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FAITHLESS OR FAITHFUL ELECTORS? AN ANALOGY TO DISOBEDIENT BUT CONSCIENTIOUS JURORS

*Jeffrey Abramson**

INTRODUCTION

Imagine that on November 3, 2020, President Trump loses the popular vote but apparently wins the Electoral College by a margin of 274 to 264. However, five of the electors who pledged to vote for Trump announce that they cannot in good conscience vote for a candidate who lost the national popular vote. When the Electoral College ballots are officially cast on December 14, they therefore vote for Mike Pence, knowing this will deprive Trump of the majority he needs to win. The result throws the election into the House of Representatives to decide who wins.

Or imagine that the Democratic Party candidate narrowly wins both the popular vote and apparently a bare majority (271) of electoral votes. However, on December 14, two electors supposed to vote for the victorious Democrat do not, citing concerns about the physical well-being of the candidate. They write in the name of former Secretary of State Colin Powell instead. Their defections also throw the election into the House.

Scenarios such as these could happen.¹ In 2016, ten electors cast ballots for presidential candidates other than those the popular vote in their states directed them to support.² Three states refused to count the ballots,³ but four other states

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¹ In 1876, Rutherford Hayes defeated Samuel Tilden by a single contested electoral vote. See JACQUELINE JONES, ET AL., *CREATED EQUAL: A HISTORY OF THE UNITED STATES* 488, Table 15.4 (2009). In 2000, George Bush achieved the necessary majority in the Electoral College by a single vote. *BUSH V. GORE: THE COURT CASE AND COMMENTARIES* xiv (E. J. Dionne, Jr. & William Kristol eds., 2001). In 1836, the refusal of Virginia Democratic electors to vote for Richard Johnson, the victorious vice-presidential candidate of their party, threw that election into the Senate. See Brian C. Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 *HARV. J. ON LEGIS.* 101, 111 (2017).

² See Jesse Wegman, *Why Do We Have an Electoral College Again?*, *N.Y. TIMES* (Jan. 26, 2020), <https://www.nytimes.com/2020/01/25/opinion/sunday/electoral-college-supreme-court.html?searchResultPosition=1>.

³ The three states were Colorado, Maine, and Minnesota. See Kiersten Schmidt & Wilson Andrews, *A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton*, *N.Y. TIMES* (Dec. 19, 2016), <https://www.nytimes.com/interactive/2016/12/19/us/elections/electoral-college-results.html>.

accepted the other seven votes from so-called “faithless electors.”⁴ This was the largest outbreak of elector resistance in a century.⁵

The term “faithless elector” is unfortunate, since the accusatory adjective begs the question: Are electors required to vote in accordance with the popular vote in their states or did the Constitution create an Electoral College precisely to give electors some discretion in how they vote? For this reason, I refer in this Essay to “independent” electors.⁶ And I offer an analogy between independent electors and independent jurors. In the case of jurors, we dispense with the usual importance of holding government actors accountable for violating their oaths of office. As with electors, we require that jurors pledge to follow their lawful instructions. But we do not punish jurors who violate that oath. In fact, we frequently honor them for rendering verdicts according to conscience. The question is whether the Constitution extends to electors a similar kind of discretion to break their oath with impunity and to have their independent vote counted.

To answer that question, the Court has taken two cases for decision this term,⁷ one from Colorado, the other from Washington. The Colorado case arose after Hillary Clinton won that state’s popular vote in the 2016 presidential election.⁸ Like thirty-two other states⁹ and the District of Columbia,¹⁰ Colorado requires a pledge from presidential electors to follow the state’s popular vote.¹¹ However, one elector violated both his pledge and state law by attempting to cast a presidential ballot for John Kasich, instead of Clinton. Colorado’s Secretary of State removed him as an elector, declined to accept his ballot, and replaced him with an alternate elector who cast a “proper” ballot for the winner

⁴ The seven votes occurred in Washington (4), Texas (2), and Hawaii (1). *Id.*

⁵ *Id.*

⁶ Electors can claim independence in two related ways. First, they can claim they are free and not bound to vote according to the popular vote in their respective states. Secondly, like any independent voter, they can claim that they should not be bound by any partisan or political party affiliation.

⁷ As of this writing, due to the Covid-19 pandemic, the Court has postponed oral arguments this term until further notice.

⁸ *Baca v. Colo. Dep’t of State*, 935 F.3d 887 (10th Cir. 2019), *cert. granted*, No. 18-1173, 2020 WL 254162 (U.S. Jan. 17, 2020), *consolidated with In re Guerra*, 441 P.3d 807 (Wash. 2019), *cert. granted sub nom. Chiafalo v. Washington*, No. 19-465, 2020 WL 254167 (U.S. Jan. 17, 2020). On March 10, 2020, the Court announced that it is no longer consolidating the Colorado and Washington cases.

⁹ See Brief for South Dakota *et al.* as Amicus Curiae at 1, *Colo. Dep’t of State v. Baca*, No. 19-518 (U.S. Nov. 20, 2019); see also *The Electoral College*, FAIRVOTE, https://www.fairvote.org/the_electoral_college#faithless_elector_state_laws (last visited Mar. 30, 2020).

¹⁰ D.C. CODE ANN. § 1-1001.08(g)(2) (West 2018).

