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Alexander Gouzoules

ARTICLES

THE "FAITHLESS ELECTOR" AND 2016: CONSTITUTIONAL UNCERTAINTY AFTER THE ELECTION OF DONALD TRUMP

Alexander Gouzoules[*]

Presidential electors are obligated by custom and, in some states, by law, to cast their Electoral College votes for the candidate who won their state's election. An elector who exercises discretion and votes for an alternative candidate is commonly (if somewhat uncharitably) known as a "faithless elector."[1] Until the election of 2016, faithless electors were rare enough to be little more than a curiosity, albeit one that sparked academic debate about the Constitution's structure and society's democratic values.[2] In the thirty years prior to 2016 (including the

* Attorney, 2014-; Federal Judicial Clerk for the Honorable William H. Walls, 2015-2016; J.D., *cum laude*, Harvard Law School, 2014; M.A. Stanford University, 2011; B.A. Emory University, 2008.

1. Although a few commentators with more sympathy to the idea of elector discretion have used terms like "autonomous elector," see MARTIN DIAMOND, THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY 6 (1977), or "party-defector elector," see Henry Stokes Paulsen, *The Constitutional Power of the Electoral College*, PUBLIC DISCOURSE (Nov. 21, 2016), http://www.thepublicdiscourse.com/2016/11/18283/ (the "faithless" descriptor is nearly universal).

2. *See, e.g.*, Vasan Kesavan, *The Very Faithless Elector*, 104 W. VA. L. REV. 123, 124

divisive and contested 2000 election), only two faithless votes were recorded: John Edwards received a vote earned by John Kerry in 2004,[3] and Lloyd Bentsen received a vote earned by Michael Dukakis in 1988.[4] In addition to these two votes, Washington, D.C. elector Barbara Lett-Simmons, who was pledged to Al Gore in 2000, abstained from voting to protest the District's lack of congressional representation.[5] She characterized this as an act of civil disobedience rather than a faithless vote and declared that she would have voted for Gore had the ultimate outcome been in doubt.[6] Notably, all three of these modern defections came from electors pledged to the defeated presidential candidate, so their faithless votes ran no risk of depriving the winner of his majority.

Indeed, in the 50 years prior to 2016, only one elector pledged to a winning candidate cast a faithless vote, and that vote occurred after Richard Nixon's 49-state landslide victory in 1972, when Roger MacBride of Virginia voted for Libertarian John Hospers instead of Nixon.[7] This single exception occurred after Nixon earned a stunning 521 votes, arguably proving the rule that, in modern America, faithless votes are occasionally cast as acts of protest but never as serious attempts to change electoral outcomes. In the context of this history, observers like Joy McAfee have argued that the fear of faithless electors determining an election's outcome had "been ignited based upon fortune telling and speculation" rather than any genuine risk.[8] Likewise, Judith Best dismissed the potential problem presented by faithless electors as being too "miniscule" to justify a constitutional amendment.[9]

But after two election cycles in which no faithless votes were cast,

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(2001); *see* Robert Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 NW. U. L. REV. 121, 121 (2006); *see also* Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 668–69 (1996) (discussing the lack of scholarly consensus as to the status of electors).

3. *See Minnesota Elector Gives Edwards a Vote, Kerry Gets Other Nine*, MINNESOTA PUBLIC RADIO (Dec. 13, 2004), http://news.minnesota.publicradio.org/features/2004/12/13_ap_electors/.

4. L. PAIGE WHITAKER & THOMAS H. NEALE, CONG. RESEARCH SERV., RL30804, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 10 (2001).

5. *See id.*; *see also The 43rd President: The Electors Vote, and the Surprises are Few*, N.Y. TIMES (Dec. 19, 2000), http://nyti.ms/2hqiOqy (left ballot blank to protest capital's "colonial status").

6. WHITAKER & NEALE, *supra* note 4.

7. *Id.*

8. Joy McAfee, *2001: Should the College Electors Finally Graduate? The Electoral College: An American Compromise from Its Inception to Election 2000*, 32 CUMB. L. REV. 643, 653 (2001).

9. JUDITH BEST, THE CAST AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 190 (1971).

seven were recorded in 2016[10]—by far the most in more than a century.[11] An additional three were cast but invalidated by operation of state laws of uncertain constitutionality.[12] And three more electors filed lawsuits against state officials before the vote, unsuccessfully seeking injunctive relief against state laws that prevented them from casting a faithless vote.[13]

Significantly, several of these faithless votes were not merely symbolic acts of protest but were part of a coordinated, if ultimately unsuccessful, attempt to keep the Presidency out of the hands of Donald Trump.[14] Electors from both parties publicly called for their fellow electors to defect to a mutually agreeable candidate.[15] While this effort was ongoing, multiple Democratic elected officials urged that the Electoral College vote be postponed, implying that electors might change their minds and exercise discretion as evidence of alleged Russian intelligence operations targeting the Clinton campaign became public.[16] As a result, a large-scale public campaign urging electors to defect sprang up in advance of the vote.[17]

In the end, thirteen electors attempted to cast faithless votes or participated in lawsuits premised on their intention to do so.[18] This break with precedent was a rare test of the patchwork of state laws that attempt to regulate the electors. Disturbingly, this test revealed that the process by which some faithless votes are invalidated and some are not is even more inconsistent and incoherent than scholars have imagined.[19] We are left after the election of 2016 with new uncertainty as to the constitutional framework for selecting a president, even as the public demonstrates more openness to the idea of faithless electors than it had in the past. It is sobering to note that George W. Bush achieved the Presidency in 2000 by winning 272 electoral votes, just two more than the required threshold of 270. The number of faithless votes cast in 2016 easily exceeds Bush's margin of victory in 2000.

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10. *See* Julia Boccagno, *Which Candidates did the Seven "Faithless" Electors Support?*, CBS NEWS (Dec. 21, 2016), http://www.cbsnews.com/news/which-candidates-did-the-seven-faithless-electors-support-election-2016.

11. WHITAKER & NEALE, *supra* note 4.

12. *See* Scott Detrow, *Donald Trump Secures Electoral College Win, With Few Surprises*, NPR (Dec. 19, 2016), http://www.npr.org/2016/12/19/506188169/donald-trump-poised-to-secure-electoral-college-win-with-few-surprises.

13. Koller v. Brown, No. 5:16-cv-7069-EJD, 2016 WL 7325032 (N.D. Cal. Dec. 16, 2016); Baca v. Hickenlooper, 16-cv-2986-WYD-NYW, 2016 WL 7384286 (D. Col. Dec. 21, 2016).

14. *See* discussion *infra* Part II.

15. *See* discussion *infra* Part III.

16. *See* discussion *infra* Part III.

17. *See* discussion *infra* Part III.

18. *See* discussion *infra* Part III.

19. *See* discussion *infra* Parts II, IV.

This Article will begin by discussing the constitutional framework that sets up the Electoral College and the evolution of federal law on the electoral system. It will then survey the various types of state laws that currently "bind" electors to vote for the winning candidate, arguing that these laws should be classified into two broad categories—one of which creates more uncertainty than the other. This paper will then review the events leading up to the 2016 Electoral College vote, including lawsuits filed by would-be faithless electors in California, Colorado, and Washington. The next section will discuss how the conventional understanding of faithless electors should be revised after the events of 2016. In the final section, I argue that there is more uncertainty as to the operation of the various state "binding" laws than past observers have realized, because many such laws leave wide discretion as to their operation in the hands of partisan state election officials. In light of this, I conclude the article by urging state legislatures and the courts to minimize these dangers by working toward a uniform and coherent electoral system. Such a system is more needed now than ever before.

