RECENT CASES

CONSTITUTIONAL LAW — ELECTORAL COLLEGE — TENTH CIRCUIT HOLDS THAT STATES CANNOT COMPEL PRESIDENTIAL ELECTORS TO VOTE IN ACCORDANCE WITH POPULAR VOTE. — *Baca v. Colorado Department of State*, 935 F.3d 887 (10th Cir. 2019).

Following the presumptive election of Donald Trump as President of the United States on November 8, 2016, concerned citizens mounted a last-ditch effort to convince presidential electors to deny him the presidency when the Electoral College voted on December 19.[1] Though unsuccessful, this campaign placed a spotlight on the role of electors and spawned litigation in multiple jurisdictions.[2] Recently, in *Baca v. Colorado Department of State*,[3] the Tenth Circuit held that Article II and the Twelfth Amendment provide for the independence of presidential electors, and thus states may not compel electors to vote in accordance with the popular vote.[4] While the Tenth Circuit's decision to reach this constitutional question was surprising given the doctrine of constitutional avoidance, *Baca* may be the rare case where the values underlying avoidance theory actually weighed in favor of engaging on the merits.

Democrats Micheal Baca, Polly Baca, and Robert Nemanich (the "anomalous electors"[5]) were appointed as Colorado presidential electors after Hillary Clinton won the popular vote in that state.[6] However, rather than voting for Secretary Clinton, they sought to cast their electoral votes for a "compromise candidate" as part of a nationwide effort to unite electors around an alternative to Donald Trump.[7] After learning of this plan, Colorado Secretary of State Wayne Williams said that he would remove anomalous electors.[8] In response, Ms. Baca and Mr. Nemanich (unsuccessfully) sought to enjoin him from enforcing the relevant Colorado statute.[9]

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[1] *See* Lilly O'Donnell, *Meet the "Hamilton Electors" Hoping for an Electoral College Revolt*, THE ATLANTIC (Nov. 21, 2016), https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433 [https://perma.cc/U9ZQ-V43W].

[2] In *In re Guerra*, 441 P.3d 807 (Wash. 2019), the Washington Supreme Court — in a holding contrary to that of the instant case — found that nothing in Article II or the Twelfth Amendment "grants to . . . electors absolute discretion in casting their votes" and that a post-hoc fine for a faithless vote "[did] not interfere with a federal function." *Id.* at 817.

[3] 935 F.3d 887 (10th Cir. 2019).

[4] *Id.* at 955–56.

[5] Some commentators have suggested this term as an alternative to the more pejorative "faithless electors." *Id.* at 931 n.17. While Ms. Baca and Mr. Nemanich were technically only prospective anomalous electors, *see id.* at 904, this comment omits the distinction for ease of reference.

[6] *Id.* at 902.

[7] *See* O'Donnell, *supra* note 1; *see also Baca*, 935 F.3d at 902–03.

[8] *Baca*, 935 F.3d at 903.

[9] *See* Baca v. Hickenlooper, No. 16-1482, 2016 U.S. App. LEXIS 23391, at *19 (10th Cir. Dec. 16, 2016) (denying an emergency motion for injunction pending appeal); Baca v. Hickenlooper, No. 16-cv-02986, 2016 WL 7384286, at *6 (D. Colo. Dec. 21, 2016) (denying the request for a temporary

In simultaneous proceedings, Secretary Williams sued Ms. Baca and Mr. Nemanich in state court, seeking to clarify Colorado's elector-succession process.[10] The state district court found that Colorado electors were "required to vote" for the Clinton ticket and that a failure to do so would cause a "vacancy in the electoral college" that would need to "be immediately filled by a majority vote of the presidential electors present."[11] The Colorado Supreme Court declined to consider an expedited appeal.[12]

The Colorado electors convened to cast their votes on December 19.[13] Mr. Baca crossed out Secretary Clinton's name on his ballot and wrote in "John Kasich."[14] Secretary Williams promptly removed him, discarded his vote, and appointed a substitute elector.[15] After witnessing this, Ms. Baca and Mr. Nemanich "felt intimidated and pressured to vote against their determined judgment" and voted for Secretary Clinton.[16]

