THE MYTH OF DISCRETION: WHY PRESIDENTIAL ELECTORS DO NOT RECEIVE FIRST AMENDMENT PROTECTION

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The American government is unique among the nations of the world, both past and present, because of its use of the concept of federalism. The essence of federalism is its constructive use of repellent forces: by binding the various states to each other via a central government, the perennial tendency of states to expand their power and influence is kept in check, and liberties are thus preserved in the process. Some maintain, however, that this delicate balance, however resilient it may appear to be, is undermined greatly by problematic institutions that do not embrace the very rights the federalist system was supposedly designed to protect.

A specific target of such critics is the electoral college—the temporary assembly of individuals that convenes in the December immediately after the presidential election, pursuant to constitutional instructions, to choose the President of the United States. It has been criticized as being obsolete, antithetical to democracy, and misleading to voters. While arguments abound on both sides as to the continuing vitality of the electoral college, it can be definitively stated that the presidential electors who fill its ranks do not have any First Amendment right to vote as they choose, particularly if their choices are made contrary to their respective states’ mandates that electors adhere to the popular will.

This article will endeavor to explain why presidential electors’ electoral college votes do not receive the First Amendment’s protection of expression the way ordinary voters’ election day ballots do. Part I will briefly explore the creation of the electoral college, its conceptual underpinnings, and some of the basic perspectives of that oft-maligned institution and its relatively unknown functionaries, the presidential electors. Part II will review the Supreme Court’s approach to voting rights jurisprudence in general and its interrelation with the First Amendment. This section will specifically note how the Court’s recognition of a right to vote has been tempered by an assortment of justifiable restrictions of that right under the compelling state interest standard. Part III will lay out the constitutional, legal and traditional reasons why electors do not have a recognized independent role within the constitutional framework. It will detail how electors have evolved over time into at-will components of the electoral machinery. It will also explore the contemporary arguments both against and in favor of the electoral college and explain why the views in favor present a more cogent and realistic approach to the basic

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1 "The great virtue of the American structural constitutional system of... federalism is that it preserves liberty by setting governmental power against itself." Steven G. Calabresi, Mediating Institutions: Beyond the Public Private Distinction: Political Parties as Mediating Institutions, 61 U. Chi. L. Rev. 1479 (Fall 1994) [hereinafter Calabresi].

2 See, e.g., Thomas M. Durbin, The Anachronistic Electoral College: The Time for Reform, 39 Fed. B. News & J. 510, 512 (Oct. 1992) (discussing how the electoral college is contrary to the "one person, one vote" principle favored by the Supreme Court) [hereinafter Durbin]. But see Judith Best, The Case Against Direct Election of the President: A Defense of the Electoral College 125 (1971) (pointing out that the "one person, one vote" principle is a judicial construct that lacks constitutional support) [hereinafter Best].

3 See, e.g., U.S. Const. art. II, §1, cl. 2, which lays out the mechanical requirements for the assembly and voting procedures of presidential electors.

4 See generally Durbin, supra note 2.

5 See, e.g., Brannon P. Denning, Means to Amend: Theories of Constitutional Change, 65 Tenn. L. Rev. 155, 213-14 (Fall 1997) (discussing how most Americans' expectations of majoritarian rule are not truly mirrored by the electoral college) [hereinafter Denning].

6 See, e.g., Ronald D. Rotunda, The Aftermath of Thornton, 13 Const. Commentary 200, 203-04 (Summer 1996) (noting that most Americans today believe they are voting for the president and vice president rather than their electors).

7 Substantial discussion will be devoted to this topic in Part III, infra.
A. A Brief Sketch of the Electoral College

The electoral college began inauspiciously enough: during the summer of 1787, as the Constitutional Convention was nearing its end, those present came upon a legitimate point of contention regarding the election of the president.\(^8\)

It is important to note that the wrangling over the presidential election process mirrored concerns about legislative structure and apportionment, which was logical considering that the number of electors was, as it is now, directly proportional to the total number of members in Congress. See Tadahisa Kuroda, The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804 8, 15 (1994) [hereinafter Kuroda]. At the Convention, the large states sought to have congressional apportionment based on population alone, but the small states expressed concern that such a scenario would make it easier for the large states to marginalize the small ones. Forrest McDonald, States’ Rights and the Union: Imperium in Imperio, 1776-1876 16 (2000) [hereinafter McDonald]. Conversely, the large states opposed any scheme whereby the large and small states would receive equal numbers of representatives, as that would unfairly shift the balance in favor of the latter. Id. Recognizing the threat that such an imbalance posed to the Union, convention attendees, including George Washington, favored a compromise to irreparable dissolution. See Rogan Kersh, Dreams of a More Perfect Union 59 (2001).

The end result of this exchange was the bicameral legislature: representation would be based on popular distribution in the House of Representatives, while each state would have two representatives in the Senate. McDonald, supra, at 16.

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While many favored having the newly-conceived House of Representatives choose the head of the executive branch, others favored direct election by the people.\(^9\) Each side had reservations about the other’s proposal,\(^10\) and a compromise was struck: an electoral college would empower the individual states to select their own presidential electors, who in turn would convene in state capitals across the nation and cast their ballots for president and vice president.\(^11\) The electors would be akin to an educated elite, and would be capable of casting responsible votes for the leaders of the United States.\(^12\)

In the years following that compromise, the role of presidential elector changed dramatically in part because of basic changes made by the nature and benefits of the “compromise” between the camps [hereinafter HARVARD LAW REVIEW]; McPherson, 146 U.S. at 28 (mentioning how the two camps “reconciled con-trary of views” by agreeing to the electoral college).

\(^9\) Compare Beverly J. Ross & William Josephson, The Electoral College and the Popular Vote, 12 J. L. & Politics 665, 676 (Fall 1996) (stating the viewpoint of those opposing direct election) [hereinafter Ross & Josephson] with Kuroda, supra note 8, at 8. See also McPherson v. Blacker, 146 U.S. 1, 28 (1892) (recalling that substantial debate occurred in 1787 over the means of choosing the president).


\(^11\) See Harvard Law Review Association, Note, Rethinking the Electoral College Debate: The Framers, Federalism, and One Per-son, One Vote, 114 HARV. L. REV. 2526, 2528-29 (June 2001) (providing the pro-direct election viewpoint and discussing the nature and benefits of the “compromise” between the camps) [hereinafter HARVARD LAW REVIEW]; McPherson, 146 U.S. at 28 (mentioning how the two camps “reconciled con-trary of views” by agreeing to the electoral college).

\(^12\) While many at the convention were apprehensive about having direct elections, it would be inaccurate to say that all of these men distrusted the electorate. Specifically, some were dissatisfied with the state of communications in what was still largely a rural nation, and felt that only a discrete core of individuals could properly remain informed on the broad field of issues and candidates. Ross & Josephson, supra note 9, at 676.

It is also worth mentioning at this juncture that many who favored the electoral college thought it would only rarely be the final step in the presidential selection process. Many, like Virginian George Mason, for example, figured that the vast majority of elections would wind up in the House of Repre-sentatives simply because they anticipated a fractured electoral college vote. See Lawrence D. Longley & Alan G. Braun, The Politics of Electoral College Reform 26-27 (1972) [hereinafter Longley & Braun]; Columbia Law Review, supra note 10, at 707; and Kuroda, supra note 8, at 19. Others viewed the electoral college not as the mechanism for actually choosing the president, but as something more akin to a nominating convention in preparation for the House’s selection. Longley & Braun, supra note 12, at 27. See also U.S. Const. art II, §1, cl. 3 and U.S. Const. amend. XII, which explain the original and updated methods, respectively, of how the House of Representatives would choose the president in the event the electoral vote failed to yield a majority for one candidate. The “House contingency,” as it is sometimes called, has only been used once since the passage of the Twelfth Amendment in 1804. See Ann Althouse, Electoral College Reform: Déjà Vu, 95 NW. U. L. Rev. 993, 997 (Spring 2001) (reviewing Alexander M. Bickel, Reform and Continuity; the Electoral College, the Convention, and the Party System (1971); Judith Best, The Case Against Direct Election of the President: A Defense of the Electoral College (1971); Lawrence D. Longley & Alan G. Braun, The Politics of Electoral College Reform (1972)) [hereinafter Althouse]. In the election of 1824, Democrat Andrew Jackson received both more popular votes and more electoral votes than National Republican candidate John Quincy Adams, but because neither received the requisite majority of electoral votes, the House ultimately selected Adams. See Will Hively, Myth Against Tyranny, Discover, Nov. 1996, at 75-76 (hereinafter Hively).
states themselves. While the schemes used in the first presidential election of 1788 varied widely, and continued to vary widely for some time, almost all of the states then in the Union had, by the late 1820s, made the shift to having eligible citizens within each state choose the entire slate of electors, presumably based on their positions and the candidates they supported. Indeed, the states had the exclusive right to create this bond with the popular will, as the text of Article II of the Constitution makes clear: "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."10

