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## Election Law and the Presidency: An Introduction and Overview

Jerry H. Goldfeder

*Fordham University School of Law*

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**FORUM**

**ELECTION LAW AND THE PRESIDENCY**

**AN INTRODUCTION AND OVERVIEW**

*Jerry H. Goldfeder\**

INTRODUCTION

We elect the President of the United States in a unique and bizarre way. Votes are not cast for the candidate but rather for electors pledged to a candidate. Several weeks after the voters have had their say—on the Tuesday after the first Monday in November<sup>1</sup>—the electors meet in all fifty states and the District of Columbia to choose the President and Vice President—the country’s real Election Day.<sup>2</sup>

Today’s Electoral College is comprised of 538 electors, derived from the total number of U.S. Senators (100) and members of the House of Representatives (435), plus three additional electors from the District of Columbia.<sup>3</sup> Each state’s electoral total is equal to the state’s total number of congressional representatives.<sup>4</sup>

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\* Jerry H. Goldfeder teaches Election Law as an Adjunct Professor of Law at Fordham University School of Law and the University of Pennsylvania Law School. He is the author of *Goldfeder’s Modern Election Law* (4th ed. 2016) and coauthor of the “Government and Election Law” column in the *New York Law Journal*. He is Special Counsel at Stroock & Stroock & Lavan LLP in its New York City office. Portions of this article are revised from earlier excerpts of a chapter in *Goldfeder’s Modern Election Law* (3d ed. 2012), which are printed here with the permission of its publisher. This Article provides an overview of presidential election law and serves as an introduction to the forum entitled *Election Law and the Presidency* held at Fordham University School of Law.

1. 3 U.S.C. § 1 (2012).

2. *Id.* § 7.

3. *See* U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XXIII, § 1. Not all American citizens may vote in presidential elections. Circuit courts have consistently held that U.S. citizens residing in territories such as Puerto Rico and Guam do not have a constitutional right to vote for President. *See, e.g.,* *Igartua-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005); *Att’y Gen. v. United States*, 738 F.2d 1017 (9th Cir. 1984) (holding that the U.S. Constitution allows only citizens of states the right to vote in presidential elections).

4. House seats are allocated to the states based on national census results. *See* U.S. CONST. art. 1, § 2, cl. 3. The Electoral College ensures that the smallest states (those with two Senators and one House member) will have a minimum of three electoral votes. *See id.*; *id.* art. 1, § 3, cl. 1. In 1989, a federal district court decided that census counts that include undocumented aliens are permissible to determine congressional districts and therefore, electoral vote allocations. *See Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989).

Since 1888, when Grover Cleveland, the candidate who received the most popular votes, lost to Benjamin Harrison, the candidate with the most Electoral College votes,<sup>5</sup> most of the country was blissfully unconscious of this system. That is, until the 2000 presidential election. The day after polls closed in November of 2000, Americans awoke to the reality that the winner of the national popular vote was not necessarily the one who would be sworn in as President the following January.<sup>6</sup> Instead, it was the candidate with a majority of the Electoral College votes who would be the actual winner. The 2016 election, which also saw the winner of the popular vote lose in the Electoral College, has underscored this reality.

Americans now fully appreciate that presidential candidates are vying for a majority of the Electoral College votes, rather than the individual votes of constituents. Modern campaigns are organized around this goal, and commentators are focused on this reality. As a result, there has been an increased cry to reform the electoral process. After all, if every other public official in the land is elected by receiving more votes than their competitors, why should the President of the United States be elected in this apparently undemocratic fashion?

The process appears even more unusual in that electors are chosen pursuant to state law rather than according to any standardized national rules. For example, Maine and Nebraska voters choose their electors by a combination of statewide and congressional district results, while the remaining forty-eight states and Washington, D.C., award their electors to the candidate who wins statewide.<sup>7</sup> Further, all states award their electors to the candidate with a plurality of votes—irrespective of the margin of victory.<sup>8</sup> However peculiar the American presidential election system appears, it is exactly how our Founders wanted it.

## I. HISTORICAL CONTEXT

One of the more difficult issues facing delegates to the 1787 Constitutional Convention was how to structure the federal government. Wary of overreaching despots after a long and bitter war against King George III, the delegates grappled with how to bring unity to the thirteen states that had been functioning under the Articles of Confederation, a governing document that reflected the people's primary allegiance to their

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5. *Historical Election Results: 1789–2012 Presidential Elections*, NAT'L ARCHIVES & RECORDS ADMIN.: U.S. ELECTORAL C., <https://www.archives.gov/federal-register/electoral-college/votes/index.html> (last visited Nov. 19, 2016) [<https://perma.cc/CPD3-KM8G>].

6. See, e.g., U.S. CONST. amend XX, § 1; Robin Toner, *The 2000 Elections: The Electoral College; Election Quandary Prompts Pop Civics Test*, N.Y. TIMES (Nov. 9, 2000), <http://www.nytimes.com/2000/11/09/us/2000-elections-electoral-college-election-quandary-prompts-pop-civics-test.html> [<https://perma.cc/HY4V-C3F6>].

7. ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 17 (2001).

8. *Methods of Choosing Presidential Electors*, DAVE LEIP'S U.S. ELECTION ATLAS, <http://uselectionatlas.org/INFORMATION/INFORMATION/methods.php> (last visited Nov. 19, 2016) ("The slate of Electors pledged to the ticket having received a plurality of votes state-wide are chosen.") [<https://perma.cc/EJ94-5EHA>].

respective states. Once the delegates determined that a centralized authority was necessary, they took up the issue of whether there should be one chief executive or, perhaps, a troika.<sup>9</sup> Having determined that there would be a President, the delegates next grappled with how long the term should be and whether he<sup>10</sup> could serve more than one term. On the general theory that a President who could not succeed himself was more likely to exercise powers in an unrestrained way, term limits were not adopted.

With these issues resolved, the most vexing problem remained: how to select the President. One proposal was having Congress choose the President. Delegates rejected this idea, fearing the President would be too beholden to the legislative branch—especially in light of the decision not to bar the President from running for reelection.<sup>11</sup> James Madison and others urged a direct national popular vote for President, but this too was defeated because the Founders worried it would lead to uncertain results. Instead, the delegates reached a solution by creating the Electoral College, modeled after the grand legislative compromise that formed the House and the Senate. Known as the “Connecticut Compromise,” our new national legislature preserved the autonomy and dominance of the thirteen states in the new federal government.<sup>12</sup> Likewise, the Electoral College plan was envisioned to permit states to play the central role in choosing the nation’s chief executive.<sup>13</sup> The Constitution thus provides, “Each State shall appoint, in such Manner as the Legislature . . . 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.”<sup>14</sup> Just as each state’s number of House members is based on its population, so too would its number of Electoral College votes—leavened somewhat by having an additional two electors representing its two votes in the U.S. Senate. Under this plan, each state would determine how it would choose electors, and the nation’s chief executive would be dependent on the support of the states to win and stay in office.<sup>15</sup> These electors, meeting in their respective states on an appointed day, would vote for President and Vice President.<sup>16</sup>

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9. JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783–1789*, at 143 (2015).

10. The pronoun “he,” obviously anachronistic, reflects the reality during the founding of the republic.

11. RICHARD J. ELLIS, *FOUNDING THE AMERICAN PRESIDENCY* 64–66 (1999).

12. See ELLIS, *supra* note 9, at 148.

Writing in code to Jefferson in Paris, Madison shared his deep disappointment at the outcome [of the Convention], which blasted his hopes for a fully empowered natural government. “I hazard an opinion,” he lamented, “that the plan should it be adopted will neither effectively answer the national object nor prevent the local mischiefs which everywhere excite disgust against the state governments.”

*Id.*

13. Indeed, the Founders directed that states have paramount authority to regulate all federal elections. See U.S. CONST. art I, § 4, cl. 1.

14. *Id.* art. II, § 1, cl. 2.

15. Because the Electoral College plan was derivative of the Connecticut Compromise, it allowed slave-owning states to temporarily have greater weight in the Electoral College. The counting of slaves as three-fifths of a person impacted census numbers and thus these

Although each state currently employs the popular vote to choose electors, it was not always done this way.<sup>17</sup> The most common electoral procedure in the first four presidential election cycles was direct legislative appointment.<sup>18</sup> In fact, from 1789 through 1832, a majority of legislatures chose their state's electors.<sup>19</sup> Others did so through direct voting, or by a combination of district voting and legislative appointment. Indeed, states would sometimes change their method of appointing electors based on political considerations. In New York, for instance, the Federalists, who lost control of the state legislature to the Anti-Federalists in 1800, attempted to alter the state's procedure from legislative appointment to district voting.<sup>20</sup> In a significant example a century later, Michigan temporarily discarded a statewide winner-take-all method for a district system, which was generally understood to have been effected for political purposes. Litigation ensued, and the U.S. Supreme Court upheld a state's prerogative to choose electors as it saw fit, irrespective of the reason.<sup>21</sup>

In 1969 and 1991 respectively, Maine and Nebraska opted to award electors to the winning candidate in each congressional district and two to the winning candidate statewide.<sup>22</sup> In 2004, Colorado considered whether to amend the state constitution so that presidential candidates would be

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states' representation in the House of Representatives. Likewise, therefore, the number of Electoral College votes to which they were entitled was similarly affected.

16. See U.S. CONST. art. II, § 1, cl. 3, *amended by id.* amend. XII.

17. Indeed, the popular vote method is not immune from change even now. For example, in December 2000, during the litigation contesting Florida's certification of George W. Bush as the winner, the legislature was poised to alter its state's electoral scheme by choosing electors for George W. Bush. When the U.S. Supreme Court effectively ended the recount in his favor, the legislature stood down. See GREENE, *supra* note 7, at 111; David Barstow & Somini Sengupta, *Contesting the Vote: The Florida Legislature; Florida Governor Backs Lawmakers' Efforts to Bypass Courts and Select Electors*, N.Y. TIMES (Nov. 30, 2000), <http://www.nytimes.com/2000/11/30/us/contesting-vote-florida-legislature-florida-governor-backs-lawmakers-efforts.html> [<https://perma.cc/GX2K-X94F>]. And in 2016, while Hillary Clinton garnered a plurality of the vote in Maine, Donald Trump won a congressional district and thus received one electoral vote. See *2016 Presidential Election Results*, POLITICO, <http://www.politico.com/2016-election/results/map/president> (last visited Nov. 19, 2016) [<https://perma.cc/TC87-7GFT>].

