

## 3 | How the Electoral College Works

This chapter discusses the:

- federal constitutional and statutory provisions governing presidential elections (section 3.1),
- current state laws for nominating presidential electors (section 3.2),
- current state laws for electing presidential electors (section 3.2),
- certification of the popular vote count (section 3.4),
- certification of votes cast by presidential electors (section 3.5),
- counting of the electoral votes in Congress (section 3.6),
- faithless presidential electors (section 3.7),
- state laws permitting a voter to cast separate votes for individual candidates for presidential elector (section 3.8)
- write-in votes for president (section 3.9),
- voting before the days of government-printed ballots (section 3.10),
- voting with government-printed ballots (section 3.11)
- fusion voting (section 3.12), and
- unpledged electors (section 3.13).

The President and Vice President of the United States are not elected directly by the voters when they go to the polls on Election Day in November.

Instead, the U.S. Constitution provides that the President and Vice President are to be elected by a small group of people (currently 538) who are known individually as “presidential electors” and collectively as the “Electoral College.”

These presidential electors meet in their respective state capitals in mid-December to elect the President and Vice President.

One might assume that a national constitution would specify how these 538 members of the Electoral College are to be chosen. However, the U.S. Constitution leaves the choice of method for selecting presidential electors to the individual states.

Article II, section 1 of the Constitution states:

“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.”<sup>1</sup> [Emphasis added]

The Constitution does not say whether a state’s presidential electors are to be chosen by the voters, the state legislature, the Governor and his cabinet, or some other person or body.

If voters are allowed to choose the presidential electors, the Constitution does not specify whether they are to be chosen from single-electoral districts, from multi-electoral districts, or statewide. It is silent as to whether they are to be elected on a winner-take-all basis, a proportional basis, or some other basis.

If the state legislature is to appoint the presidential electors, the Constitution does not say whether the members of the legislature’s two chambers should vote in a joint meeting (thereby typically diminishing the role of State Senators), or whether the two chambers vote separately (thereby possibly requiring agreement between opposing parties).

Although the states have historically used many different methods for appointing their presidential electors (chapter 2), this chapter discusses how the system operates today.

Under current laws in all 50 states and the District of Columbia, the choice of presidential electors is made by the voters—not state legislatures, Governors, or anybody else. This has been the case since the 1880 election.

Thanks to the “short presidential ballot” (section 2.14), voters are not required to cast separate votes for individual candidates for presidential elector. Instead, voters today choose among presidential-vice-presidential slates. A voter’s vote is deemed to be a vote for each of the presidential electors that were nominated in association with that presidential-vice-presidential slate.

Forty-eight states and the District of Columbia use so-called “winner-take-all” laws for selecting all of their presidential electors. Under these laws, the winning presidential electors are those who were nominated in association with the presidential-vice-presidential slate that received the most popular votes (that is, a plurality) in that particular state.

In Maine and Nebraska, two of each state’s presidential electors are elected on a statewide winner-take-all basis—just like the other 48 states and the District of Columbia. However, the state’s remaining presidential electors are elected by congressional district.

The congressional-district method currently used in Maine and Nebraska is a present-day reminder that individual state law—not the U.S. Constitution or a uniform federal law—determines how presidential electors are selected.

Maine and Nebraska also provide a reminder that states may change their method of selecting their presidential electors simply by changing their state law. For example, Maine switched from the statewide winner-take-all method to the congressional-district method in 1969, and Nebraska did so in 1991.

The U.S. Constitution gave the states considerably more power in choosing the manner of appointing their presidential electors than it does in choosing the manner of electing their members of Congress.

Article I, section 4, clause 1 defines the power of Congress over congressional elections:

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<sup>1</sup> U.S. Constitution. Article II, section 1, clauses 1 and 2.

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; **but the Congress may at any time by Law make or alter such Regulations**, except as to the Places of chusing Senators.” [Emphasis added] [Spelling as per original]

That is, the power of states to conduct congressional elections is subject to congressional intervention, whereas Congress has no comparable power over presidential elections. As the U.S. Supreme Court ruled in *McPherson v. Blacker* in 1892:

“In short, the appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States.”<sup>2</sup> [Emphasis added]

### 3.1. FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS

The election of the President and Vice President of the United States is governed by a combination of federal and state laws and constitutional provisions.<sup>3</sup>

#### 3.1.1. Number of presidential electors

The Constitution gives each state as many presidential electors as it has members of the U.S. House of Representatives and U.S. Senate.

The number of seats in the House was set at 435 by a 1911 federal statute (Section 1.4.2). Each of the 50 states has two U.S. Senators. The District of Columbia acquired three electoral votes by virtue of the 23<sup>rd</sup> Amendment to the Constitution (ratified in 1961). Therefore, there are currently 538 presidential electors in the Electoral College.

After each decennial federal census, the 435 seats in the United States House of Representatives are reapportioned among the 50 states. Under an algorithm established by a 1941 federal law, each state is initially assigned one Representative. Then, seats 51 through 435 are assigned using a formula known as the “method of proportions.”<sup>4</sup>

This formula is applied to each state’s “apportionment population.” This number is the sum of the “resident population” plus the number of the U.S. military personnel and federal civilian employees living outside the United States (and their dependents living with them) for whom it is possible to identify a home state.<sup>5</sup> The difference between the resident popu-

<sup>2</sup> *McPherson v. Blacker*. 146 U.S. 1 at 35. 1892. <https://supreme.justia.com/cases/federal/us/146/1/>

<sup>3</sup> For the reader’s convenience, appendix A contains the provisions of the U.S. Constitution relating to presidential elections. Appendix B of this book contains the Electoral Count Reform Act of 2022, which is the current federal law relating to presidential elections. The Electoral Count Act of 1887 (which was the law in effect during the events of January 6, 2021) may be found in appendix B of the 4<sup>th</sup> edition of this book at <https://www.every-vote-equal.com/4th-edition>

<sup>4</sup> Census Bureau. 2021. Computing Apportionment. March 1, 2021. <https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html>. The U.S. Supreme Court upheld the constitutionality of the “method of equal proportions” in 1992 in *Department of Commerce v. Montana* (112 S.Ct. 1415) and *Franklin v. Massachusetts* (112 S.Ct. 2767).

<sup>5</sup> U.S. Census Bureau. 2020. 2020 Census Apportionment Results. April 26, 2021. <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html>

lation and the apportionment population is only about a tenth of a percent of the country's total population. Concerning the 2020 apportionment of congressional seats and electoral votes, Election Data Services found:

“The overseas counts had no impact on the apportionment results.”<sup>6</sup>

The 2020 census determined the apportionment of House seats (and hence electoral votes) that will apply to the 2024 and 2028 presidential elections.

The 2030 census will determine the apportionment of electoral votes that will apply to the 2032, 2036, and 2040 presidential elections.

Table 3.1 shows the distribution of electoral votes among the 51 jurisdictions that are entitled to appoint presidential electors. Because each state has two Senators and at least one Representative, no state has fewer than three electoral votes.

As can be seen from the table, the average number of electoral votes is about 11.

The median number of electoral votes is seven—that is, half the states have fewer than seven electoral votes, and half have more.

### 3.1.2. Number of electoral votes required for election

The U.S. Constitution does not require an absolute majority of the electoral votes for election.

Instead, both the original Constitution and the 12<sup>th</sup> Amendment (ratified in 1804) requires an absolute majority of the presidential electors “appointed.”

Specifically, the 12<sup>th</sup> Amendment provides:

“The person having the greatest number of votes for President, shall be the President, if such number be a **majority of the whole number of Electors appointed.**”<sup>7</sup> [Emphasis added]

If all states appoint their presidential electors, 270 of the 538 electoral votes are required for election.

There have been two occasions when states have failed to appoint presidential electors.

- Most famously, the 11 southern states belonging to the Confederacy failed to appoint presidential electors in the midst of the Civil War in 1864.
- New York failed to appoint any presidential electors for the nation's first presidential election in 1789, because the two houses of the state legislature could not agree on a method (section 2.2).

The word “appointed” played a prominent role in the events of January 6, 2021, when some supporters of outgoing President Donald Trump argued that certain states had failed to validly appoint their presidential electors (as discussed momentarily below).

<sup>6</sup> Election Data Services. 2021. Final Census Apportionment Counts Surprises Many Observers. April 28, 2021. [https://www.electiondataservices.com/wp-content/uploads/2021/04/NR\\_Appor20wTablesMaps-20210428.pdf](https://www.electiondataservices.com/wp-content/uploads/2021/04/NR_Appor20wTablesMaps-20210428.pdf)

<sup>7</sup> The word “appointed” appeared in the original Constitution as well as the 12<sup>th</sup> Amendment.

**Table 3.1** Distribution of electoral votes

State	1984-1988	1992-1996-2000	2004-2008	2012-2016-2020	2024-2028
Alabama	9	9	9	9	9
Alaska	3	3	3	3	3
Arizona	7	8	10	11	11
Arkansas	6	6	6	6	6
California	47	54	55	55	54
Colorado	8	8	9	9	10
Connecticut	8	8	7	7	7
D.C.	3	3	3	3	3
Delaware	3	3	3	3	3
Florida	21	25	27	29	30
Georgia	12	13	15	16	16
Hawaii	4	4	4	4	4
Idaho	4	4	4	4	4
Illinois	24	22	21	20	19
Indiana	12	12	11	11	11
Iowa	8	7	7	6	6
Kansas	7	6	6	6	6
Kentucky	9	8	8	8	8
Louisiana	10	9	9	8	8
Maine	4	4	4	4	4
Maryland	10	10	10	10	10
Massachusetts	13	12	12	11	11
Michigan	20	18	17	16	15
Minnesota	10	10	10	10	10
Mississippi	7	7	6	6	6
Missouri	11	11	11	10	10
Montana	4	3	3	3	4
Nebraska	5	5	5	5	5
Nevada	4	4	5	6	6
New Hampshire	4	4	4	4	4
New Jersey	16	15	15	14	14
New Mexico	5	5	5	5	5
New York	36	33	31	29	28
North Carolina	13	14	15	15	16
North Dakota	3	3	3	3	3
Ohio	23	21	20	18	17
Oklahoma	8	8	7	7	7
Oregon	7	7	7	7	8
Pennsylvania	25	23	21	20	19
Rhode Island	4	4	4	4	4
South Carolina	8	8	8	9	9
South Dakota	3	3	3	3	3
Tennessee	11	11	11	11	11
Texas	29	32	34	38	40
Utah	5	5	5	6	6
Vermont	3	3	3	3	3
Virginia	12	13	13	13	13
Washington	10	11	11	12	12
West Virginia	6	5	5	5	4
Wisconsin	11	11	10	10	10
Wyoming	3	3	3	3	3
<b>Total</b>	<b>538</b>	<b>538</b>	<b>538</b>	<b>538</b>	<b>538</b>

### 3.1.3. Date for appointing presidential electors (Election Day)

While the states have exclusive power to choose the *manner* of appointing presidential electors, Congress has exclusive power to choose the *time* when presidential electors are to be chosen.

The U.S. Constitution provides (Article II, section 1, clause 4):

**“The Congress may determine the Time of chusing the Electors ....”**  
[Spelling as per original] [Emphasis added]

After the Constitution was ratified, but before the new government came into being, the outgoing Confederation Congress (operating under the Articles of Confederation) passed a resolution on September 13, 1788, specifying that each state would appoint its presidential electors on January 7, 1789.<sup>8</sup>

As the 1792 presidential election approached, Congress decided to give the states some leeway as to the day when they could appoint their presidential electors. A 1792 federal law allowed the electors to be appointed any time during the 34-day period preceding the first Wednesday in December. That same law also specified that the Electoral College would meet on the final day of the 34-day period.

**“Electors shall be appointed in each state for the election of a President and Vice President of the United States, within thirty-four days preceding the first Wednesday in December, one thousand seven hundred and ninety-two, and within thirty-four days preceding the first Wednesday in December in every fourth year succeeding the last election.”**<sup>9</sup> [Emphasis added]

Because the 1792 law allowed the presidential election to take place on different days in different states, it was possible for the outcome of the voting in one state to influence the result in another. The lack of uniformity raised the question as to whether some states or candidates were gaming the system.<sup>10</sup>

Thus, in 1845, Congress passed a law designating a uniform national day for appointing presidential electors—a choice that remains in effect today.

**“The electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed.”**<sup>11</sup> [Emphasis added]

<sup>8</sup> Resolution of 13 September 1788 by the Confederation Congress. [https://avalon.law.yale.edu/18th\\_century/resolu01.asp](https://avalon.law.yale.edu/18th_century/resolu01.asp) This resolution also established the first Wednesday in February for the first meeting of the Electoral College and the first Wednesday in March for the inauguration.

<sup>9</sup> An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2<sup>nd</sup> Congress. 1 Stat. 239. March 1, 1792. Image 14. <https://tile.loc.gov/storage-services/service/l1/l1sl/l1sl-c2/l1sl-c2.pdf> Many of the provisions of this 1792 law later appeared in the Electoral Count Act of 1887.

<sup>10</sup> The final impetus for congressional action may have been the increase in the speed of communication as a result of the telegraph. On May 24, 1844, Samuel F.B. Morse transmitted the message “What hath God wrought?” from Washington to Baltimore using an electronic telegraph (a project that was financed by a \$30,000 appropriation from Congress).

<sup>11</sup> An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 28<sup>th</sup> Congress. 5 Stat. 721. January 25, 1845. Image 759. [https://www.loc.gov/resource/l1salvol.l1sal\\_005/?sp=759&st=image](https://www.loc.gov/resource/l1salvol.l1sal_005/?sp=759&st=image)

### History of the 1845 “failed to make a choice” provision

While passing the 1845 law, Congress made a seemingly inconsequential accommodation to pre-existing laws in three states.

The resulting vague wording played an important role in the tumultuous events of January 6, 2021 (discussed in the next subsection).

In this subsection, we detail the history of the 1845 law.

In December 1844, Ohio Representative Alexander Duncan introduced a bill in Congress providing:

“All regular<sup>12</sup> state elections for the choice of electors of President and Vice President of the United States shall be held **on the same day, and on one single day, in all States** of the Union.”<sup>13</sup> [Emphasis added]

During the House debate in the Committee on the Whole on Duncan’s bill on December 9, 1844, New Jersey Representative Elmer offered an amendment that would recognize that health or travel difficulties might prevent an already selected presidential elector from voting in the Electoral College.

Elmer’s proposed amendment was based on the fact that in 1789, 1792, 1808, 1812, 1816, 1820, and 1832, one or more presidential electors was absent from the Electoral College meeting due to health or travel difficulties.<sup>14</sup>

Elmer’s proposed amendment said:

“Nothing herein contained shall prevent the legislatures of the several states for directing the appointment of electors on any subsequent day in the same year, **to take the place of any electors who may be prevented by sickness of any other cause** from fulfilling the duties of their appointment.”<sup>15</sup> [Emphasis added]

In response to Representative Elmer, Representative Duncan amended his bill on December 11 to create an exception allowing states to appoint replacement presidential elector(s) that become apparent on the day when the Electoral College meets.

<sup>12</sup> The term “regular” here is in contrast to a special national election for President. The 1792 statute provided for a special national election in event of the death, removal, or resignation of both the President and Vice President. Duncan’s 1844 bill set a date for such special elections. Of course, no such special election ever occurred.

<sup>13</sup> H.R. 432 introduced by Representative Duncan on December 4, 1844. <https://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=028/llhb028.db&recNum=994>

<sup>14</sup> There was a total of 18 such absences during this period. In 1789, four electors were absent (two from Maryland and two from Virginia). In 1792, three electors were absent (two from Maryland and one from Vermont). In 1808, one elector was absent (from Kentucky). In 1812, one elector was absent (from Ohio). In 1816, four electors were absent (three from Maryland and one from Delaware). In 1820, three electors were absent (one each from Mississippi, Pennsylvania, and Tennessee). In 1832, two electors were absent (from Maryland).

<sup>15</sup> *Congressional Globe*, 28<sup>th</sup> Congress, 2nd Session. December 9, 1844. Page 14. <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=015/llcg015.db&recNum=29>

“That each State may by law provide for the filling of any vacancy or **vacancies which may occur in its college of electors when such college meets** to give its electoral vote.<sup>16</sup> [Emphasis added]

A more significant second deficiency in Representative Duncan’s bill was pointed out by New Hampshire Representative John Parker Hale in the Committee of the Whole on December 9, 1844. As reported in the *Congressional Globe*:

“Mr. Hales desired to make a suggestion to the gentleman from Ohio (Mr. Duncan) and the other friends of this bill. **This bill appeared to him to be framed on the idea that the choice of electors would always be perfected in one day**; now it appeared to him that the bill was deficient, as it made no provision for an election, **if the people should fail to elect on the day designated**. In the State which he had the honor to represent [New Hampshire], a majority of all the votes cast was required to elect the electors of President and Vice President of the United States, and **it might so happen that no choice might be made.**”<sup>17</sup> [Emphasis added]

Indeed, starting with the nation’s first presidential election in 1789, New Hampshire state law had required candidates for presidential elector to receive an absolute majority of the statewide popular vote in order to be elected.<sup>18</sup> If one or more candidates for presidential elector did not receive an *absolute* majority of the statewide vote on Election Day, the New Hampshire General Court (state legislature) would fill those positions after Election Day, but before the Electoral College meeting.

