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.[1] 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.[2]

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.[3] It has been criticized as being obsolete,[4] antithetical to democracy,[5] and misleading to voters.[6] While arguments abound on both sides as to the continuing vitality of the electoral college,[7] 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

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 201, 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*.

premise of our nation. Finally, Part IV will attempt to weave all the disparate elements together in explaining why the First Amendment cannot override the other justifications for permitting states to deny electors discretionary exercise of their electoral college votes.

I. THE ORIGINS AND FUNCTIONS OF THE ELECTORAL COLLEGE

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] 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

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[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.

[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).

[10] For an in-depth review of the competing concerns, *see generally* Columbia Law Review, Note, *State Power to Bind Presidential Electors*, 65 COLUM. L. REV. 696, 704-708 (Apr. 1965) (proof discussing competing concerns) [hereinafter COLUMBIA LAW REVIEW]. *See also* KURODA, *supra* note 8, at 7-15.

[11] *See* Harvard Law Review Association, Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, 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 contrariety 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 Representatives 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 DIRECTION 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, *Math 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,[13] and continued to vary widely for some time,[14] 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,[15] 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."[16]

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,[18] 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,[26] or that new circumstances have come into play that necessitate a different approach.[27]

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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.

17 *See* LONGLEY & BRAUN, *supra* note 12, at 36 *and* "*EC WebZine, 1824: Jackson Invents the Popular Will*," *available at* http://www.avagara.com/e_c/ec_1824.htm (Sept. 22, 2002) [hereinafter *EC WebZine: Jackson*].

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

19 *See* LONGLEY & 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. LONGLEY & BRAUN, *supra* note 12, at 36.

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

22 *See* http://www.cnn.com/ELECTION/2000/results/national.html (Sept. 22, 2002).

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 Nonsense*, 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

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28 *See* DURBIN, *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 W. VA. L. REV. 123, 125 (Fall 2001) (questioning whether electors can constitutionally be bound by any law). *See also* DURBIN, *supra* note 2, at 514 (pointing out that binding statutes were ineffective against the casting of faithless electoral votes in recent past elections).

33 "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

34 "Congress shall make no law . . . prohibiting . . . the right of the people peaceably to assemble . . . ." *Id.*

35 "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." *Id.*

36 *See, e.g.*, Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (noting that "the freedom to associate [has been recognized as] fundamental," particularly in the context of elections); Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (stating that "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First [Amendment]") (internal quotations omitted); Carrington v. Rash, 380 U.S. 89, 94 (1965) (stating that "[t]he exercise of rights so vital to the maintenance of democratic institutions cannot constitutionally be obliterated" by state regulations) (internal quotations omitted).

37 *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (noting that conduct made illegal by the state is not unconstitutional simply because the criminal activity involves elements of speech).

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.[38] The Court has said that commercial interests, while important, cannot be used to violate laws that are reasonably tailored to promote public interests.[39] 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.[40] Such activities could not properly be called speech,[41] particularly if the activities were part of a larger scheme of behavior that had no overarching speech component.[42]

The Court has also stated that the mere characterization of something as speech does not necessarily make it so.[43] In instances where the government is able to articulate that some activity is undesirable and seeks to impose restrictions, the Court has upheld restrictive laws, provided those laws are narrowly tailored to the interest sought.[44] 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.[45]

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.[46] Whereas the former is usually found to be deserving of greater deference,[47] 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.[48] 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.[49]

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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 deserving 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). For a broader discussion of the speech-conduct distinction, *see generally* Buckley v. Valeo, 424 U.S. 1 (1976).

47 *See Johnson*, 491 U.S. at 406.

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[50] and expression,[51] 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[52] and implemented regulations that are considered the least restrictive of those basic rights.[53] 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.[54]

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.[55] 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,[56] Nineteenth[57] and Twenty-sixth[58] Amendments have all awarded specific groups within society the right to vote.[59] Some have consequently looked to the Fourteenth Amendment's grant of equal protection to fill this perceived constitutional gap.[60] 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.[61]

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.[62] In keeping with the spirit of the constitutional text as a

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50 *See* U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting . . . the right of the people peaceably to assemble").