The three anomalous electors then filed a complaint in the U.S. District Court for the District of Colorado, asserting a cause of action under 42 U.S.C. § 1983.[17] They sought a judgment finding that the Colorado Department of State (the "Department") violated their federally protected rights, declaring the relevant Colorado statute unconstitutional, and awarding them nominal damages.[18] The district court dismissed the complaint on two grounds. First, the court held that the anomalous electors lacked standing, because their suit was barred under the political subdivision standing doctrine.[19] Second, the court found that the plaintiffs failed to state a claim, because "state elector[s] enjoy[] no constitutional protection against removal by the appointing authority."[20]

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restraining order and preliminary injunction); *see also* COLO. REV. STAT. § 1-4-304(5) (2019) ("Each presidential elector shall vote for the presidential candidate . . . who received the highest number of votes at the preceding general election in this state.").

10 *See Baca*, 935 F.3d at 903.

11 Williams v. Baca, No. 2016-cv-34522, slip op. at 1 (Colo. Dist. Ct. Dec. 13, 2016).

12 *See Baca*, 935 F.3d at 903.

13 *Id.* at 904.

14 *Id.*

15 *Id.*

16 *Id.* (quoting Opening Brief of Appellants Appendix at 17, *Baca*, 935 F.3d 887 (No. 18-1173)).

17 *Id.* A § 1983 claim requires a plaintiff to "prove (1) a person, (2) acting under color of state law, (3) deprived [the plaintiff] of 'any rights, privileges, or immunities secured by the Constitution and laws.'" *Id.* at 922 (quoting 42 U.S.C. § 1983 (2012)).

18 *Id.* at 904. The anomalous electors originally sued Secretary Williams, but amended their complaint pursuant to a joint stipulation. *See* Baca v. Colo. Dep't of State, No. 17-cv-01937, slip op. at 1 (D. Colo. Oct. 20, 2018) (order of the court re: stipulation of the parties). As part of this stipulation, the Department waived its sovereign immunity. *Id.* slip op. at 3.

19 Baca v. Colo. Dep't of State, No. 17-cv-01937, slip op. at 7–13 (D. Colo. Apr. 10, 2018). This doctrine restricts federal courts' jurisdiction "over certain controversies between political subdivisions and their parent states." *Id.* slip op. at 8 (quoting City of Hugo v. Nichols, 656 F.3d 1251, 1255 (10th Cir. 2011)).

20 *Id.* slip op. at 25.

The Tenth Circuit affirmed the dismissal of Ms. Baca and Mr. Nemanich's claims, but reversed with regard to Mr. Baca.[21] Writing for the panel, Judge McHugh[22] first considered whether the plaintiffs had standing. Noting that the political subdivision standing doctrine did not apply, she proceeded to consider the general requirements for standing.[23] She concluded that none of the anomalous electors "allege[d] an imminent personal injury that could confer standing to seek prospective relief."[24] However, she found that Mr. Baca met the "standing requirement for retrospective relief based on his removal from an office to which he was entitled."[25]

Having surmounted this initial jurisdictional hurdle, Judge McHugh considered whether Mr. Baca's case was moot.[26] She acknowledged that "there [was] a major flaw in the merits of [his] § 1983 claim," because "the Department [was] not a person for purposes of the statute."[27] However, the court could still hear the claim because the Department expressly waived the personhood argument[28] and the defect was "not obvious from the face of the complaint."[29] Moreover, Judge McHugh reasoned, the court should not raise this issue sua sponte, because where "the parties [choose] to litigate [a] case on the federal constitutional issues alone," the "prudential rule of avoiding constitutional questions has no application."[30]

Proceeding to the merits, Judge McHugh noted that the case turned on the constitutionality of the Department's removal of Mr. Baca for his anomalous vote.[31] She determined that the Supreme Court had not resolved the question of elector independence,[32] and then framed the appropriate constitutional inquiry: whether the Constitution "expressly

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[21] *Baca*, 935 F.3d at 956.