18. See Michael McLaughlin, *Direct Democracy and the Electoral College: Can a Popular Initiative Change How a State Appoints Its Electors*, 76 FORDHAM L. REV. 2943, 2962 (2008).

19. Charles S. Bullock et al., *Electoral College Reform and Voting Rights*, 1 FAULKNER L. REV. 89, 118 (2009).

20. See McLaughlin, *supra* note 18, at 2962 n.131. Indeed, New York did not cast any Electoral College votes in 1789 because its legislature could not agree upon a plan for selecting electors. See *id.*

21. *McPherson v. Blacker*, 146 U.S. 1, 41–42 (1892).

22. This system has continued to affect presidential elections. In fact, in 2008, Barack Obama, while getting trounced statewide in Nebraska, picked off one Electoral College vote by winning in one of its three congressional districts. Mitch Smith, *Nebraska Legislature Rejects Winner-Take-All Electoral Vote System*, N.Y. TIMES (Apr. 12, 2016), [http://www.nytimes.com/2016/04/13/us/nebraska-legislature-rejects-winner-take-all-electoral-vote-system.html?\\_r=0&mtref=undefined&gwh=21B8129A29F241119216A8A373DF9065&gwt=pay](http://www.nytimes.com/2016/04/13/us/nebraska-legislature-rejects-winner-take-all-electoral-vote-system.html?_r=0&mtref=undefined&gwh=21B8129A29F241119216A8A373DF9065&gwt=pay) [<https://perma.cc/KU5T-TYD7>].

awarded electoral votes proportional to the votes they received.<sup>23</sup> Had it passed, the system would have been unique in modern American politics. However, it was soundly defeated at the polls.<sup>24</sup> In addition, several times during the last decade, voters in California attempted to change their statewide winner-take-all system to the congressional district system practiced by Maine and Nebraska, but each effort failed to obtain the required number of signatures to have the issue placed on the ballot.<sup>25</sup>

## II. WHO IS THE ELECTORAL COLLEGE?

The U.S. Constitution is silent regarding the qualifications of electors.<sup>26</sup> Its only guidance is by way of proscription: electors may *not* hold “an Office of Trust or Profit under the United States.”<sup>27</sup> Thus, no member of the House or Senate may be an elector and neither may an appointee or employee of the federal government.<sup>28</sup> By state law and custom, states allow political parties to choose a slate of electors to represent their respective candidates. Most state political parties choose potential electors through state party conventions,<sup>29</sup> though some states allow state party committees to directly appoint potential electors.<sup>30</sup> Whichever procedure is

23. See Howard Witt, *Colorado Vote Reform Could Alter Election: Ballot Initiative on Allocating Electors Would Apply Now*, CHI. TRIB. (Oct. 29, 2004), [http://articles.chicagotribune.com/2004-10-29/news/0410290310\\_1\\_electoral-college-electoral-votes-popular-vote](http://articles.chicagotribune.com/2004-10-29/news/0410290310_1_electoral-college-electoral-votes-popular-vote) [https://perma.cc/9JN3-FJVZ].

24. The ballot proposal resulted from the initiative and referendum process in Colorado. Although the Constitution provides that the “Legislature” shall determine how the electors of its state shall be chosen, the Supreme Court recently ruled that the voters of a state enacting legislation was equivalent to the legislature acting. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015). Although the case was not about choosing electors, its holding certainly could be applied in this context.

25. See, e.g., Letter from Californians for Equal Representation to Patricia Galvan, Initiative Coordinator, Office of the Att’y Gen. (July 17, 2007), [http://ag.ca.gov/cms\\_pdfs/initiatives/2007-07-17\\_07-0032\\_Initiative.pdf](http://ag.ca.gov/cms_pdfs/initiatives/2007-07-17_07-0032_Initiative.pdf) [https://perma.cc/8WMY-AMG4].

26. See U.S. CONST. art. II, § 1, cl. 2.

27. *Id.* In 1876, the Democratic governor of Oregon discovered that one of that state’s electors was a “Post-master fourth class,” a federal office, and thus ineligible. WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876*, at 109–10 (2004). In 2012, Senator Sherrod Brown (D-Ohio) was inadvertently selected to serve on his state’s Democratic Party slate of electors pledged to President Obama. As a member of Congress, he was ineligible and had to be replaced. See Kristina Dell, *Electoral College Explained: A Good, Flawed System*, CNN (Nov. 1, 2004, 12:29 PM), <http://www.cnn.com/2004/ALLPOLITICS/11/01/eletoral.college.tm/index.html?eref=sitesearch> [https://perma.cc/WCN3-WMK4].

28. Unless and until an issue arises, or legislation defines it, the scope of this proscribed category remains somewhat ambiguous.

29. In Pennsylvania, for example, a political party’s presidential nominee appoints a slate of electors. See 25 PA. STAT. AND CONS. STAT. ANN. § 2878 (West 2016). In Wisconsin, a political party’s state legislative candidates and state officers appoint electors. See WIS. STAT. ANN. § 8.18 (West 2014). Ultimately, the presidential candidates have the right to decide whether their names appear next to a party’s slate of electors. See *Wallace v. Thornton*, 162 S.E.2d 273, 276 (S.C. 1968).

30. See, e.g., COLO. REV. STAT. ANN. § 1-4-502(2) (West 2010) (state conventions); FLA. STAT. ANN. § 103.021(1) (West 2016) (party committees); IND. CODE § 3-8-4-2 (2015) (state conventions); MICH. COMP. LAWS ANN. § 168.42 (West 2016) (state conventions); N.M. STAT. ANN. § 1-15-3 (West 2016) (state conventions); N.Y. ELEC. LAW § 6-102 (McKinney

followed, a slate of electors is chosen from the party elite, based on party service, financial donations, or diversity.<sup>31</sup>

In twenty-nine states and Washington, D.C., electors are pledged by statute or party rule to vote for the winner of that state's popular vote.<sup>32</sup> In the remaining states, electors are free to use their discretion in voting for a candidate.<sup>33</sup> Nevertheless, nearly all state political parties require electors to make informal commitments to the party nominees.<sup>34</sup> Indeed, some states have laws that sanction faithless electors, though none have done so.<sup>35</sup>

The concept of pledged electors was not what the Framers had in mind. When the Framers adopted the Electoral College, they assumed that electors would exercise "discretion and judgment in casting their votes."<sup>36</sup> Alexander Hamilton described electors as decision makers who are "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."<sup>37</sup>

That perception, or perhaps goal, quickly faded once President George Washington announced he would not seek a third term and candidates' supporters and political party adherents vied to become electors with the purpose of aiding their candidates. Accordingly, in the early years of the republic, the method of choosing electors was varied for political purposes.<sup>38</sup>

2015) (party committees); OHIO REV. CODE ANN. § 3513.11 (West 2016) (state conventions); 25 PA. STAT. AND CONS. STAT. ANN. § 2878 (party presidential nominee); VA. CODE ANN. § 24.2-508 (West 2016) (political parties).

31. See ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 42 (2006).

32. *About the Electors*, NAT'L ARCHIVES & RECORDS ADMIN.: U.S. ELECTORAL C., <https://www.archives.gov/federal-register/electoral-college/electors.html#selection> (last visited Nov. 19, 2016) [<https://perma.cc/2AFX-9JFQ>].

33. The Electoral College vote from states that do not legally bind their electors totals 266, just shy of the 270 majority needed to elect the President.

34. In *Ray v. Blair*, 343 U.S. 214, 230-31 (1952), the Court upheld a state's right to require electors to pledge to vote for their party's nominee, as well as to remove electors who refuse to pledge.

35. See MICH. COMP. LAWS ANN. § 168.47 (faithless vote is cancelled and elector replaced); N.M. STAT. ANN. § 1-15-9 (violation is a fourth-degree felony); N.C. GEN. STAT. ANN. § 163-212 (West 2016) (violation cancels vote and elector is replaced and subject to \$500 fine); OKLA. STAT. tit. 26, §§ 10102, 10109 (1975) (violation is a misdemeanor carrying a fine up to \$1,000); S.C. CODE ANN. § 7-19-80 (1971) (faithless elector replaced; criminal sanctions for violation).

36. Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 675 (1996).

37. BENNETT, *supra* note 31, at 14.

38. NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 44 (1981) ("Massachusetts, for example, shifted its system of choosing electors no less than seven times during the first ten elections."). Similarly, Virginia

permitted electors to be elected from districts in three previous presidential contests (1788, 1792, and 1796), but after Federalists carried 8 of 19 congressional districts in the election of 1798, Republicans, who controlled the state assembly,

Today, electors are more valued for their predictability than sagacity. Twenty-nine states and the District of Columbia *require* electors to vote for the candidate on whose ticket they ran—thus trying to prevent a “faithless” elector from exercising discretion in casting a ballot.<sup>39</sup>

In sum, our presidential electoral system has progressed where its central player—the elector—no longer functions as the thoughtful, independent actor that the Founders contemplated. Nevertheless, the Electoral College remains in place, possessing the ultimate authority to choose our President.

### III. VOTING FOR PRESIDENT

As indicated above, our actual Election Day is when the electors meet to vote for President, not when the general public casts its votes. Pursuant to the Constitution, Congress has set the date as the first Monday after the second Wednesday in December.<sup>40</sup> Chosen today by popular vote on the Tuesday after the first Monday in November,<sup>41</sup> the electors, who meet in

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switched to the winner-take-all format, virtually guaranteeing they would get every one of Virginia’s 21 electoral votes in 1800.

