ remedies to combat “faithless electors,” there are three general categories into which they fall. The first category contains states which seek to bind a vote, effectively eliminating a presidential elector’s ability to exercise personal choice.<sup>188</sup> The second category comprises states which seek to coerce a presidential elector’s vote by adding an explicit punishment imposed upon the “faithless elector” in the statutory language.<sup>189</sup> The third category of states encourages electors to vote a specific way, but does not bind or punish.<sup>190</sup> While the first two sets of states disassemble the intent of the Framers, the third seeks to reach a specific outcome without disrespecting the Constitution.

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<sup>185</sup> See *id.* at 214 (showing that the majority holding did not consider that the presidential electors were performing a federal function).

<sup>186</sup> See U.S. CONST. art II, § 1, cl. 1 (vesting the executive powers of the federal government of the United States with the President).

<sup>187</sup> See *Agreement Among the States*, *supra* note 36 (showing the states that want to encourage the presidential electors to vote for the winner of the national popular vote).

<sup>188</sup> See ALA. CODE § 17-14-31(c) (1975); CAL. ELECT. CODE § 6906 (West 1994); HAW. REV. STAT. §14-28 (1970); WIS. STAT. § 7.75 (1979).

<sup>189</sup> See N.M. STAT. ANN §§ 1-15-5; 1-15-9; S.C. CODE. ANN. § 7-19-80 (1962); N.C. GEN. STAT § 163-212 (1967); OKLA. STAT. tit. 26, §§ 10-102; 10-109 (1974); MICH. COMP. LAWS § 168.47 (1954).

<sup>190</sup> See *generally* 25 PA. CONS. STAT. § 2878 (1937) (showing that the method of selecting the presidential electors is delegated to the presidential nominees, helping to ensure that the votes will be cast as expected).

### A. States That Bind

The states that bind are comprised of jurisdictions that have either passed legislation, or allow political parties, to require presidential electors to vote a specific way.<sup>191</sup> The most prominent of these examples is the State of Alabama,<sup>192</sup> the progenitor of this issue.<sup>193</sup> Alabama's current law, which allows political parties to require an oath to bind votes,<sup>194</sup> contains many flaws in its attempt to combat elector "faithlessness."

#### 1. The Death Caveat

The first major flaw among this category of laws is that a presidential elector must vote for the candidate of their national party convention,<sup>195</sup> regardless of circumstance.<sup>196</sup> This means that in the extreme event that a presidential candidate has died, the elector must still vote for the deceased.<sup>197</sup> If a presidential candidate were to pass away, the assumption would be that their vote would go to the vice-presidential nominee of the party they selected on Election Day.<sup>198</sup> While parties in some states have contingencies for such circumstances, the State of Alabama does not.<sup>199</sup> If a party does not correct the situation in time, the vote

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<sup>191</sup> See generally ALA. CODE 1975 § 17-14-31(c) (showing that the presidential elector is bound by her pledge, which is certified by the Secretary of State of Alabama).

<sup>192</sup> *Id.*; see generally *Ray v. Blair*, 343 U.S. 214 (1952) (showing litigation surrounding this issue).

<sup>193</sup> See *Blair*, 343 U.S. at 216.

<sup>194</sup> See ALA. CODE § 17-14-31(c) (1975).

<sup>195</sup> See Russell Burman, *What Actually Happens at the U.S. Presidential Conventions?*, ATLANTIC (Jul. 10, 2016), <https://www.theatlantic.com/politics/archive/2016/07/a-laymans-guide-to-the-republican-and-democratic-national-conventions/489560/>.

<sup>196</sup> See ALA. CODE § 17-14-31(c) (1975).

<sup>197</sup> See *id.* (showing that there are no contingencies for the death of a candidate in Alabama's election code).

<sup>198</sup> See generally U.S. CONST. amend. XXV (showing that the Vice President is the successor to the Presidency upon a vacancy to the office).

<sup>199</sup> See ALA. CODE § 17-14-31(c) (1975) (showing that the statutory language does not have a contingency for death of a nominee).

must go to the individual on the top of the ticket.<sup>200</sup> The election of a dead individual to office is an absurd result, especially since there will most likely be a vice-presidential candidate with a pulse, still on the ticket, for the presidential electors to shift their support to.

