

# ORIGINALISM, CONSTITUTIONAL CONSTRUCTION, AND THE PROBLEM OF FAITHLESS ELECTORS

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*In the wake of the 2016 presidential election, opponents of President-elect Donald Trump launched an unprecedented lobbying effort to encourage the presidential electors to vote for an alternative candidate. These efforts were bolstered in part with arguments based on the original meaning and purpose of the Electoral College.*

*In this Article, I argue that these historical arguments are flawed as an understanding of the meaning and purpose of the presidential selection system embedded in the U.S. Constitution. Electors were not established to exercise a veto on the popular choice for president, but rather were expected to exercise discretion only in a context in which the people were unable to decide who should be president.*

*In addition to its practical import, the “faithless-electors” example shows the theoretical value of the conceptual distinction between constitutional interpretation and constitutional construction. An appreciation of how the office of presidential elector has been constructed over time exposes how radical of a departure the lobbying effort was from American constitutional traditions and democratic commitments and illustrates a better approach to thinking about how a fixed constitutional text should be joined with a living constitutional practice.*

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### INTRODUCTION

The Electoral College is sporadically interesting. It is perhaps not as obscure of a constitutional provision as, say, the Emoluments Clause.<sup>1</sup> But most of the time it slumbers in relative obscurity, little discussed and little understood. On occasion, however, the Electoral College moves out of the shadows and into the limelight. Like many structural features of the Constitution, it tends to garner attention when it gets in the way. Disappointed presidential aspirants and their supporters are motivated to complain, but successful ones have little reason to praise or credit the constitutional design. It is perhaps unsurprising that the Electoral College will attract more comment and criticism when the country is highly polarized, geographically sorted to an unusual degree, and closely divided. It is in that political environment that the small effects of an electoral institution's design are likely to be noticed and taken as significant. When one party comfortably dominates the electoral arena, the details of the presidential selection process are less relevant and hardly likely to generate ire.

This is not a period of comfortable party dominance. Despite the hopes of partisans, neither party has a secure electoral lock on national institutions. Those who have been waiting for a decisive electoral realignment that will firmly establish a national-majority party have been repeatedly forced to defer the moment of arrival.<sup>2</sup> As in the late nineteenth century, the presidential fortunes of the two parties are decided by the smallest of margins. Electoral campaigns are fought out in a small number of "battleground" states. In such a context, electoral systems matter. The Electoral College will come under scrutiny.

If such scrutiny is only natural and to be expected, the events following the 2016 presidential election are remarkable and unprecedented. In the wake of Democratic nominee Hillary Clinton's defeat at the hand of Republican Donald Trump, some of her supporters launched an astonishingly misguided effort to lobby the presidential electors to ignore the votes by which they themselves were selected and to cast their own ballots for a candidate other than Donald Trump. The problem of "faithless electors" had long been viewed as a quirky, anachronistic, and unfortunate feature of the Electoral College. Some of Clinton's electors now hoped to systematically marshal that same feature to alter the outcome of a presidential election. In the process, that lobbying effort sought to recast the office of presidential elector from being a mechanical and ceremonial role to being a role of substantial discretionary authority. They dusted off the

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1. U.S. CONST. art. I, § 9.

2. See, e.g., Everett C. Ladd, *Like Waiting for Godot: The Uselessness of Realignment for Understanding Change in Contemporary American Politics*, 22 POLITY 511 (1990).

historical purpose of the Electoral College and reinterpreted it as establishing an invaluable check on democratic errors.

In this Article, I revisit and clarify the design and purpose of the Electoral College. The invention of the Electoral College solved a variety of problems in negotiating and drafting the U.S. Constitution in the Philadelphia Convention of 1787. Although the Constitution included several checks and balances that were designed to protect against democratic excesses and promote liberty and good government, the Electoral College was not an important component of checks and balances. Presidential electors were never intended to operate as a counter-majoritarian check on democratic majorities or as an elite corrective to popular errors. Rather, the presidential electors were understood as a device for institutionalizing a popular election to fill the presidential office, and the electors were expected to exercise a discretionary choice in casting their ballots only when the people at large were unable to decide on a president.

The debate over presidential electors also provides an opportunity to deepen our understanding of constitutional theory. In particular, recent theories of constitutional originalism have distinguished between the concepts of interpretation and construction.<sup>3</sup> While an effort at constitutional interpretation can shed light on the original meaning of the constitutional provisions establishing the Electoral College, and further historical inquiry can clarify its original purpose, the concept of constitutional construction can help us understand how the Electoral College has developed over time and how the recent lobbying efforts are inconsistent with our current constitutional scheme. The problem of faithless electors can illuminate how the constitutional system operates in practice. The concept of constitutional construction can help us understand the faithless-elector problem, and the faithless-elector example can help us appreciate the utility of the concept of constitutional construction within constitutional theory.

## I. THE STRUCTURE OF THE ELECTORAL COLLEGE

The presidential-selection system described in the U.S. Constitution, generally known as the Electoral College, is complex and unusual. The system devised in the Philadelphia Convention was largely an ad hoc invention by the drafters with few direct precedents in electoral systems that had been used

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3. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011) (“Framework Originalism, by contrast views the Constitution as an initial framework for governance . . . that Americans must fill out over time through constitutional construction.”); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 1 (1999) (“[C]onstitutional construction is the method of elaborating constitutional meaning in this political realm.”); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 5 (1999) (“[T]hese two mechanisms of constitutional elaboration, taken together, provide a device for ‘conjoining’ the constitution as binding law with the ‘constitution as a political order.’”); Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL’Y.* 65 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013).

elsewhere.<sup>4</sup> The Electoral College remained unusual even after it was adopted. While the American state constitutions share many similarities with the U.S. Constitution, no state after 1787 decided to follow the federal example and adopt a version of the Electoral College for itself. Other national constitutions drafted since the late eighteenth century have borrowed from the American model, and some have even experimented with their own versions of the Electoral College. But other countries have not chosen to stick with that idiosyncratic method for choosing a chief executive.<sup>5</sup>

The system outlined in the Constitution has several features, only some of which are significant for the arguments surrounding the 2016 presidential election.<sup>6</sup> First, and most immediately relevant, the president is not chosen directly by the general citizenry casting ballots in November. Rather, the mass of voters choose the president only indirectly by selecting a slate of party-nominated presidential electors.<sup>7</sup> Formally, the president is elected when the presidential electors cast their ballots in December. Early in the nation's history, the political parties provided ballots to voters to cast in the election, and those early presidential ballots simply listed the names of the presidential electors pledged to vote for that party's presidential nominee. Modern ballots generally make the electors more invisible—and the salient choice made by the voter more apparent—by leaving the names of the presidential electors off the government-issued ballot and asking voters to simply select the presidential candidate they wish to support. Voters are asked in November to vote for a presidential candidate, even if the mechanics of how that vote will be registered requires an anonymous, pledged presidential elector.

Second, the number of electors apportioned to each state is the number of members in the House of Representatives plus the number of U.S. senators to which each state is entitled.<sup>8</sup> This has generally been the more controversial feature of the Electoral College, and it was again a subject of controversy in 2016. This apportionment rule necessarily creates a gap between the simple national popular vote and the electoral vote, because the popular vote is filtered through the allotted state electors. The distribution of electoral votes is lumpier than the distribution of population. That lumpiness could be mitigated if state electoral votes were awarded in proportion to the popular vote share in each state, but they are instead generally awarded on a winner-takes-all basis.

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4. THOMAS E. CRONIN, *INVENTING THE AMERICAN PRESIDENCY* 56 (1989); John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 *AM. POL. SCI. REV.* 799, 810 (1961).

5. Donald L. Horowitz, *The Federalist Abroad in the World*, in *THE FEDERALIST PAPERS* 505 (Ian Shapiro ed., 2009).

6. I have provided a similar summary of the presidential selection process in Keith E. Whittington, *The Electoral College: A Modest Contribution*, in *THE LONGEST NIGHT* 371–72 (A. J. Jacobson & M. Rosenfeld eds., 2002).

7. U.S. CONST. art. II, § 1.

8. *Id.*

As a result, the particular apportionment of the Electoral College creates a slight bias in favor of the states that have small populations. Even the smallest states are entitled to at least three electoral votes, no matter how few residents they have.<sup>9</sup> Moreover, the Twenty-third Amendment awards the District of Columbia as many electors as the smallest states.<sup>10</sup> Seven states and the District of Columbia receive three electoral votes, the minimum number.<sup>11</sup> Those eight bodies collectively control 4% of the electoral votes but account for less than half that proportion of the national population. By contrast, the nine largest states account for half of the national population but command just 45% of the electoral votes.<sup>12</sup>

The disparity between electoral votes and popular votes is exacerbated by geographic polarization. If Democratic and Republican voters were evenly distributed across the various states, then the gap between each candidate's electoral and popular vote totals will be relatively small. But when the large states skew heavily toward a single party, then the gap between electoral votes and popular votes is magnified. In 2016, Hillary Clinton received hundreds of thousands of "wasted" popular votes in large Democratic strongholds like California and New York (both of which she won by extremely large margins). Meanwhile, Donald Trump was winning large Republican-leaning states like Texas and Georgia by much smaller margins. As Trump narrowly swung blocs of electoral votes his way, Clinton ran up the score in the popular vote. Consequently, Clinton took a sizable plurality of the national popular vote, while Trump received a solid, if unspectacular, majority of the electoral vote. Meanwhile, third-party candidates siphoned off a significant portion of the popular vote while scoring no electoral votes at all, leaving both major-party candidates well short of a majority of the popular vote. This is a general feature of the Electoral College, where "the more homogeneous voters tend to be in their political preferences [in a given state], the less likely they are to be influential nationally."<sup>13</sup>

Ideally, given the geographic apportionment of votes in the Electoral College, successful presidential candidates organize their campaigns around the electoral map rather than the popular vote as such. The presidential campaign necessarily consists of 51 distinct state-level campaigns, with resources allocated to optimize the chances of securing a majority of the electoral votes. Given the

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9. *Id.* Each state is entitled to the same number of presidential electors as it has members of the U.S. Senate and members of the U.S. House of Representatives.

10. *Id.* amend. XXIII.

11. They consist of Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Montana, and the District of Columbia. *State Press Guide to Election Day: How the Electoral College Works*, STATE PRESS (Nov. 6, 2016), <http://www.statepress.com/article/2016/11/sppolitics-voter-guide-understand-electoral-college>.

12. They consist of California, Texas, Florida, New York, Illinois, Pennsylvania, Ohio, Georgia, and North Carolina. *2010 Census State Population and the Distribution of electoral Votes and Representatives*, GREEN PAPERS (May 20, 2017), <https://www.thegreenpapers.com/Census10/HouseAndElectors.phtml>.

13. Barney War, *The U.S. Electoral College and Spatial Biases in Voter Power*, 99 ANNALS ASSOC. AM. GEOGRAPHERS 184, 194 (2009).

proclivities of those individual state races, political analysts have long termed the starting point of the electoral map an *electoral lock*, which presumptively favors one party or another in a neutral race. As Republicans were enjoying greater success in winning the White House than winning Congress in the latter half of the twentieth century, political analysts spoke of a “Republican lock” on the Electoral College, though there was little evidence supporting a systematic Republican bias in how the electorate was structured.<sup>14</sup> More recently, commentators have favored the idea of a “blue wall” of Democratic states that tilted the Electoral College toward the Democrats.<sup>15</sup> Whether or not a systematic partisan bias inheres in the structure of the Electoral College, such recurrent analytical efforts are reminders that presidential elections are organized geographically.<sup>16</sup>

Third, the presidential electors are to be chosen in a manner determined by the state legislatures, excluding only the possibility of naming federal officers.<sup>17</sup> The constitutional drafters might have expected the state legislatures to simply choose the presidential electors themselves, but over the first decades of the Constitution’s existence the states moved to statewide popular election as the mode for selecting the electors.<sup>18</sup> The states likewise moved fairly quickly to adopt the *unit rule*, or the winner-take-all mode of awarding electors to a single presidential candidate. States did not take long to recognize that they would have more sway in the presidential election if they awarded all their electoral votes as a unit to a single candidate rather than splitting their votes across multiple candidates. While the constitutional apportionment of presidential electors creates a small-state bias, the unit rule creates a large-state bias in the Electoral College. Winning a large state by a small margin generates far more impact for the electoral vote than it does for the popular vote.

Fourth, candidates must win the votes of the majority of appointed electors.<sup>19</sup> The electoral ballots are cast at a meeting in each state, and counted by

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14. See, e.g., Thomas Brunell & Bernard Grofman, *The 1992 and 1996 Presidential Elections: Whatever Happened to the Republican Electoral College Lock?*, 27 PRES. ST. Q. 134 (1997); James C. Garand & T. Wayne Parent, *Representation, Swing, and Bias in U.S. Presidential Elections, 1872–1988*, 35 AM. J. POL. SCI. 1011 (1991).

15. See, e.g., THOMAS F. SCHALLER, *THE STRONGHOLD* 6 (2015) (Republicans need “to pull the electoral equivalent of an inside straight” to recapture the White House); JOHN B. JUDIS & RUY TEIXEIRA, *THE EMERGING DEMOCRATIC MAJORITY* 71 (2002) (“[T]he Democrats are on the verge of establishing the same kind of ‘lock’ on the electoral college that the Republicans enjoyed in the 1980s.”); Ronald Brownstein, *The Blue Wall*, 41 NAT’L J. 38 (2009).

16. See Phillip J. Ardoyn & Bryan M. Parsons, *Partisan Bias in the Electoral College: Cheap States and Wasted Votes*, 35 POL. & POL’Y. 342 (2007).

17. U.S. CONST. art. II, § 1.

18. South Carolina in 1868 was the last state to adopt popular elections as the manner for choosing presidential electors. States have periodically experimented with district-based modes of picking the electors rather than a single state-wide ballot. DAVID W. ABBOTT & JAMES P. LEVINE, *WRONG WINNER* 16 (1991).

