

2 | History of the Electoral College

In 1787, the Constitutional Convention considered a variety of methods for choosing the President and Vice President, including selection by:

- Congress,
- state Governors,
- state legislatures,
- popular vote,
- presidential electors elected in popular elections by district, and
- presidential electors selected in a manner chosen by each state legislature.

The delegates debated the method of electing the President on 22 separate days and held 30 votes on the topic.^{1,2} As Professor George C. Edwards wrote:

“The delegates were obviously perplexed about how to select the president. ... On July 17, for example, the delegates voted for selection of the president by the national legislature. Two days later they voted for selection by electors chosen by state legislatures. Five days after that, they again voted for selection by the national legislature, a position they rejected the next day and then adopted again the day after that. Then, just when it appeared that the delegates had reached a consensus, they again turned the question over to a committee. This committee changed the convention’s course once more and recommended selection of the president by electors.”³

In the closing days of the Constitutional Convention in September 1787, the delegates decided to create a system in which a small number of eminent people (called “presidential electors”) would choose the President. The resulting body—called the “Electoral College”—was described in 1788 by John Jay (the presumed author of *Federalist No. 64*):

“As the **select assemblies for choosing the President** ... will in general be **composed of the most enlightened and respectable citizens**, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtues.” [Emphasis added]

¹ Peirce, Neal R. 1968. *The People’s President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 28–57.

² Longley, Lawrence D., and Braun, Alan G. 1972. *The Politics of Electoral College Reform*. New Haven, CT: Yale University Press. Pages 22–41.

³ Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Page 99.

The composition of the Electoral College resembled a joint session of Congress in the sense that each state would be entitled to a number of presidential electors equal to its number of U.S. Representatives and U.S. Senators.

Article II, section 1 of the U.S. Constitution provides:

“The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

“Each State shall appoint, in such 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 the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.” [Emphasis added]

Note that the Constitution is totally silent as to the method of selecting the members of the Electoral College. In particular, the Constitution did not say whether the voters would be allowed to vote for presidential electors. Moreover, if the presidential electors were to be popularly elected, the Constitution provided no guidance as to how the election would be conducted.

2.1. THE STATES HAVE USED 12 DIFFERENT METHODS FOR SELECTING PRESIDENTIAL ELECTORS.

The states have used 12 different methods for selecting presidential electors since the first presidential election in 1789.

Six different methods were used in 1789, and they appear at the top of the list below:

- appointment of the state’s presidential electors by the Governor and his Council (GC),
- appointment by the state legislature (L),
- popular election of presidential electors from single-electoral districts (DPE),
- popular election of one presidential elector from each county in the state (DCO),
- popular vote in each congressional district, but with the legislature making the final choice between each district’s two leading candidates, and appointment of the state’s remaining two electors by the legislature (DL),
- popular election of all of the state’s presidential electors on a statewide winner-take-all basis (W),
- popular election using multi-electoral districts (DM),
- popular election using congressional districts, and appointment of the state’s remaining two electors by the legislature (DCL),
- popular election from congressional districts and a statewide popular election for the state’s remaining two electors (DCS),
- popular election from congressional districts with those presidential electors, in turn, selecting the state’s remaining two electors (DX),
- appointment by a “Grand Committee” consisting of the Governor, his Council, and the state House of Representatives (GCL), and
- appointment of presidential electors by “baby electoral colleges” (BEC).

Table 2.1 Methods of appointing presidential electors 1789–1836

	1789	1792	1796	1800	1804	1808	1812	1816	1820	1824	1828	1832	1836
NH	W	W	W	L	W	W	W	W	W	W	W	W	W
MA	DL	DM	DCL	L	W	L	DM	L	DCS	W	W	W	W
CT	L	L	L	L	L	L	L	L	W	W	W	W	W
NJ	GC	L	L	L	W	W	L	W	W	W	W	W	W
PA	W	W	W	L	W	W	W	W	W	W	W	W	W
DE	DCO	L	L	L	L	L	L	L	L	L	L	W	W
MD	W	W	DPE	DPE	DM	DM	DM	DM	DM	DM	DM	DM	W
VA	DPE	DPE	DPE	W	W	W	W	W	W	W	W	W	W
SC	L	L	L	L	L	L	L	L	L	L	L	L	L
GA	L	L	W	L	L	L	L	L	L	L	W	W	W
NY		L	L	L	L	L	L	L	L	L	DX	W	W
RI		L	L	W	W	W	W	W	W	W	W	W	W
NC		L	DPE	DPE	DPE	DPE	L	W	W	W	W	W	W
VT		GCL	GCL	GCL	GCL	GCL	GCL	GCL	GCL	GCL	W	W	W
KY		DPE	DPE	DPE	DM	DM	DM	DM	DM	DM	W	W	W
TN			BEC	BEC	DPE	DPE	DPE	DPE	DPE	DPE	DPE	W	W
OH					W	W	W	W	W	W	W	W	W
LA							L	L	L	L	W	W	W
IN								L	L	W	W	W	W
MS									W	W	W	W	W
IL									DPE	DPE	W	W	W
AL									L	W	W	W	W
ME									DCS	DCS	DCS	W	W
MO									L	DPE	W	W	W
AR													W
MI													W

Table 2.1 shows the method for appointing presidential electors used in each state in the presidential elections between 1789 and 1836.

Overall, the table shows:

- Twenty-one of the 26 states changed their method of selecting presidential electors at least once between the 1789 and 1836 presidential elections.
- Between 1789 and 1836, an increasing number of states permitted their voters to select presidential electors.
- By 1836, South Carolina was the only state where the legislature continued to select presidential electors.
- The 1828 election was the first time that a majority of the states used the winner-take-all method of electing presidential electors. This method became predominant by 1832.
- Massachusetts changed its method in each of the first 10 presidential elections.

We now describe the 12 methods in greater detail.

2.1.1. Appointment of presidential electors by the Governor and his Council

On November 21, 1788, the New Jersey state legislature passed a law empowering the Governor and his Council to appoint the state's six presidential electors.

“[I]t shall and may be lawful for **the Governor and Council of this State to meet on the first Wednesday in January** next at Princeton, ... and then and there, by Plurality of Votes, to **nominate, elect and appoint, six Citizens of this state**, being Freeholders and Residents in the state, and otherwise qualified **to be the Electors** for the Purposes mentioned in the said Constitution, whom the Governor for the Time being shall commission under the Great Seal of the State, and make known the same by Proclamation; and **the said Electors, so chosen and appointed as aforesaid, shall meet together at Trenton**, in the County of Hunderdon, **on the first Wednesday in February** next, and then and there proceed to vote by Ballot for two Persons mentioned in the first Section of the second Article of the said Constitution.”⁴

On Election Day (January 7, 1789), Governor William Livingston issued the required proclamation certifying the choice that he and his Council made that day.

“Be it made known, that on this day, the honorable David Brearley, James Kinsey, John Neilson, David Moore, John Rutherford, and Matthew Ogden, Esquires, **were duly appointed by the Governor and Council of this state**, according to an act of the Legislature thereof, Electors on behalf of this state, for the purpose of choosing a President and Vice President of the United States.”⁵ [Emphasis added]

Note that many histories incorrectly say that New Jersey's presidential electors were appointed by the state legislature in 1789.⁶

⁴ An Act for carrying into effect, on the part of the state of New Jersey, the Constitution of the United States. November 21, 1788. *Acts of the General Assembly of the State of New Jersey*. Legislature number 13. Chapter CCXLI. Section 8. Page 481. <https://njlaw.rutgers.edu/cgi-bin/diglib.cgi?collect=njleg&file=013&page=0481&zoom=120>

⁵ DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III. Page 31.

⁶ For example, in its historical review of methods used to appoint presidential electors in 1789, the U.S. Supreme Court's opinion in *McPherson v. Blacker* in 1892 (incorrectly) stated, “At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, **Delaware**, Georgia, **New Jersey**, and South Carolina.” [Emphasis added]. 146 U.S. 1 at 29. A possible source of this misinformation about New Jersey and Delaware may be page 19 of the plaintiff's brief. See *Brief of F.A. Baker for Plaintiffs in Error in McPherson v. Blacker*. 1892.

2.1.2. Appointment of presidential electors by the state legislature

In 1789, the legislatures of Connecticut,⁷ Georgia,^{8,9} and South Carolina¹⁰ designated themselves as the appointing authority for all of their state's presidential electors.

The appointment of presidential electors by a state legislature—without any direct involvement by the voters—did not seem as odd in 1789 as it would today. At the time, state legislatures elected the Governor in all but five states (Connecticut, Massachusetts, New Hampshire, New York, and Rhode Island).¹¹ State legislatures appointed the delegates to the 1787 Constitutional Convention. Under the newly ratified Constitution, state legislatures chose United States Senators.¹² Moreover, the Founders were familiar with the fact that the British Parliament selected the Prime Minister.

Numerous state legislatures appointed presidential electors in the early years of the Republic. This practice had almost entirely disappeared by 1836. No state legislature has appointed presidential electors since Colorado did so in 1876.

2.1.3. Popular election of presidential electors from presidential-elector districts

In 1789, Virginia had 10 congressional districts and hence 12 electoral votes. The Virginia legislature passed a law creating 12 presidential-elector districts, and the voters elected one presidential elector from each.¹³

The use of the district method (subsequently copied by North Carolina) turned out to be decisive in determining the outcome of the nation's third presidential election in 1796 and, as will be seen below, led to the system for electing the President that we have today.

2.1.4. Popular election of presidential electors by county

In 1789, Delaware voters chose the state's presidential electors—with one presidential elector being elected from each of the state's three counties.

⁷ Laburee, Leonard Woods. 1945. *The Public Records of the State of Connecticut from May, 1785, through January, 1789*. Pages 495-496. January 7, 1789. <https://babel.hathitrust.org/cgi/pt?id=wu.89067359778&view=lup&seq=523&q1=electors>

⁸ *Georgia State Gazette*. December 13, 1788. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn84020084/1788-12-13/ed-1/seq-2/#sort=date_asc&index=9&ro%20%20Thws=12&proxtext=electors&sequence=0&ords=electors&page=3

⁹ The appointment of presidential electors by the Georgia legislature was reported in *Georgia State Gazette*. January 10, 1789. Page 2. Column 2. <https://gahistoricnewspapers.galileo.usg.edu/lccn/sn84020084/1789-01-10/ed-1/seq-2/>

¹⁰ The appointment of presidential electors by the South Carolina legislature was reported in *Georgia State Gazette*. January 31, 1789. Image 2. Column 3. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn84020084/1789-01-31/ed-1/seq-2/#sort=date_asc&index=2&rows=12&proxtext=electors&sequence=0&words=electors&page=4

¹¹ State constitutions were changed over the years so that, today, the voters directly elect all state Governors.

¹² The ratification of the 17th Amendment in 1913 permitted the voters to directly elect U.S. Senators.

¹³ An Act for the appointment of electors to choose a President pursuant to the constitution of government for the United States. November 17, 1788. Pages 648–653. <https://babel.hathitrust.org/cgi/pt?id=hvd.hxh5ud&view=lup&seq=716>

On October 28, 1788, the Delaware legislature passed a law providing:

“Every person coming to vote for ... [presidential Elector] ... shall deliver in writing on one ticket or piece of paper, the [name] of one ... person to be voted for as one of the Electors ... said Elector shall be an Inhabitant of the same County.”¹⁴

The elections were held at one location in each county:

- the home of Robert Griffith in Sussex County,
- the Kent County Court House in Dover, and
- the New Castle Court House in New Castle.

The *Delaware Gazette* of January 10, 1789, reported the results of the election of the state’s three presidential electors:

- Gunning Bedford Sr. from New Castle County with 163 votes;
- George Mitchell from Sussex County with 522 votes; and
- John Banning from Kent County with unanimous support.¹⁵

Note how few people voted out of Delaware’s population of 59,094 (according to the 1790 census).

Note that the voter had to bring a piece of paper to the polling place. There were no government-printed ballots in Delaware or anywhere else in the United States until 1888, and there were no government-printed ballots for President anywhere until 1892.¹⁶ Instead, votes in most states were cast by means of hand-written or printed pieces of paper (called “tickets”) supplied by the voter. In some states, voting was *viva voce*.

Note that some sources incorrectly state that Delaware’s presidential electors in 1789 were appointed by the state legislature.¹⁷

2.1.5. Popular voting by congressional district, but with the legislature making the final choice

In 1789, Massachusetts voters voted for presidential-electoral candidates in each of the state’s eight congressional districts. The state legislature then made the final choice between the two candidates receiving the most popular votes in each district. In effect, the voters nominated two candidates for consideration by the legislature.¹⁸

One can argue whether this procedure (which was never used again) qualifies as a popular election. In any case, the heavy-handed involvement of the Massachusetts legisla-

¹⁴ Delaware election law passed on October 28, 1788. DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1984. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 2. Page 71.

¹⁵ *Delaware Gazette*. January 10, 1789. DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1984. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 2. Page 83.

¹⁶ See section 3.11 for a discussion of government-printed ballots.

¹⁷ See footnote 6 above concerning New Jersey.

¹⁸ Resolve for Organizing the Federal Government. 1788. *Acts and Resolves passed by the General Court, 1788–89*. Boston, MA: Secretary of the Commonwealth. November 20, 1788. Chapter 49. Page 258. <https://archive.org/details/actsresolvespass178889mass/page/256/mode/2up?q=electors>

ture had little practical political impact in 1789, given that George Washington was poised to win the unanimous support of all of the nation's presidential electors, and that John Adams of Massachusetts was destined to win unanimous support of the presidential electors from his home state.

The state's two senatorial electors were appointed by the state legislature in 1789 without any involvement by the voters.

2.1.6. Popular election on a statewide winner-take-all basis

In New Hampshire, Maryland, and Pennsylvania, all of the state's presidential electors were elected on a statewide winner-take-all basis in 1789.

These three winner-take-all laws each differed somewhat from present-day practice.

For example, in New Hampshire, an absolute majority of the popular vote was necessary to elect a presidential elector. In the absence of the required majority, the state legislature made the selection after Election Day.¹⁹ As it happened, no candidate for presidential elector in New Hampshire in 1789 received the required absolute majority, and the legislature ended up choosing all of the state's electors.

In 1845, Congress debated legislation to establish a uniform nationwide Election Day for choosing presidential electors. The existence of New Hampshire's absolute-majority requirement (copied, by then, by two other states) required Congress to address the possibility that some state legislatures might become involved in choosing their state's presidential electors after Election Day. The result was a vaguely worded exception that was couched in terms of the voters' "failure to make a choice" on Election Day. This 1845 "carve out" played an important role in the tumultuous events of January 6, 2021 (section 3.1.3).

Maryland added a regional twist to its winner-take-all rule. All of Maryland's voters were permitted to vote for all eight of the state's presidential electors—thereby enabling a statewide plurality of voters to control the disposition of all of the state's electoral votes. However, each voter was required to vote for three electors from the Eastern Shore and five from the Western Shore, thereby ensuring a regional distribution of presidential electors.

"Every person coming to vote for Elections of President and Vice President ... shall have a right to vote for eight persons, five of whom shall be residents of the Western Shore, and three of the Eastern Shore, and the five persons residents of the Western Shore having the greatest number of votes of all the Candidates on that shore [and] those persons residents of the Eastern Shore, having the greatest number of votes of all the candidates on that shore shall be declared to be duly elected."²⁰

¹⁹ An act for carrying into effect an ordinance of Congress of the 13th September relative to the Constitution of the United States. *Laws of New Hampshire 1784–1792*. 1916. Volume Five. Manchester, NH: The John B. Clarke Company. November 12, 1788. Page 333. <https://archive.org/details/lawsfnewhampshi05newh/page/332/mode/2up?q=electors>

²⁰ An act directing the time, places and manner, of holding elections for representatives of this state in the congress of the United States, and for appointing electors on the part of this state for choosing a president and vice-president of the United States, and for the regulation of the said elections. 1788. *Laws of Maryland*,

Pennsylvania's winner-take-all law was especially inconvenient.

