

The Vexing Problem of Faithless Electors

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The Electoral College is an unloved and mostly ignored institution. It generally operates in the background of American electoral politics and is poorly understood by most voters. It rises into our collective consciousness only when something goes wrong or when one of the two political parties decides that it is systematically working against the party's immediate interests.

We are currently living through such a moment when the Electoral College stands in the political spotlight. The contested presidential election of 2000 thrust the mechanisms of our presidential selection system to center stage, and few liked what they saw. The extended legal battle in Florida seemed to highlight not only the dirty reality of how votes are cast and counted in the United States, but also the surprising uncertainty about how contested outcomes were to be resolved. Once the dust settled, Democrats began to focus their attention on the seeming unfairness of a presidential candidate winning the election despite losing the national popular vote. That concern faded a bit in subsequent election cycles and Democrats even began to celebrate the reliable "blue wall" constructed by the Electoral College that would cement their control of the White House into the foreseeable future.

Disgust with the Electoral College returned with a vengeance in 2016. Republican Donald Trump broke down the blue wall and cobbled together an Electoral College victory despite winning nearly three million fewer votes than Hillary Clinton, his Democratic rival who ran up the score with big-state blowouts in California, New York, and Illinois. The constitutional allocation of electoral votes was once again cast as an illegitimate remnant of corrupt compromises, increasingly framed as yet another legacy of white supremacy (on the

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grounds that the original Electoral College gave a boost to slave-holding states relative to some alternative electoral formulas).

The aftermath of Trump's shocking victory on election night brought to the fore another, generally ignored, aspect of the Electoral College—the presidential electors themselves. Some grasped hold of this aspect of the Electoral College as a potential lifeline. An unprecedented public lobbying campaign was organized by Democratic activists to persuade some of the presidential electors pledged to vote for the Republican Party nominee to instead cast their ballot for someone—anyone—else, in the hopes of denying Donald Trump the White House. Americans were suddenly informed that the president was not in fact chosen by the general electorate in November but was instead chosen by a relative handful of unknown presidential electors meeting in December. Armed with the writings of the newly popular Alexander Hamilton, the “Hamilton Electors” urged their colleagues to ignore their pledges and instead cast their ballots for whomever they thought most qualified to be president. The movement fizzled when it turned out that electors pledged to vote for Clinton were the most easily persuaded that exercising a free choice for the most qualified individual required breaking their pledge to support the Democratic Party's nominee, but it exposed an extraordinary risk inherent in the design of the Electoral College. Americans suddenly realized that a few dozen individuals could overturn the results of a presidential election.

Despite 2016's seemingly close call, the problem of “faithless electors” soon faded into the background as politicians, activists, and the media turned their attention to new and more immediate outrages. Just as the 2000 presidential election seemed to expose an election system in desperate need of reform only to be forgotten as election season passed, so the 2016 presidential election seemed to expose the disturbing problem of faithless electors as something more than an occasional idiosyncratic quirk that could be ignored after the Hamilton Electors had failed in their mission to stop a Trump presidency.

The U.S. Supreme Court has not often been asked to weigh in on the workings of the Electoral College. The controversies surrounding the system have generally been too short-lived and too inextricably political to draw in the Court, though there have been exceptions in which judges have been asked to consider the meaning and implications of the constitutional rules guiding the selection of presidents. This is a part of the Constitution that is not encrusted

with judicial precedents or surrounded by elaborate academic theories. The justices are not dug in to hardened positions on how best to think about the Electoral College and there are no great ideological battles fought over its meaning.

Justices pondering a question about the Electoral College are in the rare position of working on a nearly blank canvas. If such a proper legal case involving the Electoral College arises during a heated struggle over the possession of the White House, as in the Florida fracas of 2000, it seems inevitable that the immediate partisan contest will overshadow everything else. But the Court in the faithless elector cases of 2020 were differently situated.¹ Although the cases arose out of the 2016 election, they did not arrive at the Court until long after those particular passions had cooled. The justices were not being asked to determine who would occupy the White House on Inauguration Day. They were asked to settle a question that was more uncertain in its implications for any partisan team. In such fortuitous circumstances, it is perhaps unsurprising that the Court was able to reach a unanimous conclusion on how the cases should be resolved, though the justices could not entirely agree on how to reach that conclusion.

The greatest risk raised by the faithless elector cases was the possibility that the justices might throw a monkey wrench into the electoral machinery. They could have made it somewhat more likely that Hamilton Elector-style lobbying campaigns would become regular features of our electoral process, and as a result made it marginally more likely that the country could eventually face the constitutional crisis of the Electoral College denying victory to the declared winner of Election Day. The justices in 2020 instead took care not to further unsettle the political system. In doing so, they did not—and could not have—put an end to the possibility that a faithless elector might

¹ The Court consolidated two cases that were heard together, which together involved a total of six presidential electors from the 2016 cycle in two states. The Court produced a substantive opinion for only one case, but formally separated them in order to take account of the recusal of Justice Sonia Sotomayor from the case that came out of Colorado. Sotomayor is personal friends with Polly Baca, a named party in the suit, a pledged elector who cast a ballot for Hillary Clinton in 2016, and the first Latina to be elected to the Colorado state senate. The Court issued a brief *per curiam* in *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020), which reversed the Tenth Circuit. The Court issued lengthy majority and concurring opinions in *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), which affirmed the Washington state supreme court.

someday swing an election result, but they did what they could to ensure that such an event was not made *more* likely to occur. They endorsed the status quo ante, and left it to politicians to take measures that would minimize the prospect and impact of faithless electors.

This essay reviews the faithless elector problem and how the Court tried to resolve it. Part I reviews the design of the Electoral College, the problem of faithless electors, and the ways we have tried to contain that problem. Part II notes how this problem of faithless electors reached the Supreme Court. Part III examines the strategy Justice Elena Kagan adopted in the majority opinion for empowering states to discipline presidential electors. Part IV examines the alternative strategy offered by Justice Clarence Thomas in his concurring opinion. Part V considers some implications of the Court's action in these cases for related controversies.

I. The Electoral College and Faithless Electors

The Electoral College was not one of the constitutional Framers' most inspired ideas. It was an ad hoc creation that built on compromises already made while attempting to address problems that never emerged. It was the first component of the 1787 Constitution to be specifically altered through constitutional amendment, when the Twelfth Amendment was ratified in 1804. It has never operated as it was originally expected to do, and politicians throughout American history have maneuvered to minimize its effects. The drafters of American state constitutions declined to emulate its design by creating their own versions of the Electoral College, and other countries that experimented with similar systems for choosing a chief executive soon abandoned them.

The constitutional process for filling the office of the president of the United States is a bit of a Rube Goldberg device, and across our historical practice we have tried to simplify it and avoid its more troubling features. Those efforts have not always been successful.

