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Faithless Electors: Keeping the Ties That Bind

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NOTES

FAITHLESS ELECTORS: KEEPING THE TIES THAT BIND

*Scott Eckl**

Every four years, the United States chooses a president and vice president. Millions of Americans exercise the right to vote, believing that they are voting for the candidates of their choice. In actuality, 538 relatively unknown party insiders known as electors officially choose the president a month later in fifty-one obscure meetings. Most of the time, these electors mirror the popular votes. However, whether these electors are required to do so and whether the states can enforce laws requiring them to do so are open questions. The Tenth Circuit recently declared statutes that bind electors unconstitutional. A few months before that decision, the Washington State Supreme Court ruled that these laws and their enforceability are constitutional. This Note identifies the arguments for each position, analyzes the strengths and weaknesses of each position, and identifies any issues not considered either by legal scholars or by the courts. Finally, this Note agrees with the Washington State Supreme Court that these laws are constitutional and implores the U.S. Supreme Court to affirm the Washington State Supreme Court's decision in June 2020 before one of those 538 electors can change the outcome of a future presidential election.

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INTRODUCTION

Following the November 2016 presidential election, U.S. citizens outraged by the result led an unprecedented campaign to pressure electors to vote for someone other than two major party nominees, Donald Trump and Hillary Clinton.¹ Many Republican electors reported receiving “tens of thousands”

1. See Gabriel Debenedetti & Kyle Cheney, *Progressive Groups Plan to Protest Electoral College Vote*, POLITICO (Dec. 7, 2016), <https://www.politico.com/story/2016/12/electoral-college-vote-protests-232311> [<https://perma.cc/XTX7-77DY>].

of emails pleading them to vote for someone other than Trump.² One Republican elector in Michigan reported that he received “cardboard trays full of letters asking [him] not to vote for the person the people of the state of Michigan chose.”³ Some Democratic electors, in an effort to stop Trump from becoming president, advocated voting for another Republican in the hopes that Republican electors would join them.⁴

In the official tally, seven electors defected and voted for a candidate other than Donald Trump or Hillary Clinton.⁵ Two states, Colorado and Washington, chose to enforce their laws against these “faithless electors,” which prompted litigation challenging the constitutionality of these laws under the Twelfth Amendment.⁶ With little U.S. Supreme Court precedent on the issue, the litigation resulted in contradictory rulings.⁷ In *In re Guerra*,⁸ the Washington State Supreme Court ruled that these laws are constitutional.⁹ Conversely, in *Baca v. Colorado Department of State*,¹⁰ the Tenth Circuit ruled that these laws are unconstitutional.¹¹ The electors in the Washington case and the state in the Colorado case have appealed to the Supreme Court,¹²

2. *See id.*

3. Chad Livengood, *Trump’s Michigan Electors Endure Deluge of Threats, Lobbying to Change Votes*, DET. NEWS (Dec. 18, 2016), <https://www.detroitnews.com/story/news/politics/2016/12/18/mich-electors/95601280/> [<https://perma.cc/5CM6-UQEA>].

4. One Washington elector explained that her defection meant “casting [her] electoral college ballot not for Clinton, who won [her] state of Washington, but for a compromise Republican candidate who other Republican electors can rally around to stop Trump getting elected.” Ed Pilkington, ‘*Faithless Electors’ Explain Their Last-Ditch Attempt to Stop Donald Trump*’, GUARDIAN (Dec. 19, 2016), <https://www.theguardian.com/us-news/2016/dec/19/electoral-college-faithless-electors-donald-trump> [<https://perma.cc/R63U-QH9Z>].

5. *See* 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> [<https://perma.cc/7UG9-VV2T>]. Two Texas Republican electors voted for Ron Paul and John Kasich, respectively; one Hawaii Democratic elector voted for Bernie Sanders; three Washington Democratic electors voted for Colin Powell and one voted for Faith Spotted Eagle. *Id.* Three other electors in Colorado, Maine, and Minnesota attempted to vote for someone other than their party’s nominee but either changed their minds or were forced out by their states. *See id.*

6. *See Baca v. Colo. Dep’t of State*, 935 F.3d 887, 902 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.); *In re Guerra*, 441 P.3d 807, 808 (Wash. 2019), *cert. granted sub nom.* Chiafalo v. Washington, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-465) (mem.); *see also* U.S. CONST. amend. XII.

7. Though they came to different conclusions, both the Washington State Supreme Court and the Tenth Circuit relied heavily on the U.S. Supreme Court’s decision in *Ray v. Blair*, 343 U.S. 214 (1952), which held that party pledges in primaries were constitutional.

8. 441 P.3d 807 (Wash. 2019), *cert. granted sub nom.* Chiafalo v. Washington, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-465) (mem.).

9. *See id.* at 808.

10. 935 F.3d 887 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.).

11. *See id.* at 902.

12. *See* Petition for a Writ of Certiorari at 3, Chiafalo v. Washington, 140 S. Ct. 918 (2020) (No. 19-465), 2020 WL 254167.

which will hear the case on April 28, 2020, and should issue a decision on June 29, 2020.¹³

The seven faithless votes in 2016 did not alter the election.¹⁴ But these votes, the contradictory rulings, and the looming 2020 election have reinvigorated a debate about the Electoral College.¹⁵ Since the Supreme Court has yet to definitively address the issue of binding electors, many states have enacted their own laws.¹⁶ Thirty-two states and the District of Columbia have laws, known as binding statutes, prohibiting elector discretion but seventeen of those states do not prescribe any consequence for an elector who deviates from the law.¹⁷ Absent a clear Supreme Court ruling or a constitutional amendment, the law on this issue will remain inconsistent.

Part I of this Note discusses the structure of the Electoral College, as described in Article II and the Twelfth Amendment to the U.S. Constitution. It then briefly discusses the history of the Electoral College, binding statutes, and faithless electors. Finally, it discusses the jurisprudence relevant to a state's authority to bind its electors. Part II outlines the opposing viewpoints on the constitutionality of elector independence and states' authority to impose binding statutes. Part III argues that binding statutes are constitutional and discusses the positive and negative effects that the upcoming Supreme Court ruling could have on the issue and on future elections.

I. THE SMOKE-FILLED ROOM: THE BIRTH OF A CONTROVERSIAL SYSTEM AND HOW IT HAS BEEN USED AND INTERPRETED THROUGHOUT HISTORY

The Electoral College was highly controversial during the Constitutional Convention and has been throughout U.S. history. This Part discusses the structure of the Electoral College. It discusses the founders' original intent for the Electoral College, the history of the Electoral College, and the enactment of the Twelfth Amendment. It also discusses faithless electors

13. See *Justices to Consider Faithless Electors, Ahead of 2020 Vote*, POLITICO (Jan. 17, 2020), <https://www.politico.com/news/2020/01/17/justices-to-consider-faithless-electors-ahead-of-2020-vote-100631> [<https://perma.cc/Z7DT-WWWX>]. These dates may, however, change as the Court responds to the COVID-19 outbreak. See Press Release, U.S. Supreme Court, Postponement of March Oral Arguments (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20 [<https://perma.cc/4T9S-N6UE>] (announcing postponement of oral arguments scheduled in March and early April due to the coronavirus outbreak).

14. See *Presidential Election Results: Donald Trump Wins*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/2PKE-MFTB>].

15. See Editorial, *Fix the Electoral College—or Scrap It*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/opinion/electoral-college.html> [<https://perma.cc/N9Q2-DXGY>].

16. See Jim Brunner, *Four Washington State Electors Break Ranks and Don't Vote for Clinton*, SEATTLE TIMES (Dec. 19, 2016), <https://www.seattletimes.com/seattle-news/politics/four-washington-electors-break-ranks-and-dont-vote-for-clinton/> [<https://perma.cc/E8T7-YQPW>].

17. See *Electoral College: Faithless Elector State Laws*, FAIR VOTE, https://www.fairvote.org/the_electoral_college#faithless_electors [<https://perma.cc/Y725-BDKQ>] (last visited Mar. 17, 2020).

and actions by states and political parties to control them. Finally, it discusses how the courts have interpreted the electors' roles and states' authority to control them.

A. *What Is the Electoral College?*

The Electoral College, created by the Constitution, is composed of a group of people called electors who officially vote for our country's president and vice president.¹⁸ Each state contributes a certain number of electors to this group based on the state's number of congressional representatives.¹⁹

On Election Day, people vote for electors—not for the presidential or vice-presidential candidates.²⁰ Article II, Section 1 of the Constitution, as amended by the Twelfth Amendment, sets the formal process for electing the president.²¹ First, each state appoints its designated number of electors.²² Then, the electors across the country meet on the same day in their respective states to cast their votes for president and vice president.²³ Originally, the Constitution required the electors to vote for two candidates for president: the candidate with the highest number of votes would become president and the next runner-up would become vice president.²⁴ The Twelfth Amendment, however, changed this so that the electors would vote separately for president and vice president.²⁵ The presidential candidate with the most votes becomes president if the number of votes constitutes a majority of the electors.²⁶

18. See U.S. CONST. art. II, § 1. The term “Electoral College” does not appear anywhere in the Constitution. See JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* 2 (4th ed. 2013).

19. “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.” U.S. CONST. art. II, § 1, cl. 2, *amended by* U.S. CONST. amend. XII. There are 538 electors, derived from the total number of senators (100), the total number of members of the House of Representatives (435), and three additional members from the District of Columbia. See *Distribution of Electoral Votes*, NAT'L ARCHIVES, <https://www.archives.gov/federal-register/electoral-college/allocation.html> [<https://perma.cc/GN9V-T7A2>] (last visited Mar. 17, 2020).

20. See U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

21. See *id.*

22. See *id.*; see also 3 U.S.C. § 1 (2018) (“The electors . . . shall be appointed . . . on the Tuesday next after the first Monday in November . . .”).

23. See U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII; see also 3 U.S.C. § 7 (“The electors . . . shall meet and give their votes on the first Monday after the second Wednesday in December . . .”).

24. See U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII. The two candidates must be from different states. See *id.* The “inhabitanancy rule” satisfied some framers' worries about regionalism and encouraged electors to adopt a more national outlook. See Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 *FORDHAM L. REV.* 965, 972 n.44 (2016).

25. See U.S. CONST. amend. XII.

26. If no presidential candidate receives a majority of the electoral votes, then the election is thrown to the House of Representatives, where each state gets one vote. See *id.* If the vice-presidential candidate does not receive a majority of the electoral votes, the election is thrown to the Senate. See *id.*

The Constitution is silent as to who can be an elector, except that it explicitly states that electors cannot be senators or representatives or someone “holding an Office of Trust or Profit under the United States.”²⁷ Currently, most states allow political parties to choose a slate of electors to represent their respective candidates.²⁸ State laws vary as to how a political party chooses its specific electors.²⁹ These electors generally remain unknown to the public because the “short-form” ballot only contains the names of the candidates for president and vice president.³⁰ In every state, a vote for the candidate of that particular party is a vote for that party’s slate of electors.³¹

B. The Constitutional Convention’s Understanding of the Electoral College and the Subsequent Ratification of the Twelfth Amendment

Selecting the process that would choose the president was one of the more elaborate debates among the fifty-five delegates to the 1787 Constitutional Convention.³² The framers wanted to give the people a voice after first rejecting a proposal to have Congress appoint the president.³³ After several weeks of debating between a popular vote and an electoral system, the framers created a “Committee of Eleven” (one delegate per state) to resolve the issue.³⁴ This committee drafted the plan that resembles the Electoral College used today.³⁵

In *The Federalist Papers*, Alexander Hamilton defended the Electoral College and advocated for its ratification.³⁶ The electors were to be “men most capable of analyzing the qualities adapted to the station” and “most likely to possess the information and discernment requisite to so complicated

27. U.S. CONST. art. II, § 1, cl. 2, *amended by* U.S. CONST. amend. XII. In 1876, for example, a postmaster in Oregon resigned so that he could be eligible to serve as an elector. See ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 32 (2006).

