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ESSAY

BOUND ELECTORS

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INTRODUCTION

In a decision hailed as “a masterpiece of historical analysis and originalist reasoning,”¹ the Tenth Circuit recently held that the Constitution prevents a state from binding its presidential electors to vote for the winner of the state’s popular vote.² The Supreme Court has agreed to review and resolve this important issue of constitutional law before the 2020 presidential election.³

Far from being a masterpiece, however, the Tenth Circuit opinion is a selective reading of incomplete linguistic, historical, and judicial materials. It ignores centuries of controversy over interpreting the law governing presidential elections. It reaches an overly broad conclusion—that “the states’ delegated role is complete upon the appointment of state

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¹ Jason Harrow, *The Originalist Take on Presidential Electors*, Wash. Examiner (Sept. 9, 2019, 12:09 PM), <https://www.washingtonexaminer.com/opinion/op-eds/the-originalist-take-on-presidential-electors> [<https://perma.cc/4K7A-6SDL>].

² See *Baca v. Colo. Dep’t of State*, 935 F.3d 887 (10th Cir. 2019).

³ See, e.g., Associated Press, *Justices To Consider Faithless Electors, Ahead of 2020 Vote*, Politico (Jan. 17, 2020, 4:24 PM), <https://www.politico.com/news/2020/01/17/justices-to-consider-faithless-electors-ahead-of-2020-vote-100631> [<https://perma.cc/SF2E-FR49>].

electors”⁴—that is inconsistent with constitutional history and practice. It ultimately relies on background political principles that were contested at the adoption of the Constitution and remain contested today.

In addition, the opinion utilizes the disputed interpretive technique of attributing thick meanings to constitutional words to divine substantive results from open-textured or scant constitutional provisions.⁵ This technique includes attributing prescriptively thick meanings to words—meanings that implicitly generate substantive rules of law missing from the Constitution’s express text. The Tenth Circuit finds an unwritten constitutional rule that states may not abridge the freedom of presidential electors largely because it finds that at the adoption of the Constitution the word “elector” meant someone who has freedom when voting.⁶

This Essay critiques the Tenth Circuit decision. It furnishes historical support for an interpretation that state power over electors continues after their appointment and may include the power to bind them to the result of a popular election. It identifies issues with attributing thick meanings to constitutional terms. It suggests that the Supreme Court should reject the Tenth Circuit’s reasoning and develop a coherent theory of the roles of the people, the states, and the federal government in the electoral process in order to resolve the dispute. Finally, it suggests a number of questions that the Court might consider in developing that theory.

I. CONSTITUTIONAL PROVISIONS

The most perplexing issue for the Philadelphia Convention was how to select the President.⁷ The resulting provisions, as amended, appear in

⁴ See *Baca*, 935 F.3d at 947.

⁵ See, e.g., David Robertson, Thick Constitutional Readings: When Classic Distinctions Are Irrelevant, 35 Ga. J. Int’l & Comp. L. 277, 279 (2007) (distinguishing thick constitutional meanings that instantiate ethical aspirations from thin ones that do not); see also Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 Geo. L.J. 1, 15 (2018) (arguing that “the thicker the communicative content” of constitutional text, “the less need there is to enter into” interpretive construction); cf. Lawrence B. Solum, Legal Theory Lexicon 028: Concepts and Conceptions, Legal Theory Lexicon, https://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_1.html [<https://perma.cc/9HE5-UCTL>] (last updated Oct. 13, 2019) (distinguishing between general concepts and more detailed, and competing, conceptions of those concepts).

⁶ See *Baca*, 935 F.3d at 945–46.

⁷ See 2 Jonathan Elliot, The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 473 (2d ed. 1836), <https://hdl.handle.net/2027/nc01.ark:/13960/t0qs1jm66?url-append=%3Bseq=76> (statement of James Wilson).

Article II, Section 1 (the “Appointments Clause”) and the Twelfth Amendment of the Constitution (together, the “Electoral Clauses”). The Appointments Clause provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.⁸

For convenience, this Essay uses “Electors” hereafter to refer to presidential and vice presidential electors and “electors” to refer to voters in other contexts.⁹ Electors cast votes separately for the President and Vice President pursuant to the Twelfth Amendment.¹⁰ That Amendment provides rules for the timing, delivery, and counting of their votes and, in the absence of a majority, for the House of Representatives to choose the President (with each state having one vote) and the Senate to choose the Vice President.¹¹

The sparse Electoral Clauses prescribe few details for how to fill the important positions of President and Vice President.¹² As a result,

upon no other problem, connected with the politics of the country, has there been propounded such a variety of views, so widely apart, by such able and eminent statesmen, and discussed with such heat and acrimony over so long a period, as those delivered in Congress touching the metes and bounds prescribed to this question by the Constitution.¹³

⁸ U.S. Const. art. II, § 1, cl. 2.

⁹ Quotations retain the capitalization of the original unless otherwise noted.

¹⁰ U.S. Const. amend. XII.

¹¹ Prior to the Twelfth Amendment, the Electors did not vote for the two positions separately. They cast two votes. The person with the majority of votes became President, and the one with the next greatest number of votes became Vice President. See U.S. Const. art. II, § 1, cl. 3 (repealed 1804). The Amendment did not substantially change the remaining parts of the electoral process.

¹² See, e.g., Letter from James Madison to Thomas Jefferson, Nat’l Archives (Mar. 15, 1800), <https://founders.archives.gov/documents/Madison/01-17-02-0218> [<https://perma.cc/-ZM3C-XHMY>] (“It is not to be denied that the Constn. might have been properly more full in prescribing the election of P: & V. P. . . .”). For example, the Constitution prescribes who shall judge the qualifications of Representatives and Senators but not who shall judge those of Electors. See U.S. Const. art. I, § 5, cl. 1 (each house to judge the qualifications of its own members).

¹³ David A. McKnight, *The Electoral System of the United States* 12 (Philadelphia, J. B. Lippincott & Co. 1878).

The Tenth Circuit’s straightforward analysis belies these historical controversies, which arise from conflicting principles governing the powers of the people, the states, and the federal government.¹⁴

II. THE *BACA* DECISION

States typically hold popular elections for President and Vice President. They count each popular vote for a candidate as a vote for a slate of Electors pledged to support that candidate when voting pursuant to the Twelfth Amendment. The Tenth Circuit opinion in *Baca* considers the question of whether a state legislature has the power to bind Electors to honor their pledge, to replace those who refuse with faithful alternates, and to have the alternate votes counted under the Twelfth Amendment. The opinion utilizes five characteristically originalist approaches from constitutional text, history, and structure. It concludes that “the states’ delegated role is complete upon the appointment of state electors.”¹⁵ The legislature has no power to bind Electors, who are free to vote at will for anyone.

The first approach relies on constitutional history, particularly *The Federalist Papers*. The opinion cites the views of Alexander Hamilton and John Jay, as detailed in *The Federalist Nos. 60, 64, and 68*, that the Constitution gives Electors the power to appoint the President.¹⁶ In particular, the court relies on Hamilton’s view that giving independent Electors the right to elect the President disperses the power to choose the principal members of the federal government—the people elect Representatives, state legislatures elect Senators, and Electors elect the President.¹⁷

The second approach attempts to find the answer to a question of substantive law—whether states have the power to bind Electors—in period dictionary definitions of three words in the Electoral Clauses: “elector,” “vote,” and “ballot.” The court finds that all of the period

¹⁴ See, e.g., *infra* notes 82–87 and accompanying text (conflicting interpretations of “State” in the Appointments Clause).

¹⁵ *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 947 (10th Cir. 2019).

¹⁶ *Id.* at 952–54 (quoting *The Federalist Nos. 60, 68* (Alexander Hamilton), No. 64 (John Jay)).