Voters in 1789 (and well into the 20th century) did not vote for their choice for President and Vice President but, instead, voted for individual candidates for the position of presidential elector.

Thus, in a state such as Pennsylvania with 10 electoral votes, the voter was expected to vote for 10 individual candidates for presidential elector.

Pennsylvania's winner-take-all law required that the voter's choices had to be *hand-written*—thus preventing the voter from bringing a printed “ticket” to the polling place—a convenience permitted by other states.

“Every person coming to vote for electors ... shall deliver **in writing** on ticket or piece of paper the names of ten person to be voted for as electors.”²¹ [emphasis added]

Today, all states use the so-called “short presidential ballot” that enables voters to conveniently cast a single vote for the presidential-vice-presidential slate of their choice (section 2.14).

2.1.7. Popular election using multi-electoral districts

Starting in 1792, additional methods for appointing presidential electors emerged.

In 1792, Massachusetts had 16 electoral votes (as a result of the 1790 census). The voters directly elected all of the state's presidential electors. The state was divided into four regional districts for this purpose. In two districts, the voters elected five presidential electors. In the other two districts, the voters elected three presidential electors.²²

The 1792 Massachusetts law specified that if a candidate failed to receive an absolute majority, the legislature would then make the choice after Election Day. Because of the absolute-majority requirement, the voters chose five of the state's 16 presidential electors, and the legislature chose eleven.²³

1785-1791. *Archives of Maryland Online*. Volume 204. Chapter X. Page 319. <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000204/html/am204-319.html>

²¹ An act directing the time, places, and manner of holding elections for representatives of this state in the Congress of the United States and for appointing electors on the part of this state for choosing a president and Vice President of the United States. Act 1373. Passed Oct. 4, 1788. *The Statutes at Large of Pennsylvania, Regular Session of 1788, General Laws*. Volume 13. Page 142. <https://palrb.gov/Preservation/Statutes-at-Large/View-Documents/17001799/1788/0/act/1373.pdf>

²² Resolve for districting the commonwealth, for the purpose of choosing electors of President and Vice President. Passed June 30, 1792. *Massachusetts Acts and Resolves, 1792 Session*. Pages 189-191. <https://archive.org/details/actsresolvespass179293mass/page/188/mode/2up?q=electors> <https://archive.org/details/actsresolvespass179293mass/page/188/mode/2up?q=electors>

²³ Crocker, Matthew H. 2007. *A New Nation Votes: American Election Returns 1787-1825*. *Lampi Collection of American Electoral Returns, 1787-1825*. American Antiquarian Society. https://elections.lib.tufts.edu/?f%5Boffice_id_ssim%5D%5B%5D=ON056&f%5Bstate_name_sim%5D%5B%5D=Massachusetts&range%5Bpub_date_facet_isim%5D%5Bbegin%5D=1792&range%5Bpub_date_facet_isim%5D%5Bend%5D=1792

2.1.8. Popular election using congressional districts, with the legislature appointing the state’s senatorial electors

Massachusetts has the distinction of having changed its method of awarding its electoral votes more times than any other state—a grand total of 11 times. It changed its method in every one of the nation’s first ten presidential elections.²⁴

In the nation’s third presidential election in 1796, Massachusetts voters elected one presidential elector from each congressional district.²⁵

The state’s two senatorial electors were then appointed by the state legislature.

2.1.9. Popular election from congressional districts and a statewide popular election for the state’s senatorial electors

In 1820, Massachusetts voters elected one presidential elector from each congressional district and two on a statewide basis—essentially the method used by Maine and Nebraska today.²⁶

2.1.10. Popular election from congressional districts with the chosen presidential electors selecting the state’s remaining electors

In 1828, New York voters elected presidential electors by congressional district. The resulting district-level electors then chose the state’s two senatorial electors.²⁷

2.1.11. Appointment by “grand committee” consisting of the Governor, his Council, and the House of Representatives

Vermont became a state in time to participate in the 1792 presidential election.

Vermont was the second state to involve the Governor and his cabinet in the selection of presidential electors.

In Vermont, the presidential electors were appointed by a “Grand Committee” consisting of the Governor, his 12-member Council, and all of the members of the state House of Representatives.²⁸

Note that Vermont had a unicameral legislature at the time.

²⁴ The 11th occasion was on August 4, 2010, when Massachusetts Governor Deval Patrick signed the National Popular Vote Compact into law.

²⁵ Resolve for the choice of electors for President and Vice President of the United States. Massachusetts Acts and Resolves, Passed June 16, 1796. *Massachusetts Acts and Resolves, 1796 May Session*. Chapter 20. Page 226. <https://ia804609.us.archive.org/29/items/actsresolvespass179697mass/actsresolvespass179697mass.pdf>

²⁶ Resolve regulating the choice of electors of President and Vice President of the United States. *Acts and Resolves passed by the General Court of Massachusetts*. May 1819-Feb 1824. Passed June 15, 1820. Chapter 6. Page 245. <https://archive.org/details/actsresolvespass181924mass/page/244/mode/2up?q=electors>

²⁷ Election of Representatives in Congress, Electors of President and Vice President, and Senators in Congress. 1827. *Laws of the State of New York Passed at the Second Meeting of the Fiftieth Session of the Legislature*. Pages 25–27. <https://babel.hathitrust.org/cgi/pt?id=uc1.b4375246&view=1up&seq=59&q1=electors>

²⁸ An Act directing the mode of appointing electors to elect a President and Vice President of the United States. Passed November 3, 1791. *Laws of 1791*. Page 43.

2.1.12. Appointment of presidential electors by “baby electoral colleges”

The multi-layered system used by Tennessee in 1796 (and again in 1800) was perhaps the most unusual system ever used by any state.

The legislative act establishing this system asserted that the state’s presidential electors would

“be elected with as little trouble to the citizens as possible.”^{29,30}

Tennessee’s law established three regional “baby electoral colleges”—each empowered to select one of the state’s presidential electors.

Then, the Tennessee law named several prominent local individuals from Washington, Sullivan, Green, and Hawkins Counties to meet and select one presidential elector from their part of the state.

Then, it named another group of prominent local individuals from Knox, Jefferson, Sevier, and Blount Counties to select their area’s presidential elector.

Finally, it named yet another group of individuals from Davidson, Sumner, and Tennessee Counties to select a presidential elector from their area.

The three regional electoral colleges met, and each selected one presidential elector.

The three presidential electors then met later and cast their votes for President and Vice President.

2.2. 1789—THE FIRST PRESIDENTIAL ELECTION

Only 10 states participated in the nation’s first presidential election on January 7, 1789.

Rhode Island and North Carolina did not participate, because neither had ratified the Constitution by the time of the election.

New York had ratified the Constitution by the time of the 1789 presidential election. However, it did not participate in the election, because the legislature could not agree on a method for choosing presidential electors.

The state had been closely divided on the question of ratifying the Constitution.

At the time, the lower house of the legislature (the Assembly) was elected by freemen; however, there were significant wealth qualifications in order to vote for State Senators.

Given the different electorates for the two chambers, a majority of the Senate were Federalists who had strongly backed the ratification of the Constitution. Meanwhile, the Assembly was dominated by Anti-Federalists who were still actively seeking substantial changes in the newly ratified Constitution.

²⁹ *Acts Passed at the Second Session of the First General Assembly of the State of Tennessee*. 1796. Chapter IV. Knoxville, TN: George Roulstone Printers. See page 10:9 at <https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74276090> For the 1799 law used in the 1800 presidential election, see page 108:107 at <https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74276298>

³⁰ At the first session of its legislature in March 1796, Tennessee enacted a law designating a joint session of the state legislature as the authority for appointing presidential electors. An Act Providing for the Appointment of Electors to Elect the Prefident and Vice Prefident of the United States. Chapter XI. This first law can be found at pages 30:29 at <https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74275932> Before ever being used, this first law was replaced during the legislature’s second session by the “baby electoral college” system. The replacement bore the same name as the old law and can be found on pages 10:9 and 12:11 at <https://llmc.com/OpenAccess/docDisplay5.aspx?textid=7427609>

Table 2.2 Methods of appointing presidential electors in 1789

State	Method of choosing presidential electors
Connecticut	Legislature (L)
Delaware	Popular election in one-county-one-electors districts (DCO)
Georgia	Legislature (L)
Maryland	Popular voting on statewide winner-take-all basis (W), with geographic restriction
Massachusetts	Popular voting by congressional districts with legislature selecting from the two leading candidates from each district, and with the legislature appointing the two senatorial electors (DL)
New Hampshire	Popular voting on statewide winner-take-all basis (W)
New Jersey	Governor and his Council (GC)
Pennsylvania	Popular voting on statewide winner-take-all basis (W)
South Carolina	Legislature (L)
Virginia	Popular voting in presidential-electors districts (DPE)

Both chambers of the state legislature agreed that the legislature should appoint the state's presidential electors—rather than the voters, the Governor, or anyone else.

With the Anti-Federalists and the Federalists each controlling one chamber, the legislature deadlocked over the method for picking the state's presidential electors. The competing approaches were:

- picking the presidential electors in a joint session consisting of all the Assemblymen and Senators meeting together—with each member having one vote, and
- a procedure requiring that a list of presidential electors be separately approved by each chamber.

Given that the Anti-Federalists held a substantial majority in the Assembly, while the Federalists held only a narrow majority in the Senate, the use of a joint session would have given the Anti-Federalists the power to pick all of the state's presidential electors.³¹

On the other hand, if the chambers acted separately, the state's eventual list of presidential electors would necessarily be the product of negotiation and compromise between the two chambers.

Election Day (January 7, 1789) came and went without any agreement. As a result, New York did not cast any electoral votes in the nation's first presidential election.

Table 2.2 shows the six different methods of appointing presidential electors used by the 10 states that participated in the 1789 presidential election.

2.3. THE DELIBERATIVE NATURE OF THE ELECTORAL COLLEGE

The Founding Fathers anticipated that the Electoral College would act as a deliberative body in which the presidential electors would exercise independent and detached judgment in order to select the best persons to serve as President and Vice President.

³¹ Kuroda, Tadahisa. 1994. *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787–1804*. Westport, CT: Greenwood Press. Pages 39–49.

As Alexander Hamilton (the presumed author of *Federalist No. 68*) wrote in 1788:

“[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **A small number of persons**, selected by their fellow-citizens from the general mass, will be most likely to possess **the information and discernment requisite to such complicated investigations.**” [Emphasis added]

There was no meaningful deliberation in the Electoral College in 1789 concerning the choice for President, because George Washington was the unanimous choice of the 69 presidential electors who voted.³²

However, the race for Vice President was very competitive, and the Electoral College acted in an arguably deliberative manner with respect to its choice of Vice President in 1789.

Under the original Constitution, each presidential elector had two votes.

Eleven candidates other than Washington received votes from the 69 presidential electors.³³

John Adams was elected as the nation’s first Vice President with 34 of 69 electoral votes.³⁴

In six of the 10 states that participated in the 1789 election, the presidential electors split their votes among two or more candidates for Vice President. That is, the electors did not vote in lockstep but instead exhibited a degree of independent judgment, as shown in table 2.3.

Meanwhile, the presidential electors voted in lockstep in four states (table 2.4).

In contrast, in the 1792 election, only two of the 132 electors deviated from the choice for Vice President made by the rest of their state’s delegation (one in Pennsylvania and one in South Carolina).³⁵

2.4. 1792—THE SECOND PRESIDENTIAL ELECTION

By 1792, New York had resolved the dispute between its two legislative chambers that had prevented the state from appointing any presidential electors in the nation’s first presidential election.

³² In addition to New York state not casting any votes in the Electoral College in 1789, two presidential electors from Maryland and two from Virginia failed to vote that year.

³³ Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 27.

³⁴ Note that John Adams was elected Vice President in 1789 without receiving an absolute majority of the presidential electors “appointed.” The original Constitution (Article II, section 1, clause 3) required an absolute majority of the presidential electors “appointed” to elect the President, but required only the second largest number of electoral votes to choose the Vice President. Thus, Adams’ 34 electoral votes (out of 69) were sufficient. The 12th Amendment (ratified in 1804) required an absolute majority of the presidential electors “appointed” to elect both the President and Vice President.

³⁵ Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 29.

Table 2.3 The six states where presidential electors scattered their votes for Vice President in 1789

State	Result
Connecticut	John Adams–5, Samuel Huntington–2
Georgia	John Milton–2, James Armstrong–1, Edward Telfair–1, Benjamin Lincoln–1
New Jersey	John Jay–5, John Adams–1
Pennsylvania	John Adams–8, John Hancock–2
South Carolina	John Rutledge–6, John Hancock–1
Virginia	John Adams–5, John Jay–1, John Hancock–1, George Clinton–3

Table 2.4 The four states where presidential electors voted in lockstep for Vice President in 1789

State	Result
Delaware	John Jay–3
Maryland	Robert H. Harrison–6
Massachusetts	John Adams–10
New Hampshire	John Adams–5

New York’s 1792 law authorized the legislature to appoint presidential electors in the same way that the state had previously appointed delegates to the Confederation Congress:

“The senate and assembly shall each openly nominate as many persons as shall be equal to the whole number of Delegates to be appointed; after which nomination they shall meet together, and those persons named in both lists shall be Delegates; and out of those persons whose names are not on both lists, one-half shall be chosen by the joint ballot of the senators and members of assembly so met together as aforesaid.”^{36,37}

Rhode Island and North Carolina had ratified the Constitution by 1792. The legislatures chose the presidential electors in both Rhode Island³⁸ and North Carolina³⁹ for the second presidential election.

Vermont became a state in time for the 1792 election. Its presidential electors were appointed by a “Grand Committee” consisting of the Governor, his 12-member Council, and all of the members of the state House of Representatives.

Kentucky had also become a state in time for the 1792 election. The state was divided

³⁶ An Act for appointing electors in this state for the election of a president and vice president of the United States of America. Passed April 12, 1792. *Laws of New York—Fifteenth Session*. Pages 481–482.

³⁷ Constitution of New York of 1777. Section XXX.

³⁸ *Acts and Resolves of the Rhode Island General Assembly, October 1792*. Page 5.

³⁹ An act directing the manner of appointing electors to vote for a President and Vice President of the United States. *Laws of North Carolina*. November 15, 1792. Chapter 15, Page 8. <https://digital.ncdcr.gov/Documents/Detail/laws-of-north-carolina-1792-november/3691870?item=4230925>

into four presidential-electoral districts, and voters chose one presidential elector from each district.⁴⁰

Three of the 10 states that participated in the 1789 presidential election changed their method of selecting presidential electors in time for the 1792 election.

In 1792, the Delaware legislature took the power to elect the state's presidential electors away from the voters and vested it in itself. It was not until 1832 that the legislature again allowed its voters to select the state's presidential electors.

The New Jersey legislature took the power to appoint presidential electors away from the Governor and his Council and vested it in themselves.

Massachusetts created several multi-electoral districts and allowed the voters to choose those presidential electors.⁴¹

Three states continued to use the statewide winner-take-all system (New Hampshire, Pennsylvania, and Maryland).

The legislatures in a total of eight states appointed the presidential electors (Connecticut, Delaware, Georgia, New Jersey, New York, North Carolina, and Rhode Island, and South Carolina).⁴²

In 1792, George Washington again received a vote from all of the presidential electors who voted.