51 *See id.* ("Congress shall make no law . . . abridging the freedom of speech").

52 *See, e.g.,* Norman v. Reed, 502 U.S. 279, 288-89 (1992) (stating that, in burdening the electorate with some regulation, the state must provide a "demonstration of a corresponding interest sufficiently weighty to justify the limitation"); *Illinois State Board of Elections*, 440 U.S. at 184 (noting that "[w]hen such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest"); Storer v. Brown, 415 U.S. 724, 736 (1974) (finding a candidate disaffiliation provision sufficient because it "furthers the State's interest [which is] not only permissible, but compelling").

53 *See, e.g.,* Smith v. Board of Election Comm'rs for Chicago, 587 F.Supp. 1136, 1150 (N.D. Ill. 1984) (stating that overly burdensome regulations will be struck down if "less burdensome alternatives" are available); *Illinois State Board of Elections*, 440 U.S. at 185 (requiring "that States adopt the least drastic means to achieve their ends"); *Kusper*, 414 U.S. at 58-59 (commenting that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty"). *See also* National Association for the Advancement of Colored People v. Button, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in [areas] so closely touching our most precious freedoms").

54 The civil rights cases dealing with apportionment issues exceed the scope of this article. With a few exceptions, the following cases discuss primarily First Amendment issues. For an understanding of some of the racial and political themes found throughout the early apportionment cases, *see generally* Reynolds v. Sims, 377 U.S. 533 (1964).

55 This premise, notwithstanding the recent "one person, one vote" jurisprudence, was confirmed by the Court in the pre-New Deal era. *See* Minor v. Happersett, 88 U.S. 162, 178 (1874) (noting that "the Constitution of the United States does not confer the right of suffrage upon any one"). While the primary holding of *Minor* was rendered obsolete by the Nineteenth Amendment, nothing in that amendment, nor in any other amendment, has affected the accuracy of the above statement.

56 "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, §1.

57 "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX, §1.

58 "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, §1.

59 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.

60 *See* WINKLER, *supra* note 49, at 334.

61 *See id.*

62 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.[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,[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.[65] Other limitations that have received express support from the Court are residency requirements set forth by the individual states and their political subdivisions.[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.[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.[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 *Richardson v. Ramirez*,[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.[70] The California Supreme Court struck down the provision as being a violation of equal protection,[71] but the United States Supreme Court reversed, noting that section 2 of the Fourteenth Amendment expressly permits[72] the states to exclude individuals convicted of rebellion or criminal activity,[73] notwithstanding the grant of equal protection established in section 1.[74] The Court found section 2 to be of "controlling significance" in this context[75]

amend. XIV, §2.

63 For example, section 2 of the Fourteenth Amendment has been interpreted by the Court as permitting the states to impose restrictions on the franchise of convicted felons. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (noting that section 2 is of "controlling significance" in allowing states to exclude that portion of the population). For more on *Richardson*, *see infra*.

64 Some individuals do in fact advocate the expansion of voting rights to non-citizens. *See, e.g.*, Jamin B. Raskin, *Their Chance to Vote*, WASH. POST, Oct. 13, 1991, at C8 ("The circle of political community must widen to take in all of those governed by the community's decisions").

65 "The right of *citizens of the United States* to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, §1 (emphasis added). "The right of *citizens of the United States* to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX, §1 (emphasis added). "The right of *citizens of the United States*, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, §1 (emphasis added).

66 *See, e.g.*, 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"). *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).

67 *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* WINKLER, *supra* note 49, at 342-43 (claiming that states currently justify some of their voter restrictions by pointing toward the desire to maintain the integrity of the political unit).

68 *See, e.g., 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 *Carrington*, such decisions nevertheless run the risk of being rooted in some evaluation of content. He points to the *Richardson* decision as an example of such an inevitability. WINKLER, *supra* note 49, at 355-57.

69 418 U.S. 24 (1974).

70 *Id.* at 27.

