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## The Electora! College's Fragile Relationship with the American Public

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Nikolas A. Apostolou  
The Electoral College's Fragile Relationship with the American Public  
12/1/2018

“A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations. It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate, who was to have so important an agency in the administration of the government as the President of the United State. But the precautions which have been so happily concerted in the system under consideration, promise an effectual security against mischief.”

This passage from Alexander Hamilton's *Federalist Papers No 68*, well represents our founding fathers' beliefs and fears around electing a president. In the writing, Hamilton argues for the implementation of the Electoral College system. Primarily the Electoral College was favored by the founders, and ultimately it was implemented for two reason.

First, an uneducated, unsophisticated, and easily manipulated citizenry was concerning for the founders. They believed that the Electoral College would ensure that the chosen electors fulfill their duties of choosing a qualified candidate for the office of president. These electors would act as a check on an electorate that might be duped by a candidate. The group of electors only met once ever, thus making it all but impossible for a foreign government to manipulate them over time. This certainty was key in the electoral process for Hamilton and the founders. In *the Federalist Papers No 68*, Hamilton says “The process of election affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an

eminent degree endowed with the requisite qualifications”. Thus, the first reason the Electoral College was created as a result of the founders not trusting the population to make the right choice.

Second, the Electoral College was created because it acts as part of a compromise made to satisfy small states and as a protection of state power<sup>1</sup>. Under the Electoral College system each state had the same number of electoral votes as they had representation in Congress. Individual states would send electors who would presumably prevent the election of a candidate threatening to centralize power in the federal government. It sought to reconcile differing state and federal interest, provide a degree of popular participation in the election, give the less populous states some additional leverage in the process by providing “senatorial” electors, preserve the presidency as independent of Congress, and generally insulate the election process from political manipulation. For these reasons and more, the Electoral College was the safe guard implemented by the founding fathers to protect the American electoral process for the offices of President and Vice-President.

Although ratified as a part of the Constitution at the Constitutional Convention of 1787, many of the original justifications for the Electoral College have less force today. Amendments to the Constitution such as the 17th Amendment, and the rapid growth of informational sources available to the populace at large, has generally silenced the original concerns that lead to the Electoral College. A 2011 Gallup Poll reported 62 percent of Americans would forgo the Electoral College in favor of a “one person, one vote” election process (Saad 2011)<sup>2</sup>. With that

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<sup>1</sup> See Elizabeth D. Lauzon, (2007) *Challenges to Presidential Electoral College and Electors* 20 A.L.R. Fed. 2d 183 (Originally published in 2007)

<sup>2</sup> Lydia Saad, *Americans Would Swap Electoral College For Popular Vote* ([news.gallup.com](http://news.gallup.com) 2011) “Nearly 11 years after the 200 presidential election brought the idiosyncrasies of the United States’ Electoral College into full view, 62% of Americans say they

said, changing this system of electing the President and Vice-President would be extremely challenging because it would take a constitutional amendment ratified by 3/4 of the states. But while a majority of Americans would willingly rid the system of the Electoral College as an outdated relic of years past, it is not a topic that is as fiercely contested.

There are a number of political and cultural topics in America that evoke hostile emotional responses, but the Electoral College is not one of them. Even though a majority of Americans are in favor of doing away with the Electoral College, it is a societal norm. The strength of the Electoral College is that the American people know nothing else. The Electoral College is thus an example of an idea that fits well into the theory of Legal Positivism.

### **Legal Positivism**

Legal Positivism is the thesis that the existence and content of law depends on social facts and not on the merits. The English jurist John Austin famously formulated it as: "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." (1832, p. 157)<sup>3</sup>. This is not to say that a laws merits are unimportant, rather, that the merits do not determine whether specific laws or a system of law exist.

Whether a society has a legal system is dependent on the values and structure of the governance of a society. The governance of a society is based on the society's social customs. Laws are in force when a societies officials recognize certain social standards as authoritative, such as legislative enactments, judicial decisions, or social customs. For H.L.A. Hart, the

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would amend the U.S. Constitution to replace that system for electing presidents with a popular vote system. Barely a third, 35%, say they would keep the Electoral College".

<sup>3</sup> See John Austin (1832). *The Province of Jurisprudence Determined*. Ed. E.E. Rumble, 1995. Cambridge: Cambridge University Press.

authority of law is social<sup>4</sup>. The ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually practiced (1994, p. 116)<sup>5</sup>. Every four years the American voters practice utilizing the Electoral College when voting for the office of President and Vice-President. Acts as basic as voting, as well as additional example to follow, will support that legal positivism is today, keeping the Electoral College alive and strong.

62 percent of American's believed that the Electoral College was not needed in 2011, yet the system continues on strong today. In part, legal positivism can be pointed to for this. American officials have long recognized certain social standards as authoritative. Some of the most basic and influential examples can be seen in the American legal system and the decisions that they make. The Constitution of the United States is possibly the most well recognized authoritative standard. More subtly, social custom plays a role in the Electoral College, and how the future leaders in America will handle decisions dealing with the Electoral College.

The American legal system as a whole has given great significance and legitimacy to the Electoral College system. According to positivism, law is a matter of what has been posited, ordered, decided, practiced, or tolerated. The Constitution of the United States of America did just that, it enshrined the idea of the Electoral College for future generations to model and practice.

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<sup>4</sup> See H.L.A. Hart, (1994, first edition 1961) *The Concept of Law*, 2nd ed. ed.P. Bullock

<sup>5</sup> Hart's necessary and sufficient conditions for the existence of a legal system are that "those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and ...its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials".

The United States Constitution Article II, Section 1 lays out the framework for the Electoral College. Section 1, Clause 2 speaks to the process for the appointment of electors. The only restriction put upon the states by the Constitution was that no person holding an office of trust or profit under the United States shall be appointed an elector. Section 1, Clause 3 speaks to the timing of the election process. It gives Congress the power to decide when electors are chosen and when they vote. Since the ratification of the Constitution, there have been two amendments to the Constitution that has affected the Electoral College<sup>6</sup>.