In only two of the 15 states participating in the 1792 presidential election did the Electoral College act in an arguably deliberative manner with respect to the choice of Vice President—compared to six in 1789.

The split voting for Vice President in two states in 1792 was the last time when the Electoral College acted as the deliberative body envisioned by the Founders.

2.5. 1796—THE FIRST CONTESTED PRESIDENTIAL ELECTION AND THE EMERGENCE OF POLITICAL PARTIES

For the 1796 election, Massachusetts abandoned the multi-electoral districts that it used in 1792 and switched to a system in which the voters elected the presidential electors by congressional district. If no candidate for presidential elector received an absolute majority of the popular votes cast in a district, the legislature made the choice. The state legislature also appointed the state's two senatorial electors without any involvement by the voters.⁴³

⁴⁰ An Act for the appointment of electors to chufe a Prefident and Vice-Prefident of the United States. June 28, 1792. *Acts (of a General Nature) Passed at the Second Session of the Sixth General Assembly of the Commonwealth of Kentucky*. Lexington, KY: John Bradford Printers. Pages 15–17.

⁴¹ Resolve for districting the commonwealth, for the purpose of choosing electors of President and Vice President. Passed June 30, 1792. *Massachusetts Acts and Resolves, 1792 Session*. Pages 189–191. <https://archive.org/details/actsresolvespass179293mass/page/188/mode/2up?q=electors> <https://archive.org/details/actsresolvespass179293mass/page/188/mode/2up?q=electors>

⁴² An Act prescribing on the part of this state, the time, place and manner of appointing electors of a President and Vice president of the United States. *South Carolina, 1792-93. December Session: 3-86*. Page 3. Retrieved from Hein Online Session Laws.

⁴³ Resolve for the Choice of Electors for the President and Vice President of the United States. *Acts and Resolves of Massachusetts 1796–1797*. Boston, MA: Secretary of the Commonwealth. Pages 225–227. June 13, 1796. <https://ia804609.us.archive.org/29/items/actsresolvespass179697mass/actsresolvespass179697mass.pdf>. For election returns, see <https://ia804609.us.archive.org/29/items/actsresolvespass179697mass/actsresolvespass179697mass.pdf>

Maryland switched from popular election of presidential electors on a statewide winner-take-all basis to popular election using presidential-electoral districts.⁴⁴

Georgia switched from legislative appointment to statewide popular election on a winner-take-all basis.⁴⁵

Thus, the number of states that used the statewide winner-take-all system remained at three for the 1796 election (New Hampshire, Pennsylvania, and Georgia).

The recently admitted state of Tennessee used the “baby electoral college” system (section 2.1.11).

George Washington’s decision not to run for a third term in 1796 opened the way for the nation’s first contested presidential election.

The contest for control of the national government resulted in the emergence of political parties. As Professor Jeffrey Pasley observed:

“The issue that led most directly to national electoral competition between parties was the so-called Jay Treaty with Great Britain, ratified by the Senate in 1795. While historians have long debated exactly when and how political parties first emerged, there has never been any question about what the politicians of the Early Republic regarded as the point of no return. While ideological cleavages and some electoral competition had already developed, ... it was the Jay Treaty that came to encapsulate them all, deepening the conflict and taking it national.”⁴⁶

The Founders’ vision of the Electoral College as a deliberative body conflicted with the political goal of winning the presidency.⁴⁷

Thus, the Electoral College was necessarily converted into a body whose members would—regardless of how selected—robotically vote for nominees of their political party.

This overnight conversion in the character of the Electoral College occurred without any change in state laws, federal laws, or the U.S. Constitution.

In the summer of 1796, the Federalist members of Congress met in a caucus and nominated John Adams of Massachusetts (the incumbent Vice President) and Thomas Pinckney of South Carolina as their party’s candidates for President and Vice President. Although the party caucus did not specifically designate which nominee was to become President, it was generally understood that Adams was the party’s choice for President.

⁴⁴ An act to alter the mode of electing electors to choofe the Prefident and Vice Prefident of the United States. *Laws of Maryland, 1795*. Archives of Maryland Online. Volume 647. Chapter LXXII. Page 66. <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000647/html/am647-66.html>

⁴⁵ *The Augusta Chronicle and Gazette of the State*. September 24, 1796. Image 3. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn82015220/1796-09-24/ed-1/seq-3/#sort=date_asc&index=2&rows=12&proxtext=electors&sequence=0&words=electors&page=

⁴⁶ Pasley, Jeffrey L. 2013. *The First Presidential Contest: 1796 and the Founding of American Democracy*. Lawrence, KS: University Press of Kansas. Page 101.

⁴⁷ White, Theodore H. 1969. *The Making of the President 1968*. New York, NY: Atheneum Publishers. Page 471.

Meanwhile, the Republican congressional caucus⁴⁸ voted to support the candidacies of Thomas Jefferson of Virginia and Aaron Burr of New York.^{49,50,51}

The two parties then campaigned throughout the country to elect their nominees.

The necessary consequence of centrally nominated candidates was that presidential electors would be expected to cast their votes in the Electoral College for the party's nominees.

Thus, candidates for presidential elector generally made it known (often through advertisements in newspapers) how they intended to vote in the Electoral College.

As the Supreme Court observed in *McPherson v. Blacker*:

“Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, **whether chosen by the legislatures or by popular suffrage on general ticket⁵² or in districts, they [the presidential electors] were so chosen simply to register the will of the appointing power** in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated.”⁵³ [Emphasis added]

The overnight transition from the deliberative Electoral College envisioned by the Founding Fathers to the robotic Electoral College was illustrated by the fact that 138 of the 139 presidential electors in 1796 conformed to the Supreme Court's observation that the electors would simply

“register the will of the appointing power.”

Table 2.5 shows the methods of appointing presidential electors used in 1796 and the number of electoral votes received by John Adams and Thomas Jefferson.^{54,55}

In 1796, there was no hint of independent judgment by any of the presidential electors

⁴⁸ The party of Thomas Jefferson subsequently became known as the “Democratic-Republicans” and finally as the “Democrats.”

⁴⁹ Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 63–64.

⁵⁰ Grant, George. 2004. *The Importance of the Electoral College*. San Antonio, TX: Vision Forum Ministries. Pages 23–26.

⁵¹ The congressional caucus was replaced by the national nominating convention during the 1820s.

⁵² The statewide winner-take-all method of choosing presidential electors was called the “general ticket” system at the time. It was later called the “unit rule” or “winner-take-all rule.”

⁵³ *McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

⁵⁴ Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 176.

⁵⁵ This table simplifies the results of the 1796 election by presenting only the number of electoral votes received by Adams and Jefferson. Under the original Constitution, each presidential elector cast two undifferentiated votes. Thirteen different people received electoral votes in the 1796 election. Eleven of them were generally understood to be running for Vice President. Adams and Jefferson were generally understood to be running for President. The candidate with the most electoral votes (provided that it was a majority of the electors appointed) became President. The second-ranking candidate (regardless of whether he received a majority of the electors appointed) became Vice President.

Table 2.5 Methods of appointing presidential electors in 1796 and results

State	Adams	Jefferson	Method of choosing presidential electors
Connecticut	9		Legislature (L)
Delaware	3		Legislature (L)
Georgia		4	Popular voting statewide (W)
Kentucky		4	Popular voting in elector districts (DPE)
Maryland	7	4	Popular voting in elector districts (DPE)
Massachusetts	16		Popular voting in congressional districts, with the legislature choosing the two senatorial electors (DCL)
New Hampshire	6		Popular voting statewide (W)
New Jersey	7		Legislature (L)
New York	12		Legislature (L)
North Carolina	1	11	Popular voting in elector districts (DPE)
Pennsylvania	1	14	Popular voting statewide (W)
Rhode Island	4		Legislature (L)
South Carolina		8	Legislature (L)
Tennessee		3	Legislature appointment of members of regional “baby electoral colleges” which, in turn, appointed presidential electors (BEC)
Vermont	4		Grand committee consisting of the Governor, his Council, and the members of the House of Representatives (GCL)
Virginia	1	20	Popular voting in elector districts (DPE)
Total	71	68	

from the eight states in which presidential electors were chosen by the state legislature.⁵⁶ All 62 presidential electors from these eight states voted in lockstep for Jefferson or Adams in accordance with “the will of the appointing power”—that is, in accordance with the will of the legislative majority that effectively appointed the electors.

Similarly, there was no hint of independent judgment by the presidential electors from two of the three states that used the statewide winner-take-all rule. All six of New Hampshire’s presidential electors voted for Adams, and all four of Georgia’s electors voted for Jefferson—in lockstep with the strong sentiments of each state’s voters. That is, when the voters on a statewide basis were “the appointing power,” the winning presidential electors did their bidding.

Moreover, all of the district-level presidential electors in the strongly Federalist state of Massachusetts were supporters of their home state candidate (Adams), as were the two presidential electors appointed by the legislature. Again, the presidential electors did the bidding of “the appointing power.”

All four of the district-level presidential electors in Kentucky were supporters of Jefferson.

In three states (Virginia, North Carolina, and Maryland), electoral votes were frag-

⁵⁶ This count treats Tennessee’s “baby Electoral College” and Vermont’s Grand Committee as states in which the legislature chose the state’s presidential electors. *A New Nation Votes: American Election Returns 1787–1825*. American Antiquarian Society and Tufts University. <https://elections.lib.tufts.edu/catalog/kh04dr012>

mented because of the use of districts. The splitting of the electoral votes of these states was not, however, a demonstration of independence or detached judgment by presidential electors. The electors were merely voting in accordance with “the will of the appointing power”—which in this case was the will of the voters of each separate district.

Although Pennsylvania chose presidential electors in a statewide popular election in 1796, its electoral votes were divided 14–1 for a different reason. At the time (and well into the 20th century), voters were required to cast separate votes for each individual presidential elector. Thus, in 1796, Pennsylvania voters had to vote for 15 separate candidates for presidential elector.

Moreover, Pennsylvania law (unusual at the time) required that the names of voter’s choices for presidential elector be *hand-written*.⁵⁷

As Edward Stanwood reported in *A History of the Presidency from 1788 to 1897*:

“In Pennsylvania, the vote was extremely close. There were ... two tickets, each bearing fifteen names. The highest number polled by any candidate for elector was 12,306; the lowest of the thirty had 12,071. Thus 235 votes only represented the greatest difference; and two of the Federalist electors were chosen.”⁵⁸ [Emphasis added]

The result of this close election was that 13 Jeffersonians and two Federalists were chosen as presidential electors from Pennsylvania in 1796.

The state’s electoral votes were split because the election was so close, even though the state was using the statewide winner-take-all method. In fact, similar splits in a state’s electoral votes continued to occur until the short presidential ballot came into widespread use in the middle of the 20th century (section 2.14).

When the Electoral College met, 14 of the 15 electors voted, as expected, for their own party’s designated nominee for President.

Thus, 138 of the 139 presidential electors in 1796 loyally voted for the nominees of their party.

In short, because of the emergence of competing political parties and the centralized nomination of presidential and vice-presidential candidates in 1796, the Electoral College no longer functioned as the deliberative body envisioned by the Founders.

Nonetheless, one of the two Pennsylvania Federalist electors who was elected due to the close statewide vote did not vote as expected.

Federalist Samuel Miles cast his vote in the Electoral College for Republican Thomas Jefferson—instead of his party’s nominee, John Adams.⁵⁹

⁵⁷ The law did not say whose hand had to write the names of the voter’s preferred candidates. Thus, the competing parties prepared and distributed sheets of paper with the required hand-written names of their party’s nominees for presidential elector. It is not known how many voters used these prepared lists. In any case, some of the variation in vote totals was, almost certainly, caused by individual voters’ mistakes in writing out their own lists. *The Statutes at Large of Pennsylvania*. Volume 15. Passed April 1, 1796. Chapter 1893. Page 428. <https://palrb.gov/Preservation/Statutes-at-Large/View-Document/17001799/1796/0/act/1893.pdf>

⁵⁸ Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 48.

⁵⁹ Peirce, Neal R. 1968. *The People’s President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Page 64.

In the December 15, 1796, issue of *United States Gazette*, a Federalist supporter bitterly complained:

“What, do I chufe Samuel Miles to determine for me whether John Adams or Thomas Jefferfon is the fittest man to be President of the United States? No, **I chufe him to act, not to think.**” [Emphasis as per original; spelling as per original].⁶⁰

Of the 24,068 electoral votes cast for President in the 59 presidential elections between 1789 and 2020, the vote of Samuel Miles for Thomas Jefferson in 1796 remains the only instance when an elector might have thought, at the time he voted, that his unexpected vote might affect the national outcome (section 3.7).

The expectation that presidential electors should “act” and not “think” has prevailed ever since 1796. The Electoral College simply became a rubber stamp for affirming “the will of the appointing power.” For over two centuries, the Electoral College has thus retained the form—but not the substance—of a deliberative body.

2.6. 1800—THE SECOND CONTESTED PRESIDENTIAL ELECTION

Six states changed their method of appointing presidential electors in anticipation of the 1800 election.

2.6.1. Virginia in 1800

In the nation’s first contested election in 1796, Federalist John Adams defeated Republican Thomas Jefferson by a 71–68 vote in the Electoral College (table 2.5).

Nothing focuses the attention of a presidential candidate on electoral machinery more than losing a close election.

In 1796, presidential electors had been elected by district in both Jefferson’s home state of Virginia and the neighboring Jeffersonian stronghold of North Carolina.

In 1796 in Virginia, Republican candidates won all but one of the state’s 21 presidential-electoral districts. However, in the district comprising Loudoun County and Fauquier County, the Federalist candidate for elector (Leven Powell) won 592 votes, while the Republican candidate (Albert Russell) received only 313 votes.⁶¹ Thus, Virginia’s use of the district system cost Jefferson one of his home state’s 21 electoral votes.

Similarly, North Carolina’s use of the district system cost Jefferson one of that state’s 12 electoral votes.⁶²

If Jefferson had received 100% of the electoral votes from the strongly Republican states of Virginia and North Carolina, he would have won the presidency in 1796 by a 70–69 margin in the Electoral College.

⁶⁰ This piece was signed with the alias “CANDOUR.”

⁶¹ Virginia 1796 Electoral College, District 21. *A New Nation Votes: American Election Returns 1787–1825*. American Antiquarian Society and Tufts University. <https://elections.lib.tufts.edu/catalog/hx11xg19w>

⁶² North Carolina 1796 Electoral College. *A New Nation Votes: American Election Returns 1787–1825*. American Antiquarian Society and Tufts University. <https://elections.lib.tufts.edu/catalog/k35694952>

Then, in the 1798 midterm elections, Virginia Republicans were shocked when the Federalists won eight of Virginia's 19 congressional races.^{63,64}

As the 1800 presidential election approached, Virginia Republicans considered two ways to avoid again losing electoral votes to the Federalists:

- eliminate the voters from the process and choose all the state's presidential electors in the state legislature (which was controlled by Jefferson's supporters), or
- continue conducting popular elections, but do so on a statewide winner-take-all basis.

Charles Pinckney, a prominent Jefferson supporter from South Carolina, advocated simply eliminating the voters from the process.

In a 1799 letter marked "Private and in confidence," Charles Pinckney wrote James Madison (then a Virginia Republican Congressman and later President) about

"the absolute necessity of your State Legislature passing at their next session an act to declare that **the Electors of a President & Vice President shall be elected by joint Ballott by your State Legislature** in the manner it is done in this State [that is, South Carolina]—this act must Be passed at your next session or it will be too late—the Election comes on you recollect in December 1800 & as **the Success of the Republican Interest depends upon this act** I am to intreat you not only to use all your own Influence, but to Write to & speak to all your Friends in the republican interest in the state Legislature to have it done. **The Constitution of the United States fully warrants it—& remember that Every thing Depends upon it—that Mr Adams carried his Election [in 1796] by One Vote from Virginia & from North Carolina.**"

"**A single Vote may be of great Consequence.** It is now a proper time to push every measure favourable to the republican interest."