At the heart of the Electoral College are the presidential electors themselves.² The Constitution does not enshrine a right to vote for

² I have also described the constitutional presidential election system in Keith E. Whittington, *The Electoral College: A Modest Contribution*, in *The Longest Night* 371–72 (A.J. Jacobson & M. Rosenfeld eds., 2002) and Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 *Ariz. L. Rev.* 903 (2017).

the president or recognize a role for the general citizenry at all in filling the office of the president.³ Formally, the president is elected when the presidential electors cast their ballots in December. The Constitution empowers Congress to specify the day on which the presidential electors of each state shall meet in their respective states, and federal law currently dictates that they “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.”⁴ The electors “vote by ballot for President and Vice President,” the results in each state are recorded, and a certificate listing the results is sent to Congress to be counted.⁵

The Constitution says that electors shall be appointed “in such Manner as the Legislature thereof may direct.” The only limitation is that “no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”⁶ The Founders might have expected the state legislatures to simply appoint the presidential electors themselves, just as they would choose U.S. senators. In the beginning, a majority of the states did in fact use that method. The practice gradually declined as Jeffersonian and Jacksonian democratizing sensibilities swept the nation and new states entered the union with less inclination to follow the old tradition. The aristocratic South Carolina, which kept a property qualification on suffrage even after most states had abandoned it, stuck with legislature-appointed presidential electors until the Civil War. Some states immediately turned the matter over to the voters, however, and that manner of appointing presidential electors soon became predominant. Most preferred a single statewide vote for selecting a slate of electors. States likewise moved to adopt the “unit rule,” whereby all the presidential electors would be awarded

³ But see U.S. Const. amend. XIV, § 2, which would reduce a state’s congressional representation based on the proportion of white male citizens, age 21 or over, who are denied the right to vote for presidential electors and certain other offices. See also *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental.”).

⁴ U.S. Const. art. II, § 1; 3 U.S.C. § 7.

⁵ U.S. Const. amend. XII.

⁶ U.S. Const. art. II, § 1.

to a single presidential candidate.⁷ This approach was seen to provide states with more heft in national politics than if electors were split among multiple candidates. The unit rule was particularly consequential in large states, where winning a large cache of electors by a small margin could generate a far bigger impact on the electoral vote than on the popular vote.

The Constitution allocates to each state “a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”⁸ This has generally been the more controversial feature of the Electoral College since it is the feature that more routinely has consequences to the electoral fortunes of the political parties. The apportionment rule necessarily creates a gap between the national popular vote and the electoral vote, and that gap is exacerbated by the unit rule that the states have generally adopted in allocating their electoral votes to candidates. When Hillary Clinton narrowly lost Florida in 2016, she walked away with no electoral votes but a substantial addition to her popular vote total. When she won in a landslide in California later that night, she further inflated her popular vote total but gained no more electoral votes than if she had won the state by a bare majority. If states individually abandoned the winner-takes-all system in favor of some kind of proportional allocation of electors to the competing candidates (and there are several variations on the proportional method), the gap between the national popular vote and the electoral vote would shrink and the size of presidential margins of victory would generally shrink as well.

The Electoral College formula of awarding each state its number of representatives in Congress creates a small bias. For very small states, even getting an elector based on seats in the House of Representatives can inflate their significance relative to their share of the national population. Of course, the two electors that each state receives to mirror its equal representation in the Senate likewise gives small states extra weight in the Electoral College. By contrast, the largest states are slightly underrepresented in the Electoral College. The effect is

⁷ Only Maine and Nebraska have adopted a different rule. They allocate two electoral votes to the state’s popular vote winner and one electoral vote to the popular vote winner in each congressional district.

⁸ U.S. Const. art. II, § 1.

not large, but depending on how partisan preferences are distributed across the country those small effects can be consequential. Donald Trump's landslide victories in such small states as Wyoming, North Dakota, and South Dakota were far more beneficial in the Electoral College than they would have been under a national popular vote (though Hillary Clinton got her own bonus when blowing out Trump in Vermont, Delaware, and the District of Columbia). Clinton's massive advantage in large states like California, New York, and Illinois was somewhat diluted by the Electoral College formula (Trump's margin of victory was smaller in Republican-leaning big states like Texas, North Carolina, and Georgia). Swing states like Ohio, Florida, and Pennsylvania become particularly pivotal not only because they are competitive, but also because they are big and use the unit rule to allocate presidential electors. Narrow victories in Ohio, Florida, and Pennsylvania go a long way in the Electoral College, just as California and New York were once critical presidential battlegrounds.

Finally, the Constitution requires that a winning candidate must receive the votes of a "majority of the whole number of Electors appointed."⁹ The official counting of the votes is done by the president of the U.S. Senate in a joint meeting of the Congress. Potentially, this gives Congress an important role to play in resolving disagreements over the outcome of elections and the validity of particular ballots, though no one seems very inclined to let Congress decide such questions as who won Florida in 2000 or whether the ballots of faithless electors should be counted. If no candidate wins a majority of the electoral votes, the House, voting by state (meaning all the members from the state cast ballots and the winning candidate gets the single vote from that state), chooses the president from the top three candidates, and the Senate chooses the vice president from the top two candidates.¹⁰

There are consequences to the requirement that the winning candidate assemble an actual majority in the Electoral College rather than simply winning the most votes of any candidate in the race. Any close election raises the specter that a candidate might fail to win a majority of the electoral votes and that the whole contest might

⁹ U.S. Const. amend. XII.

¹⁰ *Id.* In implicit recognition of the formation of political parties, the Twelfth Amendment altered the initial rule and separated the votes for presidential and vice-presidential candidates, rather than filling the vice presidency with the runner-up in the presidential race.

be thrown into the House for resolution. In 1824, the one instance of the House having to determine the winner of a four-candidate race fed Andrew Jackson's populist candidacy in 1828.¹¹ His supporters nursed the view that only a "corrupt bargain" in the House had elevated John Quincy Adams to the White House, despite Adams coming in second in both the popular and electoral votes. Jackson had won 38 percent of the presidential electors, far short of the required majority but distinctly ahead of Adams, who could claim only 32 percent of the electors.

No one is eager for the legitimacy crisis that would likely follow from the House being forced to choose the president in the modern era, but it is not hard to imagine potential scenarios. A close presidential election could conceivably lead to a tie vote in the Electoral College, throwing the contest to the House. Such an outcome on Election Day would undoubtedly put inordinate pressure on the electors to break the tie themselves, by a faithless elector switching his or her vote to avoid the fight in the House. An election dispute in one or more states similar to what happened in Florida in 2000 could force Congress to decide which, if any, electors to count in order to reach a majority.

