

# *Chiafalo*: Constitutionalizing Historical Gloss in Law and Democratic Politics

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## INTRODUCTION

On November 9, 2016 at 2:48 am, CNN's Wolf Blitzer announced Donald Trump as the next President of the United States.<sup>1</sup> On election day, November 8, 2016, Donald Trump won the popular elections in a sufficient number of states such that he emerged with the most pledged presidential electors, more than the 270 that he would need to defeat his Democratic opponent, the former Secretary of State and Senator from New York, Hillary Clinton. However, if Peter Chiafalo and his friends had their way, notwithstanding what happened on “election day,” and leaving aside Wolf Blitzer’s purportedly authoritative pronouncement on CNN, Donald Trump would not become the 45th President of the United States.

Peter Chiafalo, Levi Guerra and Esther John (the “Chiafalo Electors”) were three presidential electors from the State of Washington who were pledged to vote for Hillary Clinton in the 2016 presidential election. Most Americans believed that Donald Trump won the election on “election day,” November 8, 2016. But as the Chiafalo Electors knew, all that happened on “election day” was that the states selected their slate of presidential electors. It is true that the states award their electors to the party that wins the popular vote in the state and thus, as a functional matter, we can predict which candidate will prevail in the electoral college based upon the results of the popular returns in each state. Presidential electors are selected on the basis of

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<sup>1</sup> See Leinz Vales, *The Moment CNN Projected Donald Trump Is President-Elect*, CNN (Nov. 9, 2016), <https://www.cnn.com/2016/11/09/politics/moment-cnn-projects-trump-u-s-president-cnntv/index.html> [<https://perma.cc/659Q-WRSV>].

their loyalty to their party. But this was only a prediction. Nothing official had yet happened. The only presidential selection process that officially counts under the American Constitution is the meeting of the presidential electors, those selected on November 8, in their respective states to cast their electoral ballots. In the presidential election of 2016, that day, the day in which the presidential electors were required by law to meet and cast their ballots in their respective “electoral colleges,” was December 19, 2016.<sup>2</sup>

Chiafalo was a co-founder of the “Hamilton Electors,”<sup>3</sup> a group of presidential electors who derived their inspiration from Alexander Hamilton’s vision of the Electoral College. In *Federalist 68*, Hamilton painted a picture of presidential electors as judicious and independent thinkers entrusted with the grave task of choosing the person who would be the best President for the country.<sup>4</sup> The Hamilton Electors believed that the Constitution authorized them, as presidential electors, to vote for whomever they pleased. They did not believe that their discretion could be constrained by law, state or federal. Specifically, the Hamilton Electors hoped to deprive Trump of the presidency by persuading their fellow presidential electors, both those pledged to Trump and those pledged to Clinton, to vote on December 19 for a compromise candidate, someone other than Donald Trump or Hillary Clinton. At the very least, they hoped to deprive Trump of an Electoral College majority, which would then force the House of Representatives to choose the country’s next President and Vice President.

The Chiafalo Electors faced a legal problem. Under the laws of the State of Washington, each elector nominee is required to pledge that if she is selected for the position, she agrees to serve and “to mark my ballots for president and vice-president for the nominees for those offices of the party that nominated me.”<sup>5</sup> Moreover, in order for an elector’s vote to be valid, the elector must cast her vote consistent with her pledge.<sup>6</sup> That is, the elector must vote for her party’s nominee. Otherwise, her vote would not be counted. Under Washington law as amended in 2019, an elector who casts an invalid ballot—by not voting for the nominee of her party—is automatically removed as an elector. In the language of the Washington statute, the elector “vacates the office of elector, creating a vacant position to be filled” by the secretary of state as provided for by law. In 2016, before Washington

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<sup>2</sup> 3 U.S.C. § 7 (2020) provides: “The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.” *Id.*

<sup>3</sup> See ROBERT M. ALEXANDER, REPRESENTATION AND THE ELECTORAL COLLEGE 163 (2019).

<sup>4</sup> THE FEDERALIST NO. 68, at 354 (Alexander Hamilton) (Gideon ed., 2001).

<sup>5</sup> WASH. REV. CODE ANN. § 29A.56.084 (2019) (West, Westlaw through all legislation from the 2020 Reg. Sess. of the Wash. Leg.).

<sup>6</sup> See WASH. REV. CODE ANN. § 29A.56.090 (2019) (West, Westlaw through all legislation from the 2020 Reg. Sess. of the Wash. Leg.).

amended the law, an elector who filed an invalid ballot was subject to a civil fine up to \$1,000.<sup>7</sup>

Because they refused to vote consistent with their pledge, the Chiafalo Electors were fined by Washington's secretary of state. They unsuccessfully appealed their fines through the state courts.<sup>8</sup> In its decision upholding the fines, the Washington Supreme Court stated that Article II, Section I "gives to the states absolute authority in the manner of appointing electors."<sup>9</sup> This authority also includes the power to fine electors who vote in a manner that is contrary to the dictates of the state. The Chiafalo Electors filed a petition for a writ of certiorari to the U.S. Supreme Court asking the Court to review their case.

The Chiafalo Electors were not alone. In Colorado, Michael Baca, Polly Baca, and Robert Nemanich (the "Baca Electors") were presidential electors selected by the Democratic Party. As Democrats, they pledged to vote for Hilary Clinton, who won the state's popular vote. Under Colorado law, presidential electors are required to cast their ballots for the winner of the State's popular vote. Therefore, the Baca Electors were required by Colorado law to cast their presidential electoral votes for Clinton.

However, dismayed by the prospect of a Trump presidency, Michael Baca—the other co-founder of the Hamilton Electors<sup>10</sup>—sought to convince a sufficient number of presidential electors, pledged Democrats as well as Republicans, to vote for an alternative candidate. Republican John Kasich was the suggested option.<sup>11</sup> Thus, instead of voting for Clinton at the December 19th meeting of the state's electoral college as he pledged and as required by state law, Baca voted for Kasich.<sup>12</sup> As a consequence, Colorado's Secretary of State removed Baca as an elector and discarded his vote. After seeing what happened to Michael Baca, Polly Baca and Robert Nemanich decided to vote for Clinton, though they too would have preferred to vote for Kasich.

The Baca Electors sued.<sup>13</sup> The district court dismissed the lawsuit on standing grounds and, alternatively, on the ground that the plaintiffs failed to state a claim. A panel of the Tenth Circuit reversed. In direct contrast to the Supreme Court of Washington, the Tenth Circuit held that Article II guaranteed the right of presidential electors to vote as they saw fit. The Court explained, "while the Constitution grants the states plenary power to appoint their electors, it does not provide the states the power to interfere

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<sup>7</sup> See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2332 (2020).

<sup>8</sup> See *id.* at 2318.

<sup>9</sup> *In re Guerra*, 441 P.3d 807, 814 (Wash. 2019).

<sup>10</sup> See ALEXANDER, *supra* note 3, at 163.

<sup>11</sup> See Lilly O'Donnell, *Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt*, ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/> [<https://perma.cc/GD6P-D8GU>].

<sup>12</sup> See *Baca v. Colo. Dep't of State*, 935 F.3d 887, 901 (10th Cir. 2019).

<sup>13</sup> See *id.* The State prevailed in the district court on the ground that the plaintiffs did not have standing and that they failed to state a claim upon which relief can be granted. A panel of the Tenth Circuit reversed the lower court's decision in part and affirmed in part.

once voting begins, to remove an elector . . . or to appoint an elector to cast a replacement vote.” Colorado appealed to the U.S. Supreme Court, which granted certiorari to resolve the dispute between the courts.

In *Chiafalo v. Washington*, Justice Kagan authored an opinion for the Court upholding a state’s power to compel electors, under pains of penalty—fines or removal—to vote as instructed by the state.<sup>14</sup> Justice Kagan offered two bases for her decision. First, she relied on the text of the Constitution. She argued that Article II, Section 1, which authorizes the states to appoint presidential electors “in such manner as the Legislature thereof may direct,” provides the states wide latitude to condition the appointment of presidential electors on any basis not excluded by the Constitution. And because the Constitution does not preclude the states from eliminating the discretion of presidential electors, states can require presidential electors to vote for their party’s nominee when that person prevails in the popular vote.

Second, Justice Kagan, more subtly—and we will argue more consequentially—relied upon past historical practice to support her conclusion that the Constitution authorizes states to not only require electors to take an oath to support their party’s nominee but also to sanction electors who breach their oath. Justice Kagan explained that elector discretion had not been part of our historical practice.<sup>15</sup> To the contrary, states have long sought to bind electors. “From the first,” she pointed out, “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, she intimated, have generally acquiesced to this loss of discretion.<sup>16</sup> Since almost immediately after the Founding, electors have functioned as “agents of others.” The laws of Washington and Colorado simply “follow[ ] in the same tradition.” Justice Kagan thus concluded for the Court in *Chiafalo*: “The Electors’ constitutional claim has neither text nor history on its side.” In a companion case, *Colorado Department of State v. Baca*, the Court issued a *per curiam* opinion based upon its decision in *Chiafalo*, which had the effect of reversing the Tenth Circuit and upholding Colorado’s law.

Surprisingly, not a single Justice disagreed with Justice Kagan’s deployment of historical gloss in *Chiafalo*. In fact, with the exception of Justice Thomas, who concurred in the judgment but would have decided the case on Tenth Amendment as opposed to Article II grounds, every member of the Court concurred in Justice Kagan’s reasoning. And quite frankly, the disagreement between Justices Thomas and Kagan was quite narrow. Moreover, the outcome seemed popular among legal elites and among the public at large. For example, according to an analysis by the notable website

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<sup>14</sup> 140 S. Ct. 2316, 2328 (2020).

<sup>15</sup> See *id.* at 2326 (“Electors have only rarely exercised discretion in casting their ballots for President . . .”).

<sup>16</sup> See *id.* (“And electors (or at any rate, almost all of them) rapidly settled into that non-discretionary role.”).

Fivethirtyeight.com, over 60% of Americans approved of the outcome in *Chiafalo*.<sup>17</sup>

Though *Chiafalo* looks like an easy case, the issue presented—whether presidential electors have a constitutional right to cast their ballots for whomever they want—is much more difficult than Justice Kagan’s opinion lets on. *Chiafalo* is part of a recent trend of Supreme Court decisions that rely upon the post-Founding historical practices of constitutional actors to give meaning to the Constitution.<sup>18</sup> This method of constitutional interpretation, which some scholars have called “historical gloss,”<sup>19</sup> and others refer to as convention,<sup>20</sup> has also given rise to a growing and robust academic literature primarily focused on the conditions under which it is justifiable, if ever, for courts to use historical gloss as a modality of constitutional interpretation.<sup>21</sup> The literature has largely been driven by disputes in the domain of separation of powers—focused on the legitimacy and illegitimacy of deploying “gloss” to resolve constitutional disagreement among the three branches of the federal government—though scholars have extended their inquiry to other areas as well.<sup>22</sup> Justice Kagan in *Chiafalo* deploys historical gloss to give constitutional meaning in a context that has received little attention in the historical gloss literature, the law of democracy. This Article uses *Chiafalo* to examine the deployment of historical gloss in that context.

We make one central point in this Article. Justice Kagan’s opinion in *Chiafalo* uses historical gloss to entrench a particular and modern view of political participation—which is best reflected by American political practices—by rejecting an alternative and anachronistic view—which is best reflected by the text and structure of the Constitution. Part I argues that *Chiafalo* is not a textualist opinion because Article II, Section 1 does not support the majority’s conclusion that states have the power to limit elector discretion. The majority’s reasoning to the contrary is not persuasive, even on its own terms. Part II argues that *Chiafalo* is best understood as the latest case from the Court to apply the approach of “historical gloss” to interpret-

<sup>17</sup> See Amelia Thompson-DeVeaux & Anna Wiederkehr, FIVETHIRTYEIGHT (July 13, 2020), <https://fivethirtyeight.com/features/the-supreme-courts-big-rulings-were-surprisingly-mainstream-this-year/> [<https://perma.cc/Q86K-TMW2>].