"**This is no time for qualms.**"⁶⁵ [Emphasis added]

As Noble E. Cunningham wrote in *History of American Presidential Elections 1878–2001*:

"**In looking for ways to improve their chances for victory in the next presidential election, Republican managers thus turned their attention to state election laws.** No uniform system of selection of presidential electors prevailed. In some states, electors were chosen by the state legislature; in

⁶³ Larson, Edward J. 2007. *A Magnificent Catastrophe: The Tumultuous Election of 1800*. New York, NY: Free Press. Page 62. https://books.google.com/books?id=MXcCdlmwwecC&pg=PA62&lpg=PA62&dq=Charles+Pinckney+lived+for+politics&source=bl&ots=eAFaEbIWNd&sig=n4-McTecSzKqitjUddrpsi_hJfg&hl=en&sa=X&ved=0ahUKEwjPw6qw6OvVAhVmxFQKHdzwCJI4ChDoAAQ

⁶⁴ Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford, UK: Oxford University Press. Page 156.

⁶⁵ Letter from Charles Pinckney to James Madison. September 30, 1799. William T. Hutchinson et al. (editors). *Papers of James Madison*. Volume 17. Pages 272–273. Chicago, IL: University of Chicago Press. Available at <https://founders.archives.gov/documents/Madison/01-17-02-0175>

others they were elected on a general ticket throughout the state; in still others they were elected in districts. This meant that **the party that controlled the state legislature was in a position to enact the system of selection that promised the greatest partisan advantage.** Thus, in January 1800 the Republican-controlled legislature of Virginia passed an act providing for the election of presidential electors on a general ticket [that is, winner-take-all] instead of districts as in previous elections. By changing the election law, Republicans in Virginia, confident of carrying a majority of the popular vote throughout the state but fearful of losing one or two districts to the Federalists ensured the entire electoral vote of the Union's largest state for the Republican candidate."⁶⁶ [Emphasis added]

Jefferson summed up the reasons for Virginia's switch from the district system to the statewide winner-take-all system in a January 12, 1800, letter to Virginia Governor (and later President) James Monroe:

"On the subject of an election by a general ticket, or by districts, most persons here seem to have made up their minds. **All agree that an election by districts would be best, if it could be general; but while 10 states chuse either by their legislatures or by a general ticket, it is folly & worse than folly** for the other 6 not to do it. In these 10. states the minority is entirely unrepresented; & their majorities not only have the weight of their whole state in their scale, but have the benefit of so much of our minorities as can succeed at a district election. This is, in fact, ensuring to our minorities the appointment of the government. To state it in another form; it is merely a question whether we will divide the U S into 16. or 137. districts. The latter being more chequered, & representing the people in smaller sections, would be more likely to be an exact representation of their diversified sentiments. But a representation of a part by great, & a part by small sections, would give a result very different from what would be the sentiment of the whole people of the U S, were they assembled together."⁶⁷ [Emphasis added; spelling and punctuation as per original]

Six days after Jefferson's letter to the Governor, the Virginia legislature passed a law that ended the "folly" of dividing the state's electoral votes⁶⁸ and replaced the district sys-

⁶⁶ Cunningham, Noble E., Jr. 2002. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Pages 104–105. Note that Cunningham's article incorrectly attributes Jefferson's lost electoral vote in Pennsylvania to the state's use of the district system, whereas voting for presidential electors in Pennsylvania was, in fact, statewide. As previously mentioned in this section, it was the extreme closeness of the Pennsylvania *statewide* vote that produced the split statewide result that permitted the Federalists to elect two of their elector candidates. One of the two Federalist electors (Samuel Miles) defected to Jefferson, but one loyally voted for Adams.

⁶⁷ Ford, Paul Leicester. 1905. *The Works of Thomas Jefferson*. New York, NY: G.P. Putnam's Sons. 9:90.

⁶⁸ In 1892, the U.S. Supreme Court commented on the "folly" of dividing a state's electoral votes by saying, "The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the constitution, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform [that is, winner-take-all] rule was preferable." *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

tem that had been used in the first three presidential elections with the statewide winner-take-all system.

Two days later, Governor Monroe signed the law.⁶⁹

Remarkably, Virginia's new winner-take-all law began with an explanation linking its passage to the absence of a federal constitutional amendment:

“Whereas, until some uniform mode for choosing a president and vice president of the United States, shall be prescribed by an amendment to the constitution, it may happen under the law of this commonwealth for appointing electors for that purpose, that a choice may take place contrary to the will of a majority of the United States, and also contrary to the will of a majority of the people of this state, which would be inconsistent with the true intent and meaning of the constitution of the United States; and although this commonwealth is willing to accede to any reasonable and proper amendment of the said constitution to remedy the said evil, yet for as much as it ought in the mean time to be counteracted by every constitution regulation within the power of the legislature, until is shall be so removed.” [Emphasis added]

The Federalists campaigned against the new law in the subsequent April 1800 state legislative elections.

The *Virginia Federalist* complained that the general ticket (i.e., winner-take-all law) would:

“exclude one third at least of the citizens of Virginia from a vote for the president of the United States.”⁷⁰

The *Virginia Federalist* later said that the new law violated:

“the ancient useages of elections and [the voters'] established rights.”^{71,72}

The Republicans defended the new winner-take-all law in a nine-page broadside entitled “A Vindication of the General Ticket Law”:

“Virginia for instance has 21 electors, who constitute nearly one third of a majority, which is 70. **If all her votes are given in the same way, her consti-**

⁶⁹ An Act to amend an act entitled “An Act for Appointing Electors to choose a President and Vice President of the United States.” 1800. *Acts Passed at a General Assembly of the Commonwealth of Virginia*. Chapter One. Passed January 20, 1800. Pages 197–200. <https://babel.hathitrust.org/cgi/pt?id=mdp.35112104867314&view=lup&seq=203&q1=electors>

⁷⁰ *Virginia Federalist*. March 19, 1800. Pages 2–3.

⁷¹ *Virginia Federalist*. May 28, 1800. Page 3.

⁷² Larson, Edward J. 2007. *A Magnificent Catastrophe: The Tumultuous Election of 1800*. New York, NY: Free Press. Page 64. https://books.google.com/books?id=MXcCdlmwwecC&pg=PA62&lpg=PA62&dq=Charles+Pinckney+lived+for+politics&source=bl&ots=eAFaEbiWNd&sig=n4-McTecSzKqitjUddrpsi_hJfg&hl=en&sa=X&ved=0ahUKEwjPw6qw6OvVAhVmxFQKHdzWCJI4ChDoAQ

tutional influence in the election is great; it is three times greater than that of New Jersey, which has seven votes, and seven times greater than that of Delaware which has three. **But if the state were to vote by districts, ten votes might, under the law, be given for one candidate and eleven for the other,** and thus the state of Virginia, instead of retaining a power in the election, which the constitution allows three times greater than that of New Jersey, and seven times greater than that of Delaware, would have only a seventh part of the influence of the former, and a third part of the influence of the latter; in other words, only one efficient vote.”⁷³ [Emphasis added]

The full text of this document may be found in appendix C.

In any case, the Federalists failed to win control of the state legislature in the April 1800 elections and were thus unable to repeal winner-take-all.

As a result of this timely change in Virginia’s election law, Jefferson received 100% of Virginia’s electoral votes in the 1800 election.⁷⁴

The remainder of Thomas Jefferson’s January 12, 1800, letter to Virginia Governor James Monroe continues with what he learned from Aaron Burr of New York, his 1796 (and 1800) running mate (referred to as “113” in the letter).

The letter is noteworthy in that it records Burr’s prediction of victory in New York’s upcoming April 1800 state legislative elections based on winning New York City and Burr’s political calculation not to permit New York and New Jersey voters to participate in choosing the state’s president electors by the “general ticket” (that is, winner-take-all) method.

“I have today had a conversation with 113 who has taken a flying trip here from NY. He says, they have really now a majority in the H of R, but for want of some skilful person to rally round, they are disjointed, & will lose every question. In the Senate there is a majority of 8. or 9. against us.

“But in the new election which is to come on in April, **three or 4. in the Senate will be changed in our favor; & in the H of R** the county elections will still be better than the last; but still **all will depend on the city election, which is of 12. members.** At present there would be no doubt of our carrying our ticket there; nor does there seem to be time for any events arising to change that disposition.

⁷³ A Vindication of the General Ticket Law passed by the Legislature of Virginia on the 18th day of January. (Addressed “To the freeholders of Shenandoah County,” signed, Shenandoah Committee) Staunton, VA: John M. Thur Printers. 1800. Restored by Barrow, 1961. Page 2 states “Extract from a late publication signed Franklin.” Located at the Library of Virginia, Special Collections West Side JK528.V82.

⁷⁴ Virginia’s switch from the district system to the winner-take-all system, combined with the Republican victory in the spring 1800 state legislative elections in New York (described shortly in this section) allowed Jefferson’s party to win a majority in the Electoral College in the 1800 presidential election.

“There is therefore the best prospect possible of a great & decided majority on a joint vote of the two houses. **They are so confident of this, that the republican party there will not consent to elect either by districts or a general ticket. They chuse to do it by their legislature.** I am told the republicans of N J are equally confident, & equally anxious against an election either by districts or a general ticket. The contest in this State will end in a separation of the present legislature without passing any election law, (& their former one is expired), and in depending on the new one, which will be elected Oct 14. in which the republican majority will be more decided in the Representatives, & instead of a majority of 5. against us in the Senate, will be of 1. for us. They will, from the necessity of the case, chuse the electors themselves. Perhaps it will be thought I ought in delicacy to be silent on this subject. But you, who know me, know that my private gratifications would be most indulged by that issue, which should leave me most at home. If anything supersedes this propensity, it is merely the desire to see this government brought back to it’s republican principles.

“Consider this as written to mr. Madison as much as yourself; & communicate it, if you think it will do any good, to those possessing our joint confidence, or any others where it may be useful & safe. Health & affectionate salutations.”
[Emphasis added] [Spelling and punctuation from original]

2.6.2. Massachusetts in 1800

Meanwhile, the closeness of the electoral vote in the 1796 election and Virginia’s “folly” of dividing its electoral votes in 1796 did not go unnoticed by the Federalist Party in Massachusetts.

John Adams had won the support of all 16 of his home state’s popularly elected presidential electors in 1796.

However, the Republicans were making inroads in Federalist Massachusetts—just as the Federalists were doing in Virginia.

The Federalists feared that the Jeffersonians might win as many as two districts in the upcoming 1800 presidential election.⁷⁵

Thus, the Federalist-controlled Massachusetts legislature did the same thing that the Republican-controlled Virginia legislature did—it repealed the district method for electing presidential electors.

Then—just to be safe—the Massachusetts legislature decided to eliminate the voters as well as the districts. It passed a law designating itself as the appointing authority for all of the state’s presidential electors for the 1800 election.^{76,77}

⁷⁵ Cunningham, Noble E., Jr. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). 2002. *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Page 105.

⁷⁶ Resolve respecting the choice of electors of president and Vice President of the United States, and requesting the Governor to transmit a certificate of such choice. *Acts and Resolves of Massachusetts, 1800–1801*. Chapter Six. Passed June 6, 1800. Page 142. <https://archive.org/details/actsresolvespass180001mass/page/142/mode/2up?q=electors>

⁷⁷ Congressional Quarterly. 2010. *Presidential Elections 1789–2008*. Washington, DC: CQ Press. Page 190.

2.6.3. New Hampshire in 1800

The political situation was similar in nearby New Hampshire. In 1789, 1792, and 1796, New Hampshire had conducted popular elections for presidential elector on a statewide winner-take-all basis.

Fearing a possible loss in a statewide popular vote in 1800, the Federalist-controlled New Hampshire legislature passed a law specifying that it would choose all of the state's presidential electors.^{78,79}

2.6.4. Georgia in 1800

Similarly, Republicans in Georgia were concerned that the Federalists had won two congressional seats in the 1798 midterm elections in their state.

Consequently, Georgia became the third state to switch from popular voting for presidential electors (which it used in 1796) to legislative appointment for the 1800 election.^{80,81}

2.6.5. New York in 1800

The Empire State was not to be outdone by Virginia, Massachusetts, New Hampshire, and Georgia in terms of political shamelessness.

The legislature had appointed all of the state's presidential electors in 1792 and 1796.

The Federalists were in control of the legislature at the beginning of the year.

Recognizing that continuing Federalist control of the legislature would mean that Jefferson would again lose all 12 of New York's electoral votes, Jefferson's supporters advocated use of the district system—the very system that Jefferson had just eliminated in Virginia.

“In New York, Republicans introduced a measure to move from legislative choice to election by districts, but the proposal was defeated by the Federalists.”⁸²

After killing the Republican proposal to adopt popular elections and the district

⁷⁸ An act directing the mode of appointing electors of this state for the election of a President and Vice President of the United States. *Laws of New Hampshire*. Volume Six. Second Constitutional Period, 1792-1801. Volume 6. Ninth General Court, First Session. Chapter 6. Passed June 14, 1800. Page 636. <https://archive.org/details/lawsofnewhampshi1904newh/page/636/mode/2up?q=electors>

⁷⁹ Sharp, James Roger. 2010. *The Deadlocked Election of 1800: Jefferson, Burr, and the Union in Balance*. Lawrence, KS: University Press of Kansas. Pages 116–117.

⁸⁰ *Augusta Herald*. November 5, 1800. Image 3. Column 3. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn82014178/1800-11-05/ed-1/seq-3/#sort=date_asc&index=5&rows=12&proxtext=electors&sequence=0&words=Electors+electors&page=18. See also *The Augusta Chronicle and Gazette of the State*. November 22, 1800, Image 3. Column 1. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn82015220/1800-11-22/ed-1/seq-3/#sort=date_asc&index=11&rows=12&proxtext=electors&sequence=0&words=electors&page=18

⁸¹ Sharp, James Roger. 2010. *The Deadlocked Election of 1800: Jefferson, Burr, and the Union in Balance*. Lawrence, KS: University Press of Kansas. Pages 118.

⁸² Cunningham, Noble E., Jr. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). 2002. *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Page 105.

system, the Federalists were horrified when the Republicans won control of the legislature in the spring 1800 legislative elections.^{83,84}

The loss of the legislature (largely due to the organizing efforts of Jefferson's 1796 running mate, Aaron Burr) meant that Jefferson would receive all 12 of New York's electoral votes when the new legislature chose presidential electors later in the year.⁸⁵

Given the close 71–68 vote in the Electoral College in the Adams-Jefferson race in 1796, the imminent shift of these 12 electoral votes was poised to decide the national outcome of the 1800 presidential election.

However, the legislature that was elected in the spring would not take office until July 1. As John Ferling wrote:

“Jarred by the specter of defeat in the autumn, **Hamilton importuned Governor John Jay to call a special session of the Federalist-dominated New York legislature so that it might act before the newly elected assemblymen took their seats.** Hamilton's plan was for the outgoing assembly to enact legislation providing for the popular election—in districts—of the state's presidential electors, a ploy virtually guaranteed to ensure that the Federalists would capture nine or ten of the twelve electoral college slots.”⁸⁶ [Emphasis added]

Federalist Alexander Hamilton was blunt in his letter to Federalist Governor John Jay on May 7, 1800, in which he advocated that the Governor convene a lame-duck session of the outgoing legislature before July 1.