First, the 12th Amendment was ratified in 1804 because there had been considerable confusion during the 1800 election process which needed clarification. The amendment provided for the election of the president and vice president by the electoral college. Should there be no majority vote for one person, the house of Representatives, with one vote per state, chooses the president and the Senate then chooses the vice president. Finally, there was the 23rd Amendment to the Constitution which included the Electoral College. In the year 1961 the U.S. Constitution was ratified allowing District of Columbia residents to vote in presidential elections<sup>7</sup>. The District is entitled as if it were a State, but in no event may they have more electors than the least populous State.

The ratification of the U.S. Constitution, as well as the 12th and 23rd Amendments proved the intent of the founding fathers and generations that followed them. Law is a matter of

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<sup>6</sup> See National Archives and Records Administration: America's Founding Documents ([archives.gov](https://www.archives.gov))

<sup>7</sup> While many of the people leading the push were liberal Democrats, the District of Columbia in the 1950's was fairly balanced in its potential voting impact. Thus, an amendment to grant the District increased voting powers was able to gain bipartisan support in a way that would have been more difficult later.

what has been posited, ordered, decided, practiced, or tolerated. Clearly, this set of laws has been posited and ordered. Moving forward, looking at the court system, one will see that American courts have decided, practiced, and tolerated that Electoral College many times over<sup>8</sup>.

The Supreme Court held in *Sanders v. Gray*, 372 U.S. 386, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963), that the inclusion of Electoral College in the federal Constitution under U.S. Const. Art. II, § 1 and U.S. Const. Amend XII, does not violate the 14th Amendment's equal protection and due process clauses, despite its inherent numerical inequality in presidential elections. The Court pointed out that under the Electoral College, in election of the President and Vice-President, voting strength is not in exact proportion to population. However, since the Electoral College was set up as a compromise to enable the formation of the Union among several sovereign states, such voting inequalities does not violate the 14th Amendment.

In *Trinsey v. U.S.*, 2000 WL 1871697 (E.D. Pa. 2000), the court held that the Electoral College, as implemented under U.S. Const. Art. II, § 1 and U.S. Const. Amend. XII, does not unconstitutionally deny voters their right to a one person, one vote equality as protected under the 14th Amendment (Lauzon 1007)<sup>9</sup>. The court noted that neither the Constitution nor the one person, one vote doctrine vests a right in the citizens of the country to vote for presidential electors or empowers the courts to overrule a constitutionally mandated procedure in the event that the vote of the electors is contrary to the popular vote.

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<sup>8</sup> See Elizabeth D. Lauzon, (2007) *Challenges to Presidential Electoral College and Electors* 20 A.L.R. Fed. 2d 183 (Originally published in 2007)

<sup>9</sup> The court in *Trinsey* stated that under the 14th Amendment, once the state has granted its citizens the right to vote for presidential electors, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another. The court also noted that it did not have the province to engage in a constitutional amendment where it is asserted that part of the document is unconstitutional.

Finally, the most recent of the cases, *New v. Ashcroft*, 293 F. Supp. 2d 256, 20 A.L.R. Fed. 2d 733 (E.D. N.Y. 2003). In that decision, the court stated that its role is to interpret and enforce the Constitution, and that it is not empowered to strike the document's text on the basis that it is offensive to itself or is in some way internally inconsistent.

Essentially, the courts around America have told the public one thing in regard to the Electoral College. That is that it cannot be questioned constitutionally, as it was established by the Constitution<sup>1011</sup>. This reasoning brings us back to the quote earlier from John Austin, "The existence of law is one thing; its merit and demerit another". Throughout the American justice system and its challenges of the Electoral College, the courts answer has been that the laws exist, and they speak not to its merit or demerit. For positivists, this offers a theory of validity to such a law.

There are two main categories to the term validity. First, Han Kelsen says that validity is the specific mode of existence of a norm. For example, an invalid marriage is not a special kind of marriage having the property of invalidity; it is not a marriage at all. In this light, a valid law is one that is systematically valid in the jurisdiction (1945, p. 61)<sup>12</sup>. The second main idea of

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<sup>10</sup> See *Penton v. Humphrey*, 264 F. Supp. 250 (S.D. Miss. 1967). There the court noted that the one-person, one-vote doctrine has been applied to an increasing number of voter processes, but the alleged inequities of the Electoral College, established under U.S. Const. Art II, § 1 and U.S. Const. Amend. XII, are an exception to the application of the doctrine because the Electoral College is created by the Constitution.

<sup>11</sup> Also See *Irish v. Democratic-Farmer-Labor Part of Minn.*, 399 F.2d 119 (8th Cir. 1968). The court noted that the use of the Electoral College is a variation from the one man-one vote criterion of equal protection. However, since the Constitution created the inequity in the Electoral College, it could not be held unconstitutional under the 14th Amendment.

<sup>12</sup> See: Hans Kelsen (1945). "General Theory of Law and State", trans. A. Wedberg, repr. 1961. New York: Russell and Russell.

validity is one of moral propriety, which is the sound justification for respecting the norm. The moral propriety of a law rests on its merits. One indication that these senses differ is that one may know that a society has a legal system, and know what its law are, without having any idea whether they are morally justified<sup>13</sup>.

Therefore, validity is a major factor when looking to the decision-making process for the American court system. Based on the unwavering validity of the U.S. Constitution and based on the sound justifications that were originally given by the founders for the Electoral College, courts around America have without question held on behalf of the Electoral College, and there is no sense of that changing anytime soon. And even if it is not the case with the Electoral College, the argument can be made that a seemingly immoral law will get a pass under a positivist thesis that deemphasizes the importance of morality.

To be clear, there are no legal positivists arguing that the systemic validity of law establishes its moral validity. Kelsen states that “The science of law does not prescribe that one ought to obey the commands of the creator of the constitution” (1967, p. 2040)<sup>14</sup>. Hart believes only a prima facie duty to obey, based on and limited by fairness. One owes no obligation to unfair or pointless laws (Hart 1995). To accuse Hart and other positivists of believing that laws should be obeyed regardless of content is baseless. Hart explains that “an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law,

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<sup>13</sup> In this sense a valid law is one that is systemically valid in the jurisdiction, this is distinct from the idea of validity as a morally sound justification for respecting the norm.