A third-party candidate with a substantial base of support who drew strength from both parties could steal enough electoral votes to deny any candidate a majority. Former president Theodore Roosevelt won an astonishing 16 percent of the presidential electors in 1912, but he did so largely by stealing votes from his Republican successor, the incumbent William Howard Taft, allowing Democrat Woodrow Wilson to sail to an Electoral College victory despite winning just over 40 percent of the popular vote. In 1860, John C. Breckenridge, John Bell, and Stephen A. Douglas divided the South amongst themselves, but Abraham Lincoln's solid hold on the North allowed him to win a comfortable Electoral College victory with less than 40 percent

¹¹ The House also had to resolve the presidential election of 1800, when the Electoral College produced a tie between Democratic-Republican candidates Thomas Jefferson and Aaron Burr at a time when the electors did not cast separate ballots for the president and vice president. Federalist shenanigans in the House nearly derailed the first peaceful transfer of power between political parties, and the Twelfth Amendment was hastily adopted to avoid a recurrence of that scenario. In 1876, rather than directly resolving the contested election, Congress created a Federal Electoral Commission to reach some solution. The result was the Compromise of 1876 that elevated Republican Rutherford B. Hayes to the White House and ended Reconstruction by removing federal troops from the soon-to-be Democratic-dominated South.

of the popular vote. A third-party candidate with a geographically concentrated base of support could play the spoiler and deny any candidate a straight majority in the Electoral College. That was the worry the Dixiecrat revolts produced in the mid-20th century when Strom Thurmond in 1948 and George Wallace in 1968 both won a nontrivial number of electoral votes, though in neither case was it enough to drag the leading candidate below the majority threshold. The more recent candidacies of Ross Perot in 1992 and 1996 might have affected the outcome of the race, but he had neither the size of support nor the geographic concentration that would have been needed to translate his popular votes into electoral votes. Third-party candidates like Ralph Nader, Pat Buchanan, Gary Johnson, or Jill Stein might tilt the electoral map to favor one or the other of the two major parties, but they did not threaten the nightmare scenario of actually siphoning off enough electoral votes to deny a candidate a clean victory in the Electoral College.

One risk of dropping the unit rule and adopting more proportional allocation of electoral votes is that third-party candidates could have a much greater chance of claiming some electoral votes—potentially enough to throw the contest to the House. Faithless electors could not only change the outcome themselves, but could toss the contest to the House with enough defections from the majority candidate. This was the Hamilton Electors' most plausible goal in 2016. By encouraging Republican presidential electors to break their pledges to vote for Donald Trump and instead cast a ballot for a different Republican like then-Ohio governor John Kasich or former secretary of state Colin Powell, the Clinton supporters hoped to at least move the fight to the House of Representatives. (Republicans enjoyed a majority there too under the one-vote-per-state-delegation rule, and it seems unlikely that Republican legislators would have been willing to do what the Republican National Convention had not and deny Trump his apparent victory).

Though this be madness, there was a method to it—at least at the beginning. The delegates in Philadelphia had a difficult political problem to solve, and this was the best they could come up with at the time. The Articles of Confederation did not create a separate executive branch at all. The Revolutionary era state constitutions generally set up exceedingly weak governors, who were often selected by and dependent on the legislature and hemmed in by a

constitutionally entrenched executive council. The Federalists seeking constitutional reform in 1787 wanted something different. The Virginia Plan that set the agenda for the convention proposed the creation of a federal executive, and James Wilson soon added that the executive should be “a single person.” The Framers were prepared to create a single, powerful, and independent chief magistrate, and that raised the stakes on how that magistrate was to be selected, confounding most of the existing models.

Both the Virginia Plan and the rival New Jersey Plan proposed that the national executive be chosen by the national legislature. This was the dominant model in the states at the time. Even Massachusetts, which allowed for a popular vote for the governor, had the legislature serve as a fallback if no candidate won a clean majority after the popular balloting—and in the absence of political parties to winnow down the choices, or charismatic leaders to dominate the balloting, the legislature was likely to be the effective means for choosing the governor most of the time. Only New York allowed the individual who won the greatest number of votes from the general electorate to assume the governor’s office, and the dominant presence of George Clinton assured early on that the state did not have to confront the problem of governors assuming office on the basis of only a small plurality of the vote.

The Virginia and New Jersey plans diverged on the key question of how the national legislature would itself be constituted. The Virginia Plan envisioned a national legislature based on popular representation, which meant a legislature, and thus a president, controlled by the larger states. The New Jersey Plan envisioned a national legislature based on equal state delegations like the Confederation Congress, which meant a legislature, and thus a president, more heavily influenced by the smaller states. The convention bogged down in trying to resolve the tension between those two perspectives until finally settling on the Connecticut Compromise that created a bicameral legislature that embodied both principles.

The Connecticut Compromise that settled the question of how Congress would be constituted became the foundation stone for selecting the president as well. The same small-state/big-state power-sharing arrangement needed to be replicated in the executive branch. Once the possibility of an executive council was taken off the table, the power-sharing became even more delicate and depended entirely on how the chief executive would be selected (and potentially

removed). But when the Framers turned their attention to the executive, the problem of how to give the executive sufficient independence from the legislature came to the fore. James Madison and others worried that the central problem facing the American republic was one of “elective despotism” in the form of unchecked legislatures.¹² In the same way that state governors were subsumed to their legislatures, a national executive chosen by the national legislature risked becoming servile to the will of the legislature. Even worse, there was a serious risk of cabals, factions, and corruption if the legislature was entrusted with the power of selecting the executive.

The best solution to this problem seemed to be the creation of a temporary Congress. A temporary Congress could be constituted on the exact same basis as the regular Congress, preserving the Connecticut Compromise. At the same time, a temporary Congress would not have the ongoing interaction with the executive and with governance that tended to undermine the independence of the executive and the separation of powers. Even better, a temporary Congress that was geographically dispersed across the states would be much harder to bribe or influence, reducing the threat of corruption and intrigue. And thus was born the Electoral College, an ephemeral doppelganger of Congress.

Notably, the Framers in Philadelphia seemed to think of the Electoral College functionally as equivalent to “election by the people.”¹³ James Wilson suggested the basic idea as a means for making the executive and legislature “as independent as possible with each other, as well as of the States.” Wilson was also optimistic that “Continental Characters will multiply as we more [and] more coalesce, so as to enable the electors in every part of the Union to know [and] judge of them.” But most of the delegates feared that once the nation moved past the one obvious choice of George Washington, average voters would have a hard time evaluating any candidates beyond the prominent personalities in their own states.¹⁴ Patrick Henry,

¹² The Federalist No. 48 (James Madison).

¹³ James Madison, *The Journal of the Constitutional Convention*, in 4 *The Writings of James Madison* 62 (Gaillard Hunt ed., 1903).

¹⁴ James Madison, *The Journal of the Constitutional Convention*, in 3 *The Writings of James Madison* 64 (Gaillard Hunt ed., 1903) (quoting James Wilson); Madison, *supra* note 13, at 367 (quoting Wilson).

George Clinton, and John Hancock had been able to dominate gubernatorial elections in their home states, but they were hardly the kind of “Continental Characters” that would rally the voters in states at the other end of the country. Presidential electors might be expected to be more familiar with the less-celebrated figures from distant states and more likely to unite behind a dominant candidate who could command a majority. Connecticut’s Roger Sherman expressed the sentiment typical among convention delegates in thinking that the people at large “will never be sufficiently informed of characters, and besides will never give a majority of votes to any one man.”¹⁵

The Electoral College promised to solve the representation problem (by mirroring the Connecticut Compromise), the executive independence problem (by giving the president a popular foundation), the corruption problem (by dispersing the choice of the president across the states), and the voter information problem (by filtering the will of the people through a set of selected representatives). It might be awkward and unfamiliar, but it was a clever solution to the problems that were uppermost on the minds of the Founders. If worst came to worst, Congress could always pick the president, just like several state legislatures picked their governors.