71 *Id.*

72 It is important to note here that states are free to expand the availability of rights above the threshold established by the Constitution. *See, e.g.*, Manor v. Rakiey, 2 Mass. L. Rptr. 506 (1994). The *Richardson* Court was merely affirming that states were well within constitutional boundaries if they opted to adhere to the textual grant of the Fourteenth Amendment. *Richardson*, 418 U.S. at 56.

73 The Fourteenth Amendment reaffirms that the voting rights of citizens, "except for [those who have undertaken] *participation in rebellion, or other crime*," are to be guarded for the sake of apportionment of representatives. U.S. CONST. amend. XIV, §2 (emphasis added).

74 Section 1 of the Fourteenth Amendment contains the following language: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, §1.

75 *Richardson*, 418 U.S. at 54.

because it believed any interpretation that allowed section 1 to override section 2 ignored both common sense[76] and basic principles of statutory construction.[77] 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.[78]

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[79] 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.[80]

Williams v. Rhodes[81] 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,[82] each brought suit.[83] 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.[84] The Court cited both the First and Fourteenth Amendments,[85] 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.[86]

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[87] 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.[88] 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 *Button*, 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. Patterson, 357 U.S. 449, 464 (1958) ("substantiality").

80 Ballot access cases, while distinguishable in several respects from voter access cases, nevertheless share essential elements relevant to this analysis. Specifically, ballot access cases emphasize that it is improper for a state regulation to burden individual rights of expression and association absent some sufficient and reasonable state justification.

81 393 U.S. 23 (1968).

82 *See Williams*, 393 U.S. at 24-26 (discussing the state's fifteen percent signature requirement).

83 *Id.* at 24-28.

84 *Id.* at 34-35.

85 *Id.* at 30-31.

86 *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").

87 *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.

88 *See Williams*, 393 U.S. at 30.

other specific provisions of the Constitution."[89] Second, and perhaps more importantly, the Court elaborated on the idea that states were constitutionally permitted to establish limits on voting under certain circumstances: it recognized that states could impose restrictions on certain groups, provided that those restrictions were not so burdensome or unreasonable as to violate the Fourteenth Amendment's grant of equal protection.[90] The Court's holding was essentially a recognition that states could regulate in order to protect what the Court referred to as "a compelling state interest."[91] 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."[92]

The shift initiated by *Williams* took time to fully develop. Five years later, in *Kusper v. Pontikes*,[93] 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."[94] 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.[95] In *Storer v. Brown*,[96] 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]."[97] 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,[98] 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.[99]

In the early 1980s, the jurisprudential landscape changed significantly once again with the Court's decision in *Anderson v. Celebrezze*.[100] 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.[101] 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

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.

93 414 U.S. 51 (1973).

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).

95 *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 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.

96 415 U.S. 724 (1974).

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.[102]

To be sure, the *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.[103] The "character and magnitude" concept found its way, in varying forms, into subsequent decisions dealing with both voters' associational rights[104] and candidates' ballot access rights.[105]

The *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 *Williams* and *Kusper*, and replaced it with a standard that permitted some burdening of voting rights in the presence of a compelling state interest.[106] Nine years would pass before the Court, in *Burdick v. Takushi*,[107] expressly rejected the idea that strict scrutiny must be applied in all instances where a voting regulation is challenged,[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.[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.[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.[111]

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

A. Federalism Lives On: Article II, The State Autonomy Argument and Supportive Federal Law

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

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102 *Id.* at 791-92, 806.

103 *Id.* at 789.

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

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

106 *See id.*

107 504 U.S. 428 (1992).

108 *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").

109 *Id.* at 433.

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. *See generally* WINKLER, *supra* note 49.

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 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 . . . ." *Id.* at 195-196.

112 U.S. CONST. art. II, §1, cl. 2.

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. *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. *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."[114] 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.[115] 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.[116] Similarly, 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,[117] and the corresponding distribution of congressional representation.[118]

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.[119] Title 3 of the United States Code, which deals with varying aspects of the presidency, is unambiguous in its deference to the states. Section 2, for instance, provides that in the event a state election fails to result in the election of presidential electors, "*the electors may be appointed* on a subsequent day in such a manner as the *legislature* of such State may direct."[120] The relevance of section 2 lies in its clear expression of finality: it says that the state legislatures are the final arbiters of which electors will ultimately represent them when it comes time for the electors to cast their votes, subject only to the time constraints[121] set by Congress.

