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Winter 2020

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Liquidating Elector Discretion

*Rebecca Green**

In Chiafalo et al. v. Washington, *the U.S. Supreme Court determined that states may constitutionally remove or punish faithless electors. In support of its holding, the Court cited a 2014 case called* National Labor Relations Board v. Noel Canning, *which blessed a form of constitutional interpretation that looks to settled practice (or "liquidation," as James Madison called it) to resolve constitutional ambiguity. The Court agreed with petitioners that electors following the majority will of voters in their state is settled practice. This Article engages this assertion, suggesting that the question is more nuanced than the Court allowed. It examines Electoral College norms and practice finding support for the conclusion that, while its exercise is rare, elector discretion was—at least until* Chiafalo*—the understood and accepted norm.*

INTRODUCTION

The winner of the popular vote failed to win the White House in 2016. As this reality set in, reports of foreign interference swirled.[1] To a greater

* Kelly Professor for Teaching Excellence, William & Mary Law School, Co-Director, Election Law Program. The author would like to thank Professors Allie Larsen and William Baude for early input and William & Mary Law School Election Law Fellows Austin Plier '20, Camden Kelliher '21, Lizzy Harte '21, Kristin Palmason '21, Cody McCracken '22 and Elizabeth DePatie '22 for their fantastic research help. All errors are solely my own.

[1] *See, e.g.*, Jon Campbell, *Stewart-Cousins Wants Intelligence Briefing for Electors*, J. NEWS (Dec. 13, 2016, 3:30 PM), https://www.lohud.com/story/news/politics/politics-on-the-hudson/2016/12/13/stewart-cousins-intelligence/95385846/ [https://perma.cc/RQ5V-N7ZY] (citing presidential elector seeking more information about foreign interference); Gregory Jarrin, *Electors Should Switch to Clinton*, ARIZ. DAILY SUN (Dec. 18, 2016), https://azdailysun.com/news/opinion/mailbag/electors-should-switch-to-clinton/article_152d836f-ab45-556a-b468-a227655d9df2.html [https://perma.cc/UX4R-TYYH] (citing foreign interference as a reason electors should defect); Matt O'Brien, *Elector Seeks Intelligence Report on Russian Interference*, AP NEWS (Dec. 13, 2016), https://apnews.com/e33e8d7f06a7487fad

degree than any time in U.S. history, electors faced a deluge of public pressure to vote for someone other than the popular vote winner in their state.[2] Seven electors ultimately did so.[3] These defections did not impact the outcome. But the tumult succeeded in raising the profile of the faithless elector question—so much so that whether states may constitutionally prohibit elector defection went before the U.S. Supreme Court in the spring of 2020.[4] Resolution of this question was of critical import as the nation careened towards what looked to be another nail-biter in November.

It is hard to argue that the Framers intended anything but elector discretion in the original design.[5] But those who believe that states can constitutionally remove or penalize defecting electors point to the quick devolution of electors to the role of mere party lackeys, particularly after passage of the Twelfth Amendment.[6] In common practice, goes the argument, electors quickly began acting as mere "ministerial agents" of state political parties—not conscience-following "voters"—soon after the Founding to present.[7]

This Article draws on James Madison's analytic frame of "constitutional liquidation," blessed by the U.S. Supreme Court in *National Labor Relations Board v. Noel Canning*,[8] to challenge this narrative. When the constitution is ambiguous, Madison counseled, resolving it "might require a regular course of practice to liquidate and settle [its] meaning."[9] Liquidation requires examining what institutions, relevant actors, and the general public accept as settled practice with respect to indeterminate constitutional text. Madison believed that this analysis should inform courts charged with interpreting constitutional commands.

In resolving the case, the Court referenced the *Noel Canning* frame. Justice Kagan drew on the concept of "settled practice" to argue that the elector's role as ministerial has long been the norm in the United States.

01e0c0cf4979be [https://perma.cc/LE4X-VJ5Y] (reporting on Rhode Island elector seeking information about foreign interference in election).

[2] *See infra* Section III.B.

[3] *See Faithless Electors,* FAIRVOTE, https://www.fairvote.org/faithless_electors [https://perma.cc/7F9W-Q8TF]. According to FairVote's analysis, eight Democrats and two Republicans tried to cast faithless votes in 2016; of those ten, three were unable to because they either were forced to change their vote to the nominee (David Bright of Maine switched back from Bernie Sanders to Hillary Clinton after his Sanders vote was ruled "out of order") or because they were removed and replaced with someone who instead cast a vote for Clinton (Muhammad Abdurrahman of Minnesota and Micheal Baca of Colorado). *See id.*

[4] Chiafalo v. Washington, 140 S. Ct. 2316 (2020).

[5] *See* THE FEDERALIST NO. 68, at 354 (Alexander Hamilton) (Gideon ed., 2001); Stephen M. Sheppard, *A Case for the Electoral College and for Its Faithless Elector*, 2015 WIS. L. REV. ONLINE 1, 3–5 (2015) (noting that the constitutional texts clearly envision discretion).

[6] *See generally* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE (2020) (taking a deep dive into debates surrounding passage of the Twelfth Amendment, shedding new light into its meaning and impact, arguing that it reflects a majoritarian consensus).

[7] Keith Whittington uses the "agent" versus "delegate" frame. *See* Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 910 (2017).

[8] 573 U.S. 513 (2014).

[9] Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 502 (David B. Mattern et al. eds., 2009).

Directly refuting appeals to *Noel Canning* for the opposite proposition, she writes,

> Electors have only rarely exercised discretion in casting their ballots for President. From the first, States sent them to the Electoral College—as today [the state of] Washington does—to vote for pre-selected candidates, rather than to use their own judgment. And electors (or at any rate, almost all of them) rapidly settled into that non-discretionary role.[10]

This discussion drills down on Justice Kagan's claim, examining Electoral College norms and practice by looking at state statutes, procedures, and voting at meetings of electors historically and today. While it is true that the vast, vast majority of state electors have accepted the command of popular will in their states and that electors voting according to popular will is widely assumed, a counternarrative exists. Norms of Electoral College design, history, and practice in the states suggest that elector *discretion* is settled and accepted practice. The discussion below lays out this argument and addresses its key shortcomings as well as difficulties in applying a liquidation analysis to the question of elector discretion.

This Article does not pretend to answer comprehensively whether history and practice support a counternarrative of "settled" elector discretion. Rather it challenges the *Chiafalo* Court's unblinking assumption that the *Noel Canning* frame dictated the conclusion it reached.

I. *Norms and Constitutional Interpretation*

What is the "liquidation" analysis and what does employing it entail? Can it be applied to resolving ambiguities about elector discretion? This section walks through these questions.

A. The Noel Canning Frame

In *Noel Canning*, a 2014 U.S. Supreme Court case reviewing presidential recess appointment powers, the Court faced the common conundrum of resolving competing constitutional claims. The case called into question the validity of President Obama's recess appointments to the National Labor Relations Board without Senate consent.[11] In its analysis, the Court attached significant weight to historical practice, citing *McCulloch v. Maryland*'s direction to examine it.[12] With this frame in mind, Justice Breyer wrote of recess appointments:

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[10] *Supra* note 4 at 2326.

[11] *See Noel Canning,* 573 U.S. at 520 (citing recess appointments as invalidating appointment of three of five members of the National Labor Relations Board).

[12] *See id.* at 524 ("[A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people,

> Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.[13]

The Court explored working arrangements and common acceptance in practice over the course of this country's history to address the scope of powers involved. Although the Court did not invalidate recess appointments on this basis,[14] the decision provided authority for the idea that "the longstanding 'practice of the government' can inform [our] determination of 'what the law is.'"[15]

Since *Noel Canning*, legal scholars have expounded on this method of constitutional interpretation.[16] Harvard Law School Professor Richard Fallon explored this idea that "precedent" should be understood to reach further than judicial pronouncements to include government practices and procedures that gain common acceptance.[17] As an example, Professor Fallon points to the Article II requirement that the President must make treaties and appoint various officers only with "advice and consent" of the Senate. As Fallon describes, President Washington soon gave up the practice of appear-

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are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." (quoting McCulloch v. Maryland, 17 U.S. 316, 401 (1819))); *see also id.* ("[A] practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929))).

[13] *Id.* at 526.

[14] The Court instead relied on technical distinctions not relevant for present purposes. *See id.* at 552 (citing Senate rules by which the Senate may retain power to conduct business during pro forma sessions).

[15] *Id.* at 514.

[16] In addition to Professors Richard Fallon and William Baude, discussed in this Section, see, e.g., Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015); Paul G. Ream, *Liquidation of Constitutional Meaning Through Use*, 66 DUKE L.J. 1645 (2017); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018).

[17] *See* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1773 (2015) ("[J]ames Madison maintained that [constitutional] meaning would need to be 'liquidated' or settled by precedent and practice."); *see also* THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained *by a series of particular discussions and adjudications*." (emphasis added)). Professor William Baude notes that The Federalist No. 37 is only one source of Madison's use of the term. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9 (2019) ("While Federalist No. 37 may mark the beginning of Madison's discussion of liquidation, he continued to discuss and elaborate on the concept over the course of his life—in public and private, in the abstract and concretely.").

ing in person before the Senate to seek such advice and consent;[18] the practice of subsequent Presidents reinforced that "advice and consent" need not entail physical presence at the Senate.[19]

Madison referred to the idea of resolving constitutional ambiguity by looking to settled practice as "liquidation."[20] Professor Fallon wisely notes "liquidation" may not serve up easy answers. How fixed must "settled practice" be to establish precedential value? Must the settled practice derive from norms developed soon after the Founding? Does settled practice arrived upon long after the Founding carry less weight or more?[21] Especially with respect to the resolving ambiguities about the role of presidential electors, what if settled practices in the states are not uniform either between states or over time?

