

2 | How the Electoral College Works

The current system for electing the President and Vice President of the United States is governed by a combination of federal and state statutory provisions and constitutional provisions. This chapter discusses the:

- federal constitutional and federal statutory provisions governing presidential elections (section 2.1),
- history of various methods for appointing presidential electors (section 2.2),
- current state laws governing the election of presidential electors (section 2.3),
- certification of the popular vote by the states (section 2.4),
- meeting of the Electoral College (section 2.5),
- certification of the votes cast by a state’s presidential electors (section 2.6),
- counting of the electoral votes in Congress (section 2.7),
- write-in votes for president (section 2.8),
- state laws permitting a voter to cast separate votes for individual candidates for the position of presidential elector (section 2.9),
- fusion voting (section 2.10),
- unpledged electors (section 2.11),
- faithless presidential electors (section 2.12), and
- five major changes in the manner of appointing presidential electors that have been implemented without a federal constitutional amendment (section 2.13).

2.1 FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS

The President and Vice President of the United States are not elected directly by the voters. Instead, the President and Vice President are elected by a group of 538 people who are known individually as “presidential electors” and collectively as the “Electoral College.”

The U.S. Constitution provides:

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

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number

of Senators and Representatives to which the State may be entitled in the Congress. . . . ”¹ [Emphasis added]

Presidential electors are elected by each state and the District of Columbia on the Tuesday after the first Monday in November in presidential election years.

The presidential electors meet to cast their votes for President and Vice President in 51 separate meetings held around the country in mid-December.

The number of presidential electors depends on the size of the U.S. House of Representatives and the U.S. Senate. The number of seats in the House is set by federal statute, and there are currently 435 U.S. Representatives. There are, in addition, two Senators from each state. Consequently, the 50 states together currently have 535 electoral votes. The District of Columbia acquired three electoral votes as a result of the ratification of the 23rd Amendment to the U.S. Constitution in 1961. Thus, in total, there are currently 538 electoral votes.

In order to be elected, the Constitution requires that a presidential or vice-presidential candidate win the votes of a majority of the presidential electors who have been “appointed.” Assuming that all states appoint their presidential electors,² that requirement currently means winning 270 of the 538 electoral votes.

After each decennial federal census, the 435 seats in the United States House of Representatives are reapportioned among the 50 states. The 2010 census determined the apportionment of electoral votes that will apply to the 2012, 2016, and 2020 presidential elections.

Table 2.1 shows the distribution of electoral votes among the 51 jurisdictions that appoint presidential electors for the period between 1992 and 2020. Because each state has two Senators and at least one Representative, no state has fewer than three electoral votes. Column 2 shows the number of electoral votes for the 1992, 1996, and 2000 presidential elections. Column 3 shows the numbers for the 2004 and 2008 elections. Column 4 shows the number for the 2012, 2016, and 2020 elections. The average number of electoral votes for the 51 jurisdictions is 10.5, and the median number is 8.

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

“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]

Federal election law establishes the date for choosing presidential electors. In 2012, the designated date was Tuesday, November 6.

¹ U.S. Constitution. Article II, section 1, clauses 1 and 2.

² On rare occasions, states have failed to appoint presidential electors. For example, in the nation’s first presidential election in 1789, New York failed to appoint its electors because of a disagreement between the State Senate and Assembly on the manner of appointing presidential electors. During the Civil War, the 11 Southern states failed to appoint electors for the 1864 election.

Table 2.1 DISTRIBUTION OF ELECTORAL VOTES 1992-2020

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

“The electors of President and Vice President shall be appointed, in each State, on the **Tuesday next after the first Monday in November**, in every fourth year succeeding every election of a President and Vice President.”³
[Emphasis added]

Similarly, the date for the meeting of the Electoral College is established by federal law. In 2012, the designated day for the meeting of the Electoral College was Monday, December 17.

“The electors of President and Vice President of each State shall meet and give their votes on the **first Monday after the second Wednesday in December** next following their appointment at such place in each State as the legislature of such State shall direct.”⁴ [Emphasis added]

The above statute was enacted in 1934 after the 20th Amendment (ratified in 1933) changed the date for the presidential inauguration from March 4 to January 20.

The Electoral College meeting in mid-December is governed by the 12th Amendment to the U.S. Constitution 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.”

For the reader’s convenience, appendix A contains the provisions of the U.S. Constitution relating to presidential elections, and appendix B contains the relevant provisions of federal law.

The voters who have the qualifications to vote for the lower house of their state legislature have the right, under the Constitution, to vote for U.S. Representatives.⁵ The 17th Amendment (ratified in 1913) gave the voters the right to directly elect U.S. Senators (who, under the original Constitution, had been elected by state legislatures).

The voters, however, have no federal constitutional right to vote for President or Vice President or for presidential electors. Instead, the Constitution provides:

³ United States Code. Title 3, chapter 1, section 1.

⁴ United States Code. Title 3, chapter 1, section 7.

⁵ At the time of ratification of the Constitution, the qualifications to vote for the lower house of the state legislature varied considerably from state to state. Many states had highly restrictive property or wealth qualifications. 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.

“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. . . .”⁶ [Emphasis added]

As the Court wrote in the 1892 case of *McPherson v. Blacker*—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 general ticket [i.e., the winner-take-all rule], nor that the majority of those who exercise the elective franchise can alone choose the electors. . . .”⁷

“In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States.”⁸ [Emphasis added]

The full text of the Court’s decision in *McPherson v. Blacker* can be found in appendix O.

In 2000, the U.S. Supreme Court in *Bush v. Gore* reiterated the principle 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. *Id.*, at 28–33. . . .”⁹ [Emphasis added]**

2.2 HISTORY OF METHODS OF SELECTING PRESIDENTIAL ELECTORS

In 1787, the Constitutional Convention considered a variety of methods for electing the President and Vice President, including election by

- state governors,
- Congress,
- state legislatures,

⁶ U.S. Constitution. Article II, section 1, clause 2.

⁷ *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

⁸ *Ibid.* at 35.

⁹ *Bush v. Gore*. 531 U.S. 98. 2000.

- nationwide popular vote, and
- electors.

The delegates debated the method of electing the President on 22 separate days and held 30 votes on the topic.^{10,11} As described in George Edwards’s book *Why the Electoral College Is Bad for America*:

“The delegates were obviously perplexed about how to select the president, and their confusion is reflected in their voting. On July 17, for example, the delegates voted for selection of the president by the national legislature. Two days later they voted for selection by electors chosen by state legislatures. Five days after that, they again voted for selection by the national legislature, a position they rejected the next day and then adopted again the day after that. Then, just when it appeared that the delegates had reached a consensus, they again turned the question over to a committee. This committee changed the convention’s course once more and recommended selection of the president by electors. . . .”¹²

In the end, the 1787 Constitutional Convention never agreed on a method for choosing the presidential electors. The matter was simply turned over to the state legislatures.

The U.S. Constitution gives the states considerably more discretion in choosing the manner of appointing their presidential electors than it does in choosing the manner of electing U.S. Representatives and Senators. The states’ power to choose the manner of conducting congressional elections is subject to congressional oversight. Article I, section 4, clause 1 of the U.S. Constitution provides:

“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 choosing Senators.” [Emphasis added]

In contrast, Article II, section 1, clause 2 of the U.S. Constitution gives Congress no comparable oversight power concerning a state’s choice of the manner of appointing its presidential electors.

“Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of Electors, equal to the whole Number of Sena-

¹⁰ Peirce, Neal R. 1968. *The People’s President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 28–57.

¹¹ Longley, Lawrence D., and Braun, Alan G. 1972. *The Politics of Electoral College Reform*. New Haven, CT: Yale University Press. Pages 22–41.

¹² Edwards, George C., III. 2004. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Pages 79–80.

tors and Representatives to which the State may be entitled in the Congress. . . .” [Emphasis added]

As the U.S. Supreme Court wrote in *McPherson v. Blacker*:

“In short, the appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States.”¹³
[Emphasis added]

That is, the states have plenary authority in choosing the manner of appointing their presidential electors.

Of course, plenary authority is not unfettered power. State power in this area is limited by numerous general constitutional limitations on the exercise of governmental power, such as the Equal Protection clause of the 14th Amendment, the 15th Amendment (outlawing the denial of vote based on race, color, or previous condition of servitude), the 20th Amendment (women’s suffrage), the 24th Amendment (outlawing poll taxes), and the 26th Amendment (establishing the right to vote for 18-year-olds).

In addition, the U.S. Supreme Court noted in *McPherson v. Blacker* that a state legislature’s choices over the manner of appointing the state’s presidential electors may be limited by its state constitution.¹⁴ Colorado is the only state to have an explicit state-constitutional limitation on the state legislature’s choices. In the section of the Colorado Constitution containing the “schedule” governing the transition from territorial status to statehood, the Colorado Constitution specified that the legislature could appoint presidential electors in 1876; however,

“after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.”¹⁵

As it happens, the Colorado legislature’s direct appointment of presidential electors in 1876 was the last occasion in the United States when the voters were not allowed to vote directly for presidential electors.

2.2.1 THE FIRST AND SECOND PRESIDENTIAL ELECTIONS

In the nation’s first presidential election in 1789 and second election in 1792, the states employed a wide variety of methods for choosing presidential electors, including

- appointment of the state’s presidential electors by the Governor and his Council,
- appointment by both houses of the state legislature,

¹³ *McPherson v. Blacker*. 146 U.S. 1 at 35. 1892.

¹⁴ *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

¹⁵ Section 20 of the article of the Colorado Constitution governing the transition from territorial status to statehood.

- popular election using special single-member presidential-electoral districts,
- popular election using counties as presidential-electoral districts,
- popular election using congressional districts,
- popular election using multi-member regional districts,
- combinations of popular election and legislative choice,
- appointment of the state’s presidential electors by the Governor and his Council combined with the state legislature, and
- statewide popular election.

In New Jersey in 1789, the state legislature passed a law authorizing the Governor and his Council to appoint all of the state’s presidential electors.¹⁶

In four of the 10 states that participated in the first presidential election (Connecticut, Georgia, New Jersey, and South Carolina), the state legislatures designated themselves as the appointing authority for all of the state’s presidential electors. That is, the voters had no direct involvement in choosing presidential electors in those states.

Note that the appointment of presidential electors by a state legislature did not seem as odd in 1789 as it would today. In 1789, the state legislatures had the power to appoint United States Senators¹⁷ and, in all but two states, the state’s governor.¹⁸ Moreover, the state legislatures appointed the delegates to the 1787 Constitutional Convention.

In four of the 10 states that participated in the first presidential election, the voters chose all of the presidential electors.

In New Hampshire, Pennsylvania, and Maryland, all of the state’s presidential electors were elected on the basis of a version of the statewide winner-take-all rule (sometimes called the “general ticket system” or the “unit rule”).

The version of the winner-take-all rule used in 1789 in New Hampshire and Pennsylvania differed from today’s version in two respects.

First, the names of the presidential and vice-presidential candidates did not appear on the ballot in the early years of the Republic. Instead, the voter cast votes for individual candidates for the position of presidential elector. For example, a voter in

¹⁶ An Act for carrying into effect, on the part of the state of New Jersey, the Constitution of the United States. November 21, 1788. *Acts of the General Assembly of the State of New Jersey*. Page 481. See also DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 3. Page 29. Interestingly, the U.S. Supreme Court’s opinion in the 1892 case of *McPherson v. Blacker* contains an error concerning New Jersey. In its historical review of methods used to appoint presidential electors in 1789, the Court (incorrectly) stated, “At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina.” 146 U.S. 1 at 29. The source of this misinformation about New Jersey appears to be page 19 of the plaintiff’s brief in the 1892 case. *Brief of F.A. Baker for Plaintiffs in Error in McPherson v. Blacker*. 1892.

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

¹⁸ State constitutions were changed over the years so that, today, the voters directly elect all state governors.

New Hampshire (which had five electoral votes in 1789) could vote for five individual presidential-electoral candidates.

Second, the version of the winner-take-all rule used in New Hampshire in 1789 differed from the present-day system in that an absolute majority of the popular vote was necessary to elect a presidential elector (with the legislature intervening and making the selection in the absence of an absolute majority). Today, a plurality of voters is sufficient to elect all of a state's presidential electors in all 48 states that use the winner-take-all system.

Maryland added a regional twist to its version of the winner-take-all rule. All of the state's voters were permitted to vote for three electors from the Eastern Shore and five from the Western Shore. This approach enabled a statewide majority to control all of the state's electoral votes on a winner-take-all basis while ensuring a regional distribution of presidential electors.

In Virginia (which, at the time, had 10 congressional districts and hence 12 electoral votes), the state was divided into 12 presidential-electoral districts. Each voter cast a vote for an elector for his district.

Delaware has three counties and had three electoral votes in 1789 (as it does today). One presidential elector was elected from each county.¹⁹

Massachusetts used a combination system in 1789. In each of the state's eight congressional districts, the voters cast ballots in a popular election for their choice for the district's presidential elector. However, the actual appointment of the presidential elector for each district was then made by the state legislature from between the two elector candidates receiving the most popular votes in each district. The state legislature also chose the state's two senatorial electors. Thus, a majority of the legislature²⁰ effectively exercised the power to choose all 10 of the state's district electors. The practical role of the voters was simply to nominate candidates for consideration by the legislature.

In New York, the legislature could not agree on a method for choosing presidential electors. Both houses of the legislature agreed that the legislature—not the voters—would choose the state's presidential electors. However, the Senate and Assembly deadlocked over the question of whether the legislature would choose the presidential

¹⁹ DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1984. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 2. Page 83. The election returns shown on page 83 of *The Documentary History* indicate that the candidate receiving the most votes in each county was elected as presidential elector. This appears to be accordance with a legislative act passed on October 28, 1788. Interestingly, the U.S. Supreme Court decision in the 1892 case of *McPherson v. Blacker* contains an error concerning Delaware. In its historical review of the election laws of 1789, the Court (incorrectly) stated, "At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina." 146 U.S. 1 at 29. This source of this misinformation appears to be page 19 of the plaintiff's brief in the 1892 case. *Brief of F.A. Baker for Plaintiffs in Error in McPherson v. Blacker*. 1892.

²⁰ Sitting in a joint convention of both houses.

electors in a joint session (consisting of all the state Senators and all the state Assemblymen) or by means of a concurrent resolution (containing the names of the presidential electors) that had to be separately approved by both the Senate and Assembly.²¹ As a result of this unresolved dispute over the relative power of the Senate and Assembly, New York was unable to cast its votes in the Electoral College in the first presidential election.

Rhode Island and North Carolina did not participate in the nation's first presidential election in 1789, because they had not ratified the Constitution in time to participate.

George Washington received a vote from all of the 69 presidential electors who voted in the Electoral College in 1789.²² John Adams was elected Vice President in 1789.

Vermont became a state in time to participate in the 1792 presidential election. Vermont passed legislation authorizing the state's presidential electors to be appointed by a "Grand Committee" consisting of the Governor and his Council and the state House of Representatives (the state being unicameral at the time).²³

Kentucky became a state in time for the 1792 election and permitted its voters to elect presidential electors by district.

By 1792, New York had resolved the dispute that had prevented it from appointing any presidential electors in 1789. A law was passed authorizing the legislature to appoint presidential electors in the same manner as it appointed the state's United States Senators.²⁴

In 1792, the Massachusetts legislature loosened its grip on the choice of presidential electors. The state was divided into four regional multi-member districts for the purpose of electing the state's 16 electors.²⁵ The 1792 plan in Massachusetts permitted the voters to directly elect all of the state's presidential electors (except that if a candidate were to fail to receive a majority of the popular votes cast in a particular district, the legislature would make the choice).