To combat this issue, three states—California, Hawaii, and Wisconsin—have applicable language in their laws regarding their presidential electors.<sup>201</sup> California’s provision states that:

The electors, when convened, *if both candidates are alive*, shall vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent, one of whom, at least, is not an inhabitant of this state.<sup>202</sup>

What the provision in California’s code does not cover, though, is exactly *how* a presidential elector should vote in the case of either candidates’ death.<sup>203</sup> The statute only prescribes how the electors will vote *if both* candidates are alive.<sup>204</sup> It does not address what happens if the presidential candidate is dead, but the vice-presidential candidate is not. It also does not address what happens if vice-presidential candidate is dead, but the presidential candidate is not. The statute therefore restores the ability for presidential electors to use their judgment in the case where either candidate is deceased.<sup>205</sup> Statutes that infuse the “death caveat” language therefore acknowledge the importance of a presidential elector’s ability to exercise personal judgment, albeit in the most limited of circumstances.<sup>206</sup> In essence, the state has set up an unnecessary obstacle for presidential electors to exercise their constitutional duties by using the death caveat.

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<sup>200</sup> *See id.*

<sup>201</sup> *See* CAL. ELECT. CODE § 6906 (West 1994); HAW. REV. STAT. § 14-28 (1970); WIS. STAT. § 7.75 (1979).

<sup>202</sup> CAL. ELECT. CODE § 6906 (West 1994) (emphasis added).

<sup>203</sup> *See id.* (showing that there are no explicit instructions on how a presidential elector should vote in the case of death to a nominee).

<sup>204</sup> *Id.*

<sup>205</sup> *See id.* (giving no explicit instructions on how a presidential elector should vote in the case of death to a nominee).

<sup>206</sup> *See* U.S. CONST. art. II, § 1.

## 2. Mental Incapacity

Binding states also fail to address the necessity of a contingency plan should a President-elect (or Vice President-elect) show signs of mental incapacitation.<sup>207</sup> For example, if John Doe runs for President and receives the support of the required number of 270 electoral votes on the first Tuesday in November, he will presumably be formally elected President of the United States by the Electoral College.<sup>208</sup> But what if Mr. Doe, a week before the Electoral College meets,<sup>209</sup> begins to show signs that he is no longer mentally fit to hold the office? If such an event were to occur, presidential electors should be able to correct the situation by selecting his running mate instead. They are, in effect, guardians of the office of the Presidency, not vindictive individuals looking to destroy democracy.<sup>210</sup>

## 3. Lack of Enforcement

Another fundamental flaw of binding states is that there is no enforcement mechanism to “bind” a vote.<sup>211</sup> For example, nothing

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<sup>207</sup> See CAL. ELECT. CODE § 6906 (West 1994); HAW. REV. STAT. § 14-28 (1970); WIS. STAT. § 7.75 (1979) (showing that mental incapacity is not a factor considered by this type of legislation).

<sup>208</sup> Abby Johnston, *What If Donald Trump Doesn't Get An Absolute Majority? 270 Electoral Votes Are Needed For The Presidency*, BUSTLE (Dec. 3, 2016), <https://www.bustle.com/articles/198176-what-if-donald-trump-doesnt-get-an-absolute-majority-270-electoral-votes-are-needed-for-the> (showing that a total of 270 electoral votes is needed to be formally elected president).

<sup>209</sup> *What are the Roles and Responsibilities of the Designated Parties in the Electoral College Process?*, U.S. ELECTORAL COLLEGE, <https://www.archives.gov/federal-register/electoral-college/roles.html> (last visited Dec. 29, 2017) [hereinafter *What are the Roles and Responsibilities*, U.S. ELECTORAL COLLEGE] (showing the the presidential electors each convene in their home states to formally elect the President and Vice President in weeks following the general election).

<sup>210</sup> See generally THE FEDERALIST NO. 68, *supra* note 6, at 352 (showing that Hamilton wanted only the most capable of individuals to directly select the nation's chief executives).

<sup>211</sup> See generally ALA. CODE § 17-14-31(c) (1975); CAL. ELECTION CODE § 6906 (West 1994); HAW. REV. STAT. § 14-28 (1970); WIS. STAT. § 7.75 (1979)

in place could stop a presidential elector in Alabama from disregarding the law. Furthermore, no binding state has ever actually levied any punishment upon faithless electors in this category of state,<sup>212</sup> and the Supreme Court has not yet weighed in on whether a state can inflict punishment upon presidential electors for exercising personal judgment.<sup>213</sup>

While these statutes are largely unenforced, they carry the consequence of deterring presidential electors from executing the powers of their office. Presidential electors should be able to serve their short terms without any mental reservations about their position. By repealing laws which seek to bind the ability of presidential electors, individuals elected to office would begin to execute the job as it was originally intended.

