A CHECK ON THE RABBLE? FAITHLESS ELECTORS AND ELECTORAL COLLEGE REFORM

AN ANALYSIS ON THE HISTORY, CONSTITUTIONALITY, PARTISANSHIP, AND REFORM EFFORTS OF FAITHLESS ELECTOR LAWS

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Ensuring that the leader of a country is elected fairly is a fundamental characteristic of democracies, yet the United States uses a process that for many is so baffling and confusing that it is anything but fair. Every four years, the American people vote for a new president in an indirect election through the Electoral College. Given this institution’s role in deciding one of the most influential positions in the world, it is vital to understand how it functions. On this note, for many, one of its most glaring features is that a candidate does not need the national popular vote to win. This issue garnered increased attention due to the 2016 presidential election in which Donald Trump lost the national popular vote to Hillary Clinton by almost three million votes. However, he still won the Electoral College, thus becoming the United States’ 45th president.[[1]](#footnote-1) This scenario has occurred five times in American history and although it is understandable why this characteristic of the Electoral College receives so much scrutiny, another core feature of its design is lacking the crucial attention it deserves, the electors themselves.[[2]](#footnote-2)

In addition to not needing the national popular vote, candidates do not have to win the electoral college as the media predicts it on election night either. That evening, the media tell the world who shall become the next president of the United States as electioneers tally the votes in their respective voting districts and news outlets report the results. Usually, candidates give concession or victory speeches late that night and some people cheer in anticipation, knowing that on January 20th the president-elect will take the oath of office. For many Americans, the election is now over. However, this is presumptuous. In between election day in November and inauguration in January, electors of the electoral college vote in December.[[3]](#footnote-3) Although the electors’ voting process is seen, by most, as ceremonial today, these electors can radically change the election’s outcome. Depending upon one’s interpretation of the Constitution, court cases, and state and federal laws, not every elector must vote for their pledged candidate, and it does not matter legally that he or she is chosen by their respective parties with the high expectation that they do so. If an elector decides to not vote for their party’s presidential nominee, they are called a faithless elector.

Instead of wide condemnation across the political spectrum of faithless electors, state laws vary widely on how they address this issue. There does not seem to be any obvious political leanings, i.e. Republican states do not consistently have stronger faithless elector laws than Democratic states or vice versa. Twenty states have no requirements for their electors to vote for their respective party’s nominee.[[4]](#footnote-4) In contrast, the remaining thirty states, plus the District of Columbia, require their electors to vote for their party’s candidate by expressing that they must do so in their respective laws. Some of these states even force their electors to take a verbal oath or sign documentation affirming that they will uphold the state’s law. In comparing these *pledge laws*, states differ on what happens to their faithless electors and their deviant votes.[[5]](#footnote-5) States either replace, fine, and/or criminally charge faithless electors and some mandate a re-cast of their ballot(s).[[6]](#footnote-6)

Due to the differences between these laws, the official tally of the Electoral College in the 2016 presidential election was not what the media predicted in November of that year. This is because on December 19, ten electors were faithless. However, three of them voted in one of six states that replace a faithless elector and re-casts their vote for the *correct* candidate.[[7]](#footnote-7) With this predicament, on election night the media counted 306 electors for Trump and 232 for Clinton, yet the official tally was 304 electors for Trump, 227 for Clinton, and 7 for others.[[8]](#footnote-8) These seven faithless ballots, the ones that state elector laws respectively counted, went towards Colin Powell, Bernie Sanders, John Kasich, Ron Paul, and Faith Spotted Eagle. In short, had these ten faithless electors operated in different states, the official tally could have changed considerably.[[9]](#footnote-9)

The reality that electors can vote for someone not of the constituents’ wishes seems to be of no concern to the general populace, yet this similar reasoning is what drives the current discussion towards eliminating the Electoral College because of its disregard of the national popular vote. In other words, critics see both faithless electors and the primacy of the Electoral College’s vote over the national popular vote as undemocratic and thus needing to be modified.[[10]](#footnote-10) Through this discussion, there have been plenty of proposals to change the electoral college, which would indirectly affect faithless electors through that reform.

To name a few, one proposal, unsurprisingly, is the abolishment of the electoral college, which by removing electors circumvents any need for a discussion on faithless electors since they would no longer exist. Another idea is to federally change electors to be proportioned by how much their party nominee receives of the state’s popular vote.[[11]](#footnote-11) For example, if a candidate won Missouri’s popular vote by sixty percent, they would receive sixty percent of that state’s electors. This proportional representation contrasts with the current winner take all system of forty-eight states.[[12]](#footnote-12) Similarly, another thought is to encourage states to move away from their winner take all systems, since under Article II of the Constitution they themselves can determine how they choose their electors.[[13]](#footnote-13) Besides proportional representation, states could move to the district system used in Nebraska and Maine where electors are chosen if their party’s nominees win a congressional district and the state’s popular vote.[[14]](#footnote-14) However, there is still an unanswered problem. Except for the abolishment of the electoral college, neither the district system or proportional representation prevents faithless electors, which is arguably the core of the undemocratic nature of the institution.

Nonetheless, it would be incorrect to state that no proposals exist that explicitly target faithless electors in their attempt to reform the Electoral College. Specifically, three non-governmental organizations called the Uniform Law Commission (ULC), the National Popular Vote Incorporated (NPV Inc.), and Equal Citizens each offer different answers to faithless electors. Proposed by the ULC, the *Uniform Faithful Presidential Electors Act* (UFPEA), replaces any faithless elector with a new one who then appropriately casts their ballot for their party’s nominee.[[15]](#footnote-15) Proposed by the NPV Inc, the *National Popular Vote Compact* (NPVC) would ask that electors vote for the candidate who receives the national popular vote instead of the state popular vote from which they respectively reside from.[[16]](#footnote-16)

In contrast to passing legislation, Equal Citizen’s tactic is to go through the courts. Currently, the organization is helping faithless electors of the 2016 election in Washington and Colorado argue against their state’s respective *pledge laws*.[[17]](#footnote-17) The end goal is to push the issue to the Supreme Court so that the justices will make a definitive decision on the constitutionality of faithless elector laws.[[18]](#footnote-18) In comparing these three organization’s strategies, both the ULC’s and Equal Citizen’s plan, if successful, would eliminate faithless electors while the NPV Inc’s proposal could backfire and create them.

Given the untapped power that faithless electors have in radically altering the outcome of a U.S. presidential election, there needs to be, at a minimum, more discussion on the topic before the next one in 2020. Overall, the conversation on how the electoral college should function, if at all, is important to ensure American democracy. However, in that dialogue, there needs to be consideration on how faithless electors could undermine the U.S. government and how this problem should be handled.

The paramount question addressed by this paper is why is there such discrepancy in the partisanship and constitutionality of faithless elector laws? Regardless of political affiliation, the parties should have a keen interest in making sure that their electors vote according to their wishes as having a president of choice in office is a huge asset in pushing a political agenda. It seems counterintuitive not to have standard federal regulations on how electors should function from the party’s perspective. However, in only two cases has the Supreme Court ruled on elector laws that pertain to faithless electors. Furthermore, the consequences of these rulings have never resulted in such action, these being *McPherson v. Blacker* 1892and *Ray v. Blair* 1952.[[19]](#footnote-19) Therefore, the variation of faithless elector laws allude to that the issue may not be one of strict partisanship. To help determine this, statistical analysis can look at how states have voted in the past presidential elections in comparison to their faithless elector laws.

In analyzing this topic, a discussion of important faithless elector moments is provided. Next, a general history of the development of faithless electors and the electoral college is described. Then, a few examples of faithless elector laws are shown. After that, data was collected to help determine if there is clear partisanship in faithless elector laws. The next section explores the findings from that data. Afterward, a discussion about what the UFPEA, the NPVC, and Equal Citizens’ impact to the electoral college and faithless electors would be is discussed. Finally, the conclusion discusses the overarching takeaways about faithless electors and argues how best the issue should be tackled preceding forward.

Faithless Electors Historical Moments: How Have They Impacted Previous Elections?

According to the 501(c)(3)h non-profit organization Fair Vote, there have been one hundred and sixty-seven faithless electors in U.S. history from 1796 to 2016.[[20]](#footnote-20) Although these individuals have never changed the end result of the election regarding who electioneers and the media declared the winner on election day, some of their stories bear more weight in discussing the constitutionality of faithless electors than others. On this note, five presidential elections are of prime importance, those of 1796, 1836, 1876, 2000, and 2016.

The first faithless elector in U.S. history was Samuel Miles in 1796 who was a Pennsylvania elector in the first contested Presidential election that pitted the Federalist John Adams against the Democratic Republican Thomas Jefferson.[[21]](#footnote-21) The conundrum was that Miles originally pledged his vote towards Adams yet decided to cast his ballot for Jefferson. In response, Pennsylvania constituents expressed their outrage in how they saw themselves as being cheated of their sacred right to vote. A local Pennsylvania newspaper, *The Gazette* quoted a constituent saying "What, do I choose Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be president? No! I choose him to act, not to think."[[22]](#footnote-22) This quote shows that although Miles’ action was completely legal, the idea that electors could exercise their constitutional right to vote their conscience was going to be faced with public backlash. In other words, just because something is lawful, does not make it acceptable. What is important to note here is that the debate between whether electors should abide by their constituents wishes or act as they deem fit is not a modern phenomenon.

Although Miles’ decision did not affect the 1796 election’s outcome, two elections in the 1800’s illustrate that faithless electors have substantially meddled in an election’s results after the polls closed. In 1836, the Senate for the only time in U.S. history decided the vice-presidency. This issue started when the twenty-three electors from Virginia could not in their eyes morally support the democratic Vice-President-elect Richard M. Johnson of Kentucky after discovering that he had questionably lived with an African American woman. Without Virginia’s electoral votes, the Electoral College did not reach a majority and thus the Senate had to settle the matter under the 12th amendment. The Senate still chose Johnson for the vice-presidency, yet the Virginian electors had given the upper chamber the means to choose someone completely different. Had the Senate not elected Johnson, democratic President-elect Martin Van Buren would have gone into office without his running mate.[[23]](#footnote-23) Had these Virginia electors remained faithful, the entire debacle could have been avoided.

Whereas the Virginia electors consciously voted against Richard M. Johnson, nine presidential elections later, the electors of an entire party were faced with an unprecedented situation. In 1872, the democratic candidate Horace Greeley died in-between the November election day and the December *Meeting of the Electors*. Despite his election rival’s untimely death, the incumbent Republican Ulysses S. Grant had a clear majority of electors and still won reelection as called for in November. Nevertheless, the democratic electors pledged to Greeley, except for three, decided to split their votes to other democratic candidates.[[24]](#footnote-24) Like in 1836, the outcome of the election did not change, but Greeley’s death begs the question of what would have happened had Grant died instead.

In contrast to 1796, 1836, & 1876, for people today, the 2000 and 2016 presidential elections are perhaps the most vivid examples of how the electoral college can and has impacted the presidency. In 2000, Democratic presidential nominee and Vice President Al Gore was running against the son of past Vice President George H.W. Bush, George W. Bush. An incredibly close election, as electioneers tallied votes across the country on election day it became clear that Florida was going to be the deciding state. Without it, neither candidate had enough electoral college votes to win the presidency.