¹¹ COLO. REV. STAT. ANN. § 1-4-304(5) (West 2019) (requiring pledge to “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 the state”).

of the State's popular vote.¹² In the Washington case,¹³ three electors similarly violated state law by casting votes for former Secretary of State Colin Powell, rather than for Hillary Clinton, the winner of the state's popular vote. A fourth voted for Faith Spotted Eagle.¹⁴ However, unlike Colorado, Washington accepted and recorded the four votes and then imposed a fine on the electors, as authorized by state law.¹⁵

In both Colorado and Washington, the independent Democratic electors were apparently responding to a national effort to persuade enough Republican electors pledged to vote for Donald Trump to vote for another Republican, thereby denying Trump a majority in the Electoral College and throwing the election into the House.¹⁶ At the time, Republicans held the majority in the House. By not voting for Clinton, the Democratic electors were trying to show Republican electors that they were not trying to elect Clinton, but were instead setting an example they hoped Republicans would follow by deserting Trump.¹⁷ It would have taken thirty-seven Republican electors pledged to vote for Trump to defect, for this strategy to have worked.¹⁸

¹² Two other Colorado electors were prepared to cast wayward ballots but refrained from doing so after witnessing the removal of their fellow wayward elector. *Baca*, 935 F.3d at 901, 904.

¹³ *In re Guerra*, 441 P.3d. 807 (Wash. 2019), *consolidated with* *Baca v. Colo. Dep't of State*, 935 F.3d 887 (10th Cir. 2019), *cert. granted sub nom.* *Chiafalo v. Washington*, No. 19-465, 2020 WL 254167 (U.S. Jan. 17, 2020). *But cf. supra* note 8 (the Court is no longer consolidating the Colorado and Washington cases).

¹⁴ *Schmidt*, *supra* note 3.

¹⁵ WASH. REV. CODE ANN. § 29A.56.340 (West 2016); David Gutman, *4 Washington State Electors Decided Not to Vote for Hillary Clinton in 2016*, SEATTLE TIMES (May 24, 2019) <https://www.seattletimes.com/seattle-news/politics/states-high-court-upholds-1000-fines-for-rogue-electors-who-didnt-vote-for-hillary-clinton-in-2016>. In 2019, Washington amended its law so as to remove and replace any elector who violates the required pledge to abide by the results of the popular vote in the state. *See* WASH. REV. CODE ANN. § 29A.56.090 (West Supp. 2019). This new law is modeled after the Uniform Commission's Faithful Presidential Electors Act, which has been adopted by five other states. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT 7–8, 11 (2010).

¹⁶ Ed Pilkington, *Electoral College's 'Faithless Electors' Fail to Stop Trump but Land Democratic Blow*, GUARDIAN (Dec. 19, 2016), <https://www.theguardian.com/us-news/2016/dec/19/electoral-college-revolt-faithless-electors-analysis>.

¹⁷ *See* Peter Beinart, *The Electoral College Was Meant to Stop Men Like Trump from Being President*, ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/the-electoral-college-was-meant-to-stop-men-like-trump-from-being-president/508310> (stating that Trump presidency is so "terrifying" in "unprecedented ways" that "for the first time in modern American history, there's a plausible case for urging the electors to vote their consciences").

¹⁸ Jeffrey K. Tulis, Sanford Levinson, & Jeremi Suri, *The Hail Mary Pass that Could Deny Donald Trump the Presidency: It's up to You, Electors*, N.Y. DAILY NEWS (Nov. 21, 2016), <https://www.nydailynews.com/opinion/tulis-levinson-suri-hail-mary-defeat-donald-trump-article-1.2882315>.

I. PRE-RATIFICATION AND POST-RATIFICATION VIEWS ON THE ELECTORAL COLLEGE

The Constitution does not address the issue of pledge-bound electors. It could not have, since the framers did not require states to involve the people at all in presidential elections.¹⁹ Article II says only that each state shall appoint its presidential electors “in such Manner as [its] Legislature may direct.”²⁰

In the Federalist Papers, Hamilton certainly expected the Electoral College to weed out candidates distinguished only by “talents for low intrigue” or practiced in “the little arts of popularity.”²¹ Electors would be statesmen most likely “to possess the information and discernment” necessary to protect the presidency from a demagogue or a candidate under foreign influence.²²

While the Court frequently turns to the Federalist Papers for help in interpreting the Constitution,²³ those writings are of little help in probing the Electoral College provisions. Consistent constitutional practice soon after ratification has been for every state to hold popular elections as their way of appointing electors.²⁴ Hamilton’s pre-ratification views cannot be a guide to what became our constitutional norm only after ratification.²⁵ Rather than fulfilling the expectations of the Federalist Paper authors, presidential elections quickly reflected the writings of Antifederalists, who wondered whether “free people [could] resign their right of suffrage into other hands besides their own” and whether “it [is] rational, that the sacred rights of mankind should thus dwindle down to Electors of electors.”²⁶ In 1892, the Supreme Court noted that, as to independent voting by electors, “the original expectation may be said to have been frustrated.”²⁷

¹⁹ *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States. . . .”).

²⁰ U.S. CONST. art. II.

²¹ THE FEDERALIST NO. 68 (Alexander Hamilton).

²² *Id.*; see also THE FEDERALIST NO. 57, at 420 (Alexander Hamilton or James Madison) (“[T]he aim of every political constitution is . . . to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good . . .”).

²³ Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 246–47 (2005).

²⁴ See Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Sub-Constitutional Change*, 100 GEO. L.J. 173, 182 (2011).

²⁵ See Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 926–27 (2017).

²⁶ Republicus, ANTI-FEDERALIST NO. 72.

²⁷ *McPherson v. Blacker*, 146 U.S. 1, 36 (1892); see also *Ray v. Blair*, 343 U.S. 214, 228 n.16 (1952) (electors had “degenerated into mere agents” as early as the first election).

