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Is the Uniform Faithful Presidential Electors Act Constitutional?

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INTRODUCTION

My topic is both timely and perennial: The Electoral College. More specifically, I will first discuss the constitutional problem known as the "Faithless Elector" and, then, I will attempt to solve such problem. My proposed solution is the Uniform Faithful Presidential Electors Act (UFPEA), a statute that several states have adopted.[1]

The "problem of the faithless elector" is posed by the possibility that a presidential elector—pledged to vote for his or her party's nominee for president—fails to do so, either by voting for another candidate or by not voting at all. The Supreme Court last spoke to this issue in a 1952 decision, *Ray v. Blair*.[2] As we shall see, however, that decision explicitly left open the question of the legal enforceability, or binding quality, of the pledge that a presidential elector might previously have been required to take.[3] The UFPEA is an attempt to solve, or perhaps one should say, sidestep, that problem. But, as I shall argue, that statute, though subtle and inventive, is unconstitutional.

The possibility of a faithless elector is a real and troubling problem. In the presidential election of 2012, as many as five potential Republican electors hinted that they would not vote for the Republican presidential nominee, Mitt Romney, and would prefer his rival Ron Paul instead.[4] In the 2000 election, one elector from the District of Columbia abstained from voting for the Democratic presidential nominee, Al Gore.[5] Since George W. Bush obtained only 271 electoral votes that year—one vote over the majority of 270 required to win the presidency—a bare handful of defections could have decided the outcome.[6] There have been at least 157 faithless electors in the course of the country's constitutional history, including the elections of 1948, 1956, 1960, 1968, 1972, 1976, 1988, 2000, and 2004.[7] In this extraordinary political year, the chance of faithless electors surely

1 Adopting States include Minnesota, Montana, Nebraska and Nevada. *See* Faithful Presidential Electors Act, UNIFORM LAW COMMISSION: THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.uniformlaws.org/Act.aspx?title=Faithful%20Presidential%20Electors%20Act.

2 343 U.S. 214 (1952).

3 *See infra* Part III.

4 *See* Robert M. Alexander, *Rogue Electors Threaten Elections' Integrity*, CNN (Oct. 26 2012, 1:12 PM), http://www.cnn.com/2012/10/22/opinion/alexander-electors.

5 *See* David Stout, *The 43rd President: The Electoral College; The Electors Vote, and the Surprises Are Few*, THE NEW YORK TIMES (Dec. 19, 2000), http://www.nytimes.com/2000/12/19/us/43rd-president-electoral-college-electors-vote-surprises-are-few.html.

6 *See* Alexander, *supra* note 4.

7 *See* THOMAS H. NEALE, THE ELECTORAL COLL.: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS, CONGRESSIONAL RESEARCH SERVICE 7 (Apr. 13, 2016); Faithless Electors, FAIR VOTE, http://www.fairvote.org/faithless_electors [http://archive.fairvote.org/?page=973].

cannot be discounted.

In order to analyze the constitutional and legal issues here, it is necessary, first, to return to the origins of that distinctively American institution, the Electoral College, as it emerged from the Constitutional Convention of 1787 and was explained to the Ratifiers thereafter.

Second, after that necessarily brief survey, this Article will lay out the textual, structural, and other arguments for concluding that presidential electors exercise constitutionally protected discretion in how they cast their ballots for president (and vice president), and attempts to eliminate such discretion are unconstitutional. In that connection, we must consider the broader background of late 18th century political practices, both in this country and in England, from which so much of our constitutional culture derives. Two aspects of that practice will require particular attention: the absence of political parties, and the debate over legislative "instructions."

Third, this Article will examine the Supreme Court's decision in *Ray v. Blair*, which leaves open the critical question of whether the breach of an elector's pledge has any legal remedy consistent with the Constitution.[8]

Finally, this Article will assess the constitutionality of the UFPEA against the constitutional standards that have been articulated. This analysis will advance two main arguments for concluding that the UFPEA is unconstitutional. The more decisive argument is based on the original Constitution; the other argument examines the First Amendment.

I. THE ORIGINS OF THE ELECTORAL COLLEGE

The term "Electoral College" is not used in the Constitution. The term "Electoral Colleges" would be far better, because Article II, Section 1, Clause 2 expressly provides that the electors are to meet "in their respective States."[9] (This requirement was introduced to prevent the bribery or corruption of the electors, which the Framers thought would be easier to do if they were all assembled in a single place.) Better still would be the term "Electoral Congresses." That is because the voting structure of the Electoral College resembles, apparently by design, that of the Federal Congress: each state is assigned as many electoral votes as it has members of the U.S. House of Representatives, plus two additional votes, corresponding to its two members of the U.S. Senate.[10] If this structural similarity is indeed intentional, then it

8 *See infra* Part III.

9 U.S. CONST. art. II, § 1, cl. 2.

10 *See* Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc*

provides some support for thinking that the presidential electors, forming as it were an ad hoc Congress, have as much discretion to vote as the members of Congress do.

The original constitutional provisions for the Electoral College are set out in Article II, Section 1, Clauses 2 and 3[11] which are elaborately detailed. Their intricacy may reflect the extreme difficulties that the Framers had encountered in addressing the problem of a presidential election—an issue that Pennsylvania Framer James Wilson described as "in truth the most difficult of all on which we have had to decide."[12] At first, the Framers thought highly of their invention: in *The Federalist* No. 68, Hamilton wrote that "[t]he mode of appointment of the Chief Magistrate of the United States . . . . it be not perfect, it is at least excellent."[13] But, unfortunately, the arrangements rapidly proved to be disappointing. By 1823, James Madison, in a letter to George Hay, was prepared to attribute the provisions to the "fatigue and impatience" produced in the delegates by their long, exhausting summer in Philadelphia.[14]

Practical experience had indeed revealed devastating weaknesses in the original plan. Owing to the terms of Article II, the presidential election of 1796 produced what we would call a "split" ticket in which a Federalist candidate, John Adams, was elected president and his political opponent, the Republican Thomas Jefferson, was elected vice president. Worse still, in the presidential election of 1800, the Electoral College provisions produced an unintended tie between two Republicans, Thomas Jefferson and Aaron Burr, which in turn led to a prolonged and nearly disastrous stalemate in the House of Representatives (on which the choice then fell).[15] Fearing repetition of

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Congress for the Selection of a President, 73 J. AM. HIST. 35, 52 (1986) ("In effect, the Electoral College was simply a special congress elected to choose a president, without the shortcomings of the real Congress.").

11 U.S. CONST. art. II, § 1, cl. 2–3.

12 Ellis Katz, *The American Electoral College* 1, http://usa.usembassy.de/etexts/gov/katzelectoralcollege.pdf.

13 THE FEDERALIST NO. 68 (Alexander Hamilton).

14 In his letter to George Hay, James Madison stated:

> The difficulty of finding an unexceptionable process for appointing the Executive Organ of a Government such as that of the U.S. was deeply felt by the Convention; and as the final arrangement of it took place in the latter stage of the Session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies, tho' the degree was much less than usually prevails in them.

Letter from James Madison to George Hay, THE FOUNDERS' CONSTITUTION (Aug. 23, 1823), http://press-pubs.uchicago.edu/founders/documents/a2_1_2-3s10.html. Criticism of the Electoral College has been unrelenting. For a leading constitutional scholar's objections, *see* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 81–97 (2006).

15 *See* EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION

these calamities, the Framing generation ratified the Twelfth Amendment on June 15, 1804, in time for the presidential election of that year. Apart from the Bill of Rights and the Eleventh Amendment, the Twelfth Amendment is the only modification of the original Constitution to have been made in the Framing period. Later constitutional amendments have made further changes in the presidential election process, such as conferring electoral votes on the District of Columbia,[16] limiting an incumbent president's eligibility to be elected for a third term,[17] and altering the date of the president's inauguration.[18] But the core of the process remains as it was in the 1804 presidential election.

The scheme of the Electoral College emerged only at a very late stage in the Philadelphia Convention. No one knows exactly which of the delegates originated the idea. (James Wilson had earlier introduced a proposal for the indirect popular election of the president by means of a district-based selection of "electors" from the national legislature[19]—but what the Framers eventually proposed is strikingly different from Wilson's original plan.[20]) A careful, scholarly study by Shlomo Slonim[21] traces through the debates over the method of selecting the president—a matter over which the Framers wrangled at great length, which they found themselves unable to resolve (and which in the end they referred to an eleven member committee, charmingly named the Committee on Unfinished Parts, chaired by the former Chief Justice of New Jersey, the little remembered David Brearly[22]). The Committee's proposal was explained and defended, however, by Gouverneur Morris, a prominent and highly influential delegate, and seems to have met with general satisfaction. Slonim found that

> The delegates . . . were impressed with the Electoral College scheme,

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OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN (2006) (discussing the election of 1800); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 16–108 (2005); JOHN FERLING, ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800 (PIVOTAL MOMENTS IN AMERICAN HISTORY) (2004); NOBLE E. CUNNINGHAM, JR., THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATION, 1789–1801, 211–48 (1957).