However, what occurred to determine who received Florida’s electors was nothing short of political and constitutional controversy.[[25]](#footnote-25) On November 7th, 2000 at 7:50 P:M, the media declared Gore the winner of Florida. However, by early next morning, the official tally changed to Bush and then later to undecided. At that time, Bush had 2,909,135 Florida votes to Gore’s 2,907,351.[[26]](#footnote-26) With both candidates receiving 48.8% of the states’ votes, Florida enacted an automatic recount of its electronic votes under its Election Code 102.141, which states that if the margin of victory is 0.5% or less, its accuracy must be verified.[[27]](#footnote-27) With the election’s results up in the air, intense legal debates proliferated.

What became the central question was whether Florida’s votes could be legitimately verified. On November 9th, Al Gore requested the manual recount of votes in four Florida counties, yet two days later, the Bush campaign challenged under constitutional grounds. After a series of legal debates, the center of which revolved around whether the manual recount and the extension of the deadlines for counting the votes could be legally sustained, the Florida Supreme Court ruled that the manual recounts should continue and be counted in the official tally, a ruling that the Bush campaign appealed to the U.S. Supreme Court.[[28]](#footnote-28)

In *Bush v. Gore,* the U.S. Supreme Court gave a multi-faceted verdict on December 12th against the Florida Supreme Court’s prior ruling declaring that the manual recount of votes was unconstitutional because it could not validate any uniformity in how they were counted.[[29]](#footnote-29) The court’s most important finding was that the unsigned 7-2 *per curiam* stated that a recount regardless of how it was conducted would be unconstitutional as it could not be adequately finished to meet the deadline of December 12th under Title 3, U.S. Code, Section 5 of elector controversies while adhering to the equal protection and due process clause of the 14th amendment.[[30]](#footnote-30) The law states that any discrepancies as to who the electors of a state are must be solved at least six days in advance of when the electoral college meets to vote.[[31]](#footnote-31) With the Supreme Court’s ruling, the final official tally of Florida’s popular vote became 2,912,790 for Bush and 2,912,253 for Gore, a margin of victory of only 537 votes. Despite Al Gore winning the national popular vote by about half a million ballots, Bush received Florida’s 25 electoral votes, giving him the electoral college and thus the presidency.[[32]](#footnote-32)

Regardless of the legality of the Supreme Court’s verdict and whether the court should have taken the case, faithless electors still could have completely changed the 2000 election. The day after the court’s decision, on December 13th, Gore gave a broadcasted speech where he accepted Bush as the 43rd president, yet the electors still would not vote until five days later.[[33]](#footnote-33) It would have taken only three electors to have given the election to Gore and two to prevent Bush from a majority. Despite all the legal debates, two people could have completely changed the election’s outcome.[[34]](#footnote-34) Though this did not happen, one elector did not remain faithful on December 18th.

The official tally should have been Bush 271 electors, Gore 267 electors, yet that is not what happened. Instead, an elector from the District of Colombia (DC), Barbara Lett-Simmons decided to abstain from voting, the first time an elector had done so since 1836, in protest that the DC did not have a voting member in Congress.[[35]](#footnote-35) Under the 23rd amendment, the DC is attributed three electors, but does not have a permanent elected official to either legislative chamber. [[36]](#footnote-36) With her decision, the final vote count was 271 electors for Bush and 266 electors for Gore, ending an historic election.

Although the 2016 election is like the 2000 election in that the winning candidate did not win the national popular vote, the 2016 election is arguably more closely aligned to the 1836 election. In both cases, electors were actively trying to change the election’s outcome. Whereas in 1836, the controversy was over the Vice President-elect, this time, the problems lay in the President-elect. Donald Trump was no ordinary candidate. To those who viewed him as a populist demagogue, a candidate like himself was the exact reason as to why the framers established the Electoral College. The institution was supposed to be a check on the rabble to ensure that only a suitable candidate could obtain the presidency.[[37]](#footnote-37) With Trump’s victory, this forsaken power needed to be resurrected.

In *Federalist Paper 68* titled *The Mode of Electing the President*, Alexander Hamilton explicitly outlines this rhetoric stating:

The process of election 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. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States.[[38]](#footnote-38)

Under Hamilton’s ideas, Donald Trump was an illegitimate President-elect that the electors needed to stop. For American voters, his victory through the electoral college only gave more credence to his illegitimacy.

Given this situation, two electors after Trump’s declared victory in November called themselves the Hamilton Electors and started a national movement. Michael Baca of Colorado and Bret Chiafalo of Washington’s goal was to encourage enough of their colleagues to exercise their constitutional duty, as they saw it, to “vote their conscience” and support a compromise candidate, thus preventing Trump’s presidency.[[39]](#footnote-39) At minimum, they wanted to create enough faithless electors to send the presidency to the House under the 12th amendment, which was the same tactic the Virginia electors used in the 1836 election in the Senate.[[40]](#footnote-40) Chiafalo described his intentions to an *Atlantic* news reporter a few weeks after election day stating, “We’re trying to be that ‘break in case of emergency’ fire hose that’s gotten dusty over the last 200 years.”[[41]](#footnote-41) In addition, Baca stated, “the Constitution is quite clear about what our job is and that it’s our decision at the end of the day.”[[42]](#footnote-42) Assuming these two Democrats could have convinced at least thirty-seven republican electors to support abandoning Trump, the likelihood still remains that the House would have awarded him the presidency anyway. However, to these two electors, the thought of Trump in the White House was worth the risk of trying.

Although Baca and Chiafalo’s efforts were unsuccessful, their actions left their mark in the history of the Electoral College. They were able to get ten faithless electors, two Republicans and eight Democrats, for Donald Trump and Hilary Clinton respectively. For the 2000 election, this would have been over three times the number of electors needed to have denied Bush the presidency without going through the House. Furthermore, since 1912, there had not been more than one faithless elector in any given election.[[43]](#footnote-43) Since Greeley’s death in 1872, this was the second highest number of faithless electors ever in U.S. history.[[44]](#footnote-44) Finally and perhaps most strikingly, until 2016, Samuel Miles from 1796 was the only elector to have ever voted across party lines.[[45]](#footnote-45) All of these statistics showcase just how historic the last presidential election was in terms of faithless electors.

Wait, Who Picks the President? The Design & Application of Faithless Electors

It is difficult to understand faithless electors without a grasp of how the electoral college functions. Although many see the institution as undemocratic, the framers intentionally established it in the way that they did. Once it became accepted that the Articles of Confederation needed to be amended, the constitutional convention conjured in Philadelphia from May to September of 1787 in the old Pennsylvania State House.[[46]](#footnote-46) It is within these halls that the idea of electors originated from, yet a series of events have occurred in American history that have led to the current dilemma of the variety of state faithless elector laws.

As one might expect, deciding on how the president was to be elected was a contentious issue the framers debated. The topic was so divisive that under seven different moments, the convention’s delegates came to a decision on what to do on the matter only to later reconsider and reopen discussion.[[47]](#footnote-47) At the constitutional convention, there were four prominent ideas proposed of electing the president, these being by popular vote, electors, state legislatures, or by Congress.[[48]](#footnote-48) However, each seemed to have clear flaws. In terms of popular vote, the delegates did not trust the rabble of voters to make a rational decision on the manner.[[49]](#footnote-49) If Congress choose the presidency, the framers were concerned that the president could become too tied to the legislative branch’s wishes.[[50]](#footnote-50) Finally, if the state legislatures named the president, there were fears that it would undermine the national government’s authority in relation to the states.[[51]](#footnote-51)

Eventually, the idea formulated that the electors would be chosen as the best people of their constituents and could make the most virtuous choice on their behalf for president.[[52]](#footnote-52) This idea was first proposed by Pennsylvania delegate James Wilson on June 2th, 1787. According to *The Papers of James Madison,* which were Madison’s notes on the daily proceedings of the constitutional convention, Wilson proposed the idea as follows:

That the states shall be divided up into districts and that the persons qualified to vote in each district for membership of the first branch of the National Legislature elect members for their respective districts to be electors of the executive magistracy; that the said electors of the executive magistracy meet at \_\_\_\_ , and they \_\_\_\_ or any \_\_\_\_ of them, so meet shall proceed to elect by ballot, but not out of their own body, \_\_\_\_\_\_ person in whom the executive authority of the national government shall be invested.[[53]](#footnote-53)

Among the many criticisms of Wilson’s radical idea, the overarching concern was how these electors were to be chosen. On the day he proposed it, it was struck down by a vote of 2-8 out of the eleven states present at the convention.[[54]](#footnote-54)

It would not be until near the end of the convention, that the delegates finally agreed to a modified version of Wilson’s original idea. With the mode of electing the president still undecided, the convention created a committee comprised of one delegate of every state on August 24th, chaired by David Brearley of New Jersey. The purpose of this committee was to create proposals on matters that had yet to be resolved. By September 4th, Brearley released the committee’s suggestion that would become the electoral college written in the constitution. The only objection to the committee’s proposal was that the House was changed from the Senate as the designated chamber that determined the presidency if the electoral college did not reach a majority.[[55]](#footnote-55)

In understanding the rationale as to why the electoral college and the electors were designed as they were, there is perhaps no better document then *Federalist Paper 68* by Alexander Hamilton titled *The Mode of Electing the President*. Hamilton, along with John Jay and Thomas Jefferson, wrote the eighty-five *Federalist Papers* to convince New Yorkers to ratify the Constitution under the penname Publius. On March 14, 1788 in *Federalist Paper 68*,Hamilton succinctly articulates the purpose of the electoral college, yet many of the arguments he makes are almost inexplicable to today’s permutation of the institution. Perhaps the most peculiar argument Hamilton makes is that the electors of each state could not possibly have communication with each other before voting arguing, “They have *not made* [emphasis mine] the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes.”[[56]](#footnote-56) In addition to the electoral college’s “moral certainty,” which was discussed previously, Madison overall describes in *Federalist Paper 68* that the electors of each state, having been already chosen by their citizens as the most virtuous of their respective districts, were all supposed to be separate bodies that came together at a set date without any pre-planning to vote for someone that would be qualified for the presidency. With modern technology and political parties, this argument is completely outdated.

Nevertheless, at the time, the electoral college was completely revolutionary in thought, yet in practice it had some glaring flaws. Although the framers arguably intended the electors to be independent voters, this idea cracked when two extraconstitutional features emerged once the constitution became ratified. The political party and the mass voter campaign changed the playing field. Simply put, it was politically strategic to help ensure that parties got electors who they could count on to vote for their party’s candidate in return for getting them elected.[[57]](#footnote-57) Already, the idea of a faithless elector concerned the parties. However, it is important to note that there is no clause in the Constitution that requires electors to vote any certain way in large part because there was no conception of political parties when the constitution was drafted.[[58]](#footnote-58)

Specifically, there is a clause in the Constitution that deserves much attention in regard to faithless electors which says:

Each State shall appoint, *in such Manner as the Legislature thereof may direct*, [emphasis mine] a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.[[59]](#footnote-59)

This is the second clause in Article II, section I of which the previous clause establishes the presidency and his term in office. This shows that the framers put much emphasis on how the president was to be elected.[[60]](#footnote-60) Therefore, the intentional decision by the framers to give the states the ability to choose how they wanted their electors to be chosen became crucially important with any discussion regarding them moving forward.