¹⁷ *Id.* at 953 (quoting *The Federalist No. 60* (Alexander Hamilton) (Consequently, “there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors.”)). Senators are now popularly elected. See U.S. Const. amend. XVII.

definitions “imply the right to make a choice or voice an individual opinion,” supporting a finding that Electors “are free to vote as they choose.”¹⁸ The court does not identify any express text governing state power to bind Electors. Instead, it relies on prescriptively thick meanings of the three words to find an implicit rule forbidding states to bind them.

The third approach is to read the term “Electors” in the Appointments Clause consistently with its use elsewhere in the Constitution, specifically regarding individual electors voting for members of the House of Representatives.¹⁹ The opinion cites precedent finding that a “‘fundamental principle of our representative democracy,’ embodied in the Constitution,” prescribes that such individual electors are free to vote as they would like.²⁰ The opinion reasons that Electors must also have such freedom because they have the same name.²¹

The fourth approach is to contrast express state obligations to those of the President. Colorado argued in *Baca* “that the power to appoint necessarily includes the power to remove and nullify an anomalous vote,” relying on the President’s power to remove executive appointees as affirmed in *Myers v. United States*.²² The Tenth Circuit found that *Myers* depended on the constitutional provision that the President “shall take care that the laws be faithfully executed” and the consequence that the President must be able to control inferior executive officers.²³ The Constitution does not require states to “take care” that Electors perform their function, and therefore state power to appoint does not include the power to remove.²⁴

The fifth and final approach relies on the structure of the Constitution’s voting procedures to determine that “states may not interfere” with an Elector’s discretion.²⁵ It details the express procedural steps that the Constitution enumerates. It notes that “the express duties of the states are limited to appointment of the presidential electors,”²⁶ after which every

¹⁸ *Baca*, 935 F.3d at 945.

¹⁹ *Id.*

²⁰ *Id.* at 946 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

²¹ *Id.*

²² *Id.* at 940 (citing *Myers v. United States*, 272 U.S. 52, 175–76 (1926)).

²³ *Id.* at 940–41; see also U.S. Const. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”).

²⁴ *Baca*, 935 F.3d at 941.

²⁵ *Id.* at 942.

²⁶ *Id.*

subsequent step “is expressly delegated to a different body,”²⁷ such as the Electors to vote, the President of the Senate to count the votes, and, in the absence of a majority, the House of Representatives to choose the President and the Senate to choose the Vice President.²⁸ This leaves no role for the states after they appoint Electors. In addition, the Constitution “sets the precise number of electors,” and therefore “the state may not appoint additional electors to cast new votes in favor of the candidate preferred by the state.”²⁹

III. CRITIQUE OF THE COURT’S REASONING

A. Expectations and The Federalist Papers

The Tenth Circuit fails to consider expectations of other Founders and ratifiers that differ significantly from those of Hamilton and Jay. It also neglects to acknowledge that Hamilton’s and Jay’s other expectations about the Appointments Clause proved to be wrong. Expectations are just expectations. They do not control constitutional interpretation.

A second, competing expectation was that states would choose the President. James Madison wrote in *The Federalist No. 39* that “[t]he immediate election of the president is to be made by the states in their political characters.”³⁰ At the Massachusetts ratifying convention, Increase Sumner explained that “the president is to be chosen by electors under the regulation of the state legislature,”³¹ and the Rev. Samuel Stillman stated that “[t]he president, and senators are to be chosen by the interposition of the legislatures of the several states, who are the representatives and guardians of the people.”³² A New York ratifier asserted in 1789 that the Electors are the “voice of the state governments.”³³ Massachusetts commentators claimed in 1796 that the President represents the states, in part because in the absence of an electoral majority the Constitution requires congressional voting by

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 943.

³⁰ *The Federalist No. 39* (James Madison).

³¹ 2 Elliot, *supra* note 7, at 86.

³² *Id.* at 171–72.

³³ Proceedings of the Legislature, N.Y. Daily Gazette, Feb. 16, 1789, at 170 (statement attributed to Harrison, presumably referring to Richard Harison).

states.³⁴ Another New Yorker explained in 1800 that “[o]ur electors represent the government of this state.”³⁵ In yet a third expectation, Charles Cotesworth Pinckney, James Wilson, and Edmund Randolph stated that the people elect the President through the Electors.³⁶

This competing history supports the interpretation that states may bind Electors to the result of the popular vote. Indeed, it has been suggested that Hamilton’s personal ambition drove his vision of wise Electors acting independently.³⁷ He was probably the least popular of the Founders.³⁸ *The Federalist Papers* were inconsistent advocacy pieces pitched to differing constituencies to achieve ratification. They laid the groundwork for self-serving interpretations of the Constitution, much like statements in the legislative history of congressional statutes today.³⁹

The Tenth Circuit’s opinion also ignores other expectations of Hamilton and Jay that proved to be wrong. Both expected that the people would choose the Electors.⁴⁰ Yet state legislatures appointed Electors for years after ratification.⁴¹ The votes of those Electors counted.

Hamilton expected that Electors would be persons “most capable of analyzing the qualities adapted to the station, and acting under circumstances favourable to deliberation, and to a judicious combination of all the reasons and inducements that were proper to govern their choice.”⁴² Jay expected that the Electors would be “the most enlightened and respectable citizens”⁴³ whose “discernment” would presumably

³⁴ See Legislature of Massachusetts, *Argus*, June 3, 1796, at 3. Each state receives one vote when the House elects the President, both under the original Constitution and the Twelfth Amendment.

³⁵ Important Debate, *Republican Watch-Tower*, Apr. 9, 1800, at 1.

³⁶ See James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 *Law & Contemp. Probs.* 495, 505 (1962).

³⁷ See *id.*

³⁸ See, e.g., Sarah Laskow, 10 Things That You Have Secretly Been Dying to Know About the World of ‘Hamilton’, *Atlas Obscura* (Dec. 30, 2015), <https://www.atlasobscura.com/articles/10-things-that-you-have-secretly-been-dying-to-know-about-the-world-of-hamilton> [<https://perma.cc/XKJ7-Q855>].

³⁹ See, e.g., Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 *Harv. L. Rev.* 1005, 1005 (1992) (objections to utilizing legislative history for statutory interpretation, including the view that staff and lobbyists draft the history).

⁴⁰ See *The Federalist* No. 64 (John Jay), No. 68 (Alexander Hamilton).

⁴¹ See, e.g., *McPherson v. Blacker*, 146 U.S. 1, 12–14 (1892) (argument of appellants, noting legislative appointments from the first presidential election through as late as 1876).

⁴² *The Federalist* No. 68 (Alexander Hamilton).

⁴³ *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 954 (10th Cir. 2019) (quoting *The Federalist* No. 64 (John Jay)).

ensure that the President would always be chosen from among “those . . . whose reputation for integrity inspires and merits confidence.”⁴⁴ Yet voters in early elections complained that they could not know all of the Elector candidates;⁴⁵ both the people and state legislatures have chosen mere “puppets” as Electors;⁴⁶ ballots in popular presidential elections routinely fail to include even the names of the proposed Electors;⁴⁷ and Electors have chosen Presidents entirely lacking in integrity. The votes of those Electors also counted.

Not even a unanimous expectation of the Founders could invalidate any of these practices any more than state laws binding Electors. As the Supreme Court has expounded, “we can perceive no reason for holding that the power confided to the States by the Constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created.”⁴⁸

B. Public Meaning of Words in the Electoral Clauses

The competing expectations suggest that the Tenth Circuit’s semantic interpretation is too thick. Indeed, the court’s dictionary definitions can be read thinly to include electors bound to vote by ballot for a specific

⁴⁴ The Federalist No. 64 (John Jay).