University of Chicago Law School Professor William Baude, in a 2019 article called *Constitutional Liquidation*, addresses some of these questions by analyzing Madison's writings.[22] Professor Baude identifies three distinct elements of Madison's liquidation analysis: (1) the presence of a discrete textual indeterminacy; (2) a course of deliberate practice (i.e., repeated decisions by institutional actors and authorities that reflected constitutional reasoning);[23] and (3) actual settlement of the ambiguity revealed by institutional and public acquiescence to the practice in question.[24]

Can liquidation help resolve whether the Constitution requires elector discretion? The next section discusses complications of attempting it.

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[18] *See* Fallon, *supra* note 16, at 1773 ("Today we often equate precedent exclusively with judicial precedent. But the term reaches more broadly. As Madison foresaw, historical evidence of settlement through nonjudicial practice sometimes figures importantly in constitutional law . . . In an early instance, President George Washington appeared before the Senate to seek its advice in person, but the occasion went badly, and Washington never repeated the exercise.").

[19] *See* Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 259–60 (2012) ("During the nineteenth century, Presidents would occasionally consult formally with the Senate prior to negotiating or signing treaties. But Presidents rarely consulted formally with the Senate, and the Senate rarely sought to weigh in unsolicited, at the negotiation stage. As Edwin Corwin later observed, a change in the 'working constitution' had been effected, and by 1936, Justice Sutherland would state for the Court in sweeping dicta that, although the President 'makes treaties with the advice and consent of the Senate . . . he alone negotiates [and] [i]nto the field of negotiation the Senate cannot intrude . . .'").

[20] *See* Fallon, *supra* note 16, at 1774–75. The term "liquidate" may seem strange to modern ears for this meaning, but Professor Baude explains that starting in the seventeenth century, the term was used to mean "clarify" or "settle." Baude, *supra* note 16, at 12 ("Since at least the seventeenth century, 'liquidate' has been used to mean '[t]o make clear or plain (something obscure or confused); to render unambiguous; to settle (differences, disputes).'" (quoting *Liquidate*, OXFORD ENGLISH DICTIONARY (2d ed. 1989))).

[21] Professor Baude answers this with a definitive no. *See infra* Section III.B.

[22] *See* Baude, *supra* note 16, at 13–18 (building out liquidation theory as consisting of three factors: indeterminacy, a course of deliberate practice, and settlement).

[23] *See id.* at 16 (2019); *see also infra* note 126 and accompanying text (discussing the degree of uniformity liquidation requires).

[24] *See* Baude, *supra* note 16, at 16. In writing about liquidation, Baude points out that it is a particularly democratic form of constitutional interpretation. *See id.* at 46 ("[Liquidation] attempts to entrench traditions that have been found acceptable by many groups of people . . . ").

B. Liquidating "Settled Practice" and the Electoral College

U.S. elections are enormously complex in large part due to their decentralized nature. The U.S. presidential election is not one single federal tally, but rather fifty-one separate state popular elections followed by fifty-one separate Electoral College votes.[25] State election rules and practices governing both the popular vote and Electoral College operation vary considerably. Wide divergence between state election practices and procedures therefore seems to render the task of identifying "settled practice" dead in the water. Few would use the words "settled practice" and "U.S. elections" in a single sentence. It is one thing to liquidate constitutional meaning of a narrowly circumscribed congressional or executive act. How to liquidate constitutional meaning when fifty-one state institutions are in play?

At least two factors suggest a liquidation analysis is possible. First, unlike elections for other offices, the narrow question of elector discretion is comparatively straightforward. Popular elections in the states involve a huge number of moving parts that have created complexities and vast divergences between how states run elections. How do candidates qualify for the ballot? Where are polling places located and how many must there be? What type of identification must voters present? Who may vote by early and absentee ballot? These and myriad other variables vastly complicate and "unsettle" election practice as among the states. The question of Presidential elector discretion implicates far fewer variables.[26] Settled practice of elector balloting and institutional and public acquiescence to those norms is therefore discernable.[27]

Second, the presence of existing claims about settled practice demonstrates that such consensus is arguably possible. A dominant narrative already exists about what constitutes settled practice when it comes to elector discretion. As discussed in greater detail below, scholars already argue that settled practice exists in the form of wide acceptance that the popular will of voters in states dictates elector votes.[28] Even more convincingly, petitioners to the Supreme Court arguing against elector discretion cite the *Noel Canning* frame in support of their position.[29] The task here is to interrogate this assertion.

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[25] *See* U.S. CONST. amend. XXIII, § 1 (adopted in 1961, granting the District of Columbia a number of presidential electors equal to that of the least populous state).

[26] Article II, Section 1 of the U.S. Constitution mandates the required number of electors in each State, and the Twelfth Amendment imposes structure on electoral college voting not likewise spelled out for the popular vote (which is instead delegated to state legislatures). *See* U.S. CONST. art. I, § 2; *id.* amend. XXII. Furthermore, the only ambiguity raised with respect to elector discretion is the narrow issue of whether the phrase, "[t]he Electors shall meet in their respective states and vote by ballot for President and Vice-President," intends that this vote belongs to the elector as an exercise of conscience or not. *Id.* amend XII.

[27] Admittedly, state practice varies widely in many respects as between the states. *See* discussion *infra* Sections III.A and III.B.

[28] *See* discussion *infra* Section IV.A.

[29] *See* Petition for Writ of Certiorari, Colo. Dep't of State v. Baca, 140 S. Ct. 2316 (2020) (No. 19-518), 2019 WL 5390121, at *30. ("This well-established post-enactment understand-

From this vantage, in examining settled assumptions and acceptance of the elector role, what conclusions emerge? The following section applies Professor Baude's liquidation framework with an eye towards whether it might support reading the Constitution to require elector discretion.

II. Liquidation and Elector Discretion

Using Professor Baude's three-part frame, the discussion in this section takes each in turn. It first examines the specific textual indeterminacy that renders the extent of elector discretion uncertain. It then reviews whether it is possible to identify a "course of deliberate practice" with respect to electors exercising independent judgment. And finally, it assesses the degree of "settlement" of institutional actors and popular acquiescence to the exercise of elector discretion.[30]

A. Indeterminacy

The first prong of Professor Baude's analysis is easily met. According to the text of the Twelfth Amendment:

> [t]he electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and all persons voted for as Vice-President, and the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate.[31]

The Constitution thereby directs electors to "vote," but does not settle whether electors must be permitted to exercise discretion casting their ballots. Federal statute adds little meat to the bones on this question, mandating that "electors of President and Vice President of each State shall meet

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ing by the public [that electors have no discretion], coupled with longstanding historical practice [that electors have no discretion], is entitled to no less weight than that placed on the pre-enactment statements by some Framers relied on by Respondents."); *see also Noel Canning*, 573 U.S. at 524.

[30] Baude suggests other forms of acquiescence might exist. *See id.* at 18–19 ("The key idea of acquiescence was that the losers in some sense gave up. This might mean bipartisan acceptance. For instance, Madison described the requisite practice as 'that which has the uniform sanction of successive Legislative bodies, through a period of years and under the varied ascendancy of parties.' Or it might be institutional. For instance, we might look for whether other branches had acquiesced in a particular branch's interpretation, as opposed to that branch simply reasserting its own contested views. The strongest cases of acquiescence appeared to combine the two." (citations omitted)).

[31] U.S. Const. amend. XII.

and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each state as the legislature of such State shall direct,"[32] and that "electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution."[33]

Nothing on the face of either the Constitution or federal statute resolves the question of whether a state may prohibit electors from exercising discretion or whether states must honor that choice when they do.[34] Aspects of this design have been litigated. For example, the Supreme Court has held that political parties may constitutionally require electors to take pledges to vote for a particular candidate.[35] But the Supreme Court has not resolved the ultimate question of whether states may punish or remove electors who violate that pledge.

Some have argued that use of the words "ballot," "vote," and "elector" in the text of the Constitution and federal statutes resolves the question by implying an exercise of discretion.[36] As Robert Bennett describes, the Framers' choice of these words, "naturally conjures up . . . groups of electors making genuine choices and then recording those choices on their 'ballots.'"[37] The Tenth Circuit agreed. It concluded that contemporaneous understandings at the time the Framers wrote those words "have a common theme: they all imply the right to make a choice or voice an individual opinion. We therefore agree . . . that the use of these terms supports a determination that the electors, once appointed, are free to vote as they choose."[38] The Washington Supreme Court disagreed, finding that "nothing in [the text] of Article II, Section 1 suggests that electors have discretion to cast their votes

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[32] 3 U.S.C. § 7 (2018).

[33] *Id.* § 8.