Today, a majority of states codify constitutional reality in laws requiring electors to pledge to vote the people's will.²⁸ After the Twenty-Third Amendment gave electoral votes to the District of Columbia, Congress legislated the same pledge for District electors.²⁹

The problem is that, alongside the dominant constitutional norm of electors merely rubber-stamping the popular vote in their states,³⁰ there has remained a steady if smaller tradition of independent electors. Seventeen states do not have a law binding how electors must vote,³¹ though some of them rely on what they call an "honor system."³²

Depending on how one counts, there have been as many as 184 instances of independent voting.³³ The first occurred in 1796, in the first contested presidential election, when a Federalist elector broke his vow by voting for Democratic-Republican Thomas Jefferson rather than John Adams.³⁴ Adams won the Electoral College by only three votes. The last occurred in 2016, when Congress recorded seven independent electoral votes for President and six for Vice President.³⁵

Prior to 2016, no state had ever punished an elector for going against the popular vote.³⁶ And no state threw out an independent ballot until Colorado did so.³⁷ Given this history, what is new are recent efforts to remove and/or punish independent electors.³⁸ For example, in 1968, Congress debated at length

²⁸ See, e.g., *In re Guerra*, 441 P.3d 807, 808 n.1 (Wash. 2019), consolidated with *Baca v. Colo. Dep't of State*, 935 F.3d 887 (10th Cir. 2019), cert. granted sub nom. *Chiafalo v. Washington*, No. 19-465, 2020 WL 254167 (U.S. Jan. 17, 2020). But cf. supra note 8 (the Court is no longer consolidating the Colorado and Washington cases).

²⁹ D.C. CODE ANN. § 1-1001.08(g)(2) (West 2018).

³⁰ See, e.g., *Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924) (stating that an elector's function is "nothing more than clerical").

³¹ *The Electoral College*, FAIRVOTE, https://www.fairvote.org/the_electoral_college#faithless_elector_state_laws (last visited Mar. 30, 2020).

³² See, e.g., Brief for South Dakota et. al as Amicus Curiae, supra note 9.

³³ *Faithless Electors*, FAIRVOTE, https://www.fairvote.org/the_electoral_college#faithless_electors (last visited Mar. 30, 2020).

³⁴ *Baca*, 935 F.3d at 948. A Philadelphia newspaper reporter asked, "What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No I chuse him to act not to think." *Id.*

³⁵ 163 CONG. REC. 189 (2017).

³⁶ *Guerra*, 441 P.3d at 818 (Gonzalez, J., dissenting) ("The State's authority to penalize its electors is an issue of first impression.").

³⁷ *Baca*, 935 F.3d. at 949 ("[W]e are aware of no instance in which Congress has failed to count an anomalous vote, or in which a state—before Colorado—has attempted to remove an elector in the process of voting, or to nullify a faithless vote.").

³⁸ See *Faithless Elector Issue Does Not Affect Operation of National Popular Vote*, NATIONAL POPULAR

whether to accept an independent vote for George Wallace from a North Carolina elector who should have voted for Richard Nixon. After debate, both houses voted against a motion to throw out the ballot.³⁹

II. THE LOWER COURTS SPLIT

The Supreme Court's decision will turn largely on how it interprets Article II's reserving to each state the power to appoint presidential electors "in such Manner as [its] Legislature may direct."⁴⁰ Both the Washington Supreme Court and the Tenth Circuit Court of Appeals agreed that this plenary power over appointment gives states the right to condition an elector's appointment on a pledge to vote at the Electoral College in accordance with the popular vote in the state.⁴¹ But then the two courts split. The Washington court found that the state was properly exercising its constitutional power over an elector's appointment when it punished him or her for violating the condition of the appointment, namely the pledge.

The Tenth Circuit disagreed. Once electors are appointed by the state, the appointed electors become federal officers exercising a federal function.⁴² The state's appointment power over electors is at an end and nothing in Article II or the Twelfth Amendment gives a state a further right to control how the elector finally votes. Instead, those provisions make clear that "every step thereafter is expressly delegated to a different body," namely Congress, carrying out "detailed instructions set forth in the Constitution itself."⁴³ Among those instructions are that electors are to "vote by ballot," sign and certify their votes, and "transmit" them to the President of the Senate. For the Tenth Circuit, "[t]he plain language of the Constitution [is] that, once a vote is cast, it must be included in the certified list sent to the President of the Senate."⁴⁴ For this reason, the court concluded, the state wholly lacks "power . . . to remove an elector who votes in a manner unacceptable to the state or to strike that vote."⁴⁵

VOTE, <https://www.nationalpopularvote.com/faithless-electors-issue-does-not-affect-operation-national-popular-vote> (stating that prior to the 1960s, no state had a law requiring electors to precommit to how they would vote).

³⁹ See *Baca*, 935 F.3d at 950 (citing 115 CONG. REC. 246 (1969)).

⁴⁰ U.S. CONST. art. II

⁴¹ *Baca*, 935 F.3d at 939; *Guerra*, 441 P.3d at 813.

⁴² *Baca*, 935 F.3d at 940.

⁴³ *Id.* at 942–43.

⁴⁴ *Id.* at 943.

⁴⁵ *Id.* The Colorado court's argument leaves open the possibility that Washington acted constitutionally in counting a wayward vote but punishing the elector, while Colorado went too far in throwing out the vote.

The Tenth Circuit buttressed its defense of independent electors with an “original meaning” argument. Here, the court focused on key terms in Article II or the Twelfth Amendment, such as electors are “to vote” or “to cast a ballot,” as those terms would have been understood at the time of the Constitution’s adoption or the amendment’s ratification.⁴⁶ Turning to contemporaneous dictionaries, the court found that a voter or elector was a “chuser,” and that to cast a ballot was to make a free or discretionary choice.⁴⁷

For all their differences, both the Washington court and the Tenth Circuit turned to the same leading 1952 Supreme Court precedent. In *Ray v. Blair*, the Court upheld an Alabama law that permitted political parties to require a binding pledge from its slate of electors to vote for the party’s candidate.⁴⁸ The Court rejected the argument that the Constitution gives such “absolute freedom” to an elector “to vote his own choice” that a state cannot restrict that freedom by extracting any sort of precommitment.⁴⁹ The Washington court stressed this part of the *Ray* decision. By contrast, for the Tenth Circuit, what was decisive was an odd distinction the *Ray* Court went on to draw. It was one thing to agree that states had the right to extract a pledge from electors to abide by the state’s popular vote result. It was quite another, the Court opined, to say that that the pledge if broken was “legally enforceable.” Without deciding the issue, the *Ray* Court left open the possibility that states could extract a pledge from electors and yet not be able to punish them for violating the pledge, due to “an assumed constitutional freedom of the elector under the Constitution . . . to vote as he may choose in the electoral college.”⁵⁰