28. See *Distribution of Electoral Votes*, *supra* note 19.

29. See, e.g., COLO. REV. STAT. § 1-4-502(2) (2020) (by state convention); N.Y. ELEC. LAW § 6-102 (McKinney 2020) (by state committee); 25 PA. CONS. STAT. § 2878 (2020) (by party presidential nominee); WIS. STAT. § 8.18 (2020) (by party nominees for state legislature).

30. See BENNETT, *supra* note 27, at 2.

31. See, e.g., N.Y. ELEC. LAW § 12-100 (“Each vote cast for the candidates of any party . . . for president and vice president of the United States . . . shall be deemed to be cast for the candidates for elector of such party . . .”).

32. See 2 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1411 (Boston, Charles C. Little & James Brown 1851).

33. See *id.* § 1456.

34. See John D. Feerick, *The Electoral College—Why It Ought to Be Abolished*, 37 FORDHAM L. REV. 1, 8 (1968).

35. See BRIAN L. FIFE, REFORMING THE ELECTORAL PROCESS IN AMERICA: TOWARD MORE DEMOCRACY IN THE 21ST CENTURY 83–84 (2010). As one political scientist who summarized the proceedings stated: “Every solution seemed worse than the rest. The arrangement they finally cobbled together at the last minute was adopted more out of desperation, perhaps, than out of any great confidence in its success.” *Id.* at 84. The plan passed by a vote of nine to two. *Id.* at 83–84.

36. See TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804, at 17 (1994).

an investigation.”³⁷ They were to “enter upon the task, free from any sinister bias.”³⁸ Hamilton further wrote that this process would guarantee that the president “will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications.”³⁹

There was little debate during the convention on the exact role of the electors.⁴⁰ Some argued that “[t]he Electors will be strangers to the several candidates and of course unable to decide on their comparative merits.”⁴¹ Further references to the role of electors and their contemplated independence, however, are found in *The Federalist Papers*, particularly Hamilton’s *Federalist No. 68*.⁴²

After the country’s first two contested elections, in 1796 and 1800, Congress felt the need to amend Article II.⁴³ The original provision allowed electors to vote for two people for president, which resulted in pairing political rivals as president and vice president.⁴⁴ The provision also allowed the House of Representatives, when no presidential candidate received a majority of the electoral vote, to choose among the top five candidates.⁴⁵ Because of this provision, Congress went through thirty-six rounds of voting in 1800.⁴⁶ The differing procedures that the states used to appoint the electors⁴⁷ and the rise of political parties had drastically altered the system envisioned by the framers.⁴⁸

The Twelfth Amendment addressed some of these flaws by simplifying the process, requiring presidential electors to vote separately for president and vice president.⁴⁹ The 1804 ratification of the Twelfth Amendment represents the most significant constitutional change to the Electoral College.⁵⁰

37. THE FEDERALIST NO. 68, at 410 (Alexander Hamilton) (E. H. Scott ed., 1898).

38. *Id.* at 411.

39. *Id.* at 412.

40. See Feerick, *supra* note 34, at 9 n.44.

41. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 501 (Max Farrand ed., rev. ed. 1937).

42. See generally THE FEDERALIST NO. 68, *supra* note 37.

43. See KURODA, *supra* note 36, at 110–14.

44. Some Federalist-leaning electors only voted for John Adams for president to assure an Adams presidency. This tactic, however, resulted in the odd pairing of the Federalist Adams and Democratic-Republican Thomas Jefferson for vice president. See *id.* at 65–66.

45. U.S. CONST. art. II, § 1, amended by U.S. CONST. amend. XII.

46. NEAL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE 40 (1981).

47. See *id.* at 247. In 1796, legislatures in seven states directly selected electors and six states chose electors by popular vote. See *id.* In 1800, legislatures in ten states directly selected electors and five states chose electors by popular vote. See *id.*

48. See *id.* at 41.

49. Additionally, if the election was thrown to the House, the Twelfth Amendment required the House to pick from the top three electoral vote-getters. See U.S. CONST. amend. XII.

50. See *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 947–49 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.) (describing the history of the Electoral College). The Twenty-Third Amendment granted the District of Columbia the number of electors equal to that of the least populous state. See U.S. CONST. amend. XXIII.

C. *What Does the Electoral College Look like Today?*

Political parties play the largest role in determining the electors.⁵¹ Notably, the Constitution does not mention—and in fact sought to avoid—the influence of political parties.⁵² Political parties, however, began to form almost immediately during George Washington’s administration and became more prominent after Washington declined to seek a third term.⁵³ In the 1796 election, state political parties began securing pledges from their electors.⁵⁴ Since that election, electors have mostly been party loyalists who have taken some pledge or oath to support their party’s nominees.⁵⁵ In 2020, thirty-two states and the District of Columbia legally require elector candidates to sign a pledge.⁵⁶ These pledges and the consequences for breaking them differ among the states.⁵⁷

While some states do not impose any penalties for breaking a pledge, other states impose penalties of varying degrees. Seventeen states⁵⁸ and the District of Columbia⁵⁹ have laws that bind electors without providing for any enforcement.⁶⁰ Eleven states have laws that cancel the elector’s vote and replace the elector.⁶¹ Two states impose a penalty on the elector but record

51. Robert M. Alexander, *Lobbying the Electoral College: The Potential for Chaos*, in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES 159, 164–65 (Gary Bugh ed., 2010).

52. See BENNETT, *supra* note 27, at 20.

53. See *id.* at 21.

54. See Alexander, *supra* note 51, at 164.

55. See *Ray v. Blair*, 343 U.S. 214, 229 n.16 (1952).

56. See *Electoral College*, *supra* note 17.

57. See *Distribution of Electoral Votes*, *supra* note 19. Unpledged electors—those without either a binding state law or a party pledge—ceased to exist after the 1800 election, only to reappear again in 1960 when slates of unpledged electors won in Southern states in opposition to the Democrats’ support for civil rights initiatives. See Feerick, *supra* note 34, at 21.

58. These states are Alabama, Alaska, California, Connecticut, Delaware, Florida, Hawaii, Maryland, Massachusetts, Mississippi, Ohio, Oregon, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming. See *Electoral College*, *supra* note 17.

59. See D.C. CODE § 1-1001.08(g) (2020).

60. Three states—California, Hawaii, and Wisconsin—have language in their binding statutes that restrict their electors to voting for their party’s candidate “if both candidates are alive.” See, e.g., CAL. ELEC. CODE § 6906 (West 2020); see also Zachary J. Shapiro, Note, *Free Agency: The Constitutionality of Methods That Influence a Presidential Elector’s Ability to Exercise Personal Judgment*, 26 CARDOZO J.L. & POL’Y 395, 422–24 (2018). This language allows some discretion in a scenario where a candidate dies after the November election day but before the December meeting date. Shapiro, *supra*, at 422–24. National parties have contingencies in place if a death occurs, but electors may not feel obligated to vote for that nominee. See *id.* This has happened twice in history. See Feerick, *supra* note 34, at 23–24.

61. These states are Arizona, Colorado, Maine, Indiana, Michigan, Minnesota, Montana, Nebraska, Nevada, Utah, and Washington. See *Electoral College*, *supra* note 17. In 2016, Washington imposed a fine of \$1000. See *In re Guerra*, 441 P.3d 807, 808 (Wash. 2019), *cert. granted sub nom. Chiafalo v. Washington*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-465) (mem.). In June 2019, the state legislature repealed that law and replaced it with one that does not impose a monetary penalty but replaces the faithless elector and fails to count their vote. See WASH. REV. CODE § 29A.56.330 (repealed 2019).

the vote as cast.⁶² Two states impose a penalty on the elector and cancel the vote.⁶³

An elector who abstains or votes contrary to their pledge and their state's laws may be called a "faithless elector."⁶⁴ A recent estimate indicates that, in the history of presidential elections, there have been 167 faithless electors whose votes were officially counted.⁶⁵ These electors' votes deviated for various reasons,⁶⁶ but none of their votes affected the outcome of an election.⁶⁷ After a long hiatus, ten of the last eighteen elections had at least one faithless elector.⁶⁸ In 2016, there were seven faithless electors.⁶⁹ This marked the greatest number of faithless electors in an election since 1872.⁷⁰ While the Supreme Court has occasionally heard elector-related cases, there is no established legal doctrine regarding faithless electors in general elections.

D. *The Legal Status of Presidential Electors*

Presidential electors serve a somewhat limited federal function. In *Burroughs v. United States*,⁷¹ the Court ruled that "presidential electors are not officers or agents of the federal government, [but] they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution."⁷² The Court implied that the exercise of this federal function

62. *See Electoral College*, *supra* note 17. These states, New Mexico and South Carolina, allow the government to bring a criminal action against the elector. *See* N.M. STAT. ANN. § 1-15-9 (2020); S.C. CODE ANN. § 7-19-80 (2020).

63. These states are Oklahoma, which imposes a fine and holds the elector guilty of a misdemeanor, and North Carolina, which imposes a \$500 fine. *See* N.C. GEN. STAT. § 163-212 (2020); OKLA. STAT. tit. 26, § 10-109 (2020).

64. *See* BENNETT, *supra* note 27, at 95. Scholars who believe that the Constitution originally intended electors to exercise independent judgment consider the term ironic because the "faithlessness" exhibited is only to their pledges and not to the Constitution itself. *Id.* at 96.

65. *See Electoral College*, *supra* note 17.

66. *See id.* Electors have cast seventy-one faithless votes for candidates who died after the November election day but before the electors met in December. *Id.* Twenty-nine electors have abstained or have cast an abnormal vote. *Id.* Sixty-seven have voted for a different candidate altogether on their own initiative. *Id.*

67. *See* BENNETT, *supra* note 27, at 98.

68. *See* Alexander, *supra* note 51, at 161; *see also Electoral College*, *supra* note 17. Faithless electors have been recorded in the elections of 1948, 1956, 1960, 1968, 1972, 1976, 1988, 2000, 2004, and 2016. *Electoral College*, *supra* note 17.

69. It could have been ten but three were either disqualified or changed their votes. *See* Schmidt & Andrews, *supra* note 5.

70. *See Electoral College*, *supra* note 17. In 1872, sixty-three Democratic electors voted for someone other than their nominee, Horace Greeley, because he died after the November election day but before the Electoral College meeting. *Id.*

71. 290 U.S. 534 (1934).