19. U.S. CONST. amend. XII.

the president of the U.S. Senate in a joint meeting of the Congress.<sup>20</sup> Since the ratification of the Twelfth Amendment, separate ballots are cast for the president and vice president.<sup>21</sup> If no candidate receives a majority of the electoral votes, the House, voting by state, chooses the president from the top three candidates, and the Senate chooses the vice president from the top two candidates.<sup>22</sup>

## II. THE CALL FOR FAITHLESS ELECTORS

As a technical matter, the president is not chosen in the popular election in November. The president is chosen in the various state meetings of the Electoral College in December, and that result is certified when the votes are counted in Congress in January.

This arrangement creates an obvious potential problem: an elector might not vote for the candidate that those who selected the elector expected. This is the so-called faithless-electors problem. In the moment of casting the ballot for president, an elector might break faith with those who selected him or her and vote for the “wrong” presidential candidate. In fact, there have been several faithless electors over the course of the nation’s history, and their reasons for voting unexpectedly have varied. In 2000, for example, a Democratic elector from Washington, D.C. refused to cast a ballot as a protest over the District’s lack of representation in Congress.<sup>23</sup> In 1976, a Republican elector from the state of Washington cast his ballot for Ronald Reagan, the unsuccessful challenger for the GOP presidential nomination of incumbent Gerald Ford.<sup>24</sup> In 1972, a Republican elector from Virginia cast his ballot for the Libertarian Party candidate rather than for the incumbent Republican President Richard Nixon.<sup>25</sup> In 1960, a Republican elector from Oklahoma joined several unpledged electors in voting for the Virginia Democrat Harry Byrd as part of a Dixiecrat revolt from the Democratic Party nominee John F. Kennedy.<sup>26</sup> In 1872, the losing Democratic Party nominee for president, Horace Greeley, died before the meeting of the Electoral College. Most of his pledged electors cast their ballots for various alternatives, and Congress

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20. *Id.* When voting for the president and vice-president, electors must vote for at least one candidate who is not a resident of the same state as the elector. Consequently, the political parties prefer to nominate candidates for president and vice-president who are not from the same state. The details of the meeting of the electors are determined by each state, but most states currently specify that the voting ceremony is open to the public. Michael Tracey, *Hear Ye, Hear Ye: Attend Your Local Electoral College Meeting on December 19*, MEDIUM (Dec. 15, 2016), <https://medium.com/@mtracey/despite-the-recent-round-of-frenzy-the-electoral-college-will-probably-not-subvert-the-will-of-5f17a75d2a0f>.

21. The rise of organized political parties made the original system, in which the runner-up in the presidential elector vote became the vice president, undesirable.

22. U.S. CONST. amend. XII.

23. ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 96 (2006).

24. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 94 (2008).

25. JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT* 39 (1975).

26. John D. Feerick, *The Electoral College—Why It Ought to be Abolished*, 37 *FORDHAM L. REV.* 1, 20 (1968).

refused to count the ballots that the Georgia delegation did cast for Greeley.<sup>27</sup> Most of the aforementioned votes were symbolic gestures that were understood to have no consequence for the election outcome.

A long-standing approach to thinking about political representation distinguishes between representatives as *trustees* and representatives as *delegates*. Trustees exercise discretion on behalf of those they represent. Such a representative is entrusted to be a “free agent,” to follow “what he considers right or just—his convictions or principles, the dictates of his conscience.”<sup>28</sup> As one early twentieth-century British political philosopher put it, the people could overcome the “tyranny of ignorance”<sup>29</sup> by entrusting their affairs “to the direction and management of [the representative’s] superior mind.”<sup>30</sup> By contrast, a delegate is charged with the task of accurately conveying the will of those being represented. A delegate is under a mandate or instruction to take a particular action, “to pursue his constituents’ will and not his own.”<sup>31</sup> Unsurprisingly, representatives rarely view themselves as mere agents in this narrow sense, not least because the decision-making tasks that they face are often complex and the will of their constituents is rarely so express.<sup>32</sup> Presidential electors, however, are almost uniquely situated to act as delegates. Unlike legislators, whose duties are complex, electors must only answer one question with a limited set of pre-determined responses. Electors can be readily instructed as to how they are to perform their singular task. In the unique context of the Electoral College, the representative’s role as “a mere mechanical reflection or delivery of the wishes of the constituents” becomes more plausible.<sup>33</sup> Indeed, we might think that “there was something very wrong” if the elector “not only fails to follow the instruction of his constituency” but in fact does “the opposite of what the constituency desires.”<sup>34</sup> In such a case, the elector cannot be easily thought of as behaving as a “representative” at all.

The potential for a faithless elector arose as soon as electors began to pledge their support to a given candidate. The practice of choosing pledged electors started very early in the nation’s history. The issue hardly existed in the first two elections because the presidency so obviously belonged to George Washington. The only real question was who would be runner-up and thus assume the duties of vice president. By 1796, however, the situation was very different. George Washington disappointed many by refusing to serve more than two terms,

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27. *Id.* at 23 n.93.

28. Heinz Eulau et al., *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 AM. POL. SCI. REV. 742, 749 (1959).

29. A. R. Lord, *The Problem of Modern Democracy*, in 1 PHILOSOPHICAL LECTURES AND REMAINS OF ARTHUR RITCHIE LORD 88 (William Sweet & E.E. Harris eds., 2005).

30. A. R. LORD, *THE PRINCIPLES OF POLITICS* 170–71 (1921).

31. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 146 (1967).

32. See Donald J. McCrone & James H. Kuklinski, *The Delegate Theory of Representation*, 23 AM. J. POL. SCI. 278, 297–99 (1979).

33. PITKIN, *supra* note 31, at 151.

34. *Id.* at 152.



which left the question of his successor to be decided between the closest friends of the Washington administration and the “antis.”<sup>35</sup> In that rudimentary-partisan context, potential electors declared themselves for one presidential candidate or another and their selection to cast the final ballots in the Electoral College was made on the basis of those declarations.<sup>36</sup> The electors were not cyphers, and political operatives took care “to ascertain the complexion of the electors” so as to be assured that they would vote appropriately.<sup>37</sup> Indeed, when the Pennsylvania electors in 1796 followed the unit rule and cast their ballots for Thomas Jefferson, who had narrowly won a majority of the statewide vote, an irate “Adamite” complained that a candidate for elector had not made his intentions sufficiently clear and that by acceding to the will of the majority, the candidate had failed to give adequate weight to the “federal interest in this state”<sup>38</sup>:

When I vote for a legislator, I regard the privilege that he is to exercise his own judgment—It would be absurd to prescribe the delegation. But when I voted for the Whelen ticket, I voted for John Adams . . . What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson is to be the fittest man for President of the United States? No—I chose him to *act*, not to *think*.<sup>39</sup>

Whether chosen by voters or by state legislators, the presidential electors were understood to be instruments for expressing the will of those who selected them, not independent agents authorized to exercise their own judgment.

If the Electoral College is the Chekhov’s gun of the U.S. Constitution, the outcome of the 2016 presidential election persuaded many disappointed opponents of Republican nominee Donald Trump to try to use it.<sup>40</sup> The particulars of the proposal have been various, but they have all been motivated by an overriding concern of stopping Donald Trump from winning the White House.

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35. GEORGE GIBBS, 1 MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS 400–01 (1846) (“The votes of the city and county of Philadelphia afforded a majority of two thousand against Mr. Adams. . . . The majority of the last legislature was federal, and the antis were desirous of having the electors chosen by districts.”).

36. *Id.* at 400–02.

37. *Id.* at 387.

38. GAZETTE OF THE UNITED STATES 3 (Dec. 15, 1796). Pennsylvania was committed to the winner-take-all mode in 1796, and the slate supporting Thomas Jefferson narrowly won the statewide polling. But Federalists delayed the electoral returns from one Jefferson-leaning county until after the statutory deadline, and as a consequence two Federalist electors were certified by the governor as eligible to cast ballots at the meeting of the electors. One of those electors, Samuel Miles, agreed to cast his ballot for the state winner, Thomas Jefferson. The other Federalist elector refused to yield to the statewide results and cast his ballot for John Adams. GAZETTE OF THE UNITED STATES 3 (Nov. 26, 1796).

39. GAZETTE OF THE UNITED STATES 3 (Dec. 15, 1796).

40. FRED R. SHAPIRO, YALE BOOK OF QUOTATIONS 146 (2006) (“One must not put a loaded rifle on the stage if no one is thinking of firing it.”).

The most immediate reaction among Democrats after the polls closed and it became clear that Donald Trump had won was to challenge the legitimacy of the Electoral College itself. Although the news media had projected that Trump would comfortably win the electoral vote in the early morning hours of November 9, it quickly became apparent that Clinton would receive a larger share of the popular vote than her opponent. The focus then was on the ways in which the allocation of electoral votes could deny the winner of the popular vote the presidency.<sup>41</sup> Protestors took to the streets shouting “not my president.”<sup>42</sup> Democratic Senator Barbara Boxer of California announced that she would propose a constitutional amendment to abandon the Electoral College, which she characterized as “an outdated, undemocratic system that does not reflect our modern society.”<sup>43</sup> The “legitimacy” of an Electoral College winner was said to be “undermined” whenever the winner failed to receive a plurality of the popular vote. The misalignment of the popular vote and the electoral vote is just a “botched election.”<sup>44</sup>

The focus soon turned from bemoaning the ways in which the Electoral College had given the White House to Trump than the ways in which it could still be used to deny him the presidency.<sup>45</sup> Almost immediately after the election results were known, California political activist Daniel Brezenoff started a petition at change.org calling on “Conscientious Electors” to cast their ballots for the national popular-vote winner, Hillary Clinton.<sup>46</sup> The petition quickly received millions of signatures. Arguing that Trump was “unfit to serve” and “a danger to the

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41. See, e.g., Ed Kilgore, *The Electoral College Strikes Again*, NEW YORK (Nov. 10, 2016), <http://nymag.com/daily/intelligencer/2016/11/the-electoral-college-strikes-again.html>; Scott Lemieux, *How the Terrible, Skewed, Anachronistic Electoral College Gave Us Trump*, NEW REPUBLIC (Nov. 9, 2016), <https://newrepublic.com/article/138631/terrible-skewed-anachronistic-electoral-college-gave-us-trump>.

42. Thomas Fuller, *Anti-Trump Demonstrators Take to the Streets in Several U.S. Cities*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/10/us/trump-election-protest-berkeley-oakland.html?mcubz=1>.

43. Sarah D. Wire, *California Sen. Barbara Boxer Filed Long Shot Bill to Scrap the Electoral College System*, L.A. TIMES (Nov. 15, 2016), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-boxer-files-longshot-bill-to-scrap-the-1479234745-htmstory.html>.

44. Andrew Trees, *Electoral College is No Way to Show Off Democracy*, USA TODAY (Nov. 14, 2016), <https://www.usatoday.com/story/opinion/2016/11/14/trump-clinton-popular-vote-electoral-college-democracy-column/93773104/>.

45. Douglas Anthony Cooper, *The Electoral College Was Designed to Prevent Trump; You Can Make This Happen*, HUFFINGTON POST (Nov. 14, 2016), [http://www.huffingtonpost.com/douglas-anthony-cooper/the-electoral-college-was\\_b\\_12897066.html](http://www.huffingtonpost.com/douglas-anthony-cooper/the-electoral-college-was_b_12897066.html).

46. Daniel Brezenoff, *Electoral College: Make Hillary Clinton President*, CHANGE.ORG, <https://www.change.org/p/electoral-college-make-hillary-clinton-president-on-december-19-4a78160a-023c-4ff0-9069-53cee2a095a8?recruiter=627835418> (last visited Oct. 27, 2017).

Constitution,” Brezenoff contended that the “constitutional” and “patriotic” thing for the electors to do was deny Trump the presidency.<sup>47</sup>

Brezenoff subsequently raised funds and joined other activists to publish an advertisement in several newspapers arguing that “extraordinary circumstances call for extraordinary measures.”<sup>48</sup> The open letter to the electors similarly focused on Trump’s flaws as a potential president. The charges were broad-ranging, running from his policy proposals on immigration, to the potential conflicts of interest raised by his personal business dealings, to his lack of political experience.<sup>49</sup> The letter concludes by arguing that the electors were constitutionally empowered “to exercise judgment and choice” and had a “right and responsibility” to evaluate all possible candidates for president and select the person most qualified for the position.<sup>50</sup> Unlike the change.com petition, the letter did not specifically advocate that the electors vote for the popular-vote winner but instead invited the electors to canvass the nation for a suitable alternative to Trump.<sup>51</sup> The letter featured signatures from a handful of electors and numerous academics, and the high-profile lobbying effort was aimed at increasing “public pressure” on electors from “states with large Democratic populations” to break their pledge to vote for the Republican nominee.<sup>52</sup>

In later weeks, attention shifted away from Trump’s own perceived flaws and toward the likely involvement of Russia in hacking and publicly releasing electronic files from the Democratic National Committee (“DNC”) through the website WikiLeaks. The gradual revelation of the DNC documents across the presidential campaign had embarrassed Clinton operatives and fractured the Democratic Party.<sup>53</sup> Although the WikiLeaks revelations of Clinton’s close relationship to business interests and Wall Street were more likely to anger critics on her left than potential Trump voters on her right, Clinton supporters subsequently blamed the leaks for her defeat in the general election.<sup>54</sup> As evidence mounted that the Russian government might have been involved in the WikiLeaks documents, critics of Trump gained a new angle of attack. As Green Party presidential nominee Jill Stein pushed the theory that Russia might have hacked

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47. Tierney McAfee, *Inside One Man’s “Hail Mary” Attempt to Yet Elect Hillary Clinton President*, PEOPLE (Dec. 5, 2016), <https://www.yahoo.com/news/inside-one-man-hail-mary-152440975.html>.

48. *An Open Letter to the Electors*, BLUEOREGON (Dec. 14, 2016), <http://www.blueoregon.com/2016/12/open-letter-electors/>.

49. *Id.*

50. *Id.*

51. Kyle Cheney, *Full-Page Ads Turn up the Heat on Trump Electors*, POLITICO (Dec. 14, 2016), <http://www.politico.com/story/2016/12/trump-electors-activist-campaign-electoral-college-232635>.