In their argument before the Washington Supreme Court, lawyers for the independent electors argued that *Ray* thus recognized a distinction between the “moral authority” of a pledge and its “legal enforceability.”⁵¹ An amicus brief from South Dakota in the pending Colorado case expressed confusion about such a distinction, arguing that “if it is constitutional to exact a pledge to support a party’s nominee as a condition of serving as an elector, it necessarily follows that there is some constitutional means of enforcing that pledge.”⁵²

⁴⁶ U.S. CONST art. II; U.S. CONST. amend. XII.

⁴⁷ *Id.* at 944.

⁴⁸ 343 U.S. 214, 225 (1952).

⁴⁹ *Id.* at 228.

⁵⁰ *Id.* at 230 (“[E]ven if such promises of candidates for the electoral college are legally unenforceable . . .”).

⁵¹ *In re Guerra*, 441 P.3d. 807, 816 n.9 (Wash. 2019).

⁵² Brief of Amicus Curiae South Dakota, *supra* note 9.

By agreeing to hear the two independent elector cases, the Court seems poised to answer the question left open by *Ray*. It is possible that the Supreme Court might strike a middle ground and uphold both lower court decisions. It could agree that Colorado went too far by authorizing a “remove and replace” system. But so long as a state counts the independent vote, as Washington did, the Supreme Court could find that states have the right to impose a fine on an elector who violates his pledge.

However, such a split decision would be unwise. The Court must cleanly decide whether the Constitution gives electors a choice in how they vote. If it does, then punishment after the fact is every bit as much of a constitutional violation as is removal before the fact.

III. AN ANALOGY BETWEEN JURORS AND ELECTORS

From the democratic point of view, it seems indefensible to suggest that persons acting under color of law could ever be unaccountable for violating an oath of office. And yet, that is the case with jurors. We swear jurors in and bind them to follow the judge’s instructions on the law, whether they agree with them or not.⁵³ But we do not and cannot punish them if they set aside the law to do justice as they see it. We do not call them faithless jurors. We call them jurors rendering verdicts according to their conscience.⁵⁴ In criminal trials, if jurors set aside the law to acquit a criminal defendant, that verdict stands. To be sure, if jurors convict against the law, an appellate court can throw out the conviction. But in neither case can a juror be punished. So the strange phenomenon of actors “bound by oath but not punishable” exists in law. The question is whether electors are another example of constitutionally free actors—free in the sense that they answer to no accountability mechanism for refusing to vote for the winning candidate in their state.

The term “jury nullification” describes the power of juries to set aside the law to acquit a defendant in the name of justice, even if fidelity to the law would demand conviction.⁵⁵ Roughly speaking, independent electors engage in a kind

⁵³ E.D. MICH., SAMPLE CRIMINAL JURY INSTRUCTIONS 1–2, <https://www.mied.uscourts.gov/pdf/efiles/Clelandintroconcludinglanguage.pdf>. (“It is my job to instruct you about the law, and you are bound by the oath you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with one or more of them.”).

⁵⁴ Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 964 n. 28 (2006).

⁵⁵ See, e.g., JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 57–95 (2000).

of nullification. They substitute their own choice of President for what their lawful instructions demand.

Acts of nullification, whether done by jurors or electors, are inherently dangerous. In trials, there can be a nullifying jury that acquits the obviously guilty murderers of Emmett Till.⁵⁶ But there can also be jurors who nullify the 1850 Fugitive Slave Law in order to acquit a person who helped runaway enslaved persons escape.⁵⁷ In the grandfather of all jury nullification cases, the judge all but instructed the jury they would be violating their oaths if they acquitted the Quaker William Penn, since Penn had proudly admitted violating the law in order to pray to God. The jury struck a blow for religious freedom by finding Penn not guilty.⁵⁸

As is the case with jurors, nullifying electors have given us the bad with the good. In 1836, twenty-three electors from Virginia refused to support the Democratic Party candidate for vice president, due to reports that he lived with an enslaved African-American woman.⁵⁹ In 1948, thirty-nine electors reneged on their pledge to vote for the Democratic victor in their states, Harry Truman, joined the so-called “Dixiecrat” revolt, and cast votes for Strom Thurmond, the losing candidate of the State’s Rights Party.⁶⁰

On the other hand, how legitimate was George W. Bush’s one-vote victory in the Electoral College in 2000, in an election where he lost the popular vote to Al Gore by half a million votes? It took the Supreme Court’s pulling the plug on a recount of disputed votes in Florida to award Bush that state’s twenty-five votes, just enough to make him President.⁶¹ Would it have been that wrong, in such circumstances, for two or more Florida electors to have abstained on the grounds that the popular vote in Florida was flawed?

For juries, rather than eliminating acts of nullification entirely, courts try to tame them. We do not instruct or even acknowledge to jurors that they are free to nullify.⁶² In fact, we do the opposite. We require a pledge or oath to apply the

⁵⁶ *Id.* at 111–12; *see also* STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* 42 (1991).

⁵⁷ ABRAMSON, *supra* note 55, at 80–82.

⁵⁸ *Id.* at 68–73.

⁵⁹ THOMAS H. NEALE, *CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS* 6 (2016).

⁶⁰ Wilfred U. Codrington III, *Can the Members of the Electoral College Choose Who They Vote For?*, BRENNAN CENT. JUST. (Jan. 8, 2020), <https://www.brennancenter.org/our-work/research-reports/can-members-electoral-college-choose-who-they-vote>.