It turned out that there was another solution to the voter-information problem: political parties. Their emergence in the 1790s quickly obviated the need for presidential electors as such. The Electoral College could still serve all its other functions even if the presidential electors themselves were reduced to mere cyphers. Political parties created “Continental Characters” by winnowing the pool of potential candidates and coalescing support around a favorite. Party organizations could vet potential candidates and serve as an alternative to the personal renown of individuals. Ultimately, party organizations made it possible for someone other than “great and striking men,” as the Victorian observer James Bryce characterized the “heroes of the Revolution,” to rise to “this great office.”¹⁶ Party organization made it possible for men like Martin Van Buren, James K. Polk, Franklin Pierce, Abraham Lincoln, and Rutherford B. Hayes to rise to the presidency even if they lacked the national reputation

¹⁵ Madison, 3 Writings, *supra* note 14, at 450 (quoting Roger Sherman).

¹⁶ James Bryce, 1 *The American Commonwealth* 100 (1888).

of a George Washington, Thomas Jefferson, Andrew Jackson, or Ulysses S. Grant.

Political parties were also publicity machines, and they could make sure that voters across the country were informed—or at least, informed enough—about their favored candidates. James Polk might not have been a “Continental Character” when he started, but the Democratic Party communications operation was going to make him one by the time of the election. Fundamentally, political parties and the Electoral College are rival mechanisms for accomplishing a presidential “election by the people.” The emergence of a party-based democracy required that the political parties gain mastery over the presidential electors, and they did. That mastery was accomplished through pledged electors.

Party organizations and pledged electors in presidential elections emerged as soon as the country needed to find George Washington’s successor. The parties published the names of slates of electors pledged to support the party’s favored presidential candidate and eventually simply printed ballots listing those pledged electors that the voter could deposit in the ballot box. The parties did not put forward as electors “those who know most of Eminent characters & qualifications” and could deliberate on the most suitable possibilities for exercising the president’s duties.¹⁷ They put forward loyal party apparatchiks who could be trusted to cast their ballots in a predictable way.

But as soon as there were pledged electors there were also faithless electors who broke their pledges. As early as 1796, one aggrieved Federalist voter took to the newspapers to complain when a Pennsylvania elector, Samuel Miles, who was expected to vote for John Adams instead voted for Thomas Jefferson.

When I vote for a legislator, I regard the privilege that he is to exercise his own judgment—It would be absurd to prescribe the delegation. But when I voted for the Whelan ticket, I voted for John Adams What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson is to be the fittest man for President of the United States? No—I chose him to *act*, not to *think*.¹⁸

¹⁷ Madison, *supra* note 13, at 69 (quoting George Mason).

¹⁸ “For the Gazette of the United States,” *Gazette of the United States* (New York City), Dec. 15, 1796, at 3.

Miles was not a political nonentity. He had risen to the rank of brigadier general during the American Revolution and had served briefly as mayor of Philadelphia during the Washington administration. He was the kind of man the Framers might have imagined filling the role of presidential elector and exercising independent judgment to identify the fittest candidate for president. But, by the time of the third presidential election, men like Miles were not expected to think, they were simply expected to act so as to faithfully transmit the will of the voters.

The practice of pledged electors solidified in the 19th century. There were some faithless electors in the early decades, but they primarily cast surprise ballots for the vice presidency, not the presidency. The major exception was in 1872, when the Democratic presidential nominee Horace Greeley died after losing the November general election to the incumbent President Grant but before the presidential electors cast their ballots. When they assembled a few weeks later, most of Greeley's pledged electors cast ballots for someone still alive (three stuck with the dead man, and Congress refused to count those votes as valid). Constitutional treatise writers like Justice Joseph Story took care to point out that the "expectations" of the constitutional Framers had been "completely frustrated" by the "practical operation" of the Electoral College, since it "is notorious, that the electors are now chosen wholly with reference to particular candidates, and are silently pledged to vote for them."¹⁹ Democratic Sen. Thomas Benton explained in his memoirs that "electors have no practical power over the election." They were "an instrument, bound to obey a particular impulsion; and disobedience to which would be attended with infamy, and with every penalty which public indignation could inflict."²⁰ The British jurist Albert Dicey observed that "the power of an elector to elect is as completely abolished by constitutional understandings in America" as the British monarch's power to veto legislation passed by Parliament. "For him to exercise his legal power of choice is considered a breach of political honour too gross to be committed by the most unscrupulous of politicians."²¹ Former president Benjamin Harrison

¹⁹ Joseph Story, 3 *Commentaries on the Constitution of the United States* 321 (1833).

²⁰ Thomas Hart Benton, 1 *Thirty Years' View* 37 (1854).

²¹ Albert V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* 30 (1885).

posited that “an elector who failed to vote for the nominee of his party would be the object of execration, and in times of very high excitement might be the subject of a lynching.”²² The imagery that commentators used to explain the role of the presidential electors is telling. They were “a registering machine,” “mere passive instruments,” “mere automata,” “a messenger,” “a mere cogwheel,” and “party dummies.”²³ As might be expected, faithless electors were, with the exception of the Greeley episode, practically unknown in the 19th century.

When, at the beginning of the 20th century, state governments took from political parties the responsibility for printing ballots, they soon began to dispense with the bother of actually listing the names of candidates for the office of presidential elector. The electors were not only cogs in the machine, they became anonymous as well. The ballots distributed by the parties to the voters in the 19th century only listed that party’s candidates for office. Voters did not need to do anything other than stuff the piece of paper in the box. When the government began printing the “long ballot” that listed all the candidates running for office, voters had to recognize and check off which candidates they supported. Listing the names of the presidential electors was simply confusing, and so governments started listing the presidential candidates instead. When voters checked the box for Theodore Roosevelt in November of 1912, they were silently (and often unknowingly) *really* voting for a slate of presidential electors who were pledged to vote for Theodore Roosevelt a month later. In 1932, when a Brooklyn lawyer sued the state of New York because newfangled voting machines left off the name of the presidential electors, the judge thought the state legislature knew what it was doing in authorizing the design of the new machines. It knew “that voters were no longer interested in the personnel of the group of electors.”²⁴

If presidential electors exercised free choice then “they would be the most important and powerful officials voted for” and obviously the people should know their names. But they did not exercise free

²² Benjamin Harrison, *The Constitution and the Administration of the United States of America* 77 (1897).

²³ See Whittington, *Faithless Electors*, *supra* note 2, at 933.