52. *Id.*

53. Kyle Cheney, *The Most Revealing Clinton Campaign Emails in WikiLeaks Release*, POLITICO (Oct. 7, 2016), <http://www.politico.com/story/2016/10/john-podesta-wikileaks-hacked-emails-229304>.

54. Jeff Stein, *Why Team Clinton is Linking Its Criticisms of the FBI to WikiLeaks and Russian Hackers*, VOX (Dec. 16, 2016), <http://www.vox.com/policy-and-politics/2016/12/16/13980944/putin-fbi-russia-podesta>.

electronic voting machines and effectively stuffed the ballot box in favor of Trump,<sup>55</sup> others argued that Russia had instead “hacked the voters” with a variety of weapons of “information warfare” designed to sway the American electorate with everything from “fake news” to leaks of stolen campaign memoranda.<sup>56</sup>

The Russia angle bolstered the lobbying effort of the so-called Hamilton Electors. Within days of the general election, a small group of Democratic presidential electors launched an effort to persuade the members of the Electoral College to refuse to vote for Trump. They argued that Alexander Hamilton intended that the Electoral College “act as a constitutional failsafe against those lacking the qualification from becoming President.”<sup>57</sup> As Democratic elector Michael Baca from Colorado asserted, “The Constitution is quite clear about what our job is . . . and that it’s our decision at the end of the day.”<sup>58</sup> Unlike Brezenoff, who argued that the electors should simply vote for the winner of the national popular vote, the Hamilton Electors argued that the electors should cast their vote for a responsible Republican candidate, though the identity of such a candidate was not immediately forthcoming.<sup>59</sup> The Hamilton Electors offered several reasons for thinking that voting for Donald Trump would mark a failure in the presidential electors’ duty to “protect and defend the U.S. Constitution,” including the contention that he was a demagogue, would likely find himself impeached, and was unqualified.<sup>60</sup> Adding to those arguments were the “growing concerns that our Presidential election was compromised by foreign interests, likely Russia, who may have been interacting with the Trump campaign through the election.”<sup>61</sup> Christine Pelosi, a Democratic elector from California and daughter of the House minority leader, joined Baca in demanding an intelligence briefing for the electors detailing Russian efforts to affect the presidential election.<sup>62</sup> That demand was quickly backed by the Clinton campaign, while some Democratic members of the U.S. House of Representatives went further and called for postponing the meeting

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55. Joe Lauria, *Blaming Russia to Overturn the Election*, HUFFINGTON POST (Dec. 8, 2016), [http://www.huffingtonpost.com/joe-lauria/blaming-russia-to-overturn\\_b\\_13408446.html](http://www.huffingtonpost.com/joe-lauria/blaming-russia-to-overturn_b_13408446.html).

56. Theodore R. Johnson, *Russia Didn’t Hack the U.S. Election; It Hacked the Voters*, SLATE (Dec. 13, 2016), [http://www.slate.com/articles/technology/future\\_tense/2016/12/how\\_russia\\_hacked\\_american\\_voters.html](http://www.slate.com/articles/technology/future_tense/2016/12/how_russia_hacked_american_voters.html).

57. HAMILTON ELECTORS, <http://www.hamiltonelectors.com/about> [https://web.archive.org/web/20170126025006/www.hamiltonelectors.com/about] (last visited Sept. 21, 2017).

58. Lilly O’Donnell, *Meet the “Hamilton Electors” Hoping for an Electoral College Revolt*, ATLANTIC (Nov. 21, 2016), <http://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/> (quoting Michael Baca).

59. *Id.*

60. HAMILTON ELECTORS, *supra* note 57.

61. *Id.*

62. Allegra Kirkland, *Clinton Camp Backs Electors’ Request for Briefing on Russian Interference*, TPM (Dec. 12, 2016), <http://talkingpointsmemo.com/livewire/clinton-campaign-podesta-supports-electoral-college-members-request-intelligence-briefing-russia-hacking>.

of the Electoral College and for the electors to refuse to vote for Trump.<sup>63</sup> Meanwhile, prominent pundit Keith Olbermann denounced Trump as a Russian “puppet” and the Trump victory as a “bloodless coup” orchestrated by Russia.<sup>64</sup>

Although largely mobilized by Clinton’s supporters, the call for faithless electors was ultimately aimed at Republican electors pledged to vote for Donald Trump.<sup>65</sup> They received some encouragement when a lone Republican elector from Texas, Christopher Suprin, announced that he would not vote for Donald Trump. Suprin instead planned to join the Hamilton Electors. At least some of the Hamilton Electors dallied with voting for Ohio Republican John Kasich, who had been a particularly vocal critic of Trump as a candidate during the Republican primaries but who had attracted little support himself among the primary voters.<sup>66</sup>

The suggestion that the members of the Electoral College could and should “vote their conscience” had been endorsed by numerous sources. *Atlantic* editor Peter Beinart contended that the founders “self-consciously limited the people’s voice” and that modern American political discourse should more forthrightly embrace the “undemocratic” features of American politics, from the U.S. Supreme Court to political party elites.<sup>67</sup> Although he admitted that an

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63. Cristina Marcos, *House Dem Wants Electoral College Vote Delayed until after Intelligence Briefing*, HILL (Dec. 14, 2016), <http://thehill.com/homenews/campaign/310381-house-dem-wants-electoral-college-vote-delayed-until-after-intelligence>.

64. Keith Olbermann *Wonders Aloud*, “*Is There a Russian Coup Underway in America?*,” WEEK (Dec. 13, 2016), <http://theweek.com/speedreads/667107/keith-olbermann-wonders-aloud-there-russian-coup-underway-america>.

65. It is perhaps fitting that in a season of political blundering and miscalculations, the movement to lobby the presidential electors culminated with a video message featuring the actor Martin Sheen, best known for portraying an idealized liberal president in the 1990s TV series *West Wing*, urging Republican electors to break with their pledge to vote for the Republican nominee. Daniel Halper, *Celebrities Beg Electors to be ‘Heroes’ and Vote Against Trump*, N.Y. POST (Dec. 15, 2016), <http://nypost.com/2016/12/15/celebrities-beg-electors-to-be-heroes-and-vote-against-trump/>. Apparently the organizers were working under the theory that if only someone had thought to ask “Hanoi Jane” Fonda to produce a special message to Republican presidential electors in 1980, the political history of the late twentieth century might have taken a different turn.

66. Lois Romano, *Kasich Lost GOP Nomination, But Now He’s Finding a Moment*, WASH. POST (July 10, 2016), [https://www.washingtonpost.com/politics/kasich-lost-gop-nomination-but-now-hes-finding-a-moment/2016/07/10/b2372d94-454f-11e6-8856-f26de2537a9d\\_story.html?utm\\_term=.30bc721662d0](https://www.washingtonpost.com/politics/kasich-lost-gop-nomination-but-now-hes-finding-a-moment/2016/07/10/b2372d94-454f-11e6-8856-f26de2537a9d_story.html?utm_term=.30bc721662d0); Christopher Suprin, *Why I Will Not Cast my Electoral Vote for Donald Trump*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html?mcubz=1>. In response, Kasich asked the electors to vote for Donald Trump, stating “the election is over.” Kyle Cheney, *Kasich Asks Presidential Electors Not to Vote for Him*, POLITICO (Dec. 6, 2016), <http://www.politico.com/story/2016/12/john-kasich-electoral-college-president-232261>.

67. Peter Beinart, *The Electoral College Was Meant to Stop Men Like Trump from being President*, ATLANTIC (Nov. 21, 2016),

Electoral College vote for someone other than Donald Trump was a “terrifying prospect” that risked destabilizing the American democratic system as a whole, he thought that on balance the risk of “independent-minded electors” was worth it so long as Trump could be kept from the White House in 2016.<sup>68</sup> Former Labor Secretary Robert Reich declared that a “dark cloud of illegitimacy” would blanket any Trump administration and contended that the “framers of the Constitution created an Electoral College that could override the will of a majority of voters.”<sup>69</sup> The Democratic mayor of Charlottesville, Virginia, called for us to abandon the term *faithless electors* in favor of *conscientious electors* and to “give them the resources and the protection to investigate and deliberate” rather than requiring them to act as a “rubber-stamp of the popular vote.”<sup>70</sup> He argued that the best modern reading of the founders’ design was a congressional committee or grand jury, and the presidential electors should be able to subpoena Donald Trump’s tax returns and continue their investigation and deliberation for “as long as they reasonably need to make their choice.”<sup>71</sup> There is, after all, “no more conservative principle in our country than fidelity to the Constitution as originally designed.”<sup>72</sup> Constitutional scholars Jeffrey Tulis and Sanford Levinson urged the presidential electors to “fulfill their clear constitutional duty of denying an unqualified demagogue” the presidency.<sup>73</sup> Harvard Law School’s Lawrence Lessig announced his willingness to provide “strictly confidential legal support to any [e]lector who wishes to vote [his or her] conscience.”<sup>74</sup> Lessig likewise argued that the Electoral College is “meant to be a circuit breaker—just in case the people go crazy.”<sup>75</sup> To

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<https://www.theatlantic.com/politics/archive/2016/11/the-electoral-college-was-meant-to-stop-men-like-trump-from-being-president/508310/>.

68. *Id.*

69. Robert Reich, *Trump’s Dark Cloud of Illegitimacy*, ROBERTREICH.ORG (Dec. 12, 2016), <http://robertreich.org/post/154389090140>; Robert Reich, Facebook Post (Dec. 8, 2016), <https://www.facebook.com/RBReich/posts/1395094817169777>.

70. Michael Signer, *Make the Electoral College Great Again: Let “Conscientious Electors” Do Their Job*, VOX (Nov. 29, 2016), <https://www.vox.com/the-big-idea/2016/11/29/13771920/electoral-college-faithless-electors-independent-trump>.

71. *Id.*

72. *Id.* David Pozen simultaneously argued that Republican electors breaking their pledges would be “an act of profound constitutional fidelity” and that the Electoral College should be abandoned as “antiquated and fundamentally undemocratic.” David Pozen, *Why G.O.P. Electoral College Members Can Vote Against Trump*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/opinion/why-gop-electoral-college-members-can-vote-against-trump.html?mcubz=1>.

73. Jeffrey K. Tulis et al., *The Hail Mary to Defeat Donald Trump: It’s Up To You, Electors*, N.Y. DAILY NEWS (Nov. 21, 2016), <http://www.nydailynews.com/opinion/tulis-levinson-suri-hail-mary-defeat-donald-trump-article-1.2882315>.

74. ELECTORS TRUST, <http://www.electorstrust.org/> (last visited Sept. 21, 2017); Anthony Gockowski, *Harvard Law Prof Pledges to Defend Electors Who Reject Trump*, CAMPUS REFORM (Dec. 6, 2016, 12:35 PM), <https://www.campusreform.org/?ID=8496>.

75. Lawrence Lessig, *The Constitution Lets the Electoral College Choose the Winner. They Should Choose Clinton*, WASH. POST (Nov. 24, 2016), <https://www.washingtonpost.com/opinions/the-constitution-lets-the-electoral-college->

serve that function, the electors should understand their choice as being unconstrained by pledges or local electoral results; they are “free to choose.”<sup>76</sup> The real question, therefore, is “whether there is any good reason to veto the people’s choice” of president.<sup>77</sup> The twist comes with the claim that the “people’s choice” is Hillary Clinton, the winner of the national popular vote. So long as the national popular vote winner is “within the bounds of a reasonable judgment by the people,” then the electors should cast their ballots to validate that result.<sup>78</sup> The conventional-wisdom mistake about the Electoral College is the assumption that the electors should represent the people who actually voted for them. They should not understand themselves as representatives at all, but rather as akin to judges “reviewing a jury verdict.”<sup>79</sup>

The call for faithless electors has not been costless. The public effort to mobilize a lobbying campaign to influence the electoral vote has led to an unprecedented level of harassment of the individuals who serve in that role.<sup>80</sup> The best-case scenario is, as one elector put it, “we have been getting a civics lesson we weren’t prepared to get.”<sup>81</sup> But the worst-case scenario might include the possibility that the presidential electors would convince themselves that they are empowered to ignore the electorate. If those 538 individuals come to believe that “the people got it wrong,”<sup>82</sup> or that a president will be inaugurated under a “dark cloud of illegitimacy”<sup>83</sup> fostered by a public battle over the presidential election that does not end with the general election and the concession of the losing candidate; or even that the people and their leaders will no longer accept the result of a free and fair election held under the rules laid down by the U.S. Constitution, then they should feel free to cast a ballot for any individual that they themselves think would make a good president.

As it turned out, more Democratic electors broke their pledges when they cast their ballots in 2016 than did Republican electors. It is perhaps unsurprising that Democratic electors would be more influenced by activists on the left that

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choose-the-winner-they-should-choose-clinton/2016/11/24/0f431828-b0f7-11e6-8616-52b15787add0\_story.html?utm\_term=.17732da4d554.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* Similarly, Geoffrey Stone called on the electors to “fearlessly and courageously do right by our nation” and cast their ballots for Hillary Clinton rather than the individual who, in scare quotes, “won” their state. Geoffrey R. Stone, *Electors Against Trump Are Faithful Not Faithless*, TIME (Dec. 12, 2016), <http://time.com/4597387/faithless-electors-donald-trump/>.

80. Kyle Cheney, *Electors Under Siege*, POLITICO (Dec. 17, 2016), <http://www.politico.com/story/2016/12/electors-under-siege-232774>.

81. Robert Samuels, *In Last-Shot Bid, Thousands Urge Electoral College to Block Trump at Monday Vote*, WASH. POST (Dec. 17, 2016), [https://www.washingtonpost.com/politics/in-last-shot-bid-thousands-urge-electoral-college-to-block-trump-at-monday-vote/2016/12/17/125fa84a-c327-11e6-8422-eac61c0ef74d\\_story.html?utm\\_term=.86854639ff77](https://www.washingtonpost.com/politics/in-last-shot-bid-thousands-urge-electoral-college-to-block-trump-at-monday-vote/2016/12/17/125fa84a-c327-11e6-8422-eac61c0ef74d_story.html?utm_term=.86854639ff77).