⁶¹ *Bush v. Gore*, 531 U.S. 98 (2000); *see also* FED. ELECTION COMM’N, *FEDERAL ELECTIONS 2000* (2000).

⁶² *United States v. Dougherty*, 473 F. 2d. 1113, 1137–38 n.4 (D.C. Cir. 1972).

law whether they agree with it or not.⁶³ But if jurors, so bound, feel strongly that justice requires them to break their oaths, then we live with unprompted outbreaks of nullification. As the U.S. Court of Appeals for the District of Columbia put it, when a jury takes it upon itself to defy legal instructions, then “the jury must feel strongly about the values involved in the case, so strongly that it must identify the case as establishing a call of high conscience.”⁶⁴ Such spontaneous acts of nullification prevent overly mechanical applications of the law.⁶⁵

Until 2016, election law reached exactly this practical accommodation with independent electors. A majority of states bound them by law to vote the popular vote. Political parties took care to nominate party loyalists as electors, people who could be trusted to vote for the party nominee whenever he or she carried the state. But if even party loyalists felt strongly that they could not support their party’s victorious candidate, states accepted and counted their ballots.

Nullifying jurors have changed verdicts.⁶⁶ With the exception of the 1836 election, where abstainers denied the Vice-Presidential victor a majority in the Electoral College, thereby throwing the decision into the Senate,⁶⁷ independent electors have never tilted the Electoral College outcome. Yet the possibility is there, as the one-vote Bush electoral margin victory in 2000 shows.

But there are limits to the analogy between juror and elector. Normatively, the question is whether the democratic defense that can be made for jury independence can also be made for elector independence. Juries, by their makeup and method of selection, have the democratic credentials to stand in for, or represent, the community.⁶⁸ They can justify departures from the law because they have the legitimacy that comes from being the most directly democratic institution we have.⁶⁹

⁶³ See *supra* note 53 and accompanying text.

⁶⁴ *Dougherty*, 473 F. 2d. at 1136.

⁶⁵ *Id.* at 1134 (quoting *United States v. Moylan*, 417 F.3d 1002, 1009 (4th Cir. 1969)).

⁶⁶ See ABRAMSON, *supra* note 55, at 57–95.

⁶⁷ See Kalt, *supra* note 1, at 111.

⁶⁸ 28 U.S.C. §1861 (2012) (stating that juries must be selected from a cross-section of the entire community).

⁶⁹ OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 458 (3d ed. 1853) (“Which is the best tribunal to try [a] case? This man who sits upon the bench, and who has . . . nothing in common with the people . . . ? Is he the better man to try the case than they who have the same stake in the community [as the accused]?”).

In the case of wayward electors, the democratic credentials are flipped. The people have spoken and sent electors to deliver their choice. Nothing about selecting a slate of electors gives that slate, or anyone on it, the democratic credentials to depart from the popular vote.

Hamilton anticipated that electors, like jurors, would meet and deliberate. But they don't, at least as one body.⁷⁰ On the Monday following the second Wednesday in December, electors meet in their several states and submit ballots without conversation. On January 6, the ballots are opened and counted in a joint session of Congress. The Electoral College never assembles as a whole. Tellingly, the group-sounding word "college" does not even appear in the Constitution. Thus, while juries give us the virtues of deliberative democracy by giving people from different walks of life an opportunity to meet and educate one another prior to voting,⁷¹ electors do nothing of the sort. They simply vote. And if all we are doing is counting votes, then it should be the people's votes that determine the Presidency and Vice Presidency, not the votes of electors.

The fact that jurors deliberate, while electors do not, is significant. Consider this argument for juror independence. Keeping what is said in the jury room private and confidential is necessary if jurors are to deliberate honestly and fairly. This means that, absent extraordinary circumstances, the government cannot investigate what was said in the jury room.⁷² Since the government cannot investigate jury behavior, we never know whether jurors did anything wrong.⁷³

This defense of juror independence does not translate to electors, since for them there is no privacy or deliberation to protect. To be sure, in other American elections, we protect the privacy of the voting booth. But both Article II and the Twelfth Amendment require electors to sign their names and certify their ballots.⁷⁴ As the Washington Supreme Court noted: "[T]he names of every

⁷⁰ See Norman R. Williams, *The Danger of the National Popular Vote Compact*, 2012 B.Y.U. L. REV. 1523, 1530 (2012) ("[T]he framers feared that, were all the electors to assemble in one place, they would engage in vote-swapping and collusion.").

⁷¹ *United States v. Singletary*, 562 F.2d 1058, 1060 n.2 (8th Cir. 1977) ("[I]t is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement . . .").

⁷² See, e.g., FED. R. EVID. 606(b)(1).

⁷³ See Thomas A. Green, *Lights Hidden Under a Bushel's Case*, in TEXTS AND CONTEXTS IN LEGAL HISTORY: ESSAYS IN HONOR OF CHARLES DONAHUE 397–416 (J. Witte, S. McDougall & A. di Robilant eds., 2016).

⁷⁴ 3 U.S.C. § 9 (2012). The state court rejected the argument that the use of the word "ballot" in Article II and the Twelfth Amendment necessarily required secret balloting. A common meaning of "ballot" at the time the constitutional provisions were ratified was simply "[a]n instrument for casting a vote." *In re Guerra*, 441 P.3d 807, 816 n.8 (Wash. 2019).

presidential elector is [sic] on a state's certificate of ascertainment submitted to Congress." Indeed, in their brief to the Supreme Court opposing the grant of certiorari, the state of Washington appended photographs of the signed ballot of each of the independent electors—exactly the image we never have of voters in the voting booth or jurors in the jury room.⁷⁵