I. THE FAITHLESS ELECTOR BEFORE 2016: A CONSTITUTIONAL OMISSION AND AN ACADEMIC CURIOSITY

The Constitution was designed to leave "the selection of the President to the people, through their legislatures, and to the political sphere."[20] Article II, Section 1 provides that:

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

At the time of ratification, Alexander Hamilton argued in favor of the Electoral College in Federalist 68, articulating a view that active electors would stand as a bulwark against the possibility that a president with "talents for low intrigue, and the little arts of popularity"[21] could achieve office without the necessary qualifications or the appropriate temperament. Hamilton believed that a "small number of persons, selected by their fellow-citizens from the general mass, will be most

20. Bush v. Gore, 531 U.S. 98, 111 (2000).

21. ALEXANDER HAMILTON, JOHN JAY, JAMES MADISON, THE FEDERALIST NO. 68, 354, (George W. Carey & James McClellan eds., Gideon ed. 2001). Whether skill with 140-character tweets should be considered as one of the "little arts of popularity" is a subject for another time.

likely to possess the information and discernment requisite to such complicated investigations" as would be required to select a president.[22] This process would afford "a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications."[23] Although there are many interpretations as to why the framers ultimately chose to adopt the Electoral College system rather than direct national elections,[24] few dispute that electors were originally intended to have discretion in casting their votes.[25]

But, as Robert Bennett noted, "it is astounding how quickly many of the assumptions on which [the original design of the Electoral College] was based proved to be false."[26] After the Constitution's framework was put into effect, it soon became evident that the process of selecting the winner of the Electoral College vote as President and the runner-up as Vice President was flawed.[27] The Twelfth Amendment reformed the Electoral College system to correct this flaw. In relevant part, it mandates that:

> 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; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and all persons

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22. *Id.* at 352.

23. *Id.* at 354.

24. *E.g.*, Gray v. Sanders, 372 U.S. 368, 377 (1963) (The "Electoral College was set up as a compromise to enable the formation of the Union among the several sovereign states."); Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 467–71 (2007) (arguing that the lobbying of slave-owners was "the real demon dooming direct national election in 1787 and 1803"); McAfee, *supra* note 8, at 646 (The "Electoral College was actually a compromise based upon federalism and equality of all states.").

25. "No one faithful to our history can deny that the plan originally contemplated what is implicit in its text—that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices." Ray v. Blair, 343 U.S. 214, 232 (1952) (Jackson, J. dissenting); *see, e.g.*, Ross & Josephson, *supra* note 2, at 676; Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Secession Gap*, 48 ARK. L. REV. 215, 230 (1995) (The "Constitution plainly contemplates that, at least formally, the electors must themselves decide upon their votes."). *See also* Bennett, *supra* note 2, at 126.

26. *See also* Bennett, *supra* note 2, at 127.

27. *See, e.g.*, 6 ANNALS OF CONG. 1824 (1797); 11 ANNALS OF CONG. 1289-90 (1802); *see generally* Tadahisa Kuroda, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804, at 1–20 (1994); *see also Blair*, 343 U.S. at 224, n.11 ("During the John Adams administration, we had a President and Vice-President of different parties, a situation which did not commend itself either to the Nation or to most political theorists. The situation was manifestly intolerable.").

> voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

The Twelfth Amendment was not intended to remove elector discretion, as can be seen from the statements of the Amendment's contemporaries. For example, William Loughton Smith, Representative from South Carolina and one of the first to propose the Electoral College's reform, believed that the problem with the original system for choosing a Vice President was that it did not "carry into effect the real intention of the Electors."[28]

By the late 1820s, "almost all of the states then in the Union had . . . made the shift to having eligible citizens within each state choose the entire slate of electors, presumably based on their positions and the candidates they supported."[29] In the decades to come, a consensus formed around the idea that the electors should vote in accordance with the wishes of the voters of their state.[30] This evolution was not hotly contested; it took seventy years for the Supreme Court to first address the issue of state control over electors. In *McPherson v. Blacker*, plaintiffs challenged a scheme by Michigan to allocate its electoral votes by congressional district, and the Court held that the Constitution "has conceded plenary power to the state legislatures in the matter of the appointment of electors."[31]

In the coming decades, two state courts would address electoral discretion as well. In 1912, the Nebraska Supreme Court held that electors applying their own judgment in the Hamiltonian model would deprive the state's citizens of their right to vote.[32] In 1933, the Supreme Court of New York held that the role of electors is "purely ministerial."[33] Of course, only the U.S. Supreme Court could definitively interpret the Constitution, but these state court decisions demonstrate society's evolving understanding of the role of electors at the turn of the twentieth

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28. 6 ANNALS OF CONG. 1824 (1797).

29. John A. Zadrozny, *The Myth of Discretion: Why Presidential Electors Do not Receive First Amendment Protection*" 11 COMMLAW CONSPECTUS 165, 167 (2003).

30. By the election of 1872, electors pledged to Horace Greeley voted for him "even though, by the time of the Electoral College vote, Greeley was dead and in his coffin." Ronald D. Rotunda, *The Aftermath of Thornton*, 13 CONST. COMMENT. 201, 204 (1996).

31. McPherson v. Blacker, 146 U.S. 1, 35 (1892); *see also* Bush v. Gore, 531 U.S. 98, 104 (2000) ("[T]he state legislature's power to select the manner for appointing electors is plenary . . . .").

32. State *ex rel.* Neb. Republican State Cent. Comm. v. Wait, 138 N.W. 159, 165 (Neb. 1912).

33. Thomas v. Cohen, 262 N.Y.S. 320, 326 (Sup. Ct. 1933).

century.[34]

A more significant challenge to the system came in the middle of the Twentieth Century, as the nation began to grapple with segregation and, as a result, southern Democrats began to chafe against their party. President Harry Truman issued Executive Order 9981 in July 1948, ordering the desegregation of the U.S. military.[35] In the following election, a faithless vote was cast against him when Preston Parks of Tennessee voted for Strom Thurmond of the State's Rights Party rather than Truman.[36] And in the next election, Alabama Democrat Edmund Blair sought a seat as elector but refused to pledge to vote for the ultimate Democratic nominee, as required by party rule (and by a state statute requiring party primary candidates to abide by party rules).[37] Instead, Blair brought a challenge to this Alabama law that gave party officials the authority to set qualifications of primary candidates for the position of elector.[38] Blair alleged that this Alabama law violated the Twelfth Amendment by "restrict[ing] the freedom of a federal elector to vote in the Electoral College for his choice . . . ."[39] The case he brought, captioned *Ray v. Blair*, reached the U.S. Supreme Court after the Supreme Court of Alabama issued a *writ of mandamus*, siding with Blair.[40]

In an opinion by Justice Reed, the Court recognized a fundamental paradox of the Electoral College: that "presidential electors exercise a federal function in balloting for President and Vice-President, but they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the federal constitution."[41] The Court also

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34. *Id.* The New York court stated that:

> To read [the Constitution] with an eye to the language only and with a disregard for the brilliant history of party government in this nation, which has been attended with such signal success (placing us first among the nations of the world), would mean to hold that our primaries, nominating, campaigning, and voting, are empty gestures.

Writing decades after Watergate and soon after the anti-establishment surge of 2016, it is difficult to imagine a court today echoing *Cohen*'s uncritical and wholly laudatory embrace of the history of party government in the United States. *Cohen* and *Wait* are both products of a time when public faith in party institutions was far higher than today.

35. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

36. WHITAKER & NEALE, *supra* note 4, at 12.

37. Zadrozny, *supra* note 29, at 178.

38. *Id.*

39. Ray v. Blair, 343 U.S. 214, 215 (1952).

40. *Id.* at 215–16.

41. *Id.* at 224–25. For an argument that this holding was mistaken, see Kesavan, *supra* note 2, at 131–32 (arguing that the finding in *Blair*, that electors are not federal officials, is incorrect).

acknowledged that the "applicable constitutional provisions on their face furnish no definite answer to the query whether a state may permit a party to require party regularity from its primary candidates for national electors."[42]

But the Court avoided making a decision that might have clarified whether elector discretion is required by the Twelfth Amendment or can be regulated by the states. Instead, it framed the issues narrowly, relying on the fact that "the right to a place on the primary ballot only is in contest."[43] Because the Alabama law in question only affected voluntary participants in a party primary, who were theoretically free to run for the office of elector as independent candidate candidates (and thereby avoid the law's restrictions), the Court held that the law did not violate the Twelfth Amendment.[44] It explained that:

> [E]ven if such promises by candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II §1, 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.[45]

This avoidance worked as a matter of formal logic, but it ignored the fact that running for presidential elector outside of a party system is effectively impossible in modern America. This objection animated Justice Jackson's lively dissent in *Blair*, as Jackson understood that "long-prevailing conditions . . . effectively foreclose[] any chance of the State's being represented by an unpledged elector."[46] Within the party system, Jackson noted that the electors, "although often personally eminent, independent, and respectable, [had] officially [become] voluntary party lackeys and intellectual nonentities . . . ."[47] But the party system had become so ubiquitous that, as "an institution, the Electoral College [had] suffered atrophy almost indistinguishable from *rigor mortis*."[48]

Jackson argued that, under the original constitutional plan, "no state law could control the elector in the performance of his federal duty, any more than it could a United States Senator who also is chosen by, and

42. *Blair*, 343 U.S. at 224.
43. *Id.* at 223 n.10.
44. *Id.* at 230–31.
45. *Id.* at 230 (emphasis added); *see also id.* at 223 n.10.
46. *Id.* at 233 (Jackson, J., dissenting).
47. *Id.* at 232.
48. *Id.*

represents, the State."[49] Jackson presciently believed that the Electoral College was, at best, "a mystifying and distorting factor in presidential elections which may resolve a popular defeat into an electoral victory" and, at worst, "open to local corruption and manipulation, once so flagrant as to threaten the stability of the country."[50] But he also believed that binding laws like Alabama's turned a "voluntary general practice" into a "legal obligation," and he strongly objected to the idea that "powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse."[51]

Putting aside the merits of the Electoral College itself, Jackson's dissent reflected a more clear-eyed analysis than the implausible distinction between primary and general election access relied on by Reed. Many years later, even scholars who largely approved of the outcome of *Blair* have framed the decision in Jackson's terms rather than Reed's.[52]

But the *Blair* majority was influential in at least two ways. First, because it had allowed Alabama's regulatory scheme to survive, an expanding number of states would pass their own elector binding laws in the years to come. Second, the fact that the *Blair* court declined to definitively interpret the Twelfth Amendment meant that state legislators had little guidance in drafting these statutes. As a result of this lingering uncertainty, today's binding statutes vary greatly in their structure and operation. And while these varying statutes were enacted, commenters continued to debate whether *Blair* implied that they were constitutional.[53]

John Zadrozny performed a survey of the state binding laws that existed in 2003.[54] He classified these statutes into three categories: (1) states with "a simple statutory declaration that electors will adhere to the general election results," (2) states that, "anticipating the problems that would arise from the [first category's] seeming lack of enforceability,

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49. *Id.*

50. *Id.* at 234.

51. *Id.* at 233.

52. *See* Rotunda, *supra* note 30, at 206 (citing *Blair* as demonstrating that the states and political parties had "in effect . . . amended [the Constitution] without enacting a formal amendment that requires electors to be faithful to their pledge."); *see also* Zadrozny, *supra* note 29 (arguing that electors "through an evolutionary process that derives support from the text of the Constitution, have been rendered mere tools of the state.").

53. For instance, Akhil Amar wrote that, "[c]ontrary to the loose language in that passing footnote, I now do not think that *Ray* 'strongly suggests that states can bind collegians any way they choose.'" Amar, *supra* note 25. On the other hand, Ross and Josephson argued that the Court's "language and reasoning in *Ray v. Blair* strongly imply that state laws directly binding electors to a specific candidate are constitutional." Ross & Josephson, *supra* note 2, at 665. Kesavan, meanwhile, simply concluded that it "is still an open question whether this 'seemingly democratic process' passes constitutional muster." Kesavan, *supra* note 2, at 125.

54. Zadrozny, *supra* note 29, at 179.

implemented statutes that required electors to honor pledges made to their respective parties," and (3) states in which "the casting of a faithless vote triggered an automatic resignation on the part of that faithless elector and a subsequent appointment of a new elector who would honor the obligation."[55]

I suggest that a dichotomy between deterrent and invalidation statutes is a more precise framework than Zadronzy's three classes. To be sure, among deterrent-based statutes, some merely provide a "statutory declaration" that electors vote for the nominee of their political party[56] whereas others require electors to take an oath to vote for the winning candidate[57] and still others criminalize a faithless vote and require the state attorney general to bring a criminal action against faithless electors.[58] But, for three reasons, these categories collapse into each other on closer inspection.

First, some states that seemingly only have a "statutory declaration" against faithless votes also have criminal statutes that could be applied to a faithless elector if a state attorney general chose to vigorously pursue such a case. For example, California Elections Code § 6906 declares that the state's "electors, when convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice President . . . who are, respectively, the candidates of the political party which they represent . . . ." But California Elections Code § 18002 states that: "Every person charged with the performance of any duty under any law of this state relating to elections, who willfully neglects or refuses to perform it . . . [is] punishable by fine not exceeding one thousand dollars or by imprisonment . . . for 16 months . . . ." Thus, whether California is a "statutory declaration" state or a state that "require[s] electors to honor pledges" depends on whether a prosecutor decided to apply § 18002 to a faithless elector.

Second, many states require electors to certify that they will vote for the winning candidate. Alabama, for example, specifically requires an Elector to certify that he or she will: "cast my ballot as . . . elector for _____ for President and _____ for Vice-President of the United States' (inserting in said blank spaces the respective names of the persons named as nominees for said respective offices in the certificate to which this statement is attached)."[59] Such a pledge could operate, like a "statutory declaration," as a social and normative deterrent against faithless electors who feel personal pressure to follow state law and avoid breaking their oath. But alternatively, in the hands of an aggressive state attorney

55. *Id.*
56. *E.g.*, HAW. REV. STAT. § 14-28 (1981).
57. *E.g.*, ALA. CODE § 17-14-31 (2006).
58. *E.g.*, S.C. CODE ANN. § 7-19-80 (1971).
59. *See* ALA. CODE § 17-14-31 (2006).

general, such a pledge could operate much like a statute that criminalizes a faithless vote by laying the grounds for a perjury charge against a faithless elector.

The final reason the deterrent-based statutes belong in a single category is that even those statutes that, on first glance, appear to set up specific statutory penalties against faithless electors actually rely on the same social and customary deterrence as the "statutory declaration" states. For example, Washington State law provides for a $1,000 fine for the casting of a faithless vote. But an elector who does not feel bound by social pressure to abide by state law is unlikely to be convinced by the deterrent effect of a $1,000 fine. The Electoral College of 2016 provided evidence that committed faithless electors will violate state laws that have specific statutory penalties just as they will violate state laws that do not.[60] For these reasons, the state binding laws essentially fall into two categories.