### *B. States That Coerce*

States that coerce presidential electors differ from the previous category, as they seek to proactively influence the way a presidential elector votes.<sup>214</sup> Incorporated in these statutes are sanctions against presidential electors ranging from removal from office to criminal penalties.<sup>215</sup>

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(showing that the states did not explicitly add language to the statute concerning how vote binding would be enforced).

<sup>212</sup> *About the Electors*, U.S. ELECTORAL COLLEGE, <https://www.archives.gov/federal-register/electoral-college/electors.html> (last visited Dec. 29, 2017).

<sup>213</sup> *Id.*

<sup>214</sup> *See generally* MICH. COMP. LAWS § 168.47 (1954); N.M. STAT. ANN §§ 1-15-5, 9; N.C. GEN. STAT § 163-212 (1967); OKLA. STAT. 26, tit. 26 §§ 10-102, 109 (1974); S.C. CODE. ANN. § 7-19-80 (1962) (showing that adding fines and criminal penalties essentially coerce presidential electors to vote a specific way).

<sup>215</sup> *See generally* MICH. COMP. LAWS § 168.47 (1954) (showing that presidential electors who do not vote according to the popular will of their state's result are removed from office and their vote stripped from the record).



### 1. Removal from Office

In the United States, we have the unique opportunity to peacefully overthrow our government every few years.<sup>216</sup> When an elected representative's choices have upset her constituency, the proper method of removal is through political means.<sup>217</sup> However, this is not the case when it comes to presidential electors in the State of Michigan.<sup>218</sup> Michigan's election law provides that:

Refusal or failure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes a resignation from the office of elector, his vote shall not be recorded and the remaining electors shall forthwith fill the vacancy.<sup>219</sup>

Michigan is one of only a few states that has the ability to change a presidential elector's vote after it has been cast.<sup>220</sup> This is not only at odds with the concept of a representative democracy,<sup>221</sup> but fundamentally offends principles of federalism.<sup>222</sup> In performing their duties, presidential electors are performing a federal function, and should be unencumbered by restrictions imposed by the states.<sup>223</sup> To use a hypothetical, consider the Speaker of the House of Representatives, Paul Ryan, who hails from Wisconsin.<sup>224</sup> The Speaker is outspoken when it comes to

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<sup>216</sup> See Amy B. Wang, *Pelosi: 'Peaceful Transfer of Power is the Cornerstone of Our Democracy'*, WASH. POST (Nov. 9, 2016), <https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-updates-on-the-2016-election-voting-and-race-results/pelosi-peaceful-transfer-of-power-is-the-cornerstone-of-our-democracy/>.

<sup>217</sup> *Free, Fair, & Regular Elections: Essential Principles*, DEMOCRACY WEB, <http://democracyweb.org/elections-essential-principles> (last visited Dec. 29, 2017).

<sup>218</sup> See MICH. COMP. LAWS § 168.47 (1954).

<sup>219</sup> *Id.*

<sup>220</sup> See NCSL, *supra* note 8.

<sup>221</sup> See U.S. CONST. art. I, § 8, cl. 18.

<sup>222</sup> See U.S. CONST. art. VI, cl. 2.

<sup>223</sup> See *Ray v. Blair*, 343 U.S. 214, 231 (1952) (Jackson, J., dissenting).

<sup>224</sup> See Scott Wong, *Paul Ryan Elected Speaker*, THE HILL (Oct. 29, 2015), <http://thehill.com/homenews/house/258516-house-elects-paul-ryan-as-speaker>.

repealing the Affordable Care Act.<sup>225</sup> He was elected on promises to the people of his district that he will not only repeal the Act, but also find a “better alternative.”<sup>226</sup> If Speaker Ryan is one day successful in his efforts to repeal, but neglects to find a suitable replacement, then the people of Wisconsin can elect him out of office.<sup>227</sup> The State of Wisconsin may not force him to resign simply because he broke his promise to their citizens, nor can they nullify any of the votes he has cast in the House, as this would be contrary to federalism.<sup>228</sup> Any potential political castigation of Ryan would be sufficient punishment. The State of Michigan, therefore, should not be able to force the resignation of presidential electors who are performing a federal function, nor nullify their votes.<sup>229</sup> Any resulting political rebuke would be a sufficient remedy.

## 2. Monetary Fines

In addition to removal from office through non-political means, there are a few states that have explicitly imposed monetary penalties upon presidential electors to coerce their votes.<sup>230</sup> North Carolina imposes a \$500 fine if a presidential elector faithlessly

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<sup>225</sup> See Aaron Reilly, *Goodbye Obamacare – Paul Ryan’s got it from here*, THE BADGER HERALD (Nov. 29, 2016), <https://badgerherald.com/opinion/2016/11/29/ryancare-set-to-replace-obamacare-needs-copy/>.