[34] Some commentators suggest that in fact the text of the Constitution leaves no ambiguity as to elector discretion. Writes Keith Whittington, "[t]he constitutional provisions relating to the appointment of the presidential electors and the casting of the electoral ballots for president are not especially vague or open-textured. As a matter of straightforward textual interpretation, the Constitution would seem to leave the presidential electors unbound in their decision-making." Whittington, *supra* note 7, at 920.

[35] Ray v. Blair, 343 U.S. 214, 231 (1952). Notably, the Court itself recognized longstanding acceptance of the practice of electors voting according to the popular vote. *See id.* at 228–29 ("History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the long-standing practice."). Note, however, experts in the history of government can both acknowledge an expectation that electors will support a nominee *and* that electors in the end have the discretion not to.

[36] *See, e.g.*, ROBERT BENNETT, TAMING THE ELECTORAL COLLEGE 104 (2006) ("Use of the word 'ballot' is often cited as strong textual support for elector discretion.") (citing, *inter alia*, NEIL R. PEIRCE, THE PEOPLE'S PRESIDENT 129–30 (1968)); William Josephson and Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 172 (1996) (discussing whether the use of the word "ballot" implies that electors cast secret ballots and stating that "[i]n all other election contexts, the Framers used the words 'choose' or 'elect,' which do not imply secrecy" and that "[p]resumably, the Framers intended the use of the word 'ballot' to be equivalent to 'secret ballot").

[37] BENNETT, *supra* note 35, at 104.

[38] Baca v. Colorado Dep't of State, 935 F.3d 887, 945 (10th Cir. 2019).

without limitation or restriction by the state legislature."[39] The Washington Supreme Court chose not to read meaning into the use of those words. These divergent interpretations amply satisfy the indeterminacy prong.[40]

B. Course of Deliberate Practice

Professor Baude's second prong requires an analysis of the "course of practice" in elector balloting.[41] In this analysis, should founding-era practice be accorded more weight than modern day? According to Baude, "privileging early practice through liquidation is tempting but wrong."[42] He argues instead that recent practice is more relevant to the liquidation analysis.[43] With an eye towards more recent practice, this section will examine this question from four angles: first, the frequency of faithless elector votes; second, the geography of defecting electors; third, Electoral College ballot design; and fourth the degree of elector accountability. In each instance, practices in the states offer support to the idea that elector discretion is the accepted default.

First, electors exercising discretion has become more not less common. The Constitution delegates to state legislatures the power to appoint electors.[44] When the Electoral College began functioning in presidential elections starting in 1788, the ten participating state legislatures selected electors

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[39] *In re* Guerra, 441 P.3d 807, 814 (Wash. 2019), *cert. granted sub nom.* Chiafalo v. Washington, 140 S. Ct. 918 (2020) (No. 19-465). The Washington Supreme Court quoted *Ray v. Blair*'s statement that "[i]t is true that the Amendment says the electors shall vote by ballot . . . [but] it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself." *Id.* at 816 (quoting *Ray*, 343 U.S at 228). The Washington Supreme Court concluded "*Ray*'s holding rests on a rejection of [the] position that the Twelfth Amendment demands absolute freedom for presidential electors." *Id.*

[40] Justice Kagan dismissed this argument in Chiafalo: ". . .[T]hose words need not always connote independent choice. Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he "votes" or fills in a "ballot." In those cases, the choice is in someone else's hands, but the words still apply because they can signify a mechanical act. Chiafalo v. Washington, *supra* note 4 at 2325.

[41] Madison used many formulations to describe this idea, which Professor Baude describes as a "regular course of practice"; a "course of practice of sufficient uniformity and duration"; a "continued course of practical sanctions"; "reiterated sanctions . . . thro' a long period of time"; a "settled practice, enlightened by occurring cases"; a "course of authoritative, deliberate and continued decisions"; or a "course of authoritative expositions sufficiently deliberate, uniform, and settled." Baude, *supra* note 17, at 16–17.

[42] *Id.* at 59.

[43] *See id.* at 54 ("Suppose that for decades, a course of practice seemed to confirm one view and to represent a liquidated constitutional settlement. But later, somehow, a contrary practice took over. This new contrary practice was itself debated, but then became liquidated by a similar course of practice. What should the modern interpreter do? The answer . . . is to follow the *later* practice, not to treat the first practice as permanent and inviolate. Under both historical and modern doctrines of precedent, it was and is generally accepted that later precedent, once established, is controlling.").

[44] *See* U.S. CONST. art. II, §1, cl. 2 ("Each state shall appoint in such a Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress . . .").

directly without popular input.[45] By 1836, almost all states had shifted to models in which the popular vote directed elector voting.[46] The number of "faithless electors" over the course of U.S. history is quite small relative to the total number of faithful electors since this country's first presidential election: 165 electors have cast their vote for someone other than the candidate with the most votes in their state (90 for President and 75 for Vice President).[47] Seventy-one of those electors defected because the candidate chosen by popular vote in their state died before the Electoral College met (sixty-three for President and eight for Vice President).[48] The remaining exercised discretion to vote for someone other than the popular vote winner in their state. Even accounting for defecting votes due to the death of a candidate, electors have exercised independent discretion to vote for someone other than a ministerial role would dictate dozens of times in U.S. history.

Important for present purposes, elector discretion can be both rare and settled practice. As an empirical matter, the vast majority of electors casting their ballot for the winner of the popular vote in their state may seem to resolve the "deliberate practice" question.[49] But this conclusion misses a key aspect of Electoral College voting: by design, elector defection is *meant* to happen very rarely.[50] Electoral College design intended electors whose discretion and independence inspired the confidence of the voters who elected them,[51] yet the practice of popularly electing members of the Electoral College as surrogates for a presidential candidate quickly developed such that an elector's decision to defect from the will of voters was widely viewed as political suicide.[52] The result of this design and practice is that instances of elector discretion are atypical—i.e., that in the regular course electors will choose to follow popular will in their states unless extraordinary circumstances de-

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[45] *See* FOLEY, *supra* note 6, at 17.

[46] *See* TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE ch. 2 (2012).

[47] *See Faithless Electors*, *supra* note 3.

[48] *Id.*

[49] Indeed, in 1872, electors pledged to Horace Greeley stuck with him even though "by the time of the Electoral College vote, Greeley was dead and in his coffin." Ronald D. Rotunda, *The Aftermath of Thornton*, 13 CONST. COMMENT 201, 204 (1996).

[50] In practice, "exceptionally close elections—those that yield ballot-counting disputes—are relatively infrequent." EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTION IN THE UNITED STATES 17 (2016).

[51] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1451 (1833) ("A small number of persons, selected by their fellow-citizens from the general mass for this special object, would be most likely to possess the information and discernment and independence essential for the proper discharge of the duty.").

[52] *See* 1 THOMAS HART BENTON, THIRTY YEARS' VIEW 37 (New York, D. Appleton & Co. 1854) (claiming that faithless electors "would be attended with infamy, and with every penalty which public indignation could inflict"); 1 FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 192 (Philadelphia, Lippencott, Grambo, & Co. 1853) (saying of a faithless elector, "his political character was gone for life"); 3 STORY, *supra* note 49, § 1457 ("It is notorious that the electors are now chosen wholly with reference to particular candidates, and are silently pledged to vote for them . . . [A]n exercise of an independent judgment would be treated as a political usurpation, dishonourable to the individual . . .").

mand otherwise,[53] such that an elector would sacrifice political life and reputation to cast a faithless vote for the perceived good of the nation.[54]

This design has borne out in practice. Only rarely have electors chosen to buck the popular vote.[55] They have done so for discrete reasons. To cite a few modern examples, in 1956, W.F. Turner of Alabama voted for Walter E. Jones instead of the Democratic popular vote winner he was picked to vote for, Adlai Stevenson.[56] On November 9, 1960, an attorney in Montgomery, Alabama named R. Lea Harris wrote to every presidential elector suggesting a plan to prevent Kennedy from winning a majority of Electoral College votes.[57] Persuaded by Harris' plea, Henry Irwin, a Republican elector in Oklahoma, sent a telegram to 218 Republican electors around the country urging them to defect as well.[58] Unsuccessful in getting anyone else to join him, Irwin did ultimately deny Nixon his Electoral College vote, instead voting for two conservative senators for President and Vice President: Harry F. Byrd of Virginia and Barry Goldwater of Arizona.[59] In 1988, a West

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[53] As Keith Whittington describes, "[t]he Electoral College is sporadically interesting. It is perhaps not as obscure of a constitutional provision as, say, the Emoluments clause. But most of the time it slumbers in relative obscurity." Whittington, *supra* note 7, at 904.

[54] *Id.* ("It is perhaps unsurprising that the Electoral College will attract more comment and criticism when the country is highly polarized, geographically sorted to an unusual degree, and closely divided. It is in that political environment that the small effects of an electoral institution's design are likely to be noticed and taken as significant."); *see also* BENNETT, *supra* note 35, at 98 (discussing some of the reasons why faithless elector votes are rare).