Or consider the logic of a second argument against punishing jurors—the one made by Chief Justice Vaughan in the famous *Bushell's Case* that established the modern jury system.⁷⁶ After acquitting William Penn of the crime of unlawful assembly, jurors found themselves accused of perjury and thrown into prison.⁷⁷ To the presiding judge, it was clear that the juror verdict amounted to a lie, since the jurors well knew that the evidence showed an unlawful assembly in the street had occurred.⁷⁸ After all, the judge noted, the jury at one point came back and reported that while they could not agree on whether Penn was guilty of unlawful assembly, they were agreed on the fact that Penn had preached in the middle of Gracechurch Street.⁷⁹ The judge sent the jury back to deliberate, instructing them that, as a matter of law, preaching in the middle of a public thoroughfare made Penn guilty of an unlawful assembly.⁸⁰ Nonetheless, the jury eventually returned a verdict of not guilty.⁸¹ The judge accepted the verdict, released Penn, but then fined the jurors for committing perjury.⁸² They had to be lying when they pronounced Penn not guilty, the judge concluded, since they had previously reported finding him guilty of preaching in the middle of a public thoroughfare.⁸³

The jurors went off to prison until they could pay their fines.⁸⁴ Freeing them of perjury charges, the highest British court reasoned as follows: How can an appellate court ever know that a jury is lying? We make jurors the final finders of the fact and, given the privacy of jury deliberations, the appellate court is not privy to what facts the jury found to be true, or why. Perhaps the jury did not believe the testimony that Penn attracted enough listeners to block the King's

⁷⁵ Brief of Respondent Washington in Opposition to Petition for Writ of Certiorari, *Chiafalo v. Washington*, Appendix, 39a–43a.

⁷⁶ Case of the Imprisonment of Edward Bushel for Alleged Misconduct as a Juryman (1670), Vaughan Rep. 135; 124 Eng. Rep. 1006 (1670).

⁷⁷ John A. Phillips and Thomas C. Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and Bushell's Case*, 4 L. & INEQUALITY 189, 190 (1986).

⁷⁸ *See id.*

⁷⁹ *See id.* at 196.

⁸⁰ *See id.* at 208.

⁸¹ *See id.* at 209.

⁸² *See id.*

⁸³ *See* ABRAMSON, *supra* note 55, at 68–73.

⁸⁴ *See id.* at 190, 196.

thoroughfare. Perhaps the jury had personal knowledge of the width of the street, the numbers in the crowd, or knew enough to doubt the credibility of the Crown's witnesses. For reasons such as these, the high court concluded, it is impossible to accuse a jury of getting the evidence wrong.⁸⁵ But perhaps a court could punish jurors for disobeying their oaths to follow the law? Since jurors apply the law to the facts, as they find them, we can never know whether they disregarded the law either, because we don't know their understanding of the facts. Depending on the jury's understanding of the evidence, a verdict of guilty or not guilty could each be a faithful application of the law.

This second argument against punishing jurors does not work any better than the first as a reason to protect independent electors. We do know, and rather easily, what we can never precisely know about jurors—that electors went against their pledge. Jury decision-making takes place in a black box. Electoral voting is a quasi-public act. Privacy is important for jury work; publicity is important for the Electoral College.⁸⁶ As argued above, per the instructions in the Twelfth Amendment, the electors are required to certify their own vote, seal up the certificates, and send one copy to the President of the Senate.

IV. TURNING THE TABLES: RIGHTING THE WRONGS OF THE ELECTORAL COLLEGE

So far, I have argued that electors usually lack the democratic credentials that justify granting jurors considerable independence, even from their oaths and the law. However, there is one circumstance where so-called “faithless” electors can claim democratic justification for voting against their instructions. As long as we have an Electoral College, we run the risk, with or without independent electors, of electing a president the people did not in fact elect. This is no hypothetical. In four previous elections, including the 2016 election of Donald Trump, the Electoral College delivered the presidency to the loser of the popular

⁸⁵ See Green, *supra* note 73.

⁸⁶ *The Electoral College*, NAT'L CONF. STATE LEGISLATURES (Jan. 6, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx> (“Each elector votes on his or her own ballot and signs it.”).

vote.⁸⁷ A recent study suggests that 2020 could be a fifth such election.⁸⁸ Faced with such antidemocratic results, the faithless elector is paradoxically the one keeping faith with the people.⁸⁹ Just as jurors sometimes need to defy the law to do justice, electors sometimes need to do more than mechanically rubber stamp an undemocratic result. They can serve as a lawful Trojan horse, sneaking democracy back into the Electoral College.⁹⁰

It would be better to abolish the Electoral College.⁹¹ But this seems unlikely,

⁸⁷ These are: 1876 (Rutherford B. Hayes), 1888 (William Henry Harrison), 2000 (George W. Bush), and 2016 (Donald Trump). See Williams, *supra* note 70, at 1534. John Quincy Adams won the election of 1824, even though he lost both the popular and electoral votes to Andrew Jackson. Since no one won a majority in the Electoral College, the election was thrown into the House. With the support of electors pledged to Henry Clay, Adams leapfrogged over Jackson and reached the necessary majority of electoral votes. In exchange for Clay's help, Adams named Clay his secretary of state. See Jones et. al., *Created Equal*, *supra* note 1, at 338 (Table 11.2). In several other elections, presidential candidates have won a majority of electoral votes even while achieving only a plurality of the popular vote. This was true of the election of Abraham Lincoln in 1860 (39.8% of popular vote), Woodrow Wilson in 1912 (41.9%), Harry Truman in 1948 (49.5%), John Kennedy in 1960 (49.9%), Richard Nixon in 1968 (43.4%), Bill Clinton in 1992 and 1996 (43.1% and 49.2% respectively). *Id.* at 421 (Table 13.5); 597 (Table 19.4); 770 (Table 24.1), 803 (Table 25.2); 835 (Table 26.2); 911 (Table 29.1); and 913 (Table 29.2).