72. *See id.* at 545 (citation omitted); *see also In re Green*, 134 U.S. 377, 379 (1890) ("[Electors] are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress.").

would not be immune from the federal government's interest in keeping an election free from corruption.⁷³

In exercising this federal function, electors act within the authority of the states, which have "plenary power" over appointing electors.⁷⁴ In *McPherson v. Blacker*,⁷⁵ the Court recognized that the Constitution does not provide the exact method of appointing electors, but it "leaves it to the [state] legislature exclusively to define the method."⁷⁶ The Court suggested that historical practices and practical implications allow for a more flexible interpretation of the Twelfth Amendment, granting states this autonomy.⁷⁷

The Court has continued to rely on the Electoral College's history and its practical implications in granting states more authority.⁷⁸ In *Ray v. Blair*,⁷⁹ the Court declared that "[t]his long-continued practical interpretation of the constitutional propriety of an implied or oral pledge . . . weighs heavily in considering the constitutionality of a pledge."⁸⁰ The Court later admitted that while "[t]he individual citizen has no federal constitutional right to vote for electors," "[h]istory has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors."⁸¹ The Court has acknowledged that citizens have a constitutional right to vote for the president when "the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college" and that such "right to vote as the legislature has prescribed is fundamental."⁸²

The Court, however, has yet to explicitly address whether such long-standing historical practice eliminates elector independence in general elections. In *Ray*, the Court addressed an Alabama Democratic Party rule requiring elector candidates in primaries to sign a pledge to support the party's nominees.⁸³ Edmund Blair, an otherwise qualified electoral candidate, refused to sign the pledge and thus the party refused to certify his candidacy.⁸⁴ In a narrow ruling, the Court reasoned that no provision in the

73. See *Burroughs*, 290 U.S. at 546–47.

74. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

75. 146 U.S. 1 (1892).

76. *Id.* at 27.

77. See *id.* at 36 ("But we can perceive no reason for holding that the power confided to the States by the Constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created."); see also *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (declaring that, so long as no other provision in the Constitution is violated, "[Article II, § 1] does grant extensive power to the States to pass laws regulating the selection of electors").

78. See *Ray v. Blair*, 343 U.S. 214, 229–30 (1952).

79. 343 U.S. 214 (1952).

80. *Id.* at 229–30 ("However, even if such promises of candidates . . . are legally unenforceable because violative of an assumed constitutional freedom of the elector . . . it would not follow that the requirement of a pledge in the primary is unconstitutional."). *Id.* at 230.

81. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

82. *Id.*

83. See *Ray*, 343 U.S. at 215.

84. See *id.*

Constitution barred a political party, in a primary for its electors, from requiring pledges to support its nominees.⁸⁵ The Court reasoned that involvement in a party is voluntary and thus one must comply with the party's rules.⁸⁶ Justice Robert Jackson, however, observed in his dissent that the framers intended electors to be "free agents" who would "exercise an independent and nonpartisan judgment."⁸⁷ In rejecting the majority's emphasis on historical practices, Justice Jackson reasoned that the Court could not use custom to amend the Constitution.⁸⁸

The Court's ruling in *Ray*, which was limited to primary elections,⁸⁹ left state and federal courts to address the issue in the context of general elections. Before 2016, state courts in California,⁹⁰ Nebraska,⁹¹ and New York,⁹² as well as a federal district court in Michigan,⁹³ ruled that binding statutes in general elections were constitutional. State courts in Alabama,⁹⁴ Kansas,⁹⁵ and Ohio,⁹⁶ however, ruled that states could not restrict elector independence.

The question left unaddressed in *Ray* regarding pledges in general elections and the faithless votes in the 2016 election prompted litigation in four jurisdictions. Three Washington electors voted contrary to their pledges to vote for Hillary Clinton.⁹⁷ Under state law at the time, the Washington secretary of state fined them each \$1000 for failing to uphold their pledge.⁹⁸ The three electors took their case all the way to the Supreme Court of Washington, arguing that the law and the fine imposed were

85. *See id.* at 231.

86. *See id.* at 230.

87. *Id.* at 232 (Jackson, J., dissenting).

88. *See id.* at 233. Justice Jackson further advocated for abolishing the whole system altogether and instituting a direct popular vote for president. *See id.* at 234.

89. *See id.* at 231 (majority opinion).

90. *Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924) (declaring that electors use no judgment or discretion).

91. *State ex rel. Neb. Republican State Cent. Comm. v. Wait*, 138 N.W. 159, 165 (Neb. 1912) (suggesting that states had the right to remove electors if they violated pledges because voters vote for "entire strangers" and a faithless vote "would be repugnant to every sense of honor").

92. *Thomas v. Cohen*, 262 N.Y.S. 320, 331 (Sup. Ct. 1933) (ruling that short-form ballots, party primaries, and nominating conventions have drastically changed the presidential election process and positing that the Twelfth Amendment would have been written differently if these present-day conditions had existed at the time).

93. *Gelineau v. Johnson*, 904 F. Supp. 2d 742, 748 (W.D. Mich. 2012) (assuming that *Ray* strongly suggested that a state's enforcement of a pledge would be constitutional).

94. *Op. of the Justices*, 34 So. 2d 598, 599–600 (Ala. 1948) (believing that the Constitution's language clearly indicates that electors can exercise judgment). However, this was an advisory opinion issued before the Supreme Court's decision in *Ray*.

95. *Breidenthal v. Edwards*, 46 P. 469, 470 (Kan. 1896) (affirming the position that electors are under no legal obligation to uphold their party's pledges).

96. *State ex rel. Beck v. Hummel*, 80 N.E.2d 899, 908–09 (Ohio 1948) (suggesting that pledges are only enforced by a moral obligation, not a legal one).

97. *See In re Guerra*, 441 P.3d 807, 808 (Wash. 2019), *cert. granted sub nom. Chiafalo v. Washington*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-465) (mem.).

98. *See id.*

unconstitutional.⁹⁹ The court ruled against them and declared the law and the fine constitutional.¹⁰⁰ Electors in California and Minnesota also challenged their states' laws, but the courts in those states denied the electors' proposed preliminary injunctions, which would have precluded the states from certifying ballots that complied with the states' binding statutes.¹⁰¹

In Colorado, one faithless elector voted contrary to his pledge to vote for Hillary Clinton.¹⁰² After failing to obtain an injunction against the state, the state removed him, cancelled his vote, and replaced him with an elector who voted for Hillary Clinton.¹⁰³ He sued the state, but the district court ruled that Colorado's binding statute was constitutional and the state's actions were permissible.¹⁰⁴ The Tenth Circuit, however, reversed that decision and became the first court to expressly rule that a state's binding statute was unconstitutional.¹⁰⁵

II. A STATE OF BATTLEGROUND: ELECTOR INDEPENDENCE VERSUS STATE AUTHORITY

The Supreme Court's ruling in *Ray*, the long-standing state practice of having binding statutes requiring electors to vote for the candidate who won the state's popular vote, and electors' historical adherence to these statutes suggest universal acceptance of the statutes' constitutionality. Indeed, until the Tenth Circuit's decision, no court has ever explicitly declared a binding statute unconstitutional.¹⁰⁶ However, the Tenth Circuit's decision and the Washington State Supreme Court's contradictory ruling have revived the issue.

This Part discusses the legal issues of elector independence and binding statutes in light of *Baca v. Colorado Department of State*. It discusses arguments raised by the Tenth Circuit, the parties in the litigation, and other courts and legal scholars that binding statutes are unconstitutional. It then outlines the arguments raised by the Washington State Supreme Court and other courts and scholars that binding statutes are constitutional. Finally, it explores the text of the Constitution, the framers' intent, and electors' roles and historical practices.

99. *See id.*

100. *See id.* at 807.

101. *See Abdurrahman v. Dayton*, No. 16-cv-4279 (PAM/HB), 2016 WL 7428193, at *2–4 (D. Minn. Dec. 23, 2016); *Koller v. Brown*, 224 F. Supp. 3d 871, 874 (N.D. Cal. 2016).

102. *See Baca v. Colo. Dep't of State*, 935 F.3d 887, 902–03 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.).

103. *See id.* at 904.

104. *See id.* at 901–05.

105. *See id.* at 956.

106. *See supra* Part I.D.

A. The Unconstitutionality of Binding Statutes

When interpreting the Constitution, the Supreme Court first looks at the text.¹⁰⁷ The Court has, however, afforded considerable weight to governmental and historical practices when the issue concerns “the respective powers of those who are equally the representatives of the people.”¹⁰⁸ The Constitution should be “understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”¹⁰⁹ This section discusses the arguments that binding statutes are unconstitutional because they are contradictory to the plain language of the Twelfth Amendment and to the framers’ original intent. It also discusses how, historically, electors have been understood to be independent.

1. The Twelfth Amendment’s Language Prohibits States from Controlling Electors

According to the Tenth Circuit in *Baca*, the language of the Twelfth Amendment exclusively limits states’ power to the appointment of presidential electors.¹¹⁰ The Twelfth Amendment does not mention the states after assigning them the power to appoint the electors on the date selected by Congress.¹¹¹ The language provides specific details as to how the electors should cast their votes—without mentioning the states’ ability to remove them or direct who they must vote for.¹¹² The states are notably absent from the process once appointment occurs because the Amendment allows electors “themselves” to make distinct lists, certify the votes, and transmit them to the Senate.¹¹³ In fact, once voting begins, there is nothing in the Amendment’s language that says that a state can interfere with the process.¹¹⁴

The Amendment’s use of the terms “elector,” “vote,” and “ballot” could also be instructive in suggesting that states cannot direct who electors should vote for.¹¹⁵ Contemporaneous definitions of the words seem to reveal that the framers intended electors to exercise discretion in casting votes.¹¹⁶

107. See *Utah v. Evans*, 536 U.S. 452, 459 (2002) (starting with a textual analysis of the Constitution before considering historical practices).

108. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

109. *United States v. Sprague*, 282 U.S. 716, 731 (1931).

110. See *Baca*, 935 F.3d at 942.

111. See U.S. CONST. amend. XII.

112. See *id.*; *Baca*, 935 F.3d at 942.

113. See U.S. CONST. amend. XII.

114. See *id.*

115. *Baca*, 935 F.3d at 943.

116. One dictionary defined the term “elector” as one that “has a vote in the choice of any officer.” 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J. F. & C. Rivington 1785). Webster’s dictionary defined “ballot” as “to choose or vote by ballot.” NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (New Haven, Sidney’s Press 1806); see also *Baca*, 935 F.3d at 943–44; *Gibbons v. Ogden* 22 U.S. (9 Wheat.) 1, 188 (1824) (“The enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”).