82. *Id.*

83. Reich, *supra* note 69.

aiming to persuade the presidential electors that they should make an independent judgment on who they thought would best fulfill the office of the president.<sup>84</sup> Of course, throwing away a vote that otherwise would have gone to a losing candidate has no immediate consequences, which has always made it easier for electors who know that they are not going to be pivotal to the outcome to abandon their pledged commitment. Even so, after a hard-fought Democratic primary, several Democratic electors were more inclined to cast their ballots for eventual loser of the primary contest, Bernie Sanders, than for the official nominee.<sup>85</sup> One Hawaii Democratic elector simply decided that “Hillary Clinton I do not feel is qualified.”<sup>86</sup>

### III. ORIGINAL MEANING AND CONSTITUTIONAL CONSTRUCTION

As the appellation of Hamilton Electors and the mass mailing of pages from the *Federalist Papers* to Republican members of the Electoral College indicate, historically inflected rhetoric surrounded the 2016 controversies over the prospect of faithless electors. Those pushing electors to deny Trump the presidency touted the founders’ constitutional design, Alexander Hamilton’s worries about unchecked democracy, and the virtues of fidelity to the historical Constitution. This originalist gloss on the lobbying campaign to alter the outcome of the presidential election is not very compelling. Showing how those advocates erred in thinking about the meaning of the Electoral College can serve two constructive goals: clarifying both why pledged presidential electors should not break their pledges and how an understanding of the original meaning of the Constitution should be paired with an appreciation of constitutional development across time.

For these purposes, it might be helpful to make three distinct inquiries. First, what was the original meaning of the constitutional text relating to the

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84. Kyle Cheney, *Electoral College Sees Record-Breaking Defections*, POLITICO (Dec. 19, 2016), <http://www.politico.com/story/2016/12/electoral-college-electors-232836>; Kiersten Schmidt & Wilson Andrews, *A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/interactive/2016/12/19/us/elections/electoral-college-results.html?mcubz=1>.

85. Michael A. Memoli, *As Electoral College Meetings End in Hawaii, Bernie Sanders Gets a Vote That Will Stick*, L.A. TIMES (Dec. 19, 2016, 5:34 PM), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-in-hawaii-bernie-sanders-electoral-1482196946-htmllstory.html>. More dubiously, some presidential electors were prevented from casting their ballots for Sanders on the grounds that state law required that they vote for their party’s nominee. In Maine, a pledged Democratic elector’s vote was ruled “out of order” and he was forced to cast a ballot for Clinton. Scott Thistle, *Maine Electors Cast Votes for Clinton, Trump – After Protests Inside and Outside State House*, PORTLAND PRESS HERALD (Dec. 20, 2016), <http://www.pressherald.com/2016/12/19/maine-electoral-college-elector-says-he-will-cast-his-ballot-for-sanders/>. In Minnesota, a pledged Democratic elector was replaced after attempting to vote for Sanders. J. Patrick Coolican, *Minnesota Electors Align for Clinton; One Replaced after Voting for Sanders*, MINNEAPOLIS STAR TRIB. (Dec. 20, 2016), <http://www.startribune.com/mn-electors-meet-award-clinton-votes-amid-protests-against-trump/407477396/#1>.

86. Memoli, *supra* note 85.



Electoral College? Second, what was the original purpose of that provision? Third, how has the Electoral College been constructed over time?

*A. Original Meaning of the Electoral College*

Recent originalist theorizing emphasizes that the first task of constitutional interpretation is to determine original meaning, or at least determine what can be discovered about the original meaning of the constitutional text.<sup>87</sup> Because much of normative constitutional theory generally and theories about constitutional interpretation specifically are centrally concerned with the context of judicial review, the question of interpretive meaning and determinacy has mostly revolved around the circumstances under which judges would be justified in setting aside an otherwise valid statutory requirement. A clear conflict between the requirements of the constitutional text thus understood and a statutory command would be sufficient to authorize a judge to refuse to implement the legislature's directive.

The issues surrounding the Electoral College do not necessarily implicate judicial review. Determining what the constitutional text says in this case is most immediately useful for guiding political behavior. In particular, what does the constitutional text say about the office and duty of a presidential elector?

The U.S. Constitution constitutes the office of presidential elector in Article II and the Twelfth Amendment. Article II specifies that the electors shall be appointed "in such Manner as the Legislature may direct," and that each state is entitled to appoint a number of electors "equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress."<sup>88</sup> The Twelfth Amendment specifies that the "Electors shall meet in their respective states, and vote by ballot for President and Vice President."<sup>89</sup> The qualified individual receiving the votes of "a majority of the whole number of Electors appointed" shall be the president.<sup>90</sup>

There is room for disagreements on the margins of the Electoral College process, but these core provisions are fairly clear. The Constitution gives the presidential electors a single task: to meet and cast a ballot. It says nothing about how they might choose to cast that ballot. It indicates how many electors a state may appoint, but it does not say anything about what those electors should do (beyond the formalities of how the list of votes cast is reported to Congress). It is perhaps telling that the term the constitutional drafters chose for those who would cast the ballot for president is the same term they used to describe the voters who would elect the members of the U.S. House of Representatives.<sup>91</sup> Presidential electors are not characterized as members of an Electoral College or

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87. Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y. 599, 608–10 (2004); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 3–6 (2015).

88. U.S. CONST. art. II, § 1.

89. *Id.* amend. XII.

90. *Id.*

91. *Id.* art. I, § 2.

representatives of their states; they are simply Electors. Like the average citizen, they are just voters casting a ballot, but in their case voters in a very small electorate casting a ballot for a very high office.

The Constitution empowers the state legislatures to direct the “manner” in which presidential electors are to be appointed.<sup>92</sup> The manner of appointment could readily range from selecting the electors themselves, to authorizing the governor to appoint them, to authorizing the citizenry to elect them, and various other permutations. Choosing the way electors are appointed, however, would not seem to suggest that legislatures are empowered to instruct the elector on how to vote.<sup>93</sup> Because the elector performs no other duty than casting a single ballot, there is little opportunity to recall an elector that is behaving in an unsatisfactory fashion. The Constitution does not authorize the state legislatures to instruct the presidential electors; only to designate the way they are to be appointed. Unlike, say, the Pennsylvania Constitution of 1776 which recognizes a right of the people “to instruct their representatives,” the Constitution does not explicitly contemplate that sort of ambassadorial relationship between the legislature and the elector.<sup>94</sup> The Constitution specifically directs that U.S. senators will be “chosen by the Legislature” of each state.<sup>95</sup> While state legislatures have that option with presidential electors, their authority over the choosing of the electors more closely resembles their authority to prescribe the “Times, Places and Manner of holding Elections.”<sup>96</sup> The founding generation seemed to have understood the “Manner of holding Elections” to include a wide array of rules regarding how elections are to be conducted, who can participate in them, and how votes cast in them will be counted, but such rules would seem to extend no further than indicating how an office will be filled.<sup>97</sup> Controlling election regulations is a far cry from controlling how those elected to an office will conduct themselves once in that office. Once the legislature has specified the mechanism by which a presidential elector is to be appointed, the legislature’s work is done. When it comes time for the appointed electors to meet and cast their ballots, the Constitution says nothing about them consulting with the legislature on how those ballots should be cast.

The constitutional provisions relating to the appointment of the presidential electors and the casting of the electoral ballots for president are not especially vague or open-textured. As a matter of straightforward textual interpretation, the Constitution would seem to leave the presidential electors unbound in their decision-making. Once appointed to the office in a manner

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92. *Id.* art. II, § 1.

93. See Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap*, 48 ARK. L. REV. 215, 219 (1994) (“[C]onstitutionality of such laws seems highly dubious if we consult constitutional text, history, and structure . . .”).

94. PA. CONST. of 1776, art. XVI.

95. U.S. CONST. art. I, § 3.

96. *Id.* art. I, § 4.

97. See, e.g., THE FEDERALIST NO. 60 (Alexander Hamilton).

chosen by the state legislature, the presidential electors are constitutionally free to choose how to cast their ballot.<sup>98</sup>

***B. Constitutional Purposes of the Electoral College***

Knowing the purposes for the drafting and inclusion of a particular constitutional provision can be useful for interpreting text that is otherwise unclear, but it is less productive when the text is clear. In the case of the Electoral College, the text as written is reasonably clear on its own. In that context, the interpreter must be careful not to allow the aspirations and expectations of the founders to substitute for the text that they ultimately wrote and ratified. The founders had goals that they were trying to accomplish, but those merely informed the rules that they could agree on and adopt. What they did in writing the text should be distinguished from why they wrote it. Much of the historically inflected rhetoric surrounding the 2016 presidential contest about how the presidential electors *should* perform their duties tended to misunderstand both the meaning of the historical materials and their implications for current behavior.

The Electoral College was a novel device for solving a perplexing problem in creating a new federal constitution. Many of the constitutional reformers who organized the Philadelphia Convention in 1787 were convinced that the model of government contained in the Articles of Confederation was inadequate. The nation needed an executive and judicial branch, as well as a more empowered legislative branch. The Virginia Plan introduced at the Convention's opening proposed that there should be an executive, and James Wilson soon proposed that the executive consist "of a single person."<sup>99</sup> The creation of such an office raised immediate questions about how it should be filled.

Unlike the Articles of Confederation, the early state constitutions had provided for executive officers. The early state governors were generally weak and possessed only limited powers, but the state constitutional drafters had already struggled with the problem of creating a procedure by which the executive could be chosen. Most often, the revolutionary constitutions empowered the state legislature to choose a chief executive, and often an executive council as well. The Virginia Constitution of 1776 was fairly typical. It provided for a "governor, or chief magistrate" to "be chosen annually by joint ballot of both Houses" of the state legislature.<sup>100</sup> A "Privy Council, or Council of State, consisting of eight members, shall be chosen, by joint ballot by both Houses of Assembly, either from their own members or the people at large, to assist in the administration of

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98. This leaves open, however, the question of whether states are constitutionally permitted to impose their own restrictions on the presidential electors. In particular, can states penalize presidential electors for breaking their pledges when casting their ballots? Several states purport to do just that, though the constitutionality of those laws is in some doubt. *Ray v. Blair*, 343 U.S. 214 (1952). I do not try to resolve that issue here.

99. 3 JAMES MADISON, *WRITINGS OF JAMES MADISON* 57 (Gaillard Hunt ed., 1902).

100. VA. CONST. of 1776.

government.”<sup>101</sup> The council of state would in turn choose from among its members one person to serve as president or lieutenant-governor.<sup>102</sup> Only three states tried an alternative mechanism. The Vermont Constitution of 1777 established a Supreme Executive Council, with the governor, lieutenant-governor, treasurer, and councilors chosen by the freemen by hand-written votes to be collected by town constables and delivered for tabulation to the state legislature.<sup>103</sup> If no candidate received “the major part of the votes,” then the legislature would choose a governor.<sup>104</sup> The Massachusetts Constitution of 1780 took a similar approach, but stated that “if no person shall have a majority of votes” then the House of Representatives would select two of the top four gubernatorial candidates to refer to the Senate which would finally select the governor from those two options.<sup>105</sup> The New York Constitution of 1777 dispensed with the fallback of the legislative choice of a governor by simply giving the office to “the person who hath the greatest number of votes” cast by the freeholders.<sup>106</sup> In a disorganized election that was not structured by political parties, it is easy to imagine that the state legislatures would almost always wind up selecting the governor, even when the people had some role in the process, unless like New York the office was simply awarded to the top vote-getter regardless of how far short that candidate fell from receiving a majority of the votes.<sup>107</sup> The role of the legislature might at least be minimized so long as an overwhelming favorite could command popular acclaim, as Thomas Chittenden did in revolutionary Vermont and John Hancock did in revolutionary Massachusetts.<sup>108</sup>

Given that constitutional experience in the states, it was only natural that the Virginia Plan proposed that the new “national Executive . . . be chosen by the National Legislature.”<sup>109</sup> The competing New Jersey Plan took the same approach to the selection of the chief executive, though with the notable difference that its proposed Congress consisted of equal state delegations rather than the proportionally allocated popular representatives of the Virginia Plan.<sup>110</sup> Although presidential selection by the national legislature seemed natural, the divergence in views of how Congress itself should be constituted had implications for the executive. Delaware’s John Dickinson floated the idea that the national executive should be removable “on the request of the majority of the Legislatures of

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101. *Id.*

102. *Id.*

103. VT. CONST. of 1777, ch. II, § XVII.

104. *Id.*

105. MASS. CONST. of 1780, ch. II, § I, art. III.

106. N.Y. CONST. of 1777, art. XVII.

107. George Clinton swiftly consolidated power in New York, allowing him to win the governorship without facing much electoral competition until the organization of the Federalists in the late 1780s. *See* ALFRED F. YOUNG, THE DEMOCRATIC REPUBLICANS OF NEW YORK 22–25 (1967).

108. JACOB G. ULLERY, MEN OF VERMONT 39 (1894) (Chittenden, the “Washington of Vermont”); *see also* MICHAEL J. DUBIN, UNITED STATES GUBERNATORIAL ELECTIONS, 1776–1860, at 99 (2003).

109. 3 MADISON, *supra* note 99, at 19.

110. *Id.* at 168.

individual States.”<sup>111</sup> If the small states had their way, the president would be accountable to the states and their representatives. If the large states had their way, the president would be accountable to the representatives of the people at large. Finding a successful compromise between those two perspectives would be a central challenge of the Philadelphia Convention generally.