In 1792, the Delaware legislature took the power to elect the state's presidential electors from the voters and vested it in itself. The legislatures of Rhode Island and North Carolina chose presidential electors in 1792.

In 1792 (as in 1789), George Washington again received a vote from all of the presidential electors who voted.

²¹ The issue of whether to use a joint session (versus a concurrent resolution) also vexed state legislative elections of U.S. Senators for many decades, with the result that U.S. Senate seats would often remain unfilled for years because of a partisan division between the two houses of the state legislature.

²² In addition to the missing electoral votes from New York (and the non-ratifying states of Rhode Island and North Carolina), two presidential electors from Maryland and two from Virginia failed to vote in the Electoral College in 1789.

²³ An Act directing the mode of appointing electors to elect a president and vice president of the United States. Passed November 3, 1791. *Laws of 1791*. Page 43.

²⁴ An Act for appointing electors in this state for the election of a president and vice president of the United States of America. Passed April 12, 1792. *Laws of New York*. Pages 378–379.

²⁵ As a consequence of the 1790 federal census, Massachusetts became entitled to choose 16 presidential electors in the 1792 presidential election (as compared to 10 in the 1789 election).

2.2.2 THE NATION'S FIRST COMPETITIVE ELECTION (1796)

In the early years of the republic, Thomas Jefferson led the opposition to the policies of the ruling Federalist Party.

George Washington's decision not to run for a third term in 1796 opened the way for a contested presidential election between the country's two emerging political parties.

In the summer of 1796, the Federalist members of Congress caucused and nominated John Adams of Massachusetts and Thomas Pinckney of South Carolina as their party's candidates. Meanwhile, the Republican caucus (sometimes also called the "Democratic-Republicans" and later called the "Democrats") voted to support the candidacies of Thomas Jefferson of Virginia and Aaron Burr of New York.^{26,27,28}

For the 1796 election, Massachusetts abandoned the multi-member districts used in 1792 and switched to a system in which the voters elected the presidential electors by congressional district (with the legislature intervening if the leading candidate were to fail to receive an absolute majority of the popular votes cast in his district). The state legislature appointed the state's two senatorial electors.

Maryland switched from popular election of presidential electors using the winner-take-all rule to popular election by districts for the 1796 election.

Georgia switched from legislative appointment to statewide popular election.

Thus, the number of states that used the statewide winner-take-all system remained at three for the 1796 election.

The system used by the newly admitted state of Tennessee in 1796 (and also in 1800) was perhaps the most unusual system ever used by a state. A state-level Electoral College chose Tennessee's members of the national Electoral College. The legislative act establishing this system asserted that this multi-layered method had the advantage that presidential electors could

"be elected with as little trouble to the citizens as possible."²⁹

To that end, the Tennessee legislature specifically named, in its statute, certain prominent local persons from Washington, Sullivan, Green, and Hawkins Counties to meet and select one presidential elector from their part of the state. Then, it named another group of individuals from Knox, Jefferson, Sevier, and Blount Counties to select their area's presidential elector. Finally, it named yet another group from Davidson, Sumner, and Tennessee Counties to select a presidential elector from their district. The three presidential electors would then meet and vote for President and Vice President.

The Founding Fathers anticipated that the Electoral College would act as a deliber-

²⁶ Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 63–64.

²⁷ Grant, George. 2004. *The Importance of the Electoral College*. San Antonio, TX: Vision Forum Ministries. Pages 23–26.

²⁸ The congressional caucus was replaced by the national nominating convention during the 1820s.

²⁹ Laws Tenn. 1794, 1803, p. 209; Acts 2d Sess. 1st Gen. Assem. Tenn. c. 4.

ative body in which the presidential electors would exercise independent and detached judgment in order to select the best persons to serve as President and Vice President.

As John Jay (the presumed author of *Federalist No. 64*) wrote in 1788:

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

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

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

The Electoral College actually acted in a reasonably deliberative manner in the 1789 election. Under the original Constitution, each presidential elector had two votes. As previously mentioned, all 69 presidential electors voted for George Washington (making his election unanimous). However, the electors scattered their second votes among 11 candidates for Vice President.³⁰ Moreover, in six of the 10 states that participated in the election, the presidential electors split their votes among two or more candidates. Moreover, they did not vote in lockstep at the state level but instead exhibited a degree of independent and deliberative judgment in casting their votes.³¹ The votes were cast as follows:

- Connecticut
 - John Adams—5
 - Samuel Huntington—2
- Georgia
 - John Milton—2
 - James Armstrong—1
 - Edward Telfair—1
 - Benjamin Lincoln—1

³⁰ Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 27.

³¹ In contrast, presidential electors split their votes in only two of the 15 states participating in the 1792 election. In that election, only two of the 132 electors deviated from the choice made by the rest of their state’s delegation (one in Pennsylvania and one in South Carolina). Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 29.

- New Jersey
 - John Jay—5
 - John Adams—1
- Pennsylvania
 - John Adams—8
 - John Hancock—2
- South Carolina
 - John Rutledge—6
 - John Hancock—1
- Virginia
 - John Adams—5
 - John Jay—1
 - John Hancock—1
 - George Clinton—3

In the remaining four states, the presidential electors voted in lockstep for one candidate:

- Delaware—John Jay—3
- New Hampshire—John Adams—5
- Maryland—Robert H. Harrison—6
- Massachusetts—John Adams—10

John Adams was thus elected as the nation’s first Vice President with 34 of 69 electoral votes.³²

The Founding Fathers’ lofty expectations that the Electoral College would be a deliberative body were dashed by the political realities of the nation’s first competitive presidential election.³³

In 1796, both political parties nominated candidates for President and Vice President on a centralized basis (the party’s caucus in Congress). Both parties then campaigned throughout the country for their centrally designated nominees. The necessary consequence of the emergence of centrally designated nominees was that presidential electors would be expected to cast their votes in the Electoral College for the party’s nominees.

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

³² John Adams was elected Vice President in 1789 without receiving an absolute majority of the presidential electors “appointed.” His 34 electoral votes (out of 69) were sufficient for election at the time because the original Constitution (Article II, section 1, clause 3) required an absolute majority of the presidential electors “appointed” to elect the President, but required only the second largest number of votes to elect the Vice President. Under the 12th Amendment (ratified in 1804), an absolute majority of the presidential electors “appointed” is required to elect both the President and Vice President.

³³ White, Theodore H. 1969. *The Making of the President 1968*. New York, NY: Atheneum Publishers. Page 471.

“Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated.”³⁴ [Emphasis added]

Table 2.2 shows the distribution, by state, of the 71 electoral votes received by John Adams and the 68 electoral votes received by Thomas Jefferson in the nation’s first contested presidential election in 1796.^{35,36}

Despite the distinguished qualifications of both Adams and Jefferson, there was no hint of independent judgment by any of the presidential electors chosen by the legislatures of the nine states in which presidential electors were chosen by the state legislature.³⁷ As table 2.2 demonstrates, all 66 presidential electors from these nine states voted in lockstep for Jefferson or Adams in accordance with “the will of the appointing power”—that is, the will of the legislative majority.

In the one state (New Hampshire) in which the voters elected the state’s presidential electors in a statewide popular election in 1796, all of the state’s presidential electors voted for Adams. That is, the voters were “the appointing power” at the state level in New Hampshire, and the winning electors faithfully did the bidding of the statewide majority.

All of the presidential electors in Massachusetts voted for their home state candidate, Adams. All four presidential electors in Kentucky voted for Jefferson.

In three states (Virginia, North Carolina, and Maryland), the electoral votes were fragmented because the presidential electors were elected from districts. Although Thomas Jefferson was very popular in all three states, one elector from Virginia, one from North Carolina, and four electors from Maryland voted differently from the statewide majority. These presidential electors were not demonstrating independence or detached judgment—they were merely voting in accordance with “the will of the appointing power”—that is, the voters of their respective districts.

³⁴ *McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

³⁵ Congressional Quarterly. 2002. *Presidential Elections 1789–2002*. Washington, DC: CQ Press. Page 176.

³⁶ The table simplifies the results of the 1796 election by presenting only the number of electoral votes received by Adams and Jefferson. Thirteen different people received electoral votes in the 1796 election. Under the original Constitution, each presidential elector cast two votes. The candidate with the most electoral votes (provided that it was a majority of the electors appointed) became President. The second-ranking candidate (if he received a majority of the electors appointed) became Vice President.

³⁷ This count (nine) treats Tennessee as a state in which the legislature, in effect, chose the state’s presidential electors. When Tennessee’s three presidential electors cast their votes in the Electoral College in 1796, they unanimously supported Thomas Jefferson—the candidate who was popular with a majority of the Tennessee legislature.

Table 2.2 ELECTORAL VOTES FOR ADAMS AND JEFFERSON IN THE NATION'S FIRST COMPETITIVE PRESIDENTIAL ELECTION (1796)

| STATE | ELECTORAL VOTES | ADAMS | JEFFERSON | METHOD OF CHOOSING PRESIDENTIAL ELECTORS |
|----------------|------------------------|--------------|------------------|---|
| Connecticut | 9 | 9 | | Legislature |
| Delaware | 3 | 3 | | Legislature |
| Georgia | 4 | | 4 | Legislature |
| Kentucky | 4 | | 4 | Popular voting in elector districts |
| Maryland | 11 | 7 | 4 | Popular voting in districts |
| Massachusetts | 16 | 16 | | Popular voting in congressional districts (with the legislature choosing the two senatorial electors) |
| New Hampshire | 6 | 6 | | Popular voting statewide |
| New Jersey | 7 | 7 | | Legislature |
| New York | 12 | 12 | | Legislature |
| North Carolina | 12 | 1 | 11 | Popular voting in elector districts |
| Pennsylvania | 15 | 1 | 14 | Popular voting statewide |
| Rhode Island | 4 | 4 | | Legislature |
| South Carolina | 8 | | 8 | Legislature |
| Tennessee | 3 | | 3 | Presidential electors chosen by county electors chosen by the state legislature |
| Vermont | 4 | 4 | | Legislature |
| Virginia | 21 | 1 | 20 | Popular voting in 21 elector districts |
| Total | 139 | 71 | 68 | |

Although Pennsylvania employed the winner-take-all system in 1796, its electoral votes were divided for a different reason. Voters were required to cast separate votes for the 15 individual positions of presidential elector. As Edward Stanwood reported in *A History of the Presidency from 1788 to 1897*:

“In Pennsylvania, the vote was extremely close. There were . . . two tickets, each bearing fifteen names. The highest number polled by any candidate for elector was 12,306; the lowest of the thirty had 12,071. Thus 235 votes only represented the greatest difference; and two of the Federalist electors were chosen.”³⁸

The result of this close election was that 13 Jeffersonians and two Federalists were chosen as presidential electors from Pennsylvania in 1796. When the Electoral College met, 14 of the 15 electors slavishly voted, as expected, for their own party's designated nominee for President.

³⁸ Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 48.

One of the two Federalist electors, Samuel Miles did not vote as expected. Instead, he cast his vote in the Electoral College for Thomas Jefferson—instead of John Adams.³⁹ In the December 15, 1796, issue of *United States Gazette*, a Federalist supporter complained:

“What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson is the fittest man to be President of the United States? No, **I chuse him to act, not to think.**” [Emphasis as per original; spelling as per original].⁴⁰

The expectation that presidential electors should “act” and not “think” has remained strong ever since 1796. Of the 22,991 electoral votes cast for President in the 57 presidential elections between 1789 and 2012, only 17 were cast in an unfaithful way. Moreover, among these 17 cases, the vote of Samuel Miles for Thomas Jefferson in 1796 remains the only instance when the elector might have thought, at the time he voted, that his vote might affect the national outcome.⁴¹

In summary, because of the emergence of political parties and centralized nomination of presidential and vice-presidential candidates in 1796, the Electoral College has not acted as the deliberative body envisioned by the nation’s Founding Fathers. As early as 1796, the Electoral College simply became a rubberstamp for affirming “the will of the appointing power” of each separate entity that selected electors. Since 1796, the Electoral College has had the form, but not the substance, of the deliberative body envisioned by the Founders.

2.2.3 THE SECOND COMPETITIVE ELECTION (1800)

Thomas Jefferson lost the presidency in the nation’s first competitive election (1796) by a mere three electoral votes (table 2.2).

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

“The presidential election of 1796 had been extremely close, and in examining the results of that contest Republican Party managers had been struck by the fact that Adams’ 3-vote margin of victory in the electoral college could be attributed to 1 vote from Pennsylvania, 1 from Virginia, and 1 from North Carolina. In each of these states, the Republicans had won an impressive victory, amassing in the three states a total of 45 electoral votes. The loss of 3 votes in these strongly Jeffersonian states was due to the

³⁹ Peirce, Neal R. 1968. *The People’s President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Page 64.

⁴⁰ This piece was signed “CANDOUR.”

⁴¹ All but two of the 17 instances of deviant electoral votes for President were “grand-standing” votes (that is, votes cast after the presidential elector knew that his vote would not affect the national outcome). One electoral vote (in Minnesota in 2004) was cast by accident. See section 2.12 for additional details.

district method of electing presidential electors. **In looking for ways to improve their chances for victory in the next presidential election, Republican managers thus turned their attention to state election laws.** No uniform system of selection of presidential electors prevailed. In some states electors were chosen by the state legislature; in others they were elected on a general ticket throughout the state; in still others they were elected in districts. This meant that the party that controlled the state legislature was in a position to enact the system of selection that promised the greatest partisan advantage. Thus, in January 1800 the Republican-controlled legislature of Virginia passed an act providing for the election of presidential electors on a general ticket instead of districts as in previous elections. By changing the election law, Republicans in Virginia, confident of carrying a majority of the popular vote throughout the state but fearful of losing one or two districts to the Federalists ensured the entire electoral vote of the Union's largest state for the Republican candidate."^{42,43} [Emphasis added]

Vice President Thomas Jefferson (soon to be a candidate for President in the 1800 election) summed up the reasons for Virginia's switch from the district system to the statewide winner-take-all system in a January 12, 1800, letter to James Monroe (then a member of the Virginia legislature):

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

⁴² Cunningham, Noble E., Jr. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). 2002. *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Pages 104–105. The quotation from Cunningham contains a small error. Pennsylvania did not use a district system in 1796. The split vote in Pennsylvania resulted from the closeness of the statewide popular vote, as explained in section 2.2.2.

⁴³ Although the thrust of Cunningham's analysis is correct, Cunningham incorrectly attributes Jefferson's lost electoral vote in Pennsylvania to the use of the district system. As pointed out in section 2.2.2, the closeness of the Pennsylvania *statewide* vote permitted the Federalists to elect two of their elector candidates. One of the two Federalist electors defected to Jefferson, but one loyally voted for Adams.

by small sections, would give a result very different from what would be the sentiment of the whole people of the U S, were they assembled together.”⁴⁴
[Emphasis added; spelling and punctuation as per original]

Thus, in 1800, Virginia ended its “folly” and adopted the statewide winner-take-all system to replace the district system used in the state in the first three presidential elections.⁴⁵ As a result of this change in Virginia’s election law, Jefferson received all of Virginia’s electoral votes in the 1800 election.⁴⁶

Meanwhile, Virginia’s “folly” of dividing its electoral votes did not go unnoticed by the Federalist Party in Massachusetts. In the 1796 election, Adams had succeeded in winning all his home state’s electoral votes. The Jeffersonians, however, were making such significant inroads into Massachusetts that the Federalist-controlled legislature feared that the Jeffersonians might win as many as two districts in Massachusetts in the upcoming 1800 election.⁴⁷ Thus, the Massachusetts legislature eliminated the district system and, just to be safe, also eliminated the voters from the process. That is, the Massachusetts legislature decided to choose all of the state’s presidential electors themselves for the 1800 election.⁴⁸

⁴⁴ Ford, Paul Leicester. 1905. *The Works of Thomas Jefferson*. New York, NY: G.P. Putnam’s Sons. 9:90.