<sup>14</sup> See: Hans Kelsen (1967). “Pure Theory of Law”, trans. M. Knight. Berkeley: University of California Press.

as if this, once declared, was conclusive of the final moral question: 'Ought this law to be obeyed?'" (Hart 1958, p. 75)<sup>15</sup>.

Hart had seminal views on the concepts of positivism and legal systems in his work *The Concept of Law*. While every legal system in the world contains primary rules that regulate behavior, Hart believed that legal systems with only those primary rules were not as sophisticated as others. The emphasis on primary rules to regulate behavior has led to the overlooking of a second type of rule, another primary rule which confers upon citizens the power to create, modify, and extinguish rights and obligations in the other persons. These rules empower persons to structure their legal relations within the coercive framework of the law, a feature that Hart regards as one of "law's greatest contributions to social life". But there is one truly distinguishing factor when it comes to the differences between rudimentary forms of law, and a true legal system. That difference for Hart comes in the existence of secondary meta rules. Secondary meta rules are specific to the ways in which primary rules may be conclusively ascertained, introduced, eliminated, and varied (Hart 1994, p. 92)<sup>16</sup>.

Hart distinguishes three types of secondary rules that mark a societal change from primitive forms of law to a true legal system. (1) The rule of recognition which "specifies some feature of features or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts"

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<sup>15</sup> For other, similar, examples see Joseph Raz, *The Morality of Freedom* Oxford: Clarendon Press.

<sup>16</sup> [Secondary rules] "may be said to be on a different level from the primary rules, for they are all about such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the way in which the primary rules may be conclusively determined" (Hart 1994, p. 92).

(Hart 1994, p. 92); (2) the rule of change, which enables a society to add, remove, and modify valid rules; and (3) the rule of adjudication, which provides a mechanism for determining whether a valid rule has been violated. To use Hart's own words, law is "the union of primary and secondary rules" (Hart 1994, p. 107). This means all societies with true legal systems have a rule of recognition that articulates criteria for legal validity, and it include provisions for making, changing, and adjudicating laws. Thus, under a positivist theory it is absolutely possible to change laws that are valid as a societal norm yet morally invalid. The next question becomes, what makes a law morally invalid, and if the Electoral College fits within those categories.

Natural law theorists accept that unjust laws may have legal validity. As John Finnis says in his work *Natural Law and Natural Rights*, "The tradition goes so far as to say that there may be an obligation to conform to some such laws in order to uphold respect for the legal system as a whole". Finnis goes on to lay out a number of types of unjust laws. First, are laws promulgated by leaders not intended to advance the common good. For example, laws intended to benefit the leaders, or their friends or laws made out of malice against some person or group (Finnis p. 352). Second, laws that constitute ultra vires acts are an abuse of power and another type of injustice in law. An ultra vires act is one in which an office-holder may exploit their opportunity to affect people's conduct by making stipulations which stray beyond their authority. Thirdly, laws promulgated without following proper procedure are unjust<sup>17</sup>. According to Finnis it is an important aspect of commutative justice to treat all people as entitled to the dignity of self-direction and they equal opportunity of understanding and complying with the law. Finally, a law

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<sup>17</sup> "The exercise of legal authority otherwise than in accordance with due requirements of manner and form is an abuse and an injustice, unless those involved consent, or ought to consent to an accelerated procedure in order to cut out 'red tape' which in the circumstances would prejudice substantial justice" (Finnis p 353)

can be unjust even if it occurs unintentionally. For example, by imposing on some a burden from which others are exempt, it may be commutatively unjust. By denying to one, some, or everyone an absolute human right that is consistent with the reasonable requirements of public order, it may be commutatively unjust. A legal injustice of these magnitudes will affect the obligations owed by individuals according to Finnis.

How do injustices of law affect the obligations of individuals to obey that law? Finnis breaks down the phrase “obligation to obey the law” as having four possible meanings. Empirical liability, legal obligation, moral obligation, and a collateral moral obligation, are the possible interpretations of the phrase<sup>18</sup> (Finnis p. 354). The first of the four interpretations, empirical liability, Finnis claims to be asked most often theoretically. As he states, “If one asks how injustice affects one’s obligation to conform to law, one is not likely to be asking for information on the practically important but theoretically banal point of fact, ‘Am I or am I not likely to be hanged for non-compliance with this law?’” (Finnis p. 355). The second possible interpretation, a legal obligation in a legal sense, sounds redundant but is not. Finnis explains that legal thought allows for the principles of practical reasonableness and not solely from some past acts or court decisions. For example, there are regularly arguments before the highest courts that look to amend or abandon well established rules and doctrines. Although, once a law is ruled

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<sup>18</sup> “...Someone uttering the question might conceivably mean by ‘obligation to obey the law’ either: (i) empirical liability to be subjected to sanction in event of non-compliance; or (ii) legal obligation in the intra-systemic sense (‘legal obligation in the legal sense’) in which the practical premise that conformity to law is socially necessary is a framework principle insulated from the rest of practical reasoning; or (iii) legal obligation in the moral sense (i.e. the moral obligation that presumptively is entailed by legal obligation in the intra-systemic or legal sense); or (iv) moral obligation deriving not from the legality of the stipulation-of-obligation but from some ‘collateral’ source...” (Finnis p. 354)

upon, and is said to be just or unjust but remaining a law, it is not wise to continue with the argument. There is no practical purpose to attack the positivity of a law in that manner. Finnis's third interpretation of the question, moral obligations, will be very different from the second in how strongly it is argued in that sense.