Specifically, New Hampshire law provided:

“**That the inhabitants** of the several towns, plantations and places in this State, qualified to vote in the choice of senators for the state legislature, **shall assemble in their respective towns, plantations and places on the first Monday of November next, to vote for eight persons**, inhabitants of this State, who shall not be senators or representatives in Congress, or persons holding offices of profit or trust under the United States, **to be electors of President and Vice President of the United States**; and the selectmen of the towns, plantations and places shall give fifteen days notice of the time, place and design of such meeting; and the meeting shall be governed by a moderator chosen for that purpose, who shall impartially preside, and with the

<sup>16</sup> An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. <https://www.loc.gov/law/help/statutes/t-large/28th-congress/session-2/c28s2ch1.pdf>

<sup>17</sup> *Congressional Globe*, 28<sup>th</sup> Congress, 2nd Session. December 9, 1844. Page 14. <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=015/llcg015.db&recNum=29>

<sup>18</sup> An Act for carrying into effect an ordnenance of Congress of the 14<sup>th</sup> Sept last relative to the Constitution of the United States. November 12, 1788. Page 333. <https://archive.org/details/lawsofnewhampshi05newh/page/331/>. In subsequent years, New Hampshire enacted a series of similar laws, each with an absolute majority requirement, with the single exception of the 1800 election (when the New Hampshire legislature appointed presidential electors without involvement of the voters. See <https://archive.org/details/lawsofnwnewhampshi1904newh/page/636/>).



selectmen, whose duty it shall be to attend at such meeting, shall receive from all the inhabitants of such towns, plantations and places respectively, present and qualified as aforesaid, votes for such electors (**each voter giving in on one ballot or ticket the names of the persons he votes for**) and shall in open town meeting sort and count the same; of all which the clerk of each town, plantation or place respectively, shall make a fair record in the presence of the said selectmen of the name of every person voted for, and the number of votes against his name, and a full and fair copy of such record shall be made out and attested by the said selectmen or clerks respectively, and sealed up and directed to the Secretary of State.”

“The Secretary shall, on the twenty-third day of November next, lay the same before the Senate and House of Representatives in convention, to be by them examined and counted; and **in case there shall appear to be any or the full number who have a majority of the votes, they shall be declared electors**; provided that not more than eight persons have such majority; but in case more than eight persons shall have a majority of votes, then those eight persons who have the highest number of votes (if any there be) shall be declared electors. And in case the state of the votes will not admit of the designation of eight persons by the highest number of votes, then so many as can be designated, shall be declared electors; and from the remaining number of those who have a majority of the votes, **the Senate and House of Representatives, in convention, shall forthwith elect by ballot, one person at a time, so many persons, as, added to those already declared electors, shall complete the number of eight.**”<sup>19,20,21</sup> [Emphasis added]

New Hampshire repealed its requirement for an absolute majority in 1912.

Similarly, starting with the nation’s first presidential election in 1789, Massachusetts had a requirement that candidates for presidential elector receive an absolute majority of the votes.<sup>22</sup> The General Court (the legislature) would make the choice in the absence of such majority. Even today, if a candidate for presidential elector fails to receive at least

<sup>19</sup> An Act directing the mode of balloting for and appointing Electors of this State for the election of a President and Vice President of the United States. June 19, 1820. Pages 893–894. <https://archive.org/details/lawsofnewhampshi08newh/page/893/>

<sup>20</sup> New Hampshire’s absolute majority requirement dates back to the nation’s first presidential election in 1789 (see <https://archive.org/details/lawsofnewhampshi05newh/page/331/mode/1up>). After 1789, New Hampshire enacted a series of similar laws for electing presidential electors containing an absolute majority requirement, with the single exception of the 1800 election (when the New Hampshire legislature appointed presidential electors without direct involvement of the voters). <https://archive.org/details/lawsofnewhampshi1904newh/page/636/mode/2up>

<sup>21</sup> The New Hampshire law in effect in 1845 was 28 N.H. Rev. Stat. §§ 4, 5 (1843). The Massachusetts law in effect in 1845 was “An Act directing the mode of choosing Electors of President and Vice President of the United States” enacted in 1832.

<sup>22</sup> The Massachusetts law in effect in 1845 was “An Act directing the mode of choosing Electors of President and Vice President of the United States” enacted in 1832.

20% of the popular vote in Massachusetts, the General Court (that is, the state legislature) would choose the state's electors.<sup>23</sup>

Georgia had a similar law in 1845.<sup>24</sup>

Accordingly, on December 11, Representative Duncan amended his bill by creating a carve-out allowing presidential electors to be appointed *after* the uniform national election day in the three states.

“When any State shall have held an election for the purpose of choosing electors, and shall **fail to make a choice** on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide.”<sup>25</sup> [Emphasis added]

Another rejected amendment is noteworthy in indicating the scope of Duncan's bill.

In 1844, South Carolina was the only state where the state legislature selected the state's presidential electors.

On December 13, 1844, South Carolina Representative John Campbell proposed an amendment on the House floor to Duncan's bill that would have exempted states whose legislatures appointed presidential electors from the proposed uniform national election day.

“That nothing herein contained shall apply to any State where the electors of President and Vice President are now chosen by its legislature, until such time as such State shall give the election of electors directly to the people.”<sup>26</sup>

South Carolina Representative John Campbell's amendment was rejected by a 52–141 vote.<sup>27,28</sup> Thus, the South Carolina legislature was required to convene and appoint its presidential electors on the same day as other states conducted statewide popular elections.

In other words, Congress exercised its power to control the schedule for choosing presidential electors so as to require every state to choose its presidential electors on the

<sup>23</sup> Current Massachusetts law (section 118 of chapter 54) requires preparation of a list of “the names of the persons who have received at least one-fifth of the entire number of votes cast for electors.” The elector candidates from this list “who have received the highest number of votes . . . shall be deemed to be elected.” <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVIII/Chapter54/Section118> However, if an insufficient number of electors are yet to be chosen, section 136 provides “the governor shall . . . call together the general court; and the senators and representatives assembled in joint convention shall by ballot choose electors to complete the full number.” <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVIII/Chapter54/Section136>

<sup>24</sup> The Georgia law in effect in 1845 was “An Act to prescribe the mode of choosing the Electors of President and Vice President of the United States to which this state is entitled by the constitution of the United States” enacted in 1824.

<sup>25</sup> An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. <https://www.loc.gov/law/help/statutes-at-large/28th-congress/session-2/c28s2ch1.pdf>

<sup>26</sup> *Congressional Globe*, 28<sup>th</sup> Congress, 2nd Session. December 13, 1844. Page 30. <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=015/llcg015.db&recNum=45>

<sup>27</sup> *Congressional Globe*, 28<sup>th</sup> Congress, 2nd Session. December 13, 1844. Page 31. <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=015/llcg015.db&recNum=46>

<sup>28</sup> *Journal of the House of Representatives of the United States, 1844-1845*. December 13, 1844. [https://memory.loc.gov/cgi-bin/query/D?hlaw:12:./temp/~ammem\\_LTNv::](https://memory.loc.gov/cgi-bin/query/D?hlaw:12:./temp/~ammem_LTNv::)

Tuesday after the first Monday in November, except that if the state happened to “fail to make a choice,” Congress allowed electors to be chosen at a later date.

In summary, the legislative history shows that Duncan’s original bill

- originally had no exceptions to a uniform national date for states to appoint their presidential electors,
- was amended to allow states to appoint presidential elector(s) to fill vacancies that become apparent after the uniform national election day and the day when the Electoral College meets, and
- was amended to allow states that held an election for the purpose of choosing electors, but had failed to make a choice on Election Day, to appoint electors on a later day.

In January 1845, after additional minor amendments, Congress completed work and President Tyler signed Duncan’s amended bill establishing a uniform national day for appointing presidential electors. The key provision was:

“That the electors of President and Vice President shall be appointed in each State on the **Tuesday next after the first Monday in the month of November** of the year in which they are to be appointed.”<sup>29</sup> [Emphasis added]

The final wording of the two exceptions in the 1845 law requiring states to appoint presidential electors after the uniform national election day was as follows:

“Provided, That each State may by law provide for the filling of any vacancy or **vacancies which may occur in its college of electors when such college meets** to give its electoral vote:

“And provided, also, when any State shall have held an election for the purpose of choosing electors, and shall **fail to make a choice** on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide.”<sup>30</sup> [Emphasis added]

The Tuesday after the first Monday in November remains the uniform national day for appointing presidential electors to this day. This date was incorporated into section 1 of the Electoral Count Act of 1887 and is currently found in section 1 of the Electoral Count Reform Act of 2022.<sup>31</sup>

The New Hampshire–Massachusetts–Georgia exception in the 1845 law became section 2 of the Electoral Count Act of 1887:

“Whenever any State has held an election for the purpose of choosing electors, and has **failed to make a choice on the day prescribed by law**, the electors

<sup>29</sup> An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. <https://www.loc.gov/law/help/statutes-at-large/28th-congress/session-2/c28s2ch1.pdf>

<sup>30</sup> *Ibid.*

<sup>31</sup> Section 1 title 3. United States Code.

may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” [Emphasis added]

This provision was repealed by the Electoral Count Reform Act of 2022.<sup>32</sup>

### Events of January 6, 2021

The dormant “failed to make a choice” wording from the 1845 law acquired sudden prominence in the 2020 presidential election.

On November 3, 2020, Joe Biden won the national popular vote by a margin of 7,052,711 popular votes and won the electoral vote by a margin of 74 votes (table 1.2.1).

At the time, five of the closely divided states that Biden won (Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin) had Republican-controlled state legislatures. Two of them had Republican Governors.

President Trump and his advocates initiated 64 federal and state judicial and administrative proceedings to dispute the outcome of the election.<sup>33</sup> None of this litigation succeeded in overturning the results in any state.

Eight conservative former judges, lawyers, and Senators examined all 64 judicial and administrative proceedings initiated by Donald Trump and his advocates. Their conclusion was summarized in the title of their report—*Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*.

“Our conclusion is unequivocal: Joe Biden was the choice of a majority of the Electors, who themselves were the choice of the majority of voters in their states.”<sup>34</sup>

Nonetheless, supporters of outgoing President Donald Trump argued that the “failed to make a choice” wording permitted Republican-controlled state legislatures to meet after Election Day, claim that the voters had “failed to make a choice” because of real or imagined irregularities, and then appoint slates of presidential electors who would vote for Trump when the Electoral College met.

<sup>32</sup> Today, a plurality of the popular vote is sufficient to choose the state’s presidential electors in every state—with one minor exception. Current Massachusetts law states that if a candidate for presidential elector fails to receive at least 20% of the popular vote, the General Court (that is, the state legislature) would fill that position. Specifically, section 118 of chapter 54 requires preparation of a list of “the names of the persons who have received at least one-fifth of the entire number of votes cast for electors.” The elector candidates from this list “who have received the highest number of votes . . . shall be deemed to be elected.” <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVIII/Chapter54/Section118> However, if an insufficient number of electors satisfy that requirement, section 136 provides “the governor shall . . . call together the general court; and the senators and representatives assembled in joint convention shall by ballot choose electors to complete the full number.” <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVIII/Chapter54/SThection136>

<sup>33</sup> The Brennan Center for Justice has an on-line tracker for this litigation. Brennan Center. 2021. *Voting Rights Litigation Tracker 2020*. July 8, 2021. <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020>

<sup>34</sup> Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. <https://lostnotstolen.org/>

Despite considerable pressure from President Trump and his supporters, no state legislature invoked the “failed to make a choice” wording.

Thus, the Electoral College met on December 14, 2020, and Joe Biden received 306 electoral votes to Trump’s 232.

Those electoral votes were scheduled to be counted in a joint session of the newly elected Congress on January 6, 2021.

The “failed to make a choice” wording in section 2 of the Electoral Count Act of 1887<sup>35</sup> and the word “majority of the whole number of Electors appointed” provision of the Constitution formed the basis for several scenarios designed to give President Trump a second term.

On January 3, 2021, attorney John Eastman wrote a memo entitled “January 6 Scenarios” saying:

**“VP Pence determines that the ongoing election challenges must conclude before ballots can be counted, and adjourns the joint session of Congress,”**

“Taking the cue, state legislatures convene, order a comprehensive audit/investigation of the election returns in their states, and then determine whether the slate of electors initially certified is valid, or whether the alternative slate of electors should be certified by the legislature, exercise authority it has directly from Article II and also from 3 U.S.C. §2, which provides:

‘Whenever any State has held an election for the purpose of choosing electors, and has **failed to make a choice** on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.’<sup>36</sup>

“If, after investigation, proven fraud and illegality is insufficient to alter the results of the election, the original slate of electors would remain valid. BIDEN WINS.

**“If, on the other hand, the investigation proves to the satisfaction of the legislature that there was sufficient fraud and illegality to affect the results of the election, the Legislature certifies the Trump electors. Upon reconvening the Joint Session of Congress, those votes are counted and TRUMP WINS.”<sup>37,38</sup> [Emphasis added]**

<sup>35</sup> The entire Electoral Count Act of 1887 may be found in appendix B of the 4<sup>th</sup> edition of this book at <https://www.every-vote-equal.com/4th-edition>

<sup>36</sup> Congress repealed the “failed to make a choice” language as part of the Electoral Count Reform Act of 2022.

<sup>37</sup> Eastman, John. 2021. January 6 Scenario. CNN. 2021. Trump lawyer’s full memo on plan for Pence to overturn the election. January 3, 2021. Pages 4–5. *CNN*. <https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html>

<sup>38</sup> See also the shorter and earlier memo. Eastman, John. 2020. January 6 Scenario. CNN. Trump lawyer’s memo on six-step plan for Pence to overturn the election. *CNN*. <https://edition.cnn.com/2021/09/21/politics/read-eastman-memo/index.html>

The “number of electors appointed” provision of the Constitution was the basis of another scenario outlined by Eastman. The idea was to declare that no presidential electors had been appointed from certain states that Biden had won.

**“VP Pence opens the ballots, determines on his own which is valid, asserting that the authority to make that determination under the 12th Amendment, and the Adams and Jefferson precedents, is his alone (anything in the Electoral Count Act to the contrary is therefore unconstitutional).**

**“(i) If State Legislatures have certified the Trump electors, he counts those, as required by Article II (the provision of the Electoral Count Act giving the default victory to the “executive”-certified slate therefore being unconstitutional). Any combination of states totaling 38 elector votes, and TRUMP WINS.**

**(ii) If State Legislatures have not certified their own slates of electors, VP Pence determines, based on all the evidence and the letters from state legislators calling into question the executive certifications, decides to count neither slate of electors.** (Note: this could be done when he gets to Arizona in the alphabetical roster, or he could defer Arizona and the other multi-slate states until the end, and then make the determination). At the end of the count, the tally would therefore be 232 for Trump, 222 for Biden. **Because the 12th Amendment says “majority of electors appointed,” having determined that no electors from the 7 states were appointed ..., TRUMP WINS.**

**(iii) Alternatively, VP Pence determines that because multiple electors were appointed from the 7 states but not counted because of ongoing election disputes, neither candidate has the necessary 270 elector votes, throwing the election to the House. IF the Republicans in the State delegations stand firm, the vote there is 26 states for Trump, 23 for Biden, and 1 split vote. TRUMP WINS.”<sup>39,40</sup> [Emphasis added]**

When the joint session of Congress met on January 6, 2021, to count the electoral votes, Vice President Pence refused to make any of the rulings that Eastman advocated and that President Trump had urged Pence to make.

An unsuccessful effort was made in Congress to postpone its counting of the electoral votes and invite the legislatures of various contested states to “audit” their previously certified results from their states. Presumably, after these audits, the Republican-controlled legislatures would then appoint slates of Trump presidential electors to replace the Biden electors who had already cast their votes in the Electoral College on December 14, 2020.

After order was restored in the Capitol in the evening of January 6, Congress counted

<sup>39</sup> Eastman, John. 2021. January 6 scenario. CNN. 2021. Trump lawyer’s full memo on plan for Pence to overturn the election. January 3, 2021. Pages 4–5. CNN. <https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html>

<sup>40</sup> See also the shorter and earlier memo. Eastman, John. 2020. January 6 scenario. CNN. 2021. Trump lawyer’s memo on six-step plan for Pence to overturn the election. CNN. <https://edition.cnn.com/2021/09/21/politics/read-eastman-memo/index.html>

the electoral votes cast on December 14, 2020, and declared that Joe Biden had been elected President.

These events have been voluminously described elsewhere.<sup>41,42,43</sup>

### **Electoral Count Reform Act of 2022**

After reviewing the events of January 6, 2021, Congress enacted the Electoral Count Reform Act of 2022 (appendix B).

The 2022 Act contained several changes specifically designed to prevent a state legislature from overriding the choice of its voters after Election Day.

First, the 2022 Act repealed the vague “failed to make a choice” section of the 1845 law and the Electoral Count Act of 1887.