As the years passed, however, concern developed over what were perceived to be inherent flaws of the electoral college. In 1824, for instance, Democrat Andrew Jackson was one of several candidates running for the presidency.17 He received both a majority of popular votes as well as a majority of electoral votes, but because no single candidate received a simple majority of all electoral votes, the election became the responsibility of the House of Representatives.19 After a good deal of haranguing on Jackson's part, National Republican candidate John Quincy Adams received the most ballots and became President.20 In the elections of 1876 and 1888, the two eventual winners of the presidential contest had won the requisite number of electoral votes, but had failed to receive more popular votes than their nearest respective opponents.21 More recently, President George W. Bush won the presidency in a similar fashion: his electoral vote total was sufficient for victory, despite his trailing of the Democratic candidate for president, Al Gore, by approximately a half million votes.22

B. Competing Theories About the Vitality of the Electoral College

Critics were quick to point out that the electoral college was denying the voters their choice as expressed on election day.23 Some asked how the United States, the home of democracy and freedom, could provide for the election of its leader with a system that disputes the logic of majority rule.24

Those same critics have used an assortment of arguments to justify the elimination of the electoral college altogether. A common theme sounded among this camp is that the electoral college puts presidents into office that do not reflect the desires of the popular will as expressed on election day.25 Some argue that the original justifications for the electoral college have since dissipated, or that new circumstances have come into play that necessitate a different approach.27

13 In 1788, only one state – Pennsylvania – successfully allowed its citizens to vote for electors on a general ticket. Several others permitted their citizens to vote for electors under a district-based scheme. See McPherson, 146 U.S. at 29-30.

14 Schemes for choosing electors were still quite varied leading up to 1800, despite the fact that the total of states that had shifted to the popular vote method of choosing electors had risen to six. See id. at 30-32.

15 See id. at 32 (noting that "[a]fter 1832 electors were chosen by the general ticket [i.e., via popular vote] in all the states excepting South Carolina"). The Court goes on to state that occasional reversions were made to having the legislature select electors, but this was sporadic and short-lived. Id. at 32-33.

16 U.S. Const. art. II, §1, cl. 2.


18 See Hively, supra note 12, at 75-76.

19 See LONGLY & BRAUN, supra note 12, at 36.

20 See EC WebZine: Jackson, supra note 17. Jackson's frustrations were not without justification. House Speaker Henry Clay finished third in popular voting but fourth in electoral votes, the latter of which rendered him ineligible to be selected by the House. Consequently, Clay used his clout to build up support for Adams in the House of Representatives. LONGLY & BRAUN, supra note 12, at 36.

21 These two elections will be discussed in greater detail in Part III, infra.


23 See, e.g., DURBIN, supra note 2, at 512 (noting that the possibility of electing a "minority" president has the effect of subverting the popular will). The reader will note that comparable criticism arose in the wake of the 2000 presidential election. See, e.g., Donna Britt, This College Is a Study In Non-sense, WASH. POST, Nov. 10, 2000, at B8 (stating derisively that the Founders "designed a system to limit the popular will that's still in fine working order").

24 See DURBIN, supra note 2, at 512 (discussing the "one person, one vote", principle).

25 See id. (referencing the occurrence of "minority" presidents).

26 See, e.g., HARVARD LAW REVIEW, supra note 11, at 2529-30 (mentioning how two of the Founders' original goals in choosing the electoral college – the recognition of slavery for apportionment purposes and an uninformed populace – no longer deserve consideration).

27 See id. at 2530 (discussing how the development of the two-party system in the United States "has eviscerated most of the features of the electoral college" that were justifiable under a federalist scheme).
Most of these critics call for a direct vote system, which would replace the electoral college with a mechanism that simply aggregates the popular vote totals of the various presidential candidates on a national scale.\(^{28}\)

One cannot discuss the electoral college without discussing the presidential electors that give it effect. In fact, many critics of the electoral college invoke the existence of presidential electors as one of the primary reasons why the electoral college is a threat to democratic tendencies: they note that the discretionary role of electors, preferred by the Founders, is a substantial obstacle to guaranteeing that the people’s will is carried out.\(^{29}\) Proponents of the electoral college, however, are quick to point out that electors no longer possess the discretion they once did,\(^{30}\) provided one makes the assumption that such discretion was ever more than a theoretical issue.\(^{31}\) Most electoral college critics reject any view of electors as non-discretionary, in no small part because such a perspective weakens their calls for reform.\(^{32}\)

The perspective of electors as non-discretionary actors in the presidential selection process is the correct one, as will be demonstrated over the course of the following sections. Before that analysis can begin, however, it is necessary to shift gears and examine the Supreme Court’s approach to voting rights in general and the extent to which limits can be placed on those rights.

II. VOTING RIGHTS BASICS: AN EXPLORATION OF SUPREME COURT ELECTION JURISPRUDENCE AND THE IMPACT OF THE FIRST AMENDMENT

A. A Preamble of Pragmatism: Overriding the First Amendment in Assorted Non-Election Circumstances

The freedoms of expression,\(^{33}\) association\(^{34}\) and petition\(^{35}\) have been recognized repeatedly by the Supreme Court as being essential to any society that considers freedom and democracy to be among its foremost virtues.\(^{36}\) It is equally well-established, however, that the First Amendment confers no absolute rights upon American citizens, as its various protections are vulnerable to co-option by those who would abuse the grant of rights to violate the rights of others.\(^{37}\) It is with this dilemma in mind that the Supreme Court has carved out several prominent exceptions to the rights granted by the First Amendment. While

\(^{28}\) See Durbín, supra note 2, at 516 (providing typical examples of what a direct vote system might look like) and Longley & Braun, supra note 12, at 64-69.

\(^{29}\) See, e.g., Denning, supra note 5, at 213 (discussing how the enforcement mechanisms in place at the state level, assuming they are even constitutional, may not be enough to keep electors bound to the popular vote); Columbia Law Review, supra note 10, at 703 (expressing uncertainty as to whether statutes can constitutionally bind electors).

\(^{30}\) See, e.g., Columbia Law Review, supra note 10, at 700-01 (noting that, the constitutionality of binding statutes aside, the functions they perform do not come with the discretionary tendencies of other elected offices). See also Thomas v. Cohen, 262 N.Y.S. 320, 324 (Sup. Ct. 1933) (noting the gradual historical evolution of the role of elector).

\(^{31}\) Some dispute the idea that everyone viewed electors as discretionary at the nation’s inception. One famous anecdote tells the story of Federalist elector Samuel Miles. In 1796, Miles allegedly rebuffed his party affiliation and voted for Thomas Jefferson instead of John Adams. His defection promptly triggered the following comment from an unknown Federalist contemporary: “Do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to act, not to think.” See Best, supra note 2, at 39. See also Kuroda, supra note 8, at 11 (noting that “[n]o delegate [at the Constitutional Convention] argued that electors would be disinterested persons exercising their own judgment without reference to prevailing opinion and interests in their states”).

\(^{32}\) See, e.g., Vasan Kesavan, The Very Faithless Elector?, 104
they vary in terms of purpose and scope, they share a commonality: all of the exceptions reflect a sense that the First Amendment cannot be used as a tool for infringing upon the rights of others.

The Court has recognized for some time now that commercial ventures cannot utilize improper business practices while simultaneously seeking shelter under the First Amendment’s protections. The Court has said that commercial interests, while important, cannot be used to violate laws that are reasonably tailored to promote public interests. Similarly, the Court has forbidden organizations such as unions from interfering with business operations where the conduct of the former was designed not to communicate some message but to hinder another’s commercial enterprise. Such activities could not properly be called speech, particularly if the activities were part of a larger scheme of behavior that had no overarching speech component.

The Court has also stated that the mere characterization of something as speech does not necessarily make it so. In instances where the government is able to articulate that some activity is undesirably and seeks to impose restrictions, the Court has upheld restrictive laws, provided those laws are narrowly tailored to the interest sought. Indeed, the Court even has gone so far as to say that some instances of technical speech are impermissible because of the harm they might produce.

How can the Court justify these exceptions that infringe upon rights clearly laid out in the First Amendment? One way it has done so has been by drawing a distinction between speech and conduct. Whereas the former is usually found to be deserving of greater deference, the latter is more often than not found to be deserving of lesser deference for practical reasons: permitting all conduct to be depicted as speech would make it extremely difficult to craft any sort of effective regulation. Alternatively, the Court has been willing to uphold regulations if they are deemed to be content-neutral: if the negative impact on expressive rights is deemed incidental to the regulatory goal, the regulation will usually be permitted to stand.

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38 See id. at 498 (rejecting the idea that "the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute").

39 See, e.g., National Society of Professional Engineers v. United States, 435 U.S. 679, 697-98 (1978) (noting that an injunction against the petitioner "may impinge upon rights that would otherwise be constitutionally protected").

40 See, e.g., National Labor Relations Board v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 616 (1980) (noting that the prohibiting of picketing for unlawful purposes was not violative of the First Amendment); Giboney, 336 U.S. at 495-96 (proclaiming that "it is difficult to perceive how it could be thought that these constitutional guaranties [i.e., those under the First Amendment] afford labor union members a peculiar immunity from laws against trade restraint").

