AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

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

**Chiafalo v. Washington, \_\_\_ U.S \_\_\_ (2020)**

*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.*

*Peter Chiafalo was chosen as a presidential elector in Washington state and was pledged to support the Chafalo and two other Democratic electors in Washington cast their ballots for Colin Powell, the former general who had served as secretary of state under President George W. Bush. The U.S. Constitution specifies that each state will appoint presidential electors in a manner that the state legislature directs. The Washington legislature directed the electors would be chosen by the voters in the general election from a slate nominated by the state political party conventions (though only the names of the presidential candidates, not the presidential electors, appear on the ballot provided to voters). The law further specified that presidential electors must file a pledge with the state indicating that they would vote for the candidate nominated by their party. Electors breaking their pledge by casting a ballot for someone other than their party’s candidate were subject to a $1000 civil fine. The fine was imposed on the three faithless electors in Washington.*

*The electors challenged the fines in the state courts, but the state’s authority to impose the fines was upheld. The U.S. Supreme Court accepted the case from the state supreme court, and unanimously affirmed the state court. The Court held that the states could impose conditions on individuals appointed to the position of presidential elector, and that those conditions could include the requirement of a pledge. The Washington case was consolidated with a case out of Colorado. In that case, the state removed an elector who said he would break his pledge and replaced him with a different elector who fulfilled the pledge to vote for Hillary Clinton. After the 2016 election, Washington state adopted a similar law allowing the replacement of faithless electors. The Court upheld the state’s authority to take that action to enforce pledges as well.*

JUSTICE KAGAN delivered the opinion of the Court.

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[T]his Court has considered elector pledge requirements before. Some seventy years ago Edmund Blair tried to become a presidential elector in Alabama. Like all States, Alabama lodged the authority to pick electors in the political parties fielding presidential candidates. And the Alabama Democratic Party required a pledge phrased much like Washington’s today. No one could get on the party’s slate of electors without agreeing to vote in the Electoral College for the Democratic presidential candidate. Blair challenged the pledge mandate. . . .

Our decision in Ray rejected that challenge. “Neither the language of Art. II, §1, nor that of the Twelfth Amendment,” we explained, prohibits a State from appointing only electors committed to vote for a party’s presidential candidate. Nor did the Nation’s history suggest such a bar. To the contrary, “[h]istory teaches that the electors were expected to support the party nominees” as far back as the earliest contested presidential elections. “[L]ongstanding practice” thus “weigh[ed] heavily” against Blair’s claim. And current voting procedures did too. The Court noted that by then many States did not even put electors’ names on a presidential ballot. The whole system presupposed that the electors, because of either an “implied” or an “oral pledge,” would vote for the candidate who had won the State’s popular election. *Ray v. Blair* (1952).

Ray, however, reserved a question not implicated in the case: Could a State enforce those pledges through legal sanctions? Or would doing so violate an elector’s “constitutional freedom” to “vote as he may choose” in the Electoral College? Today, we take up that question. We uphold Washington’s penalty-backed pledge law for reasons much like those given in Ray. The Constitution’s text and the Nation’s history both support allowing a State to enforce an elector’s pledge to support his party’s nominee—and the state voters’ choice—for President.

. . . . [T]he power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect. A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period. Or more substantively, a State can insist (as Ray allowed) that the elector pledge to cast his Electoral College ballot for his party’s presidential nominee, thus tracking the State’s popular vote. Or—so long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State’s appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington’s.

And nothing in the Constitution expressly prohibits States from taking away presidential electors’ voting discretion as Washington does. The Constitution is barebones about electors. . . .

The Framers could have done it differently; other constitutional drafters of their time did. In the founding era, two States—Maryland and Kentucky—used electoral bodies selected by voters to choose state senators (and in Kentucky’s case, the Governor too). The Constitutions of both States, Maryland’s drafted just before and Kentucky’s just after the U. S. Constitution, incorporated language that would have made this case look quite different. Both state Constitutions required all electors to take an oath “to elect without favour, affection, partiality, or prejudice, such persons for Senators, as they, in their judgment and conscience, believe best qualified for the office.” The emphasis on independent “judgment and conscience” called for the exercise of elector discretion. But although the Framers knew of Maryland’s Constitution, no language of that kind made it into the document they drafted.

The Electors argue that three simple words stand in for more explicit language about discretion. . . . If the States could control their votes, “the electors would not be ‘Electors,’ and their ‘vote by Ballot’ would not be a ‘vote.’”

But those words need not always connote independent choice. Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he “votes” or fills in a “ballot.” In those cases, the choice is in someone else’s hands, but the words still apply because they can signify a mechanical act. Or similarly, suppose in a system allowing proxy voting (a common practice in the founding era), the proxy acts on clear instructions from the principal, with no freedom of choice. Still, we might well say that he cast a “ballot” or “voted,” though the preference registered was not his own. For that matter, some elections give the voter no real choice because there is only one name on a ballot (consider an old Soviet election, or even a down-ballot race in this country). Yet if the person in the voting booth goes through the motions, we consider him to have voted. The point of all these examples is to show that although voting and discretion are usually combined, voting is still voting when discretion departs. Maybe most telling, switch from hypotheticals to the members of the Electoral College. For centuries now, as we’ll later show, almost all have considered themselves bound to vote for their party’s (and the state voters’) preference. Yet there is no better description for what they do in the Electoral College than “vote” by “ballot.” And all these years later, everyone still calls them “electors”—and not wrongly, because even though they vote without discretion, they do indeed elect a President.