Second, the 2022 Act requires that the appointment of presidential electors be in accordance with laws “enacted prior to election day.” Specifically, section 1 of the new law provides:

“The electors of President and Vice President shall be appointed, in each State, on election day, **in accordance with the laws of the State enacted prior to election day.**” [Emphasis added]

This new requirement does not affect the power of state legislatures to change the method of awarding their electoral votes (potentially appointing presidential electors without involvement of the state’s voters); however, no post-election changes can be made.

Third, Congress recognized that the wording of the 1845 law concerning vacancies among presidential electors provided a potential avenue for abuse by state legislatures.

In 1789, 1792, 1808, 1812, 1816, 1820, and 1832, between one and three duly appointed presidential electors failed to cast their votes in the Electoral College—often because of health reasons or the difficulties of travel in the pre-railroad world. Luckily, no uncast electoral votes affected the outcome of any presidential election during this period.

In 1845, Congress dealt with the problem of vacancies and absences by specifically designating one specific additional time after Election Day when states could appoint a presidential elector:

“That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors **when such college meets** to give its electoral vote.<sup>44</sup> [Emphasis added]

<sup>41</sup> Select Committee to Investigate the January 6th Attack on the United States Capitol. 2022. *The January 6 Report: The Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol*. New York, NY: Celadon Books.

<sup>42</sup> Raskin, Jamie. 2022. *Unthinkable: Trauma, Truth, and the Trials of American Democracy*. New York, NY: Harper.

<sup>43</sup> Bowden, Mark and Teague, Matthew. 2022. *The Steal: The Attempt to Overturn the 2020 Election and the People Who Stopped It*. New York, NY: Atlantic Monthly Press.

<sup>44</sup> An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. <https://www.loc.gov/law/he lp/statutes/t-large/28th-congress/session-2/c28s2ch1.pdf> This provision of the 1845 law later became section 4 of the Electoral Count Act of 1887.

In 2022, Congress amended the 1845 vacancy-filling procedure to require that any state law for filling a vacancy in the Electoral College must have been “enacted prior” to Election Day.

“Each State may, by law **enacted prior to election day**, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.” [Emphasis added]

Fourth, the 2022 Act permits a state to extend the “period of voting” in event of a *force majeure* event (such as a natural disaster or terrorist attack). However, the period of voting can only be extended under procedures and standards contained in laws “enacted prior” to Election Day. Specifically, section 21(1) of the 2022 Act re-defined “Election Day” as follows:

“‘Election day’ means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, **in the case of a State that appoints electors by popular vote**, if the State modifies the period of voting, as necessitated by **force majeure events that are extraordinary and catastrophic**, as provided **under laws of the State enacted prior to such day**, ‘election day’ shall include the modified period of voting.”<sup>45</sup> [Emphasis added]

As of July 2024, no state had adopted procedures for extending the period of voting.

### 3.1.4. Date for the Electoral College meeting

The September 13, 1788, resolution of the Confederation Congress established the first Wednesday in February in 1789 as the date for the first meeting of the Electoral College.<sup>46</sup>

The new Constitution (Article II, section 1, clause 4) gave the newly created Congress power to set the date for subsequent Electoral College meetings.

“The Congress may determine the Time of chusing the Electors, and **the Day on which they shall give their Votes; which Day shall be the same throughout the United States.**” [Spelling as per original] [Emphasis added]

As the second presidential election approached in 1792, Congress passed a law setting the date for the Electoral College meeting:

“That the electors shall meet and give their votes on the said **first Wednesday in December**, at such place in each state as shall be directed, by the legislature thereof.”<sup>47</sup> [Emphasis added]

<sup>45</sup> Note that the 2022 federal law recognizes the fact that the Constitution does not require a state to allow its voters to choose the state’s presidential electors. The choice of method of selecting a state’s presidential electors is an exclusive state power under Article II, section 1 of the Constitution. The timing restrictions in section 21(1) apply only if a state “appoints electors by popular vote” (as all states have chosen to do since 1880).

<sup>46</sup> Resolution of 13 September 1788 by the Confederation Congress. [https://avalon.law.yale.edu/18th\\_century/resolu01.asp](https://avalon.law.yale.edu/18th_century/resolu01.asp)

<sup>47</sup> An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2<sup>nd</sup>



In 1933, the 20<sup>th</sup> Amendment changed the date for the presidential inauguration from March 4 to January 20. In 1934, Congress amended the Electoral Count Act of 1887 and set the date for the Electoral College meeting to be the first Monday after the second Wednesday in December.<sup>48</sup>

The Electoral Count Reform Act of 2022 changed the meeting date of the Electoral College by one day, so that section 7 now provides:

“The electors of President and Vice President of each State shall meet and give their votes on the **first Tuesday after the second Wednesday in December** next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day.”<sup>49</sup> [Emphasis added]

Thus, today, there are 42 days between Election Day and the meeting date of the Electoral College.

Depending on the year, Election Day (the Tuesday after the first Monday in November) can be any date from November 2 to November 9. The meeting date of the Electoral College is the Tuesday after the second Wednesday in December and therefore can be any date from December 14 (if Election Day is November 2) to December 20 (if Election Day is November 8).

For example, in 2024, Election Day will be Tuesday November 5, and the meeting date for the Electoral College will be Tuesday December 17.

State law, in turn, specifies the place and time of day for the Electoral College meeting. These meetings are typically held at the state Capitol. For example, Minnesota law provides:

“The Presidential electors, before 12:00 P. M. on the day before that fixed by congress for the electors to vote for president and vice-president of the United States, shall notify the Governor that they are at the state capitol and ready at the proper time to fulfill their duties as electors. The Governor shall deliver to the electors present a certificate of the names of all the electors. If any elector named therein fails to appear before 9:00 A. M. on the day, and at the place, fixed for voting for president and vice-president of the United States, the electors present shall, in the presence of the Governor, immediately elect by ballot a person to fill the vacancy.”<sup>50</sup>

Figure 3.1 shows the meeting of the Minnesota Electoral College in St. Paul on December 17, 2012.

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Congress. 1 Stat. 239. March 1, 1792. Image 14. <https://tile.loc.gov/storage-services/service/l1/l1sl/l1sl-c2/l1sl-c2.pdf> Many of the provisions of the 1792 law later appeared in the Electoral Count Act of 1887.

<sup>48</sup> Section 7 of the Electoral Count Act of 1887.

<sup>49</sup> Section 7 of the Electoral Count Reform Act of 2022.

<sup>50</sup> Minnesota election law. Section 208.06. In this chapter, we will frequently refer to the laws of Minnesota to illustrate the way in which states implement the process of electing the President and Vice President.



**Figure 3.1** Meeting of Minnesota Electoral College in St. Paul on December 17, 2012

### **3.1.5. Procedures for the Electoral College meeting**

The Electoral College does not meet in a central place. Instead, the Meeting Clause of the original Constitution and the 12th Amendment specifies:

“The Electors shall meet in their respective States.”

In the pre-railroad and pre-telegraph era, this provision prevented the presidential electors from knowing—with certainty—how electors in other states had voted. The Founders thought that the geographical dispersal of the Electoral College would act to prevent the formation of political parties—what they called “factions.”

Of course, geographic dispersal did not prevent presidential electors from making advance arrangements as to how they would vote in their state’s meeting.

The meeting of the Electoral College is governed by the 12<sup>th</sup> Amendment to the U.S. Constitution (ratified in 1804), which provides (in part):

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

## 3.2. STATE LAWS FOR NOMINATING PRESIDENTIAL ELECTORS

### 3.2.1. Nomination of presidential elector candidates

In a majority of states, candidates for the position of presidential elector are nominated by party conventions at the congressional-district level and state level.<sup>51</sup>

Minnesota election law (section 208.03) is typical and provides:

“Presidential electors for the major political parties of this state shall be nominated by delegate conventions called and held under the supervision of the respective state central committees of the parties of this state.”

In many other states and the District of Columbia, the state party committee nominates the party’s presidential electors.

Pennsylvania has a unique procedure for nominating presidential electors. A 1937 law gives each party’s presidential nominee the power to personally and directly nominate the entire slate of candidates for the position of presidential elector:

“The nominee of each political party for the office of President of the United States shall, within thirty days after his nomination by the National convention of such party, nominate as many persons to be the candidates of his party for the position of presidential elector as the State is then entitled to.”<sup>52</sup>

Some states (e.g., California) permit each political party to choose its own method for nominating presidential electors. For example, the California Democratic Party empowers the party’s most current nominee for U.S. Representative to nominate the party’s candidate for presidential elector from that congressional district (and each of the party’s most recent nominees for U.S. Senate to nominate a senatorial elector).

In some states, a political party’s candidates for presidential elector are nominated at a state convention after the party selects its presidential and vice-presidential nominee at its national convention.

However, in other states, the selection of the party’s elector candidates is done before the selection of the party’s national nominee is known with certainty and, more pertinently, before the party has coalesced behind its national nominee.

For example, in Washington State, the party’s candidates for presidential elector are nominated at the same state convention that selects the party’s delegates to its national nominating convention. In 2016, Vermont Senator Bernie Sanders swept the Washington State Democratic Party’s local caucuses held in March. As a result, supporters of Sanders greatly outnumbered supporters of Hillary Clinton at the party’s state convention in June.<sup>53</sup>

Thus, many of the 12 presidential electors nominated by the Washington Democratic Party’s state convention in June 2016 were less-than-enthusiastic Clinton supporters.

<sup>51</sup> National Association of Secretaries of State. 2020. *Summary: State Laws Regarding Presidential Electors—October 2020*. October 2020. <https://www.nass.org/sites/default/files/surveys/2020-10/summary-electoral-college-laws-Oct20.pdf>

<sup>52</sup> Section 2878 of Pennsylvania election law enacted on June 1, 1937.

<sup>53</sup> Associated Press. 2016. Washington Democrats meet for state convention. *Spokane Spokesman-Review*. June 17, 2016. <https://www.spokesman.com/stories/2016/jun/17/state-convention-for-washington-democrats-convenes>

After Clinton carried the state in November 2016, four of the state’s 12 presidential electors failed to vote for Clinton when the Electoral College met in December (section 3.7).

As a result of the unprecedented number of faithless electors in 2016, the method of nominating candidates for presidential elector was changed prior to the 2020 election:

“In Washington, where the faithless elector problem was the most acute in 2016—there were four defectors—state Democrats made the process much more centralized for 2020, **moving the selection process from state and congressional district conventions to the party’s state central committee.**”<sup>54</sup> [Emphasis added]

### 3.2.2. The link between state governments and the political parties

Minnesota law illustrates the procedure by which the state election officials become officially informed of the names of the persons running for President and Vice President and the names of the persons running for presidential elector. Section 208.03 provides:

“On or before primary election day the chair of the major political party shall certify to the secretary of state the names of the persons nominated as Presidential electors and the names of the party candidates for president and vice-president.”

## 3.3. STATE LAWS FOR ELECTING PRESIDENTIAL ELECTORS

### 3.3.1. There is no federal constitutional right to vote for President.

The Constitution explicitly gives the right to vote for U.S. Representatives to everyone who has the qualifications to vote for the more numerous chamber of their state legislature.<sup>55</sup>

Under the original Constitution, U.S. Senators were chosen by state legislatures. However, the 17<sup>th</sup> Amendment (ratified in 1913) gave the voters the right to directly elect their Senators.

Nonetheless, voters today have no federal constitutional right to vote for President or Vice President or presidential electors.

As the U.S. Supreme Court wrote in *McPherson v. Blacker* in 1892—the leading case on the manner of appointing presidential electors:

**“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 gen-**

<sup>54</sup> Putnam, Josh. 2020. If The Supreme Court Lets The Electoral College Vote However It Wants, Will Chaos Ensure? *FiveThirtyEight*. June 16, 2020. <https://fivethirtyeight.com/features/if-the-supreme-court-lets-the-electoral-college-vote-however-it-wants-will-chaos-ensure/>

<sup>55</sup> At the time of ratification of the Constitution, the qualifications to vote varied considerably from state to state. Many states had highly restrictive property, wealth, and/or income qualifications to vote. The requirements to vote for the lower house of the state legislature were often more lenient than for the state senate. See table A.3 (page 314) in Keyssar, Alexander. 2000. *The Right to Vote: The Contested History of Democracy in the United States*. New York, NY: Basic Books.

**eral ticket [i.e., the winner-take-all rule], nor that the majority of those who exercise the elective franchise can alone choose the electors.”<sup>56</sup>**

“In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States.”<sup>57</sup> [Emphasis added]

In 2000, the U.S. Supreme Court in *Bush v. Gore* reiterated that fact that the people have no federal constitutional right to vote for President.

**“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state 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.”<sup>58</sup> [Emphasis added]

Voters can vote for President today because there is a law in their state allowing them to do so. For example, Minnesota allows provides:

“Presidential electors shall be chosen **at the state general election** held in the year preceding the expiration of the term of the president of the United States.”<sup>59</sup> [Emphasis added]

### **The link between the voter’s vote for President and the presidential electors.**

Figure 3.2 shows a 2004 ballot for President and Vice President in Hennepin County, Minnesota. It includes the Democratic-Farmer-Labor Party slate consisting of John F. Kerry for President and John Edwards for Vice President, the Republican Party slate consisting of George W. Bush and Dick Cheney, and seven other presidential-vice-presidential slates.

The ballot simply reads:

“U.S. President and Vice President—Vote for one team.”

It is silent as to:

- the existence of the Electoral College,
- the fact that the state has 10 electoral votes, and
- the fact that the voter is, in fact, voting for 10 individual candidates for presidential elector whose names do not appear anywhere on the ballot.

<sup>56</sup> *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

<sup>57</sup> *Ibid.* Page 35.

<sup>58</sup> *Bush v. Gore*. 531 U.S. 98 at 104. 2000.

<sup>59</sup> Minnesota Election law. Section 208.02.

HENNEPIN COUNTY	STATE OF MINNESOTA	NOVEMBER 2, 2004
<b>STATE GENERAL ELECTION BALLOT</b> <b>INSTRUCTIONS TO VOTERS</b> To vote, completely fill in the oval(s) next to your choice(s) like this: ●		
<b>FEDERAL OFFICES</b>	<b>COUNTY OFFICES</b>	
U.S. PRESIDENT AND VICE PRESIDENT VOTE FOR ONE TEAM	COUNTY COMMISSIONER DISTRICT 5 VOTE FOR ONE	
<input type="radio"/> DAVID COBB AND PAT LAMARCHE <small>Green</small>	<input type="radio"/> RANDY JOHNSON	
<input type="radio"/> GEORGE W. BUSH AND DICK CHENEY <small>Republican</small>	<input type="radio"/> CHRIS HOWARD	
<input type="radio"/> JOHN F. KERRY AND JOHN EDWARDS <small>Democratic-Farmer-Labor</small>	<input type="radio"/> write-in, if any	SOIL AND WATER CONSERVATION DISTRICT SUPERVISOR DISTRICT 1 VOTE FOR ONE
<input type="radio"/> BILL VAN AUKEN AND JIM LAWRENCE <small>Socialist Equality</small>	<input type="radio"/> KIM N. BOYCE	
<input type="radio"/> ROGER CALERO AND ARRIN HAWKINS <small>Socialist Workers</small>	<input type="radio"/> write-in, if any	SOIL AND WATER CONSERVATION DISTRICT SUPERVISOR DISTRICT 3 VOTE FOR ONE
<input type="radio"/> THOMAS J. HARENS AND JENNIFER A. RYAN <small>Christian Freedom</small>	<input type="radio"/> write-in, if any	SOIL AND WATER CONSERVATION DISTRICT SUPERVISOR DISTRICT 5 VOTE FOR ONE
<input type="radio"/> RALPH NADER AND PETER MIGUEL CAMEJO <small>Better Life</small>	<input type="radio"/> MICHAEL WYATT	
<input type="radio"/> MICHAEL PEROUTKA AND CHUCK BALDWIN <small>Constitution</small>	<input type="radio"/> JONATHAN M. BURRIS	
<input type="radio"/> MICHAEL BADNARIK AND RICHARD CAMPAGNA <small>Libertarian</small>	<input type="radio"/> KEVIN W. RODEWALD	
<input type="radio"/> write-in, if any	<input type="radio"/> GREGORY J. BOWNIK	
	<input type="radio"/> write-in, if any	
		<small>Typ:01 Seq:0019 Spl:01</small>

**Figure 3.2** Presidential ballot in Minnesota in 2004

The linkage between a vote cast for a presidential slate and the state’s 10 presidential electors is established by state law. Minnesota’s law is typical and provides:

“When Presidential electors are to be voted for, a vote cast for the party candidates for president and vice-president **shall be deemed** a vote for that party’s electors as filed with the secretary of state.”<sup>60</sup> [Emphasis added]

Thus, a voter who filled in the oval next to the names of John Kerry and John Edwards, was “deemed” to be casting a vote for each of the 10 candidates for the position of presidential elector who had been nominated by the Minnesota Democratic Farmer-Labor Party.