41 See Giboney, 336 U.S. at 495-96.

42 See id. at 498 (stating that speech can be found illegal if it is part of "a single and integrated course of conduct" which has itself been made illegal).

43 See, e.g., United States v. O’Brien, 391 U.S. 367, 376 (1968) (discussing the respondent’s characterization of the burning of his draft card as "protected `symbolic speech"").

44 See id. at 382 (upholding the restrictive statute on the ground that the government chose "appropriately narrow means" for achieving its purpose of preserving draft certification); National Association for the Advancement of Colored People v. Claiborne Hardware Company, 458 U.S. 886, 912 (1982) (noting that regulations which have only an "incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances").

45 See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (rejecting claim that "fighting words" are desiring of First Amendment protection); Schenck v. United States, 249 U.S. 47, 52 (1919) (rejecting claim that panic-inducing words, such as shouting fire in a theater, are deserving of First Amendment protection).

46 See, e.g., Texas v. Johnson, 491 U.S. 397, 406 (1989) (stating that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word"); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134-35 (9th Cir. 2000), cert. denied sub nom. Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001) (noting that "expressive conduct receives significantly less protection than pure speech") (emphasis in original).


48 See National Society of Professional Engineers, 435 U.S. at 697 (stating that "[t]he First Amendment does not make it ... impossible ever to enforce [applicable criminal laws]"; Giboney, 336 U.S. at 502 (declaring that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed").

49 See, e.g., Humanitarian Law Project, 205 F.3d at 1135 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (noting that courts will apply a lighter standard of review when "a regulation ... serves purposes unrelated to the content of expression"). Some commentators believe that the Court has frequently failed to steer clear of making content-based judgments. See, e.g., Adam Winkler, Expressive Voting, 68 N.Y.U. L. Rev. 330, 355 (May 1993) (noting that the Court has "arguably strayed" from content-neutral decision-making) [hereinafter WINKLER].
B. Is There a Right to Vote? Textual Gaps and the Court's Search For a Solution

In the voting rights context, the First Amendment's freedoms of association and expression, while not absolute, are quite strong, and can be overcome only in instances where the government has both expressed a compelling interest of some sort for a given statute or rule and implemented regulations that are considered the least restrictive of those basic rights. The Supreme Court has had numerous occasions in the post-civil rights era to address concerns over issues such as voter expression and ballot access.

Despite the above tendencies of the Court, voting has always been at a distinct disadvantage under First Amendment review because there is no textual grant within that amendment protecting the right to vote, nor is there such a grant anywhere else in either the main body of the Constitution or the remainder of the Bill of Rights. Further complicating the voting equation is the fact that all subsequent amendments addressing the right to vote have been both positive and specific grants: the Fifteenth, Nineteenth, and Twenty-sixth Amendments have all awarded specific groups within society the right to vote. Some have consequently looked to the Fourteenth Amendment's grant of equal protection to fill this perceived constitutional gap. Those that have looked instead to the First Amendment's expansive protections view it as a more appropriate guardian of the several values that are represented in the voting process.

C. The Acceptance of Exceptions: Assorted Areas Where Denials of Voting Rights and Ballot Access Are Considered Constitutional

The expansive perspective of the franchise as laid out above is inappropriate, especially when one considers that the Constitution itself makes no such sweeping claim. This fact cannot easily be dismissed, and it would be ill-advised for scholars and citizens alike to envision a right where none is clearly established. To the contrary, the Constitution does recognize that there are instances where citizens may not be permitted to vote. In keeping with the spirit of the constitutional text as a generally Reynolds v. Sims, 377 U.S. 533 (1964).

Section 2 of the Fourteenth Amendment, for example, provides that states will suffer apportionment penalties for denying eligible citizens the right to vote. It does, however, award all American citizens the positive right to vote without being burdened by poll taxes or other pecuniary obstacles to the ballot box. U.S. Const. amend. XXIV. §1.

The Twenty-fourth Amendment is the one voting rights amendment that does not grant a specific group the right to vote. It does, however, award all American citizens the positive right to vote without being burdened by poll taxes or other pecuniary obstacles to the ballot box. U.S. Const. amend. XXIV. §1.

Section 2 of the Fourteenth Amendment, for example, provides that states will suffer apportionment penalties for denying eligible citizens the right to vote, excluding instances where the right to vote is denied to a citizen for his "participation in rebellion, or other crime." U.S. Const.
whole, the Court has acknowledged that there are circumstances where the federal and state governments could properly proscribe the right to vote.\textsuperscript{63} One such limitation that has not faced tremendous opposition is the requirement that only citizens of the United States be allowed to vote in United States elections. While this sentiment is not universal,\textsuperscript{64} it is widely accepted in large part because the several areas of the Constitution that deal directly with extending or protecting the franchise make mention of citizenship status as a prerequisite for voting.\textsuperscript{65} Other limitations that have received express support from the Court are residency requirements set forth by the individual states and their political subdivisions.\textsuperscript{66} The Court, in supporting such restrictive regulations, appears to have justified the idea that a political unit has the right to limit the franchise to those individuals who have some sort of stake in the well-being of that unit.\textsuperscript{67} As a corollary, the Court is willing to uphold regulations designed to exclude disinterested individuals, although it has taken care to stress that content-based voting restrictions do not benefit from this specific grant of power to the states.\textsuperscript{68}

Not all textual grants are universally embraced, and occasionally, in instances where the Constitution permits something that would be deemed antithetical to a provision such as the First Amendment, the latter category usually finds itself on the losing end of such struggles. In \textit{Richardson v. Ramirez},\textsuperscript{69} for example, previously convicted felons residing in California brought suit against the state, challenging a provision of its constitution which permitted the state to exclude ex-felons from exercising their right to vote.\textsuperscript{70} The California Supreme Court struck down the provision as being a violation of equal protection,\textsuperscript{71} but the United States Supreme Court reversed, noting that section 2 of the Fourteenth Amendment expressly permits\textsuperscript{72} the states to exclude individuals convicted of rebellion or criminal activity,\textsuperscript{73} notwithstanding the grant of equal protection established in section 1.\textsuperscript{74} The Court found section 2 to be of "controlling significance" in this context\textsuperscript{75} and therefore justify some of their voter restrictions by pointing toward the desire to maintain the integrity of the political unit.

\textsuperscript{63} See, e.g., \textit{Carrington}, 380 U.S. at 91 (stating that any residency restrictions must be founded "on a nondiscriminatory basis, and in accordance with the Constitution"). See also id. at 94 (preventing states from excluding voters from exercising the franchise "because of the way they may vote"). Winkler notes that, despite the Court's statements in \textit{Carrington}, such decisions nevertheless run the risk of being rooted in some evaluation of content. He points to the \textit{Richardson} decision as an example of such an inevitability. \textit{Winkler, supra} note 49, at 355-57.

\textsuperscript{64} See, e.g., \textit{Holt Civic Club v. City of Tuscaloosa}, 439 U.S. 60, 68-69 (1978) (noting that the Court's "cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders"). \textit{But see} Dunn v. Blumstein, 405 U.S. 330, 359-60 (1972) (warning that a residency requirement lacking a sufficient bond to a compelling state interest will fail under equal protection analysis).

\textsuperscript{65} \textit{See Carrington}, 380 U.S. at 91 (declaring that the states have "unquestioned power to impose reasonable residence restrictions of the availability of the ballot") (emphasis added). See also \textit{Winkler, supra} note 49, at 342-43 (claiming that states cur-
because it believed any interpretation that allowed section 1 to override section 2 ignored both common sense and basic principles of statutory construction. While the majority did not invoke the First Amendment, the dissent did so implicitly, using its grant of freedom of expression as a means of finding the latter’s position untenable, particularly given that California partially justified the statute on qualitative grounds.

In much the same way that the voting rights of ordinary citizens can be curtailed under specific conditions, the rights of candidates to receive access to state or local ballots can be curtailed pending similar specific conditions. Indeed, both operate under the compelling state interest standard because the rights of voters to express themselves and associate via the ballot box correspond to the rights of candidates to associate, as a candidate, with those who would vote for him.

Williams v. Rhodes arguably represents the inception of a shift in favor of such reasonable restrictions. In anticipation of the 1968 presidential election, two separate parties, the Ohio American Independent Party and the Socialist Labor Party, sought to have their candidates for the offices of presidential electors placed on the general election ballot in Ohio. Ohio had several candidate registration requirements, the net effect of which was to suppress minor party candidates; when one of the two parties was denied access to the ballot despite fulfilling the primary requirement, each brought suit. In a consolidated decision, the Court found the Ohio statute to be too burdensome and granted one of the parties the ballot access it requested. The Court cited both the First and Fourteenth Amendments and ultimately concluded that Ohio could not use the relatively broad grant of power provided under Article II of the Constitution to shield its stringent voter registration requirements.

Superficially at least, this case could be viewed as an emerging First Amendment protection for both candidates and voters. The Court itself states that voting benefits from numerous constitutional protections should, as an expressive tool, retain First Amendment protection because of the overlap between the right to associate and the right to support association via the ballot box. The net effect of this decision, however, was that it laid out just how much leeway states have in the electoral process, which in turn established boundaries within which states could safely operate without fear of judicial reprisal.