Further, the term “ballot” could also imply that the electors’ votes would be secret.¹¹⁷ A state’s ability to fine or remove an elector on the basis of their vote would require the elector’s vote to be known, which would be inconsistent with a secret ballot.¹¹⁸ As the Tenth Circuit observed, these definitions “have a common theme: they all imply the right to make a choice or voice an individual opinion.”¹¹⁹

The meaning of “elector” as someone who has the right to exercise discretion could further be supported by the use of the word in other parts of the Constitution.¹²⁰ In Article I, “electors” refers to citizens voting for congressional representatives.¹²¹ There are no binding statutes restricting who these electors should vote for.¹²² Because the Supreme Court reads terms consistently throughout the Constitution, the electors referenced in the Twelfth Amendment may have the same discretion as the electors described in Article I.¹²³

Other phrases in the Twelfth Amendment could also imply that electors can exercise discretion and judgment. The only restrictions that the Twelfth Amendment places on electors are that they cannot vote for two people from the same state for president and vice president and that they cannot hold federal offices of “Trust or Profit” in the federal government.¹²⁴ This latter restriction would be unnecessary if electors merely transmitted the popular vote and did not exercise some independent discretion.¹²⁵ The additional requirement that electors are to meet “in their respective States” would also be unnecessary if the electors functioned merely as rubber stamps.¹²⁶ These precautions were designed to protect against corruption—an evil that could only arise if electors had discretion.¹²⁷

Additionally, one scholar argues that binding statutes unconstitutionally place another qualification on electors that is not explicitly listed in the Twelfth Amendment.¹²⁸ In *U.S. Term Limits, Inc. v. Thornton*,¹²⁹ the

117. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 41, at 390 (“It is expected and required by the Constitution, that the votes shall be secret and unknown.”).

118. See Robert J. Delahunty, *Is the Uniform Faithful Presidential Electors Act Constitutional?*, 2016 CARDOZO L. REV. DE·NOVO 165, 175.

119. *Baca*, 935 F.3d at 945 (analyzing multiple dictionary definitions of the words “elector,” “vote,” and “ballot”).

120. *See id.*

121. “[T]he Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2, cl. 1; *see also* THE FEDERALIST NO. 57, at 349 (Alexander Hamilton) (E. H. Scott ed., 1898) (confirming that an “elector” meant a voter).

122. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

123. *See Baca*, 935 F.3d. at 946–47; *see also* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (interpreting a term of art in different parts of the Constitution consistently).

124. U.S. CONST. amend. XII.

125. *See BENNETT*, *supra* note 27, at 14–15.

126. *See Delahunty*, *supra* note 118, at 174–75.

127. *See id.*

128. *See id.* at 175–76.

129. 514 U.S. 779 (1995).

Supreme Court ruled that the Article I qualifications for election to the House of Representatives were exhaustive and accordingly found an Arkansas law that attempted to add an additional qualification unconstitutional.¹³⁰ Similarly, it is plausible to read the Twelfth Amendment restrictions on electors as exclusive, ruling out the possibility of an additional condition that electors are bound to vote for a certain candidate.¹³¹

2. The Supremacy Clause, the Tenth Amendment, and Constitutional Appointment Power Prohibit States from Controlling Electors

Electors independence can further be supported by the Supremacy Clause because electors perform a federal function with which a state cannot interfere.¹³² The Supremacy Clause establishes that the Constitution and federal laws are supreme to state laws and cannot be controlled by the states.¹³³ The Supreme Court has ruled that states cannot interfere with, limit, or control federal functions.¹³⁴ This is true even if the person performing the federal function is appointed by the state.¹³⁵ The Supreme Court has also ruled that electors perform “and discharge duties in virtue of authority conferred by, the Constitution of the United States.”¹³⁶ Therefore, the only authority that would allow states to control electors would have to be implicitly or explicitly found in the Constitution.¹³⁷

Notably, the Tenth Amendment does not overcome the absence of any language in the Twelfth Amendment explicitly granting the states the right to control electors.¹³⁸ The Tenth Amendment reserves powers not delegated by the Constitution to the states.¹³⁹ If a power is not explicitly referenced in the Constitution, the silence is sometimes “interpreted as an intent that the relevant power be retained by the states” under the Tenth Amendment.¹⁴⁰ The Supreme Court, however, has ruled that the Tenth Amendment can only

130. *See id.* at 780 (ruling unconstitutional a law to deny ballot access to any representative who had served three terms in the House or two in the Senate).

131. *See Delahunty, supra* note 118, at 176.

132. *See Burroughs v. United States*, 290 U.S. 534, 545 (1934); *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 937–38 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.).

133. *See* U.S. CONST. art. VI, cl. 2; *see also Baca*, 935 F.3d at 938.

134. *See Leser v. Garnett*, 258 U.S. 130, 137 (1992) (“[A] federal function derived from the Federal Constitution . . . transcends any limitations sought to be imposed by the people of a State.”).

135. *See Hawke v. Smith*, 253 U.S. 221, 231 (1920) (ruling that state law cannot interfere with the state legislators’ role in ratifying amendments); *see also Cunningham v. Neagle*, 135 U.S. 1, 75 (1890) (ruling that a federal official cannot be guilty of violating a state law for conduct authorized by federal law).

136. *Burroughs*, 290 U.S. at 545.

137. *See Baca*, 935 F.3d at 938.

138. *See id.* at 938–39.

139. *See* U.S. CONST. amend. X.

140. *Baca*, 935 F.3d at 938; *see also* U.S. CONST. amend. X (“[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

reserve rights that existed before the Constitution was ratified.¹⁴¹ Because electors were created under the Constitution, the power to control them is not reserved to the states and must be expressly delegated in the Constitution.¹⁴² In the absence of an express delegation, such a power does not exist.¹⁴³

Additionally, such a power cannot be found explicitly in the Appointments Clause.¹⁴⁴ The Supreme Court's analysis of the Appointments Clause recognizes that the power to appoint, control, and remove officers is based on the president's obligation to take care that the laws are faithfully executed.¹⁴⁵ As the Tenth Circuit observed, however, this principle extends solely to executive power.¹⁴⁶ When states appoint electors, they are not selecting them to carry out a function for which the state is ultimately responsible.¹⁴⁷ Electors are not subordinate to the state; they exercise a federal function when casting their ballots.¹⁴⁸ There is no obligation in the Twelfth Amendment that the electors faithfully perform their function, unlike the obligation imposed on the president by Article II.¹⁴⁹ Additionally, the power to appoint is separate from the power to control. Before the enactment of the Seventeenth Amendment requiring popular election of senators, the state legislatures had plenary power to select senators.¹⁵⁰ The legislatures, however, did not have any power to legally bind a senator to vote in a certain way.¹⁵¹ Similarly, while presidents appoint federal judges, they have no power to control their decisions.¹⁵² This distinction between appointment and control applies to electors as well.¹⁵³ Therefore, states' power to appoint electors does not include the power to remove or control them.¹⁵⁴

141. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995).

142. See *Baca*, 935 F.3d at 939.

143. See *id.*

144. See U.S. CONST. art. II, § 2, cl. 2; see also *Myers v. United States*, 272 U.S. 52, 163–64 (1926); *Baca*, 935 F.3d at 940.

145. See *Myers*, 272 U.S. at 163–64; see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010) (ruling that the president is “responsib[le] to take care that the laws be faithfully executed” and that “the President therefore must have some ‘power of removing those for whom he cannot continue to be responsible’” (quoting *Myers*, 272 U.S. at 117)).

146. See *Baca*, 935 F.3d at 940.

147. See *id.* at 941.

148. See *id.*

149. Compare U.S. CONST. amend. XII, with *id.* art. II, § 3, cl. 1.

150. See *id.* art. I, § 3, cl. 1, amended by U.S. CONST. amend. XVII.

151. See Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 592 (1996).

152. See *United States v. Klein*, 80 U.S. (1 Wall.) 128, 147 (1872).

153. See *Ray v. Blair*, 343 U.S. 214, 230 (1952) (remarking that promises may be “legally unenforceable because [they are] violative of an assumed constitutional freedom of the elector under the Constitution, Art. II § 1, to vote as he [or she] may choose in the electoral college”).

154. See *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 941 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.).

3. The Original Intent of the Framers That Electors Should Exercise Judgment Has Been Affirmed by History

The Electoral College was seemingly based on other models that granted electors independence. One model, known to many of the framers, was the system instituted in Maryland in 1776, which explicitly granted electors independence.¹⁵⁵ The Maryland Constitution required electors “in their judgment and conscience” to vote for the state senators they “believe[d] best qualified for the office.”¹⁵⁶ In expressing that the framers approved of the Maryland system, Alexander Hamilton remarked that it was “much appealed to.”¹⁵⁷ James Madison referred to Maryland’s system in arguing for the national system at the Constitutional Convention.¹⁵⁸

A reading of many of *The Federalist Papers* reveals that the framers understood electors to be independent.¹⁵⁹ In *Federalist No. 68*, Hamilton described the process of choosing an executive that most avoided “cabal, intrigue, and corruption.”¹⁶⁰ According to Hamilton, this process, described as an “investigation,” should be left to people “most capable of analyzing the qualities” of the executive “acting under circumstances favorable to deliberation.”¹⁶¹ The electors would “be most likely to possess the information and discernment requisite to so complicated an investigation.”¹⁶² He expressly rejected the prospect of “any pre-established body” selecting the executive and insisted that the executive be chosen by people who were selected for the sole purpose of doing so.¹⁶³

Other writings in *The Federalist Papers* are consistent with *Federalist No. 68* in assuming elector independence. In *Federalist No. 60*, Hamilton described the method for choosing the president, separate from the state legislatures choosing the Senate, as “by electors chosen for that purpose by the people.”¹⁶⁴ Hamilton anticipated that the two methods would be different in that state legislatures would not choose the president by “bound proxies” in the form of binding statutes.¹⁶⁵ In *Federalist No. 64*, John Jay described electors as “the most enlightened and respectable citizens” and noted that they would possess “extensive and accurate information relative to men and characters” so as to have “equal marks of discretion and discernment.”¹⁶⁶

155. See Delahunty, *supra* note 118, at 171–72.

156. MD. CONST. of 1776 art. XVIII.

157. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 41, at 289.

158. See generally JAMES MADISON, *Observations on Jefferson’s Draft of a Constitution for Virginia*, in 1 THE PAPERS OF JAMES MADISON 649 (Hutchinson et al. eds., 1962).

159. See *Printz v. United States*, 521 U.S. 898, 971 (1997) (declaring that *The Federalist Papers* are one of the most important sources for interpreting the original intent of the Constitution).

160. THE FEDERALIST NO. 68, *supra* note 37, at 411.

161. *Id.* at 410.

162. *Id.*

163. *Id.*

164. THE FEDERALIST NO. 60, at 366 (Alexander Hamilton) (E. H. Scott ed., 1898).

165. See *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 952–53 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.).

166. THE FEDERALIST NO. 64, at 389 (John Jay) (E. H. Scott ed., 1898).

In the ratification debate around the country, there were many framers that, when referring to presidential electors, considered them independent.¹⁶⁷ John Dickinson, an influential framer in Pennsylvania, in his “Fabius” letters supporting ratification of the Constitution, described electors’ roles in a way consistent with elector independence.¹⁶⁸ Roger Sherman, another influential framer in Connecticut, wrote that the president would be “reelected as often as the electors shall think fit.”¹⁶⁹ In other ratifying conventions around the country, many supporters and opponents of the Constitution thought of the electors as independent and explained that the electors would choose the president.¹⁷⁰ While the statements of the framers themselves have merit, the affirmation by constitutional scholar and Supreme Court Justice Joseph Story reveals an acceptance that the framers understood electors to be independent.¹⁷¹

Based on the first few elections, the public and the framers assumed elector independence. In the first election, there was little debate that George Washington would be chosen, but Hamilton realized that the Constitution allowed electors to vote for two people for president.¹⁷² Since Hamilton believed that this provision would result in a tie, he went around the country convincing some electors to vote just for Washington.¹⁷³ Using Hamilton’s actions as an example, in 1800, Aaron Burr tried to persuade electors to vote only for him.¹⁷⁴ Additionally, some early candidates for elector took the

167. See KURODA, *supra* note 36, at 19, 21. In assuming elector independence, some of the framers argued that the requirement that electors can only vote for one candidate from their states “was a constraint on the free exercise of judgment.” *Id.* at 19. Others described the electors as “[i]ndependent and free from undue influence.” *Id.* at 21.