“The moral certainty therefore is, that there will be an anti-federal majority in the ensuing legislature; and the very high probability is, that **this will bring Jefferson into the chief magistracy, unless it be prevented by the measure which I now submit to your consideration, namely, the immediate calling together of the existing legislature.**

“I am aware that there are weighty objections to the measure; but the reasons for it appear to me to outweigh the objections. And in times like these in which we live, **it will not do to be over-scrupulous.** It is easy to sacrifice the substantial interests of society by a strict adherence to ordinary rules.

“In observing this, I shall not be supposed to mean that anything ought to be done which integrity will forbid; but merely that the **scruples of delicacy and propriety,** as relative to a common course of things, **ought to yield to the extraordinary nature of the crisis.** They ought not to hinder the taking of a

⁸³ Sharp, James Roger. 2010. *The Deadlocked Election of 1800: Jefferson, Burr, and the Union in Balance*. Lawrence, KS: University Press of Kansas. Pages 118.

⁸⁴ Aaron Burr received major credit for this Republican victory in the April 1800 state legislative elections in New York.

⁸⁵ Weisberger, Bernard A. 2001. *America Afire: Jefferson, Adams, and the First Contested Election*. William Morrow. Page 238.

⁸⁶ Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford, UK: Oxford University Press. Page 131.

legal and constitutional step **to prevent an atheist in religion, and a fanatic in politics, from getting possession of the helm of State.**⁸⁷ [Emphasis added]

Governor Jay (formerly Chief Justice of the United States) rejected Hamilton's proposal and wrote this notation on Hamilton's letter:

"Proposing a measure for party purposes which it would not become me to adopt."⁸⁸

Hamilton was, of course, correct in predicting that the newly elected legislature would give all 12 of New York's electoral votes to Thomas Jefferson. Moreover, those 12 votes accounted for all of Jefferson's 73–65 lead over Adams in the Electoral College in 1800.

2.6.6. Pennsylvania in 1800

The Pennsylvania legislature permitted its voters to elect all of the state's presidential electors in 1789, 1792, and 1796 using the statewide winner-take-all rule.

However, the political situation in Pennsylvania in 1800 was complicated by the fact that the state had not previously enacted its winner-take-all method of picking presidential electors in the form of a permanent statute.

Control of the legislature was divided between the two parties when it came time to appoint presidential electors for the 1800 election.

"In Pennsylvania, a Republican House of Representatives and a Federalist Senate produced a deadlock over the system to be used to select electors, and the vote of that state was eventually cast by the legislature in a compromise division of the 15 electoral votes, eight Republican and seven Federalist electors being named."⁸⁹

2.6.7. Summary of changes in anticipation of the 1800 election

All three states (Maryland, New Hampshire, and Pennsylvania) that used the winner-take-all method in 1789 had abandoned it by the time of the 1800 election.

Georgia (which had adopted the statewide winner-take-all method in 1796) abandoned it in 1800.

Meanwhile, two states (Rhode Island⁹⁰ and Virginia) switched to the statewide winner-take-all method in 1800—making them the only two states to use the system in 1800.

⁸⁷ The complete letter can be found in *Brief of F.A. Baker for Plaintiffs in Error in McPherson v. Blacker*. 1892. Pages 30–31. See also Cunningham, Noble E., Jr. 1958. *Jeffersonian Republicans: The Formation of Party Organizations*. Chapel Hill, NC: University of North Carolina Press. Page 185. See also Weisberger, Bernard A. 2001. *America Afire: Jefferson, Adams, and the First Contested Election*. William Morrow. Page 239.

⁸⁸ *Brief of F.A. Baker for Plaintiffs in Error in McPherson v. Blacker*. 1892. Page 31.

⁸⁹ Cunningham, Noble E., Jr. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). 2002. *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Page 71.

⁹⁰ Resolution Relative to Election of President. *Acts and Resolves of the Rhode Island General Assembly, 1801–1804*. Passed November 1, 1800.

Despite the decrease in the number of states using the winner-take-all method, 1800 would turn out to be the year when it got its second wind.

2.7. THE 12TH AMENDMENT

Under the original Constitution, each presidential elector cast two votes.

In voting, a presidential elector did not differentiate between his choice for President and his choice for Vice President (as they do today). Instead, the candidate with the most electoral votes became President (provided that the candidate had an absolute majority of the presidential electors appointed), and the second-place candidate became Vice President (regardless of whether that candidate had an absolute majority).

In the nation's first two presidential elections (1789 and 1792), the problems lurking in this arrangement were masked, because George Washington was the unanimous choice of the Electoral College.

That was not to be the case in the nation's first competitive presidential election in 1796.

In that year, the Federalist members of Congress caucused and nominated Vice President John Adams of Massachusetts and Thomas Pinckney of South Carolina.

Meanwhile, their opponents in Congress (initially called the "Republicans," later called the "Democratic Republicans," and eventually called the "Democrats") caucused and nominated Thomas Jefferson of Virginia (who had served as Secretary of State for several years under Washington) and Aaron Burr of New York.

Neither caucus officially designated one of their nominees as the presidential nominee and the other as the vice-presidential nominee. It was, however, generally understood that Adams and Jefferson were the presidential candidates.

As John Ferling wrote:

"The election was overshadowed by the Constitutional Convention's ill-advised notion that electors were to vote by ballot for two persons for the presidency. The electoral college system was a calamity waiting to happen."⁹¹

The election was expected to be close in the Electoral College.

The Federalists were strongest in the north, and the Republicans were strongest in the south.

Each party had a nominee from each region in order to maximize its appeal.

Federalist nominee Thomas Pinckney was expected to be able to win all of the electoral votes from his home state of South Carolina (where the legislature appointed the presidential electors). However, Republican nominee Aaron Burr was not expected to be able to win similar support in the New York legislature (where the legislature also appointed the electors).

Given that each presidential elector cast two votes in the Electoral College—not differentiated as to whether for President or Vice President—the Federalist Party faced the excruciating dilemma of whether to give its wholehearted support to both its own nominees.

⁹¹ Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford, UK: Oxford University Press. Page 887.

If 100% of the Federalist presidential electors had loyally cast one of their two votes for Adams and their second vote for Thomas Pinckney, and if Pinckney had then won the additional bloc of electoral votes from South Carolina, Thomas Pinckney would likely have ended up with more electoral votes than Adams. However, Adams was the person that the party's congressional caucus and most Federalists wanted to become President.

To avoid that result:

“No less than eighteen [Federalist] electors in New England resolved that Pinckney’s vote should not exceed Adam’s and withheld their votes from the [Federalist] candidate for Vice president, and scattered them upon others.”⁹²

This strategic voting by Federalist presidential electors succeeded in ensuring the presidency to John Adams.

However, it simultaneously enabled Republican Thomas Jefferson to end up with the second-highest number of electoral votes.

Thus, Federalist John Adams was elected President, and his chief critic and opponent (Jefferson) became Vice President.^{93,94,95}

The problems inherent with giving each presidential elector two undifferentiated votes surfaced again in the nation’s second contested presidential election (1800).

Thomas Jefferson and Aaron Burr again were the nominees of the Republican Party. As in 1796, it was generally understood that Jefferson was the Party’s choice for President, and Burr was the party’s choice for Vice President.

In 1800, the Republicans won an absolute majority in the Electoral College.

To avoid the scattering of electoral votes that had given the vice-presidency to the opposing party in 1796, 100% of the Republican presidential electors loyally voted for both of their party’s nominees in 1800.

However, the result of their lockstep loyalty was that Jefferson and Burr each received an equal number of votes in the Electoral College.

Under the Constitution, ties in the Electoral College were to be resolved by a “contingent election” in which the U.S. House of Representatives picks the President and the U.S. Senate picks the Vice President.

⁹² Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 49.

⁹³ Peirce, Neal R. 1968. *The People’s President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 63–64.

⁹⁴ Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Pages 49–53. There is considerable historical controversy concerning Alexander Hamilton’s possible motives and role in the “strategic voting” by Federalist presidential electors in the 1796 election. The main point, for the purposes of this chapter, is that the original Constitution’s provision for double voting by presidential electors was unworkable in the context of political parties and in the context of a competitive presidential election.

⁹⁵ John Adams received 71 electoral votes to Jefferson’s 68. Adams received an absolute majority (71 out of 138) of the electoral votes. Jefferson received the second highest number of electoral votes but not an absolute majority.

In the House, each state is entitled to cast one vote for President. Moreover, states with an equally divided House delegation could not cast a vote. Nonetheless, an absolute majority of the House delegations was required in order to elect a President.

In 1800, newly elected members of the House did not take office until March 4—the same day that the newly elected President took office.

Thus, the Congress that was sitting at the time of the contingent election was the lame-duck Federalist Congress elected in 1798.

Neither party controlled an absolute majority of the House delegations at the time.⁹⁶

After a prolonged and bitter dispute involving 36 ballots in the House of Representatives, Thomas Jefferson emerged as President.^{97,98,99}

The 1796 and 1800 elections demonstrated that giving presidential electors two undifferentiated votes was incompatible with a system in which political parties competed for power.

Thus, Congress passed the 12th Amendment specifying that each presidential elector would cast separate votes for President and Vice President.

Separate voting for President and Vice President enables the winning political party to elect both of its nominees to national office.

The states quickly ratified the amendment, and the new procedure was in effect in time for the 1804 election.¹⁰⁰

The 12th Amendment can be viewed as formalizing the central role of political parties in presidential elections and recognizing that the Electoral College was not a deliberative body.

2.8. MASSACHUSETTS CHANGED ITS METHOD OF SELECTING PRESIDENTIAL ELECTORS IN EACH OF THE FIRST 10 ELECTIONS

Massachusetts changed its method of awarding its electoral votes in every one of the first 10 presidential elections.

In addition to the methods previously mentioned (for 1789, 1792, 1796, and 1800), Massachusetts made the following additional changes:

- In 1804, the voters were allowed to elect 17 presidential electors by district and two on a statewide basis. This was thus the first election in which the Massachusetts legislature ceded control to the voters for all of the state's presidential electors.¹⁰¹

⁹⁶ As a result of the 20th Amendment (ratified in 1933), the newly elected House takes office on January 3. A contingent election today would be conducted by the newly elected House on January 6.

⁹⁷ Dunn, Susan. 2004. *Jefferson's Second Revolution: The Elections Crisis of 1800 and the Triumph of Republicanism*. Boston, MA: Houghton Mifflin.

⁹⁸ Weisberger, Bernard A. 2001. *America Afire: Jefferson, Adams, and the First Contested Election*. William Morrow.

⁹⁹ Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford, UK: Oxford University Press.

¹⁰⁰ Kuroda, Tadahisa. 1994. *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787–1804*. Westport, CT: Greenwood Press.

¹⁰¹ *Acts and Resolves of the Massachusetts General Court, 1804–1895*. Boston: Young & Mims, MDCCCIV. Reprinted, Wright & Porter, 1898. Page 296. <https://archive.org/details/actsresolvespass180405mass/page/296/mode/2up?q=electors>

- In 1808, the legislature decided to pick the electors itself—again excluding the voters entirely.¹⁰²
- In 1812, the voters elected six presidential electors from one district, five electors from another district, four electors from another, three electors from each of two districts, and one elector from a sixth district.¹⁰³
- In 1816, the legislature again decided to pick all the electors itself.¹⁰⁴
- In 1820, the voters were allowed to elect 13 presidential electors by district and two on a statewide basis.¹⁰⁵
- Then, in 1824, Massachusetts adopted its 10th method of awarding electoral votes, namely the statewide winner-take-all rule that is in effect today.¹⁰⁶

Finally, in 2010, Massachusetts conditionally changed its method of appointing its presidential electors by enacting the National Popular Vote Compact. This change will go into effect when states possessing a majority of the electoral votes (270 out of 538) enact the same legislation.

2.9. MID-DECADE CHANGES IN PRESIDENTIAL-ELECTOR DISTRICTS IN TENNESSEE IN 1807.

The Tennessee legislature abandoned the “baby Electoral College” method that it used in 1796 and 1800 and replaced it in 1803 with a system in which the voters of five presidential-electtor districts would each elect one elector.

Specifically, the first presidential-elector district consisted of the counties of Greene, Washington, Carter, and Sullivan for the 1804 presidential election. The second district consisted of Hawkins, Claiborne, Grainger, Jefferson, and Cocke.¹⁰⁷

Then, in 1807, the legislature rearranged the districts prior to the 1808 presidential election. For example, Hawkins County (which had been in the second district) was added to the first district, and Sevier County and a portion of Campbell County were added to the second district.¹⁰⁸

¹⁰² *Resolves of the General Court of the Commonwealth of Massachusetts*, May 1806–Mar. 1810. Boston: Adams & Rhoades. Pages 205–209. <https://archive.org/details/actsresolvespass0610mass/page/n341/mode/2up?q=electors>

¹⁰³ *Resolves of the Commonwealth of Massachusetts Passed at the Several Sessions of the General Court, May 1812–Mar. 1815*. Boston: Russell, Cutler and Co., 1812–15. Chapter LXXI. Passed Oct. 12, 1812. Page 94. <https://archive.org/details/actsresolvespass181215mass/page/94/mode/2up?q=electors>

¹⁰⁴ *Acts and Resolves passed by the General Court of Massachusetts. May 1815–Feb 1819*. Chapter XIX. Passed June 13, 1816. Page 233. <https://archive.org/details/actsresolvespass1519mass/page/232/mode/2up?q=electors>

¹⁰⁵ *Acts and Resolves passed by the General Court of Massachusetts. May 1819–Feb 1824*. Chapter 6. Passed June 15, 1820. Page 245. <https://archive.org/details/actsresolvespass181924mass/page/244/mode/2up?q=electors>

¹⁰⁶ *Acts and Resolves passed by the General Court of Massachusetts. May 1824–Mar 1828*. Chapter IX. Passed June 8, 1824. Page 40. <https://archive.org/details/actsresolvespass2428mass/page/40/mode/2up?q=electors>

¹⁰⁷ An Act to provide for the election of electors of President and Vice President of the United States. Chapter XXIV. November 3, 1803. Image 67. <https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74276806>

¹⁰⁸ An Act to provide for the election of electors of President and Vice President of the United States. Chapter LXXIV. December 4, 1807. Image 125. <https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74277246>

2.10. KENTUCKY'S USE OF MULTI-ELECTOR DISTRICTS 1804–1824

Between 1804 and 1824, Kentucky voters elected presidential electors from multi-electoral districts.

“That this state shall be divided into three districts, for the purpose of electing fourteen electors to choose a President and Vice President of the United States, in the following manner [designating which counties are in each district].”

“Electors [shall] vote for the number of electors for President and Vice President hereby authorized to be elected in said districts.”¹⁰⁹

2.11. FIRST APPEARANCE OF THE PRESENT-DAY CONGRESSIONAL-DISTRICT METHOD

In 1820, Massachusetts adopted a system in which the voters elected one presidential elector from each of the state's congressional districts and two electors statewide.

“Each of the present districts for the choice of Representatives to Congress, shall form one district, for the choice of one Elector, and the two remaining Electors shall be chosen by the people at large.”¹¹⁰

Maine was admitted to the Union on March 15, 1820 (under the Missouri Compromise) and adopted this same system to elect its presidential electors.

“There shall be chosen at large out of the whole State, two Electors of President and Vice President of the United States, and one in each District within this State.”¹¹¹

Maine continued to use this system in 1824 and 1828. It then adopted the statewide winner-take-all rule starting in 1832.

In 1969, Maine repealed the winner-take-all system and re-adopted the system it had used in 1820, 1824, and 1828.

Nebraska adopted this same system in 1991.

2.12. SPREAD OF POPULAR VOTING FOR PRESIDENTIAL ELECTORS

In the period between 1804 and 1836, the method of choosing presidential electors varied considerably from state to state, and from election to election (table 2.1).