The state experience had already suggested one difficulty with having legislatures select the executive, and that was the executive’s lack of independence.<sup>112</sup> The state constitutions were generally explicit in wanting the three branches of government to be “forever separate and distinct from each other,” as the North Carolina Constitution phrased it.<sup>113</sup> If anything, the Federalists who gathered in Philadelphia were even more committed to the separation and independence of the three branches of government. To those who complained that the U.S. Constitution did not seem to commit itself to the same formal separation of powers that the state constitutions explicitly recognized, James Madison countered that more important than completion, separation of the branches was a functional system of checks and balances. It was these sorts of formal statements of the principle of separation of powers that Madison derided as “parchment barriers against the encroaching spirit of power.”<sup>114</sup> In particular, Madison distrusted the near-sovereign legislatures that the states had set up. While in a monarchy the legislative power was vital to protecting the people from the king, in a republic he thought the threat to the people’s liberty was likely to come from the legislature itself. Looking across the states, he argued that the “legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”<sup>115</sup> The threat of legislative “usurpations” and “elective despotism” suggested the need for an executive that could successfully check the legislature.<sup>116</sup> An executive check on the legislature would require an executive with genuine, and not merely formal, independence. A chief executive who owed his appointment to the legislature could hardly stand as a bulwark to legislative usurpation.

Worse yet, an executive dependent on legislative appointment would have every incentive to curry favor with legislators rather than act as a check on legislative abuses. One option for mitigating that problem was to limit the president to a single term with a fixed salary, so that the question of reappointment and financial repercussions would not hang over the president’s tenure. But the founders were familiar enough with the intrigues of the feudal courts of Europe to anticipate the possibility of foreign powers or domestic cabals attempting to influence the national legislature to install some willing princeling as president. Requiring that qualified presidential candidates be citizens who had resided in the

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111. *Id.* at 73.

112. *See* MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY 160–61 (1997).

113. N.C. CONST. of 1776, art. IV.

114. THE FEDERALIST NO. 48 (James Madison).

115. *Id.*

116. *Id.*

country for a reasonable period of time went only part way toward reducing the threat.

A possible solution to the problem of presidential independence was to put the office on a more independent footing, which meant finding an appointment option other than Congress. The possibility of the state governments selecting the president was a non-starter for the nationalist-minded Federalists, and the traditional option of a truly independent monarch was beyond the pale in the new republic. That left only one real option: selection of the president by the people.

The prospect of popular election of the president arose early in the Convention, but the drafters took some time to warm up to the idea. James Wilson pointed out the examples of New York and Massachusetts as resulting in the choice of “persons whose merits have general notoriety.”<sup>117</sup> Popular election would make both the executive and the legislature “as independent as possible with each other, as well as of the States.”<sup>118</sup> George Mason was among those who initially thought such a mode of selection as impracticable, but needed time to digest the notion.<sup>119</sup> The next day, Wilson offered a more detailed proposal for popular election of the president, but rather than borrowing directly from New York or Massachusetts he suggested that the states be divided into electoral districts, each of which would choose “electors of the Executive magistracy,” who in turn would gather and select the president.<sup>120</sup> The delegates found the proposal appealing in that it cut both the state governments and the Congress out of the process, but the delegates were not immediately persuaded that the scheme was either practical or politically viable. Only the Pennsylvania delegation agreed to the motion.<sup>121</sup>

Why James Wilson proposed a modified version of the popular vote is not entirely clear. The examples of New York and Massachusetts to which he referred as illustrative of similar systems did not employ anything like the Electoral College for picking their governors. Maryland used a similar system for selecting its senate, allowing the voters of each county and town to vote for a set of “electors of the senate” who would then meet and choose 15 individuals to serve in the state’s upper legislative chamber.<sup>122</sup> James Madison praised the Maryland method of selecting senators as a reasonable precedent for the indirect election of U.S. senators by the state legislatures, but its relevance as a possible model for the presidential selection system was only briefly noticed during the ratification debates.<sup>123</sup> Ultimately, neither Wilson nor the other participants in the Philadelphia Convention distinguished between a president selected by popular vote and a

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117. 3 MADISON, *supra* note 99, at 63.

118. *Id.* at 64.

119. *Id.* at 64–65.

120. *Id.* at 65.

121. *Id.* at 67.

122. MD. CONST. of 1776, arts. XIV, XV.

123. THE FEDERALIST NO. 63 (James Madison); Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 38 n.9 (1986).

president selected by presidential electors; both were simply modes of “election by the people.”<sup>124</sup>

After the long, drawn-out debate over congressional apportionment and the eventual compromise of a “national” House and a “federal” Senate,<sup>125</sup> the delegates returned to the issue of choosing the president. For various reasons, the spirit of the Connecticut Compromise drove that debate as well. As Madison would later explain, the “executive power will be derived from a very compound source,” with the selection mechanism being “of a mixed character, presenting at least as many FEDERAL as NATIONAL features.”<sup>126</sup> An Electoral College that mirrored the representative structure of Congress was building on rather than undoing the earlier compromises. Small states that might worry that a president would always emerge from the big states could be reassured by the departure from a strict popular vote. Slave states that might worry that they would suddenly be disadvantaged in a strict popular vote could be reassured by the incorporation of the earlier 3/5ths compromise into the allocation of presidential electors. Pennsylvania could expect to control the most ballots in a pure popular vote for the president, and the Pennsylvania delegates were keen to advance such a proposal, but ultimately the other states demanded concessions.

In the context of the Convention debates, the Electoral College promised to solve the primary problems associated with direct popular election while avoiding the apparently insoluble problems associated with congressional selection of the president. In a world in which fewer than a million voters were spread across more than a thousand miles of the Atlantic coast and were more comfortable thinking of themselves as Virginians or New Yorkers than as Americans, the founders struggled to imagine how the people would settle on a choice for president. George Washington was the obvious first choice, but after that the options were limited. Local figures like John Hancock of Massachusetts, George Clinton of New York, or Patrick Henry of Virginia might dominate state-level politics, but they were much less likely to be equally well-known or beloved in other states and regions. The patrician politics of the early republic allowed political elites to observe and evaluate the merit, intelligence, and work ethic of each other while working together in state capitals, the federal capital, or foreign missions. In contrast, the average citizen had far less to go on when thinking about individuals who did not reside in their own communities.<sup>127</sup> The members of the

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124. 3 MADISON, *supra* note 99, at 102.

125. THE FEDERALIST NO. 39 (James Madison) (“The House of Representatives . . . is NATIONAL, not FEDERAL. The Senate, on the other hand . . . is FEDERAL, not NATIONAL.”).

126. *Id.* When Madison weighed in on the question during the Convention debate, he thought direct or indirect election by the people had the fewest problems, but recognized the weight of the worries over a pure national popular vote. 4 MADISON, *supra* note 99, at 59–63.

127. For a discussion on the culture of patrician politics, see RALPH KETCHAM, PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY (1984); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 52–54 (1993).

national legislature could at least be expected to personally know the likely candidates for the chief magistracy and could render an informed judgment on their candidacy, but the founders could not square the circle of leveraging congressional knowledge while establishing executive independence. Some delegates like James Wilson were optimistic that “Continental Characters will multiply as we more [and] more coalesce, so as to enable the electors in every part of the Union to know [and] judge of them,”<sup>128</sup> but most of the delegates feared that voters would generally just fall back on favoring hometown heroes, exacerbating the threat of the big states dominating the presidency.<sup>129</sup>

From the perspective of the delegates in Philadelphia, the Electoral College was a compromise that minimized the apparent problems with either congressional selection of the president or a national popular vote. The founders wanted a check on Congress that something like a modern prime minister could not provide, but the several states that formed the Confederation were unwilling to form a new union that would be dominated by the largest states. The Electoral College was the best solution that came to hand, but it was hardly a perfect one. Appreciating the challenges confronting those trying to invent a new constitutional system in the late eighteenth century clarifies why the Electoral College was included in the Constitution, but does little to affect our interpretation of the relevant constitutional provisions. There are few textual indeterminacies that need to be resolved by reference to the purposes that the text was designed to serve.

### *C. Constitutional Construction of the Electoral College*

The presidential selection process did not work as the framers envisioned. As expected, George Washington was elected by acclamation for as long as he wanted to serve. After that, however, selecting a president became more challenging. But the challenges were not of the sort that the framers had anticipated. They had worried that the people would have difficulty seeing beyond the borders of their own states and would be unable to come to agreement on a single individual to be named president. They hoped the presidential electors

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128. 4 MADISON, *supra* note 99, at 367; *see also id.* (Georgia’s Abraham Baldwin: “The increasing intercourse among the people of the States, would render important characters less [and] less unknown, and the Senate would consequently be less [and] less likely to have the eventual appointment thrown into their hands”).

129. *See 3 id.* at 450–54 (Connecticut’s Roger Sherman: the people at large “will never be sufficiently informed of characters, and besides will never give a majority of votes to any one man”; South Carolina’s Charles Pinckney: the legislature would be “most attentive to the choice of a fit man” while the people are liable to be “led by a few active [and] designing men”; Virginia’s George Mason: “The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.”; North Carolina’s Hugh Williamson: “There are at present distinguished characters, who are known perhaps to almost every man. This will not always be the case. The people will be sure to vote for some man in their own State.”); *see also 4 id.* at 7–8 (Massachusetts’ Rufus King: “some difficulty arising from the improbability of a general concurrence of the people in favor of any one man”; Massachusetts’ Elbridge Gerry: the “people are uninformed, and would be misled by a few designing men”).



would be more familiar than the people themselves with suitable men of “[e]minent character[] [and] qualifications” for the high office and would act accordingly.<sup>130</sup> Instead, by 1796, the presidential electors were an afterthought. The voters were making up their own minds as to who should be president, and the electors were expected to do what they were told. In effect, a new constitutional rule was established, unwritten and informal, that limited the discretion of the electors. I have called such rules *constitutional constructions*.<sup>131</sup>

Constitutional constructions supplement interpretations by establishing the practical meaning of the foundational document and guiding the behavior of government officials.<sup>132</sup> Rather than revealing the meaning implicit in the constitutional text, constructions more creatively generate constitutional meaning to resolve contemporary political and legal disputes. A proper construction of constitutional meaning does not contradict the discoverable meaning revealed by interpretation, but rather supplements and extends those interpretations.

Constructions can be particularly productive in two distinct contexts. First, constructions can help resolve textual indeterminacies. When the properly interpreted constitutional text remains obscure, a construction can provide practical meaning that reduces the uncertainty about what actions are required. Where an interpretation might be adequate to clarify what a constitutional rule says, for example, a construction might be necessary to establish its legal implications and applications in particular contexts.<sup>133</sup> Second, constructions can help fill in the gaps where a constitutional rule is needed but is not adequately supplied by the constitutional text itself. Such constructions operate in the interstices of the Constitution, providing a richer set of principles, norms, and practices to guide political behavior and constrain political choice than the bare text can do itself.<sup>134</sup>

Especially in this second sense, constructions do similar work to what are sometimes called *constitutional conventions* within the English constitutional tradition.<sup>135</sup> The turn-of-the-century British jurist A.V. Dicey popularized the concept as a way of making sense of the British constitutional system that was so obviously guided by something other than a foundational legal text of the type that characterized American constitutionalism. Substantively, constitutional law referred to all rules that “directly or indirectly affect the distribution or the exercise of the sovereign power in the state.”<sup>136</sup> Notably, those rules included “laws . . . enforced by the Courts,” but also consisted of “conventions, understandings, habits, or practices which, though they may regulate the conduct

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130. 4 *id.* at 69.

131. See WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 3, at 9.

132. See Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMM. 119 (2010).

133. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 95, 96 (2010).

134. Whittington, *supra* note 132, at 123–25.

135. See also Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1851 (2013).

136. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed. 1915).

of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all because they are not enforced by the Courts.”<sup>137</sup> It was those unwritten constitutional conventions, or the *constitutional morality* of the British political elite, that sustained English liberties and preserved republican government within a constitutional monarchy.<sup>138</sup>

The whole point of a constitutional convention is to constrain legal discretion. In the British context, legal limitations on government authority were few and far between. As a formal matter, government officials possessed vast discretion over how to use political power. Most notably, the monarch was still a monarch. Constitutional rules specified whether a government official possessed discretionary authority; constitutional conventions specified how that discretionary authority was to be properly used. If the legal constitutional rules left the queen with vast power to rule her kingdom, constitutional conventions said that she could not exercise those powers. The discretion vested by the law was taken away by conventions. Conventions provide the “rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised.”<sup>139</sup> The web of constitutional conventions prevents the queen from declaring war or appointing a member of the House of Lords to be prime minister, even though such actions would be perfectly within her lawful discretion. Exercising the lawful discretion of her office in that manner would be unconstitutional, as understood by the “constitutional morality of the day.”<sup>140</sup> *Conventions* define duties or obligations that circumscribe the discretionary authority of officeholders.<sup>141</sup>

The workings of the Electoral College over the course of American history have been guided by a constitutional construction that has effectively limited the discretion of presidential electors in a manner similar to how conventions limit the discretion of the English monarch. Dicey himself pointed to the duties of the presidential electors in the American constitutional system as illustrative of the fact that the concept of a constitutional convention had relevance even in the presence of a written constitution:<sup>142</sup>

[S]ide by side with the law have grown up certain stringent conventional rules, which, though they would not be noticed by any court, have in practice nearly the force of law . . . . Constitutional understandings have entirely changed the position of the Presidential electors. They were by the founders of the constitution intended to be what their name denotes, the persons who chose or selected the President . . . . This intention has failed; the “electors” have become a mere means of voting for a particular candidate . . . . The understanding that an elector is not really to elect, has now

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137. *Id.* at 23.

138. *Id.*

139. *Id.* at 418.

140. *Id.*

141. GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS 17 (1984).

142. DICEY, *supra* note 136, at 28 n.1 (“[T]he conventional element in the constitution of the United States is now as large as in the English constitution.”).

become so firmly established, that for him to exercise his legal power of choice is considered a breach of political honour too gross to be committed by the most unscrupulous of politicians . . . . The power of an elector to elect is as completely abolished by constitutional understandings in America as is the royal right of dissent from bills passed by both Houses by the same force in England.<sup>143</sup>

Notably, the characterization of the modern role of the presidential elector as a convention or construction emphasizes the normative obligations the contemporary constitutional system imposes on the officeholder by. These are not just descriptive behavioral regularities or traditions; they are, in effect, constitutional requirements—though not constitutional requirements likely to be enforced by the courts. Misunderstanding and breaching those conventional duties is tantamount to misunderstanding and breaching the Constitution itself.

