AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Federalism/State Regulation of Federal Elections

**Baca v. State of Colorado, No. 18-1173 (10th Cir. 2019)**

*When Donald Trump narrowly won the electoral vote on election day in November 2016, a movement soon arose arguing that the presidential electors who were pledged to vote for Trump should instead cast their ballot for someone else when they met in each of the states to cast their official ballots on December 19, 2016. Known as the “Hamilton Electors,” this group of Democratic-pledged electors urged their Republican-pledged colleagues to do what the founders had intended when they created the Electoral College and cast an independent ballot for whatever candidate they thought most fit to hold the office of president. Many states have long had on the books rules to try to discourage such “faithless electors” who broke their pledges, but there were constitutional doubts about those state policies.*

*Michael Baca was one of the most prominent of the Hamilton Electors. He was chosen as a presidential elector in Colorado and was pledged to support the Democratic nominee, Hillary Clinton. As part of his effort to encourage Republican electors to break their pledges, Baca attempted to cast his ballot for John Kasich, the Republican governor of Ohio who was seen as a potential centrist alternative to Donald Trump. The U.S. Constitution specifies that each state will appoint presidential electors in a manner that the state legislature directs. The Colorado legislature directed the electors would be chosen by the voters in the general election from a slate nominated by the state political party conventions. The law further specified that if, when the electors gathered to vote in December, there was a vacancy due to the death or absence of the originally appointed elector or “refusal to act,” a replacement will be immediately appointed by the state secretary of state. When the electors met, the secretary of state required that they take an oath that they would cast their ballot for the candidate who had won the state’s general election (Hillary Clinton). Baca took the oath, but then crossed Clinton’s name off his ballot and wrote in Kasich’s name. The secretary of state declared his ballot void, his office vacant, and appointed a replacement, Celeste Landry, who cast a ballot for Clinton. Baca was not allowed to cast a ballot for vice president (he intended to vote for the Democratic candidate, Tim Kaine), and the secretary of state referred his case to the state attorney general for possible perjury charges.*

*Three Colorado presidential electors, including Baca (the other two cast their ballots for Clinton), filed suit in federal district court seeking a declaration that their federal constitutional rights as presidential electors had been violated. The trial court dismissed the case, and the electors appealed to the federal circuit court. The circuit court reversed that ruling, concluding that states could not prevent faithless electors from casting their ballots once they were duly appointed.*

Judge [McHUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e).

. . . .

. . . . The precise question before this court is whether the states may constitutionally remove a presidential elector during voting and nullify his vote based on the elector’s failure to comply with state law dictating the candidate for whom the elector must vote.

. . . .

*Ray v. Blair*’s (1952) holding is narrow. The Court recognized the states’ plenary power to determine how electors are appointed. It then held this power can include requiring individuals seeking appointment as electors in a party’s primary to take a (potentially unenforceable) pledge to vote for a specific candidate for President or Vice President. But *Ray* does not address restrictions placed on electors after appointment or actions taken against faithless electors who have performed their federal function by voting for a different presidential or vice presidential candidate than those they pledged to support. Indeed, *Ray* does not decide whether pledges taken at any stage of the process can be enforced at all, let alone through removal of an elector and nullification of the elector’s vote.

. . . .

The Department argues that, even if the Constitution is silent on the question, “the power to bind or remove electors is properly reserved to the States under the Tenth Amendment.” The Tenth Amendment states, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Thus, in many instances, silence is properly interpreted as an intent that the relevant power be retained by the states. But that is not true here.

The Supreme Court has instructed that the Tenth Amendment “could only ‘reserve’ that which existed before.” *U.S. Term Limits, Inc. v. Thornton* (1995). Thus, “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.” . . .

The same calculus applies to presidential electors. The Tenth Amendment could not “reserve” to the states the power to remove or bind electors because no such power was held by the states before adoption of the federal Constitution. . . .

[B]ecause the Tenth Amendment could not reserve to the states the power to remove electors or cancel their votes, the states possess such power only if expressly delegated by the Constitution.

. . . .

To be sure, “the state legislature’s power to select the manner for appointing electors is plenary.” . . . The states therefore have broad discretion in the process by which they select their presidential electors. But the question here is not over Colorado’s power to appoint electors; it is whether this appointment power includes the ability to remove electors and cancel already-cast votes after the electors are appointed and begin performing their federal function.

. . . .