⁴⁵ In 1892, the U.S. Supreme Court commented on the “folly” of dividing a state’s electoral votes by saying, “The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the constitution, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable.” *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

⁴⁶ The remainder of Thomas Jefferson’s January 12, 1800, letter to James Monroe is interesting in that it discusses the political calculations in the decisions by the New York and New Jersey legislatures not to permit the voters to participate in choosing the state’s president electors. The letter continues, “I have today had a conversation with 113 [Aaron Burr] who has taken a flying trip here from N Y. He says, they have really now a majority in the H of R, but for want of some skilful person to rally round, they are disjointed, & will lose every question. In the Senate there is a majority of 8. or 9. against us. But in the new election which is to come on in April, three or 4. in the Senate will be changed in our favor; & in the H of R the county elections will still be better than the last; but still all will depend on the city election, which is of 12. members. At present there would be no doubt of our carrying our ticket there; nor does there seem to be time for any events arising to change that disposition. There is therefore the best prospect possible of a great & decided majority on a joint vote of the two houses. They are so confident of this, that the republican party there will not consent to elect either by districts or a general ticket. They chuse to do it by their legislature. I am told the republicans of N J are equally confident, & equally anxious against an election either by districts or a general ticket. The contest in this State will end in a separation of the present legislature without passing any election law, (& their former one is expired), and in depending on the new one, which will be elected Oct 14. in which the republican majority will be more decided in the Representatives, & instead of a majority of 5. against us in the Senate, will be of 1. for us. They will, from the necessity of the case, chuse the electors themselves. Perhaps it will be thought I ought in delicacy to be silent on this subject. But you, who know me, know that my private gratifications would be most indulged by that issue, which should leave me most at home. If anything supersedes this propensity, it is merely the desire to see this government brought back to it’s republican principles. Consider this as written to mr. Madison as much as yourself; & communicate it, if you think it will do any good, to those possessing our joint confidence, or any others where it may be useful & safe. Health & affectionate salutations.”

⁴⁷ Cunningham, Noble E., Jr. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). 2002. *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Page 105.

⁴⁸ Congressional Quarterly. 2002. *Presidential Elections 1789–2002*. Washington, DC: CQ Press.

Similarly, the Federalist-controlled New Hampshire legislature feared losing the statewide vote to the Jeffersonians under the state's existing statewide winner-take-all popular election system and decided to choose all of the state's presidential electors themselves.

Cunningham describes election law politics in New York and Pennsylvania in 1800 as follows:

“In New York, Republicans introduced a measure to move from legislative choice to election by districts, but the proposal was defeated by the Federalists, an outcome that ultimately worked to the advantage of the Republicans when they won control of the legislature in the state elections of 1800. In Pennsylvania, a Republican House of Representatives and a Federalist Senate produced a deadlock over the system to be used to select electors, and the vote of that state was eventually cast by the legislature in a compromise division of the 15 electoral votes, eight Republican and seven Federalist electors being named.”^{49,50}

The Pennsylvania legislature permitted its voters to elect all of the state's presidential electors in 1789, 1792, and 1796 using the statewide winner-take-all rule; however, it did not implement this policy decision by means of permanent legislation. When it came time to appoint presidential electors for the 1800 election, the Federalists and the Republicans each controlled one house of the legislature. Faced with the possibility of not being able to appoint any presidential electors in 1800, the divided legislature agreed on a compromise. The compromise involved having the legislature appoint the presidential electors with an 8–7 division between the parties.

Georgia switched from the winner-take-all rule (first used in 1796) to legislative appointment for the 1800 election.

Thus, all four states that used the winner-take-all rule prior to 1800 had abandoned it by the time of the 1800 election (Maryland abandoning it in 1796 and New Hampshire, Pennsylvania, and Georgia abandoning it in 1800).

For the 1800 election, Rhode Island switched from legislative appointment to the winner-take-all rule.

Thus, only one state (Rhode Island) used the winner-take-all rule for the 1800 election.

⁴⁹ Cunningham, Noble E., Jr. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). 2002. *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Pages 105.

⁵⁰ It is interesting to note that, by the time of the nation's second competitive presidential election (1800), both of the states (Pennsylvania and New Hampshire) in which presidential electors were elected in a statewide popular vote in 1796 had switched to a system of legislative election of the state's presidential electors. That is, no state used a statewide popular vote system in the 1800 presidential election.

2.2.4 THE EMERGENCE OF THE CURRENT SYSTEM

The method of choosing presidential electors varied from state to state and from election to election over the next several decades.

Chief Justice Melville Fuller of the U.S. Supreme Court recounted the history of methods used to appoint presidential electors between 1804 and 1828 in his opinion in *McPherson v. Blacker*:

“[W]hile most of the states adopted the general ticket system, the district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824, and 1828. Massachusetts used the general ticket system in 1804, . . . chose electors by joint ballot of the legislature in 1808 and in 1816, . . . used the district system again in 1812 and 1820, . . . and returned to the general ticket system in 1824. . . . In New York, the electors were elected in 1828 by districts, the district electors choosing the electors at large. . . . The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont, and New Jersey in 1812.”⁵¹

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

By 1832, the voters, rather than the state legislatures, chose presidential electors in 22 of the 23 states, with South Carolina being the only exception.

By 1832, Maryland was the only state where presidential electors were elected by district. Maryland changed to the statewide winner-take-all system in 1836.

Thus, in 1836, presidential electors were elected on a statewide basis in all of the states (that is, either by the people or, in the case of South Carolina, by the legislature).

As previously noted, the Founding Fathers did not advocate the use by the states of a statewide winner-take-all system to allocate their electoral votes. Nonetheless, because the state legislatures possessed the exclusive power to choose the manner of appointing their presidential electors, it was probably inevitable, in retrospect, that they would realize the disadvantage of dividing their electoral votes and, therefore, adopt the unit rule.

Thus, the Constitution’s grant of the power to the states to choose the manner of allocating their electoral votes resulted in the emergence throughout the country of a system that the Founding Fathers never envisioned. Instead of being a deliberative body, the Electoral College, in practice, was composed of presidential electors who voted in lockstep to rubberstamp the choices that had been previously made by extra-constitutional bodies (namely, the nominating caucuses of the political parties).

This fundamental change in the system for electing the President did not come

⁵¹ *McPherson v. Blacker*. 146 U.S. 1 at 32. 1892.

about from a federal constitutional amendment but instead from the use by the states of a power that Article II of the U.S. Constitution specifically granted to them. As Stanwood noted in *A History of the Presidency from 1788 to 1897*,

“the [statewide] method of choosing electors had now become uniform throughout the country, **without the interposition of an amendment to the Constitution.**”⁵² [Emphasis added]

The South Carolina legislature last chose presidential electors in 1860. Since the Civil War, there have been only two instances when presidential electors have been chosen by a state legislature. In 1868, the Florida legislature did so because Reconstruction was not complete in the state in time for the presidential election. In 1876, Colorado did so because it was admitted as a new state shortly before the presidential election.

By 1876, the principle that the people should elect presidential electors was so well established that the Colorado Constitution specifically addressed the exceptional nature of the appointment of the state’s presidential electors by the legislature:

“Presidential electors, 1876. The general assembly shall, at their first session, immediately after the organization of the two houses and after the canvass of the votes for officers of the executive department, and before proceeding to other business, provide by act or joint resolution for the appointment by said general assembly of electors in the electoral college, and such joint resolution or the bill for such enactment may be passed without being printed or referred to any committee, or read on more than one day in either house, and shall take effect immediately after the concurrence of the two houses therein, and the approval of the governor thereto shall not be necessary.”⁵³

The next section of the Colorado Constitution then mandated an immediate transition from legislative appointment to popular election of presidential electors by providing that after 1876:

“[T]he electors of the electoral college shall be chosen by direct vote of the people.”⁵⁴

The inclusion of the above section in the Colorado Constitution was a congressional condition for Colorado’s admission to the Union.

⁵² Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 165. See also Busch, Andrew E. 2001. The development and democratization of the electoral college. In Gregg, Gary L. II (editor). 2001. *Securing Democracy: Why We Have an Electoral College*. Wilmington, DE: ISI Books. Pages 27–42.

⁵³ Section 19 of the article of the Colorado Constitution governing the transition from territorial status to statehood.

⁵⁴ Section 20 of the article of the Colorado Constitution governing the transition from territorial status to statehood.

2.2.5 DEVELOPMENTS SINCE 1876

Since 1876, the norm has been that a state's voters directly elect presidential electors in a statewide popular election under the winner-take-all system (with only three exceptions, as described below).

The first exception arose as a consequence of the controversial 1888 presidential election. In that election, President Grover Cleveland received 5,539,118 popular votes in his re-election campaign, whereas Republican challenger Benjamin Harrison received only 5,449,825 popular votes.⁵⁵ Despite Cleveland's margin of 89,293 popular votes, Harrison won an overwhelming majority of the electoral votes (233 to Cleveland's 168) and was elected President. In the 1890 mid-term elections, the Democrats won political control of the then-usually-Republican state of Michigan. Under the Democrats, Michigan switched from the statewide winner-take-all system (then prevailing in all the states) to an arrangement in which one presidential elector was elected from each of Michigan's 12 congressional districts; one additional presidential elector was elected from a specially created eastern district (consisting of the first, second, sixth, seventh, eighth, and 10th congressional districts); and the state's remaining presidential elector was elected from a western district (consisting of the state's other six congressional districts). The Republicans contested the constitutionality of the change to the district system before the U.S. Supreme Court in the 1892 case of *McPherson v. Blacker* (appendix O). In that case, the Court upheld Michigan's right to use the district method of allocating its electoral votes. As a result, in the 1892 presidential election, Democrat Grover Cleveland received five electoral votes from Michigan, and Republican Benjamin Harrison received the other nine. When the Republicans regained political control of the state government in Michigan, they promptly restored the statewide winner-take-all system. In the 1896 election, McKinley (the Republican nominee) received 100% of Michigan's electoral votes.

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

The third exception arose in 1992 when Nebraska adopted Maine's system of district and statewide electors. Nebraska law provides:

“Receipt by the presidential electors of a party or a group of petitioners of the highest number of votes statewide shall constitute election of the two at-large presidential electors of that party or group of petitioners. Receipt by the presidential electors of a party or a group of petitioners of the highest number of votes in a congressional district shall constitute election

⁵⁵ Congressional Quarterly. 2002. *Presidential Elections 1789–2002*. Washington, DC: CQ Press. Page 128.

of the congressional district presidential elector of that party or group of petitioners.”⁵⁶

Until 2008, the district system used in Maine and Nebraska did not result in a political division of either state’s presidential electors. However, in 2008, Barack Obama carried Nebraska’s 2nd congressional district and thereby won one of Nebraska’s five electoral votes.

After the 2008 presidential election, Nebraska’s Republican Governor Heineman urged that the state abolish the district system and re-adopt the winner-take-all rule. The legislature did not, however, act on the governor’s recommendation.⁵⁷

2.2.6 THE SHORT PRESIDENTIAL BALLOT

Until the middle of the 20th century, voters generally cast separate votes for individual candidates for the position of presidential elector. In other words, in a state with 20 electoral votes using the statewide winner-take-all rule, the voter was entitled to cast 20 separate votes.

Inevitably, some voters would accidentally invalidate their ballot by voting for more than 20 candidates—something that was especially easy to do on the paper ballots that were in general use at the time. Other voters would accidentally vote for fewer than 20 electors (thereby diminishing the value of their franchise). Still other voters would mistakenly vote for just one presidential elector (thereby drastically diminishing the value of their vote). A small number of voters intentionally split their ticket and voted for presidential electors from opposing parties (perhaps because they liked or disliked individual candidates for the position of presidential elector).

One result of these long “bed sheet” ballots was that a state’s electoral vote would occasionally split between two political parties when the election was close in a particular state. For example, the Federalists elected two presidential electors in Pennsylvania in 1796. In 1916, Woodrow Wilson received one of West Virginia’s electoral votes, while Charles Evans Hughes received seven. In 1912, Wilson received two of California’s electoral votes, with Theodore Roosevelt receiving 11. The statewide winner came up short by one electoral vote in California in 1880, in Ohio and Oregon in 1892, in California and Kentucky in 1896, and in Maryland in 1904.⁵⁸

The *short ballot* was developed to simplify voting for President. It enables a voter to cast a single vote for a presidential slate composed of a named candidate for Presi-

⁵⁶ Nebraska election law. Section 32.1038.

⁵⁷ See section 7.1 for a poll of Nebraska voters on the subject of the district system, the winner-take-all rule, and the national popular vote approach.

⁵⁸ Congressional Quarterly. 2002. *Presidential Elections 1789–2002*. Washington, DC: CQ Press. Pages 158–159.

**PRESIDENTIAL ELECTORS
OFFICIAL BALLOT**

Town of
WINDSOR
for the
General Election November 3, 1964

Electors of President and Vice-President of the United States

To vote a straight party ticket, make a cross (X) in the square at the head of the party column of your choice. If you desire to vote for a person whose name is not on the ballot, fill in the name of the candidate of your choice in the blank space provided therefor.

If you do not wish to vote for every person in a party column, make a cross (X) opposite the name of each candidate of your choice; or you may make a cross (X) in the square at the head of the party column of your choice which shall count as a vote for every name in that column, except for any name through which you may draw a line, and except for any name representing a candidate for an office to fill which you have otherwise voted in the manner heretofore prescribed.

| REPUBLICAN PARTY | | DEMOCRATIC PARTY | |
|---|--|---|--|
| For President BARRY M. GOLDWATER of Arizona | | For President LYNDON B. JOHNSON of Texas | |
| For Vice-President WILLIAM E. MILLER of New York | | For Vice-President HUBERT H. HUMPHREY of Minnesota | |
| <input type="checkbox"/> | | <input type="checkbox"/> | |
| For Electors of President and Vice-President of the United States | | For Electors of President and Vice-President of the United States | |
| Vote for THREE | | Vote for THREE | |
| MABEL STAFFORD, Republican, South Wallingford | | MARGARET M. FARMER, Democratic, Burlington | |
| LEE EMERSON, Republican, Barton | | PETER J. HINCKS, Democratic, Middlebury | |
| OLIN GAY, Republican, Springfield | | HAROLD RAYNOLDS, Democratic, Springfield | |
| | | | |
| | | | |
| | | | |

Figure 2.1 Presidential ballot in Vermont in 1964

dent and a named candidate for Vice President. By 1940, 15 states had adopted the short ballot. The number increased to 26 states by 1948 and to 36 by 1966.⁵⁹

The presidential ballot in Ohio in 1948 was particularly confusing. Ohio employed the short ballot for established political parties. The newly formed Progressive Party (supporting Henry Wallace for President) failed to qualify in Ohio as a regular party in time for the 1948 presidential election. Consequently, the individual names of the Progressive Party’s 25 candidates for the position of presidential elector appeared on the ballot. In the confusion caused by this hybrid system, an estimated 100,000 ballots

⁵⁹ Peirce, Neal R. 1968. *The People’s President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Page 120.

were invalidated because voters mistakenly voted for some individual presidential electors while simultaneously also voting for either Democrat Harry Truman or Republican Thomas Dewey. Truman carried Ohio by 7,107 votes.