The majority of states with elector binding laws rely on deterrence-based statutory schemes. In this category are Alabama,[61] Alaska,[62] California,[63] Colorado,[64] Connecticut,[65] Delaware,[66] the District of Columbia,[67] Florida,[68] Hawaii,[69] Maine,[70] Massachusetts,[71] Maryland,[72] Mississippi,[73] Montana,[74] Ohio,[75] Oregon,[76] Tennessee,[77] Vermont,[78] Virginia,[79] Wisconsin,[80] and Wyoming.[81] In a subcategory of these laws are states that specifically provide a penalty for a faithless vote. In New

60. *See* discussion *infra* Part II.B.3.
61. *See* ALA. CODE § 17-14-31 (2006).
62. *See* ALASKA STAT. § 15.30.040 (1960).
63. *See* CAL. ELEC. CODE § 6906 (1994).
64. *See* COLO. REV. STAT. § 1-4-304 (2001).
65. CONN. GEN. STAT. § 9-176 (1961).
66. DEL. CODE. ANN. tit. 15, § 4303 (1992).
67. D.C. Code § 1-1001.08(g) (2015).
68. FLA. STAT. § 103.021 (2011).
69. HAW. REV. STAT. § 14-28 (1981).
70. ME. REV. STAT. tit. 21-A, § 805 (1989). Maine law provides that at-large electors vote for the winner of the state's popular vote and that electors representing a congressional district cast their vote for the winner of each district.
71. MASS. GEN. LAWS ch. 53, § 8 (1990).
72. MD. CODE, ELEC. LAW, § 8-505 (2007).
73. MISS. CODE ANN. § 23-15-785 (2010).
74. MONT. CODE ANN. § 13-25-304 (2011).
75. OHIO REV. CODE ANN. § 3505.40 (1969).
76. OR. REV. STAT. § 248.355 (2001).
77. TENN. CODE ANN. § 2-15-104(c) (1972).
78. VT. STAT. ANN. tit. 17, § 2732 (1980).
79. VA. CODE ANN. § 24.2-203 (2001).
80. WIS. STAT. § 7.75 (1979).
81. WYO. STAT. ANN. § 22-19-108 (1977).

Mexico, a faithless vote is a fourth degree felony.[82] In Washington, a faithless elector "is subject to a civil penalty of up to one thousand dollars."[83] South Carolina gives "any registered elector the right to institute proper action to require compliance" with state election law.[84] South Carolina also establishes that a faithless vote is a violation of state election law and requires that the state Attorney General bring a criminal action against a faithless elector.[85]

The second category of binding law is the invalidation-based binding law, which provides for the automatic removal and replacement of any elector who attempts to cast a faithless vote. One state with such a law is Michigan.[86] Under Michigan law,

> [r]efusal or failure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes a resignation from the office of elector, his vote shall not be recorded and the remaining electors shall forthwith fill the vacancy.[87]

Other states with this type of statute are Nebraska,[88] Nevada,[89] North Carolina (which also provides for a $500 fine for the attempt to cast a faithless vote),[90] Oklahoma (which also provides that an attempt to cast a faithless vote is a misdemeanor subject to a $1,000 fine),[91] and Utah.[92]

Interestingly, some of these statutes leave small windows for the exercise of elector discretion. Several allow electors to exercise discretion in the case of the death of a candidate between the Election and the College vote, giving their electors more discretion than Horace Greeley's electors appear to have believed they had in 1872.[93] Two states go farther. Utah creates an exception to its binding law "in the cases of death or felony conviction of a candidate."[94] And South Carolina has created an exception under which the:

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82. N.M. STAT. ANN. § 1-15-9 (1978).
83. WASH. REV. CODE § 29A.56.340 (2003).
84. S.C. CODE ANN. § 7-19-80 (1976).
85. *Id.*
86. *See* MICH. COMP. LAWS § 168.47 (1970); *see also* Gelineau v. Johnson, 904 F. Supp. 2d 742 (W.D. Mich. 2012) (discussing Michigan's binding law).
87. MICH. COMP. LAWS § 168.47 (1970).
88. NEB. REV. STAT. § 32-714 (2014). Like Maine, Nebraska also provides for Electoral voting by Congressional district.
89. NEV. STAT. § 298.075 (2013).
90. N.C. GEN. STAT. § 163-212 (1998).
91. OKLA. STAT. tit. 26, § 10-102 (2013), § 10-109 (1975).
92. UTAH CODE ANN. § 20A-13-304 (1995).
93. WIS. STAT. § 7.75 (1979); *see* Rotunda, *supra* note 30.
94. UTAH CODE ANN. § 20A-13-304 (1995).

> executive committee of the party from which an elector of the electoral college was elected may relieve the elector from the obligation to vote for a specific candidate when, in its judgment, circumstances shall have arisen which, in the opinion of the committee, it would not be in the best interest of the State for the elector to cast his ballot for such a candidate.[95]

In this way, these statutes arguably represent a middle ground between a true binding law and elector discretion.

Although today's binding statutes can be placed into two broad categories, many nonetheless contain a surprising amount of ambiguity. One such statute is Colorado's, which will be discussed in further detail below. Colorado appears to have a "deterrent-based" declaratory scheme in that Colo. Rev. Stat. 1-4-204(5) mandates that "[e]ach presidential elector shall vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in this state." Unlike Michigan, Colorado does not formally create a vacancy upon "refusal or failure to vote" for the correct candidates. Unlike South Carolina, Colorado does not criminalize a faithless vote. Unlike Alabama, Colorado does not require electors to make a specific pledge with statutorily mandated text that requires them to vote for the winning candidate.

But Colo. Rev. Stat. 1-4-204(1) requires that the electors must "take the oath required by law for presidential electors" and it also provides that "[i]f any vacancy occurs in the office of a presidential elector because of death, refusal to act, absence, or other cause, the presidential electors present shall immediately proceed to fill the vacancy in the electoral college." Could a Colorado election official require an elector to pledge to vote for the winning candidate as part of their oath of office? Could such an election official interpret an intention to cast a faithless vote as a "refusal to act" or "other cause," leading to an elector's replacement? What recourse would a would-be faithless elector have if an election official chose to do so?

The ambiguity created by such statutes interjects partisan state election officials into the process, as these actors have significant discretion in deciding whether faithless votes are successfully cast.[96] For this reason, invalidation-based statutes more effectively serve the goal of enacting the will of the voters of the states in which they are passed, as they do not create uncertainty by leaving discretion to state officials. In a close and contested election, this discretion can create yet another unneeded layer of constitutional uncertainty in an already complex and

95. S.C. CODE ANN. § 7-19-80 (1976).

96. *See* discussion *infra* Part III.

contested process.

II. DISRUPTION: THE ELECTION OF 2016

A. *A Growing Movement for Elector Discretion*

On December 5, 2016, after a divisive election that was unprecedented in many ways, Texas Republican Presidential Elector Christopher Suprun announced in an editorial column that he would not be voting for Donald Trump, who had won the state of Texas.[97] Suprun argued that "electors have the legal right and a constitutional duty to vote their conscience," urging his fellow electors to "unify behind a Republican alternative, [such as] an honorable and qualified man or woman [like] Gov. John Kasich of Ohio."[98] Only once in the past fifty years had an elector pledged to a winning candidate cast a faithless vote, and then only when the winning candidate had won an insurmountable victory that was unprecedented in scale. Suprun was not declaring an intention to cast a protest vote to bring attention to a cause like statehood for D.C. or libertarianism—he was urging the Electoral College to intervene in the election's result for the first time in modern history.