16 U.S. CONST. amend. XXIII, § 1.

17 U.S. CONST. amend. XXII, § 1.

18 U.S. CONST. amend. XX, § 1.

19 Records of the Federal Convention, THE FOUNDERS' CONSTITUTION (1787), http://press-pubs.uchicago.edu/founders/documents/a2_1_2-3s2.html.

20 *See* Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 PRESIDENTIAL STUD. Q. 689 (1987) (discussing Wilson's role).

21 Slonim, *supra* note 10. For more on the origins of the idea of the Electoral College, *see* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 48–51 (2015).

22 *See David Brearly*, TEACHINGAMERICANHISTORY.ORG, http://teachingamericanhistory.org/static/convention/delegates/brearly.html (last visited Aug. 28, 2016) (providing a brief biography of Brearly's life).

> which so successfully blended all the necessary elements to ensure a safe and equitable process for electing a president and which reserved considerable influence for the states. . . . The Electoral College constituted a package deal in which diverse interests and safeguards were neatly balanced.[23]

The most significant change made to the Committee's proposal was giving the House of Representatives, rather than the Senate, the default role of selecting the president if no one had obtained an Electoral College majority.[24] The only other change of significance was to bar federal legislators and those who occupied federal offices of "profit or trust" from serving as electors.[25]

The Framers' eventual method for electing the president could be said to have been influenced by their conception of the presidential office itself. Plainly, American conditions precluded us from having a hereditary monarch, despite the advantages that several Framers (perhaps under David Hume's influence[26]) saw in it.[27] But the Framers eventually agreed on an institution that in many respects can be considered a kind of elective monarchy—and so not altogether unlike the proposal that Alexander Hamilton had daringly put before the Convention in his speech of June 18, 1787.[28] As John Adams put it, in a

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23 Slonim, *supra* note 10, at 54.

24 *Id.*

25 *Id.*

26 *See* DAVID HUME, *That Politics May Be Reduced to a Science*, *in* ESSAYS MORAL, POLITICAL, LITERARY (Eugene F. Miller ed., 1777), http://oll.libertyfund.org/titles/hume-essays-moral-political-literary-lf-ed?q=hereditary#Hume_0059_115.

> This chief magistrate may be either *elective* or *hereditary*; and though the former institution may, to a superficial view, appear the most advantageous; yet a more accurate inspection will discover in it greater inconveniencies than in the latter, and such as are founded on causes and principles eternal and immutable.

Id. Hume's influence on the Framers, including Benjamin Franklin (who knew Hume personally), James Madison and Alexander Hamilton, was considerable. *See* John M. Werner, *David Hume and America*, 33 J. HIST. IDEAS 439 (1972). Especially notable is Hume's influence on Madison's thinking about "factions." *See* Douglass Adair, *That Politics May Be Reduced to a Science: David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343 (1957). For amplification, *see* Mark G. Spencer, *Hume and Madison on Faction*, 59 WM. & MARY Q. 869 (2002).

27 *See* CHARLES C. THACH. JR., THE CREATION OF THE PRESIDENCY 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 80–81 (1922).

28 *See* Alexander Hamilton, Federal Convention, THE FOUNDERS' CONSTITUTION (1787), http://press-pubs.uchicago.edu/founders/documents/v1ch8s10.html. Hamilton's proposal for an elective monarchy was in fact representative of the thinking of an important segment of American opinion in 1787. *See* FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR 94–96, 166–69 (Trevor Colbourn ed., 1974). *See also* PRAKASH, *supra* note 21, at 36–62; ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 29 (2014). Sir William Blackstone, a major influence on the Founders, pronounced an elective monarchy to be "the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature." 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF

1789 letter to Roger Sherman, no "other name can with propriety be given" to our Constitution than that of "a monarchical republic, or if you will, a limited monarchy."[29]

Early modern Europe had afforded many examples of elective monarchies, including the Papacy, the Holy Roman Empire,[30] Venice, Poland and (previously) Holland.[31] But it seems clear that the Framers did not have any such models in mind, and indeed found some of them extremely defective.[32] Instead, the Electoral College was seemingly modeled on the system that Maryland, under its Constitution of 1776, had employed to select state senators.[33] (Of note, a delegate from Maryland, Charles Carroll, was a member of the Brearly Committee.) That Constitution established a Senate of fifteen members, and an electoral college was formed to choose those senators.[34] In every county, voters selected two electors, while Baltimore and Annapolis each sent one elector. Senators were not required to represent jurisdictions; rather, the only stipulation provided in the Maryland Constitution was that nine senators should reside on the western shore, and the other six on the eastern shore.[35]

The Framers were of course well aware of Maryland's Electoral College. In the speech by Hamilton referred to earlier, he noted that in considering models for the Executive, the Senate of Maryland was "much appealed to."[36] And in a letter to Thomas Jefferson of 1788, James Madison refers to the Maryland Electoral College when advising Jefferson on the options for the election of a Governor of Virginia.[37]

ENGLAND 185 (Chicago, Univ. of Chicago Press 1979), http://press-pubs.uchicago.edu/founders/documents/a2_1_2-3s1.html. *See* JEREMY BLACK, GEORGE III: AMERICA'S LAST KING 22–23 (2006) (discussing eighteenth century elective monarchies).

29 JOHN ADAMS, THE PORTABLE JOHN ADAMS 396, 399 (John Patrick Diggins ed., 2004).

30 *See* THE FEDERALIST NO. 19 (Alexander Hamilton and James Madison). Of interest, Americans presumably were aware that the Hanoverian Kings of England, including George III, were also Kings of Hanover, and hence "electors" of the Holy Roman Empire. Unlike the votes of other electors (which were in principle absolutely free), the Hanoverian votes had to be cast for a particular candidate. *See* Marta Vajnagi, *Britain-Hanover and the Imperial Election of 1745,* 14 HUNG. J. OF ENG. & AMER. STUD. 51, 51–52 (2008); François Velde, *The Holy Roman Empire* 13–15 (2004), http://www.heraldica.org/topics/national/hre.htm#Electors.

31 *See* THE FEDERALIST NO. 20 (Alexander Hamilton and James Madison).

32 For Madison's arguments to the Philadelphia Convention on the liabilities of the Holy Roman Empire and Poland, recorded in his notes on the debates of July 25, 1787, see Madison Debates July 25: In Convention, YALE LAW SCHOOL: THE AVALON PROJECT (1787), http://avalon.law.yale.edu/18th_century/debates_725.asp.

33 MD. CONST. of 1776, art. I; *id.* art. XI.

34 *Id.* art. XIV; *id.* art. XV.

35 *See* Charles A. Rees, *Remarkable Evolution: The Early Constitutional History of Maryland*, 36 U. BALT. L. REV. 217 (2007).

36 *See* Alexander Hamilton, Federal Convention, THE FOUNDERS' CONSTITUTION (1787), http://press-pubs.uchicago.edu/founders/documents/v1ch8s10.html.

37 *See generally* James Madison, *Observations on Jefferson's Draft of a Constitution for Virginia*, THE FOUNDERS' CONSTITUTION (1788), http://press-pubs.uchicago.edu/founders/documents/v1ch17s25.html.

Madison may well be recapitulating arguments voiced at length the previous year at the Philadelphia Convention:

> An election by the Legislature is liable to insuperable objections. It not only tends to faction intrigue and corruption, but leaves the Executive under the influence of an improper obligation to that department. An election by the people at large, as in this & several other States—*or by Electors as in the appointment of the Senate in Maryland*, or indeed by the people through any other channel than their legislative representatives, seem to be far preferable.[38]

Assuming, as is highly plausible, that the Maryland Electoral College was the model used in the Federal Constitution, it would seem that presidential electors were expected, indeed required, to exercise discretion in their choices. Article XVIII of the 1776 Maryland Constitution read:

> That the electors, immediately on their meeting, and before they proceed to the election of Senators, take such oath of support and fidelity to this State, as this Convention, or the Legislature, shall direct; and also an oath "to elect without favour, affection, partiality, or prejudice, such persons for Senators, as they, *in their judgment and conscience, believe best qualified for the office*."[39]

The ratification debate makes abundantly clear that the presidential electors were intended to exercise judgment and discretion. Indeed, that they would do so was made a selling point in favor of the Electoral College. In *The Federalist* No. 68, Alexander Hamilton explained the merits of the Electoral College as follows:

> It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture.
>
> It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which 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 such complicated investigations.[40]

On Hamilton's account, the presidential electors are chosen for the

38 *Id.* (emphasis added).
39 MD. CONST. of 1776, art. XVIII (emphasis added).
40 THE FEDERALIST NO. 68 (Alexander Hamilton).

specific purpose of "analyzing the qualities" needed in a president; they will "act[] under circumstances favorable to deliberation;" and their decisions will display a "judicious combination of all the reasons and inducements . . . proper to govern their choice." [41] It would be difficult to affirm more clearly that the electors must exercise judgment and discretion.