[55] It should be noted that in addition to the dozens of faithless electors who have cast successful votes at odds with the will of voters, there are unknown others who attempted to cast a faithless vote when their state Electoral College met, but were immediately replaced without formal record of their attempt. For example, in 2016, a Minnesota elector attempted to cast a vote for someone other than Hillary Clinton, who won the state's popular vote, and upon attempting to do so was immediately replaced by an alternate who would vote for Clinton. *See* Michael McIntee, *Minnesota Electors Cast Presidential Ballots in Electoral College*, YOUTUBE (Dec. 19, 2016), https://youtu.be/cLq1DE_blic?t=3685 [https://perma.cc/X9LP-ZDRK], (timestamp 101:25 to 1:06:40). As this example illustrates, we cannot know how many electors attempted to defect but were summarily removed without record of their doing so.

[56] *See* ROSS, *supra* note 44, at 117. Why? Apparently, Turner's preferred candidate was formerly a circuit court judge from his hometown. *See* GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 57 (3d ed. 2019).

[57] *See* 109 CONG. REC. 2,440 (1963). The Congressional Record notes that Irwin and Harris "bombarded electors with literature urging them to cast 'free votes' as is their constitutional right and duty." *Id.*

[58] *See Nomination and Election of President and Vice President and Qualifications for Voting: Hearing on S.J Res. 1, S.J. Res. 2, S.J. Res. 4, S.J. Res. 9, S.J. Res. 12, S.J. Res. 16, S.J. Res 17, S.J. Res 23, S.J. Res. 26, S.J. Res. 28, S.J. Res. 48, S.J. Res. 96, S.J. Res. 1-2, S.J. Res. 113, and S.J. Res. 114, Proposing Amendments of the Constitution Relating to the Method of Nomination and Election of the President and Vice President, and S.J. Res. 14, S.J. Res. 20, S.J. Res. 54, S.J. Res. 58, S.J. Res. 67, S.J. Res. 71, S.J. Res. 81, and S.J. Res. 90, Proposing Amendment to the Constitution Relating to Qualifications for Voting Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 87th Cong. 610 (1961) (testimony of Henry D. Irwin, Bartlesville, Okla.) ("I am Oklahoma Republican elector. The Republican electors cannot deny the election to Kennedy. Sufficient conservative Democratic electors available to deny labor Socialist nominee. Would you consider Byrd President, Goldwater Vice President, or wire any acceptable substitute. All replies strict confidence.")

[59] *See id.* at 563. For a longer description of the history of faithless electors and particularly the rise in the phenomenon in the mid-twentieth century in the name of efforts to resist

Virginia elector, surprised by the degree of discretion afforded her, decided to cast a defecting vote to draw attention to the fact of elector discretion.[60] In 2000, a District of Columbia elector defected to protest lack of congressional representation for the District.[61]

The 2016 presidential election provides a clear example of defections arising as a consequence of extraordinary circumstances—a candidate many believed unfit for office, a mismatch between the popular vote total and Electoral College winner by a significant margin, and evidence of foreign interference. These factors produced an unusually high rate of elector defection.[62] The 2016 election might prove an extreme example, but is consistent with past practice of electors exercising discretion only on the rare occasion when they believed circumstances warranted. Looked at this way, the relatively rare occurrence of defecting electors does not discount the possibility that their exercise of discretion constitutes settled practice.

Electors have defected with surprising regularity throughout U.S. history. As Appendix 1 demonstrates, if U.S. presidential elections between 1796 and 2016 are broken down into eleven twenty-year cycles, only two of those cycles featured zero defecting electors.[63] In the majority of those nine cycles in which at least one elector defected, not one but multiple electors defected.[64] And, as Baude counsels, looking to more recent practice as a guide, elector defection is becoming more common, not less, suggesting increasingly settled belief that defection is constitutionally acceptable.[65] In the past eighteen U.S. presidential elections, at least one elector has defected in ten of them.[66] The vast majority of electors have followed majority will in their states,[67] but electors have defected in states all around the country, have done so steadily over the course of U.S. history, and have done so with greater prevalence more recently, giving weight to the argument that elector discretion has become settled practice.

Second, consideration of geography also points to settled practice. If elector discretion were not the deliberate default in practice, one might ex-

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federal desegregation orders, *see* Alexander Gouzoules, *The "Faithless Elector" and 2016: Constitutional Uncertainty After the Election of Donald Trump*, 28 U. FLA. J. L. & PUB. POL'Y 215, 218–22 (2017).

[60] *See* ROSS, *supra* note 44, ch. 2; Bernard Weinraub, *Bush Gets to Proclaim Own Election Victory*, N.Y TIMES, Jan. 4, 1989, at B6.

[61] *See* ROSS, *supra* note 44, at 118.

[62] *See* Gouzoules, *supra* note 57, at 217 (noting that "seven [faithless electors] were recorded in 2016—by far the most in more than a century").

[63] The twenty-year periods from 1876–1892 and 1916–1932 featured no defecting electors, though notably the 1876 election was a contested election decided ultimately in the Senate. *See infra* Appendix 1. Every other twenty-year cycle featured at least one instance in which something other than an ordinary vote for the candidate selected by the party occurred. *See id.*

[64] Six out of the eleven twenty-year cycles featured more than one instance in which electors departed from the ordinary course of voting for the party/popular vote choice: 1796–1812, 1816–1832, 1896–1912, 1956–1972, 1976–1992, and 1996–2012. *See id.* That number rises to seven out of twelve if the current twenty-year cycle ending in 2032 is included. *See id.*

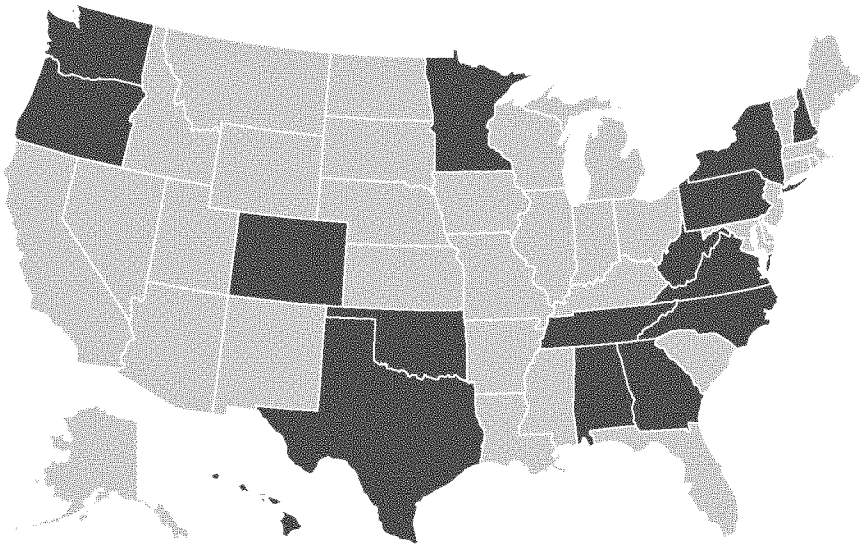
[65] *See* Baude, *supra* note 16, at 54.

[66] *See infra* Appendix 1.

[67] *See* AFTER THE PEOPLE VOTE 91–95 (John Fortier ed., 2004) (listing state Electoral College vote totals corresponding to popular vote outcomes, 1789–2000).

pect that any elector defections would be confined to a single state or a small group of states which perhaps featured statutory commands or normative practices giving rise to greater incidence of faithless electors in those few states. In fact, defecting electors over the course of U.S. history have appeared all over the map as Figure 1 below shows. Far from being clustered all in one state or even in a limited few, elector defections—though they happen rarely—have occurred all over the country in seventeen U.S. states.[68]

FIGURE 1[69]



A third indicator of settled practice regarding elector discretion is the ballots themselves. If electors have come to play only a ministerial role in practice, we might expect that ballots states use would not provide electors with an actual choice. We might imagine, for example, that elector ballots would look something like the one Michigan used in 2016, which left a space for the elector to sign under the words "I hereby cast my vote for

[68] There does not appear to be a strong correlation between states that currently bind electors or remove faithless electors and whether or not those states have had incidents of faithless electors. Colorado, North Carolina, and Oklahoma have a history of one or more defecting electors and currently bind electors. Arizona, Indiana, Michigan, Montana, Nebraska, Nevada, New Mexico, and South Carolina either bind electors or remove defecting electors, but none have had elector defections in the past.

[69] Drawn from *Faithless Electors*, *supra* note 3. For present purposes, "defecting" includes electors who voted against popular will in their state whether by not casting a vote (abstaining) or by voting their conscience. In each case, the elector exercised some degree of discretion, the key factor for purposes of the present analysis. Note that Colorado is shaded in, although the validity of its 2016 faithless elector vote is pending before the Supreme Court. *See Baca*, 140 S. Ct. 918 (2020).

Donald J. Trump for President of the United States."[70] Clearly such "ballot" does not contemplate Michigan electors voting for anyone but Donald J. Trump; it expects only that the elector will merely sign his or her name below the printed "choice" of voters. Colorado elector Michael Baca got around this problem in 2016 when confronted with a similar ballot that listed only Hillary Clinton's name. Unlike Michigan's 2016 elector ballot, Colorado's included a box next to Clinton's name that electors were intended to mark. Instead, Mr. Baca crossed out Clinton's name and wrote in by hand "John Kasich," even drawing a separate box next to Kasich's name and marking that box with an "X" before signing his ballot.[71]

In this way, even when a ballot features a printed name and lacks indicators of choice by design, there is no getting around electors exercising choice by virtue of electors being handed a constitutionally-mandated ballot and a pen.[72]

But Michigan and Colorado's 2016 "choiceless" ballots do not appear to be the norm. Many Electoral College ballots supply electors a true choice as a matter of ballot design. A cursory search (consisting of a Google search of images of Electoral College ballots) reveals that multiple states ballot design decisions do in fact anticipate elector choice quite clearly on the face of the ballot.[73] Electoral College ballots from Illinois in 2008[74] and Texas in 2016[75]

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[70] Sarah Rice, Photograph of Michigan Presidential Elector Ballot, *in* Gary L. Gregg, *The Electoral College—After the People Vote*, EPOCH TIMES (Sept. 18, 2019), https://www.theepochtimes.com/the-electoral-college-after-the-people-vote_3041988.html [https://perma.cc/ZSY8-W4AB].