Vermont used a combination of the short presidential ballot and the traditional long ballot until 1980. Figure 2.1 shows a 1964 sample presidential ballot in Vermont. As can be seen, the voter had the option of casting a vote for all three of a party's presidential electors; voting for one, two, or three individual presidential-electoral candidates on the ballot; or voting for one, two, or three write-in candidates for the position of presidential elector.

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

Nonetheless, it is still possible today, under some circumstances in some states, to cast write-in votes for individual presidential electors (section 2.8), to cast votes for unpledged presidential electors (section 2.11), and, on an exceptional basis, to cast separate votes for individual candidates for the position of presidential elector (section 2.9).

2.3 CURRENT METHODS OF ELECTING PRESIDENTIAL ELECTORS

As stated previously, the people have no federal constitutional right to vote for President or Vice President of the United States. In Colorado, the people have a state constitutional right to vote for presidential electors. In all the other states, the people have acquired the presidential vote by means of state law.

In this book, 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.

As a convenience for the reader, appendix D contains the provisions of Minnesota election law that are relevant to presidential elections.

Section 208.02 of Minnesota election law gives the people of Minnesota the right to vote for presidential electors.

“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.”

In Minnesota, the presidential ballot is prepared and printed by county auditors in accordance with state law. Accordingly, when a voter walked into a polling place in Hennepin County, Minnesota, on November 2, 2004, he or she received a “short presidential ballot” resembling the sample ballot shown in figure 2.2, containing nine presidential slates, including the Republican slate consisting of George W. Bush for President and Dick Cheney for Vice President, and the Democratic slate consisting of John F. Kerry and John Edwards.

As demonstrated by figure 2.2, Minnesota's presidential ballot is entirely silent as to the existence of the Electoral College or the fact that the state has 10 electoral votes. The ballot simply reads,

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

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

Figure 2.2 Presidential ballot in Minnesota in 2004

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

“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.”⁶⁰ [Emphasis added]

Thus, a voter filling in the oval next to the names of George W. Bush and Dick Cheney on November 2, 2004, was directly casting a vote not for Bush and Cheney, but instead for a slate of 10 Republican candidates for the position of presidential elector who, if elected on November 2, 2004, were expected to meet on December 13, 2004, and vote for Bush and Cheney in the Electoral College.

Minnesota law outlines the procedure by which the Minnesota Secretary of State

⁶⁰ Minnesota election law. Section 208.04, subdivision 1.

becomes officially informed of the names of the persons running for President and Vice President and the names of the candidates for the position of presidential elector:

“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. 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.**”⁶¹ [Emphasis added]

Thus, it is the state chair of each major political party in Minnesota who officially informs the Minnesota Secretary of State as to the name of the person nominated for President by the party’s national convention, the name of the person nominated for Vice President by the party’s national convention, and the names of the 10 persons nominated by the party’s state convention for the position of presidential elector.

Twenty-nine states follow Minnesota’s approach of nominating elector candidates at state party conventions. In six other states and the District of Columbia, the state (or district) party committee nominates the party’s presidential electors. In several states, a party’s nominees for presidential elector are selected in a primary election. Many of the remaining states (e.g., California) permit each political party in the state to choose its method for itself. In Pennsylvania, each party’s presidential nominee directly nominates the elector candidates who will run under his name in the state.⁶²

Minnesota law also provides the procedure by which the county auditors become officially notified of the names of the persons running for President and Vice President:

“The secretary of state shall certify the names of all duly nominated Presidential and Vice-Presidential candidates to the county auditors of the counties of the state.”⁶³

Laws in the other states and the District of Columbia operate in a broadly similar way to accomplish the above objectives.

Today, there is nothing on the ballot in 34 states to indicate the existence of the Electoral College or presidential electors.

Ballots in five states (Arizona, Idaho, North Dakota, Oklahoma, and South Dakota) explicitly list the names of all of the candidates for the position of presidential elector associated with each presidential slate. For example, the 2004 presidential ballot in North Dakota (figure 2.3) made it clear that a vote for “Bush–Republican” is, in fact, a vote for the Republican Party’s three presidential-electoral candidates, namely Betsy Dalrymple, Evan Lips, and Ben Clayburgh.

⁶¹ Minnesota election law. Section 208.03.

⁶² Berns, Walter (editor). 1992. *After the People Vote: A Guide to the Electoral College*. Washington, DC: The AEI Press. Page 11. See section 2.12 for Pennsylvania law.

⁶³ Minnesota election law. Section 208.04, subdivision 1.

GENERAL ELECTION BALLOT — NOVEMBER 2, 2004 — MCLEAN COUNTY

| A | B | C |
|---|--|--|
| <p>PARTY BALLOT</p> <p>INSTRUCTIONS TO VOTER To vote for the candidate of your choice, you must completely blacken the oval (●) opposite the name of the candidate. To vote for a person whose name is not printed on the ballot, write or paste that person's name in the blank space provided for that purpose and completely blacken the oval (●) opposite the space provided.</p> <p>PRESIDENT & VICE PRESIDENT OF THE UNITED STATES Vote for no more than ONE name</p> <p><input type="checkbox"/> BUSH <small>Republican</small> (Stetson Elices / Kelly Dalrymple / Evan Lips / Ben Clayburgh)</p> <p><input type="checkbox"/> NADER <small>Independent</small> (Matthew Renter / Francis Jund / Mary Jund)</p> <p><input type="checkbox"/> KERRY <small>Democratic-NPL</small> (Joseph Burdick / Fred Heikang / Richard Reider)</p> <p><input type="checkbox"/> PEROUTKA <small>Constitution</small> (Charles Senick / Leonard Watral / Herb Minkoff)</p> <p><input type="checkbox"/> BADNARIK <small>Libertarian</small> (Richard Remers / James Foster / Keith Hanson)</p> <p><input type="checkbox"/></p> <p>UNITED STATES SENATOR Vote for no more than ONE name</p> <p><input type="checkbox"/> BYRON L. DORGAN <small>Democratic-NPL</small></p> <p><input type="checkbox"/> MIKE LIFFRIG <small>Republican</small></p> <p><input type="checkbox"/></p> <p>REPRESENTATIVE IN CONGRESS Vote for no more than ONE name</p> <p><input type="checkbox"/> DUANE SAND <small>Republican</small></p> <p><input type="checkbox"/> EARL POMEROY <small>Democratic-NPL</small></p> <p><input type="checkbox"/></p> <p>STATE SENATOR 8TH DISTRICT Vote for no more than ONE name</p> <p><input type="checkbox"/> WES WEIBLE <small>Democratic-NPL</small></p> <p><input type="checkbox"/> LAYTON FREBORG <small>Republican</small></p> | <p>MEMBER OF HOUSE OF REPRESENTATIVES 8TH DISTRICT Vote for no more than TWO names</p> <p><input type="checkbox"/> DWIGHT WRANGHAM <small>Republican</small></p> <p><input type="checkbox"/> KEN BAKER <small>Democratic-NPL</small></p> <p><input type="checkbox"/> JEFF DELZER <small>Republican</small></p> <p><input type="checkbox"/> MURIEL KISSE <small>Democratic-NPL</small></p> <p><input type="checkbox"/></p> <p>GOVERNOR AND LIEUTENANT GOVERNOR Vote for no more than ONE set of names</p> <p><input type="checkbox"/> ROLAND RIEMERS & MITCHELL S. SANDERSON <small>Independent Nomination</small></p> <p><input type="checkbox"/> JOSEPH A. SATROM & DEB MATHERN <small>Democratic-NPL</small></p> <p><input type="checkbox"/> JOHN HOEVEN & JACK DALRYMPLE <small>Republican</small></p> <p><input type="checkbox"/></p> <p>SECRETARY OF STATE Vote for no more than ONE name</p> <p><input type="checkbox"/> ALVIN A. (AL) JAEGER <small>Republican</small></p> <p><input type="checkbox"/> DOUGLAS MELBY <small>Democratic-NPL</small></p> <p><input type="checkbox"/></p> <p>STATE AUDITOR Vote for no more than ONE name</p> <p><input type="checkbox"/> ROBERT R. (BOB) PETERSON <small>Republican</small></p> <p><input type="checkbox"/> BRENT EDISON <small>Democratic-NPL</small></p> <p><input type="checkbox"/></p> <p>STATE TREASURER Vote for no more than ONE name</p> <p><input type="checkbox"/> DEAN MEYER <small>Democratic-NPL</small></p> <p><input type="checkbox"/> KELLY SCHMIDT <small>Republican</small></p> <p><input type="checkbox"/></p> | <p>ATTORNEY GENERAL Vote for no more than ONE name</p> <p><input type="checkbox"/> BRUCE SCHOENWALD <small>Democratic-NPL</small></p> <p><input type="checkbox"/> WAYNE STENEHIEM <small>Republican</small></p> <p><input type="checkbox"/></p> <p>COMMISSIONER OF INSURANCE Vote for no more than ONE name</p> <p><input type="checkbox"/> JIM POOLMAN <small>Republican</small></p> <p><input type="checkbox"/> TERRY BARNES <small>Democratic-NPL</small></p> <p><input type="checkbox"/></p> <p>COMMISSIONER OF AGRICULTURE Vote for no more than ONE name</p> <p><input type="checkbox"/> DOUG GOEHRING <small>Republican</small></p> <p><input type="checkbox"/> ROGER JOHNSON <small>Democratic-NPL</small></p> <p><input type="checkbox"/></p> <p>PUBLIC SERVICE COMMISSIONER Vote for no more than ONE name</p> <p><input type="checkbox"/> RON GUMERINGER <small>Democratic-NPL</small></p> <p><input type="checkbox"/> KEVIN CRAMER <small>Republican</small></p> <p><input type="checkbox"/></p> <p>TAX COMMISSIONER Vote for no more than ONE name</p> <p><input type="checkbox"/> MIKE EVERY <small>Democratic-NPL</small></p> <p><input type="checkbox"/> RICK CLAYBURGH <small>Republican</small></p> <p><input type="checkbox"/></p> |

Figure 2.3 Presidential ballot in North Dakota in 2004

Curiously, in North Dakota, the name of the candidate for Vice President does not appear on the ballot even though the ballot is headed by the words “President & Vice President of the United States—Vote for no more than one team.”⁶⁴

Ballots in 12 additional states (Colorado, Connecticut, Kansas, Massachusetts, Michigan, Mississippi, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Tennessee) and the District of Columbia mention that the voter is voting for presidential electors but do not include the names of the individual candidates for the position of presidential elector.

⁶⁴ The names of vice-presidential candidates do not appear on the ballot in Arizona or North Dakota.

OFFICIAL BALLOT
GENERAL ELECTION, TUESDAY, NOVEMBER 2, 2004
BARRY COUNTY, MICHIGAN

ASSYRIA TWP 1

TO VOTE: Completely detach the ballot (outside your check), as shown.

IMPORTANT: Use only a #2 pencil in the marking pen provided. **DO NOT USE RED INK!**

PARTISAN SECTION: To vote the partisan section of the ballot, you may cast a "straight ticket," a "split ticket" or a "mixed ticket."

Straight Ticket: Vote for party of your choice. Nothing further need be done in the partisan section.

Split Ticket: You may cast a straight ticket AND vote for individual candidates of your choice.

Mixed Ticket: Vote for the individual candidates of your choice in each office.

The **NONPARTISAN** and **PROPOSAL** SECTIONS of the ballot must be voted separately. Be certain to check the reverse side of the ballot.

DO NOT vote for more candidates than indicated under each office title.

WRITERS CANDIDATES: To vote for a person whose name is not printed on the ballot, write or place the name of that person in the blank space provided and detach the seal. This must be done even if you cast a straight party vote. Do not cast a written vote for a person whose name is already printed on the ballot for that office.

If you have completed voting, place the ballot in the secrecy sleeve so that votes cannot be seen and the numbered seal is visible. Return the ballot to the election official stationed at the station. If voting by absentee ballot, follow the instructions provided by the clerk for returning the ballot.

NOTE: If you make a mistake, detach your ballot to the election official and obtain a replacement ballot. Do not attempt to write any marks inside an oval.

| PARTISAN | LEGISLATIVE | STATE BOARDS |
|---|--|---|
| STRAIGHT PARTY TICKET To Vote A Straight Party Ticket Vote For Not More Than One (1) | Representative in State Legislature 87th District 2 Year Term Vote For Not More Than One (1) | Members of the Board of Trustees of Michigan State University 8 Year Terms Vote For Not More Than Two (2) |
| REPUBLICAN PARTY <input type="checkbox"/> DEMOCRATIC PARTY <input type="checkbox"/> GREEN PARTY <input type="checkbox"/> U.S. TAXPAYERS PARTY <input type="checkbox"/> LIBERTARIAN PARTY <input type="checkbox"/> NATURAL LAW PARTY <input type="checkbox"/> | GARY NEWELL <input type="checkbox"/> DAVID A. BRINKERT <input type="checkbox"/> PHILIP PETER ADAMS <input type="checkbox"/> (U.S. Senator) | MELANIE FOSTER <input type="checkbox"/> RANDALL PITTMAN <input type="checkbox"/> JOEL L. FERGOUSON <input type="checkbox"/> PHIL THOMPSON <input type="checkbox"/> BENJAMIN ALAN BURGESS <input type="checkbox"/> CRYSTAL VAN SOULE <input type="checkbox"/> J.L. Sargent BILL HALL <input type="checkbox"/> MICHAEL H. MILLER <input type="checkbox"/> KATHERINE DEKOR <input type="checkbox"/> |
| | STATE BOARDS Members of the State Board of Education 8 Year Terms Vote For Not More Than Two (2) | Members of the Board of Governors of Wayne State University 8 Year Terms Vote For Not More Than Two (2) |
| | NANCY DANFOP <input type="checkbox"/> ROBERT M. SMART <input type="checkbox"/> MARIANNE YARDE MCGUIRE <input type="checkbox"/> HERBERT S. MOTYER <input type="checkbox"/> | SUSAN LICATA HAROUTYUNIAN <input type="checkbox"/> PAUL C. HILLEGONDS <input type="checkbox"/> TINA ABBOTT <input type="checkbox"/> ANNETTA WELLS <input type="checkbox"/> MARGARET GUTTSALL <input type="checkbox"/> PHILIP A. ADAMS <input type="checkbox"/> JERRY JAMONCIC <input type="checkbox"/> THOMAS W. JONES <input type="checkbox"/> KATHLEEN OAKFORD <input type="checkbox"/> |
| PRESIDENTIAL Electors of President and Vice President of the United States 4 Year Term Vote For Not More Than One (1) | PETER FONZETTI <input type="checkbox"/> GAL M. GRAESSER <input type="checkbox"/> STEPHANE POORTENDIAE <input type="checkbox"/> SCOTTY BOWMAN <input type="checkbox"/> ERNE WHITEBIDE <input type="checkbox"/> COLETTE MULLIGAN <input type="checkbox"/> | Members of the Board of Regents of University of Michigan 8 Year Terms Vote For Not More Than Two (2) |
| GEORGE W. BUSH <input type="checkbox"/> DICK CHENEY <input type="checkbox"/> JOHN F. KERRY <input type="checkbox"/> JOHN EDWARDS <input type="checkbox"/> DAVID COBB <input type="checkbox"/> PATRICIA LAMARCHE <input type="checkbox"/> MICHAEL ANTHONY PEROUTKA <input type="checkbox"/> CHUCK BALDWIN <input type="checkbox"/> MICHAEL BADNARIK <input type="checkbox"/> RICHARD CAMPAGNA <input type="checkbox"/> WALTER BROWN <input type="checkbox"/> MARY ALICE HERBERT <input type="checkbox"/> RALPH NADEAU <input type="checkbox"/> PETER MIGUEL CAMEJO <input type="checkbox"/> | PATRICK ANDERSON <input type="checkbox"/> CARL MEYERS <input type="checkbox"/> OLGA P. MAYNARD <input type="checkbox"/> S. MARTIN TAYLOR <input type="checkbox"/> NATHANIEL GAMBER <input type="checkbox"/> KAREN ADAMS <input type="checkbox"/> JOE KANSER <input type="checkbox"/> MICHAEL R. COPLEY <input type="checkbox"/> JAMES LEWIS HIGLER <input type="checkbox"/> MARY F. DEBUSCHCHE <input type="checkbox"/> | COUNTY Prosecuting Attorney Vote For Not More Than One (1) |
| CONGRESSIONAL Representative in Congress 3rd District 2 Year Term Vote For Not More Than One (1) | JAMES LEWIS HIGLER <input type="checkbox"/> MARY F. DEBUSCHCHE <input type="checkbox"/> | County Clerk Vote For Not More Than One (1) |
| VERNON J. ENLERS <input type="checkbox"/> PETER H. HICKEY <input type="checkbox"/> MARCEL J. SALES <input type="checkbox"/> WARREN ADAMS <input type="checkbox"/> | | DEBBIE S. SMITH <input type="checkbox"/> |
| | | County Treasurer Vote For Not More Than One (1) |
| | | SUSAN VANDERKAM <input type="checkbox"/> |
| | | Register of Deeds Vote For Not More Than One (1) |
| | | GABRIELA K. BURKHDOFF <input type="checkbox"/> |

TURN BALLOT OVER TO CONTINUE VOTING

Printed by Authority of the Barry County Election Commission

FRONT COPY 1 Rep'n 10-2 ASSYRIA TWP 1'

Figure 2.4 Presidential ballot in Michigan in 2004

Oregon’s presidential ballot is unusually explicit and 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.”