⁸⁸ Vinod Bakthavachalam & Reed Hunt, *Snatching Victory from the Jaws of Defeat, Again*, N.Y. TIMES (Feb. 15, 2020), <https://www.nytimes.com/2020/02/12/opinion/electoral-college-2020.html> (stating that a Democrat could win the popular vote by a margin of eight to nine million votes in 2020, yet still lose the electoral vote).

⁸⁹ Counsel for the Washington state electors who wrote in Colin Powell rather than Hillary Clinton argues that they were being faithful to the will of the Clinton voters who elected them, doing what those voters would have wanted them to do had they known that the Electoral College was about to elect the loser of the national vote. See Petition for Writ of Certiorari, *Chiafalo v. Washington*, No. 19-465 (oral argument set Apr. 28, 2020).

⁹⁰ It could be argued that the winner of the Electoral College should not be punished for playing by the rules of the game. For instance, in 2016 Trump had little incentive to campaign in California, since he was never going to win that state's popular vote. But, if the rules had been the winner of the popular vote takes the Presidency, then presumably Trump would have sought more votes in California and might then have won the national popular vote.

⁹¹ Defenders of the Electoral College offer three arguments in its favor. First, they credit the current system with promoting national as opposed to merely regional political parties. The Electoral College does this by giving "candidates the incentive to bring together a broad, nationwide coalition that can compete in the different regions of the nation." John Yoo, *A Defense of the Electoral College in the Time of Trump*, 46 PEPP. L. REV. 101, 156 (2019). For instance, consider a candidate with a geographically narrow but numerically overwhelming advantage among voters clustered in the major cities on each coast. Such a candidate might win the popular vote, and yet fail to muster a majority of electoral votes. *Id.* at 156–57. Secondly, supporters see the electoral college as serving the country's interest in certainty on election night. *Id.* at 158. In a tight election where the outcome of the popular vote might depend on resolving disputes over contested ballots, the nation need not wait the days it might take to resolve those disputes, if on election night one candidate has already won 270 electoral votes. Thirdly, in elections where no candidate wins a majority of the popular vote, the electoral college system arguably enhances the legitimacy of the plurality vote winner. *Id.* at 157. I do not address all these defenses in this Essay. However, the election of 2000 stands out as a recent counterexample, where the electoral system did not produce a certain winner on election night, although the popular vote did, or would have, had it been determinative of the outcome. See *supra* note 61. As to legitimacy, defenders of the Electoral College have little to say about the ever-present possibility that the system might actually de-legitimize presidents who lose the popular vote.

even though two-thirds of Americans oppose it.⁹² To date, almost 700 attempts to pass a constitutional amendment eliminating the Electoral College have failed in Congress.⁹³ Three major obstacles stand in the way of abolishing the Electoral College. First, less populous states may be unwilling to surrender the advantages of the status quo. While this advantage can be exaggerated,⁹⁴ there is no doubt that the system represents geography as well as population.⁹⁵ For example, the civic group FairVote gives this example from the 2008 election.⁹⁶ That year, on average, a state had one electoral vote for every 565,166 people.⁹⁷ However, Wyoming had three electoral votes and a total population of only 532,668.⁹⁸ Thus, surpassing the national average, one Wyoming elector voted for 177,556 people.⁹⁹ These numbers explain why smaller states have a vested interest in preserving the Electoral College. Second, elections frequently turn on the results in key battleground states, such as Florida, Michigan, Minnesota, Pennsylvania, New Hampshire, and Wisconsin.¹⁰⁰ Such states may also not rush to surrender their Electoral College clout. Third, at any point in time, one party or the other is likely to find the Electoral College math working to its advantage.¹⁰¹

Even if there is little prospect of abolishing the Electoral College by amendment, there is a political way to prevent the national vote going one way and the electoral vote the other. This is for states holding a majority of electoral votes (270) to agree to appoint electors who would cast those votes for the winner of the national popular vote. The National Popular Interstate Compact (NPVIC) aims to do just that.¹⁰² Currently, fifteen states plus the District of Columbia, with a combined 196 electoral votes, have signed the compact.¹⁰³

⁹² Bakthavachalam & Hunt, *supra* note 88.

⁹³ *Past Attempts at Reform*, FAIRVOTE, https://www.fairvote.org/past_attempts_at_reform (last visited Mar. 30, 2020).

⁹⁴ Nat Cohn, *The Electoral College's Big Problem: It's Biased Toward the Big Battlegrounds*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/upshot/electoral-college-votes-states.html>; Wegman, *supra* note 2.

⁹⁵ See, e. g., Williams, *supra* note 70, at 1527 (“[F]ramers . . . settled on the Electoral College as a way to preserve the influence of the states, particularly smaller states . . .”).

⁹⁶ *Population vs. Electoral Votes*, FAIRVOTE, https://www.fairvote.org/the_electoral_college#population_vs_electoral_votes (last visited Mar. 30, 2020).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Alex J. Tuchfarber, *The Big Six Swing States in 2020*, UVA CENT. POLS. (Aug. 22, 2019), <http://crystalball.centerforpolitics.org/crystalball/articles/the-big-six-swing-states-in-2020>.

¹⁰¹ Michael Geruso, Dean Spears, & Ishaana Talesara, *Inversions in US Presidential Elections: 1836-2016* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 26247, 2019).

¹⁰² *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/written-explanation> (last visited Mar. 30, 2020).

¹⁰³ *Id.*

Critics argue that the compact is unconstitutional.¹⁰⁴ Even if constitutional, the proposal would not eliminate the possibility of independent electors. States would only have whatever power they now have to replace wayward ballots. At worst, the compact could add the problem of wayward states if, despite signing the compact, states could desert the compact in March if unhappy with whom the polls show is likely to win the national vote in November.