[22] Judge Holmes joined Judge McHugh's opinion.

[23] *Baca*, 935 F.3d at 906–08 ("To satisfy Article III standing, the Presidential Electors [needed to] show an injury in fact, fairly traceable to the challenged action, that [was] redressable by the relief sought." *Id.* at 908 (citing Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010))).

[24] *Id.* at 912.

[25] *Id.* at 915; *see id.* at 921. With regard to the other claims for retrospective relief, Judge McHugh found that the electors were not entitled to retrospective relief based on "official harm to their role as electors," *id.* at 912; *see also id.* at 912–13, the legislator standing doctrine did not apply, *id.* at 920–21, and the general threats that influenced Ms. Baca and Mr. Nemanich were "not sufficient to meet the personal injury-in-fact requirement," *id.* at 917.

[26] "Mootness" refers to the termination of standing during litigation through some "intervening circumstance." *Id.* at 922 (quoting Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 669 (2016)).

[27] *Id.* at 924.

[28] *See id.*

[29] *Id.* at 926; *see also id.* at 927–28.

[30] *Id.* at 928–29 (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 7–8 (1993)).

[31] *See id.* at 930–31.

[32] *See id.* at 935–36. Judge McHugh distinguished *Ray v. Blair*, 343 U.S. 214 (1952), in which the Court found that the Twelfth Amendment did not bar a loyalty pledge in Alabama's elector primary process, *id.* at 215, 231, principally on the grounds that *Ray* did not determine the pledge's legal enforceability and focused on elector appointment rather than removal, *Baca*, 935 F.3d at 935–36.

delegated" removal power to the states.[33] Judge McHugh found the Department's claim that the Tenth Amendment reserved such power to the states unconvincing, because "no such power was held by the states before adoption of the federal Constitution."[34] Nor does states' power to appoint electors necessarily include the power to remove, she reasoned, because electors "exercise a federal function . . . when casting their ballots."[35]

Turning to the constitutional text, Judge McHugh noted that Article II, as modified by the Twelfth Amendment, sets out "detailed instructions" for the electoral process, but does not expressly delegate to the states "the power to interfere once voting begins, to remove an elector, to direct the other electors to disregard the removed elector's vote, or to appoint a new elector to cast a replacement vote."[36] In fact, the text suggests the opposite conclusion: contemporaneous dictionary definitions of "elector," "vote," and "ballot" all "imply the right to make a choice,"[37] as does the use of the word "elector" elsewhere in the Constitution.[38] The passage of the Twelfth Amendment, which "did nothing to prevent future faithless votes" despite a previous faithless elector, further reinforced this reading.[39] While Judge McHugh acknowledged the state practice of restricting electors' discretion, she found it noncontrolling because "practices employed — even over a long period — cannot overcome the allocation of power in the Constitution"[40] and because of Congress's countervailing practice of counting faithless votes.[41] Finally, Judge McHugh found that contemporaneous authoritative sources — principally the *Federalist Papers*[42] and Justice Story's *Commentaries on the Constitution*[43] — supported the principle of elector discretion.[44] Based on this analysis, Judge McHugh concluded that "Article II and the Twelfth Amendment provide presidential electors the right to cast a vote . . . with discretion."[45] The court thus reversed the dismissal of Mr. Baca's claim and remanded for further proceedings.[46]

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[33] *Baca*, 935 F.3d at 939.

[34] *Id.* (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803–04 (1995)); *see id.* at 938.

[35] *Id.* at 941 (citing Burroughs v. United States, 290 U.S. 534, 545 (1934)). On this point, Judge McHugh found case law dealing with appointments and the implied power of removal inapposite, because the reasoning underlying these decisions "extends solely to the executive power." *Id.* at 940.

[36] *Id.* at 943.

[37] *Id.* at 945.

[38] *See id.* at 945–46.

[39] *Id.* at 948.