Chief Justice Melville Fuller of the U.S. Supreme Court recounted the variety of methods used to appoint presidential electors during this period in *McPherson v. Blacker*:

¹⁰⁹ An act to lay off the State into Electoral Districts. *Acts passed at the First Session of the Thirty-Second General Assembly for the Commonwealth of Kentucky. 1824. First Session.* Chapter DCCXVIII. Approved. January 7, 1824. Page 457.

¹¹⁰ Resolve regulating the choice of electors of President and Vice President of the United States. *Acts and Resolves passed by the General Court of Massachusetts.* Chapter VI. Passed June 15, 1820. Page 245. <https://archive.org/details/actsresolvespass181924mass/page/244/mode/2up?q=electors>

¹¹¹ Resolve providing for the choice of electors of President and Vice President. *Resolves of the legislature of the state of Maine, 1820.* Chapter XIX. Passed June 22, 1820.

“[T]he district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824, and 1828. Massachusetts used the general ticket system in 1804, ... chose electors by joint ballot of the legislature in 1808 and in 1816, ... used the district system again in 1812 and 1820, ... and returned to the general ticket system in 1824. ... In New York, the electors were elected in 1828 by districts, the district electors choosing the electors at large.... The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont,¹¹² and New Jersey in 1812.”¹¹³

Nonetheless, there was an unmistakable trend during this period in favor of both

- popular election of presidential electors and
- the winner-take-all method.

The controversial 1824 election focused attention again on the machinery for electing the President.

In that election, Andrew Jackson won the most popular votes and the most electoral votes; however, he did not become President.

By 1824, presidential electors were chosen by popular vote (either by districts or statewide) in 18 of the 24 states. The six states where legislatures still chose presidential electors in 1824 were Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont.

Jackson received 41% of the national popular vote in the 18 states that conducted popular elections for presidential electors—compared to 31% for John Quincy Adams (with the remaining popular votes divided approximately equally between two other candidates).

Jackson led Adams in the Electoral College by a 99–64 margin. However, he failed to receive the required absolute majority of 131 of the 261 electoral votes because of the electoral votes won by the two other candidates. Thus, the election of the President was thrown into the U.S. House (section 1.6.1). A mere 2,586 popular votes in four states kept Jackson from receiving the required majority in the Electoral College.

The controversy over the method of selecting presidential electors was stoked by the fact that Jackson received only 15 of the 71 electoral votes cast by presidential electors picked by state legislatures. Had Jackson received as few as 32 of these 71 electoral votes, he would have had the required absolute majority of 131.

Second, the conduct of the contingent election in the House further enflamed the controversy. House Speaker Henry Clay came in fourth place in the Electoral College. Under the 12th Amendment, only the top three candidates could be considered by the House. Being ineligible, Speaker Clay helped John Quincy Adams (the second-place candidate) to win the presidency in the House election. President Adams then promptly appointed Speaker Clay as his Secretary of State—an action that was widely criticized and became known as “the corrupt bargain.”¹¹⁴

¹¹² Vermont’s presidential electors were not selected by the legislature but instead by a “Grand Committee” consisting of the Governor his Council and the members of the House of Representatives (section 2.4).

¹¹³ *McPherson v. Blaker*. 146 U.S. 1 at 32. 1892.

¹¹⁴ Ratcliffe, Donald. 2015. *The One-Party Presidential Contest: Adams, Jackson, and 1824’s Five-Horse Race*. Lawrence, KS: University Press of Kansas.

Table 2.6 Number of states conducting popular elections of presidential electors 1789–1836

Election	Number of participating states	Number of states conducting popular elections of presidential electors	Percent of states conducting popular elections of presidential electors
1789	10	6	60%
1792	15	6	40%
1796	16	8	50%
1800	16	5	31%
1804	17	10	59%
1808	17	10	53%
1812	18	9	50%
1816	19	10	59%
1820	24	15	63%
1824	24	18	75%
1828	24	22	92%
1832	24	23	96%
1836	26	25	96%

The public reaction to these controversial aspects of the 1824 presidential election gave added impetus for the adoption of state laws allowing the voters to elect presidential electors.

By 1828, voters chose presidential electors in all but two states (Delaware and South Carolina), and Jackson swept that election.¹¹⁵

In 1832 and 1836, the voters chose presidential electors in all but one state (South Carolina). The South Carolina legislature continued to select presidential electors up to, and including, the 1860 election.

Table 2.6 shows the number of states conducting popular elections of presidential electors for the first 13 elections.

As can be seen in the table, 1800 was the year with both the smallest number of states and smallest percentage of states allowing the voters to select presidential electors.

Since the Civil War, there have been only two instances when presidential electors have been chosen by a state legislature—rather than the voters.

During Reconstruction, the Florida legislature appointed presidential electors in the 1868 presidential election.

The last occasion when any state legislature appointed presidential electors occurred in 1876.

When Colorado was admitted as a new state in the summer of that year, the Colorado legislature picked the state's presidential electors. However, the principle that the people should elect presidential electors was so well established by that time that the Colorado Constitution specifically acknowledged the exceptional nature of the legislature's appointment of the state's presidential electors on that occasion. The Colorado Constitution's

¹¹⁵ Cole, Donald B. 2009. *Vindicating Andrew Jackson: The 1828 Election and the Rise of the Two-Party System*. Lawrence, KS: University Press of Kansas.

schedule governing the transition from territorial status to statehood specified that the legislature would appoint presidential electors in 1876, but then required that starting in 1880:

“the electors of the electoral college shall be chosen by direct vote of the people.”

2.13. SPREAD OF WINNER-TAKE-ALL

Only two states used the statewide winner-take-all method in the 1800 election (Virginia and Rhode Island).

The political party that controlled a given state generally preferred the winner-take-all method, because it maximized the party’s power in national affairs.

As Missouri Senator Thomas Hart Benton said in a Senate speech in February 1824:

“The general ticket system, now existing in 10 States was the offspring of policy, and not of any disposition to give fair play to the will of the people. **It was adopted by the leading men of those States, to enable them to consolidate the vote of the State...**The rights of minorities are violated because a majority of one will carry the vote of the whole State.... This is ... a case ... of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed.”¹¹⁶ [Emphasis added]

Each state’s dominant political party was not only the beneficiary of the winner-take-all method, it was also in a position to enact it into law.

Thus, seven states (Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, and Virginia) used winner-take-all for the 1804 election.¹¹⁷

The number increased to 12 by 1824.

After the controversial 1824 election, the number jumped to 18 by 1828.

By the time of the 1832 election, there were only two states that did not use the winner-take-all method of awarding electoral votes, namely Maryland (which used a multi-electoral district system) and South Carolina (where the legislature appointed the presidential electors).

The preamble to Maryland’s 1834 law adopting the winner-take-all method for use in the upcoming 1836 election explained the reason for making the change:

“Whereas, the manner of appointing electors of president and Vice President, of the United States, by a general ticket, as directed by the legislatures of a large majority of the states, has the effect of giving the whole electoral vote

¹¹⁶ 41 *Annals of Congress* 169. February 3, 1824. <https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=041/llac041.db&recNum=2>

¹¹⁷ Note that some sources incorrectly say that Massachusetts used a district system in 1804. However, all 19 presidential electors were chosen statewide under the winner-take-all rule in 1804. *Resolve Prescribing the Mode for the Choice of Electors of President and Vice President of the United States*. Acts and Resolves Passed by the General Court—Session Laws. Volume 1804–1805. Boston, MA: Secretary of the Commonwealth. Pages 296–298. <https://archive.org/details/actsresolvespass180405mass/page/n7/mode/2up> See also *American Election Returns 1787–1825*. <https://elections.lib.tufts.edu/catalog/qn59q517m>

Table 2.7 Number of states using winner-take-all 1789–1836

Election	Number of participating states	Number of states using winner-take-all	Percent of states using winner-take-all
1789	10	3	30%
1792	15	3	20%
1796	16	3	19%
1800	16	2	13%
1804	17	7	41%
1808	17	6	35%
1812	18	5	28%
1816	19	7	37%
1820	24	9	38%
1824	24	12	50%
1828	24	18	75%
1832	24	22	92%
1836	26	25	96%

of each of those states, to one person, for each of those important offices; and **the mode adopted and long used in the state of Maryland**, of electing in separate districts of the state, one or at most two electors from [each] district, **results in all cases of contest in giving a divided vote** to the candidates for the highest offices in the government, and the majority of **the citizens of Maryland are thereby deprived of their just weight in the choice of the Chief Magistrate**, as compared with the majority of the citizens of most of the other states.¹¹⁸ [Emphasis added]

Thus, in 1836, South Carolina remained as the only state that did not conduct a popular election for its presidential electors and the only state that was not using the winner-take-all method.¹¹⁹

Table 2.7 shows the number of states using the winner-take-all method for selecting presidential electors for the first 13 elections.

Opposition to the spread of the winner-take-all system was centered in Congress.

Given that the Constitution gave the states exclusive power to choose the method of selecting presidential electors, the tool available to Congress to stop the spread of the winner-take-all system was a federal constitutional amendment.

¹¹⁸A supplement to an act, entitled, an act, to reduce into one, the several acts of assembly, respecting elections, and to regulate such elections. Passed March 13, 1834. Archives of Maryland Online. Volume 210. Page 305. <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000210/html/am210-305.html>

¹¹⁹Note that, as a practical matter, legislative selection usually meant that all of that state's electors would be supporters of the same presidential candidate. That was indeed the case in South Carolina in every case between 1836 and 1860. It would also be the case when both chambers of the legislature met in joint session. However, the selection of presidential electors by a legislature can result in a split delegation to the Electoral College if there is a political split between the two chambers (e.g., in Pennsylvania in 1800 when the legislature's two chambers were controlled by different parties).

Initiation of an amendment by Congress requires a two-thirds vote of both houses.

In 1813, 1819, 1820, and 1822, the U.S. Senate approved, by a two-thirds vote, a federal constitutional amendment to adopt the district method on a nationwide basis.

However, the amendment never managed to pass the House, although it did garner 63% support in 1819.¹²⁰

As previously noted, the Founding Fathers did not ever debate the winner-take-all method at the 1787 Constitutional Convention. Also, the winner-take-all method is not mentioned in the *Federalist Papers*.

Nonetheless, because the Constitution gave each state legislature the exclusive power to choose the method of appointing presidential electors, the spread of winner-take-all was, in retrospect, almost inevitable.

The Constitution's grant of the power to the states to independently choose the manner of allocating their electoral votes resulted in an irresistible spread of a system that the Founders never envisioned.

This fundamental change in the system for electing the President did not come about from a federal constitutional amendment but instead from the use by the states of a power that Article II of the U.S. Constitution specifically granted to them.

As Stanwood noted in *A History of the Presidency from 1788 to 1897*:

“[The winner-take-all] method of choosing electors had now become uniform throughout the country, **without the interposition of an amendment to the Constitution.**”¹²¹ [Emphasis added]

Since the Civil War, there have been only three states in which voters have selected presidential electors by a method other than the statewide winner-take-all rule.

2.13.1. Michigan's use of districts in 1892

The first exception arose in Michigan as a consequence of the controversial 1888 presidential election. In that election, President Grover Cleveland received 5,539,118 popular votes in his re-election campaign, whereas Republican challenger Benjamin Harrison received only 5,449,825 popular votes.¹²²

Despite Cleveland's nationwide margin of 89,293 popular votes, Harrison won a 233–168 majority in the Electoral College and was therefore elected President.

In the 1890 midterm elections, the Democrats won political control of the usually Republican state of Michigan. The Democrats repealed the statewide winner-take-all method

¹²⁰ Keyssar, Alexander. 2020. *Why Do We Still Have the Electoral College?* Cambridge, MA: Harvard University Press. Page 62.

¹²¹ Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 165. See also Busch, Andrew E. 2001. The development and democratization of the electoral college. In Gregg, Gary L., II (editor). 2001. *Securing Democracy: Why We Have an Electoral College*. Wilmington, DE: ISI Books. Pages 27–42.

¹²² Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 128.

of electing presidential electors (then prevailing in all the states). The state switched to an arrangement in which:

- one presidential elector would be elected by the voters of each of Michigan's 12 congressional districts;
- one additional presidential elector would be elected by the voters in the eastern half of the state (consisting of the 1st, 2nd, 6th, 7th, 8th, and 10th congressional districts); and
- the state's final presidential elector would be elected by the voters in the western half of the state (consisting of the state's other districts).

Despite the numerous historical examples of states using districts to choose presidential electors between 1789 and 1832, Michigan Republicans contested the constitutionality of the change to the district system.

In October 1892, the U.S. Supreme Court upheld Michigan's right to use the district method in *McPherson v. Blacker*.¹²³

The Democrats' district law delivered the desired results. In the 1892 election, Democrat Grover Cleveland received five electoral votes from Michigan, and Republican Benjamin Harrison received nine.

As soon as the Republicans regained overall control of the state government in Michigan, they promptly restored the statewide winner-take-all method. In 1896, the Republican presidential nominee (McKinley) received all of Michigan's electoral votes.

2.13.2. Maine's adoption of the district method in 1969

The second exception arose in 1969 when Maine adopted a system in which the state's two senatorial presidential electors are awarded to the presidential slate winning the statewide vote, and one presidential elector is awarded to the presidential slate carrying each of the state's two congressional districts.

This district system was identical to the system that Maine used in 1820, 1824, and 1828.

Until 2016, the district system did not produce an outcome different from the winner-take-all method of awarding electoral votes. In both 2016 and 2020, Donald Trump won one electoral vote from Maine by virtue of carrying the state's 2nd congressional district.

2.13.3. Nebraska's adoption of the district method in 1991

The third exception arose in 1991 when Nebraska adopted Maine's system of district and statewide electors.¹²⁴

Until 2008, the district system used in Nebraska did not produce an outcome different from the winner-take-all method of awarding electoral votes.

However, in 2008, Barack Obama carried Nebraska's 2nd congressional district (the Omaha area) and thereby won one of Nebraska's five electoral votes. In 2020, Joe Biden also won the 2nd district. Section 9.35 discusses the attempt to repeal Nebraska's district system.

¹²³ *McPherson v. Blacker*. 146 U.S. 1. 1892.

¹²⁴ Nebraska Revised Statutes. Section 32.1038.

2.14. EMERGENCE OF THE SHORT PRESIDENTIAL BALLOT

The “short presidential ballot” enables a voter to conveniently cast a single vote for a named candidate for President and a named candidate for Vice President—instead of voting separately for numerous individual candidates for presidential elector.

Starting with the nation’s first presidential election in 1789, voters in states that conducted popular elections were required to cast votes for individual candidates for presidential elector.

For example, Pennsylvania had 15 electoral votes in the 1796 election. The 15 elector candidates with the most popular votes statewide became the state’s presidential electors. That is, the state had a winner-take-all system.

But because the elector candidates ran individually, and because some elector candidates were better-known or better-liked than others, each elector candidate ended up with a slightly different statewide total.

The statewide vote in Pennsylvania was very close in 1796. Even though Pennsylvania was using the winner-take-all method, the state’s electoral votes ended up being split between the two parties. Thomas Jefferson’s Republican Party won 13 presidential electors, and John Adams’ Federalist Party won two.

Split electoral votes recurred in numerous subsequent elections.

For example, in 1880 in California (with six electoral votes), the statewide popular-vote count for the presidential electors of the two major parties ranged between 79,885 for the least popular elector candidate and 80,441 for the most popular candidate—a difference of only 556 votes. The top five vote-getters were Democratic elector candidates supporting their party’s nominee, Winfield S. Hancock. However, a Republican elector candidate supporting James A. Garfield managed to come in sixth place—thus splitting California’s electoral votes 5–1.¹²⁵

Similarly, the statewide winner came up one electoral vote short in Ohio and Oregon in 1892, in California and Kentucky in 1896, and in Maryland in 1904.