Figure 2.4 shows a 2004 presidential ballot from Michigan.⁶⁵ It refers to “Presidential: Electors of President and Vice President of the United States—4 Year Term.”

⁶⁵ The Michigan ballot in figure 2.4 and the ballots of a number of other states provide the voter with the option of casting a “straight party” vote.

2.4 CERTIFICATION OF THE PRESIDENTIAL VOTE BY THE STATES

After the popular voting for presidential electors takes place on the Tuesday after the first Monday in November, the votes are counted at the precinct level. The vote counts are then typically aggregated at some level of local government (e.g., city, town, village, township, or county). Finally, the vote counts are aggregated at the statewide level.

Vote counts at each level are monitored by candidates, political parties, civic groups, and the media. The media often pool their efforts and have a joint reporting system. The candidates, political parties, and media typically have unofficial vote counts from every precinct and county on Election Night or shortly thereafter.

The official vote counts are transmitted from the local level to the state level shortly after Election Day.

In terms of the official count, Minnesota law (and the laws of many other states) specifies that the state canvassing board shall ascertain the number of votes cast for each presidential slate in the state.

“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**. 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. The governor shall transmit to each person declared elected a certificate of election, signed by the governor, sealed with the state seal, and countersigned by the secretary of state.”⁶⁶ [Emphasis added]

It is the above section of Minnesota election law that establishes the statewide winner-take-all rule in Minnesota by means of the highlighted words “declare the person or persons receiving the highest number of votes for each office duly elected.”

Minnesota law (in common with the laws of many states) calls for the use of a lottery in the event of a statewide tie vote for presidential electors. In some states (including Maine and Michigan), 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.”⁶⁷

⁶⁶ Minnesota election law. Section 208.05.

⁶⁷ Maine 21-A M.R.S., section 732. The State of Maine claims a copyright in its codified statutes. All copyrights and other rights to statutory text are reserved by the State of Maine.

Although elections are primarily controlled by state law, various federal laws also govern presidential elections. For example, federal law requires each state to create seven “Certificates of Ascertainment” certifying the number of votes cast for each presidential slate. 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 their meeting in mid-December. Title 3, chapter 1, section 6 of the United States Code specifies:

“It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, **setting forth the names of such electors and the canvass** or other ascertainment under the laws of such State of **the number of votes** given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State. . . .” [Emphasis added]

Figures 2.5, 2.6, and 2.7 show the first three pages of Minnesota’s 2004 Certificate of Ascertainment (with all eight pages being shown in appendix E). Minnesota’s Certificate of Ascertainment is signed by the Governor and Secretary of State, bears the state seal, and was issued on November 30, 2004 (four weeks after the voting by the people on November 2).

The second page of Minnesota’s Certificate of Ascertainment (figure 2.6) shows that 1,445,014 popular votes were cast for each of the 10 presidential electors associated with the presidential slate consisting of John Kerry for President and John Edwards for Vice President of the Minnesota Democratic-Farmer-Labor Party. All 10 elector candidates received the identical number of votes because Minnesota law (in common with the laws of many other states) specifies that a vote cast for the Kerry–Edwards presidential slate “shall be deemed” to be a vote for each of the 10 presidential electors associated with that slate.⁶⁸

Similarly, the third page of Minnesota’s Certificate of Ascertainment (figure 2.7) shows that 1,346,695 popular votes were cast for presidential electors associated with the presidential slate consisting of George W. Bush and Dick Cheney of the Republican Party.⁶⁹

⁶⁸ Minnesota election law. Section 208.04, subdivision 1.

⁶⁹ Minnesota’s 2004 Certificate of Ascertainment goes on to report the votes cast for candidates of the Better Life Party, Libertarian Party, Green Party, Constitution Party, Christian Freedom Party, Socialist Equity Party, and Socialist Workers Party.

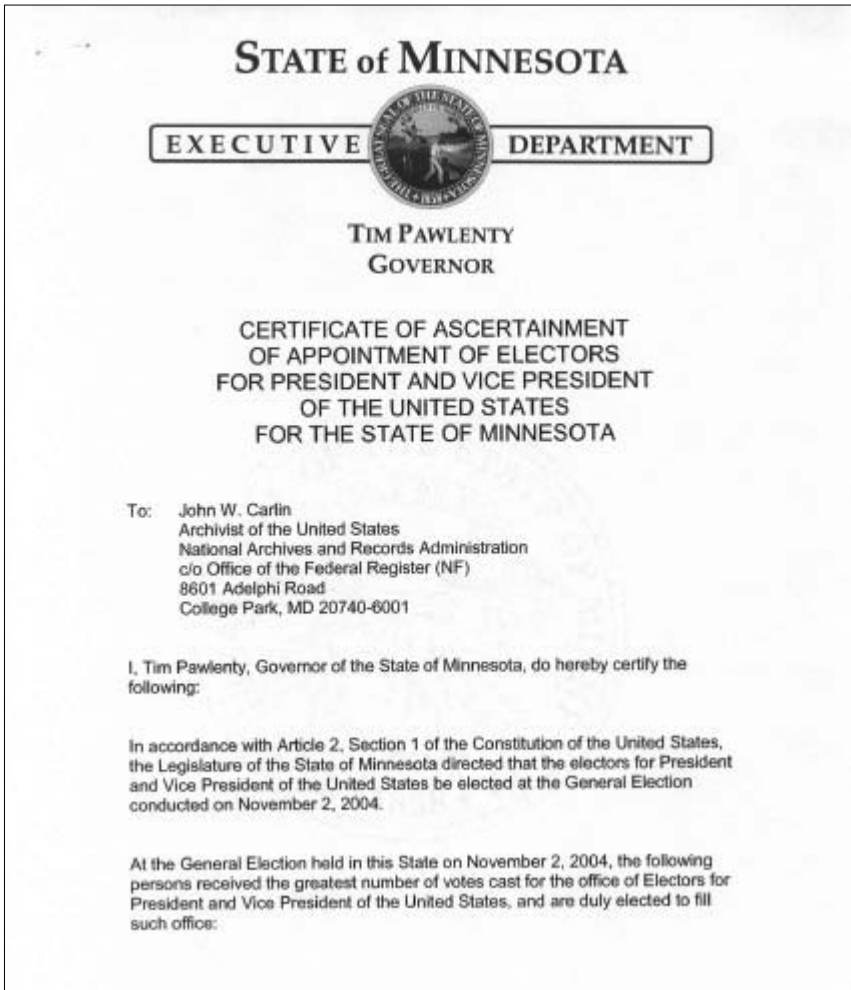


Figure 2.5 First page of Minnesota's 2004 Certificate of Ascertainment

The Certificate of Ascertainment reflects Minnesota's use of the winner-take-all system of awarding electoral votes. In particular, the second page (figure 2.6) of the certificate states that the 10 presidential electors associated with the presidential slate consisting of John Kerry for President and John Edwards for Vice President of the Minnesota Democratic-Farmer-Labor Party

“received the greatest number of votes for the office of Electors of President and Vice President of the United States and are duly elected to fill such office.”

In the two states that use the district system (Maine and Nebraska), the Certificate of Ascertainment shows the statewide vote (which decides the state's two

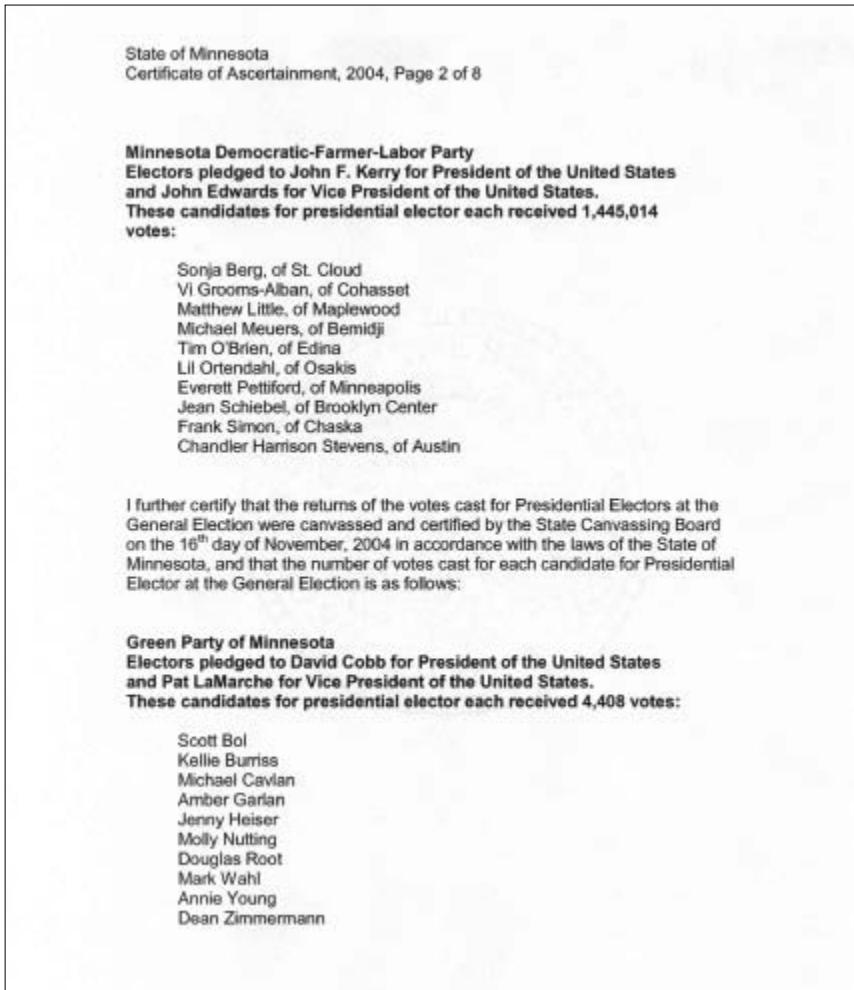


Figure 2.6 Second page of Minnesota's 2004 Certificate of Ascertainment showing that the Kerry-Edwards slate received 1,445,014 popular votes and carried the state

senatorial electors) as well as the district vote (which decides the presidential elector for each congressional district). Maine's 2004 Certificate of Ascertainment is shown in appendix F, and Nebraska's 2004 Certificate of Ascertainment is shown in appendix G.

Controversies about voting for President generally focus on the steps leading up to the issuance of the Certificate of Ascertainment in the contested state. Title 3, chapter 1, section 5 of the United States Code creates a "safe harbor" date six days before the scheduled meeting of the Electoral College for reaching a "final determination of any controversy" concerning the November voting for presidential electors. Title 3, chapter 1, section 5 of the United States Code states:

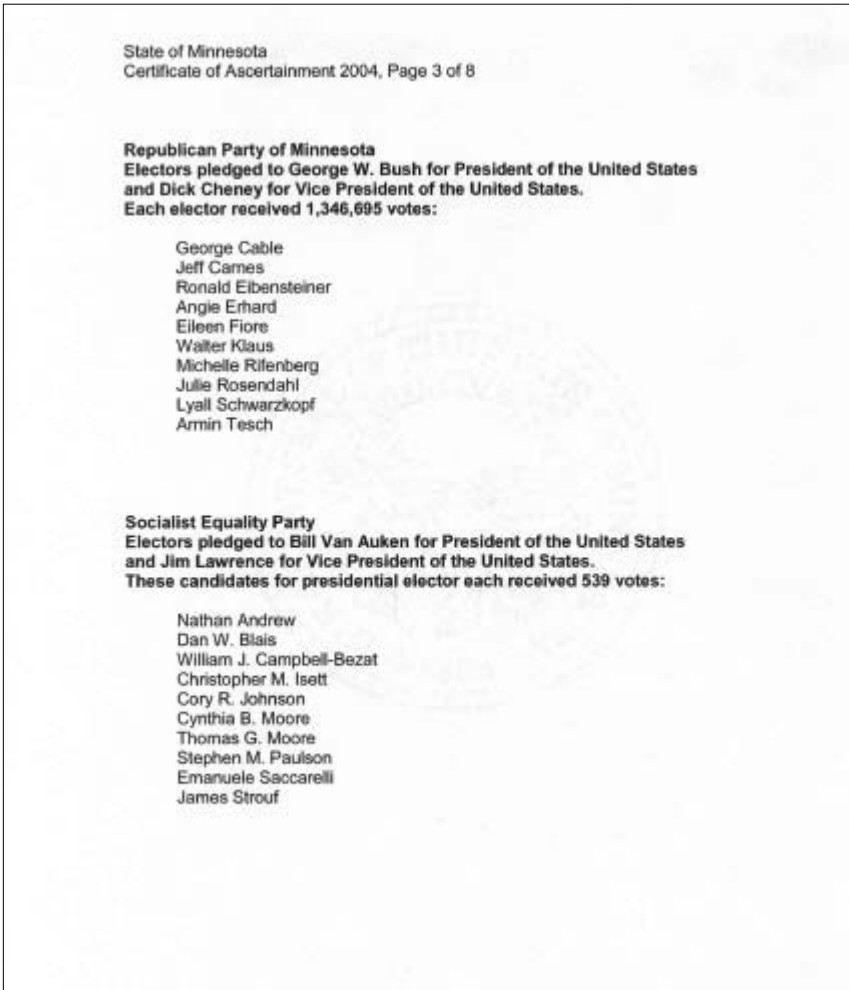


Figure 2.7 Third page of Minnesota’s 2004 Certificate of Ascertainment showing that the Bush–Cheney slate received 1,346,695 popular votes

“If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.”

This “safe harbor” date played a central role in the decision of the U.S. Supreme Court in *Bush v. Gore*⁷⁰ concerning the disputed counting of the popular votes in Florida in the 2000 presidential election.