With this clause, states differed in how they approached appointing their electors in the first presidential elections. The minority of states choose their electors through popular vote, whereas the majority elected them through legislative selection. However, in the subsequent years, more states decided their electors through popular vote. To illustrate this, in 1789, four states choose their electors through popular vote, while by the following election that number increased to six.[[61]](#footnote-61) In addition, electors casted two votes for the presidency. Essentially, the entire system worked as follows. The voters would pick their electors who would later cast two votes for the presidency.[[62]](#footnote-62) After the votes were tallied, the House of Representatives would choose from the top five candidates, assuming no majority.[[63]](#footnote-63) The person with a majority would become the president and the candidate with the second highest votes would become the vice president.[[64]](#footnote-64)

However, after a few presidential elections, it became apparent that there were flaws in this system because of political parties of which the framers could not have considered when they wrote the Constitution. Two examples are worth noting. First, in 1796, John Adams’ vice presidential running mate Thomas Pinckney did not receive the second highest number of electors to Thomas Jefferson, a member of the opposing party. As demonstrated above, at this time, the president and his running mate did not run on one ticket. Therefore, Thomas Jefferson became the Vice President despite his clear political differences with John Adams. Second, Thomas Jefferson and Aaron Burr garnered the same electoral votes in the election of 1800, which deferred the election to the House. After thirty-six votes, the House finally decided Jefferson as the president.[[65]](#footnote-65) Given these two incidents, it became apparent that the Constitution needed to be amended.

Ratified in 1804, the 12th amendment radically altered the way that electors operated. This in effect, greatly affected how faithless electors worked as well. The 12th amendment made two important changes to the electoral college. First, electors now voted for the President and the Vice-President on two separate tickets with one ballot.[[66]](#footnote-66) Second, the House would only decide from the top three presidential candidates instead of the top five.[[67]](#footnote-67)

Since the 12th amendment, there have not been any major changes to the way the electoral college functions constitutionally.[[68]](#footnote-68) However, there are two Supreme Court cases that should be noted. Together, the 12th amendment and Article II, section I, clause II, laid the constitutional and legal foundation of which the Supreme Court gave decrees relating to faithless elector laws. In the first case *McPherson v. Blacker* (1892), the Supreme Court ruled that the states have the power to dictate how they want their presidential electors to be chosen.[[69]](#footnote-69) In particular, the first phrase within Article II, section I, clause II again states that “each State shall appoint, *in such Manner as the Legislature thereof may direct* [emphasis mine], a Number of Electors” became the basis of the court’s decision.[[70]](#footnote-70) Although this case does not relate to faithless elector laws directly, after the ruling, states expanded the Court’s decision into allowing themselves to create requirements for their electors. One of these requirements became *pledge laws*. Six decades later, it took another Supreme Court case to determine if these *pledge laws* were constitutional.

Decided in 1952 by a 5-2 vote, *Ray v. Blair* is the only Supreme Court case that pertains to faithless elector laws. The debate started when a member of the democratic party, Edmund Blair refused to take his party’s pledge to become an elector in Alabama. Specifically, Blair did not agree with a particular section in Alabama’s statues that stated “a pledge to aid and *support* [emphasis mine]the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States.”[[71]](#footnote-71) Because Blair did not agree to the pledge, the party’s Chairman of Alabama’s Executive Committee of the Democratic Party Ben F. Ray denied his certification to be an elector. Before the Supreme Court took the case, the Supreme Court of Alabama ruled that it was illegal for Ray to mandate Blair take the pledge. The Court argued on the grounds of the 12th amendment that the pledge restricted the freedom of electors to choose whoever they wanted.[[72]](#footnote-72) However, the Supreme Court reversed the lower court’s opinion.

Justice Stanley Forman Reed delivered the court’s majority opinion, stating that Ray’s mandate for the pledge and Blair’s subsequent denial of the pledge was not a violation of Article II, section I, clause II of the Constitution. Essentially, the Court supported Ray’s decision to deny a potential elector if they did not take the pledge. Specifically, Justice Reed articulates:

. . . Even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional. A candidacy in the primary is a voluntary act of the applicant. He is not barred, discriminatorily, from participating, but must comply with the rules of the party. Surely one may voluntarily assume obligations to vote for a certain candidate. The state offers him opportunity to become a candidate for elector on his own terms, although he must file his declaration before the primary. Code of Ala. Tit. 17, § 145. Even though the victory of an independent candidate for elector in Alabama cannot be anticipated, the state does offer the opportunity for the development of other strong political organizations where the need is felt for them by a sizable block of voters. Such parties may leave their electors to their own choice.[[73]](#footnote-73)

Along with the precedent from *McPherson v. Blacker*, since the legislature may decide how the electors are chosen, the Court ruled that it was constitutional for states to allow political parties to have their electors make pledges to a party’s nominee if they so choose.[[74]](#footnote-74) The Court based its ruling on that electors are not representatives of the federal government and there is nothing in the Constitution that says that states cannot have political parties that do not require pledges from their electors. In all, Reed’s ruling gives states the freedom to determine if they would allow political parties to have specific requirements for their respective electors. What is important to note is that the decision does not say that electors are forced to certain way.

As the 12th amendment did with the electoral college, *Ray v. Blair* completely changed faithless elector laws. According to the Constitution, the states had the power to choose their electors as they deemed fit, yet the framers intended these electors to be independent voters. Essentially, these two parts of the Constitution were with at odds with each other. Does the state’s power under the Constitution allow them to make electors not independent voters? Justice Robert H. Jackson made this argument in the court’s dissent joined by Justice William O. Douglas when he stated:

No one faithful to our history can deny that the plan originally contemplated what is implicit in its text -- that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices. Certainly, under that plan, no state law could control the elector in performance of his federal duty.[[75]](#footnote-75)

The framers of the Constitution probably would not have agreed with the U.S. Supreme Court’s ruling and most likely concurred with the Supreme Court of Alabama’s decision and Justice Jackson’s dissent. Whether the framers would have foreseen this now arguably error in their design of the Constitution may never be known. Regardless, this court case set the foundation for why faithless electors laws even exist and why there is variation between the states today regarding these legislations.

The Supreme Court has not addressed this issue since *Ray v. Blair*, yet the debate over faithless electors has gained substantial momentum in the wake of the 2016 election. Whereas the last presidential election was historic for its faithless electors, it also is unprecedented for those faithless electors to have continued the debate long after the *Meeting of the Electors*. As discussed previously, the Hamilton Electors reopened a national conversation of whether electors could vote as they saw fit and their efforts are most prominent in Colorado and Washington.

Of the two entities, Colorado has become the heart of the current dialogue of faithless electors.[[76]](#footnote-76) For context, Colorado’s faithless elector law reads as follows:

When all vacancies have been filled, the presidential electors shall proceed to perform the duties required of them by the constitution and laws of the United States. The vote for president and vice president shall be taken by open ballot. Each presidential elector shall vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in this state. [[77]](#footnote-77)

Essentially, the entire debate centered around whether it was lawful for Colorado to uphold this state law if its electors did not vote as required by it. As part of the Hamilton Electors, three of Colorado’s electors, Bob Nemanich, Polly Baca, and Michael Baca, actively pushed against this law before December 19th, 2016 in the courts yet received mixed results.

The first major blow to the movement was that these electors pushed for Colorado to not enforce the law, yet a district judge denied that order in a preliminary injunction on December 12th, 2016.[[78]](#footnote-78) Even with this defeat, the debate had only just begun. Having seen this preliminary injunction commence, Colorado Secretary of State Wayne Williams requested a court proceeding to determine what should be the proper protocol if Colorado’s electors did not vote *correctly*. On December 13th, 2016, another Denver District Court Judge ruled that not only should the law be enacted, but the electors should be removed from office for their deviant votes.[[79]](#footnote-79)

In *Baca et al v. Hickenlooper et al* 2016, District Court Judge Wayne Williams discusses his reasoning for denying Jason Wesoky’s, the attorney for the electors, preliminary injunction. Although the Judge makes many arguments, the most applicable here is the interpretation he takes from *Ray v. Blair*. Specifically, he states, “*Blair* suggests that the state may also set requirements for presidential electors, and in the event that they fail to conform to the state’s statutory mandate, the state is permitted to take some remedial action, such as removal of electors.”[[80]](#footnote-80) Judge Williams argues that if states can set requirement for their electors, then they should have the means to enforce those requirements. Furthermore, Williams also adds that Wesoky was never able to cite a case or statue that argued that any of these *pledge laws* were unconstitutional. This last point is crucial because its argument gets chipped away at by how Baca and Nemanich’s attorney responded to Judge Williams’s decision.

To no surprise, Wesoky appealed the district court’s decision and the case went to the 10th Circuit Appeals Court which gave a complex ruling four days later on December 17th, just two days before the electors voted. The appeals court upheld Judge Williams’s decision, yet it undermined it at the same time. Essentially, the Court stated that it concurred with the district’s court decision, yet upholding Colorado’s law would not be in light of the 12th amendment if it was done so after the electors voted.[[81]](#footnote-81) The problem for the court was more that the argument Wesoky made did not support his position. The electors argued that having to vote for a specific candidate was an unconstitutional qualification, yet the court classified this as a duty.[[82]](#footnote-82) Specifically, the Court stated, “Whether that statute [referring to Colorado’s statute] also affords the State with authority to remove an elector *after voting has begun* [emphasis mine] is not a question that has been posed by plaintiffs to either the district court or this court.” Most importantly was that attached as a footnote to this sentence was the following statement, “And we deem such an attempt by the State unlikely in light of the text of the 12th amendment.”[[83]](#footnote-83)

With this ruling, the court said that Wesoky’s argument, that electors should not be penalized for voting their conscience, probably exists in the Constitution.[[84]](#footnote-84) The Court’s problem was that the plaintiffs were making the wrong case, yet the judges gave them plenty of room to retry it under different parameters. This ruling is arguably the most important development regarding faithless electors through the judicial branch since *Ray v. Blair,* because even though it did rule faithless elector laws unconstitutional, it left open the possibility that permutations of them may in fact be unconstitutional had Wesoky restructured the plaintiff’s position.

Despite this significant achievement, the Colorado electors still had to vote in two days, and the question remained as to whether Colorado Secretary of State Wan Williams was going to uphold Colorado’s law. Instead, Williams did much more than just uphold the law. On the day of voting, he made all nine of Colorado’s presidential electors take an additional oath.[[85]](#footnote-85) With this new situation, out of the three Colorado’s electors who were part of the Hamilton Electors, only Michael Baca affirmed his commitment and voted for John Kasich instead of Hillary Clinton.[[86]](#footnote-86) Breaking his oath, Williams ousted Baca as an elector and stated that he would press charges.[[87]](#footnote-87) However, it was not until months after the meeting that Williams strongly contemplating taking judicial action.[[88]](#footnote-88)

Appalled by Williams’ recourse, all three electors decided to file an imitation lawsuit against him. For them, William’s actions were in violation of the 10th Circuit Appeals Court’s decision, though being stated in a footnote, that acting against an elector “after voting has begun” would not be in light of the 12th amendment. By this time, Equal Citizens’ founder and past Harvard Law Professor Lawrence Lessig had now taken up the plaintiff’s case with Jason Wesoky. In the suit, Lessig writes, “Because of Defendant Williams’ threats, his changing of the oath, and his actions against Elector Michael Baca, Plaintiffs felt intimidated and pressured to vote against their determined judgment.”[[89]](#footnote-89) Throughout the middle months of 2017, both sides bickered and debated against each other in this lawsuit. To Williams, he was doing his job to uphold Colorado’s law as Secretary of State. To the Hamilton Electors, they were doing their job in preventing an unworthy candidate from obtaining the highest office in the land. What eventually occurred was that both sides decided to make a deal with each other.