Likewise, John Jay argued in *The Federalist* No. 64 that the Framers' proposed method for electing the president would tend to result in the selection of a person of the highest quality.[42] And again, such outcomes will be produced by relying on the discretion and judgment of the electors themselves:

> As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The Constitution manifests very particular attention to this object. By excluding men under thirty-five from the first office, and those under thirty from the second, it confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism, which, like transient meteors, sometimes mislead as well as dazzle. If the observation be well founded, that wise kings will always be served by able ministers, it is fair to argue, that as an assembly of select electors possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment.[43]

At least some early candidates for presidential electorships took the view that they would be entitled, if not bound, to exercise discretion in casting their ballots. William Deakins, a candidate for one of Maryland's presidential electorships in 1796, pledged "to vote for that man, who to my judgment, after all information I can obtain, shall appear best qualified."[44] To be sure, by 1796 it was becoming harder to maintain such an independent position—but even so, it still remained possible.

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41 *See id*.
42 *See* THE FEDERALIST NO. 64 (John Jay).
43 *See id*.
44 CUNNINGHAM, *supra* note 15, at 96.

II. TEXT, STRUCTURE AND FOUNDING ERA PRACTICE

A. *Text and Structure*

The view that the Constitution requires presidential electors to exercise discretion in voting for the president does not rest solely on the evidence of original intent. Both the text and the structure of the Constitution indicate that their independent judgment is required.

To begin with, consider the term "elector" itself, as used in Article II, Section 1, Clause 2. The term was, of course, common in eighteenth century political discourse—e.g., in Edmund Burke's celebrated 1774 *Speech to the Electors of Bristol*.[45] An "elector" was simply someone who had the right to vote—as Burke's Bristol constituents did. So we find Sir William Blackstone, in the chapter "Of Elections" in his *Commentaries on the Laws of England*, unselfconsciously using the term "electors" as synonymous with "voters."[46] The term "elector" occurs in precisely that sense elsewhere in the Constitution—as in Article I, Section 2, Clause 1, which prescribes that the "Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[47] In commenting on this provision in *The Federalist* No. 57, Hamilton (or Madison) clinches the point that an "elector" simply meant a "voter":

> Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.[48]

But an ordinary voter, or one who has the right of suffrage, cannot be constrained in the exercise of that right. The voter's choices may indeed be limited, but they cannot be compelled. And "electors" are voters.

Other textual indications also point to the conclusion that electors are to exercise discretion and judgment. For one, the requirement that electors are to meet "in their respective States,"[49] seems gratuitous—

45 Edmund Burke, *Speech to the Electors of Bristol*, THE FOUNDERS' CONSTITUTION (1774), http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html.

46 *See* BLACKSTONE, *supra* note 28.

47 U.S. CONST. art. II, § 1, cl. 3.

48 *See* THE FEDERALIST NO. 57 (Alexander Hamilton or James Madison).

49 U.S. CONST. art. I, § 2, cl. 2.

unless we assume, as *The Federalist* tells us, that this is a precaution designed to prevent intrigue, cabal, and corruption. But those evils could only arise if the electors had discretion how to cast their votes: automata cannot conspire, nor can they be bribed. Further, the electors are required to "vote by Ballot,"[50] and the late eighteenth century "ballot" was usually not a pre-printed form created by the state with the names of the candidates inscribed on it; but often merely a blank piece of paper, on which an elector wrote the names of his selections and brought it to the poll.[51] Indeed, pre-printed ballots were not allowed in some states and did not become common until 1800 or later. "A precursor of the printed ballot appeared in the 1796 presidential election in Philadelphia, [as] the result of developing partisan machinery there."[52] But that, of course, was several years after the Constitution was drafted and ratified. Hence casting a "Ballot," at the Framing, involved a decision to write down a particular name.

Moreover, at the Framing, "candidates" were not usually formally "nominated" in any case. "A citizen would cast his vote for any individual for any office."[53] Indeed, one might be elected to an office without knowing beforehand that one might be the choice or intending to be a candidate. Thus, John Marshall (later Chief Justice) was elected to the Virginia House of Delegates in 1795—although he was supporting someone else for that office.[54] The first known state-wide nominating conventions were held in Pennsylvania for the presidential election of 1789—but Pennsylvania was far ahead of other States in developing a party system.[55] The backdrop of contemporary voting practices reinforces the claim that a presidential elector's "Ballot" had to reflect a discretionary choice.

Further, Article II, Section 1, Clause 2 specifies that electors shall vote "for two persons, of whom one at least shall not be an inhabitant of the same State with themselves." That is the *only* constraint the Constitution explicitly imposes on an elector's discretion how to cast his vote. In the 1995 *Term Limits* case,[56] the Supreme Court ruled that the constitutional enumeration of the qualifications for election to the House of Representatives[57] was exhaustive—thus excluding the possibility of state legislation limiting the number of terms for which an

50 U.S. CONST. amend. XII.

51 However, in Rhode Island, New York and Pennsylvania, printed ballots were in use for elections in the colonial period. *See* CHILTON WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760–1860, 59 (1960).

52 JOHN F. HOADLEY, ORIGINS OF AMERICAN POLITICAL PARTIES: 1789–1803, 43 (1986).

53 *Id.* at 37; *see also* CUNNINGHAM, *supra* note 15, at 33–35.

54 *See* HOADLEY, *supra* note 52, at 37.

55 *See id.* at 38.

56 U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).

57 U.S. CONST. art. I, § 2, cl. 2.

incumbent could be re-elected.[58] It is equally plausible to read the constitutional specification of how an elector must vote as exclusive, thus ruling out the possibility of any additional state legislative constraint on the elector's choice.

B. *Founding Era Practice*

I have been arguing that the political culture, traditions, and practices in which the Constitution was embedded shed light on the meaning of the Electoral College Clauses. Two further aspects of that surrounding culture need to be considered. One concerns the absence of political parties at the time of the Founding. The other has to do with the practice of giving "instructions" to elected representatives, particularly senators.

1. Political Parties

Political parties, in anything like the form in which we know them, did not exist at the time of the Founding. There were, to be sure, shifting political groupings or alliances, such as the "Whigs" and "Tories," found in the eighteenth century English Parliament.[59] But traditionally, "parties" had been equated with "factions" and, as such, condemned.[60] The very idea of a "party," as we would understand it, had only begun

58 *Term Limits*, 514 U.S. at 780.

59 *See* DAVID HUME, ESSAYS MORAL, POLITICAL, LITERARY, PART I (Eugene F. Miller ed., 1777), http://oll.libertyfund.org/titles/hume-essays-moral-political-literary-lf-ed?q=hereditary#Hume_0059_115; HARVEY C. MANSFIELD, STATESMANSHIP AND PARTY GOVERNMENT: A STUDY OF BURKE AND BOLINGBROKE 4–5 (1965) (explaining origins of Whigs and Tories and why they were not parties); FRANK O'GORMAN, THE EMERGENCE OF THE BRITISH TWO-PARTY SYSTEM 1760–1832, ix–x (1982) (no political parties in mid-eighteenth century Britain); O'GORMAN, *supra* note 59, at 23 (as of 1790, "party ideas . . . appealed, at most, to one third of the House of Commons"); ACKERMAN, *supra* note 15, at 17 ("Nothing resembling the modern party system had yet emerged as an historical reality. Even in England, the words 'Whig' and 'Tory' marked extended groupings of elite families, locked in factional struggle for power and patronage."); GHITA IONESCU & ISABEL DE MADARIAGA, OPPOSITION 55–56 (1968) ("With the advent of George III, and during the long régime of [Lord] North, the Whigs in opposition evolved sufficiently in doctrine, organization and solidarity of party, to force the King to accept them, on their terms, in 1782 as an alternative government. But if the Whigs were by now a party in Burke's sense of the word, the Tories were not.").

60 *See* Caroline Robbins, *"Discordant Parties": A Study of the Acceptance of Party by Englishmen*, 73 POL. SCI. Q. 505, 507 (1958) ("Englishmen of all sorts during the seventeenth and eighteenth centuries deplored party and expatiated in speeches, pamphlets and histories on the evils of faction."). For brief discussion of some American views of party (John Adams, Benjamin Franklin, James Madison, George Washington), *see id.* at 509–10. Condemnations of "faction" can be traced back as far as classical Athens. *See* THOMAS N. MITCHELL, DEMOCRACY'S BEGINNING: THE ATHENIAN STORY 241–43, 302 (2015).

to be defined when the Constitution was framed.

> Since the Founders were clueless about the operation of a two-party system, they did not hit upon the solution that seems obvious to us: design a system under which each party nominates a presidential ticket. Instead of delegating the nomination functions to the parties, they supposed the Constitution itself had to provide a non-party mechanism that picked out the best candidates.[61]

The historian Richard Hofstadter discerned three trends in English political thought that prefigured the development of what we would recognize as political parties.[62] First, early in the eighteenth century, the English politician and author Henry St. John Bolingbroke had published a series of letters in which he effectively denounced "parties" and called for their suppression.[63] Despite Bolingbroke's language, however, there is a scholarly consensus that "none of the modern institutional forms associated with parties existed at that time. There was no organization, nor was there any substantial electoral base."[64] Somewhat later in the eighteenth century, David Hume drew a distinction between a "faction" and a "party," viewing the former as an unmitigated evil but the latter as an inevitable, if not always wholesome, consequence of free government. For Hume, "[f]actions subvert government, render laws impotent, and beget the fiercest animosities among men of the same nation."[65] James Madison echoes Hume's sentiments by defining a "faction" as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community."[66] But Madison elides the distinction, found in other writers, between "faction" and "party."[67]

The first thinker of consequence to distinguish clearly between "faction" and "party," and to pronounce "parties" affirmatively good,

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61 ACKERMAN, *supra* note 15, at 27.