Because the Kerry–Edwards slate received the most popular votes in Minnesota in 2004, the 10 Democratic candidates for presidential elector were elected on November 2,

<sup>60</sup> Minnesota election law. Section 208.04, subdivision 1.

2004. Then, on December 13, 2004, they met in St. Paul, Minnesota, and cast their votes in the Electoral College.

In 2020, the names of the individual presidential-electoral candidates appeared on ballots of only three states (Arizona, Idaho, and South Dakota).

For example, figure 3.3 showing Idaho's 2020 ballot indicates that a vote for Donald Trump and Michael Pence was a vote for the four presidential-electoral candidates nominated by the Idaho Republican Party, namely Rod Beck, Raúl Labrador, Janice McGreachin, and Melinda Smyser.

In states such as Idaho that show the names of candidates for presidential elector on the ballot, the presidential electors are often well-known political figures. For example, Raúl Labrador was a former Congressman and Chair of the Idaho Republican Party. Janice McGreachin was Idaho's Lieutenant Governor at the time. Melinda Smyser was a former State Senator and Lieutenant Governor.

Ballots in some states mention that the voter is voting for presidential electors without identifying them. For example, Oregon's presidential ballot informs the voter:

“Your vote for the candidates for United States President and Vice President shall be a vote for the electors supporting those candidates.”

### 3.4. CERTIFICATION OF THE PRESIDENTIAL VOTE COUNT BY THE STATES

After the popular voting for presidential electors takes place on Election Day, the votes are counted at the precinct level.

The official vote counts from precincts are then reported to some intermediate level of government (e.g., city, town, village, township, county, or parish).<sup>61</sup>

Shortly thereafter, the official vote counts from the lower levels are reported to the state level.

Most states have “rapid transmission” requirements that require the certified vote counts from lower levels to be promptly reported to the next-higher level.

Meanwhile, candidates, political parties, civic groups, and media independently gather unofficial vote counts from every precinct and county on Election Night or shortly thereafter. The media often pool their efforts and operate a joint reporting system.

#### 3.4.1. The process of declaring the winning presidential electors

State laws provide that a state canvassing board (or other designated board or official) will ascertain the number of popular votes cast for each presidential slate in the state. Minnesota law is typical and provides.

“The state canvassing board at its meeting on the second Tuesday after each state general election shall open and canvass the returns made to the secretary of state for Presidential electors, prepare a statement of the number of votes cast for the persons receiving votes for these offices, and **declare the person or persons receiving the highest number of votes for each office duly elected.**”<sup>62</sup> [Emphasis added]

<sup>61</sup> In Alaska, votes are aggregated by state Senate districts.

<sup>62</sup> Minnesota election law. Section 208.05.


IDAHO COUNTY	STATE OF IDAHO	NOVEMBER 3, 2020
<b>SAMPLE BALLOT</b>		
<p><b>INSTRUCTIONS TO VOTER</b></p> <p>To vote, fill in the oval (●) next to the candidate of your choice.</p> <p>To vote a "Write-in", fill in the oval next to the blank write-in line and write the name of your choice on the blank write-in line.</p> <p>If you make a mistake, request a new ballot from an election worker.</p> 	<p style="text-align: center;"><b>CANDIDATES FOR UNITED STATES OFFICES</b></p> <p><b>UNITED STATES SENATOR</b> (Vote for One)</p> <p><input type="radio"/> <b>Natalie M Fleming</b> (IND)</p> <p><input type="radio"/> <b>Paulette Jordan</b> (DEM)</p> <p><input type="radio"/> <b>Jim Risch</b> (REP)</p> <p><input type="radio"/> <b>Ray J. Writz</b> (CON)</p> <p><input type="radio"/> _____ (WRITE-IN)</p>	<p style="text-align: center;"><b>CANDIDATES FOR LEGISLATIVE DISTRICT OFFICES</b></p> <p><b>LEGISLATIVE DISTRICT 7 STATE REPRESENTATIVE POSITION B</b> (Vote for One)</p> <p><input type="radio"/> <b>Charlie Shepherd</b> (REP)</p> <p><input type="radio"/> _____ (WRITE-IN)</p>
<b>CANDIDATES FOR UNITED STATES OFFICES</b>	<b>CANDIDATES FOR LEGISLATIVE DISTRICT OFFICES</b>	<b>CANDIDATES FOR COUNTY OFFICES</b>
<p style="text-align: center;"><b>PRESIDENT</b> (Vote for One)</p> <p><input type="radio"/> <b>INDEPENDENT</b> <b>Brock Pierce</b> <b>Karla Ballard - VP</b> Presidential Electors: Zachary Todd Hanna, Terrel Hill Christopher Kreighbaum, Ryan Lyden</p> <p><input type="radio"/> <b>REPUBLICAN</b> <b>Donald J. Trump</b> <b>Michael R. Pence - VP</b> Presidential Electors: Rod Beck, Raúl Labrador Janice McGeachin, Melinda Smyser</p> <p><input type="radio"/> <b>INDEPENDENT</b> <b>Kanye West</b> <b>Michelle Tidball - VP</b> Presidential Electors: Ryan Andrew Fauvell, Julia Hurst Adriel Martinez, Megan Shoemaker</p> <p><input type="radio"/> <b>DEMOCRATIC</b> <b>Joseph R. Biden</b> <b>Kamala D. Harris - VP</b> Presidential Electors: Cherie Buckner-Webb, Maryanne Jordan Mary Lou Reed, Elaine Smith</p> <p><input type="radio"/> <b>CONSTITUTION</b> <b>Don Blankenship</b> <b>William Mohr - VP</b> Presidential Electors: Brendan Gomez, David Hartigan Tony Ullrich, Ray Writz</p> <p><input type="radio"/> <b>INDEPENDENT</b> <b>Rocky "Rocky" De La Fuente</b> <b>Darcy G. Richardson - VP</b> Presidential Electors: Nick Carannante, Tim Guy Shawn Satterthwaite, Daryl Yandell</p> <p><input type="radio"/> <b>LIBERTARIAN</b> <b>Jo Jorgensen</b> <b>Spike Cohen - VP</b> Presidential Electors: Elizabeth Clark, Dan Karlan Aaron Mason, Cathy Smith</p> <p><input type="radio"/> _____ (WRITE-IN)</p>	<p style="text-align: center;"><b>REPRESENTATIVE IN CONGRESS FIRST DISTRICT</b> (Vote for One)</p> <p><input type="radio"/> <b>Rudy Soto</b> (DEM)</p> <p><input type="radio"/> <b>Joe Evans</b> (LIB)</p> <p><input type="radio"/> <b>Russ Fulcher</b> (REP)</p> <p><input type="radio"/> _____ (WRITE-IN)</p> <p style="text-align: center;"><b>CANDIDATES FOR LEGISLATIVE DISTRICT OFFICES</b></p> <p><b>LEGISLATIVE DISTRICT 7 STATE SENATOR</b> (Vote for One)</p> <p><input type="radio"/> <b>Carl G. Crabtree</b> (REP)</p> <p><input type="radio"/> _____ (WRITE-IN)</p>	<p style="text-align: center;"><b>COUNTY COMMISSIONER FIRST DISTRICT</b> 4 Year Term (Vote for One)</p> <p><input type="radio"/> <b>R. Skipper "Skip" Brandt</b> (REP)</p> <p><input type="radio"/> _____ (WRITE-IN)</p> <p style="text-align: center;"><b>COUNTY COMMISSIONER SECOND DISTRICT</b> 2 Year Term (Vote for One)</p> <p><input type="radio"/> <b>Ted Lindsley</b> (REP)</p> <p><input type="radio"/> <b>Joe Cladouhos</b> (IND)</p> <p><input type="radio"/> _____ (WRITE-IN)</p> <p style="text-align: center;"><b>COUNTY SHERIFF</b> (Vote for One)</p> <p><input type="radio"/> <b>Casey M. Zechmann Sr.</b> (IND)</p> <p><input type="radio"/> <b>Doug Ulmer</b> (REP)</p> <p><input type="radio"/> _____ (WRITE-IN)</p> <p style="text-align: center;"><b>PROSECUTING ATTORNEY</b> (Vote for One)</p> <p><input type="radio"/> <b>Kirk A. MacGregor</b> (REP)</p> <p><input type="radio"/> _____ (WRITE-IN)</p>
<b>VOTE BOTH SIDES</b>		
<p><b>NOTE: The order of the candidates on this sample ballot may not necessarily reflect the rotation in your precinct on election day.</b></p>		

Figure 3.3 Presidential ballot in Idaho in 2020



The highlighted words “declare the person or persons receiving the highest number of votes for each office duly elected” are what establish the statewide winner-take-all rule for presidential electors in Minnesota.

### 3.4.2. Ties in the popular vote

In the event of a statewide tie vote for presidential electors, many state laws call for the use of a lottery to break the tie. Minnesota law is typical and provides:

“When it appears that more than the number of persons to be elected as Presidential electors have the highest and an equal number of votes, the secretary of state, in the presence of the board shall **decide by lot** which of the persons shall be declared elected.”<sup>63</sup> [Emphasis added]

In some states, the state legislature is empowered to break a tie among presidential electors. For example, Maine law provides:

“If there is a tie vote for presidential electors, the Governor shall convene the Legislature by proclamation. The Legislature by joint ballot of the members assembled in convention shall determine which are elected.”<sup>64</sup>

### 3.4.3. Certificates of Ascertainment

Since 1792, federal law has required each state to issue certificates reporting the official results of the presidential election to the federal government.<sup>65</sup>

Current federal law (the Electoral Count Reform Act of 2022) requires each state to create seven Certificates of Ascertainment reporting the number of votes cast for each presidential slate and the names of the state’s presidential electors. One of these certificates is sent to the Archivist of the United States in Washington, D.C., and six are supplied to the presidential electors for their use during the meeting of the Electoral College in mid-December.

Figure 3.4 shows Vermont’s 2008 Certificate of Ascertainment. It contains the number of popular votes received by eight presidential-vice-presidential slates and scattered write-ins.

Vermont’s Certificate of Ascertainment shows that 219,262 popular votes were cast for each of the three presidential electors associated with the Democratic presidential-vice-presidential slate consisting of Barack Obama for President and Joe Biden for Vice President. All three Democratic elector candidates received the identical number of popular votes, because Vermont law (like those of other states) provides that a vote for a presidential-vice-presidential slate shall be “deemed” to be a vote for each of the presidential electors nominated in association with that slate.

<sup>63</sup> *Ibid.*

<sup>64</sup> Maine 21–A M.R.S, section 732.

<sup>65</sup> An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2<sup>nd</sup> Congress. 1 Stat. 239. March 1, 1792. Page 240. <https://tile.loc.gov/storage-services/service/l1/lsl/lsl-c2/lsl-c2.pdf>



**Figure 3.4** Vermont's 2008 Certificate of Ascertainment

Because the Obama–Biden slate received the most popular votes in Vermont in 2008, the Governor states:

“I certify that Claire Ayer, Euen Bear, and Kevin B. Christie are the Electors of President and Vice President of the United States for the State of Vermont.”

In the two states that use the congressional-district method of awarding electoral votes (Maine and Nebraska), their Certificates of Ascertainment show the statewide popular vote count (which decides the state’s two senatorial electors) as well as the district-level popular vote count (which decides the presidential elector for each district).<sup>66</sup>

### 3.5. CERTIFICATE OF VOTE

When the Electoral College meets in each state in mid-December, federal law requires that the presidential electors sign six separate Certificates of Vote reporting the outcome of their voting for President and Vice President. One Certificate of Ascertainment is then attached to each of the Certificates of Vote.<sup>67</sup>

In addition, federal law specifies that one of these sets of documents be sent to the President of the U.S. Senate in Washington; two be sent to the chief elections officer of the state; two be sent to the Archivist of the United States in Washington; and one be sent to the federal district court in the judicial district in which the electors assemble.<sup>68</sup>

In the event that no certificates are received from a particular state by the fourth Wednesday in December, federal law establishes procedures for sending a special messenger to the local federal district court in order to obtain the missing certificates.<sup>69</sup>

In Minnesota in 2004, the Kerry–Edwards presidential slate received the most votes in the statewide popular election, and the 10 Democratic–Farmer–Labor Party presidential electors were thus elected. Figure 3.5 shows Minnesota’s 2004 Certificate of Vote.

In Minnesota in 2004, the presidential electors voted by secret ballot when they met. In accordance with the 12<sup>th</sup> Amendment, each presidential elector cast one vote for President and a separate vote for Vice President.

As can be seen in the figure, all 10 of Minnesota’s Democratic presidential electors voted, as expected, for John Edwards for Vice President.

However, unexpectedly, one of the 10 electors also voted for John Edwards for President. That vote was apparently accidental because, after the votes were counted, all 10 electors said that they had intended to vote for John Kerry for President. The result of this error was that John Kerry officially received only 251 electoral votes for President in 2004 (and John Edwards received one accidental electoral vote for President).

The vote for Edwards for President in Minnesota in 2004 was, as far as is known, the only electoral vote ever cast by accident.


Minnesota subsequently amended its state law to eliminate use of the secret ballot in the Electoral College.

<sup>66</sup> The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at <https://www.archives.gov/electoral-college/2020>

<sup>67</sup> United States Code. Title 3, chapter 1, section 9.

<sup>68</sup> United States Code. Title 3, chapter 1, section 11.

<sup>69</sup> United States Code. Title 3, chapter 1, sections 12 and 13.



**PRESIDENTIAL ELECTOR  
CERTIFICATE OF VOTE**

*We, the undersigned, duly elected and qualified as electors for the President and Vice-President of the United States of America for the respective terms beginning on the twentieth day of January, 2005 in and for the State of Minnesota, as appears by the annexed certificates mailed and delivered to us by the Governor of this State, its chief executive officer, having met and convened agreeable to the provisions of the law, in the executive chamber at the State Capitol at Saint Paul, Minnesota on the first Monday after the second Wednesday in December 2004, being the thirteenth day of this month.*

*Do hereby certify, that being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice-President by distinct ballots.*

*And we further certify that the following are two distinct lists, one of the votes for President and the other of the votes for Vice-President, so cast as aforesaid:*

PERSONS VOTED FOR PRESIDENT	NUMBER OF VOTES
JOHN KERRY	9
JOHN EDWARDS	1
PERSONS VOTED FOR VICE-PRESIDENT	NUMBER OF VOTES
JOHN EDWARDS	10

*In Testimony whereof, and as required by the Twelfth Amendment to the Constitution of the United States, we have hereunto set our hands on the first Monday after the second Wednesday in December 2004, being the thirteenth day of this month.*

PRESIDENTIAL ELECTORS	
Signature of Elector <i>Sonja Hayden Berg</i> Printed name of Elector <b>Sonja Berg</b>	Signature of Elector <i>Lil Ortendahl</i> Printed name of Elector <b>Lil Ortendahl</b>
Signature of Elector <i>Vi Grooms-Alban</i> Printed name of Elector <b>Vi Grooms-Alban</b>	Signature of Elector <i>Everett Pettiford</i> Printed name of Elector <b>Everett Pettiford</b>
Signature of Elector <i>Matthew Little</i> Printed name of Elector <b>Matthew Little</b>	Signature of Elector <i>Jean E Schiebel</i> Printed name of Elector <b>Jean Schiebel</b>
Signature of Elector <i>Michael Meuers</i> Printed name of Elector <b>Michael Meuers</b>	Signature of Elector <i>Frank Simon</i> Printed name of Elector <b>Frank Simon</b>
Signature of Elector <i>Tim O'Brien</i> Printed name of Elector <b>Tim O'Brien</b>	Signature of Elector <i>Chandler Harrison Stevens</i> Printed name of Elector <b>Chandler Harrison Stevens</b>

Figure 3.5 Minnesota 2004 Certificate of Vote

### 3.6. COUNTING OF THE ELECTORAL VOTES IN CONGRESS

The constitutional requirement that the presidential electors meet in their respective states necessitates that the electoral votes be counted in a central place.

Under the terms of the 20<sup>th</sup> Amendment (ratified in 1933), the newly elected Congress takes office and convenes on January 3 in each odd-numbered year.

Current federal law, in turn, specifies that Congress shall meet in a joint session on January 6 after each presidential election for the purpose of counting the electoral votes. The 12<sup>th</sup> Amendment states:

“[T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;— The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed.”

In the event that no candidate for President receives the votes of an absolute majority of the presidential electors “appointed” to the Electoral College, the 12<sup>th</sup> Amendment specifies that the House of Representatives chooses the President (section 1.6.1). If no candidate receives the required majority for Vice President, the Senate fills that office.<sup>70</sup>

Between 1789 and 1861, Congress adopted a separate *ad hoc* resolution governing the counting of electoral votes for each election.<sup>71</sup>

In 1865, Congress adopted Joint Rule 22, which governed the counting of the electoral votes in 1865, 1869, and 1873.<sup>72</sup>

In order to settle the disputed 1876 Tilden-Hayes presidential election, Congress established a special Electoral Commission in January 1877.<sup>73</sup>

A decade later, Congress passed the Electoral Count Act of 1887, which governed the counting of electoral votes until it was replaced by the Electoral Count Reform Act of 2022 (appendix B).