The federally established “safe harbor” date for the November 6, 2012, presidential election is Monday December 10, 2012 (with December 17, 2012, being the date for the meeting of the Electoral College).

Many states finalize their Certificate of Ascertainment in late November. Maine’s 2004 Certificate of Ascertainment (shown in appendix F) was issued on November 23, 2004. Almost all states have a law setting a specific deadline for finalizing the canvassing of their statewide elections (sometimes with a special earlier deadline for presidential electors). Appendix T lists these deadlines.

The federal “safe harbor” date established by Title 3, chapter 1, section 5 of the United States Code is generally regarded as the deadline for each state to finalize its Certificate of Ascertainment. For example, New York’s 2004 Certificate of Ascertainment (shown in appendix H) was issued on December 6, 2004 (i.e., six days before the scheduled December 13 meeting of the Electoral College). Ohio also finalized its Certificate of Ascertainment on December 6, 2004.⁷¹

2.5 MEETING OF THE ELECTORAL COLLEGE

The U.S. Constitution (Article II, section 1, clause 4) grants Congress the power to choose the time for choosing presidential electors (what we call “Election Day”) and the day that the Electoral College must meet:

“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]

Given the slow communications of the pre-telegraph era, this provision of the Constitution effectively prevented the electors from knowing, with certainty, how the electors in other states were voting.⁷²

Federal law specifies that presidential electors shall be appointed on the Tuesday after the first Monday in November.⁷³

Federal law specifies one particular day for the meeting of the Electoral College.

“The electors of President and Vice President of each State shall meet and give their votes on the **first Monday after the second Wednesday in**

⁷⁰ *Bush v. Gore*. 531 U.S. 98. 2000.

⁷¹ Appendix J shows the date on which each state’s Certificate of Ascertainment was finalized in 2000 and 2004.

⁷² The Meeting Clause of the 12th Amendment (ratified in 1804) specifies that the meeting of the presidential electors must be physically conducted in each state (“The Electors shall meet in their respective states . . .”).

⁷³ United States Code, Title 3, section 1.

December next following their appointment at such place in each State as the legislature of such State shall direct.”⁷⁴ [Emphasis added]

State law, in turn, specifies the place and time of the meeting of the Electoral College. 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. If more than the number of persons required have the highest and an equal number of votes, the governor, in the presence of the electors attending, shall decide by lot which of those persons shall be elected.”⁷⁵

2.6 CERTIFICATION OF VOTES OF THE PRESIDENTIAL ELECTORS

Federal law requires that each state’s presidential electors sign six separate Certificates of Vote reporting the outcome of their voting for President and Vice President. Of the seven Certificates of Ascertainment created by each state, one is sent to the National Archivist in Washington, D.C., and six are given to the presidential electors for use at their meeting. At the Electoral College meeting, the electors attach one Certificate of Ascertainment to each of the six required “Certificates of Vote.”

“The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive of the State.”⁷⁶


In addition, federal law⁷⁷ specifies that one of these sets of documents be sent to the President of the U.S. Senate in Washington, D.C.; two be sent to the Secretary of State of the United States; two be sent to the Archivist of the United States in Washington, D.C.; and one be sent to the federal district court in the judicial district in which

⁷⁴ United States Code. Title 3, chapter 1, section 7.

⁷⁵ Minnesota election law. Section 208.06.

⁷⁶ United States Code. Title 3, chapter 1, section 9.

⁷⁷ United States Code. Title 3, chapter 1, section 11.



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.


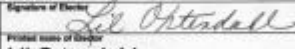

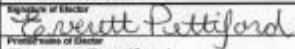
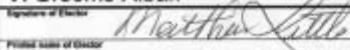
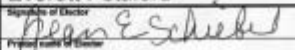
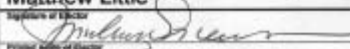
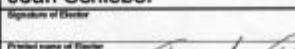
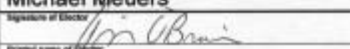
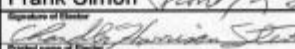
| PRESIDENTIAL ELECTORS | |
|--|--|
| <small>Signature of Elector</small>  <small>Printed name of Elector</small> Sonja Berg | <small>Signature of Elector</small>  <small>Printed name of Elector</small> Lil Ortendahl |
| <small>Signature of Elector</small>  <small>Printed name of Elector</small> Vi Grooms-Alban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

Figure 2.8 Minnesota 2004 Certificate of Vote

the electors assemble. In the event that no certificates are received from a particular state by the fourth Wednesday in December, federal law⁷⁸ establishes procedures for sending a special messenger to the local federal district court in order to obtain the missing certificates.

In Minnesota in 2004, the Kerry–Edwards presidential slate received the most votes in the statewide popular election held on November 2, 2004. Thus, all 10 Democratic-Farmer-Labor Party presidential electors were elected. Figure 2.8 shows Minnesota’s 2004 Certificate of Vote.

⁷⁸ United States Code. Title 3, chapter 1, sections 13 and 14.

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

As can be seen in figure 2.8, 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 (with John Edwards receiving one 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.⁷⁹

2.7 COUNTING OF THE ELECTORAL VOTES IN CONGRESS

Under the terms of the 20th Amendment (ratified in 1933), the newly elected Congress convenes on January 3 after the election.

The electoral votes are counted in a joint session of Congress on January 6.

“Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o’clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.”⁸⁰

The 12th Amendment to the Constitution governs the counting of the electoral votes by Congress. In order to be elected President, a candidate must receive “a majority of the whole number of Electors appointed.” Assuming that all 538 electors are

⁷⁹ See section 2.12 for a discussion of the related issue of faithless electors.

⁸⁰ United States Code. Title 3, chapter 1, section 15.

appointed, 270 electoral votes are currently necessary for election. The 12th Amendment states in part:

“[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 required majority, the 12th Amendment (appendix A) provides a procedure for a “contingent election” in which the House of Representatives chooses the President (with each state having one vote). The 12th Amendment also provides for a contingent election in the event that no candidate receives the required majority for Vice President. In a contingent election for Vice President, each Senator has one vote.

The President and Vice President are inaugurated on January 20 in accordance with the terms of the 20th Amendment (ratified in 1933). Prior to the 20th Amendment, the inauguration date was March 4.

2.8 WRITE-IN VOTES FOR PRESIDENT

Write-in votes for the offices of President and Vice President are inherently more complex than those for any other office because the voters are not voting directly for candidates to fill the office of President and Vice President, but instead, for candidates to fill the position of presidential elector.

Minnesota law permits a voter to cast presidential write-in votes in two ways.

- **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. Such advance filing makes write-in voting more convenient because it enables the voter to write in the name of a presidential slate (just two names), without having to write in the names of 10 (in the case of Minnesota) individual candidates for the position of presidential elector.
- **Election-Day Write-Ins:** Under this approach, there is no advance filing, and the voter must write in the names of up to 10 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.

“(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

TWIN FALLS COUNTY, IDAHO - NOVEMBER 2, 2004

TWIN FALLS 1

INSTRUCTIONS TO VOTER:

TO VOTE, complete the arrow pointing to your choice, like this .
To vote for a candidate whose name is not printed on the ballot, complete the arrow pointing to the write-in space for the appropriate office and write the name of the person for whom you wish to vote in the blank write-in space for that office.

| CANDIDATES FOR UNITED STATES OFFICES | CANDIDATES FOR UNITED STATES OFFICES | CANDIDATES FOR COUNTY OFFICES |
|---|---|--|
| FOR PRESIDENT (Vote for One) | FOR UNITED STATES SENATOR (Vote for One) | FOR COUNTY COMMISSIONER SECOND DISTRICT (Vote for One) |
| (CONSTITUTION) MICHAEL A. PEROUTKA | MIKE CRAPO REPUBLICAN | BOB POWERS DEMOCRATIC |
| FOR VICE PRESIDENT CHUCK BALDWIN | Write-in | TOM MIKESSELL REPUBLICAN |
| FOR PRESIDENTIAL ELECTORS | FOR REPRESENTATIVE IN CONGRESS-SECOND DISTRICT (Vote for One) | Write-in |
| GARY SCHULTE ROSE JOHNSON | MIKE SIMPSON REPUBLICAN | FOR COUNTY COMMISSIONER THIRD DISTRICT (Vote for One) |
| MARVIN RICHARDSON PAUL SMITH | LIN WHITWORTH DEMOCRATIC | MIKE IHLER DEMOCRATIC |
| (REPUBLICAN) | Write-in | WILLIAM J. BROCKMAN REPUBLICAN |
| GEORGE W. BUSH | Write-in | Write-in |
| FOR VICE PRESIDENT DICK CHENEY | CANDIDATES FOR LEGISLATIVE DISTRICT OFFICES | FOR COUNTY SHERIFF (Vote for One) |
| FOR PRESIDENTIAL ELECTORS | LEGISLATIVE DISTRICT NO. 24 FOR STATE SENATOR (Vote for One) | ROBBIN STUBBLEFIELD REPUBLICAN |
| PETE T. CONARRUSA SANDRA PATANO | GARY BATY DEMOCRATIC | WAYNE TOUSLEY INDEPENDENT |
| DEBBE FIELD JOHN A. SANDY | CHARLES H. COINER REPUBLICAN | PAUL F. BACH DEMOCRATIC |
| (LIBERTARIAN) | Write-in | Write-in |
| MICHAEL BADNARIK | LEGISLATIVE DISTRICT NO. 24 FOR STATE REPRESENTATIVE POSITION A (Vote for One) | FOR CLERK OF THE DISTRICT COURT (Vote for One) |
| FOR VICE PRESIDENT RICHARD V. CAMPAGNA | LEON E. SMITH REPUBLICAN | WOODROW BOHRN DEMOCRATIC |
| FOR PRESIDENTIAL ELECTORS | Write-in | KRISTINA GLASCOCK REPUBLICAN |
| TED DUNLAP PATTY HAUTZINGER | Write-in | Write-in |
| ROB GATES GORDON WILMOTH | LEGISLATIVE DISTRICT NO. 24 FOR STATE REPRESENTATIVE POSITION B (Vote for One) | FOR PROSECUTING ATTORNEY (Vote for One) |
| (DEMOCRATIC) | SHARON BLOCK REPUBLICAN | GRANT LOEBS REPUBLICAN |
| JOHN F. KERRY | MAGGI FORTNER DEMOCRATIC | Write-in |
| FOR VICE PRESIDENT JOHN EDWARDS | Write-in | NON-PARTISAN JUDICIAL BALLOT |
| FOR PRESIDENTIAL ELECTORS | Write-in | FIFTH JUDICIAL DISTRICT MAGISTRATE COURT |
| JOHN PEAVEY NANCY LEE HENDRICKS | Write-in | Shall Magistrate RANDY J. STOKER of Twin Falls County, Idaho, of the Fifth Judicial District be retained in Office? |
| PATRICIA BUDENBOTT RICHARD CHILCOTE | Write-in | |
| (WRITE-IN) PRESIDENT | | |

Figure 2.9 Presidential ballot in Idaho in 2004

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.”⁸¹

Minnesota’s 2004 Certificate of Ascertainment (appendix E) shows that 1, 1, 2, 2, and 4 votes were cast for the presidential electors associated with the five officially declared write-in slates in the presidential election in Minnesota in 2004.

Many other states permit advance filing of write-ins in a similar manner.

⁸¹ Minnesota election law. Section 204B.09, subdivision 3.

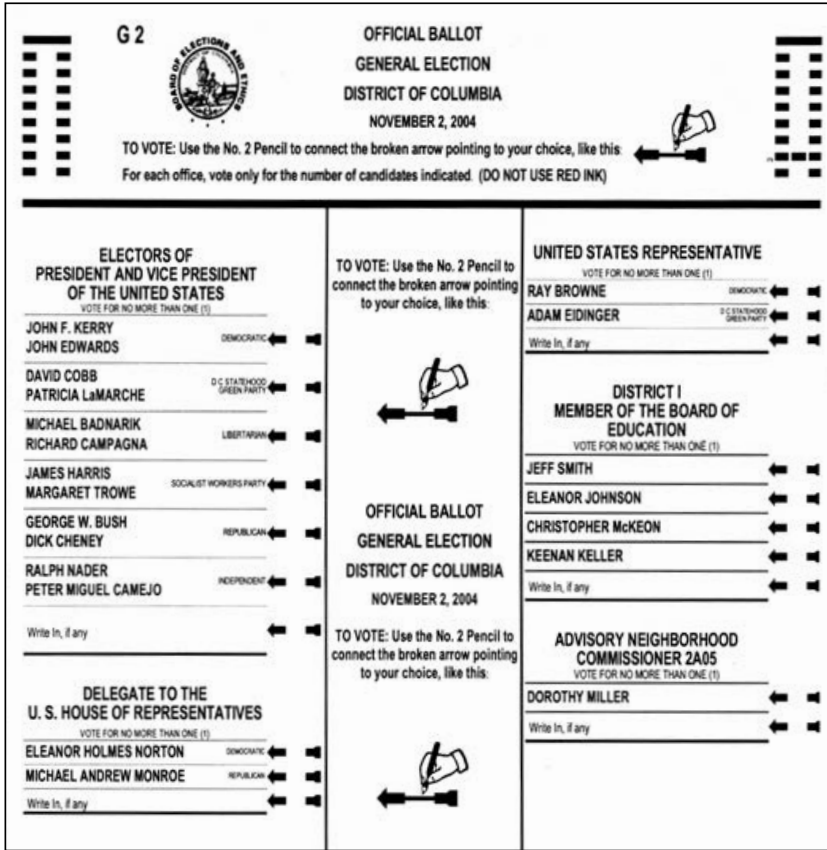


Figure 2.10 Presidential ballot in the District of Columbia in 2004

Election-Day write-ins (without advance filing) are permitted in fewer states. This option is allowed in Minnesota as the consequence of a 1968 opinion of the Minnesota Attorney General.⁸² That ruling declared that a presidential write-in vote may be cast in Minnesota by writing between one and 10 names of persons for the position of presidential elector. The Minnesota Attorney General also ruled that a pre-printed sticker containing the names of between 1 and 10 presidential electors could be employed in Minnesota. Given the small amount of space available for a write-in for president on Minnesota's ballot (figure 2.2), a pre-printed sticker is the most practical way to cast such a vote.

A similar small space (figure 2.9) is provided on the ballot for presidential write-ins in Idaho (which has four electoral votes) and the District of Columbia (figure 2.10).

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

⁸² 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.

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

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.

2.9 SEPARATE VOTING FOR INDIVIDUAL PRESIDENTIAL ELECTORS

Notwithstanding the now-universal use of the short presidential ballot, it is still possible in some states for a voter to cast separate votes for individual candidates for the position of presidential elector.

Section 23.15.431 of Mississippi election law, entitled “Voting irregular ballot for person whose name does not appear on voting machine,” 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. Such irregular ballots shall be deposited, written or affixed in or upon the receptacle or device provided on the machine for that purpose. With that exception, no irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any irregular ballot so voted shall not be counted. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted.”⁸³

In addition, Mississippi election law concerning “Electronic Voting Systems” provides:

“No electronic voting system, consisting of a marking or voting device in combination with automatic tabulating equipment, shall be acquired or used in accordance with Sections 23.15.461 through 23.15.485 unless it shall . . .

“(c) Permit each voter, at presidential elections, by one (1) mark or punch to vote for the candidates of that party for President, Vice-President, and their presidential electors, or to vote individually for the electors of his choice when permitted by law.”⁸⁴

⁸³ Mississippi election law. Section 23.15.431.

⁸⁴ 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).

