

# A More Perfect Electoral College: Challenging Winner-Takes-All Provisions Under the Twelfth Amendment

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# A MORE PERFECT ELECTORAL COLLEGE: CHALLENGING WINNER-TAKES-ALL PROVISIONS UNDER THE TWELFTH AMENDMENT

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“The most exquisite Folly is made of Wisdom spun too fine.”

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<sup>1</sup> BENJAMIN FRANKLIN, POOR RICHARD’S ALMANAC (1746), <https://founders.archives.gov/documents/Franklin/01-03-02-0025>.

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## INTRODUCTION

At best, the Electoral College, utilized in the election of the President of the United States, is widely misunderstood; at worst, it is downright mistrusted.<sup>2</sup> The United States Constitution assigns to “Electors” from each state the right and responsibility of casting the actual votes, thus electing the President and Vice President.<sup>3</sup> Article II allows each respective state to determine how it appoints its Electors.<sup>4</sup> Forty-eight states and the District of Columbia have enacted statutory provisions that appoint their Electors on a Winner-Takes-All (WTA) basis, whereby the political party of the candidate receiving the most popular votes within the state selects that state’s Electors.<sup>5</sup>

<sup>2</sup> See Art Swift, *American’s Support for Electoral College Rises Sharply*, GALLUP (Dec. 2, 2016) <https://news.gallup.com/poll/198917/americans-support-electoral-college-rises-sharply.aspx>. Attitudes towards the Electoral College have changed over the years, from an all-time high approval rating of 80% in 1968, to 2016’s 47%. However, lawsuits challenging the current electoral college indicate a growing distrust of the system. See *Lyman v. Baker*, 352 F. Supp. 3d 81 (D. Mass. 2018).

<sup>3</sup> U.S. CONST. art. II, § 1. It should be noted that in addition to the Electors’ right to vote for the President, the Constitution implicitly assigns to Electors the nominating power. See *infra* note 89 and accompanying text.

<sup>4</sup> See *Anderson v. Celebrezze*, 460 U.S. 780, 794 n.18 (1983) (noting constitutional delegation of presidential Elector selection to states); Christopher Anglim, *A Selective, Annotated Bibliography on the Electoral College: Its Creation, History, and Prospects for Reform*, 85 LAW LIBR. J. 297, 299 (1993) (describing wide discretion given to states in appointing Electors).

<sup>5</sup> See, e.g., D.C. CODE § 1-1051.01 (2018); MASS. GEN. LAWS ch. 54, § 148 (2018); UTAH CODE ANN. § 20A-13-301 (West 2018) (codifying respective states’ WTA provisions); NAT’L ASSOC. OF SEC’YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL ELECTORS (2016), <https://www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf> (cataloging states’ various Elector laws). Accordingly, the vote of

Under the WTA scheme, the political party of the presidential and vice presidential candidates who win the most popular votes in a state is awarded all of that state's Electors.<sup>6</sup> This is the case regardless of whether—for example—the party's candidates garner only 41.9% of the popular vote and only 3,829 more votes than the next vote-getter in the state (as President Ronald Reagan did in Massachusetts in 1980) or as much as 76.2% of the popular vote and as many as 1,236,695 more votes than the next vote-getter in the state (as President Lyndon Johnson did in Massachusetts in 1964).<sup>7</sup> The WTA system thus effectively disenfranchises those voters who vote for candidates other than those receiving the most votes in their state.

WTA also distorts presidential campaigns. Considering only a small margin of victory in the popular vote in a state can deliver all of that state's electoral votes, WTA necessarily leads campaigns to focus on “battleground states” where the two major political parties each believe their candidates can achieve popular vote victory for that year's election.<sup>8</sup> In fact, just four of the 2016 election's battleground states (Florida, North Carolina, Ohio, and Pennsylvania) saw 71% of campaign advertising spending and 57% of candidate appearances.<sup>9</sup> Moreover, the top fourteen 2016 battleground states<sup>10</sup> saw 99% of advertising spending and 95% of candidate appearances.<sup>11</sup> From this data, it is clear that WTA results in presidential campaigns routinely turning focus away from tens of millions of citizens in non-battleground states such as Massachusetts. WTA effectively incentivize candidates for President and Vice President to give disproportionate attention to an unrepresentative subset of the country, ultimately providing that

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every citizen voting for a candidate other than the leading candidate is rendered meaningless by receiving no Elector representation directly or through a political party.

<sup>6</sup> See, e.g., MASS. GEN. LAWS ch. 54, § 148; see also NAT'L ARCHIVES & RECORDS ADMIN., *Frequently Asked Questions*, U.S. ELECTORAL C., <https://www.archives.gov/federal-register/electoral-college/faq.html#wtapv> [<https://perma.cc/DVP7-GPNC>] (outlining Electoral College).

The District of Columbia and 48 states have a Winner-takes-all rule for the Electoral College. In these states, whichever candidate receives a majority of the popular vote, or a plurality of the popular vote (less than 50 percent but more than any other candidate), takes all of the state's electoral votes.

NAT'L ARCHIVES & RECORDS ADMIN., *supra*.

<sup>7</sup> See *1964 Presidential General Election Results-Massachusetts*, DAVID LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/state.php?f=0&fips=25&year=1964> [<https://perma.cc/JZ78-AL9J>] (showing 1964 Massachusetts presidential election results); *1980 Presidential General Election Results-Massachusetts*, DAVID LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/state.php?f=0&fips=25&year=1980> (showing 1980 Massachusetts presidential election results).

<sup>8</sup> See NONPROFIT VOTE, *AMERICA GOES TO THE POLLS 2016: A REPORT ON VOTER TURNOUT IN THE 2016 ELECTION 12* (2017), <https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf> [<https://perma.cc/SA4F-26PN>].

<sup>9</sup> See CANDIDATES MAKE LAST DITCH AD SPENDING PUSH ACROSS 14-STATE ELECTORAL MAP (2016), <https://www.bloomberg.com/politics/graphics/2016-presidential-campaign-tv-ads/>, (breaking down both candidate's ad spending in fourteen states during the 2016 election).

<sup>10</sup> See *id.* The 2016 battleground states collectively included only 35% of eligible voters; they were Arizona, Colorado, Florida, Georgia, Iowa, Maine, Michigan, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin. *Id.*

<sup>11</sup> See *id.* at 7, 12.

unrepresentative subset outsized political influence. Under such circumstances, the presidential election does not reflect or include the voices of millions across the entire nation.

Despite current sentiment to the contrary, it is the WTA system, not the Electoral College itself, that plagues the health of our body politic. Section I of this Article begins first by providing the necessary historical discussion of the Framers' debates over the mode<sup>12</sup> of presidential selection that resulted in the use of presidential Electors.<sup>13</sup> It identifies five core principles by which every mode was measured, determining these constitutional priorities that governed the decisions.<sup>14</sup> Next, section I of this article will recount the history behind the first four presidential elections, where the manner of elector necessitated the introduction of the Twelfth Amendment.<sup>15</sup> Section II will explore the language and purpose of the Twelfth Amendment.<sup>16</sup> Next, section II of this Article argues that history does not mandate the usage of WTA, and in fact, supports the argument that WTA is antithetical to our constitutional origins.<sup>17</sup> After detailing the constitutional history of presidential elections and WTA, that the WTA system results in problems that may amount to violations of the constitutional requirements of the mode of presidential selection, and the Twelfth Amendment.<sup>18</sup> Finally, section III of this proposes, by statistical analysis of the last several elections, that the best remedy to these ills is not to kill the Electoral College—with a national popular vote or otherwise—but to put WTA to rest.<sup>19</sup> The replacement to WTAs, as a matter of federalism theory and practical consequence, is what these authors have termed the “Proportional Elector Manner.”

## I. HISTORICAL BACKGROUND ON THE MODE OF PRESIDENTIAL SELECTION

By the accounts of Alexander Hamilton and James Madison, the United States Constitution did not simply reflect ideas generated and refined by its Framers during the Constitutional Convention, but rather synthesized those policies and practices already at work in the constitutions of the states and other countries.<sup>20</sup> The convention debates, the Federalist Papers, and the Framers' correspondence reveal that these fifty-five men turned their attention to a wide variety of complex issues. Yet, throughout their debates, in their decisions, and during their drafting, the Framers remained focused on certain key principles to simplify and clarify the federal system of government that they were building. All these focused on the transcendent

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<sup>12</sup> For the purposes of this Article, we define a “mode” as a means of presidential selection, and a “manner” as a means of Elector appointment.

<sup>13</sup> See *infra* Section II.A (discussing historical background of proposed presidential election modes).

<sup>14</sup> See *infra* Parts II.A.1-5.

<sup>15</sup> See *infra* Part II.B.1.

<sup>16</sup> See *infra* Part II.B.2.

<sup>17</sup> See *infra* Part III.A (arguing constitutional history opposes WTA use).

<sup>18</sup> See *infra* Part III.B (making legal arguments to WTA).

<sup>19</sup> See *infra* Section IV (outlining “Proportional Elector Manner”).

<sup>20</sup> See THE FEDERALIST NO. 39, at 211-12 (James Madison) (Clinton Rossiter ed., 1991) (describing state constitutional values implemented in creation of Federal Constitution); JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 218 (Ohio Univ. Press, 1966) [hereinafter MADISON'S JOURNAL] (comparing foreign governments to state systems).

goals of preserving liberty for all and preventing tyranny by any.<sup>21</sup> These lofty ideals manifested in elaborate systems and structures—sometimes deliberately inefficient—but often decidedly effective in preserving, protecting, and defending the Framers’ avowed ambition “to form a more perfect union.”<sup>22</sup>

The federal government splits power with those granted to individual state governments and its own delegated enumerated powers.<sup>23</sup> The structure of the national government correspondingly reflected three forms of republican character. First: directly, by deriving “all its powers . . . from the great body of the people”<sup>24</sup>—namely by electing Representatives by popular vote. Second: indirectly, by electing Senators by state legislative appointment. Finally, by “a very compound source” specifically by electing the President through the Electors of the several states, acting “partly as distinct and coequal societies, partly as unequal members of the same society.”<sup>25</sup> The Framers intended these separate sources of power to assure the independence of each branch of government.<sup>26</sup> These principles informed the Framers’ debates and decisions on virtually all topics, and influenced their drafting of virtually all provisions.

Before addressing WTA specifically, this Article first reviews the modes of presidential selection debated by the Framers, focusing specifically on those considerations that played a key role in the Framers’ decision that the Electoral College was a “more perfect” compromise.

The process of electing the President and Vice President has changed substantially since the first election, but the current process retains some (but certainly not all) of the characteristics thought important by the Framers.<sup>27</sup> That said, the Framers’ debates remain informative given

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<sup>21</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654-55 (1952) (Jackson, J. concurring) (synthesizing the essence of U.S. government is to “leave to live by no man’s leave.”). *Id.* at 654.

<sup>22</sup> U.S. CONST. pmb1.

<sup>23</sup> See THE FEDERALIST NO. 39, *supra* note 20, at 211 (James Madison) (identifying balance of state sovereignty and republican representation); see also U.S. CONST. amend. X.

<sup>24</sup> See THE FEDERALIST NO. 39, *supra* note 20, at 209 (James Madison).

<sup>25</sup> See *id.* at 210, 212.

<sup>26</sup> See MADISON’S JOURNAL, *supra* note 20, at 311-12 (quoting James Madison) “If it be essential to the preservation of liberty that the Legislative, Executive, and Judiciary powers be sparate, it is essential to a maintenance of the separation, that they should be independent of each other.” *Id.* at 311.