John Ferling, *Thomas Jefferson, Aaron Burr and the Election of 1800*, SMITHSONIAN (Nov. 1, 2004), <http://www.smithsonianmag.com/history/thomas-jefferson-aaron-burr-and-the-election-of-1800-131082359/?no-ist> [<https://perma.cc/V7BW-J74C>].

39. Bullock, *supra* note 19, at 119. Indeed, the Supreme Court has ruled that statutory requirements binding electors to their candidates are not unconstitutional. *See Ray*, 343 U.S. 214. That said, there have been several instances of faithless electors to date: in 1796, a Pennsylvania elector, pledged to vote for Federalist candidate John Adams, cast the nation’s first faithless electoral vote, choosing Democratic-Republican candidate Thomas Jefferson; in 1820, a New Hampshire elector, pledged to vote for Democratic-Republican candidate James Monroe, voted for Democratic-Republican John Quincy Adams, who was not a candidate in the popular election. (John Quincy Adams served as President from 1825–1829); in 1948, a Tennessee elector, pledged to vote for Democrat Harry Truman, voted for States Rights Party candidate Strom Thurmond; in 1956, an Alabama elector, pledged to vote for Democrat Adlai Stevenson, voted for Walter Burgwyn Jones, a local judge; in 1960, an Oklahoma elector, pledged to vote for Republican Richard Nixon, voted for Democrat Harry Byrd, who was not a candidate in the popular election; in 1968, a North Carolina elector, pledged to vote for Republican Richard Nixon, voted for George Wallace, the American Independent Party candidate; in 1972, a Virginia elector, pledged to vote for Republicans Richard Nixon and Spiro Agnew, voted for Libertarian candidates John Hospers and Theodora Nathan, marking the first time a woman received an electoral vote; in 1976, a Washington state elector, pledged to vote for Republican Gerald Ford, voted for Ronald Reagan of the same party; in 1988, a West Virginia elector, pledged to the Democratic ticket, voted for Lloyd Bentsen for President and Michael Dukakis for Vice President, contrary to the order of national ticket; in 2000, a District of Columbia elector, pledged to Democrat Al Gore, abstained from voting to protest the District’s lack of Congressional representation; in 2004, a Minnesota elector, pledged to Democrat John Kerry, voted for Kerry’s running mate John Edwards. *See AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE* app. G (John C. Fortier ed., 3d ed. 2004); *see also* BENNETT, *supra* note 31, at 96 (stating that there have been “perhaps a dozen or more” faithless electors).

40. 3 U.S.C. § 7 (2012) (“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.”).

41. The U.S. Constitution authorizes Congress to set a uniform, national date for the states to appoint electors. Article II provides, “The Congress may determine the Time of choosing the Electors and the Day on which they shall give their Votes; which Day shall be



their respective states to cast one vote each for President and Vice President,<sup>42</sup> must meet on the same date throughout the country<sup>43</sup> and may only vote for one candidate from their home state.<sup>44</sup> Under the Twelfth Amendment, each elector casts separate votes for President and Vice President.<sup>45</sup> Whichever slate of electors pledged to a presidential candidate receives a plurality of votes cast on Election Day wins. Provided there is no controversy as to which slate won, all the winning slate's electors cast their votes on the first Monday after the second Wednesday in December. Upon the electors certifying their vote, the state's governor signs and sends a certificate of ascertainment to the president of the Senate and archivist of the United States.<sup>46</sup>

On January 6, the president of the Senate (the incumbent Vice President, or, in his absence, the president pro tem of the Senate) presides over a joint session of Congress to tally the states' electoral votes.<sup>47</sup> The roll of the states is called in alphabetical order, and the announcement of the states' tallies proceeds unless there is an objection. To challenge a state's electoral count, at least one Senator and one House member must object.<sup>48</sup> Once all

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the same throughout the United States." U.S. CONST. art. II, § 1, cl. 3. In 1845, Congress abolished "multiple day voting" and required that all states choose electors on "the Tuesday next after the first Monday in November." This day is commonly referred to as "Election Day." Originally enacted as the Act of Jan. 23, 1845, the current statute states, "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 U.S.C. § 1. Although all states are required to select electors on this day, many states permit citizens to vote before Election Day by opening polling stations weeks in advance ("early voting") or by providing absentee or mail-in ballots. In 2001, the Ninth Circuit upheld the constitutionality of mail-in votes that are received before Election Day because the ballots are not counted until the federally prescribed date. *See Voting Integrity Project v. Keisling*, 259 F.3d 1169 (9th Cir. 2001).

42. U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XII.

43. *Id.* art. II, § 3, cl. 1; 3 U.S.C. § 7.

44. This so-called "inhabitaney" rule was meant to rein in electors' favoritism for their own state's candidates. Or, to put it another way, the rule encouraged electors to adopt a more national outlook. In 2000, it prompted then-vice-presidential candidate and Texas resident Dick Cheney to change his state of residency to Wyoming. Texas voters brought a legal challenge, arguing that state electors were constitutionally prohibited from voting for both Bush and Cheney in that the two candidates were really inhabitants of Texas. *See* U.S. CONST. amend. XII; *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000).

45. The election of 1800 followed the Constitution at the time, producing unintended results. Electors cast two votes but did not identify which vote was cast for President and which for Vice President. The Twelfth Amendment corrected this glitch. *See generally* TADISHA KVORDA, *THE ORIGINS OF THE TWELFTH AMENDMENT* (1994).

46. U.S. CONST. amend. XII. The certifications of ascertainment are also used to calculate the official national popular vote totals. *See* 3 U.S.C. § 6.

47. 3 U.S.C. § 15.

48. If a member of the House and Senate presents a written objection, the House and Senate reconvene separately to deliberate. *See id.* If, on the other hand, all controversies relating to which slate of electors has won in a state are resolved at least six days before the date that electors are required to meet, then the bona fides of the electors are presumptively free from challenge. *Id.* § 5.

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

of the electoral votes are tallied, and assuming the candidates for President and Vice President have each received a majority of the Electoral College votes, the president of the Senate declares the winners.<sup>49</sup>

To become President or Vice President, a candidate must receive a majority of the national Electoral College vote total.<sup>50</sup> Since the current Electoral College has 538 electors, a successful candidate must receive 270 electoral votes to prevail. If no presidential candidate obtains a majority of the electoral votes, the House of Representatives chooses the President from the top three electoral vote winners.<sup>51</sup> In the House election, each state delegation has one vote for President.<sup>52</sup> To become President, a candidate today must receive votes from an absolute majority of the state delegations (twenty-six votes).<sup>53</sup> If no vice presidential candidate receives a majority of the electoral votes, the Senate elects the Vice President from the top two vote recipients of the vice presidential electoral vote, with each Senator casting one vote. To become Vice President, a candidate must receive votes from an absolute majority of the Senators (fifty-one votes).<sup>54</sup>

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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.

*Id.* In *Bush v. Gore*, 531 U.S. 98 (2000), the State of Florida's alleged desire to comply with the safe harbor provision was the basis for the Supreme Court's 5–4 determination not to remand for a statewide recount.

Despite the putative inoculation of an electoral slate if a state has complied with the conditions of 3 U.S.C. § 5's safe harbor, the Constitution provides that electors may be challenged. U.S. CONST. amend. XII. As such, the congressional desire of a safe harbor cannot eviscerate Congress's constitutional authority to make its own determination of the bona fides of a state's electors.

49. U.S. CONST. amend. XII. The Vice President, in his role as presiding officer of the Senate, must sometime declare himself to be winner or loser of an election. Vice President George H.W. Bush declared himself to be the winner of the presidential election of 1988. *See Vice President Does Duty, Declares Himself Elected*, L.A. TIMES (Jan. 4, 1989), [http://articles.latimes.com/1989-01-04/news/mn-323\\_1\\_vice-president](http://articles.latimes.com/1989-01-04/news/mn-323_1_vice-president) [<https://perma.cc/9S3G-JA2X>]. Vice President Richard Nixon announced his loss in 1960, and Vice President Al Gore declared George W. Bush the winner in 2000. *See* GEORGE C. EDWARDS, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* 25 (2d ed. 2004).

50. U.S. CONST. amend. XII.

51. Prior to the Twelfth Amendment, state delegations from the House of Representatives chose the President from the top five electoral vote winners.

52. House members from each state meet to form state delegations, regardless of party affiliations, with each Representative casting one vote for President within her respective state delegation. Washington, D.C., obviously not a state with elected Representatives, would not participate in this process. Pursuant to House rules (and not the Constitution), a candidate must be supported by an absolute majority of the state's Representatives to obtain that state's vote. A quorum of two-thirds of the state delegations is required for the House to vote. *See* U.S. CONST. art. II, § 1, cl. 3; 3 ASHER CROSBY HINDS, *PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* ch. 62, § 1984 (1907) (House rule that requires an absolute majority of the state's Representatives).

53. *See* U.S. CONST. amend. XII.

54. *Id.* If the Senate is divided 50–50, there is an issue as to whether the presiding Vice President may cast a tie-breaking vote—as would be done in routine legislative matters. Professor Abner Greene assumes the Vice President would do so. GREENE, *supra* note 7, at

In either case, the new President and Vice President are then sworn into office at noon on the twentieth of January.<sup>55</sup>

#### IV. ELECTORAL COLLEGE CONTROVERSIES

This part addresses several of the most controversial Electoral College controversies.<sup>56</sup>

##### A. *The 1800 Election and the Twelfth Amendment*

The 1800 presidential election was the test of how the Electoral College system actually functioned in a hotly contested election.

##### 1. The 1796 Split Ticket

Pursuant to the original language of the Constitution, electors could vote for two candidates without specifying their choices for President or Vice President.<sup>57</sup> The candidate with the most electoral votes became President, and the runner-up became Vice President. In the event of an Electoral College tie or if no candidate obtained a majority, the House of Representatives would elect the President.

These procedures received little attention in the first two presidential elections because George Washington was a near unanimous choice for President.<sup>58</sup> However, problems arose soon after Washington decided not to seek a third term.<sup>59</sup> In 1796, electors chose a split ticket, selecting Federalist candidate John Adams as President, and rival Democratic-Republican candidate Thomas Jefferson as Vice President.<sup>60</sup> The next

175–76. It is not clear, however, given the provision in the Constitution that it is “the Senate” that makes the choice. *See* U.S. CONST. amend. XII.