Although Mississippi law permits such “irregular” voting, Mississippi’s 2004 Certificate of Ascertainment (appendix I) and the state’s 2000 Certificate indicate that no such votes were actually cast in the state in either the 2004 or 2000 presidential elections.

2.10 FUSION VOTING IN NEW YORK

Fusion voting is a major aspect of partisan politics in the state of New York. In New York, candidates for political office may appear on the ballot in the general election as nominees of more than one political party. For example, George Pataki has run for Governor as the candidate of both the Republican Party and the Conservative Party. That is, Pataki’s name appeared more than once on the same ballot. Under New York election law, the votes that a candidate receives on each ballot line are added together in a process called *fusion*.

One of the political effects of fusion is that it enables a minor party to make a nominee of a major political party aware that he or she would not have won without the minor party’s support.

New York is not the only state that currently allows fusion voting. For example, fusion voting is currently permitted under Vermont election law.

Fusion voting played an important role in Minnesota politics prior to the merger that resulted in the formation of that state’s present-day Democratic-Farmer-Labor Party.

Figure 2.11 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.

When fusion voting is applied to presidential races, the question arises as to how to handle the presidential electors. New York law permits two parties to nominate a common slate of presidential electors. For example, the Republican and Conservative parties nominated the same slate of presidential electors for the 2004 presidential election. Similarly, the Democratic Party and Working Families Party nominated the same slate of presidential electors.

Figure 2.12 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 (appendix H) 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.

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























































| 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) |
|---|--|---|--|
|  REPUBLICAN  A |   1A Republican George W. Bush <small>FOR PRESIDENT</small>  Dick Cheney <small>FOR VICE PRESIDENT</small> |   2A Republican Howard Mills |   3A Republican Warren Redlich |
|  DEMOCRATIC ★ B |  ★ 1B Democratic John F. Kerry <small>FOR PRESIDENT</small> John Edwards <small>FOR VICE PRESIDENT</small> |  ★ 2B Democratic Charles E. Schumer |  ★ 3B Democratic Michael R. McNulty |
|  INDEPENDENCE  C |   1C Independence Ralph Nader <small>FOR PRESIDENT</small> Jan D. Pierce <small>FOR VICE PRESIDENT</small> |   2C Independence Charles E. Schumer |   3C Independence Michael R. McNulty |
|  CONSERVATIVE  D |   1D Conservative George W. Bush <small>FOR PRESIDENT</small> Dick Cheney <small>FOR VICE PRESIDENT</small> |   2D Conservative Marilyn F. O'Grady |   3D Conservative Michael R. McNulty |
|  WORKING FAMILIES  E |   1E Working Families John F. Kerry <small>FOR PRESIDENT</small> John Edwards <small>FOR VICE PRESIDENT</small> |   2E Working Families Charles E. Schumer |   3E Working Families Michael R. McNulty |
|  PEACE AND JUSTICE  F |   1F Peace and Justice Ralph Nader <small>FOR PRESIDENT</small> Peter Miguel Camejo <small>FOR VICE PRESIDENT</small> |   2F Builders Abraham Hirschfeld |   3F Builders Abraham Hirschfeld |
|  BUILDERS  F |   2F Builders Abraham Hirschfeld |   3F Builders Abraham Hirschfeld |   3F Builders Abraham Hirschfeld |

Figure 2.11 2004 New York presidential ballot

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

New York’s 2004 presidential ballot (figure 2.11) shows that the election is conducted on the basis of distinct presidential *slates*. Ralph Nader appeared on the ballot in New York as the presidential nominee of both the Independence Party and the Peace and Justice Party. Nader, however, ran with Jan D. Pierce for Vice President on the Independence Party line but with Peter Miguel Camejo for Vice President on the Peace and Justice Party line. Thus, there were two different “Nader” presidential slates in New York in 2004, each with a different slate of presidential electors.

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 Mondello | 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 |
| Catharine Blaney | 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 Badillo | 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 2.12 Third page of New York's 2004 Certificate of Ascertainment

The Nader–Pierce presidential slate received 84,247 votes on the Independence Party line (shown on the fifth page of the Certificate of Ascertainment in appendix H). The Nader–Camejo presidential slate received 15,626 votes on the Peace and Justice Party line (shown on the sixth page of the Certificate of Ascertainment in appendix H). Because there were two distinct presidential slates (with different candidates for Vice President) and two distinct slates of presidential electors, there was no fusion of votes between the Independence Party and the Peace and Justice Party.

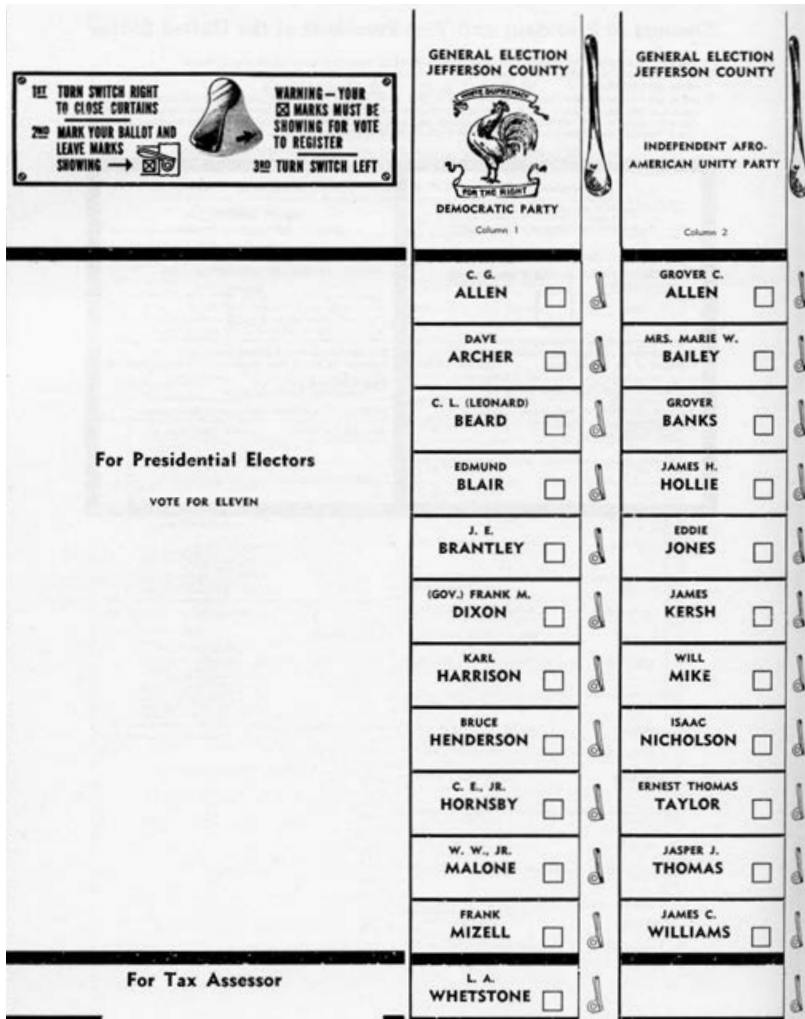


Figure 2.13a 1960 Alabama presidential ballot

2.11 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.

In 1960, for example, the names of no presidential or vice-presidential candidate appeared on the ballot. Instead, Alabama's presidential ballot (figure 2.13) contained 11 separate lines. Each line contained the names of five candidates for the position of presidential elector (each nominated by one of the five political parties on the ballot). There was a separate lever for each of the 55 candidates.⁸⁵ The 11 electors of the Ala-

⁸⁵ 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 2.13 in this book with the permission of Yale University Press.

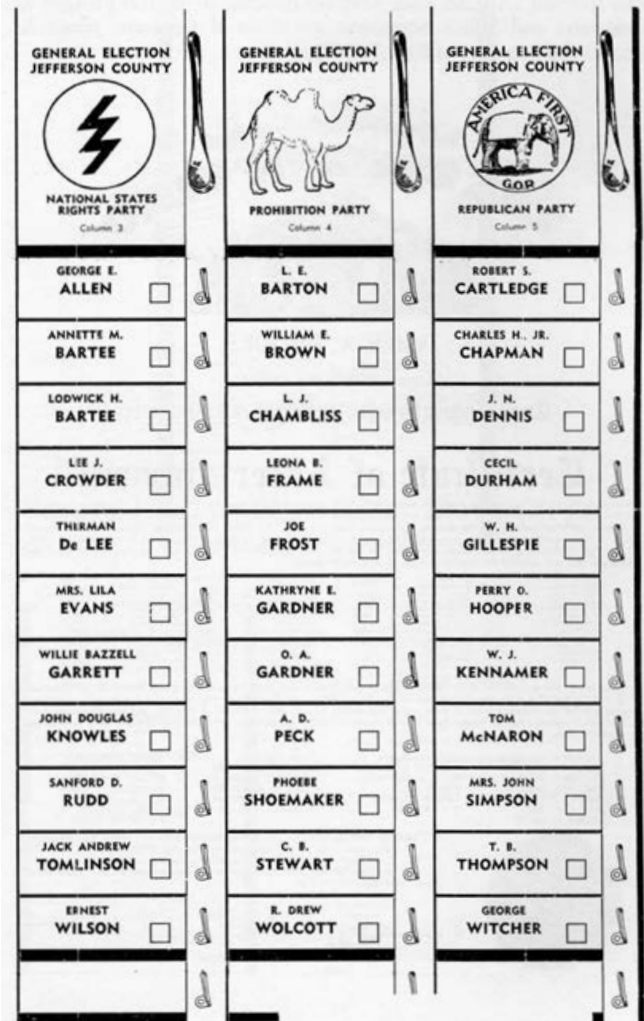


Figure 2.13b 1960 Alabama presidential ballot (cont.)

bama Democratic Party appeared under the party's rooster logo and the slogan "White Supremacy—For the Right." Similarly, there were lists of 11 elector candidates for the Alabama Republican Party and 11 elector candidates for each of three other political parties on the ballot in Alabama that year. The 11 Democratic candidates were elected on Election Day in November 1960. When the Electoral College met in mid-December, John F. Kennedy received the votes of five of the 11 presidential electors, and Harry F. Byrd of Virginia received six electoral votes.

In his 2011 book *Why the Electoral College Is Bad for America*, Professor George Edwards argues that a fair accounting of the popular vote cast in Alabama in 1960 would have made Richard Nixon—not John F. Kennedy—the winner of the nationwide popular vote in 1960.⁸⁶ This accounting issue arises because neither presidential

⁸⁶ Pages 67–69.

candidate's name appeared on the ballot in Alabama (shown in figure 2.13). Instead, only the names of 11 candidates for the position of presidential electors appeared on the ballot. These names were arranged in columns headed only by the political party's name, but not the name of the presidential candidate nominated by that party's national convention. In the primary election that chose the Democratic nominees for the 11 candidates for the position of presidential elector, only five of the winning Democratic nominees were publicly pledged to their party's national nominee (John F. Kennedy). Six were unpledged and made it clear that they opposed the national party. An argument can therefore be made to proportionally allocate only five-elevenths of the Democratic Party's popular margin in Alabama over the Republican Party to Kennedy. This method of accounting would have put Nixon ahead of Kennedy in the nationwide popular vote. Nixon, however, never publicly argued for this interpretation.

Current Mississippi law provides for unpledged presidential electors:

“(1) When presidential electors are to be chosen, the Secretary of State of Mississippi shall certify to the circuit clerks of the several counties the names of all candidates for President and Vice-President who are nominated by any national convention or other like assembly of any political party or by written petition signed by at least one thousand (1,000) qualified voters of this state.

“(2) The certificate of nomination by a political party convention must be signed by the presiding officer and secretary of the convention and by the chairman of the state executive committee of the political party making the nomination. Any nominating petition, to be valid, must contain the signatures as well as the addresses of the petitioners. Such certificates and petitions must be filed with the State Board of Election Commissioners by filing the same in the office of the Secretary of State not less than sixty (60) days previous to the day of the election.

“(3) Each certificate of nomination and nominating petition must be accompanied by a list of the names and addresses of persons, who shall be qualified voters of this state, equal in number to the number of presidential electors to be chosen. Each person so listed shall execute the following statement which shall be attached to the certificate or petition when the same is filed with the State Board of Election Commissioners:

‘I do hereby consent and do hereby agree to serve as elector for President and Vice-President of the United States, if elected to that position, and do hereby agree that, if so elected, I shall cast my ballot as such for _____ for President and _____ for Vice-President of the United States’

(inserting in said blank spaces the respective names of the persons named as nominees for said respective offices in the certificate to which this statement is attached).

“(4) The State Board of Election Commissioners and any other official charged with the preparation of official ballots shall place on such official ballots the words

‘PRESIDENTIAL ELECTORS FOR (here insert the name of the candidate for President, the word ‘AND’ and the name of the candidate for Vice-President)’

in lieu of placing the names of such presidential electors on such official ballots, and a vote cast therefore shall be counted and shall be in all respects effective as a vote for each of the presidential electors representing such candidates for President and Vice-President of the United States. In the case of unpledged electors, the State Board of Election Commissioners and any other official charged with the preparation of official ballots shall place on such official ballots the words ‘UNPLEDGED ELECTOR(S) (here insert the name(s) of individual unpledged elector(s) if placed upon the ballot based upon a petition granted in the manner provided by law stating the individual name(s) of the elector(s) rather than a slate of electors).’⁸⁷

2.12 FAITHLESS PRESIDENTIAL ELECTORS

Political parties and formal national nominations for President and Vice President emerged at the time of the nation’s first competitive presidential election (1796).

Since then, the vast majority of electoral votes have been cast faithfully—that is, for the presidential candidate nominated by the same political party that nominated the presidential elector. The reason is that candidates for the position of presidential electors are nominated by each political party, and parties only generally nominate people who are known to be loyal party members.

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

“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. . . .

“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’⁸⁸

⁸⁷ Mississippi election law. Section 23.15.785.

⁸⁸ *Ray v. Blair* 343 U.S. 214 at 232. 1952.

Among the 22,991 electoral votes cast in the 57 presidential elections between 1789 and 2012, there have been 17 cases when a presidential elector has cast a vote for President in a deviant way.^{89,90,91}

- In 1796, Samuel Miles was one of the two Federalist presidential electors chosen in Pennsylvania; however, he voted for Thomas Jefferson (the Republican candidate) instead of for Federalist John Adams (section 2.2.2).
- In the 1808 presidential election, James Madison was the prohibitive favorite and secured 122 of the 176 electoral votes. George Clinton was a Founding Father, New York's first governor, and the then-sitting Vice President (under Jefferson). Clinton had not been nominated for President by either major party in 1808 and was poised to become the first Vice President not to rise eventually to the Presidency. In an apparent gesture of respect to Clinton, six of New York's 19 presidential electors voted for Clinton instead of Madison.
- In the uncontested presidential election of 1820, there was another gesture of respect in the Electoral College. A New Hampshire Democratic-Republican presidential elector who had been expected to vote for James Monroe voted for John Quincy Adams, thereby preventing Monroe from duplicating George Washington's 1789 and 1792 unanimous votes in the Electoral College.
- In 1948, a Truman elector (Preston Parks) in Tennessee voted for Strom Thurmond, the Dixiecrat presidential nominee.
- In 1956, a Stevenson elector (W.F. Turner) in Alabama voted for Walter B. Jones, a local judge.
- Nixon lost one electoral vote on each of the three occasions (1960, 1968, and 1972) when he ran for President. In 1960, an Oklahoma Republican elector (Henry D. Irwin) voted for United States Senator Harry F. Byrd (a Democrat). In 1968, a North Carolina Republican elector (Lloyd W. Bailey) voted for Governor George Wallace (that year's nominee of the American Independent Party). In 1972, a Virginia Republican elector (Roger L. MacBride) voted for John Hospers (a Libertarian).
- In 1976, one Ford elector from the state of Washington voted for Ronald Reagan for President (who had lost the presidential nomination to Ford at the closely divided 1976 Republican nominating convention).
- In 1988, a Democratic elector (Margaret Leach) from West Virginia voted for Lloyd Bentsen for President and Michael Dukakis for Vice President,

⁸⁹ Congressional Quarterly. 2002. *Presidential Elections 1789–2002*. Washington, DC: CQ Press. Page 159.