168. 2 JOHN DICKINSON, *The Letters of Fabius*, in THE POLITICAL WRITINGS OF JOHN DICKINSON 67, 85 (Wilmington, Bonsal & Niles 1801) (“The electors may throw away their votes, mark, with public disappointment, some person improperly favoured by them, or justly revering the duties of their office, dedicate their votes to the best interest of their country.”).

169. A Citizen of New Haven, *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1788, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: CONNECTICUT 524, 524 (Merrill Jensen ed., 1978).

170. For example, James Wilson stated that the electors would be free from corruption, implying that they would be independent free agents. See *Convention of Pennsylvania*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 412, 473–74 (Washington, Jonathan Elliot 1836) (statement of James Wilson).

171. Justice Story observed “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.” See STORY, *supra* note 32, § 1463. Justice Story’s *Commentaries* have been informative on issues of constitutional interpretation. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 799 (1995).

172. See BENNETT, *supra* note 27, at 21.

173. Hamilton wrote that “[e]verybody is aware of that defect in the constitution which renders it possible that the man intended for Vice President may in fact turn up President.” *Id.*

174. Conflicting accounts say that Burr possibly attempted to convince electors in New Jersey, New York, and South Carolina to switch their votes to him. See JAMES CHEETHAM, VIEW OF THE POLITICAL CONDUCT OF AARON BURR 44 (New York, Denniston & Cheetham 1802); see also CHARLES A. O’NEIL, THE AMERICAN ELECTORAL SYSTEM 84 (New York, G. P. Putnam’s Sons 1887).

view that they would be entitled to exercise judgment in casting their ballots.¹⁷⁵

The new process designed under the Twelfth Amendment did nothing to change these early assumptions and practices.¹⁷⁶ Additionally, many comments during the ratification debate of the Twelfth Amendment suggest that electors could exercise discretion. Many members of Congress referred to electors making choices and to the criteria they could use in making those choices.¹⁷⁷ Some members believed that electors had a duty to vote for the most qualified person.¹⁷⁸ Members mentioned the risk of electors being bribed or enticed to vote for a candidate who might not be the best candidate.¹⁷⁹ One congressman even suggested that electors be given a second chance to vote if no majority was reached as an alternative to having the House decide the election.¹⁸⁰ Taken together, these statements suggest a prevailing sentiment that electors could exercise discretion in casting their ballots.

Congress reaffirmed this sentiment more than one hundred years later with the ratification and implementation of the Twenty-Third Amendment, which granted the District of Columbia electors equal to the number granted to the least populous state.¹⁸¹ Though there was no mention of elector independence in the House and Senate during the ratification of the Twenty-Third Amendment, two representatives confirmed that its language closely mirrors the language of the Twelfth Amendment, which suggests that Congress wanted it to have the same meaning.¹⁸² Furthermore, even though Congress passed a binding statute, representatives have treated the statute merely as “a strong moral suasion . . . [with] no legal effect.”¹⁸³

175. In 1792, electors in North Carolina and Virginia met and debated the merits of two presidential candidates. See GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* 19 (2004).

176. Congress was more concerned with electors’ strategic voting inverting the presidential and vice-presidential candidates, which was a real worry based on the accounts from the 1796 and 1800 elections. See BENNETT, *supra* note 27, at 27; see also 13 ANNALS OF CONG. 87, 98, 186 (1803).

177. See 13 ANNALS OF CONG. 736 (statement of Rep. Holland) (stating that electors “exercis[e] their rationality as to the application of either person to any specific office”).

178. See, e.g., *id.* at 709 (statement of Rep. Lowndes) (preferring electors to vote for “men of high character”); *id.* at 752 (statement of Rep. Griswold) (stating that electors have “the great and solemn duty . . . to give their votes for two men who shall be best qualified”).

179. See, e.g., *id.* at 174 (statement of Sen. Tracy) (worrying that “by the force of intrigue and faction, the Electors may be induced to scatter their votes”); *id.* at 692 (statement of Rep. Purviance) (fearing that, eventually, electors could be bought “by promises or ample compensation”).

180. See *id.* at 132–33 (statement of Sen. Hillhouse).

181. U.S. CONST. amend. XXIII.

182. See 106 CONG. REC. 12,553, 12,558, 12,571 (1960).

183. See *To Amend the Act of August 12, 1955, Relating to Elections in the District of Columbia: Hearing on H.R. 5955 Before the H.R. Subcomm. No. 3 of the Comm. on the D.C.*, 87th Cong. 133 (1961) (statement of Rep. Huddleston). The law provides no legal consequences but requires that an elector must “take an oath or solemnly affirm that he or she will vote for the candidates of the party he or she has been nominated to represent, and it shall be his or her duty to vote in such a manner in the electoral college.” D.C. CODE § 1-1001.08(g)(2) (2020). In 2000, Congress declined to enforce this binding statute when one of

Congress has also never failed to count a faithless elector and has only debated the issue once.¹⁸⁴ In 1969, six senators and thirty-seven representatives objected to a North Carolina vote for George Wallace even though Richard Nixon won the state's popular vote.¹⁸⁵ There was an extensive debate, but many members of both houses thought that electors were independent.¹⁸⁶ The House voted 228 to 170 and the Senate voted 58 to 33 to accept the vote.¹⁸⁷ On many occasions, Congress has affirmed elector independence through its statements, its inability to pass any amendments or legislation, and its inaction in faithless elector scenarios.¹⁸⁸

B. *The Constitutionality of Binding Statutes*

This section presents the main argument that binding statutes are constitutional because a state has plenary authority over its electors. The historical usage of this state authority and the practical implications of the Electoral College support this understanding.

1. Nothing in the Twelfth Amendment Prohibits Binding Statutes

Nothing in the text of the Twelfth Amendment suggests that electors have the discretion to vote without limitation by the state.¹⁸⁹ For primary elections, the Supreme Court, in *Ray*, explicitly rejected “the argument that the Twelfth Amendment demands absolute freedom for the elector to vote his own choice, uninhibited by a pledge” because of the “long-continued practical interpretation of the constitutional propriety” of pledges.¹⁹⁰ While the Court left open the question of whether pledges are enforceable under the Twelfth Amendment, nothing in the *Ray* decision suggests that pledges would not be.¹⁹¹

its electors abstained from voting. See Brief for Appellants at 48, *Baca v. Colo. Dep’t of State*, 935 F.3d 887 (10th Cir. 2019), cert. granted, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.).

184. See *Electoral College*, supra note 17; see also 163 CONG. REC. H185–89 (daily ed. Jan. 6, 2017) (counting the faithless votes from 2016).

185. See generally 115 CONG. REC. 146 (1969).

186. See, e.g., *id.* at 148 (statement of Rep. McColloch) (“[T]he electors are constitutionally free and independent in choosing the President and Vice President.”); *id.* at 157 (statement of Rep. Poff) (“However, this language [of Article II, § 1, cl. 2] does not empower the States to deprive electors, once appointed, of their free choice in the electoral college.”); *id.* at 203–04 (statement of Sen. Ervin) (stating that the Constitution makes clear that Congress cannot “take what was an ethical obligation and convert it into a constitutional obligation”).

187. See *id.* at 170, 246.

188. See PEIRCE & LONGLEY, supra note 46, at 131 (stating that Congress has offered over 513 amendments regarding the Electoral College, but only one—the Twelfth Amendment—passed).

189. See *In re Guerra*, 441 P.3d 807, 814 (Wash. 2019), cert. granted sub nom. Chiafalo v. Washington, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-465) (mem.).

190. *Ray v. Blair*, 343 U.S. 214, 228–29 (1952).

191. See *In re Guerra*, 441 P.3d at 816; see also *Koller v. Brown*, 224 F. Supp. 3d 871, 878–79 (N.D. Cal. 2016) (“Though the constitutionality of general election pledges for electors was left undecided in *Ray*, it is possible if not likely the Court would apply the same realistic approach when examining state-imposed restrictions on presidential electors.”).

Further, the notion that the term “ballot” suggests that electors have a right to secrecy and discretion is disputable.¹⁹² Since the Twelfth Amendment requires that electors vote distinctly for president and vice president and prohibits them from voting for two candidates from the same state, anonymity would be impossible because Congress, when counting the votes, would have no way of knowing whether the elector adhered to these rules.¹⁹³ Additionally, historical practices of both the states and Congress provide ample evidence for rejecting the assumption that the “ballots” are secret.¹⁹⁴

2. States Have Broad Powers to Appoint Electors

While it is undisputed that electors perform a federal function, they do so on behalf of the states that appoint them.¹⁹⁵ Although the Supreme Court acknowledged in *Burroughs* that electors perform a federal function, the Court also recognized that federal authority was limited in interfering “with the power of a state to appoint electors or the manner in which their appointment shall be made.”¹⁹⁶ In *In re Green*,¹⁹⁷ the Court stated that “[t]he sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation.”¹⁹⁸ Further, when the Supreme Court has struck down state interference with federal functions under the Supremacy Clause, it did so because the actors were acting under federal authority.¹⁹⁹ In contrast, electors “act by authority of the state that in turn receives its authority from the Federal Constitution.”²⁰⁰ The Supreme Court in *Ray* confirmed that the Constitution grants broad authority to the states under the Twelfth Amendment.²⁰¹

The states’ power to appoint electors is also plenary and exclusive.²⁰² The Twelfth Amendment’s language provides that the state legislature may

192. *In re Guerra*, 441 P.3d at 816 n.8.

193. Brief for Derek T. Muller as Amicus Curiae Supporting Neither Party at 4–5, *Baca v. Colo. Dep’t of State*, 935 F.3d 887 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.) [hereinafter Muller Brief]; *see also* ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 57–58 (1994) (concluding that the Constitution does not require secret ballots).

194. *See* Muller Brief, *supra* note 193, at 6; Natalie Brand, *Washington State Electors Vote for Clinton, Powell, Faith Spotted Eagle*, KING5 NEWS (Dec. 20, 2016), <https://www.king5.com/article/news/politics/washington-state-electors-vote-for-clinton-powell-faith-spotted-eagle/281-373558515> [<https://perma.cc/5XCP-ARDA>].

195. *See In re Green*, 134 U.S. 377, 378–80 (1890).

196. *Burroughs v. United States*, 290 U.S. 534, 544 (1934).

197. 134 U.S. 377 (1890).

198. *Id.* at 379.

199. *See, e.g., Leser v. Garnett*, 258 U.S. 130, 137 (1992) (“[A] federal function derived from the Federal Constitution . . . transcends any limitations sought to be imposed by the people of a State.”); *Hawke v. Smith*, 253 U.S. 221, 230 (1920).