55. The Twentieth Amendment changed the presidential inauguration date from March 4 to January 20. *See* U.S. CONST. amend. XX. Also, the commencement of new congressional terms was moved to January 3, allowing the new Congress to count the electoral votes on January 6 and, if necessary, conduct the House and Senate fallback elections. *Id.* If the election is not resolved by January 20, the Presidential Succession Act allows the Speaker of the House, upon resigning from Congress, to serve as acting President until the President is elected. 3 U.S.C. § 19 (2012). If the Speaker declines, or is otherwise ineligible, the president pro tem of the Senate is next in line to serve as acting President, followed by the Secretary of State and other cabinet members (assuming they resign from their positions and are otherwise eligible to serve as President). *See* U.S. CONST. art. II, § 1, cl. 3; 3 U.S.C. § 19; *What If No One Has Been Chosen by Inauguration Day?*, in *AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE*, *supra* note 39, at 20, 20–22.

56. Most recently, in 2016, Donald Trump was elected President without winning the national popular vote, having lost to Hillary Clinton. *See* David Leonhardt, *Clinton’s Substantial Popular-Vote Win*, N.Y. TIMES (Nov. 11, 2016), [http://www.nytimes.com/2016/11/11/opinion/clintons-substantial-popular-vote-win.html?\\_r=0](http://www.nytimes.com/2016/11/11/opinion/clintons-substantial-popular-vote-win.html?_r=0) [https://perma.cc/F4CE-R4MX].

57. U.S. CONST. art. II, § 1, cl. 3.

58. Prior to the adoption of the Constitution, various congressional delegates served as President under the Articles of Confederation. *See* STANLEY L. KLOS, *PRESIDENT WHO?: FORGOTTEN FOUNDERS* 57 (2004).

59. *See* BENNETT, *supra* note 31, at 21.

60. *See About the Electors*, *supra* note 32 (John Adams received 71 Electoral College votes out of a total of 138; Thomas Jefferson was the runner-up, with 68 votes).

presidential election would prove even more troublesome, leading to the enactment of the Twelfth Amendment.

## 2. 1800: The Popular Vote

The 1800 presidential election offered a rematch of the 1796 election; however, this time the rival candidates had already been serving together. Incumbent Federalist President John Adams faced a challenge from his Vice President, Thomas Jefferson, the Democratic-Republican Party leader. Adams selected Charles Pinckney of South Carolina as his running mate, and Jefferson chose former New York Senator Aaron Burr.<sup>61</sup>

The ticket of Jefferson and Burr appears to have defeated Adams and Pinckney in the popular vote, but no official records were preserved.<sup>62</sup> Presumably, Thomas Jefferson would be the third President of the United States, with Aaron Burr serving as his Vice President.<sup>63</sup>

## 3. 1800: The Electoral Vote

For the 1800 presidential election, the electors met in their respective states to cast votes for President and Vice President. Planning ahead, one Federalist elector voted for John Jay to avoid a potential tie vote between Adams and Pinckney. Thus, Adams received sixty-five votes, and Pinckney received sixty-four. Unfortunately, the Democratic-Republicans did not properly anticipate the problem—Jefferson and Burr each received a total of seventy-three electoral votes, creating the first and only Electoral College tie in the nation's history.<sup>64</sup> As a result, the election was thrown into the House.

## 4. The House Election

An Electoral College tie between Jefferson and Burr required the House of Representatives to determine the winner of the presidency.<sup>65</sup> In that the

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61. DAVID McCULLOUGH, *JOHN ADAMS* 543–62 (2001). *See generally* JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2004).

62. *See About the Electors, supra* note 32. The 1800 election also signified the beginning of the end for the Federalist Party. Federalist candidates ran for President in the next four elections, but none came close to winning and the party eventually collapsed. *Id.*

63. In 1800, there were sixteen states with a total of 138 electors. A majority of seventy electoral votes was required to win the election. *See, e.g.,* LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 2000, app. b (1999).

64. *See, e.g.,* AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 95; BENNETT, *supra* note 31, at 22–23; Norman J. Ornstein, *The Disputed Elections: 1800, 1824, 1876*, in AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, at 29, 29–31.

65. Because the electoral vote ended in a tie with both candidates having a majority, the Constitution directed the House to elect either Jefferson or Burr as President. *See* U.S. CONST. art. II, § 1.

Federalist Party members still held a majority in the lame-duck House of Representatives, they were to play a decisive role in the election.<sup>66</sup>

Although the Federalists held a majority of House members, the Democratic-Republicans actually controlled eight of the sixteen state delegations, with a nine vote majority required for election; in six states, the Federalists controlled a majority; and in the two remaining states, Vermont and Maryland, each had an even split.<sup>67</sup> In no less than thirty-five ballots, the eight states controlled by the Democratic-Republicans cast their votes for Jefferson. The six Federalist states cast their votes for Burr.<sup>68</sup> On the thirty-sixth ballot, Delaware abstained, leaving only fifteen states casting ballots; Jefferson's eight delegations now constituted a majority. At the same time, Federalists from Vermont and Maryland switched to Jefferson, giving him the votes of ten states. Jefferson was elected.<sup>69</sup>

### 5. The Twelfth Amendment

Congress passed the Twelfth Amendment to the Constitution as a result of the contested 1800 election. Ratified on September 25, 1804, it requires electors to cast separate votes for President and Vice President.<sup>70</sup> Further, it modified the congressional election procedure by requiring the House to elect a President from the candidates with the three highest electoral vote totals, instead of five.<sup>71</sup> Though far from an Electoral College panacea, the Twelfth Amendment effectively solved the problem encountered during the 1800 election.

With Jefferson elected and the decline of the Federalist Party, the next five presidential elections proceeded relatively smoothly, providing the Democratic-Republican candidates with clear margins of victory.<sup>72</sup>

#### B. The 1824 Election

The 1824 election was a multicandidate race, and the first and only time when a candidate won the popular vote and had the most electoral votes but still did not win the presidency.

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66. See BENNETT, *supra* note 31, at 22–23. In 1933, the Twentieth Amendment changed the commencement of new congressional terms to January 3, removing a lame-duck House from the presidential election process. See U.S. CONST. amend. XX.

67. See Ferling, *supra* note 38.

68. See *id.* Alexander Hamilton was one of the few Federalists who supported Jefferson, arguing that his fellow New Yorker Burr was quite “unfit” to be President. BENNETT, *supra* note 31, at 22. In 1804, Hamilton and then-Vice President Burr met in a fateful duel that resulted in Hamilton's death. See Ornstein, *supra* note 64, at 31.

69. See, e.g., BENNETT, *supra* note 31, at 22–23; Ornstein, *supra* note 64, at 29–31.

70. U.S. CONST. amend. XII.

71. *Id.* art. II, § 1, cl. 2.

72. See, e.g., AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 94–95; LONGLEY & PEIRCE, *supra* note 63, app. a at 179.

### 1. The Popular Vote

The 1824 election saw four main candidates competing for the presidency. Andrew Jackson, William Crawford, and Henry Clay were the Democratic-Republican candidates; John Quincy Adams, son of the second President, John Adams, ran as a coalition candidate. With the field crowded, none of the four presidential candidates emerged as the favorite, triggering a close and contentious race for the presidency.<sup>73</sup>

Andrew Jackson received the most popular votes, approximately 152,000; John Quincy Adams finished second with about 114,000 votes; Henry Clay received 47,000 votes, while William Crawford mustered 44,000 votes.<sup>74</sup>

### 2. The Electoral Vote

With an Electoral College vote majority of 131 needed to win, Jackson netted the most with 99.<sup>75</sup> Adams came in second place with 84 electoral votes. Despite finishing last in the national popular vote, Crawford had the third highest Electoral College vote, at 41. Clay received only 37 electoral votes.<sup>76</sup> No candidate having received a majority, the presidential election was once again thrown into the House of Representatives.

### 3. The House Election

Unfortunately for Clay, the Twelfth Amendment rendered him ineligible in the House balloting. Prior to its enactment, the House would have been free to choose from any of the four contenders in that the Constitution originally allowed the House to choose from the top five candidates.<sup>77</sup> This would undoubtedly have been a boon to Clay, who was the Speaker of the House and immensely popular in Congress.<sup>78</sup>

No longer a candidate, Clay used his considerable influence to negotiate a deal for John Quincy Adams to win the presidency. In return, Adams selected Clay to serve as Secretary of State during his administration.<sup>79</sup> Thus Andrew Jackson became the only presidential candidate in history to finish first in both the popular and electoral votes and not win the presidency.

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73. See, e.g., Ornstein, *supra* note 64, at 31–34.

74. Compare AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 94 (Jackson: 151,271 votes; Adams: 113,122 votes; Clay: 47,531 votes; Crawford: 40,856 votes), with LONGLEY & PEIRCE, *supra* note 63, app. a at 179 (Jackson: 152,933 votes; Adams: 115,696 votes; Clay: 47,136 votes; Crawford: 46,979 votes).

75. See LONGLEY & PEIRCE, *supra* note 63, app. a at 179, app. b (in 1824 there were twenty-four states with a total of 261 electors).

76. See, e.g., AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 94; LONGLEY & PEIRCE, *supra* note 63, app. a at 179.

77. U.S. CONST. art. II, § 1, cl. 3.

78. See Ornstein, *supra* note 64, at 31–34.

79. *Id.*

Jackson got his revenge four years later when he defeated Adams's reelection bid. He was reelected in 1832, and, although controversial for his brutality toward Native Americans, was immortalized on the twenty-dollar bill—at least until the 2020s.<sup>80</sup>

### C. The 1876 Election

The 1876 presidential election saw three states undecided after Election Day. This contentious election resulted in the creation of a special commission to determine who won the a presidency.