²⁴ *In the Matter of the Application of William A. Thomas v. Cohen*, 262 N.Y.S. 320 (N.Y.S. Kings Co., 1933).

choice and thus it did not matter that no one knew who they were. The parties spent “vast sums” informing the electorate about the presidential candidates, and their “names were heralded throughout the land.” The voters expected to see those familiar names on the ballot, and they expected to know who had won the election “before they retire for the night.” Modern presidential electors had no “right to defy the will of the people.” Their vote in December “is a mere formality now,” and their identity was irrelevant. The legislature could reasonably leave their names off the ballot because no one was voting for *them* in any case. The New York judge speculated that presidential electors had such a “bounden duty” to adhere faithfully to their pledge that a court might issue a mandamus to direct them if they “attempted to disregard that duty.”²⁵

For most of its history, the nation has relied on the threat of social sanction—and perhaps even physical violence—to keep the electors in line. Electors were carefully chosen for their loyalty, and everyone knew it would be a gross breach of honor to break their pledge to vote for their party’s candidate. Those factors still play a dominant role. It is no accident, for example, that California election law empowers each Democratic candidate for the House and the Senate to “designate one presidential elector” to be advanced by the state Democratic Party chairperson, and that the individuals often chosen to fulfill that honor are close family members, friends, and associates to those Democratic congressional candidates.²⁶ Then–House Minority Leader Nancy Pelosi’s daughter, Christine, was a prominent member of the Hamilton Electors movement in 2016, though she herself faithfully voted for Clinton when the California presidential electors assembled on December 19. Christine Pelosi’s primary qualification for being an elector is that she is Nancy Pelosi’s daughter and could be trusted to do what she was told. Pennsylvania cuts out the middleman and empowers the presidential nominee him or herself to name the electors.²⁷

When the parties internally fractured in the 20th century, party loyalty no longer seemed to be enough. Faithless electors, once practically unknown, became more common and, in some cases, more

²⁵ *Id.*

²⁶ Cal. Elec. Code § 7100.

²⁷ 25 Pa. Cons. Stat. § 2878.

organized. States began to experiment with laws designed to legally bind presidential electors to their pledges. When former president Roosevelt announced an independent challenge to incumbent president Taft in 1912, several of the presidential electors chosen by the Nebraska Republican Party were subsequently nominated by the state Progressive Party to serve as Roosevelt electors. The state GOP demanded that those rogue Roosevelt electors be removed and replaced by Taft loyalists, and the state supreme court agreed. The court thought that the “candidates had, by their acts, vacated their places as republican presidential electors,” and the party central committee had the right to fill those vacancies. A voter who marked his ballot for Taft was entitled to a presidential elector who would faithfully vote for Taft, and an elector who announced that he would do otherwise was behaving in a manner “incompatible” with the office of a Republican Party presidential elector.²⁸ When “Dixiecrats” refused to take the pledge to vote for the presidential nominee of the national convention, the U.S. Supreme Court held that the state could properly refuse to certify those individuals as candidates for the office of presidential elector.²⁹

In that 1952 case, *Ray v. Blair*, the Court approved a state-required pledge but left open the question of what the state could do if a presidential elector agreed to take a pledge and then violated it. Many states adopted such a pledge requirement, and they soon began to add teeth to encourage fidelity to the pledge, imposing civil fines on electors who broke their pledge, or, in a couple states, making pledge-breaking a criminal offense. A few states specified that the unwillingness of an elector to vote in accord with the pledge created a vacancy to be immediately filled with a new elector willing and able to cast the appropriate vote.³⁰

II. Donald Trump and the “Hamilton Electors”

Even as faithless electors became more common in the 20th century, they remained primarily curiosities. Electors on occasion broke their pledges to make an idiosyncratic symbolic gesture, as when

²⁸ State ex rel. Neb. Republican State Central Comm. v. Wait, 138 N.W. 159 (Neb. 1912).

²⁹ *Ray v. Blair*, 334 U.S. 214 (1952).

³⁰ Zachary J. Shapiro, Free Agency: The Constitutionality of Methods that Influence a Presidential Elector’s Ability to Exercise Personal Judgment, 26 J.L. & Pol’y 395 (2018).

a Republican elector in 1972 voted for the Libertarian Party candidates, a 1976 Republican elector voted for Ronald Reagan, and a 2000 Democratic elector cast a blank ballot to protest the District of Columbia's lack of congressional representation. Those gestures were individual, disorganized, and specifically intended not to affect the outcome of the election (though if 251 of Richard Nixon's 520 pledged electors in 1972 thought they were playing with house money they could have accidentally brought him below the required majority threshold while casting their ballots for alternative candidates). A modicum of coordination is useful even when playing the free spirit.

All that changed in 2016. Real-estate developer and television celebrity Donald Trump had won his long-shot bid for the Republican nomination for president, but few thought he could win the general election against Democratic nominee Hillary Clinton. Nonetheless, Trump threaded the needle and won just enough votes in the right places to cobble together an Electoral College majority. Clinton supporters were in dismay and denial. Activists launched a "Hail Mary" attempt to give Clinton the White House anyway by lobbying Republican presidential electors to break their pledge. Some pitched the idea that the electors should cast their ballots for the national popular vote winner, regardless of their pledge to vote for the statewide popular vote winner—in other words, Republican electors should vote for Clinton. Others suggested that presidential electors should refuse to vote for someone who was uniquely unfit for the presidency and should vote for anyone but Trump. Still others argued that Russia had stolen the election and that presidential electors should refuse to vote for a candidate who had not legitimately won a free and fair election.

A small group of Democratic presidential electors—the aforementioned "Hamilton Electors"—argued that pledges were inconsistent with our constitutional design. Presidential electors were constitutionally obligated, they said, to "vote their conscience," as presidential aspirant Ted Cruz had similarly urged the delegates at the Republican National Convention to do a few months earlier. In selling the Constitution to the skeptical ratifiers of New York, Alexander Hamilton had predicted that the odd device of the Electoral College "affords 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.”³¹ The Hamilton Electors glossed this prediction as a claim that the Electoral College should act as a “constitutional failsafe” when the voters failed to choose a person eminently endowed with the requisite qualifications.

An extraordinarily intense and public lobbying campaign produced a historic number of faithless electors in 2016. It did not, however, deny Donald Trump the presidency. Two Trump electors in Texas cast ballots for other candidates (John Kasich and former Texas House member Ron Paul). A Clinton elector in Hawaii voted for Sen. Bernie Sanders. Three Clinton electors in Washington state voted for Colin Powell and another voted for activist Faith Spotted Eagle. Other Clinton electors attempted to cast ballots for other candidates, but a vote in Maine for Bernie Sanders was declared out of order, and electors in Colorado and Minnesota were replaced when they attempted to vote for John Kasich and Bernie Sanders, respectively.