[71] Derek T. Muller, *Analysis: 10th Circuit Finds Colorado Wrongly Removed Faithless Presidential Elector in 2016*, EXCESS OF DEMOCRACY (Aug. 21, 2019), https://excessofdemocracy.com/blog/2019/8/analysis-10th-circuit-finds-colorado-wrongly-removed-faithless-presidential-elector-in-2016 [https://perma.cc/W6FH-52HF].

[72] Immediately after Mr. Baca wrote in John Kasich's name, he was dismissed as an elector by Colorado Secretary of State Wayne Williams, who replaced Mr. Baca with a substitute elector who then cast a vote for Hillary Clinton. *See* Brief of Appellants at 2, Baca v. Colo. Dep't of State, 935 F.3d 887 (10th Cir. 2019) (No. 18-1173).

[73] Googling "Electoral College ballot" returned images of several ballots that allowed clear elector discretion. These include Texas's 2016 ballot discussed *infra*; Indiana's 2008 ballot, which featured a blank line to allow the elector to enter a choice; Florida's 2000 ballot, which in violation of the Twelfth Amendment includes both the vice presidential and presidential candidates on the same ballot but which instructs the elector, "Mark a cross (X) to the right of the name of the person for whom you desire to vote"; Illinois's 2008 ballot, discussed *infra*; Nevada's 2016 ballot, which leaves a blank line for the elector to fill in the choice; Pennsylvania's 2000 and 2016 ballots, which feature a blank line; and Minnesota's ballot which does not include a year but pictures a handwritten "Barack Obama" in the blank line provided. Three ballot images returned in this search did not include indicators that electors had discretion, i.e., did not provide choice, leave a blank line or otherwise provide obvious avenue for defection: Ohio in 2016, Michigan in 2016, and Colorado in 2016, which Baca nevertheless found a way to defect from as described *infra*.

[74] *See Illinois Electoral College Ballot (2008)*, OFF. OF THE ILL. SECRETARY OF ST., *100 Most Valuable Documents at the Illinois State Archives*, https://www.cyberdriveillinois.com/departments/archives/online_exhibits/100_documents/images/2008-il-electoral-college.jpg [https://perma.cc/Z84C-4NE5].

[75] *See* Bob Daemmrich, Photograph of Texas Presidential Elector Ballot, *in* Patrick Svitek, *Why Bills to Bind Texas' Electoral College Never Reached Gov. Abbott*, TEX. TRIB. (June

are representative: both ask the elector to select one candidate from among a list of presidential nominees.

If settled practice were that electors exercise a ministerial role only, it seems odd that many states—in recent elections—would require electors to indicate a choice on their ballot as in the Illinois and Texas examples. A comprehensive review of electoral ballot design would be required to make any definitive statement about what is or has become settled practice when it comes to expectation of elector discretion from the perspective of ballot design. But such a review, particularly of modern practice,[76] would be helpful in establishing expectations and practice at state Electoral College meetings.

Fourth, to what extent are electors accountable for their vote? Were electors playing a purely ministerial role, one might expect that states would require them to stand by their vote to ensure they had not exercised independent choice when casting their ballots. Yet anecdotal evidence suggests that the practice of electors casting secret ballots may have happened with regularity. In 2004, for example, an elector defected in Minnesota but no one knew which elector had done so because Electoral College balloting had been conducted in secret.[77] Some surmise that use of the word "ballot" in the Constitution's text requires *secret* ballots.[78] Few historians have examined the history of Electoral College balloting. Robert Dixon conducted an informal survey in 1949 on voting procedures in the Electoral College from which he created the chart pictured below in Figure 2.[79]

9, 2017), https://www.texastribune.org/2017/06/09/texas-electoral-college-bills-abbott/ [https://perma.cc/ES7P-WKC3].

[76] *See supra* note 17 (noting Professor Baude's argument that recent practice is more applicable in a liquidation analysis).

[77] *See* Tim Gihring, *The Enduring Mystery of America's Last 'Faithless Elector'*, MINN. POST (Dec. 15, 2016), https://www.minnpost.com/politics-policy/2016/12/enduring-mystery-america-s-last-faithless-elector/ [https://perma.cc/9REW-F88Z].

[78] U.S. CONST. art. II, § 1, cl. 3. A congressional report citing Senator Charles Pinckney, one of the two South Carolina signers of the Constitution, quotes the Senator as follows: "the vote should be taken in such manner [secretly], and on the same day, as to make it impossible for the different States to know who the Electors are for, or for improper domestic, or, what is of much more consequence, foreign influence and gold to interfere." 10 ANNALS OF CONG. 129 (1800) (statement of Sen. Charles Pinckney). It is unclear by whom "secretly" is added in brackets to this quote, but suggests at least some acceptance of secret Electoral College balloting. *See* Robert G. Dixon, Jr., *Electoral College Procedure*, 214 W. POL. Q. 214, 220 (1950) ("The constitutional injunction to vote 'by ballot' would seem to imply secret voting and certainly to require a written ballot.").

[79] *See* Dixon, *supra* note 76, at 221.

FIGURE 2

VOTING PROCEDURE IN ELECTORAL COLLEGE

	Blank Paper	Typewritten Ballot	Printed Ballot	Engraved Ballot	Oral Voting
Elector's Vote Either Signed or Announced	Ala., Mich., Ore.	Ariz., Minn., N.H., Tex., Wyo.	Calif., Del., Ohio, W.Va.,		La., Md., Mass.,* N. D., Wash.
Elector's Vote Neither Signed nor Announced	Idaho, Kan., Mass.,* Mo., Neb., Okla., R.I., S.D., Tenn., Utah, Wis.	Colo., Ill., Mont., Nev., N.C., S.C., Vt.	Conn., Fla., Maine, Pa.**	N.J., N.Y.	

Source: Author's questionnaire to secretaries of states, April, 1949.

* Massachusetts—Elector announces vote as he deposits ballot, which is blank paper and unsigned.

**Pennsylvania—Printed ballot is used but elector writes in name of president and vice-president and is told he need not sign it.

From this evidence, which includes responses from only forty-one states, it appears that in at least twenty-four states, as of 1949, electors were not held accountable for their vote (i.e., they could exercise discretion without anyone knowing how they voted or holding them to a pledged candidate). In the remaining seventeen states, electors were required to stand by their vote, yet it is not clear from this survey whether the ballots distributed nevertheless left room for elector choice as a question of ballot design.[80] Were it uniform practice that electors played only a ministerial role, surely states would universally hold electors accountable for their "vote." Variance among states in elector accountability demonstrates a lack of settled practice with respect to elector balloting—and undermines claims that settled practice assumes electors lack discretion.

Examining other aspects of state procedures and norms in conducting Electoral College meetings could further the "settled practice" analysis. For example, how often do states require electors to select a secretary to preside over the process (much like a jury foreman)? If this is common practice, it may suggest a greater degree of elector independence.[81] Work is required to develop a conclusive picture. But as this sampling demonstrates, looking closely at the statutes, rules, and practices within state Electoral College

[80] In a voice vote, choice is limitless—one can utter whatever one likes. In Massachusetts, Roberts reports that an elector "deposited" an unsigned blank paper ballot as the elector announced his vote, providing ample opportunity for discretion by that design. Dixon, *supra* note 77, at 221.

[81] North Carolina, Ohio and Wisconsin, for example, begin their elector meeting with electors voting on leadership within the group (e.g., secretary). *See* N.C. GEN. STAT. § 163-210 (Lexis Advance through Session Laws 2020-97 of the 2020 Regular Session of the General Assembly, but does not reflect possible future codification directives relating to Session Laws 2020-95 through 2020-97 from the Revisor of Statutes pursuant to G.S. 164-10); OKLA. STAT. ANN. tit. 26, § 10-107 (West, current with enacted legislation of the Second Regular Session of the 57th Legislature (2020)); and Wis. Stat. § 7.75 (West, current through 2019 Act 186, published April 18, 2020).

meetings could help support a conclusion that elector discretion is a deliberate course of practice in most states.

C. Settlement

According to Professor Baude's assessment of "settlement," Madison looked beyond a course of deliberate practice for a degree of "sufficient uniformity" such that a practice becomes *settled*.[82] Examining Madison's writings on the subject, Professor Baude concludes that the settlement analysis consists of two elements: the degree of institutional acquiescence and the degree of popular acceptance of elector discretion. The next two subparts examine each in turn.

