The Very Faithless Elector

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Francisco Partners

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THE VERY FAITHLESS ELECTOR?

Vasan Kesavan*

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I. INTRODUCTION

It is never too early to be thinking about our constitutional future. In less than thirty-six months, We the People will again vote for our next President and Vice President. Well, not exactly. Under our Constitution, our votes will not really count. We all know that we will vote for Electors who will in turn cast the necessary votes for our next President and Vice President. Much has been written about the Electoral College in years past and more attention has been paid to it in months past than ever before. Suffice it to say that nobody—in the legal academy at least—seems to like the present mode of Presidential election very much. According to Professor Levinson, "[O]nly the most blind ancestor worship can generate any affection at all for our present scheme of electing...our Chief Executive."¹ According to Professor Amar, the Electoral College mode of Presidential election is "a constitutional accident waiting to happen."² But it is

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* Vice President, Francisco Partners. J.D., Yale Law School, 2001. For their helpful comments and suggestions, thanks to Bruce Ackerman, Akhil Amar, Joel Goldstein, Kumar Kesavan, Jennifer Koester, Sandy Levinson, Mike Paulsen, and Nick Rosenkranz. Special thanks to Rob Alsop of the West Virginia Law Review.


² Akhil Reed Amar, A Constitutional Accident Waiting to Happen, 12 CONST. COMMENT. 143, 143 (1995). Indeed, the election of President George W. Bush is Professor Amar's "constitutional accident"—a President who wins the electoral vote, but loses the popular vote. The last
also fair to say that nobody – in the legal academy or elsewhere – has found a better mousetrap that commands public consensus, at least not just yet.

One of the many defects of the Electoral College that has received substantial scholarly attention over the years is the problem of the “faithless” Elector – the Elector who does not vote in accordance with the popular vote, but instead exercises her own discretion to vote for the candidate of her choice. To be sure, this problem received substantial popular attention in the Presidential election of 2000: Any two faithless votes by George W. Bush electors would have thrown the election into the House of Representatives, and any three faithless votes would have thrown the election to former Vice President Al Gore.

The Constitution does not, of course, mandate that Electors vote in accordance with the popular vote. But thankfully, the faithless Elector problem has been a very small one. Although there is no consensus on the exact number of faithless Electors since the Founding, it appears that only a dozen or so Electors have voted in contravention of the popular vote.

such constitutional accidents were the elections of President Benjamin Harrison in 1888 and President Rutherford B. Hayes in 1876. The election of President John Q. Adams in 1824 was a slightly different “constitutional accident”: Adams lost both the electoral vote and the popular vote to Andrew Jackson, but nevertheless became President pursuant to a special contingency election in the House of Representatives because Jackson failed to garner the requisite majority of electoral votes. See U.S. CONST. amend. XII (“The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for President, the House of Representatives shall choose immediately, by ballot, the President.”). In the Presidential election of 1828, Jackson defeated Adams handily.


4 The final electoral count for President was 271 votes for George W. Bush and 266 votes for Al Gore, see 147 CONG. REC. H44 (Jan. 6, 2001), but going into December 18, 2000 (the date specified by federal law for the meeting and voting of the Electors in the Electoral Colleges), the expected electoral count for President was 271 votes for Bush and 267 votes for Gore. One Gore-Lieberman elector from the District of Columbia did not cast her votes for President and Vice President in protest of the District’s lack of statehood. See Charles Babington, Electors Reassert Their Role; Bush Wins Vote; Protest Costs Gore, WASH. POST, Dec. 19, 2000, at A1.

5 See Ross & Josephson, supra note 3, at 667. The paradigm case is that of Samuel Miles, a Federalist Elector from Pennsylvania, who in 1796 voted for Democrat-Republican Thomas Jefferson instead of Federalist John Adams, prompting a Federalist voter to exclaim: “Do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be
The constitutional question is whether the *casus omissus* of the Constitution may be fixed short of constitutional amendment. Several States have responded to the faithless Elector problem by enacting laws that purport to "bind" Electors to vote in accordance with the popular vote; seven States have responded to the problem by enacting laws that purport to punish Electors for failing to do so. It is still an open question whether this "seemingly democratic practice" passes constitutional muster. The Supreme Court famously reserved the question whether Elector-binding laws are constitutional in footnote ten of *Ray v. Blair* which affirmed the constitutionality of Alabama's enforcement of a Democratic Party rule requiring candidates for the office of Elector to pledge support for the Party's nominee as a condition of ballot access.

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6 Some individuals have formally recommended that Congress propose a constitutional amendment to solve the problem of the faithless Elector, but Congress has not yet done so. In 1965, President Lyndon B. Johnson recommended a constitutional amendment in his State of the Union Message. See H.R. Doc. No. 1, 89th Cong., 1st Sess. 9 (1965); H.R. Doc. No. 64, 89th Cong., 1st Sess. 4 (1965). At least two Senators have also recommended a constitutional amendment to solve the problem of the faithless Elector - Senators Karl Mundt and Slade Gorton in 1969 and 1992, respectively. See Ross & Josephson, *supra* note 3, at 704 n.218.

7 See *Ross & Josephson, supra* note 3, at 690-91, 698.


9 343 U.S. 214 (1952).