“Given that legal obligation presumptively entails a moral obligation, and that the legal system is by and large just, does a particular unjust law impose upon me any moral obligation to conform to it?” (Finnis p. 357). Finnis argues that rulers have, strictly speaking, no right to be obeyed, but do have the authority to make morally obligatory rules. This authority is for a specific purpose though, for the common good. Therefore, if rulers chose to use their authority in the detriment of the common good, or against basic principle of practical reasonableness, any such rule lacks the authority the rest of their rules hold<sup>19</sup>. Specifically, Finnis says, “For the purpose of assessing one's legal obligations in the moral sense, one is entitled to discount laws that are ‘unjust in any of the way mentioned’”<sup>20</sup> (p. 360). Finally, the fourth interpretation is connected to the third. Finnis explains that the effectiveness of other laws can be harmed by the sight of other citizens disobeying or disregarding a specific law. Thus, in this situation the good does not derived from being a law-abiding citizen, rather the good hinges on an individual not negatively effecting the legitimately just laws. Therefore, Finnis comes to the conclusion that the

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<sup>19</sup> “More precisely, stipulations made for partisan advantage, or (without emergency justification) in excess of legally defined authority, or imposing inequitable burdens on their subjects, or directing the doing of things that should never be done, simply fail, of themselves, to create any moral obligation whatever” (Finnis p. 360).

<sup>20</sup> ‘Unjust in any of the ways mentioned’ is in reference to (XII.2 Types of Injustice in Law p. 352)

good citizen may, but not always, be morally required to conform to certain stipulations in order to keep law effective.

Now with a grounded understanding of what makes law valid or invalid, just or unjust, moral or amoral, and our obligations pertaining to those rules, it is time to look into the moral and legal implications of the Electoral College, both intended and unintended consequences. From there, we can conclude if the Electoral College is unjust or not.

### **Morality Issues of the Electoral College**

John Finnis explains three types of injustices in the law. First, are laws promulgated by leaders not intended to advance the common good. For example, laws intended to benefit the leaders, or their friends or laws made out of malice against some person or group (Finnis p. 352). The intent of the founding fathers was not malicious in their actions to create the Electoral College, but they certainly made the law to devalue specific citizens. Hamilton and the other founders believed that the electors would be able to ensure that only a legitimately qualified candidate would be selected president. They believed that the electoral college was a safety net to guard that public from being deceived. And they believed that the electors would be “free from any sinister bias”<sup>21</sup>. Looking at these reasons today, it appears that they are no longer relevant.

Technology in 2018 allows all perspective voters to gather the necessary information to make informed decisions in the blink of an eye. This was not something the founders could have ever envisioned. Using electors was intended to safeguard against uninformed or uneducated decisions in a country far too large to communicate efficiently at the time. This is no longer a

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<sup>21</sup> See *The Federalist* 68

concern, or a legitimate reason to continue on with the system today. In addition, the electors of today are most likely not the ones “free from any sinister bias” that Hamilton wrote about<sup>22</sup>. The members of the Electoral College are today chosen by the political parties and are expected to vote along party lines.

In *Sbarboro v. Jordan*, 164 Cal. 51, 127 P. 170 (1912), the court held that the presidential electors nominated by a regularly called and organized convention of a political party were entitled to have the Secretary of State place their names on the general election ticket<sup>23,24</sup>. Moving forward, American courts have not only found those electors nominated as entitled to have their names on the ballot, but that they must go through party conventions. In *King v. Willis*, 333 F. Supp. 670 (D. Del. 1971), the court held that the state’s requirements that a political party hold state and nation conventions to nominate presidential electors and to form a state committee, did not constitute unreasonable burdens upon the presidential candidate’s First and 14th Amendment rights. Not only has the court system mandated the political convention process for selecting electors, but in certain cases they have also upheld cases in which parties mandate who the electors vote for.

In *Ray v. Blair*, 343 U.S. 214, 72 S. Ct. 654, 96 L. Ed. 894 (1952), the Court held that the constitutional provisions governing presidential elections did not bar the political party from requiring a pledge from presidential elector candidates in its primary to support nominees of its

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<sup>22</sup> See Also: William C. Kimberling, “The Manner of Choosing Electors,” [uselectionatlas.org](http://uselectionatlas.org)

<sup>23</sup> See Elizabeth D. Lauzon, (2007) *Challenges to Presidential Electoral College and Electors* 20 A.L.R. Fed. 2d 183 (Originally published in 2007)

<sup>24</sup> See Also: *Spreckels v. Graham*, 194 Cal. 516, 228 P. 1040 (1924) the court held that the nomination of presidential electors could be made only at party conventions, to which delegates were chosen at the primaries, or by nominations at the primaries in the case of new or small parties, thus shutting out independent nominations all together.

national convention. This does not seem to be the system that the founders envisioned when implementing the Electoral College. But as the system has changed and grew over time, the Electoral College seems to be the one stalwart that hasn't changed.

As referenced earlier, several voting rights have been constitutionally amended over time. Be it women gaining the right to vote, freed slaves gaining the same right, the shift from an appointed to a popularly elected Senators, or the fact that the Vice-Presidency was at one time handed to the looser of the general election, the system has changed. Seemingly most analogous to the Electoral College is the shift in Senators be appointed by state legislatures to a popular vote which took a constitutional amendment to become law. In light of the structure of the Electoral College, the same process would need to be followed. While a partisan and gridlocked political system would likely never move to see this happen, there is at least a process in which the results can be replicated.

As Finnis has stated, a law can be unjust even if it occurs unintentionally. The founding fathers might not have intentionally caused unjust consequences, but it seems clear that The Electoral College gives too much power to so called “swing states”, essentially allowing presidential elections to be battled out solely in a handful of states. During the 2016 national election, the presidential candidates Hillary Clinton and Donald Trump made more than 90% of their campaign stops in just eleven battleground states<sup>25</sup>. Of those visits, nearly two-thirds took place in the four battleground states with the most electoral votes, that includes Florida, Pennsylvania, Ohio, and North Carolina<sup>26</sup>. The two main political parties can nearly guarantee

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<sup>25</sup> See: Sam Weber and Laura Fong, “This System Calls for Popular Vote to Determine Winner”, [pbs.org](https://www.pbs.org) Nov. 6, 2016

<sup>26</sup> See: [270towin.com](https://www.270towin.com) “States Voting History”

winning the electoral votes in certain states, such as California for the Democratic Party and Indiana for the Republican Party<sup>2728</sup>. The Electoral College is not worried about actual popular vote totals, neither are candidates. They only need to pay attention to a small number of states that can swing in either direction. This point is given credence by the wildly unbalanced nature of the 2016 presidential candidates campaigning trails.