Suprun's call was mirrored by Washington State's Democratic Elector Bret Chiafalo and Colorado's Democratic Elector Michael Baca.[99] Chiafalo and Baca began a group they referred to as the "Hamilton Electors," a reference to Federalist 68.[100] Chiafalo argued that the group was "trying to be the 'break in case of emergency' fire hose that's gotten dusty over the last 200 years . . . This is an emergency."[101] They suggested that Democratic and Republican electors both defect to a Republican "compromise candidate" such as John Kasich or Mitt Romney.[102]

Although many had assumed that, as Ronald Rotunda wrote, it had "long been clear that people expect the electors to act as their agents, not as independent decision makers,"[103] Suprun's and Chiafalo's call generated significant public support among those opposed to Donald Trump. Individual electors reported receiving tens of thousands of letters

97. Christopher Suprun, *Why I Will Not Cast My Electoral Vote for Donald Trump*, N.Y. TIMES (Dec 5, 2016), http://nyti.ms/2h8jSOv.

98. *Id.*

99. 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/.

100. *Id.*

101. *Id.*

102. *Id.*

103. Rotunda, *supra* note 30, at 204; *see also* Bennett, *supra* note 2, at 125.

and emails urging them to abandon the Republican businessman.[104] The volume was such that Idaho's Secretary of State released a statement, declaring that: "In recent days, Idaho's four Republican Party electors have been receiving phone calls regarding their vote in the Electoral College . . . . Many of these phone calls are crossing into what could reasonably be considered harassment."[105] Pennsylvania assigned a plainclothes state trooper to each of its twenty electors to provide protection from perceived threats.[106]

These would-be faithless electors also received a certain amount of support from Democratic elected officials. As allegations emerged that Russian hacking operations against the Democratic National Committee (DNC) and Hillary Clinton campaign chair John Podesta had played a role in the election,[107] Representative Don Beyer of Virginia called on Congress to "delay the date of the vote for the Electoral College until an intelligence briefing has been given to each Elector."[108] Beyer stated that "[e]lectors should be given all information relevant to [alleged Russian] interference before they make their decisions and before they cast their votes," implicitly taking the position that electors should have discretion in casting their votes. Senate Minority Leader Harry Reid also called for presidential electors to be given intelligence briefings as to Russian activities.[109]

As the movement for an Electoral College rebellion against Donald Trump gathered attention and support, Colorado elector Robert Nemanich contacted Colorado's Secretary of State Wayne Williams,

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104. *See, e.g.*, Joe Ferguson, *Arizona Electoral Voters Flooded with Pleas, Threats Not to Vote for Trump*, ARIZONA DAILY STAR (Dec. 16, 2016), http://tucson.com/news/local/arizona-electoral-voters-flooded-with-pleas-threats-not-tovote/article_64c49156-6525-5165-84d5-ff55ae523725.html; Detrow, *supra* note 12.

105. Press Release, Office of Lawrence Denney, Secretary of State of Idaho, "Idaho's Presidential Electors Deserve Our Respect and Civility" (Nov. 14, 2016).

106. Angela Couloumbis, *Pa. Electors Get Police Protection: "This is Stupid,"* PITTSBURGH POST-GAZETTE (Dec. 17, 2016), http://www.post-gazette.com/early-returns/2016/12/17/Pennsylvania-electors-get-police-protection/stories/201612170147.

107. *See generally* OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT U.S. ELECTIONS (ICA 2017-01D) (Jan. 6, 2017).

108. Patricia Sullivan, *Virginia Congressman Calls for Delay in Electoral College Vote*, WASH. POST (Dec. 14, 2016), https://www.washingtonpost.com/local/virginia-politics/virginia-congressman-calls-for-delay-in-electoral-college-vote/2016/12/14/98022426-c21b-11e6-8422-eac61c0ef74d_story.html?utm_term=.c04533c91e33.

109. *Id.* The calls by Beyer and Reid echoed one of Hamilton's concerns in Federalist No. 68. Hamilton warned against "the desire in foreign powers to gain an improper ascendant in our councils." He argued that the Electoral College guarded against this because "the appointment of the President [did not] depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment."

asking what would happen if he did not vote for Hillary Clinton and Tim Kaine, who had won that state.[110] Williams responded that, under Colorado's binding law, Colo. Rev. Stat. 1-4-304, his office "would likely remove the elector and seat a replacement elector until all nine electoral votes were cast for the winning candidates."[111] Williams then "instituted a new oath to be given to Colorado's Electors" on the day of the Electoral College vote and stated that an elector who violated the statute could face either a misdemeanor or felony perjury charge.[112] In response, Nemanich and his fellow Colorado elector Polly Baca[113] brought an action against Williams, along with Colorado Governor John Hickenlooper and Colorado Attorney General Cynthia Coffman arguing that Colorado's binding law violated Article II of the Constitution, as amended by the Twelfth Amendment, and also compelled speech in violation of the First Amendment.[114] Trump and the Trump campaign intervened in the lawsuit on December 12, 2016.[115]

Around the same time, California elector Vincenz Koller, pledged to Hillary Clinton, filed suit in the Northern District of California against Governor Jerry Brown in his official capacity, seeking to invalidate California's binding law.[116] Koller declared that he believed he had the duty to "vote in the best interests of the state and the nation" by selecting a "qualified compromise candidate" such as Mitt Romney or John Kasich.[117] Finally, the initiator of the "Hamilton Electors" movement, Bret Chiafalo, filed a similar suit in the Western District of Washington along with his fellow Washington elector, Levi Guerra.[118] These suits were the most significant legal challenge to elector-binding laws since *Ray v. Blair*.

B. *A Wave of Litigation and Three Chances to Revisit* Ray v. Blair

1. *Baca v. Hickenlooper*

After filing in the District of Colorado on December 6, 2016, the Baca plaintiffs sought a temporary restraining order and a preliminary injunction, restraining them from "removing or replacing [them] as electors, compelling them to vote for certain candidates, precluding them from voting for any candidates, or otherwise interfering with the vote of

110. Baca v. Hickenlooper, No. 16-1482, slip op. at 3 (10th Cir. Dec. 16, 2016).
111. *Id.* at 4.
112. *Id.*
113. Not to be confused with her fellow 2016 Colorado elector Michael Baca.
114. *Id.*
115. Baca v. Hickenlooper, No. 16-cv-2986, slip op. at 1 (D. Colo. Dec. 21, 2016).
116. Koller v. Brown, No. 16-cv-7069, 2016 WL 7325032, at *1 (N.D. Cal. Dec. 16, 2012).
117. *Id.*
118. Chiafalo v. Inslee, No. 16-36034, 2016 WL 7243752, at *1 (9th Cir. Dec. 15, 2016).

the electors on December 19, 2016."[119] Judge Wiley Daniel denied this motion, and plaintiffs appealed his decision to the Tenth Circuit.[120]

Their appeal was heard by a panel of Judges Mary Beck Briscoe, Carolyn McHugh, and Nancy Mortiz. In an order for the court, the judges rejected plaintiffs' argument, noting that they had not pointed to "a single word in any of these positions that support their position that the Constitution requires that electors be allowed to exercise their discretion in choosing who to cast votes for."[121] Instead, plaintiffs had primarily relied on Federalist 68.[122] The court explained in a footnote that, although "we turn to external sources when unable to discern the meaning of the Constitution from its plain language, we begin our analysis with careful examination of the words used. Here, plaintiffs make no textual argument at all."[123]

Like the *Blair* Court, the Tenth Circuit did not take a position on whether elector freedom is guaranteed by the Constitution. It specifically noted that "there is language in the Twelfth Amendment that could arguably support the plaintiffs' position," citing an article by Michael Stokes Paulsen.[124] But the court declared that it would not make those arguments in place of plaintiffs, who had failed to make them.[125] As an alternative argument, plaintiffs asserted that requiring them to vote for an elector was an improper "qualification," but the Tenth Circuit held that "a statutory requirement to vote in a certain way . . . is more in the way of a duty than a qualification" and was not inappropriate.[126]

Perhaps most significantly, plaintiffs also asserted that the Colorado statute "violates the Supremacy Clause by usurping Congress's exclusive power to count electoral votes."[127] Specifically, they contended that the

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119. Baca v. Hickenlooper, No. 16-1482, slip op. at 5 (10th Cir. Dec. 16, 2016).