<sup>18</sup> See, e.g., Noel Canning v. NLRB, 573 U.S. 513 (2014); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015); see also Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 60 (2017).

<sup>19</sup> See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417 (2012).

<sup>20</sup> See, e.g., Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913 (2020). As Issacharoff & Morrison explain, “beneath the Constitution’s text there lies a world of institutional settlement—a constitution by convention.” *Id.* at 1916.

<sup>21</sup> See, e.g., *id.*; Joseph Blocher & Margaret Lemos, *Practice and Precedent in Historical Gloss Games*, 106 GEO. L.J. ONLINE 1 (2016); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2014).

<sup>22</sup> See, e.g., Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701 (2019).

ing the Constitution. However, unlike past cases where the Court has used gloss to interpret the Constitution when the text is ambiguous or silent, in *Chiafalo*, Justice Kagan deploys historical practice in the face of a clear constitutional text which leads to a different conclusion than the evidence from historical practice. Part III examines why Justice Kagan relies on gloss in *Chiafalo* and explains, from the vantage point of law and democracy, that the Court deploys gloss instrumentally to constitutionalize a particular view of political participation and representation. *Chiafalo* updates and modernizes our understanding of representation and political participation. *Chiafalo* is thus as much about the future as it is the past. It is about entrenching a different conception of democratic politics. Part IV explores some problems that are raised for the historical gloss literature when gloss is used in this way to interpret the Constitution. Finally, we conclude with some questions about the robustness and potential of the Court's right of political participation.

## I. CONSTITUTIONAL TEXT: INTERPRETING ARTICLE II, SECTION 1

In this Part, we address the central question presented in *Chiafalo*, which is how to interpret Article II, Section 1's appointment power. The question is specifically whether that clause authorizes a state to penalize an elector who votes in a manner that is inconsistent with the state's instructions. There are three obvious possibilities for interpreting Article II, Section 1. The first option is that Article II, Section 1 protects elector discretion. This was the position of the Tenth Circuit in *Baca*. The second option is that the constitutional text is silent and does not address the issue. This is the position of Justice Thomas in *Chiafalo*. The third option is that the text authorizes the state to penalize electors. This is the position that the majority in *Chiafalo* purports to support. As we show in this Part, of all three options, the least convincing one is the argument that the text of the Constitution authorizes the state to remove elector discretion.

Agreeing on a method for choosing the chief executive was no easy task for the delegates gathered in Philadelphia in 1787.<sup>23</sup> The delegates entertained a number of proposals, including election by popular vote, selection by the Governors of the States, selection by Congress, and selection by electors chosen by popular election.<sup>24</sup> Toward the end of the Convention, on September 4, three months after James Wilson suggested selecting the presi-

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<sup>23</sup> Reflecting on the constitutional convention, James Wilson recalled, "The convention sir, were perplexed with no part of this plan so much as with the mode of choosing the President of the United States." *Convention of Pennsylvania, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AT PHILADELPHIA, IN 1787*, at 415, 511 (Jonathan Elliot ed., reprint ed. 1987) (statement of James Wilson).

<sup>24</sup> See Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, the Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. ST. U. L. REV. 879, 880 (2002).

dent using electors, the Committee of Eleven proposed a compromise.<sup>25</sup> Article II, Section 1, clauses 2, 3, and 4 memorializes a process of presidential selection that we now refer to colloquially as the Electoral College.<sup>26</sup>

Though the language of the Constitution is often broad and often indeterminate,<sup>27</sup> the same is not true of the Electoral College. The constitutional text that sets up the presidential selection process is directive, specific, and determinate. Article II, Section 1, clause 2 provides a formula—reflecting the structural compromise between the large and small states—for allocating presidential electors. Under this formula, each state is entitled to the same number of electors as they are entitled to representatives in Congress. Reflecting the federalist structure of the Constitution, Article II, section 1, clause 2 instructs specifically that the state *legislatures* decide how to appoint presidential electors, but section 1, clause 4 states that Congress determines the time of choosing the electors and the day that the electors must transmit their votes to Congress.<sup>28</sup>

Article II, Section 1, clause 3 is at least as prescriptive. It provides that electors will meet in their respective states and vote for two people, one of whom must be a non-resident of the state. These electors will make a list of all the persons receiving votes and how many votes they received. They will then sign and certify the list and send it to Congress. Congress will assemble and the President of the Senate will unseal the lists and count the votes. The person receiving the most votes will be chosen as President. If no one receives a majority or there is a tie, the House of Representatives will choose the President. Prior to the ratification of the Twelfth Amendment, the person who received the next highest vote would be named as Vice President. In the case of a tie among the second-highest vote getters, the Senate would choose the Vice President. In keeping with Article II, the Twelfth Amendment is similarly commanding. Among its many prescriptions, the Twelfth Amendment requires the electors to meet in their respective states, to vote separate ballots for President and Vice President, to keep track of those who received votes, to sign, seal, and send the lists to Congress; Congress will count the votes and the person who received the greatest number of votes for President will be President.<sup>29</sup>

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<sup>25</sup> See James Madison, Journal (Sept. 4, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 493, 496–503 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]; James Madison, Journal (Aug. 31, 1787), in 2 FARRAND'S RECORDS, *supra*, at 475, 481.

<sup>26</sup> Of course, the Twelfth Amendment made some changes to our presidential selection process, but the basic structure remained the same.

<sup>27</sup> Examples are numerous. What exactly is “due process” and “freedom of speech”; what are “privileges and immunities”; and what is the scope of the “executive power of the United States”?

<sup>28</sup> Section 2 of the Fourteenth Amendment imposes further restrictions on the states. See Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279 (2015).

<sup>29</sup> See U.S. CONST. amend. XII.

The Constitution precludes the electors from meeting together as a body of electors, which would presumably promote greater deliberation but might subject the electors to outside or foreign influence and might lead to a herd mentality. It almost seems as if the drafters of the text thought that the relevant pool of qualified candidates, and their apparent qualifications, would be self-evident to everyone, particularly to the ostensibly sagacious electors.<sup>30</sup> It is true that the Framers did not spend much time focusing on the details of presidential selection—everyone expected that George Washington would be selected as the first President of the United States.<sup>31</sup>

Nothing in the Constitution specifies how the electors are to identify candidates or how candidates make their case to the electors.<sup>32</sup> There is nothing to restrict (or guide) the judgment of the electors so that they could appropriately separate out qualified from less qualified candidates. Pursuant to Article II, Section 1, clause 3, electors must vote for one person who is not a resident of the state. The Twelfth Amendment instructs: “The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves.” Article II, Section 1, clause 5 states that only individuals who are at least thirty-five years old, who have resided in the United States for at least fourteen years, and who were born in the United States are eligible to the presidency. Whatever the merits of these restrictions, they are minimal and do not appear able, or intended, to constrain the discretion that the text would seem to grant to the electors.<sup>33</sup>

If you take the text and structure of the Constitution and you take into account both the drafting history and the intention of the Framers, the best read of the text is that the Constitution created a federal office, of presidential “electors,” with a distinctive, prescriptive, and consequential responsibility.<sup>34</sup> This was generally the view of legal commentators who examined the issue outside of the context of litigation,<sup>35</sup> and it was the position of a panel of the Tenth Circuit in *Baca v. Colorado Department of State*.<sup>36</sup>

<sup>30</sup> See Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 925 (2017) (“The patrician politics of the early republic allowed political elites to observe and evaluate the merit, intelligence, and work ethic of each other while working together in state capitals, the federal capital, or foreign missions.”).

<sup>31</sup> See Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1151 (2002).

<sup>32</sup> The assumption was that presidential electors, as part of the ruling political elite, would naturally be familiar with suitable candidates. See Whittington, *supra* note 30, at 926–27.

<sup>33</sup> See Whittington, *supra* note 30, at 920 (“The constitutional provisions relating to the appointment of the presidential electors and the casting of the electoral ballots for president are not especially vague or open-textured. As a matter of straightforward textual interpretation, the Constitution would seem to leave the presidential electors unbound in their decision-making.”).

<sup>34</sup> The historian Alex Keyssar describes the electoral college as a “temporary legislature” that would “disband as soon as it carried out its one function.” See ALEXANDER KEYSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 25 (2020).

<sup>35</sup> See, e.g., Whittington, *supra* note 30, at 920.

<sup>36</sup> See 935 F.3d 887 (10th Cir. 2019).

The parties in *Baca* presented the Tenth Circuit with two opposing arguments. To Michael Baca, the determinative issue was whether the constitutional text confers discretion upon presidential electors. Baca anchored his argument on the Supremacy Clause: he was performing a federal function and unless the Constitution explicitly allowed the state to direct the votes of presidential electors, state regulation was inconsistent with the Supremacy Clause. By contrast, from the State's perspective, the determinative question was whether the constitutional text bars the states from compelling presidential electors to vote in a manner dictated by the state. Colorado rested its argument on the Tenth Amendment, and the view that the Amendment reserved the power to bind presidential electors to the states, unless the Constitutional text explicitly provided differently.

The Tenth Circuit agreed with Baca. Writing for the majority, Judge McHugh began the analysis by articulating the majority's interpretive framework. "As a general rule," she noted, the Constitution must be interpreted "according to its text," though in certain contexts a court must also interpret the Constitution in light of state practice.<sup>37</sup> Relying on the constitutional text, Article II and the Twelfth Amendment, the majority concluded that "the Constitution provides no express role for the states after appointment of its presidential electors."<sup>38</sup> Noting the prescriptive specificity of the text, the Court remarked that the Constitution assigns "specific duties to identified actors."<sup>39</sup> The states are authorized to appoint electors and they have wide discretion to determine the process for selecting the electors. However, once the states have selected their presidential electors, they have no further role to play.<sup>40</sup> "Instead, every step thereafter is expressly delegated to a different body."<sup>41</sup> States have no authority under the Constitution to interfere with the process of presidential selection once they have fulfilled their constitutionally assigned task, which is to simply appoint presidential electors.<sup>42</sup>

The court then concluded not only that the states lack the power to interfere with the electors once they have been appointed, but also that presidential electors have a constitutional right to exercise their discretion when voting for President and Vice President, as presidential electors. Article II and the Twelfth Amendment, uses the words "elector," "vote," and "ballot." The court reasoned that those words, understood from the perspective of

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<sup>37</sup> *Baca v. Colo. Dep't of State*, 935 F.3d 887, 936 (10th Cir. 2019).

<sup>38</sup> *Id.* at 942.

<sup>39</sup> *See id.* ("Article II, as modified by the Twelfth Amendment, describes the process for selecting the President and Vice-President in unusual detail."); *id.* at 943 ("From the moment the electors are appointed, the election process proceeds according to detailed instructions set forth in the Constitution itself.")

<sup>40</sup> *See id.*

<sup>41</sup> *Id.* at 942.

<sup>42</sup> *See id.* at 943 ("In short, while the Constitution grants the states plenary power to appoint their electors, it does not provide the states power to interfere once voting begins, to remove an elector, to direct other electors to disregard the removed elector's vote, or to appoint a new elector to cast a replacement vote.")

those who were alive at the time they were written in the Constitution, “have a common theme: they all imply a right to make a choice or voice an individual opinion.”<sup>43</sup> The court thus concluded that “[i]t is beyond dispute that” presidential electors “exercise unfettered discretion in casting their ballot at the ballot box.”<sup>44</sup>

Using the standard approach to legal analysis—text, structure, intent of the drafters, public and ordinary meaning of the text—the Tenth Circuit reasoned that the Constitution unambiguously supports the conclusion that presidential electors, not voters, select the President and Vice President. Efforts to limit their agency is inconsistent with the very text and structure of the Constitution. The reasonable implications from the text and structure of the Constitution are that the electors are agentic; their choices are supposed to be consequential.<sup>45</sup> They, not the voters, are the actors of constitutional consequence.