62 *See* HOADLEY, *supra* note 52, at 9–11 (discussing Hofstader); *see also* MANSFIELD, *supra* note 59, at 15–16 (thumbnail sketches of views of Bolingbroke, Hume and Burke).

63 Henry St. John Bolingbroke, *Dissertation Upon Parties* (1733–1734), http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/bolingbroke/parties.html.

64 HOADLEY, *supra* note 52, at 22.

65 DAVID HUME, *Of Parties in General*, *in* ESSAYS MORAL, POLITICAL, LITERARY (Eugene F. Miller ed., 1777), http://oll.libertyfund.org/titles/hume-essays-moral-political-literary-lf-ed?q=hereditary#Hume_0059_115.

66 THE FEDERALIST NO. 10 (James Madison).

67 Madison's experience of politics in the 1790s significantly altered his view of factions, leading him to reconsider the position he had taken in *The Federalist* No. 10 and bringing him to see the need for political parties. *See* Robert A. Dahl, *James Madison: Republican or Democrat?*, 3 PERSP. POL. 439, 443–45 (2005). Madison's change of heart was due primarily to the emergence of a "Federalist" party under the aegis of Alexander Hamilton. On these innovations, *see* William Nisbet Chambers, *Party Development and Party Action: The American Origins*, 3 HIST. & THEORY 91, 99–106 (1963).

was the British parliamentarian and thinker Edmund Burke. In his *Thoughts on the Cause of the Present Discontents* (1770), Burke famously wrote that "[p]arty is a body of men united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed."[68] But for years after Burke wrote, the British party system remained rudimentary in form.[69] Indeed, even Burke himself had "nothing to say about the organization of party nor the institutionalization of its activities."[70]

Burke's ideas on party have had a benign and lasting influence,[71] and by 1816, Bertrand de Moleville could affirm that "an opposition party in the parliament, [is] the only means to maintain the full confidence and submission of the nation to the decisions of these assemblies."[72] But Burke's "favorable opinion of party seemed to have little or no impact on American political thought at that time."[73] Indeed, the American experience of parties as of the time of the Framing was substantially similar to Britain's. Although party historians differ about the defining criteria of "parties" and, as a consequence, differ as to their point of origin, "[p]arty labels, party platforms, and mass-based party organizations were not . . . part of the system" under the Articles of Confederation.[74] Further, at the Philadelphia Convention itself, "it appears clear that no solid foundations for a party system were established. At most, there existed a set of shifting factions, but they certainly did not exhibit the strength, depth, or stability of parties."[75] The best that can be said is that the process of party development was soon to be underway. "[D]uring Washington's first Administration neither Jefferson nor anyone else in the United States conceived of the sort of popular party which he was later to lead."[76] Even after the Republican victories over the Federalist candidates in the congressional elections of 1792–1793, Thomas Jefferson could express the hope that the electoral outcome marked the end, not the beginning, of party rivalry.[77]

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68 EDMUND BURKE, PRE-REVOLUTIONARY WRITINGS 187 (Ian Harris ed., 1993).

69 HOADLEY, *supra* note 52, at 23 (finding the election of 1784 to be "an important turning point for the British party system," but cautioning that "it is important not to overstate the maturity of that party system"); *see also id.* at 24 (reporting conclusion of historian Sir Louis Namier that "there was 'no trace of a two-party system, or at all of party in the modern sense'" before about 1790).

70 O'GORMAN, *supra* note 59, at 9.

71 *See* JESSE NORMAN, EDMUND BURKE: THE FIRST CONSERVATIVE 216–18, 222–25 (2013).

72 Robbins, *supra* note 60, at 511.

73 HOADLEY, *supra* note 52, at 11.

74 *Id.* at 27.

75 *Id.* at 29.

76 JOSEPH CHARLES, THE ORIGINS OF THE AMERICAN PARTY SYSTEM: THREE ESSAYS 83 (1956).

77 *See* JOHN ZVESPER, POLITICAL PHILOSOPHY AND RHETORIC: A STUDY OF THE ORIGINS OF

Jefferson's *Report on the Privileges and Restrictions on the Commerce of the United States in Foreign Countries* of December 1793[78] and Madison's resolutions on it in the House of Representatives in January 1794[79] were the first announcements, it appears, of anything recognizable as an opposition party's *program.*[80] "It is not until the summer of 1795, when numerous and highly successful mass meetings were being held from Georgia to New Hampshire to protest against the Jay Treaty, that we can see even the outlines of a popular party on a national basis."[81] As late as 1796, Washington's Farewell Address gave warning "in the most solemn manner against the baneful effects of the spirit of party."[82] Indeed Duke University political scientist John Aldrich has argued that *the Constitution itself* gave rise to our original political parties (which themselves fell far short of the modern political party) because it created collective action problems that those parties arose to solve—in particular, the "resolution of remaining ambiguity over the Constitution . . . . the 'great principle,' [of] exactly how powerful and positive the new federal government was to be."[83]

The absence of political parties must inform our understanding of the Framers' design for the Electoral College. There were no formal or institutionalized procedures for nominating national candidates to the Presidency; no organizations to campaign or electioneer on behalf of a party's candidates; no (or few[84]) "tickets," "slates," or "platforms"; and no "pledges." The very necessity for the Twelfth Amendment shows how undeveloped the political party apparatus for electing a president was—there had been no "party" identifications sufficient to prevent the

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AMERICAN PARTY POLITICS 79–80 (1977). *See also* CUNNINGHAM, *supra* note 15, at 45–49 (analyzing the election of 1792, and concluding that while there is "some evidence that the Republican interest was beginning to organize . . . . parties did not yet reach very deeply into the political life of the country").

78 REP. ON THE PRIVILEGES AND RESTRICTIONS ON THE COM. OF THE U.S. IN FOREIGN COUNTRIES, YALE LAW SCHOOL: THE AVALON PROJECT (1793), http://avalon.law.yale.edu/18th_century/jeffrep2.asp.

79 Commercial Discrimination, FOUNDERS ONLINE: NATIONAL ARCHIVES (1794), http://founders.archives.gov/documents/Madison/01-15-02-0111.

80 CHARLES, *supra* note 76, at 93–98. By the Presidential election of 1800, party "platforms" were starting to be formed. *See* CUNNINGHAM, *supra* note 15, at 211–12.

81 CHARLES, *supra* note 76, at 83.

82 George Washington, *Washington's Farewell Address*, YALE LAW SCHOOL: THE AVALON PROJECT (1796), http://avalon.law.yale.edu/18th_century/washing.asp.

83 JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 71–72 (1995). *See also* IONESCU & DE MADARIAGA, *supra* note 59, at 59–60 ("The coherent and systematic organization of government support [under George Washington and Alexander Hamilton] soon led to the counter process, the emergence of a movement designed to challenge the domination of the Federalists. . . . Once divergent views on the government's interpretation of the constitution had come into the open, opinion was bound to polarize around them.")

84 In the first presidential election, only two States, Pennsylvania and Maryland, used general ticket elections to select their Presidential electors. In the second Presidential election, these two States were joined by New Hampshire. *See* McPherson v. Blacker, 146 U.S. 1, 29–30 (1892).

election of a Federalist president together with a Republican vice-president in 1796. And even in the election of 1800, which has been seen as "a contest between recently organized political parties," the two Republican candidates inadvertently tied each other in the Electoral College vote.[85] Indeed, the Electoral College itself seems to have stimulated the emergence of political parties. It gradually became obvious that if one wanted to win the presidency for someone of sympathetic views, it would be essential to unite around a single candidate and organize concerted, nationwide efforts in support of his candidacy.[86]

In the context of the Founding, therefore, it would have been absurd to suppose that electors might be either "faithful" or "faithless" to their parties' nominees for president. Their voting choices would inherently have had to be discretionary and unfettered.