### 3.7. FAITHLESS PRESIDENTIAL ELECTORS

A total of 24,068 presidential electors have been appointed to serve in the Electoral College in the nation’s 59 presidential elections between 1789 and 2020.

The term “faithless” is often loosely applied to any electoral vote that was cast in some exceptional way; however, as will be seen in this section, these exceptional cases fall into numerous distinctly different categories.

In any event, none of these exceptional votes ever changed the outcome of any presidential election.

U.S. Supreme Court Justice Robert H. Jackson summarized the history of presidential electors in *Ray v. Blair* in 1952:

“No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation’s highest offices....”

<sup>70</sup> Article I, section 3, clause 4 appears to allow the sitting Vice President (who is frequently a candidate for President or re-election as Vice President) to vote in the case of a tie in the Senate. It says, “The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”

<sup>71</sup> The proceedings for the electoral counts between 1789 and 1873 can be seen in Hind’s Precedents. Volume 3. <https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/html/GPO-HPREC-HINDS-V3-8.htm>

<sup>72</sup> Wallner, James. 2024. Congress’ Role in Presidential Elections: Part V. February 12, 2024. <https://www.rstreet.org/commentary/congresss-role-in-presidential-elections-part-v/>

<sup>73</sup> An act to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon, for the term commencing March fourth, anno Domini 1877. January 29, 1877. Page 227. <https://tile.loc.gov/storage-services/service/l1/l1sl/l1sl-c44/l1sl-c44.pdf>

“This arrangement miscarried. Electors, although often personally eminent, independent, and respectable, officially become **voluntary party lackeys and intellectual nonentities** to whose memory we might justly paraphrase a tuneful satire:

‘They always voted at their party’s call  
‘And never thought of thinking for themselves at all.’”<sup>74</sup> [Emphasis added]

Despite the Founders’ vision that the Electoral College would be a deliberative body, candidates for presidential elector started giving pledges as to how they would vote in the Electoral College as early as 1789.<sup>75</sup>

As a U.S. Senate report in 1826 stated:

**“In the first election** held under the constitution, **the people** looked beyond these agents (electors), fixed upon their own candidates for President and Vice President, and **took pledges from the electoral candidates to obey their will.**

“In every subsequent election, the same thing has been done. Electors, therefore, have not answered the design of their institution.

**“They are not the independent body and superior characters which they were intended to be.** They are not left to the exercise of their own judgment: on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents. **They have degenerated into mere agents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous, if he is not.**”<sup>76</sup> [Emphasis added]

The exceptional votes that have been cast in the Electoral College over the years fall into several categories:

- **Absence of electors due to health or travel difficulties:** In the early years of the Republic, 18 electors failed to vote for President and Vice President, because they were absent from the Electoral College meeting (and could not be replaced under applicable law at the time).
- **Death of presidential nominee:** 63 electoral votes were not cast for the presidential nominee of the elector’s political party, because the nominee had died before the Electoral College meeting.
- **Death of vice-presidential nominee:** Eight electoral votes were not cast for the vice-presidential nominee of the elector’s political party, because the nominee had died before the Electoral College meeting.
- **Deviating votes for Vice President in five 19<sup>th</sup>-century elections:** 67

<sup>74</sup> *Ray v. Blair*. 343 U.S. 214 at 232. 1952. <https://www.law.cornell.edu/supremecourt/text/343/214>

<sup>75</sup> Although George Washington received a vote from every presidential elector in 1789, there was a spirited contest for Vice President in that election (section 2.2).

<sup>76</sup> Senate Report No. 22, 19th Congress, 1st Session (1826). Page 4. The report is quoted in footnote 15 of *Ray v. Blair* 343 U.S. 214. 1952. <https://www.law.cornell.edu/supremecourt/text/343/214>

electors chose not to vote for their party's vice-presidential nominee either to honor or snub a candidate they knew, at the time they cast their vote, was going to win or lose the office.

- **Accidentally cast electoral vote:** In 2004 in Minnesota, an elector accidentally wrote an unintended name on his ballot.
- **Grand-standing votes for President:** 22 electors cast a deviating vote for President knowing, at the time they voted, that their vote would not possibly affect the outcome of the election in the Electoral College. Seven of these 22 deviating votes were cast in the 2016 Trump–Clinton race.
- **Samuel Miles in 1796—the only true faithless elector:** Federalist Samuel Miles' vote in the Electoral College for Republican Thomas Jefferson in 1796 was the only instance when an elector might have thought—at the time that he cast his vote—that his vote might affect the national outcome for President.

Table 3.2 shows the exceptional electoral votes for President (but not Vice President).<sup>77,78,79,80</sup>

### 3.7.1. The 18 absences due to health or travel difficulties

In 1789, 1792, 1808, 1812, 1816, 1820, and 1832, between one and four presidential electors were absent from the Electoral College meeting due to health or travel difficulties.<sup>81</sup>

In 1845, Congress passed a law allowing the states to pass laws for filling vacancies that occur in the Electoral College after Election Day.<sup>82</sup> These state laws typically empower the electors present at the Electoral College meeting to replace an elector who is absent due to illness, death, resignation, disqualification, travel difficulties, or other reason. These laws have eliminated this particular problem.

<sup>77</sup> Note that in the four presidential elections prior to ratification of the 12<sup>th</sup> Amendment in 1804, each elector cast two undifferentiated votes.

<sup>78</sup> Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 159.

<sup>79</sup> There were arguably three additional faithless electors in the 1796 presidential election, although this argument does not have widespread support among historians. As *Congressional Quarterly* notes, “Some historians and political scientists claim that three Democratic-Republican electors voted for Adams. However, the fluidity of political party lines at that early date, and the well-known personal friendship between Adams and at least one of the electors, makes the claim of their being ‘faithless electors’ one of continuing controversy.” See *Congressional Quarterly*. 1979. *Presidential Elections Since 1789*. Second edition. Washington, DC: CQ Press. Page 7.

<sup>80</sup> FairVote. Faithless Electors. <http://archive.fairvote.org/?page=973>

<sup>81</sup> In 1789, four electors were absent (two from Maryland and two from Virginia). In 1792, three electors were absent (two from Maryland and one from Vermont). In 1808, one elector was absent (from Kentucky). In 1812, one elector was absent (from Ohio). In 1816, four electors were absent (three from Maryland and one from Delaware). In 1820, three electors were absent (one each from Mississippi, Pennsylvania, and Tennessee). In 1832, two electors were absent (from Maryland).

<sup>82</sup> An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. <https://www.loc.gov/law/help/statutes-at-large/28th-congress/session-2/c28s2ch1.pdf>

Table 3.2 Categories of exceptional electoral votes for President

Election	Electors voting	Cast as expected for President	Absent electors	Death of nominee for President	Accidental vote in 2004	Grand-standing vote	Samuel Miles in 1796
1789	69	65	4				
1792	132	129	3				
1796	139	138					1
1800	138	138					
1804	176	176					
1808	175	168	1			6	
1812	218	217	1				
1816	221	217	4				
1820	232	228	3			1	
1824	261	261					
1828	261	261					
1832	288	286	2				
1836	294	294					
1840	294	294					
1844	275	275					
1848	290	290					
1852	296	296					
1856	296	296					
1860	303	303					
1864	234	234					
1868	294	294					
1872	366	303		63			
1876	369	369					
1880	369	369					
1884	401	401					
1888	401	401					
1892	444	444					
1896	447	447					
1900	447	447					
1904	476	476					
1908	483	483					
1912	531	531					
1916	531	531					
1920	531	531					
1924	531	531					
1928	531	531					
1932	531	531					
1936	531	531					
1940	531	531					
1944	531	531					
1948	531	530				1	
1952	531	531					
1956	531	530				1	
1960	537	536				1	
1964	538	538					
1968	538	537				1	
1972	538	537				1	
1976	538	537				1	
1980	538	538					
1984	538	538					
1988	538	537				1	
1992	538	538					
1996	538	538					
2000	538	537				1	
2004	538	537			1		
2008	538	538					
2012	538	538					
2016	538	531				7	
2020	538	538					
<b>Total</b>	<b>24,068</b>	<b>23,963</b>	<b>18</b>	<b>63</b>	<b>1</b>	<b>22</b>	<b>1</b>



### **3.7.2. The 63 deviating votes cast after the death of a presidential nominee in 1872**

The largest single bloc of exceptional electoral votes was cast as a result of the death of the 1872 Democratic presidential nominee between Election Day and the Electoral College meeting.

In the November election, Horace Greeley had won 63 electoral votes to Republican Ulysses S. Grant's 286. After Greeley's death, his 63 electors scattered their votes among Benjamin Gratz Brown (Greeley's vice-presidential running mate) and three others.

### **3.7.3. The eight deviating votes cast after the death of a vice-presidential nominee in 1912**

In 1912, incumbent Republican President William H. Taft and incumbent Vice President James S. Sherman won eight electoral votes, while Woodrow Wilson won 435 and former President Theodore Roosevelt won 88. After Sherman died before the Electoral College meeting, the eight Republican presidential electors voted for Nicholas Murray Butler.

### **3.7.4. The 67 deviating votes for Vice President in five 19<sup>th</sup>-century elections**

#### **1812 election**

In 1812, three Federalist electors refused to support Jared Ingersoll, their party's vice-presidential nominee. Instead, they voted for Elbridge Gerry, the vice-presidential candidate for the Democratic-Republican Party. The Democratic-Republican ticket headed by James Madison was the known runaway winner of the Electoral College (winning in the Electoral College by a 128–89 margin). That is, the three Federalist electors who snubbed Ingersoll knew, at the time they voted, that their votes would merely decrease the number of electoral votes for a candidate who had already lost.

#### **1828 election**

In 1828, seven Democratic electors from Georgia refused to support John Calhoun, the party's vice-presidential nominee, and instead voted for William Smith. The Democratic ticket headed by Andrew Jackson was the known runaway winner of the Electoral College (with 178 of the 261 electoral votes). Thus, Calhoun easily won the vice-presidency despite the loss of these seven electoral votes. These seven electors knew, at the time they voted, that their votes snubbing Calhoun would not prevent Calhoun from becoming Vice President.

#### **1832 election**

In 1832, all 30 Democratic electors from Pennsylvania refused to support Martin Van Buren, the party's vice-presidential nominee and instead voted for William Wilkins. The Democratic ticket headed by incumbent President Andrew Jackson was the known runaway winner of the Electoral College (with 219 of the 288 electoral votes). Van Buren easily won the vice-presidency in the Electoral College despite the loss of these 30 electoral votes from Pennsylvania. These electors knew, at the time they voted, that their votes snubbing Van Buren were not going to prevent Van Buren from becoming Vice President.

### 1836 election

In the 1836 election, 23 Democratic presidential electors from Virginia did not vote for their party's vice-presidential nominee, Richard M. Johnson of Kentucky.

Because Johnson was living with an African-American woman at the time, the Virginia delegation at the Democratic Party's national convention in Baltimore in 1835 announced that they were adamantly opposed to Johnson's nomination for Vice President.

Nonetheless, Johnson was nominated by more than a two-to-one margin at the convention.

Opposition to Johnson persisted after the convention. The 23 Democrats nominated to be electors from Virginia announced that they would not support Johnson in the Electoral College.

In the election, Martin Van Buren, the Democratic presidential nominee won both Virginia and a comfortable margin in the Electoral College.

All 23 of Virginia's Democratic electors dutifully voted for Van Buren, their party's nominee for President. They then voted for William Smith, instead of Johnson, for Vice President.

As a result, Johnson did not receive an absolute majority of the electoral votes, and the election of the Vice President was thrown into the U.S. Senate.<sup>83</sup>

However, the Democrats controlled the Senate by a large margin, and Johnson won the vice-presidency by an overwhelming 33–16 party-line vote.<sup>84</sup>

Given the fact that the Virginia delegation to the nominating convention announced their vigorous opposition to Johnson, and that the Virginia Democratic Party's 23 nominees for elector announced their opposition to Johnson prior to Election Day, it would be inaccurate to characterize these 23 deviating electoral votes as being "unexpected"—much less "faithless." That is, the Virginia electors did exactly what they said they would do.

Given the Democratic Party's overwhelming strength in the U.S. Senate, the 23 deviating Virginia electors knew, at the time they voted, that their snubbing Johnson in the Electoral College was not going to prevent Johnson from becoming Vice President.

### 1896 election

In 1896, two political parties nominated William Jennings Bryan as their presidential candidate—something that was very common in the 19<sup>th</sup> century.

The Democratic Party nominated Arthur Sewall for Vice President, but the People's Party nominated Thomas Watson for Vice President.

The People's Party won 31 electoral votes for their Bryan-Watson ticket; however, four of their presidential electors voted for the Democratic Party's nominee for Vice President (namely Arthur Sewall).

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<sup>83</sup> Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Pages 182–188.

<sup>84</sup> Sibley, Joel H. 2002. Election of 1836. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Volume 2. Page 600.

In any case, the Republican ticket headed by William McKinley was the known runaway winner of the Electoral College (with a 271–176 win). In other words, the four electors from the People’s Party switched their votes between two vice-presidential nominees already known to be losers.

### 3.7.5. Accidental electoral vote in 2004

In 2004, one of Minnesota’s 10 Democratic presidential electors accidentally voted for John Edwards for both President and Vice President (figure 3.5). Afterwards, all 10 of the Democratic presidential electors said that they had intended to vote for John Kerry for President and John Edwards for Vice President. This accidentally cast electoral vote had no effect on the national outcome, and incumbent President George W. Bush won the Electoral College with 286 of 538 electoral votes.

### 3.7.6. The 22 grand-standing votes for President

Now let’s consider various cases when an elector cast a grand-standing vote for President.<sup>85,86,87</sup>

#### 1808 election

In 1808, six of New York’s 19 presidential electors voted for George Clinton instead of James Madison. These six votes were cast in an apparent gesture of respect to Clinton, who was the sitting Vice President at the time and who had previously served as New York’s first Governor (between 1777 and 1795). Vice President Clinton had not been nominated for President by either major party in 1808. Thus, he was poised to become the first Vice President not to advance to the presidency. Madison was the runaway favorite when the Electoral College met (with 122 of the 176 electoral votes). That is, these six New York electors knew, at the time they cast their unexpected electoral votes for Clinton, that their courtesy gesture was not going to affect the national outcome.

#### 1820 election

In 1820, James Monroe was uncontested in the presidential election. William Plummer, Sr., a New Hampshire Democratic-Republican presidential elector (who had been expected to vote for Monroe), voted instead for John Quincy Adams. Plummer’s vote prevented Monroe from receiving a unanimous vote in the Electoral College (as George Washington had in 1789 and 1792). Plummer knew that his single unexpected vote was not going to affect the national outcome. Indeed, he stated that he had cast his unexpected vote out of respect for Washington.

<sup>85</sup> Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 159.

<sup>86</sup> Peirce, Neal R. 1968. *The People’s President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 122–127.

<sup>87</sup> Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 53–60.

**1948 election**

In 1948, the Democratic National Convention adopted a civil-rights provision as part of its national platform—thus splitting the Party.

Segregationist Strom Thurmond ran for President as the Dixiecrat presidential nominee and won 38 electoral votes by carrying four states in the November election (Alabama, Louisiana, Mississippi, and South Carolina).

Thurmond received 73,815 popular votes in Tennessee, but incumbent Democratic President Harry Truman carried the state with 270,402 votes. Republican nominee Thomas E. Dewey received 202,914 votes.

Although Preston Parks had been nominated to be a presidential elector by the Tennessee Democratic Party, he voted for Thurmond instead of Truman.

Truman was known to be the winner in the Electoral College (with 303 of the 531 electoral votes). That is, Parks knew, at the time that he voted, that his deviating vote was not going to affect the national outcome.

Faithless presidential electors continued to play a role in presidential politics in southern states during the period before and after passage of the civil rights legislation of the mid-1960s.

**1956 election**

In 1956, W.F. Turner, a Democratic elector in Alabama, voted for Walter B. Jones, a local judge, instead of his party's national nominee, Adlai Stevenson. Incumbent President Dwight D. Eisenhower was the known overwhelming winner of the Electoral College at the time when it met (with 457 of the 531 electoral votes). That is, Turner knew, at the time that he voted, that his deviating vote was not going to affect the national outcome.

**1960 election**

In 1960, Henry D. Irwin, an Oklahoma Republican elector, voted for segregationist Senator Harry F. Byrd (a Democrat) instead of his party's nominee, Richard Nixon. John F. Kennedy was the known winner of the Electoral College at the time when it met (with a comfortable 303 of the 537 electoral votes).

**1968 election**

In 1968, Lloyd W. Bailey, a North Carolina Republican elector, voted for Governor George Wallace (that year's nominee of the American Independent Party) instead of Richard Nixon. Nixon was the known winner of the Electoral College at the time when it met (with a comfortable 301 of the 537 electoral votes).

**1972 election**

In 1972, Roger L. MacBride, a Virginia Republican elector, voted for John Hospers (a Libertarian who ran for President in 1976) instead of incumbent President Richard M. Nixon. Nixon was the runaway winner of the Electoral College at the time when it met (and ended up with 520 of the 538 electoral votes).