In 1912, Wilson received two of California’s electoral votes, with Theodore Roosevelt receiving 11.

In 1916, Democrat Woodrow Wilson received one of West Virginia’s electoral votes, while Republican Charles Evans Hughes received seven.¹²⁶

State-printed ballots for President first appeared in 1892.

In filling out a long “bed sheet” paper ballot, it was inevitable that some voters would accidentally vote for more elector candidates than their state’s number of electors—thereby invalidating their ballot. Other voters would inevitably vote for fewer electors than their state’s number of electors—thereby diminishing their impact on the election. Some voters mistakenly voted for just one elector candidate—thereby drastically diminishing the value of their franchise. In addition, a small number of voters would intentionally split their ticket and vote for presidential electors from opposing parties—perhaps because they liked or disliked a particular individual candidate for presidential elector.

¹²⁵ Congressional Quarterly. 2008. *Presidential Elections 1789–2008*. Washington, D.C.: CQ Press. Page 188.

¹²⁶ *Ibid.* Pages 158–159.

For these reasons, the inevitable result of long “bed sheet” ballots was that a state’s electoral vote would occasionally be split between presidential candidates.

Some states aided the voter by placing the names of each political party’s nominee for President and Vice President at the top of a column containing all of a party’s candidates for presidential elector.

For example, on the 1904 Louisiana ballot, the Democratic Party appears in the first column with the name of its presidential nominee (Alton B. Parker), and the Republican Party appears in the second column with the name of its presidential nominee (Theodore Roosevelt). The voter was still required to cast a separate vote for each of the state’s nine presidential electors.¹²⁷

The introduction of voting machines (with their limited space) created additional pressure to eliminate the “bed sheet” ballot created by separately listing the names of the numerous individual candidates for presidential elector.

In 1892, Massachusetts passed the nation’s first law allowing voters to make a single mark that would serve as a vote for a given party’s entire group of elector candidates.¹²⁸ Minnesota became the second state to pass such a law in 1901.¹²⁹

A second innovation emerged at approximately the same time. In 1897, Kansas passed a law that placed the names of the party’s presidential and vice-presidential nominees on paper ballots. This law acknowledged the political reality that voters were voting for a President and Vice President who would serve four-year terms governing the country—not for presidential electors who would make a brief appearance in their state Capitol to cast their votes in the Electoral College.

In 1918, Maryland passed a law combining Kansas’ idea (of presenting the voter with the names of the presidential and vice-presidential nominees) with Massachusetts’ idea (of enabling the voter to conveniently vote for a given political party’s entire group of elector candidates).¹³⁰ The result was what we today call the “short presidential ballot.”

By 1940, 15 states had adopted the short presidential ballot. The number increased to 26 states by 1948 and to 36 states by 1966.¹³¹

Since 1980, all states have used the short presidential ballot.

The increasing use of voting machines led to another change. Starting in Iowa in 1900, Indiana in 1901, New Jersey in 1902, and Illinois in 1903, states passed laws allowing the names of the individual candidates for presidential elector to be omitted from voting ma-

¹²⁷ The 1904 Louisiana ballot is part of the New York Public Library’s Election Ballots Collection and Rare Book Division. Image ID 57965442. <https://digitalcollections.nypl.org/items/32c1a750-4dcc-0137-d7df-2ff72b3d559c>

¹²⁸ The “short presidential ballot” should not be confused with “straight ticket” voting (which enables a voter to make a single mark to support all of a party’s candidate for *all* offices).

¹²⁹ Albright, Spencer D. 1940. The Presidential Short Ballot. *American Political Science Review*. Volume 34. Issue 5. Pages 955–959. page 955. <https://econpapers.repec.org/article/cupapsrev/default74.htm#v34:i5>

¹³⁰ Albright, Spencer D. 1940. The Presidential Short Ballot. *American Political Science Review*. Volume 34. Issue 5. Pages 955–959. Page 956. <https://econpapers.repec.org/article/cupapsrev/default74.htm#v34:i5>

¹³¹ Peirce, Neal R. 1968. *The People’s President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Page 120.

chines. In 1917, Nebraska became the first state to omit the names of elector candidates from paper ballots.¹³²

However, the old system lingered in some states.

The presidential ballot in Ohio in 1948 was particularly confusing. Ohio employed the short presidential ballot in 1948 for established political parties that had qualified to be on the ballot in previous years. Thus, Ohio permitted the voter to cast a single vote for all the elector candidates associated with the two major-party candidates—Democrat Harry Truman or Republican Thomas Dewey.

However, the newly formed Progressive Party (supporting Henry Wallace for President) failed to qualify in Ohio as a regular party in time for the 1948 presidential election. Ohio retained the old system for such situations. Thus, in lieu of Henry Wallace's name appearing on the ballot, the ballot provided a way to cast votes for the Progressive Party's 25 individual elector candidates.

In the confusion caused by this hybrid ballot, about 100,000 voters invalidated their ballots by voting for one or more individual Progressive elector candidates, while simultaneously voting for either Democrat Harry Truman or Republican Thomas Dewey. Truman carried Ohio by a mere 7,107 votes.

In the 1960 election, Alabama had not yet adopted the short presidential ballot. This fact led to a controversy as to whether John F. Kennedy won the most popular votes nationwide in 1960. The 1960 Alabama ballot is shown in figures 3.10a and 3.10b, and this controversy is discussed in section 3.13.

As recently as 1980, Vermont used a combination of the short presidential ballot and the traditional long ballot. Figure 2.1 shows a 1964 sample presidential ballot in Vermont where the voter had three options:

- vote for the Johnson-Humphrey slate or the Goldwater-Miller slate and thereby cast a vote for all three of that slate's presidential electors;
- vote for one, two, or three individual presidential-elector candidates of the same or different parties; or
- vote for one, two, or three write-in candidates for presidential elector.

It is still possible in some states today to cast write-in votes for presidential electors (section 3.9), votes for unpledged presidential electors (section 3.13), and separate votes for individual elector candidates (section 3.8).

By 2020, names of the individual presidential-elector candidates appeared on ballots of only three states (Arizona, Idaho, and South Dakota). For example, the 2020 ballot in Idaho (figure 3.3) shows the names of the four presidential-elector candidates associated with each presidential-vice-presidential slate.

¹³² Albright, Spencer D. 1940. The Presidential Short Ballot. *American Political Science Review*. Volume 34. Issue 5. Pages 955–959. Page 956. <https://econpapers.repec.org/article/cupapsrev/default74.htm#v34:i5>

PRESIDENTIAL ELECTORS
OFFICIAL BALLOT
 Town of
WINDSOR
 for the
General Election November 3, 1964

<p>REPUBLICAN PARTY</p> <p>For President</p> <p>BARRY M. GOLDWATER of Arizona</p> <p>For Vice-President</p> <p>WILLIAM E. MILLER of New York</p> <div style="text-align: center; margin-top: 10px;"> <input style="width: 40px; height: 20px;" type="checkbox"/> </div>	<p>DEMOCRATIC PARTY</p> <p>For President</p> <p>LYNDON B. JOHNSON of Texas</p> <p>For Vice-President</p> <p>HUBERT H. HUMPHREY of Minnesota</p> <div style="text-align: center; margin-top: 10px;"> <input style="width: 40px; height: 20px;" type="checkbox"/> </div>
For Electors of President and Vice-President of the United States	For Electors of President and Vice-President of the United States
Vote for THREE	Vote for THREE
MABEL STAFFORD, Republican, South Wallingford	MARGARET M. FARMER, Democratic, Burlington
LEE EMERSON, Republican, Barton	PETER J. HINCKS, Democratic, Middlebury
OLIN GAY, Republican, Springfield	HAROLD RAYNOLDS, Democratic, Springfield

Figure 2.1 Presidential ballot in Vermont in 1964

2.15. SEVEN COURT DECISIONS INTERPRETING ARTICLE II, SECTION 1

Seven court cases are particularly relevant to the interpretation of Article II, section 1 of the Constitution and the subject matter of this book.

These seven cases are mentioned briefly below and are discussed in greater detail elsewhere in this book.

2.15.1. *McPherson v. Blacker* in 1892

The U.S. Supreme Court recognized the exclusive power of the states to choose the method of awarding electoral votes in the seminal case of *McPherson v. Blacker* in 1892:

“[F]rom the formation of the government until now the practical construction of the clause has conceded **plenary** power to the state legislatures in the matter of the appointment of electors.”^{133,134}

¹³³ *McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

¹³⁴ In the 2000 case of *Bush v. Gore*, the U.S. Supreme Court wrote, “The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state

“The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [i.e., the winner-take-all rule], nor that the majority of those who exercise the elective franchise can alone choose the electors.... In short, **the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States.**”¹³⁵ [Emphasis added]

See the index of this book for numerous references to this case.

2.15.2. *State of Delaware v. State of New York in 1966*

In 1966, Delaware led a group of 12 predominantly small states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, and Pennsylvania) in suing New York in the U.S. Supreme Court.

At the time, New York was not only a closely divided battleground state, but it also possessed the largest number of electoral votes (43).

In *State of Delaware v. State of New York*, Delaware argued that New York’s decision to use the winner-take-all rule effectively disenfranchised voters in Delaware and the other 11 plaintiff states.¹³⁶ See Delaware’s brief,¹³⁷ New York’s brief,¹³⁸ and Delaware’s argument in its request for a re-hearing.¹³⁹

The U.S. Supreme Court declined to hear the case—presumably following the Court’s 1892 decision in *McPherson v. Blacker* that the choice of method of awarding electoral votes is exclusively a state decision.¹⁴⁰ See additional discussion in section 9.3.5.

2.15.3. *Williams v. Virginia State Board of Elections in 1968*

The plaintiffs in *Williams v. Virginia State Board of Elections* argued that Virginia’s winner-take-all statute violated the Equal Protection Clause of the 14th Amendment on the grounds that New York’s voters controlled the selection of 43 presidential electors, whereas Virginia voters controlled only 12.

A three-judge federal court in Virginia rejected this “interstate equal protection” claim as well as a claim based on the one-person-one-vote principle concerning the constitutionality of the winner-take-all method of awarding electoral votes. The U.S. Supreme Court

legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the State legislature’s power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. *Id.*, at 28–33.” (531 U.S. 98 at 104. 2000).

¹³⁵ *McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

¹³⁶ *Delaware v. New York* (1966). <https://www.scribd.com/document/331930037/Delaware-v-New-York-1966>

¹³⁷ <https://www.nationalpopularvote.com/elevenplaintiffs>

¹³⁸ <https://www.nationalpopularvote.com/delawarebrief>

¹³⁹ <https://www.nationalpopularvote.com/newyorkbrief>

¹⁴⁰ *State of Delaware v. State of New York*, 385 U.S. 895, 87 S.Ct. 198, 17 L.Ed.2d 129 (1966).

let the decision of the three-judge panel stand in a *per curiam* decision.¹⁴¹ See additional discussion in section 9.1.7 and section 9.33.3.

2.15.4. *Williams v. Rhodes* in 1968

In *Williams v. Rhodes* in 1968, the U.S. Supreme Court ruled that Article II, section 1's grant of power to the states is subject to the Equal Protection clause of the 14th Amendment.¹⁴² See additional discussion in section 9.1.13, section 9.1.14, and section 9.25.

2.15.5. *Bush v. Gore* in 2000

In 2000, the U.S. Supreme Court settled the dispute involving Florida's 25 electoral votes in favor of George W. Bush.¹⁴³ The Court approvingly cited its 1892 decision in *McPherson v. Blacker*. See additional discussion in section 6.23, section 7.35, section 9.11, and section 9.17.

2.15.6. Equal Citizens' challenge to winner-take-all laws in 2018

In 2018, Equal Citizens, a non-profit organization founded by Harvard Law Professor Lawrence Lessig, spearheaded the formation of the coalition of professors, organizations, plaintiffs, and law firms that filed lawsuits in federal district courts in Massachusetts, Texas, South Carolina, and California.¹⁴⁴

These (substantially similar) lawsuits argued that the state-by-state winner-take-all method of awarding electoral votes is unconstitutional under both the Equal Protection clause of the 14th Amendment and the First Amendment.^{145,146}

Equal Citizens argued against the winner-take-all (WTA) method in California in *Rodriguez et al. v. Brown*:

“WTA violates the Fourteenth Amendment because it counts votes for a losing presidential candidate in California only to discard them in determining Electors who cast votes directly for the presidency. Put differently, **the WTA system unconstitutionally magnifies the votes of a bare plurality of voters by translating those votes into an entire slate of presidential Electors,**

¹⁴¹ *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622. Dist. Court, E.D. Virginia (1968). This decision was affirmed by the U.S. Supreme Court at 393 U.S. 320 (1969) (*per curiam*).

¹⁴² *Williams v. Rhodes*. 1968. 393 U.S. 23.

¹⁴³ *Bush v. Gore*. 531 U.S. 98. 2000.

¹⁴⁴ Interest in filing such lawsuits was stimulated after the November 2016 presidential election by Atlanta attorney Jerry L. Sims of Davis Gillett Mottern & Sims LLC, who advanced the legal theory behind the lawsuits. See letter to National Popular Vote from Jerry L. Sims on November 20, 2016. <https://www.nationalpopularvote.com/sites/default/files/sims-idea-email-2016-11-30.pdf>

¹⁴⁵ Weiss, Debra Cassens. 2018. Winner-take-all electoral college system is unconstitutional, say suits led by Boies. *American Bar Association Journal*. February 22, 2018. http://www.abajournal.com/news/article/winner-take-all_electoral_college_system_is_unconstitutional_say_suits_by_b

¹⁴⁶ Press release from law firm of Boies Schiller Flexner LLP entitled “Legal Team Led by David Boies and LULAC Files Lawsuits Challenging Winner-Take-All Approach to Selecting Electors in Presidential Elections.” February 21, 2018. http://electionlawblog.org/wp-content/uploads/2018-02-21-WTA_PressRelease_FINAL-12-PM.pdf

all of whom support the nominee of a single political party—**while, at the same time, the votes cast for all other candidates are given no effect.** Accordingly, in the last five presidential elections, at least 30% of California voters cast a vote for the candidate that did not win the popular vote in California, and those voters thereby effectively had their votes cancelled. Their votes were completely irrelevant to how the Electors representing California voted in the Electoral College. **WTA thus treats California citizens who vote for a losing candidate in an arbitrary and disparate manner in clear violation of the principle of “one person, one vote.”**

“In addition, WTA violates the First Amendment because of the burdens that it places on the right of association and on the right to have a voice in presidential elections through casting a vote. There is no state interest that remotely outweighs these burdens. Again, at least 30% of voters in the last five presidential elections—nationwide and in California—have voted for a losing candidate, and none of their votes have counted in the final direct election. This trend will likely continue.”¹⁴⁷ [Emphasis added]

The lawsuits filed by Equal Citizens pointed out that a presidential election is a two-stage process to fill a single office.

After counting all the votes for President cast by the voters on Election Day in November in a given state, winner-take-all laws give all of the state’s electoral votes to the supporters of the presidential candidate who received a plurality of the votes in the state, while giving no electoral votes to the supporters of other candidates. Thus, in the decisive second stage of the presidential selection process in December, the supporters of other candidates are left unrepresented.

The same Equal Protection argument applies to Maine and Nebraska at the district level.

See additional discussion at the Equal Citizens web site.¹⁴⁸

Maine’s 2016 election returns can be used to illustrate the argument behind the lawsuits filed by Equal Citizens.