2. "Instructions"

The political culture of late eighteenth century America and England might also bear on the question of the Electoral College in another way. Both before, during and after the Framing period, claims were often made for a power, or right, to "instruct" those who had been elected to office, or at least to some offices. In post-constitutional American practice, this power or right was most often claimed for, and was indeed sometimes exercised by, state legislatures. Such "instructions" were directed or applied principally to U.S. senators who, before the ratification of the Seventeenth Amendment in 1913, were, or could have been, elected by state legislatures. But the power or right of instruction, it was sometimes argued, extended also to members of the U.S. House of Representatives and to state officials. Given that the original Constitution vests the state legislatures with the plenary power to direct the "manner" in which the states' presidential electors are appointed, there is surely a possible analogy between those electors and federal senators: both types of official, it might be said, are, or originally were, subject to receiving "instructions" from the body that

85 RICHARD P. MCCORMICK, THE PRESIDENTIAL GAME: THE ORIGINS OF AMERICAN PRESIDENTIAL POLITICS 70 (1982) (The 1800 Presidential election "was a contest between recently organized political parties. Among the prominent indicators of the presence of parties were the congressional nominating caucuses, the disciplined voting of the electors, the rapid emergence of organizations in the states, and the rigidity of the positions taken during the contingent election by the House. The invention of nation-wide political parties, so evident by 1800, affected in many ways the process of electing the President.")

86 *See id.* at 11 ("the most important single factor responsible for the characteristic two-party system in the United States is the constitutionally determined rule that the victor in the presidential contest must obtain a majority of the electoral vote").

elected or appointed them. There is a certain intuitive plausibility to this idea, because if a state legislature may appoint presidential electors itself[87]—and some state legislatures did in fact do so, up to the outbreak of the Civil War—then it might be deduced that the state legislatures could also "instruct" their electors how to vote. Electors, on this view, would be mere mouthpieces of their state legislators—as senators, at least according to some early commentators, were or might be. Further, if state legislatures can "instruct" their electors how to vote, then it does not seem to take a large step to conclude that statutes binding electors to vote as pledged must be constitutional, as such requirements can be seen as merely standing "instructions."

The question of "instructions" was a key element in a broader eighteenth century Anglo-American debate over the nature of political "representation," and even more fundamentally over the proper conception of the relationship between "sovereignty" and "government."[88] Was a member of the House of Commons or of the U.S. Congress a "delegate" from a state or district, or was he a "trustee" in whose judgment and discretion the voters confided? Eminent protagonists were found on either side of that debate—Edmund Burke on the side critical of any claim of power to instruct, Thomas Jefferson on the other side. The First Congress considered and, after prolonged debate, rejected, a proposal by Representative Thomas Tudor Tucker of South Carolina to amend the Constitution to incorporate the power of issuing binding instructions (to both senators and representatives).[89] In that debate, Congressman James Madison (who had himself once violated his instructions as a Virginia delegate to the Continental Congress) opposed Tucker's proposed amendment, arguing that it was "doubtful" whether Members of the federal Congress could be so bound.[90]

The actual practice of "instruction" also showed marked divergences. The "delegates" to the Constitutional Convention were themselves under "instructions" from their states to vote in certain ways. According to a delegate of Delaware, he and his colleagues were "restrained by their commission from assenting to any change of the rule of suffrage," rather they were instructed to maintain the equal

87 *See* THE FEDERALIST NO. 45 (James Madison) (The State legislatures "must in all cases have a great share in [the President's] appointment, and will, perhaps, in most cases, of themselves determine it."); *see also* William C. Kimberling, *The Electoral College* 5 (May 1992), http://www.fec.gov/pdf/eleccoll.pdf.

88 That debate is admirably reviewed in RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 121–248 (2015).

89 RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 98 (2001).

90 The entire debate in the House of Representatives in 1789, including Madison's remarks referred to in the text above, is available at, Debate in House of Representatives, THE FOUNDERS' CONSTITUTION (1788), http://press-pubs.uchicago.edu/founders/documents/v1ch13s39.html.

numerical representation of states.[91] On the other hand, some delegates at the convention "almost certainly went further than their instructions allowed: [i]nstructed to amend the Articles [of Confederation], they instead created a new system of government."[92]

Let me give a—necessarily abbreviated—account of this great Anglo-American debate. In England, the Common Law tradition generally disfavored the practice of "instructions." In his treatise *Institutes of the Lawes of England* (1626–44), Lord Coke observed that even though a member of Parliament was chosen from a particular district, he nonetheless "serveth for the whole Realm, for the end of his coming thither, as in the writ of his election appeareth, is general."[93] John Hatswell, a leading eighteenth century expert on parliamentary procedure, cited Coke, Algernon Sydney, Blackstone, and House of Commons Speaker Arthur Onslow in support of the view that instructions were non-binding.[94] Nearer to the Founding, Anthony Ellys, the Bishop of St. David's, argued in *Liberty Spiritual and Temporal of the Subjects of England* (1763–1765) that Members of Parliament, "once chosen" were vested with "a discretionary power, to act as they sought fit, within the established bounds of the constitution."[95]

The question was debated in the House of Commons in March 1769, and although there were members who spoke in favor of "instructions," Jeremiah Dyson, a member who was regarded as an expert on Parliamentary procedure, opined that attempts to bind representatives by instructions had no authority under the Constitution.[96] In that debate, Edmund Burke unequivocally declared that "the doctrine of instruction to representatives" was "unfounded in reason; if not put down, it will destroy the constitution."[97] Burke later delivered his sentiments at great length in a celebrated 1774 address to his Bristol constituents.[98] In these speeches, Burke advanced a "trusteeship" conception of the duties of a member of Parliament, under which "the wishes of [a member's] constituents 'ought to have great weight with him; their opinions high respect; their business unremitted attention,' but he should not sacrifice to them 'his unbiased opinion, his mature judgment, his enlightened conscience.' In the last analysis, these

91 *See* Christopher Terranova, *The Constitutional Life of Legislative Instructions in America*, 84 N.Y.U. L. Rev. 1331, 1340 n.61 (2009).

92 *Id.* at 1341.

93 RICHARD BOURKE, EMPIRE & REVOLUTION: THE POLITICAL LIFE OF EDMUND BURKE 379 (2015).

94 *See* Terranova, *supra* note 91, at 1335 n.25.

95 Quoted in BOURKE, *supra* note 93, at 380.

96 *See id.* at 380–81.

97 Quoted in *id.* at 381.

98 *See* Edmund Burke, *Speech to the Electors of Bristol*, THE FOUNDERS' CONSTITUTION (1774), http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html.

faculties should be exercised at the discretion of the member."[99] Burke's arguments did much to discredit the doctrine of binding instructions in England.

This is not to say that the doctrine was without its supporters in England.[100] Early in the eighteenth century, a group of British radicals "emphasized the tradition in England of mandates for Members of Parliament from their constituents, and sought to refashion the [House of] Commons as a house of mandated delegates."[101] James Burgh's *Political Disquisitions* (1775) articulated and defended their program.[102] An edition of Burgh's treatise was issued in Philadelphia in the same year, with an endorsement from (General) George Washington.[103]

There were American supporters of mandatory instructions as well. In Part VI of his 1814 treatise, *Inquiry into the Principles of Policy of the Government of the United States*, John Taylor of Caroline argued that the "right of instruction" was "appurtenant" to the power of election.[104] Thomas Jefferson approved of Taylor's reasoning, writing to him that his argument "settles unanswerably the right of instructing representatives, and their duty to obey."[105]

Nonetheless, in America as well as in England, the doctrine of instruction was widely criticized, and instructions were, in practice, often disobeyed or disregarded—even by those, like Benjamin Watkins Leigh, a senator from Virginia in the Jacksonian era, who in 1812 had defended the doctrine.[106] We have already seen that the "instructions" conveyed to the delegates of the Philadelphia Convention were disregarded, and that the First Congress rejected a proposed constitutional amendment to authorize instructions to senators and representatives.[107] In some instances, senators, such as John Quincy Adams of Massachusetts in 1808, resigned their seats rather than

99 FRANK O'GORMAN, EDMUND BURKE: HIS POLITICAL PHILOSOPHY 55 (1973).

100 For a sample of constituent "instructions" and "representations" sent to members of Parliament in the 1740s, *see* 12 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND: FROM THE NORMAN CONQUEST, IN 1066, TO THE YEAR 1803, 1741–1743, 416–27 (1812), https://babel.hathitrust.org/cgi/pt?id=mdp.39015087740265;view=1up;seq=238;size=75.

101 TUCK, *supra* note 88, at 199.

102 *See* JAMES BURGH, 1 POLITICAL DISQUISITIONS; OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS AND ABUSES (1775).

103 TUCK, *supra* note 88, at 200.

104 *See* JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 370 (Dr. W. Stark ed., Routledge & Kegan Paul Ltd. 1950), http://lf-oll.s3.amazonaws.com/titles/1308/0549_Bk.pdf.

105 Quoted in Clement Eaton, *Southern Senators and the Right of Instruction, 1789-1860*, 18 J. Southern Hist. 303, 305 (1952).

106 *See id.* at 304–05, 311–15.

107 Note, however, that Tucker's proposal to mandate instructions for Representatives as well as for Senators may have contributed to its defeat. "[I]t is not clear that the First Congress ruled out instructions to senators." Terranova, *supra* note 91, at 1348.

agreeing to follow instructions from their state legislatures.[108] The practice of instructing senators, though it persisted until the Civil War, was also sectional, and was essentially confined to the South.