<sup>226</sup> See Scott Wong & Sarah Ferris, *Ryan Vows to Offer ObamaCare Replacement Plan in 2016*, HILL (Dec. 3, 2015), <http://thehill.com/homenews/house/261968-ryan-vows-to-offer-obamacare-replacement-plan-in-2016>.

<sup>227</sup> See John Bresnahan & Rachael Bade, *Ryan Puts Speakership on the Line with Obamacare Blitz*, POLITICO (Mar. 20, 2017), <http://www.politico.com/story/2017/03/paul-ryan-obamacare-repeal-trump-236229> (discussing what is at stake for President Trump and Paul Ryan in efforts to repeal and replaced the Affordable Care Act fail).

<sup>228</sup> See discussion *supra* Section II.B. See generally Eric Magazu, *The Importance of Federalism*, MASS. DAILY COLLEGIAN (Apr. 16, 2012), <http://dailycollegian.com/2012/04/16/importance-of-federalism>.

<sup>229</sup> See generally *Ray v. Blair*, 343 U.S. 214, 231–32 (1952) (Jackson, J., dissenting) (discussing the role of electors as “free agents” to promote nonpartisanship and the Framers’ intended federalism).

<sup>230</sup> See N.C. GEN. STAT § 163-212 (1967); OKLA. STAT. tit. 26, § 10-109 (1974).

votes, while Oklahoma and Washington impose a \$1,000 fine.<sup>231</sup> Furthermore, it is worth pointing out that in March of 2017, a Washington state judge upheld the State's decision to fine three presidential electors who were pledged to Secretary Hillary Rodham Clinton, but cast their votes for former Secretary of State Colin Powell.<sup>232</sup> The fact that electors must pay a fine violates the will of the Framers regarding the free agency of the electors.<sup>233</sup>

While the payment of fines for civil penalties is not novel in American law,<sup>234</sup> the levying of a fine for the exercise of personal choice in a representative democracy should be inconceivable. This would be akin to a Governor in support of repealing the Affordable Care Act fining a Senator who voted against the repeal. It is not the state's domain to interfere with federal matters, nor is it appropriate to attempt to influence a representative's vote with monetary penalties. This becomes especially true when a state official is attempting to limit the power of a federal representative. The practice is contrary to federalism.<sup>235</sup>

### 3. Criminal Sanctions

New Mexico and South Carolina are the only states on the books, to date, that have explicitly imposed criminal sanctions on presidential electors that have chosen to exercise personal judgment in casting their votes.<sup>236</sup> New Mexico's faithless elector statute states:

Presidential electors for the state shall perform the duties of the presidential electors required by law

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<sup>231</sup> Compare N.C. GEN. STAT. § 163-212 (1967), with OKLA. STAT. tit. 26, § 10-109 (1974), and Reid Wilson, *Washington Judge Upholds Fines for Faithless Electors*, HILL (Mar. 9, 2017), <http://thehill.com/homenews/state-watch/323124-wash-judge-upholds-fines-for-faithless-electors>.

<sup>232</sup> See Wilson, *supra* note 231.

<sup>233</sup> See U.S. CONST. art. II (providing guidance on electors and the method for choosing electors).

<sup>234</sup> See, e.g., 42 U.S.C. § 7524 (1965) (imposing a civil penalty for motor vehicle manufacturers that do not properly comply with emission standards).

<sup>235</sup> See discussion, *supra* Section II.B.

<sup>236</sup> See N.M. STAT. ANN. §§ 1-15-5; 1-15-9 (1969); S.C. CODE ANN. § 7-19-80 (1962).

and the constitution of the United States . . . All presidential electors shall cast their ballots in the electoral college for the candidates of the political party which nominated them as presidential electors . . . Any presidential elector who casts his ballot in violation of the provisions [of this statute] is guilty of a fourth degree felony.<sup>237</sup>

The statute itself is contradictory. If the presidential electors of New Mexico are to perform the duties required by the Constitution of the United States,<sup>238</sup> then they should do so unencumbered with criminal restrictions.<sup>239</sup> Nowhere in the Constitution does it say that an elected representative will be jailed for expressing personal choice.<sup>240</sup> In fact, there is an entire section of the Constitution that prohibits this practice.<sup>241</sup> If one were to take this to the logical extreme, the jailing of elected representatives based on their personal choice in legislative votes could become a dark possibility. The Framers drafted and ratified the Constitution to avoid tyranny,<sup>242</sup> but prosecuting an elected representative for expressing her personal choice is a form of tyranny.<sup>243</sup>

### *C. States That Encourage*

States that encourage presidential electors to vote a certain way are those that have not enacted “faithless elector laws,” but have implemented election laws which attempt to achieve a certain

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<sup>237</sup> N.M. STAT. ANN. §§ 1-15-5, 1-15-9 (1969).