Primarily, the Court’s focus on textual protections of the right to vote undermined potential broader arguments that some amorphous nontextual basis could be used to protect voting rights. In addition to citing the three major voting rights amendments then in effect, the Court also noted that although the states receive significant regulatory power under constitutional provisions, they are necessarily forbidden from “violat[ing]...

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76 See id. (noting that the Court’s decision conformed with both “the express language of §2” and “historical and judicial interpretation” of the Fourteenth Amendment).
77 Id. at 55 (“[W]e... rest on the demonstrably sound proposition that §1... could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which §2 imposed for other forms of disenfranchisement”).
78 See id. at 81-82 (Marshall, J., dissenting) (noting that the state’s desire to deny ex-felons the franchise because of how they might vote “strikes at the very heart of the democratic process,” and that “[a] temporal majority could [improperly] use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views”). See also WINKLER, supra note 49, at 355-57 (discussing how the Court’s decisions in this area came close to being impermissibly based on restriction of content).
79 The use of the phrase “compelling state interest” derives from Bilton, 371 U.S. at 438, but other cases have expressed identical or similar sentiments in different language. See, e.g., Sherbert v. Verner, 374 U.S. 398, 406 (1963) (“paramount”); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (“subordinating”); and National Association for the Advancement of Colored People v. Alabama ex rel. Patter-
80 See Williams, 393 U.S. at 30.
81 See id. at 24-26 (discussing the state’s fifteen percent signature requirement).
82 Id. at 24-28.
83 Id. at 34-35.
84 Id. at 30-31.
85 Id. at 29 (“we must reject the notion that Art. II, §1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions”).
86 See id. (noting that the Fifteenth, Nineteenth and Twenty-fourth Amendments all provide specific protections of the franchise). The Twenty-sixth Amendment, ratified three years after the Williams decision, extended a similar guarantee of the right to vote to citizens eighteen years of age and older. U.S. Const. amend XXVI, §1.
87 See Williams, 393 U.S. at 30.
The Court's holding was essentially a recognition states could impose restrictions on certain groups, under certain circumstances: it recognized that access to one party's primaries based on prior membership rather than of state was excessive; it was a rejection of degree unduly restrictive of a voter's opportunity to run afoul of the First and Fourteenth Amendments. The Court referred to as "a compelling state interest." The Court was careful to reiterate that, despite the rejection of the statutes at issue, "the State is left with broad powers to regulate voting."

The shift initiated by Williams took time to fully develop. Five years later, in Kusper v. Pontikes, the Court struck down an Illinois statute that restricted voters' access to only one party's primaries within a twenty-three-month time frame, finding it "unduly restrictive" of a voter's opportunity for choice because it "so impinge[d] upon freedom of association as to run afoul of the First and Fourteenth Amendments." It is notable, however, that the Court based its rejection of this statute on the ground that the means chosen by the state was excessive; it was a rejection of degree rather than of principle. In Storer v. Brown, the Court, supporting a California statute limiting access to one party's primaries based on prior membership in another party, noted that elections required regulatory supervision in order to ensure basic fairness and honesty, and that such supervision would be analyzed in light of "the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the [extent of the burden imposed]." This refinement revealed a degree of understanding deference that had been in shorter supply in the years leading up to Williams. While the Court retained its appreciation of the fundamental nature of the myriad rights involved in the electoral process, and made statements to that effect repeatedly, it also recognized that states were, out of necessity, permitted to install electoral restrictions as long as they were able to demonstrate a compelling need for those restrictions.

In the early 1980s, the jurisprudential landscape changed significantly once again with the Court's decision in Anderson v. Celebrezze. In 1980, John B. Anderson sought to run for the presidency of the United States as an independent. His attempt to be placed on the ballot in all states met with particular difficulty in Ohio, which had a statute that required independents to file within the state by March to be eligible to be placed on the ballot in the November general election later that year. Anderson filed suit, alleging that the burden placed on independent candidates like himself was too great and far exceeded the corresponding state interest. The Court agreed with the petitioner, noting that the burden placed on Anderson and his supporters "unquestionably outweigh[ed]" the state's interest in ensuring that the independents on the general

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89 Id. at 29 (emphasis added).
90 See id. at 30.
91 Id. at 31 (quoting Button, 371 U.S. at 438). One noteworthy aspect of this decision, which will become more relevant later on, has to do with the concept of political stability. In its argument, the state justified the statutes at issue on the ground that they promoted political stability via a two-party system. While the Court did reject the idea that a desire to support the two major parties constituted a sufficient state interest, it did not refute the broader notion that political stability generally is a compelling state interest. Id. at 31-32.
92 Id. at 34.
94 See id. at 57. Note that many First Amendment claims overlap with Fourteenth Amendment claims, primarily because of the latter's guarantee of equal protection. Occasionally, however, voting rights claims are argued solely on the basis of the latter amendment's Equal Protection Clause. See generally Richardson v. Ramirez, 418 U.S. 24 (1974). See Kusper, 414 U.S. at 58-59 (claiming that states "may not choose means that unnecessarily restrict constitutionally protected liberty"). In striking down the restrictive Illinois

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95 Statutes at issue, however, the Court clarified that what it found objectionable was the extent of the restriction: the twenty-three-month time frame had the net effect of preventing the respondent from switching party affiliation in time to vote in a different party's primary. Id. at 60. The Court nevertheless supported the idea that states could establish reasonable limits on party registration to curtail party-raiding, or the shifting from one party to another of non-loyal membership whose sole goal is to alter primary outcomes in favor of their original party. Id. at 59-60.
97 Id. at 730.
98 See, e.g., Illinois State Board of Elections, 440 U.S. at 184 (noting that the Court has "often reiterated that voting is of the most fundamental significance under our constitutional structure"). See also Winkler, supra note 49, at 334 (confirming that voting and its associated rights derive from numerous sources within the Constitution).
99 Illinois State Board of Elections, 440 U.S. at 184.
100 460 U.S. 780 (1983).
101 Id. at 782-83.
election ballot had broad-based support.\textsuperscript{102}

To be sure, the \textit{Anderson} Court found the statute under review to be too burdensome. Of primary importance in this case, however, was the moderate standard the Court used to reach its decision. In analyzing the arguments presented, the Court implicitly but clearly repudiated strict scrutiny as a practical standard in the First Amendment context by articulating that a case-by-case balancing test was to be used whenever electoral rights were at stake: courts were to "first consider the character and magnitude of the asserted injury to the rights protected by the [First Amendment]" and contrast them to the "precise interests put forward by the State as justifications for the burden imposed" by the regulations at hand.\textsuperscript{108} The "character and magnitude" concept found its way, in varying forms, into subsequent decisions dealing with both voters' associational rights\textsuperscript{104} and candidates' ballot access rights.\textsuperscript{105}

The \textit{Anderson} Court had essentially come full circle from the cases of the early 1960s dealing with voting rights: it had dissolved what was basically a de facto strict scrutiny approach, as evidenced by cases like \textit{Williams} and \textit{Kusper}, and replaced it with a standard that permitted some burdening of voting rights in the presence of a compelling state interest.\textsuperscript{106} Nine years would pass before the Court, in \textit{Burdick v. Takushi},\textsuperscript{107} expressly rejected the idea that strict scrutiny must be applied in all instances where a voting regulation is challenged,\textsuperscript{108} under the premise that requiring such a high hurdle for regulation "would tie the hands of States seeking to provide reasonable boundaries and standards for their own elections."\textsuperscript{109}

Not all camps have embraced this rather permissive approach toward state regulation of elections. Some have taken issue with the Court's willingness to cede the expressive component of voting and, by association, campaigning - in order to ensure the efficacy and integrity of the electoral process.\textsuperscript{110} Still, the Court's expressed standard has undoubtedly supplied clarity as states are now on notice that they can solve perceived electoral problems in many instances without being accused of violating basic constitutional principles at every turn.\textsuperscript{111}

III. WHY ELECTORS LACK DISCRETIONARY VOTING POWER UNDER OUR CONSTITUTIONAL FRAMEWORK


While it is agreed on all sides that presidential electors owe their origin to the text of the Constitution,\textsuperscript{112} there is a lack of consensus on the issue of how electors should be viewed.\textsuperscript{113} Nevertheless, a variety of factors, such as the explicit text of

\textsuperscript{102} \textit{Id.} at 791-92, 806.

\textsuperscript{103} \textit{Id.} at 789.

\textsuperscript{104} See, e.g., \textit{Smith}, 587 F.Supp. at 1146 (quoting the "character and magnitude" analysis of the \textit{Anderson} decision in justifying a balancing of citizen and state interests).

\textsuperscript{105} See, e.g., \textit{Norman}, 502 U.S. at 289 (requiring that the "state interest [be] of compelling importance").

\textsuperscript{106} See \textit{id.}

\textsuperscript{107} 504 U.S. 428 (1992).

\textsuperscript{108} \textit{Id.} at 432 (noting that the "[p]etitioner proceed[ed] from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny").

\textsuperscript{109} \textit{Id.} at 433.