1. Institutional Acquiescence

At the federal level, as briefs in the Supreme Court case and litigation below report, the U.S. Congress has yet to turn away a faithless elector's vote.[83] States have sent faithless elector ballots to the President of the Senate more than 150 times; not once has the President of the Senate rejected or otherwise not included faithless ballots in the congressional count.[84] This fact deserves great weight in the present analysis. If some defecting votes had not been accepted or if the Senate accepted defecting ballots early on in U.S.

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[82] *See* BAUDE, *supra* note 17, at 18.

[83] *See* Respondents' Brief in Support of Certiorari, *Baca*, 140 S. Ct. 2316 (2020) (No. 19-518), 2019 WL 6211320, at *7 ("In fact, Congress has accepted every vote contrary to a pledge or expectation in the Nation's history that has been transmitted to it - a total of more than 150 votes across twenty different elections from 1796 to 2016."). Still, there is some disagreement about whether or not this is true. In the highly abnormal election of 1872, the electoral votes from Arkansas and Louisiana were not counted for various reasons, and the reasons given for Louisiana seem to include something about the electors not voting as intended. *See Journal of the Senate of the United States of America, 1789-1873*, AM. MEMORY, http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(sj06845)) [https://perma.cc/64HZ-VCGP]. In their cert. brief in Chiafalo, the petitioners refuted this claim on the basis that "Congress did count two ballots from replacement electors in January 2017 - one from Colorado and one from Minnesota." *See* Petition for Writ of Certiorari, *Baca*, 140 S. Ct. 2316 (2020) (No. 19-518), 2019 WL 5390121, at *30–31 (emphasis omitted). In 2016, Congress accepted, without objection, three votes for Colin Powell and a vote each for John Kasich, Ron Paul, Bernie Sanders, and Faith Spotted Eagle. *See* Jamie Garza, *Counting of Electoral College Votes*, C-SPAN (Jan. 6, 2017), https://www.c-span.org/video/?c4642640/user-clip-january-6-2017counting-electoral-college-votes [https://perma.cc/34KS-7JMT] (showing some objections being raised and the counting of deviant votes without objection); *see also* 115 CONG. REC. 246 (1969) ("Objections to the Electoral College votes were recorded in 1969 and 2005. In both cases, the House and Senate rejected the objections and the votes in question were counted."). It is possible that many more electors considered defecting and ultimately chose not to. For example, Richie Robb, a West Virginia elector indicated reticence about casting his ballot for George Bush, though in the end he apparently did. *See* BENNETT, *supra* note 35.

[84] In only two election cycles—1969 and 2005—have formal objections to Electoral College votes been recorded. In both cases, the House and Senate rejected those objections and counted the votes in question. *See Electoral College Fast Facts*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Electoral-College/Electoral-College/ [https://perma.cc/RLG4-7YRX].

history but not later on, one could imagine that the institutional settlement question would be much harder to answer. That the Senate has accepted every defecting vote seems dispositive on the question of institutional acceptance at least with respect to Congress.

What of state-level institutions? In addressing whether *states* can bind electors under Article II, relevant inquiries might be the degree to which states do in fact bind electors, whether states enforce their binding rules in the belief that doing so is constitutional, and whether states that do not have binding rules refrain from enacting them in the belief that such rules are unconstitutional.

On these questions, the picture—though hardly uniform—tilts towards common acceptance of elector discretion. Part of the reason relates to the relative lack of attention in states to elector discretion. As one commenter described it, "the subject of faithless electors is treated by both the Congress and many states with surprising casualness."[85] At present, only nine state statutes require that defecting electors be removed and replaced by alternates.[86] Several other states fine or otherwise penalize defecting electors.[87] New Mexico, for example, slaps faithless electors with a fourth degree felony charge, up to eighteen months in prison, and a fine up to $5,000.[88]

Even in states that statutorily remove electors upon their casting a defecting ballot, such electors are nevertheless handed ballots that anticipate elector choice. The Nevada statute, for example, requires the secretary of state to refuse defecting ballots and replace defecting electors.[89] And yet the

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[85] BENNETT, *supra* note 39, at 97.

[86] States that remove and replace defecting electors include Arizona, Colorado, Indiana, Maine, Michigan, Montana, Nebraska, Nevada, South Carolina, and Washington. This is the process chosen by the Uniform Faithful Presidential Electors Act, discussed *infra* Section IV.A. The UFPEA renders any attempt to vote in violation of a pledge as a resignation creating a vacancy to be filled. Notably, even in states that remove defecting electors, some seem to acknowledge that under certain circumstances electors may yet defect. *See e.g.*, *Electoral College in South Carolina*, S.C. ELECTION COMMISSION, https://www.scvotes.org/electoral-college-south-carolina [https://perma.cc/748L-BKHH] ("Those elected must vote for the candidate for whom they declared. Any person selected to fill a vacancy in the Electoral College must vote for the same candidate for whom the person he is replacing declared. Any elector who votes contrary to their declaration shall be deemed guilty of violating the election laws of the State and upon conviction shall be punished according to law. However, the executive committee of the party from which an elector was elected may relieve the elector from the obligation of his declaration when, in its judgment, circumstances shall have arisen which, in the opinion of the committee, it would not be in the best interest of the State for the elector to cast his ballot for such a candidate.").

[87] States that do not penalize defecting electors affirmatively in their codes may nevertheless punish faithless electors through other statutes. California's election code, for example, imprisons and/or fines anyone "charged with the performance of any duty under any law of this state relating to elections who willfully neglects or refuses to perform it." CAL. ELEC. CODE § 18002 (West, Westlaw through Ch. 3 of 2020 Reg. Sess.). Presumably this includes electors.

[88] *See* N.M. STAT. ANN. § 1-15-9 (West, Westlaw through Ch. 84 of the 2nd Regular Session of the 54th Legislature (2020)).

[89] *See* NEV. REV. STAT. ANN. § 298.075(2) (West, Westlaw through the end of the 80th Reg. Sess. (2019)) ("If a presidential elector . . . [d]oes not present both ballots, presents an unmarked ballot or presents a ballot marked with a vote that does not conform with the [state popular vote]: (1) The Secretary of State shall refuse to accept either ballot of the presidential

ballot handed to electors in 2016 in Nevada contained nothing but a blank space, inviting electors to write down whomever they chose.[90]

One might even argue that state legislatures pass statutes ejecting or otherwise penalizing electors *because* they understand that the Constitution requires elector discretion. In a 2010 publication, the Congressional Quarterly noted that at least as of that year, "no faithless elector has been punished and experts doubt that it would be constitutionally possible to do so."[91] This statement indicates a degree of acceptance that binding laws (at least as of 2010) were largely aspirational. If it were widely understood and accepted that electors could not constitutionally defect, why the need for state statutes binding them (and why such harsh criminal sanctions)? Maybe penalty, removal, and pledge statutes represent toothless pressure tactics imposed in the face of implicit recognition that states lack power to constitutionally bind electors.

If a majority of state legislatures seem to broadly accept elector discretion, what of state courts? It appears that—at least until *Baca* and *Chiafalo*[92]—only two state courts had ruled against elector discretion. The Nebraska Supreme Court held that electors exercising discretion against the popular will in the 1912 election deprived the state's voters of their right to vote.[93] In New York, after electors defected in the 1932 presidential election, a New York superior court ruled that the role of electors is "purely ministerial."[94] These two cases—though of course not authoritative when it comes

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elector; and (2) The Secretary of State shall deem the presidential elector's position vacant. The vacancy must be filled pursuant to the provisions of NRS 298.065.").

[90] *See* Ed Pearce, *Governor Sisolak Vetoes Presidential Popular Vote Compact Bill*, KOLOTV.COM (May 31, 2019), https://www.kolotv.com/content/news/Its-on-the-governors-desk-Nevada-set-to-join-popular-vote-compact-510410131.html [https://perma.cc/J3NQ-RFZQ].

[91] GUIDE TO U.S. ELECTIONS, at 819b (6th ed. 2010); *see also* BENNETT, *supra* note 39, at 98–99 (discussing various reasons why states may not attempt to bind electors in the belief that doing so would ultimately be adjudged unconstitutional); LAWRENCE D. LONGLEY & ALAN G. BRAUN, THE POLITICS OF ELECTORAL COLLEGE REFORM 140 (1972).

[92] *In re* Guerra, 441 P.3d 807, 817 (Wash. 2019), *cert. granted sub nom.* Chiafalo v. Washington, 140 S.Ct. 918 (2020).

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

[94] Thomas v. Cohen, 262 N.Y.S. 320, 326 (N.Y. App. Div. 1933). The plaintiff sought mandamus action to require New York to list the names of electors on the ballot (it listed only the names of presidential and vice presidential candidates). He argued, "'I am entitled to know just who the person is and where he lives, to whom I entrust the duty of selecting for me a president and vice-president. I might have great confidence in one man and none in another of the same group. It matters not what their politics is. The presidential electors can make the selection without regard to politics or the candidates nominated by the political parties' . . . 'The law gives the elector the absolute right to vote for any one whom he may please for president and vice-president of the United States.'" *Id.* at 323. Notably, the court gave credence (if not in name) to the concept of liquidation: "Free people have the right to effect a change in the meaning of their written constitution by the process of long and continuous interpretation followed by action, which interpretation and action are contrary to the exact wording of the organic law. Marked change in conditions, nonexistence of reasons for provisions, official action coupled with universal public acceptance and co-operation repeated over a long period of time, such as 100 years, warrant giving to words a meaning interpretive of those new conditions and actions, when the new meaning accords fully and completely with the

to interpreting the federal Constitution, show a degree of institutional acceptance of electors as ministerial agents. Then again, that only one state supreme court and one state superior court have so held despite dozens of defecting electors over the course of U.S. history undermines the conclusion that state courts stand uniformly behind state efforts to bind electors.