Nixon had the unenviable distinction of losing one electoral vote on each of the three

occasions when he ran for President (1960, 1968, and 1972). In 1969, he sent a message to Congress saying that one of the conditions for his support for changing the method of electing the President was “abolition of individual electors” (section 4.7.3).

### 1976 election

In 1976, Mike Padden, a Republican presidential elector from Washington State, voted for Ronald Reagan (who had lost the presidential nomination to President Gerald Ford at the closely divided Republican nominating convention earlier in the year). Padden’s switch between these two Republicans had no effect on the national outcome, because Democrat Jimmy Carter won the Electoral College with 297 of the 538 electoral votes.

### 1988 election

In 1988, Margaret Leach, a Democratic elector from West Virginia, voted for Lloyd Bentsen for President and Michael Dukakis for Vice President, saying that she thought that the Democratic ticket would have been better in the opposite order. Leach’s switch had no effect on the Electoral College winner, because Vice President George H.W. Bush had won an overwhelming 426 of the 538 electoral votes.

### 2000 election

In 2000, Barbara Lett-Simmons, a Democratic presidential elector from the District of Columbia, did not vote for Al Gore. Instead, she abstained as a protest against the District’s lack of representation in Congress. Lett-Simmons’ abstention had no effect on the nationwide outcome, because Texas Governor George W. Bush had secured Florida’s 25 electoral votes and thus won the Electoral College with 271 electoral votes.

### 2016 election

In 2016, Hillary Clinton won the national popular vote by 2,868,518 votes; however, 306 Republican presidential electors and 232 Democratic electors were elected on Election Day.

Between Election Day and the Electoral College meeting on December 19, 2016, various politically implausible scenarios were bandied about in a futile attempt to prevent Donald Trump from becoming President.

In an op-ed in the *Washington Post* on November 24, Harvard Law Professor Lawrence Lessig advocated that the Electoral College should choose Hillary Clinton because she had won the national popular vote—a suggestion that would have required at least 38 Republican electors to abandon their own party’s national nominee and vote for Clinton.<sup>88</sup>

Another unlikely scenario involved 37 of the 306 Republican electors voting for a Republican other than Donald Trump (perhaps Republican Governor John Kasich of Ohio). In that case, Trump would have received only 269 electoral votes. The choice of President would then have been thrown to the newly elected U.S. House of Representatives (with

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<sup>88</sup> Lessig, Lawrence. 2016. Op-Ed: The Constitution lets the electoral college choose the winner. They should choose Clinton. *Washington Post*. November 24, 2016. [https://www.washingtonpost.com/opinions/the-constitution-lets-the-electoral-college-choose-the-winner-they-should-choose-clinton/2016/11/24/0f431828-b0f7-11e6-8616-52b15787add0\\_story.html?utm\\_term=.401e78c0662f](https://www.washingtonpost.com/opinions/the-constitution-lets-the-electoral-college-choose-the-winner-they-should-choose-clinton/2016/11/24/0f431828-b0f7-11e6-8616-52b15787add0_story.html?utm_term=.401e78c0662f)

each state having one vote). The Republicans had an absolute majority of the 50 state delegations—thus creating the possibility of installing a Republican other than Trump.

An even less likely scenario involved all 232 Democratic electors abandoning Clinton and 38 Republican electors abandoning Trump—leaving Trump with only 268 electoral votes. Then, the resulting bipartisan coalition of 270 electors would presumably have elected a Republican other than Trump.

During this period, Peter Chiafalo (a Democratic presidential elector from Washington State) and Michael Baca (a Democratic elector from Colorado) co-founded a group called “Hamilton Electors” to advocate various scenarios by which the Electoral College could choose someone other than Donald Trump when it met on December 19.<sup>89,90,91</sup>

Of course, it was never likely that the precondition for these speculative scenarios (namely defection by 37 or 38 Republican electors) would materialize.

What actually happened in 2016 was considerably tamer—although still unprecedented. On November 28, *Politico* reported:

“Art Sisneros, a Texas Republican elector ... confirmed Monday that he would quit the position.... He argued that Trump is unqualified to be president—but also wrote that he knows he can’t prevent it from happening.”<sup>92</sup>

When the remaining Texas Republican electors met in Austin on December 19, they replaced Sisneros with someone who was willing to vote for Donald Trump.

However, two Texas electors did not resign and, instead, voted for someone other than Donald Trump at the Electoral College meeting.

One of the Republican electors, Christopher Suprun, explained his position on December 5 in an op-ed in the *New York Times*:

“Alexander Hamilton provided a blueprint.... *Federalist* 68 argued that an Electoral College should determine if candidates are qualified, not engaged in demagoguery, and independent from foreign influence. Mr. Trump shows us again and again that he does not meet these standards.”<sup>93</sup>

When the Electoral College met, Suprun voted for Republican Ohio Governor John Kasich.<sup>94</sup>

<sup>89</sup> Charles, Guy-Uriel and Fuentes-Rohwer, Luis E. 2020. Chiafalo: Constitutionalizing Historical Gloss in Law & Democratic Politics. *Harvard Law & Policy Review*. Volume 15. Number 1. Winter 2020. Pages 16–17. <https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP107.pdf>

<sup>90</sup> O’Donnell, Lilly. 2016. Meet the ‘Hamilton Electors’ Hoping for an Electoral College Revolt. *Atlantic*. November 21, 2016. <https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/>

<sup>91</sup> Wegman, Jesse. 2020. *Let the People Pick the President: The Case for Abolishing the Electoral College*. New York, NY: St. Martin’s Press. Pages 1–10.

<sup>92</sup> Cheney, Kyle. 2016. Texas elector who criticized Trump says he’s resigning. *Politico*. November 28, 2016. <https://www.politico.com/story/2016/11/art-sisneros-texas-electoral-college-resigns-231874>

<sup>93</sup> Suprun, Christopher. 2016. Op-Ed: Why I Will Not Cast My Electoral Vote for Donald Trump. *New York Times*. December 5, 2016. [https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html?\\_r=0](https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html?_r=0)

<sup>94</sup> Messeri, Olivia. 2016. Gov. Greg Abbott Goes After Texas Elector. *The Daily Beast*. December 20, 2016. <https://www.thedailybeast.com/cheats/2016/12/20/greg-abbott-goes-after-texas-elector>

A second Texas Republican elector, Bill Greene, voted for former Texas Republican Congressman Ron Paul instead of Trump.

As a result of these two deviating Republican votes for President, Donald Trump received only 304 electoral votes when the Electoral College met—even though 306 Republican presidential electors had been elected on Election Day.<sup>95</sup>

As to the Democratic side, the political reality was that—in the absence of 37 or 38 Republican defections—the national outcome was not going to be affected by anything that the 232 Democratic electors did.

Nonetheless, there were five Democratic electors whose votes for President were cast and counted for someone other than Clinton when the Electoral College met on December 19.

- **Four Democratic electors from Washington State:** Bret Chiafalo, Levi Guerra, and Esther John voted for Republican Colin Powell. Robert Satiacum voted for Faith Spotted Eagle, a Native American political activist who had been prominent in attempting to block the Keystone XL and the Dakota Access Pipelines.<sup>96</sup>
- **One Democratic elector from Hawaii:** David Mulinix of Hawaii voted for Vermont U.S. Senator Bernie Sanders (who had lost the Democratic nomination fight to Hillary Clinton earlier in the year).<sup>97</sup>

As a result of these five deviating votes for President, Hillary Clinton received only 227 electoral votes when the Electoral College met on December 19—even though 232 Democratic presidential electors had been elected on Election Day.<sup>98</sup>

Overall, seven electoral votes for President (two Republican and five Democratic) were cast and counted for persons other than Trump and Clinton.

In addition, there were five Democratic electors (three in Colorado, one in Minnesota, and one in Maine) who attempted to cast their electoral votes for someone other than Clinton.

In Colorado, three Democratic electors publicly stated, after Election Day, that they wanted to cast their electoral votes for someone other than Hillary Clinton—despite having signed a pledge, prior to Election Day, to vote for their party's nominee.

On December 6, two of these Colorado Democratic electors (Polly Baca and Robert Nemanich) sought a temporary restraining order and preliminary injunction against enforcement of Colorado's 1959 "Faithful Elector" law.<sup>99</sup> That law required presidential electors to vote in accordance with the pledge that they had previously signed prior to Election Day.<sup>100</sup>

<sup>95</sup> National Archives. *2016 Electoral College Results*. <https://www.archives.gov/electoral-college/2016>

<sup>96</sup> Washington State's 2016 Certificate of Election shows the four deviating electoral votes for President along with eight electoral votes for Clinton at <https://www.archives.gov/files/electoral-college/2016/vote-washington.pdf>

<sup>97</sup> Hawaii's 2016 Certificate of Election shows the one deviating electoral vote for President at <https://www.archives.gov/files/electoral-college/2016/vote-hawaii.pdf>

<sup>98</sup> National Archives. *2016 Electoral College Results*. <https://www.archives.gov/electoral-college/2016>

<sup>99</sup> Colo. Rev. Stat. § 1-4-304(5).

<sup>100</sup> *Polly Baca and Robert Nemanich v. Hickenlooper*. Complaint. December 6, 2016. <http://ia902801.us.archive.org/21/items/gov.uscourts.cod.167359/gov.uscourts.cod.167359.1.0.pdf>

Polly Baca and Robert Nemanich both argued in their complaint that they had a right to vote for whomever they wanted and that Colorado’s law was therefore unconstitutional.

U.S. District Court Judge Wiley Daniel wrote a detailed opinion denying the request,<sup>101</sup> finding that the plaintiffs were unlikely to prevail if a full hearing were to be conducted on the issue.<sup>102</sup> He ruled from the bench that the plaintiffs were engaging in a “political stunt.”<sup>103</sup>

The plaintiffs then appealed to the Tenth Circuit, which denied their request.<sup>104</sup>

At that point, Polly Baca and Robert Nemanich “felt intimidated and pressured to vote against their determined judgment,” and they cast votes for Hillary Clinton.<sup>105</sup>

When the Electoral College met in Denver on December 19, Democratic elector Michael Baca (no relation to Polly Baca) proceeded to cast his electoral vote for President for Ohio Republican Governor John Kasich.

Acting under authority of Colorado’s 1959 Faithful Elector law, the Colorado Secretary of State promptly cancelled Michael Baca’s deviating vote and declared his office vacant.

The choice of a replacement elector then fell to the eight remaining Colorado electors present at the meeting. A majority of the remaining electors (six of the eight) selected a replacement—with electors Polly Baca and Robert Nemanich not agreeing to the replacement. The replacement elector (Celeste Landry) then duly cast her vote for Clinton.<sup>106</sup>

Thus, in the end, Clinton received all nine of Colorado’s electoral votes—that is, Colorado’s Faithful Elector law delivered its intended result.

Something similar happened in Minnesota. As mentioned earlier in this section, an “accidental” electoral vote had been cast in that state in 2004 by an absent-minded elector. As a result, the legislature in 2010 enacted a version of the Uniform Faithful Presidential Electors Act.<sup>107</sup>

In 2016, Democratic elector Muhammad Abdurrahman voted for Bernie Sanders for President. His deviating vote was promptly replaced under authority of the 2010 Minnesota law. Thus, Hillary Clinton received all 10 of Minnesota’s electoral votes—that is, Minnesota’s law delivered its intended result.<sup>108</sup>

<sup>101</sup> *Polly Baca and Robert Nemanich v. Hickenlooper*. 2016. Opinion. <https://casetext.com/case/baca-v-hickenlooper>

<sup>102</sup> Frank, John. 2016. Judge rejects injunction request in Colorado elector suit seeking to block Donald Trump. *Denver Post*. December 12, 2016. <https://www.denverpost.com/2016/12/12/trump-lawyers-intervene-colorado-lawsuit-free-electors/>

<sup>103</sup> *Ballot Access News*. January 1, 2017. Page 1. [www.ballot-access.org](http://www.ballot-access.org)

<sup>104</sup> *Polly Baca and Robert Nemanich v. Hickenlooper*. 2016. Opinion. <https://casetext.com/case/baca-v-hickenlooper>

<sup>105</sup> *Baca v. Colorado Dep’t of State*. 935 F.3d 887, 945 (10th Cir. 2019). August 20, 2019. Page 6. [https://scholar.google.com/scholar\\_case?case=7418016276739753369&q=Baca+v.+Colorado+Dep%E2%80%99t+of+State,+935+F.3d+887&hl=en&as\\_sdt=2006&as\\_vis=1](https://scholar.google.com/scholar_case?case=7418016276739753369&q=Baca+v.+Colorado+Dep%E2%80%99t+of+State,+935+F.3d+887&hl=en&as_sdt=2006&as_vis=1)

<sup>106</sup> Colorado’s 2016 Certificate of Election shows Michael Baca’s removal from office, the choice of his replacement, and the certification of nine electoral votes for Clinton for President. See <https://www.archives.gov/files/electoral-college/2016/vote-colorado.pdf>

<sup>107</sup> Information about the Uniform Faithful Presidential Electors Act advocated by the Uniform Law Commission and its status in various states is at <https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d>

<sup>108</sup> Minnesota’s 2016 Certificate of Election is at <https://www.archives.gov/files/electoral-college/2016/vote-minnesota.pdf>



Maine has a law that requires that presidential electors support the nominee of the political party that nominated them. However, its law lacks the specific enforcement mechanism found in the laws of some other states. The *Portland Press Herald* reported:

“The initial vote by David Bright, a Democratic elector from Dixmont, was ruled out of order because he cast his ballot for [Vermont Senator Bernie Sanders].”

“When the electors cast ballots a second time, Bright switched his vote and supported Clinton.”<sup>109</sup>

Thus, Hillary Clinton received all of the electoral votes to which she was entitled under Maine law—that is, Maine’s law delivered its intended result.<sup>110</sup>

In summary, although seven electoral votes were cast and counted for persons other than Clinton or Trump, all of these seven presidential electors knew, at the time they cast their votes in the Electoral College, that their action would not affect the national outcome.

### 3.7.7. Samuel Miles’ faithless electoral vote in 1796

The 1796 presidential election was the first presidential election

- that was contested (George Washington having been the unanimous choice of the presidential electors in 1789 and 1792);
- that occurred after the emergence of competing national political parties;
- in which each of the competing political parties nominated candidates for President and Vice President at a central national meeting (specifically, their party’s congressional caucus).

The existence of competing national parties, each running a national campaign aimed at putting their nominees in control of the Executive Branch, made it imperative that the candidates competing for the position of presidential elector support their party’s national nominee.

In 1796, Samuel Miles was one of the two Federalist presidential electors chosen in Pennsylvania.

However, Miles unexpectedly voted for Thomas Jefferson (the Republican nominee) instead of John Adams (the Federalist nominee).

As the meeting of the Electoral College in 1796 approached, it was well known that the overall vote for President in the Electoral College between the Federalist Party and the Republican Party would be close—close enough, and uncertain enough, that one electoral vote might possibly affect the national outcome.

In fact, John Adams ended up receiving 71 electoral votes to Jefferson’s 68, so that a switch by only two presidential electors would have changed the national outcome (section 2.5).

<sup>109</sup>Thistle, Scott. 2016. Maine electors cast votes for Clinton, Trump – after protests inside and outside State House. *Portland Press Herald*. December 19, 2016. <https://www.pressherald.com/2016/12/19/maine-electoral-college-elector-says-he-will-cast-his-ballot-for-sanders/>

<sup>110</sup>Because Maine chooses two of its four presidential electors by congressional district, and because Trump carried the state’s 2<sup>nd</sup> congressional district, Clinton received a total of three electoral votes from Maine (one from the 1<sup>st</sup> congressional district and two statewide).

The Constitution requires that the presidential electors meet on the same day throughout the United States in their separate states—not at a central location.

Given the slow communications of the day (the first railroads did not appear in America until the late 1820s, and the telegraph did not appear in America until 1844), no one could be confident about exactly how many votes Adams and Jefferson would actually receive on the day of the Electoral College meeting. Thus, Samuel Miles would have had reason to believe, at the time he voted, that his single electoral vote very well might determine the overall national outcome. Thus, he qualifies as the nation's only true faithless elector.

### 3.7.8. *Chiafalo v. Washington* faithless elector case

The Electoral College meetings in 2016 in both Washington State and Colorado led to litigation about the constitutionality of state laws restricting how presidential electors must vote.

Washington State law imposed a \$1,000 fine on any presidential elector who violated the pledge to vote for the nominees of the political party that nominated the elector.

Three of the Washington electors who did not vote for Clinton (Levi Guerra, Esther John, and Peter Chiafalo) appealed their fines.

In 2019, the Washington State Supreme Court upheld the constitutionality of the state's Faithful Elector law, saying:

“The Constitution explicitly confers broad authority on the states to dictate the manner and mode of appointing presidential electors.”