#### 1. The Popular Vote

In 1876, the Civil War reconstruction effort was still underway, with northern troops occupying the southern states. At the time, the Republican Party's primary power base was situated in the industrialized North, while the Democrats received the bulk of their support from the agrarian South. Against this backdrop, the 1876 election was, at the time, one of the most bitterly disputed presidential contests in the nation's history.<sup>81</sup>

The Republican candidate, Ohio Governor Rutherford B. Hayes, ran against the Democratic Party nominee, New York Governor Samuel J. Tilden. Hayes selected former New York Congressional Representative William Wheeler as his running mate and Tilden chose former Indiana Governor, Senator Thomas Hendricks.<sup>82</sup>

Reports of rampant partisan maneuvering and coercion marred the voting in various states. With more than eight million voters casting ballots, Tilden carried the national popular vote by a margin of at least 250,000 votes over rival Hayes.<sup>83</sup> However, with the results of three state contests in doubt and twenty electoral votes still up for grabs, Tilden fell one

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80. See, e.g., AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 93; LONGLEY & PEIRCE, *supra* note 63, app. a at 179; see also Jackie Calmes, *Harriet Tubman Ousts Andrew Jackson in Change for a \$20*, N.Y. TIMES (Apr. 20, 2016), <http://www.nytimes.com/2016/04/21/us/women-currency-treasury-harriet-tubman.html?mtrref=undefined&gwh=46F89C83BA875FDAC32639524C628EDF&gwt=pay> [https://perma.cc/RNS3-TPER].

81. See generally REHNQUIST, *supra* note 27. The late Chief Justice Rehnquist's narrative provides a thoughtful and insightful exposition of the tension between the rule of law and the politics of those involved in determining the race's outcome. He clearly believed that there was fraud and a just result would have had Tilden as President. Probably more important to him was to present an *apologia* for Supreme Court Justices becoming involved in determining the eventual winner—just as he and his colleagues did in 2000. See *infra* Part V.E.

82. See REHNQUIST, *supra* note 27. In 1884, Hendricks was elected Vice President under President Grover Cleveland. Less than a year later, Hendricks died in office.

83. Compare AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 93 (Tilden received 4,288,546 popular votes, while Hayes obtained 4,034,311 votes), with LONGLEY & PEIRCE, *supra* note 63, app. a at 181 (Tilden received 4,287,670 popular votes, with Hayes at 4,035,924 votes).

electoral vote short of obtaining an Electoral College majority of 185 votes.<sup>84</sup>

## 2. Disputed Electoral Slates

With Florida, Louisiana, and South Carolina struggling to tabulate final popular vote totals for the 1876 election, Republican Party leaders quickly exerted pressure on the three southern states to certify their electoral slates.<sup>85</sup>

In the three undecided states, both sides claimed victory and resorted to fraudulent tactics in their attempt to secure the states' votes for their party's candidate.<sup>86</sup> President Ulysses S. Grant responded to the turmoil by calling for order.<sup>87</sup> Nevertheless, bribery, fraud, and voter intimidation permeated the final popular vote counts, and the states eventually submitted multiple electoral vote certifications to Congress.<sup>88</sup>

In Florida, which reprised its pivotal role in presidential elections some 125 years later, about 50,000 votes had been cast. Votes were reported by the various counties to a State Canvassing Board, and, on the "face of the returns," Tilden led Republican Rutherford B. Hayes by "only 80-some votes." The Canvassing Board, however, which had two Republicans and one Democrat, had the authority and "discretion to exclude returns that were 'irregular, false, or fraudulent.'" Exercising this discretion, sometimes unanimously and sometimes by a 2-1 vote along party lines, the Canvassing Board concluded that Hayes had won the state by forty-five votes.

In Louisiana, Tilden appeared to have won the state by between 8000 and 9000 votes. The State Returning Board, which had the ultimate decision-making authority as to the victor, was "not one to inspire confidence in the Democrats." The law required that the Returning Board have five members with both parties represented, but there was only one Democrat on the Board, and he resigned prior to the 1876 election. The President of the Board had been Governor of Louisiana during Reconstruction, but had been removed as governor "for dishonesty." He remained on the Returning Board, however, and his three Republican colleagues were likewise "not held in high regard by impartial observers."

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84. Tilden held a 184-165 electoral vote lead over Hayes. See LONGLEY & PEIRCE, *supra* note 63, app. a at 181, app. b (in 1876, there were thirty-eight states with a total of 369 electoral votes); Ornstein, *supra* note 64, at 34.

85. A Hayes supporter sent a telegram under the name of Republican Party chairman Zachariah Chandler to officials in the disputed states that read, "With your state sure for Hayes, he is elected. Hold your state." See REHNQUIST, *supra* note 27, at 97. Adding to the confusion, an Oregon Republican elector, employed as a postmaster, was constitutionally prohibited from serving as an elector. See *supra* note 27.

86. See REHNQUIST, *supra* note 27, at 95-96.

87. *Id.* at 101. President Grant's order said in part:

No man worthy of the office of President would be willing to hold the office if counted in, placed there by fraud; either Party can afford to be disappointed in the result, but the country cannot afford to have the result tainted by the suspicion of illegal or false returns.

*Id.*

88. See Ornstein, *supra* note 64, at 35.



After taking testimony during twelve public sessions, the Board “rejected more than 13,000 Democratic [ballots]” and only 2500 Republican votes. Unsurprisingly, Hayes was declared the winner.

South Carolina saw “illegal voting by both white Democrats and black Republicans.” The Board of Canvassers certified Hayes as the winner. The courts held the members of the Board in contempt, fined them, and locked them up in the county jail. Nevertheless, Hayes prevailed.<sup>89</sup>

### 3. The Congressional Dilemma

Faced with competing slates of electors and a lack of specific constitutional guidelines,<sup>90</sup> congressional leaders were deeply divided over how to properly resolve the electoral-vote-counting problems.<sup>91</sup> The Democrats controlled the House and the Republicans controlled the Senate, and each party sought to impose its procedures on the counting process. Although the Constitution called for the House to choose a President in the absence of a candidate receiving a majority, neither party wished to pursue this procedure. The Civil War, President Lincoln’s assassination, and Reconstruction had resulted in a fragile peace, and there appeared to be very little political will to pursue this option. Instead, a compromise was reached that created a special fifteen-member ad hoc commission to determine the winner of the presidency.<sup>92</sup>

### 4. The Special Electoral Commission

The Special Electoral Commission (“the Commission”) was comprised of five Representatives, five Senators, and five Supreme Court Justices, with each member having one vote.<sup>93</sup> To avoid blatantly partisan outcomes, the political makeup of the Commission consisted of three Republican Senators and two Republican Representatives, along with three Democratic Representatives and two Democratic Senators. The Supreme Court Justices

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89. Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?* 32 FORDHAM URB. L.J. 523, 549 (2005) (alteration in original) (quoting REHNQUIST, *supra* note 27, at 104–09).

90. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 2.

91. In response to the 1876 election, Congress enacted the Electoral Count Act of 1887, providing federal statutory guidance to determine state election controversies and Congressional counting objections. *See* ch. 90, 24 Stat. 373 (codified as amended in scattered sections of 3 U.S.C.).

92. This congressional compromise helped avert a potential constitutional crisis that was brewing, with southern Democrats wary of “any move that might lead to another civil war.” *See* REHNQUIST, *supra* note 27, at 114.

93. *See id.* at 163. Special Electoral Commission congressional members included Republican Senators George Edmunds (Vermont), Frederick Frelinghuysen (New Jersey), and Oliver Morton (Indiana); Republican Representatives James Garfield (Ohio) and George Hoar (Massachusetts); Democratic Senators Thomas Bayard (Delaware) and Allen Thurman (Ohio); and Democratic Representatives Josiah Abbott (Massachusetts), Henry Payne (Ohio), and Eppa Hunton (Virginia). *See id.*

appointed were Democrats Nathan Clifford and Stephen Field and Republicans William Strong and Samuel Miller.<sup>94</sup>

Selecting the final Supreme Court Justice to serve on the bipartisan Commission proved to be a critical and contentious process. Initially, congressional leaders wanted Justice David Davis, appointed by President Lincoln and widely regarded as a political independent, to fill the fifth Commission seat.<sup>95</sup> However, the Illinois state legislature elected Davis to the U.S. Senate, rendering him ineligible to sit on the Commission.<sup>96</sup> Republican Justice Joseph Bradley was appointed as the fifteenth and final member of the Commission.

With the Special Electoral Commission in place, the president of the Senate proceeded to count the electoral votes before the joint congressional session, as is prescribed by the Constitution.<sup>97</sup> When objections were raised to votes of the states in question, the Commission was authorized to hear arguments and resolve the matter.<sup>98</sup> Although Tilden only needed to receive one additional electoral vote to prevail in the presidential contest, the Commission voted 8–7 along party lines on all substantive and procedural issues and thus handed the election to Hayes.

A critical procedural vote concerned whether the Commission could “go behind” the results as reported by the states’ canvassing boards.<sup>99</sup> Because those boards had taken testimony and reviewed ballots, a *de novo* review by the Commission would necessarily entail revisiting allegations of fraud, voter suppression, and questionable ballots. In an 8–7 vote, the Commission determined that it would accept the “regularly given” results by the states without independently reviewing the underlying substantive findings. Once that decision was reached, the die was cast and the results of Louisiana, South Carolina, and Florida in Hayes’ favor would stand.<sup>100</sup>

Chief Justice William Rehnquist’s view was that Tilden’s fate had been sealed when the fifteenth commissioner had been appointed—ensuring that all determinations would be along party lines and Hayes would prevail.<sup>101</sup> Indeed, the Democrats in Congress lent their political weight behind the

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94. Justice Clifford also served as President of the Special Electoral Commission. *See* REHNQUIST, *supra* note 27, at 164.

95. *See* Ornstein, *supra* note 64, at 35.