Another unintended consequence of the Electoral college is the so called “swing state privilege<sup>2930</sup>. There are millions of voters in safe states across the country that feel as though their votes are wasted. Specifically, in presidential races this is a concern. For example, for democratic voters in California it doesn't matter if their nominee wins by ten million votes, or ten votes, they still earn the same 55 electoral votes. There is seemingly little incentive for voters to turn out for presidential elections if they live in a state where their political party has a significant advantage. In part due to the winner take all system implied in most states, this feeling of a wasted vote is magnified even more when looked at in the minority view holder's perspective. For example, a Republican in California will go to the polls knowing his vote is a drop in the bucket, and that it could and would mean more in a different state. All while voters in the swing states such as Ohio and Florida will tip the scales of an election based on the fact that

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<sup>27</sup> California has become a reliably Democratic state today, winning the past seven presidential elections. 2016 marked the third consecutive election that the Democratic nominee has surpassed 60% in the state.

<sup>28</sup> Indiana has been a reliably Republican State for decades. Winning nine of the last ten presidential elections. The loss was by 1% in 2012 to Barack Obama.

<sup>29</sup> See Andrew Prokop, “Why the Electoral College is the Absolute Worst, Explained”, [vox.com](http://www.vox.com) Nov. 10, 2016

their communities are more politically divided. But not only swing states get special privileges, small states as well are afforded certain advantages.

Built into the Electoral College system at a fundamental level, is a small state bias. Every state in the U.S. is guaranteed at least three electoral votes no matter their size. This means that in the 2016 election four percent of the country's population that represent the smallest states, were actually allotted eight percent of the Electoral College's votes<sup>31</sup>. In the 1996 election between President Bill Clinton and Bob Dole, Wyoming cast roughly 210,000 votes total, thus each of their three electoral votes represented about 70,000 votes. Meanwhile, in California approximately 9,700 votes were cast for 54 electoral votes, therefore representing about 170,000 voters<sup>31</sup>. That is a great disparity that clearly creates an unfair advantage for smaller states over larger ones.

Finally, the will of the American people is not being represented to its fullest capacities. With over 300 million people in our country and growing, it seems ancient to adhere to a system in which 538 people will select the next president. What makes it more difficult to bear is that debatably, the Electoral College is going directly against the will of the American people.

In 1824, Andrew Jackson won the popular vote yet received less than half of the electoral votes. In 1876, Samuel Tilden won the popular vote, but lost the election by one Electoral College vote. In 1888, Grover Cleveland also won the popular vote, but lost by 55 votes in the Electoral College<sup>32</sup>. To this point, all of the examples have been from over a century ago, but the

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<sup>30</sup> See Andrew Prokop, "Why the Electoral College is the Absolute Worst, Explained", [vox.com](http://vox.com) Nov. 10, 2016

<sup>31</sup> See: Marc Schulman, "Why The Electoral College" [historycentral.com](http://historycentral.com)

<sup>32</sup> See: Rachael Revesz, "Five presidential nominees who won popular vote but lost the election" [independent.co.uk](http://independent.co.uk) Nov.16, 2016

two most recent examples tend to show that this is a problem that is getting worse in the U.S. First, in the year 2000, Al Gore won over half a million more votes than President George W. Bush. Despite that fact, President Bush gained 271 electoral votes, compared to Mr. Gore's 255 votes. Even more shocking were the results of the 2016 election<sup>33</sup>. According to the Cook Political Report, Hillary Clinton's final vote total was 65,844,610 compared to Donald Trump's 63,979,636, leaving a difference of 2,864,974 votes in Clinton's favor<sup>34</sup>. Despite this, Trump won the electoral college by a wide margin, 304 to 227. Donald Trump lost the popular election by a larger margin than any other U.S. president in history. "That deficit is more than five times bigger than the 544,000 by which George W. Bush lost to Al Gore in 2000 - the second biggest popular vote deficit in history for a candidate who has still gone on to become president" (Kentish 2016). This unnatural result was the culmination of Trump winning several larger states such as Florida, Pennsylvania, and Wisconsin, by very thin margins. Meanwhile, Clinton claiming victory by a wider margin in other larger states such as California, Illinois, and New York, did not help her cause<sup>35</sup>. She fell victim to the Electoral College system. According to the Pew Research Center, when looking back at all presidential elections since 1828, the winner's electoral vote share has on average, been 1.36 times his popular vote share. President Obama for example had an inflation factor of 1.21 in 2012, while President Trump carried a 1.22 inflation factor in 2016. With the technological, societal, and word wide advancements since the time of

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<sup>33</sup> See: Benjamin Kentish "Donald Trump has lost popular vote by greater margin than any US President" [independent.co.uk](http://independent.co.uk) Dec. 12, 2016

<sup>34</sup> See: Sarah Begley "Hillary Clinton Leads by 2.8 Million in Final Popular Vote Count", [time.com](http://time.com) Dec. 20, 2016

<sup>35</sup> See: Drew Desilver "Trump's victory another example of how Electoral College wins are bigger than popular vote ones", [pewresearch.org](http://pewresearch.org) Dec. 20,2016

Alexander Hamilton, it is hard to say that this would be the way he envisioned the Electoral College working. In fact, this is not the only way in which the Electoral College can work. The Electoral College can adapt into a more adequate tool for elections if Americans so choose<sup>36</sup>.

Over 700 proposals have been brought before Congress to make a change in the Electoral College. But there are two main ways in which the system could change. The first is a constitutional amendment, and the second would be actions that comes from the state. To begin, a constitutional amendment would be very difficult, if not impossible to gather in a hyper political and highly partisan time such as now. Requiring 3/4 of the states to approve of anything, very much seems to be a herculean task at this point in time. That is why the best alternative solution to the issues with the Electoral College, is a solution at the state level. On the state level there are two different methods that could potentially change the problems built into the electoral college system. First, a simple fix that could do the most good for the most people would be to change the Electoral College and stop selecting Electors on a winner take all basis. Currently all but two states use a plurality winner take all system to pick their presidential electors. Currently Maine and Nebraska award part of their electoral votes by congressional district rather than statewide. This leads to results such as President Trump taking one of Maine's four electoral votes, even though Hillary Clinton won the state overall<sup>37</sup>. The main issue with doing a system like this nationwide, is the state mutual assent. This would require all states to agree to make this change at the same time in order for it to work. Because any specific action from a state would in

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<sup>36</sup> See: Marc Schulman "Changing The Electoral College", [historycentral.com](http://historycentral.com)

<sup>37</sup> See: Drew Desilver "Trump's victory another example of how Electoral College wins are bigger than popular vote ones", [pewresearch.org](http://pewresearch.org) Dec. 20,2016

effect either help or significantly hurt one side, it is only possible to do it simultaneously. Next, the most viable proposal at this current time, seems to be just as simple.