⁴⁵ See Philadelphia, Jan. 8., Pa. Gazette, Jan. 8, 1800, <https://www.accessible-archives.com/collections/the-pennsylvania-gazette/> [<https://perma.cc/4WUT-86QL>] (follow “Browse” hyperlink; then select relevant issue).

⁴⁶ *McPherson*, 146 U.S. at 15 (argument of appellants).

⁴⁷ See, e.g., Mike Rappaport, Why Does the Unconstitutionality of Prohibiting Faithless Electors Seem Problematic?, Originalism Blog (Dec. 27, 2016), <https://originalismblog.-typepad.com/the-originalism-blog/2016/12/why-does-the-unconstitutionality-of-prohibiting-faithless-electors-seem-problematicmike-rappaport.html> [<https://perma.cc/N45A-M5J5>].

⁴⁸ *McPherson*, 146 U.S. at 36.

candidate,⁴⁹ such as by a proxy. Proxies were used in Anglo-American elections well before the adoption of the Constitution.⁵⁰

Late eighteenth-century legal and general usage also includes thin meanings that encompass both free and bound electors. Period usage distinguished electors who were “bound” from those who could “vote for whom they pleased,”⁵¹ the “dependent elector from him who exercises this first right of a freeman, agreeably to the dictates of his mind,”⁵² and “unworthy and dependant [sic] electors” from “worthy independent electors.”⁵³ A voter could be influenced in varying degrees and remain an “elector.” Period texts are replete with references to obliged,⁵⁴ bribed,⁵⁵ corrupt,⁵⁶ and venal⁵⁷ electors. Those with power could “dictate to the

⁴⁹ Period definitions of “ballot” include “[a] little ball or ticket used in giving votes,” see *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 944 (10th Cir. 2019) (quoting 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785)), without specifying whether the ballot reflects a proxy or the volition of the person who gives it. Period definitions of “vote” include “[s]uffrage; voice given and numbered,” see *id.* (quoting 2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785)), without specifying whose voice is given and numbered. Period definitions of “elector” include “one who elects,” see *id.* (quoting Noah Webster, *A Compendious Dictionary of the English Language* (1806)), without specifying whether under a proxy or by volition.

⁵⁰ See, e.g., Saul Levmore, *Precommitment Politics*, 82 *Va. L. Rev.* 567, 617 n.103 (1996); see also *Acts and Laws of the State of Connecticut, in America* 45 (1784) (penalizing voters who provide more than one vote or proxy at elections).

⁵¹ James Monroe, *A View of the Conduct of the Executive, in the Foreign Affairs of the United States, Connected with the Mission to the French Republic, During the Years 1794, 5, & 6*, at 273 (1797), <https://hdl.handle.net/2027/uc2.ark:/13960/t79s1mp9k?urlappend=%3Bseq=349>.

⁵² 1 T.H.B. Oldfield, *An Entire and Complete History, Political and Personal of the Boroughs of Great Britain* 258 (1792), <https://hdl.handle.net/2027/mdp.39015051139007?urlappend=%3Bseq=498>.

⁵³ William Paxton, *A Complete Collection of the Papers Which Were Published on Occasion of the Late Canvass and Election, for the Borough of Newark, in the Months of May and June, 1790*, at 46–47 (2d ed. 1791) (capitalization omitted).

⁵⁴ See 1 James Burgh, *Political Disquisitions: Or, an Enquiry into Public Errors, Defects, and Abuses* 158 (J.B. Gent ed., 1774), <https://hdl.handle.net/2027/pst.000055464277?urlappend=%3Bseq=198>.

⁵⁵ See James Drake, *The History of the Last Parliament: Began at Westminster, the Tenth Day of February, in the Twelfth Year of the Reign of King William, An. Dom. 1700*, at 209 (2d ed. 1702), <https://hdl.handle.net/2027/mdp.39015062365013?urlappend=%3Bseq=247>; see also Letter from Governor Winthrop to Governor Bradford, Nat’l Archives (Feb. 16, 1767), <https://founders.archives.gov/documents/Adams/06-01-02-0067-0012> [<https://perma-cc/2SJE-D5PA>] (“Suppose . . . members . . . purchased the votes of the electors by bribery.”).

⁵⁶ See Drake, *supra* note 55, at 209.

⁵⁷ See 1 Charles Johnstone, *The Reverie: Or, a Flight to the Paradise of Fools* 9 (1763), <https://hdl.handle.net/2027/uc1.31175035193765?urlappend=%3Bseq=33>.

Electors in the most absolute manner.”⁵⁸ “[C]orrupt electors” were known to include a special word or mark on their “ballot” to prove during the count that they had given their “vote” as promised.⁵⁹

Period usage demonstrates that a person could be an “elector” casting a “vote” with a “ballot” even when bound or coerced. This is true in both objectionable circumstances, such as bribery, and unobjectionable ones, such as proxies. Two descriptions of elections that predate the adoption of the Constitution illustrate thin usage that does not involve electors exercising their free will. One is from John Rutledge, Jr., to Thomas Jefferson:

[A]t a meeting of the people, it was moved that instructions should be given to the electors “to vote for Mr. de Mirabeau” but being informed by his friends that it would be less flattering and honorable to be in this manner elected than by the free will of the voters the motion was withdrawn.⁶⁰

The other is a description of college electors⁶¹ bound by statutes and oath to elect only presidents who had specified qualifications.⁶² The King of England sometimes commanded them to elect a particular candidate; they complied when the candidate had those qualifications but refused when one did not, explaining:

As to their former practice, when they have elected in obedience to the king’s letter heretofore, it has been always in such cases where the persons recommended have been every way qualified for the office by their statutes: in which cases they always have been, and ever will be,

⁵⁸ Letter from Ulster Volunteer Corps Comm. of Correspondence to Benjamin Franklin, Nat’l Archives (July 19, 1783), <https://founders.archives.gov/documents/Franklin/01-40-02-0203> [<https://perma.cc/93M9-7Y48>].

⁵⁹ John Cartwright, *The People’s Barrier Against Undue Influence and Corruption: Or the Commons’ House of Parliament According to the Constitution* 120 (2d ed. 1780).

⁶⁰ Letter from John Rutledge, Jr., to Thomas Jefferson, Nat’l Archives (Apr. 3, 1789), <https://founders.archives.gov/documents/Jefferson/01-15-02-0019> [<https://perma.cc/DSY6-ZZVU>].

⁶¹ See *Magdalen College and King James II, 1686–1688*, at 36 (Rev. J.R. Bloxam ed., 1886), <https://hdl.handle.net/2027/uiug.30112085280698?urlappend=%3Bseq=92> (voted in accordance with his judgment of who was better qualified, “according to the oath I had then newly taken, as a Senior Fellow, and a new Elector”).

⁶² See Abel Boyer, *The History of King William the Third 107–08* (1702), <https://hdl.handle.net/2027/mdp.39015021305126?urlappend=%3Bseq=269>.

ready to comply with his majesty's pleasure; it not being without unspeakable regret, that they disobey the least of his commands.⁶³

Consequently, the electors “did most humbly pray his majesty to leave them to a free election, or recommend such a person to them as was capable by their statutes.”⁶⁴

There is nothing in the meanings of the words “elector,” “vote,” or “ballot” that precludes a state from either leaving its Electors to a free election or binding them to vote for a qualified candidate chosen in a popular vote.

C. (In)Consistent Usage in the Constitution

The Tenth Circuit's analogy to individual electors is unpersuasive. Meaning depends on context, which includes underlying constitutional principles.⁶⁵ But context is controversial, is frequently disputed, and prevents the non-normative identification of constitutional “meanings” as historical facts. As a delegate to the New York ratifying convention later noted in a debate over the Appointments Clause, people “are not only apt to draw different inferences from the same circumstances, but will differ as to the circumstances themselves.”⁶⁶ Indeed, the Supreme Court has rejected analogies between voting by Electors and voting by individual electors because their contexts differ.⁶⁷

In addition, the Supreme Court precedents like *Powell v. McCormack* that recognize House elector independence rely on a fundamental underlying principle of representative democracy,⁶⁸ not the definition of the word “elector.” That same principle of representative democracy might support a state's power to bind Electors to the result of the popular vote. Individual electors differ significantly from Electors. Individual electors have the right not to vote,⁶⁹ consistent with an underlying theory

⁶³ 12 T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, at 7 (1816).