\textsuperscript{110} At least one commentator believes the Court has neglected legitimate First Amendment arguments in the context of voting cases. Adam Winkler decries what he sees as the Court's overly "instrumental" approach, and favors a more cohesive approach to voting rights jurisprudence, one which combines the recognized instrumental approach with the oft-ignored "constitutive" approach. It is this constitutive approach which allows citizens to express themselves in numerous ways via the ballot box. \textit{See generally Winkler, supra} note 49.

\textsuperscript{111} Part of the justification for the compelling interest approach most likely had to do with the potential strain on government resources that would accompany application of strict scrutiny. In \textit{Munro v. Socialist Workers Party}, 479 U.S. 189 (1986), for instance, the Court said that states did not have to provide "evidence" in support of their proactive voter regulations: "To require States [to do so] would invariably lead to endless court battles . . . . Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight . . . . provided that the response is reasonable . . . ." \textit{Id.} at 195-196.

\textsuperscript{112} U.S. CONST. art. II, §1, cl. 2.

\textsuperscript{113} State court jurisprudence is supportive of a claim that presidential electors are state officers. For a sampling of some of these decisions, see, e.g., State ex rel. Beck v. Hummel, 80 N.E.2d 899, 909 (Ohio 1948) (recognizing the right of independent presidential electors to have their own names included on the ballot, instead of via a short ballot); In re State Question No. 137, 244 P. 806, 808 (Okla. 1926) (recognizing presidential electors as state officers).

Several scholars make the assertion that the electoral college is not a crucial element of federalist doctrine, and that it cannot be explained as being one piece of the federalist puzzle. \textit{See, e.g., Longley & Braun, supra} note 12, at 84-85. They essentially assert that the structure of Congress is sufficient to protect the basic interests of federalism. \textit{Id.} Such a viewpoint
both the Constitution and federal law, historical and judicial interpretation, and the basic federalist principles that support all of the above, favor viewing electors as state officials properly under the exclusive control of the respective states.

The Constitution, in the same clause that creates the office of presidential elector, establishes that the states may appoint electors "in such Manner as the Legislature thereof may direct." This language permits a broad reading of states' abilities to select electors, and it is worth noting that the only substantive limits placed on states in this area are located in other constitutional clauses. There is only one qualitative limitation placed on states in the area of the electoral college: the Constitution empowers Congress to set the times of assembly of the electors. Similarity, there is only one quantitative limitation placed on states' abilities to determine electors: the number of electors allotted to each state is determined not by each individual state, but rather by the distribution of the national population, as determined by decennial census, and the corresponding distribution of congressional representation.

In addition, federal laws are currently in place that further support states' unilateral rights to dictate the selection and, if necessary, dismissal of electors, notwithstanding the fact that all states currently tie electors' victories to the general election outcome voluntarily.

Section 2 is equally unambiguous. In providing that "[e]ach State may, by law, provide for the filling of any vacancies which may occur in its college of electors," it offers support to those who would claim that states may constitutionally remove electors at will. First, it imposes only the requirement that removal be pursuant to some state statute, presumably one that has already taken effect. Second, and perhaps more importantly, the passage proclaims that a state may fill "vacancies which may occur in its college of electors."
What this portion emphasizes is that, rather than being a national body that would be accountable to federal rules, the college is an internal state device governed by state rules. Such rules could therefore reasonably and properly be established, on a state-by-state basis, to restrict elector discretion.  

Additionally, sections 5 and 6 work in tandem to support the notion that the states’ decisions in the elector selection process are conclusive. Section 5 contributes by reaffirming the role of the state legislature: it provides that a state may, “by laws enacted prior to the day fixed for the appointment of the electors,” come to a “final determination of any controversy or contest concerning the appointment of all or any of the electors of such State.” Section 6 buttresses section 5 by requiring the executive authority of the state to certify the legislature’s decision, provided that its decision is based on a law in place six days prior to the assembly of electors in the state capitol. The net effect of these two provisions is to emphasize the basic premise of Article II: namely, that states, via their legislatures, retain the ultimate ability to appoint presidential electors, notwithstanding the current popular vote connection.

The above provisions would all be useless without section 15, the absence of which would effectively empower Congress to make decisions as to the propriety of the states’ methods of selection.

Section 15 requires that “no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected.” This is essentially a requirement that Congress accept a state’s slate of electors that has both met the safe harbor requirements of section 5 and is not challenged by another slate of electors.

B. From Aristocratic Elite to At-Will Employee: The Historical Evolution of the Role of Presidential Electors

Despite the electoral college’s longevity, litigation dealing with the subject, which might have served to guide states in how to draft appropriate binding legislation, was non-existent during most of the nineteenth century. More fundamental issues, such as the Civil War and Reconstruction, pushed such constitutional niceties to the side. By the 1890s, however, the issue had surfaced in the legal arena, and it was not long thereafter that the Supreme Court supplied a sought-after catalyst.

In 1892, the Court issued its decision in McPherson v. Blacker, the first to consider the constitutionality of states’ tools for choosing electors. William McPherson and several other electors in Michigan filed suit against the state, claiming that account of how Congress dealt with the receipt of two different slates of electors from Hawaii after the 1960 election, see Best, supra note 2, at 195-96.

While many facets of the electoral college debate may be considered infirm, there is at least some precedent regarding the “regularly given” requirement. In 1872, Democratic presidential candidate Horace Greeley died shortly after the general election. Most of his electors, having either pledged to vote for him or honoring the wish of their respective state populations, cast their electoral votes for Greeley. Congress, in undertaking the “regularly given” analysis, ultimately decided that votes cast for a deceased candidate could not properly be accepted. See Best, supra note 2, at 175-76.

While there is no textual support for this, it could plausibly be stated that the rejuvenated interest in the subject of elector independence was due to the election of 1888 and its atypical outcome.

It is important to note that while McPherson was the first Supreme Court case to address the constitutionality of state mechanisms, it was not the first to discuss how electors relate to the individual states. In In re Green, 134 U.S. 877 (1890), the Court declared that “Congress has never undertaken to interfere with the manner of appointing electors ... but has left these matters to the control of the States.” Id. at 880. There will be more discussion of the state-elector connection infra.
its legislatively created scheme for appointing electors according to vote tallies in several designated districts violated the Constitution’s grant of power only to each state as a whole. In rejecting this approach, the Court invoked the plain text of Article II: it noted that it was the “legislative power” of the state which controlled the selection of electors, and that there was no constitutional provision requiring the state to cede such powers to the people. In using such pointed language, the Court was reaffirming the idea that the states not only possessed “plenary authority” to fill their allotted electors’ spots however they chose, but also that states retained the authority to alter their chosen means of selection at any time.

The McPherson Court set a powerful precedent, which in turn encouraged a flurry of decisions justifying state revocation of elector authority when deemed appropriate. In 1912, several electors who had initially pledged to support the Republican Party’s candidate for president in the state of Nebraska, and were in fact nominated to run in November on that premise, announced in the wake of the national convention that they would vote for the Progressive Party’s candidate instead. The Nebraska Supreme Court, in State ex rel. Nebraska Republican State Central Committee v. Wait, eventually sided with the state’s Republican organization, noting both that the electors were bound by their pledges to vote for the Republican candidate and that their representations in favor of the Progressive Party could be viewed as abdications of their duties as Republican electors.

More than twenty years after Wait, in Thomas v. Cohen, the New York Supreme Court weighed in on the place of presidential electors in the contemporary scheme. The petitioner was challenging New York state’s use of the short ballot, which did not list the names of individual electors but rather listed the major party candidates for whom the unnamed electors would vote. It was the petitioner’s contention that he had an absolute constitutional right to vote for electors rather than the presidential and vice presidential candidates. The court rejected this claim in no uncertain terms, and likewise rejected, in similar terms, the associated claim that electors are free agents unbound by party labels or general election results. The court rooted its rejection of the latter in the historical evolution of the role of electors. After providing a lengthy discussion about presidential elections and the development

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134 A district-based scheme typically divided a state into portions equal in number to the total number of electors that state was constitutionally allowed to receive. One consequence of this approach was that electors were chosen by more discrete populations within the state. Today, only two states, Maine and Nebraska, utilize this form of electoral vote distribution. See Durbin, supra note 2, at 513.

135 See McPherson, 146 U.S. at 24-25 (“[I]t is argued [by the petitioners] that the appointment of electors by districts is not an appointment by the State”).

136 "The clause under consideration [i.e., Article II] does not read that the people or the citizens shall appoint, but that 'each State shall; ...'” Id. at 25 (emphasis added).

137 Id.

138 Id. at 35 (quoting S. Rep. No. 43-395 (1879)) (“[the power to appoint electors] is conferred upon the legislatures of the States by the Constitution . . . . Whatever provisions may be made . . . to choose electors by the people, there is no doubt of the right of the legislature to resume the power [to select electors] at any time, for it can neither be taken away nor abdicated”).