[40] *Id.* at 949 (citing McPherson v. Blacker, 146 U.S. 1, 35–36 (1892)).

[41] *Id.* at 949–50.

[42] *See* THE FEDERALIST NO. 64, at 389 (John Jay) (Clinton Rossiter ed., 2003); THE FEDERALIST NO. 68, *supra*, at 410–12 (Alexander Hamilton).

[43] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1457, at 321–22 (Boston, Hilliard, Gray & Co. 1833).

[44] *See Baca*, 935 F.3d at 952–55.

[45] *Id.* at 955.

[46] *Id.* at 956.

Judge Briscoe dissented. While she acknowledged the majority's "thorough analysis," she would have found the case moot.[47] Judge Briscoe contended that, because § 1983 does not create a remedy against a state,[48] the plaintiffs were foreclosed from asserting a "plausible claim for nominal damages."[49] The case thus presented "an abstract dispute about the law" sans a constitutional case or controversy.[50] Nor, in Judge Briscoe's view, did the Department's waiver of the personhood argument impact this analysis, because parties cannot use stipulations to evade the case or controversy requirement.[51]

The *Baca* majority's decision to reach the constitutional question was surprising given the doctrine of constitutional avoidance. This doctrine counsels that courts should seek to avoid constitutional adjudication on the merits to preserve their institutional legitimacy and promote democratic deliberation. But the structural question at issue in *Baca* did not implicate traditional institutional credibility concerns, and the *Baca* court's ultimate decision may actually help to preserve the judiciary's legitimacy by forestalling a potential constitutional crisis. The decision may also catalyze democratic debate about the legally ambiguous underpinnings of our electoral system. Thus, *Baca* was the rare case where the values animating avoidance theory were actually best served by eschewing avoidance and engaging on the merits.

The *Baca* court's choice to reach the merits rather than taking a jurisdictional "out" was surprising because it seemingly ran counter to the doctrine of constitutional avoidance. This doctrine suggests that courts should not decide constitutional questions "unless such adjudication is unavoidable."[52] Though often invoked in the statutory interpretation context, constitutional avoidance stands for the broader principle that courts "[should] not pass upon a constitutional question although properly presented . . . , if there is also present some other ground upon which the case may be disposed of."[53] The theory is intertwined with the

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[47] *Id.* (Briscoe, J., dissenting).

[48] *Id.* at 957 (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 69 (1997)).

[49] *Id.* (first citing *Arizonans*, 520 U.S. at 69; and then citing Lankford v. City of Hobart, 73 F.3d 283, 288 (10th Cir. 1996)).

[50] *Id.* at 958 (quoting Alvarez v. Smith, 558 U.S. 87, 93 (2009)).

[51] *See id.* at 958–59.

[52] ANDREW NOLAN, CONG. RESEARCH SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 2 (2014) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)).

[53] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948–49 (1997) ("[C]ourts should decide an antecedent statutory issue, *even one waived by the parties*, if its resolution could preclude a constitutional claim." (emphasis added)).

"passive virtues" — courts' use of justiciability doctrines to avoid reaching the merits.[54]

Proponents of constitutional avoidance point to two primary benefits. First, institutional credibility: by declining to reach constitutional questions, courts "avoid unnecessary entanglement in controversial and sensitive constitutional issues, protecting the judiciary from potential backlash by the political branches and preserving the [courts'] role as the protector[s] of established constitutional principles."[55] Second, separation of powers and the promotion of the democratic process: Avoidance of constitutional rulings keeps the political branches' options open, giving "the political processes . . . relatively free play."[56] Such an approach promotes democratic deliberation[57] and gives the question at issue time to "ripen[]."[58] Whatever the rationale, constitutional avoidance remains a favored tool in the federal judiciary's arsenal[59] — making the *Baca* court's decision not to invoke the doctrine all the more surprising.