10 See id. at 223 n.10. The principal argument against the constitutionality of Elector-binding laws is that such laws are plainly inconsistent with the original understanding. See, e.g., *The Federalist No. 68*, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation."); *Ray*, 343 U.S., at 232 (Jackson, J., dissenting) (describing original understanding that Electors "would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices"). It is at least somewhat of an open question whether the original understanding of 1787 is the correct original understanding for the purpose of evaluating the constitutionality of Elector-binding laws. The Twelfth Amendment, which replaced Article II, § 1, clause 3, was apparently adopted in part to vindicate majoritarian popular will. See Lolabel House, Twelfth Amendment of the Constitution of the United States 20-40 (1901) (unpublished Ph.D. dissertation, University of Pennsylvania).

Scholars remain split on the difficult question whether Elector-binding laws are constitutional. Professor Akhil Reed Amar once thought that *Ray v. Blair* "strongly suggests that states can bind [electoral] collegians any way they choose." Amar & Amar, *supra* note 8, at 943 n.86. He has since revised his position and now thinks that "the constitutionality of such [Elector-binding] laws seems highly dubious if we consult constitutional text, history, and structure." Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 219 (1994). See also id. at 230 ("The Constitution plainly con-
Putting this hard constitutional question aside for the moment, I want to draw your attention to a simpler and bigger defect in the Electoral College mode of Presidential election – and one that has been completely overlooked by scholars for over two hundred years: The problem of the “very faithless” Elector – the Elector who does not vote in accordance with the Constitution. Careful attention to the Oath or Affirmation Clause reveals that Electors are not bound by oath or affirmation to support the Constitution. Under our Constitution, the faithless Elector may be very faithless! This is a first-class constitutional stupidity because Electors are responsible for electing an entire branch of Government.

The Constitution somewhat circumscribes the discretion of faithless Electors by requiring them to vote for two persons, at least one of whom must not be an inhabitant of the same State as themselves. But where exactly does the Constitution mandate that Electors vote for Presidential and Vice Presidential candidates who are natural born citizens of the United States and at least thirty-five years of age, and who have been residents of the United States for at least

\[\text{templates that, at least formally, the electors must themselves decide upon their votes.}\]

Professor Vikram David Amar, his brother and sometimes co-author, is more agnostic, describing the question as an “open one.” See Vikram David Amar, The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?, 41 WM. & MARY L. REV. 1037, 1089 n.233 (2000) [hereinafter Amar, The People Made Me Do It] (“[T]he electors of the so-called electoral college may be free agents. I say ‘may’ here because, on the one hand, the electoral college, like Congress and an Article V proposing convention, is truly a national group whose existence owes entirely to the Constitution. On the other hand, the electoral college does not ‘meet’ and deliberate like Congress or an Article V proposing convention. The question of whether electors can be ‘bound’ and be punished for breaking pledges is therefore an open one.”). I agree. Even if Electors are properly federal officers or agents (as I claim in Part III infra), it does not necessarily follow that they may not be bound by their respective States to vote in accordance with the popular vote.

\[11\] U.S. CONST. art. VI, cl. 3.

\[12\] See Part II infra.

\[13\] Cf. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

\[14\] See U.S. CONST. amend. XII (“The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves.”); id. art. II, § 1, cl. 3 (“The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves.”). Notably, these are the only limitations on Electors’ discretion in the Constitution. Although it may appear as though the Twelfth Amendment inadvertently dropped the “two Persons” requirement of Article II, § 1, cl. 3, the rest of the Twelfth Amendment makes clear that Electors must vote for persons. See U.S. CONST. amend. XII ([T]hey shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, . . . .”). It is thus fair to say that Electors cannot “constitutionally” vote for Professor Paulsen’s dog “Gus” for President or Vice President. See Michael Stokes Paulsen, Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond, 13 CONST. COMMENT. 217, 222 (1996).
least fourteen years?\textsuperscript{15}

The problem of the very faithless elector is not some senseless concern, at least by historical standards. The Senate in the Sixth Congress seriously debated the question of what should happen if Electors vote for persons who are not constitutionally qualified to the office of President.\textsuperscript{16} And we have seen it done before. In the election of 1872, three Electors from the State of Georgia voted for a dead man for President – Democrat Horace Greeley who had died after the popular election in November, but before the Electors in the Electoral Colleges had given their votes.\textsuperscript{17}

The critic would argue that the Elector – whose powers and duties are conferred by the Constitution – must implicitly act pursuant to it, but it is a truism that men are not angels.\textsuperscript{18} The Founding generation believed that the Oath or Affirmation Clause would have real bite. The critic would also argue that an oath or affirmation requirement to support the Constitution would not solve the problem of the very faithless Elector, but, as we shall see, the Founding generation would have strongly disagreed.\textsuperscript{19}

A short roadmap will be helpful. In Part II, I set forth the constitutional stupidity that Electors are not bound by the Oath or Affirmation Clause. In Part III, I discuss the position of Electors in our constitutional order – whether Electors are properly officers or agents of the United States, officers or agents of the several States, or something else. In Part IV, I discuss what the Framers and Ratifiers would likely have said about the constitutional stupidity. And finally in

\textsuperscript{15} See U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."); id. amend. XII ("But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."). More precisely, the Constitution requires the President-elect and Vice President-elect to be thirty-five years of age as of the date fixed for the beginning of their respective terms: January 20 at the time of noon. See id. amend. XX, §§ 1, 3.