139 State ex rel. Nebraska Republican State Central Committee v. Wait, 138 N.W. 159, 162 (Neb. 1912). A similar situation arose in Kansas, where several of that state’s electors were infuriated by Theodore Roosevelt’s loss to William Howard Taft at the national convention, and the result was a substantial amount of legal and media commentary as to the roles and responsibilities of electors. For one such in-depth review of how things progressed in Kansas, see generally Ross E. Davies, From the Bag: Faithless Electors of 1912: Arthur Watkins, E. Davies, From the Bag: Faithless Electors of 1912: Arthur Watkins.
of the two-party system, it went on to discuss the corresponding evolution of voters' expectations:

The American people have grown to regard the electoral college as a matter of minor importance. . . . So sacred and compelling is that obligation upon [the electors], so long has its observance been recognized by faithful performance, so unexpected and destructive of order in our land would be its violation, that the trust [given to electors] has . . . ripened into a bounden duty — as binding upon them as if it were written into organic law (emphasis added). 140

While the Thomas decision was both strongly worded and pragmatic, its impact on the national scene was minor for three likely reasons of varying significance. First, the fervor for electoral reform, then as much as now, inevitably died down with the passing of the electoral cycle. Second, Thomas was decided at the state level and may have lacked the prominence that a federal forum might have provided. 150 Finally, and perhaps most importantly, however, was the fact that most states had already begun to embark on the path toward some sort of electoral college reform. As is intimated by Wait, some states had already passed statutes that required electors to pledge to support the nominees of their respective parties, 151 recognizing that parties were, in some respects, in the best position to ensure that electors abided by the wishes of the electorate. 152 This final reason probably goes a long way toward putting Thomas in its proper context: it was concerned not with the enforceability of states' restrictions on electors but rather with the relationship between presidential electors and the voting public, the latter of which was not really in dispute. Thomas was not the decision that was to align all of the disparate elements of the previous fifty years' worth of jurisprudence regarding the elector's place in society. Ray v. Blair accomplished what Thomas was not equipped to do. In Alabama, Edmund Blair sought to be a presidential elector for the Democratic Party, but was denied an opportunity to run for that office because of his refusal to submit to a pledge designed to ensure all Democratic electors would indeed vote for the eventual 1952 presidential ticket. State officials, as per statutory authority, refused to allow Blair to run, and Blair filed for a writ of mandamus compelling Alabama's secretary of state to allow him on the ballot. 156 The Supreme Court of Alabama granted the writ on the ground that the Constitution continued to confer discretionary power upon the electors, but the United States Supreme Court reversed. 158 While the decision defended both political parties' abilities to bind electors through pledges and states' abilities to delegate that

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148 Id. at 324-26.
149 Id. at 326.
150 These first two propositions are speculative on the author's part, but they seem more than plausible.
151 See, e.g., Wait, 138 N.W. at 161 (stating that "the [state] legislature . . . has deliberately and clearly recognized the existence of political parties and attempted to delegate to the members of each party the right to vote . . . for candidates of their own party"). See also Ray v. Blair, 343 U.S. 214, 219 n.4 (1952) (noting that Alabama's binding of electors to party-mandated pledges was "not a unique delegation" and citing at least ten other states that delegated to parties the ability to bind electors).
152 See, e.g., Wait, 138 N.W. at 161. Other decisions and commentaries recognize political parties as necessary players on the modern American landscape, for better or for worse. Compare Thomas, 262 N.Y.S. at 325 (discussing the development of party's national conventions into "American institution[s]") and Ray, 343 U.S. at 220-21 ("political parties . . . were created by necessity, by the need to organize the rapidly increasing population") with Ross & Josephson, supra note 9, at 676 (discussing how the rise of the party system was unanticipated by the founders and therefore incompatible with the electoral college scheme) and Harvard Law Review, supra note 11, at 2542 (stating how "the Framers simply did not contemplate the existence of the modern two-party, democratically based, winner-take-all system").
154 The pledge in question read as follows: "By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election." Id. at 217-18 (emphasis added).
155 The Court cited Ala. Code 1940, Tit. 17, §347, which stated that "every state executive committee of a party shall have the right, power and authority to fix and prescribe the . . . qualifications of its own members, [and shall also] determine who shall be entitled and qualified to [run for the office of elector]." Ray, 343 U.S. at 217 n.2 (emphasis added).
156 Ray, 343 U.S. at 215.
157 Ray v. Blair, 57 So.2d 395, 398 (Ala. 1952). Alabama's highest court anchored its view of electors' discretionary authority in the Twelfth Amendment, which, in its opinion, did not compel obedience with party wishes but merely permitted or encouraged it. It went on to say that electors "should be free to vote for another [i.e., someone other than the party's nominee], as contemplated by both the founders in 1787 and the drafters of the Twelfth Amendment. Id.
158 Ray, 343 U.S. at 231.
159 Id. at 220, 228-29. It is important to note that the Court tread carefully here, stating that nothing in the Constitution forbid an elector from binding himself via a pre-convention pledge. Id. at 230.
power via Article II. Ray's most substantial contribution to the debate over presidential elector status was its implicit acceptance of the idea that specific performance could be available as a remedy should an elector defy the popular will as reflected on election day. It was here that the Court made a syllogistic leap: if a political party could bind its electors through pledges, and the state could select its electors outright, it was therefore a reasonable exercise of power for a state to bind its electors via pledges or other mechanisms. It followed, at least implicitly, that a violation of such a pledge could permit some sort of equitable remedy, which, in this limited case, would be the negation of the so-called faithless vote—in other words, one that does not conform to state requirements, be they to honor pledges or conform to the popular vote—and the casting of a vote in line with the pledge requirement.

Most states took the holding of Ray v. Blair to heart, and began passing statutes that gave states a variety of tools by which to bind presidential electors. One mechanism some states chose was a simple statutory declaration that electors will adhere to the general election results. Other states, anticipating the problems that would arise from the above's seeming lack of enforceability, implemented statutes that required electors to honor pledges made to their respective parties. Other states chose an even more direct means, declaring that the casting of a faithless vote triggered an automatic resignation on the part of that faithless elector and a subsequent appointment of a new elector who would honor the obligation. Regardless of the nuance of category, these statutes all had one thing in common: they codified, at the state level, the assumption that states have total and absolute control over the qualitative aspects of electors' votes where electors ignore the dictates of state law.

C. The System Works Just Fine: Modern Justifications for Preservation of the Electoral College

While the role of the presidential elector has evolved according to popular expectations, the role of the electoral college itself has not. Notwithstanding the distinct voices in the pro- and anti-electoral college camps, its true value can

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160 The Court stated that the power to delegate derived from Article II. If a state can unilaterally select its own electors without input from the electorate, it reasoned, it was not impermissible for a state to legislatively delegate that selection power to a political organization. Id. at 227.

161 Id. at 227, 230. It is important to note that the Court did not state this proposition in express terms; this may have been due to the Court's desire to show some measure of deference, however slight and potentially symbolic, to the Alabama Supreme Court. Ross & Josephson, supra note 9, at 696.

162 The dissent reflected this implication in its statement when it noted that the law at issue in the case "does no more than . . . make a legal obligation of what has been a voluntary general practice." Ray, 343 U.S. at 233 (Jackson, J., dissenting) (emphasis added). Since the Ray decision, at least one commentator has embraced the idea that presidential electors are bound under contract law. According to this theory, electors have, in essence, contracted with the voters of a given state, via express or implied statements, that they will honor voter choice on election day. Consequently, any violation of this contractual arrangement could theoretically be corrected via specific performance. Charles L. Black, Jr., The Faithless Elector: A Contracts Problem, 38 LA. L. REV. 31, 32 (1977). As of 1996, seventeen states used this type of statute. State statutes that are representative of this type are COLO. REV. STAT. ANN. §1-4-304(5) (West 2001) ("Each presidential elector shall vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in this state") (emphasis added), CONN. GEN. STAT. ANN. §9-176 (West 1989) ("Each . . . elector shall cast his ballots for the candidates under whose names he ran on the official election ballot") (emphasis added), OHIO REV. CODE ANN. §3505.40 (Anderson 1996) ("A presidential elector . . . shall . . . cast his electoral vote for the nominees . . . of the political party which certified him") (emphasis added), and WIS. STAT. ANN. §7.75(2) (West 1996) ("[P]residential electors . . . shall vote by ballot for [the persons] who are . . . the candidates of the political party which nominated them") (emphasis added).


164 As of 1996, three states currently use this type of statute: MICH. COMP. LAWS ANN. § 168.47 (West 1989) ("Refusal or failure to vote for the candidates . . . appearing on the Michigan ballot . . . constitutes a resignation from the office of elector") (emphasis added), N.C. GEN. STAT. §163-212 (1995) ("[R]efusal or failure to vote for the candidates of the political party which nominated such elector shall constitute a resignation from the office of elector [and] his vote shall not be recorded") (emphasis added), and UTAH CODE ANN. §20A-13-304(3) (1995) ("Any elector who casts an electoral ballot for a person not nominated by [his] party . . . is considered to have resigned . . .[and] his vote may not be recorded") (emphasis added).

165 It is worth pointing out that no Court decision since Ray has seen fit to counter that case's premise. In Williams, for instance, the Court sidestepped the issue of state discretion regarding electors. Williams, 393 U.S. at 38 (Douglas, J., concurring).