After the election was over, two lawsuits were filed challenging laws meant to bind presidential electors to their pledges. Colorado authorizes its secretary of state to replace a presidential elector in the case of a “vacancy,” and “refusal to act” is one ground for declaring a vacancy. Refusing to adhere to the pledge was interpreted as a refusal to act under the state statute. Michael Baca, a leading member of the Hamilton Electors group, had his vote for Kasich discarded, and he was replaced with a new elector who agreed to keep her pledge. He was joined in a federal lawsuit by two other Clinton electors who claimed that they felt intimidated into adhering to their pledge. The lawsuit sought to have the law declared invalid as a violation of their constitutional rights as presidential electors. In 2016, Washington state authorized its secretary of state to impose a \$1,000 civil fine on faithless electors (the state subsequently adopted a law allowing the removal and replacement of a faithless elector). The three electors who voted for Kasich were each fined, and they filed a challenge in state court arguing that the fine was unconstitutional. The Tenth Circuit ultimately declared the Colorado statute unconstitutional, while the Washington Supreme Court upheld the Washington statute. The cases were consolidated at the U.S. Supreme Court, which reversed the Tenth Circuit and affirmed the Washington court.

³¹ The Federalist No. 68 (Alexander Hamilton).

III. The Majority and the Power of Appointment

The justices agreed that states could adopt measures to discourage faithless electors, but they disagreed on the source of that authority. Justice Elena Kagan, writing for a unanimous Court (although with concurrences), provided a rationale grounded in Article II and the Twelfth Amendment, which together lay out the Electoral College's contours. Her approach accords with how the Washington Supreme Court approached the case and builds on what the U.S. Supreme Court had said in *Ray*.

In upholding states' power to require that presidential electors take a pledge to vote for the party nominee, the *Ray* Court rejected the argument that "the Twelfth Amendment demands absolute freedom for the elector to vote his own choice."³² The Court was influenced by the "long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector," and thought that practice had implications for the validity of states requiring such a pledge. The majority in *Ray* was not very specific, however, about where states got the power to require such pledges. The question concerned how political parties organized their primary elections that would eventually lead to the designation of a slate of electors. That the case arose out of Alabama made it perhaps easier: The Court was inclined to let states bolster a party's ability to exclude candidates from office who were not committed to that party's principles and organization, unless there was a strong countervailing constitutional rule like the one against racial discrimination.

But the two dissenters in *Ray*, Robert Jackson and William O. Douglas, worried that presidential electors "performed a federal duty" and thought the state could no more dictate how they performed that duty than it could instruct a U.S. senator how to conduct his. Presidential electors might have refrained from exercising free choice for a long period of time, but the dissenters did not think the "powers and discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse."³³ "A political practice which has its origin in custom must rely upon custom for its sanctions."³⁴

³² 334 U.S. at 228.

³³ *Id.* at 233 (Jackson, J., dissenting).

³⁴ *Id.*

Since, in *Chiafalo*, Washington state was attempting to legally sanction presidential electors for how they performed their federal duty, the question of whether the political custom of pledged electors could be enforced by the state as mandatory required an answer that the *Ray* Court had not provided. Perhaps the *Ray* majority was implying that the “practical interpretation” of the Constitution had, through long usage, altered the nature of electors’ federal duty. But the majority had not quite said that, and such a claim would raise thorny conceptual puzzles for how we should understand constitutional change.

Kagan found the state’s authority to sanction faithless electors in the power to appoint those electors in the first place. When considering whether state legislatures could use a district method of voting for presidential electors rather than a statewide slate, the Supreme Court in *McPherson v. Blacker* emphasized that the Constitution empowered the state legislatures with “the broadest power of determination” for how presidential electors would be chosen.³⁵ Kagan added that if the state legislature can appoint an elector in any manner it chooses, then it must also have the “power to condition his appointment—that is, to say what the elector must do for the appointment to take effect.”³⁶ Establishing conditions of appointment allowed for such now-uncontroversial practices as requiring that electors take a pledge or live within the state. Less clear is the idea that the power to subsequently impose sanctions goes along with the power to condition the appointment. If the state can require that an elector “live in the State or qualify as a regular voter during the relevant time period,” does that also mean that the state can impose a civil fine or criminal penalty if an elector were to move out of the state in the days before he is to cast his ballot?³⁷ There seems to be a lot packed into the notion of conditions on appointment that Kagan did not bother to unpack and explain.

There was an additional issue of whether a state’s sanctions of faithless electors violates some countervailing constitutional rule. Kagan echoed earlier decisions in pointing out that pledged electors are consistent with the constitutional language setting up the

³⁵ *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

³⁶ *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020).

³⁷ *Id.*

Electoral College. She added that the constitutional text could have been written differently, as the Maryland and Kentucky constitutions were in setting up somewhat similar systems, to explicitly require that the electors deliberate and exercise independent judgment. Kagan was unpersuaded that terms like “elector” and “vote” necessarily require independence of action since we recognize the possibility of pledged votes in a variety of contexts. The presidential electors could be free agents, but the text of the Constitution does not require them to be. The state could not violate an independent constitutional rule by making it a condition of appointment that an elector be white or Christian, but Kagan saw no bar to an elector being required to vote in a specific way.

IV. The Concurrence and the Tenth Amendment

Justice Clarence Thomas, joined partially by Justice Neil Gorsuch, took a different approach. Thomas thinks the question of where the state gets the authority to sanction faithless electors is much simpler: he does not need to find that authority in the text of the Constitution at all. Instead, he thinks the authority should be understood as part of the powers the Tenth Amendment reserves to the states.

That logic is consistent with Thomas’s dissent in the congressional-term-limits case in 1995. In *U.S. Term Limits, Inc. v. Thornton*, the majority of the Court held that a state’s scheme of excluding long-serving incumbent members of Congress from the ballot was effectively adding new qualifications for congressional office to the ones listed in the text of the Constitution.³⁸ Thomas dissented, arguing that a state held a reserved power to add such qualifications and nothing in the Constitution barred it. The majority thought the state’s authority over the election of members of Congress could arise only from the Constitution itself. Since the states had no pre-existing authority over federal officeholders prior to the ratification of the very Constitution that created those federal offices, then regulating those offices could not be among the powers “reserved” by the Tenth Amendment.

Thomas argued that Kagan’s approach does not work. The Constitution provides that states may appoint presidential electors “in such Manner as the Legislature thereof may direct.” Thomas would

³⁸ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

characterize this as a manner-of-appointment clause, which would not extend to other substantive aspects of appointments. State legislatures “set the approach for selecting Presidential electors,” but selecting the manner by which electors are chosen does not give the states an authority to impose substantive conditions on their appointment or direct how electors conduct their duties after they have been appointed. The majority largely ignored the specification of a manner of selection. As a consequence, the majority gives the whole provision a reading that is at odds with how the power was discussed at the Founding and with the parallel provision of the Constitution empowering Congress to regulate the “Times, Places and Manner of holding Elections for Senators and Representatives.” If the power to regulate the manner of holding federal elections extends only to procedural regulations, then it would seem that the power to choose the manner of selecting electors likewise extends only to procedural regulations. The legislature can specify who gets to select the presidential electors and how the selection process should occur, but that is different from controlling what the selected electors then do.