<sup>27</sup> See JAMES W. CEASAR, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 42 (1979) (discussing theory behind popular election). Originally, Article II, Section 2 of the Constitution required electors to be proportioned by a state’s number of representatives and senators. Each elector was given two votes, one of which had to be cast for a candidate from outside the elector’s state. If there was a tie above the majority threshold, the House would pick from the tied candidates. If there was a tie below the majority threshold, the House would consolidate representatives by state, give each state a vote, and require a majority of those votes to select a winner. *Id.* at 42-43 n.1. Much of this was superseded by the ratification of the Twelfth Amendment in 1804. See L. PAIGE WHITAKER & THOMAS H. NEALE, CONG. RESEARCH SERV., RL 30804, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS at 2 (2004) <http://www.au.af.mil/au/awc/awcgate/crs/rl30804.pdf>. Since that time, the closest Congress has come to changing the mode of presidential selection was during the 91st Congress, when House Judiciary Resolution 681 proposed the direct election of the President and Vice President, requiring a runoff when no candidate received more than 40% of the vote. The resolution passed the House in 1969 but failed to pass the Senate. See *id.* at 18.

their extended consideration of the topic.<sup>28</sup> The Framers knew that the mode of presidential selection must come from “some existing authority under the National or States Constitutions, by some special authority derived from the people, or by the people themselves.”<sup>29</sup> The Framers consequently explored five principal modes of selection: by the national legislature, by state executives, by state legislatures, by national popular vote, and by state-chosen Electors.<sup>30</sup>

In ultimately adopting the Electoral College, the Framers sought to incorporate both national and federal interests, simultaneously respecting the independent sovereignty of the states and reflecting the delegated powers of the national government.<sup>31</sup> Additionally, maintaining the independence of the Executive was among the Framers’ principal concerns.<sup>32</sup> In turning to a review of the debated modes of section, it is helpful to keep in mind that, as James Madison opined, one of the Constitution’s core aims is to elect leaders “who possesses most wisdom to discern, and most virtue to pursue the common good.”<sup>33</sup>

#### A. THE PROCEDURAL REQUIREMENTS OF THE PRESIDENTIAL ELECTION

We are particularly fortunate that the Framers widely and exhaustively discussed the mode of presidential election.<sup>34</sup> From these debates and discussions, we can distill the principles with which the Framers were concerned in ultimately deciding upon the Elector mode. Ultimately, the use of Electors appeared the least susceptible to tyranny and the most

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<sup>28</sup> See MADISON’S JOURNAL, *supra* note 20, at 362-66 (quoting James Madison). James Wilson characterized the mode of presidential selection as the most difficult that they were tasked to decide. *See id.* at 578.

<sup>29</sup> *Id.* at 363 (quoting James Madison).

<sup>30</sup> Some modes derived from these authorities were not considered, except in passing. *See id.* at 363 (quoting Madison saying selection by judiciary “presumed . . . out of the question”). “The State [Judiciaries] had [not been, and he] presumed [would not be,] proposed as a proper source of appointment.” *Id.* at 365. Proposed modes varied widely, with some seeking to incorporate a lottery system. *Id.* at 359, 370–71. There was pushback against leaving the appointment up to chance. *Id.* at 362.

<sup>31</sup> See THE FEDERALIST NO. 39, *supra* note 20, at 212 (James Madison).

The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations from so many distinct and coequal bodies politic.

*Id.*

<sup>32</sup> See MADISON’S JOURNAL, *supra* note 20, at 46-47 (discussing Randolph, Wilson, and Madison opinions on presidential independence). Some of the Framers recognized that the mode of selection for the president depended heavily on those powers delegated to the Executive, and those checks on the office thereof. *See id.* at 582-84.

<sup>33</sup> See THE FEDERALIST NO. 57, *supra* note 20, at 318 (James Madison).

<sup>34</sup> See DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 16 (U. of Chi. Press 2004). The mode of selection is objectively one of the most thoroughly covered topics within Madison’s Journal, however many scholars point out that the journal itself only accounts for 10% of each day’s total discussions. *See id.* at 15.

preservative of liberty.<sup>35</sup> Studying these debates allowed us to identify those values the Framers required of the presidential selection process. This Article now attempts to identify those principles the Framers deemed important in selecting the president,<sup>36</sup> and then analyzes WTA considering these values to see how this manner measures up against those principles the Framers ultimately identified as important.<sup>37</sup>

### 1. THE MODE TO SELECT THE PRESIDENT MUST CONTAIN FACTIONALISM

The Framers required any mode of presidential selection to prevent factionalism from seizing the engine of governance. Gouverneur Morris explained how a special purpose body of Electors was superior to a standing legislative body, because it avoided: “the danger of intrigue and faction”—as was expected in any legislature.<sup>38</sup> Hamilton described these “factions” as: “[A] number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>39</sup> Reasonably, one such faction that falls under Hamilton’s definition was voter’s state allegiance.<sup>40</sup> Madison noted weighty difficulties remained, which unquestioningly reflected his presumption that individuals would self-identify at the state level, perhaps standing above having a unified national interest or unquestioning fidelity to a national government.<sup>41</sup> Enduring state identification would likely have resulted in the “disposition in the people to prefer a Citizen of their own State,” which would necessarily disadvantage small states.<sup>42</sup>

Charles Pinckney found popular elections to be vulnerable to the will of “a few active and designing men” who might assume leadership over each state’s election, and that more well-populated states might collude to advance their own shared priorities, even when not consistent with the national interest.<sup>43</sup> Oliver Ellsworth also concluded that Madison’s view was “unanswerable,” with the largest states’ citizens’ invariably preferring in-state candidates and the largest states “invariably hav[ing] the man.”<sup>44</sup>

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<sup>35</sup> See THE FEDERALIST NO. 41, *supra* note 20, at 223 (James Madison) (reflecting on choosing the greater, not the perfect, good).

<sup>36</sup> *Infra* Part II.A.1-5.

<sup>37</sup> *Infra* Part III.A.1-5.

<sup>38</sup> MADISON’S JOURNAL, *supra* note 20, at 576-77 (indicating reasoning for special purpose of body of Electors).

<sup>39</sup> THE FEDERALIST NO. 10, *supra* note 20, at 46 (James Madison) (quoting Alexander Hamilton).

<sup>40</sup> See *id.* at 50 (describing faction from “local prejudices”).

<sup>41</sup> MADISON’S JOURNAL, *supra* note 20, at 364-65 (quoting James Madison). Perhaps aiming to disprove his own (widely shared) point by his actions, Madison suggested that “he was willing to make the sacrifice” of dealing with the near-term consequences of certain proposed uniform electoral mechanics that, given then-prevailing regional differences in democratic practices and population demographics, disadvantaged his state, which was both Southern and large. See *id.* at 365-66. There is no record that his actions influenced the thinking of any of his fellow Framers on the question of direct popular election.

<sup>42</sup> *Id.* at 365 (quoting James Madison).

<sup>43</sup> *Id.* at 307 (quoting Charles Pickney).

<sup>44</sup> *Id.* at 366 (quoting Oliver Ellsworth).

There also existed another factional “difficulty . . . of a serious nature.”<sup>45</sup> This difficulty was that with, for example, a direct popular national vote, the Southern States “could have no influence in the election” given that their eligible voter populations were significantly smaller than those of the Northern States.<sup>46</sup> Madison diagnosed this problem as arising out of pragmatic circumstances, notwithstanding the underlying moral complexities. In modern terms, while all states limited voting by gender, the Southern states further constrained voting by restricting voting rights by socioeconomic class and denying voting rights by race.<sup>47</sup> Madison did not address the moral aspect of this challenge, simply noting that the “substitution of electors obviated this difficulty.”<sup>48</sup> In pursuit of uniting the states, Madison and the other Framers protected the Southern States against any adverse consequences from their in-state discriminatory voting practices, which some of the Southern States long thereafter continued with legacy manifestations to the present. But, at the time of the Constitutional Convention, this was simply a political reality if any union—much less a more perfect one—were to be formed at all.

## 2. THE MODE TO SELECT THE PRESIDENT MUST BE RESISTANT TO POPULAR EXCITEMENT

One of the common themes to the Constitution—and a tenet of republican representation—was that decisions ought to be made divorced of populist emotions.<sup>49</sup> The Framers understood the power of populism and feared the power of the Executive in the hands of what they called a “demagogue,” namely a political leader who gained power through exciting passion and intrigue in the people.<sup>50</sup> Protecting against demagogues was an imperative for the presidential election no matter which mode was ultimately chosen. In Federalist No. 10, Alexander Hamilton explained how proportional representation was meant to be a buffer designed to “aggregate [the] interests being referred to the national, the local and particular to the State legislatures.”<sup>51</sup> Hamilton argued that an elected representative of a district serves as “a *medium* of the chosen body of citizens, whose wisdom may best discern the true interest in their

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<sup>45</sup> See MADISON’S JOURNAL, *supra* note 20, at 327 (quoting James Madison).

<sup>46</sup> See *id.* (quoting James Madison).

<sup>47</sup> See *id.* (quoting James Madison). “The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the [black population.]” *Id.*

<sup>48</sup> See *id.* (quoting James Madison).

<sup>49</sup> See MADISON’S JOURNAL, *supra* note 20, at 235 (quoting Gouverneur Morris stating the “people never act from reason alone”).

<sup>50</sup> See THE FEDERALIST NO. 59, *supra* note 20, at 354 (Alexander Hamilton) (describing demagogues).

Demagogues . . . flatter the public, and . . . stoke division, anger and resentment. Demagogues promise that they will restore lost glories and make everything right again. They divert the public's attention to enemies and scapegoats within and without the republic. They divide the public in order to conquer it. They play on people's fears of loss of status. They use divisive rhetoric to distract attention, maintain a loyal set of supporters, and keep themselves in power.

Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 152 (2017).

<sup>51</sup> See THE FEDERALIST NO. 10, *supra* note 20, at 51 (James Madison).

country.”<sup>52</sup> The mechanisms of the Constitution were designed so that true leaders of virtue would materialize on a national stage.<sup>53</sup>

The safety mechanism to prevent such abuse is having the appropriate size of districts within the election.<sup>54</sup> Hamilton explained that by using representatives to represent districts in a larger scheme acts as a means to quarantine those factions of “sinister designs” that have taken hold of their electorate.<sup>55</sup> When choosing the appropriate size of a district, on one hand, a district must be small enough that the representative is “acquainted with all their local circumstances and lesser interests.”<sup>56</sup> On the other hand, the district must be large enough “to comprehend and pursue great and national objects.”<sup>57</sup> Containing representation to a Republican mode “renders factious combinations less to be dreaded.”<sup>58</sup> Indeed, Hamilton anticipated this quarantine model in the context of a district to that of the larger, national scheme, when he said:

[When] you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.<sup>59</sup>

If such a demagogue were to rise to power in one district, his or her metaphorical sickness was difficult to spread to another, and it would take overwhelming support during an election of other such demagogues of the same nature to acquire power.<sup>60</sup> Even if a demagogue were to capture the support of numerous districts, the quarantining quality of effective districting would inoculate the remaining electorate.

### 3. THE MODE TO SELECT THE PRESIDENT MUST ENSURE EXECUTIVE INDEPENDENCE

The Framers in general, and Hamilton in particular, identified the necessity of executive independence from the influence of the other two branches of government.<sup>61</sup> Imbued with federalist philosophy, the Framers perceived a close relationship between national and state

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<sup>52</sup> See *id.* at 50 (emphasis added).

<sup>53</sup> See THE FEDERALIST NO. 57, *supra* note 20, at 318 (James Madison).

<sup>54</sup> See THE FEDERALIST NO. 10, *supra* note 20, at 46-57 (James Madison) (quoting Alexander Hamilton). Gouverneur Morris disagreed that “a few designing men” might influence the vote by their “activity and intrigues,” except in “a small district.” MADISON’S JOURNAL, *supra* note 20, at 307-08. He proclaimed “[i]t can never happen throughout the continent” that “those little combinations and those momentary lies, which often decide popular elections within a narrow sphere” might influence a national election. *Id.* Morris ultimately doubted that collusive and combined action in and by populous states might arise from an at-large election with nearly the same likelihood that it might arise from elections by the state legislatures. *Id.* (quoting Gouverneur Morris).

<sup>55</sup> See THE FEDERALIST NO. 10, *supra* note 20, at 50-51 (James Madison) (quoting Alexander Hamilton).

<sup>56</sup> See *id.* at 51 (James Madison) (quoting Alexander Hamilton).

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See THE FEDERALIST NO. 10, *supra* note 20, at 51 (James Madison) (quoting Alexander Hamilton).