Section 4 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,"[122] 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.[123] Second, and perhaps more importantly, the passage proclaims that a state may fill "vacancies which may occur in *its* college of electors."[124]

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is shortsighted, as it apparently sees no value in having the president chosen according to a structure that mirrors the federalist structure of Congress.

114 U.S. CONST. art. II, §1, cl. 2.

115 The Constitution, for instance, specifically states that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. CONST. art. II, §1, cl. 4. Clause 2 of Article II, section 1 contains no limiting language, other than that regarding the basis for apportionment. U.S. CONST. art. II, §1, cl. 2.

116 "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. CONST. art. II, §1, cl. 4.

117 "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers. . . . The actual Enumeration shall be made . . . within every subsequent Term of ten Years." U.S. CONST. art. I, §2, cl. 3. The base effect of this constitutional requirement is that, while states can increase their total number of electors relative to those of other states, they can never have less than three electors, since every state will always have two senators and at least one member of the House of Representatives. This feature has been roundly criticized by those who feel small states have a disproportionate advantage in the electoral college. *See, e.g.*, DURBIN, *supra* note 2, at 512 (noting that "a small state has an advantage over a large state as to the allocation of the electoral votes"); HARVARD LAW REVIEW, *supra* note 11, at 2533 (stating that the "Senate add-on feature" of the electoral college has the effect of "giv[ing] more influence to small states").

One tangential criticism of the electoral college has to do with what one might call "census lag": since the electoral college (and congressional representation) is reapportioned only every ten years, reapportionment does not occur frequently enough to keep pace with the shifting demographics of the American population. The result is some states may be wielding more clout than they technically deserve, since a portion of the population that gave them their electoral vote totals may have since moved out of state. Conversely, some states that deserve more electoral clout are forced to wait until several years after a census, which deprives them of influence in presidential elections that occur in the year of a census. *See* DURBIN, *supra* note 2, at 513.

118 "Each State shall appoint . . . a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in Congress . . . " U.S. CONST. art. II, §1, cl. 2.

119 *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (noting that states can voluntarily link the awarding of electoral votes to the popular vote, but that they also reserve the right to undo that link).

120 3 U.S.C. §2 (2000) (emphasis added).

121 *See* U.S. CONST. art. II, §1, cl. 4.

122 3 U.S.C. §4 (2000).

123 This is known as the "safe harbor" provision, which is part of 3 U.S.C. §5 and is discussed *infra*.

124 3 U.S.C. §4 (2000) (emphasis added).

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.[125]

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."[126] Section 6 buttresses section 5 by requiring the executive authority of the state to certify the legislature's decision,[127] provided that its decision is based on a law in place six days prior to the assembly of electors in the state capitol.[128] 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.*"[129] 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.[130]

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.[131]

In 1892, the Court issued its decision in *McPherson v. Blacker*,[132] the first to consider the constitutionality of states' tools for choosing electors.[133] William McPherson and several other electors in Michigan filed suit against the state, claiming that

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125 For all the varying opinions regarding states' abilities to restrict elector discretion, not even the most zealous pro-electoral college advocate would claim that the Constitution *requires* states to restrict elector discretion; they would merely point out that the degree of control is best left to the states. *See* COLUMBIA LAW REVIEW, *supra* note 10, at 709 (discussing the role of state discretion in this area). Indeed, as some are quick to note, there may still be circumstances under which elector discretion would be desirable, such as when the winner of a presidential campaign dies prior to the assembly of the electoral college in December. For an analysis of how this succession problem could be overcome with simple federal legislation, *see generally* Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215 (1995).

126 3 U.S.C. §5 (2000) (emphasis added).

127 *Id.* §6.