⁶⁴ *Id.* at 3.

⁶⁵ Cf. Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 *Ga. L. Rev.* 1, 9 (2017) (considering five top-tier constitutional values to determine the constitutional meaning of “emoluments”).

⁶⁶ *Proceedings of the Legislature*, *supra* note 33, at 170.

⁶⁷ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 574–75 (1964).

⁶⁸ See, e.g., *Baca v. Colo. Dep't of State*, 935 F.3d 887, 945–46 (10th Cir. 2019) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

⁶⁹ See, e.g., *Philadelphia*, Jan. 8, *supra* note 45 (asserting that the system of choosing Electors statewide rather than from local districts “subjected many citizens either to the

of representative democracy that suffrage is a personal right.⁷⁰ The Constitution requires Electors to vote,⁷¹ and states have long mandated their voting and sanctioned unexcused dereliction.⁷² This is consistent with a competing theory of representative democracy in which voting is a duty that the state can impose and regulate,⁷³ consistent with the non-Hamiltonian view of Electors discussed above.

The Electoral Clauses illustrate the inconsistency of constitutional usage. They specify both that states “shall appoint” Electors⁷⁴ and that Electors “shall . . . vote” for President and Vice President.⁷⁵ Yet some interpret the word “shall” as permissive for states although imperative for Electors.⁷⁶ Others, however, interpreted “shall appoint” as imperative in the early years of the Republic. A group of Federal Republicans described appointment as a “high constitutional obligation.”⁷⁷ Pennsylvania Governor Thomas McKean, a signer of the Declaration of Independence and former president of the Continental Congress, called appointment “a solemn obligation to our sister states . . . that must, at all events, be performed,” with any failure representing “the virtual secession of” the state and “a vital stab to the Union.”⁷⁸

necessity of voting for men wholly unknown to them, of giving an unavailing vote, or waving their right of suffrage”); see also Legislative Acts, Country J., July 11, 1787, at 1 (allowing each elector to vote for all of the county’s allocated seats in the state Assembly or “so many of them as such elector shall think proper to vote for”).

⁷⁰ See, e.g., Int’l Inst. for Democracy & Electoral Assistance, Compulsory Voting [hereinafter “IDEA”], <https://www.idea.int/data-tools/data/voter-turnout/compulsory-voting> [<https://perma.cc/S6NG-7L8V>] (“Most democratic governments consider participating in national elections a right of citizenship.”).

⁷¹ See U.S. Const. amend. XII.

⁷² See *infra* note 116.

⁷³ See, e.g., IDEA, *supra* note 70 (“In some countries, where voting is considered a duty, voting at elections has been made compulsory and has been regulated in the national constitutions and electoral laws. Some countries go as far as to impose sanctions on non-voters.”).

⁷⁴ U.S. Const. art. II, § 1, cl. 2.

⁷⁵ *Id.* amend. XII.

⁷⁶ See, e.g., McKnight, *supra* note 13, at 44 (permissive for states); *infra* note 116 (imperative for Electors).

⁷⁷ Federal Meeting, Pa. Gazette, Nov. 12, 1800, <https://www.accessible-archives.com/collections/the-pennsylvania-gazette/> [<https://perma.cc/4WUT-86QL>] (follow “Browse” hyperlink; then select relevant issue) (statement of a meeting of Federal Republicans).

⁷⁸ Lancaster, November 14, Pa. Gazette, Nov. 19, 1800, <https://www.accessible-archives.com/collections/the-pennsylvania-gazette/> [<https://perma.cc/4WUT-86QL>] (follow “Browse” hyperlink; then select relevant issue).

The Fourteenth Amendment protects “the right to vote at any election for” Electors, members of Congress, and other specified positions.⁷⁹ However, some assert that the right to vote for Electors is merely a contingent one that exists only if the state legislature chooses to allow a popular election.⁸⁰

Two other words that are critical to the Electoral Clauses, “State” and “Legislature,” also have different usages within the Constitution and have given rise to conflicting interpretations of those Clauses.⁸¹ The word “State” can refer to a body politic, a geographic area of a body politic, or the sovereign group of people who make up a body politic.⁸² In the context of the Appointments Clause, some have argued that the word “State” means the body politic rather than the people,⁸³ in part because whenever the Constitution gives power to the people, it does so expressly.⁸⁴ Under this interpretation, the Constitution allows the legislature to authorize itself, the people, the governor, or anyone else—even non-citizens—to appoint the state’s Electors. Others have argued that the word means the people as a sovereign group⁸⁵ because the right of choosing Electors is an inherent power of the people that they never delegated to the legislature⁸⁶ and because the “oracular” Alexander Hamilton said that the people would choose Electors, relying on the same text from *The Federalist Papers* that the *Baca* court does in its opinion.⁸⁷ Under this interpretation,

⁷⁹ U.S. Const. amend. XIV.

⁸⁰ See *McPherson v. Blacker*, 146 U.S. 1, 39 (1892). One could argue that the Twenty-Sixth Amendment created a popular right to vote for Electors. The Court’s reasoning in *McPherson* militates against that argument.

⁸¹ See, e.g., *McKnight*, supra note 13, at 39–44 (discussing the meaning of the term “State”); see also infra notes 95–98 and accompanying text (discussing the meaning of the term “Legislature”).

⁸² See, e.g., *Boston*, June 7, Pa. Gazette, June 18, 1800, <https://www.accessible-archives.com/collections/the-pennsylvania-gazette/> [<https://perma.cc/4WUT-86QL>] (follow “Browse” hyperlink; then select relevant issue); see also *Texas v. White*, 74 U.S. 700, 720 (1869) (discussing various possible definitions of “State”).

⁸³ See, e.g., *Important Debate*, supra note 35, at 1; see also *Boston*, June 7, supra note 82 (describing the argument that the word “State” for purposes of appointing Electors is best understood to refer to the body politic).

⁸⁴ See *Important Debate*, supra note 35, at 1.

⁸⁵ See, e.g., *Important Debate*, supra note 35, at 1; see also *Albany*, November 19, N.Y. J. & Patriotic Reg., Nov. 30, 1799, at 4 (pointing to the problems with defining “State” as the legislature); *Boston*, June 7, supra note 82 (arguing “State” means body politic in the context of appointing Electors).

⁸⁶ See *Boston*, June 7, supra note 82.

⁸⁷ See *Albany*, November 19, supra note 85, at 4.

only the people can appoint Electors. The legislature can only determine the manner in which the people choose.

Yet others have acknowledged that the word is unclear in context and have argued for a default rule that all government power, including the power to appoint Electors, should reside in the people where the Constitution is unclear.⁸⁸

The Supreme Court rejected a descriptively and prescriptively thick meaning of “State” in *McPherson v. Blacker*.⁸⁹ The appellants argued that “State” means a sovereign political corporation with a full range of judicial, military, and other powers, a sovereign “greater almost than the United States.”⁹⁰ Therefore, the clause “[e]ach State shall appoint . . . a Number of Electors”⁹¹ prescribes that the State as a whole must appoint all of its Electors. The legislature cannot cut up the state’s sovereign power and “divide it among . . . disjointed fractions of the territory of the State, each of which shall choose one elector.”⁹² The Supreme Court rejected this thick meaning of “State” with its implicit set of substantive constitutional rights and powers. The Court found that in this context the Constitution uses the word “State” in an ordinary sense and that a “State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established.”⁹³ Consequently, state legislatures are free to prescribe any manner of appointing Electors, including by districts.⁹⁴

The word “Legislature” may refer to a state’s lawmaking procedure,⁹⁵ to the people as a whole,⁹⁶ or to a distinct representative body.⁹⁷ As it regards a representative body, the word might refer to a body constrained by fundamental state law (including the state constitution, executive veto, and judicial review) or to a radically independent body unconstrained by

⁸⁸ See New York, Friday November 28, 1800, Republican Watch-Tower, Nov. 29, 1800, at 2.