<sup>60</sup> See MADISON’S JOURNAL, *supra* note 20, at 307-08 (quoting Gouverneur Morris describing the “quarantine” ability of effective districting).

<sup>61</sup> See THE FEDERALIST NO. 68, *supra* note 20, at 380-81 (Alexander Hamilton).

legislatures, just as they saw an intertwined dynamic between the national legislature and the national executive. Achieving this balanced structure required that the legislative branch have the power to impeach the executive for his “incapacity, negligence, or perfidy.”<sup>62</sup> But with this remedy came risk; there was concern that giving the legislature both the power to appoint and remove the President might make the executive its “mere creature.”<sup>63</sup> If the President was too weak, the legislature could “usurp” the executive’s powers; but if the President was given too much power, the legislature could have been rendered meaningless.<sup>64</sup> In the words of Gouverneur Morris, either “legislative tyranny” or an “elective monarch” might arise from an unbalanced structure.<sup>65</sup>

The Framers engaged in extensive discussion at the Convention about the possibility of the national legislature selecting the President.<sup>66</sup> But they ultimately rejected this approach as inconsistent with several of the Framers’ key principles, including separation of powers among the branches and the allocation of power between states and the national government. Keeping legislative and executive powers separate was an “indispensable necessity” for the Framers.<sup>67</sup> Even with this check in place, it remained “the most difficult of all rightly to balance the Executive.”<sup>68</sup>

These two perspectives together led the Framers to reject executive selection by state legislatures. As the national legislature was meant to control the “strong propensity [of state legislatures] to a variety of pernicious measures,” so too the national executive “was to control the National Legislature, so far as it might be infected with a similar propensity.”<sup>69</sup> As with selection by the national legislatures, so too with state legislatures—the risk endured that larger states might routinely prevail over smaller states.<sup>70</sup> Aside from separation of powers concerns, Madison expressed two practical concerns about legislative selection. First, he was concerned this mode would “agitate [and] divide” the legislature and cause the public interest to “materially suffer.”<sup>71</sup> There was also concern that legislative selection of the President might render the veto power<sup>72</sup> meaningless, as the legislature might appoint someone who it knew would not exercise

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<sup>62</sup> See MADISON’S JOURNAL, *supra* note 20, at 332 (quoting James Madison).

<sup>63</sup> See *id.* at 56 (quoting George Mason); see also *id.* at 327 (quoting James Madison positing “free agency” of executive from legislatures deemed “essential”).

<sup>64</sup> MADISON’S JOURNAL, *supra* note 20, at 327.

<sup>65</sup> See *id.* at 525-26 (quoting Gouverneur Morris); see also *id.* at 136-37 (anticipating fears of Executive becoming “elective monarch”).

<sup>66</sup> See MADISON’S JOURNAL, *supra* note 20, at 367 (quoting Gouverneur Morris).

<sup>67</sup> *Id.* at 577 (quoting Elbridge Gerry).

<sup>68</sup> *Id.* at 361 (quoting Gouverneur Morris).

<sup>69</sup> *Id.* at 364 (quoting James Madison).

<sup>70</sup> See MADISON’S JOURNAL, *supra* note 20, at 366 (quoting Oliver Ellsworth); *id.* at 368-69 (quoting John Dickinson).

<sup>71</sup> See *id.* at 363 (quoting James Madison).

<sup>72</sup> This is the only check on presidential power expressly authorized under Article I. See U.S. CONST. art. I, § 7.

this necessary check on the House.<sup>73</sup> Others expressed reserve that this mode of selection would likely beholden the executive to the larger states.<sup>74</sup>

Ultimately, the selection of the President by either the state legislators, Governors, or national legislature was rejected for its propensity to degrade the independence of the executive.<sup>75</sup> Hamilton believed that the nature of a detached person, without a position of trust or profit, for the sole purpose of selecting the President, would help insulate the executive from bribery or corruption.<sup>76</sup> His writings identify how such separation protected appointment:

[The Electors] have not made the appointment of the President to depend on any preexisting bodies of men who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment.<sup>77</sup>

#### 4. THOSE WHO SELECT THE PRESIDENT MUST KNOW OF THE CANDIDATE'S QUALITIES.

The Elector system was largely intended to serve as an extension of republican representation of the people for the sole purpose of selecting the President.<sup>78</sup> It thus appears that one of the driving considerations in the use of Electors appeared to be the availability of information to help voters make such an important decision.<sup>79</sup> Many of the Framers doubted the abilities of the people to even obtain the necessary information to make an informed decision.<sup>80</sup> For example, as a second basis for supporting Madison's view that state-centric concerns might dictate voters' choices in a popular election, Roger Sherman posited that the people at large were not capable of being "sufficiently informed of [the leading] characters."<sup>81</sup> George Mason expressed this sentiment more starkly, asserting that the people might no more chose "a proper character for" President than a blind man might pass "a trial of colours."<sup>82</sup>

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<sup>73</sup> See MADISON'S JOURNAL, *supra* note 20, at 363-64 (quoting Madison); *see also id.* at 325-26 (quoting Edmund Randolph).

<sup>74</sup> *See id.* at 325-26 (suggesting that legislative selection might occur either by joint ballot by both houses or by nomination by the lower house and appointment by the upper house); *see also id.* at 94 (quoting David Brearly's identification of Massachusetts, Pennsylvania, and Virginia as larger states).

<sup>75</sup> *See id.* at 322, 325 (describing dangers of proposed appointment by state executives); *supra* note 63 and accompanying text (describing danger of appointment by national legislature); *supra* note 69 and accompanying text (describing danger of appointment by state legislature).

<sup>76</sup> *See* THE FEDERALIST NO. 68, *supra* note 20, at 381 (Alexander Hamilton).

<sup>77</sup> *See id.*

<sup>78</sup> *See* MADISON'S JOURNAL, *supra* note 20, at 368-69 (quoting John Dickinson). "Let the people of each State choose its best Citizen. The people will know the most eminent characters of their own States, and the people of different States will feel an emulation in selecting those of which they will have the greatest reason to be proud." *Id.* at 369.

<sup>79</sup> *See* THE FEDERALIST NO. 68, *supra* note 20, at 380 (Alexander Hamilton) (arguing Elector more likely to "possess the information and discernment requisite to such complicated investigations").

<sup>80</sup> *See* MADISON'S JOURNAL, *supra* note 20, at 306 (quoting Roger Sherman).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 308 (quoting George Mason).

Gouverneur Morris took the opposite view, believing that “[i]f the people should elect, they will never fail to prefer some man of distinguished character, or services; some man, if he might so speak, of continental reputation.”<sup>83</sup> Even when acknowledging that “the multitude will be uninformed,” Morris theorized that the people would know “of those great [and] illustrious characters which have merited their esteem & confidence.”<sup>84</sup> Morris categorically linked accomplishment to fame, concluding “[i]t cannot be possible that a man shall have sufficiently distinguished himself to merit this high trust without having his character proclaimed by fame throughout the Empire.”<sup>85</sup>

However, skepticism won the day, and this priority was one of the driving forces to ensure the use of Electors to be appointed in some fashion. Before the popularization of selection of Electors by general vote, appointment of Electors by state legislators was a popular choice amongst states for this exact reason, as most voters understood their vote for their state legislator to actually be a vote for the President.<sup>86</sup> This particular concern, brought up at most mentions of the National Popular Vote (“NPV”), was one of the principle reasons that the NPV mode was denied.

### **5. THE MODE TO SELECT THE PRESIDENT SHOULD BE REPRESENTATIVE OF THE PEOPLE’S WILL**

The Framers settled on the Elector mode because it embodied the truest balance between direct representations of the people whilst simultaneously preventing human error. According to Hamilton,

All these advantages will happily combine in the plan devised by the convention; which is, that the people of each State shall choose a number of persons as Electors, equal to the number of senators and representatives of such State in the national government, who shall assemble within the State, and vote for some fit person as President. Their votes, thus given, are to be transmitted to the seat of the national government, and the person who may happen to have a majority of the whole number of votes will be the President.<sup>87</sup>

The system of federal representation—having a balance between the House and the Senate—was created to simultaneously balance the will of the people in their capacity as citizens of the nation as a whole and their interests as members of a sovereign state.<sup>88</sup> Madison himself realized that the purpose of Electoral College was represent those dual interests in the presidential elections.<sup>89</sup> The college was designed not to interpose its will or change the choice of the people; the evidence of rigorous debate in support of the NPV is evidence of this idea’s

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<sup>83</sup> *Id.* at 306 (quoting Gouverneur Morris).

<sup>84</sup> *Id.* at 308 (quoting Gouverneur Morris).

<sup>85</sup> *Id.* at 324 (quoting Gouverneur Morris).

<sup>86</sup> *See infra* note 94 (explaining voting population’s understanding state representatives appointed Electors).

<sup>87</sup> *See* THE FEDERALIST NO. 68, *supra* note 20, at 381 (Alexander Hamilton) (emphasis added).

<sup>88</sup> *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654-55 (1952) (Jackson, J. concurring) (describing American government system).

<sup>89</sup> *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 464 (Max Farrand ed., 1911).

importance.<sup>90</sup> By implication, it reveals that when the vote of the people was changed by the college, which has happened five times in history, there ought to be a danger that the college was systemically curing.

## B. WTAS AND THE TWELFTH AMENDMENT

### 1. THE HISTORY OF ARTICLE II

Understanding of the Twelfth Amendment starts with understanding the language of Article II.

The Electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. . . . The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. . . . In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.<sup>91</sup>

The original Article II system allowed Electors to nominate *and* select two individuals for President, requiring that one vote be cast for a candidate not from their own state.<sup>92</sup> However, the Electors were not permitted to cast their vote specifically for the President or Vice, but rather choose the two candidates believed best qualified to serve.<sup>93</sup> At its heart, this Electoral system was designed to select the fittest candidate, but also served as a means to proportionally protect those smaller states with fewer Electors.<sup>94</sup> However, the deficiencies of this troublesome two-vote Elector, lying just below the surface of the elections of 1789 and 1792, would rear its ugly head in 1796 and 1800.<sup>95</sup> Combined with a rise in Democratic Republican party power, those latter hotly contested elections would eventually birth the Twelfth Amendment.

After the return of the 1790 census, Congress passed a law to proportionally assign the states their Congressional representation and number of Electors.<sup>96</sup> At this time, the states were

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<sup>90</sup> E.g. Norman R. Williams, *Why The National Popular Vote Compact Is Unconstitutional*, 2012 BYU L. REV. 1523, 1523 (2012); Stanley Chang, *Recent Development: Updating The Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 216 (2007).

<sup>91</sup> U.S. CONST. art II., § 1 (describing original presidential selection process).

<sup>92</sup> See CEASAR, supra note 27, at 79-80 (discussing mechanisms of original Article II language).

<sup>93</sup> See TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804*, at 140 (1994).

<sup>94</sup> See *id.* at 140.

<sup>95</sup> See *id.* at 108.

<sup>96</sup> See *id.* at 53.

divided between those appointing their Electors and those allowing the people to vote for them.<sup>97</sup> In the case of appointed Electors, state legislators were seen as expressing the preference of the people in choosing presidential Electors.<sup>98</sup>

The election of 1796, however, revealed the insufficiency of this electoral procedure. The rift between Federalists, now slipping from power, and Republicans brought forth calls for party “faithful, not independent and maverick, [E]lectors.”<sup>99</sup> The Electors’ strategic maneuvering resulted in their voting for the candidate of their choosing, and “scattering” their second vote amongst thirteen other candidates to bolster their actual choice.<sup>100</sup> These practices led to the presidency of John Adams, with Thomas Jefferson as Vice President.<sup>101</sup> The election of 1796 “sow[ed] the seeds of division between Jefferson and Burr and between Hamilton and Adams” that would reap the whirlwind of 1800.<sup>102</sup>

A “complete mess” most aptly describes the election of 1800. New York proved to be the most important battleground state, as it had WTAs in place for its appointed Electors. Republicans diligently and successfully ran their campaigns because they understood state legislators as the key to obtaining Electors.<sup>103</sup> Aaron Burr began his campaign in New York City with a star-studded presidential ticket.<sup>104</sup> Sensing a Federalist defeat in New York, Alexander Hamilton attempted to change Elector selection from legislative appointment to a district voting process in a deal with the governor, a move viewed by most as less-than-scrupulous.<sup>105</sup> Problems arose when Hamilton characterized this tactic as trying to change the rules of the game, and “take what they had not won.”<sup>106</sup> Adams and Hamilton, attempting to place their thumbs on the scales, harmed Federalists irreparably nationally.<sup>107</sup> Federalist Electors, sensing their defeat, threw Electoral votes to Republican Aaron Burr to trigger a tie between the two Republican frontrunners.<sup>108</sup> Federalists knew that in the event of a tie, Article II directed that the House of Representatives elect the president.<sup>109</sup> Republicans accused the Federalists’ support of Burr as “a defeat of the Election & usurpation of the Government by some creature whom they intend to

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<sup>97</sup> See *id.* at 54-55, 110.