<sup>238</sup> *See generally* U.S. CONST. art. II, § 1 (showing that the language of the Constitution does not restrict the ability of the presidential electors).

<sup>239</sup> *See* U.S. CONST. art. II, § 1.

<sup>240</sup> *See generally* U.S. CONST.

<sup>241</sup> *See* U.S. CONST. art. I, § 6, cl. 1 (“The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.”).

<sup>242</sup> *See* U.S. CONST. pmbl.

<sup>243</sup> *See generally* U.S. CONST. amend. I (showing that the government can make no law abridging the right to free speech). *See also* NAACP v. Alabama, 357 U.S. 449, 461 (finding that there is a right to political association and political choice attached to freedom of speech).

result.<sup>244</sup> The states that fall into this category are by far the best available models under the Constitution, as there are no punishments if a presidential elector exercises personal judgment.<sup>245</sup>

### 1. The Pennsylvania Model

The Commonwealth of Pennsylvania has taken an interesting approach in attempting to direct the votes of presidential electors a certain way without actually stripping them of personal choice.<sup>246</sup> Instead of crafting a law designed to bind or punish presidential electors, Pennsylvania has chosen to utilize its explicit authority under the Constitution to select individuals who would follow the will of the popular vote in the state.<sup>247</sup> Pennsylvania's statute for selecting presidential electors is as follows:

The nominee of each political party for the office of President of the United States shall, within thirty days after his nomination by the National convention of such party, nominate as many persons to be the candidates of his party for the office of presidential elector as the State is then entitled to. If for any reason the nominee of any political party for President of the United States fails or is unable to make the said nominations within the time herein provided, then the nominee for such party for the office of Vice-President of the United States shall, as soon as may be possible after the expiration of thirty days, make the nominations.<sup>248</sup>

By allowing the individual presidential nominees to appoint the presidential electors in the state,<sup>249</sup> Pennsylvania has addressed any concern regarding "faithlessness" without restricting the

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<sup>244</sup> See, e.g., 25 PA. CONS. STAT. § 2878 (1937).

<sup>245</sup> See *id.*

<sup>246</sup> See *id.* (allowing the presidential nominees to select the slate of electors).

<sup>247</sup> See U.S. CONST. art. II, § 1, cl. 2 (allowing the states to select the method of choosing presidential electors to be sent to the Electoral College).

<sup>248</sup> 25 PA. CONS. STAT. § 2878 (1937).

<sup>249</sup> See *id.*

presidential electors constitutional powers.<sup>250</sup> If Senator Smith, the Democratic nominee for President, selects Ms. Jones as one of his electors in the Commonwealth, one would assume that the trust given to her by the Senator would be respected on Election Day; if it is not, then Ms. Jones will most likely be rebuked by Senator Smith and his supporters. On that same note, if Senator Smith passes away after he won the popular vote in the state, but before the Electoral College meets, Ms. Jones has the ability to cast her vote for president using her best judgment without fear of punishment.<sup>251</sup> She can choose to select the vice-presidential nominee from the Democratic Party, or she can choose to select the name from a third party that also represents the interests not only of the state, but of the nation.<sup>252</sup>

This is where the true benefit of the Electoral College emerges, as Ms. Jones, in the hypothetical, does not have to make this decision alone.<sup>253</sup> When casting her vote, she is not only using her judgment, but is able to act on the advice of the other presidential electors who have convened with her on that day.<sup>254</sup> Pennsylvania has twenty electoral votes, so Ms. Jones will have nineteen colleagues to consult with when the presidential electors of Pennsylvania convene.<sup>255</sup> While this method does not bind or coerce a presidential elector from exercising personal judgment, there is still room for improvement to fully embrace the federal nature of the office.

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<sup>250</sup> Compare *id.*, with U.S. CONST. art. II, § 1, cl. 2.

<sup>251</sup> See 25 PA. CONS. STAT. § 2878 (1937).

<sup>252</sup> See *id.*

<sup>253</sup> See generally *What are the Roles and Responsibilities*, U.S. ELECTORAL COLLEGE, *supra* note 209 (explaining that the presidential electors met in their respective states on December 19, 2016 to cast their votes for president and vice president).