“The Constitution does not limit a state’s authority in adding requirements to presidential electors, indeed, **it gives to the states absolute authority in the manner of appointing electors**. Thus, it is within a state’s authority under article II, section 1 to impose a fine on electors for failing to uphold their pledge.”<sup>111</sup> [Emphasis added]

Meanwhile, the U.S. Court of Appeals for the Tenth Circuit reached the opposite conclusion in a case involving Michael Baca, the Colorado Democratic elector who had been removed from the Electoral College in 2016 because he had not voted for Clinton. The Tenth Circuit concluded:

“The text of the Constitution makes clear that **states do not have the constitutional authority to interfere with presidential electors** who exercise their constitutional right to vote for the President and Vice President candidates of their choice.”<sup>112</sup> [Emphasis added]

Given the disagreement between a federal appeals court and a state supreme court,

<sup>111</sup> *Guerra v. Washington State*. In re Guerra, 193 Wash. 2d 380, 441 P. 3d 807. May 23, 2019. Pages 16–17. <https://law.justia.com/cases/washington/supreme-court/2019/95347-3.html>

<sup>112</sup> *Baca v. Colorado Dep’t of State*. 935 F.3d 887, 945 (10th Cir. 2019). August 20, 2019. Page 93. [https://scholar.google.com/scholar\\_case?case=7418016276739753369&q=Baca+v.+Colorado+Dep%E2%80%99t+of+State,+935+F.3d+887&hl=en&as\\_sdt=2006&as\\_vis=1](https://scholar.google.com/scholar_case?case=7418016276739753369&q=Baca+v.+Colorado+Dep%E2%80%99t+of+State,+935+F.3d+887&hl=en&as_sdt=2006&as_vis=1)

the unprecedented number of deviating electoral votes in 2016, and the approach of the 2020 election, the U.S. Supreme Court agreed to hear the issue.

On July 6, 2020, the U.S. Supreme Court upheld the judgment of the Washington State Supreme Court (and rejected the position of the Tenth Circuit).

The U.S. Supreme Court was unanimous in ruling that states could require presidential electors to vote faithfully.

Eight of the nine justices signed Justice Elena Kagan’s majority opinion in *Chiafalo v. Washington*.<sup>113</sup>

Justice Thomas wrote a concurring opinion saying that the 10<sup>th</sup> Amendment was the appropriate basis for deciding the case, and Justice Gorsuch concurred with part of Thomas’ concurring opinion.

See section 9.1.1, section 9.1.13, section 9.1.14, section 9.14.4, and section 9.37.2 for additional discussion and quotations from these opinions.

### 3.7.9. Faithful Elector laws and the Uniform Faithful Presidential Electors Act

Thirty-three states and the District of Columbia have laws that regulate the way that a presidential elector should vote.

Many of these state laws simply assert that a presidential elector is obligated to vote for the nominee of the political party that nominated the elector, while containing no specific enforcement mechanism.<sup>114</sup>

Nonetheless, even in the absence of a specific enforcement mechanism in Maine’s state law, a deviating electoral vote was declared “out of order” in 2016 in that it was contrary to state law. That electoral vote was then recorded in favor of the presidential candidate whose name appeared on the state’s ballot (section 3.7.6).

North Carolina led the way in passing an especially effective faithful elector law. It provides:

- if a presidential elector casts a deviating vote, that action constitutes resignation from the office of elector;
- a deviating vote cast is cancelled, and
- a replacement will be appointed by the remaining electors present at the Electoral College meeting.<sup>115</sup>

Specifically, North Carolina law (section 163-212) provides:

“Any presidential elector having previously signified his consent to serve as such, who fails to attend and vote for the candidate of the political party which nominated such elector, for President and Vice-President of the United States at the time and place directed in G.S. 163-210 (except in case of sickness or other unavoidable accident) shall forfeit and pay to the State five hundred dollars (\$500.00), to be recovered by the Attorney General in the Superior Court

<sup>113</sup> *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). [https://www.supremecourt.gov/opinions/19pdf/19-465\\_i425.pdf](https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf)

<sup>114</sup> Berns, Walter (editor). 1992. *After the People Vote: A Guide to the Electoral College*. Washington, DC: The AEI Press. Pages 10–13 and 86–88.

<sup>115</sup> *Ibid.* Pages 12 and 87–88.

of Wake County. In addition to such forfeiture, refusal or failure to vote for the candidates of the political party which nominated such elector shall constitute a resignation from the office of elector, his vote shall not be recorded, and the remaining electors shall forthwith fill such vacancy as hereinbefore provided.”

The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws or NCCUSL) is a nongovernmental body, formed in 1892, that has produced more than 200 recommended uniform state laws over the years, including the widely used Uniform Commercial Code.

In 2010, the Commission used the North Carolina law as a starting point and promulgated its “Uniform Faithful Presidential Electors Act.” The Commission urged state legislatures to adopt its recommended law.

The Uniform Faithful Presidential Electors Act:

- requires candidates for the position of presidential elector to sign a pledge of faithfulness;
- calls for the election of both electors and alternate electors by each party;
- specifies that any attempt by an elector to vote in violation of his or her pledge constitutes resignation from the office of elector; and
- provides a mechanism for immediately filling the vacancy with a pre-designated alternate or other replacement.

As of July 2024, the Act has been enacted by 14 states:

- California
- Delaware
- Idaho
- Illinois
- Indiana
- Hawaii
- Minnesota
- Montana
- Nebraska
- Nevada
- North Dakota
- Tennessee
- Virginia
- Washington State.<sup>116,117</sup>

The National Popular Vote organization has endorsed the Uniform Faithful Presidential Electors Act.

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<sup>116</sup>Information about the Uniform Law Commission’s proposed law and its status in various states is at <https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410ce587d> The text of the proposed law is at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c98d06fd-0be3-aff9-a9ab-af16d701c771>

<sup>117</sup>Washington State passed a version of the Uniform Faithful Presidential Electors Act in 2019—that is, after the 2016 election, but before the U.S. Supreme Court case decided in July 2020.

### 3.8. VOTING FOR INDIVIDUAL PRESIDENTIAL ELECTORS

Notwithstanding the now-universal use of the short presidential ballot, it is still theoretically possible for voters in some states to cast separate votes for individual presidential-electoral candidates.

For example, section 23–15–431 of Mississippi election law provides:

“Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office, are herein referred to as irregular ballots. In voting for presidential electors, a voter may vote an irregular ticket made up of the names of persons in nomination by different parties, or partially of names of persons so in nomination and partially of persons not in nomination, or wholly of persons not in nomination by any party.”<sup>118</sup>

In addition, Mississippi election law provides:

“No electronic voting system ... shall be ... used ... unless it shall ... permit each voter ... to vote individually for the electors of his choice.”<sup>119</sup>

An examination of the 2020 Certificates of Ascertainment from Mississippi, the other 49 states, and the District of Columbia uncovered no instances of any votes cast for individual presidential-electoral candidates.

### 3.9. WRITE-IN VOTES FOR PRESIDENT

Write-in votes for the offices of President and Vice President are inherently more complex than those for other offices, because voters are electing a slate of presidential-electoral candidates.

Many states allow such write-in votes.

For example, Minnesota law provides two ways by which write-in votes may be cast for presidential electors:

- **Advance filing of write-ins:** Under this approach, supporters of a write-in presidential slate may file a slate of presidential electors prior to Election Day with the Secretary of State. Such advance filing makes write-in voting more convenient, because it enables the voter to write in just two names, instead of writing in the names of numerous individual candidates for presidential elector.
- **Election-Day write-ins:** Under this approach, there is no advance filing, and the voter must write in the names of the individual presidential electors.

Minnesota law implements the method of advance filing of write-ins as follows:

“(a) A candidate for state or federal office who wants write-in votes for the candidate to be counted must file a written request with the filing office for the office sought no later than the fifth day before the general election. The filing officer shall provide copies of the form to make the request.

<sup>118</sup>Mississippi election law. Section 23–15–431.

<sup>119</sup>Mississippi election law. Section 23–15–465. Similar statutory provisions are applicable to other voting systems that may be used in Mississippi (e.g., optical mark-reading equipment).

“(b) A candidate for president of the United States who files a request under this subdivision must include the name of a candidate for vice-president of the United States. The request must also include the name of at least one candidate for Presidential elector. The total number of names of candidates for Presidential elector on the request may not exceed the total number of electoral votes to be cast by Minnesota in the presidential election.”<sup>120</sup>

Many other states have similar procedures for advance filing of write-ins.

Minnesota is one of the few states that permit Election-Day write-ins without advance filing. This option is allowed as the consequence of a 1968 opinion of the state’s Attorney General.<sup>121</sup> That ruling declared that a presidential write-in vote may be cast by writing between one and 10 names of persons for presidential elector. The Attorney General also ruled that a pre-printed sticker containing the names of between one and 10 presidential electors could be employed. Given the exceedingly small amount of space available for a write-in on Minnesota’s ballot (figure 3.2), a pre-printed sticker would appear to be the only practical way to cast such a vote.

In summary, it is possible for an individual candidate for presidential elector in Minnesota to receive votes in three separate ways:

- by appearing as one of the electors nominated by a political party on the ballot under section 208.03;
- by appearing on a list of electors filed in advance under subdivision 3 of section 204B.09; or
- by receiving a write-in vote for presidential elector (say, by means of a pre-printed sticker) as permitted by the Attorney General’s opinion in 1968.

When the Minnesota State Canvassing Board meets, all votes cast for a particular individual candidate for presidential elector, from the three sources mentioned above, are added together. The 10 elector candidates receiving the most votes are elected. Minnesota’s Certificate of Ascertainment for 2020 illustrates the reporting of write-in votes for President.<sup>122</sup>

### 3.10. VOTING BEFORE THE DAYS OF GOVERNMENT-PRINTED BALLOTS

There were no government-printed ballots in the United States until 1888, and there were no government-printed ballots for President anywhere until 1892.

Prior to that, votes in most states were cast by means of printed or hand-written pieces of paper that the voter brought to the polling place. These printed pieces of paper (called “tickets”) were typically printed by political parties.<sup>123</sup>

For example, the Republican “ticket” in 1860 in Worcester, Massachusetts (figure 3.6) shows the party’s 13 candidates for presidential elector (two state-level and 11 district-

<sup>120</sup> Minnesota election law. Section 204B.09, subdivision 3.

<sup>121</sup> Op. Atty. Gen., 28c–5. October 5, 1968. The question of Election-Day write-ins arose from those desiring to vote for Eugene McCarthy instead of Hubert Humphrey.

<sup>122</sup> Minnesota’s 2020 Certificate of Ascertainment may be viewed at <https://www.archives.gov/files/electoral-college/2020/ascertainment-minnesota.pdf>

<sup>123</sup> For example, see the 1788 Delaware law quoted in section 2.1.4.

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#21

## THE REGULAR REPUBLICAN TICKET.

*For President,*  
**ABRAHAM LINCOLN,**  
OF ILLINOIS.

*For Vice President,*  
**HANNIBAL HAMLIN,**  
OF MAINE.

*For Presidential Electors,*  
AT LARGE,  
GEORGE MOREY, of Boston ;  
REUBEN A. CHAPMAN, of Springfield.

1st Congressional District—	ALFRED MACY.
2d " "	JAMES H. MITCHELL.
3d " "	JOHN M. FORBES.
4th " "	CHARLES B. HALL.
5th " "	PELEG W. CHANDLER.
6th " "	JOHN G. WHITTIER.
7th " "	GERRY W. COCHRANE.
8th " "	JOHN NESMITH.
9th " "	AMASA WALKER.
10th " "	CHARLES FIELD.
11th " "	CHARLES MATTOON.

*For Representative to Congress, Ninth District,*  
**GOLDSMITH F. BAILEY,** of Fitchburg.

*For Governor,*  
**JOHN A. ANDREW,**  
OF BOSTON.

*For Lieutenant Governor,*  
**JOHN Z. GOODRICH,**  
OF STOCKBRIDGE.

*For Secretary of the Commonwealth,*  
**OLIVER WARNER,** of Northampton.

*For Attorney General,*  
**DWIGHT FOSTER,** of Worcester.

*For Treasurer and Receiver General,*  
**HENRY K. OLIVER,** of Lawrence.

*For Auditor of Accounts,*  
**LEVI REED,** of Abington.

*For Councillor, Fourth District,*  
**HUGH W. GREENE,** of Northfield.

*For Senator, North East Worcester District,*  
**THOMAS E. GLAZIER,** of Gardner.

*For County Commissioner,*  
**VELOROUS TAFT,** of Upton.

*For Representatives in General Court,*  
*Sixth Worcester District,*  
**D. H. MERRIAM,** of Fitchburg,  
**J. Q. A. PIERCE,** of Leominster,  
**SAMUEL OSGOOD,** of Sterling.

1860

**Figure 3.6** Republican Party ticket for Worcester, Massachusetts in 1860 election

level) that were supporters of Abraham Lincoln for President and Hannibal Hamlin for Vice President. The ticket also lists the party's candidates for U.S. Representative, Governor, five other statewide offices, two local offices, State Senator, and State Representative.

Figure 3.7 shows the Republican ticket in 1872 for Ward 10 in Boston, Massachusetts, including the party's 13 candidates for presidential elector (two state-level and 11 district-level) that were supporters of Ulysses S. Grant for President and Henry Wilson for Vice President. The ticket also shows numerous other candidates.

In some states, voting was *viva voce*.

### 3.11. VOTING ON GOVERNMENT-PRINTED BALLOTS

Government-printed ballots were first used in 1888 in a Louisville, Kentucky, city election.

The first state to use government-printed ballots for state and federal offices was Massachusetts in 1889 (followed by Indiana in 1890).

This approach spread quickly, and a majority of the states had government-printed ballots for President by 1892. However, Georgia did not have government-printed ballots until 1922, and South Carolina not until 1950. North Carolina permitted privately printed ballots until 1929, even though there were also government ballots in the state starting in 1901.

### 3.12. FUSION VOTING

Before the era of government-printed ballots, “fusion voting” was the natural way of voting.

Most voting in the United States was by means of a printed piece of paper (typically produced by a political party) brought to the polls by the individual voter. These tickets typically contained the names of all of the party's nominees for the various offices being filled at a given election.

It was common for a candidate to be nominated by more than one political party or organization. Therefore, a candidate's name would appear on the “ticket” of more than one party. When the votes were counted, a candidate would be credited with a vote for each voter-supplied ballot paper on which his name appeared. That is, all votes in favor of a given candidate were “fused” together.

The transition to government-printed ballots necessitated the creation of detailed legal procedures for gaining access to the ballot.

That transition was often accompanied by restrictions on the ability of a candidate to be nominated by more than one political party.

In “full fusion” voting, the names of a candidate would appear on a government-printed ballot multiple times—one time for each political party that nominated the candidate.

However, during the transition to government-printed ballots that occurred in the late 19<sup>th</sup> century and early 20<sup>th</sup> century, more and more states decided to prohibit a candidate from running as the nominee of more than one political party.

Today, full fusion voting exists only in New York State and Connecticut.<sup>124</sup>

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<sup>124</sup> A vestigial form of fusion voting, called “partial fusion” voting, continues to exist in Vermont and Oregon (and is authorized, but not used, in Mississippi). In “partial fusion” voting, a candidate's name appears only once on the ballot, along with a notation listing the various political parties that nominated the candidate. See *Ballotpedia* article on fusion voting at [https://ballotpedia.org/Fusion\\_voting](https://ballotpedia.org/Fusion_voting)




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**WARD 10.**

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WRIGHT & POTTER, PRINTERS, 79 MILK STREET (CORNER OF FEDERAL), BOSTON.



**For President, ULYSSES S. GRANT.**  
**For Vice-President, HENRY WILSON.**

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FOR PRESIDENTIAL ELECTORS.

AT LARGE. { EBENEZER R. HOAR, of Concord.  
JOHN M. FORBES, of Milton.

BY DISTRICTS.

<p>1—WILLIAM T. DAVIS, of Plymouth. 2—HARRISON TWEED, of Taunton. 3—ALVAN SIMONDS, of Boston. 4—EDWARD H. DUNN, of Boston. 5—AMOS F. BREED, of Lynn.</p>	<p>6—LUTHER DAY, of Haverhill. 7—JOHN C. HOADLEY, of Lawrence. 8—AARON C. MAYHEW, of Milford. 9—STEPHEN SALISBURY, of Worcester. 10—LEVI STOCKBRIDGE, of Amherst. 11—HENRY ALEXANDER, Jr., of Springfield.</p>
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FOR REPRESENTATIVE TO CONGRESS, THIRD DISTRICT.

**WILLIAM WHITTING**  
OF BOSTON.

---

FOR GOVERNOR.

**WILLIAM B. WASHBURN,**  
OF GREENFIELD.

---

FOR LIEUTENANT-GOVERNOR.

**THOMAS TALBOT,**  
OF BILLERICA.

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<p>FOR SECRETARY OF THE COMMONWEALTH. OLIVER WARNER, OF NORTHAMPTON.</p>	<p>FOR TREASURER AND RECEIVER-GENERAL. CHARLES ADAMS, JR., OF NORTH BROOKFIELD.</p>
<p>FOR AUDITOR. CHARLES ENDICOTT, OF CANTON.</p>	<p>FOR ATTORNEY-GENERAL. CHARLES R. TRAIN, OF BOSTON.</p>
<p>FOR COUNCILLOR, FOURTH DISTRICT. RUFUS S. FROST, OF CHELSEA.</p>	<p>FOR SENATOR, FIFTH SUFFOLK DISTRICT. WILLIAM H. LEARNARD, JR., OF BOSTON.</p>
<p>FOR REPRESENTATIVES TO GENERAL COURT, DISTRICT TEN. SAMUEL B. HOPKINS.</p>	<p>JOHN A. NOWELL.</p>

1872.