Thomas thinks it is important that some states do not purport to tie their directives of how electors vote to the conditions of their appointment. Some states claim the authority to penalize electors for violating the pledge they take as a condition of being appointed, but others simply declare that presidential electors have a legal duty to vote in a particular way. Kagan dismissed this as “small semantic differences” of no consequence, but Thomas certainly seems right that the states seem to be saying something different about why presidential electors are expected to vote for the winner of the statewide ballot. In all likelihood, the states acted under a variety of different theories about where the electors’ duty to be faithful comes from. Plainly, some states rejected the rationale that the Court’s majority ultimately embraced. Kagan effectively asserted that states like California and New Mexico have taken the wrong approach but that their mistake can be ignored under the legal fiction that their statutes can be read as if they were imposing conditions on appointment. That might be a conceivable solution given what the Court has done, but Thomas is right to highlight the novelty and awkwardness of the majority’s approach.

Thomas, like Kagan, does not think the expectations of the Framers that the presidential electors would be free agents is embodied

in the Constitution as written. The Framers might have expected the Electoral College to work that way, but they did not require it to work that way. Therefore, Thomas agrees that there is no constitutional bar to pledged electors or even to legal efforts to enforce the fidelity of pledged electors. In his reading, the states have the authority to punish electors for violating their public oaths as part of their general reserved power, just as states could punish oath-breaking in other contexts. Unfortunately, Thomas's approach is not only at odds with the term-limits precedent, but it also leaves a number of questions unanswered. If the states have a reserved authority to direct how presidential electors fulfill their duties, do they also have a reserved authority to direct how members of Congress fulfill theirs? Can the state legislature issue instructions to senators as to how they should vote on an upcoming bill and impose fines if the senators don't vote accordingly? Even if state legislatures can direct how presidential electors vote, can they discard a ballot and declare it invalid if the electors defy the wishes of the state legislature? Thomas seems right that the power to choose the manner of selection does not easily encompass the imposition of substantive constraints on how those selected must conduct their duties, but his own solution to the problem does not easily account for the states' actions in Washington and Colorado either.

V. Implications

The constitutional issues surrounding the Electoral College are sufficiently far off the beaten path that this case has fewer ramifications for general constitutional law than most Supreme Court decisions. The presidential selection system rarely generates justiciable issues, and the constitutional text and the justices' conceptual tools used to resolve this case are unlikely to play a major role in future cases. Constitutionally speaking, this case is relatively self-contained, which freed the justices from some of the considerations that weigh down the Court's average constitutional case. Even so, it's worth recognizing some broader implications for how the justices resolved the case.

First, note that no justice took the path suggested by the New York judge who resolved the voting-machine challenge in 1933. Essentially, that judge embraced the notion of a living constitution that could be interpreted to alter the terms of the Electoral College

such that electors were under a judicially enforceable duty to vote for the candidate who won the statewide vote. Such argumentation would not be outlandish under some theories of constitutional adjudication, and it is not hard to imagine judges at various points in history embracing it, yet it got no traction on the current Court. Kagan took into account our evolving constitutional practices, but she did not suggest that changing times can alone create judicially enforceable duties on electors or alter the nature of their office. The Constitution, properly interpreted, gives electors discretion in how they vote. The relevant question for the Court was whether the states had adequate constitutional authority to impose limits on that discretion, not whether the Constitution had evolved such that the electors had lost discretion that they once possessed. The “living” components of the Constitution were properly cabined.

Second, the justices avoided unsettling the status quo. The binding laws that states have adopted in the attempt to enforce elector fidelity are relatively new and, but for the Court’s intervention, might have been mostly symbolic. Still, the symbolism is potentially important. Such laws came into vogue precisely because faithless electors seemed to be a growing problem and the old ways were not seen as sufficient to deter them. The binding laws might not be the most reasonable, effective, or even constitutional means for discouraging faithless electors, but the goal of discouraging faithless electors is an admirable one, and the binding laws might be marginally helpful in preventing the disaster of a group of faithless electors attempting to change the result of a presidential election.

More troubling, the binding laws in themselves might not be very effective in deterring faithless electors but striking down the binding laws might itself have encouraged more faithless electors in the future. If we picture these laws as primarily symbolic and expressive, then we might think they serve the salutary purpose of bolstering the social norms surrounding electors’ pledges and reinforcing the idea that faithless electors are doing something dishonorable, something worthy of social scorn and ostracism (if not necessarily imprisonment). If the Court had never entered into the arena—or if Washington had never fined the faithless electors in 2016—then the binding laws might have stood quietly by in the shadows, untested as coercive tools but operative as political messaging.

Unfortunately, once the courts had committed themselves to resolving such cases, they were in a difficult spot. If they struck down the laws, they might have inadvertently telegraphed the message to future presidential electors that faithlessness is tolerable, acceptable, or even desirable. No matter how carefully the justices attempted to couch their opinions, the bottom-line signal might have further undermined political norms against faithless electors and made a constitutional crisis ever so slightly more likely. That was a big risk to run, without a lot of countervailing benefit, and undoubtedly would have discouraged the justices from blithely striking down these laws if they had an alternative.

Notably, the justices did tend to positively reinforce the message that electors should be faithful, not faithless. The implicit message of the judgment was to affirm the message of the state legislatures that pledges matter and that presidential electors should not go rogue. Merely upholding the binding statutes tends to reinforce that message. In his concurrence, Thomas did not comment on the responsibility of electors to be faithful to their pledge. In her opinion for the Court, however, Kagan did emphasize the point and make the message more explicit. She highlighted the fact that presidential electors had long been understood to be “trustworthy transmitters of other people’s decisions” and that a “tradition more than two centuries old” insisted that the “electors are not free agents.”³⁹ She concluded with the fundamental point that the state binding laws are intended to convey: The states hoped to “impress on electors their role as agents to others” and instructs them “that they have no ground for reversing the vote of millions of its citizens.”⁴⁰ And finally, “that direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.”⁴¹ She might have hit that theme even harder, but the Court was clear that rogue electors are inherently anti-democratic and at odds with the spirit of American constitutional democracy. The Court gave no credence to the idea that there was something noble and heroic about the Hamilton Electors’ project and neither did that project finally breathe life into the American constitutional scheme. The Hamilton Electors were

³⁹ Chiafalo, 140 S. Ct. at 2328.

⁴⁰ *Id.*

⁴¹ *Id.*

seeking to overturn a democratic election by construing their duty as more grandiose and significant than anyone understands it to be or than they were appointed to exercise.

Third, it is also worth considering the fact that the justices did decide to resolve the case on the merits. None of the justices bothered to ask whether these cases even belonged before the Court, which is no real surprise given that the Court had scheduled them for argument in the first place and has generally embraced its own supremacy in resolving all variety of constitutional questions. The fact that the Tenth Circuit had struck down Colorado's binding laws did force the Court's hand to some degree, requiring it either to act or leave such laws in other states sitting under a constitutional cloud.