[T]he power to remove subordinates in the executive branch derives from the President’s broad executive power and his responsibility to faithfully execute the laws. Unlike the President appointing subordinates in the executive department, states appointing presidential electors are not selecting inferior state officials to assist in carrying out a function for which the state is ultimately responsible. Presidential electors exercise a federal function—not a state function—when casting their ballots. When undertaking that federal function, presidential electors are not executing their appointing power’s function but their own. And unlike the Take Care Clause imposed on the President, neither Article II nor the Twelfth Amendment instructs the states to take care that the electors faithfully perform their federal function. From this we conclude that the states’ power to appoint electors does not include the power to remove them or to nullify their votes.

. . . .

As the text and structure show, the Twelfth Amendment allows no room for the states to interfere with the electors’ exercise of their federal functions. From the moment the electors are appointed, the election process proceeds according to detailed instructions set forth in the Constitution itself. The Twelfth Amendment directs the electors to “name in their [distinct] ballots the person voted for as President . . . [and] Vice-President.” And it demands that the lists of votes certified and delivered to the President of the Senate include “all persons voted for as President, and all persons voted for as Vice-President, and the number of votes for each.” The plain language of the Constitution provides that, once a vote is cast, it must be included in the certified list sent to the President of the Senate. Nowhere in the Twelfth Amendment is there a grant of power to the state to remove an elector who votes in a manner unacceptable to the state or to strike that vote. Indeed, the express requirement that all votes be listed is inconsistent with such power. And because Article II, Section 1, Clause 2 sets the precise number of electors, the state may not appoint additional electors to cast new votes in favor of the candidate preferred by the state.

In short, while the Constitution grants the states plenary power to appoint their electors, it does not provide the states the power to interfere once voting begins, to remove an elector, to direct the other electors to disregard the removed elector’s vote, or to appoint a new elector to cast a replacement vote. In the absence of such a delegation, the states lack such power.

. . . .

Dictionaries from the relevant period support Mr. Baca’s contention that the drafters of the Twelfth Amendment intended electors to exercise discretion in casting their votes for President and Vice President. At the time of the Twelfth Amendment, the term “elector” was defined as “[h]e that has a vote in the choice of any officer.” . . .

. . . .

The freedom of choice we ascribe to congressional electors comports with the contemporaneous dictionary definitions of elector discussed above. And because we treat usage of a term consistently throughout the Constitution, the use of elector to describe both congressional and presidential electors lends significant support to our conclusion that the text of the Twelfth Amendment does not allow states to remove an elector and strike his vote for failing to honor a pledge to vote for the winner of the popular election. Instead, the Twelfth Amendment provides presidential electors the constitutional right to vote for the candidates of their choice for President and Vice President.

. . . .

It is true that a pledge requirement is consistent with longstanding practices. As the Supreme Court noted in *Ray,* there is a “long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college.” And “[h]istory teaches that the electors were expected to support the party nominees.” Review of presidential election results also shows that electors usually honor their pledges. Indeed, this consistency led states to omit the names of candidates for elector from the general ballot. “Instead in one form or another [the states] allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party’s nominees for the electoral college.”

Although we concur with the Department’s review of historical practice, we cannot agree that these practices dictate the result the Department seeks. First, and most importantly, the practices employed—even over a long period—cannot overcome the allocation of power in the Constitution. Second, there is an opposing historical practice at play: a history of anomalous votes, all of which have been counted by Congress. . . . Since that first faithless vote [in 1796], there have been approximately 166 additional anomalous votes listed, certified, delivered, and counted.

Indeed, we are aware of no instance in which Congress has failed to count an anomalous vote, or in which a state—before Colorado—has attempted to remove an elector in the process of voting, or to nullify a faithless vote. And on only one occasion [in 1969] has Congress even debated whether an anomalous vote should be counted. . . . After significant debate, the House voted to reject the objection (and count the elector’s votes) by a margin of 228–170, and the Senate voted to reject the objection, by a count of 58-33.

. . . .

This uninterrupted history of Congress counting every anomalous vote cast by an elector weighs against a conclusion that historical practices allow states to enforce elector pledges by removing faithless electors from office and nullifying their votes.

. . . .

Secretary Williams impermissibly interfered with Mr. Baca’s exercise of his right to vote as a presidential elector. Specifically, Secretary Williams acted unconstitutionally by removing Mr. Baca and nullifying his vote. . . .

*Affirm*.