120. *Id.* at 5.

121. *Id.* at 10.

122. *Id.* at 10 n.2.

123. *Id.* Of course, the Supreme Court had already held that "applicable constitutional provisions, on their face, furnish no definite answer to the query whether a state may permit a party to require party regularity from its primary candidates for national electors," *see* Ray v. Blair, 343 U.S. 214, 224 (1952), and, as the *Baca* court itself noted, it is appropriate to look to external sources where the constitutional text is facially ambiguous.

124. *Baca*, No. 16-1482, slip op. *Id.* at 10 n.3. Paulsen argued that state binding laws are unconstitutional. Paulsen, *supra* note 1. Paulsen argued that the text of the Constitution gave states the power to prescribe the "Manner" in which electors are appointed, which might justify requiring electors to pledge to vote in a certain way. *Id.* But, as Paulsen argues, once the electors are appointed, the text of the Twelfth Amendment refers to "The Electors" meeting in their respective states and voting by ballot. *Id.* He reads *Blair* as allowing the state to require electors to make a pledge but as leaving open the question of whether such a pledge could actually be enforced. *Id.*

125. *Id.*

126. *Id.* at 11.

127. *Id.*

statute gave Colorado the authority to discount or ignore an elector's vote if that vote was faithless. The court avoided this issue.[128] It explained that Williams's threat to remove the electors was not based on the challenged statute, 1-4-304(5) but was based "upon his interpretation of the authority afforded to him under Colo. Rev. Stat 1-4-304(1)," which gave the state the authority to "fill [any] vacanc[ies] in the electoral college" prior to the start of voting.[129] The court declared that whether 304(1) "also affords the State with authority to remove an elector after voting has begun is not a question that has been posed by plaintiffs to either the district court or this court."[130] Surprisingly, the circuit then added a footnote, stating: "[a]nd we deem such an attempt by the State unlikely in light of the text of the Twelfth Amendment."[131] Later, in explaining why there was insufficient risk of irreparable harm to justify extraordinary relief, the court again noted that "we question whether [304(1)] provides [Williams] any such authority after voting has commenced, [but] that precise question is not before us."[132]

I describe the court's footnote as surprising because this is exactly what Williams did, the text of the Twelfth Amendment notwithstanding. Furthermore, the removal and replacement of faithless electors after they have cast their votes is precisely the outcome expressly called for by state statutes in several other states. Was the Tenth Circuit implying that the invalidation-based binding laws of states like Michigan violate the text of the Twelfth Amendment? It would seem so, but the court's dismissal of this argument was cursory and, its analysis leaves little room for further extrapolation.

Finally, the court rejected plaintiffs' First Amendment claim that the Colorado statute burdened their "core political speech." The Court held that plaintiffs had failed "to identify any authority establishing, or even remotely suggesting, that the First Amendment applies to electors."[133]

After the Tenth Circuit rejected plaintiffs' appeal, the district court issued a written opinion along with its order denying injunctive relief.[134] Judge Daniel took a strong position against elector discretion. He wrote that plaintiffs were, "in effect, ask[ing] the Court to value their vote over that of the citizens of Colorado."[135] He found that "the citizens of Colorado would be irreparably harmed if an injunction is granted because they expect electors to vote for the candidate who won the majority of the

128. *Id.* at 12.
129. *Id.*
130. *Id.*
131. *Id.* n.4.
132. *Id.* at 13.
133. *Id.* at 12–13.
134. Baca v. Hickenlooper, No. 16-cv-2986, slip op. at 1 (D. Colo. Dec. 21, 2016).
135. *Id.* at 9.

state's vote."[136] Daniel held that the "public has some expectation, and it is a permissible expectation, that presidential electors are bound by the promises they voluntarily made when they accepted their nominations."[137]

Daniel's opinion arguably took a stronger line against elector discretion than the circuit did, and he cited no data or authority to support his conclusion about the public's expectations.[138] Of the three elector-binding challenges brought in 2016, Daniel's decision embraced the right of states to limit elector discretion most strongly, harkening back in some ways to the early Twentieth Century state supreme court decisions that described the role of electors as "purely ministerial."[139]

2. *Koller v. Brown*

Like Baca, California elector Vincenz Koller sought a temporary restraining order and a preliminary injunction against California's Governor, Attorney General, and Secretary of State. Koller argued before Judge Edward Davila that, if he voted for a compromise candidate like Kasich or Romney, he could face "punitive sanctions" under the California Elections Code.[140]

The California court read *Ray v. Blair* as providing "some indication that the Court may not find the California statutes constitutionally troubling," but it found that the plaintiff met the threshold requirement of showing "serious questions going to the merits of the claims."[141] Ultimately, however, it denied the plaintiff's request, holding that he had not sufficiently shown a risk of irreparable harm to justify the extraordinary relief of a TRO or injunction. On this issue, the defendants pointed out that no California elector had ever been prosecuted or threatened with prosecution under § 18002,[142] demonstrating the extent to which discretionary actions by state officials implicates the operation of binding laws. The Court also noted that Koller had said he would vote

136. *Id.* at 10.

137. *Id.*

138. The 2016 election in general, and the unexpectedly-widespread public calls for elector defections against Donald Trump, should caution against unsupported assumptions about what the public expects from the political system.

139. Thomas v. Cohen, 262 N.Y.S. 320, 326 (Sup. Ct. 1933); *see* Zadrozny, *supra* note 29.

140. Koller v. Brown, No. 5: 16-cv-7609, slip op. at 1–2 (N.D. Cal. Dec. 16, 2016). California's Elections Code states that electors must vote for the candidate from the party they represent, and in a separate section creates sanctions against persons "charged with the performance of any duty under any law of this state relating to elections, who willfully neglects or refuses to perform it." *Id.* at 2.

141. *Id.* at 4, 8.

142. *Id.* at 11.

for Clinton "as the California law stands now."[143] Judge Davila also noted that, if Koller did cast a faithless vote and was prosecuted, he might be able to mount a successful defense or might receive a deferred judgment.[144] All of these factors contributed to the court's finding that the potential ensuing harm was not sufficiently immediate to entitle him to extraordinary relief. In this way, another court avoided making a final determination on the status of elector discretion.

The *Koller* litigation came to the same ultimate result as the *Baca* litigation, but the courts' reasoning differed significantly, demonstrating that this area of the law is anything but settled. The Northern District of California credited plaintiffs' arguments based on contemporary statements of the framers, noting that "Hamilton's statements in Federalist 68 are informative on the meaning intended by the framers of the Constitution in Article II § 1."[145] In contrast, the Tenth Circuit held that the intentions of the framers could only be considered if the plaintiffs successfully argued that the plain meaning of the text was ambiguous.[146] The Northern District also constructed its holding more narrowly than the District Court of Colorado, primarily relying on the demanding standards for a preliminary injunction rather than on broad principles about the public's expectations of elector behavior. And the California court's opinion lacked any of Judge Daniel's strong language against elector discretion.