200. *Ray v. Blair*, 343 U.S. 214, 224–25 (1952).

201. *Id.*; *see also Burroughs*, 290 U.S. at 544; *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

202. *See Ray*, 343 U.S. at 227; *McPherson*, 146 U.S. at 35; *see also Williams v. Rhodes*, 393 U.S. 23, 34 (1968) (stating that states have “broad powers to regulate voting, which may include laws relating to the qualification and functions of electors”).

appoint electors “in such manner as the Legislature thereof may direct.”²⁰³ Therefore, this power to appoint could encompass the power to remove. If it did not, then the states would have no ability to enforce their authority over their electors.²⁰⁴ Additionally, the analogy comparing electors to federal judges or senators (appointed by the state legislatures before the Seventeenth Amendment) is seemingly incorrect. Judges and senators are federal officers protected by specific constitutional provisions against removal or the attachment of certain conditions.²⁰⁵

The ability to add qualifications or conditions to electors may also be permitted under the Constitution. Nothing in the Constitution prohibits states from attaching a condition or qualification to the appointment of electors.²⁰⁶ In fact, the Supreme Court, in *McPherson*, determined that states have the power to “define the method of effecting the object” of appointing the electors.²⁰⁷ Because the states have this exclusive power to appoint, they are permitted to attach conditions, such as those binding electors to the state’s popular vote.²⁰⁸ Further, even the Tenth Circuit originally rejected this argument by concluding that “a statutory requirement to vote in a certain way . . . is more in the way of a duty than a qualification.”²⁰⁹

3. An Inconsistent Viewpoint Among the Framers and a Consistent Understanding in History Suggest That States Can Bind Electors

Since the framers did not contemplate the modern-day concepts of political parties, national primary campaigns, pledges, or faithless electors, they never had reason to impose any restrictions on states binding their electors.²¹⁰ Further, such contemplation did not take place at any point during the Constitutional Convention, where an issue like this would have been raised.²¹¹

203. U.S. CONST. art. II, § 1, cl. 2; *see also* 115 CONG. REC. 163 (1969) (statement of Rep. Fraser) (“This language is a general grant of power, broadly drawn, which does not circumscribe the procedures under which the States may choose electors.”).

204. *See* *Burnap v. United States*, 252 U.S. 512, 515 (1990) (“The power to remove is, in the absence of any statutory provision to the contrary, an incident of the power to appoint.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (“[E]very right, when withheld, must have a remedy . . .”).

205. Brief for Appellee at 44, *Baca v. Colo. Dep’t of State*, 935 F.3d 887 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.).

206. *See* U.S. CONST. art. II, § 1; *see also* U.S. CONST. amend. XII.

207. *See McPherson*, 146 U.S. 1 at 27.

208. *See* Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 678 (1996) (“The states’ constitutional power to appoint electors would appear to include the power to bind them.”).

209. *Baca v. Hickenlooper*, No. 16-cv-02986-WYD-NYW, 2016 U.S. App. LEXIS 23391, at *13–14 (10th Cir. Dec. 21, 2016).

210. *See* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1658 (2002).

211. *See* HARDAWAY, *supra* note 193, at 85. Robert M. Hardaway further argues that “[i]t was doubtless envisioned that the entire process of electing electors and determining their characteristics would be an evolutionary one.” *Id.*

During the ratifying conventions and the debates about the Constitution, the framers expressed contradictory views on the role of presidential electors.²¹² Despite the strong suggestion that Hamilton intended electors to be independent, he also expressed in *Federalist No. 68* the idea that “the people should operate in the choice” of the president.²¹³ Additionally, in *Federalist No. 45*, James Madison wrote that the state legislatures “must in all cases have a great share in [the president’s] appointment, and will, perhaps, in most cases, of themselves determine it.”²¹⁴ Along with Madison, other framers such as James Wilson, Gouverneur Morris, and Roger Sherman also expressed the sentiment that the president would be elected by the people, which seemingly contradicts the belief that electors would be independent.²¹⁵

The experience during the first years of the Electoral College, before the ratification of the Twelfth Amendment, suggests that electors did not have discretion.²¹⁶ As early as the first election, electors made pledges to specific candidates and were not known to exhibit absolute discretion in voting for the president.²¹⁷ In subsequent elections, the public understood electors to be pledged to a certain party and expected them to support their candidates.²¹⁸

212. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) (writing that conflicting statements on both sides of an issue cannot be readily relied on).

213. THE FEDERALIST NO. 68, *supra* note 37, at 410. Some commentators have explained that Hamilton sometimes expressed contradictory views based on the audience he was trying to persuade to ratify the Constitution. See HARDAWAY, *supra* note 193, at 85–86.

214. THE FEDERALIST NO. 45, at 287 (James Madison) (E. H. Scott ed., 1898).

215. See BENNETT, *supra* note 27, at 15–16. For example, on January 7, 1787, Roger Sherman wrote in *The Connecticut Courant* that the president would be appointed “in a manner . . . wisely adapted to concentrate the general voice of the people” and that the president “depends upon the people.” A Citizen of New Haven, *supra* note 169, at 532. Another example occurred when Hamilton advocated for ratification in New York, stating that “[t]he legislatures are to provide the mode of electing the President, and must have a great influence over the electors.” *Convention of New York, in THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, *supra* note 170, at 211, 304 (statement of Alexander Hamilton).

216. See *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) (expressing the idea that the actions of some of the framers shortly after the Constitution’s ratification are strong evidence of constitutional meaning and intent).

217. Most electors informally pledged loyalty to a certain party. For example, a Pennsylvania Federalist slate of electors pledged to vote for someone—presumably John Adams—who would continue the policies of George Washington. O’NEIL, *supra* note 174, at 65. This slate produced the nation’s first “faithless elector,” Samuel Miles, who was pressured to fulfill the will of the people of Pennsylvania who voted for Thomas Jefferson. See *id.* Reacting to Miles’s decision to ignore his pledge, a critic in a Philadelphia newspaper wrote, “What, do I chuse [sic] Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse [sic] him to *act*, not *think*.” BENNETT, *supra* note 27, at 102; see also *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 948 (10th Cir. 2019), *cert. granted*, 140 S. Ct. 918 (Jan. 17, 2020) (No. 19-518) (mem.). Another newspaper, the *New York Diary*, expressed disappointment that the election was not a “decided expression of the public voice” and that a uniform rule was needed. See O’NEIL, *supra* note 174, at 66.

218. See *McPherson v. Blacker*, 146 U.S. 1, 36 (1892) (“[E]xperience soon demonstrated that . . . [electors] were so chosen simply to register the will of the appointing power in respect

One reason that the public expected electors to transmit the state's popular vote was the widespread use of the "short-form" presidential ballot.²¹⁹ A short-form ballot is a ballot that only contains the names of the presidential and vice-presidential candidates, excluding the names of the electors.²²⁰ A vote for the party's candidates is a vote for that party's electors.²²¹ First created by Nebraska in 1917, the development of these types of ballots simplified the ballot for the average voter.²²² The Supreme Court, in *Ray*, recognized this reality and determined that this practice weighed "heavily in considering the constitutionality of a pledge."²²³ Since most states do not print the names of electors on the ballots, voters are choosing unknown people who they expect to vote for their party's nominee.²²⁴

As Congress debated the Twelfth Amendment, most congressmen knew that pledges were being used during elections and did not include anything in the Amendment to prohibit the practice.²²⁵ One congressman remarked that "[w]ise and virtuous as were the members of the Convention, experience has shown that the [Electoral College] therein adopted cannot be carried into operation" and "[t]herefore, practically, the very thing is adopted, intended by this amendment."²²⁶ Many other statements from legislators also indicated that electors were agents of the people and did not have the ability to exercise discretion.²²⁷ At the time the Twelfth Amendment was ratified, there were also state laws that replaced or fined electors who failed to carry out their duties.²²⁸ Despite substantial debate, the Twelfth Amendment did

of a particular candidate."); *see also* 115 CONG. REC. 149 (1969) (statement of Rep. Celler) ("This traditional ministerial function of the electors has become sacred."). James Russell Lowell, an elector in 1876, said of his decision to vote for Rutherford B. Hayes and not Samuel Tilden:

I have no choice, and am bound in honor to vote for Hayes, as the people who chose me expected me to do. They did not choose me because they had confidence in my judgment, but because they thought they knew what that judgment would be. It is a plain question of trust.

BENNETT, *supra* note 27, at 103.

219. *See* HARDAWAY, *supra* note 193, at 17.

220. *See* Spencer D. Albright, *The Presidential Short Ballot*, 34 AM. POL. SCI. REV. 955, 955 (1940).

221. *See* N.Y. ELEC. LAW § 12-100 (McKinney 2020).

222. *See* Albright, *supra* note 220, at 956, 958.

223. *Ray v. Blair*, 343 U.S. 214, 230 (1952).

224. *See The Electoral College*, NAT'L CONF. ST. LEGISLATURES (Jan. 6, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx#2016%20dates> [<https://perma.cc/ST6S-8VXJ>].

225. *See* U.S. CONST. amend. XII.

226. 11 ANNALS OF CONG. 1289 (1802) (statement of Rep. Mitchell).

227. *See* 115 CONG. REC. 162 (1969) (statement of Sen. Breckinridge) ("If any principle is more sacred and all-important for free government it is that elections should be as direct as possible And if it were practicable to act without any agents in the choice, that would be preferable even to the choice by Electors."); *id.* at 163 (statement of Rep. Clopton) ("The Electors are the organs, who, acting from a certain and unquestioned knowledge . . . select and announce those particular citizens, and affix to them by their votes and evidence of the degree of public confidence which is bestowed upon them.").

228. *See* Muller Brief, *supra* note 193, at 16.

not address whether these pledges were prohibited or whether states were restricted in enacting these types of laws.²²⁹

Congress has also given the states broad power to appoint their electors. Congress has passed legislation giving the states exclusive power to make a “final determination” over “any controversy or contest” over the appointment of an elector.²³⁰ Additionally, when Congress passed the Twenty-Third Amendment, it also passed a law that binds the District of Columbia’s electors to the district’s popular vote.²³¹ One court reasoned that this indicates that Congress explicitly favors binding an elector’s vote to the popular vote of the state.²³²

Additionally, while it is true that Congress has never failed to count a faithless vote, it is also true that Congress has never failed to count a vote that was bound by state law.²³³ Congress has objected to electoral votes numerous times in the past, but no electoral votes have ever been overturned.²³⁴ In the 1969 debate over the North Carolina elector who voted for George Wallace over Richard Nixon, Congress ultimately counted the single Wallace vote but did so in large part because North Carolina had no binding statute.²³⁵

III. ALL POLITICS (SHOULD BE) LOCAL

The Supreme Court’s narrow ruling in *Ray*, which limited its decision to primary elections, led the Tenth Circuit to override decades of practice and state law.²³⁶ This Part advocates for the Washington State Supreme Court’s position that states have exclusive control over electors and that binding statutes are constitutional. It analyzes the strongest arguments for this position and addresses certain arguments not discussed by the courts. Finally, it implores the Supreme Court to definitively rule on the issue and discusses the effects that such a ruling might have on future elections.

229. See *United States v. Sprague*, 282 U.S. 716, 732 (1931) (“The fact that an instrument drawn with such meticulous care . . . does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended.”).