96. Ratified in 1913, the Seventeenth Amendment requires the states to hold popular elections to elect Senators. *See* U.S. CONST. art. I, § 3, cl. 1; *id.* amend. XVII; *see also* Jerry H. Goldfeder, *The 17th Amendment and Vacant Senate Seats*, N.Y. L.J. (Feb. 27, 2009) <http://www.newyorklawjournal.com/id=1202428624783/The-17th-Amendment-And-Vacant-Senate-Seats?slreturn=20160929150926> [<https://perma.cc/V849-QZV7>].

97. U.S. CONST. amend. XII. Because Republicans controlled the Senate, they asserted that this constitutional provision meant that its presiding officer had authority to count the votes as he saw fit rather than merely exercising a ministerial role. *See* REHNQUIST, *supra* note 27, at 167–70. Needless to say, the Democrats did not accept this interpretation of the Constitution, and the controversy was one of the imbroglions that led to the ad hoc commission. *Id.* at 164–65.

98. *See* REHNQUIST, *supra* note 27, at 165.

99. *Id.* at 176–78.

100. *Id.* at 178.

101. *See id.* at 189.

outcome by agreeing to abide by the Commission's findings in return for an end to Reconstruction. Thus, Hayes won the presidency, and northern troops withdrew from the South.<sup>102</sup>

#### D. The 1888 Election

In the election of 1888, incumbent Democratic President Grover Cleveland faced Republican challenger Benjamin Harrison, a former Senator from Indiana. Cleveland selected Allen Thurman, a former Ohio Senator and member of the 1876 Special Electoral Commission, as his running mate; Harrison chose New York Republican Levi Morton, a former Congressman. After the popular votes were tallied, Cleveland led Harrison by approximately 96,000 votes.<sup>103</sup>

Fortunately for Harrison, it was not the popular vote that determined the winner.<sup>104</sup> Harrison was elected President with 233 electoral votes to Cleveland's 168.<sup>105</sup> Thus, for the second time in twelve years and the third time in the life of the republic, the presidential candidate with the most popular votes lost the election. It would not be for another 112 years that an Electoral College winner would lose the popular vote.<sup>106</sup>

#### E. The 2000 Election

The 2000 election ended in a stalemate that riveted the nation's attention for a full seven weeks. After multiple state and federal court proceedings, the U.S. Supreme Court resolved it.

##### 1. The Popular Vote

Unlike previous Electoral College controversies, news coverage and results of the 2000 presidential election were broadcast live on television and the Internet, allowing millions of viewers to watch as the events unfolded. Moreover, the 2000 election became the first time in the nation's

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102. *Id.* The President came to be known by opponents as Rutherford B. Hayes.

103. Compare AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 93 (Cleveland received 5,534,488 popular votes, while Harrison obtained 5,443,892 votes), with LONGLEY & PEIRCE, *supra* note 63, app. a at 182 (Cleveland received 5,540,365 popular votes, while Harrison obtained 5,445,269 votes).

104. See LONGLEY & PEIRCE, *supra* note 63, app. b at 188, app. c at 193.

105. In an 1892 rematch, Cleveland defeated Harrison by sizable margins in both the electoral and popular vote, becoming the only President in history to win nonconsecutive presidential terms. See AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 93.

106. In 1960, John Kennedy narrowly defeated Richard Nixon in the national popular vote by less than 113,000 votes (a margin of 0.2 percent). However, many Democrats in Alabama voted for unpledged electors, some of whom had no intention of electing Kennedy. Although the state's electors went to Nixon, all of the popular votes for unpledged Democratic electors were included in Kennedy's national popular vote total—though, it could be argued, these votes should not have been assigned to JFK. Thus, perhaps Kennedy managed to win the presidency without winning the national popular vote. See LONGLEY & PEIRCE, *supra* note 63, at 46–52, app. a at 184–85 (1960 alternate computation).

history that the Supreme Court had a role in determining the winner of the presidency.<sup>107</sup>

Democrat Al Gore, the incumbent Vice President, ran against Republican challenger George W. Bush, the governor of Texas and son of former President George H.W. Bush.<sup>108</sup> Gore selected Connecticut Senator Joe Lieberman as his running mate, and Bush chose former U.S. Representative and Secretary of Defense Dick Cheney.

On the night of the November 7th election, exit polls and early popular vote counts appeared to indicate that Al Gore would win enough electoral votes to exceed the Electoral College majority of 270 votes.<sup>109</sup> An apparent popular vote victory in Florida indicated a total for Gore of 280 votes. By 8:00 p.m. Eastern Time, news networks had projected Al Gore as the nation's next President even though many polling places, including those on the Florida panhandle, were still open.<sup>110</sup>

As the evening progressed, Gore's popular vote lead in Florida slowly evaporated, placing his projected state victory and concomitant Electoral College majority in doubt. By 10:00 p.m. Eastern Time, with Florida once again too close to call, news networks rescinded their earlier projections of a Gore presidency.<sup>111</sup>

In the early morning hours of the next day, the popular vote count would show that Bush seemed to have a lead of 1,784 votes over Gore in Florida.<sup>112</sup> With a Florida victory, Bush would have an Electoral College majority of 271 votes.<sup>113</sup> Fox News was the first to seize on the vote swing, projecting George W. Bush as the winner of the Florida popular vote and the presidency at approximately 2:16 a.m. Eastern Time.<sup>114</sup> The other news

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107. In 1876, the Special Election Commission marked the first time that Supreme Court Justices played any role in determining the outcome of a presidential election. *See* REHNQUIST, *supra* note 27, at 5.

108. George W. Bush and John Quincy Adams share the distinction of being the only Presidents in history to have fathers who also served as President. Ironically, both sons lost the national popular vote. Benjamin Harrison, who won the presidency in 1888 despite losing the national popular vote, is the only President in history to have a grandfather who was a former President (William Henry Harrison). *See, e.g.,* AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 93.

109. *See, e.g.,* GREENE, *supra* note 7, at 2.

110. News networks no longer announce the projected winner of a state's popular vote until after the polls are closed in that state.

111. *See* GREENE, *supra* note 7, at 2–3. Rescinding the Florida call reduced Al Gore's projected electoral vote count to 255, with Bush still holding at 246 electoral votes.

112. The official Florida popular vote count ultimately gave Bush 2,912,790 votes, with Gore at 2,912,253 votes, providing Bush with a 537 popular vote margin. *See, e.g.,* John C. Fortier, *The 2000 Election*, in AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, at 37, 40.

113. At this point, Bush had a projected lead of 271–255 electoral votes over Gore, with the New Mexico and Oregon contests too close to call. Ultimately, Bush would win 271 electoral votes, while Gore's eventual wins in New Mexico and Oregon would increase his total to 266 electoral votes (a faithless elector from Washington, D.C., abstained from voting for Gore). *See* AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 91.

114. *See One Call Too Many?*, CBS NEWS (Nov. 14, 2000, 10:35 AM), <http://www.cbsnews.com/news/one-call-too-many/> [<https://perma.cc/96N3-L43M>]. John Ellis, the

networks quickly followed suit, declaring a presidential victory for Bush.<sup>115</sup> With Gore refusing to concede, only one thing appeared certain: Gore had a very comfortable lead in the popular vote. Ultimately, his margin over Bush was 543,816 votes.<sup>116</sup>

## 2. The Florida Recount

With the final popular vote count in Florida providing Bush a narrow margin of 1,784 votes, state law required an automatic machine recount of every ballot. After the machine recount cut more than half of Bush's popular vote lead, a "protest" phase allowed candidates to call for hand recounts in counties of their choosing.<sup>117</sup> Gore selected Palm Beach, Volusia, Broward, and Miami-Dade counties for hand recounts, primarily because these counties all used punch-card voting systems that were especially prone to undervotes.<sup>118</sup> Bush resisted this move and, instead, opted to bring a federal lawsuit to halt the county recounts. Meanwhile,

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head of the 2000 Fox News decision desk and first cousin of George and Jeb Bush, was the first poll analyst to project a Bush victory in Florida. Ellis admits that he spoke with both Bush brothers during the evening before calling the race for his cousin. *Id.*

115. The 2000 election marked the last time that Voter News Services (VNS), a consortium owned by the news networks and the Associated Press, provided the networks with statistical analysis of popular vote counts and exit polls in a presidential election. Despite potential margins of error in the VNS system and the notorious unreliability of exit polls, news networks collectively relied on an incredibly narrow margin to call the Florida election for Bush. With 5,962,657 Floridians casting ballots, a final election night margin of 1,784 votes constituted approximately 0.03 percent of the state's popular vote total. Months later, Congress would ask network news executives to explain their projections. According to some accounts, General Electric CEO and chairman Jack Welch directly influenced the NBC News decision to declare a Bush victory (General Electric is the corporate parent of NBC). See Megan Garvey, *Waxman Renews NBC News Assault*, L.A. TIMES (Sept. 11, 2001), <http://articles.latimes.com/2001/sep/11/news/mn-44585> [<https://perma.cc/L9JB-6GYC>]; *Presidential Summary: Presidential State Map*, CBS NEWS, <http://www.cbsnews.com/campaign2000results/election/> (last visited Nov. 19, 2016) [<https://perma.cc/3XY3-QCYG>]; Jim Rutenberg & Felicity Barringer, *Joint Service for Exit Polls Shuts Down: Networks Say They Plan New System for 2004*, N.Y. TIMES (Jan. 14, 2003), [http://www.nytimes.com/2003/01/14/us/joint-service-for-exit-polls-shuts-down-networks-say-they-plan-new-system-for.html?\\_r=0](http://www.nytimes.com/2003/01/14/us/joint-service-for-exit-polls-shuts-down-networks-say-they-plan-new-system-for.html?_r=0) [<https://perma.cc/5ZVF-38EA>].

116. After the networks projected a Bush presidency, Gore called his rival to offer his concessions and then drove to the Nashville War Memorial to deliver his concession speech. En route, Gore's advisors, who had been monitoring the Florida contest, convinced the candidate that the outcome of the state popular vote was far from certain. At approximately 3:30 a.m., Eastern Time, Gore called Bush to retract his earlier concession, prompting his agitated rival to respond that his younger brother, Florida Governor Jeb Bush, had assured a Republican victory in the state election. See GREENE, *supra* note 7, at 3; Fortier, *supra* note 112, at 38.