Alternatively, one might argue that the text of the Constitution is silent on the issue of elector discretion and that the Constitution’s silence should be read in favor of state authority—including the power of the state to conclusively bind presidential electors and compel them to cast their ballot for a pledged presidential candidate.<sup>46</sup> This is Justice Thomas’s position in *Chiafalo*.<sup>47</sup> Justice Thomas examined the issue primarily on federalism grounds. One of central purposes of the Constitution is to divide power between the states and the federal government, and federal power can be exercised only when it has been explicitly delegated to the federal government by the Constitution. “When the Constitution is silent,” Justice Thomas wrote, “authority resides with the States or the people. This allocation of power is

<sup>43</sup> *Id.* at 945.

<sup>44</sup> *Id.* The court did note, however, that presidential electors must abide by the minimal requirements set out in the Constitution, such as the requirement that a candidate is not eligible to the presidency who does not meet the age, residency or citizenship requirement provided for in the Constitution. *See id.* at 945 n.27.

<sup>45</sup> *See* Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap*, 48 ARK. L. REV. 215, 219 (1995); David A. Strauss, *Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 22 (2015) (noting in the context of the Electoral College that the “practice is different from what the text seems to contemplate”); Whittington, *supra* note 30, at 935–36 (“But the role of the presidential electors themselves is quite clear. The constitutional text specifies that the electors will be appointed in a manner chosen by the state legislatures and will cast ballots for president and vice president. Electors have few formal limitations on their discretion when casting those ballots.”).

<sup>46</sup> There is also an intermediate step between the position that the text affirmatively supports elector discretion versus the view that the text is silent but should be read in favor of state power. One might argue that the text is silent and textual silence does not imply a normative valence. The constitutional text is simply silent. Electors are free to follow directives on how they should vote, from their states, their political parties, or any other institution. They are also free to vote according to the dictates of their conscience. Either approach is consistent with the constitutional text.

<sup>47</sup> *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2333 (2020) (Thomas, J., concurring) (“[T]he Constitution does not speak to States’ power to require Presidential electors to vote for the candidates chosen by the people. . . . When the Constitution is silent, authority resides with the States or the people.”).

both embodied in the structure of our Constitution and expressly required by the Tenth Amendment.” Justice Thomas goes on to explain that both the structure and text of the Constitution delegates the process of Presidential selection to the states, with very little for the federal government to do and with no explicit restriction on the power of the states.<sup>48</sup> Consequently, states can compel electors to vote for the nominee chosen by the states’ voters, if that is what the people of the states want to do.<sup>49</sup>

In sharp contrast of the position of the Tenth Circuit in *Baca* and Justice Thomas in *Chiafalo*, one might argue that the Constitution clearly authorizes the states to require putative electors to pledge that they will vote for their party’s nominee and to punish them when they defect. This is supposedly the majority’s position in *Chiafalo*. Justice Kagan’s opinion in *Chiafalo* purports to present a descriptive account of Article II, Section 1. Justice Kagan argued that Article II, Section 1 is an affirmative grant of power to the States that allows them to lawfully induce an oath from would-be presidential electors and to sanction the electors if the electors defect. In fact, Justice Kagan implied that the text is so clear that extralegal sources, such as the intent of the framers, were not necessary to interpret the text.<sup>50</sup>

Justice Kagan’s legal analysis departed from the proposition that Article II Section 1, the appointments power—“Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors . . .”—was a broad grant of power to the States that authorizes them to appoint electors, “in such manner” as they desire. From the power to appoint she reasoned that the State also has the power to condition the “appointment—that is, to say what the elector must do for the appointment to take effect.”<sup>51</sup> As she explained: “A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period.” From

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<sup>48</sup> *Id.* at 2335 (Thomas, J., concurring) (“[P]owers related to electors reside with States to the extent that the Constitution does not remove or restrict that power . . . . As the Court recognizes, nothing in the Constitution prevents States from requiring Presidential electors to vote for the candidate chosen by the people.”).

<sup>49</sup> Another position: The Constitution is not silent on elector discretion, and the power of the state to punish electors that defect on this issue should be read in favor of state power—including a state’s decision to conclusively bind presidential electors and sanction them if they do not cast their ballot as instructed—as opposed to reading the Constitution’s silence in favor of the discretion of presidential electors to vote according their conscience and preference. That is, the Constitution—its text and structure—is neutral and silent on whether the state can require an oath as a condition of being an elector and whether a state can sanction the elector through removal or the imposition of a fine. But for consequentialist or prudential reasons one ought to read textual silence in favor of state power. State discretion allows for flexibility and adaptability, necessary components of a constitution that is expected to last the ages.

<sup>50</sup> *Chiafalo*, 140 S. Ct. at 2325–26 (“The Electors and their amici object that the Framers using those words expected the Electors’ votes to reflect their own judgments. . . . But even assuming other Framers shared that outlook, it would not be enough. 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 . . .”).

<sup>51</sup> *Id.* at 2324.

there she deduced that the power to condition also included the power to instruct: “a State can insist . . . that the elector pledge to cast his Electoral College ballot for his party’s presidential nominee, thus tracking the State’s popular vote.” Next, in a move not obvious to the untrained eye, the power to instruct included the power to sanction. Justice Kagan called this—in her inimitably elegant style — “an associated condition of appointment.” As an “associated condition of appointment,” the State “can demand that the elector actually live up to his pledge, on pain of penalty.” And then we come full circle: under Article II, Section 1, the power to appoint presidential electors necessarily includes the power to punish the elector for voting in a manner inconsistent with the State’s preferences. As Justice Kagan put it, “the State’s appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington’s.”

Justice Kagan is undoubtedly right as a matter of logic that the power to appoint could also include the power to sanction. But of course, that was not the question before the Court—the question was not whether the power to appoint could theoretically or in the abstract include the power to sanction if the elector did not vote as specified by the state. The question before the Court was whether the text of the Constitution, Article II, Section 1, clause 2, authorizes the state to eliminate elector discretion and to sanction the elector as part of the State’s appointments power. As Justice Thomas rightly notes in his concurrence, the power to appoint—Justice Thomas would call this the “affirmative duty” to appoint—is different from “the broad power to impose and enforce substantive conditions on appointment.” As one legal commentator observed, state laws purporting to bind presidential electors “seem[ ] highly dubious if we consult the text, history, and structure” of the Constitution.<sup>52</sup>

Justice Kagan’s analysis elides this distinction, in part because of her analogical style of reasoning. She wrote, for example, that “[a] State can require . . . that an elector live in the State or qualify as a regular voter during the relevant time period.”<sup>53</sup> Surely a state can impose reasonable elector qualifications such as requiring that the elector be a resident of the state or that the elector be eligible voter as part of the power to appoint the elector. These qualifications are simply reasonable implications of the power to appoint, unless the Constitution is crystal clear that such reasonable qualifications are not permitted. Justice Kagan went on to provide another example, which she ostensibly presented as the equivalent of the prior example. “Or,” she stated, using the conjunction to connote equivalency, “more substantively, a State can insist . . . that the elector pledge to cast his Electoral College ballot for his party’s presidential nominee, thus tracking the State’s popular vote.”<sup>54</sup> If the state can require the elector to be a resident of the State as a condition of

<sup>52</sup> Amar, *supra* note 45, at 219.

<sup>53</sup> *Chiafalo*, 140 S. Ct. at 2324.

<sup>54</sup> *Id.*

appointment, Justice Kagan reasoned implicitly, it can certainly impose an equivalent qualification, which is to require the elector to take an oath to support the nominee of the elector's party. This is the key step in Justice Kagan's analysis.<sup>55</sup> If the state can require an oath, it must certainly have the power to sanction defecting electors in order to enforce the oath. Using the conjunction "or" once again to indicate equivalence among her examples, Justice Kagan deploys the oath requirement as a bridge to her conclusion that the state can "demand that the elector actually live up to his pledge, upon pain of penalty."<sup>56</sup>

To be fair to Justice Kagan, a number of Justices made similar moves at oral argument. Chief Justice Roberts asked Professor Lawrence Lessig, Chiafalo's counsel whether "simply requiring an elector to take a pledge [is] okay in your view?" "Absolutely," Lessig replied. A pledge is simply a "moral," not a "legal obligation." But if the state has the power to require a pledge, Roberts asked, why does it not have the power to compel compliance with the pledge? A state does not have such power, Lessig replied, because a sanction is "a legal obligation. It crosses the line because the State has no such power to impose such an obligation through law."<sup>57</sup> Justice Ginsburg picks up precisely on this point. "It's somewhat hard to understand the concept of something I am pledged, bound to do, I have made a promise to do something but that promise is unenforceable."<sup>58</sup> Justice Breyer too wanted to join in. "Counsel, a state can appoint people, requirement, that they be permanent residents of the state. That's all right, isn't it?"<sup>59</sup> Lessig agreed that a state could do that. And if the state can require the elector to be a permanent resident of the state, Breyer reasons, can the state remove the elector if the elector changes his or her residence such that the elector no longer meets the residency requirement and provide for an alternate elector who meets the residency requirement. Yes, Lessig agrees, the state can remove the non-resident elector and substitute a conforming elector. "What's the difference between that situation," Breyer muses, "where they say, you must promise to vote for the person who wins the most votes, and then he gets to the room, and in that room, he doesn't live up to that requirement . . . that he be a resident of the state."<sup>60</sup> Justice Gorsuch expressed a similar concern. "[C]ould a state say we'll pay your expenses and give you a per diem for your service, but only if you carry out your promise to vote in a particular way that you pledged initially."<sup>61</sup> "No," Lessig responded. "That is, in effect, a penalty as

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<sup>55</sup> See, e.g., *id.* at 2324 n. 6 (articulating clearly the point that "a law penalizing faithless voting (like a law merely barring that practice) is an exercise of the State's power to impose conditions on the appointment of electors").

<sup>56</sup> *Id.* at 2324.

<sup>57</sup> Transcript of Oral Argument at 5–6, *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (No. 19-465).

<sup>58</sup> *Id.* at 13–14.

<sup>59</sup> *Id.* at 15.

<sup>60</sup> *Id.* at 16.

<sup>61</sup> *Id.* at 30.

well.”<sup>62</sup> This short exchange was followed by the question that kept tripping up a number of Justices: “Why—why couldn’t it do that if it could do the other things.”<sup>63</sup>

The Justices could not get beyond the fact that, as Justice Ginsburg stated, a state can compel an elector to take an oath to support a particular candidate but could not enforce the oath. One might argue that the majority did not rely solely on analogical reasoning and deduction to support its argument that states can compel the elector to swear allegiance to the party’s nominee as a condition of the appointment. The pledge requirement is somewhat supported by the Court’s 1952 case, *Ray v. Blair*,<sup>64</sup> in which the Court upheld an Alabama law that refused to allow a potential presidential elector to participate in the party’s primary election unless the elector pledged to support the party’s nominee in the general election.

But *Ray* should have been confined to its facts. *Ray* is a political party case not an electoral college case. *Ray* arose out of the Dixiecrat revolt in 1948. The Dixiecrats refused to support the Democratic Party’s presidential nominee, Harry S. Truman. The Alabama Democratic Party responded by enacting a state law precluding a candidate for elector from participating in the Party’s primary unless the candidate pledged to support the Party’s nominee in the general election.

The Court in *Ray* noted the “longstanding practice” of electors supporting the nominee of his or her party.<sup>65</sup> The Court then stated: “This 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 weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary.”<sup>66</sup> The Court concluded that the pledge, in the primary, did not violate the Constitution.