\textsuperscript{16} See 10 ANNALS OF CONG. 29 (remarks of Sen. James Ross, Jan. 23, 1800); id. at 131, 133 (remarks of Sen. Charles Pinckney, Mar. 28, 1800).

\textsuperscript{17} In all fairness, the Greeley Electors were attempting to be faithful – faithful to their constituents who had voted for Greeley, if not faithful to the Constitution.

\textsuperscript{18} Cf. THE FEDERALIST No. 51, at 322 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Ambition must be made to counteract ambition. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

\textsuperscript{19} But what if Electors are nevertheless very faithless? Does Congress have the power – or constitutional duty – to not count such patently unconstitutional votes? Or should the Chief Justice simply refuse to swear in President Gus-the-Dog as Professor Paulsen has suggested? See Paulsen, supra note 14, at 222. This is a very tricky constitutional question beyond the scope of this Essay, and one that I have explored at considerable length elsewhere. See Vasan Kesavan, Is the Electoral Count Act Unconstitutional?, 80 N.C. L. REV. (forthcoming June 2002).
Part V, I propose a solution to the problem of the very faithless Elector that does not require a constitutional amendment.

II. A CONSTITUTIONAL STUPIDITY?

For all of their virtues, the Framers were sloppy draftsmen in several respects. They forgot to specify that the Vice President cannot preside over her own impeachment trial. They forgot to specify that the President cannot pardon herself (no small issue these days). Did they also forget to specify that Electors take an oath or affirmation to support the Constitution? The Oath or Affirmation Clause provides:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Careful textual analysis reveals that Electors are neither (1) "Senators or Representatives," (2) "Members of the several State Legislatures," (3) "executive and judicial Officers . . . of the United States," nor (4) "executive and judicial Officers . . . of the several States" — and hence simply not covered by the Oath or Affirmation Clause. A few clauses make this point.

Article II, § 1, clause 2 provides that "[e]ach 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." It should go without saying that Electors are not consti-

20 For a collection of thoughtful essays by leading constitutional scholars on the "stupidest features" of the Constitution, see CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).


23 U.S. CONST. art. VI, cl. 3.

24 The textual argument that follows is a species of textual argument now known as "intratextualism." For a rich discussion of this interpretive technique, including its history, strengths, and weaknesses, see Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747 (1999); and Adrian Vermeule & Ernest A. Young, Hercules, Herbert, and Amar: The Trouble With Intratextualism, 113 HARV. L. REV. 730 (2000).

25 U.S. CONST. art. II, § 1, cl. 2.
tionally synonymous with "Members of the several State Legislatures." Electors may be State legislators, but need not be.26

The Elector Incompatibility Clause that immediately follows provides that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."27 The Elector Incompatibility Clause makes clear that Electors are — by definition — neither (1) "Senator[s] or Representative[s]," nor (2) "Person[s] holding an Office of Trust or Profit under the United States." The meaning of this latter phrase has been the subject of much confusion in the legal academy, but the phrase is best read as simply referring to "executive and judicial Officers . . . of the United States."28 Thus, for the purpose of the Oath or Affirmation Clause, Electors are neither (1) Senators or Representatives, (2) Members of the several State Legislatures, nor (3) Officers of the United States. So far, so good.

A handful of other clauses clinch the case that Electors are neither executive or judicial "Officers of the United States," nor executive or judicial "Officers . . . of the several States." Electors are not appointed pursuant to the Appointments Clause which governs the appointment of executive and judicial Officers of the United States,29 but, as we have just seen, are appointed by the

26 Electors are no more constitutionally synonymous with State legislators than Members of Congress are with State legislators. Members of Congress may also be State legislators, but need not be. James Madison made this point well with respect to Representatives. See THE FEDERALIST NO. 56, at 348 (Clinton Rossiter ed., 1961) ("The representatives of each State . . . will probably in all cases have been members, and may even at the very time be members, of the State legislature, where all the local information and interests of the State are assembled, and from whence they may easily be conveyed by a very few hands into the legislature of the United States.") (emphasis added).

27 U.S. CONST. art. II, § 1, cl. 2.

28 The textual argument is incredibly straightforward: A "Person holding an Office of Trust or Profit under the United States" holds an "Office . . . under the United States" and is therefore an "Officer of the United States." History strongly confirms this reading. Senator Charles Pinckney, Framer and leading delegate to the South Carolina ratifying convention, interpreted the Elector Incompatibility Clause in exactly this way. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 387 (Max Farrand ed., 1937) [hereinafter FARRAND] (remarks of Sen. Charles Pinckney, Mar. 28, 1800) ("The disqualifications against any citizen being an Elector, are very few indeed; they are two. The first, that no officer of the United States shall be an Elector; and the other, that no member of Congress shall.") (emphasis added). See also 17 CONG. REC. 815 (remarks of Sen. Sherman, Jan. 21, 1886) (interpreting Elector Incompatibility Clause as disqualifying "members of Congress or judges of the courts or officers of the United States") (emphasis added). The secret drafting history of the Constitution confirms this reading too. An early draft of the Elector Incompatibility Clause provided that "Electioners respectively shall not be Members of the National Legislature, or Officers of the Union, or eligible to the office of supreme Magistrate." 2 FARRAND, supra, at 61 (emphasis added). See also id. at 69 (motion by Elbridge Gerry and Gouverneur Morris "that the Electors of the Executive shall not be members of the Natl. Legislature, nor officer of the U. States, nor shall the Electors themselves be eligible to the (supreme) Magistracy,"," agreed to "nem. con.") (emphasis added).