On October 25, 2017, local media outlets announced that the electors would drop the imitation lawsuit if Williams agreed to help move the case through the courts by granting waiving immunity.[[90]](#footnote-90) As of yet, the only legal movement in this debate is the removal of the imitation lawsuit.[[91]](#footnote-91) There is no formal indication that the Supreme Court will take *Baca v. Hickenlooper* and make a final ruling on the constitutionality of faithless elector laws, based on the 10th Circuit Appeals Court’s decision, the District Court’s version, and their own judgment.

Examples of Faithless Elector Laws

To get a sense of the variety of faithless elector laws, a few examples are necessary. Alabama, North Carolina, and Oklahoma are heavy Republican states, yet their faithless elector laws vary. In Alabama, electors take the following verbal pledge; "I do hereby consent and do hereby agree to serve as elector for President and Vice President of the United States, if elected to that position, and do hereby agree that, if so elected, I shall cast my ballot as such elector for \_\_\_\_\_ for President and \_\_\_\_\_ for Vice President of the United States.”[[92]](#footnote-92) All of the states that require verbal oaths have in their *pledge laws* something in their states’ statutes or codes to the general effect of Alabama’s. However, Alabama has no law that specifically penalizes electors for upholding this oath, while other states do.[[93]](#footnote-93)

For example, the harshest faithless elector laws are these of North Carolina and Oklahoma. North Carolina’s general statutes section § 163-212 reads as follows;

Any presidential elector having previously signified his consent to serve as such, who fails to attend and vote for the candidate of the political party which nominated such elector, for President and Vice-President of the United States at the time and place directed in G.S.163-210 (except in case of sickness or other unavoidable accident) shall forfeit and pay to the State five hundred dollars…. In addition to such forfeiture, refusal or failure to vote for the candidates of the political party which nominated such elector shall constitute a resignation from the office of elector, his vote shall not be recorded, and the remaining electors shall forthwith fill such vacancy as hereinbefore provided.[[94]](#footnote-94)

In Oklahoma general statutes §26-10-109, it states that “any Presidential Elector who violates his oath [i.e. not voting for their pledged candidate] shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars.”[[95]](#footnote-95) Despite being ideologically similar, these three states do not have similar *pledge laws*.

Besides showcasing the variety of these faithless elector laws, it is more important to illustrate the contradictory language that they use. This is most evident in states that require their electors to vote for their party’s nominee but do not replace the elector or punish them for a deviant vote (called a purple state in the next section). Vermont is a prime example. Vermont’s state law reads, “The electors shall perform the duties required of them by the Constitution and laws of the United States” yet in another line in that same statue it reads, “The electors must vote for the candidates for president and vice president who received the greatest number of votes at the general election.”[[96]](#footnote-96) This language is similar to Colorado’s and also served as part of the plaintiff’s argument in *Baca v. Hickenlooper*.[[97]](#footnote-97) These sentences are contradictory because the Constitution does not require electors to vote a certain way, yet the statue clearly forces them to and is upheld by the Constitution’s broad discretion to allow state legislatures to choose how they determine their electors.

Lastly, Virginia is also a case to illustrate how these laws can change in subtle ways but have immense impact. In 1993, Virginia’s law read, “Electors selected by the state convention of any political party shall be *expected* [emphasis mine] to vote for the nominees of the national convention to which the state convention elects delegates.”[[98]](#footnote-98) However, in 2001, the law was changed to say, “Electors selected by the state convention of any political party shall be *required* [emphasis mine] to vote for the nominees of the national convention to which the state convention elects delegates.”[[99]](#footnote-99) This one-word change turned Virginia from a state that had no law requiring electors to vote a certain way to one that did.[[100]](#footnote-100)

Methods: The Collection of Data

To test whether there is definitive partisanship in faithless elector laws, I gathered data from three websites. First, the type of faithless elector laws each one of these states had during the 2016 presidential election was collected from FairVote.org. The organization splits these faithless elector laws into five categories and provides an illustrative map where each category is represented by its own color.[[101]](#footnote-101) To ensure accuracy, Fair Vote’s map was cross-referenced with the National Association of Secretaries of State’s *Summary: State Laws Regarding Presidential Electors*, which is a document that collected all the state laws that were applicable to each state’s respective presidential electors in the 2016 presidential election.[[102]](#footnote-102)

Fair Vote’s map is displayed below, and these five categories are as follows:[[103]](#footnote-103) The first category is the twenty states that have no *pledge law*, noted in gray. The second category entailed states that had a *pledge law* but had no punishments nor was the vote or elector replaced if he or she violated the state’s law, noted in purple. The third category involved states that had a *pledge law*, yet their faithless electors were replaced, their votes not counted, and their replacement elector votes for the *correct* candidate, noted in blue. The fourth category curtailed states that provided punishments to electors who did not vote for their pledged candidate, but their votes are still counted, noted in orange. Lastly, the fifth category involved states that have a punishment for electors that violate their *pledge law*, their votes are not counted, and their replacement elector votes for the *correct* candidate, noted in red.

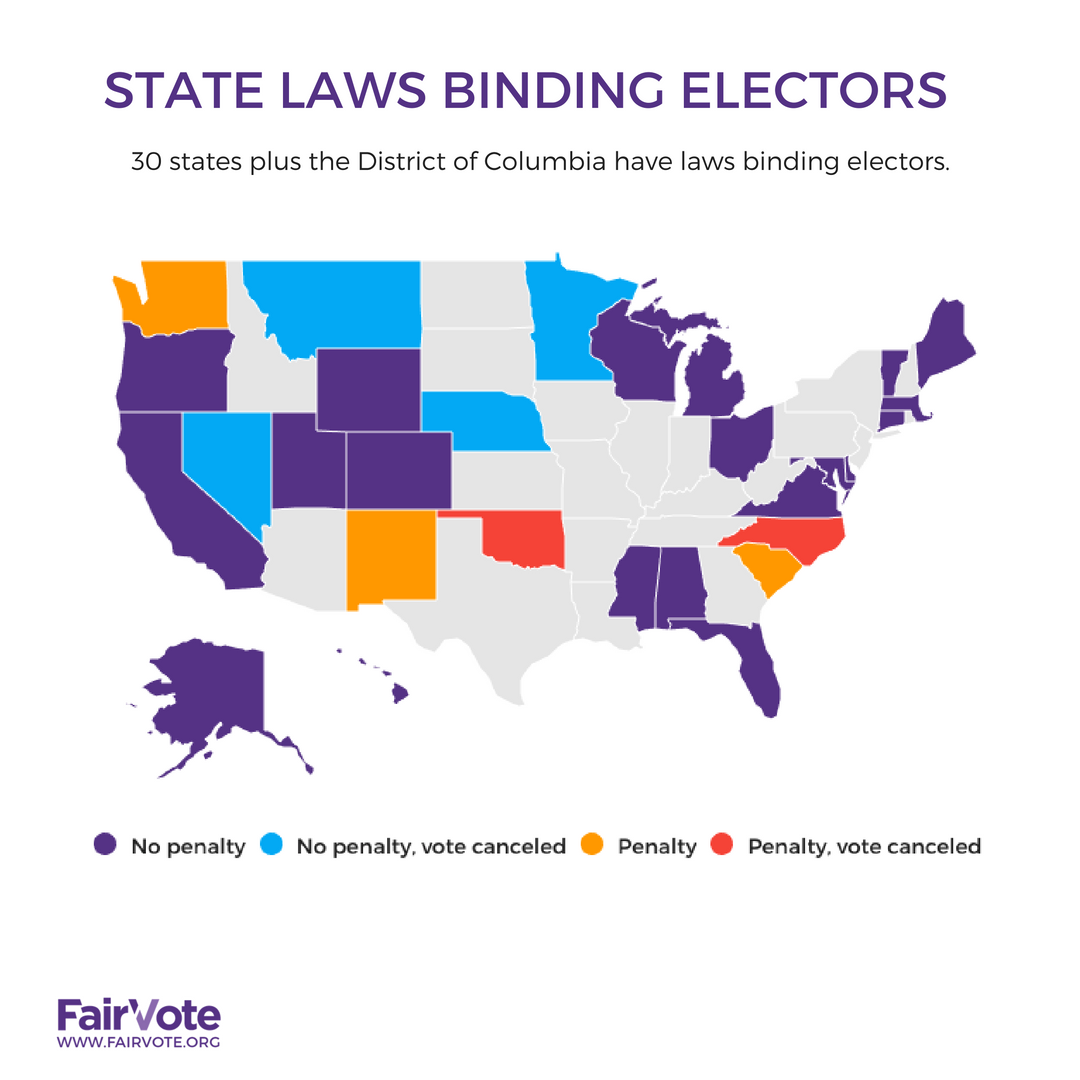


Figure : State Laws Binding Electors: http://www.fairvote.org/faithless\_elector\_state\_laws

Figure 1: Fair Vote’s Map: *State Laws Binding Electors*

Building on Fair Vote’s map, statistics from the last ten presidential elections results, 1980 to 2016, was gathered from 270towin.com. From this website, I made a tally of how many times each states’ electors voted for the democratic or republican candidate. For example, Alabama has gone Republican, or red, in the last ten presidential elections. Thus, the result was indicated in the following tables as data set (0,10). The (0) representing the democrats the (10) republicans. Collectively, the data was used to gauge how democratic or republican the states party’s identity was in the last thirty-six years.[[104]](#footnote-104)

The last website used to collect data was the law research database lawschool.westlaw.com, which is the premier catalog of every law passed in the U.S. Specifically, the source was used to extract when states passed their faithless electors laws that were in effect for the 2016 presidential election. Along with the data collected from 270towin.com, both sites were used to help gauge the partisan identity of the states. The information from Westlaw helped to see if there were any trends in when states passed these laws in response to court cases like *Ray v. Blair* or other events throughout U.S. history.[[105]](#footnote-105)

Shown below, Table 1 and Table 2 are adapted tables from the data collected from all three websites. Table 1 lists out the data sets of how many times each state voted for the democratic or republican candidate in comparison to their faithless elector law and when they passed that legislation. Similarly, Table 2 shows the same data, but instead of a collective data set of how each state voted from 1980-2016, the chart shows the last ten presidential elections individually.[[106]](#footnote-106) Any state highlighted in yellow signified that its data set was either a (4,6), (5,5) or (6,4), which implies that the state was not strongly partisan throughout these four decades.

Table : Sources: Data adapted from http://www.fairvote.org/faithless\_elector\_state\_laws, http://www.270towin.com/states/, & lawschool.westlaw.com.