128 *Id.* §5. This six-day requirement is the afore-mentioned safe harbor provision, which exists to ensure that a state's electoral votes are not completely lost if there is an ongoing dispute within the state prior to the assembly of the electoral college. *See Bush*, 531 U.S. at 113.

129 3 U.S.C. §15 (2000) (emphasis added). The "one return" portion of section 15 does not effect the analysis here, but it is worth noting that there has been at least one occasion where Congress had the difficult choice of choosing which slate of electors is the "regularly given" one. For an 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.

130 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.

131 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.

132 146 U.S. 1 (1892).

133 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. 377 (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 380. 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[134] violated the Constitution's grant of power only to each state as a whole.[135] 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.[136] 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,[137] but also that states retained the authority to alter their chosen means of selection at any time.[138]

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.[139] The Nebraska Supreme Court, in *State ex rel. Nebraska Republican State Central Committee v. Wait*,[140] eventually sided with the state's Republican organization, noting both that the electors were bound by their pledges to vote for the Republican candidate[141] and that their representations in favor of the Progressive Party could be viewed as abdications of their duties as Republican electors.[142]

More than twenty years after *Wait*, in *Thomas v. Cohen*,[143] 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.[144] The court rejected this claim in no uncertain terms,[145] and likewise rejected, in similar terms, the associated claim that electors are free agents unbound by party labels or general election results.[146] The court rooted its rejection of the latter in the historical evolution of the role of electors.[147] After providing a lengthy discussion about presidential elections and the development

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 (1873)) ("[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 Wakeling on the Kansas Electoral Case*, 4 GREEN BAG 2D 179 (Winter 2001).

140 *Wait*, 138 N.W. at 162.

141 *See id.* (noting that the electors "pledged themselves to discharge their duties . . . by voting for the candidates . . . subsequently nominated by [the Republican Party]. We are all agreed that any other construction would be farcical.").

142 *See id.* at 163 (discussing how the electors' representations should be viewed as effective resignations from their posts as electors).

143 262 N.Y.S. 320 (Sup. Ct. 1933).

144 *Id.* at 323. The short ballot's use has served in several other instances to buttress the argument that electors are, at least in present times, instruments of the people rather than discretionary actors. *See, e.g.*, State ex rel. Hawke v. Myers, 4 N.E.2d 397, 398 (Ohio 1936) (noting that the provisions of Ohio law permitting use of the short ballot were not unconstitutional); *and Storer*, 415 U.S. at 738 n.9 (establishing that the candidates for president and vice president had standing in the present lawsuit, a position which impliedly marginalized the place of electors by reducing their prominence).

145 "Does section 1 of article 2 of the United States Constitution give the right to voters to vote for presidential electors? It does not." *Thomas*, 262 N.Y.S. at 323.

146 "No one has ever suggested that the choice [i.e., of president and vice president] was not made on election day." *Id.* at 325.

147 "We now have, and for a long time have had, a system of popular balloting for individuals (electors) who have been designated by the political parties for the sole purpose of vot-

of the two-party system,[148] 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).[149]

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[153] 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[154] designed to ensure all Democratic electors would indeed vote for the eventual 1952 presidential ticket. State officials, as per statutory authority,[155] 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,[157] but the United States Supreme Court reversed.[158] While the decision defended both political parties' abilities to bind electors through pledges[159] and states' abilities to delegate that

ing for those nominated for President and Vice President . . . . *How did that change come about? It evolved.*" *Id.* at 324 (emphasis added).

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 parties' 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").

153 343 U.S. 214 (1952).

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,[160] *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.[161] 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.[162]

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.[163] 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.[164] 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.[165] 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.[166]

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,[167] its true value can

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).

163 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, nine states used this type of statute, although the language of their respective pledges varies. *See* Ala. Code §17-19-2(c) (1995), Fla. Stat. Ann. §103.021(1) (West 1996), Mass. Gen. Laws Ann. ch. 53, §8 (West Supp. 1996); Wash. Rev. Code Ann. §29.71.020 (West 1993).

165 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).

166 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).