29 See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appoint-
several States pursuant to Article II, § 1, clause 2. Electors do not receive commissions from the President who “shall Commission all the Officers of the United States,” and the President does not have the power to appoint vacant Electors by granting commissions to them. In addition to these textual arguments, there is one good structural argument why Electors are not executive or judicial Officers of the United States: The purpose of the Elector Incompatibility Clause is to ensure the independence of Electors from the Federal Government. Moreover, the function performed by Electors – the function of electing (or appointing) a President and Vice President – can hardly be fairly characterized as one that is “executive” or “judicial” in nature.

Section 3 of the Fourteenth Amendment reiterates that Electors are not Officers of the United States, and more importantly, makes clear that Electors are not Officers of the several States. The section provides in relevant part that “[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State . . . .” The contra-distinctions in this phrase


31 See U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session.”); see also THE FEDERALIST NO. 67, at 409-10 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that Recess Appointments Clause only applies to Officers of the United States and not to Senators).

32 See, e.g., THE FEDERALIST NO. 68, at 413 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that Elector Incompatibility Clause “exclude[s] from eligibility to this [Electoral] trust all those who from situation might be suspected of too great devotion to the President in office”); JAMES KENT, COMMENTARIES ON AMERICAN LAW *276 (Boston, Little, Brown & Co. 1826) [hereinafter KENT’S COMMENTARIES] (describing purpose of Elector Incompatibility Clause as “to prevent the person in office, at the time of the election, from having any improper influence on his re-election, by his ordinary agency in the government”). Indeed, Gouverneur Morris even suggested at the Philadelphia Convention of 1787 that the President ought to be impeachable for “[c]orrupting his electors.” 2 FARRAND, supra note 28, at 69.

33 It should be noted that the original Constitution did not make this latter point clear. It is therefore possible, though not likely, that section 3 of the Fourteenth Amendment changed the Constitution to make clear that Electors are not capital “O” executive and judicial Officers of the several States. This intratextual argument highlights one of the weaknesses of intratextualism – comparing and contrasting text penned at different times and by different persons.

34 U.S. CONST. amend. XIV, § 3. Note that the “constitutional stupidity” of the Oath or Affirmation Clause is reaffirmed by this section. The section, despite its elaborate construction,
make clear that Electors, like Senators or Representatives, do not "hold any office, civil or military, under the United States" or "hold any office, civil or military, . . . under any State." Those who "hold any office, civil or military, under the United States, or under any State" are quite sensibly Officers of the United States and Officers of the several States, respectively.35

Thus, for the purposes of the Oath or Affirmation Clause, Electors are neither (1) Senators or Representatives, (2) Members of the several State Legislatures, (3) executive or judicial Officers of the United States, nor (4) executive or judicial Officers of the several States. Electors are not covered by the Oath or Affirmation Clause. Q.E.D.

III. WHAT OFFICE DO ELECTORS OCCUPY IN OUR CONSTITUTIONAL ORDER?

So if Electors are neither (1) Senators or Representatives, (2) Members of the several State Legislatures, (3) executive or judicial Officers of the United States, nor (4) executive or judicial Officers of the several States, what are they then?

In Bush v. Gore,36 Chief Justice Rehnquist, in his concurring opinion joined by Justices Scalia and Thomas, wrote, "'While presidential electors are not officers or agents of the federal government (In re Green, 134 U.S. 377, 379), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States.'"37

This is, with all due respect, incorrect. If Electors are not officers or agents of the United States, they must, in a constitutional system of dual sovereigns, be officers or agents of the several States or occupy no offices of constitutional significance at all. As we have seen, Electors are not officers or agents of the several States, and there is good reason to believe that Electors occupy of-

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35 See also U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.") (emphasis added).
37 Id. at 112 (Rehnquist, C.J., concurring) (quoting Burroughs v. United States, 290 U.S. 534, 545 (1934)).
fices of constitutional significance. The office of Elector is created by the Constitution, and the Constitution mandates their existence. Is it really so clear that Electors are not officers or agents of the United States?

Chief Justice Rehnquist should not be singled out for any error. In the case of In re Green, cited by the Chief Justice, the Supreme Court held that

[although the electors are appointed and act under and pursuant to the constitution of the United States, they 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.]

In re Green has been cited for the proposition that Electors are Officers of the several States – a virtual non sequitur. The confusion extends to at least two scholars in the legal academy who incorrectly believe that “[r]elevant constitutional provisions imply that electors are state, not federal, officers.”