Figure 3.7 Republican Party ticket for Ward 10 of Boston, Massachusetts, in 1872 election
































OFFICES 	1 PRESIDENTIAL ELECTORS FOR PRESIDENT AND VICE PRESIDENT (Vote ONCE)	2 UNITED STATES SENATOR (Vote for ONE)	3 REPRESENTATIVE IN CONGRESS 21st District (Vote for ONE)	4 STATE SENATOR 44th District (Vote for ONE)
REPUBLICAN  A	 1A Republican ELECTORS FOR George W. Bush Dick Cheney FOR VICE PRESIDENT	 2A Republican Howard Mills	 3A Republican Warren Redlich	 4A Republican Hugh T. Farley
DEMOCRATIC  B	 1B Democratic ELECTORS FOR John F. Kerry John Edwards FOR VICE PRESIDENT	 2B Democratic Charles E. Schumer	 3B Democratic Michael R. McNulty	
INDEPENDENCE  C	 1C Independence ELECTORS FOR Ralph Nader Jan D. Pierce FOR VICE PRESIDENT	 2C Independence Charles E. Schumer	 3C Independence Michael R. McNulty	 4C Independence Hugh T. Farley
CONSERVATIVE  D	 1D Conservative ELECTORS FOR George W. Bush Dick Cheney FOR VICE PRESIDENT	 2D Conservative Marilyn F. O'Grady	 3D Conservative Michael R. McNulty	 4D Conservative Hugh T. Farley
WORKING FAMILIES  E	 1E Working Families ELECTORS FOR John F. Kerry John Edwards FOR VICE PRESIDENT	 2E Working Families Charles E. Schumer	 3E Working Families Michael R. McNulty	
PEACE AND JUSTICE  F	 1F Peace and Justice ELECTORS FOR Ralph Nader Peter Miguel Camejo FOR VICE PRESIDENT	 2F Builders Abraham Hirschfeld		

Figure 3.8 2004 New York presidential ballot

In New York, where fusion voting has historically played a uniquely important role, right-of-center candidates usually appear on the ballot as the nominee of both the Republican Party and the Conservative Party. Similarly, left-of-center candidates often appear on both the Democratic Party's line on the ballot and the Working Families Party's line.

Under full fusion voting, the votes that a candidate receives from the lines of each party that nominated the candidate are added together.

Fusion enables a minor party to nominate a major party's candidate for a particular office and thereby make the major-party nominee aware that he or she would not have won without the minor party's support.

Conversely, fusion allows a minor party to nominate a separate candidate for a given office and thereby make the major party aware of the number of votes it could have received if its nominee had been acceptable to the minor party.

**STATE OF NEW YORK, ss:**

Statement of the whole number of votes cast for all the candidates for the office of ELECTOR OF PRESIDENT and VICE-PRESIDENT at a General Election held in said State on the Second day of November, 2004.

The whole number of votes given for the office of ELECTOR OF PRESIDENT and VICE-PRESIDENT was **7,448,266** of which

		REPUBLICAN	CONSERVATIVE	TOTAL
George E. Pataki	received	2,806,993	155,574	2,962,567
Alexander F. Treadwell	received	2,806,993	155,574	2,962,567
Joseph Bruno	received	2,806,993	155,574	2,962,567
Charles Nesbitt	received	2,806,993	155,574	2,962,567
Mary Donohue	received	2,806,993	155,574	2,962,567
Rudolph Giuliani	received	2,806,993	155,574	2,962,567
Charles Gargano	received	2,806,993	155,574	2,962,567
Joseph Mendello	received	2,806,993	155,574	2,962,567
J. Patrick Barnett	received	2,806,993	155,574	2,962,567
John F. Nolan	received	2,806,993	155,574	2,962,567
Robert Davis	received	2,806,993	155,574	2,962,567
Peter J. Savago	received	2,806,993	155,574	2,962,567
Maggie Brooks	received	2,806,993	155,574	2,962,567
Catherine Blarney	received	2,806,993	155,574	2,962,567
Howard Mills	received	2,806,993	155,574	2,962,567
John Cahill	received	2,806,993	155,574	2,962,567
Rita DiMartino	received	2,806,993	155,574	2,962,567
Libby Pataki	received	2,806,993	155,574	2,962,567
Stephen Minarik	received	2,806,993	155,574	2,962,567
Raymond Meier	received	2,806,993	155,574	2,962,567
Thomas M. Reynolds	received	2,806,993	155,574	2,962,567
Adam Stoll	received	2,806,993	155,574	2,962,567
Herman Bedillo	received	2,806,993	155,574	2,962,567
Jane Forbes Clark	received	2,806,993	155,574	2,962,567
James Garner	received	2,806,993	155,574	2,962,567
Shawn Marie Levine	received	2,806,993	155,574	2,962,567
Viola J. Hunter	received	2,806,993	155,574	2,962,567
Laura Schreiner	received	2,806,993	155,574	2,962,567
Carmen Gomez Goldberg	received	2,806,993	155,574	2,962,567
Bernadette Castro	received	2,806,993	155,574	2,962,567
Cathy Jimino	received	2,806,993	155,574	2,962,567

**Figure 3.9** Third page of New York's 2004 Certificate of Ascertainment

Figure 3.8 shows the 2004 New York presidential ballot. As can be seen, the Bush–Cheney presidential slate ran with the support of both the Republican Party and the Conservative Party, and the Kerry–Edwards slate ran with the support of both the Democratic Party and the Working Families Party.

Complications can arise when fusion voting is applied to presidential races.

New York law permits two parties to nominate a common slate of presidential electors. For example, the Republican and Conservative parties nominated a joint slate of presidential electors for the 2004 presidential election. Similarly, the Democratic Party and Working Families Party nominated a joint slate of presidential electors.

Figure 3.9 shows the third page of New York's 2004 Certificate of Ascertainment indicating that the Bush–Cheney presidential slate received 2,806,993 votes on the Republican Party line and an additional 155,574 votes on the Conservative Party line, for a grand total of 2,962,567 votes.

Similarly, the fourth page of New York's 2004 Certificate of Ascertainment shows that the Kerry–Edwards slate received 4,180,755 votes on the Democratic Party line and an

additional 133,525 votes on the Working Families Party line, for a grand total of 4,314,280 votes.<sup>125</sup>

New York's 2004 Certificate of Ascertainment states (on its second page) that the 31 presidential electors shared by the Democratic Party and the Working Families Party (i.e., the Kerry–Edwards electors)

“were, by the greatest number of votes given at said election, duly elected elector of President and Vice-President of the United States.”

Similarly, in New York in 2004, Ralph Nader appeared on the ballot as the presidential nominee of both the Independence Party and the Peace and Justice Party.

Oddly, Nader also ran with Jan D. Pierce for Vice President on the Independence Party line, but with Peter Miguel Camejo as his running mate on the Peace and Justice Party line. Thus, there were two different Nader presidential slates in New York in 2004, and each had a different slate of presidential electors.

The Nader–Pierce presidential slate received 84,247 votes on the Independence Party line (shown on the fifth page of New York's 2004 Certificate of Ascertainment). The Nader–Camejo presidential slate received 15,626 votes on the Peace and Justice Party line (shown on the sixth page of New York's 2004 Certificate of Ascertainment).

In the unlikely event that Nader had gotten more support in New York than the major-party presidential candidates, he probably would not have received any electoral votes from New York, because the self-destructive decision to run with two different vice-presidential candidates would have divided his support between two dueling slates of presidential electors.

In California, fusion voting is allowed only for President, and it is rarely used (section 9.30.5).

### 3.13. UNPLEDGED PRESIDENTIAL ELECTORS

Unpledged electors were a prominent feature of presidential voting in various southern states immediately before and after passage of the civil rights legislation of the mid-1960s.

During that period, the Democratic Party's national platform favored civil rights. In many southern states, the Democratic Party was divided between segregationists and supporters of civil rights.

In Mississippi in 1960, segregationists captured all eight Democratic nominations for the position of presidential elector. These eight candidates presented themselves to the public in November as unpledged electors.

If the Electoral College had been closely divided between the two major parties in 1960, these eight unpledged electors might have held the balance of power between the two major parties. In that event, Mississippi's eight electors might have been able to negotiate concessions on civil rights from one or the other major-party presidential nominees before casting their votes in the Electoral College.

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<sup>125</sup> New York's entire 2004 Certificate of Ascertainment is shown in appendix H (on page 809) of the 4<sup>th</sup> edition of this book available at <https://www.every-vote-equal.com/4th-edition>

One alternative scenario was that Mississippi's eight unpledged electors in 1960 would vote in the Electoral College for a segregationist (presumably Virginia Senator Harry F. Byrd), thereby throwing the presidential election into the U.S. House of Representatives. In an election in the House, each state would have had one vote, and 26 out of 50 votes would be required for election. Thus, the 11 southern states almost certainly would have held the balance of power between the two major parties in the House—thus enabling them to negotiate concessions on civil rights from one of the major parties.

On Election Day in November, all eight unpledged candidates won in Mississippi. When the Electoral College met, all eight voted for Senator Byrd.

Mississippi's election law continues to allow for unpledged presidential electors.<sup>126</sup>

Segregationists in Alabama (which had 11 electoral votes) had a similar plan. However, they were unable to capture all 11 Democratic nominations for presidential elector because of a lack of discipline within their ranks.

In the 1960 Democratic primary in Alabama, there were 24 unpledged (segregationist) candidates seeking the 11 Democratic nominations for presidential elector.

In contrast, there were exactly 11 "loyalist" candidates—that is, candidates who were committed to the national party's nominee for President (John F. Kennedy).

With support for the unpledged electors dispersed over 24 candidates, the Democratic primary produced a mixed result—six unpledged nominees and five loyalists.<sup>127</sup>

In the November 1960 election in Alabama, the short presidential ballot (section 2.14) was not in use in all states (as it is today in every state).

Figure 3.10a and figure 3.10b show Alabama's 1960 presidential ballot. The ballot contained 11 separate lines—one for each of the state's 11 presidential electors. Each line contained the names of one elector candidate for each of the five political parties on the ballot. That is, there were 55 separate levers on the voting machine for presidential elector.<sup>128</sup>

John F. Kennedy's name appeared nowhere on the ballot. Instead, the 11 electors of the Alabama Democratic Party appeared under the party's rooster logo and the slogan:

"White Supremacy—For the Right."

Similarly, there were 11 elector candidates for the Alabama Republican Party, but Richard Nixon's name did not appear anywhere on the ballot.

All 11 Democratic candidates were elected on Election Day in November 1960.

When the Electoral College met in December, John F. Kennedy received the votes of the five loyalist Democratic electors, and Harry F. Byrd of Virginia received the votes of the six unpledged (segregationist) Democratic electors.

The Alabama 1960 presidential ballot is discussed further in section 6.2.3 and section 9.30.12.

<sup>126</sup> Mississippi election law. Section 23–15–785.

<sup>127</sup> Trende, Sean. 2012. Did JFK lose the popular vote? *Real Clear Politics*. October 19, 2012. [https://www.realclearpolitics.com/articles/2012/10/19/did\\_jfk\\_lose\\_the\\_popular\\_vote\\_115833.html](https://www.realclearpolitics.com/articles/2012/10/19/did_jfk_lose_the_popular_vote_115833.html)

<sup>128</sup> The 1960 Alabama presidential ballot is shown in appendix K of Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. The 1960 Alabama presidential ballot is reprinted as figure 3.10a and figure 3.10b in this book with the permission of Yale University Press.




<p>1<sup>ST</sup> TURN SWITCH RIGHT TO CLOSE CURTAINS</p> <p>2<sup>ND</sup> MARK YOUR BALLOT AND LEAVE MARKS SHOWING → </p> <p>3<sup>RD</sup> TURN SWITCH LEFT</p> <p>WARNING—YOUR <input checked="" type="checkbox"/> MARKS MUST BE SHOWING FOR VOTE TO REGISTER</p> 	<p>GENERAL ELECTION JEFFERSON COUNTY</p>	<p>GENERAL ELECTION JEFFERSON COUNTY</p>
<p>For Presidential Electors</p>	 <p>FOR THE RIGHT DEMOCRATIC PARTY</p>	<p>INDEPENDENT AFRO-AMERICAN UNITY PARTY</p>
<p>VOTE FOR ELEVEN</p>	<p>C. G. ALLEN <input type="checkbox"/></p>	<p>GROVER C. ALLEN <input type="checkbox"/></p>
	<p>DAVE ARCHER <input type="checkbox"/></p>	<p>MRS. MARIE W. BAILEY <input type="checkbox"/></p>
	<p>C. L. (LEONARD) BEARD <input type="checkbox"/></p>	<p>GROVER BANKS <input type="checkbox"/></p>
	<p>EDMUND BLAIR <input type="checkbox"/></p>	<p>JAMES H. HOLLIE <input type="checkbox"/></p>
	<p>J. E. BRANTLEY <input type="checkbox"/></p>	<p>EDDIE JONES <input type="checkbox"/></p>
	<p>(GOV.) FRANK M. DIXON <input type="checkbox"/></p>	<p>JAMES KERSH <input type="checkbox"/></p>
	<p>KARL HARRISON <input type="checkbox"/></p>	<p>WILL MIKE <input type="checkbox"/></p>
	<p>BRUCE HENDERSON <input type="checkbox"/></p>	<p>ISAAC NICHOLSON <input type="checkbox"/></p>
	<p>C. E., JR. HORNSBY <input type="checkbox"/></p>	<p>ERNEST THOMAS TAYLOR <input type="checkbox"/></p>
	<p>W. W., JR. MALONE <input type="checkbox"/></p>	<p>JASPER J. THOMAS <input type="checkbox"/></p>
	<p>FRANK MIZELL <input type="checkbox"/></p>	<p>JAMES C. WILLIAMS <input type="checkbox"/></p>
<p>For Tax Assessor</p>	<p>L. A. WHETSTONE <input type="checkbox"/></p>	

Figure 3.10a First part of 1960 Alabama presidential ballot




<p>GENERAL ELECTION JEFFERSON COUNTY</p>  <p>NATIONAL STATES RIGHTS PARTY Column 3</p>	<p>GENERAL ELECTION JEFFERSON COUNTY</p>  <p>PROHIBITION PARTY Column 4</p>	<p>GENERAL ELECTION JEFFERSON COUNTY</p>  <p>REPUBLICAN PARTY Column 5</p>
<p>GEORGE E. ALLEN <input type="checkbox"/></p>	<p>L. E. BARTON <input type="checkbox"/></p>	<p>ROBERT S. CARTLEDGE <input type="checkbox"/></p>
<p>ANNETTE M. BARTEE <input type="checkbox"/></p>	<p>WILLIAM E. BROWN <input type="checkbox"/></p>	<p>CHARLES H., JR. CHAPMAN <input type="checkbox"/></p>
<p>LODWICK H. BARTEE <input type="checkbox"/></p>	<p>L. J. CHAMBLISS <input type="checkbox"/></p>	<p>J. N. DENNIS <input type="checkbox"/></p>
<p>LEE J. CROWDER <input type="checkbox"/></p>	<p>LEONA B. FRAME <input type="checkbox"/></p>	<p>CECIL DURHAM <input type="checkbox"/></p>
<p>THERMAN De LEE <input type="checkbox"/></p>	<p>JOE FROST <input type="checkbox"/></p>	<p>W. H. GILLESPIE <input type="checkbox"/></p>
<p>MRS. LILA EVANS <input type="checkbox"/></p>	<p>KATHRYNE E. GARDNER <input type="checkbox"/></p>	<p>PERRY O. HOOPER <input type="checkbox"/></p>
<p>WILLIE BAZZELL GARRETT <input type="checkbox"/></p>	<p>O. A. GARDNER <input type="checkbox"/></p>	<p>W. J. KENNAMER <input type="checkbox"/></p>
<p>JOHN DOUGLAS KNOWLES <input type="checkbox"/></p>	<p>A. D. PECK <input type="checkbox"/></p>	<p>TOM McNARON <input type="checkbox"/></p>
<p>SANFORD D. RUDD <input type="checkbox"/></p>	<p>PHOEBE SHOEMAKER <input type="checkbox"/></p>	<p>MRS. JOHN SIMPSON <input type="checkbox"/></p>
<p>JACK ANDREW TOMLINSON <input type="checkbox"/></p>	<p>C. B. STEWART <input type="checkbox"/></p>	<p>T. B. THOMPSON <input type="checkbox"/></p>
<p>ERNEST WILSON <input type="checkbox"/></p>	<p>R. DREW WOLCOTT <input type="checkbox"/></p>	<p>GEORGE WITCHER <input type="checkbox"/></p>

Figure 3.10b Second part of 1960 Alabama presidential ballot