But the Court distinguished between a pledge in the primary and the Electoral College. The Court noted: “[E]ven if such promises for candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, . . . to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional.”<sup>67</sup> This is because a party pledge in the party’s primary simply enforces “the rules of the party.”<sup>68</sup> If the Alabama Democratic Party wants to require individuals who wish to serve as the Party’s representatives to pledge to support the Party’s general election candidate, that should be completely up to the Party and if the State wants to pass a law to that effect, that should be up to the State.

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 343 U.S. 214 (1952).

<sup>65</sup> *Id.* at 228–29.

<sup>66</sup> *Id.* at 229–30.

<sup>67</sup> *Id.* at 230.

<sup>68</sup> *Id.*

But, as the majority in *Ray* recognized, that is not the same question as one asking whether the State—as opposed to a political party when it appoints its electors as its representatives—is entitled to compel its presidential electors to take an oath—not adjuring that they will be truthful or that they will faithfully perform their constitutional duty—but that they will vote a particular nominee. That question was not decided by *Ray*. *Ray* did not foreclose the possibility that a pledge and a penalty requirement could violate Article II, Section 1. At bottom, *Ray* and the pledge line of questioning were red herrings.

Justice Kagan’s conclusion does not find succor in *Ray*, nor does it find much support from the text of the appointment power of Article II, Section 1. Justice Kagan’s textual analysis depended entirely on her interpretation of the State’s power to appoint.<sup>69</sup> As she put it, “the power to appoint an elector (in any manner)” conveyed “the broadest power of determination” over the appointment.<sup>70</sup> The explicit assumption of Justice Kagan’s analysis was that the entity that has the power to make an appointment also as the power to impose substantive constraints on the appointment. However, as Keith Whittington noted: “Controlling election regulations is a far cry from controlling how those elected to an office will conduct themselves once in that office.”<sup>71</sup>

Moreover, Justice Kagan’s assumption cannot be right as a general proposition. There are many areas of election law in which everyone concedes that the state can impose qualifications for voters—electors—but cannot prescribe how voters are supposed to vote. For example, the states can compel voters to register as prerequisite to voting. It can compel voters to live in particular voting districts if they want to vote in those districts. It can require voters to take a pledge that voters will truthfully provide certain pertinent information. But no one would argue that because the state can promulgate these types of qualifications, it can also, as an associated condition, compel voters to vote for a specific candidate. Such a proposition would be absurd.

The Court rejected precisely that way of thinking in *U.S. Term Limits v. Thornton*.<sup>72</sup> In *U.S. Term Limits*, Arkansas argued that it had the right to refuse to provide ballot access to candidates for the House of Representatives who have already served three terms in the House and candidates for the Senate who have already served to two terms in the Senate. Arkansas urged, among its many arguments, that it had the power to exclude term-limited

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<sup>69</sup> Justice Thomas made a similar observation. See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2332 (2020) (Thomas, J., concurring) (“The Court’s theory is entirely premised on the State exercising a power to *appoint*.” (emphasis in original)).

<sup>70</sup> *Id.* at 2324 (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

<sup>71</sup> Whittington, *supra* note 30, at 920. Whittington further argues: “The manner of appointment could readily range from selecting the electors themselves, to authorizing the governor to appoint them, to authorizing the citizenry to elect them, and various other permutations. Choosing the way electors are appointed, however, would not seem to suggest that legislatures are empowered to instruct the elector on how to vote.” *Id.*

<sup>72</sup> 514 U.S. 779 (1995).

candidates from the ballot under Elections Clause, Article I, Section 4, which provides that “[t]he Times, places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” The Court disagreed. Writing for the majority, Justice Stevens concluded that the power delegated to the States under the Elections Clause, the “Manner of holding Elections,” is “a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes.” The Court in *U.S. Term Limits* was very clear that “manner” means the power to enact electoral procedures, not the power to dictate substantive outcomes.<sup>73</sup> As Justice Thomas recognized in his concurrence, there is no textual basis for reading “manner” differently in Article II, Section 1 than how it is read in Article I, Section 4.<sup>74</sup> There may be normative reasons and consequentialist reasons for allowing states to penalize electors for not voting as directed by the state. But the claim fails on textualist grounds.

## II. CHIAFALO AND HISTORICAL PRACTICE

*Chiafalo* cannot be justified on textualist grounds and quite frankly *Chiafalo* is not a textualist case. *Chiafalo* fits with a recent line of Supreme Court cases using historical practice to give meaning to the Constitution. In fact, gloss featured in two other cases decided the same term, *Financial Oversight and Management Board for Puerto Rico v. Aurelius*<sup>75</sup> and *Trump v. Mazars USA, LLP*.<sup>76</sup> Justice Sotomayor was the first to point to this path at oral argument in *Chiafalo*. She suggested, in the form of a question of course, “that historical practice since the founding offered a practical interpretation of the Constitution.”<sup>77</sup> And that practice favored state regulation of electors. Justice Kagan, whose turn followed Justice Sotomayor, pushed the point ever more aggressively, intimating that *Chiafalo*’s argument is undermined by historical practice. “Mr. Lessig, if . . . your reading is . . . very deeply contextual, then shouldn’t we look to what happened in the very first elections under the Constitution, where, you know, immediately, right away, electors associated themselves with a political party, pledged their votes ahead of

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<sup>73</sup> See *id.* at 832–34 (“The Framers intended the Elections Clause to grant States authority to create procedural regulations . . . . The Elections Clause give States authority ‘to enact numerous requirements as to procedure and safeguards which experience show are necessary to enforce the fundamental right involved.’” (quoting *Smiley v. Holm*, 285 U.S. 355, 366)); *id.* at 835 (noting that state regulations under the Elections Clause are constitution where they regulate “elections procedures . . . and . . . not . . . substantive qualification[s] rendering a class of potential candidates ineligible for ballot positions”).

<sup>74</sup> *Chiafalo*, 140 S. Ct. at 2330–31 (Thomas, J., concurring).

<sup>75</sup> 140 S. Ct. 1649 (2020).

<sup>76</sup> 140 S. Ct. 2019 (2020).

<sup>77</sup> Transcript of Oral Argument at 24, *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (No. 19-465).

time, . . . and it's that practice that has continued for over 200 years? . . . [D]oesn't . . . history suggest the opposite?"<sup>78</sup>

Under the guise of responding to arguments made by Chiafalo, in her *Chiafalo* opinion, Kagan picks up right where she left off during oral argument. Quoting *The Pocket Veto Case*, Justice Kagan stated that "[l]ong settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'"<sup>79</sup> She noted that even though the electors claimed that historical practice was on their side, "[e]lectors have only rarely exercised discretion in casting their ballots."<sup>80</sup> The Nation's history with presidential electors "points in the opposite direction."<sup>81</sup> To the extent that electors have exercised discretion, those examples were anomalous and the exceptions that prove the rule.<sup>82</sup> Electors have cast over 23,000 votes over the course of the relevant historical period and they have cast approximately 180 faithless votes. And "because faithless votes have never come close to affecting an outcome, only one has ever been challenged."<sup>83</sup> Though it is true that Congress counted the faithless vote, Justice Kagan concluded that "the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years."<sup>84</sup>

If one reads *Chiafalo* superficially, it would appear that Justice Kagan used historical practice in *Chiafalo* in the "classical" manner assumed by the academic literature—as a "gloss" to supplement the text. The text is clear and historical practice serves as additional evidence that interpretation suggested by the text is correct. Consistent with that view, she told us twice in the opinion that both the text and historical practice led to the same conclusion, in favor of the power of the states to control presidential electors. However, as we argue in this part, Justice Kagan does not use gloss in *Chiafalo* in the classical sense. Justice Kagan deploys historical practice not to supplement the text, but to counter it.

To frame our argument, consider a thought experiment. Assume that you are a person unfamiliar with American electoral practices but are interested in how Americans select their chief executive. Suppose that the text of the United States Constitution is the only information you have available to you. If you were to read the text and only the text, how closely would you be able to recreate actual electoral practices? Let us now run the experiment in the other direction. Suppose that you are a keen observer of American electoral practices and you want to deduce from your observation what the American Constitution or even more broadly, what American law, such as the Electoral Count Act, says about the process by which Americans elect

<sup>78</sup> *Id.* at 28.

<sup>79</sup> 140 S. Ct. at 2326 (citing *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *id.* at 2328 ("The history going the opposite way is one of anomalies only.")

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

their chief executive. From your keen observation of democratic practices on the ground, how closely could you recreate what the text says about how Americans are to select their chief executive?

We surmise that it would be difficult to recreate the constitutional text and structure if the only information you had to recreate the text came from observing American democratic practices. Conversely, even the best reader of the Constitution would be unable to recreate American electoral practices, with respect to the election of the Nation's chief executive, from simply reading the text. The Constitution, its text and structure, appears to set up a presidential selection process that seems to delegate a consequential choice to a group of people that the Constitution refers to as electors. Presumably, consistent with that delegation, the electors are to exercise their best judgment unbound, as a matter of law, by popular constraint. Consistent with this view, the Constitution imposes few constraints on presidential electors, which strongly implies that they are expected to exercise their independent judgment and that their choices are to be consequential. The Constitution does not provide any explicit direct role for popular input or control. And it clearly does not provide a positive right to vote for President and Vice President.

Notwithstanding the prescriptive specificity and clarity of the constitutional text, the way in which the Electoral College currently operates is not what one would expect if one only read the text of the Constitution, at least since political parties emerged on the scene.<sup>85</sup> Whatever else it has to commend it, the process described in the Constitution for selecting the President and Vice President—the Electoral College—is anachronistic.<sup>86</sup> It fits uncomfortably with modern democratic norms, in which popular control is the *sine qua non* of democratic legitimacy. Recall here the reapportionment revolution and its declaration that constitutional equality in the exercise of the franchise demands one-person, one-vote. With respect to the Electoral College, polling majorities seem to agree and would prefer the direct election of the President.<sup>87</sup> Critics of the Electoral College focus specifically on the delegate allocation formula, which provides a bonus to smaller states and does not proportionally reflect the voting power of voters in larger states,<sup>88</sup>

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<sup>85</sup> See Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 928–29 (2001).

<sup>86</sup> See, e.g., Ethan J. Lieb & Eli J. Mark, *Democratic Principle and Electoral College Reform*, 106 MICH. L. REV. FIRST IMPRESSIONS, 105, 105 (2008) (“The electoral college is a relic from another time . . .”).

<sup>87</sup> See Stephen Shepard, *Poll: Voters Prefer Popular Vote over Electoral College*, POLITICO (Mar. 27, 2019), <https://www.politico.com/story/2019/03/27/poll-popular-vote-electoral-college-1238346> [<https://perma.cc/M39M-TAMC>].

<sup>88</sup> This critique is of a piece with general criticisms about the undemocratic nature of the U.S. Constitution. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2008). For a terrific defense of “the power of states to administer elections, and, more specifically, to determine voter eligibility,” what he calls the “invisible federalism” that protects the

an inconsistency that is clearly at odds with the one-person, one-vote conception.

Keeping with modern ideas of democratic equality and political legitimacy, as a matter of democratic practice, we have a selection mechanism that is roughly populist, though a person unfamiliar with the American practice of presidential selection would not logically infer a roughly populist selection process from the text and structure of the Constitution. If you only read the text, you would not guess that American citizens, in all fifty states and the District of Columbia, participate in party primaries or caucuses and hold a general election purporting to elect their chief executive. In fact, you would be perplexed as to why residents of Puerto Rico vote in party primaries for President in light of the fact that they are not entitled to any presidential electors.

As a matter of American political practice, the Electoral College is not an independent selection mechanism that in fact chooses the chief executive. This is one of the bases for criticizing the Electoral College when the Electoral College winner does not match the winner of the popular vote. To the extent that the constitutional text assumes the independence of presidential electors as a collective of deliberative institutions that would engage in genuine deliberations in their respective states and uninfluenced by political faction or group bias, things have not worked out that way. *All* of the states select presidential electors via popular elections. Indeed, even before we get to the general election, we have a party primary system that essentially invites putative candidates, anyone who believes that they can capture the attention of the public, to participate. And for the most part, they do. If there is any wisdom in the process, it is the wisdom of the crowd and not of sagacious respected elders quadrennially debating the fate of the Republic.