⁸⁹ 146 U.S. 1 (1892).

⁹⁰ *Id.* at 10–11.

⁹¹ U.S. Const. art. II, § 1, cl. 2.

⁹² *McPherson*, 146 U.S. at 11.

⁹³ *Id.* at 25.

⁹⁴ See *id.* at 35–36.

⁹⁵ See Kirby, *supra* note 36, at 502.

⁹⁶ See Michael McLaughlin, Note, Direct Democracy and the Electoral College: Can a Popular Initiative Change How a State Appoints Its Electors?, 76 Fordham L. Rev. 2943, 2966 (2008).

⁹⁷ See Kirby, *supra* note 36, at 502.

any state law or authority.⁹⁸ Historically, some have argued that “Legislature” means both branches with their usual powers, including each branch’s power to reject the other’s proposals.⁹⁹ Others have claimed that the Appointments Clause permits a joint ballot.¹⁰⁰

Some commentators have believed that state law governed the question. One, for example, asserted that the Federal Constitution was unclear, so by default the state constitution should determine whether a joint ballot was allowed or concurrence required: “It was useless to say that the Legislature were to direct the manner, if the [federal] constitution had already prescribed it, and left no alternative.”¹⁰¹ Some Supreme Court Justices have argued, however, that the use of the term “Legislature” in the Appointments Clause prescribes some degree of freedom for the legislature from state law and from other branches of state government when choosing the manner of appointing Electors.¹⁰²

History and semantics cannot resolve disputes over the consistency or inconsistency of constitutional usage. Nor can they determine whether to impute a prescriptively thick meaning to a word within the Electoral Clauses or, as in the case of *McPherson* and “State,” not to impute one.

D. Contrast to the “Take Care” Clause

The Tenth Circuit’s contrast to the President’s obligation to “take care” is also unconvincing. The Constitution allows Congress to delegate the power to appoint inferior officers to the judiciary and department heads without imposing on them an express duty to take care to perform their functions faithfully.¹⁰³ Yet their power to appoint includes the power to

⁹⁸ See *id.* at 502–03.

⁹⁹ See New York, Saturday November 8, 1806, *Spectator*, Nov. 12, 1800, at 3; see also *Proceedings of the Legislature*, *supra* note 33, at 170 (statement of Harison).

¹⁰⁰ See, e.g., *Important Debate*, *supra* note 35, at 1.

¹⁰¹ Pennsylvania Legislature, in Senate, Friday, November 14, Pa. Gazette, Nov. 26, 1800, <https://www.accessible-archives.com/collections/the-pennsylvania-gazette/> [<https://perma.cc/4WUT-86QL>] (follow “Browse” hyperlink; then select relevant issue).

¹⁰² See Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. U. L. Rev. 731, 733–36 (2001) (discussing the Supreme Court’s rulings on the disputed Florida vote count in the 2000 presidential election). Smith details the history of lower court decisions on legislative independence in a variety of constitutional contexts.

¹⁰³ See U.S. Const. art. II, § 2, cl. 2.

remove.¹⁰⁴ In the late eighteenth century, other general powers to appoint also included an implicit power to revoke.¹⁰⁵

In addition, the absence of an express obligation to take care does not forbid states to take care. Under the competing constitutional history described above, states should take care that Electors perform their function. And states have done so from the beginning of the Republic by establishing Elector qualifications, regulating Electors, and regulating the treatment of Electors.

Some states limited eligibility to freeholders.¹⁰⁶ Some imposed minimum residency requirements.¹⁰⁷ Tennessee required three years of residence immediately prior to selection and eligibility to the General Assembly.¹⁰⁸ New York excluded members of the state legislature.¹⁰⁹

These period practices are notable for two reasons. First, a residency requirement substantively limits an Elector's discretion when voting for

¹⁰⁴ See *United States v. Allred*, 155 U.S. 591, 594 (1895) (court commissioner); see also *In re Hennen*, 38 U.S. 230, 258–59 (1839) (judicial clerk). Both cases are cited in *Petition for Writ of Certiorari at 21*, *Colo. Dep't of State v. Baca*, No. 19-518 (Oct. 16, 2019).

¹⁰⁵ See, e.g., John Joseph Powell, *An Essay on the Learning Respecting the Creation and Execution of Powers* 287–88 (2d ed. 1791), <https://hdl.handle.net/2027/nyp.334330084-79796?urlappend=%3Bseq=317> (summarizing property case law: “A power of appointment includes in itself a right to appoint either absolutely, or *with a power of revocation*, although *no express* power of revocation be reserved in the deed creating the power of appointment.”).

¹⁰⁶ See, e.g., *An Act for the Appointment of Electors to Choose a President Pursuant to the Constitution of Government for the United States, Virginia, Acts of 1788*, ch. 1, pa. 1, § 2 (1788) [hereinafter “Virginia Act”], <https://hdl.handle.net/2027/hvd.hxh5uh?urlappend=%3Bseq=279> (limitation to “some discreet and proper person, being a freeholder, and bona fide resident in such district for twelve months”); see also *An Act Relative to the Appointment of Electors to Vote for a President and Vice-President of the United States, The Acts of the General Assembly of the State of North-Carolina*, ch. 16, § 1 (1792) [hereinafter “North Carolina Act”], <https://hdl.handle.net/2027/mdp.35112203943248?urlappend=%3Bseq=58> (limitation to “discreet and sober person, being a freeholder and actually resident within the district for which he shall be elected”).

¹⁰⁷ See, e.g., *supra* note 106; see also Frank Fletcher Stephens, *The Transitional Period, 1788–1789, in the Government of the United States* 71 (1909), <https://hdl.handle.net/2027/uc1.c2774348?urlappend=%3Bseq=83> (New Hampshire limitation to state inhabitants); *id.* at 72 (Massachusetts limitation to inhabitants of districts from which elected).

¹⁰⁸ See *An Act to Appoint Electors to Elect a Pr[e]sident and Vice-President of the United States, Tennessee*, ch. 46, §§ 3–4 (1799) [hereinafter “Tennessee Act of 1799”]; see also *An Act Providing for the Election of Electors to Elect a President and Vice-President of the United States, Tennessee*, ch. 4, §§ 4–5 (1796) [hereinafter “Tennessee Act of 1796”] (including an alternative residency qualification for anyone “who was a resident of the district at the time of making the constitution”).

¹⁰⁹ See *Albany*, November 26, *Albany Reg.*, Nov. 26, 1792, at 2 (in an election for which the legislature appointed the state's Electors).

the President and Vice President. Only nonresident Electors¹¹⁰ may cast both of their ballots for residents of an appointing state.¹¹¹ Second, the Constitution does not impose any eligibility requirements for Electors other than excluding Senators, Representatives, and holders of certain federal offices.¹¹² That omission might be interpreted to prohibit any other eligibility requirements.¹¹³ The Constitution might grant a right of eligibility to everyone else—even British prime ministers.¹¹⁴ However, historical practice shows that many understood the Constitution to allow states the power to limit eligibility. This practice is consistent with an interpretation that states have inherent substantive powers over Electors, not merely formal power over the manner of their appointment.