117. See FLA. STAT. § 102.166 (2000); see also Fortier, *supra* note 112, at 38–40.

118. An undervote occurs when a voter does not fully dislodge the chad (paper punch-out) from the ballot, and the machine does not register any vote for President. In 2002, Congress would respond to voting system problems by enacting the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002), designed to replace punch-card systems, establish the Election Assistance Commission to help administer federal elections, and set minimum election administration standards.

Florida Secretary of State Katherine Harris<sup>119</sup> announced that, under state law, the popular vote recounts must be completed by November 14 to be included in the official certification, scheduled for November 17.<sup>120</sup>

### 3. The Lawsuits

On November 11, as the Palm Beach canvassing board commenced the first hand recount, Bush commenced an action in federal district court to halt the recounts on equal protection grounds. Given the looming deadline imposed by Harris, the counties brought their own state lawsuit requesting an extension of time to complete the hand recounts. The federal district court declined to enjoin the recounts, while the state court refused to give more time to the counties.<sup>121</sup>

On appeal, the Florida Supreme Court reversed the lower state court ruling, setting a November 26 deadline for the hand recounts. The court instructed the counties to determine the intent of the voters but failed to elaborate further.<sup>122</sup> Lacking a uniform standard, the counties' ensuing hand recounts proved to be a chaotic spectacle that quickly dissolved into partisan bickering.<sup>123</sup> On November 26, with some of the recounts still unfinished, Secretary of State Harris certified the official popular vote tally, declaring Bush the winner of Florida by a 537-vote margin.

Refusing to go down quietly, Gore filed an action in state court pursuant to the contest phase provision of Florida election law.<sup>124</sup> Gore presented various arguments, claiming that (1) the popular vote count was subject to several irregularities, (2) the now complete (but late) Palm Beach recount should not be excluded from the final popular vote count, (3) the halted Miami-Dade recount should be resumed, (4) the applied voting standards were too strict, and (5) the Harris certification should be retracted. The state circuit court disagreed with Gore's contentions, allowing the vote certification to stand.<sup>125</sup> On appeal, the Florida Supreme Court, in a dramatic Friday afternoon 4–3 decision issued on December 8, 2000, reversed the lower court ruling, ordering the inclusion of partial recount

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119. Secretary of State Katherine Harris also served as Chair of the Bush-Cheney election campaign. It is not altogether uncommon for election regulators to also play a partisan role in a campaign.

120. The Florida certification date was set in part by a federal consent decree with the Justice Department that required the state to wait ten days for overseas absentee ballots that were cast by Election Day. *See* FLA. STAT. §§ 102.111-12; Fortier, *supra* note 112, at 39.

121. *See, e.g.,* Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla. 2000); McDermott v. Harris, No. 00-2700, 2000 WL 1693713, at \*4 (Fla. Cir. Ct. Nov. 14, 2000). The Eleventh Circuit, sitting en banc, affirmed the district court decision. *See* Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000).

122. *See* Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000).

123. With the focus on undervotes, party loyalists from both sides fought bitterly over the intent of hanging chads (detached corners) and dimpled chads (indentations). At the time, Texas was the only state in the nation to have a statute that specifically defined voter intent for such ballots. *See* 6 TEX. ELEC. CODE ANN. § 65.009 (West 2004).

124. *See* FLA. STAT. § 102.168.

125. *See* Gore v. Harris, No. 00-2808, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4, 2000).

results, the resumption of incomplete county recounts, and, most significantly, a recount of undervotes throughout the entire state.<sup>126</sup>

#### 4. Supreme Court Intervention

Faced with the Florida Supreme Court order directing all sixty-seven counties to conduct a recount, election personnel throughout the state assembled and began the process early Saturday morning. Several hours later, however, the U.S. Supreme Court enjoined the recount and agreed to hear Bush's appeal of the state court decree.<sup>127</sup> That would be the last time any votes were counted or recounted in Florida.

On Monday, December 11, 2000, oral argument was held on the merits of Bush's appeal of the Florida Supreme Court's December 8 order. Essentially, Bush argued that the Florida Supreme Court's decision to continue the popular vote recount created a new election law and, therefore, violated the Presidential Election Clause of the U.S. Constitution.<sup>128</sup> Further, Bush claimed that the Florida recount process that had been ordered lacked any standard and was nothing less than an arbitrary procedure that did not satisfy basic constitutional equal protection and due process protections.<sup>129</sup> Gore countered by asserting that an orderly Florida recount was not only feasible but also necessary to vindicate the right to vote and determine the legitimate winner of the presidency.<sup>130</sup>

On the night of December 12, in a 7–2 decision, the U.S. Supreme Court held that the Florida recount had been conducted in a manner that violated the Equal Protection Clause of the U.S. Constitution.<sup>131</sup> Each of Florida's

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126. Claiming the Florida Supreme Court's decision changed existing election laws, the Republican-controlled state legislature began appointing its own slate of electors—presumably authorized by 3 U.S.C. § 2, which provides that if electors have not been chosen, the state legislature could step in with a remedy: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” 3 U.S.C. § 2 (2012). Indeed, Governor Jeb Bush stated that he intended to certify the legislature's electoral slate, but the U.S. Supreme Court ended the election before the appointment process was finished. *See Gore v. Harris*, 772 So. 2d 1243, 1258 (Fla. 2000); *see also* 3 U.S.C. § 5; Fortier, *supra* note 112, at 41.

127. *See, e.g.*, Fortier, *supra* note 112, at 41–42. The U.S. Supreme Court granted Bush's request for an injunction, holding that, if the recount proceeded and Gore pulled ahead and if the Court later reached the merits of the case and ruled that the Florida Supreme Court erred by allowing the recount, Bush would be irreparably harmed by seeming to have lost as a result of the illegal recount. Therefore, the Court reasoned, it needed to first reach the merits of Bush's appeal before any recount should proceed.

128. *See* U.S. CONST. art. II, § 1, cl. 2; *Bush v. Gore*, 531 U.S. 98, 110 (2000).

129. *See Bush*, 531 U.S. at 110.

130. *Id.* at 105.

131. *Id.* at 110. This was based on the fact that several counties had used different methods to conduct their recounts earlier in the process. *Id.* at 106. Indeed, one county had even altered its method from one day to the next. *Id.* at 106–07. Of course, although this was factually accurate as to the recount during the protest phase of the litigation, there was no record of disparate methods being used by the sixty-seven counties going forward during the contest phase *because the Supreme Court had enjoined the statewide recount*. As such, the Supreme Court found an equal protection violation based upon past practice (during the protest phase of the Gore challenge) rather than on the ensuing recount ordered by the

counties had the prerogative to apply whatever standard it considered best in determining the voters' intent. For example, Miami-Dade and Broward counties ascertained voter intent differently, and Miami-Dade even changed its standard during the recount process. Thus, the Supreme Court found an equal protection violation.

The justices were not as united, however, in determining an appropriate remedy for the unconstitutional recount. In a 5–4 vote, relying on the “safe harbor” provision of the Electoral Count Act,<sup>132</sup> the majority declared that a fair recount of the Florida popular vote could not be concluded by the statutory deadline to resolve disputes. The four dissenting Justices issued opinions that attacked the majority decision and strongly asserted that the interests of justice and the right to vote would be far better served by completing a recount that passed constitutional muster.<sup>133</sup> Regardless, with the Florida popular vote recount permanently enjoined, Vice President Gore conceded the race the very next day. George W. Bush became the forty-third President of the United States.

#### V. PROPOSED ELECTORAL COLLEGE REFORMS

This part surveys some of the proposals to eliminate or reform our Electoral College system.

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Florida Supreme Court. Thus, the Supreme Court found an equal protection violation based upon what it *assumed* would occur during the statewide recount. Moreover, in that the Supreme Court was fully aware that disparate vote counting methods occurred in every election all across the United States, it held that its ruling in *Bush* had no precedential value beyond its own set of facts. *Id.* at 109.

132. 3 U.S.C. § 5 (2012). In 2000, the “safe harbor” deadline was December 12. The safe harbor provision allowed a state’s Electoral College results to be presumptively free from challenge when the votes were counted by Congress on January 6. This statutory protection is conditional, however, and is triggered *if* certain deadlines are met. There is no reason for a state to have to finish its counting and recounting by that date. Nevertheless, the U.S. Supreme Court inferred from a Florida Supreme Court decision during this litigation that Florida had wished to meet the December 12 deadline to qualify for a challenge-free Electoral College slate when its votes were ultimately counted in January. Accordingly, a thin majority of the U.S. Supreme Court held on December 12 that no further recounting could occur and refused to remand so that Florida’s counties could conduct its recount within the bounds of the Equal Protection Clause of the U.S. Constitution. *See Bush*, 531 U.S. at 110.

The majority’s rationale for refusing to remand was characterized as a “goof” by Professor Abner Greene. GREENE, *supra* note 7, at 122. I happen to think that the Supreme Court’s holding in this regard, however, was an egregious misreading of 3 U.S.C. § 5 and the Florida Supreme Court’s decision. In any event, the Supreme Court’s refusal to remand ended the election. Vice President Gore conceded the next day.

133. In a reprise of 1876, the Supreme Court Justices would ultimately determine the winner of the presidency: Justices Rehnquist, Scalia, Thomas, Kennedy, and O’Connor sided with Bush’s position, and Justices Stevens, Breyer, Souter, and Ginsburg backed Gore’s. *See Bush*, 531 U.S. 98.