Another possible reform would be to do away with the “winner-take-all” rule, which awards all of a state’s electoral votes to a candidate who may have won the popular vote only by the slenderest of margins. All but two states have such an all or nothing system.¹⁰⁵ By translating a close popular vote into a lopsided Electoral College victory, the winner-take-all rule distorts results and is the major reason a candidate can win the popular vote and yet lose the presidency.¹⁰⁶ If we cannot abolish the Electoral College, we can at least lessen its antidemocratic tendencies by allocating a state’s electoral votes in proportion to a candidate’s share of the popular vote. But since electoral votes cannot be split in half or thirds, the popular vote would have to be rounded up, or down, to the nearest electoral vote.¹⁰⁷ In a tight election, the rounding error could actually increase the danger of one or two independent electors tilting the election.

V. THE PROBLEM OF THE DEMAGOGUE

It may be helpful to distinguish between procedural and substantive justifications for granting electors a measure of independence. A procedural justification is when an elector votes to reinforce the norms of electoral democracy, by voting in favor of the winner of the national vote. A substantive justification is when an elector rejects the popular choice as objectively wrong or dangerous.

¹⁰⁴ Article I, §10, cl. 3 of the Constitution stipulates that “No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State” It is an open question whether the NPVC is the kind of compact that requires Congressional approval. *See* *United States Steel v. Multistate Tax Commission*, 434 U.S. 452, 473 (1978) (suggesting that the Compact Clause applies to any agreement among states “that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States”). For another argument as to why the NPVC might be unconstitutional, see Williams, *supra* note 70, at 1527 (under Article II, § 1, states do not have the power to select electors based on the votes of citizens of other states).

¹⁰⁵ Maine and Nebraska award one elector to the popular vote winner of each congressional district in the state and two electors to the statewide winner. *Split Electoral Votes in Maine and Nebraska*, 270 TO WIN, <https://www.270towin.com/content/split-electoral-votes-maine-and-nebraska/> (last visited Mar. 9, 2020).

¹⁰⁶ *See, e.g., Winner Take All Is Unfair*, EQUAL CITIZENS, <https://equalcitizens.us/equal-votes> (last visited Mar. 30, 2020) (stating that Trump carried Michigan by only 10,000 votes in 2016, and yet got all sixteen of that state’s electoral votes).

¹⁰⁷ Wegman, *supra* note 2.

As previously mentioned, the authors of the Federalist Papers expected electors to exercise some amount of independent, substantive judgment.¹⁰⁸ As students of classical history, they knew that previous republics had fallen prey to demagogues, skillful at manipulating the people. The very first of the Federalist Papers brings up the threat of the demagogue, and the very last returns to this Achilles heel of popular government.¹⁰⁹ In light of this danger, they designed the Electoral College to function in part as a fail-safe mechanism for saving the people from themselves.

Together with indirect election of Senators,¹¹⁰ and provisions for impeaching and removing elected presidents, the Electoral College was part of an original constitutional design of filters between the people and their representatives. But the Seventeenth Amendment ended the democratic anomaly of the indirect election of Senators.¹¹¹ Impeachment has occurred only three times, and a president has never been removed. The Electoral College lingers, in theory, as important a check on the election of a demagogue as ever. But this is a theory that makes sense only in the abstract.¹¹² It has no concrete application to the country we became a long time ago.

Here we come to a major difference between jury trials and elections. While there is a correct verdict in many jury trials, there is no such thing as a correct result in a presidential election. If we knew the correct result, we wouldn't have to hold elections in the first place. So, we should resist turning to electors as if they were last minute Platonic guardians with the power to save us from ourselves.¹¹³ While the procedurally-minded elector (violating one's pledge in order to vote for the winner of the popular vote) is faithful to democratic norms, the substantively-minded elector (the people have made a bad choice) is not.

¹⁰⁸ See *supra* note 22 and accompanying text.

¹⁰⁹ THE FEDERALIST NO. 1 (Alexander Hamilton) ("History will teach us that . . . of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people, commencing demagogues and ending tyrants."); THE FEDERALIST NO. 85 (Alexander Hamilton) (noting the need to guard against "the military despotism of a victorious demagogue . . .").

¹¹⁰ U.S. CONST. art. I, § 3.

¹¹¹ U.S. CONST. amend. XVII (1913).

¹¹² See, e. g., *In re Guerra*, 441 P.3d 807, 815 (Wash. 2019) (constitutional interpretation "should reflect . . . the historic reality"); see also *Baca v. Colorado*, 935 F. 3d 887, 936 (10th Cir. 2019) (constitutional interpretation of the Electoral College provisions "ought to receive a considerable impression from . . . practice").

¹¹³ Michael Signer, *The Electoral College was Designed to Stop Demagogues Like Trump*, TIME (Nov. 17, 2016), <https://time.com/4575119/electoral-college-demagogues>.

CONCLUSION

Until 2016, an independent elector was like a disobedient juror in three important respects. First, each took an oath of office—the juror to follow the law, the elector to follow the popular vote in one’s state. Second, neither could be removed from office for violating the respective oaths. Third, neither could be punished.

This similarity between elector and juror ended in 2016 when Washington punished electors for their independent votes, and Colorado removed its independent elector, threw out the offending ballot, and replaced the elector with another. The Supreme Court has granted certiorari in both cases.

The legal issue turns on a normative question about democratic accountability. Jurors are an exception to the basic principle that officeholders be held accountable for violating their oaths of office. Although we do not encourage jury nullification of the law, we live with it, because jurors enjoy the distinct democratic legitimacy that comes from being the most directly democratic of our institutions. Jurors are not representatives, in the sense of having constituents to represent. Instead, they are as close to the people governing themselves as we get.

In general, independent electors cannot not make the same sort of democratic argument for their independent voice. However, this Essay has identified one circumstance—and it is an important and recurrent one—where independent electors, like disobedient jurors, have democratic justification for violating their oaths. This is when a presidential candidate loses the popular vote and yet is about to win the Electoral College. At such a moment, the democratic tables are turned. The so-called “faithless” elector becomes the one showing faith in democracy, by voting the people’s will.