⁹⁰ 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.

⁹¹ Edwards, George C., III. 2004. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Pages 21–27.

saying that she thought that the Democratic ticket would have been better in opposite order.

- In 2000, a Democratic presidential elector from the District of Columbia (Barbara Lett-Simmons) did not vote for Al Gore, as a protest against the District's lack of representation in Congress.
- In 2004, an unknown Democratic presidential elector from Minnesota voted, in an apparent accident, for John Edwards for both President and Vice President (section 2.6). Afterwards, all 10 of the Democratic presidential electors said that they intended to vote for Kerry for President.

These 17 cases can be divided into three categories:

- **Clear Case of a Faithless Elector:** In 1796, Samuel Miles cast his electoral vote in an unexpected way in an election in which the overall electoral vote was very close (71 for Adams and 68 for Jefferson). Given the fact that this was the first presidential election in which political parties made formal national nominations for President, and the slow communications of the day, Miles might have had reason to believe, at the time he voted, that his vote might affect the outcome of the election in the Electoral College (section 2.2.2).
- **Grand-Standing Votes:** There have been 15 cases of presidential electors who cast a deviant vote; however, these electors knew, at the time they voted, that their vote would not affect the outcome of the election in the Electoral College. These cases include several instances where the deviant votes were a gesture of respect.
- **Accidental Vote:** In 2004 in Minnesota, there was one accidentally miscast electoral vote for President (section 2.6).

Thus, after 56 presidential elections, the vote of Samuel Miles in 1796 was the only case when an electoral vote was cast in an unfaithful way by a presidential elector who might have thought, at the time he voted, that his vote might affect the outcome.

Table 2.3 shows the number of presidential electors voting in the nation's 57 presidential elections between 1789 and 2012 (a total of 22,991 electoral votes), the number of electoral votes that were cast as expected for President, and the 17 electoral votes that were cast for President in a deviant way (that is, one clear faithless elector, 15 grand-standing votes, and one accidental vote).^{92,93}

Deviant electoral votes were cast on two other occasions.

⁹² Congressional Quarterly. 2002. *Presidential Elections 1789–2002*. Washington, DC: CQ Press. Page 159.

⁹³ There were, arguably, three additional faithless electors in the 1796 presidential election. 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.

Table 2.3 FAITHLESS ELECTORS FOR PRESIDENT

| ELECTION | ELECTORS VOTING | CAST AS EXPECTED | CLEAR FAITHLESS ELECTOR | GRAND-STANDING VOTE | ACCIDENTAL VOTE |
|-----------------|----------------------------|-----------------------------|--|--------------------------------|----------------------------|
| 1789 | 69 | 69 | | | |
| 1792 | 132 | 132 | | | |
| 1796 | 138 | 138 | | | |
| 1800 | 138 | 137 | 1 | | |
| 1804 | 176 | 176 | | | |
| 1808 | 175 | 169 | | 6 | |
| 1812 | 218 | 218 | | | |
| 1816 | 221 | 221 | | | |
| 1820 | 232 | 231 | | 1 | |
| 1824 | 261 | 261 | | | |
| 1828 | 261 | 261 | | | |
| 1832 | 288 | 288 | | | |
| 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 | 366 | | | |
| 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 | | | |

Table 2.3 (continued)

| ELECTION | ELECTORS VOTING | CAST AS EXPECTED | CLEAR FAITHLESS ELECTOR | GRAND-STANDING VOTE | ACCIDENTAL VOTE |
|--------------|-----------------|------------------|-------------------------|---------------------|-----------------|
| 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 | | | |
| Total | 22,991 | 22,974 | 1 | 15 | 1 |

In the 1872 election, a number of electoral votes for President were cast in an unexpected (but not “unfaithful”) way. The Democratic candidate, Horace Greeley, died shortly after Election Day, but before the Electoral College met. Greeley had won 63 electoral votes, and Grant had won 286. Greeley’s 63 presidential electors split their support among four other persons.

In the 1836 election, 23 Democratic presidential electors from Virginia did not vote for the Democratic Party’s vice-presidential nominee. Richard M. Johnson of Kentucky was nominated by more than a two-to-one margin at the party’s second national convention held in Baltimore in 1835. Before the voting, the Virginia delegation, referring to Johnson, announced that they would not support any candidate who did not support the party’s principles. After Johnson was nominated, the Virginia delegation reiterated their position that they would not support Johnson. In the 1836 election, the Democratic ticket won Virginia (and won nationally). In the Electoral College, all 23 of Virginia’s presidential electors duly voted for their party’s nominee for President (Martin Van Buren); however, they then all voted for William Smith for Vice President,

instead of Johnson. 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.⁹⁴ Johnson won by a party-line vote of 33 to 16 in the Senate.⁹⁵ Given the fact that the Virginia Democratic Party announced their vigorous opposition to Johnson at the convention (both before and after Johnson’s nomination), it is difficult to characterize the pre-announced votes of the 23 Democratic presidential electors as being unexpected, much less “faithless.” Moreover, given the level of Johnson’s support in the Senate, the 23 anti-Johnson presidential electors almost certainly realized that their deviant votes were not going to prevent Johnson from becoming Vice President (and hence these votes can be categorized as “grand-standing” votes).

In 2004, Richie Robb, one of the Republican nominees for the position of presidential elector from West Virginia, threatened, prior to Election Day, to not vote for George W. Bush in the Electoral College. However, Robb ultimately voted for Bush when the Electoral College met on December 13, 2004. In any case, Robb’s vote could not have affected the outcome because George W. Bush won the Presidency in 2004 with 16 more than the required majority of 270.

The laws of most states (including Minnesota) do not specify the way that a presidential elector should vote. However, many states have attempted to address the problem of potential faithless electors.

Nineteen states have laws that assert that a presidential elector is obligated to vote for the nominee of his or her party, but these laws contain no provision for enforcement.^{96,97} For example, Maine law provides:

“The presidential electors at large shall cast their ballots for the presidential and vice-presidential candidates who received the largest number of votes in the State. The presidential electors of each congressional district shall cast their ballots for the presidential and vice-presidential candidates who received the largest number of votes in each respective congressional district.”⁹⁸

Five states (New Mexico, North Carolina, Oklahoma, South Carolina, and Washington) have laws imposing penalties of up to \$1,000 on faithless electors. However, these laws provide no mechanism for reversing a vote that has already been faithlessly cast.

⁹⁴ Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Pages 182–188.

⁹⁵ 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.

⁹⁶ Berns, Walter (editor). *After the People Vote: A Guide to the Electoral College*. Washington, DC: The AEI Press. Pages 10–13 and 86–88.

⁹⁷ Concerning pledges by presidential electors, see *Ray v. Blair*. 343 U.S. 214. 1952.

⁹⁸ Maine 21-A M.R.S. section 805.

Pennsylvania, North Carolina, and Montana arguably have the most effective laws for ensuring that presidential electors vote in the intended way.

Pennsylvania election law (section 2878) addresses the problem of potential faithless electors proactively by providing that each party's presidential nominee shall have the power to nominate the entire slate of candidates for the position of presidential elector in Pennsylvania:

“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. If for any reason the nominee of any political party for President of the United States fails or is unable to make the said nominations within the time herein provided, then the nominee for such party for the office of Vice-President of the United States shall, as soon as may be possible after the expiration of thirty days, make the nominations. The names of such nominees, with their residences and post office addresses, shall be certified immediately to the Secretary of the Commonwealth by the nominee for the office of President or Vice-President, as the case may be, making the nominations. Vacancies existing after the date of nomination of presidential electors shall be filled by the nominee for the office of President or Vice-President making the original nomination. Nominations made to fill vacancies shall be certified to the Secretary of the Commonwealth in the manner herein provided for in the case of original nominations.”

North Carolina's election law specifies that failure to vote as pledged

- constitutes resignation from the office of elector,
- cancels the vote cast by the faithless elector, and
- provides for another person to be appointed to cast the vote by the remaining electors.⁹⁹

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 of Wake County. In addition to such forfeiture, refusal or failure to vote for the candidates of the political party which nominated

⁹⁹ Berns, Walter (editor). *After the People Vote: A Guide to the Electoral College*. Washington, DC: The AEI Press. Pages 12 and 87–88.

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.”

At its 119th annual meeting in 2010, the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws or NCCUSL) approved a “Uniform Faithful Presidential Electors Act” and recommended it for enactment in all the states.¹⁰⁰

The Conference, formed in 1892, is a nongovernmental body that has produced more than 200 recommended uniform state laws. The Conference is most widely known for its work on the Uniform Commercial Code.

The Uniform Faithful Presidential Electors Act has several of the features of North Carolina’s current law. The Act provides a statutory remedy in the event a presidential elector fails to vote in accordance with the voters of his or her state. The Act has a state-administered pledge of faithfulness, with any attempt by an elector to submit a vote in violation of that pledge, effectively constituting resignation from the office of elector. The proposed uniform law calls for the election of both electors and alternate electors. The Act provides a mechanism for filling a vacancy created for that reason or any other.

As of mid-2012, the Uniform Faithful Presidential Electors Act has been enacted by Montana.

The Uniform Faithful Presidential Electors Act has also been introduced in the legislatures of Minnesota, Nebraska, and North Carolina. The National Popular Vote organization has endorsed this proposed uniform law.

In summary, faithless electors are a historical curiosity associated with the Electoral College, but they never have had any practical effect on any presidential election.¹⁰¹

2.13 FIVE MAJOR CHANGES IN THE PRESIDENTIAL ELECTION SYSTEM THAT HAVE BEEN IMPLEMENTED WITHOUT A FEDERAL CONSTITUTIONAL AMENDMENT

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

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

¹⁰⁰ <http://nccusl.org/Act.aspx?title=Faithful%20Presidential%20Electors%20Act>.

¹⁰¹ Edwards, George C., III. 2004. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Pages 25–27.

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

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

- **Popular Vote:** As recounted in section 2.2, there was no agreement among the Founding Fathers as to whether the voters should be directly involved in the process of choosing presidential electors. Some favored permitting the voters to directly select presidential electors, while others did not. The Constitution left the manner of choosing presidential electors to the states. In fact, the voters were allowed to choose presidential electors in only six states in the nation’s first presidential election (1789). However, state laws changed over the years. By 1824, voters were allowed to choose presidential electors in three-quarters of the states, and by 1832, voters were able to choose presidential electors in all but one state.¹⁰² Since 1876, all presidential electors have been elected directly by the voters. In short, direct popular voting for presidential electors became the norm by virtue of the piecemeal enactment of state laws—not because the Founders advocated popular voting, not because the original Constitution required it, and not because of any federal constitutional amendment. The states used the built-in flexibility of the Constitution to change the system.
- **Statewide Winner-Take-All Rule:** The Founding Fathers certainly did not advocate that presidential electors be chosen by the people on a statewide winner-take-all basis. The winner-take-all rule was not debated at the Constitutional Convention. It was not mentioned in the *Federalist Papers*. The winner-take-all approach was used by only three of the states participating in the nation’s first presidential election in 1789. Some states elected presidential electors by districts in the early years of the Republic. However, those states soon came to realize what Thomas Jefferson called the “folly”¹⁰³ of diminishing their influence by fragmenting their electoral votes, and the states gravitated toward the winner-take-all rule. It was not

¹⁰²The South Carolina legislature chose presidential electors up to 1860. There were two isolated instances of the election of presidential electors by the state legislature since 1860, namely Florida in 1868 and Colorado in 1876.

¹⁰³Letter from Thomas Jefferson to James Monroe on January 12, 1800. Ford, Paul Leicester. 1905. *The Works of Thomas Jefferson*. New York: G. P. Putnam’s Sons. 9:90.

until the 11th presidential election (1828) that the winner-take-all rule was used by a majority of the states. Since 1836, the presidential slate receiving the most popular votes in each separate state has won all of a state's presidential electors—with only occasional and isolated exceptions.¹⁰⁴ The statewide winner-take-all rule emerged over a period of years because of the piecemeal enactment of state laws—not because the Founders advocated the winner-take-all rule, not because the original Constitution required it, and not because of any federal constitutional amendment.

- **Nomination of Presidential Candidates by Political Parties:** Since the nation's first competitive presidential election (1796), candidates for President and Vice President have been nominated on a nationwide basis by a central body of a political party (e.g., by the congressional caucus of each party starting in 1796 and by national conventions of each party starting in the 1820s). This feature of the present-day system of electing the President emerged because of the actions taken by nongovernment entities—namely the political parties. This change did not come about because the Founders wanted it, because the original Constitution mentioned it or required it, or because of any federal constitutional amendment.
- **Nondeliberative Nature of the Electoral College Since 1796:** The Founding Fathers intended that the Electoral College would act as a deliberative body in which the presidential electors would exercise independent judgment as to the best persons to serve as President and Vice President. However, starting in 1796, political parties began nominating presidential and vice-presidential candidates on a centralized basis and began actively campaigning for their nominees throughout the country. As a result, presidential electors necessarily became rubber stamps for the choices made by the parties. “[W]hether chosen by the legislatures or by popular suffrage on general ticket or in districts, [the presidential electors] were so chosen simply to register the will of the appointing power.”¹⁰⁵ Thus, starting in 1796, presidential electors have been expected to vote for the candidates nominated by their party—that is, “to act, not to think.”¹⁰⁶ Moreover, this expectation has been achieved with remarkable fidelity. Of the 22,991 electoral votes cast for President in the 57 presidential elections between 1789 and 2012, the vote of Samuel Miles for Thomas Jefferson in 1796 was the only instance when a presidential elector might have thought, at the time he voted, that his vote might affect the national outcome for

¹⁰⁴The three exceptions since 1836 include the present-day district system in Maine (since 1969), the present-day district system in Nebraska (since 1992), and the one-time use of a district system by Michigan in 1892.

¹⁰⁵*McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

¹⁰⁶*United States Gazette*. December 15, 1796. Item signed “CANDOUR.”

President.¹⁰⁷ The change in character of the Electoral College from the deliberative body envisioned by the Founding Fathers to a rubber stamp came about because of the emergence of political parties. This change did not come into being because the Founders wanted it, because the original Constitution mentioned it or required it, or because of any federal constitutional amendment.

- **Short Presidential Ballot:** The universal adoption of the short presidential ballot has almost entirely eliminated presidential electors from the public's consciousness. Since 1980, voters have generally not cast separate votes for individual candidates for the position of presidential elector, but instead have cast a single vote for a presidential slate consisting of a candidate for President and a candidate for Vice President. Moreover, in all but a few states, the names of the presidential electors have disappeared from the ballot. The short presidential ballot emerged over a period of years because of the piecemeal enactment of laws by the individual states—not because the Founders advocated it, not because the original Constitution mentioned it or required it, and not because of any federal constitutional amendment.

In short, the flexibility built into the U.S. Constitution permitted the development of a system for electing the President and Vice President that is very different from the one that the Founding Fathers envisioned.

¹⁰⁷ As discussed in greater detail in section 2.12, 15 of the other instances of deviant electors are considered to have been grand-standing votes, and one electoral vote (in 2004 in Minnesota) was cast by accident.