However, in *Baca*, institutional credibility considerations actually weighed in favor of direct engagement with the constitutional question. To begin with, the question presented was not the type of divisive political issue that most concerns proponents of constitutional avoidance.[60] Rather, it was a structural question regarding the Article II process explicitly detailed in the Constitution.[61] This seems like precisely the type of question courts *should* decide. As Justice Scalia noted in his *NLRB v. Noel Canning*[62] concurrence: "It is not every day that [the Court] encounter[s] a proper case or controversy requiring interpretation of the Constitution's structural provisions," and thus the Court should "take every opportunity" to reaffirm those principles.[63]

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[54] *See* Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40–47 (1961); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 71, 122–25 (2d ed. 1986); *cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–6 (1999) (using many of the rationales underlying the "passive virtues" to advocate for judicial minimalism in cases where the Court reaches the merits).

[55] NOLAN, *supra* note 52, at 7; *see also* Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 CASE W. RES. L. REV. 1031, 1033–35 (2006) (discussing the argument that avoidance promotes judicial credibility and independence).

[56] BICKEL, *supra* note 54, at 70; *see also* Richard L. Hasen, *Constitutional Avoidance and Anti-avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 183 (noting that constitutional avoidance can be used to "further a dialogue with Congress" and prompt redrafting of legislation).

[57] *See* SUNSTEIN, *supra* note 54, at 4.

[58] BICKEL, *supra* note 54, at 71.

[59] *See, e.g.*, NOLAN, *supra* note 52, at 11 (noting that the Roberts Court's jurisprudence "illustrat[es] the continued viability" of constitutional avoidance and related doctrines).

[60] Recent examples of such issues include affirmative action and voting rights. *See id.* at 17–18.

[61] *See Baca*, 935 F.3d at 942.

[62] 134 S. Ct. 2550 (2014).

[63] *Id.* at 2617 (Scalia, J., concurring in the judgment); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say

Indeed, deciding the constitutional question in a relatively apolitical setting may actually preserve courts' legitimacy by forestalling a potential constitutional crisis. In 2000, George W. Bush prevailed in the presidential election with a bare majority of 271.[64] If faithless electors were to change the outcome of a similarly close election in the future, the courts would likely be called on to resolve the question of elector discretion in a highly politicized, time-sensitive environment à la *Bush v. Gore*.[65] Far better to settle the matter behind the "veil of ignorance" when an election is not on the line and the stakes — and the risk to the judiciary's legitimacy — are much lower.[66]

Democratic process considerations also favored direct engagement in *Baca*. Constitutional avoidance may promote democratic deliberation in cases where a ruling would prematurely calcify a contested norm.[67] But, prior to the 2016 election, the role of presidential electors was subject to relatively little scrutiny or democratic debate. The common understanding was that electors were "clerks, not kingmakers"[68] — that, over two centuries of practice, an "unwritten and informal" norm had developed that limited their discretion.[69] Yet the legal constraints on electors remain largely undefined: twenty-one states do not place legal limits on elector choice,[70] and laws in the other states establish varying

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what the law is."); Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) (noting that excessive use of avoidance may "enervat[e] principle to an impermissible degree"). The *Baca* court's decision to reach and expound upon the constitutional question may also have been motivated by awareness of parallel litigation in Washington State, *see In re* Guerra, 441 P.3d 807 (Wash. 2019), and a desire to provide additional reference for the Supreme Court should it choose to take up the question.

[64] JEFF TRANDAHL, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 7, 2000, at 74 (2001), http://clerk.house.gov/member_info/electionInfo/2000election.pdf [https://perma.cc/47JD-MQC2].

[65] 531 U.S. 98 (2000); *see* Ron Elving, *The Florida Recount of 2000: A Nightmare that Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting [https://perma.cc/9WHU-L323].

[66] Professors Guy-Uriel Charles and Luis Fuentes-Rohwer have proposed a similar "ounce of prevention" approach in the political question context. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Supreme Court, 2017 Term — Comment: Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 239–41 (2018) ("[J]udicial intervention in [certain] context[s] is an act of judicial restraint because it obviates the need for the Court to take sides later on substantive partisan disputes . . . ." *Id.* at 241.); *see also* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1042 (2008) ("[T]heorists of the passive virtues . . . ignor[e] the opportunity cost of failures to clarify the constitutional rules in ways that can avoid more conflict in the future.").