*Table 2: Sources: Data adapted from http://www.fairvote.org/faithless\_elector\_state\_laws, http://www.270towin.com/states/,* *&* *lawschool.westlaw.com.*



Analysis: A Lack of Clear Partisanship

The data shows that it is impractical to clearly define any partisanship in faithless elector laws because there is evidence that supports either position. There are two reasons as to why there could be partisanship present. First, the eight states that did not clearly have ideological tendencies have a wide variation in their faithless elector laws. Again, these eight highlighted states each had a data set of either (4,6) or (6,4), except for Nevada with (5,5). Two of these states, Colorado and Ohio, had a *pledge law* (purple). Furthermore, Iowa, New Hampshire, and Pennsylvania, had no faithless elector laws (gray). Next, New Mexico had a penalty for a faithless vote, but it was still counted (orange). And lastly, Nevada and Michigan had its faithless elector(s) vote not count, the elector(s) replaced who then proceeds to vote for the *correct* candidate, but with no penalty (blue). With eight states supporting these data sets and having four out of the five possible faithless elector law categories, this situation would support the idea that the issue is somewhat partisan as when there is no clear partisanship in a state’s ideological view, the laws around faithless electors vary.

For the second reason, the states that have only voted for republican nominees in the past ten presidential elections had a *pledge law* (purple) or had no faithless elector laws (gray). There were five states like this in each category. In contrast, the two states that have only voted for democratic nominees in the past ten presidential election are blue and purple. Furthermore, as the state develops more democratic tendency, but still leans strongly Republican, data sets (1,9), (2,8) & (3,7), there are more states which have pledge laws (purple) than do states that have no faithless elector laws (gray). Another way to look at this is that there are fifteen gray states that have a data set of either (0,10), (1,9), (2,8) (3,7) and (4,6) compared to the five states which data sets are (6,4), (7,3) and (8,2). Continuing this comparison, to the twenty states that are purple, there are eleven republican leaning states to nine democratic leaning states. This data would allude to that as the state becomes more Democratic, its strength of its faithless elector laws increases, which would thus indicate a partisan divide.

In counter, as alluded to with Alabama, North Carolina, and Oklahoma previously, there is some evidence that supports that there could be no partisanship with these laws. Building on the analysis provided in the previous paragraph, the two states that have the harshest faithless elector laws are heavily conservative. Specifically, Oklahoma and North Carolina are the only two states in the Union that punish their electors, do not count their votes and replace them (red).[[107]](#footnote-107) This is the complete opposite end of the political spectrum and contradicts the previous evidence that the more democratic tendency a state has the stronger its faithless elector laws. Instead, this evidence would suggest that the more conservative a state is, then the harsher the faithless elector laws.

Besides these two red and heavily conservative states, the contradiction is also present in the dominantly liberal states. The only two states with a data set of (10,0) are Minnesota and the DC, yet Minnesota is a blue state while the DC is a purple state. Out of the six blue states, the other states are Nebraska with a data set of (0,10), Utah (0,10), Nevada (5,5) Montana (1,9), and Michigan (4,6). Looking at Table 2, Nevada flipped back and forth within these ten presidential elections. For example, it has not voted republican five times in a row and then democratic.[[108]](#footnote-108) If one disregards Nevada, these five states solidly reside on the other end of the political spectrum of each other but have passed the same law. Instead of the data supporting that states favor faithless elector laws because of their political ideology, this evidence would suggest that the issue is not partisan but instead bipartisan.[[109]](#footnote-109)

With all this contradictory data, there could another explanation as to the variety of faithless elector laws. One thought to consider here is as informative as the data currently is, there are many limitations with this study. First, in terms of size, only data from the past ten presidential elections was used and the only way to expand the project is to incorporate more presidential election results.[[110]](#footnote-110) Unfortunately, the data from 270towin.com did not go farther back than 1980.[[111]](#footnote-111) In counter, there is a limit to how far back data should be collected from. Incorporating presidential election data in the Fifth-Party System or before *Ray v. Blair* would add an additional layer to the data that could skew the results.[[112]](#footnote-112) Although 270towin.com has its weaknesses, the most disheartening is the problem with FairVote.org.

In short, if the study was conducted again, instead of using Figure 1, a different map would be created as the five categories Fair Vote uses are too broad. This is most evident in the purple category. Fair Vote is still accurate in stating that these states require their electors to vote for their party’s candidate and have no specific punishments if they do not, but these states vary on how they make their electors vote. All these purple states articulate in their respective laws that electors must vote for their party’s nominee, but some take it one step further and require their electors take a verbal pledge, affirming that they will uphold that law.[[113]](#footnote-113) Fair Vote does not make this distinction in their map. However, this difference is important. For one, there is different symbolic meaning for one state to have a *pledge law* in the books, but perhaps never enforce it to another state who makes their electors take a verbal oath before becoming an elector, an event that could be publicized. A prime example of how important this distinction is is Colorado Secretary of State Wayne Williams’ decision to make the Colorado electors take another verbal oath on December 19th before they voted.

Besides this lack of distinction, perhaps the gravest error is that Fair Vote’s map has been wrong before, and the possibility exists that it may still not be fully accurate.[[114]](#footnote-114) According to the map in Figure 1, both Michigan and Utah were labeled as a purple state yet should have been categorized as blue states. Whereas the purple category is still too broad, the blue category was too strict. To illustrate the argument that the author of this paper recently made to Fair Vote, Michigan’s Comp. Laws § 168.47 reads: “Refusal or failure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes a resignation from the office of elector, his vote shall not be recorded, and the remaining electors shall forthwith fill the vacancy.”[[115]](#footnote-115) And Utah’s Code Ann. § 20A-13-304 states, Any elector who casts an electoral ballot for a person not nominated by the party of which he is an elector . . . is considered to have resigned from the office of elector, his vote may not be recorded, and the remaining electors shall appoint another person to fill the vacancy.[[116]](#footnote-116) As discussed in the next section, both laws contain the core idea of the UFPEA, yet Michigan and Utah have not signed the UFPEA and are not listed on the ULC’s page as having done so.[[117]](#footnote-117) On Fair Vote’s map in Figure 1, the states outlined in blue are the ones that had passed the UFPEA prior to the 2016 election. However, as Utah and Michigan illustrate, just because a state has not passed the UFPEA that does not mean that it has not passed a law which has the same effect, assuming that it is enforced. Although there is no penalty in either of these laws, the elector is removed from office and the vote is recounted, which is the clear distinction between a purple and blue state.

Lastly, another factor to consider if this test was to be conducted again is that some states are in the process of changing their laws since the 2016 election. One to note is Indiana, which transitioned from a gray state to a blue state, becoming the fifth entity to pass the UFPEA in 2017.[[118]](#footnote-118) In contrast, none of the thirty states, plus the District of Colombia have so far changed their faithless elector laws since the 2016 election.[[119]](#footnote-119) This is not to say that there are not any proposed bills within the respective state legislative branches, but none have been signed into law like Indiana. One idea for a future study would be to see how all the states have changed their faithless elector laws by the 2020 election and compare it to the data collected here.

Solutions to Faithless Electors: Three Non-Governmental Organizations’ Strategies

When it comes to changing the electoral college, there are two legislative proposals that are of high importance for faithless electors. One bill directly targets them while the other raises a serious question. Drafted in 2010 by the Uniform Law Commission (ULC), the first is called the *Uniform Faithful Presidential Electors Act* (UFPEA). Established in 1892, The ULC is a nonprofit organization housed by lawyers that advocate for the uniformity of state laws.[[120]](#footnote-120) As stated before, Minnesota, Montana, Nebraska, Nevada, and now Indiana have passed this bill.[[121]](#footnote-121) In Figure 1, the states that have passed the UFPEA are shaded in blue.[[122]](#footnote-122) Essentially, the bill stops faithless electors by having their deviant votes not count and by replacing them. In the eyes of the ULC, if all states passed the UFPEA, then the problem of faithless electors would not exist. However, as mentioned before, the Supreme Court has never ruled on the constitutionality of faithless elector laws that force the electors to vote for their party’s candidate i.e. the UFPEA. The closest ruling to this effect is the 10th Circuit Appeals Court’s decision in *Baca v. Hickenlooper.* If more states passed the legislation, then there would be an increased chance that a case similar to *Ray v. Blair* would ensue. At this present moment, it can only be hypothesized whether the UFPEA would be constitutionally struck down or not.

On the ULC’s webpage, the organization provides a template of the bill. The legislation calls for a state-administrated pledge of loyalty to that elector’s party’s nominee that reads, “if selected for the position of elector, I agree to serve and to mark my ballots for President and Vice President for the nominees for those offices of the party that nominated me.”[[123]](#footnote-123) Within this template, the ULC states their reasoning for the bill. As they phrase it, “faithless electors hold the potential for serious damage to our democratic processes, making advisable a uniform law to minimize the dangers posed.”[[124]](#footnote-124) As illustrated in the five presidential elections discussed previously, faithless electors do have the potential to completely change the outcome. In other words, the ULC’s concerns are not ungrounded. Although the ULC admits that this scenario is unlikely to arise, they assert that it is better to eliminate the problem before it occurs.[[125]](#footnote-125)

Besides the UFPEA, the second proposal fundamentally alters the way the electoral college votes and thus gravely impacts faithless electors. Headed by the National Popular Vote Incorporated (NPV Inc.), this 501(c)(4)’s goal is to pass the *National Popular Vote Compact* (NPVC), an eight hundred and eighty-eight-word bill.[[126]](#footnote-126) With this legislation, the electors of a state would vote for the candidate which had the highest national popular vote, regardless of party affiliation.[[127]](#footnote-127) No longer would electors casts ballots for the candidate that had the highest popular vote of their state. This bill eliminates the need for a constitutional amendment and, assuming there were not any faithless electors, circumvents the electoral college.[[128]](#footnote-128)

Unlike the UFPEA, more than five states have ratified the NPVC. According to NPV Inc.’s website, eleven states have passed the bill that together account for one hundred and sixty-five electoral votes. Furthermore, there are twelve other state legislatures that currently have the bill in some stage of its legislative process. In contrast to the UFPEA, the NPVC has not yet passed in any additional state since the 2016 presidential election.[[129]](#footnote-129) The closest state to joining these eleven states is New Mexico and its five electors, where the bill passed in the state Senate in 2017, having already went through the state House in 2009.[[130]](#footnote-130) The legislation will not go into effect until enough states have signed onto it that together hold at least 270 electoral votes. Article IV clause I of the NPVC articulates this saying, “this agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.”[[131]](#footnote-131)

Given the bill’s dynamics, it should be no surprise that academics have questioned the constitutionality of the NPVC rigorously. Just like *McPherson v. Blacker*, proponents of the bill argue that the Constitution gives states the ability to dictate how their electors are chosen explicitly in Article II section I clause II when it states “each State shall appoint, in such Manner as the Legislature thereof may direct, a number of electors.”[[132]](#footnote-132) With this wording, supporters of the legislation state that it has always been the state’s authority to choose how the presidential electors operate. Again, *McPherson v. Blacker* defends that it is not the federal government’s jurisdiction to dictate how the state may choose their electors.[[133]](#footnote-133) Therefore, it is not necessary to pass a constitutional amendment to change how the electoral college operates. However, this raises the question of whether it is constitutionally legal to change an institution of the Constitution without amending the Constitution. Having a compact among states like this is uncharted territory.