As a matter of political practice, presidential electors are selecting from a pool of candidates, usually two, which the voting public has narrowed for them.<sup>89</sup> Put charitably, the process itself is very much a popularity contest, mediated by the political parties. As a matter of American political practice,

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Electoral College against reform efforts, see Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1239 (2012).

<sup>89</sup> And of course, it is misleading to suggest that presidential electors select the president—implying independent agency. Our two political parties identify and select a slate of presidential electors who are generally partisans of unquestioned loyalty. The historical record makes clear that parties have done a good job of choosing party loyalists. Few electors have defected; instances of “faithless electors” are comparatively few. See *Faithless Electors*, FAIRVOTE, [http://www.fairvote.org/faithless\\_electors](http://www.fairvote.org/faithless_electors) [<https://perma.cc/8H9V-P9TG>] (last updated July 6, 2020). In fact, the very concept of a “faithless elector” is arguably unconstitutional. If the constitutional design set up these electors to exercise their own judgment, in whatever way they saw fit, then the constitutional text/history does not recognize the concept of “faithless elector”. By constitutional definition, they cannot be faithless.

presidential electors have seen their roles reduced to mere ciphers or passive agents.<sup>90</sup> They are, at best, constitutional actors of no consequence.

And this historical devolvement is perfectly consistent with the text and structure of the Constitution—or so the majority argues. The Constitution, Justice Kagan tells us, “took no position on how independent from—or how faithful to—party and popular preferences the electors’ votes should be.”<sup>91</sup> Or as she would put it elsewhere in the opinion, the “Constitution is barebones about electors.”<sup>92</sup> The “Constitution left much to the future,” to the evolutionary practices of the nation. “And the future did not take long in coming.” The Nation soon developed a practice by which “presidential electors became trusty transmitters of other people’s decisions.”<sup>93</sup>

Though *Chiafalo* often reads as if Justice Kagan was providing a descriptive account of Article II, Section 1, she was not. Historical practice is responsible for much of the analytical work in the opinion. And though courts, for understandable reasons, are reluctant to argue that practice can and should trump a clear text, commentators are not so constrained.

The majority’s argument *Chiafalo* is an example of a phenomenon described by Professors Curtis Bradley and Neil Siegel by which assertions of textual clarity are themselves “often affected by interpretive considerations that are commonly thought to be extratextual,” such as historical practice.<sup>94</sup> Bradley and Siegel were specifically addressing perceptions of ambiguity in the text which is often used to justify the application or non-application of extratextual modalities of constitutional interpretation.<sup>95</sup> By contrast and contrary to the story that most legal academics tell about when courts use extratextual methods to interpret the text,<sup>96</sup> Justice Kagan claimed that the text was clear and used an extratextual modality to give meaning to the Constitution.

Building on Bradley and Siegel, our point here is that Justice Kagan’s argument about the clarity and directionality of the text—that the text is clear and that it supports state laws that punish electors that defect from the state’s directive—is constructed. The considerations that are potentially relevant to resolve the meaning of the text may also be relevant to determining

<sup>90</sup> See Ronald D. Rotunda, *The Aftermath of Thornton*, 13 CONST. COMMENTARY 201, 204 (1996) (describing the electors as “faceless scribes whose only real job” is “to ratify what the voters had already decided”).

<sup>91</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020).

<sup>92</sup> *Id.* at 2324.

<sup>93</sup> *Id.* at 2326.

<sup>94</sup> Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1238 (2015).

<sup>95</sup> See *id.* (“Participants in American constitutional practice typically agree that, when the constitutional text is clear, it is controlling. They often debate, however, whether the text is clear and, to that it is not, what should be consulted in resolving textual ambiguities.”).

<sup>96</sup> See *id.* at 1241 (“Nontextual modalities can appropriately be considered, according to the orthodox view, only to resolve ambiguities in the text.”).

both the clarity of the text and its directionality.<sup>97</sup> Thus, Justice Kagan’s declaration in *Chiafalo* that the text is clear—and that it supports the right of the states to bind electors—cannot be viewed in isolation. It cannot be fully understood if separated from the influence, the decisive influence, of historical practice as an extratextual modality. And it is the extratextual lever that is doing the heavy lifting in the analysis.

### III. COMPETING VIEWS OF REPRESENTATION AND POLITICAL PARTICIPATION

Once we understand that evidence from the text of the Constitution and evidence from historical practice point in different directions with regard to the discretion of presidential electors, we can better understand the work that historical practice is doing in *Chiafalo*. It provides a basis for Justice Kagan to pick between two competing views of representation and political participation with respect to presidential selection. One view is supported by the text and the other view by historical practice. Through historical practice, Justice Kagan is providing a font for a modern conception of consequential political participation and attempting to modernize the Electoral College to make it more consistent with contemporary notions of representation.

The Electoral College reflects the Framers’ elitist conception on political participation and representation. “The institution would function as yet another buffer between ‘the people’ and their government.”<sup>98</sup> Presidential electors, not citizens, were given the power to choose the Nation’s most important offices. They would indirectly represent the people and choose what is best for them. The states, specifically, their legislatures, were given the task of choosing the electors. The Electoral College’s allocation formula only indirectly reflects populist influences. Moreover, if no candidate receives a majority of electoral votes, the Constitution’s “contingent election system”

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<sup>97</sup> This formulation borrows from and extends a similar formulation in Bradley and Siegel. *See id.* at 1242 (“[T]he same considerations that are potentially relevant in resolving the meaning of ambiguous text can also affect the perceived clarity of the text in the first instance.”). Our formulation deemphasizes the focus on ambiguity; as *Chiafalo* demonstrates, extratextual modalities can be applied even to texts that are offered as clear and controlling. We add to the Bradley & Siegel formulation the direction or the substantive content that a court gives to the text. Directionality is important because both sides of a dispute often argue that the text favors them and sometimes both parties claim, as in *Chiafalo*, that historical practice or other types of extratextual modalities are on their side. As we have noted, almost all of the scholars who have examined the question have concluded that the text is clear and it supports elector discretion. The Court, of course, held that the text is clear and that it supports the states. The emphasis on directionality shows that extratextual modalities come into play not just to inform clarity but also substantive meaning.

<sup>98</sup> ALEXANDER, *supra* note 3, at 31.

kicks in,<sup>99</sup> and the House selects the President with each state voting as a bloc.

This process of presidential selection is heavily dependent upon elites who will both blunt the preferences of the people and act in their best interest, rising above factions and parochialism. Notably, Justice Harlan featured this conception of representation in his dissent in *Reynolds*. “[P]eople are not ciphers,” Harlan offered, and “legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where the electors live.”<sup>100</sup> It precludes direct participation by the demos in favor of the states and political elites.

The Constitution does not give voters a right to vote for President and Vice President. The text of the Constitution does not even give the voters a right to vote for presidential electors. Voters have no right to participation—at least not under the Constitution—in the process of presidential selection. The Constitution leaves it up to the states to decide what role if any voters ought to play in the process. If a state decides not to grant its voters the privilege of voting for presidential electors, and we use the word privilege intentionally, it does not have to do so.

Indeed, it is remarkable how important the states are under the Constitution when it comes to political participation. Two of the great oddities of the U.S. Constitution, for those unfamiliar with American constitutional history, is that it allocates much of the power to regulate federal elections to the states and that it views the states as units to be represented. States are both the foci of and medium for representation. The Constitution interweaves state and national regulatory power over elections in numerous ways. One example is Article I, Section 4.<sup>101</sup> This provision gives *states* in the first instance the express power to regulate *national* elections for Congress, though it preserves for Congress ultimate authority over the subject. Another example is Article I, Section 2, clause 1.<sup>102</sup> One could also add the Seventeenth Amendment to this list.<sup>103</sup> Thus, the Constitution not only provides that the states have the initial responsibility for regulating federal elections; it also provides that the states set voting qualifications for

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<sup>99</sup> ALEXANDER KEYSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 3 (2020).

<sup>100</sup> *Reynolds v. Sims*, 377 U.S. 533, 623–24 (1964) (Harlan, J., dissenting).

<sup>101</sup> See U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.”).

<sup>102</sup> See U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

<sup>103</sup> See U.S. CONST. amend. XIV (“The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”).

Congressional elections. And unlike the times, places, and manners clause,<sup>104</sup> which provides for Congressional oversight, the only limitation here is that the same voter qualifications apply to both state and federal electors.

Additionally, in both the Senate and in the Electoral College the states are represented *qua* states. State representation is one of the institutional arguments often offered in defense of the Electoral College. Wyoming and Maine deserve representation *qua* states, not as a function of the size of their population. To be sure, the states are not represented in the College to the same degree as they are in the Senate; but their allocation is far greater than mere population numbers would grant them.

The architects of the American Constitution were famously concerned about mob rule.<sup>105</sup> James Madison specifically worried that popular majorities could not adequately protect private rights and public goods.<sup>106</sup> His solution was a mixed system, one that reflects ideals of popular sovereignty and direct representation. But that system also depended upon political elites, enlightened statesmen, who would rise above factional interests and deliberate over the public good. There is no better example of that balance than the selection method created by the framers for electing members of the House, elected via direct election,<sup>107</sup> versus Senators, who were selected by state legislatures in the Constitution's original design.<sup>108</sup> The Electoral College takes up both approaches and combines them into its formula for allocating electors.<sup>109</sup> We would venture to wager that if Americans were starting anew today, we would not choose the same system created by the Founders. Moreover, Americans today are unlikely to find the states as compelling entities to be represented. The Founders' worries two centuries ago were different than the concerns that drive us today. But we are stuck with the vision of the Framers because their vision is entrenched in the Constitution. Or are we?

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<sup>104</sup> See U.S. CONST. art. I, § 4 (authorizing the states to prescribe the "times, places and manner of holding elections for Senators and Representatives."); *Foster v. Love*, 522 U.S. 67, 69 (1997) ("The [Elections] Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices.").

<sup>105</sup> See THE FEDERALIST NO. 68, at 354 (Alexander Hamilton or James Madison) (Gideon ed., 2001) ("Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.").

<sup>106</sup> See, e.g., Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 252 (1990); Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 476 (1988).

<sup>107</sup> U.S. CONST. art. I, § 2, cl. 1 provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ." U.S. CONST. art. I, § 2, cl. 3 provides: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ."

<sup>108</sup> This was not changed until the ratification of the Seventeenth Amendment in 1913, which brought the method for electing Senators into line with the method for electing Representatives.

<sup>109</sup> See ROBERT M. ALEXANDER, REPRESENTATION AND THE ELECTORAL COLLEGE 31 (2019).

Contrast this concept of political participation and representation with that being vindicated by Justice Kagan in *Chiafalo*. Justice Kagan is the Democracy Justice. Her aim in *Chiafalo* is of a piece with her uncharacteristically blistering dissent in the political gerrymandering case *Rucho v. Common Cause*.<sup>110</sup> In *Rucho*, Kagan took the majority to task for concluding that federal courts do not have the power to decide partisan gerrymandering cases because those cases raised political questions that were best decided by the political process. Kagan argued emphatically that political gerrymandering is unconstitutional because it “deprive[s] citizens of the most fundamental of their constitutional rights,” which are “the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives.”<sup>111</sup> Partisan gerrymandering is not just objectionable because it “debase[s] and dishonor[s] our democracy,” it is particularly pernicious because it “turn[s] upside down the core American idea that all governmental power derives from the people.”<sup>112</sup>

*Chiafalo* is an attempt, through the method of historical practice, to vindicate the same family of constitutional rights that Justice Kagan could not get the Court to vindicate in *Rucho*. She launches her opinion in *Chiafalo* by sounding the alarm that the presidential selection process may be selling a misleading bill of goods to the voters. She notes that even though voters “vote” for a presidential candidate every four years, they are in fact only selecting their state’s presidential electors, who will later select the President.<sup>113</sup> The worry, of course, is that even though voters expect that their participation and their votes will be consequential, elector discretion would make those votes irrelevant.