[67] *See, e.g.*, BICKEL, *supra* note 54, at 70–71; SUNSTEIN, *supra* note 54, at 4–5.

[68] Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 936 (2017).

[69] *Id.* at 927; *see id.* at 929.

[70] *See* NAT'L ASS'N OF SEC'YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL ELECTORS 1 (2016), https://www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf [https://perma.cc/5B78-4XQF].

degrees of control.[71] In this context, courts glean little additional information by waiting, as the political branches have already reached a general understanding.[72] However, if this understanding rests on an unsteady legal foundation, courts can spur democratic deliberation of a different sort.[73] By reaching the constitutional question and foregrounding the tension between modern understandings and the Constitution, the *Baca* court provided political actors and society clarity. This clarity may spark generative democratic debate — for example, over whether to heighten scrutiny of potential electors,[74] support a constitutional amendment modifying the current process,[75] or revisit the Electoral College system as a whole.[76]

Baca may thus be the rare case where "anti-avoidance" was warranted — where the court was correct to affirmatively engage and clarify.[77] True, the court's ultimate ruling unsettled a longstanding norm and is arguably inconsistent with modern democratic values.[78] But the practical effect of elector freedom is likely to be small, and can be further cabined by changes to state appointment processes.[79] More important is the very fact of judicial engagement with the uncomfortable realities of the Electoral College system. Such engagement brings the anachronisms of the system into sharp focus and may center and legitimize proposals for reform. Thus, the *Baca* court's approach not only promoted the virtues underlying avoidance theory but could also provoke constitutional evolution in a more fundamental sense.

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[71] *See generally id.* (compiling relevant state statutes).

[72] *Cf.* BICKEL, *supra* note 54, at 70–71.

[73] *See* Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 841 (2008) (arguing that "incompletely theorized agreements should be subject to scrutiny and critique"); *cf.* Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CALIF. L. REV. 1179, 1182–85 (1996) (noting, albeit in a discussion of narrow rulings, the role that courts can play in drawing public attention to underexamined issues).

[74] *See, e.g.*, Vikram David Amar, *Three Observations About the (Limited) Impact of the Tenth Circuit's Recent Decision (in* Baca v. Colorado Department of State*) Concerning "Faithless" Electors in the Electoral College*, JUSTIA: VERDICT (Sept. 5, 2019), https://verdict.justia.com/2019/09/05/three-observations-about-the-limited-impact-of-the-tenth-circuits-recent-decision-in-baca-v-colorado-department-of-state-concerning-faithless-electors-in-the-electoral [https://perma.cc/CYR2-YCRL].

[75] *See* John Laidler, *End the Electoral College?*, HARV. GAZETTE (Oct. 21, 2019), https://news.harvard.edu/gazette/story/2019/10/harvard-panel-debates-effectiveness-of-electoral-college [https://perma.cc/J485-SLFY].

[76] *See, e.g.*, Editorial Board, Opinion, *Fix the Electoral College — Or Scrap It*, N.Y. TIMES (Aug. 30, 2019), https://nyti.ms/2Lbj3q6 [https://perma.cc/DQK8-CUQV].

[77] *See* Hasen, *supra* note 56, at 183 (describing "anti-avoidance" as the Court "setting itself up to address a constitutional question head-on [even when the question] was not properly presented").

[78] *See* Noah Feldman, Opinion, *Appeals Court Opens the Door to Electoral College Chaos*, BLOOMBERG (Aug. 25, 2019, 9:21 AM), https://www.bloomberg.com/opinion/articles/2019-08-25/electoral-college-chaos-is-possible-over-faithless-elector-ruling [https://perma.cc/3GRN-5TUP].

[79] *See* Amar, *supra* note 74 (arguing that states — which under the *Baca* court's reasoning retain plenary appointment authority — could significantly reduce faithlessness by appointing electors from among candidates' campaign staffs on the eve of the election).