Opponents of the compact have three counterpoints. First, although the phrase “in such manner the legislature thereof may direct” implies that the Constitution gives essentially unlimited power to state legislatures in choosing their electors, objectors view that there should be a more limited scope in interpreting the Constitution in this instance. Opponents reiterate that the framers did not want the president to be popular elected. Simply put, the framers designed the electoral college to make sure the president could not be nationally popularly elected, so why would the Constitution give states the power to erode it?[[134]](#footnote-134) Second, contenders articulate that it is out of the jurisdiction of the states to have their electors cast ballots based on voters outside of their constituents.[[135]](#footnote-135) Finally, the third reason is perhaps the strongest argument against the NPVC’s constitutionality.

Known as the compact clause of the Constitution, it reads that, “no State shall, without the Consent of Congress . . . enter into any agreement or compact with another state.[[136]](#footnote-136) The purpose of the clause is to ensure congressional oversight of state legislative laws. However, arguments against this state that the bill only delves into an area that the federal government, understandably, has an interest in.[[137]](#footnote-137) Again, it still is not the federal government’s prerogative to interfere with a state’s jurisdiction of its electors. From another perspective, the federal government cannot stop states from passing the same bill.

Regardless of the constitutionality of the NPVC, it brings up a huge question about faithless electors. Nowhere in the bill does it state that the electors must vote for their party’s candidates. This is intentional as the under the NPVC, electors would be voting for the opposing party’s nominee if they won the national popular vote. However, the bill does not say that the electors must vote for the candidate who wins the national popular vote. The legislation still gives the power of choosing the electors to the states. In other words, the bill only changes the parameters of who the electors are supposed to support and does not address the wide discrepancy of faithless elector laws. It leaves that question for the states.

Hypothetically, would a state’s electors in Alabama vote for the democratic candidate that won the national popular vote in 2020 if the NPVC took effect, assuming the state went republican eleven times in a row? In the five times the winner of the electoral college did not win the national popular vote, there were plenty of electors for the winning candidate that did not change their ballots to the national popular vote-winning candidate. Therefore, the precedent is there for electors to not respect the idea that the winner of the national popular vote should be the president instead of the electoral college, regardless of party loyalty.

It seems misguided to automatically assume that future electors from states within the NPVC would honor the law when electors from other states do not have to unless there is additional legislation that forces these electors to honor the bill. In the defense of the NPV Inc., they have addressed this concern. In one of the informational videos about the bill on NPV Inc.’s website, they advocate passing the UFPEA. Taken together, these two bills, assuming the NPVC took effect, would ensure that the candidate who won the national popular vote would become the next president. The 270-plus electors from these states would have to vote for the national popular vote-winning candidate. If they did not, then their vote would not be counted and they would be replaced by another elector who would then vote for the *correct* candidate. Within this new system, it is plausible to assume that the political parties and the states would at least consider changing how their electors are chosen. Although the NPV Inc. does not say explicitly on their website, it appears that they are backing their bill on the American people seeing their system as more democratic than the electoral college. Therefore, they would be ok with this new change despite this potentially huge flaw with faithless electors if the UFPEA could not accommodate this concern and the states and/or political parties maintained their current processes of choosing their electors.

In contrast to all this, Equal Citizens’ strategy is markedly different from the ULC and the NPV Inc.’s. Instead of trying to pass a law that could be constitutionality challenged, Equal Citizens’ plan is instead to show that the current laws are already unconstitutional. Its current battles in Washington and Colorado show that it has taken up the case of the Hamilton Elector’s core argument. In short, the reasoning is that it is unconstitutional for any elector to have to vote a specific way under Article II of the Constitution, and the 1st, 12th, and 14th amendment.[[138]](#footnote-138)

If the organization is successful in getting a favorable Supreme Court ruling, what would be considered faithless electors now could be described as faithful electors in the future. The terminology would essentially change. Whereas an elector would have been faithful if they voted for their party’s nominee previously, now they would be faithless if they voted for their party’s candidate solely on the basis that they felt like they had to. If this situation occurred, it is also probably likely that calls for a constitutional amendment to elect the president by the national popular vote would gain more traction than ever before. The general populace in all likelihood would not take favorably the idea that their votes were now completely meaningless, when the electors could freely vote for someone against their wishes for the highest office in the U.S.

However, just like with the NPVC, the issue becomes how much weight to attribute to different parts of the Constitution. If Article II, section I, clause II lets states choose how they pick their electors, should they be allowed to make a requirement, regardless if it is deemed a qualification or a duty, to have their electors operate as the state sees fit? While the Constitution does not prescribe electors to vote for any person, it also does not stop states from creating laws to force their electors to vote a certain way.[[139]](#footnote-139) Here lies the core problem. Just like with the NPVC, the issue becomes what is the proper interpretation of the Constitution.

Each organization has made progress in its agenda, though it seems that Equal Citizens’ tactic is the most likely to push the conversation forward before the 2020 presidential election. As mentioned before, so far the UFPEA has only been passed in one additional state, Indiana, since the 2016 presidential election while the NPVC has not been passed in any.[[140]](#footnote-140) Furthermore, according to the ULC’s website, the UFPEA is not currently introduced in any other state.[[141]](#footnote-141) Even if these concerns were not valid, the biggest problem with both of these approaches compared to Equal Citizens is that they have to convince enough state legislatures to ratify their proposals, in which the combined electoral college would be 270, for their bill to take effect. At this time, it would be likely that someone would challenge both bills in the courts. Equal Citizens’ strategy only has to go through the courts and has already made a pact with the State of Colorado to hopefully hear its case in the Supreme Court.[[142]](#footnote-142) With the 10th Circuit Appeals Court’s ruling on *Baca v. Hickenlooper*,it is the closest to achieving an answer to this long overdue question.

Conclusion: A Check on the Rabble?

The issue of faithless electors is a topic that receives little attention, yet it has made enormous strides since the 2016 presidential election. The history of faithless elector law is quite dense, but Article II, section I, clause II of the Constitution, the 12th amendment, *McPherson v. Blacker*, *Ray v. Blair* and *Baca v. Hickenlooper* are the key points in this story. As the data collected has helped support, unlike other issues in American politics, the debate of faithless electors is not a clearly divided partisan issue. Despite the increased focus towards the electoral college from the recent election, the current discussion is on whether the institution should remain or be improved instead of what should be done about the electors. With this in mind, is today’s conversation about the electoral college around the wrong subject?

The problem of faithless electors will always be difficult to solve because of the conflicting interpretation of the Constitution. From an originalist’s perspective, electors should be able to vote as they please and states should be able to make whatever laws about faithless elector that they so choose. However, as *pledge laws* illustrate, these two perspectives, the Hamilton Electors and Article II, section 1, clause II of the Constitution seem to contradict each other. If one view takes too much prominence, then the other is disregarded. Even with the appeals court in *Baca v. Hickenlooper,* the argument is still sound that no court has never ruled specifically on this question, which is the core of the whole problem. In one perspective, this may be the ultimate quest of the UFPEA, the NPVC, and Equal Citizens. Simply put, the goal is to force the Supreme Court to answer this question. These organizations may have polarizing outcomes as to what they are seeking from this answer, but they are still wanting to reach the same conclusion, a definitive solution. Given this dilemma, as the NPVC, the UFPEA, and Equal Citizen’s show, there are potential solutions out there to reform the electoral college by forcing this question, yet this reform could affect faithless electors in several ways.

At the heart of the topic is the following question. Are faithless electors bad? To the constitutional framers, they were not, yet as the U.S. has evolved the culture around faithless electors is that they are. If any of these three non-governmental organizations’ work continues to push this dialogue further, the issue of faithless electors is a concern that could potentially have huge ramifications if it is not addressed. It is entirely possible that more faithless electors could significantly impact the 2020 election, assuming there is wide controversy of the legitimacy of the president-elect, knowing that they now have Equal Citizens to back up their case, and would by then have years of experience tackling this debate from its interactions with the 2016 electors of Washington and Colorado. As it stands currently, the electors have the power to choose a different candidate than someone who won either the national popular vote and/or the electoral college on election night. In our current political climate, we can only hope that they do not exercise that untapped power before the Supreme Court rules on the constitutionality of *A Check on the Rabb*le?