Though the Framers did not provide for direct political participation by the people, the people themselves developed a political practice of consequential political participation, to borrow from Larry Kramer.<sup>114</sup> They exercised agency within the open crevices of the text and structure of the Constitution. Justice Kagan’s opinion tells the story of the Nation’s progression from an elitist presidential selection process as directed by the text to a populist political practice that better reflected the people’s evolutionary expectations of consequential political participation. She closes the opinion with a populist battle cry and clarion call: “here, We the People rule.”<sup>115</sup>

She reminds us early in the opinion that the Electoral College was not the product of sustained deliberation by the Framers.<sup>116</sup> Moreover, the Con-

<sup>110</sup> 139 S. Ct. 2484 (2019).

<sup>111</sup> *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

<sup>112</sup> *Id.*

<sup>113</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320 (2020).

<sup>114</sup> See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 215 (2004).

<sup>115</sup> See *Chiafalo*, 140 S. Ct. at 2328.

<sup>116</sup> See *id.* at 2320 (“Our Constitution’s method of picking Presidents emerged from an eleventh-hour compromise.”).

stitutional text is very thin.<sup>117</sup> If that were not enough, this last minute, barebones framework became antiquated as well as “unworkable” as soon as it was tested. This is because the Framers’ “plan failed to anticipate the rise of political parties.”<sup>118</sup> The United States ratified the Twelfth Amendment in 1804, which was intended to fix the broken presidential selection system. “The Amendment thus brought the Electoral College’s voting procedures into line with the Nation’s new party system.”<sup>119</sup> Soon thereafter, voters would use political parties as the mechanism for asserting popular control on presidential selection. “By 1832, . . . all States but one had introduced popular presidential elections.” And “advanced, rather than resisted, the practice that had arisen in the Nation’s first elections.”<sup>120</sup>

In the early part of the twentieth century, voters likely understood themselves to be voting for presidential candidates directly, instead of voting for presidential electors. By the middle part of the twentieth century states passed statutes requiring presidential electors to vote the nominee of their party. Laws that penalize electors for defecting are only the latest developments of an evolutionary process that attempts to transmit as faithfully as possible the people’s preferences in order to fulfill the expectations of the voters’ that they have a right to vote for President and that their votes will count; it will matter.

Justice Kagan views the people—not the presidential electors or the states—as agentic. Recall here once more the reapportionment revolution and its one-person, one vote mantra. In *Reynolds v. Sims*, the Supreme Court famously declared, “[l]egislators represent people, not trees or acres.”<sup>121</sup> What matters for Justice Kagan is not the selection process referenced in the text but the “vote of millions of . . . citizens”<sup>122</sup> who are to be represented. As a matter of democratic practice, voters have come to expect that they will vote for the president. They do not expect their votes to be an empty exercise. And they have come to expect that if their candidate receives the most votes, their candidate will prevail. Washington’s and Colorado’s laws are constitutional according to Justice Kagan because they are attempting to meet the expectation of the voters through the mechanism of presidential selection by ensuring direct representation—or as direct as is possible under the structural limitation of the constitution.

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<sup>117</sup> See *id.* (“The provision that they approved about presidential electors is fairly slim.”); see also *id.* at 2324 (“The Constitution is barebones about electors.”).

<sup>118</sup> *Id.* at 2320.

<sup>119</sup> *Id.* at 2321.

<sup>120</sup> *Id.* at 2327.

<sup>121</sup> 377 U.S. 533, 563 (1964).

<sup>122</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020).

## IV. JUSTIFYING GLOSS

In *Chiafalo*, the majority uses historical practice to impose meaning upon the text of the Constitution, yet it does so in a manner that is arguably inconsistent with a straightforward reading of that text. The Electoral College offers an intriguing constitutional puzzle. The text and structure of the Constitution direct a particular process for selecting the nation's chief executive that seems to leave the selection process to elites and the states. Yet, that is not what happens as a matter of evolutionary constitutional practice. Presidential selection is a function of mass popularity and party politics. The Electoral College operates in a manner that is arguably inconsistent with the text but certainly inconsistent with the structural orientation of the Constitution. These clashes between the text and practice are not unusual and scholars have noticed them in many contexts including in the context of the Electoral College. *Chiafalo* raises an important and fundamental question about justifications for gloss. When, if ever, are courts justified in entrenching constitutional meaning derived from historical practice, particularly in the face of contrary meaning from the text and structure of the Constitution?

If there is an approach that anticipated the Court's reasoning in *Chiafalo* and provides the best account of the decision, in retrospect it is Whittington's argument that the historical practices of presidential electors after the Founding have essentially amended the Constitution.<sup>123</sup> Though conceding that the text of the Constitution clearly and unambiguously supports the conclusion that presidential electors are entitled to exercise their discretion free from state constraint,<sup>124</sup> Whittington argues that the Constitution should be interpreted to allow states to direct the electors' preferences. This is because—notwithstanding the text or the intent of the Framers—“by 1796, the presidential electors were an afterthought. The voters were making up their own minds as to who should be president, and the electors were expected to do what they were told.”<sup>125</sup> For more than two hundred years, presidential electors have been reduced to the role of mere scribes, shorn of agency.

Whittington maintains that this long historical practice—electors acting as delegates rather than as trustees—has effectively amended the Constitution and “established” an “unwritten and informal” but “new constitutional rule.”<sup>126</sup> Whittington calls these unwritten and informal rules “constitutional constructions.” “Constitutional constructions supplement [constitutional] interpretations by establishing the practical meaning of the foundational docu-

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<sup>123</sup> Indeed, Justice Kagan cites Whittington in support of her claim that after 1796, everyone expected electors to act as instructed by those who appointed them, be they legislatures or voters. See *Chiafalo*, 140 S. Ct. at 2326.

<sup>124</sup> See Whittington, *supra* note 30, at 935–36.

<sup>125</sup> *Id.* at 927.

<sup>126</sup> *Id.*

ment and guiding the behavior of government officials.”<sup>127</sup> Put differently, a sufficiently long practice changes the meaning of the text and tells democratic citizens, including constitutional interpreters, what behavior is consistent with the Constitution and what behavior is not. Returning to the context of the Electoral College, as a consequence of changed political practices since the Founding, the “practical construction of the Constitution has been that the presidential electors were to formally record the vote of the people of the states in which they were chosen, not exercise independent judgment in selecting a president. They were to be clerks, not kingmakers.”<sup>128</sup> Thus, notwithstanding the prescriptions of Constitutional text and the implications of its structure, as a practical matter long-standing political practice trumps clear text.

Whittington does not offer a justification for preferring practice over text. Moreover, and as *Chiafalo* shows, the distinction between an unwritten and informal practice and a written one is extremely thin. All that is required is for some government to formalize the practice through codification. In his 2015 Foreword to the Harvard Law Review, David Strauss addresses this question head-on.<sup>129</sup> Professor Strauss starts his article by recounting the question posed by the late Justice Antonin Scalia to then-Solicitor General Donald Verrilli, Jr. during the oral argument of *NLRB v. Noel Canning*, in which the Court was deciding whether a President has the power to make recess appointments.<sup>130</sup> Justice Scalia asked what should happen if a long-standing practice conflicts with the clear text of the Constitution. The implication of Justice Scalia’s question was that a clear text should certainly prevail over political practice, even a long-standing political practice. The Solicitor General answered that practice should trump text. The Solicitor General added that the circumstance hypothesized by Justice Scalia—a clear text yet contrary practice — is rare in American constitutional law, implying that resolving those rare conflicts do not pose much of a threat to our standard approaches to constitutional interpretation.

Not so, says Strauss. “If we read the text of the Constitution in a straightforward way, American constitutional law ‘contradicts’ the text of the Constitution more often than one might think. Or, in the words of Issacharoff and Morrison, “practice-based institutional settlements are pervasive in the law.”<sup>131</sup> Adhering to the text, Strauss notes, would require us to relinquish many of the most important and well-established principles of constitutional law.<sup>132</sup> Though not central to his Foreword, one of the examples that Professor Strauss provides in passing is the Electoral College. He observes that while the method of presidential selection can be squared with

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 936.

<sup>129</sup> See Strauss, *supra* note 45.

<sup>130</sup> 573 U.S. 513 (2014).

<sup>131</sup> Issacharoff & Morrison, *supra* note 20 at 1917.

<sup>132</sup> Strauss, *supra* note 45, at 3.

the text, “the practice is different from what the text seems to contemplate.”<sup>133</sup> These types of examples, clashes between clear text and contrary constitutional practice, dot the landscape of American constitutional law.

Strauss calls these clashes between clear text and contrary outcomes, anomalies, a term of art which for him means clashes that “call into question our familiar way of thinking about the relationship between the text of the Constitution and constitutional law.”<sup>134</sup> Anomalies help us to understand that the text is less decisive in interpreting the Constitution than we believe. Under the standard account of constitutional interpretation, the constitutional text always controls, when the text is clear. We only go beyond the text when there is no text available or when the text is ambiguous. Professor Strauss argues that the standard account does not provide an accurate description of what constitutional interpreters actually do when they interpret the Constitution. “Clear text does not always govern . . . .”<sup>135</sup> We do not interpret the Constitution by starting with the text—recall here the Tenth Circuit majority’s contrary starting premise in *Baca*—“constitutional law resembles the common law much more closely than it resembles a text-based system.”<sup>136</sup> Refining the description slightly, Professor Strauss argues we have a “mixed system, composed of both text and precedent.”<sup>137</sup> And text is itself a kind of precedent that needs to be reconciled and harmonized with other types of precedent.

Strauss argues that constitutional interpretation is “an effort to accommodate three institutional interests . . . in sovereignty, adaptation, and settlement.”<sup>138</sup> By sovereignty, he seems to mean an institution, such as a legislature, that is democratically accountable and can be responsive to the needs of the demos. Adaption allows the legal system to respond to changed circumstances. Settlement permits the legal system to identify the matters that are not contestable because the benefit of having a clear rule outweigh whatever benefits might come from a reconsideration of the matter.

Strauss acknowledges that a legal system toggling among these three interests will not always yield a bright-line rule to guide the behavior of constitutional actors. Adherence to clear text must be justified as necessary to accommodate one of the three interests and “if we cannot justify adherence to the text by reference to those interests, then we should—in fact, we do—depart from it.”<sup>139</sup> With respect to the Electoral College, Professor Strauss implies that states can limit the discretion of presidential electors though he does not provide a full defense of the point.<sup>140</sup>

<sup>133</sup> *Id.* at 22.

<sup>134</sup> *Id.* at 4.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 13.

<sup>138</sup> *Id.* at 53.

<sup>139</sup> *Id.* at 54.

<sup>140</sup> See *id.* at 57 (noting with seeming approval that we have seen a “common law-like evolution” that has “diminished” “the power of presidential electors”).

One possible defense is Professor Mark Tushnet's constitutional workaround framework.<sup>141</sup> A constitutional workaround is a political solution for getting around a clear constitutional text that stands in the way of a desired political outcome.<sup>142</sup> Take as one illustrative example the National Popular Vote Interstate Compact proposal, which Tushnet uses to demonstrate the concept. The Compact is a proposed agreement among the states and the District of Columbia to award their electoral votes to the presidential candidate that wins the national popular vote, as opposed to the candidate that wins the statewide vote (or district vote, in the case of Maine and Nebraska). The Compact is designed to work around the requirements of Article II and the Twelfth Amendment.<sup>143</sup> Though the Constitution obviously and clearly specifies the mechanism for electing the President and Vice President, it does not explicitly preclude each state from awarding their electoral votes to the national vote winner, given that under *Chiafalo* they can compel their presidential electors to do so.

