



READING PACKET FOR APRIL 6, 2024 | ELECTORAL COLLEGE

CORE READING 1: CREATING THE ELECTORAL COLLEGE | SEPTEMBER 4 & 6, 1787

SOURCE: <https://teachingamericanhistory.org/document/creating-the-electoral-college/>

In Convention, – Mr. BREARLY,^[1] from the Committee of 11, made a further partial report as follows:

“The Committee of 11, to whom sundry resolutions, etc., were referred on the thirty-first of August, report, that in their opinion the following additions and alterations should be made to the Report before the Convention, *viz.*^[2]:

“1. The first clause of Article 7, Section 1,^[3] to read as follows: ‘The Legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States.’

“2. At the end of the second clause of Article 7, Section 1, add, ‘and with the Indian tribes.’

“3. In the place of the 9th Article, Section 1, to be inserted: ‘The Senate of the United States shall have power to try all impeachments; but no person shall be convicted without the concurrence of two-thirds of the members present.’

“4. After the word ‘Excellency,’ in Section 1, Article 10, to be inserted: ‘He shall hold his office during the term of four years, and together with the Vice President chosen for the same term, be elected in the following manner, *viz.*: Each State shall appoint, in such manner as its Legislature may direct, a number of Electors equal to the whole number of Senators and members of the House of Representatives to which the State may be entitled in the Legislature. The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves; and they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of the General Government, directed to the President of the Senate. The President of the Senate shall, in that House, open all the certificates, and the votes shall be then and there counted. The person having the greatest number of votes shall be the President, if such number be a majority of that of the Electors; and if there be more than one who have such a majority, and have an equal number of votes, then the Senate shall immediately choose by ballot one of them for President; but if no person have a majority, then from the five highest on the list the Senate shall choose by ballot the President; and in every case after the choice of the President, the person having the greatest number of votes shall be Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them the Vice President. The Legislature may determine the time of choosing and assembling the Electors, and the manner of certifying and transmitting their votes.’



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“5. Section 2. ‘No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; nor shall any person be elected to that office who shall be under the age of thirty-five years, and who has not been, in the whole, at least fourteen years a resident within the United States.’

“6. Section 3. ‘The Vice President shall be *ex officio* President of the Senate; except when they sit to try the impeachment of the President; in which case the Chief Justice shall preside, and excepting also when he shall exercise the powers and duties of President; in which case, and in case of his absence, the Senate shall choose a president *pro tempore*. The Vice President, when acting as President of the Senate, shall not have a vote unless the House be equally divided.’

“7. Section 4. ‘The President, by and with the advice and consent of the Senate, shall have power to make treaties; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, and other public ministers, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not otherwise herein provided for. But no treaty shall be made without the consent of two-thirds of the members present.’

“8. After the words, ‘into the service of the United States,’ in Section 2, Article 10, add ‘and may require the opinion in writing of the principal officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices.’

“9. The latter part of Section 2, Article 10, to read as follows: ‘He shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery; and in case of his removal as aforesaid, death, absence, resignation, or inability to discharge the powers or duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.’”

The first clause of the Report was agreed to, *nem. con.*^[4]

The second clause was also agreed to, *nem. con.*

The third clause was postponed, in order to decide previously on the mode of electing the President.

The fourth clause was accordingly taken up.

Mr. GORHAM^[5] disapproved of making the next highest after the President the Vice President, without referring the decision to the Senate in case the next highest should have less than a majority of votes. As the regulation stands, a very obscure man with very few votes may arrive at that appointment.

Mr. SHERMAN^[6] said the object of this clause of the Report of the Committee was to get rid of the ineligibility which was attached to the mode of election by the Legislature, and to render the Executive independent of the Legislature. As the choice of the President was to be made out of the five highest, obscure characters were sufficiently guarded against in that case; and he had no objection to requiring



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the Vice President to be chosen in like manner, where the choice was not decided by a majority in the first instance.

Mr. MADISON^[7] was apprehensive that by requiring both the President and Vice President to be chosen out of the five highest candidates, the attention of the electors would be turned too much to making candidates, instead of giving their votes in order to a definitive choice. Should this turn be given to the business, the election would in fact be consigned to the Senate altogether. It would have the effect, at the same time, he observed, of giving the nomination of the candidates to the largest States.

Mr. GOUVERNEUR MORRIS^[8] concurred in, and enforced, the remarks of Mr. MADISON.

Mr. RANDOLPH^[9] and Mr. PINCKNEY^[10] wished for a particular explanation, and discussion, of the reasons for changing the mode of electing the Executive.

Mr. GOUVERNEUR MORRIS said, he would give the reasons of the Committee, and his own. The first was the danger of intrigue and faction, if the appointment should be made by the Legislature. The next was the inconvenience of an ineligibility required by that mode, in order to lessen its evils. The third was the difficulty of establishing a court of impeachments, other than the Senate, which would not be so proper for the trial, nor the other branch, for the impeachment of the President, if appointed by the Legislature. In the fourth place, nobody had appeared to be satisfied with an appointment by the Legislature. In the fifth place, many were anxious even for an immediate choice by the people. And finally, the sixth reason was the indispensable necessity of making the Executive independent of the Legislature. As the electors would vote at the same time, throughout the United States, and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible, also, to corrupt them. A conclusive reason for making the Senate, instead of the Supreme Court, the judge of impeachments, was, that the latter was to try the President, after the trial of the impeachment.

Colonel MASON^[11] confessed that the plan of the Committee had removed some capital objections, particularly the danger of cabal and corruption. It was liable, however, to this strong objection, that nineteen times in twenty the President would be chosen by the Senate, an improper body for the purpose.