Dicey was hardly alone in pointing out the divergence between how the Electoral College worked in practice and how it was outlined in the text of the U.S. Constitution. His characterization of the practice as a constitutional convention comparable to features of the British constitutional system was more innovative, but his recognition of the practice itself echoed what most observers of the American constitutional system had described since early in the nineteenth century. For two centuries, there has been a widespread consensus that presidential electors were not to exercise free choice in casting their ballots in the Electoral College.

Even before modern, mass political parties were well established, the recognition of the diminished role of the presidential electors was commonplace. In one of the first constitutional treatises written after the founding, William Rawle pointed out that “in no respect have the enlarged and profound views of those who framed the constitution, nor the expectations of the public when they adopted it, been so completely frustrated as in the practical operation of the system so far as relates to the independence of the electors.”<sup>144</sup> While the founders expected the electors to exercise unrestrained discretion in choosing a president, “experience has fully convinced us, that the electors do not assemble in their several states for a free exercise of their own judgments, but for the purpose of electing the particular candidate who happens to be preferred by the predominant political party which has chosen those electors.”<sup>145</sup> In his famed constitutional treatise, Joseph Story embraced Rawle’s analysis, admitting that

[i]t has been observed with much point, that in no respect have the enlarged and liberal views of the framers of the constitution, and the expectations of the public, when it was adopted, been so completely frustrated, as in the practical operation of the system, so far as relates to the independence of the electors in the electoral colleges.

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143. *Id.* at 28–29; *see also* JAMES BRADLEY THAYER, *LEGAL ESSAYS* 204 (1908).

144. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 57 (Philadelphia, Philip H. Nicklin 1829).

145. *Id.* at 57–58.

It is notorious, that the electors are now chosen wholly with reference to particular candidates, and are silently pledged to vote for them.<sup>146</sup>

The original system had been completely subverted such that “nothing is left to the electors after their choice, but to register votes, which are already pledged; and an exercise of independent judgment would be treated, as a political usurpation, dishonorable to the individual, and a fraud upon his constituents.”<sup>147</sup>

By the mid-nineteenth century, the limited responsibility of the presidential electors was well engrained. The long-serving Democratic Senator Thomas Hart Benton was particularly concerned with the misimpression that European writers had of the American political system. Their writings were “full of mistakes” and “these mistakes are generally to the prejudice of the democratic element.”<sup>148</sup> Those European visitors were ignorant “of the difference between the theory and the working of our system in the election of the first two officers” and as a consequence underestimated how well the mass citizenry exercised practical political power in America, but that difference between constitutional theory and practice was “known to every body in America.”<sup>149</sup> Aristocratic Europeans imagined that a few elites were entrusted with the great power of choosing the president, but the “electors have no practical power over the election.”<sup>150</sup>

In every case the elector has been an instrument, bound to obey a particular impulsion; and disobedience to which would be attended with infamy, and with every penalty which public indignation could inflict. From the beginning these electors have been useless, and an inconvenient intervention between the people and the object of their choice; and, in time, may become dangerous.<sup>151</sup>

Indeed, the true operation of the Electoral College was the stuff of schoolbooks in America,<sup>152</sup> though British writers seemed better able to grasp the point than the French writers who frustrated Benton.<sup>153</sup> The famed German émigré Francis Lieber

146. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 321 (Boston, Billiard, Gray, & Co. 1833).

147. *Id.* at 321–22.

148. 1 THOMAS HART BENTON, THIRTY YEARS’ VIEW 37 (New York, D. Appleton & Co. 1854).

149. *Id.*

150. *Id.*

151. *Id.*

152. FURMAN SHEPPARD, THE CONSTITUTIONAL TEXT-BOOK 158 (Philadelphia, J. B. Lippincott & Co. 1863) (“In actual practice, the electors are chosen for the express purpose of voting for particular candidates, to do which they are sometimes even pledged beforehand; they are expected to cast their votes for those candidates only, and not to exercise any freedom of choice themselves.”).

153. *See, e.g.*, CHARLES T. BROWNE, THE UNITED STATES: THEIR CONSTITUTION AND POWER 29 (1856) (“[I]n this conjecture the framers of the Constitution were mistaken. Instead of leaving the election of these two high officers to the decision of a small body of wise and prudent men, the election has been thrown back upon the people. The members of the electoral college being chosen by the suffrages of the people adopt the name of some

was comfortable with independent bodies like the idealized Electoral College and defended a trustee model of political representation generally.<sup>154</sup> But he fully recognized that the actual presidential electors of the functioning American constitutional system were not representatives in a full political sense. True political representatives did not traffic in pledges and take direct dictation from the voters or act as a mere deputy or “speaking trumpets of their constituents”; their fundamental obligation was to advance the public good as they understood it.<sup>155</sup> Presidential electors were precisely pledged deputies in this narrow sense, and not representatives in that more capacious sense. They were delegates, not legislators; political puppets, not political actors.

[S]o decidedly is the simple election ingrained in the Anglican character, that in the only notable case in which a mediate election is prescribed in America, namely, the election of the President of the United States, the whole has naturally and of itself become a direct election. The constitution is obeyed, and electors are elected, but it is well known for which candidate the elector is going to vote, before the people elect him. There is but one case of old date in which an elector, elected to vote for a certain candidate for the presidency, voted for another, and his political character was gone for life . . . . [T]he principle of a double election has been wholly abandoned in the election of the president, although the form still exists.<sup>156</sup>

The great mid-century treatise writer John Norton Pomeroy reluctantly reached a similar conclusion. The “rapid spread of the idea of the sovereignty of the people has entirely swept away these conservative checks planned by the framers, so that while the letter of the Constitution is strictly obeyed, its spirit is directly violated in the election of the chief magistrate.”<sup>157</sup> The presidential electors “have become in fact the mere passive instrument of the majority of the voters in carrying out their will as expressed by the ballot box.”<sup>158</sup> The “unwritten law” of the Constitution had hollowed out the Electoral College such that “[u]nder our present customs, the choice of presidential electors has become a mere idle and useless form; and it would be better to abandon it altogether and permit the people to vote directly for

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popular candidate for the Presidency, with which they go to the poll, and enter upon their duties afterwards pledged as to the person they shall vote for.”)

154. 2 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 505 (Boston, Charles C. Little & James Brown 1839) (“[T]he true character of a representative government does not admit of mandatory instructions to the representative, for it makes at once of the representative a mere deputy, who ought to have his instructions from the beginning. But in this case he ceases to be the representative of the people, and becomes a mere plenipotentiary, either of a party or corporation.”).

155. *Id.* at 485, 505, 552.

156. 1 FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 191–92 (Philadelphia, Lippencott, Grambo, & Co. 1853).

157. JOHN NORTON POMEROY, *AN INTRODUCTION TO MUNICIPAL LAW* 427 (New York, D. Appleton & Co. 1864).

158. *Id.*

the President, or else to conform our practice again to the original meaning and design of the organic law.”<sup>159</sup>

In the aftermath of the disputed Tilden–Hayes presidential election of 1876, the problems of political parties and corruption often guided thinking about the workings of the Electoral College, which left many with mixed feelings about the reality of pledged electors. A century before party primaries came into vogue, many concluded that the presidency was already being decided by an independent body of electors, but they were embodied in the party nominating conventions rather than the constitutionally specified Electoral College.<sup>160</sup> From that perspective, it seemed that

[o]ur presidents are servile, because, having risen to power by the unlawful influence of political chiefs, instead of by an untrammelled choice of the Electors, they stand alone against scores to the most powerful men in the land, who made them and own them, and they cringe at the crack of the party whip.<sup>161</sup>

Where the founders had hoped to establish “an exalted body of men, inspired by a righteous regard for the interests of the nation, independent of all control, and acting from the purest motives,” a “hundred years of experience” had taken the country in a different direction.<sup>162</sup> But “[i]f a popular choice is the desideratum, under existing practices we have it already.”<sup>163</sup> If reformers were unhappy with how presidents were elected, then they would do better with examining the organization and operation of the political parties than with the Electoral College itself. For better or for worse, the Constitution “has been silently changed” and the presidential electors “have been reduced to the duty of reading the newspapers, and recording the result of the action of the party to which they belong.”<sup>164</sup> Under such circumstances, the Electoral College “is not a deliberative body at all; but a mere machine to execute the will of the successful party. It is not only

159. *Id.* at 428.

160. *See, e.g.*, 2 JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES* 708 (Chicago, Callaghan & Co. 1899) (“In effect the two or more great parties of the country, in general convention, decide upon the personality of the President and Vice-President, and the electoral colleges chosen as the representatives of these parties register the choice of the extra-constitutional conventions of these political parties . . . . No wonder the choice now falls so often upon some unheard-of man, and does not always come to one of our most illustrious citizens, the cynosure of all eyes in every section of the Union. No wonder that one may be selected whose merits are only known to party managers.”).

161. DAVID A. MCKNIGHT, *THE ELECTORAL SYSTEM OF THE UNITED STATES* 328 (Philadelphia, J. B. Lippencott & Co. 1878).

162. *Id.* at 116.

163. *Id.* at 319.

164. Charles W. Storey, *The Civil Service of the United States*, 11 AM. L. REV. 197, 206 (1877); *see also* Current Topics, 3 CENT. L.J. 748 (1876) (“[I]t would seem pretty clear that framers of the constitutional amendment which controls this subject did not contemplate such a thing as a regular party nomination and a party contest, by which the judgment of the electors should be controlled by party convention.”).

cumbersome and useless, but in a close presidential election may be exceedingly perilous to the tranquility of the country.”<sup>165</sup>

Legal, political, and historical scholars were unanimous and clear in their understanding of what the constitutional method for selecting the president had become as the nineteenth century ended.

Quietly and as a matter of course, apparently, the discretion of the electors, in the performance of their duty, vanished in the air, and ever since, the electors . . . are called on to simply register the decree of the nominating convention of the party which was successful at the polls. The contest is at an end, when the election for the electors is over.<sup>166</sup>

Commentators launched a parade of metaphors to describe the lack of agency possessed by the modern presidential electors. They were “a registering machine,”<sup>167</sup> “patent voting-machines,”<sup>168</sup> “mere passive instruments,”<sup>169</sup> “mere automata,”<sup>170</sup> “a mere machine to execute the will of the successful party,”<sup>171</sup> “an instrument, bound to obey,”<sup>172</sup> “a messenger,”<sup>173</sup> a “mere cogwheel in the machine; a mere contrivance for giving effect to the election of the people,”<sup>174</sup> a “piece of mechanism,”<sup>175</sup> “an instrumentality for registering the people’s vote,”<sup>176</sup> “agents of the national conventions,”<sup>177</sup> and “party dummies.”<sup>178</sup> The college was a “farce,”<sup>179</sup> a “mere survival,”<sup>180</sup> or less kindly, “a survival of the unfittest.”<sup>181</sup>

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165. Samuel T. Spear, *Counting the Electoral Votes*, 9 CHI. LEGAL NEWS 136, 137 (1877).

166. CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 48 (New York, G. P. Putnam’s Sons 1890).

167. FRANCIS N. THORPE, *A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE* 142 (New York & London, Harper & Bros. 1898).

168. SIMEON E. BALDWIN, *MODERN POLITICAL INSTITUTIONS* 106 (Boston, Little, Brown, & Co. 1898).

169. POMEROY, *supra* note 157, at 427.

170. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 142 (Boston, Little, Brown, & Co. 1880).

171. Spear, *supra* note 165, at 137.

172. 1 BENTON, *supra* note 148, at 37.

173. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 92 (rev. ed. 1902).

174. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 416 (1906).

175. 1 A. LAWRENCE LOWELL, *THE GOVERNMENT OF ENGLAND* 2 (1908).

176. WILLIAM HOWARD TAFT, *LIBERTY UNDER LAW* 12 (1922).

177. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 245 (Boston & New York, Houghton Mifflin Co. 1885).

178. EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 44 (1924).

179. BAGEHOT, *supra* note 173, at 92.

180. HENRY CAMPBELL BLACK, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* 88 (St. Paul, Minn., West Publishing Co. 1895).

181. BALDWIN, *supra* note 168, at 106.

As the notion of an organic, living constitution began to take hold, the Electoral College was the obvious example of how the framers' intentions had been left behind. From the right, Charles Tiedeman expounded:

Now what is the real, living constitutional rule as to the selection of a President and Vice-President? [T]hat they are to be selected after deliberation by the electors, as being the men whom the electors considered best fitted to fill the positions; or that they must be nominated by parties, and selected by a popular election, indirectly through the choice of the electors of one party or of the other? There can be no hesitation in coming to the conclusion that the latter is the real, living constitutional rule.<sup>182</sup>

From the left, Edward Corwin stated plainly, "It was supposed that the members of this College would exercise their individual judgments in their choice of a President and Vice-President, but since 1796 the Electors have been no more than party dummies."<sup>183</sup> The irrelevance of the original plan for how the Electoral College would work was recognized by everybody from Supreme Court justices to presidents.<sup>184</sup>

Significantly, the organic changes associated with the living Electoral College did not alter the inherited meaning of the text itself. Though some theoretical claims associated with the notion of a living constitution posited that meaning of the "paper pictures of the Constitution" could be displaced and changed over time by the "living reality,"<sup>185</sup> the actual example of the Electoral College showed how the spirit of a constitutional provision could be abandoned even as the letter of the Constitution is faithfully preserved.<sup>186</sup> The framework constitution prescribing the appointment of presidential electors and the counting of their ballots endures, even as the perceived duty of how the presidential electors should cast their ballots has been decisively altered.<sup>187</sup>

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182. TIEDEMAN, *supra* note 166, at 49; *see also* JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES 119 (1923) ("While, in form, the system persists to this day, from the very beginning the electors simply vote as the people who select them desire."); TAFT, *supra* note 176, at 11–12 ("It is true that since the Constitution was adopted, the Electoral College, which was created in order that its members might exercise their judgment as to the man to be selected as President, has in fact lost this power and is only an instrumentality for registering the people's vote . . .").