### A. Constitutional Amendments

Over the years, many have argued in favor of abolishing the Electoral College.<sup>134</sup> Several proposed constitutional amendments sought to replace the Electoral College with a direct national popular vote to elect the nation's chief executive.<sup>135</sup> However, none of these attempts have come close to surviving the arduous constitutional amendment process. To become effective, constitutional amendments must be ratified by two-thirds of the members of the U.S. Senate and House of Representatives and then by three-quarters of the state legislatures.<sup>136</sup> Perhaps the most notable constitutional amendment attempt to abolish the Electoral College occurred in 1969. The House of Representatives approved a proposed amendment that would have required a direct national popular vote in presidential elections, but the amendment ultimately failed to receive the requisite support in the Senate.<sup>137</sup> Despite the daunting constitutional ratification process, another attempt was recently begun, but it too seems to have died.<sup>138</sup>

### B. The ABA National Popular Vote Proposal

On the surface, holding a direct national popular vote appears to be a relatively straightforward process, with each voter casting one vote and the candidate with the highest national popular vote total winning the presidency. However, proposals have differed on whether a successful candidate must obtain a majority or some other percentage of the national popular vote total, whether a quorum of the total national electorate should be required in a presidential election, whether and how a run-off election should be conducted, whether voters should cast separate ballots for President and Vice President, and whether to adopt uniform national voter eligibility standards.

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134. Electoral College critics argue that the elections of 1824, 1876, 1888, and 2000 produced flawed outcomes that were contrary to the will of the people. See Akhil Reed Amar & Vikram David Amar, *Why Old and New Arguments for the Electoral College Are Not Compelling*, in *AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE*, *supra* note 39, at 55, 61. Of course, candidates structure their campaigns to obtain an Electoral College majority, spending a significant amount of their time and resources in battleground states; candidates would implement different campaign strategies if the goal were to win the national popular vote total.

135. A few Electoral College reformists have pushed for a constitutional amendment that would award an electoral vote "bonus" to the winner of the national popular vote. See BENNETT, *supra* note 31, at 49–51. While the states would remain free to allocate their electoral votes, the national popular vote bonus would be great enough to ensure the winning candidate obtains an Electoral College majority. *Id.*

136. U.S. CONST. art. V.

137. See *Electoral College Reform: Hearings on H.J. Res. 179 and H.J. Res. 181 Before the H. Comm. on the Judiciary*, 91st Cong. (1969); *Electing the President: Hearings Before the Subcomm. on Constitutional Amendments of the Comm. of the Judiciary*, 91st Cong. (1970).

138. See H.R.J. Res. 92, 154th Cong. (2008) (proposing a constitutional amendment to abolish the Electoral College and provide a direct national popular vote).

In 1967, the American Bar Association (ABA) conducted one of the more comprehensive initiatives to establish a direct national popular vote.<sup>139</sup> Under the ABA plan, the candidate with the highest national popular vote total would win the presidency, provided that the candidate had obtained at least 40 percent of the votes cast.<sup>140</sup> If no candidate achieved the 40 percent threshold, a run-off election would be held between the candidates with the two highest popular vote totals. Presidential and vice presidential candidates would run on a single party ticket, with voters casting one ballot for their preferred ticket. And the states would retain the discretion to determine voter eligibility, at least in regard to age and convicted felon status. Not unlike similar constitutional amendment proposals, the ABA national popular vote plan has failed to muster enough support.<sup>141</sup>

### C. State Electoral College Reforms

With the constitutional amendment process offering little chance of success, Electoral College reformers have sought to change the presidential election process at the state level.

#### 1. Congressional District Allocation

Although forty-eight states and Washington, D.C., currently allocate electoral votes on a winner-take-all basis, Maine and Nebraska allocate electoral votes differently, awarding one vote to the winner of each congressional district and two additional electoral votes to the winner of the state popular vote.<sup>142</sup>

Recently, voter referendum initiatives in California and Colorado also sought to substitute alternative methods by adopting either the district model followed by Maine and Nebraska or awarding electors in proportion to the candidates' statewide vote totals. Colorado voters rejected its proposed state constitutional amendment by a two-to-one margin, while the California initiative failed to obtain enough support for ballot

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139. The purported goal of the ABA plan was to harmonize the presidential election process with prevailing "one person, one vote" jurisprudence. See *Electing the President: Recommendations of the American Bar Association's Commission on Electoral College Reform*, 53 A.B.A. J. 219, 222 (1967). Federal district courts have consistently rejected arguments that the Electoral College violates the one person, one vote standard. See *New v. Ashcroft*, 293 F. Supp. 2d 256, 258 (E.D.N.Y. 2003); *Trinsey v. United States*, No. 00-5700, 2000 U.S. Dist. LEXIS 18387, at \*6 (E.D. Pa. 2000).

140. Interestingly, Abraham Lincoln, considered one of the nation's greatest Presidents, was the only candidate in history to win the presidency and not receive at least 40 percent of the national popular vote total. See BENNETT, *supra* note 31, at 68; see, e.g., AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE, *supra* note 39, app. H at 93; LONGLEY & PEIRCE, *supra* note 63, app. a.

141. See, e.g., BENNETT, *supra* note 31, at 54–73.

142. In 1892, the U.S. Supreme Court upheld the constitutionality of a Michigan statute that awarded electoral votes in a similar manner. See *McPherson v. Blacker*, 146 U.S. 1, 42 (1892).

consideration.<sup>143</sup> Even if voters had adopted these initiatives, the referendums might have faced a legal challenge on the ground in that the U.S. Constitution provides that *state legislatures*, not voters, have the authority to determine how electoral votes are appointed.<sup>144</sup> A recent decision by the U.S. Supreme Court seems to have eliminated that issue, however.<sup>145</sup> Most recently, the Pennsylvania legislature also briefly considered changing from a winner-take-all system to a Maine/Nebraska-like district procedure but ultimately dropped the effort.<sup>146</sup>

## 2. National Popular Vote Allocation

Another proposed reform has focused on allocating state electoral votes to the candidate who wins the national popular vote.<sup>147</sup> This would mean that a state's electoral vote would be awarded to the winner of the national popular vote—irrespective of which candidate won a plurality in the state.<sup>148</sup>

In the past several years, a number of state legislative houses have passed bills to implement this method of appointing electors. Such laws would not become effective unless and until a sufficient number of states collectively made up an Electoral College majority. If that were to occur, these states' "compact" would replace the Electoral College in determining the winner of the presidency. As of this writing, ten states and Washington, D.C., comprising of 165 Electoral College votes, have adopted this approach.<sup>149</sup> It remains to be seen how far this proposal will go.

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143. See *Colorado Selection of Presidential Electors, Initiative 36 (2004)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Selection\\_of\\_Presidential\\_Electors,\\_Initiative\\_36\\_\(2004\)](https://ballotpedia.org/Colorado_Selection_of_Presidential_Electors,_Initiative_36_(2004)) (last visited Nov. 19, 2016) [<https://perma.cc/T5G4-WK7A>]; see also *California Presidential Electoral College Reform Initiative (2008)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Presidential\\_Electoral\\_College\\_Reform\\_Initiative\\_\(2008\)](https://ballotpedia.org/California_Presidential_Electoral_College_Reform_Initiative_(2008)) (last visited Nov. 19, 2016) [<https://perma.cc/YU44-LG8Y>].

144. McLaughlin, *supra* note 18, at 2944.

145. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015).

146. See Danny Yadron, *State GOP Pushes to Alter 2012 Math*, WALL ST. J. (Sept. 17, 2011), [http://www.projournal.com/mail/wrkfiles/Political%20Science201138.html#art\\_2](http://www.projournal.com/mail/wrkfiles/Political%20Science201138.html#art_2) [<https://perma.cc/D3B6-QC5R>].

147. Although the Compact Clause of the U.S. Constitution requires congressional approval of agreements between and among states, it appears that such an agreement by the states to enact national popular vote allocation statutes without a congressional imprimatur would survive a constitutional challenge. See *McPherson v. Blacker*, 146 U.S. 1 (1892). *But see* David Gringer, *Why the National Popular Vote Plan Is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182 (2008).

148. Dr. John R. Koza of National Popular Vote, Inc., is widely regarded as the leader of national popular vote allocation reform, lobbying states to enact national popular vote statutes. Along with co-inventing instant scratch-off lottery tickets, Dr. Koza published an Electoral College strategy board game designed to provide inspiration for his national popular vote agenda. See NAT'L POPULAR VOTE, <http://www.nationalpopularvote.com/> (last visited Nov. 19, 2016) [<https://perma.cc/GX39-YPKA>].

149. See *id.*

## CONCLUSION

Whatever one thinks of the way Americans elect the President or the manner by which several of the hotly contested elections have been decided, one feature of our electoral system remains consistent: the “loser” concedes, the winner moves into the White House, and not one shot is fired.<sup>150</sup> President Hayes’s election was considered a grand fraud, and President Bush’s election was not considered legitimate by one-half of the American electorate. Yet the government functioned and the rule of law prevailed. Samuel J. Tilden, whose 1876 election was stolen from him by the Special Electoral Commission, summed up our country’s attitude this way:

Everybody knows that, after the recent election, the men who were elected by the people as President and Vice President were counted out; and the men who were not elected were counted in and seated. If my voice could reach throughout our country and be heard in its remotest hamlet, I would say: Be of good cheer. The Republic will live. The institutions of our fathers are not to expire in shame. The sovereignty of the people shall be rescued from this peril and re-established.<sup>151</sup>

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150. The continuity of this 230-year tradition appeared to have been undermined by 2016 Republican presidential candidate Donald Trump, who insisted for weeks that he might not willingly concede if he had lost the election. See Nick Corasaniti, *Could Donald Trump Reject the Election Results?: Yes. Would It Do Any Good?: Nope*, N.Y. TIMES (Oct. 21, 2016), <http://www.nytimes.com/2016/10/22/us/politics/donald-trump-election-results.html?mtref=undefined&gwh=1C3E3DCC252F81AA70FF1FF64B086CF9&gwt=pay> [https://perma.cc/FY84-M9X3]. As it turned out, Trump’s threat became moot as Hillary Clinton conceded to him. Sam Frizell, *Hillary Clinton Concedes, Leaving Democrats at a Loss*, TIME (Nov. 9, 2016), <http://time.com/4565000/hillary-clinton-political-farewell/> [https://perma.cc/7GN7-CS5C].

151. REHNQUIST, *supra* note 27, at 210 (quoting ALEXANDER CLARENCE FLICK, SAMUEL JONES TILDEN 412 (1963)).