<sup>98</sup> See TADAHISA KURODA, *supra* note 93 at, 83-84, 86.

<sup>99</sup> *Id.* at 69.

<sup>100</sup> *Id.* at 70.

<sup>101</sup> See *id.* at 70.

<sup>102</sup> See *id.* at 72.

<sup>103</sup> See TADAHISA KURODA, *supra* note 93 at, 84.

<sup>104</sup> See *id.* at 84.

<sup>105</sup> See *id.* at 85.

<sup>106</sup> See *id.* at 86.

<sup>107</sup> See *id.* at 91.

<sup>108</sup> See *id.* at 97-98. James Madison had anticipated this exact problem with the original mode of presidential selection during the Constitutional Convention. See MADISON’S JOURNAL, *supra* note 20, at 368 (discussing various voting mechanisms).

<sup>109</sup> See U.S. CONST. art. II. Jefferson and Burr had each received 73 votes, with 65 to Adams, 64 to Pinckney, and 1 to Jay. See KURODA, *supra* note 94, at 102 (noting that the House was then only able to proceed balloting for Jefferson and Burr after this count).

designate by law.”<sup>110</sup> Despite Federalist attempts to supplant the national support of the Republicans, Congress elected Jefferson as President on their 36th attempt.<sup>111</sup>

This history provides us with the essential context to understand why the Eighth Congress sought to correct the Constitution’s course by proposing the Twelfth Amendment.<sup>112</sup> By 1801, the Constitution clearly contained two large weaknesses in the mode of presidential selection.<sup>113</sup> First, the Electors could use their votes to manipulate the Article II system, as seen in both 1796 and 1800. Despite the people’s preference, Electors’ vote manipulation failed to “transmit” the vote of the people, as commanded by Article II. Corruption in the manner of selecting the Electors also presented itself as a problem.<sup>114</sup> At the time, the choice for selecting Electors was boiled down to two options: legislative appointment or popular election, the latter further subdivided into elections in districts or general tickets.<sup>115</sup> The second concern demanded an amendment needed to “prevent state legislators from setting aside the clear wishes of the majority of the people.”<sup>116</sup> The Twelfth Amendment answered this call by seeking to fundamentally protect the effective participation of the people in the presidential election process.

## 2. THE TWELFTH AMENDMENT ENTERS

The text of the Twelfth Amendment states, in relevant part:

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; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists 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.<sup>117</sup>

The history of the first four elections revealed problematic political maneuvering on the part of the Electors. To solve this political maneuvering problem, the Twelfth Amendment

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<sup>110</sup> See KURODA, *supra* note 93, at 101. It is important to note that this is a drastic oversimplification of the election of 1800. Entire books have been written on the subject, however, understanding these basic facts are essential to understanding what the Twelfth Amendment was written to fix.

<sup>111</sup> *See id.* at 105.

<sup>112</sup> *See id.* at 127.

<sup>113</sup> *See id.* at 114. Of all the vast disagreements between Federalists and Republicans, this was common ground that both sides could find. Madison himself admitted that the mode had failed the charge of the Constitution, and that an amendment was needed. *See id.* at 113.

<sup>114</sup> See KURODA, *supra* note 94, at 113 (indicating that after an aristocratic has won, suffrage rights were deprived).

<sup>115</sup> *See id.* (noting that Jefferson wanted to keep his party’s options open).

<sup>116</sup> *Id.* at 114. Proponents of the Twelfth Amendment believed that the Framers, some of them still living and involved in the disastrous elections, were clear in their intent. “Wise and virtuous as were the members of the Convention, experience has shown that the mode therein adopted cannot be carried into operation; for the people do not elect a person for an [E]lector who, they know, does not intend to vote for a particular person as President.” *Id.* at 120.

<sup>117</sup> *See* U.S. CONST. amend. XII.

required each elector to submit one vote for President, and one for Vice President, instead of the Electors selecting their top two choices for President.<sup>118</sup> The Twelfth Amendment guaranteed that the states could choose their mode of selecting Electors so long as the Electors “represent[ed], in a certain proportion, both the nation and the states.”<sup>119</sup> Detractors rightly contested that the heart of the Constitution did not revolve around the will of the majority.<sup>120</sup> However, the Twelfth Amendment did not mandate majority will, but allowed states to decide their priorities in the interests of the states and the people when choosing a manner of selection. By securing the states’ right to choose the mode of selecting Electors, the Twelfth Amendment preserved the dueling interests of the states and the nation, guaranteeing effective participation in the Presidential process.<sup>121</sup>

### III. THE CONSTITUTIONALITY OF MODERN WTAS

#### A. WTAS VIOLATE THE HISTORICAL VALUES OF PRESIDENTIAL SELECTION

The Constitution did not create WTA; it simply gave permission to states to create these laws.<sup>122</sup> The use of WTAs began to catch on after the election of 1796, when Jefferson lost the election largely due to the strategic “scattering” of the Electors.<sup>123</sup> In fact, if Virginia and North Carolina, both largely supportive of Jefferson, had a WTA system in place, Jefferson would have won the presidency.<sup>124</sup> By 1824, all of the states had adopted state-wide WTAs, a tradition which has continued until today.

The use of WTAs results in two trends that entirely define the modern presidential election process.<sup>125</sup> First, WTAs create two classes of states in the context of a presidential election: “battleground states” and “spectator states.” These “battleground states” are reasonably defined as those states carrying the possibility of awarding their Electoral votes to either the Democratic or Republican candidate.<sup>126</sup> In 2016, 94% of all campaign events took place in twelve key states.<sup>127</sup> In 2012, campaigns purchased 96.2% of all political television

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<sup>118</sup> See U.S. CONST. amend. XII. A secondary function was to foster a unified party ticket, moving votes from individuals to parties. See CEASAR, *supra* note 27, at 104.

<sup>119</sup> See *supra* note 90 and accompanying text.

<sup>120</sup> See KURODA, *supra* note 94, at 150.

<sup>121</sup> See *id.* at 113-14.

<sup>122</sup> See Anglem, *supra* note 4, at 299 (describing states’ freedom in choosing Electors).

<sup>123</sup> See *supra* notes 100-103 and accompanying text (describing election of 1796).

<sup>124</sup> See Devin McCarthy, *How the Electoral College Became Winner-Take-All*, FAIRVOTE (Aug. 21, 2012), <https://www.fairvote.org/how-the-electoral-college-became-winner-take-all> (recounting election of 1796).

<sup>125</sup> See Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 233-34 (2012) (explaining how WTAs create “battleground states” and “spectator” states”).

<sup>126</sup> See *A Recent Voting History of the 15 Battleground States*, NAT’L CONST. CTR. (Nov. 2, 2016), <https://constitutioncenter.org/blog/voting-history-of-the-15-battleground-states> (describing battleground or swing states in America).

<sup>127</sup> NATIONAL POPULAR VOTE, *Two-thirds of Presidential Campaign Is in Just 6 States*, NAT’L POPULAR VOTE, <https://www.nationalpopularvote.com/campaign-events-2016> (showing breakdown of 2016 campaign events).

advertisement in ten battleground states.<sup>128</sup> These battleground states regularly change their behavior to preserve their status, often jockeying to move forward their primary date to increase their relevance.<sup>129</sup> In 2016, analysts identified fourteen states that could reasonably go to either candidate.<sup>130</sup> The remaining “spectator states” are those where their support is a foregone conclusion. Second, WTAs entirely discard the votes of the losing party in Electoral College representation, whereby 50.01% of a state’s votes translates to 100% of the state’s Electors awarded to the winner. By these two consequences that we weigh five aforementioned constitutional values against the historical constitutionality of modern WTAs.

### 1. WTAS ENABLE FACTIONALISM

By their nature, WTAs allow for factions that capture just over half of a state’s support to claim all of its Electors. For example, the competing interests of slave states and those that did not allow slavery proved one of the most important factions the Framers concerned themselves with.<sup>131</sup> To prevent this procedurally, the Framers created the two houses, the House of Representatives protecting the interests of the more populous states, while the Senate balanced it with equal votes to all states.<sup>132</sup> Second, the Constitution created the Interstate Compact Clause, forbidding any state from entering into an agreement with another state without the consent of Congress.<sup>133</sup> The Framers designed the Electoral College to address these issues by not only framing the electoral system as a proportional vote, but guaranteeing a degree of independence from otherwise political machinations. However, with slavery abolished, we find that new categories of faction have emerged, namely states grouped as either conservative or liberal, and grouped as either battleground or spectator.

The existence of two classes of states, alone appears contrary to the values expressed by the Framers in the drafting of the Constitution. The thin margin of support separating the two prevailing political parties creates a battleground state. As such, battleground states serve almost

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<sup>128</sup> See Nathaniel Peterson, *The Geography of Campaign Spending*, WRIGHT ST. U., <https://liberal-arts.wright.edu/applied-policy-research-institute/blog/article/the-geography-of-campaign-spending> (mapping 2012 political television advertisement spending).

<sup>129</sup> See BROOKINGS, *Event Summary: “Front Loading” the Primaries: The Wrong Approach to Presidential Politics?* (Jan. 14, 2004), BROOKINGS, <https://www.brookings.edu/opinions/event-summary-front-loading-the-primaries-the-wrong-approach-to-presidential-politics/> (describing “front loading” of state primaries).

<sup>130</sup> See generally REAL CLEAR POLITICS, *Battle for the White House*, REAL CLEAR POL., [https://www.realclearpolitics.com/epolls/2016/president/2016\\_elections\\_electoral\\_college\\_map\\_race\\_changes.html](https://www.realclearpolitics.com/epolls/2016/president/2016_elections_electoral_college_map_race_changes.html) (mapping likelihood of states’ presidential preference). It is worth noting that Wisconsin, one of the most important electoral wins for Donald Trump, was not listed as a battleground state, but as a likely Democratic win. *Id.*

<sup>131</sup> See *supra* notes 45-48 and accompanying text (describing factions of slave and free states). The shameful “Three Fifths” compromise of Article II is clear evidence of this divide. See U.S. CONST. art. II. Northern states were concerned with the Southern states receiving greater representation within the federal government, and by association presidential elections, by virtue of the number of their slaves. See *supra* notes 45-48 and accompanying text. This concern was not contained exclusively within the boundaries of presidential selection in Article II of the Constitution; it was too voiced in the debates over the Twelfth Amendment. See Senator Timothy Pickering, *Speech in Favor of the Twelfth Amendment* (Oct. 17, 1803), <https://www.gilderlehrman.org/sites/default/files/inline-pdfs/T-05321.02.pdf> (commenting on division between northern and southern states).

<sup>132</sup> See *supra* note 89 and accompanying text.

<sup>133</sup> See Eric T. Tollar, Note, *Playing the Trump Card: The Perils of Encroachment Resulting From Ballot Restrictions*, 51 SUFFOLK U. L. REV. 695, 703 (2018) (discussing purpose of Interstate Compact Clause).

as microcosms of the national political conversation, but distill the electoral process into high-stakes campaigns in only a limited number of states. The Framers, in their many discussions, identified that the people were the “only legitimate fountain of power.”<sup>134</sup> States have continuously jockeyed over the last several years for earlier voting and primary dates in an effort to stay relevant in the national conversation of presidential elections. Candidates know that votes in Ohio and Florida matter far more than Massachusetts and Idaho; this disparate treatment is detrimental to the rights of other citizens and defines this modern form of factionalism.