1. "Presidential Results." CNN. February 16, 2017. Accessed April 24, 2017. http://www.cnn.com/election/results/president. [↑](#footnote-ref-1)
2. Given that there have only been 58 presidential elections, this phenomenon has occurred in little under one of every ten presidential elections at about 8.6 percent. "2016 Presidential Election" 270ToWin, Accessed February 8, 2017, http://www.270towin.com/2016\_Election/. [↑](#footnote-ref-2)
3. United States Code, Title 3, Chapter 1, Section 7, *Meeting and Vote of Electors*. Most state statues in abidance with this code call the day the electors vote *Meeting of the Electors.*  [↑](#footnote-ref-3)
4. FairVote.org. "Faithless Electors." FairVote. Accessed February 8, 2017. http://www.fairvote.org/faithless\_electors. [↑](#footnote-ref-4)
5. The author uses the term *pledge law* to encompass all states that in some legal manner require their electors to vote for their party’s nominee and is not intended to be confused with any other connotations of the term. Ibid. [↑](#footnote-ref-5)
6. There is no state that replaces an elector while still counting their vote as the replacement elector’s vote would through off the electoral college. [↑](#footnote-ref-6)
7. The three states these faithless electors originated from were Maine, Minnesota, and Colorado. The word *correct* and *correctly* is italicized throughout the paper to emphasize that depending upon what perspective one takes on faithless elector laws, there is or is not a *correct* candidate. FairVote.org. "Faithless Electors." FairVote. Accessed February 8, 2017. http://www.fairvote.org/faithless\_electors. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. It should be noted here that because electors are determined by the popular vote of the states, electors are democratically elected. However, the critique here is again that the presidency is not determined by the national popular vote but instead by the Electoral College votes. [↑](#footnote-ref-10)
11. NCSL, "The Electoral College," National Conference of State Legislatures, August 22, 2016, Accessed March 12, 2018, http://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. This Article of the Constitution will be explored in more detail later as to why this is the case. [↑](#footnote-ref-13)
14. NCSL, "The Electoral College," National Conference of State Legislatures, August 22, 2016, Accessed March 12, 2018, http://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx. [↑](#footnote-ref-14)
15. Uniform Law Commission, "Faithful Presidential Electors Act," Uniform Law Commission, Accessed March 20, 2017, http://www.uniformlaws.org/Act.aspx?title=Faithful Presidential Electors Act. [↑](#footnote-ref-15)
16. "National Popular Vote," National Popular Vote, March 29, 2017, Accessed April 8, 2017, http://www.nationalpopularvote.com/. http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf. [↑](#footnote-ref-16)
17. "Equal Electors," Equal Citizens, Accessed February 20, 2018, https://equalcitizens.us/equal-electors/. [↑](#footnote-ref-17)
18. Ibid. [↑](#footnote-ref-18)
19. *McPherson v. Blacker,* 146 U.S. 1 (1892), https://supreme.justia.com/cases/federal/us/146/1/. & *Ray v. Blair*. 343 U.S. 214 (1952). https://supreme.justia.com/cases/federal/us/343/214/case.html [↑](#footnote-ref-19)
20. FairVote.org. "Faithless Electors." FairVote. Accessed February 8, 2017. http://www.fairvote.org/faithless\_electors [↑](#footnote-ref-20)
21. Ibid. [↑](#footnote-ref-21)
22. FairVote.org. "Faithless Electors." FairVote. Accessed February 8, 2017. http://www.fairvote.org/faithless\_electors. [↑](#footnote-ref-22)
23. Ibid. [↑](#footnote-ref-23)
24. The three electors who remained faithful voted for a dead person. William C. Kimberling, "The Electoral College in History," *Congressional Digest* 96, no. 1 (January 2017): 6-7, *Academic Search Complete*, EBSCO*host 6.* [↑](#footnote-ref-24)
25. What follows is a summation of what occurred. For a complete timeline see Dave Leip. [↑](#footnote-ref-25)
26. David Leap, "2000 Events Timeline - Post-Election," Dave Leip's Atlas of U.S. Presidential Elections, Accessed February 7, 2018, https://uselectionatlas.org/INFORMATION/ARTICLES/pe2000timeline.php. [↑](#footnote-ref-26)
27. Ibid. [↑](#footnote-ref-27)
28. Ibid. [↑](#footnote-ref-28)
29. Sarah M. Wheeler, "Policy Point-Counterpoint: Electoral College Reform," *International Social Science Review* 82, no. 3/4 (June 2007): 176-179. *Academic Search Complete*, EBSCO*host*, 176. [↑](#footnote-ref-29)
30. David Leap, "2000 Events Timeline - Post-Election," Dave Leip's Atlas of U.S. Presidential Elections, Accessed February 7, 2018, https://uselectionatlas.org/INFORMATION/ARTICLES/pe2000timeline.php. [↑](#footnote-ref-30)
31. United States Code, Title 3, Chapter 1, Section 5, *Determination of Controversy as to Appointment of Electors*. [↑](#footnote-ref-31)
32. "2000 Presidential Election" 270ToWin, Accessed March 24, 2018. https://www.270towin.com/2000\_Election/. [↑](#footnote-ref-32)
33. David Leap, "2000 Events Timeline - Post-Election," Dave Leip's Atlas of U.S. Presidential Elections, Accessed February 7, 2018, https://uselectionatlas.org/INFORMATION/ARTICLES/pe2000timeline.php. [↑](#footnote-ref-33)
34. William G. Ross, ""Faithless Electors": The Wild Card," JURIST, December 9, 2000, Accessed February 20, 2018, http://www.jurist.org/wayback/election/electionross4.htm [↑](#footnote-ref-34)
35. As a reminder, the 1836 election was when the Virginia electors abstained from voting for the Vice President-elect Richard M. Johnson of Kentucky. FairVote.org. "Faithless Electors." FairVote. Accessed February 8, 2017. http://www.fairvote.org/faithless\_electors. [↑](#footnote-ref-35)
36. U.S. Constitution, amendment 23, section 1. [↑](#footnote-ref-36)
37. Rabble means a disorderly crowd or mob. [↑](#footnote-ref-37)
38. Hamilton, Alexander. "Federalist Number 68: The Mode of Electing the President." The Federalist Papers - Congress.gov Resources -. Accessed February 7, 2018. https://www.congress.gov/resources/display/content/The Federalist Papers#TheFederalistPapers-68. [↑](#footnote-ref-38)
39. Lilly O'Donnell, "Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt," The Atlantic, November 21, 2016, Accessed February 14, 2018, https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/. [↑](#footnote-ref-39)
40. FairVote.org. "Faithless Electors." FairVote. Accessed February 8, 2017. http://www.fairvote.org/faithless\_electors. [↑](#footnote-ref-40)
41. Lilly O'Donnell, "Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt," The Atlantic, November 21, 2016, Accessed February 14, 2018, https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/. [↑](#footnote-ref-41)
42. Ibid. [↑](#footnote-ref-42)
43. FairVote.org. "Faithless Electors." FairVote. Accessed February 8, 2017. http://www.fairvote.org/faithless\_electors [↑](#footnote-ref-43)
44. Ibid. [↑](#footnote-ref-44)
45. William G. Ross, ""Faithless Electors": The Wild Card," JURIST, December 9, 2000, Accessed February 20, 2018, http://www.jurist.org/wayback/election/electionross4.htm. [↑](#footnote-ref-45)
46. Richard Patrick McCormick. *The Presidential Game: The Origins of American Presidential Politics*, Oxford, New York: Oxford University Press, 1982, 16. [↑](#footnote-ref-46)
47. Ibid., 17. [↑](#footnote-ref-47)
48. William C. Kimberling, "The Electoral College," Dave Leip's Atlas of U.S. Presidential Elections, 2008, Accessed March 5, 2017, http://uselectionatlas.org/INFORMATION/INFORMATION/electcollege\_history.php. [↑](#footnote-ref-48)
49. In addition, it should be stated that the framers’ concern over the rabble can be seen in more than just how they were trying to determine how the president was to be chosen. Other examples in the U.S. Constitution include that state legislatures choose their respective two senators, until the 17th amendment, and that only a third of the senate is reelected every two years. All these systems the framers designed to ensure that a wave of populism and a majority faction could not take control of the government in one election. See Richard Patrick McCormick’s book *The Presidential Game: The Origins of American Presidential Politics* & James Madison in *Federalist Paper #10: The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection*. [↑](#footnote-ref-49)
50. William C. Kimberling, "The Electoral College," Dave Leip's Atlas of U.S. Presidential Elections, 2008, Accessed March 5, 2017, http://uselectionatlas.org/INFORMATION/INFORMATION/electcollege\_history.php. [↑](#footnote-ref-50)
51. Ibid. [↑](#footnote-ref-51)
52. Ibid. [↑](#footnote-ref-52)
53. James Madison; Gilpin, Henry D. *Papers of James Madison, Purchased by Order of Congress; Being His Correspondence and Reports of Debates during the Congress of the Confederation and His Reports of Debates in the Federal Convention; Now Published from the Original Manuscripts, Deposited in the Department of State, by Direction of the Joint Library Committee of Congress, under the Superintendence of Henry D. Gilpin*. New York, J. & H.G. Langley, Volume 2, http://heinonline.org/HOL/Page?handle=hein.cow/papjamad0001&div=1&id=&page=&collection=presidents#, pg. 768-769 [↑](#footnote-ref-53)
54. Ibid., 770. [↑](#footnote-ref-54)
55. Richard Patrick McCormick. *The Presidential Game: The Origins of American Presidential Politics*, Oxford, New York: Oxford University Press, 1982, 21-24. [↑](#footnote-ref-55)
56. Alexander Hamilton, "Federalist Number 68: The Mode of Electing the President," The Federalist Papers - Congress.gov Resources -, Accessed February 7, 2018, https://www.congress.gov/resources/display/content/The Federalist Papers#TheFederalistPapers-68. [↑](#footnote-ref-56)
57. John P. Burke, *Presidential Power: Theories and Dilemmas*, Boulder, CO: Westview Press, 2016, 38-39. [↑](#footnote-ref-57)
58. US Constitution. [↑](#footnote-ref-58)
59. US Constitution, art. 2, sec. 1, cl. 2. [↑](#footnote-ref-59)
60. The subsequent clauses articulate how the electors operated and their purpose, thus further backing this statement. [↑](#footnote-ref-60)
61. John P. Burke, *Presidential Power: Theories and Dilemmas*, Boulder, CO: Westview Press, 2016, 39. [↑](#footnote-ref-61)
62. William C. Kimberling, "The Electoral College," Dave Leip's Atlas of U.S. Presidential Elections, 2008, Accessed March 5, 2017, http://uselectionatlas.org/INFORMATION/INFORMATION/electcollege\_history.php. [↑](#footnote-ref-62)
63. John P. Burke, *Presidential Power: Theories and Dilemmas*, Boulder, CO: Westview Press, 2016, 38. [↑](#footnote-ref-63)
64. Ibid., 38. [↑](#footnote-ref-64)
65. Ibid., 39. [↑](#footnote-ref-65)
66. William C. Kimberling, "The Electoral College," Dave Leip's Atlas of U.S. Presidential Elections, 2008, Accessed March 5, 2017, http://uselectionatlas.org/INFORMATION/INFORMATION/electcollege\_history.php. [↑](#footnote-ref-66)
67. Ibid. [↑](#footnote-ref-67)
68. To be fair, the 23rd amendment did add three more electors to the Electoral College because of the District of Columbia. U.S. Constitution, 23rd amendment. [↑](#footnote-ref-68)
69. Michael Brody, 2013, "Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny under the Compact Clause," *Legislation & Policy Brief* 5, no. 1: 33, *Publisher Provided Full Text Searching File*, EBSCO*host*, 35. [↑](#footnote-ref-69)
70. McPherson v. Blacker 146 U.S. 1 (1892). https://supreme.justia.com/cases/federal/us/146/1/ [↑](#footnote-ref-70)
71. Ray v. Blair, 343 U.S. 214 (1952). https://supreme.justia.com/cases/federal/us/343/214/case.html [↑](#footnote-ref-71)
72. Ibid. [↑](#footnote-ref-72)
73. Ibid. [↑](#footnote-ref-73)
74. Ibid. [↑](#footnote-ref-74)
75. Ibid. [↑](#footnote-ref-75)
76. There were four faithless electors in Washington in the 2016 presidential election, yet only three of them appealed Washington’s faithless elector law which penalizes faithless electors with a thousand dollar fine for a deviant vote. The latest news on this part of the debate is that on December 13, 2017, Superior Court Judge Carol Murphy upheld the fines declaring that the plaintiffs could not show sufficient grounds for why the fines were unconstitutional. See Jim Camden, Jim Camden, "'Faithless' Electors $1,000 Fines Upheld," Spokesman.com, December 12, 2017, Accessed February 20, 2018, http://www.spokesman.com/stories/2017/dec/13/faithless-electors-1000-fines-upheld/. [↑](#footnote-ref-76)