167 *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,[168] there has never been a situation in American history where faithless electors were in the position to alter the outcome of a presidential election.[169] There have been, however, three elections in which the eventual winner of the presidential contest did not receive a majority of the popular vote.[170] While some use these elections as examples of why the electoral college should be eliminated,[171] 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.[172]

The electoral college, much like the bicameral legislature,[173] 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.[174] 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.[175] Nonetheless, Republican Rutherford B. Hayes won the

form in the direction of a direct vote system).

168 There have been at least nine presidential elections in which a person pledged to vote for a given candidate voted for someone else; Samuel Miles was merely the first. *See* BEST, *supra* note 2, at 39. In 1820, one elector pledged to vote for James Monroe, who ran for re-election unopposed, voted instead for John Quincy Adams, allegedly to prevent Monroe from matching President Washington's feat of unanimous re-election, COLUMBIA LAW REVIEW, *supra* note 10, at 701 n.41. Seven subsequent elections reveal less noteworthy deviations: in 1948, one elector voted for Governor Strom Thurmond instead of Harry Truman; in 1956, one voted for Walter E. Jones, an Alabama judge, instead of Adlai Stevenson; in 1960, one voted for Senator Harry Byrd of Virginia instead of Richard Nixon; in 1968, one voted for Governor George C. Wallace instead of Nixon; in 1972, one voted for John Hospers, the Libertarian Party candidate, instead of Nixon; in 1976, one voted for Ronald Reagan instead of Gerald Ford; and in 1988, one voted for Senator Lloyd Bentsen instead of Michael Dukakis. *See* DURBIN, *supra* note 2, at 514.

169 For a fictional but educational account of just how such a scenario might unfold, *see generally* JEFF GREENFIELD, THE PEOPLE'S CHOICE (1995). In the aftermath of the 2000 general election, concern (or hope, depending on one's political perspective) existed in many circles that faithless Republican electors could aid Al Gore by either casting their electoral votes for him or withholding their votes from George W. Bush, which would have had the net effect of throwing the election into the House of Representatives. *See* Charles Lane, *Electors May Have the Last Word*, WASH. POST, November 9, 2000, at A31. Others were equally convinced such a thing could never happen simply because of party loyalty and the elector screening process. *See* Edward Walsh, *A Quixotic Effort to Rally the 'Faithless'?*, WASH. POST, November 17, 2000, at A26. *See also* ALTHOUSE, *supra* note 12, at 1011 (noting that the electors in this most recent election "stood their ground, despite . . . pressure to earn a place in American history by changing his or her vote").

170 In addition to President George W. Bush, Presidents Rutherford B. Hayes and Benjamin Harrison also did not receive popular vote majorities. *See, e.g.*, BEST, *supra* note 2, at 24-26. *See supra* note 12, for an explanation as to why Andrew Jackson does not fit into this specific category.

171 *See, e.g.*, DURBIN, *supra* note 2, at 512 (criticizing the electoral college for permitting "the election of a 'minority' president who has received fewer popular votes than a principal opponent"). *See also* HARVARD LAW REVIEW, *supra* note 11, at 2532-33 (pointing out that the electoral college could theoretically lead to the election of a president who received only twenty-seven percent of the popular vote nationwide).

172 *See, e.g.*, ALTHOUSE, *supra* note 12, at 1012 (boldly declaring that "the popular vote does not really embody the will of the people"). While certainly a brazen statement, it is not inaccurate: in reality, the electoral college reflects the will of the people in fifty-one concurrent jurisdictions, the results of which are aggregated subsequent to the general election. *Id.* at 1011-12. Althouse notes that American citizens both have grasped and approved of this distinction: "[P]eople understood that they were voting in fifty-one concurrent elections . . . [T]here was widespread acceptance of the structure of the electoral college and even the House contingency." *Id.*

173 *See supra* note 8.