The holding of In re Green is incorrect. In the cases of the election of Senators or Representatives, election occurs directly, not indirectly through an intermediate body created by the Constitution for a specified purpose. Electors are more like Members of Congress than Members of State Legislatures in electing Senators (prior to the Seventeenth Amendment) or the People of the several States in electing Senators and Representatives – an analogy that will prove to be especially illuminating in short order. Electors in the Electoral Colleges do “meet” and deliberate like Members of Congress. Indeed, the Electoral Col-

38 134 U.S. 377 (1890).
39 Id. at 379.
41 Ross & Josephson, supra note 3, at 692.
42 See, e.g., U.S. CONST. amend. XII (“The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . .”) (emphasis added); id. art. II, § 1, cl. 3 (similar); THE FEDERALIST No. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice.”) (emphasis added); id. (“[A]s the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.”) (emphasis added); cf. Amar, The People Made Me Do It, supra note 10, at 1089 n.233 (“[T]he electoral college, like Congress and an Article V proposing convention, is truly a national group whose existence owes entirely to the Constitution. On the other hand, the electoral college does not ‘meet’ and deliberate like Congress or an Article V proposing convention.”).
leges may properly be thought of as a special "Congress" created by the Constitution for the single and singular purpose of electing the President. Most importantly, the function performed by Electors, like that performed by Members of Congress, is distinctly national – unlike that performed by Members of State Legislatures in electing Senators (prior to the Seventeenth Amendment) or the People of the several States in electing Senators and Representatives. Electors cast their votes for persons who represent We the People of the United States, not We the People of any single State. Recall also that the Constitution requires that the Electors of each State vote for at least one person who is not an inhabitant of the same State as themselves. Indeed, the Framers briefly considered a motion to compensate Electors out of the National Treasury for their "national service" which passed without discussion, but was inexplicably dropped on subsequent debate.

The right answer, I submit, is that Electors, like Members of Congress, hold a "public Trust under the United States." This phrase has been the subject of much confusion in the legal academy, but it is well settled that Members of Congress hold a "public Trust under the United States." It should be noted that a "public Trust under the United States" is not the same thing as an "Office of Trust or Profit under the United States," even though the word "Trust" appears in both phrases. Members of Congress hold a "public Trust under the United States" and are little "O" officers or agents of the United States in every sense, but Members of Congress are just not capital "O" "Officers of the United States" who hold an "Office of Trust or Profit under the United States."

43 U.S. CONST. amend. XII; see also id. art. II, § 1, cl. 3. At the Philadelphia Convention of 1787, Hugh Williamson, who supported direct election of the President by the people of the several States, suggested that electors vote for three candidates, two of whom at least who should not be an inhabitant of the same State as themselves. See 2 FARRAND, supra note 28, at 113. Gouverneur Morris and James Madison thought that this proposal was a good one. See id. at 113-14.

44 See 2 FARRAND, supra note 28, at 73 (motion of Hugh Williamson).

45 See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 903 (1995) (Thomas, J., dissenting) (reading Religious Test Clause, U.S. CONST. art. VI, cl. 3) ("I know of no one else who holds a 'public Trust under the United States' [other than Senators and Representatives] . . ."). Justice Thomas was right, but not completely right – as I shall try to convince you, Electors also occupy a "public Trust under the United States."

For early evidence strongly suggesting that Members of Congress hold a "public Trust under the United States," see, e.g., THE FEDERALIST No. 49, at 316 (James Madison) (Clinton Rossiter ed., 1961) (referring to nature of legislative department's "public trust"); THE FEDERALIST No. 56, at 346 (James Madison) (referring to "due performance of the legislative trust"); THE FEDERALIST No. 57, at 350 (James Madison) (referring to "public trust" of Representatives); id. at 351 (referring to "representative trust"); THE FEDERALIST No. 62, at 376 (James Madison) (referring to "senatorial trust"); id. at 379 (referring to "legislative trust"); THE FEDERALIST No. 63, at 383 (James Madison) (stating that Senate is "durable invested with public trust"); id. at 386 (referring to "legislative trust"); and THE FEDERALIST No. 70, at 426 (Alexander Hamilton) (seemingly distinguishing "public trust" and "office").

46 U.S. CONST. art. II, § 1, cl. 2. This point is readily apparent upon a close parsing of the
So too Electors hold a “public Trust under the United States.” In *The Federalist No. 68*, Alexander Hamilton observed that Electors occupy a “trust,” but admittedly did not elaborate that Electors occupy a public Trust under the United States.\(^{47}\) The analogy between Electors and Members of Congress with respect to office-holding becomes crisper when we remember that the original mode of Presidential election was by Congress.\(^{48}\) The Electoral College mode of Presidential election is the substitution of one set of officers or agents of the United States for another (perhaps not coincidentally precisely equal in number).

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\(^{47}\) THE FEDERALIST No. 68, at 413 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“And they [the convention] have excluded from eligibility to this trust all those who from situation might be suspected of too great devotion to the President in office.”). See also 3 FARRAND, *supra* note 28, at 623 (Alexander Hamilton’s private, unadopted draft of the Constitution) referring to “the execution of their trust”).