166 Compare, e.g., BEST, supra note 2, at 111-13 (supporting the maintenance of the electoral college) with LONGLEY & BRAUN, supra note 12, at 66-68 (providing justification for re-
be appreciated only when the American system as a whole is considered. The electoral college provides balance among states with unequal populations, preserves unity that would be lacking under a direct vote system, ensures that all presidents have a distinctly national character, and protects the electoral process from other assorted flaws that would emerge under a direct vote system. Accordingly, presidential electors' adherence to popular desires is instrumental in making sure that these goals are achieved.

Despite the fact that there have been several occasions where presidential electors have cast their votes in a faithless manner, there has never been a situation in American history where faithless electors were in the position to alter the outcome of a presidential election. There have been, however, three elections in which the eventual winner of the presidential contest did not receive a majority of the popular vote. While some use these elections as examples of why the electoral college should be eliminated, a strong argument can be made that these elections only serve to support one of the original justifications for the electoral college in the first place, namely, that it permits election of a President whose support derives not just from the most people but from the nation as a whole.

The electoral college, much like the bicameral legislature, was decided as being the means of choosing the President, in no small part because the small states were wary of being deprived of a role in that process. The elections of 1876 and 1888 reveal that the fears of the small states were justified. In 1876, for example, New York Governor Samuel J. Tilden won the popular contest by a margin of more than 250,000 votes. Nonetheless, Republican Rutherford B. Hayes won the

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Note references omitted for brevity.
election primarily because he captured all of the electoral votes of key small states.\textsuperscript{176} While other factors impacted this particular election,\textsuperscript{177} it nonetheless illustrates that small states remained an important component of any presidential election strategy and that candidates who ignore these states did so at their peril. The election of 1888 highlights a separate but related justification for the existence of the electoral college: by forcing presidential candidates to campaign in all states and forge a platform that was nationally appealing, it made it almost impossible for a candidate to win the election with a purely regional strategy. In that year, President Grover Cleveland won the overall popular vote, but many of these votes were attributable to lopsided tallies in several southern states.\textsuperscript{178} Republican Benjamin Harrison won the election because his lower popular vote tally translated into victory in a greater number of states, and thus conveyed the required electoral votes. Far from being an abject failure of democracy, the electoral college prevented a candidate from winning office by appealing to narrow, sectional interests instead of the nation as a whole.\textsuperscript{179}

The lessons of elections past have been supported by contemporary studies and theories that find substantial value in the electoral college. First, several scholars have found that the electoral college promotes national unity by ensuring that winning candidates have not only geographic appeal but also ideological appeal.\textsuperscript{180} Under most direct vote plans proposed by electoral college opponents, a runoff election would occur if some established percentile threshold is not crossed by one candidate, the reasoning being that the winner of a presidential election should have broad-based majority appeal rather than just being a statistical winner.\textsuperscript{181} Proponents of the electoral college point out that such a scenario, while seemingly logical and straightforward, could possibly have the opposite of the intended effect: a direct vote system would serve as an incentive for more and more moderate candidates to attempt to force a runoff, thereby increasing the likelihood that moderate candidates would split each other’s vote totals into insignificance. The seemingly contradictory net result of such a presidential free-for-all might be that two politically extreme candidates could find their way into the runoff election.\textsuperscript{182} Such a potentiality lends credence to the argument that the electoral college provides more stability than a direct vote scheme because it discourages moderate or independent candidates without substantial support from running.\textsuperscript{183}

Second, the electoral college keeps other undesirable forces in check. One perspective holds that the electoral college provides a significant hedge against fraudulent voting. The premise is quite logical: under the electoral college system, the

\textsuperscript{176} Hayes won five of the Union’s six smallest states (Florida, Nevada, Oregon, Rhode Island, and Vermont), losing only Delaware. He won the above states by margins varying from 51% to 69%. See "EC WebZine, 1876: Colorado Thwarts the Popular Will," available at http://www.avagara.com/e_c/ec_1876.htm (inset) (Sept. 22, 2002).

\textsuperscript{177} Colorado complicated the equation in 1876. Colorado had only entered the Union as a state in August 1876, and state officials opted to simply select the state’s three electors, as they are permitted to do under Article II, rather than hold elections. Hayes’ one-vote majority in the electoral college proved to be the difference. Id.

\textsuperscript{178} President Cleveland’s campaign strategy involved pressing for a lower tariff, a position that was unpopular with many Republican voters but was very popular with the agricultural Democrat South, which presumably hoped to reap benefits from having markets opened overseas in reciprocation for the tariff reduction. "EC WebZine, 1888: Cleveland Blunders His Way Out of a Job," available at http://www.avagara.com/e_c/ec_1876.htm (inset) (Sept. 22, 2002) [hereinafter EC WebZine: Cleveland]. See also BEST, supra note 2, at 70 (pointing out how Cleveland’s “votes were not properly distributed because of his improvident political decision to force the tariff issue”).

\textsuperscript{179} EC WebZine: Cleveland, supra note 178. See also ALT-HOUSE, supra note 12, at 1012 (expressing that “it is good to deny candidates the option of accumulating too many votes in one region while ignoring others”); BEST, supra note 2, at 70 (noting that “[t]he electoral-count system discriminates against candidates who rely too heavily on a sectional base”); CALABRESI, supra note 1, at 1508-49 (stating that forcing candidates to run campaigns that are national in character prevents the unfair burdening of economic, political and social minorities); HARVARD LAW REVIEW, supra note 11, at 2543-44 (conceding that the electoral college is viewed by many as an effective tool for encouraging “truly national campaigns”); Hively, supra note 12, at 80-81 (discussing how candidates under a direct vote system would have the option of winning by appealing only to the largest bloc of voters at the expense of other groups, whereas the electoral college requires broad-based, pluralistic approval).

\textsuperscript{180} See BEST, supra note 2, at 111-13.

\textsuperscript{181} See, e.g., HARVARD LAW REVIEW, supra note 11, at 2544-45 (claiming that a direct election system is more in keeping with the basic “one person, one vote” theme of equal protection jurisprudence); DURBIN, supra note 2, at 512 (pointing out that “each person’s vote in a state is not necessarily equal to another person’s vote in another state” under the electoral college system). See also id. at 516 (discussing the mechanics of a theoretical direct vote system).

\textsuperscript{182} See BEST, supra note 2, at 111-13.

\textsuperscript{183} See id. at 112.
possibility of fraud at the state and local level is no less real, but its occurrence is less likely to have a substantial impact on the outcome in a given state. The very fact that such subversive techniques will have little effect is probably enough to discourage such efforts most of the time. If a direct vote system were used in presidential elections, however, voter fraud and irregularities would pose a more substantial problem because of the cumulative effect of voter fraud: small episodes of fraud and irregularities nationwide would be less detectible and thus would have a dramatic and unwanted effect on an election.

Third, the electoral college encourages finality and discourages contested outcomes. The vast majority of presidential elections under the electoral college have yielded a winner whose electoral vote total far outstrips the popular vote; this is true even in elections where the popular vote was extremely close. This fact creates a very substantial obstacle to any candidate who seeks to challenge the presumptive winner of a presidential election: since challenges to a presidential election would usually have to occur in multiple states, the challenger must carry a substantial material, and perhaps even psychological, burden in order to be successful. The current electoral structure forces candidates contemplating such a challenge to weigh the likelihood of success against the political stability and the good of the nation. Under a direct vote system the above forces of pragmatism and altruism are swept away: all a candidate would need to do in order to contest an election would be to demand a recount of the entire national popular vote. The situation is further complicated if lesser candidates challenge the lead candidate’s receipt of the threshold level of votes that would exist via a direct vote system’s theoretical runoff provision. It is easy to envision the problems and delays that might arise under such a system.