Relying on his previous work,<sup>144</sup> Tushnet suggests that the acceptability of workarounds might depend upon whether they are working around provisions that implicate the "thick" or "thin" Constitution. The thick Constitution is the part of the Constitution that sets up and regulates the government.<sup>145</sup> It does not reflect deep or controversial political, moral, or constitutional value judgments. Take the requirement that the President has to be thirty-five years old. It reflects a shallow and not very controversial intuition that the President must be someone of sufficient maturity to run the government. This is the equivalent of Strauss's settlement justification: we just need to coordinate around one outcome. By contrast, there are other provisions in the Constitution that implicate deeper and more fundamental values, such equality, liberty, and autonomy.<sup>146</sup>

Professor Tushnet argues that workarounds that attempt to work around the thick Constitution are not objectionable.<sup>147</sup> This is because the

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<sup>141</sup> See Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

<sup>142</sup> Professor Tushnet explains that Constitutional workarounds "arise (a) when there is significant political pressure to accomplish some goal, but (b) some parts of the Constitution's text seem fairly clear in prohibiting people from reaching that goal directly, yet (c) there appear to be other ways of reaching the goal that fit comfortably within the Constitution." *Id.* at 1503.

<sup>143</sup> Professor Tushnet states that a constitutional workaround is one that is itself authorized by the text of the Constitution. See *id.* at 1503–04. It is not clear to us why textual authorization is a necessary conceptual component of the definition. In fact, we would argue that it detracts from it. If constitutional actors are choosing between two texts that point in different directions, it is hard to call the process of reconciling opposing textual commitments a workaround. What seems to make a workaround a workaround is that the Constitution prohibits a particular means, which also implies the prohibition of a particular purpose. Political actors are able to achieve the impliedly-prohibited purpose through a means that is not prohibited by the Constitution.

<sup>144</sup> See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

<sup>145</sup> See *id.* at 9.

<sup>146</sup> See *id.* at 11.

<sup>147</sup> See Tushnet, *supra* note 142, at 1511; *id.* at 1507.

provisions of the thick Constitution are anachronistic; they are no longer relevant to the “structure of a well-functioning government.”<sup>148</sup> But workarounds that attempt to work around the thin Constitution are problematic, presumably, because they challenge fundamental values, which if they are to be changed ought to be changed through the standard mechanisms that we use for amending the Constitution.

The problem is that the constitutional provisions that we want to work around are the ones that are often the most normatively contestable. In Tushnet’s parlance, they are part of the thin Constitution. Thus, normative justifications really matter because we will be choosing among options that are deeply contestable and deeply contested.

*Chiafalo* raises a number of difficult collateral methodological questions for gloss as a judicial method of constitutional interpretation. We focus on two here: how do we determine the relevant historical practice that counts as gloss and what counts as settled practice? We then turn to what we view as the fundamental question, which is articulating the normative values that justify the deployment of gloss. Put differently, under what circumstances should the federal courts essentially amend the Constitution by giving effect to one set of institutional arrangements when those institutional arrangements are inconsistent with the text or inconsistent with a competing set of institutional arrangements? This is a difficult question and the answer must turn on normative justifications offered to prefer practice to text.

First, what is the relevant practice that counts as a historical practice for the purpose of applying gloss?<sup>149</sup> If historical practice is to serve as a modality that courts can use to interpret the Constitution, it is important to identify the relevant practice with a great deal of specificity and it is equally important to develop a methodology for identifying the relevant practice. We know that gloss applies to governmental practice.<sup>150</sup> Professor Curtis Bradley provides some extremely important guidance, which is particularly useful in the context of separation of powers and foreign affairs. He explains for example, that historical practice can, and arguably must, include congressional statutes, “presidential actions intended to have binding effect,” committee reports, legal memoranda and the like.<sup>151</sup>

As importantly, Bradley explains that what counts as practice and as doing gloss depends upon the normative justifications using gloss as a modality of constitutional interpretation.<sup>152</sup> This is a fundamental point with which we agree and upon which we build below. But we might also make

<sup>148</sup> *Id.* at 1511.

<sup>149</sup> See Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 69–72 (2017) (addressing this question in context of separation of powers).

<sup>150</sup> See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 18 (2020).

<sup>151</sup> Bradley, *supra* note 150, at 69–70.

<sup>152</sup> See *id.* at 70; *id.* at 64 (“Any consideration of who to ‘do’ and approach is inevitably intertwined with normative questions about the value of the approach, and that is true of the gloss approach to constitutional interpretation.”).

some headway on the question by thinking about the following points. As a point of departure, we might determine whether the relevant practice ought to be identified at the broadest or narrowest level of generality. This is critical because choosing the level of generality often essentially decides the constitutional question. Or, we might ask whether the relevant practice ought to mirror, and if so, how exactly, the facts that gave rise to the dispute. Further, we might need to identify the vantage point for determining the relevant historical practice. For instance, using *Chiafalo* as illustrative, are we to examine the historical behavior of the states—and if so, which states? All of them? Just the states involved in the dispute; or only the states of the electors involved?<sup>153</sup>

The facts that gave rise to *Chiafalo* offer at least three possible relevant practices, which range from broad to narrow, that we might identify as the relevant historical practice. Perhaps at the broadest level of generality, we might ask whether electors have generally voted the preferences of those who selected them. Here we are looking at historical practice from the vantage point of electors and asking whether there is a long-established pattern of electors who have always voted per the instructions of others. Alternatively, we can switch our vantage point and ask whether states have generally required electors to take an oath to support the nominee of their party as a condition of being selected as an elector. Lastly, at the narrowest level of generality, we might ask whether states have penalized electors who have defected and what types of penalties states have leveled.

Second, how do we determine whether a practice is settled and who has the burden of showing that the practice is settled? As Professors Bradley and Siegel note, the goal is to identify practice that is longstanding. Moreover, a longstanding practice need not be unbroken. “[M]odern practice can potentially qualify as gloss even if it differs from earlier practice.”<sup>154</sup> However, there is no agreement on the Court or among academics for figuring out when a practice is settled.

This inquiry is made more complicated by the methodological questions we have already noted, such as uncertainty about the relevant practice and the distinctive vantage points of the actors involved in the dispute. Do we have a settled history of elector defections? Yes, we do. The first one is believed to have been Samuel Miles in 1796 and depending how you count, there have been as many as 196 faithless electors in American history.<sup>155</sup> And the history of people complaining against faithless electors is just as long.<sup>156</sup> Do we have a long history of citizens voting for presidential electors? Yes, we do. Citizens in Maryland and in Pennsylvania were voting to elect presiden-

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<sup>153</sup> It is because of these types of complications that some commentators are reluctant to apply historical gloss outside of the context of separation of powers. See, e.g., Bradley, *supra* note 18 at 64, Bradley & Morrison, *supra* note 19 at 416.

<sup>154</sup> Bradley & Siegel, *supra* note 148, at 19.

<sup>155</sup> See ALEXANDER, *supra* note 3, at 131.

<sup>156</sup> See KEYSSAR, *supra* note 100, at 31.

tial electors as early as 1789.<sup>157</sup> By 1876, every state selected their electors by popular elections.<sup>158</sup> Do we have a settled history of states requiring electors to take an oath as a condition of being appointed as an elector? Well, that question is more complicated. Some states have a long history of doing so, for more than 100 years. But only 30 states, and the District of Columbia, currently have an oath requirement. Twenty states have no such requirement.<sup>159</sup> And even fewer states penalize electors who defect. Penalties for violations are very recent and they vary. Most states who penalize defecting electors simply do so by replacing them. A few provide criminal sanctions, including a fine. Thus, even though some states have had some of these laws in their books, those states have been few, and those penalties have been a comparatively recent development. It is difficult, then, to say that there is a settled history of requiring electors to pledge.

Third, what is the justification for using gloss to entrench one interpretation of the constitution over a competing interpretation? One fundamental worry about using historical practice to entrench constitutional meaning is, as Professor Adrian Vermuele has argued, “the inherent lack of democratic responsiveness and accountability” in the generation of the practice.<sup>160</sup> Recall here as well David Strauss’s concern about sovereignty, which raises a similar worry. Democratic legitimacy worries are particularly acute in the context of law and democracy—as, for example, compared to the separation of powers context—to the extent that courts are using historical practices of some states or individual actors to bind the whole country by entrenching those practices through constitutional interpretation. Put differently, whereas it might make sense to talk of “the Presidency” as an institution, with continuity over time, and perhaps it might also make sense to think of “Congress” in the same way, it is probably less useful and maybe even incoherent to talk about presidential electors—and thus “the Electoral College”—as an institution, implying temporal continuity. The deployment of gloss in some domains might raise more or less legitimacy considerations than the deployment of gloss in other domains.

There are a number of possible justifications for using gloss as a method of constitutional interpretation. Professor Curtis Bradley offers four justifications that courts sometimes use when they apply gloss to interpret the Constitution, particular in the separation of powers context.<sup>161</sup> Courts apply gloss: as deference to nonjudicial actors, when those actors are viewed as equal—to courts—interpreters of the Constitution; as a consequence of the limitations on judicial capacity when the text of the Constitution is insufficient to supply the materials for robust judicial analysis; and for Burkean consequentialist reasons, by which courts defer to what has worked before;

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<sup>157</sup> See *id.* at 32.

<sup>158</sup> See ALEXANDER, *supra* note 3, at 5.

<sup>159</sup> See *id.* at 134–35.

<sup>160</sup> Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 300 (2015).

<sup>161</sup> See Bradley, *supra* note 150, at 59.

and reliance interests.<sup>162</sup> Professors Issacharoff and Morrison point to the telos of government. “Ours is a constitution of making things work under conditions of uncertainty. It is a domain conditioned by experience in governance, by the imprecise processes of institutional accommodation.”<sup>163</sup> Issacharoff and Morrison argue that courts tend to enforce the settlements arrive through practice when they “discern an enforceable constitutional norm from the contours of historical practice.”<sup>164</sup>

Understanding the justifications for the deployment of historical practice is important not only for democratic legitimacy reasons but also because normative justifications shape the methodological considerations that determine how courts apply historical practice and thus derive constitutional meaning. That is, normative justifications construct and constrain—to borrow from, and expand, Bradley and Siegel—disputes about: the clarity, or lack thereof, of the text; whether or not the text ought to be clear as a condition of the deployment of historical practice; whether the practice ought to be written or not; what counts as the relevant practice; whether the practice is settled; the level of generality; etc. Debates about historical practice arise against the backdrop of contested and contestable normative visions about our fundamental rules and fundamental values. If there was no contestation, there would be no controversy.<sup>165</sup>

This is one reason that we do not think categorical definitions—conventions, liquidation, constitutional construction—are useful, descriptive, prescriptive, or normative guides. What matters for gloss is contestation and the plausible existence of historical practice. Whether gloss is deployed turns on normative considerations. How gloss is deployed is dependent upon the instrumental utility of the collateral methodological inquiries to achieving the Court’s normative aim.

*Chiafalo* illustrates how these normative justifications cash out. The decision is not explained by the length, nature, or solidity of the historical practice. It is explained by the normative justifications. Building on Bradley’s work, we articulate, by way of illustration, two justifications that are relevant to *Chiafalo*. One possibility is what Bradley calls Burkean consequentialism, by which he means that courts might defer to “long-standing practices [that] are suggestive of what works well.” As Bradley emphasizes, one important worry here is the probability of unforeseen and unintended consequences. A second possibility, which we call excavating fundamental rights, builds on and expands what Bradley calls reliance interests. Recall here the plurality opinion in *Casey* with respect to *stare decisis*. A practice may become suffi-

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<sup>162</sup> See *id.* at 64–69.