\(^{48}\) See 2 FARRAND, *supra* note 28, at 32, 134, 171, 185, 401 (providing for election of President by the Congress).
The point may be best seen by deductive reasoning. If Electors are neither (1) Members of Congress, (2) Members of the several State Legislatures, (3) executive or judicial Officers of the United States, nor (4) executive or judicial Officers of the several States, Electors must hold a public Trust under the United States—unless we are willing to place Electors in the position of ordinary citizens of the United States.\footnote{It is also possible, though most unlikely, that Electors occupy an office of their own constitutional significance— the office of Elector.} The Supreme Court did get at least one thing right in \textit{Bush v. Gore}: Electors “exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States.”\footnote{531 U.S., at 112 (Rehnquist, C.J., concurring).} Thus, Electors, like Members of Congress, are properly officers or agents of the United States, but they are simply not “Officers of the United States.”\footnote{51}

The problem, of course, is that the Oath or Affirmation Clause is under-inclusive—the clause does not apply to all those who hold a public trust under the United States, but only applies to Senators and Representatives.\footnote{One consequence of the textual exegesis is that Electors, like Members of Congress, are not subject to impeachment by the House of Representatives or conviction of impeachment by the Senate. This is for good reason—to ensure the independence of Electors. Does the lack of impeachment of Electors mean that Electors who act unconstitutionally—say by voting for Professor Paulsen’s dog “Gus”—may never be disqualified from future service as an Elector? No, not necessarily. States may perhaps place some disqualifications on the federal office of Elector, just as States may place some qualifications on the same. See infra note 81.}

IV. WHAT WOULD THE FRAMERS AND RATIFIERS HAVE SAID?

The constitutional stupidity is not just wooden textualism. It is remarkable because the Founding generation believed the Oath or Affirmation Clause to be of critical, if not grave importance. According to Professor Paulsen, “The Oath Clause had a profound, almost \textit{covenantal}, significance for the framers—a significance that may be difficult for some fully to understand and appreciate today.”\footnote{53 Michael Stokes Paulsen, \textit{The Most Dangerous Branch: Executive Power to Say What the Law Is}, 83 GEO. L.J. 217, 257 (1994) (emphasis added). Indeed, the oath or affirmation requirement was of profound significance to the citizenry at large: “Earlier generations believed}
We need only look to the Constitution itself for rich evidence of this proposition. All in all, no less than five clauses of the Constitution employ or rely on the oath or affirmation concept: The Oath or Affirmation Clause\(^54\) and section 3 of the Fourteenth Amendment,\(^55\) as previously mentioned, as well as the Senate Impeachment Clause,\(^56\) the Presidential Oath or Affirmation Clause,\(^57\) and the Fourth Amendment.\(^58\)

The Constitution broke no new ground in this regard. It should come of little surprise that every early state constitution contained some form of oath or affirmation requirement for office-holders.\(^59\) The ubiquity of the oath or affirmation requirement strongly suggests that the Founding generation did not consider it to be merely precatory.

Much historical evidence confirms this supposition. In *The Federalist No. 27*, Alexander Hamilton referred to the "sanctity of an oath" taken pursuant to the Oath or Affirmation Clause.\(^60\) James Monroe observed at the Virginia ratifying convention that "[t]he influence which the sanction of oaths has on men is irresistible. The religious authority of divine revelation will be quoted to prove the propriety of adhering to it, and will have great influence in disposing men's minds to maintain it."\(^61\) So too Chief Justice Marshall relied upon the significance of the judicial oath in the Oath or Affirmation Clause in support of

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54 U.S. CONST. art. VI, cl. 3.

55 Id. amend. XIV, § 3.

56 Id. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.").

57 Id. art. II, § 1, cl. 7 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:— 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"). For a discussion of the special importance of the prolix Presidential Oath or Affirmation Clause, see Paulsen, *supra* note 53, at 261-62; and Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 828-29 (1999).

58 U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").


60 *The Federalist No. 27*, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also The Federalist No. 64*, at 396 (John Jay) ("Every consideration that can influence the human mind, such as honor, *oaths*, reputations, conscience, the love of country, and family affections and attachments, afford security for [the] fidelity [of the President and Senate in treaty-making].") (emphasis added).

61 3 *Elliott's Debates*, *supra* note 46, at 216-17.
his case for judicial review in *Marbury v. Madison.*\(^6\) Pointing to the clause, Chief Justice Marshall asked, "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?"\(^6\) And early constitutional commentator William Rawle observed that the "promissory oath" of the Oath or Affirmation Clause "greatly increases the moral obligation of the party, and ought to make a deep impression on him."\(^6\)

Along these lines, and according to one scholar, the Oath or Affirmation Clause was added to the Constitution "[b]ecause the obligation of the Supremacy Clause was not enough to ensure the viability of the Constitution."\(^6\)

The constitutional stupidity is, however, especially remarkable when considered in the context of Presidential election. The Constitution places a special emphasis on authenticity and secrecy in the Electoral Colleges. The Electoral College Clauses provide that "[t]he Electors shall meet in their respective states," instead of at some central location such as the Seat of the Government of the United States.\(^6\) The purpose of this provision is to reduce the risk of cabal and corruption in Presidential election.\(^6\) The Electoral College Clauses also

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\(^5\) 5 U.S. (1 Cranch) 137 (1803).

\(^6\) Id. at 180. As has been widely remarked, this is perhaps the strongest textual argument against Chief Justice Marshall’s position because Members of Congress and executive Officers of the United States are also bound by the Oath or Affirmation Clause. For another famous Marshall Court opinion stressing the importance of the oath, see *McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316, 416 (1819) (authorizing Congress to "superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest").