The Electoral College Pact is a plan to get states to direct their electors to vote for whoever wins the popular vote. Ten states in addition to the District of Columbia have already debated and passed legislation to this avail. Currently, states that have signed the pact have a total of 165 electoral votes between them. If and when that number represents the 270 electoral votes needed to win an election, then the Electoral College Pact will automatically take full effect. Up to this point, only states that lean Democratic have signed on to the pledge. This is most likely because the effects of the Electoral College have yet to negatively affect the Republican party in recent history. It likely will take an election where a Republican wins the popular vote and not the electoral vote in order to light a fire under the party. While this plan may not be completed tomorrow, or next year, it is a viable option for the future, and that is hard to say on behalf of the Electoral College currently.

62 percent of Americans would forgo the Electoral College in favor of a “one person, one vote” election process (Saad 2011). The Electoral College that was ratified as a part of the Constitution at the Constitutional Convention of 1787, is today, flawed. Throughout time, and through authoritative bodies of leadership such as the Constitution, U.S. legislative history, and the Supreme Court, we see the Electoral College as we know it. It has been shaped over time to conform to political parties’ interests, rather than the nations. The American people have not only spoken in a survey about their dislike for the Electoral College, they also did it at the voting booth. Two of the last three Presidents of the United States did not win as many votes as the individual they ran against. That is a direct result of individual voters in the country having their

votes weighted differently than others. This law specifically gives privileges to some in small states, while stripping those in large states of the power of their votes. That is unjust.

H.L.A. Hart distinguished three types of secondary rules that mark a societal change from primitive forms of law to a true legal system<sup>38</sup>. The second of which, was the rule of change which enables a society to add, remove, and modify valid rules. A true legal system can and will allow a society to change valid rules. That must be the argument in this case. The Electoral College is a valid law. From a positivist's perspective, with the great deal of authority and social construct behind it, it is close to impossible to argue any other point. But just because a law is legally valid, we know that does not mean it is morally valid. The moral property of law, rest on its merits<sup>39</sup>, but today, there seems to be little merit in a winner take all system.

### **Natural Law and Natural Rights**

In John Finnis' seminal work *Natural Law and Natural Rights*, he provides an interpretation of basic human goods, and his basic requirements of practical reasonableness. Natural Law according to Finnis has no history because it is eternal and unchanging. He goes on to lay out his exhaustive theory of the good and contends that there are seven self-evident or obvious human goods. Finnis goes on to explain that these goods are of equal importance and are fundamentally different, meaning there is no way to arbitrarily rank the order of the goods. He contends that all must respect and participate in these seven basic goods in order to obtain a full flourishing life. The pursuit of these basic goods leads to everything one could want to have,

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<sup>38</sup> See H.L.A. Hart, (1994, first edition 1961) *The Concept of Law*, 2nd ed. ed.P. Bullock

<sup>39</sup> See: Hans Kelsen (1945). "General Theory of Law and State", trans. A. Wedberg, repr. 1961. New York: Russell and Russell.

want to do, or want to be. Therefore, when enacting and maintain legal systems, one must look to understand how their laws value and emphasis these seven basic goods.

John Finnis answers the question *What constitutes a worthwhile, valuable life?* He answers said question with his seven basic goods. The first basic good or value that Finnis references is the value of life<sup>40</sup>. This value corresponds to the drive for self-preservation. It includes bodily health, procreation, and as of a 2011 postscript, marriage between a man and a woman. Finnis speaks much more in depth about his second basic good, which is the pursuit of knowledge.

Knowledge is a good in the intrinsic sense; it is valuable for its own sake and not simply as a means or instrument to obtain other goods. Thus, according to Finnis, knowledge is distinguished from belief. Beliefs can be true or false, but knowledge of the truth cannot, it is in itself, an achievement<sup>41</sup>. The good in knowledge is not about knowing specifics, for example, knowing the weather for the next month. Rather, the value in knowledge is simply in the pursuit and commitment involved in obtaining the knowledge.

The third basic aspect of human well-being for Finnis is play. (Finnis p. 86). According to him, play has its own value. The way one accomplishes the act of playing does not matter<sup>42</sup>. Be it individually or socially, intellectually or physically, or highly structured or informally, the

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<sup>40</sup> “The term ‘life’ here signifies every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination. Hence, life here includes bodily (including cerebral health, and freedom from the pain that betokens organic malfunctioning or injury.” (Finnis p.86)

<sup>41</sup> “To think of knowledge as a value is not, as such, to think of it as a ‘moral’ value; ‘truth is a good’ is not, here, to be understood as a moral proposition, and ‘knowledge is to be pursued’ is not understood, here, as stating a moral obligation, requirement, prescription, or recommendation.” (Finnis p. 62)

<sup>42</sup> “More importantly, each one of us can see the point of engaging in performances which have no point beyond the performance itself”. (Finnis p. 87)

way in which one plays does not matter. As long as individuals do not fail to observe this redoubtable and irreplaceable element of human culture.

Finnis's fourth basic good is aesthetic experience. While some of the examples of aesthetic experiences overlap with play, such a song or dance, Finnis explains that beauty cannot be described as an indispensable element of play. "Aesthetic experience, unlike play, need not involve an action of one's own; what is sought after and valued for its own sake may simply be the beautiful form 'outside' one, and the 'inner' experience of appreciation of its beauty" (Finnis p. 88). Often enough, the value that an aesthetic experience offers is found not in the action specifically, but value is found in the creation, and active appreciation of beauty.