<sup>254</sup> See *id.*

<sup>255</sup> *Voting & Elections: The Electoral College*, PENN. DEP'T OF ST., <http://www.dos.pa.gov/VotingElections/Pages/Electoral-College-.aspx> (last visited Dec. 29, 2017); see also *id.* (explaining the voting process when the electors meet to vote for the president).

## V. THE HYBRID SOLUTION

A. *A Hybrid Solution for A Hybrid System*

While the majority of laws that address “faithless electors” are insufficient under the Constitution, their attempt to honor the popular determination of the people is admirable. In order to respect the principles of the Constitution and the will of the Framers,<sup>256</sup> states should concentrate on the method of appointing electors rather than restricting or coercing them when it comes time to cast votes. By adopting the “Pennsylvania Model,” presidential electors would be encouraged to vote for that nominee or face political backlash from not only that individual, but also from the people who cast their votes for that individual.<sup>257</sup>

Furthermore, because our government is structured as a “hybrid system,” there needs to be an additional step to create a “hybrid solution.”<sup>258</sup> In order for that to happen, states should consider adopting the National Popular Vote Interstate Compact (“NPVIC”).<sup>259</sup> The NPVIC is a pending law that would send the slate of presidential electors belonging to the winner of the national popular vote to the Electoral College.<sup>260</sup> Currently, ten states and the District of Columbia have ratified this legislation.<sup>261</sup> These eleven jurisdictions control 165 electoral votes.<sup>262</sup> The NPVIC will go into effect as soon as enough signatories sign to push the electoral vote count to 270, ensuring that the winner of the national popular vote will always win the electoral vote.<sup>263</sup>

The relevant text of the NPVIC states that the chief election official of each state shall tally the total number of votes on Election Day for each candidate for President of the United

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<sup>256</sup> See generally THE FEDERALIST NO. 10, *supra* note 52 (James Madison); THE FEDERALIST NO. 68, *supra* note 6 (Alexander Hamilton).

<sup>257</sup> See discussion *supra* Section IV.C.

<sup>258</sup> See discussion *supra* Section II.C.

<sup>259</sup> See *Agreement Among the States*, *supra* note 36.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

States.<sup>264</sup> But in doing so, the tally shall be taken from every state, not simply the state in which that election official resides.<sup>265</sup> As such, the chief election official will determine the winner of the national popular vote, and designate the appropriate presidential electors in her state as the contest winners.<sup>266</sup>

In this system, the slate of electors belonging to the party of the winner of the national popular vote would always be elected to the Electoral College.<sup>267</sup> Of the eleven jurisdictions that have signed the NPVIC, five of them have laws in place that limit a presidential elector's choice in casting their votes.<sup>268</sup> By repealing those laws and adopting the "Pennsylvania Model," the NPVIC states will allow the presidential electors to take federal matters into consideration, while encouraging them to vote for the individual who placed them in the position in the first place.<sup>269</sup> Furthermore, these presidential electors may also look towards how their individual states voted, and weigh those considerations against the national popular vote.

By allowing the presidential electors to maintain the power of free agency, they are able to act as correcting agent in the case of the death or mental incapacitation of a nominee. In addition, because the presidential electors were placed in power by the presidential nominees themselves,<sup>270</sup> their interest to select the running mate of the deceased individual could be safely assumed. If these events ever come to pass, the presidential electors will stand ready to ensure that the individual that will take the Oath of Office on the Twentieth of January is the one that satisfies a majority of the American people.

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<sup>264</sup> CAL. ELEC. CODE § 6921 (West 2012).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See *Agreement Among the States*, *supra* note 36; *NCSL*, *supra* note 8.

<sup>269</sup> Compare 25 PA. CONS. STAT. §2878 (1937), with CAL. ELEC. CODE § 6921 (West 2012).

<sup>270</sup> See 25 PA. CONS. STAT. §2878 (1937).