\(^7\) WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 191 (2d ed. 1829).

\(^8\) Nash E. Long, *The “Constitutional Remand”: Judicial Review of Constitutionally Dubious Statutes,* 14 J.L. & POL. 667, 677 (1998). In my view, the point is a stretch, but the spirit of the point is a good one.

\(^9\) U.S. CONST. amend. XII; see also id. art. II, § 1, cl. 3 (same with minor differences in capitalization).

\(^10\) See, e.g., THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Nothing was more to be desired [in the Electoral College mode of Presidential election] than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."); 4 ELLIOT’S DEBATES, supra note 46, at 122 (remarks of William Davie at North Carolina ratifying convention) ("He is elected on the same day in every state, so that there can be no possible combination between the electors."); id. at 105 (remarks of James Iredell at North Carolina ratifying convention) ("Had the time of election been different in different states, the electors chosen in one state might have gone from state to state, and conferred with the other electors, and the election might have been thus carried on under undue influence. But by this provision, the electors must meet in the different states on the same day, and cannot confer together. They may not even know who are the electors in the other states. There can be, therefore, no kind of combination. It is probable that the man who is the object of choice of thirteen different states, the electors in each voting unconnectedly with the rest, must be a person who possesses, in high degree, the confidence and respect of his country."); 3 FARRAND, supra note 28, at 461 (remarks of Sen. Rufus King, Mar. 18, 1824) ("[M]embers of the General Convention . . . did indulge the hope, by apportioning, limiting, and confining the Electors within their respective
provide that the Electors in each Electoral College shall “vote by ballot” and that “they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate” the electoral certificate. The purpose of this provision is to also to reduce the risk of cabal and corruption in Presidential election and to ensure the independence of Electors. The emphasis on authenticity and secrecy in the Electoral College Clauses is understandable – only Electors are directly responsible for choosing an entire branch of government. Thus, the constitutional stupidity is really stupid when considered in context.

In the Framers’ defense, it might be said that they overlooked the constitutional stupidity because they thought that almost all Presidential elections would be decided by the House of Representatives whose members would be on oath or affirmation in choosing the President. The better answer is that the Electoral College mode of Presidential election was indeed a last-minute compromise in September of 1787 between those who advocated direct popular election of the President and those who advocated a parliamentary-style election by Congress, and that the Framers simply forgot to amend a previously drafted Oath or Affirmation Clause agreed to in July of 1787.

68 U.S. CONST. amend. XII; see also id. art. II, § 1, cl. 3 (same with minor differences in capitalization). This provision stands in stark contrast to several clauses of the Constitution that stress transparency and publicity. See, e.g., id. art. I, § 5, cl. 3 (Journal of Proceedings Clause); id. art. I, § 9, cl. 7 (Receipts and Expenditures Clause); id. art. II, § 2, cl. 1 (Opinion Clause); id. art. II, § 3 (State of the Union Clause); id. art. III, § 3, cl. 2 (Treason Clause).

69 See, e.g., 10 ANNALS OF CONG. 144 (remarks of Senator Charles Pinckney, Mar. 28, 1800) (“As the Constitution directs they are to vote by ballot, the votes of the election ought to be secret. You have no right to require from an Elector how he voted, nor will you be able to know for whom he did vote, particularly if in the return from that State different candidates have been voted for.”).

70 See 2 FARRAND, supra note 28, at 500 (remarks of George Mason) (“[N]ineteen times in twenty the President would be chosen by the Senate . . .”); id. at 512 (remarks of George Mason) (“[I]t will rarely happen that a majority of the whole votes will fall on any one candidate . . .”); THE FEDERALIST No. 66, at 404 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The same house [House of Representatives] will be the umpire in all elections of the President which do not unite the suffrages of the majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently, happen.”); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 168 (1913) (reporting that George Mason claimed at the Virginia ratifying convention that Electors would fail to make a choice in “forty-nine times out of fifty”).

71 The basic structure of the Oath or Affirmation Clause was agreed to on July 23, 1787. See 2 FARRAND, supra note 28, at 87-88. The clause featured prominently in early drafts of the Constitution. See, e.g., id. at 133 (Committee of Detail, I draft); id. at 159-160 (Committee of
V. WHAT SHALL WE DO ABOUT THE VERY FAITHLESS ELECTOR?

You might at this point be thinking why we should do anything at all. Perhaps you think that Congress has the power—or constitutional duty—not to count the votes of very faithless Electors who vote in contravention of the Constitution. Indeed, Congress has decided that it may refuse to count electoral votes that are not “regularly given” pursuant to the Electoral Count Act of 1887, but it is far from clear whether this law is constitutional and whether Congress may refuse to count electoral votes given by very faithless Electors.

Why leave these tricky matters to Congress anyway? Our Constitution, after all, requires Members of Congress to take an oath or affirmation to support the Constitution instead of simply relying on Article III judges. What matters now is that the Founding generation would have first looked to the oath or affirmation requirement—and not to Congress—as a means to check the very faithless Elector. Indeed, the Founding generation would ostensibly have looked to Congress last given that the purpose of the Electoral College mode of Presidential Election is to remove Congress from the business of electing the President as much as possible. The critic would argue that the oath or affirmation requirement does not have much significance in today’s secular society, but this is not the spirit of our Constitution. The critic would also argue that the oath or affirmation requirement will never prevent the very faithless Elector from voting in contravention of the Constitution, but it is surely better to have an oath or affirmation requirement than not.