<sup>163</sup> Issacharoff & Morrison, *supra* note 20, at 1917.

<sup>164</sup> *Id.* at 1936.

<sup>165</sup> This is another way of thinking about Tushnet’s distinction between thin and thick Constitution. Within the thick Constitution are the things we do not fight about. Within the thin Constitution reside the morass of our potential and actual disagreements.

ciently long-standing and embedded in our society such that citizens have come to rely upon it and view it as a fundamental constitutional right.

We see both of those justifications in *Chiafalo*. With respect to Burkean consequentialism, if one listens to the oral argument in the case, the Justices were very much concerned with the consequences of elector discretion. The conservative Justices in particular were concerned about fraud, bribery, and chaos—particularly chaos. For example, Justice Alito, speaking to Chiafalo’s lawyer, Professor Lawrence Lessig, asked: “Those who disagree with your argument say that it would lead to chaos, that in—where the election—where the popular vote is close and changing it just a few votes would alter the outcome or throw it into the House of Representatives, there would be—the rational response within the losing political party or elements within the losing political party would be to launch a massive campaign to try to influence electors and there would be long period of uncertainty about who the next president was going to be.”<sup>166</sup> Here is Justice Kavanaugh. “I want to follow up on Justice Alito’s line of questioning and what I might call the avoid chaos principle of judging, which suggests that if it’s a close call or a tiebreaker, that we shouldn’t facilitate or create chaos. And you, I think answered and said it hasn’t happened, but we have to look forward, and just being realistic, judges are going to worry about chaos. So what do you want to say about that?”<sup>167</sup>

To the chagrin of conservatives in the legal academy,<sup>168</sup> all of the Court’s conservative Justices, with the exception of Justice Thomas who concurred only in the majority’s judgment, joined Justice Kagan’s majority opinion and none, including Thomas, complained about her methodology. But Burkean consequentialism might explain why some of the Court’s conservative Justices were willing to ignore what some conservative legal academics regard as a clear text and an easy case for Chiafalo on originalism grounds. From the perspective of the Court’s conservative Justices “fidelity to the text,” risks corruption in the form of bribery and electoral chaos. What is to gain? Textual purity? Faithfulness to an outdated vision? States have developed and are developing a process that seems to work—so why second-guess them?

Perhaps more strongly, *Chiafalo* also illustrates the deployment of gloss to excavate fundamental principles, such as whether voters have a right to vote for President and Vice President. This might explain both why the liberal Justices used gloss here and why the majority identified the relevant historical practice at its broadest level of generality. The majority in *Chiafalo* picked a side in a clash over two competing understandings of representation

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<sup>166</sup> Transcript of Oral Argument at 21, *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (No. 19-465).

<sup>167</sup> *Id.* at 33.

<sup>168</sup> See, e.g., Mike Rappaport, *The Originalist Disaster in Chiafalo*, LAW & LIBERTY (Aug. 7, 2020), <https://lawliberty.org/the-originalist-disaster-in-chiafalo/> [<https://perma.cc/DG25-28GM>].

and political participation. *Chiafalo* supports the modern conception of representation in which the people, broadly defined, are sovereign and bearer of political rights. This is one of the reasons, we surmise, that Justice Kagan did not rest her analysis on the Tenth Amendment, which makes the states sovereign. Her opinion seeks to vindicate political participation and political equality among the electorate, unrestrained by the states. Under this modern view, the people's choices are determinative as a matter of political legitimacy. Electors are their agents, delegates who are only authorized to vote as instructed by their principals.

This is the basis of appeals to the popular vote when results of the Electoral College do not track the popular vote count. Notwithstanding the fact that we do not elect our president directly through a national popular vote, appeals to the popular vote count to impeach the electoral vote rest on the argument that in choosing our rulers, we the people are sovereign, we get to make those choices, and our revealed preferences ought to be determinative. As Justice Kagan said in *Chiafalo*, "here, We the People rule."<sup>169</sup>

Justice Kagan's opinion in *Chiafalo* anchors a jurisprudence in which a right to vote and political participation can be established, even when that right cannot be anchored in the text of the Constitution. Moreover, Justice Kagan's opinion gives some initial content to the right. Votes must be registered and counted. Voting is not an empty exercise. Voting is a mechanism for conveying the preferences of the electorate. The expectations and practices of the demos can both establish the right and give content to it. Kagan provides agency to the demos. The people are not limited to positive rights of political participation established by the dead hand of the past. They can create their own rights through their own democratic practices.

## CONCLUSION

What are the implications of the Court's decision in *Chiafalo*? Notwithstanding *Chiafalo*, so much of the way our presidential selection system operates remains entrenched in the Constitution and much also depends upon practice or convention. To what extent can the presidential system be altered by giving new meaning to the text through gloss instead of through the Article V amendment process? Consider three particular questions, all of which have been asked by Electoral College reformers.

First, do voters now have a constitutional right under the federal constitution to, indirectly but effectively, elect the President and Vice President? Put differently, as a consequence of historical practice, are states constitutionally required to allow voters to vote for presidential electors? A long-standing reform proposal of the Electoral College calls for the direct popular election of the President. This proposal dates back to the Founding, when

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<sup>169</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020).

proponents relied on its apparent simplicity.<sup>170</sup> Critics responded with arguments that resonate to this day. For example: it would be impractical; voters lack information and would be easily deceived; and the large states would have a larger influence than the smaller states.<sup>171</sup> The critics won this first battle, but reformers did not let up. Congress took up the question again in 1816 but failed to pass legislation on the matter.<sup>172</sup> Reformers came very close in 1970, when the Bayh-Celler Amendment passed in the House by large margins and received President Nixon's endorsement, only to succumb to a Senate filibuster.<sup>173</sup> Buoyed by public support,<sup>174</sup> reformers have pressed on through the years with no success. Constitutional obstacles have proven insurmountable. Can voters now say that the Court's approach in *Chiafalo* provides them with a right to vote for President and Vice President?<sup>175</sup>

Second, reforms have also focused on how states choose to allocate their Electoral College votes. Presently, most states assign all their votes on a winner-take-all basis.<sup>176</sup> The states need not do so, however, and nothing in the Constitution forbids them from assigning their votes differently. For example, states may choose to follow a districting system. Under this system, states would distribute their votes by congressional district, with the two remaining votes—one for each Senator—given to the winner of the statewide vote. States may also follow a proportional plan, which assigns their Electoral College votes in proportion to the statewide vote. These plans date back to the nineteenth century and continue to receive popular and scholarly support today.<sup>177</sup> But they are unable to overcome multiple obstacles. To be

<sup>170</sup> See James Madison, Journal (July 25, 1787), in 2 FARRAND'S RECORDS, *supra* note 25, at 107, 111; James Madison, Journal (July 19, 1787), in 2 FARRAND'S RECORDS, *supra* note 25, at 50, 56–57; James Madison, Journal (July 17, 1787), in 2 FARRAND'S RECORDS, *supra* note 25, at 25, 29–31.

<sup>171</sup> See *id.* at 135, 137, 392, 454.

<sup>172</sup> See NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 161 (rev. ed. 1981).

<sup>173</sup> See LAWRENCE D. LONGLEY & ALAN G. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* 174 (1972).

<sup>174</sup> See Shepard, *supra* note 87.

<sup>175</sup> We do not raise this question simply as an academic exercise. For example, politicians in Arizona are proposing legislation that would authorize the State legislature to appoint the State's presidential electors after voters have voted. See *GOP Bill Would Let Arizona Legislature Revoke Presidential Election Results*, KTAR NEWS, Jan. 29, 2021, <https://ktar.com/story/3949182/arizona-gop-bill-would-let-legislature-revoke-presidential-election-results/> [<https://perma.cc/9Q6Q-R2GN>]. This proposal would seem to render the voters' ballots purely advisory.

<sup>176</sup> See Jonah Engel Bromwich, *How Does the Electoral College Work?*, N.Y. TIMES (Nov. 8, 2016), <http://www.nytimes.com/2016/11/09/us/politics/how-does-the-electoral-college-work.html> [<https://perma.cc/635L-CUHA>].

<sup>177</sup> See PEIRCE & LONGLEY, *supra* note 173, at 132, 144; Ben Chapman, *A Bipartisan Approach to Electoral College Reform*, MEDIUM (June 27, 2018), [https://medium.com/@Ben\\_Chapman/a-bipartisan-approach-to-electoral-college-reform-ab8c71d42442](https://medium.com/@Ben_Chapman/a-bipartisan-approach-to-electoral-college-reform-ab8c71d42442) [<https://perma.cc/AW59-ZFRG>]; Edward B. Foley, *An Idea for Electoral College Reform That Both Parties Might Actually Like*, POLITICO (Jan. 19, 2019), <https://www.politico.com/magazine/story/2019/01/12/electoral-college-reform-conservatives-223965> [<https://perma.cc/ME2K-ZPKG>].

sure, Nebraska and Maine have adopted the districting method. However, only once in their history—Nebraska in 2008—has one of these states split the Electoral College vote. If more states begin to allocate their electoral votes proportionally, will this serve as historical practice that will eventually compel all of the states to allocate electoral votes proportionally?

Finally, consider the National Popular Vote Interstate Compact.<sup>178</sup> Under the compact, states agree beforehand to distribute their Electoral College votes to the candidate who wins the national popular vote. The Compact will take effect once states that collectively reach 270 electoral votes agree to bind themselves. Fifteen states plus the District of Columbia have agreed to the compact, with electoral votes totaling 196. Notably, the Compact does not require a constitutional amendment and, in fact, that is precisely the point. The compact is a precommitment strategy.<sup>179</sup> Once the requisite states bind themselves, the Compact takes effect and avoids the constitutional amendment process. This is because the Compact does not change the Constitution at all, but the way that states choose to allocate their electoral votes. How should the Court examine the Compact post-*Chiafalo*? Does the approach of *Chiafalo* improve the constitutional standing of the Compact? Chief Justice Roberts anticipated this question at oral argument in *Chiafalo* and seemed to imply yes.

The Court's decision in *Chiafalo* undermines a possible and critical safety valve of our presidential selection process, by which a sufficient number of electors could disregard the wishes of the people if they believe that the people have selected a demagogue to lead them. But the Court's decision in *Chiafalo* also provides more agency to the people. They are responsible for their own political choices by crafting the types of democratic practices that are consistent with their contemporary values. The Court's decision in *Chiafalo* makes the dead hand of the past, in the form of sticky textual commitments, less sticky and less controlling. It remains an open question whether the Court's attempt to reconcile text and practice is better or worse for democracy. Are we better working with a system that is neither fish nor fowl? Would we be better off facing the dictates of the text and the past even if they lead to dire consequences, which would provide the impetus for reforming our presidential selection system? How are we to deal with potential pathologies of our current system that cannot be glossed over. For example, what happens if the Electoral College continues to select with greater frequency a candidate that loses the popular vote but wins the Electoral College vote? Does *Chiafalo* make it easier or harder to address this eventuality? There certainly are limits to what courts and historical gloss can do to ad-

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<sup>178</sup> See Muller, *supra* note 88, at 1238; Vikram David Amar, *How to—Carefully—Surmount the Electoral College*, ATLANTIC (Jan. 14, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/national-popular-vote/604861/> [<https://perma.cc/C2ZY-ENJE>].

<sup>179</sup> See JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 37–47 (1979) (discussing precommitment strategies); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 195 (Jon Elster & Rune Slagstad eds., 1988) (applying the concept to constitutions).

dress the gaps between practice and text. At some point, at least in the domain of the law of democracy, the people themselves must take up challenge and entrench their settled agreements and watch the cycle begin anew for a different generation that knew not Joseph.<sup>180</sup>

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<sup>180</sup> Exodus 1:8 (“Now there arose a new king over Egypt, who did not know Joseph.”)