During the founding era, a "decisive" argument against instructions was made by Roger Sherman:

> I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them on such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation.[109]

James Madison masterfully summed up the long debate in a letter from March 1836:

> The precise obligation imposed on a representative by the instructions of his constituents still divides the opinions of distinguished statesmen. This is the case in Great Britain, where such topics have most been discussed. It is also now the case, more or less, here, and was so at the first Congress under the present Constitution. It being agreed by all, that whether an instruction be obeyed or disobeyed, the act of the representative is equally valid and operative, the question is a moral one between the representative and his constituents. If satisfied that the instruction expresses the will of his constituents, it must be with the representative to decide whether he will conform to an instruction opposed to his judgment, or will incur their displeasure by disobeying it. In a case necessarily appealing to the conscience of the representative, its paramount dictates must, of course, be his guide.[110]

There would be a number of problems with any attempt to extend the purported right of instructions to presidential electors.

First, it is doubtful whether any such right or power ever existed. Certainly many leading figures in the late eighteenth century, both in England and America, questioned the truth of the doctrine or actively resisted its application, including Edmund Burke, James Madison and John Adams.

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108 Adams' letter of resignation can be found in DAVID KEMPER WATSON, 1 THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 235 n.39 (1910). In the same year, former President John Adams, in a letter to Joseph Bradley Varnum, wrote that "[u]pon principle, I see no right in our Senate and House to dictate, nor to advise, nor to request our representatives in Congress." 9 JOHN ADAMS, THE WORKS OF JOHN ADAMS 604, 605 (Charles Francis Adams ed., 1854), http://lf-oll.s3.amazonaws.com/titles/2107/Adams_1431-09_Bk.pdf. John Adams did concede that "the people" had a right to instruct their representatives, so long as they did not interfere with the State legislature. *Id.*

109 Quoted in CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 51 (2006).

110 Quoted in WATSON, *supra* note 108, at 236.

Second, it was both uncertain who wielded the asserted power (State legislators? The voters?), and against whom the power could be exercised (Senators? Representatives as well?).

Third, as James Madison noted, it was unclear whether the proponents of the power were contending that the legislatures (or the voters) had the right to communicate their views to their elected representatives—a right that Madison observed was already provided for[111]—or rather they were claiming that "delegates are obliged to conform to those instructions"[112]—a proposition Madison found to be untrue.[113]

Fourth, it is also unclear what the remedy (or preventative measure) for a breach of instructions would have been. The obligation to obey, as Madison put it, was a "moral" one; and a vote cast in defiance of an instruction remained "valid and operative."[114] State legislatures could do little else than to threaten recrimination. Legislatures had no power to recall the senators they had selected: the Constitution fixed their terms at six years.[115] A legislature might not re-elect a disobedient senator, but such a remedy would have existed even if "instructions" were merely precatory, not mandatory. Likewise, an erring senator might resign, but the decision to do so would be left to his conscience—and some, like Virginia Senator William Mangam,[116] did not resign.

And that is not all. If the Constitution had permitted state legislatures to mandate whom their presidential electors were to vote for, then the electoral procedure could easily have turned into a confused medley of opposing choices, as each state would have been likely to prefer its "favorite son." Why should the Framers have created the Electoral College at all, if legislative instructions were likely to have tipped the election into the House of Representatives anyway? Still more, why bother to have presidential electors at all? Rather than both appointing and instructing electors, it would have been much simpler to give each state a number of voting "units" equivalent to the combined number of its senators and representatives, and then let each state legislature cast or apportion those units as it chose. Injecting the factor of human agency—in the form of the electors—seems in itself to preclude mandatory instructions.

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111 1 ANNALS OF CONG. 766 (statement of Rep. Madison) (1789).

112 *Id.*

113 Quoted in Terranova, *supra* note 91, at 1349 n.114; *see also* 1 ANNALS OF CONG. 766–67 (statement of Rep. Madison) (1789).

114 Letter from James Madison to H. Lee (Jan. 14, 1825), *in* SELECTIONS FROM THE PRIVATE CORRESPONDENCE OF JAMES MADISON: FROM 1813–1836, 55 (Washington, J.C. McGuire 1859), https://archive.org/details/selectionsfrompr00madi.

115 *See* U.S. CONST. art. I, § 3, cl. 1.

116 Eaton, *supra* note 105, at 30810.

III. *RAY V. BLAIR*

The Supreme Court has rarely spoken to issues involving the Electoral College. When it spoke in 2000, first in *Bush v. Palm Cty. Canvassing Board*[117] and then in *Bush v. Gore*,[118] it did so with momentous consequences. For our immediate purposes, however, the most relevant Supreme Court precedent is its 1952 decision, *Ray v. Blair*.[119]

Ray was a dispute over the Democratic Party's primary process in Alabama in the run-up to the 1952 presidential election.[120] In the 1948 presidential election, Alabama had cast its eleven Electoral College votes for the segregationist candidate Strom Thurmond, who received about 80% of the State's popular vote.[121] Thurmond ran as the Democratic nominee for president, although the candidate for the national Democratic Party was incumbent President Harry Truman. The presidential election had been preceded by a bitter struggle in the Democratic Party's national convention that year, in which more than a dozen members of the Alabama delegation, enraged at their Party's call for the desegregation of the military, walked out.[122]

By the time of the 1952 presidential primaries, the State Democratic Executive Committee, acting pursuant to authority conferred by state law, "closed the official primary to any candidate for elector unless he would pledge himself, under oath, to support any [presidential] candidate named by the Democratic National Convention."[123] Plaintiff Edmund Blair, hoping to be a Democratic elector, and otherwise qualified as a candidate, refused to take the pledge to "aid and support" whoever would eventually be the presidential nominee of the national Democratic Party[124]—who that year turned out to be the liberal Adlai Stevenson of Illinois. When the Chairman of the Executive Committee of the State's Democratic Party refused to certify Blair as a candidate for presidential elector, Blair sued. He prevailed in a decision before the Supreme Court of

117 531 U.S. 70 (2000) (per curiam).
118 531 U.S. 98 (2000) (per curiam).
119 343 U.S. 214 (1952).
120 *Id.*
121 Dave Leip's Atlas of U.S. Presidential Elections, 1948 Presidential General Election Results Alabama, http://uselectionatlas.org/RESULTS/state.php?year=1948&fips=1&f=0&off=0&elect=0.
122 Michael Levy, *United States Presidential Election of 1948*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/event/United-States-presidential-election-of-1948 (last updated Jan. 31, 2016).
123 *Ray*, 343 U.S. at 215–216, 233 (Jackson, J., dissenting).
124 *Id.* at 215–216.

Alabama,[125] which ruled that the requirement of a pledge was invalid under the Twelfth Amendment.[126] The case was taken to the U.S. Supreme Court, which promptly heard oral arguments and issued a summary per curiam opinion in time for the Alabama primary, in which the Court overturned the Alabama Court's decision and issued a mandate.[127] Shortly afterwards, the U.S. Supreme Court issued a more detailed opinion intended to "supplement" its per curiam decision.[128]

Only seven Justices took part in the decision for *Ray*.[129] Justice Hugo Black, an Alabama native and a former U.S. Senator from that state, was recused. Justice Felix Frankfurter was absent from the oral argument due to illness, and took no part in the decision.[130] The majority opinion of five Justices was written by Stanley Reed, whom President Franklin Roosevelt had appointed to the Court in 1938. Two exceptionally able Justices, both of them also Roosevelt appointees, dissented: Robert Jackson joined by William Douglas.[131]

Reed's opinion is workmanlike but undistinguished—perhaps a reflection of the haste with which the Court was forced to reach a decision. Effectively, the Court addressed two questions: 1) Whether the Alabama Democratic Party, acting under a state law delegation, could prescribe the pledge[132]; and 2) if so, whether the pledge requirement was consistent with the Twelfth Amendment.[133]

The first question caused the Court little difficulty—"[a] state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees . . . in the general election . . . . is an exercise of the state's right to appoint electors in such manner" as its legislature may direct.[134] In other words, the Court affirmed the breadth of the state legislature's constitutional power to "direct" the "[m]anner" in which the state appoints its presidential electors.[135] A state legislature can structure that appointment process by delegating substantial powers to political parties. Pursuant to that delegation, the parties may select their candidates for electorships through an optional primary process, and can require prospective candidates to pledge their support for the national party's presidential and vice-presidential nominees as a condition of their candidacy for electorships.

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125 Ray v. Blair, 57 So.2d 395 (Ala. 1952).
126 *Id.* at 397–98.
127 Ray v. Blair, 343 U.S. 154 (1952).
128 Ray v. Blair, 343 U.S. 214 (1952).
129 *Id*. at 231.
130 *Id*.
131 *Id.*
132 *Id.* at 227.
133 *Id*. at 228.
134 *Id.* at 227.
135 U.S. CONST. art. II, § 1.

However, the Court recognized, the legislature's exercise of its Article II power, though broad, must accord with the other provisions of the Constitution.[136] As previously mentioned, one question raised in this case was whether the pledge requirement was consistent with the Twelfth Amendment. The parties did not raise the question of whether the pledge requirement was consistent with other constitutional provisions, such as the First Amendment. As the Court framed this question, it was whether "the Twelfth Amendment demands absolute freedom for the elector to vote his own choice, uninhibited by pledge."[137] The Court tendered two main reasons for answering this question in the negative.