Battleground states—the direct result of WTAs—have become the very factions that the Framers so feared and sought to avoid in their many debates and adjustments of the presidential selection process. The abolishment of WTAs would undoubtedly result in the death of battleground states altogether, and would cure the issue of factions.

## 2. WTAS ARE VULNERABLE TO EXCITEMENT AND DEMAGOGUES.

WTAs consolidate the outcome of a presidential election in only a handful of states, removing the protection of the republican districting method. The Framers, in their genius, designed voting districts to contain unbridled populism; however, the implementation of the WTA system substantially weaken districting’s check on populism.

WTAs make a state vulnerable to a demagogue capturing a disproportionate amount of presidential support. WTAs naturally produce high-stakes battleground states, and leave the rest of the states as spectators.<sup>135</sup> In the past six presidential elections, no candidate has succeeded without capturing at least 62.5% of battleground states in the country.<sup>136</sup> If a presidential candidate can focus their energy to capitalize in battleground states, it would mean that a disproportionate amount of states can impose their will on the entire nation.

## 3. WTAS WEAKEN EXECUTIVE INDEPENDENCE FROM STATE LEGISLATURES

The Framers clearly feared a President beholden to the political or personal interests of the body that elected him.<sup>137</sup> One of the greatest dangers the states saw in such a government was that their interests would not be secured, and concerns not be addressed.<sup>138</sup> However, just like the individual must surrender some of their liberty within a Republican government, so too must the states surrender some of their sovereignty to a federal government.<sup>139</sup>

The Framers also knew that the legislatures and representatives of the states would be no exception. The President must sign every bill brought forth by Congress, including

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<sup>134</sup> THE FEDERALIST NO. 39, *supra* note 20, at 281-82 (James Madison).

<sup>135</sup> *See supra* Part III.A.

<sup>136</sup> *See A Recent Voting History of the 15 Battleground States*, NAT’L CONST. CTR., <https://constitutioncenter.org/blog/voting-history-of-the-15-battleground-states>.

(showing presidential outcomes from 1996-2012); *2016 Presidential Election Results*, 270TOWIN, <https://www.270towin.com/maps/2016-actual-electoral-map> (showing 2016 presidential election results). Of the sixteen identified battleground states, no presidential candidate has won with less than ten. *Id.*

<sup>137</sup> *See supra* Part III.A.1 (noting evidence of congressional gerrymandering on national level).

<sup>138</sup> *See supra* note 44 and accompanying text (discussing small states concern of interests being ignored).

<sup>139</sup> *See* THE FEDERALIST NO 2, *supra* note 20, at 5 (John Jay).

appropriations bills. WTAs create a handful of battleground states that are disproportionately essential to winning the presidency. It is not outside the realm of belief that if local politicians or members of Congress would support a presidential candidate knowing that the President would look fondly upon their state when the time came for federal appropriations. Spectator states have far less to offer a presidential candidate, which could disadvantage them if a certain candidate is victorious.

#### **4. WTAs AND THOSE WHO SELECT THE PRESIDENT MUST KNOW OF THE CANDIDATE'S QUALITIES.**

During the course of the Constitutional Convention, Eldridge Gerry was the most articulate in identifying the challenges and shortcomings of the people.<sup>140</sup> Members of the convention clearly distrusted the knowledge of the general voting population so much so that this distrust alone was one of the greatest driving forces behind the defeat of the NPV.<sup>141</sup>

Technology has likely advanced in such a way that the Framers could not have imagined. Most people today have access to the internet either through computers or smartphones. Social media and widespread access to news raises the general base of knowledge of the electorate. At best, the abolition of WTAs would increase the meaningful exchange of ideas in a wider base of the electorate, and perhaps increase voter registration and turnout.

#### **5. THE MODE TO SELECT SHOULD BE REPRESENTATIVE OF THE PEOPLE'S WILL**

The Framers knew that the mode of presidential selection must come from “some existing authority under the National or States Constitutions—or by some special authority derived from the people—or by the people themselves.”<sup>142</sup> Quite simply, a republican form of government provides that the people choose those representatives who in turn create the laws to bind them.<sup>143</sup> That simple system cannot be more indicative of the foundational concept of liberty and tyranny. The people surrender a small portion of liberty to a duly elected representative of government in order to prevent tyranny, organize for common defense and interest and order, and promote order.<sup>144</sup> While a branch of government may represent the *interests* of a state or a group of people,<sup>145</sup> the only “legitimate fountain of power” lies with the people.<sup>146</sup>

At their core, WTAs transform 50.01% of the vote into the unilateral support of that same state in the Electoral College. The Framers' vision did not include this disregard of such a large section of the voting population. Additionally, the near certainty of other states voting pattern denies the voters in those states a meaningful voice in the presidential election process. Using either the Maine and Nebraska Manner or the National Popular Vote would create negative

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<sup>140</sup> See MADISON'S JOURNAL, *supra* note 20, at 327 (reporting Gerry's proposal that Governors ought to select President due to distrust of general population).

<sup>141</sup> See *supra* notes 81-82 and accompanying text (discussing fatal flaw of NPV).

<sup>142</sup> MADISON'S JOURNAL, *supra* note 20, at 363 (quoting James Madison).

<sup>143</sup> See THE FEDERALIST NO. 39, *supra* note 20, at 211 (James Madison).

<sup>144</sup> See THE FEDERALIST NO. 2, *supra* note 20, at 5 (John Jay).

<sup>145</sup> See THE FEDERALIST NO. 39 *supra* note 20, at 209 (James Madison).

<sup>146</sup> See THE FEDERALIST NO. 49, *supra* note 20, at 281 (James Madison).

consequences for the presidential candidate that ignored the interests of the members of their political party in spectator states. Providing a voice to the issues that voters in those states care about is the exact reflection of the will of all the people that the Framers intended—not just the will of the people in battleground states. Thus, this Article now proposes a new system that the authors believe help remedy these constitutional concerns while comporting with the principles the Framers identified as important in selecting the President. Regardless of the constitutionality of the current WTA system, the proposed manner is one that would benefit our political system.

### **B. WTAS CONTRADICT THE MEANING OF THE TWELFTH AMENDMENT**

The passage of the Twelfth Amendment addressed the main deficiencies in the current elector system. This Article approaches understanding the Twelfth Amendment by two different means. First, by looking to the history of the amendment, we can understand the purpose of its passage and what deficiencies it intended to correct.<sup>147</sup> Second, this Article interprets the text of the amendment to understand the normal meaning of the words as understood in their original usage. By eliminating Electors' ability to scatter or misdirect their votes, the Eighth Congress directed that Electors must “transmit” the votes of the people.<sup>148</sup> Doing so ensured the Framers' WTAs at best do not serve, and at worst violate, the central principles and text of the Twelfth Amendment.

The Framers coalesced around the idea of balance. The Constitution thus guaranteed that states gave the people in their individual capacities, in their capacities as citizens of a state, the interests of smaller states, the interests of larger states, and the interests of regions effective participation in presidential selection.<sup>149</sup> The principle of effective participation simply states that the people must have a voice within the election of a government official that represents them.<sup>150</sup> Before the widespread application of WTAs, that representation came in one of two flavors. First, the people chose their state legislator with the understanding that their representative would later choose presidential Electors that represented their interests. Second, the people would choose an Elector who would do the same, either by general ticket or district ticket. The Twelfth Amendment attempted to guarantee that the government heard the voice of the people—including the minority—and that states counted and transmitted their votes.

WTAs undercut the principle of effective participation inherent in the Twelfth Amendment. When a state's citizens vote in presidential elections, they never provide unanimous support for a candidate. However, if a minority voice garners enough support, they should be able to secure a voice of representation in the process. Allowing a minority segment to secure such representation forces candidates to at least listen to the concerns of this segment of the electorate and respond accordingly. WTAs, by constructively disregarding any electoral representation for the minority, allow candidates to ignore large, but nonetheless minority,

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<sup>147</sup> See *supra* Part II.B.1.

<sup>148</sup> See U.S. CONST. amend. XII. This language was unchanged from the original text of Article II and was specifically debated within the Constitutional convention. See U.S. CONST. art. II, § 1; see also FEDERALIST NO. 68, *supra* note 20, at 381-82 (Alexander Hamilton) (describing mandate of vote transmission).

<sup>149</sup> See MADISON'S JOURNAL, *supra* note 20, at 133 (quoting Alexander Hamilton discussing equality of suffrage essential to effective government).

<sup>150</sup> See *cf.*, *supra* Section II.A.4 (explaining “consent of the governed”); see also *cf.* Reynolds v. Sims, 377 U.S. 533, 565 (1964) (acknowledging right of each citizen to “have an equally effective voice” in election process).

segments of the voting population. This effectively eliminates the ability of those segments of the electorate to have any meaningful influence in the selection of the President. Eliminating the minority voice runs afoul of the Twelfth Amendment's guarantee of effective participation.

The election of 1796 was decided by the party Electors' unilateral support of one candidate with their first vote, and the subsequent scattering of their remaining vote to dilute the votes of their political opponents. Thus these Electors were not effectively voting at all, but instead used their votes as partisan political maneuvering.<sup>151</sup> The Twelfth Amendment intended to transform the Elector from a "discretionary trustee" to a "bound agent" by requiring the Electors to "transmit" the votes of the people.<sup>152</sup> To understand the textual meaning of the word "transmit," this Article looks to a number of dictionaries written and used at the time that the Amendment and the Constitution were written.<sup>153</sup>

Today the word "transmit" is defined as "to send or transfer (a thing) from one person to another" or "to communicate."<sup>154</sup> Reading the word as it was defined in the time of the Framers suggests that the word meant largely the same then as it does now. The Framers defined "transmit" as "to fend<sup>155</sup> from one person to another."<sup>156</sup> "Transmit" is also meaningfully used in the definition of two words: "acquire" and "give." "Acquire" is defined as "to gain by one's own labour or power; to obtain what is not received from nature, or transmitted by inheritance."<sup>157</sup> "Give" is defined as "to transmit from himself to another hand, speech, or writing; to deliver; to impart; to communicate."<sup>158</sup> A reading of these dictionaries written from 1755-1775 all conclude that "transmit" meant a transfer or communication that does not change the original character of the object of meaning of the communication.

Looking at these varying definitions, WTAs certainly do not transmit the votes of a state. For example, in 2016, 47.4% of Florida voters supported Hillary Clinton in the presidential election, 48.6% supported Donald Trump.<sup>159</sup> Yet, by merit of the WTA system, the Electors reported Florida's unanimous and unequivocal support for only the Republican candidate. The story in 2016 was the same in almost every single state throughout the country. Indeed, the

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<sup>151</sup> See CEASER, *supra* note 27, at 104 (describing shortcomings of Second Amendment). In addition to the scattering of votes, there were a number of different ways to spoil the votes of the majority. See *id.* For example, the defeated party could realistically throw all of their votes to the majority's second place candidate, making the majority's choice for Vice President win the election. See *id.*

<sup>152</sup> See *id.* at 136.

<sup>153</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 576-77, 581 (2008). When interpreting the text of the Constitution, the Supreme Court is "guided by the principle that the Constitution was written to be understood by the votes; its words and phrases were used in their normal and ordinary meaning." *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). Following the model set forth by Justice Scalia, this Article uses dictionaries at the time to determine the meaning of the word "transmit." See *id.* at 581-82.

<sup>154</sup> *Transmit*, BLACK'S LAW DICTIONARY (10th ed. 2018).

<sup>155</sup> *Fend*, 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 368 (1775) (defining *fend* as "to keep off" or "to shift off a charge").

<sup>156</sup> *Transmit*, 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 360 (2nd ed. 1775).

<sup>157</sup> *Acquire*, JOHNSON'S ENGLISH DICTIONARY 75 (2nd ed. 1755).

<sup>158</sup> *Give*, JOHNSON'S ENGLISH DICTIONARY 903.

<sup>159</sup> See *infra* app. E (showing national preference).