3. *Chiafalo v. Inslee*

The final legal challenge of the 2016 Electoral College sought relief declaring that Washington's RCW 29A.56.340 was unconstitutional.[147] Although Washington's statutory penalty is a civil one and only amounts to $1,000, plaintiffs argued that elector Levi Guerra and her family would be unable to pay this fine were she to cast a faithless vote.[148] In contrast to the Northern District of California, Judge Robart found that the plaintiffs had not shown that there were "serious questions going to the merits" of their claims. Robart referenced the District of Colorado's opinion in *Baca*, noting that Judge Daniel "denied a request to preliminarily enjoin Colorado's law, which is considerably more coercive than Washington's."[149] According to the court's interpretation, "Washington has no law precluding Plaintiffs from voting as they

143. *Id.*
144. *Id.* at 11–12.
145. *Id.* at 7.
146. Baca v. Hickenlooper, No. 16-1482, slip op. at 10 n.2 (10th Cir. Dec. 16, 2016).
147. Chiafalo v. Inslee, No. 16-36034, slip op. at 1–2 (9th Cir. Dec. 15, 2016).
148. Chiafalo v. Inslee, No. C16-1886, slip op. at 4 (W.D. Wash. Dec. 15, 2016).
149. *Id.* at 7 n.1.

choose—and having those votes counted—in the Electoral College. The only potential State-imposed repercussion before the court is the discretionary civil penalty of up to $1,000.00."[150]

Chiafalo appealed to the Ninth Circuit, but his appeal was rejected in a summary order. *Chiafalo* was ultimately no more successful than *Baca* or *Koller*, but the *Chiafalo* decision relied to a greater extent on the relatively weak and discretionary nature of Washington's statutory penalties. Despite three lawsuits being brought, no court reached the merits of whether presidential electors have constitutionally-protected discretion.

C. *The Electoral College Vote*

In the end, the faithless electors of 2016 fell far short of unseating Donald Trump. Four strategic faithless votes were successfully recorded, although these electors did not ultimately agree on a compromise candidate: Suprun followed through with his pledge, casting his vote for John Kasich.[151] And former Secretary of State Colin Powell, a Republican, received three strategic faithless votes from Chiafalo, Levi Guerra, and Esther John, all Democrats of Washington state.[152] Michael Baca, of Colorado also attempted to vote for Kasich after taking an oath to vote for Clinton.[153] In a dramatic scene in the Colorado State House, Secretary of State Williams told Baca: "[y]ou must vote as the Colorado citizens vote."[154] Baca responded that: "[t]hreatening elections is also against the law, Secretary Williams."[155] Ultimately, Williams had Baca replaced by an elector who then voted for Clinton. The three unsuccessful plaintiffs from the *Koller* and *Baca* lawsuits did not attempt to cast faithless votes.

In addition to these strategic faithless votes, 2016 also saw a spike in the number of protest votes that were cast or were attempted. David Mulinix, a Democratic elector from Hawaii, successfully voted for Bernie Sanders rather than Hillary Clinton,[156] despite the fact that Hawaii has a binding law on its books. Robert Satiacum, a Democratic elector from Washington, voted for Native American rights activist Faith Spotted Eagle instead of Clinton. Bill Greene, a Republican elector from Texas,

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150. *Id.* at 6.

151. Boccagno, *supra* note 10.

152. *Id.*

153. Brian Eason, *Colorado's Electoral Votes go to Hillary Clinton After One is Replaced*, DENVER POST (Dec. 19, 2016), www.denverpost.com/2016/12/19/Colorado-electors-new-motion-federal-appeal-denied/.

154. *Id.*

155. *Id.*

156. *See* Boccagno, *supra* note 10.

voted for former congressman Ron Paul instead of Donald Trump.[157] David Bright of Maine and Muhammad Abdurrahman of Minnesota also unsuccessfully attempted to cast faithless votes for Bernie Sanders.[158] Bright changed his ballot to a vote for Clinton after his vote for Sanders was invalidated, while Abdurrahman was replaced by an elector who voted for Clinton.[159]

III. A CHANGED LANDSCAPE

To appreciate the scale of the change that occurred in 2016, one need only compare this past election to that of 2000, the last time the popular-vote loser won the Electoral College. Writing a year after Bush's victory, Ann Althouse stated that:

> The most striking thing about the "breakdown" [in 2000] is that there was no breakdown. People were outraged about the "butterfly ballot," Vote-O-Matic punch cards, and the activities of quite a few government institutions . . . but notably *not* the electoral college. There was concern about faithless electors, but the electors all admirably stood their ground, despite the temptingly narrow electoral vote margin of George W. Bush . . . The 2000 election reinforces Professor Best's conclusion that the faithless elector problem alone is too "miniscule" to have its own constitutional amendment.[160]

Bush won 272 electoral votes in 2000, clearing the 270-vote threshold by only two electors. In 2016, 13 electors publicly expressed a desire to cast faithless votes. Seven successfully cast such votes, six did not. Both the number of successful and the number of unsuccessful faithless votes in 2016 were higher than the margin of victory five elections ago. We can no longer dismiss the question of faithless electors—or the constitutionality of the statutes that regulate them—as being a "miniscule" problem. And given the widespread popular movement calling on electors to rebel against Donald Trump, we can no longer assume that social pressure and customary norms will continue to dissuade would-be faithless electors.

The 2016 election revealed a new problem, above and beyond the oft-

157. *Id.*

158. *See* Detrow, *supra* note 12.

159. *Id.*

160. Ann Althouse, *Electoral College Reform: Déjà Vu*, 95 NW. U.L. REV. 993, 1011 (2001) (citing JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 190 (1971)).

debated democratic legitimacy of elector discretion. Hawaii and Colorado have facially similar binding laws. Hawaii law mandates that, the electors "shall vote by ballot for that person for president and that person for vice president of the United States, who are, respectively, the candidates of the political party or group which they represent . . . ."[161] Colorado law similarly requires that electors "shall vote for the presidential candidate and . . . vice-presidential candidate who received the highest number of votes at the preceding general election in this state."[162] Neither state law mandates the automatic invalidation of a faithless vote,[163] but both include a somewhat vague provision about replacing vacant elector positions.[164] In a coherent system, one would expect would-be faithless electors from Hawaii and Colorado either to both meet with success or to both meet with failure.

David Mulinix of Hawaii flouted his state's binding law and cast a vote for Bernie Sanders, while Michael Baca of Colorado was removed and replaced by Colorado's Secretary of State after attempting to cast a faithless vote. This discrepancy revealed a dangerous flaw in our patchwork system of regulating the Electoral College: the uncertain legal status of state binding laws allows state election officials to use *their* discretion to alter election outcomes.

There is no reason to believe that the state officials in Colorado and Hawaii acted with anything other than good faith (although Williams's decision to remove and replace Baca appears to contradict the Tenth Circuit's assumption that such an action would be "unlikely in light of the text of the Twelfth Amendment."). But the discretion they had in interpreting these vague statutes demonstrates a real risk. In a closer election, whether a faithless vote is recorded or invalidated could easily determine the Presidency. A partisan election official might then be presented with the decision to vigorously enforce an ambiguous binding law, as Colorado did, or to take a hands-off approach, as Hawaii did. Regardless of whether one subscribes to Hamilton's vision of free electors or Judge Daniel's view of ministerial electors, there should be broad consensus that discretion should belong to the electors or should not exist at all. Unfortunately, the deterrent-based statutes create a problematic middle ground.