77. Colo Rev. Stat. § 1-4-304. [↑](#footnote-ref-77)
78. Erica Meltzer, "Colorado Faithless Electors Lawsuit: Judge Rules State Can Compel Electors to Vote for Clinton," Denverite, December 12, 2016, Accessed April 04, 2018, https://www.denverite.com/colorado-faithless-electors-lawsuit-judge-rules-electors-must-vote-hillary-clinton-24777/. [↑](#footnote-ref-78)
79. Ibid. [↑](#footnote-ref-79)
80. *Baca et al v. Hickenlooper et al*, (D. Colo. 2016), No. 1:2016cv02986 - Document 27, https://law.justia.com/cases/federal/districtcourts/colorado/codce/1:2016cv02986/167359/27/. [↑](#footnote-ref-80)
81. See First hyperlink in article that provides the court’s ruling. Kyle, Cheney "Court: Removing 'Faithless' Electors May Be Unconstitutional," POLITICO, December 17, 2016, Accessed February 20, 2018, https://www.politico.com/story/2016/12/electors-colorado-court-appeals-232777. [↑](#footnote-ref-81)
82. See article itself. Ibid. [↑](#footnote-ref-82)
83. See First hyperlink in article that provides the court’s ruling. Ibid. pg. 12. See footnote 4 as well. [↑](#footnote-ref-83)
84. Ibid. [↑](#footnote-ref-84)
85. Corey Hutchins, "Springs Man at the Heart of Federal Lawsuit to Upend the Electoral College," Colorado Springs Independent, October 04, 2017, Accessed March 30, 2018, https://www.csindy.com/coloradosprings/springs-man-at-the-heart-of-federal-lawsuit-to-upend-the-electoral-college/Content?oid=7604815. [↑](#footnote-ref-85)
86. FairVote.org, "Faithless Electors," FairVote, Accessed February 8, 2017, http://www.fairvote.org/faithless\_electors. [↑](#footnote-ref-86)
87. Because the oath never specified that a revote would occur, Baca’s vote still counted. [↑](#footnote-ref-87)
88. Corey Hutchins, "Springs Man at the Heart of Federal Lawsuit to Upend the Electoral College," Colorado Springs Independent, October 04, 2017, Accessed March 30, 2018, https://www.csindy.com/coloradosprings/springs-man-at-the-heart-of-federal-lawsuit-to-upend-the-electoral-college/Content?oid=7604815. [↑](#footnote-ref-88)
89. Ibid. [↑](#footnote-ref-89)
90. Corey Hutchins. "Colorado Sec. of State Makes a Deal with Electoral College Members Suing Him: 'We Just Want an Answer to the Constitutional Question'," The Colorado Independent, October 26, 2017, Accessed February 20, 2018, http://www.coloradoindependent.com/167394/colorado-electoral-college-lawsuit-supreme-court. [↑](#footnote-ref-90)
91. "Equal Electors," Equal Citizens, Accessed February 20, 2018, https://equalcitizens.us/equal-electors/. [↑](#footnote-ref-91)
92. Ala. Code § 17-14-31. [↑](#footnote-ref-92)
93. FairVote.org. "Faithless Elector State Laws." FairVote. Accessed February 8, 2017. http://www.fairvote.org/faithless\_elector\_state\_laws. [↑](#footnote-ref-93)
94. N.C. Gen. Stat. § 163-212. [↑](#footnote-ref-94)
95. Okla. Stat. tit. 26, § 10-102, § 10-108. [↑](#footnote-ref-95)
96. Vt. Stat. Ann. tit. 17, § 2732. [↑](#footnote-ref-96)
97. Colo Rev. Stat. § 1-4-304. [↑](#footnote-ref-97)
98. Va. Code Ann. § 24.2-203. See lawschool.westlaw.com for 1993 version of law. [↑](#footnote-ref-98)
99. Va. Code Ann. § 24.2-203. [↑](#footnote-ref-99)
100. Although the law itself does not state this, it is probably likely to assume that Virginia made this change in response to the 2000 presidential election. [↑](#footnote-ref-100)
101. These categories distinguishable to each other by color are alluded to in the reminder of the paper in parentheses for clarification and reference. [↑](#footnote-ref-101)
102. The map was also cross-referenced through research in the WestLaw Database. NASS, "State Laws on Presidential Electors," National Association of Secretaries of State, November 2016, Accessed February 28, 2018, http://www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf. [↑](#footnote-ref-102)
103. It is incredibly important to note that Figure 1 is as of April 19,2018, no longer accurate. Through working on this project, the author noticed that this map was not accurate and contacted Fair Vote to have the map corrected. The most up to date version of this map is on FairVote’s website (http://www.fairvote.org/faithless\_elector\_state\_laws). On the new map, Indiana, Michigan, and Utah are labeled as blue states whereas above they are categorized as gray, purple, and purple states respectively. All data used for this project was current as of the 2016 presidential election. Therefore, although Indiana is listed as a blue state in the updated map, the data in the following Table 1 & Table 2 shows it as a gray state because Indiana passed the UFPEA in 2017. Currently as it is known, Indiana is the only state to have changed its faithless elector laws since the 2016 presidential election. This will be discussed more later in the paper. As this project continues, the author of this paper is in constant communication with Fair Vote to keep this map updated as new data becomes available. [↑](#footnote-ref-103)
104. "Historical Presidential Election Map Timeline," 270ToWin, Accessed February 8, 2017, http://www.270towin.com/historical-presidential-elections/timeline/. [↑](#footnote-ref-104)
105. See lawschool.westlaw.com. [↑](#footnote-ref-105)
106. For clarification, in both Table 1 and Table 2, the gray states are categorized as “No Law,” purple states “No Penalty (Law)”, blue states “No Penalty, Vote Canceled,” orange states “Penalty,” and red states “Penalty, Vote Canceled.” Each type of faithless elector law in the following tables are also color coded. [↑](#footnote-ref-106)
107. To be exact, North Carolina has voted Democrat one time in 2008 so its data set is (1,9). [↑](#footnote-ref-107)
108. Specifically, Nevada has gone from 1980-2016: red, red, red, blue, blue, red, red, blue, blue, blue. [↑](#footnote-ref-108)
109. As a side, if this discussion included Indiana as the seventh blue state its data set is (1,9). Even with this data, the argument still holds true as there are still states that are heavily republican and heavily democratic who have the same core ideas of a blue state. [↑](#footnote-ref-109)
110. To be fair, if more states entered the Union, this would also increase the data size. However, the likelihood of this happing anything soon is arguably incredibly unlikely. [↑](#footnote-ref-110)
111. The electors from Maine and Nebraska should be made notable exceptions with their district system. In 2008, Nebraska had one of its electors pledged to vote democrat while in 2016, Maine had one of its electors pledged to vote republican. For this study, the states were still determined to be counted as democratic or republican entirely in the data sets. However, this difference is illustrated in that in Table 2 there are two purple rectangles. [↑](#footnote-ref-111)
112. This idea would be a good one for future study as it would be interesting to analyze how these laws changed when substantial political realignment occurred in U.S. history. [↑](#footnote-ref-112)
113. Some state laws will specifically say what the pledge is while others articulate that a pledge must be taken yet provide no details as to what the pledge’s words are. NASS, "State Laws on Presidential Electors," National Association of Secretaries of State, November 2016, Accessed February 28, 2018, http://www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf. [↑](#footnote-ref-113)
114. See footnote 101. [↑](#footnote-ref-114)
115. Mich. Comp. Laws § 168.47. [↑](#footnote-ref-115)
116. Utah Code Ann. § 20A-13-304. [↑](#footnote-ref-116)
117. Uniform Law Commission, "Faithful Presidential Electors Act," Uniform Law Commission, Accessed March 20, 2017, http://www.uniformlaws.org/Shared/Docs/faithful%20presidential%20electors/Northwestern%20Reporter%20Uniform%20Faithful%20Presidential%20Electors%20Act%20article%20111814.pdf. [↑](#footnote-ref-117)
118. Uniform Law Commission, "Faithful Presidential Electors Act," Uniform Law Commission, Accessed March 20, 2017, http://www.uniformlaws.org/Act.aspx?title=Faithful Presidential Electors Act. [↑](#footnote-ref-118)
119. See lawschool.westlaw.com. [↑](#footnote-ref-119)
120. Ibid., ii. [↑](#footnote-ref-120)
121. FairVote.org. "Faithless Elector State Laws." FairVote. Accessed February 8, 2017. http://www.fairvote.org/faithless\_elector\_state\_laws. [↑](#footnote-ref-121)
122. Again Figure 1 does not list Indiana as a blue state as it passed the UFPEA in 2017. [↑](#footnote-ref-122)
123. Uniform Law Commission, "Faithful Presidential Electors Act," Uniform Law Commission, Accessed March 20, 2017, http://www.uniformlaws.org/Act.aspx?title=Faithful Presidential Electors Act, 7. [↑](#footnote-ref-123)
124. Ibid., 1. [↑](#footnote-ref-124)
125. Bennett, Robert W. "The Uniform Faithful Presidential Electors Act." *Northwestern Law Reporter*, Fall 2014. Accessed April 10, 2017. http://www.uniformlaws.org/Shared/Docs/faithful%20presidential%20electors/Northwestern%20Reporter%20Uniform%20Faithful%20Presidential%20Electors%20Act%20article%20111814.pdf, 1. [↑](#footnote-ref-125)
126. The Bill is also referred to as “The Agreement Among the States to Elect the President by National Popular Vote,” the National Popular Vote Interstate Compact, and the National Popular Vote Bill. To be consistent, this paper uses the National Popular Vote Compact (NPVC). [↑](#footnote-ref-126)
127. National Popular Vote." National Popular Vote. March 29, 2017. Accessed April 8, 2017. http://www.nationalpopularvote.com/. [↑](#footnote-ref-127)
128. It should be noted here that if this bill took effect, it would completely undermine the original idea of the Electoral College to prevent the presidency from becoming elected by the national popular vote. This problem is discussed in the following pages. [↑](#footnote-ref-128)
129. National Popular Vote." National Popular Vote. March 29, 2017. Accessed April 8, 2017. http://www.nationalpopularvote.com/. See *Status of National Popular Vote Bill in Each State*. [↑](#footnote-ref-129)
130. Ibid. [↑](#footnote-ref-130)
131. "National Popular Vote," National Popular Vote, March 29, 2017, Accessed April 8, 2017. http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf, 259. [↑](#footnote-ref-131)
132. US Constitution, art. 2, sec. 1, cl. 2. [↑](#footnote-ref-132)
133. Michael Brody, "Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny under the Compact Clause," *Legislation & Policy Brief* 5, no. 1: 33, *Publisher Provided Full Text Searching File*, EBSCO*host* 35. [↑](#footnote-ref-133)
134. Michael J. McGee, 2013, "Avoiding A Corrupt Bargain: Ensuring Congress is Kept Out of a Contingent Presidential Election," *University Of Louisville Law Review* 52, no. 2: 345-378. *Academic Search Complete*, EBSCO*host*. 349. [↑](#footnote-ref-134)
135. Norman R. Williams, "Why the National Popular Vote Compact Is Unconstitutional," *Brigham Young University Law Review* 2012, no. 5: 1523, *MasterFILE Premier*, EBSCO*host*. 1528 [↑](#footnote-ref-135)
136. US Constitution, art. 1, sec. 10, cl. 3. [↑](#footnote-ref-136)
137. Michael Brody, 2013, "Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny under the Compact Clause," *Legislation & Policy Brief* 5, no. 1: 33, *Publisher Provided Full Text Searching File*, EBSCO*host*, 45-46. [↑](#footnote-ref-137)
138. "Equal Electors," Equal Citizens, Accessed February 20, 2018, https://equalcitizens.us/equal-electors/. [↑](#footnote-ref-138)
139. US Constitution, art. 2, sec. 1, cl. 2 & US Constitution. [↑](#footnote-ref-139)
140. Uniform Law Commission, "Faithful Presidential Electors Act," Uniform Law Commission, Accessed March 20, 2017, http://www.uniformlaws.org/Act.aspx?title=Faithful Presidential Electors Act. & "National Popular Vote." National Popular Vote. March 29, 2017. Accessed April 8, 2017. http://www.nationalpopularvote.com/. [↑](#footnote-ref-140)
141. Uniform Law Commission, "Faithful Presidential Electors Act," Uniform Law Commission, Accessed March 20, 2017, http://www.uniformlaws.org/Act.aspx?title=Faithful Presidential Electors Act. [↑](#footnote-ref-141)
142. Corey Hutchins, "Colorado Sec. of State Makes a Deal with Electoral College Members Suing Him: 'We Just Want an Answer to the Constitutional Question'," The Colorado Independent, October 26, 2017, Accessed February 20, 2018, http://www.coloradoindependent.com/167394/colorado-electoral-college-lawsuit-supreme-court. [↑](#footnote-ref-142)