The fifth basic good according to Finnis is sociability or friendship. He goes on to state that sociability "in its weakest form is realized by a minimum of peace and harmony amongst persons, and which ranges through the forms of human community to its strongest form in the flowering of full friendships" *id.* 89. Sociability may hold together society and be tremendously important in its own right, but Finnis points out the importance of friendship at a personal level as well<sup>43</sup>. Friendship involves acting not for yourself, but in the best interests of another. It is imperative that individuals everywhere as a basic value and good, hold at least one such relationship categorized purely as a friendship.

Whereas Finnis speaks about this basic good seventh, I will speak about it sixth. That basic good is religion. In a broad sense, Finnis was referencing our human concern about the order of life. Not necessarily a 'religion' per se, rather a sense of wonder and exploration of the

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<sup>43</sup> "Friendship involves acting for the sake of one's friend's purposes, one's friend's well-being. To be in a relationship of friendship with at least one other person is a fundamental form of good, is it not?" (Finnis p. 88)

meaning of existence<sup>44</sup>. Finnis references the concern about an order of things beyond the reach of each and every one of us, and questions if those concerns really fall into the category of religion. Therefore, the basic good that comes from religion can be categorized as the connection with, and participation in, the orders that transcend individual humanity<sup>45</sup>.

Finally, the last of the basic goods is Practical Reason. In order to participate in this good, one must make rational decisions that maximize one's participation in the other six goods. By choosing worth-while activities to pursue, by making morally conscience decisions, and by fulfilling the nine sub-requirements of Practical Reason that Finnis lays out, one can participate in this very important, self-evident basic good.

“For amongst the basic forms of good that we have no good reason to leave out of account is the good of practical reasonableness, which is participated in precisely by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out” (Finnis p. 100). The nine requirements of Practical Reason are self-evident in the same way that the basic goods are self-evident. They are the means through which one participates in the basic goods. Therefore, it is imperative that one looks to these nine principles when making decisions for oneself, or conversely, for society as a whole.

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<sup>44</sup> “But is it reasonable to deny that it is, at any rate, peculiarly important to have thought reasonably and (where possible) correctly about these questions of the origins of cosmic order and of human freedom and reason – whatever the answer to those questions turns out to be, even if the answer to those questions turns out to be, and even if the answers have to be agnostic or negative?” (Finnis p. 89)

<sup>45</sup> “If there is a transcendent origin of the universal order-of-things and of human freedom and reason, then one's life and actions are in fundamental disorder if they are not brought, as best one can, into some sort of harmony ...” (Finnis p. 90)

The first principle of practical reason is to have a coherent plan of life. “Implicitly or explicitly one must have a harmonious set of purposes and orientations, not as the ‘plans’ or ‘blueprints’ of a pipe-dream, but as effective commitments.” (Finnis p. 104). Essentially, Finnis explains that it is important to view your life as a whole. Do not live moment to moment acting on instinct or impulses, rather live intelligently and control urges and impulses (*id.*)

The next principle of practical reason is to hold no arbitrary preferences amongst values<sup>46</sup>. Finnis understands clearly that it is natural to prioritize certain goods over others, for example an academic prioritizing knowledge higher than play. Finnis’s point here is that these decisions cannot be made arbitrarily. Accordingly, it is unreasonable to devalue any of the basic forms of human excellence, it is also unreasonable to overvalue any such merely derivative instrumental goods, such as wealth or one’s reputation. “It is one thing to have little capacity and even no ‘taste’ for scholarship, or friendship, or physical heroism, or sanctity; it is quite another thing, and stupid or arbitrary, to think or speak or act as if these were not real forms of good” (Finnis p. 105).

The third requirement of practical reasonableness is no arbitrary preferences amongst persons. Basic goods apply equally to all people. There is a legitimate scope for self-preference, but it does not justify egoism. To the extent that one puts themselves in the best position for self-preference, that is fine, but they should always take into account the good of others.

The fourth and fifth requirements of practical reasonableness go hand in hand with each other. The fourth being detachment and the fifth being commitment. As it goes for detachment,

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<sup>46</sup> “Any commitment to a coherent plan of life is going to involve some degree of concentration on one or some of the basic forms of good, at the expense, temporarily or permanently, of other forms of good... But the commitment will be rational only if it is on the basis of one’s assessment of one’s capacities, circumstances, and even of one’s tastes” (Finnis p. 105).

Finnis believes that one should avoid over concentration on one value or the fanatical pursuit of a good. “There are often straightforward and evil consequences of succumbing to the temptation to give one’s particular project the overriding and unconditional significance which only a basic value can claim...they are the evil consequences that we call to mind when we think of fanaticism” (Finnis p. 110). As for commitments, Finnis believes that one should not abandon them lightly. Rather they should look for a new and more creative way to promote the good. This creativity according to Finnis shows that a person or a society is truly living on the level of practical principle, and not merely on the level of conventional rules of conduct. In effect, the fourth and fifth requirements of practical reasonableness are counter-balancing. They establish the balance between fanaticism and dropping out, and when utilized correctly are part of a blueprint of a practically reasonable life.

The sixth requirement for practical reasonableness is the limited relevance of consequences or efficiency within reason<sup>47</sup>. In essence, one should calculate and plan their actions so that they are the most efficient and do the most good. Finnis points out that consequentialist calculus of the greatest good for the greatest number is senseless and irrational. That is because it is based on an inadequate idea of the good, it assumes goods are commensurable, and it weighs the possible consequences of an act going on endlessly with predictions of the future, which is not possible (Finnis p. 112).

Respect for every basic value in every act is the seventh requirement for practical reasonableness. Accordingly, one should never commit an act that directly harms a basic good, even if it will indirectly benefit a different basic good. For example, one should not kill even if it

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<sup>47</sup> “For this is the requirement that one bring about good in the world (in one’s own life and the lives of others) by actions that are efficient for their (reasonable) purpose(s)” (Finnis p. 111).

will indirectly save more lives later. When choosing one good it will result in the subordination of others. Therefore, Finnis noted that it is important for one to distinguish between direct and indirect actions and justifiable side-effects.