WTA did not *transmit* the presidential preference of about 60% of states;<sup>160</sup> instead, the WTA distorted them to express unanimous support of a single candidate. WTA thus results in the votes of the people being transmuted, not transmitted, by the Electors who represent them.<sup>161</sup> Altering the preferences of the people of a state through WTAs thus violates the Twelfth Amendment by transforming the votes of the people, not transmitting them.

#### IV. THE MORE PERFECT MANNER

There is no greater thrill than watching presidential election results; hearing the iconic announcement: “We now call the state of Massachusetts and its eleven presidential Electors for . . .” Nevertheless, when we hear “its eleven Electors,” most do not understand that Electors exist in two separate categories in every state. The structure of Electors largely mirrors representation within the federal government: 1) the number of Electors proportional with that states’ seats within the House of Representatives (District Electors), and 2) a statewide Elector bonus of two Electors per state (Statewide Electors).<sup>162</sup> District Electors, much like the House of Representatives, represent the preference of the state’s popular vote. Statewide Electors, much like the Senate, award Electors for winning the state and protect the interests of smaller states when faced with the volume of votes in the larger states.

##### A. THE THREE ALTERNATIVE MANNERS

This Article contemplates three alternatives to WTAs: the Maine and Nebraska Manner (MNM); the national popular vote (NPV); and our own invention, the Proportional Elector Manner (PEM). This Article briefly explains each manner, and then proposes the PEM as the best possible alternative.

##### 1. THE MAINE AND NEBRASKA MANNER

Although states predominantly use the WTA manner of Elector appointment, the states of Maine and Nebraska use a different system. Under the Maine and Nebraska Manner (MNM), the plurality winner within each congressional district is allocated one Elector, with the plurality winner state-wide allocated the final two. There is substantial merit to this approach, especially for states with a large urban population concentrated in limited areas of the state and rural communities extending across the remainder. New York, Texas, and California, perhaps the most prominent examples, house some of the country’s largest cities.<sup>163</sup> It is worth noting that Maine and Nebraska are themselves strong examples of states without large urban populations that benefit from the MNM.

<sup>160</sup> See *infra* app. E (describing PEM). In 2016, under the proposed PEM, there would only have been fourteen states (and D.C.) with unanimous support of a single candidate. See *infra* app. E. Using MNM, only sixteen would have unanimously supported one candidate. See *infra* app. E.

<sup>161</sup> See 2 THOMAS SHERIDAN, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 361 (1775) (defining transmute as “to change from one nature or substance to another”).

<sup>162</sup> The District of Columbia is the only exception to this rule, as they have no representation within National government, but in 1961, were afforded three presidential Electors. See U.S. CONST. amend. XXIII. The calculation for the District was difficult. For the purposes of presidential accounting, that the District of Columbia would be counted as a state like Montana or Vermont, allocating one District Electors and two state-wide Electors. When referring to “states” won overall, D.C. is included in those calculations.

<sup>163</sup> See *Ten U.S. Cities Now have 1 Million People or More; California and Texas Each have Three of These Places*, U.S. CENSUS BUREAU (May 21, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-89.html>

The Framers, in the original debates concerning presidential selection, and the subsequent debates over the Twelfth Amendment, considered, and even approved of, this manner.<sup>164</sup> The MNM currently employed by the two states of its namesake assigns the choice of each congressional district that party's presidential Elector, and the two Statewide Electors to the overall vote-getter in the states. This manner provides for a tidy assignment of presidential Electors by congressional district, and appears to be the fairest way to count the election. Although a good idea, interference by bad actors is enough to spoil any system, including the MNM. Indeed the MNM is susceptible to a consequent evil of political partisanship: gerrymandering.

The Supreme Court—particularly in the 2018 term—struggled with developing a test for identifying a politically gerrymandered district.<sup>165</sup> For the sake of brevity, the authors decline—just as the courts have—to set forth a repeatable test that may be employed to determine a gerrymander has occurred.<sup>166</sup> Nevertheless, for allegorical purposes, we can identify the issue much as Justice Stewart did with pornography: “you know it when you see it.”<sup>167</sup>

In 2008, Obama won 53.4% of the NPV to McCain's 46%.<sup>168</sup> Nevertheless, WTA inflated Obama's victory considerably, assigning 365 Electors—67.8% of the college—to Obama.<sup>169</sup> The 2008 distribution of the District Electors narrowly departs the NPV; by district, Obama wins 242 to McCain's 194: 55.5% to 44.5%.<sup>170</sup> Ultimately, both MNM and PEM closely reflect the national and district-wide vote, and seem to more closely resemble reality than WTA's huge margin. However, the two systems' accuracies drastically depart in 2012.

The MNM brings about troubling results when used to count the presidential votes in the last two elections. President Obama's incumbent victory in the 2012 election was less comfortable defeating Mitt Romney in the NPV 51.4% to 47.6%.<sup>171</sup> How then, did WTAs assign 61.7% to Obama and 38.29% to Romney?<sup>172</sup> More importantly, how is it that the MNM would actually have elected Mitt Romney as President over Barack Obama, 50.19% to 49.81% (270

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<sup>164</sup> See *supra* Parts III.A-B (summarizing history and debates over Twelfth Amendment).

<sup>165</sup> See *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (declining use of efficiency gap test for partisan political gerrymandering). The Supreme Court first created the test to determine that an unconstitutional gerrymander exists with “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.” See *Davis v. Bandemer* 478 U.S. 109, 133 (1986). However, the plurality in *Vieth v. Jubelirer* were unanimous only in their willingness to “jettison the test set forth in *Bandemer*.” See *Whitford v. Gill*, 218 F.Supp.3d 837, 877 (W.D. Wis.), *vacated*, 138 S. Ct. 1916, 1933 (2018). In *League of United Latin American Citizens v. Perry*, the Supreme Court ruled that the appellants had not provided a reliable standard for identifying unconstitutional gerrymanders. 548 U.S. 399, 420-21, 423 (2006).

<sup>166</sup> See *Gill v. Whitford*, 138 S. Ct. 1916, 1926-29 (2018) (outlining history of Court's adjudication of gerrymandering claims).

<sup>167</sup> See *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (characterizing pornography as practically obvious yet difficult to legally describe).

<sup>168</sup> *Infra* app. C.

<sup>169</sup> *Infra* app. C.

<sup>170</sup> *Infra* app. C.

<sup>171</sup> *Infra* app. D.

<sup>172</sup> See *infra* app. D.

electoral votes for Romney and 268 to Obama), in the 2012 presidential election?<sup>173</sup> The answer is deceptively simple: a candidate's success within the borders of a recently redrawn congressional district did not correlate to the candidate's success within a state.

Look at the historically conservative state of Alabama.<sup>174</sup> In 2012, MNM's accounting would've broken out only one district (14.3% of the state's total districts) for the Democratic candidate and six districts for the Republican.<sup>175</sup> How then does the vote count answer for Obama receiving almost 40% of the popular vote?<sup>176</sup> On the other side of the coin, the historically liberal state of Massachusetts tells the same story. In 2012, MNM assigned no Republican party victors in any of Massachusetts's congressional districts.<sup>177</sup> What explanation can Massachusetts then offer for almost 40% of its state voting for Romney?<sup>178</sup>

The unfortunate truth is that the disparity between NPV results and Electoral College results is the result of a bitter, national struggle over partisan consolidation of power. And if such obvious disparities between congressional districts being awarded to a candidate and the state's overall preference is evidence of a wrongdoing, then in 2012, Alabama, Arkansas, California, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wisconsin all appear guilty.<sup>179</sup> Indeed, "the fault, dear Brutus, is not in our stars, but in ourselves."<sup>180</sup> Unfortunately, the simplest explanation to account for such a drastic disparity between statewide returns and congressional district victories between 2008 and 2012: the 2010 census, redistricting, and gerrymandering.

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<sup>173</sup> The MNM's 2012 accounting of the presidential Electors would have been the second closest presidential election of all time, the first being Benjamin Harrison's 1888 win by a single electoral vote. *See infra* app. D (showing 2012 MNM election results).

<sup>174</sup> *See infra* apps. A-E (showing Alabama choosing GOP candidates in past five elections).

<sup>175</sup> *See infra* app. D.

<sup>176</sup> *See infra* app. D (showing 38% of Alabama voters supporting Obama).

<sup>177</sup> *See infra* app. D.

<sup>178</sup> *See infra* app. D (showing 37% of Massachusetts voters supporting Romney).

<sup>179</sup> *See infra* app. D. Acknowledging the seriousness of this claim, a decision was made to assign a numerical value to identify the disparity. The study first identified the margin of victory between the two parties in the respective congressional districts of each state. Then, it identified the margin of victory in the state-wide vote. Finally, it determined the margin between the congressional and statewide margins of victory and referred to it as the "discrepancy value." Only states with four congressional districts or more were analyzed as states with three or less congressional districts can exaggerate the discrepancy value. As a preliminary matter in 2012, Florida, Michigan, Ohio, Pennsylvania, Virginia, and Wisconsin all had a greater number of congressional districts vote for Romney, despite the state-wide majority vote going to Obama, which strongly suggests gerrymandered districts in those states. *See infra* app. D. The remaining named states all had a discrepancy value of 30% or more between the margin of victory of the victorious party by congressional district and the margin of victory by statewide vote. This Article acknowledges there may be additional contributing factors to this statistic, but posits that allegorically, such a discrepancy should be a cause for alarm for all voters regardless of political affiliation. *Cf.* Eric T. Tollar, Note, *Playing the Trump Card: The Perils of Encroachment Resulting From Ballot Restrictions*, 51 SUFFOLK U. L. REV. 695, 695-96 n.4 (2018) (exploring difficulties arising from use of statistical analysis).

<sup>180</sup> WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act I, sc. II, l. 231-32.

Referencing the five most recent presidential elections, WTA is most guilty of inflating the margin of victory on the national level.<sup>181</sup> MNM appeared sound until states meddled in the drawing of congressional district boundaries, and barring judicial intervention, the MNM system does not provide sufficient protection from partisan interference from state legislatures in what is a national interest.<sup>182</sup> However, in the 2000 and 2016 elections, where the NPV disagreed with the Electoral College, the PEM reveals itself to be the most accurate manner.

## 2. THE NATIONAL POPULAR VOTE

Since the 2016 election, there has been an increasing trend to change election accounting to be determined via the National Popular Vote. One proposal that is gaining momentum is an interstate compact, adopted by some and pending in other states, that would become effective once the adopting states collectively appoint a majority of the Electoral College.<sup>183</sup> If adopted by an interstate compact, the NPV would maintain the Electoral College but with the adopting states pledging to allocate their Electors to whichever candidate won the NPV (including by a non-majority plurality) regardless of the result in the state itself.<sup>184</sup>

If a constitutional amendment was adopted instead as a substitute for the Electoral College, the NPV would constitute a direct democratic process in which the candidate with the most votes wins the presidency. However, as a substitute for the Electoral College, the NPV fatally suffers from the problems identified by the framers when they considered and rejected a direct democratic process for selecting the President.<sup>185</sup>

Further, the NPV adopted by interstate compact presents additional challenges, at least as presently contemplated. If, for example, a fractious candidate wins a plurality of votes nationally but predominantly from one geographic, cultural, and political region, faring far less well in many other regions (including those in the northeast and west coasts where many states have already adopted the compact) then the peoples of the compact-adopting states will have committed their Electors to vote for that candidate, whom they themselves had rejected.<sup>186</sup> Indeed, the text of the Constitution, along with a plethora of historical evidence, command that Electors, and not the direct vote of the people, shall choose the President.<sup>187</sup> Without an amendment to the Constitution, the NPV cannot be considered an acceptable alternative to WTA.

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<sup>181</sup> See *infra* app. F (ranking WTA, MNM, and PEM accounting); *infra* note 204 (explaining in depth the methodology of ranking test to determine overall accuracy).

<sup>182</sup> See *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (declining to establish a test to determine political gerrymandering). This author contends that the MNM would be wholly appropriate for some states. However, the proverbial genie (i.e., gerrymandering) is out of the bottle in many others.

<sup>183</sup> See generally JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* (4th ed. 2013).