*B. Through the Looking Glass*

Hamilton's concerns became a reality in the 2016 presidential election, 229 years after he raised them.<sup>271</sup> The nomination of Donald J. Trump as the Republican presidential candidate resulted in many Republican representatives and officials withholding their endorsement or support of his candidacy based on his obscene rhetoric and often-incoherent policy proposals.<sup>272</sup> While Mr. Trump did receive the requisite amount of electoral votes on November 8, 2016,<sup>273</sup> he was not actually formally elected President that day.<sup>274</sup> Presidential electors could have used their judgment to vote for a different candidate to quash the "impulse of passion" that Mr. Trump was able to tap into,<sup>275</sup> but were restricted or coerced from doing so in over half the states.<sup>276</sup> The 2016 presidential election further provides justification for the ability of presidential electors to exercise personal judgment, as polls have shown that the two major party nominees had the lowest approval rating in the history of any presidential election.<sup>277</sup> In fact, when Trump announced that Governor Mike Pence would join his ticket,

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<sup>271</sup> See generally THE FEDERALIST NO. 68, *supra* note 6, at 351–55 (Alexander Hamilton) (showing how Hamilton believed that the Electoral College would prevent an unfit individual from taking the oath of office).

<sup>272</sup> Catanese, *supra* note 73.

<sup>273</sup> See Matt Flegenheimer & Michael Barbaro, *Donald Trump is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), <http://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html>.

<sup>274</sup> See *What are the Roles and Responsibilities*, U.S. ELECTORAL COLLEGE, *supra* note 209.

<sup>275</sup> See David Neiwert & Sarah Posner, *Meet the Horde of Neo-Nazis, Klansmen, and Other Extremist Leaders Endorsing Donald Trump*, MOTHER JONES (Sep. 21, 2016), <http://www.motherjones.com/politics/2016/09/trump-supporters-neo-nazis-white-nationalists-kkk-militias-racism-hate>; THE FEDERALIST NO. 10, *supra* note 52, at 43 (James Madison).

<sup>276</sup> See NCSL, *supra* note 8.

<sup>277</sup> See Eliza Collins, *Poll: Clinton, Trump Most Unfavorable Candidates Ever*, USA TODAY: ONPOLITICS (Aug. 31, 2016), <http://www.usatoday.com/story/news/politics/onpolitics/2016/08/31/poll-clinton-trump-most-unfavorable-candidates-ever/89644296/>.

many Republicans expressed fondness for him over the volatile reality television star.<sup>278</sup>

If the “Hybrid Solution” were implemented before the 2016 presidential election, we would have seen Democratic presidential electors sent to the Electoral College, as Secretary Clinton won the popular vote by nearly 2.9 million people.<sup>279</sup> While the “Hybrid Solution” does not guarantee that Clinton would have been formally elected President, it would have encouraged presidential electors to cast their votes faithfully, according to the national popular vote.<sup>280</sup> However, by allowing them to exercise personal judgment, the presidential electors could have taken additional factors into consideration, such as challenges to her honesty and judgmental capability.<sup>281</sup> If the 2016 presidential election can teach us anything, it is that by implementing the “Hybrid Solution,” presidential electors can truly begin considering federal matters, such as the national popular vote.<sup>282</sup>

### C. *The Benefits of a Hybrid Solution*

The Electoral College was established by the Constitution to allow presidential electors to exercise their own judgment in selecting the nation’s chief executives.<sup>283</sup> While the main driving force behind the implementation of personal choice among the presidential electors was federalism,<sup>284</sup> the warnings of both

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<sup>278</sup> See Tina Nguyen, *Republicans Love Mike Pence More Than They Like Donald Trump: And Pence’s Boss Might Not Be Pleased*, VANITY FAIR: HIVE-POL.(Oct. 5, 2016), <http://www.vanityfair.com/news/2016/10/mike-pence-debate-performance>.

<sup>279</sup> See Kevin Drum, *Hillary Clinton’s Popular Vote Lead Passes 2.5 Million*, MOTHER JONES (Dec. 2, 2016), <http://www.motherjones.com/kevin-drum/2016/12/hillary-clintons-popular-vote-lead-passes-25-million>.

<sup>280</sup> See *Agreement Among the States*, *supra* note 36.

<sup>281</sup> See Guy Benson, *NYT/CBS Poll: Hillary’s Untrustworthy Rating Soars to 67 Percent*, TOWNHALL (Jul. 15, 2016), <http://townhall.com/tipsheet/guybens on/2016/07/15/nytcbs-poll-hillarys-untrustworthy-rating-soars-to-67-percent-n2192807>.

<sup>282</sup> See Drum, *supra* note 279; CAL. ELEC. CODE § 6921 (West 2012).

<sup>283</sup> See U.S. CONST. art. II, § 1; *see generally* discussion *supra* Part II.

<sup>284</sup> See Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1251–53 (2012).