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. . . . Whether by choice or accident, the Framers did not reduce their thoughts about electors’ discretion to the printed page. All that they put down about the electors was what we have said: that the States would appoint them, and that they would meet and cast ballots to send to the Capitol. Those sparse instructions took no position on how independent from—or how faithful to—party and popular preferences the electors’ votes should be. On that score, the Constitution left much to the future. And the future did not take long in coming. Almost immediately, presidential electors became trusty transmitters of other people’s decisions.

“Long settled and established practice” may have “great weight in a proper interpretation of constitutional provisions.” *The Pocket Veto Case* (1929). As James Madison wrote, “a regular course of practice” can “liquidate & settle the meaning of” disputed or indeterminate “terms & phrases.” . . . Electors have only rarely exercised discretion in casting their ballots for President. From the first, States sent them to the Electoral College—as today Washington does—to vote for pre-selected candidates, rather than to use their own judgment. And electors (or at any rate, almost all of them) rapidly settled into that non-discretionary role.

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The history going the opposite way is one of anomalies only. The Electors stress that since the founding, electors have cast some 180 faithless votes for either President or Vice President. But that is 180 out of over 23,000. And more than a third of the faithless votes come from 1872, when the Democratic Party’s nominee (Horace Greeley) died just after Election Day. Putting those aside, faithless votes represent just one-half of one percent of the total. Still, the Electors counter, Congress has counted all those votes. But because faithless votes have never come close to affecting an outcome, only one has ever been challenged. True enough, that one was counted. But the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years. And anyway, the State appointing that elector had no law requiring a pledge or otherwise barring his use of discretion. Congress’s deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one.

The Electors’ constitutional claim has neither text nor history on its side. . . . A State follows . . . tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

*Affirmed*.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

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. . . . The Court appears to misinterpret Article II, §1, by overreading its language as authorizing the broad power to impose and enforce substantive conditions on appointment. The Court then misconstrues the State of Washington’s law as enforcing a condition of appointment.

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First, the Court’s attempt to root its analysis in Article II, §1, seems to stretch the plain meaning of the Constitution’s text. Article II, §1, provides that States shall appoint electors “in such Manner as the Legislature thereof may direct.” At the time of the founding, the term “manner” referred to a “[f]orm” or “method.” . . . These definitions suggest that Article II requires state legislatures merely to set the approach for selecting Presidential electors, not to impose substantive limitations on whom may become an elector. And determining the “Manner” of appointment certainly does not include the power to impose requirements as to how the electors vote after they are appointed, which is what the Washington law addresses.

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Finally, the Court’s interpretation gives the same term — “Manner” — different meanings in two parallel provisions of the Constitution. Article I, §4, states that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” In U. S. Term Limits, Inc. v. Thornton (1995), the Court concluded that the term “Manner” in Article I includes only “a grant of authority to issue procedural regulations,” not “the broad power to set qualifications.” Yet, today, the Court appears to take the exact opposite view. The Court interprets the term “Manner” in Article II, §1, to include the power to impose conditions or qualifications on the appointment of electors.

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Here, the challenged Washington law did not enforce any appointment condition. It provided that “[a]ny elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars.” Unlike the laws of Oklahoma, Indiana, Minnesota and the other States discussed above, a violation of [the Washington law] was not predicated on violating a pledge or any other condition of appointment. In fact, it did not even mention a pledge, which was set forth in a separate, unreferenced provision. Thus, [Washington’s fine] had no connection to the appointment process and could be enforced independent of the existence of any pledge requirement. While the Court’s description of [Washington’s law] as a law enforcing a condition of appointment may be helpful for the Court’s claim that Washington’s law was rooted in Article II, §1’s “power to appoint,” it is simply not accurate. Thus, even accepting the Court’s strained reading of Article II, §1’s text, I cannot agree with the Court’s effort to reconcile Washington’s law with its desired theory.

In short, the Constitution does not speak to States’ power to require Presidential electors to vote for the candidates chosen by the people. The Court’s attempt to ground such a power in Article II’s text falls short. Rather than contort the language of both Article II and the state statute, I would acknowledge that the Constitution simply says nothing about the States’ power in this regard.

When the Constitution is silent, authority resides with the States or the people. This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment. . . .

Of course, the powers reserved to the States concerning Presidential electors cannot “be exercised in such a way as to violate express constitutional commands.” That is, powers related to electors reside with States to the extent that the Constitution does not remove or restrict that power. Thus, to invalidate a state law, there must be “something in the Federal Constitution that deprives the [States of] the power to enact such [a] measur[e].” *U.S. Term Limits* (Thomas, J., dissenting).

As the Court recognizes, nothing in the Constitution prevents States from requiring Presidential electors to vote for the candidate chosen by the people. Petitioners ask us to infer a constitutional right to elector independence by interpreting the terms “appoint,” “Electors,” “vote,” and “by Ballot” to align with the Framers’ expectations of discretion in elector voting. But the Framers’ expectations aid our interpretive inquiry only to the extent that they provide evidence of the original public meaning of the Constitution. They cannot be used to change that meaning. As the Court explains, the plain meaning of the terms relied on by petitioners do not appear to “connote independent choice.” Thus, “the original expectation[s]” of the Framers as to elector discretion provide “no reason for holding that the power confided to the States by the Constitution has ceased to exist.”

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