<sup>184</sup> See *Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, <https://www.nationalpopularvote.com/written-explanation> (arguing in favor of NPV).

<sup>185</sup> See *supra* Parts II.A.2, 4 (outlining Framers' explicit rejection of NPV).

<sup>186</sup> See *supra* Parts II.A.2, 4 (noting Framers' objection to NPV).

<sup>187</sup> See *supra* Parts II.A.2, 4.

### 3. THE PROPORTIONAL ELECTOR MANNER

Beyond finding constitutional deficiencies in WTA and practical difficulties with NPV, this Article proposes an alternative to MNM: What these authors call the Proportional Elector Manner (PEM). Using this accounting method, candidates are awarded District Electors proportionally to each candidate based on the popular vote within the state. The Statewide Electors are then awarded to the candidate in proportion to the state's popular vote. Proportional allocation of Electors is simple: the percentage of the popular vote each candidate wins is divided by the number of District Electors available within the state. This number represents the amount of District Electors that candidate will receive. While straightforward on its face, PEM is still problematic as simple division does not yield whole numbers.

To address this issue, PEM proposes “Jury Elector” accounting. “Jury Elector” accounting is designed to be a simple, commonsense rule: one may never “round up” an Elector to a whole number.<sup>188</sup> The runners-up in a state are awarded as many whole Electors as their proportional vote earned them, and the state's winner is awarded the remainder as a “bonus.” For example, in 2016, Illinois had 18 District Electors and two Statewide Electors.<sup>189</sup> Clinton won 55.3% of the vote in 2016, Trump won 38.4%, Johnson took 3.8% and Stein took 1.4%.<sup>190</sup> Dividing Illinois' 18 Electors by Johnson's percentage would yield 0.68 Electors, and Stein's percentage would account for 0.25 Electors.<sup>191</sup> As neither candidate passes the threshold of 1.0, they are awarded no Electors.<sup>192</sup> Dividing Illinois's 18 District Electors by the state's loser, Trump's 38.4% of the vote comes to 6.91 Electors.<sup>193</sup> As Jury Electors may not be rounded up, this ultimately means that Trump is awarded six Electors, and the other two candidates receive

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<sup>188</sup> This “Jury Elector” system is developed from two different areas of law: jury satisfaction and the Constitution. For example, in Montana, a civil trial is permitted with as few as six jurors. *See Colgrove v. Battin*, 413 U.S. 149, 149-151 (1973). Montana law provides that: “*At least two-thirds in number of any jury may render a verdict or finding, and such verdict or finding so rendered shall have the same force and effect as if all such jury concurred therein.*” MONT. CONST. § 26 (emphasis added). Using simple division, two-thirds in the case of a jury of ten is 6.7 but would require rounding up to seven jurors to make a finding as 6.6 is *less than* two-thirds. *Id.* In the case of “Jury Electors” our rationale to round down was grounded in equity of the political process. After all, the courts generally disfavor complex mathematical calculations in the application of law. *Cf.* Transcript of Oral Argument at 37-38, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161) (criticizing complicated mathematical calculations use in law). Second, it seems inequitable to allow candidate who receives 0.1 of a hypothetical Elector to be awarded a whole Elector to the detriment of other legitimate candidates as such a method would lead to inaccurate accounting results. Rather, by requiring that a candidate proportionally achieve at least one whole electoral vote, the method keeps consistent with other areas of election law jurisprudence that require a candidate to make a showing of substantial support in order to preserve the ballot for legitimate struggles. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983) (affirming a state's right to require preliminary showing of substantial support for ballot access); *Lubin v. Panish*, 415 U.S. 709, 709 (1974) (declaring ballot restriction unreasonable to achieve state interest of maintaining election's integrity); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (affirming state interest in protecting political process by candidate showing substantial support from electorate).

<sup>189</sup> *See infra* app. E.

<sup>190</sup> *Infra* app. E.

<sup>191</sup> *Infra* app. E.

<sup>192</sup> *Infra* app. E.

<sup>193</sup> *Infra* app. E.

none.<sup>194</sup> While Clinton's 55.3% only triggers nine Electors,<sup>195</sup> the elegant solution is that the victor takes the remaining Electors that the defeated candidates failed to capture. As such, we award six District Electors to Trump proportionally, the 12 remaining Electors to Clinton proportionally, and two Statewide Electors to the overall winner of Illinois: Clinton.<sup>196</sup> Ultimately, this would mean six Electors for Trump, and 14 Electors for Clinton.<sup>197</sup>

### B. PEM IS THE MOST ACCURATE MANNER OF ELECTOR APPOINTMENT

The object of an election is to reflect or transmit the will of the electorate.<sup>198</sup> However, the purpose of Electors is to represent two separate electoral interests: the state's interests and the people's interest.<sup>199</sup> The first of these is the will of the people as individuals; the second is to ensure that the voters of smaller states are not ignored by the vast populations of the larger states.<sup>200</sup> District Electors are analogous to the interests of the people, much like the House of Representatives, and Statewide Electors are analogous to the interests of the respective states, much like the Senate.

This article sets about the task of answering a deceptively simple question: between the PEM, MNM, and WTA manners, which most accurately reflected the will of the people?<sup>201</sup> Considering the dueling interests of a presidential election,<sup>202</sup> the authors compared the result of each of the three manners against three different data points. The accuracy of each manner was compared against the result of (1) the NPV,<sup>203</sup> (2) the winner based on congressional district,<sup>204</sup>

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<sup>194</sup> *Infra* app. E.

<sup>195</sup> *Infra* app. E. Clinton won exactly 9.95 electors proportionally, but Jury Elector accounting forbids rounding up. *See infra* app. E.

<sup>196</sup> *See infra* app. E.

<sup>197</sup> *See infra* app. E.

<sup>198</sup> *See supra* Part II.A.5 (noting elections shall transmit votes of the people).

<sup>199</sup> *See supra* Parts II.A.2, 5 (outlining duel interests in elections).

<sup>200</sup> *Id.*

<sup>201</sup> In an effort to determine which of the MNM, PEM, and WTA manners most accurately reflects the will of the electorate, the authors calculated the outcome of the past five presidential elections if each of the three methods were used. First, the authors determined the winner of the statewide vote for every state. They then determined the margin by which the presidential candidate won each congressional district in each state. Finally, they determined which candidate would win the state-wide Elector of the respective state. Armed with this data, the authors identified the margins and results of these five elections using the proposed MNM and PEM accounting. Once they determined how many Electors would be awarded to each candidate using each of the three manners, the authors converted those whole numbers into percentages in order to compare them for our accuracy metrics.

<sup>202</sup> *See supra* Section II.A.2, 5 (outlining duel interests in elections).

<sup>203</sup> For this test, the authors found the margin of victory in the NPV. Then, the predicted margin of victory of each manner was calculated and measured to determine the difference between the two. For example, in 2008, Obama won 53.4% of the NPV; McCain won 46.%. *See infra* app. C. Therefore, the margin of victory for 2008 is 7.3. Using the WTA accounting, Obama won 67.9% of the Electors, and McCain won 32.2% of the Electors, creating a margin of 35.7. The difference between the NPV margin of victory and WTA accounting is 28.4 points.

<sup>204</sup> Finding the margin of victory in each state by congressional district, predicted the margin of victory of each manner, and then measured the difference between the two.

and (3) the winner based on statewide elections.<sup>205</sup> After determining which manner was the most and least accurate in every year, each manner was ranked and calculated determining the average of each manner over the past five elections.<sup>206</sup>

### **1. PEM BEST COMPORTS WITH THE FRAMERS' PRIORITIES FOR PRESIDENTIAL ELECTIONS**

Looking to the five principles by which the Framers weighed the proposed modes of presidential selection, the PEM most closely conforms to their values and prevents the ills they were meant to cure. The PEM eliminates the modern faction of battleground states, making 73% of states able to award Electors to Democratic and Republican candidates.<sup>207</sup> Proportional appointment of Electors would render battleground states more resistant to popular excitement and demagogues by disallowing the consolidation of electoral support. The use of the PEM also subsequently breaks down the political capital of battleground states, ensuring greater independence of the Executive. At worst, the electorate's increased knowledge of candidates treats WTAs, PEM, and MNM equally. Finally, the will of the people would be more clearly represented by the PEM's superior accuracy to other acceptable manner.<sup>208</sup>

### **2. PEM IS MOST ACCURATE REFLECT THE WILL OF THE PEOPLE**

In calculating the accuracy of each manner to the NPV, PEM is the clear winner, winning 13 points.<sup>209</sup> WTA came in second with nine points, with MNM closely behind with eight.<sup>210</sup> Arguably, the most interesting pattern detected is that of the past three elections. In those elections, the rank of each manner is unchanged: PEM was the most accurate, departing no more than five points from the NPV.<sup>211</sup> WTA was the least accurate, with 16 points being its closest difference, and 28 points being its largest.<sup>212</sup> On average, the ranking system proves that the PEM is the most accurate in reflecting the popular vote.

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<sup>205</sup> See *infra* app. F.

<sup>206</sup> See *infra* app. F. After determining how each proposed Electoral College manners would account for varying results in the last five elections, the study then engaged in a simple ranking study. This was done by ranking the accuracy of Electoral College outcome in order of manner closest to the NPV or against the preference of congressional districts in the last five elections. See *infra* app. F. Table 1-4. Then, for the past five elections, the most accurate was assigned a value of three, the second closest a value of two, and the least accurate manner was assigned a value of one. See *infra* app. F. Table 5. When measured against the NPV, the PEM was the most accurate with thirteen points, WTA the second most accurate at nine points, and MNM the least accurate at eight points. See *id.* When measured against preference by congressional district, PEM and MNM tied at 12 points, with WTA being the least accurate at six points. See *id.* However, because the PEM and MNM account for congressional districts in the exact same way, this tie was unsurprising. Ultimately, recent initiatives for the Interstate Agreement to have Electors determined by the outcome of the NPV, then PEM's accuracy becomes especially relevant. Cf. *supra* note 177 and accompanying text.

<sup>207</sup> See *infra* note 240 and accompanying text (showing 73% of states supporting both Democratic and Republican candidates using PEM).

<sup>208</sup> See *supra* Part IV.B (describing accuracy of three manners).

<sup>209</sup> See *infra* app. F (demonstrating PEM's accuracy to reflect the will of the people).

<sup>210</sup> See *infra* app. F.

<sup>211</sup> See *infra* app. F.

<sup>212</sup> See *infra* app. F.

There is no clear winner when calculating the accuracy of each manner compared to the percentage of congressional districts won by each candidate. MNM and PEM are tied, with WTA as the clear loser.<sup>213</sup> It is not surprising that the MNM performed well in predicting the percentage of congressional districts won; after all, that is its primary function.<sup>214</sup> What is surprising is that PEM is equally accurate as MNM in reflecting the interest of congressional district votes.

Determining the margin of victory between the states as a whole is not a useful measurement for two distinct reasons. First, regardless of which manner of accounting the Statewide Electors used, the accounting would be the same for each approach. Second, the importance of the Statewide Elector seemed to change according to party. Looking at the last five elections, Republican victory occurred only when 59%-61% of states voted for the GOP.<sup>215</sup> Democrat Barack Obama was able to win in 2008 with 57% of states, and in 2012 with 51% of states.<sup>216</sup> Ultimately, because the statewide distribution of Electors would be the same in each manner, the analysis used only the two previously mentioned metrics.

The data and ranking analysis revealed a clear winner and a clear loser when comparing the three manners. PEM is the most accurate in reflecting the NPV, and equally accurate in predicting congressional district margins.<sup>217</sup> In both of these categories, the WTA is the least accurate.<sup>218</sup> Additionally, in analyzing the various elections, a troubling pattern emerged when the MNM was calculated for every state.

The 2000 and 2016 elections joined the notorious ranks of the three other presidential elections where the preference of the popular vote was not the preference of the Electoral College.<sup>219</sup> By calculating the results of the election under the NPV, MNM, and PEM, PEM accurately predicts and explains the outcomes of the 2000 and 2016 elections.

In 2016, the final NPV reflected 48.9% of the vote for Clinton and 46.7% of the vote for Trump.<sup>220</sup> However, WTAs did not reflect how close the race it was, with 42.2% of Electors

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<sup>213</sup> See *infra* app. F.