Madison and Hamilton can be implicitly read though the text of Article II.<sup>285</sup> The system which they supported established procedures that were created to provide safeguards not only against factions, but also to prevent undeserving individuals from taking the oath of office.<sup>286</sup> By implementing the “Hybrid Solution,” the method of selecting the presidential electors would be delegated by states to individuals running for office, severing the power from factions.<sup>287</sup> This would re-individualize the political process in the choosing of our nation’s chief executive, something the Framers of the Constitution deeply wanted.<sup>288</sup>

In addition, this solution can also help prevent an individual from winning the presidency on an “impulse of passion.”<sup>289</sup> By acting as a vehicle for the national popular vote, presidential electors can act as guardians of democracy against both tyrants, as well as individuals too dull to respect the awesome powers bestowed upon them. The solution is narrowly tailored not only to the language of the Constitution,<sup>290</sup> but also to the growing trend among the states that wish to direct the votes of their respective presidential electors to achieve a specific result.<sup>291</sup> What

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<sup>285</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 43 (James Madison) (“By a faction, I understand a number of citizens . . . who are united and actuated by some common impulse of passion or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”); THE FEDERALIST NO. 68, *supra* note 6, at 353 (Alexander Hamilton) (“the executive should be independent for his continuance in office, on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favour [sic] was necessary to the duration of his official consequence.”).

<sup>286</sup> Compare THE FEDERALIST NO. 10, *supra* note 52, at 43–45 (James Madison), with THE FEDERALIST NO. 68, *supra* note 6, at 353–54 (showing each Framers’ desire for safeguards in the political process).

<sup>287</sup> See generally 25 PA. CONS. STAT. §2878 (1937) (allowing the individual presidential nominees to personally select the presidential electors of the state).

<sup>288</sup> See THE FEDERALIST NO. 10, *supra* note 52, at 43–45 (James Madison).

<sup>289</sup> See *id.*; see also Neiwert & Posner, *supra* note 275 (demonstrating the ways others may have acted on an impulse of passion).

<sup>290</sup> See generally U.S. CONST. art. II, § 1 (showing that the explicit language of the Constitution only provides for the method a state may choose in selecting the presidential electors).

<sup>291</sup> See generally 25 PA. CONS. STAT. §2878 (1937); MICH. COMP. LAWS §168.47 (1954); N.C. GEN. STAT § 163-212 (1967); HAW. REV. STAT. §14-28

differentiates the “Hybrid Solution” from current models, though, is that it respects the Guarantee Clause of the Constitution, which protects the personal choice of the elected representatives of the United States.<sup>292</sup>

But perhaps most importantly, because presidential electors would be sent to the Electoral College as a result of the national popular vote,<sup>293</sup> federal matters would be properly considered, as a true majority of Americans would have determined who they would like to see in the Oval Office.<sup>294</sup> Because the “Hybrid Solution” acknowledges the “federal function” factor referred to by Justice Jackson in his dissenting opinion in *Ray v. Blair*,<sup>295</sup> it is an excellent mechanism by which states could direct a vote without tampering with the powers bestowed upon presidential electors by the Constitution of the United States.

## CONCLUSION

While the Electoral College is far from a perfect system, states may not attempt to circumvent the Constitution in order to bind or coerce the personal choice of presidential electors. That being said, states may implement laws to encourage presidential electors to vote a certain way.<sup>296</sup> When looking at the 2016 presidential election, it is apparent that the Framers had legitimate fears about the election of the chief executive.<sup>297</sup> The ability of a presidential elector to use personal discretion in casting her vote remains an important aspect of our “hybrid system” of government. While it

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(1970); OKLA. STAT. tit. 26, §§ 10-102; 10-109 (1974); WIS. STAT. § 7.75 (1979); CAL. ELECT. CODE § 6906 (West 1994) (showing that several states have opted to use faithless elector provisions in order to achieve a specific election result).

<sup>292</sup> Compare CAL. ELEC. CODE § 6921 (West 2012), and 25 PA. CONS. STAT. §2878 (1937), with U.S. CONST. art. I, § 8, cl. 18; see discussion *supra* Part III.B.

<sup>293</sup> CAL. ELEC. CODE § 6921 (West 2012).

<sup>294</sup> See *id.*; *Agreement Among the States*, *supra* note 36.

<sup>295</sup> See *Ray v. Blair*, 343 U.S. 214, 231 (1952) (Jackson, J., dissenting); see *supra* Section III.C.

<sup>296</sup> See discussion *supra* Section V.A.

<sup>297</sup> See discussion *supra* Section V.B.

may soon become appropriate to amend the Constitution to allow for the winner of the national popular vote to become President, the states may take the preemptive step of implementing the “Hybrid Solution” to encourage the presidential electors to be ahead of the curve.