States have also used more direct measures to take care that Electors perform their function. The Appointments Clause provides that Electors “shall . . . vote” for President and Vice President,¹¹⁵ and some states have required Electors to vote and sanctioned those who failed to do so without an enumerated excuse.¹¹⁶ Some states granted Electors some or all privileges of state legislators during their service and paid them for their

¹¹⁰ In 1800, a member of the New York Assembly opposed allowing voters to choose Electors from outside the state merely because they “think that men of more wisdom might be got there than here.” Important Debate, *supra* note 35, at 1 (statement of Jedediah Peck).

¹¹¹ See U.S. Const. amend. XII (“Electors . . . vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves”); cf. U.S. Const. art. II, § 1, cl. 3 (repealed 1804) (“Electors . . . vote . . . for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves.”).

¹¹² See U.S. Const. art. II, § 1.

¹¹³ The *Baca* court acknowledged but did not reach the argument that a statute binding Electors “unconstitutionally adds new requirements for . . . holding the office of elector” under the reasoning in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995) (finding that the Constitution forbids states to add congressional qualifications beyond explicitly enumerated ones). *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 938–39 n.20 (10th Cir. 2019).

¹¹⁴ Cf. Important Debate, *supra* note 35, at 1 (New York Assembly member Jedediah Peck asserting that the doctrine of popular sovereignty that justifies giving voters the right to choose Electors from outside of their local districts would allow them “the privilege of choosing Billy Pitt, or any other European,” referring to then-Prime Minister William Pitt, the Younger). Only Maine and Nebraska choose Electors by local districts today. See Nat’l Archives, Distribution of Electoral Votes (Dec. 23, 2019), <https://www.archives.gov/electoral-college/allocation> [<https://perma.cc/VF8G-8LS5>].

¹¹⁵ U.S. Const. amend. XII.

¹¹⁶ See Amicus Curiae Brief of Derek T. Muller in Support of Neither Party at 14–15, *Baca v. Colo. Dep’t of State*, 935 F.3d 887 (10th Cir. 2019) (No. 18-1173) [hereinafter “Muller”] (citing statutes from Virginia in 1788 and Kentucky in 1799); see also North Carolina Act, *supra* note 106, at § 4 (two hundred pound fine for “failing to attend and vote” absent sickness or unavoidable accident).

time and expenses.¹¹⁷ Tennessee required Electors to swear an oath to support the state and federal constitutions.¹¹⁸ This takes care that Electors faithfully perform their obligations and suggests that a state statute may lawfully bind Electors. The obligation to uphold the state constitution likely includes the obligation to follow statutes enacted pursuant to it, including statutes binding Electors to their pledge.

E. Structure

The court's structural argument is also unconvincing. States have appointed alternate Electors since early presidential elections¹¹⁹ without express constitutional authorization and without exceeding their constitutionally allocated number of Electors. An early Tennessee statute, for example, provided that if any Elector "shall die, or refuse to act, the governor shall appoint some person in his stead."¹²⁰

The Constitution's text does not expressly forbid states to interfere with an Elector's discretion, and underlying constitutional principles of representative democracy and the relationship between states and Electors might support such a power. As described above, in early presidential elections, some states required Electors to vote, sanctioned those who failed to do so without an enumerated excuse, and required Electors to support the state and federal constitutions.

The Tenth Circuit's argument is similar to one that the Supreme Court rejected in *McPherson*. The respondents argued that the Supreme Court had no jurisdiction to review the constitutionality of a state legislature's chosen manner of appointing Electors because each step in the electoral process under state law and the Federal Constitution was assigned to another specific body, culminating with Congress.¹²¹ The Supreme Court responded that it has judicial power extending to all cases arising under

¹¹⁷ See, e.g., North Carolina Act, *supra* note 106, at § 5 (granting Electors the same privileges as members of the General Assembly and paying for their time and expenses); Tennessee Act of 1796, *supra* note 108, at § 8 (paying for time and expenses); Virginia Act, *supra* note 106, at § 9 (granting the same privilege from arrest as members of the general assembly and paying for time and expenses).

¹¹⁸ See Tennessee Act of 1796, *supra* note 108, at § 9; see also Tennessee Act of 1799, *supra* note 108, at § 8 ("[E]lectors . . . shall take an oath to support the constitution of the United States, and also the constitution of this state . . .").

¹¹⁹ See, e.g., Muller, *supra* note 116, at 13.

¹²⁰ See An Act Providing for the Appointment of Electors to Elect a President and Vice-President of the United States, Tennessee, ch. 11, § 2 (1796).

¹²¹ See *McPherson v. Blacker*, 146 U.S. 1, 21–22 (1892).

the Constitution and can issue mandamus to carry its power into effect.¹²² The Constitution may not expressly grant the Court any step in the process, but underlying principles of judicial authority still apply.

Moreover, the Constitution gives Congress even less expansive powers over the electoral vote,¹²³ yet Congress has assumed greater ones.¹²⁴ In particular, Congress has added steps subsequent to the counting of the Electors' votes and the announcement of the result. Members of Congress can raise objections, after which both houses can consider the objections and together reject a state's electoral votes.¹²⁵ This is true even though many members of the Philadelphia Convention rejected giving Congress any role in selecting the President,¹²⁶ the Founding generation failed to agree on legislation to give Congress a role,¹²⁷ and the Supreme Court has held that "[t]he only rights and duties, expressly vested by the Constitution in the national government, with regard to the appointment or votes of presidential electors," are to determine the time for choosing electors and the day on which they vote, and to open and count the votes in Congress.¹²⁸ Charles Cotesworth Pinckney, for example, insisted that state legislatures retain complete control over electoral disputes,¹²⁹ recognizing continuing state power long after the Electors' appointment.

Finally, the federal government has invaded the express power of state legislatures to determine the manner of appointing Electors. Congress has required states to accept absentee ballots and prescribed the form of those

¹²² See *id.* at 23–24.

¹²³ See U.S. Const. art. II, § 1, cl. 4 (“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.”); *id.* amend. XII (counting votes of Electors).

¹²⁴ See, e.g., C.C. Tansill, *Congressional Control of the Electoral System*, 34 *Yale L.J.* 511, 516–25 (1925).

¹²⁵ See 3 U.S.C. § 15 (2012).

¹²⁶ See, e.g., Tansill, *supra* note 124, at 517–18 (statements of Charles Cotesworth Pinckney); see also McKnight, *supra* note 13, at 30–32 (statements by Pinckney and others who attended the Convention); cf. Lemuel Sawyer, *A Biography of John Randolph, of Roanoke* 78 (1844), <https://hdl.handle.net/2027/loc.ark:/13960/t0ft90p2f?urlappend=%3B-seq=82> (Rep. John Randolph in a later debate insisting that he “could not recognize in this House, or the other, singly or conjointly, the power to decide on the votes of any State” because the “electoral college was as independent of Congress as Congress was of them; and we have no right to judge of their proceedings”).

¹²⁷ See Tansill, *supra* note 124, at 517–19.

¹²⁸ *In re Green*, 134 U.S. 377, 379 (1890).

¹²⁹ See Tansill, *supra* note 124, at 518.

ballots.¹³⁰ Congress has forbidden non-citizens to be Electors,¹³¹ to vote for Electors,¹³² and to make expenditures to influence federal elections.¹³³ This is true even though state legislatures authorized non-citizens to vote in early presidential elections,¹³⁴ it was understood that the principle of popular sovereignty allowed voters to choose non-citizens as Electors,¹³⁵ and the Constitution expressly excludes only Senators, Representatives, and those holding offices of profit or trust under the United States from the position.¹³⁶

States might find it appropriate to allow non-citizens who pay income or property taxes to vote for Electors under the principle of no taxation without representation. States might also find it appropriate to allow any non-citizen to fund voter education in presidential elections in order to encourage informed voting. What might justify federal intrusion on the express state power to determine the manner of appointing its Electors? Perhaps an underlying principal of democratic self-government cited in *Bluman v. Federal Election Commission*,¹³⁷ which might also justify state power to bind Electors to the result of the popular vote.