230. See 3 U.S.C. § 5 (2018) (stating that state laws that make a “final determination of any controversy or contest concerning” electors are “conclusive, and shall govern in the counting”).

231. See D.C. CODE § 1-1001.08(g)(2) (2020).

232. See *Baca v. Hickenlooper*, No. 16-cv-02986-WYD-NYW, 2016 U.S. Dist. LEXIS 177991, at *7 (D. Colo. Dec. 21, 2016) (“Federal law supports the notion that the State’s requirement that presidential electors pledge to vote for a particular candidate, in conformity with State law, is constitutional.”).

233. See, e.g., 163 CONG. REC. H185–89 (daily ed. Jan. 6, 2017).

234. See generally 115 CONG. REC. 146 (1969) (debating the electoral vote in North Carolina).

235. See, e.g., *id.* (statement of Rep. Jonas) (“[T]he responsibility rests on the State of North Carolina and the other States of the Union to make it impossible in the future for the election of a President of the United States to turn on the whim or predilection of individual electors.”); *id.* at 149 (statement of Rep. McColloch) (“But what law—State or Federal—did he violate? I find none.”).

236. See *supra* Parts I.D, II.A.

A. *More Than Two Hundred Years of Practical Experience Favors State Control over Electors and Binding Statutes*

The universal and unchallenged use of the presidential short-form ballot is a strong indication that electors should not be independent.²³⁷ Since 1860, states have chosen to appoint their electors according to the will of the state's popular vote.²³⁸ With the advent of the short-form presidential ballot in 1917, excluding the names of electors from the ballot further supports the argument that electors cannot have the independence to choose whomever they want for president.²³⁹ Most voters assume that they are casting their votes for the candidates named on the ballot. No state ballot indicates that citizens are actually casting votes for electors who may ignore their votes and choose someone else. The concept of the unknown elector strongly suggests that electors simply exist to register the will of the popular vote. Allowing independent electors would thus be tantamount to a fraud upon the voter because their vote could be ignored in favor of another candidate. Voters likely do not know who the electors are. Additionally, because electors are relatively unknown, they cannot be held accountable by the voting public like other elected officials.²⁴⁰ The unchallenged use of the short-ballot perpetuates the understanding that electors should follow the popular vote.²⁴¹

Further, the long-standing interpretation of an elector's role by the framers, Congress, and the courts gives no indication that electors can vote contrary to state law or the popular vote. During the Constitutional Convention, the framers did not discuss an elector's independent role.²⁴² Afterward, many framers disagreed as to electors' exact role.²⁴³ Scholars often cite *Federalist No. 68* as evidence that the framers understood electors to be independent.²⁴⁴ This, however, is the work of one framer—Alexander Hamilton—who was known to tailor his writing to its intended audience.²⁴⁵ Other framers, such as James Madison, James Wilson, and Roger Sherman, argued that the president should ultimately be chosen by the people, contradicting their own previous statements.²⁴⁶ The opinion of one framer in one piece of writing should not be taken as authoritative proof of the framers' collective intent where contradictory statements by other framers exist.²⁴⁷

237. See *supra* notes 221–24 and accompanying text.

238. South Carolina was the last state to allow its state legislature to choose its electors, permitting this activity until 1860. See PEIRCE & LONGLEY, *supra* note 46, at 248.

239. See *supra* notes 221–24 and accompanying text.

240. See *supra* notes 221–24 and accompanying text.

241. See *supra* notes 221–24 and accompanying text.

242. See *supra* Part I.B; see also *supra* notes 210–11 and accompanying text. Notably, Alexander Hamilton never expressed the view that electors should be independent during the Convention. See HARDAWAY, *supra* note 193, at 85.

243. See *supra* notes 212–18 and accompanying text.

244. See *supra* notes 159–63 and accompanying text.

245. See *supra* note 213 and accompanying text.

246. See *supra* note 215 and accompanying text.

247. See *supra* note 212 and accompanying text. Hardaway presents an interesting argument undermining the idea that one framer's view on a constitutional issue should be the authoritative source. See HARDAWAY, *supra* note 193, at 85–86. He explains that Hamilton also advocated that the president should be elected for life and that if reformers were to

In the early years of the United States, electors were not known to have independence. In the first election, Alexander Hamilton, for political reasons, tried to persuade electors to cast a single vote for George Washington instead of casting votes for both Washington and Adams.²⁴⁸ While this may suggest that Hamilton understood electors to be free agents, it may indicate more significantly that he did not actually expect electors to use their own judgment. In fact, he did not want the electors to extensively debate the merits of each candidate.²⁴⁹ Notably, in *Federalist No. 68*, Hamilton explained that electors should be “free from any sinister bias” and that they were to choose a president after a thorough “investigation.”²⁵⁰ Hamilton’s actions undermined his words; there was no investigation here.

When Congress debated the Twelfth Amendment, many of the original framers then living did not discuss the independence of electors, even though pledges and political parties were already an important part of elections at the time.²⁵¹ These framers extensively debated revising Article II’s provision that electors must vote for two candidates for president but did not debate explicitly restricting a state’s broad authority over electors.²⁵² Congress ratified the Twelfth Amendment merely as a bookkeeping provision to eliminate the confusion experienced during the 1800 election, when the House went through thirty-six rounds of voting to choose the president.²⁵³ They did not write anything into the Constitution that prohibited these pledges, despite knowing of their existence and their widespread usage.²⁵⁴

Congress has the exclusive right to object to an electoral vote, and courts should not interfere with Congress’s constitutional right to dispute electoral votes.²⁵⁵ Congress has historically assumed that states have exclusive authority over electors and that electors’ votes should mirror the popular votes of their states.²⁵⁶ In the 1969 debate over a faithless elector in North Carolina, Congress counted the faithless vote.²⁵⁷ This singular vote, however, should not suggest direct congressional acceptance of elector independence over state authority. In voting to count the faithless vote, many members cited North Carolina’s lack of a law binding its electors.²⁵⁸ If there

propose a president-for-life amendment today, “doubtless [these reformers] could also cite Hamilton’s view in that regard as authoritative.” *See id.* at 86.

248. *See supra* notes 172–73 and accompanying text.

249. *See supra* notes 172–73.

250. *See* THE FEDERALIST NO. 68, *supra* note 37, at 410.

251. *See supra* Parts I.B., II.A.3, II.B.3.

252. *See supra* notes 176–80, 225–29 and accompanying text.

253. *See* Brief for Appellee, *supra* note 205, at 45; PEIRCE & LONGLEY, *supra* note 46, at 40.

254. *See supra* Part II.B.1.

255. *See supra* note 230; *see also* 115 CONG. REC. 147 (1969) (statement of Rep. Edmondson) (observing that counting votes is “an absolute power possessed by the House and the Senate”).

256. *See supra* Part II.B.3.

257. *See supra* notes 233–35 and accompanying text.

258. *See, e.g.*, 115 CONG. REC. 162 (1969) (statement of Rep. Galifianakis) (“The first question is whether or not there are, in the laws of the State of North Carolina, provisions which require an elector to cast his vote for the candidates of the party he represents.”); *id.* at

had been a law, it might have changed their vote.²⁵⁹ Additionally, some members agreed that states can enact laws to prevent faithless votes.²⁶⁰

In 2017, many legislators attempted to object to electoral votes from different states, but Congress did not debate them.²⁶¹ Despite the controversies regarding binding statutes in California, Colorado, Minnesota, and Washington, no representative raised any objections to these electoral votes.²⁶² While it is true that Congress has never rejected a faithless elector's vote, it is equally true that the only time a state enforced its binding statute and removed a faithless voter (which is what happened in Colorado in 2016), Congress nevertheless accepted that vote.²⁶³

Congress also explicitly approved of binding statutes when it enacted the District of Columbia's binding statute after the Twenty-Third Amendment.²⁶⁴ Even though there is no enforcement mechanism in the binding law, the enactment of the law reveals that Congress wants electors to manifest the will of a state's popular vote.²⁶⁵ Despite one representative's statement that the law would only have "moral suasion," the statute is an implicit approval of the long-standing practice of binding statutes.²⁶⁶

Historically, courts have also granted states exclusive authority over their electors and have favored voters over elector independence.²⁶⁷ In *Ray*, while ruling on pledges in primaries, the Supreme Court rejected the argument that the Twelfth Amendment demanded absolute freedom for electors.²⁶⁸ The Court also ruled that the Constitution did not grant a right for electors to vote based on their individual preferences.²⁶⁹ In his dissent, Justice Jackson ignored the framers' numerous inconsistent statements about elector independence and oversimplified the Constitution in stating that it implied elector independence.²⁷⁰ While he was correct that custom is not sufficient authority to amend the Constitution, a "constitutional generality" or vagueness, such as the Twelfth Amendment's language describing the elector's role, should be interpreted with an eye toward years of political

166 (statement of Rep. Fountain) ("A moral obligation and a legal requirement . . . are two different things.").

259. *See, e.g., id.* at 162 (statement of Rep. Henderson) ("[B]ut in the absence of . . . a State law spelling out clearly the duties of an elector, he has the legal, if not the moral, right to vote as he chooses."); *id.* at 167 (statement of Rep. Fountain) ("And in the absence of any such binding authority, Congress cannot alter the electoral vote of North Carolina.").

260. *See id.* at 150 (statement of Rep. Lennon) ("So, then, it becomes crystal clear that until such time as the State legislatures of the several States act . . . we are powerless to do anything.").

261. *See* 163 CONG. REC. H186–89 (daily ed. Jan. 6, 2017).

262. Some members of Congress attempted to challenge votes in the following states: Alabama, Florida, Georgia, Michigan, Mississippi, North Carolina, South Carolina, West Virginia, Wisconsin, and Wyoming. *See generally id.*

263. *See id.*

264. *See supra* notes 231–32 and accompanying text.

265. *See supra* notes 231–32 and accompanying text.

266. *See supra* notes 181–83 and accompanying text.

267. *See supra* notes 202–04 and accompanying text.

268. *See supra* notes 79–88 and accompanying text.

269. *See supra* notes 79–88 and accompanying text.

270. *See supra* notes 87–88 and accompanying text.

practice.²⁷¹ Justice Jackson also considerably overstated the majority's ruling as "entrench[ing] the worst features of the system."²⁷² The majority's decision was simply a practical remedy for a quirk in the electoral system that was seemingly not going to be fixed by constitutional amendment or by Congress. Additionally, nearly all federal and state courts before and after *Ray* have consistently upheld the constitutionality of binding statutes.²⁷³ In 2019, however, the Tenth Circuit overturned Colorado's binding law and became the first court in history to strike down any binding statute, despite the long history of explicit approval of Congress and the framers.²⁷⁴

B. How Binding Statutes Address Constitutional Inconsistencies and Concerns

A state's authority over its electors is exclusive and comprehensive.²⁷⁵ Nothing in the Constitution prohibits the states from establishing elector pledges or removing an elector who refuses to comply with the conditions of his or her appointment.²⁷⁶ The Twelfth Amendment restricts an elector in two ways: (1) an elector must vote separately for president and vice president and (2) the two candidates must be from different states.²⁷⁷ These limitations, however, are not meant to be exhaustive because the states have plenary power over elector appointment.²⁷⁸ The two leading Supreme Court cases that restrict the addition of conditions not explicitly expressed in the Constitution are not applicable to electors since the cases dealt with elected officials; electors are distinguishable because they are appointed.²⁷⁹ Furthermore, if the framers had wanted to prohibit binding statutes, they could have explicitly stated as much in the Constitution. The framers were aware of the pre-Constitution Maryland model, under which electors had complete discretion in choosing state senators.²⁸⁰ Had the framers intended electors to have complete discretion, they could have used the explicit Maryland language.