First, the Twelfth Amendment does not explicitly forbid pledges, thus its silence on that subject must be construed in light of longstanding electoral practices.[138] Given that the Amendment's text (as the Court read it) left the question open, the "constitutional propriety" of exacting pledges could be decided in terms of the country's "long-continued practical interpretation" of the matter.[139] And "[h]istory teaches that the electors were expected to support the party nominees."[140]

The Court furnished little evidence to substantiate its historical claim. Even if it is true that electors have generally been "expected to support the party nominees,"[141] that does not establish a long-continued and uncontested practice of requiring pledges to vote for a party's nominees by state law. An "expectation" of party loyalty might have arisen even in the absence of any state statutory requirement to pledge such loyalty. Further, how long-standing, widespread and uncontroversial was the asserted practice? In the presidential election less than four years prior, electors sailing under the Democratic banner had voted against the national party's nominee in fairly large numbers. Alabama's own requirement of a pledge to support the national party's nominee had only been introduced in the interval since that last election. Even if there was, country-wide, a long-standing tradition of "faithful" electors, there was also an equally long-standing tradition of "faithless" electors.[142] Which tradition was the dispositive one?

More relevant to our purposes, however, is the second of the Court's two main Twelfth Amendment arguments. In a crucial sentence,

136 Ray v. Blair, 343 U.S. 214, 228–31 (1952).

137 *Id.* at 228.

138 *Id.* at 228–29. "It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector's . . . pledging himself." *Id.* at 228.

139 *Id.* at 229.

140 *Id.* at 228.

141 *Id.*

142 *See, e.g.*, *supra* note 140 and accompanying text.

the Court said: "*even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution . . . to vote as he may choose in the electoral college*, it would not follow that the requirement of a pledge in the primary is unconstitutional."[143] The Court here decouples two questions: 1) the constitutionality of imposing a pledge, and 2) the constitutionality of enforcing a pledge, if one is imposed. Requiring a prospective elector to take a pledge in a primary is indeed constitutional. But enforcing such a pledge, if violated, may or may not be constitutional—the question is deliberately left open.

It would not be true to say that a pledge would be meaningless if it could not be legally enforced. If an elector has sworn a pledge under oath, the source of its enforcement could be the elector's conscience, or sense of honor, or fear of God. Faithless electors could also face adverse political—if not legal—consequences for dishonoring a sworn pledge. And even if some legal remedies, such as injunctive relief, were unavailable or untimely, there might be other, post hoc remedies, such as fines, money damages or criminal prosecutions for perjury.

The point to seize on is that the Supreme Court has not held that an elector's pledge is legally enforceable. It has left open the possibility that if some legal action were taken against an elector to enforce a pledge that he had taken, that elector could defend his action by asserting a "constitutional freedom . . . to vote as he may choose in the electoral college."[144] The constitutionality of imposing a pledge no doubt makes it harder to be a faithless elector, but it does not necessarily make it unlawful.

The Supreme Court's case law thus leaves it open as to whether a presidential elector can be bound, under penalty of law, to vote for a particular nominee. And our review of the original materials in Parts I and II establishes, I hope, that the Constitution protects the elector's discretion against efforts at legal compulsion. With this backdrop in mind, we may finally turn to the constitutionality of the UFPEA.

IV. THE UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT

Minnesota, along with several other states, has codified the UFPEA.[145] The key provision of the statute reads as follows:

> 208.46 ELECTOR VOTING.
>
> (a) At the time designated for elector voting in section 208.06, and

143 Ray v. Blair, 343 U.S. 214, 230 (1952) (emphasis added).
144 *Id.*
145 *See* MINN. STAT. §§ 208.40–208.48 (2015).

> after all vacant positions have been filled under section 208.45, the secretary of state shall provide each elector with a presidential and a vice-presidential ballot. The elector shall mark the elector's presidential and vice-presidential ballots with the elector's votes for the offices of president and vice president, respectively, along with the elector's signature and the elector's legibly printed name.
>
> (b) Except as otherwise provided by law of this state other than this chapter, each elector shall present both completed ballots to the secretary of state, who shall examine the ballots and accept as cast all ballots of electors whose votes are consistent with their pledges executed under section 208.43 or 208.45, paragraph (c). Except as otherwise provided by law of this state other than this chapter, the secretary of state may not accept and may not count either an elector's presidential or vice-presidential ballot if the elector has not marked both ballots or has marked a ballot in violation of the elector's pledge.
>
> (c) An elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of the elector's pledge executed under section 208.43 or 208.45, paragraph (c), vacates the office of elector, creating a vacant position to be filled under section 208.45.[146]

A. *Is the UFPEA Constitutional?*

Observe that the statute does not require an elector to be removed for violating his or her pledge. That, I think, is quite deliberate.

It is true that under Article II, Section 1, Clause 2, the state has the power to "appoint" its electors, and it is often contended that the power to appoint, all else being equal, entails the power to remove.[147] At first blush, moreover, it seems arguable that the power to remove a faithless elector might be a power reserved to the state under the Tenth Amendment.[148] But the statute is very careful not to speak of removal. Why not?

Even if the state could remove a faithless elector, his or her removal would probably come too late: the faithless ballot would already have been cast. The state might perhaps thereafter cancel or nullify that vote—but it could only do so at the unacceptable risk of losing one of its electoral college votes. Moreover, the Tenth Amendment does not apply here. In the *Term Limits* case, the Supreme

146 *Id.*

147 *See* Myers v. United States, 272 U.S. 52, 175–76 (1926).

148 U.S. CONST. amend. X (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people).

Court explained that when the Constitution itself has created the state right or power at issue (there the context was the election of representatives to the federal Congress), that right or power necessarily could not have been reserved.[149]

Instead, the statute deems a vote in violation of a pledge to be tantamount to a letter of resignation.[150] In other words, it deems an attempted faithless vote to create a vacancy. And because a vacancy has arisen, the legislature may prescribe how that vacancy is to be filled.

If this is a valid exercise of the state's power, it would indeed be a very neat solution to the problem of the faithless elector. First, the power to specify when a vacancy arises seems to be a proper exercise of the state's power to appoint. So too does the statutory prescription of how a vacancy is to be filled. Second, the statute also effectively voids or cancels the faithless elector's attempted vote—but it does so in a way that does not deprive the state of its maximum number of electoral votes. It merely designates another elector—hopefully, a faithful one—to occupy the vacancy and cast the missing vote.

But does this solution work? Can the state constitutionally condition one's ability to cast an Elector College ballot hinge *how one casts (or seeks to cast)* that ballot? To put it provocatively: Is "The Evaporating Elector" the answer to the problem of "The Faithless Elector"? It is not.

B. *The Original Constitution*

Even without reaching any amendments to the Constitution (including the Twelfth Amendment[151]), the UFPEA provision is not a valid exercise of the legislature's Article II power. Both in intent and in effect, the provision suppresses an elector's exercise, or attempt to exercise, his or her discretion over how to cast a ballot. The provision treats some such exercises, or attempted exercises, as depriving the elector of his or her appointment—and so as annulling or cancelling the ballot that that elector has cast or seeks to cast. That is sufficient to invalidate the law.[152]

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149 U.S. Term Limits v. Thornton, 514 U.S. 779, 806 (1995).

150 According to a summary prepared by the Uniform Law Commission, "any attempt by an elector to submit a vote in violation of that pledge effectively constitut[es] resignation from the office of elector." Faithful Presidential Electors Act Summary, UNIFORM LAW COMMISSION: THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.uniformlaws.org/ActSummary.aspx?title=Faithful%20Presidential%20Electors%20Act.

151 Although a State's power under Article II to regulate elections is "extensive," it is nonetheless subject to other constitutional requirements, including those of the Twelfth and Fourteenth Amendments. *See* Williams v. Rhodes, 393 U.S. 23, 29 (1968).

152 Consider an analogy: Can Congress prescribe that certain acts taken by Executive branch appointees or federal judges be deemed to have the effect of resignations, thus "vacating" those

Article II, Section 1 protects against such attempted suppression, both textually (by its use of terms such an "elector" and "ballot") and structurally (because if the state could determine electors' choices in this way, the entire apparatus of the Electoral College system would be pointless). Moreover, the provision would upset the considered intentions of both the Framers and, more importantly, the Ratifiers, reflected in the text and structure of Article II—that presidential electors should be free to exercise their judgment in deciding how to vote. And even as construed in *Ray*, the Twelfth Amendment does not override the original meaning and intent of the relevant parts of the elector clauses of Article II.

In any case, the UFPEA provision does not go to the state's "appointment" of an elector under Article II. A faithless elector must already have been "appointed" in order for his action to create a vacancy. Thus, no appointment, no vacancy. The UFPEA instead goes to the disqualification of a duly appointed elector and the designation of a replacement. The language of Article II does not authorize the state to disqualify and replace an elector once appointed.