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161. *See* HAW. REV. STAT. § 14-28 (1981).

162. *See* COLO. REV. STAT. § 1-4-304 (2001).

163. *See* HAW. REV. STAT. § 14-28 (1981); COLO. REV. STAT. § 1-4-304 (2001).

164. HAW. REV. STAT. § 14-27 (1981) (Vacancies filled by alternates or by other electors in "case of the death or absence of any elector chosen, or if the number of electors is deficient for any other reason."); COLO. REV. STAT. § 1-4-304 (2001) (Vacancies filled by other electors in case of "death, refusal to act, absence, or other cause.") The only facial difference between the two statutes is Colorado's inclusion of "refusal to act," but, because it is difficult to characterize a faithless vote as a "refusal to act," it appear that Williams acted under the residual "other cause" clause, which is mirrored in Hawaii's law.

CONCLUSION

Plans to abolish the Electoral College have been a feature of national debate for almost as long as the college itself has existed.[165] John Hart Ely saw the Electoral College as a counterexample to his belief that, apart from the exercise of judicial review, American society has continuously progressed toward greater majoritarian rule.[166] Justice Jackson dissented in *Blair* that the "demise of the whole electoral system would not impress me as a disaster."[167] In 1967, the American Bar Association declared that the Electoral College was "archaic, undemocratic, complex, ambiguous, indirect, and dangerous."[168]

But the Electoral College has managed to survive this long, and it has always had its defenders. Ross and Josephson believed that "the failed attempts to eliminate the electoral college indicate that one or more features of the college are still seen as worth preserving or that no alternative is generally viewed as more advantageous."[169] Alexander Bickle saw the College as being able to "satisfy, at once, the symbolic aspirations of the small states and the present, practical needs of the large ones."[170] Joy McAfee wrote that, the Electoral College "is democratic, not undemocratic . . . [and] gives the United States a President to represent all the fifty states."[171]

Accordingly, the specific question of faithless electors has traditionally been swept up in larger debates about the Electoral College. Advocates of reforming the College system have argued that "widespread social turmoil, even widespread violence, could well result if an election result was altered by faithless electors."[172] Others who see the system as more benign have minimized the issue, asserting that the faithless elector question is "miniscule."[173]

What these two competing sides have in common is that both envision a *uniform* and *clearly established* system. The 2016 election has revealed

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165. *See* Althouse, *supra* note 160, at 996.

166. JOHN HART ELY, DEMOCRACY AND DISTRUST 6 (1980). Ely believed that judicial review was one counter majoritarian outcome that was justified when legislatures disrupted the democratic political process "either by clogging the channels of change or by acting as accessories to majority tyranny," but he gave no such defense of the Electoral College. *Id.* at 103.

167. Ray v. Blair, 343 U.S. 214, 234 (1952) (Jackson, J., dissenting).

168. AMERICAN BAR ASSOCIATION, ELECTING THE PRESIDENT: A REPORT OF THE COMMISSION ON ELECTORAL COLLEGE REFORM 3 (1967).

169. *See* Ross & Josephson, *supra* note 2, at 689; *see also generally* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237 (2012).

170. ALEXANDER M. BICKLE, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM (1971).

171. McAfee, *supra* note 8, at 671.

172. Bennett, *supra* note 2, at 125.

173. BEST, *supra* note 9, at 190.

that our current system lacks coherence and unity. An elector from Minnesota, like Muhammad Abdurrahman in 2016, is prohibited by operation of Minnesota law to vote for any candidate other than the winner of Minnesota's election, despite the fact that the constitutionality of that law is still unsettled. Meanwhile, an elector from Washington, like Chiafalo, is formally constrained by operation of Washington law to vote for the candidate who won Washington's election, but the statutory penalty—a fine of $1,000—cannot effectively deter an elector who is convinced that a different candidate should be President. In California, an elector like Zoller is constrained by a similar legal mechanism as that in Washington, but because the penalty against a faithless vote includes the potential of a felony conviction rather than a civil fine, all but the most committed would-be faithless electors in California are effectively deterred while those in Washington are not. Finally, an elector from Texas, like Christopher Suprun, is free to exercise his or her discretion in the Hamiltonian model, but is also constrained from developing a group consensus with his fellow electors by the jumble of binding laws across the country, each operating with varying effectiveness.

This is a system where one or two random protest votes or attempts at strategic action have the potential to throw a close election to the House of Representatives or to turn a narrow win into a loss.[174] But it is not a system where a reasoned and near-unanimous consensus that could confer legitimacy on an alternative candidate could ever be established, even in nightmare scenarios such as conclusive proof of election tampering by the winning candidate's campaign or by a foreign power.

An even more insidious flaw in this system is that too many state statutes rely on the discretion of partisan state election officials to determine how vigorously their deterrent schemes will be enforced. As the events in Colorado suggest, an official belonging to the party of the presumptive President-Elect has an incentive to vigorously enforce binding laws by requiring specific oaths and certifications, threatening prosecutions for perjury, and interpreting statutory phrases relating to elector vacancies and replacements as broadly as possible. A similar state election official from the party of the defeated candidate has an incentive to loosely enforce such statutes, allowing electors from their state to embrace compromise candidates and persuade free electors to do so as well.

Are there any ways forward from here? One would be the abolition of the Electoral College, but this seems unlikely given the many past unsuccessful attempts on this front.[175] Another would be for state

174. For a discussion of Congress's power to count electoral votes, *see* Ross & Josephson, *supra* note 2, at 706 ("It is not clear whether the constitutional power to count the elector votes includes the power not to count them.").

175. Eleven states have concluded that pledging their votes through an inter-state compact

legislatures who wish to bind their electors to move towards a uniform elector binding statute. The better binding statutes are those, like Michigan's, which operate automatically rather than leaving discretion to state officials.

In future presidential contests, election lawyers must also be prepared for litigation such as *Baca*, *Koller*, and *Chiafalo*. The long and frustrating history of elector-binding litigation shows no court will be eager to make a definitive holding on the Twelfth Amendment. But the lawsuits that presented the issue in 2016 were flawed, allowing them to be dismissed on procedural grounds. *Koller* was dismissed in part because the plaintiff would not decisively commit to casting a faithless vote. *Chiafalo* was dismissed in part because the state statute provided only a civil penalty and did not formally prevent an elector from casting a faithless vote. Either lawsuit would have been more likely to reach the merits and create a precedent had it been brought by an elector in the position of Muhammad Abdurrahman of Minnesota, who did commit to casting a faithless vote but had his vote invalidated by operation of Minnesota law.

The constitutional fault lines that the 2016 Electoral College revealed are serious, and the potential for increasing numbers of faithless electors should not be overlooked until after the next election. Reform advocates can now point to the events of 2016 to show that, far from being merely an academic curiosity, the faithless elector issue is a real and looming problem. More than two centuries after the ratification of the Twelfth Amendment, it is time to adopt a uniform and coherent system for selecting future presidents.

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is a more feasible way of reforming the Electoral College than the amendment process. *See* CAL. ELEC. CODE §§ 6920–21 (2012); *see also* Hendrik Hertzberg, *National Popular Vote: New York State Climbs Aboard*, NEW YORKER (Apr. 17, 2014), http://www.newyorker.com/online/blogs/comment/2014/04/national-popular-vote-new-york-state-climbs-aboard.html. If enough states were to join this compact, the president could be elected by winning the national popular vote. Although this compact might be simpler than abolishing the Electoral College, the question of whether state electors would be bound to follow the compact would remain.