So what shall we do then about the very faithless Elector? Is there a solution short of amending the Oath or Affirmation Clause by constitutional amendment?

Unfortunately, we cannot look to Congress to remedy the Framers’ drafting oversight because Congress lacks the constitutional authority to pre-

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72 For the relevant statutory provision, see 3 U.S.C. § 15 (1994).

73 Elsewhere, I have argued that the Electoral Count Act is unconstitutional, and that Congress (or more precisely, the joint convention of Senators and Representatives assembled for the purpose of the electoral count) has no power not to count electoral votes given by very faithless Electors. See Kesavan, supra note 19.

74 See, e.g., 2 FARRAND, supra note 28, at 497-502 (proposing Electoral College mode of Presidential election in lieu of Presidential election by Congress); 10 ANNALS OF CONG. 29 (remarks of Sen. Charles Pinckney, Jan. 23, 1800) (“He remembered very well that in the Federal Convention great care was used to provide for the election of the President of the United States, independently of Congress; to take the business as far as possible out of their hands. . . . Nothing was more clear to him than that Congress had no right to meddle with it at all; as the whole was entrusted to the State Legislatures, they must make provision for all questions arising on the occasion.”).
scribe an oath or affirmation requirement for Electors. The First Congress confronted the very tricky problem of defining and administering the oath or affirmation required by the Oath or Affirmation Clause to "Members of the several State Legislatures, and all executive and judicial Officers... of the several States." Congress could not rely on the Necessary and Proper Clause which gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" because the Oath or Affirmation Clause is not one of the "Powers vested by this Constitution in the Government of the United States" and because State legislators and officers are not "Officers of the United States." After significant debate in the House of Representatives, the First Congress simply concluded that the Oath or Affirmation Clause was "self-executing" and decided to specify the oath or affirmation (including the time and manner) for State legislators and officers anyway. This solution does not work here. The Oath or Affirmation Clause cannot be "self-executing" with respect to a class of constitutional actors that the clause omits entirely.

Fortunately, there is a solution to the problem of the very faithless Elector short of constitutional amendment. We can look to the several States to fix the Framers' drafting oversight. Each State may easily prescribe an oath or affirmation requirement in appointing its Electors pursuant to Article II, § 1, clause 2. The oath or affirmation requirement is undoubtedly a "qualification" for office-holding, and the Supreme Court has squarely held that the States


76 U.S. Const. art. I, § 8, cl. 18.

77 See Currie, supra note 75, at 170-71; Greenfield, supra note 75, at 113. Representative Elbridge Gerry of Massachusetts was the first to raise this constitutional objection in the House of Representatives. See 1 ANNALS OF CONG. 277-78 (Joseph Gales ed., 1789).

78 Act of June 1, 1789, ch. 1, § 4, 1 Stat. 23, 23-24. This was the first act passed by the First Congress – further underscoring the importance of the Oath or Affirmation Clause.

79 U.S. Const. art. II, § 1, cl. 2 ("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.").

80 The Religious Test Clause and its juxtaposition with the Oath or Affirmation Clause crisply reflects this understanding. See U.S. Const. art. VI, § 3 ("[B]ut no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.") (emphasis added). The religious test for office-holding at the Founding was commonly given as an oath or affirmation. See, e.g., 2 Farrand, supra note 28, at 342 ("No religious test or qualification shall ever be annexed to any oath of office under the authority of the U. S."); 3 id. at 310 (remarks of Governor Edmund Randolph at the Virginia ratifying convention) ("The exclusion of religious tests is an exception from this general provision, with respect to oaths, or af-
may set qualifications for the office of Elector that pass general constitutional muster. Some States may have enacted laws that require Electors to take an oath or affirmation to support the Constitution, but all States should do so before November 2, 2004 — the next date specified by federal law for the choosing of Electors. This is one sorely needed improvement to the Electoral College mode of Presidential election that is faithful both to our Constitution and its vision of federalism — and, importantly, one that does not require us to crank up the elaborate machinery of Article V super-majorities at both the Federal and State levels.

VI. CONCLUSION

What shall we make of the problems of the faithless and very faithless Elector? We have ignored the simpler and bigger problem of potential faithlessness for too long. The problem of the very faithless Elector suggests that the Electoral College mode of Presidential selection is importantly flawed, and flawed from the start. The solution to the problem of the very faithless Elector — like that to the faithless Elector — is merely one of rearranging the deck chairs on the Titanic. These problems are but two of the many defects of the current system of how we elect the President and Vice-President. It is high time to seriously debate the entire Electoral College mode of Presidential election well in advance of an impending constitutional crisis.

See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting) ("[T]he States may establish qualifications for their delegates to the electoral college, as long as those qualifications pass muster under other constitutional provisions (primarily the First and Fourteenth Amendments.") (citing Williams v. Rhodes, 393 U.S. 23, 29 (1968) and McPherson v. Blacker, 146 U.S. 1, 27-36 (1892)).

See 3 U.S.C. § 1 (1994) ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.").