174 *See, e.g.*, COLUMBIA LAW REVIEW, *supra* note 10, at 704-08 (explaining in detail the process by which the existing electoral college framework came into being); HARVARD LAW REVIEW, *supra* note 11, at 2528 (noting that "the Framers . . . sought to negotiate between the competing interests of large and small states"); DURBIN, *supra* note 2, at 512 (discussing the "compromise plan whereby less populous states were assured of a minimum of three electoral votes [i.e., to reflect the absolute minimum number of total members of Congress a state can have]"). This fear is no less relevant today. Both supporters and critics of the electoral college point out that small states continue to have influence in presidential elections. Critics, however, maintain that this influence is excessively disproportionate. *Compare generally, e.g., id. with* ALTHOUSE, *supra* note 12.

175 *But see* BEST, *supra* note 2, at 25 (claiming that fraud and other irregularities on both sides of the voting process in 1876 make it "difficult to assert with any confidence that [Tilden] actually surpassed Hayes in the popular vote").

election primarily because he captured all of the electoral votes of key small states.[176] While other factors impacted this particular election,[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.[178] Republican Benjamin Harrison won the election because his lower popular vote tally translated into victories 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.[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.[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.[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.[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.[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

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).

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.*

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").

179 *EC WebZine: Cleveland, supra* note 178. *See also* 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"); 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 1508-09 (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"); Hively, *supra* note 12, at 80-81 (discussing how candidates under a direct vote system would have the option of winning by appealing to only the largest bloc of voters at the expense of other groups, whereas the electoral college requires broad-based, pluralistic approval).

180 *See* BEST, *supra* note 2, at 111-13.

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).

182 *See* BEST, *supra* note 2, at 111-13.

183 *See id.* at 112.

possibility of fraud at the state and local level is no less real,[184] but its occurrence is less likely to have a substantial impact on the outcome in a given state.[185] The very fact that such subversive techniques will have little effect is probably enough to discourage such efforts most of the time.[186] 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.[187]

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;[188] this is true even in elections where the popular vote was extremely close.[189] 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,[190] the challenger must carry a substantial material, and perhaps even psychological, burden in order to be successful.[191] 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.[192] 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.[193] 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.[194] It is easy to envision the problems and delays that might arise under such a system.[195]

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.[196] 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.[197] 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

184 *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 Evan 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 193, 195.

196 *See id.* at 130-31 (citing how direct vote proponents believe it would stimulate voter participation). *See also id.* at 132-33 (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.[198]

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 COMPELLING 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.[199] What little historians and legal scholars purport to know about the intended role of electors comes from anecdotal and secondhand accounts.[200] Even that sparse amount of information is subject to scrutiny.[201] 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.[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[203] and the other that determines apportionment of electors to the states according to their populations as determined by census.[204]

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.[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,[206] and that their authority to do so was unequivocally plenary and not subject to the scrutiny of Congress.[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.[208] This is relevant not only because it instructs that Congress accept what the states have offered,[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.

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.[210] Some state court rulings have held that presidential

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).

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").

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).

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).

202 *See* U.S. CONST. art. II, §1, cl. 2. *See also McPherson*, 146 U.S. at 25 (noting that the state legislature is the "supreme authority" when it comes to selecting electors).

203 *See* U.S. CONST. art. II, §1, cl. 3.

204 *See* U.S. CONST. art. I, §2, cl. 3.

205 *See generally* 3 U.S.C. §§2, 4-6, 15 (2000).

206 *See id.* §2.

207 *See id.* §5.

208 *See id.* §2. *See also Bush*, 531 U.S. at 113 (stating how the judicial decisions made after the general election cannot "frustrate the legislative desire to attain the 'safe harbor' provided by §5").

209 *See* 3 U.S.C. §15 (2000) (outlining procedures for accepting and counting electoral votes in Congress).

210 *See, e.g., McPherson*, 146 U.S. at 26-27 (discussing "plenary authority").

electors are state officers[211] and can be presented to the electorate in any fashion that the state chooses.[212] Other state court rulings have expressed the belief that electors have come to serve a ministerial role.[213] 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,[214] 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.[215] 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.[216]

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.[217] Important societal interests, such as fair and effective elections,[218] political stability,[219] legitimacy of the eventual winner[220] and the expectations of the American people[221] 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 *Williams* 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 binds 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 193 (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).