Neither the federal nor state governments interpret the scant express terms of the Electoral Clauses as exhausting their powers over Electors.

¹³⁰ See 52 U.S.C. § 20303(a)(1) (2012) (generally); *id.* § 20303(c)(2) (absentee write-in ballots for President and Vice President count whether they include the name of the candidate or the name of a party).

¹³¹ See 18 U.S.C. § 611(a) (2012) (“It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President . . .”).

¹³² See *id.* (“It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a . . . Presidential elector . . .”).

¹³³ See, e.g., *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 292 (D.D.C. 2011) (upholding the prohibition), summarily aff’d, 565 U.S. 1104 (2012).

¹³⁴ See, e.g., Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1420 (1993); see also 71 Cong. Rec. 2270 (1929), <https://hdl.handle.net/2027/uc1.10073613093?urlappend=%3Bseq=1114> (Rep. Lea describing the historical practice and noting that in 1918, seven states still allowed non-citizens to vote for President); cf. Cong. Globe, 30th Cong., 1st Sess. 167 (1848), <https://hdl.handle.net/2027/mdp.39015020131085?urlappend=%3Bseq=167> (Rep. Levin criticizing the practice as a threat to republican government).

¹³⁵ See Important Debate, *supra* note 35, at 1 (statement of Jedediah Peck). Peck recognized that a principle that allowed voters to choose Electors from outside of their local districts would also allow them to choose non-citizens. He opposed both applications of the principle. See *id.* Nonetheless, states today routinely allow voters to choose Electors from outside of their local districts. See *supra* note 114.

¹³⁶ See U.S. Const. art. II, § 1.

¹³⁷ 800 F. Supp. 2d at 288.

Background constitutional principles permit greater powers, perhaps including state power to bind Electors to the result of a popular vote. But these background principles were contested at the adoption of the Electoral Clauses and remain contested today, particularly those governing the relative powers of the people and of the federal and state governments.

IV. OBJECTIONS TO ASCRIBING THICK MEANINGS

Permitting appeals to thick meanings leads to many interpretive difficulties. It is debatable whether to interpret many broad constitutional concepts, such as freedom of speech, “thickly to include specific examples of the concept or thinly to define only the concept itself.”¹³⁸ It is also debatable whether an appeal to thick meanings is a ruse to import the interpreter’s personal conceptions or to restrict interpretations to conservative conceptions prevailing at the adoption of the Constitution.¹³⁹

What if constitutional terms have thick meanings that no one can satisfy today? The Constitution limits presidential eligibility to natural born citizens.¹⁴⁰ At adoption, natural born citizens had extensive legal advantages over non-citizens,¹⁴¹ based on a theory of personal loyalty.¹⁴² Many of those advantages have been eliminated.¹⁴³ If the Constitution incorporates a descriptively thick meaning of the term that includes all of those advantages, then no one is eligible to the presidency today.

Prescriptively thick meanings create even greater problems. Does “natural born citizen” have a prescriptively thick meaning that mandates retaining all of the advantages that existed in 1789? If so, all laws that

¹³⁸ Lawrence M. Solan, Can Corpus Linguistics Help Make Originalism Scientific?, 126 *Yale L.J.F.* 57, 57 (2016).

¹³⁹ Cf. Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 *Nw. U. L. Rev.* 1243, 1270 (2019) (denying “that *originalism* is a thick ideological concept” but acknowledging that many conservatives might sell “‘originalism’ to their base on the basis that it leads to conservative results”).

¹⁴⁰ U.S. Const. art. II, § 1, cl. 5.

¹⁴¹ These typically included limitations on non-citizens holding real property and preconditions to naturalized persons exercising electoral rights under state law. See, e.g., 12 *Debates in the House of Representatives, Second Session: January–March 1790*, in *Documentary History of the First Federal Congress of the United States of America*, 4 March 1789–3 March 1791, at 162–63, 167, 497 (Helen E. Veit et al. eds., 1994).

¹⁴² See, e.g., *Calvin v. Smith* (1608) 77 *Eng. Rep.* 377, 399.

¹⁴³ See, e.g., Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 *Minn. L. Rev.* 621, 624 (1976) (historical relaxation of restrictions on non-citizen ownership of real property in the United States).

eliminated those advantages are unconstitutional. Both the state and federal governments must restore the status quo from 1789.

The Constitution provides that voters for the House of Representatives must meet the same eligibility requirements as those to vote for “the most numerous Branch of the State Legislature.”¹⁴⁴ Is the term “most numerous” prescriptively thick, requiring states to have multicameral legislatures? If so, are Nebraska’s electoral votes invalid because its Electors are appointed under provisions enacted by a unicameral legislature?

If words like “Elector” prescribe freedom from state control, do they also prescribe freedom from federal control? Do they prescribe complete freedom in voting, including freedom to vote as promised when bribed? Eighteenth-century electors routinely accepted bribes.¹⁴⁵

A nineteenth-century commentator argued that the Appointments Clause gives states the untrammelled power to appoint villains¹⁴⁶ and requires Congress to count the vote of a known-bribed Elector,¹⁴⁷ “not because it is an honest vote, but solely because it is a vote.”¹⁴⁸ If instead some underlying principle allows limits on bribed Electors’ freedom to vote as they choose, why cannot it or another underlying principle allow states or the federal government to bind Electors to the result of the popular vote in their appointing state?

How do we determine which potential prescriptively thick meanings to incorporate? Rob Natelson argues that Electors are free to vote as they please because a process under the 1776 Maryland Constitution utilized electors, the constitution required those electors to swear that they would vote freely, and therefore the public would have expected Electors to vote freely.¹⁴⁹ But the Maryland Constitution also required the electors to vote

¹⁴⁴ U.S. Const. art. I, § 2, cl. 1.

¹⁴⁵ See, e.g., *supra* note 55; see also Letter from Benjamin Franklin to William Franklin: Journal of Negotiations in London, Nat’l Archives (Mar. 22, 1775), <https://founders.archives.gov/documents/Franklin/01-21-02-0306> [<https://perma.cc/EW3Q-YWU4>] (“For the *elected* House of Commons is no better, nor ever will be while the Electors receive Money for their Votes, and pay Money where with Ministers may bribe their Representatives when chosen.”).

¹⁴⁶ See McKnight, *supra* note 13, at 119.

¹⁴⁷ See *id.* at 120.

¹⁴⁸ *Id.*

¹⁴⁹ See Rob Natelson, Presidential Elector Discretion: The Originalist Evidence, Independence Inst. (Jan. 4, 2018), <https://i2i.org/presidential-elector-discretion-originalist-evidence/> [<https://perma.cc/V472-LNPJ>].

only for “men of the most wisdom, experience and virtue.”¹⁵⁰ Would the public have expected Electors to follow this requirement also, thus incorporating it into a prescriptively thick meaning of “Elector” and invalidating the election of many American Presidents? One commentator suggested that the Founders were “a shade too lax” in omitting such a requirement from the Constitution.¹⁵¹ Perhaps they were also a shade too lax in omitting express authorization for Electors to vote as they please, leaving states free to bind Electors to the result of a popular vote.