Maine awards two of its electoral votes on a statewide winner-take-all basis, and its remaining two electoral votes on a district-wide winner-take-all basis.

Maine adopted its current district method of awarding electoral votes in 1969; however, the 2016 election was the first occasion when Maine awarded one of its electoral votes to a candidate (Trump) who lost the statewide vote.

The statewide vote in Maine in 2016 is shown in table 2.8.

The table shows that the Democratic Clinton-Kaine slate received a 48% plurality of the popular votes in the state in 2016. Consequently, the two candidates for statewide presidential elector nominated by the Maine Democratic Party were elected as the two state-

¹⁴⁷ *Rodriguez et al. v. Brown*. 2018. Complaint for Declaratory and Injunctive Relief. February 21, 2018. Pages 5–6. <https://equalvotes.us/wp-content/uploads/2018/02/complaint-california.pdf>

¹⁴⁸ See the Equal Citizens web site at <https://equalvotes.us/our-progress/index.html>

Table 2.8 Maine 2016 statewide vote for President

Party	Slate	Statewide popular vote	Statewide popular percent	Electoral Votes	Votes reassigned
Democratic	Clinton-Kaine	357,735	47.830%	2	0
Republican	Trump-Pence	335,593	44.870%	0	335,593
Libertarian	Johnson-Weld	38,105	5.095%	0	38,105
Green	Stein-Baraka	14,251	1.905%	0	14,251
Courage, Character, Service	McMullin-Johnson	1,887	0.252%	0	1,887
Constitution	Castle-Bradley	333	0.045%	0	333
It's Our Children	Kotlikoff-Leamer	16	0.002%	0	16
Non-Party	Fox-Kusher	7	0.001%	0	7
Total		747,927	100.000%	2	390,192

level members of the Electoral College. When the Electoral College met on December 19, 2016, these two presidential electors dutifully voted for the Clinton-Kaine slate.

Maine's winner-take-all law treated the 45% of the state's voters who supported the Trump-Pence slate (335,593) and the additional 7% of the state's voters who supported the six other candidates who received votes as if they had voted for the Clinton-Kaine slate. Indeed, a majority of the votes cast (390,192 or 52%) were transferred to the Clinton-Kaine slate even though those votes were not cast for the Clinton-Kaine slate. This 52% majority of Maine's voters had no influence on the decisive second stage of the process that occurred when the Electoral College met on December 19, 2016, to actually elect the President. The plaintiffs in the lawsuits argued that this zeroing-out of 52% of Maine's voters violates the Equal Protection clause of the 14th Amendment and the First Amendment rights of these voters to voice their choice.

Maine also awards two of its electoral votes on a winner-take-all basis at the congressional district level.

Maine's 2016 presidential vote in the 1st congressional district is shown in table 2.9.

In the 1st district, the Democratic Clinton-Kaine slate received the most popular votes—a 54% majority. In this district, the 154,384 voters who supported the Trump-Pence slate (39% of the district's voters) and the voters who supported the six other candidates (another 7%) were, in effect, treated as if they had voted for the Clinton-Kaine slate. A total of 181,555 votes cast (46%) were, in effect, transferred to the Clinton-Kaine slate and had no influence on the decisive second stage of the process of electing the President.

The plaintiffs in the lawsuits argued that this zeroing-out of the votes of this 46% minority of voters in the 1st district violates the Equal Protection clause of the 14th Amendment and the First Amendment.

Maine's 2016 presidential vote in the 2nd congressional district is shown in table 2.10.

In Maine's 2nd congressional district, the Republican Trump-Pence slate received the most popular votes in 2016—a 51% majority. In this district, the 144,817 voters who supported the Clinton-Kaine slate (41% of the district's voters) and the voters who supported the six other candidates (another 8%) were, in effect, treated as if they had voted for the Trump-Pence slate. A total of 172,248 votes cast (49%) were, in effect, transferred to the

Table 2.9 Maine's 2016 presidential vote in the 1st district

Party	Slate	1 st CD popular vote	1 st CD popular percent	Electoral Votes	Votes reassigned
Democratic	Clinton-Kaine	212,774	53.958%	1	0
Republican	Trump-Pence	154,384	39.151%	0	154,384
Libertarian	Johnson-Weld	18,592	4.715%	0	18,592
Green	Stein-Baraka	7,563	1.918%	0	7,563
Courage, Character, Service	McMullin-Johnson	807	0.205%	0	807
Constitution	Castle-Bradley	203	0.051%	0	203
It's Our Children	Kotlikoff-Leamer	6	0.002%	0	6
Non-Party	Fox-Kusher	0	0.000%	0	0
Total		394,329	100.000%	1	181,555

Table 2.10 Maine's 2016 presidential vote in the 2nd district

Party	Slate	2 nd CD popular vote	2 nd CD popular percent	Electoral Votes	Votes reassigned
Democratic	Clinton-Kaine	144,817	40.975%	0	144,817
Republican	Trump-Pence	181,177	51.263%	1	0
Libertarian	Johnson-Weld	19,510	5.520%	0	19,510
Green	Stein-Baraka	6,685	1.891%	0	6,685
Courage, Character, Service	McMullin-Johnson	1,080	0.306%	0	1,080
Constitution	Castle-Bradley	130	0.037%	0	130
It's Our Children	Kotlikoff-Leamer	19	0.005%	0	19
Non-Party	Fox-Kusher	7	0.002%	0	7
Total		353,425	100.000%	1	172,248

Trump-Pence slate and had no influence on the decisive second stage of the process of electing the President.

In reaching decisions in the four cases, the federal district courts and appeals courts repeatedly cited the 1968 decision of the three-judge federal court in *Williams v. Virginia State Board of Elections* (which the U.S. Supreme Court let stand in a *per curiam* decision).

Despite the arguments raised in the four lawsuits, the plaintiffs were unsuccessful in all four federal district courts and all four federal appeals courts. In the end, the Supreme Court declined to hear the matter and allowed the lower-court decisions to stand.

2.15.7. *Chiafalo v. Washington* in 2020

When the Electoral College met in December 2016, several presidential electors from both parties cast votes, or indicated that they wanted to cast votes, for a presidential candidate other than their party's candidate.

The Washington State Supreme Court and the U.S. Court of Appeals for the 10th District reached opposite conclusions as to the constitutionality of state laws restricting how presidential electors must vote.

In *Chiafalo v. Washington* in 2020,¹⁴⁹ the U.S. Supreme Court resolved the issue as described in section 3.7.8.

2.16. CHANGING ROLE OF PRESIDENTIAL ELECTORS AND CANDIDATES

The role played by presidential electors in the 19th century was very different from the deliberative role envisioned by the Founders and very different from their invisible role today.

As Russell Holt observed:

“[Abraham Lincoln] was a Whig presidential elector in 1840 and 1844. ... Moreover, he was one of the so-called senatorial electors—a statewide elector. Electors in the 19th century didn’t just cast votes in December after the presidential election. **Presidential candidates didn’t campaign. The job of campaigning—that’s what presidential electors did.** And Lincoln criss-crossed Illinois giving these passionate speeches about the virtues and values of the Whig economic program in both 40 and 44.”^{150,151} [Emphasis added]

John Tyler (who was President between 1841 and 1845) was a candidate for presidential elector in 1860 and campaigned vigorously for the southern Democratic (Breckenridge-Lane) ticket that year. Tyler won his race to be a presidential elector from Virginia.

Personal campaigning by presidential candidates was rare in the 19th century.

William Henry Harrison is generally recognized as having given the first presidential campaign speech on June 6, 1840. He was elected President later that year.¹⁵²

During the next sixty years, the four presidential candidates who did any significant amount of campaigning were Stephen A. Douglas in 1860, Horace Greeley in 1872, James G. Blaine in 1884, and William Jennings Bryan in 1896. All four lost. Bryan’s 1896 campaign was, by far, the most extensive. He traveled over 18,000 miles and gave 570 speeches in 29 states.¹⁵³

To counter Bryan’s unprecedented effort, Republican William McKinley conducted a “front porch” campaign in which hundreds of thousands of people visited his home in Canton, Ohio, to hear him speak.¹⁵⁴

Extensive personal campaigning by presidential candidates throughout the country became the norm in the 20th century.

¹⁴⁹ *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

¹⁵⁰ Holt, Michael F. 1999. *The Rise and Fall of the American Whig Party*. Author talk at Barnes and Noble Booksellers in Charlottesville, Virginia. July 15, 1999. *C-SPAN*. Timestamp 43:10. <https://www.c-span.org/video/?150474-1/the-rise-fall-american-whig-party>

¹⁵¹ Holt, Michael F. 1999. *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War*. New York, NY: Oxford University Press. Page 108.

¹⁵² Shafer, Ronald G. 2016. *The Carnival Campaign: How the 1840 Campaign of “Tippecanoe and Tyler Too” Changed Presidential Elections Forever*. Chicago, IL: Chicago Review Press. Page 134.

¹⁵³ Williams, R. Hal. 2010. *Realigning America: McKinley, Bryan, and the Remarkable Election of 1896*. Lawrence, KS: University Press of Kansas. Page 99.

¹⁵⁴ Williams, R. Hal. 2010. *Realigning America: McKinley, Bryan, and the Remarkable Election of 1896*. Lawrence, KS: University Press of Kansas. Page 131.

2.17. FIVE MAJOR CHANGES IN THE PRESIDENTIAL ELECTION SYSTEM THAT WERE IMPLEMENTED WITHOUT A FEDERAL CONSTITUTIONAL AMENDMENT

Five of the most salient features of the present-day system of electing the President and Vice President of the United States are:

- popular voting for president;
- the statewide winner-take-all method of choosing presidential electors;
- nomination of candidates by nationwide political parties;
- the nondeliberative nature of the Electoral College since 1796; and
- the short presidential ballot.

Although some people today mistakenly believe that the current system of electing the President and Vice President of the United States was designed by the Founding Fathers and embodied in the U.S. Constitution, none of the above features is mentioned in the original U.S. Constitution or reflected a consensus of the Founders. None of these features was implemented by means of a federal constitutional amendment. None was created by federal legislation.

Instead, three of these features came into being by the piecemeal enactment of state laws over a period of years, and two resulted from actions taken by non-government entities—namely the political parties that emerged at the time of the 1796 presidential election.

2.17.1. Popular voting for presidential electors

There was no agreement among the Founding Fathers as to whether the voters should be directly involved in the process of choosing presidential electors. Some favored permitting the voters to vote for presidential electors, while others did not. The Constitution left the manner of choosing presidential electors to the states.

In fact, the voters were allowed to choose presidential electors in only six states in the nation's first presidential election in 1789. However, state laws changed over the years. By 1824, voters were allowed to choose presidential electors in three-quarters of the states. By 1832, voters were able to choose presidential electors in all but one state.¹⁵⁵ Starting with the 1880 election, all presidential electors have been elected by the voters.

In short, direct popular voting for presidential electors became the norm by virtue of the piecemeal enactment of state laws—not because all the Founders favored popular elections, not because the original Constitution required it, and not because of the ratification of any federal constitutional amendment. The states used the built-in flexibility of Article II, section 1 of the Constitution to change the system.

2.17.2. Winner-take-all method of awarding electoral votes

The Founding Fathers certainly did not advocate that presidential electors be chosen by the people on a statewide winner-take-all basis. The winner-take-all method of selecting presidential electors was not even debated at the Constitutional Convention. It is not men-

¹⁵⁵The South Carolina legislature chose presidential electors up to and including 1860. There were two subsequent isolated instances of the election of presidential electors by the state legislature, namely Florida in 1868 and Colorado in 1876.

tioned anywhere in the *Federalist Papers*. The winner-take-all method was used by only three of the states participating in the nation’s first presidential election in 1789. The states that originally elected presidential electors by districts of various types eventually came to realize what Thomas Jefferson called the “folly”¹⁵⁶ of diminishing their influence by fragmenting their electoral votes and thus gravitated toward the winner-take-all method. Still, it was not until the 11th presidential election (1828) that the winner-take-all rule was used by a majority of the states. Since 1836, the winner-take-all rule has been used with only occasional exceptions.¹⁵⁷ It emerged because of the piecemeal enactment of state laws—not because the Founders preferred it, not because the original Constitution required it, and not because of the ratification of any federal constitutional amendment.

2.17.3. Nomination of presidential and vice-presidential candidates by political parties

Since the nation’s first contested presidential election in 1796, candidates for President and Vice President have been nominated on a nationwide basis by a central body of a political party. This was accomplished by the congressional caucus of each party starting in 1796 and later by national nominating conventions. This feature of the present-day system of electing the President emerged because of the actions taken by non-government entities—namely the political parties. This change did not come about because the Founders wanted it, because the original Constitution mentioned it or required it, or because of the ratification of any federal constitutional amendment.

2.17.4. Nondeliberative nature of the Electoral College Since 1796

The Founding Fathers intended that the Electoral College would act as a deliberative body in which the presidential electors would exercise independent judgment as to the best persons to serve as President and Vice President.

However, once political parties began nominating presidential candidates on a centralized basis and actively campaigning for their nominees, presidential electors necessarily became willing rubber stamps for their party’s nominees.

As the U.S. Supreme Court said:

“Whether chosen by the legislatures or by popular suffrage on general ticket or in districts, [the presidential electors] were so chosen simply to register the will of the appointing power.”¹⁵⁸

¹⁵⁶ Letter from Thomas Jefferson to James Monroe on January 12, 1800. Ford, Paul Leicester. 1905. *The Works of Thomas Jefferson*. New York, NY: G. P. Putnam’s Sons. 9:90.

¹⁵⁷ The three exceptions since 1836 include the one-time use of a district system by Michigan in 1892, the present-day district system in Maine (since 1969), and the present-day district system in Nebraska (since 1992).

¹⁵⁸ *McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

Thus, starting in 1796, presidential electors have been expected to vote for the candidates nominated by their party—that is, “to act, not to think.”¹⁵⁹

Moreover, this expectation has been achieved with remarkable fidelity. Of the 24,068 electoral votes cast for President in the 59 presidential elections between 1789 and 2020, the vote of Samuel Miles for Thomas Jefferson in 1796 was the only instance when a presidential elector might have thought, at the time he voted, that his vote might affect the national outcome for President (section 3.7).

The change in character of the Electoral College from the deliberative body envisioned by the Founding Fathers to a rubber stamp came about because of the actions taken by non-government entities, namely the political parties. This change did not come into being because the Founders wanted it, because the original Constitution mentioned it or required it, or because of any federal constitutional amendment.

2.17.5. Short presidential ballot

In the version of the winner-take-all rule that was used in 1789, each voter was allowed to cast as many votes as the state’s number of presidential electors.

This method of voting was used in most states well into the 20th century and remained in use as late as 1980 in Vermont.

The short presidential ballot enables a voter to conveniently vote for an entire slate of presidential electors merely by casting one vote for a named candidate for President and Vice President. Under the short presidential ballot, a vote for the presidential and vice-presidential candidate whose names appear on the ballot is deemed to be a vote for all of the individual presidential electors nominated in association with the named candidates. For example, when a voter cast a vote for the Trump-Vance slate in California in 2024, the voter is deemed to be casting a vote for each of 54 individual candidates for presidential elector nominated by the California Republican Party.

The universal use of the short presidential ballot in recent decades has almost entirely eliminated presidential electors from the public’s consciousness. By 2020, the names of the presidential electors had disappeared from the ballot in all but three states.

The short presidential ballot emerged over a period of years because of the piecemeal enactment of laws by the individual states—not because the Founders ever thought of it, not because the original Constitution mentioned it or required it, and not because of any federal constitutional amendment.

¹⁵⁹ *United States Gazette*. December 15, 1796. Item signed with the alias of “CANDOUR.”