This short survey of institutional acquiescence of elector discretion is admittedly incomplete. In addition to further study of state Electoral College practice and procedure, it would be interesting to explore other avenues, such as the degree to which state secretaries of state and attorneys general enforced state elector binding laws. What does emerge, however, is at least the bones of an argument that federal and state institutions routinely acquiesced to and expected elector discretion.

2. Popular Acceptance

As for popular acceptance, the evidence is strong that Americans are accustomed to and accept elector discretion as a default—particularly when circumstances foment. Again, 2016 provides an example. The 2016 Electoral College vote featured a massive campaign to persuade electors to defect.[95] People lobbied hard through letter campaigns and newspaper opinion columns for electors to consider defecting.[96] A "Conscientious Elector" petition at Change.org gained millions of signatures imploring electors to cast their vote for the popular vote winner.[97] The unique circumstances of the 2016

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understanding that the public has had for a long time. That is especially so, when a strict interpretation of the language is fraught with unnecessary dangers that would, without doubt, menace the peace and well being of the nation and might even rise to proportions that would challenge the very existence of the republic." *Id.* at 330.

[95] Keith Whittington provides a good summary of the post-2016 activism to persuade electors to upset the Electoral College outcome. *See* Whittington, *supra* note 7, at 912–17. Many news reports of elector harassment appeared. *See e.g.*, Nathan Brown, *Idaho Secretary of State: Stop Harassing Our Electors*, GOVERNING (Nov. 16, 2016), https://www.governing.com/topics/elections/tns-idaho-electors-sos.html [https://perma.cc/4ZGV-PA3]; Scott Detrow, *Donald Trump Secures Electoral College Win, With Few Surprises*, NPR (Dec. 19, 2016, 4:52 PM), https://www.npr.org/2016/12/19/506188169/donald-trump-poised-to-secure-electoral-college-win-with-few-surprises [https://perma.cc/3PBC-S63U]; Alexandra King, *Electoral College Voter: I'm Getting Death Threats*, CNN (Nov. 30, 2016, 4:27 PM), https://www.cnn.com/2016/11/30/politics/banerian-death-threats-cnntv/index.html [https://perma.cc/5FNQ-HC45].

[96] *See e.g.*, Brown, *supra* note 93; David Pozen, *Why G.O.P. Electoral College Members Can Vote Against Trump*, N.Y. TIMES (Dec. 15, 2016) [https://perma.cc/MXS8-GKMQ]; Linda Sheets, Letter to the Editor, *Electors Obligated to Vote Their Conscience*, DAILY GAZETTE (Dec. 9, 2016), https://dailygazette.com/article/2016/12/09/electors-obligated-to-vote-their-conscience [https://perma.cc/E3HV-R8SP]; Mary L. Strickland, Letter to the Editor, *An Appeal to the Electoral College*, CANTONREP.COM (DEC. 7, 2016, 12:35 PM), https://www.cantonrep.com/opinion/20161207/letter-to-editor-appeal-to-electoral-college?template=AMpart [https://perma.cc/LHP9-78MZ]; Christopher Suprun, Opinion, *Why I Will Not Cast My Electoral Vote for Donald Trump*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html [https://perma.cc/P7K4-EUR8].

[97] *See* Daniel Brezenoff, *Electoral College: Make Hillary Clinton President.*, CHANGE.ORG, https://www.change.org/p/electoral-college-make-hillary-clinton-president-on-december-19-2017 [https://perma.cc/TU94-5NL9].

election unleashed a torrent of popular pressure on specific electors to defect. A *USA Today* headline blared, "Harassment or Hail Mary, Electors Feel Besieged."[98] A *Politico* story titled "Electors Under Siege" recounted how "once-anonymous electors are squarely in the spotlight, targeted by death threats, harassing phone calls and reams of hate mail. One Texas Republican elector said he's been bombarded with more than 200,000 emails."[99] Some states hired protection for beset electors.[100]

Popular pressure on electors following the 2016 popular vote ultimately did nothing to change the outcome of that election. Yet the massive effort underscores that the public assumption that electors have discretion.[101] If widespread acceptance of electors playing only a ministerial role were the norm, how to explain the uproar in 2016? Just because circumstances never previously converged to trigger such widespread calls for the exercise of elector discretion, when circumstances did coalesce in 2016, the public assumed electors possessed the ability to exercise choice.

As the above discussion details, Professor Baude's three elements of liquidation point to settled practice assuming elector discretion. Textual ambiguity leaves the question unanswered; a course of deliberate practice shows states commonly assuming discretion in practices and procedures during Electoral College meetings; and institutions and the public routinely acquiesce and expect electors have discretion. Making these arguments as forcefully as facts allow, however, still leaves room for debate and unanswered questions as the next section explores.

III. REBUTTALS

Liquidating Electoral College practice by no means leads inevitably to concluding that the proof that the Constitution prevents states from quashing elector discretion. This section first examines ways in which liquidation points to states' right to bind electors. It then looks at very real shortcomings inherent in trying to apply the principle of liquidation to elector discretion at all.

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[98] Joseph Gerth et al., *Harassment or Hail Mary? Electors Feel Besieged*, USA TODAY (Nov. 16, 2016, 9:31 AM) https://www.usatoday.com/story/news/politics/elections/2016/11/22/electoral-college-electors/94256024/ [https://perma.cc/XG6B-6MBA].

[99] Kyle Cheney, *Electors Under Siege*, POLITICO (Dec. 17, 2016, 1:07 PM), https://www.politico.com/story/2016/12/electors-under-siege-232774 [https://perma.cc/72TZ-RG2B].

[100] *See e.g.*, Greg Hadley, *Pennsylvania Presidential Electors to Receive Police Protection Before Vote Monday, Report Says*, NEWS & OBSERVER (Dec. 19, 2016, 7:39 AM), https://www.newsobserver.com/news/politics-government/election/article121700447.html [https://perma.cc/Z8S8-844M].

[101] Students of the Electoral College acknowledge that popular sentiment supports elector discretion. *See* BENNETT, *supra* note 35, at 102 ("We have seen that there is a strong current of [public] opinion that elector discretion—and hence defection—is constitutionally protected.").

A. Settled Practice Pointing to the Constitutionality of Binding Electors

The trend in recent decades of states passing statutes to remove or impose penalties on faithless electors could signal growing acceptance of state power to bind electors. National reform movements suggest a tide in this direction. The National Conference of Commissioners on Uniform State Laws (NCCUSL) took up the task of drawing a model statute to ensure faithful electors. In July 2010, NCCUSL issued its model rule, the Uniform Faithful Presidential Electors Act (UFPEA), to encourage standardizing state rules binding electors by removing them should they defect.[102] Six state legislatures have since enacted versions of the rule in their states.[103] That six states signed on to the UFPEA since NCCUSL formally adopted it in 2010 represents some degree of momentum. But it is hardly a stampede. The success of the movement to advance the National Popular Vote Compact (NPVC) could likewise be seen as a signal of growing acceptance of the idea that the national popular vote—not electors—should drive the outcome in elections for President in the United States.[104] Then again, calls for legislative reform might be seen to acknowledge settled practice defaulting to elector discretion—and the desire to change what most understand the Constitution to currently require.

A second reason why liquidation may not clarify the elector discretion question is that the country so far has not been faced with a situation in which faithless electors have changed the outcome of a presidential election.[105] Would the public (and public institutions) accept a faithless elector produced outcome? When no candidate receives sufficient Electoral College votes to win the presidency, the Constitution provides that the House of Representatives elects the President—a so called "contingent election."[106] There is precedent for the public accepting outcomes when faithless electors have led to contingent election for the Vice Presidency.[107] But because the

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[102] The UFPEA requires that "an elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot in violation of the elector's pledge . . . vacates the office of elector, creating a vacant position to be filled under Section 6." *See* UNIF. FAITHFUL PRESIDENTIAL ELECTORS ACT § 7 (UNIF. LAW COMM'N 2010).

[103] These states are Montana in 2011, Nevada in 2013, Nebraska in 2014, Minnesota in 2015, Indiana in 2017, and Washington in 2019. *See Faithful Presidential Electors Act,* UNIFORM L. COMMISSION. https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d [https://perma.cc/B5DH-NADR].

[104] *See* NAT'L POPULAR VOTE!, https://www.nationalpopularvote.com [https://perma.cc/K2H8-X6BJ] (describing the movement and the states that have signed on and are considering signing on).

[105] We came quite close in the 2000 election in which President Bush won the Electoral College by five votes (four if the District of Columbia's defecting elector is included in the Gore count). *See* BENNETT, *supra* note 35, at 99.

[106] U.S. CONST. amend. XII ("[A]nd if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President . . .").