183. CORWIN, *supra* note 178, at 43; *see also* FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 5 (1905).

184. *See, e.g.*, SAMUEL MILLER FREEMAN, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 18 (New York & Albany, Banks & Bros. 1891); BENJAMIN HARRISON, THE CONSTITUTION AND THE ADMINISTRATION OF THE UNITED STATES OF AMERICA 77 (London David Nutt, 270–271, Strand 1897).

185. WILSON, *supra* note 177, at 10, 12.

186. POMEROY, *supra* note 157, at 427; *see also* WILLIAM BENNETT MUNRO & CHARLES EUGENE OZANNE, SOCIAL CIVICS 288–89 (1922) ("[A]s time went on the actual practice drifted further away from the original plan of free choice by unpledged electors.").

187. On "framework originalism," *see* BALKIN, *supra* note 3, at 31.



Dacey's analogy between the constitutional power of the English monarch and the presidential electors was widely embraced. In both England and America, the spirit of democracy had handcuffed inherited, elite institutions, transforming the magisterial into the ceremonial. Just as "England has slipped into a republic without knowing it," which keeps "their Queen . . . but she is little more than a historical curiosity," so "we still cling to the out-worn form of the electoral college," which seems "destined to cling to the skirts of the Constitution, simply because nobody cares to take the trouble to have them cut off."<sup>188</sup> "In choosing the President they have become, by the force of custom, as much a mere piece of mechanism as the Crown in England when giving its assent to acts passed by the two Houses of Parliament. Their freedom of choice is as obsolete as the royal veto."<sup>189</sup> The young Woodrow Wilson pointed out that the "sovereign in England picks out the man who is to be Prime Minister, but he must pick where the Commons point; and so it is simpler, as well as perfectly true, to say that the Commons elect the Prime Minister."<sup>190</sup> Similarly, it was plain fact that the "electors are the agents of the national conventions" and the people in the general election choose between the candidates proffered by the party conventions.<sup>191</sup>

Although the term *faithless elector* did not come into vogue until well into the twentieth century,<sup>192</sup> the idea that the presidential electors lack any legitimate discretion in casting their ballot is deeply rooted. Lord Bryce observed that the "presidential electors have by usage and by usage only lost the right the Constitution gave them of exercising their discretion in the choice of a chief magistrate."<sup>193</sup> For an elector to break his or her pledge and attempt to cast a fully discretionary ballot was, in Judge Cooley's estimation, "in the highest degree dishonorable."<sup>194</sup> Former President Benjamin Harrison was more blunt: "An elector who failed to vote for the nominee of his party would be the object of execration, and in times of very high excitement might be the subject of a lynching."<sup>195</sup> As informed observers had long recognized, the possibility of presidential electors breaking their pledges was simply dangerous.<sup>196</sup>

#### IV. IMPLICATIONS FOR THE DUTY OF A PRESIDENTIAL ELECTOR

There are certainly some vexing features of the presidential-election system, such as the lack of clarity about how to resolve disputes about election counts. But the role of the presidential electors themselves is quite clear. The constitutional text specifies that the electors will be appointed in a manner chosen by the state legislatures and will cast ballots for president and vice president.

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188. BALDWIN, *supra* note 168, at 107.

189. 1 LOWELL, *supra* note 175, at 2.

190. WILSON, *supra* note 177, at 245.

191. *Id.*

192. *See, e.g.*, 113 CONG. REC. 2136 (1967); Stephen E. Haberfeld, *The Problem of the Faithless Elector*, 6 HARV. J. ON LEGIS. 254 (1969).

193. JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 350 (1906).

194. COOLEY, *supra* note 170, at 142.

195. HARRISON, *supra* note 184, at 77.

196. *See* BENTON, *supra* note 148.

Electors have few formal limitations on their discretion when casting those ballots.<sup>197</sup> In an era before electoral campaigns, political parties, or the modern mass media, the framers anticipated that electors would need to exercise discretion because the people at large would find it literally impossible to identify an individual beyond their own neighbors who might possess the necessary personal and professional character to act as the administrator of the nation's laws and commander of the nation's army. But with the rise of political parties and electioneering, the electors became superfluous and by common societal agreement lost the right to exercise discretion in choosing a president. The practical construction of the Constitution has been that the presidential electors were to formally record the vote of the people of the states in which they were chosen, not exercise independent judgment in selecting a president. They were to be clerks, not kingmakers.

The Hamilton Electors fancied themselves the true decision-makers vested with the unfettered authority to select a president from the population of constitutionally qualified Americans who might serve in that office. While the people themselves had suggested that Donald Trump should be president on November 8, 2016, the presidential electors on December 19, 2016, were free to choose Bernie Sanders, John Kasich, Colin Powell, or anyone else who might catch their eye to be inaugurated as president of the United States on January 20, 2017. This is a deeply flawed understanding of the role of the presidential elector within the American constitutional order.

There are only a few options that would make sense of this proposal. One is to deny the reality or authority of the constitutional construction of the presidential elector's power. To do so would fly in the face of two centuries of political practice and well-settled constitutional norms. The Conscientious Electors movement seemed to eschew this approach. It implicitly recognized the existence and weight of the traditional view when contending that "extraordinary circumstances call for extraordinary measures."<sup>198</sup> By contrast, the Hamilton

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197. Namely, that at least one ballot must be cast for someone of a different state than the elector, that the person chosen must be a natural-born citizen, must be at least 35 years old and resident in the country for at least 14 years, and cannot have previously served as president for more than 6 years. U.S. CONST. amend. XII; *id.* art. II, § 1; *id.* amend. XXII. *But see* Vasan Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 131–35 (2001) (questioning whether presidential electors are bound to comply with the constitutional qualifications on presidents when making their selections).

198. *An Open Letter to the Electors*, *supra* note 48. Arguably, the "extraordinary circumstances" rhetoric points to a more radical position, suggesting that by designating Donald Trump the president-elect, the United States had entered into some kind of Schmittian state of exception outside the normal rule of law in which only dictatorial action was appropriate. *See* Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009). If that is the claim, then the call to arms might have been more efficaciously directed to the Joint Chiefs of Staff than to the Electoral College. It was left to Rosie O'Donnell to take that step, in calling for a declaration of martial law to prevent the Trump inauguration. Brooke Seipel, *Rosie O'Donnell Calls for "Martial Law" to Stop Trump Inauguration*, HILL (Jan. 12, 2017), <http://thehill.com/blogs/in-the-know/in-the-know/314070-rosie-odonnell-supports-imposing-martial-law-to-stop-trump>.

Electors movement took a different stand: “The Constitution is quite clear about what our job is . . . and that it’s our decision at the end of the day.”<sup>199</sup> By recurring directly to Alexander Hamilton and his explanation of the Electoral College, the Hamilton Electors simply swept away the relevance of any subsequent history. In doing so there was no real recognition of the possibility of a conflicting constitutional construction, let alone any effort to grapple with it and explain why it should be set aside. The implication would seem to be either that the presidential electors exercised independent judgment all along and just happened to agree consistently with the general electorate, or that past electors had abdicated their responsibility and the current electors were free to restore the office to its rightful place within the constitutional system. Neither claim would be very credible given the long history of explicit discussion of the Electoral College’s modified role within American constitutional practice. The Hamilton Electors were not writing on a blank slate, and yet they acted as if they were. Such a constitutional argument is not very compelling.<sup>200</sup>

A second option is to suggest that even though there is a recognized *prima facie* duty of the presidential elector to follow the election returns, the 2016 election fell within a well-recognized exception to that general rule. This is not implausible as a theoretical position: even explicit and boldly stated constitutional rules might be hedged in by implicit qualifications. As Justice Hugo Black famously pointed out, the First Amendment says that Congress shall make “no law” abridging free speech, and the Justice thought this provision “is composed of plain words, easily understood.”<sup>201</sup> Few, however, found that emphasizing the Constitution’s words *no law abridging* advanced us very far in determining when a law in fact abridged what could properly be understood as protected speech.<sup>202</sup> An unwritten constitutional rule, or constitutional construction, is equally capable of supporting an elaborate schema of provisos, qualifications, and exceptions. A meaningful construction of constitutional meaning need not be simple.

In fact, there are circumstances in which established usage would recognize that presidential electors might be free to depart from the pledged choice

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199. O’Donnell, *supra* note 58 (quoting Michael Baca).

200. It should be recognized, however, that political actors do not always observe argumentative niceties when engaging in constitutional politics. The measure of success is political, not forensic. If the Hamilton Electors had successfully installed John Kasich as president, then they could have well claimed to have simply overwritten any contrary constitutional traditions and established a new constitutional understanding moving forward. If the claim is an interpretive one rather than a revolutionary one (that is, one about what our constitutional practice actually is rather than about what our constitutional practice should be in the future), the lack of any meaningful engagement with the traditional understanding is a clear problem.

201. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960); *see also* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) (emphasis added) (“I read ‘no law abridging’ to mean *no law abridging*.”).

202. *See, e.g.*, ROGER K. NEWMAN, HUGO BLACK 616 (1994) (Solicitor General Erwin Griswold retorted to Black “that to me it is equally obvious that ‘no law’ does not mean ‘no law’”); Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428 (1967).

of candidate.<sup>203</sup> Most notably, if a candidate were to die between the time of the general election and the time of the meeting of the Electoral College, the pledged electors to the deceased candidate might not only be free to vote for a different candidate but might be obliged to do so. When the losing Democratic candidate for president Horace Greeley died after the general election of 1872, most of his electors cast their votes for an alternative, and Congress refused to count the handful of ballots that Greeley did receive.<sup>204</sup> When losing Republican candidate for vice president James Sherman did the same, the small number of electors who had pledged to vote for him switched to someone else.<sup>205</sup> When candidates literally cease to exist, we might well think that their pledged votes die with them. More controversially, it is arguable that presidential electors would be set free from their pledges if their party were to nominate someone who did not meet the constitutional qualifications to be president. If a party were to nominate Arnold Schwarzenegger (a naturalized, but not a natural-born, citizen), Bill Clinton (a former two-term president), a particularly precocious 17-year-old, or a cartoon character,<sup>206</sup> and if such a nominee were to receive votes in the general election, a presidential elector might well be obliged to cast his or her ballot for someone else.

Historical traditions do not suggest that pledged presidential electors are free to cast their ballots for someone else if they believe that their party's nominee is an unwise choice to be president. Such a substantive assessment of the quality of a candidate is at the core of the discretionary choice in casting a vote, and it is precisely such substantive judgments that the constitutional construction of the presidential elector as "mere automata"<sup>207</sup> has been long understood to have ruled out. To determine that a general election winner was substantively unfit to serve as president would be on par with Queen Elizabeth determining that a royal veto would be exercised to prevent "Brexit" or war declared on Syria in response to the use of chemical weapons. The point is not that the substantive conclusion that Donald Trump is an inappropriate choice for president or that the United Kingdom is better off in the European Union is the wrong conclusion on the merits, but

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203. This, of course, sets aside entirely the case of unpledged electors. Those have been rare in American history, but they have existed and selected with an understanding that they will cast a free ballot. See, e.g., Patrick Novotny, *John F. Kennedy, the 1960 Election, and Georgia's Unpledged Electors in the Electoral College*, 88 GA. HIST. Q. 375 (2004).

204. JUDITH A. BEST, *THE CHOICE OF THE PEOPLE?* 47 (1996).

205. ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 118–19 (2006).

206. In the best outcome of a student government election ever, the student body of the University of Texas elected the comic-strip character "Hank the Hallucination" to the office of student government president in a write-in vote. Alas, student government leaders refused to count the ballots cast for a fictional entity. Samantha Ketterer, *Hallucinations and Time Travelers: Satirical SG Campaigns Have Long History at UT*, DAILY TEXAN (Mar. 9, 2015), <http://www.dailytexanonline.com/2015/03/09/hallucinations-and-time-travelers-satirical-sg-campaigns-have-long-history-at-ut>. Undoubtedly, Congress would take the same view in the case of presidential electors. It is an open question whether the same result would hold were President Trump to nominate a fictional character to lead the Department of Education (the transition team might have put more consideration in for Edna Krabappel of *The Simpsons* fame).

207. COOLEY, *supra* note 170, at 142.

simply that neither the presidential electors nor the Queen of England possesses the rightful authority to make such a decision and impose it on an unwilling population.<sup>208</sup> Something along these lines seems to be what Lawrence Lessig had in mind when asserting that the Electoral College was a “circuit breaker” that could act “in case the people go crazy,”<sup>209</sup> but there is no evidence that anyone has ever seriously thought this was the case prior to the claim being asserted in 2016.

The possibility that presidential electors might exercise judgment in the case of a deceased presidential candidate is naturally circumscribed in a way that the suggestion that they might do so if only the general election winner were “bad enough” can never be. The quagmire that would be opened up by such an implicit proviso to the established construction is evident in the fact that there were more faithless electors who abandoned Hillary Clinton as unfit to serve as president in 2016 than there were those who abandoned Donald Trump.<sup>210</sup> Given the polarized American electorate where Donald Trump supporters rallied to the cry of “lock her up” referencing Hillary Clinton, there should be little expectation that there could be some kind of Thayerian “clear mistake” rule that the presidential electors could meaningfully apply.<sup>211</sup> Each side is likely to be too easily convinced that the other party’s candidate is, in fact, a clear mistake and beyond the pale.<sup>212</sup> It is no surprise that when commentators over the course of two centuries intoned that presidential electors were merely to register the results of the general election, they gave no hint of an exception for cases in which the presidential elector concluded, after due consideration, that that their fellow citizens had gone “crazy.”

A final option is to argue that the constitutional purposes behind the adoption of the Electoral College trumped the historical working of that institution. This is not an unfamiliar theoretical move. The structure of the argument would evoke a concern in a judicial context with whether *stare decisis* would dictate adhering to a flawed precedent on some point of constitutional law. Recognizing that a construction has been established that has hollowed out the Electoral College, is there reason to return to the something closer to the framers’

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208. The Queen is similarly incapacitated from revoking American independence. See Oli Smith, *The Queen Responds to Frustrated American Who Begs Britain to Take Back Control of the US*, EXPRESS (Oct. 17, 2015), <http://www.express.co.uk/news/royal/612766/Queen-responds-frustrated-American-begs-Britain-take-back-US>; David Mikkelson, *Fact Check: Revocation of Independence*, SNOPE.COM (Nov. 13, 2016), <http://www.snopes.com/politics/soapbox/revocation.asp>.