In addition, the Constitution lacks any oaths for Electors despite requiring them for other purposes, including for Senators when sitting in impeachments.¹⁵² Does the Constitution’s silence implicitly import the substance of the Maryland oath or exclude it under the principle *expressio unius est exclusio alterius*? The Articles of Confederation provided for state delegates to be “appointed in such manner as the legislature of each State shall direct . . . with a power reserved to each State[] to recall its delegates . . . and to send others in their stead.”¹⁵³ Does the state’s similarly phrased power to appoint Electors “in such Manner as the Legislature thereof may direct”¹⁵⁴ import a substantive recall power because the public would have expected one given confederation history? Or does the Constitution’s silence on the point exclude that power? All of this is irrelevant speculation. As the Supreme Court has ruled, historical expectations cannot alter constitutional rights.¹⁵⁵

Finally, the Supreme Court rebuffed an argument similar to Natelson’s in *McPherson*. The appellants noted that laws in force in every state at the adoption of the Fourteenth Amendment gave males the right to vote for Electors. Consequently, they argued, the Amendment’s protection of the

¹⁵⁰ Md. Const. of 1776, art. XV.

¹⁵¹ McKnight, *supra* note 13, at 112. McKnight also notes that the Maryland Constitution separately required voters to choose Electors from among only “the most wise, sensible, and discreet of the people.” *Id.* at 111–12. If a prescriptively thick meaning of “Elector” incorporates this rule, it would likely have invalidated the appointment and votes of many historical Electors. McKnight also lamented that the Founders were “a shade too lax in omitting” this separate requirement from the Federal Constitution as well. *Id.* at 112; cf. Md. Const. of 1776, art. XIV (prerequisites for electors by cross reference to article II of the Maryland Constitution). Does the failure to include this requirement in the Electoral Clauses negate the Hamiltonian theory of wise Electors voting independently?

¹⁵² See U.S. Const. art. I, § 3, cl. 6; see also *id.* art. II, § 1, cl. 8 (oath of President); *id.* art. VI, cl. 3 (oath of Senators, Representatives, members of state legislatures, and all federal and state executive and judicial officers).

¹⁵³ Articles of Confederation of 1781, art. V, para. 1.

¹⁵⁴ U.S. Const. art. II, § 1, cl. 2.

¹⁵⁵ See *supra* note 48 and accompanying text.

“right to vote at an election for the choice of electors of President and Vice President” incorporated a substantive right to a popular vote for Electors thereafter.¹⁵⁶ The Court rejected the argument, finding that the Amendment only protects the right to vote for Electors if the state legislature allows a popular vote.¹⁵⁷

Many laws governed elections at the Founding. No appeal to history or semantics can demonstrate that the Electoral Clauses incorporate the rules of one but not the others. Non-originalist interpretive theories, on the other hand, forthrightly embrace norms like the *Powell v. McCormack* Court’s principle of representative democracy to resolve interpretive disputes like these.¹⁵⁸

CONCLUSION

The Tenth Circuit’s analysis in *Baca* does not resolve the dispute over Elector independence in any historically determined way. It unites selective readings of incomplete linguistic, historical, and judicial materials by applying background political principles that were contested at the adoption of the Constitution and remain contested today. Contrary constitutional history, practice, and underlying principles support state power over Electors long after their appointment, perhaps including the power to bind them to the result of a popular vote.

The Supreme Court should reject the Tenth Circuit’s reasoning and its conclusion that the state’s power ends with the appointment of Electors. The Court should develop a coherent theory of the relationship of the people, the states, and the federal government in the presidential electoral process. In doing so, it might consider the following questions.

Non-Bribed Electors

Are Electors radically free to vote as they choose, free from any state or federal influence or sanction?

¹⁵⁶ *McPherson v. Blacker*, 146 U.S. 1, 17 (1892).

¹⁵⁷ See *id.* at 38–39.

¹⁵⁸ Cf. Christopher R. Green, “This Constitution”: Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 *Notre Dame L. Rev.* 1607, 1617 n.21 (2009) (evaluating theories that utilize non-originalist modes of constitutional discourse such as prudence and ethics).

Can Electors refuse to vote despite the constitutional requirement that they shall vote?¹⁵⁹ Can Electors cast a blank ballot or a knowingly invalid ballot (such as for a person who has not attained the age of thirty-five)?¹⁶⁰

If they can, do such Electors count as “appointed” for purposes of calculating the majority of appointed Electors required to win the presidency?¹⁶¹

If Electors are not radically free, what justifies constraints on their freedom?

Do Electors owe any duties? If so, to whom? To the appointing state? To the people of the appointing state? To the people of the entire nation?¹⁶²

What duties might Electors owe? A duty of good faith in exercising the function of choosing the President? A duty to follow state or federal law, including laws requiring them to vote?

Can states appoint alternate Electors? Under what circumstances may an alternate vote—upon the failure of an Elector to appear, or to vote, or to vote for a qualified candidate?

Can the state call in the alternate in the permitted circumstances even though that is an action that must occur after the appointment of Electors? Or can only the federal government? If the federal government refuses to call in an alternate, such as for political reasons, does the state have any remedy?

Can states punish Electors for their unexcused failure to vote? Can the federal government?

Bribed Electors

Are Electors radically free, even to accept bribes and to vote as promised?

Must Congress count a known-bribed vote?

Can the state and/or Congress replace a known-bribed vote with that of an honest alternate? If so, how late in the process? When Congress considers other objections to votes?

¹⁵⁹ Cf. McKnight, *supra* note 13, at 120–21 (asserting an Elector’s right not to vote).

¹⁶⁰ Cf. *id.* at 73–83 (discussing obviously invalid electoral votes); *id.* at 311 (whether to count electoral votes cast for Horace Greeley despite his death between the 1872 general election and the meeting of the Electors).

¹⁶¹ See U.S. Const. amend. XII.

¹⁶² Cf. *supra* note 78 and accompanying text (Gov. McKean asserting a constitutional obligation to sister states to appoint Electors).

Can the state and/or the federal government punish Electors for accepting bribes, or does that infringe on the Elector's freedom to vote at will?

Can the state and/or the federal government punish those who bribe Electors, or does that infringe on the Elector's freedom to vote at will?

Other Federal Powers

Does Congress have the authority to take any steps after the counting of the electoral votes, such as investigating and judging the validity of those votes?

Does Congress have the authority to forbid non-citizens to vote for Electors, to be Electors, to advocate for the election of candidates, or otherwise to participate in the election of the President and Vice President?

Does Congress have the authority to impose other eligibility requirements for Electors?

Does Congress have the authority to bind Electors to vote for the winner of the appointing state's popular vote or to authorize the state to bind them?

Underlying Principles

If Electors are not radically free to vote at will, what underlying principles govern state powers over them? What underlying principles govern federal powers over them?

Do these principles and the relative authority of states and the federal government turn on whether Electors owe duties to the appointing state, to the people of the appointing state, or to the people of the nation as a whole?

If Congress has the authority to interfere in the manner of appointing Electors, what principles justify that authority? Could those same principles justify state control over Electors, including the power to bind them to the result of a popular vote?

Powell and Bluman

Does the principle of representative democracy in *Powell* differ from the principle of democratic self-government in *Bluman*?¹⁶³ If so, how, and how might the two principles apply to the question of Elector

¹⁶³ See *supra* notes 20 and 137 and accompanying text.

independence? A principle of representative democracy might support giving Electors the same independence as legislators. In that case, state legislatures should take greater care in choosing the manner of appointing Electors, perhaps limiting eligibility to state legislators of the candidate's party.

A principle of democratic self-government might support state power to bind Electors to the result of a popular vote. That principle would not allow states to bind Electors in all circumstances, however. For example, a gerrymandered state legislature controlled by a minority party might attempt to appoint Electors directly and purport to bind them to vote for that party's candidates regardless of the views of the state's voters. A principle of democratic self-government might permit those Electors freedom to vote for the candidates favored by the majority of the state.

This Essay takes no position on how to apply these underlying principles or how to resolve the dispute over Elector independence. It does, however, urge the Court to embrace underlying principles as it did in *Powell* rather than attempt to find a purportedly non-normative, historically accurate, factual, originalist answer to the question, which does not exist.