Finally, the electoral college is an effective tool for battling voter apathy and encouraging voter participation. Critics allege that the electoral college discourages voting and creates apathy among the electorate, the thinking being that voters are more likely to stay home on election day if they believe their vote will be rendered meaningless by a system that allegedly negates their votes. Defenders of the electoral college, however, note that the converse is true: the smaller voting pool within a given state, and the value of that state’s electoral votes, make it more likely that voters will show up at the polls because of the recognition of their increased voting power. Any direct vote system would accordingly have a deleterious effect on voter turnout, since an individual voter would view his vote as one among hundreds of millions rather than among a few million; the latter option provides a greater likelihood that one’s vote

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194 See id. at 193.
185 See id. (noting that voter fraud only becomes a serious issue within a state “when an election is very close”).
186 See id. at 193-95.
187 See id. at 41-42, 193. See also ALTHOUSE, supra note 12, at 1005-06 (attempting to depict the extensive problems that would have arisen, under a direct vote scheme, if what happened in Florida in 2000 had happened in all fifty states and the District of Columbia).
188 See Best, supra note 2, at 191-92.
189 See id.
190 See id. at 192 (stating that a “losing candidate will not contest the election tallies in individual states unless it is possible to reverse the results in enough individual states to give him the election”). The election of 2000 was not the only one where the electoral votes of one state were pivotal. In 1916, President Woodrow Wilson won re-election, but just barely: California’s crucial electoral votes almost were won by his challenger, former Supreme Court Justice Charles Evans Hughes. Id.
191 See id. at 192-93 (stating how losing candidates would probably have to challenge vote counts in numerous states in order to overturn the results, except in the rarest of circumstances).
192 See id. at 193 (claiming that there “is a point [in every election] where the interest in continuity in government must prevail even over the interest in an absolutely accurate result”) (internal quotations omitted). See also id. at 194-95 (stating that “[t]he acceptability of the result to the defeated candidate is the key to election certainty. Once the loser has conceded, . . . the continuity of government is assured”).
193 See id. at 193 (pointing out how a direct vote system would provide “greater incentive” for losing candidates to call for recounts).
194 See id. at 196-97.
195 Best notes that the direct vote system would, depending on the specific circumstances of an election, probably serve to encourage not one but two recounts, with the first recount challenging the lead candidate’s receipt of the requisite percentile threshold of votes and the second recount challenging whether or not the lead candidate received the most votes. Id. Best’s hypotheticals reveal how chaotic the post-election process could be under such a system, especially when one considers that the time constraints would at worst serve to conceal voter fraud and other irregularities and at best encourage mistakes in the recount. Id. at 195, 195.
196 See id. at 130-31 (citing how direct vote proponents believe it would stimulate voter participation). See also id. at 132-83 (criticizing one scholar’s assertion that votes under the electoral scheme are “lost,” which in turn discourages voter participation).
197 See Hively, supra note 12, at 81-84 (examining in detail how individual votes are strengthened by the electoral college).
would have an impact.\footnote{198 See id. See also Best, supra note 2, at 131 (disputing the idea that the electoral college discourages voter participation with voter turnout statistics).}

The above arguments do not represent the entirety of the debate, but they provide a solid cross-section of the competing viewpoints. Regardless of where one falls in the above debate, however, a strong argument can be made that the effectiveness of the electoral college hinges on electors' compliance with the laws of their respective states. The arguments supplied on behalf of justifying the electoral college disintegrate if predictability disappears.

IV. NO FREE SPEECH HAVEN: THE COMPPELLING REASONS WHY PRESIDENTIAL ELECTORS DO NOT BENEFIT FROM FIRST AMENDMENT PROTECTION

Whereas the previous parts of this note have examined varying aspects of the role of presidential elector, this Section will assert how the earlier components work together to foreclose any possibility that presidential electors can properly exercise a discretionary function. Succinctly, a combination of undeniably explicit texts, long-standing judicial interpretation and equally long-standing popular expectations serve to paint a picture of electors who are both beholden to the states and required to vote as state laws provide.

First, there is nothing in the Constitution, in Article II or other areas, that speaks to the issue of elector discretion, and such silence invariably works in favor of permitting the states to pass binding statutes that remove elector discretion from the equation.\footnote{199 See U.S. Const. art. II, §1, cl. 2. See also Bush, 531 U.S. at 104 (confirming that the states' power to select electors is "plenary").} What little historians and legal scholars purport to know about the intended role of electors comes from anecdotal and secondhand accounts.\footnote{200 See, e.g., Longley & Braun, supra note 12, at 29-30 (discussing how the system eventually forced electors into positions of subservience to the electorate, which was allegedly not anticipated by the founders).} Even that sparse amount of information is subject to scrutiny.\footnote{201 See Best, supra note 2, at 39 (revealing that sentiment existed among some, even in the years immediately after ratification, that electors were not discretionary actors).} From a textual standpoint, Article II is firm in its assertion that the legislatures of the respective states represent the final authorities when it comes to the rules guiding the selection of electors.\footnote{202 That precisely carved role is modified by only two other constitutional provisions: one that gives Congress the authority to set the time of assembly for electors\footnote{203 See U.S. Const. art. II, §1, cl. 3.} and the other that determines apportionment of electors to the states according to their populations as determined by census.\footnote{204 See U.S. Const. art. I, §§2, 3.} Second, the federal statutes dealing with the electoral college generally, and the presidential electors specifically, support this broad interpretation of the power granted to the states.\footnote{205 These federal statutes echo the notion, firmly stated in Article II, that the states were to exercise their authority under the Constitution to select electors as they saw fit,\footnote{206 See id. §2.} and that their authority to do so was unequivocally plenary and not subject to the scrutiny of Congress.\footnote{207 Of particular importance here is the safe harbor feature of 3 U.S.C. § 5, which mandates that Congress accept electors who are selected pursuant to state law, provided that those electors were selected according to laws in place six days prior to the assembly of the electoral college.\footnote{208 This is relevant not only because it instructs that Congress accept what the states have offered,\footnote{209 But also because it makes no mention of what is or is not permissible content of such state laws. This silence, in conjunction with the grant of wide latitude under Article II, permits a reading that allows states to statutorily bind their electors.} Some state court rulings have held that presidential authority when it comes to selecting electors).} Third, strong judicial precedents concerning presidential electors have almost unanimously supported states in their assertions that electors, and the processes that govern their selection, are the sole domain of the respective states.\footnote{210 See, e.g., McPherson, 146 U.S. at 26-27 (discussing "plenary authority").}
electors are state officers and can be presented to the electorate in any fashion that the state chooses. Other state court rulings have expressed the belief that electors have come to serve a ministerial role. Most notably, on the one occasion when it was called upon to address the subject, the Supreme Court confirmed not only that states could bind electors and that such power derived from the broad grant of authority explicitly provided in Article II, but also implied that an elector who did not vote in accordance with the wishes of a state’s legislature risked having his vote overturned. Such decisions have left little room for an alternative reading. What has emerged from these decisions is an image of electors as apolitical agents, since it can reasonably be stated that they are giving effect to political expression that occurred at an earlier time – on election day – by individuals who certainly deserve First Amendment protection.

Fourth, even absent the above body of judicial precedent, the current Supreme Court would likely uphold state statutes that bind presidential electors were it to apply the compelling state interest standard it has utilized in other voting rights cases. Important societal interests, such as fair and effective elections, political stability, legitimacy of the eventual winner and the expectations of the American people are dependent on states’ abilities to control their electors. The Court would be hard-pressed to deny that the above considerations are not compelling state interests, as the concept has been understood since the decision. Such compelling state interests, in unison, would undoubtedly be a more than sufficient basis for denying electors First Amendment rights.

V. CONCLUSION

While the First Amendment may have a role in supporting the voting rights of the general public on election day, it should not logically have any impact on presidential electors, who, through an evolutionary process that derives support from the text of the Constitution, have been rendered mere tools of the state. The basic matters of fairness and responsiveness that most American citizens take for granted are linked to the continued functioning of the electoral college, the vitality of which is linked to electors’ adherence to the laws of their respective states. If a state opts not to bind its electors, that is its constitutional right. Where states do bind their electors via their law, however, electors should properly be at a loss for words.

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211 See Walker, 93 F.2d at 388 (supporting the contention that electors are state officers, despite their constitutional origin).

212 See Thomas, 262 N.Y.S. at 323 (challenging the notion that voters have a constitutional right to vote for electors).

213 See id. at 326 (noting that electors’ services are considered “purely ministerial”); Spreckels v. Graham, 228 P. 1040, 1045 (Cal. 1924) (stating that electors “are in effect no more than messengers whose sole duty it is to certify and transmit the election returns”).

214 See Ray, 343 U.S. at 220, 228-29.

215 See id. at 233 (Jackson, J., dissenting) (implying that the Court’s decision had had the effect of providing a legal remedy for a faithless electoral vote).

216 See generally WINKLER, supra note 49. Winkler argues that voting is deserving of First Amendment protection because it is, among other things, a form of political speech. Id. Under that analysis, an electoral vote could properly be considered an apolitical act, particularly when it is bound by state statute to reflect the general election results, and therefore not deserving of First Amendment protection. This reinforces the premise of some judicial decisions that electors exist to perform ministerial or clerical duties. See note 213, supra.

217 See, e.g., Williams, 393 U.S. at 31 (quoting Button, 371 U.S. at 438).

218 See, e.g., Storer, 415 U.S. at 730 (recognizing that states have an interest in regulating elections in order to ensure that “they are . . . fair and honest and [that] some sort of order, rather than chaos, [accompanies] the democratic processes”). See also Best, supra note 2, at 195 (noting how the electoral college serves to keep fraudulent forces in check).

219 See, e.g., ALTHOUSE, supra note 12, at 1012 (expressing that “it is good to deny candidates the option of accumulating too many votes in one region while ignoring others”); CALABRESI, supra note 1, at 1508-09 (stating that forcing candidates to run campaigns that are national in character prevents the unfair burdening of economic, political and social minorities); HARVARD LAW REVIEW, supra note 11, at 2543-44 (conceding that the electoral college is viewed by many as an effective tool for encouraging “truly national campaigns”).

220 See, e.g., Best, supra note 2, at 193-95, 204 (explaining how the electoral college discourages contests of elections and encourages electoral finality).

221 See Thomas, 262 N.Y.S. at 326 (discussing how citizens have grown to expect the electoral vote to mirror their own votes as cast on election day).