The eighth requirement for practical reasonableness is to foster and favor the common good of the communities one is a part of. The sense and implications of this requirement are complex and manifold, as well as overarching. When Finnis say communities, that could mean family, friends, work, neighbors, town, state, country, and all the way up to an international-communities. Thus, because communities are so involved in every day basic human life, “Very many, perhaps even most, of our concrete moral responsibilities, obligations, and duties have their basis in the eighth requirement” (Finnis p. 125).

The ninth and final requirement for practical reasonableness is straightforward, and that is to follow one’s conscience. One should act according to their conscience and practical reason, not the authority of someone else<sup>48</sup>. This is not just a mechanism for producing correct judgements, but an aspect of personal full-being.

When one is able to adapt Finnis’s theory of the goods as well as his requirements for practical reasonableness, it becomes strong tool decision making tool. The morality of difficult decision can and should be played out through these mechanisms. Therefore, looking at the Electoral College through the eyes of Finnis’s work will offer a better understanding of morality and it will specify the overarching structure and goals of a good and reasonable society.

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<sup>48</sup> “This dignity of even the mistaken conscience is what is expressed in the ninth requirement. It flows from the fact that practical reasonableness is not simply a mechanism for producing correct judgements, but an aspect of personal full-being, to be respected (like all the other aspects) in every act as well as ‘over-all’ – whatever the consequences (Finnis p. 126).

As stated earlier, Finnis's seven good and nine requirements of practical reasonableness apply equally to all<sup>49</sup>. Therefore, to make rational decisions in life one must think reasonably and in accordance with the nine requirements to most effectively participate in the basic goods. The system created by Finnis is clearly flexible. In making day to day decisions one can choose to go for a run, to go to a party, or just to stay home and read, all of which in principle, are legitimate choices. Obviously not all choices are reasonably justifiable, such as spending of an entire day doing nothing. There are also choices that are plain wrong such as murder.

Although some acts are wrong, there is no single correct act, and that is because the seven good are equally fundamental. Therefore, in practical reason, there can be two contradictory acts that are both morally correct choices. It is up to the members of society, and their free will to choose which act they will adopt. The Electoral College seems to fit perfectly into this example of a morally justifiable choice, even if there is an equally or more justifiable contradictory act.

Some law can directly serve basic goods, such as law against murder. Most law on the other hand is not that direct. Conversely, laws such as the Electoral College are created to stabilize society in which people have the freedom and ability to choose how to pursue the basic goods. Just as any individual has the right to go for a run, or go to a party, the creators of law are free to choose the manner in which the system works. If the legal system is in service to the basic goods in accordance with practical reason, it can be said to be a morally good legal system.

If one accepts a legal system, as it is clear that most do in America, then they have a legal obligation to obey the law. Essentially, Finnis's argument goes as follows. One ought to pursue

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<sup>49</sup> "Thus, I have illustrated this point in relation to life, truth, and play; the reader can easily test and confirm it in relation to each of the other basic values. Each is fundamental. None is more fundamental than any others, for each can reasonably be focused upon, and each, when focused upon, claims a priority of value. Hence there is no objective priority of value amongst them" (Finnis p. 93).

the basic good, society must coordinate in order to achieve the basic goods, the law is effective in coordinating society in this manner, and therefore one ought to obey the law (Finnis p. 315)<sup>50</sup>. This means that individuals hold both a legal and moral obligation to respect and obey law.

### Conclusion

“The tradition goes so far as to say that there may be an obligation to conform to some such laws in order to uphold respect for the legal system as a whole” (Finnis p. 352). The Electoral College is not perfect, I don’t believe there is anyone arguing that. But systematic validity is immensely important. The Electoral College is a valid law. From a positivist’s perspective, with the great deal of authority and social construct behind it, it is close to impossible to argue any other point. But just because a law is legally valid, we know that does not mean it is morally valid. The moral property of law, rest on its merits<sup>39</sup>.

When looking into the merits of the Electoral College from John Finnis’s moral perspective, it seems clear to me that the Elector College is a morally valid law. The Electoral College is in service to the basic goods in accordance with practical reason, therefore it can be said to be a morally good law. When Alexander Hamilton wrote *The Federalist Papers* #68 in 1788, he had not Finnis’s nine principles of practical reason or seven basic goods in mind. But he did nothing to directly contradict these seven goods, and nothing to overvalue any of such goods.

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<sup>50</sup> “The answer to the problem consists in the correct identification of the law-abiding subject’s practical reasoning- reasoning to which such a norm is directed and which such a norm is intended to direct in a distinctively ‘obligatory’ way. (Finnis p. 315).

<sup>39</sup> See: Hans Kelsen (1945). “General Theory of Law and State”, trans. A. Wedberg, repr. 1961. New York: Russell and Russell.

Our founders did use practical reasonableness to decide what is best for our country and how to implement such systems.

Finnis's seven basic goods serve as an explanation of why we do things. All activities worth doing participate in one or more basic goods. As such, it is clear that the Electoral College not only participates in one basic good but many. From knowledge, to sociability, and to practical reasonableness, it is clear that The Electoral College promotes multiple basic goods and does not contradict any of the nine requirements of practical reason.

When I began writing this paper, I was under the assumption that I would conclude The Electoral College to be either legally invalid, morally invalid, or both. The system seemed unfair, unjust, and easily changeable. But by using Finnis's logic, it is become clear that The Electoral College is neither legally or morally invalid. There may be better and more fair ways in which Americans can vote in Presidential elections, such as the Electoral College Pact spoken about earlier. But in practical reason, there can be two contradictory acts that are both morally permissible choices. It is up to human free will to choose which act they will adopt. That is what happened with The Electoral College.

The Electoral College was the great compromise that our founders needed to bring us a more perfect union. Truly, this was the genius of John Finnis. He laid out requirements that specified an overarching structure and goals. But Finnis's system does not mandate events in either small day to day life, or massive decisions like choosing to establish The Electoral College. It is up to human free will, paired with the ideals and values of practical reasonableness to carry out those acts. As long as the Electoral College continues to be of service to the basic goods and in accordance with practical reason, it is a morally good legal system. In conclusion,

based on John Finnis's seven basic good and his principles of practical reasonableness, The Electoral College is both legally and morally valid in The United States of America.

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