<sup>214</sup> See *supra* Section IV.A.1 (describing MNM).

<sup>215</sup> See *infra* apps. A-F.

<sup>216</sup> See *infra* app. C-D.

<sup>217</sup> See *infra* app. F.

<sup>218</sup> See *infra* app. F.

<sup>219</sup> See Rachael Revesz, *Five Presidential Nominees Who Won Popular Vote But Lost The Election*, INDEPENDENT (Nov. 16, 2016), <https://www.independent.co.uk/news/world/americas/popular-vote-electoral-college-five-presidential-nominees-hillary-clinton-al-gore-a7420971.html>. 2016 was the fifth time in American history that the candidate who won the popular vote lost the election. *Id.* Before this was Al Gore's loss to George Bush in 2000, Grover Cleveland's loss to Benjamin Harrison in 1888, Samuel Tilden's loss to Rutherford B. Hayes in 1876, and Andrew Jackson's loss to John Quincy Adams in 1824. *Id.* Interestingly, Jackson's loss to Adams is often pointed to as the spark that led to Martin Van Buren nationalizing the presidential nomination process, which not only removed the power of nomination from presidential Electors, but is also largely the catalyst for WTAs and modern partisanship. See CEASAR, *supra* note 27, at 144.

<sup>220</sup> See *infra* app. E. Also included was 3.3% of the vote for Libertarian Party candidate Gary Johnson, and 1.1% of the vote for Green Party candidate Jill Stein. *Id.*

voting for Hillary Clinton and 56.5% for Donald Trump.<sup>221</sup> The most troubling characteristic of the Electoral College is how a two-point NPV victory for Clinton can translate into a fourteen-point defeat once the votes are calculated using WTA.<sup>222</sup> MNM's accounting comes closer, awarding 45.72% of Electors to Clinton and 54.28% to Trump.<sup>223</sup> But MNM still suffered from a fatal flaw: the popular vote preferred Clinton. The question is evident: How did Trump win?

The answer: He won more *states*—61% to Clinton's 39%.<sup>224</sup> By using the PEM, it becomes evident that District Electors would have reflected the preference of the nation quite accurately. In 2016, we see the importance of the so-called "small-state bias": 39% of states supported Clinton but 61% of states voted for Trump, we see the importance of the so-called "small-state bias."<sup>225</sup> Even with a relatively narrow margin of the popular vote favoring Clinton, far more states preferred Trump.<sup>226</sup> Trump's victory in 61% of states resulted in the PEM determining 48.9% to Clinton and 51.3% to Trump; the closest of the tested manners to the NPV.<sup>227</sup>

The story of the 2000 election is relatively similar. There, George Bush received 48.2% of the NPV, while Al Gore received 48.7%.<sup>228</sup> Much like 2016, when the margins were narrow, the "small state bias" was particularly relevant. Indeed, in 2000, Bush won 59% of the states to Gore's 41%, securing Bush a victory via the Electoral College.<sup>229</sup> It is worth noting that this "small state bias" is not exclusive to Republicans; in 2008, Barack Obama won 57% of the states to John McCain's 43%.<sup>230</sup> However in 2012, Obama was able to secure a victory over Mitt Romney by narrowly securing 53% of states to Romney's 47%.<sup>231</sup>

Ultimately, PEM is the most accurate accounting method due to its proportional accounting of a state's popular vote and its minor exaggeration of the statewide bias. It serves to not only balance the interest of the people, but the interest of the states as entities. By not restricting the assignment of Electors to possibly-gerrymandered congressional districts, PEM fairly gauges the support of a candidate both within a state and amongst the nation.

### C. PREDICTING THE CONSEQUENCES

For just a moment, let us theorize what the effects of implementing PEM could be. First and foremost, we see that the Electoral College, by a number of different metrics, would more

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<sup>221</sup> See *infra* app. E. Translated to percentages, the Electoral college went 42.2% for the Democrat, and 56.5% for the Republican. *Infra* app. E.

<sup>222</sup> See *infra* app. E.

<sup>223</sup> See *infra* app. E.

<sup>224</sup> See *infra* app. E.

<sup>225</sup> See *infra* app. E.

<sup>226</sup> See *infra* app. E.

<sup>227</sup> See *infra* app. E.

<sup>228</sup> See *infra* app. A.

<sup>229</sup> See *infra* app. A.

<sup>230</sup> See *infra* app. C.

<sup>231</sup> See *infra* app. D.

closely resemble the preferred candidate. While the accounting may be more accurate, the result of the last three elections would be exactly the same. But what could be the consequences?

### 1. THE PEM WOULD GIVE A VOICE TO THE MARGINALIZED AND UNHEARD

In 2016, two thirds of the presidential campaigns were concentrated in just six states.<sup>232</sup> Indeed, PEM would not substantially alter the importance of the battleground states; Florida, Ohio, Pennsylvania, and Virginia would continue to be hotly contested. But take reliably Democratic, and largely ignored California. For decades, Democrats could count on the states formidable fifty-five electoral votes to bring the Democratic hopeful a fifth of their way to victory.<sup>233</sup> However, using PEM, only 37 of the Electors would have been awarded to Democrats in 2016, and 17 would have fell to Republicans.<sup>234</sup> The story is the same for reliably Republican Texas, splitting that state with fifteen votes to Democrats, and twenty-three to Republicans.<sup>235</sup> These results in both Democratic and Republican states demonstrate that PEM favors no political party. Further, the minority party in those electoral giants would be given a voice; *effective* participation in the presidential electoral process.<sup>236</sup> Minority votes in majority controlled states would finally be obtainable, and candidates would be forced to hear and respond to those voters concerns, or risk losing their votes.

The story is the same throughout the country. WTAs naturally ignore the issues concerning most voters in spectator states, as the support of the state is a foregone conclusion. However, under PEM, 73% of the states could be considered “in play,” meaning that presidential candidates would be forced to adjust their political agenda to appeal to a much wider national audience.<sup>237</sup> In doing so, the bitter and marginalized “issue politics” that burden our system could give way to a fascinating alternative. Under PEM, nuanced and complicated approaches would be necessary to win the support of votes. With enough moderate concerns in the forefront, the prevailing decider of our elections may not be issues at all, but the virtue, charisma, and leadership of the candidates for our country. Indeed, the selection of the most virtuous to lead us was the future that the Framers so desperately wanted.<sup>238</sup>

### 2. PEM WOULD NATURALLY REGULATE SPECIAL INTEREST SPENDING

Political spending continues to be a major point of contention within our political process. There are numerous challenges in tracking the spending on a candidate by PACs and

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<sup>232</sup> See *Two-thirds of Presidential Campaign is in Just 6 States*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/campaign-events-2016>.

<sup>233</sup> See *California Voting History, 270TOWIN*, <https://www.270towin.com/states/California> (showing California voting Democrat in presidential elections since 1992).

<sup>234</sup> See *infra* app. E.

<sup>235</sup> See *infra* app. E.

<sup>236</sup> See *supra* Section III (arguing effective participation in presidential elections commanded by Twelfth Amendment).

<sup>237</sup> See *infra* app. E (showing 73% of states supporting both Democratic and Republican candidates using PEM).

<sup>238</sup> See *supra* note 54 and accompanying text.

special interest groups.<sup>239</sup> However, in analyzing where candidates spend their money, two valuable conclusions become apparent.

First, political spending, just like campaign activity, is currently limited to a small group of battleground states.<sup>240</sup> In the crucial weeks leading up to the 2016 general election, Trump's spending in Wisconsin, later proven critical to his victory, exceeded \$2.4 million.<sup>241</sup> Florida saw about \$18.8 million for Clinton, and \$10.4 Million for Trump. New Hampshire, Virginia, Pennsylvania, Ohio, Colorado, and Nevada saw similar spending. Compare all of these to the \$8.2 million spent for national ads by Clinton, and the \$6.9 million spent nationally for Trump.<sup>242</sup>

However, what if the collective \$103.2 million dollars in media spending, rather than being concentrated in eleven battleground states, were spent in the thirty-six that would have valuable electoral votes for both parties? By forcing candidates to spread their advertising at risk of ostracizing classic "safe" states, PEM would essentially depreciate the value of the political dollar. This could result in three scenarios. First, the power of the wealthy to control political elections through large donations would be diluted amongst more states, resulting in a more meaningful discussion of a wider array of issues. Second, with less concentrated capital, it would likely result in increased volunteer participation in political campaigns, increasing the meaningful discourse between voters rather than just listening to soundbites and divisive political attacks. Third, it would undoubtedly energize voters in otherwise "safe" states to register to vote and involve themselves in the political process. Any of these three predictions would translate to a more honest and meaningful democratic involvement in our political system. These are *undoubtedly* the values that the Constitution always meant to propagate to make our union more perfect.

For these reasons, we believe that the Supreme Court review of WTAs is not only necessary, but inevitable. While the Framers' intent may be used to shed light on the constitutionality of an issue, it is not a per se cause of action. However opposed WTAs may be to the principles upon which the Framers relied, WTAs raise both historical and modern constitutional issues under the Twelfth Amendment.

### CONCLUSION

While the public may not trust the Electoral College, it cannot be forgotten that its use is mandated by the strictures of our Constitution. WTAs, however, are not creatures of the Constitution; they are creatures of statute. This Article asserts that it is not the Electoral College that so troubles the body politic; it is simply how the college is counted.

Most importantly, the concept of proportional representation for a presidential election is neither novel nor unused. Indeed, it is a concept utilized by the Democratic Party for the benefit

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<sup>239</sup> See *Campaign Finance Reform*, ACLU, <https://www.aclu.org/issues/free-speech/campaign-finance-reform> (advocating in favor of campaign finance reform).

<sup>240</sup> See generally Simon Dumenco, *The States Where Clinton and Trump are Advertising the Most Until Election Day*, ADAGE (Oct. 21, 2016), <https://adage.com/article/campaign-trail/states-where-trump-clinton-spending-most-on-advertising/306377/>.

<sup>241</sup> See *id.*

<sup>242</sup> See *id.*

of their own party members to create “fair representation” in the nominating process.<sup>243</sup> In 1968, the Democratic party nominated Hubert Humphry as its candidate for President despite his failure to participate in a single primary election.<sup>244</sup> In response, the Democrats passed the Commission on Party Structure and Delegate Selection, which overturned the “unit rule,” which was a winner-takes-all provision that previously gave the winner of the convention all of the party’s support.<sup>245</sup> The Commission was designed to create “fair representation” in the nominating process, and to ensure—not unlike the Twelfth Amendment—that minority factions could not use procedural rules to supplant the will of the voters.<sup>246</sup> The Republican party’s opposition to proportional representation is dug deep into the culture of the party.<sup>247</sup> Regardless, proportional representation appears to be the forward motion of our electoral process, with WTAs simply standing in the way.

At its simplest, concentrating the outcome of the Presidential election in few states draws the frustration of the rest. In the end, the solution itself seems simple. By eliminating WTAs, we may take a step towards every voter waking on Wednesday morning after the presidential election, knowing that they have been heard, and they have been counted. In the history of the United States, the process of presidential selection has been a journey of change and adjustment. These changes to the Constitution were central to the idea, born with our country, that the Union itself will never be perfect. Eliminating WTAs builds upon the fair representation model and the political courage from the states of Maine and Nebraska whose increased political importance is on display for the rest of the country to emulate. This forward thinking of the electoral process is necessary as we may, once again, strive to become more perfect.

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<sup>243</sup> See ELAINE C. KAMARK, PRIMARY POLITICS: EVERYTHING YOU NEED TO KNOW ABOUT HOW AMERICA NOMINATES ITS PRESIDENTIAL CANDIDATES 91, BROOKINGS (3d Ed. 2018).

<sup>244</sup> See STEVEN S. SMITH & MELANIE J. SPRINGER, REFORMING THE PRESIDENTIAL NOMINATION PROCESS 4 (2009).

<sup>245</sup> See *id.* at 5.

<sup>246</sup> *Id.* at 5-6.

<sup>247</sup> See KAMARK, *supra* note 243, at 91.