209. See Lessig, *supra* note 75.

210. Scott Detrow, *Donald Trump Secures Electoral College Win, With Few Surprises*, NPR (Dec. 19, 2016), <http://www.npr.org/2016/12/19/506188169/donald-trump-poised-to-secure-electoral-college-win-with-few-surprises>.

211. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

212. Tara Golshan, *Why Hillary Clinton, not Donald Trump, was the Unifying Figure at the RNC*, VOX (July 22, 2016), <http://www.vox.com/2016/7/22/12254188/clinton-rnc-focus>; Kenneth T. Walsh, *It’s Just the Beginning*, USNEWS.COM (Nov. 4, 2016), <http://www.usnews.com/news/the-report/articles/2016-11-04/after-the-election-bitter-polarization-will-remain>.

expectations about how presidential electors would behave? Is there reason to lift the constraints on their discretion that have been imposed across past generations?

If there were a clear conflict between the original meaning of these constitutional provisions and subsequent political practice, we might have reason to want to correct course. The unwritten supplement to the constitutional text should generally be understood as lesser authority than the text itself, and a construction that actually guided government officials to violate the requirements of the Constitution should be reconsidered. But that is not the case here. The reduced role for the presidential electors in the selection of the president certainly conflicts with the framers' expectations about how the system would operate, but it does not violate any of the constitutional rules that they laid down. If the presidential electors of Georgia had adopted a practice of awarding their votes based on a coin flip, and the electors of Nebraska had always cast ballots after extended debates and cross-examination of presidential surrogates, and the electors of California had always cast ballots after 24 hours of silent meditation, none of them would be violating the Constitution. However, they may be doing more or less to fulfill the framers' vision of how the president would be selected or to increase the probability that a substantively good candidate would be chosen. There might be reasons for choosing among those alternative practices, but those reasons would not include the necessity of remedying a constitutional violation and establishing fidelity with the Constitution. The framers left open how the electors would choose to cast their ballots, and exercising independent judgment or deferring to the preferences of the general electorate are both equally consistent with the terms by which the electors exercise their official duties.

That leaves the possibility that the constitutional purposes that led the founders to design this institution should give us reason to abandon the practices by which we have in fact used. When Peter Beinart argues that the Electoral College was meant to stop men like Trump from becoming president, the appeal is less to the interpretive meaning of the relevant constitutional provisions than to the background purposes that motivated the drafting of those provisions.<sup>213</sup> In what sense should those background purposes matter?

The purposes might matter in at least two ways. First, they might matter because we generally share the framers' aspirations and goals. If told that this institution is meant to "stop men like Trump," then we should probably ask whether we too would want to stop men like Trump from becoming president. If the answer to that question is no, then it hardly matters what the founders hoped to accomplish. The founders might have had all kinds of goals, ambitions, and expectations for the nation, but the ways in which they committed their posterity to those goals and ambitions is distinctly limited. If we were to conclude that the founders designed features of the Constitution to insure white supremacy or the continuation of slavery, that would not give us much independent reason to want to give those features any more effect than they naturally require.

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213. Beinart, *supra* note 67.

As it happens, we might well share some of the founders' concerns on this particular point. We would probably agree that, all things considered, we would prefer not to elect demagogues and those with "talents for low intrigue, and the little arts of popularity."<sup>214</sup> At the same time, we undoubtedly feel far less terror at this prospect than the classically trained gentlemen of the late eighteenth century.<sup>215</sup> Being skilled in the little arts of popularity might not be a particularly good thing, but we are less fearful than the founders were that this particular vice transforms democracies into dictatorships. We are more accepting of politicians with talents for low intrigue if we believe that they also bring other talents to the table. We are also less confident in our ability to identify the demagogue. For every voter who was convinced that Donald Trump was a master of the "little arts of popularity," there was (more-or-less) a voter who was convinced that Hillary Clinton cultivated a talent for "low intrigue." For every voter who bemoaned the "Teflon Presidency" of Ronald Reagan, there was a voter who bewailed the machinations of Bill "Slick Willy" Clinton. Indeed, political commentators for much of the nineteenth century would have testified that the Electoral College routinely produced men skilled at low intrigue and the little arts of popularity, though they would have been more likely to characterize these men as favorites of the political "wire-pullers,"<sup>216</sup> faithful servants of the "political chiefs,"<sup>217</sup> and "unheard-of" men "whose merits are only known to party managers."<sup>218</sup> Nineteenth-century commentators on American politics were more realistic in recognizing that the ideal of an "exalted body of men" meeting in the Electoral College to pluck out "the best within the country" to the rapturous "applause and support of the Government and the people" was an idle fantasy.<sup>219</sup> The Electoral College in operation elevated the kind of politicians that were in fact valued in the republic at any given time, whether that meant James Polk in the Antebellum Era or Chester Arthur in the Gilded Age or Warren Harding in the Progressive Era or Barack Obama in the Age of Polarization.

Second, the background purposes might matter because we generally share the founders' ideas about institutional politics. Even if we shared the founders' aspirations for the leadership of the republic, we might not share their desire to have an institution like the Electoral College filter out the bad characters. In fact, within just a few years of the invention of the Electoral College the country demonstrated that it did not share that institutional vision. There was never any momentum behind allowing an elite body of electors to set aside the will of the nation to install their favored presidential candidate. So long as the Electoral College did exactly what the people would have wanted in any case—elect George Washington—then the system worked fine. As soon as that consensus broke down—when George Washington declined to stand for a third term of office—the

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214. *Id.* (quoting THE FEDERALIST NO. 68 (Alexander Hamilton)).

215. On founding era concerns about demagoguery, see JAMES W. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 47–71 (1979).

216. BAGEHOT, *supra* note 173, at 94.

217. MCKNIGHT, *supra* note 161, at 328.

218. TUCKER, *supra* note 160, at 708.

219. MCKNIGHT, *supra* note 161, at 116.

notion that the presidential electors would exercise independent judgment was tossed aside with it. As the English writer Walter Bagehot observed, the very idea of an “election of candidates to elect candidates is a farce” in a “country full of political life.”<sup>220</sup> The voters did not wish to elect presidential electors to deliberate about whether to elect Abraham Lincoln or John Breckenridge; they wished to “only elect a deputy to vote for Mr. Lincoln or Mr. Breckenridge” and drop the appropriate “ticket in an urn.”<sup>221</sup> The counter-majoritarian difficulty associated with judicial review pales in comparison to the normative problems surrounding the idea that the Electoral College should overturn election results whenever a majority of the electors disapproved of what the people had done.

But the case for elevating the institutional role of the Electoral College is even worse than that. The advocates of faithless electors in 2016 did not merely call for the return of an exalted body of electors exercising independent judgment. They called specifically for a body of anonymous party operatives to nullify the results of a popular election. When Lawrence Lessig characterizes the Electoral College as a circuit breaker to act when the “people go crazy,” he casts the Electoral College in a role most comparable to how conservative lawyers in the Gilded Age cast the U.S. Supreme Court.<sup>222</sup> This envisions the presidential electors as holding a kind of veto power to be used as necessary when the people do the wrong thing. But this was never how the Electoral College was conceptualized nor how it has ever operated.<sup>223</sup> The drafters feared that the people would not be able to settle on a single qualified presidential candidate, and consequently they tried to design an institution that would give a democratic mantle to a president in the absence of any popular choice. The Electoral College was not armed with a veto power; it was given the power to nominate and select. As American politics has developed, the people did not need nor want the Electoral College to nominate and select a president, and thus they organized to exercise that power themselves through political parties and general elections. Having so organized themselves to perform the function that the framers feared that they would never be able to

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220. BAGEHOT, *supra* note 173, at 92.

221. *Id.*

222. Lessig, *supra* note 75. On the conservative characterization of the Supreme Court, see Keith E. Whittington, *Preserving the “Dignity and Influence of the Court”*: Political Supports for Judicial Review in the United States, in *RETHINKING POLITICAL INSTITUTIONS* 283 (Shapiro, Skowronek & Galvin eds., 2006).

223. Similarly, Franklin Roosevelt famously observed, “It is the duty of the President to propose and it is the privilege of the Congress to dispose.” Franklin D. Roosevelt, *Excerpts from the Press Conference*, AM. PRESIDENCY PROJECT (July 23, 1937), <http://www.presidency.ucsb.edu/ws/?pid=15439>. Congress had the recognized authority to receive and reject proposals put before it by the president. This is fundamental to the lawmaking process in the constitutional design. The Electoral College was never in an equivalent position. It does not receive and “dispose” of proposals from the people about who should occupy the presidency, and it was never imagined to operate in that way. The Electoral College was only needed because the drafters thought the people themselves would not be capable of proposing a presidential candidate. No one imagined that the presidential electors would be authorized to dispose of the people’s choice for president, if the people were able to successfully make a choice.



perform, the Electoral College became a vestigial organ. Weaponizing that institution to overturn electoral results does not return it to anything even resembling its intended function. The Hamilton Electors proposed to exercise the function that the framers envisioned without any of the preconditions and circumstances that the framers would have expected. The framers created an institution that they hoped would be filled by the most respected local notables who could act when the people themselves were uninformed and disorganized. The Hamilton Electors hoped to empower the institution when the reverse was the case. The call for faithless electors was a perversion rather than a realization of the framers' purposes.

There is a way that the conscientious electors could have charted their course consistent with both the expectation of the founders and our constitutional traditions. They could have stood for election under their own names as unpledged presidential electors.<sup>224</sup> The voters could have been offered the choice in November of 2016 of whether they would prefer to vote for Donald Trump, Hillary Clinton, Gary Johnson, or Jill Stein for president, or whether they would prefer Michael Baca, Christine Pelosi, and Christopher Suprin select the president for them. It seems unlikely that many voters would have taken them up on their offer. In a context in which it is inconceivable that the electors could have won office while openly announcing their plans, it would seem to be the worst of all possible worlds for the electors to instead make the attempt through subterfuge.

### CONCLUSION

The most immediate task of this Article is to clarify the role of the presidential electors within the American constitutional system. The fraught emotions surrounding the 2016 presidential elections motivated an unparalleled challenge to conventional understandings of how the Electoral College actually operates and of how it was originally intended to operate. Had that challenge been successful, the results would have been far-reaching and extraordinarily perilous. The challenge rested on some basic mischaracterizations of the history and purpose of the Electoral College; mischaracterizations that could grow hazardous if left untended.

A less immediate task is to use this incident to illuminate a point about constitutional theory and the workings of American constitutionalism. The call for faithless electors came dressed in a kind of originalist garb, with its advocates offering what they took to be the true meaning of the Constitution as handed down by its framers (and most particularly, as explained by Alexander Hamilton). This offers an opportunity to try to clarify how originalism works and how it relates to American constitutional development. It is unfortunate to get the meaning of the Constitution wrong in this particular case, but it is doubly unfortunate if those errors confound our efforts to get the Constitution right in other cases.

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224. Admittedly, modern ballot-access laws would not have facilitated the appearance of a slate of unpledged electors on the ballot.

The authoritative constitutional text drafted and ratified must necessarily be interpreted to be appropriately administered and applied. But that is only part of the work that must be done to sustain and extend the constitutional project. A constitution must also be constructed to render the indeterminate determinate, the vague definite, and the absent present. Such constructions are essential supplements to the constitutional text and its fairly discoverable meaning, and they are important features of how our constitutional system operates. The actual restraints on government power and the efficiencies in government operation that we enjoy depend in part on such constructions. Running roughshod over these unwritten elements of the constitutional order, or failing to recognize that they even exist, renders liberty less secure and democratic government less functional. The workings of the Electoral College offer a timely reminder that the development and preservation of unwritten constitutional norms and practices are as important to our constitutional order as the judicial enforcement of legal restraints on government power.

As writers on both sides of the Atlantic began to explore the ways in which the American and British constitutional systems shared unwritten, organic qualities, they regularly gave two standard examples to an American version of a constitutional convention. One was the deflation of the Electoral College. The other was the two-term limit on presidential tenure. Dicey himself pointed to “this conventional limit (of which the constitution knows nothing) on a president’s re-eligibility” as a “fatal bar” to presidential ambitions for a third term.<sup>225</sup> He was hardly alone in that assessment.<sup>226</sup> When Franklin Roosevelt broke the unwritten rule established by George Washington and his successors that restrained the discretion of presidents from pursuing a third term, the political establishment soon scrambled to codify that rule in the Twenty-second Amendment so that the violation would not be repeated nor the traditional restraints on presidential avidity subverted.

The call for faithless electors in the 2016 presidential contest mostly went unheeded, and the Hamilton Electors did not break through their conventional restraints as Roosevelt did in 1940. Nonetheless, such testing of the constitutional boundaries might serve as a warning and an opportunity for reflection. A constitutional amendment removing the human element from the Electoral College could easily replace the actual personage of a presidential elector with a literal “registering machine”<sup>227</sup> to record the results of the general election and weigh the popular votes cast by the traditional constitutional formula. Rather than risking that in the future a group of ceremonial clerks might decide to throw the American constitutional system into crisis, a formal change in the constitutional text might be the best possible legacy of the Hamilton Electors.<sup>228</sup>

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225. DICEY, *supra* note 136, at 28.

226. See Whittington, *supra* note 135, at 109–10.

227. THORPE, *supra* note 167, at 142.

228. I use the term *crisis* advisedly in this context. I have argued elsewhere that constitutional crises have been exceedingly rare in the United States, and specifically that the 2000 presidential election dispute was inappropriately characterized as a crisis in

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problematic ways. If a majority of the presidential electors had agreed to designate someone other than Donald Trump the president, however, it seems likely that it would have provoked a genuine “crisis of constitutional fidelity” as powerful political actors surely would have refused to abide by the decision of the Electoral College, casting the entire constitutional process for selecting a president into doubt. *See* Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2109 (2002).