Additionally, binding statutes directly address some of the concerns the framers had during the convention. In the debate regarding the selection of the president, the framers were concerned that the legislative branch would have too much control over the executive branch.²⁸¹ These concerns led the

271. *See Ray v. Blair*, 343 U.S. 214, 233 (1952) (Jackson, J., dissenting).

272. *Id.* at 234.

273. *See supra* Part I.D.

274. *See supra* notes 102–05 and accompanying text.

275. *See supra* notes 75–76 and accompanying text.

276. *See supra* Parts II.B.1–2.

277. *See supra* notes 224–25 and accompanying text.

278. *See supra* notes 206–09 and accompanying text.

279. *See* U.S. CONST. amend. XII (“[E]ach state shall *appoint* . . . a number of electors.”) (emphasis added); *cf.* *South Dakota v. Dole*, 483 U.S. 203, 206 (1996) (giving Congress the power to attach conditions to its constitutional spending power). *See generally* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (resting on explicit language in Article I, § 2); *Powell v. McCormack*, 395 U.S. 486 (1969) (limiting congressional, not state authority).

280. *See supra* notes 155–58 and accompanying text.

281. *See supra* Part I.B.

framers to substitute the Electoral College for their original proposal, in which the legislators would directly choose the president.²⁸² Binding statutes do not direct an elector to vote for a specific candidate or party. They direct an elector to vote based on the state's popular vote. Thus, the effect of the binding statutes is to have the voters of the state, not the state legislatures, choose the president. The fear that the executive would be unduly influenced by the legislators is unfounded since these laws place the ultimate authority with the people of the state.²⁸³

Binding statutes also diminish corruption concerns. In *Federalist No. 68*, Hamilton endorsed the practice of choosing an executive that would most avoid "cabal, intrigue, and corruption."²⁸⁴ If electors were not bound by state law, they would certainly be more susceptible to corruption.²⁸⁵ What would stop an ambitious losing presidential candidate from bribing electors to ignore their pledges and vote for them? Such a distressing scenario is not so far-fetched. For example, before the election in 2000, both Al Gore and George W. Bush developed a strategy to persuade electors to vote against their state's popular vote.²⁸⁶ Electors are less likely to experience nefarious or political influence with binding statutes in place because these laws institute legal mechanisms preventing an elector from pursuing selfish goals.

While a strict interpretation of the use of the term "electors" in Article II of the Constitution favors treating them the same as the "electors" referenced in Article I, certain facts suggest that Article II electors should not be treated the same way.²⁸⁷ Article I electors (or the general public) vote for Congress, and no one has ever disputed the unconstitutionality of laws directing how these "electors" can vote. Article I electors, however, cast their votes on secret ballots, which would be impossible for Article II electors based on procedure.²⁸⁸ Electors cannot vote for two candidates from the same state.²⁸⁹ The only way to enforce this provision is to look at each elector's ballot to ensure that they have complied.²⁹⁰ Furthermore, Article II electors are appointed by the state—as opposed to Article I electors, who constitute the general public.²⁹¹

C. Too Close to Call: Unintended Consequences and a Supreme Court Ruling

Ultimately, there are only two ways to settle the issue of the constitutionality of elector independence and binding statutes: a constitutional amendment or a Supreme Court ruling. Because of the

282. See *supra* notes 160–61 and accompanying text.

283. See *supra* notes 163–66 and accompanying text.

284. See *supra* notes 160–61 and accompanying text.

285. See *supra* notes 172–73 and accompanying text.

286. See Alexander, *supra* note 51, at 162–63.

287. See *supra* notes 120–23 and accompanying text.

288. See *supra* notes 192–94 and accompanying text.

289. See U.S. CONST. amend. XII.

290. See *supra* notes 115–19, 192–94 and accompanying text.

291. See *supra* notes 120–23 and accompanying text.

rigorous process for amending the Constitution, the easier route would be a Supreme Court ruling.²⁹² The Court will hear the *Baca* case on April 28, 2020, and should issue an opinion on June 29, 2020.²⁹³ Some argue that by reaching an opinion in June, six months before the presidential election and before either party's nominating convention, the Court will preserve its impartiality by resolving the issue "outside of the white-hot scrutiny of a contested presidential election."²⁹⁴

While this Note advocates that the Court should rule in the states' favor, it acknowledges some negative effects that such a ruling could have. If the Court holds binding statutes and their enforcement constitutional, a state could conceivably enact a law binding electors to vote for a specific party.²⁹⁵ The New Jersey and New York state legislatures have already introduced partisan bills.²⁹⁶ These bills would prevent electors from voting for candidates who do not release copies of their recent tax returns.²⁹⁷ A favorable Supreme Court ruling could open the door to many states proposing similar partisan statutes.

This Note argues, however, that slippery-slope concerns about states passing binding statutes motivated by partisan objectives are unfounded. Laws binding electors to the popular vote of a state have less nefarious purposes. These laws are neutral because they are only meant to reflect the popular sentiment that "history has now favored the voter."²⁹⁸

Restricting an elector's independence may also create unanticipated complications in the case of a candidate who dies after Election Day but before the electors' meeting in December.²⁹⁹ Binding statutes would force electors into the absurd position of voting for a deceased candidate. Representative William Moore McCulloch expressed this concern during the 1969 debate over the North Carolina faithless elector, saying that the electoral system "necessitates that the electors remain free and independent because the people's choice may have died" between November and December.³⁰⁰ While resolving this concern is outside the scope of this Note, a ruling that would require electors to comply with binding statutes might pose complications. In this regard, a ruling in the states' favor could, however, force legislators to directly address the issue of a candidate's

292. See U.S. CONST. art. V.

293. See *supra* note 13.

294. See Adam Liptak, 'Faithless Electors' Could Tip the 2020 Election. Will the Supreme Court Stop Them?, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/us/politics/supreme-court-faithless-electors-2020.html> [<https://perma.cc/2BBB-J65L>].

295. See *Powell v. McCormack*, 395 U.S. 486, 553 (1969) (stating that nothing could prevent the passage of laws that would restrict a communist or a socialist from being elected to Congress).

296. See Brief for Appellants, *supra* note 183, at 55–56. In 2016, this was a partisan issue because the Republican candidate, Donald Trump, refused to release his tax returns.

297. A court, however, would likely find these bills unconstitutional because they would explicitly add a qualification for president that is not stated in the Constitution. See *supra* notes 128–31 and accompanying text.

298. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

299. See *supra* note 60.

300. See 115 CONG. REC. 148 (1969) (statement of Rep. McCulloch).

potential death—an area of presidential election law that has received little attention.³⁰¹

A narrow ruling by the Court could alleviate some of these concerns. The Court could, for example, rule that certain binding statutes are constitutional, while others are not. While some binding statutes impose penalties on faithless electors, most have no consequences.³⁰² Further, the penalties for faithless electors differ based on the enforcement mechanisms.³⁰³ Ultimately, the Court could tailor its ruling to the different penalties. The old law in Washington that imposed a fine may be more likely to pass constitutional muster than the Colorado law, which removes an elector and cancels their vote.³⁰⁴ The Court could find that the Colorado law directly interferes with the voting process outlined in the Twelfth Amendment, while the old Washington law does not because it imposed a fine after voting ended.³⁰⁵ Other states might want to model their binding statutes after the old Washington law because the pressure of a severe fine could produce the same desired result as more enforcement-driven laws.

A ruling against the states may focus attention on the shortcomings of the Electoral College.³⁰⁶ Lawrence Lessig, a Harvard professor who filed a brief on behalf of the electors from Washington, believes that a ruling for elector independence “could also convince both sides that it is finally time to step up and modify the Constitution to address this underlying problem.”³⁰⁷ Similar to Justice Jackson in *Ray*, Lessig and others who agree with his position believe that, if the Court ruled in favor of the states, it would only mask a small defect and ignore a system that is wholly wrong and in need of substantial reform.³⁰⁸ This argument, however, is too pessimistic. A ruling for the states would simply affirm state authority over electors in the thirty-two states that have binding statutes. It is hard to fathom that such a ruling would silence the prominent calls to reform the Electoral College.³⁰⁹ Additionally, this specific issue does not address those reformers’ main concerns with the Electoral College. In fact, reform efforts are generally concerned with certain states’ oversized importance in general elections and the diminished role of other states and not with the chance that a faithless

301. *See supra* note 60.

302. *See supra* Part I.C.

303. *See supra* Part I.C.

304. Compare WASH. REV. CODE § 29A.56.330 (repealed 2019), with COLO. REV. STAT. § 1-4-304(5) (2020).

305. *See supra* note 60.

306. *See* Liptak, *supra* note 294.

307. *See id.*

308. *See supra* note 272 and accompanying text.

309. Thirteen current and former 2020 Democratic presidential candidates were open to reforming or abolishing the Electoral College. *See* Kevin Uhrmacher et al., *Where 2020 Democrats Stand on Democratic Changes*, WASH. POST (Feb. 12, 2020), <https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/> [https://perma.cc/RSY8-NNU5].

vote could tip an election.³¹⁰ Just in accepting the case, the Supreme Court has thrust the Electoral College into the spotlight in the middle of a presidential election and intensified calls for reform.³¹¹ A ruling that affirms state authority and the constitutionality of binding statutes would simply be a practical remedy for a quirk in the system that would have an instant impact on the 2020 election.

CONCLUSION

After the Tenth Circuit's August 2019 decision, the constitutionality of binding statutes is now, for the first time, in doubt. While a strict interpretation of the Constitution suggests that the elector has the freedom to vote independently, regardless of any state law, the immediate early usage and long-standing historical understanding of an elector's role suggest the opposite: binding statutes and their enforcement should be recognized as constitutional. Universal acceptance of binding statutes and short-form ballots should overcome vague constitutional language and the framers' inconsistent statements and actions.

This major Electoral College shortcoming is in urgent need of reform. In 2016, seven electors cast their votes for someone other than the candidate they were required to vote for by law.³¹² A swing of that many electors could have changed the outcomes of five of the previous fifty-eight presidential elections.³¹³ It is imperative that the Supreme Court rule on this issue and affirm the Washington State Supreme Court's decision before a faithless elector changes the outcome of a presidential election.

310. For example, Senator Bernie Sanders, highlighting the importance of certain states, stated that "presidential elections cannot be fought out in just a dozen 'battleground' states." *Id.*

311. See Nina Totenberg, *Supreme Court to Hear 'Faithless Elector' Case*, NPR (Jan. 17, 2020), <https://www.npr.org/2020/01/17/797472072/supreme-court-to-hear-faithless-electors-case> [<https://perma.cc/3K2T-5X5B>].

312. See *supra* note 5 and accompanying text.

313. See Liptak, *supra* note 294.