The Washington case presented the more obvious justiciable controversy that did not give the justices an easy out. Washington imposed a civil fine on the electors, and they have standing to challenge the constitutionality for such a fine. States have refrained from imposing such a fine in the past, but it seems doubtful that Washington's Republican secretary of state was concocting a collusive lawsuit to test the constitutionality of such binding laws. Washington seemed sincere in hoping to deter future faithless electors by making an example of these highly visible ones. The Court could have declined certiorari and let the Washington court's judgment stand. If the justices thought Washington had gotten the constitutional law wrong in that case, it would have been unfortunate for both the electors who had to pay the fine and for the Constitution, but at least the U.S. Supreme Court would not have set any precedents one way or the other. It would not have been the first time that the justices thought the enforcement of a constitutionally dubious state law was not worth their attention just yet. (Of course, if the justices thought that Washington was correct—as it appears that they do—then they might have been eager to reach out to take the case in order to put their own, even more visible stamp of approval on such laws.)

The justiciability of the Colorado case is more problematic. The justices could have vacated the Tenth Circuit's judgment without reaching the merits of the case. Such a move might have breathed some life into the political question doctrine and could have emphasized that the judiciary does not always have to jump into constitutional disputes. Colorado did not fine the faithless electors in 2016.

It removed and replaced Michael Baca as an elector and did not count his vote. Two other electors joined the suit because they felt “intimidated” into voting a particular way. Despite the election having long since passed, erstwhile elector Michael Baca wanted nominal monetary damages for his removal. As one amicus pointed out, allowing the Baca suit to proceed was an open invitation to collusive suits seeking advisory opinions that stretched the boundaries of federal jurisdictional statutes.⁴² Moreover, there is a good argument that Congress is the proper venue for determining whether an elector’s ballot is valid.⁴³ If Colorado had erred in trying to exclude a valid electoral vote, Baca could have sought to have the error corrected by Congress when the electors’ votes were counted. He did not attempt to do so, and Congress accepted the vote of Baca’s replacement.

The Court could have reasonably asserted that the matter of the validity of electoral votes is a political question the Constitution entrusts to Congress, and therefore the judiciary should not interfere. Such a move by the Court might have had broader ramifications. It might have helped funnel such disputes into Congress rather than the courts, and it might have nudged Congress into taking its constitutional responsibilities more seriously while reminding everyone that the courts are not the only constitutional interpreters in the American system. Alas, the modern Court is not very inclined to admit that some constitutional questions are outside its purview. The fact that the Court issued only a *per curiam* order in the Colorado case further swept under the rug the justiciability questions that could have been raised and addressed in a full opinion.

Fourth, the outcome of the faithless elector cases might ease the path a bit for the National Popular Vote Interstate Compact. Some states have pursued such a compact—valid only if signatory states control a majority of electoral votes—which would award their presidential electors to whichever presidential candidate wins the national popular vote. The goal is to effectively replace the Electoral College formula through voluntary state action rather than through constitutional amendment. One challenge to the success of such a

⁴² Brief of Professor Michael T. Morley as Amicus Curiae in Support of Neither Side, Colo. Dep’t of State v. Baca, 140 S. Ct. 2316 (2020) (No. 19-465).

⁴³ Brief of Professor Derek T. Muller as Amicus Curiae in Support of Neither Party, Colo. Dep’t of State v. Baca, 140 S. Ct. 2316 (2020) (No. 19-465).

compact, however, is how to ensure that presidential electors actually cast their ballots in this way. The current system aligns the preferences of a state's electors with the preferences of its voters by delegating the appointment of electors to the political parties and elevating electors pledged to vote for the presidential candidate who won the state's popular vote. If a Democrat wins the national popular vote but a Republican wins the state popular vote, Republican electors would have little inclination to vote for the Democratic presidential candidate. States would need both to detach the slate of electors from party control and to create a binding pledge directing the electors to vote for the winner of the national popular vote. If states have no legal capacity to discourage faithless electors, that task becomes even more complicated. The political and legal road to a national popular vote is still not easy,⁴⁴ but the Court's decision removes one potential constitutional roadblock.

Fifth, the Court's endorsement of strong state laws binding electors' votes potentially opens the door to a great deal of mischief. Kagan tried to close that door by emphasizing that the state cannot require electors to do something that contradicts some other constitutional rule, but it is not clear that that principle can do all the work Kagan wants it to do. If states can direct how electors cast their ballots, then a host of possibilities might tempt state legislators. Can states require electors to vote only for presidential candidates who have released their tax returns? Can states require electors to vote only for presidential candidates who have previously held elective office? Can states require electors to vote only for Democrats, regardless of the outcome of the statewide or national balloting? Can states require electors to vote only for presidential candidates who have endorsed a specific policy platform? Can states require electors to vote only for presidential candidates who are part of a gender-balanced or racially diverse ticket? In a footnote, the Court says that states cannot adopt a condition of appointment "that effectively imposes new requirements on presidential candidates."⁴⁵ But what does that mean, and how can it be reconciled with the conditions that the Court is explicitly allowing? The pledge that electors will only vote

⁴⁴ See, e.g., U.S. Const. art. I, § 10 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State").

⁴⁵ Chiafalo, 140 S. Ct. at 2324 n.4.

for presidential candidates who are a major party nominee and won the statewide balloting would seem to effectively impose new, extra-textual requirements on presidential candidates. The Court might soon find itself having to explain why a pledge to vote for a candidate who has been endorsed by a political party is not an unconstitutional qualification on presidential candidates but a pledge to vote for a candidate who has released his tax returns is.

Finally, the Court did not grapple with the differences among binding laws on the books, including the different approaches Washington and Colorado took. Washington levied a civil fine on its faithless electors. Colorado declared that Baca had vacated his office by crossing out a name on his printed ballot and writing in the name of John Kasich. Maine declared a ballot invalid and directed the faithless elector to vote again. Baca had announced his intention to violate his pledge weeks ahead of the meeting of the electors. It is imaginable that Colorado could have removed Baca as soon as he announced his intention to violate his pledge, on the same logic that Nebraska used to remove the Roosevelt electors in 1912. If taking and adhering to a pledge is a condition of appointment, then replacing electors who refuse to take a pledge or announce that they no longer regard themselves as bound by their pledge seems to fall squarely within the logic of the majority's reasoning. It is less clear that a state can retrospectively sanction electors for violating the conditions of their appointment or discard ballots that are inconsistent with the conditions of appointment of the electors. The Court did not bother to discuss the details of what measures states can take to deter faithless electors but sweepingly suggested that any measures are acceptable (presumably so long as they do not contradict some other constitutional rule).

If in the future a state's presidential electors cast their ballots for the winner of the statewide vote, and the secretary of state discards their ballots and replaces them all with electors who would vote for the winner of the national popular vote, the Court might be confronted with a case seeking a determination as to which set of ballots are the lawful ones. The Court seems to have committed itself to the view that the state legislature can direct the secretary of state to take such an action during the meeting of the duly appointed presidential electors. But the explanation is rather thin as to why that is constitutionally appropriate.

The Vexing Problem of Faithless Electors

* * *

In an effort to overturn a presidential election, the Hamilton Electors launched a dangerous campaign that flew in the face of two centuries of constitutional practice. But just because faithless electors are wrong does not mean that states have all the legal tools that they might need to prevent such infidelity. The Court has papered over the problem, and perhaps that is good enough, but the presence of willful human beings in the Electoral College remains a constitutional difficulty that could someday provoke a crisis.