[107] Contingent elections have happened only twice in U.S. history: first, to elect the President in 1825, and second, the Vice President in 1837. *See* EDWARD J. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 73 (2016). The 1825 contingent election was not a result of faithless elector voting; the 1837 contingent elec-

true extent of public acceptance of elector discretion has never been tested by a faithless elector-driven contingent election for the Presidency, we cannot know whether and to what degree our institutions and the public at large would accept it.[108] As a result, that elector defections have been universally recognized thus far does not wholly resolve the question.

Finally, the argument that elector discretion is settled practice bucks up against decades of pronouncements to the contrary. Keith Whittington, writing about faithless electors in 2016, described the intense lobbying effort to persuade electors to defect that year represented as a marked break from past assumptions. Activists after the 2016 popular vote, he writes,

> sought to recast the office of presidential elector from being a mechanical and ceremonial role to being a role of substantial discretionary authority. They dusted off the historical purpose of the Electoral College and reinterpreted it as establishing an invaluable check on democratic errors.[109]

Whittington details the extent to which authoritative actors throughout U.S. history have assumed electors' ministerial role.[110] Quoting Charles Storey, for example, Whittington contends that "[f]or better or for worse, the Constitution 'has been silently changed' and . . . presidential electors 'have been reduced to the duty of reading the newspapers, and recording the result of the action of the party to which they belong.'"[111] Even historian Robert Dixon, who surveyed Electoral College balloting in 1949 as described above, dismissed its relevance. He wrote, "[n]ow that the elector's vote in support of his party's candidates is a forgone conclusion it really matters little whether the form of the elector's action be through signed or unsigned ballots, or viva voce."[112]

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tion was. In 1836, Martin Van Buren comfortably received enough electoral college votes (170) to surpass the number needed to win a majority (148 were needed). His vice presidential running mate, Richard Johnson, however, did not secure enough Electoral College votes. Virginia's twenty-three electors refused to support Johnson after learning of his relationship with an African American woman. As a result, Johnson received only 147 electoral college votes. The Senate then gave the vice presidency to Johnson by a vote of thirty three to sixteen. *See The Senate Elects a Vice President*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/The_Senate_Elects_A_Vice_President.htm [https://perma.cc/6CC3-E7WK].

[108] Some commenters suggest that a faithless-elector-driven outcome in the modern day could lead to "widespread social turmoil, even widespread violence." *See* BENNETT, *supra* note 35, at 103.

[109] Whittington, *supra* note 7, at 904–05.

[110] For an extensive discussion providing many additional examples, see Whittington, *supra* note 7, at 929–35.

[111] *Id.* at 932.

[112] Dixon, *supra* note 76, at 221; *see also* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed. 1915) ("[Electors] were by the founders of the constitution intended to be what their name denotes, the persons who chose or selected the President . . . This intention has failed; the "electors" have become a mere means of voting for a particular candidate . . . The understanding that an elector is not really to elect, has now become so firmly established, that for him to exercise his legal power of choice is considered a breach of political honour too gross to be committed by the most unscrupulous of politicians . . . The power of an elector to elect is as completely abolished by constitutional under-

Yet whether and the extent to which these pronouncements deserve weight as evidence of "settled practice" remains an open question. Maybe, for example, such statements are merely descriptive observations about what normally happens. Or maybe they should be read as aspiration. Dixon quotes a 1948 Ohio elector's understanding of his role: "Our task is purely perfunctory if we are faithful to the trust confided in us."[113] In one sense this serves as an acknowledgement that this elector believes he is bound by popular will. In another sense, however, note his use of the word "if." The statement could be read as a warning of sorts—acknowledgement that his fellow electors may not be so cautious. In this way, pronouncements about the ministerial versus discretionary role of electors can be difficult to parse in terms of their relevance to determining settled practice.

B. Analytic Shortcomings of Liquidating Elector Discretion

It may be that the *Noel Canning* test is instructive in some contexts, but not in this one. If President Washington avoided appearing in person to obtain advice and consent at the Senate and subsequent presidents fell into this practice, that is a straightforward example that can be catalogued. Likewise, the frequency of presidential recess appointments is easily measured. Executive action is ripe for liquidation analysis. The difficulty of pinning down settled practice with respect to elector discretion is a much tougher business. Fifty-one Electoral College meetings over the course of dozens of presidential elections does not produce clean answers about either practice or popular expectation.[114] For this reason, perhaps applying liquidation principles to the question of faithless electors is neither conclusive nor instructive.

A second and powerful concern in applying a liquidation analysis here relates to the root of the liquidation idea. If the Supreme Court had held that states may not bind electors, such an outcome would likely be so disruptive as to itself disprove the "settled practice" hypothesis. Some believe that the motive of litigants who sought such an outcome was precisely to disrupt the status quo and prompt popular outcry to amend to the Constitution or advance the NPVC.[115] Yet the liquidation analysis is at least in part intended

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standings in America . . ." Indeed, this view is borne out by the relative lack of care in choosing electors.

[113] Dixon, *supra* note 76, at 221.

[114] Professor Baude suggests that Madison's own reflections on liquidation could preclude its application to practices that lack sufficient uniformity. Baude writes, "[s]ometimes [Madison's] descriptions of an example of liquidation were even more emphatic: 'that which has the uniform sanction of successive legislative bodies, through a period of years and under the varied ascendancy of parties'; [and] 'reiterated and deliberate sanctions of *every* branch of the Govt . . .'" Baude, *supra* note 16, at 16–17.

[115] *See* Richard L. Hasen, *The Coming Reckoning Over the Electoral College*, SLATE (Sept. 4, 2019, 11:08 AM), https://slate.com/news-and-politics/2019/09/electoral-college-supreme-court-lessig-faithless-electors.html [https://perma.cc/44QR-7ZY8] ("[Lawrence] Lessig," a professor at Harvard Law School and one of the attorneys behind the faithless elector litigation, "has a bigger target. He wants to use the case as a way of moving toward a constitutional amendment to change the system for choosing the president to one based on the national popular vote, or to bypass the amendment process by getting enough states in the country

to accomplish the opposite. Professor Baude underscores that liquidation is a fundamentally democratic analytic tool. It is intended to buttress the path forward that involves the least disruption. He writes:

> Liquidation provides a particularly democratic and structured way to harness this kind of traditionalism in constitutional law. The discarding of bad traditions is part of the natural selection account of tradition . . . By looking to settlement across both institutions and parties, and ideally with the public sanction, [liquidation] attempts to entrench traditions that have been found acceptable by many groups of people.[116]

Seen from this perspective, accepting elector discretion as settled practice runs against the calming effect liquidation is meant to supply. For this reason, perhaps liquidation is an inappropriate interpretive tool for reformers hoping to spark change.

Numerous other problems plague applying liquidation to the question of elector discretion. How can popular acceptance be established when, as has been the case in American elections for centuries, and was on full display in the aftermath of the 2020 election, the losing side will always cast doubt on the structure and rules of the contest?[117] Is an analysis of popular will accomplished by measuring it within states or nationally? These and many other questions complicate attempts to liquidate the Constitution's meaning in this context. But, if indeed these challenges to applying liquidation are too difficult to overcome, perhaps the real lesson learned is that Justice Kagan accepted Petitioners' reliance on it too readily.

CONCLUSION

Where does this leave us? The discussion above is a thought experiment challenging the orthodoxy (and the *Chiafalo* Court's conclusion) that settled practice argues against elector discretion. In fact, evidence suggests that Electoral College norms and practice routinely *anticipate* elector discretion and that institutional and popular acceptance of elector discretion is widespread. Whether or not a liquidation analysis is appropriate in evaluating whether states may constitutionally bind an elector is debatable. But as a matter of practice, original elements of Electoral College design that assumed electors had freedom of choice were not abandoned. Post-*Chiafalo*,

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representing a majority of Electoral College votes to pledge their states' votes to the winner of the national popular vote. Lessig supports this National Popular Vote 'compact,' and he hopes the uncertainty created by the case would create the necessary groundswell of public support for either an amendment or the compact.").

[116] Baude, *supra* note 16, at 46.

[117] *See* Richard Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 943 (2005) (providing empirical support for the losing side often having less faith in the fairness of election processes). *See also* Mot. For Leave to File Bill of Complaint, Texas v. Pennsylvania, No. 220155 (U.S. Dec. 7, 2020).

states would be wise to eliminate trappings of discretion in their Electoral College statutes and procedures to "settle" the matter once and for all.

APPENDIX 1[118]

In the chart below, presidential elections in which at least one elector voted for someone other than their state's presidential and vice-presidential popular vote winners or abstained from voting for the state's popular vote winners are indicated. An "X" delineates an election in which at least one elector cast a "faithless vote" (i.e., exercised discretion to vote against the popular vote winner in their state). An asterisk indicates an election in which a popularly elected candidate died after the popular vote but before the meeting of the Electoral College.

1796	X	1876		1956	X
1800		1880		1960	X
1804		1884		1964	
1808	X	1888		1968	X
1812	X	1892		1972	X
1816		1896	X	1976	X
1820	X	1900		1980	
1824		1904		1984	
1828	X	1908		1988	X
1832	X	1912	*	1992	
1836	X	1916		1996	
1840		1920		2000	X
1844		1924		2004	X
1848		1928		2008	
1852		1932		2012	
1856		1936		2016	X
1860		1940		[2020]	
1864		1944		[2024]	
1868		1948	X	[2028]	
1872	*	1952		[2032]	

[118] *See Faithless Electors*, *supra* note 3.