Perhaps the state might try to argue that the effect of treating the faithless elector's (attempted) ballot as creating a vacancy is a condition precedent to the elector's appointment. On that view, the elector's appointment is not perfected or completed until a ballot consistent with the pledge is cast. But if so, then no presumptive elector casting a purported ballot is legally an elector until after the balloting, which means no votes were cast.

Alternatively, the state might try to argue that casting a ballot consistent with the pledge is a condition subsequent to the appointment. The faithless ballot thus rescinds or revokes the appointment. But the revocation then comes too late—the vote has already been cast.

All of this analysis is, to say, internal to the elector clauses of Article II. Simply put, the argument is that those clauses do not empower the state, in appointing its electors, to deprive them of all possibility of exercising their discretion in casting their votes, even if the votes they cast are in violation of their pledges.

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offices? Of course not. Once appointed, these officials hold the powers they have been granted. The exercise of a lawful power in a lawful manner cannot be deemed to be a "forfeiture" of a constitutional position, thus creating a vacancy. So too with electors: if it is within their constitutional authority to exercise discretion, then such an exercise *cannot* be deemed to create a vacancy, and so obliterate itself. Granted, an elector, unlike a federal judge or administrator, is not a federal office-holder. *See In re* Green, 134 U.S. 377, 379 (1890). But that fact does not destroy the analogy.

C. *The First Amendment*

Can we go even further? Perhaps. It seems to me at least plausible to argue that the UFPEA raises First Amendment issues as well.

At first, the likelihood of a successful First Amendment challenge seems remote. In its 2011 decision in *Nevada Comm'n on Ethics v. Carrigan*, the Supreme Court rejected a claim that a legislator's vote was constitutionally protected speech.[153] The case involved a Nevada legislator's challenge to a requirement under the State's Ethics in Government Law that the legislator recuse himself from voting on a matter in which he had a personal conflict of interest.[154] The Supreme Court upheld the mandated recusal.[155] In interpreting the First Amendment, the Court relied on the long tradition of recusal statutes that apply to legislators, going back to the earliest Congresses.[156] A legislator's vote, the Court said, was reposed in him "as trustee for his constituents, not as a prerogative of personal power."[157] Hence restriction on it, unlike restrictions on an ordinary citizen's vote, was permissible. If a presidential elector could be likened to a state legislator, it might seem, the elector could not claim that his or her vote constituted protected speech; rather, it might be subject to state regulation. Indeed, if one could regard a breach (or attempted breach) of a pledge as an ethical violation of an elector's part, it might seem to follow that the state could justify a mandatory recusal of the elector.

By contrast, however, consider a lower court case that *Carrigan* cited but deemed to be irrelevant: *Clarke v. United States*[158] There the court addressed the question whether Congress could constitutionally compel members of the City Council of the District of Columbia to enact a particular piece of legislation—the so-called "Armstrong Amendment."[159] The City Council members objected, arguing that their votes on legislation were protected "speech" under the First Amendment, and that in seeking to compel them to vote for a particular outcome, Congress was unconstitutionally abridging their free speech rights.[160] While recognizing the breadth of congressional power over the District of Columbia, the court agreed with the council members.[161] Following the First Circuit's lead, the court concluded that legislators'

153 Nevada Comm'n on Ethics v. Carrigan, 564 U.S. 117, 119–21 (2011).
154 *Id*. at 125.
155 *Id*. at 120–21, 128–29.
156 *Id.* at 122–25.
157 *Id.* at 126 (quoting Raines v. Byrd, 521 U.S. 811, 821 (1997)).
158 886 F.2d 404 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc).
159 *Id.* at 405.
160 *Id*. at 409.
161 *Id.* at 417.

voting fell within the Free Speech Clause.[162]

Should we follow *Carrigan* and conclude that an elector's vote, like a legislator's, is not protected speech? Should we even press on to the further conclusion that an elector's faithlessness to a pledge justifies a compulsory recusal? Or should we follow *Clarke* in thinking that an elector's vote, like a legislator's, is constitutionally protected—at least to the extent that that the government may not compel or direct how it is cast? Would that not be a case of "compelled speech"? And can mandatory recusal really be justified when the state itself has created the conflict by extracting the legislator's pledge?

Actually, both *Carrigan* and *Clarke* were correctly decided, and they can be satisfactorily harmonized. To recur the terms employed in our discussion of "instructions," both cases rest on the conception of a legislator as a trustee, not a delegate. As a trustee, the legislator owes his constituents his fair, disinterested judgment and vote. *Carrigan* brings out one aspect of the trusteeship model, *Clark* brings out another, complementary aspect. Because the legislator's vote must be disinterested, recusal can be mandated when a conflict arises between that fiduciary duty and his personal interests. So *Carrigan* is right. But equally, because a legislator, as trustee, has the responsibility to exercise his own fair judgment, his vote cannot be compelled—he has a right and a duty to vote as he judges best. Thus *Clark* is also right.

If the free speech/legislative vote cases are relevant, they seem to reinforce the trusteeship model of the representative/elector, not the delegate model. Accordingly, those cases would confirm that the elector possesses constitutionally privileged discretion in casting his ballot, which can indeed be limited in the case of a faithless (or any other) elector, but only to avoid self-dealing, bias or some other corrupting consideration.

CONCLUSION

The UFPEA is unconstitutional. Admittedly, that conclusion rests on grounds that are severely originalist.[163] And, need one say, the courts do not always dispose of constitutional questions using originalist methods.

There are unquestionably powerful non-originalist reasons not to welcome the outcome at which I have arrived. For one thing, if political parties cannot enforce electors' pledges by legal means, then our two-

162 *Id.*

163 *See* Robert J. Delahunty and John Yoo, *Saving Originalism*, 113 Mich. L. Rev. 1081 (2015) (providing an analysis and defense of originalism).

party system, already in bad repair, may be weakened even further. That is not a result that would be appreciated in most circumstances, including within the Supreme Court.[164] Further, the authority and legitimacy of the president—especially one elected as a result of the faithlessness of one or more electors—could be badly compromised, contributing further to the instability and bad repute of the federal government. Finally, and most importantly, millions of American voters would be shocked and appalled if the outcome of a presidential election turned on the votes of faithless electors. Ordinary voters may not even realize that in voting, say, for Hillary Clinton, they are in fact voting for a slate of unnamed electors who may be pledged to vote for her but who could well vote for someone else, including her opponent. The public's confidence in the fairness, coherence and transparency of our presidential election system could easily be shattered.[165]

It would not be difficult to find eminent legal scholars prepared to argue that more than two centuries of constitutional practice have overwhelmed the Framers' short-lived expectations for the Electoral College. In the view of some of these scholars, the Constitution can be and has been informally, but definitively, amended by the inexorable, long-term workings of American democracy. We are no longer bound to follow the strict letter of the presidential election clauses of the Constitution—even if we could all concur on how to interpret them.[166]

It would go beyond my brief here to attempt to answer these objections. And I freely concede their pragmatic power. Still, let me offer a few contrarian concluding observations.

There are traditions and then there are traditions. There is certainly a well-established tradition of treating members of the Electoral College as mere automata, whisked into existence for the sole purpose of performing a single mechanical, unthinking function. But there have also been repeated instances of faithless electors—although it might be an exaggeration to say that the accumulation of those instances amounts to a "tradition."[167] Even if presidential electors are merely one trick ponies, at least some of the ponies have demanded to do the trick in their own way.

More to the point, there have been unceasing efforts since the early days of the American Republic to reform or eliminate the Electoral College: in the past two centuries, over 700 proposed constitutional

164 *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 366–67 (1997).

165 But then, most voters will probably also be shocked to discover that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1." Bush v. Gore, 531 U.S. 98, 104 (2000).

166 *See* ACKERMAN, *supra* note 15, at 27, 266.

167 *See supra* note 7 and accompanying text.

amendments to the Electoral College system have been introduced in Congress.[168] And yet, with the exception of some rather marginal changes, the original Electoral College has remained essentially intact since the Twelfth Amendment. Indeed, the relatively recent (1961) Twenty-Third Amendment embeds the Electoral College even more deeply in the Constitution, and so can be taken as a reaffirmation of the continuing vitality and constitutional centrality of that institution.[169] If nothing else, the repeated failure of attempts to eliminate the Electoral College by constitutional amendment seems to betray a gnawing awareness on the part of the American people that for better or worse, it is still with us.

The truth is that a solution to the problem that baffled the Framers also eludes us: How is America to elect its presidents? Their answer, as they came to realize themselves, was radically unsatisfactory. But over the intervening centuries, alas, "We the People" have proven no wiser. As John Quincy Adams said, in reflecting on the manner of choosing the president, "[t]his election of a chief magistrate will never be settled to the satisfaction of the people."[170]

168 *See* Hans A. von Spakovsky, *Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme*, THE HERITAGE FOUNDATION (Oct. 27, 2011), http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme. For a survey of the various kinds of proposed amendments, *see* NEALE, *supra* note 7, at 13–15.

169 U.S. CONST. amend. XXIII, § 1.

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Id.

170 Quoted in MCCORMICK, *supra* note 85, at 3.