Mr. BUTLER^[12] thought the mode not free from objections; but much more so than an election by the legislature, where, as in elective monarchies, cabal, faction, and violence would be sure to prevail.

Mr. PINCKNEY stated as objections to the mode, – first, that it threw the whole appointment in fact, into the hands of the Senate. Secondly, the electors will be strangers to the several candidates, and of course unable to decide on their comparative merits. Thirdly, it makes the Executive re-eligible, which will endanger the public liberty. Fourthly, it makes the same body of men which will, in fact, elect the President, his judges in case of an impeachment.



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Mr. WILLIAMSON^[13] had great doubts whether the advantage of re-eligibility would balance the objection to such a dependence of the President on the Senate for his reappointment. He thought, at least, the Senate ought to be restrained to the two highest on the list.

Mr. GOUVERNEUR MORRIS said, the principal advantage aimed at was, that of taking away the opportunity for cabal. The President may be made, if thought necessary, ineligible, on this as well as on any other mode of election. Other inconveniences may be no less redressed on this plan than any other.

Mr. BALDWIN^[14] thought the plan not so objectionable, when well considered, as at first view. The increasing intercourse among the people of the States would render important characters less and less unknown; and the Senate would consequently be less and less likely to have the eventual appointment thrown into their hands.

Mr. WILSON^[15] This subject has greatly divided the House, and will also divide the people out of doors.^[16] It is in truth the most difficult of all on which we have had to decide. He had never made up an opinion on it entirely to his own satisfaction. He thought the plan, on the whole, a valuable improvement on the former. It gets rid of one great evil, that of cabal and corruption; and Continental characters will multiply as we more and more coalesce, so as to enable the Electors in every part of the Union to know and judge of them. It clears the way also for a discussion of the question of re-eligibility, on its own merits, which the former mode of election seemed to forbid. He thought it might be better, however, to refer the eventual appointment to the Legislature than to the Senate, and to confine it to a smaller number than five of the candidates. The eventual election by the Legislature would not open cabal anew, as it would be restrained to certain designated objects of choice; and as these must have had the previous sanction of a number of the States; and if the election be made as it ought, as soon as the votes of the Electors are opened, and it is known that no one has a majority of the whole, there can be little danger of corruption. Another reason for preferring the Legislature to the Senate in this business was, that the House of Representatives will be so often changed as to be free from the influence, and faction, to which the permanence of the Senate may subject that branch.

Mr. RANDOLPH preferred the former mode of constituting the Executive; but if the change was to be made, he wished to know why the eventual election was referred to the *Senate*, and not to the Legislature? He saw no necessity for this, and many objections to it. He was apprehensive, also, that the advantage of the eventual appointment would fall into the hands of the States near the seat of government.

Mr. GOUVERNEUR MORRIS said the *Senate* was preferred because fewer could then say to the President, "You owe your appointment to us." He thought the President would not depend so much on the Senate for his reappointment, as on his general good conduct.

The further consideration of the Report was postponed, that each member might take a copy of the remainder of it. . . .

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In Convention, – Mr. KING^[17] and Mr. GERRY^[18] moved to insert in the fourth clause of the Report, after the words, “may be entitled in the Legislature,” the words following: “But no person shall be appointed an Elector who is a member of the Legislature of the United States, or who holds any office of profit or trust under the United States”; which passed, *nem. con.*

Mr. GERRY proposed, as the President was to be elected by the Senate out of the five highest candidates, that if he should not at the end of his term be re-elected by a majority of the Electors, and no other candidate should have a majority, the eventual election should be made by the Legislature. This, he said, would relieve the President from his particular dependence on the Senate for his continuance in office.

Mr. KING liked the idea, as calculated to satisfy particular members, and promote unanimity; and as likely to operate but seldom.

Mr. READ^[19] opposed it; remarking, that if individual members were to be indulged, alterations would be necessary to satisfy most of them.

Mr. WILLIAMSON espoused it, as a reasonable precaution against the undue influence of the Senate.

Mr. SHERMAN liked the arrangement as it stood, though he should not be averse to some amendments. He thought, he said, that if the Legislature were to have the eventual appointment, instead of the Senate, it ought to vote in the case by States, – in favor of the small States, as the large states would have so great an advantage in nominating the candidates.

Mr. GOUVERNEUR MORRIS thought favorably of Mr. GERRY’S proposition. It would free the President from being tempted, in naming to offices, to conform to the will of the Senate, and thereby virtually give the appointments to office to the Senate.

Mr. WILSON said, that he had weighed carefully the Report of the Committee for remodeling the constitution of the Executive; and on combining it with other parts of the plan, he was obliged to consider the whole as having a dangerous tendency to aristocracy; as throwing a dangerous power into the hands of the Senate. They will have, in fact, the appointment of the President, and, through his dependence on them, the virtual appointment to offices; among others, the officers of the Judiciary department. They are to make treaties; and they are to try all impeachments. In allowing them thus to make the Executive and Judiciary appointments, to be the court of impeachments, and to make treaties which are to be laws of the land, the Legislative, Executive, and Judiciary powers are all blended in one branch of the Government. The power of making treaties involves the case of subsidies, and here, as an additional evil, foreign influence is to be dreaded. According to the plan as it now stands, the President will not be the man of the people, as he ought to be; but the minion of the Senate. He cannot even appoint a tide-waiter^[20] without the Senate. He had always thought the Senate too numerous a body for making appointments to office. The Senate will, moreover, in all probability, be in constant session. They will have high salaries. And with all these powers, and the President in their interest, they will depress the other branch of the Legislature, and aggrandize themselves in proportion. Add to all this,



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that the Senate, sitting in conclave, can by holding up to their respective States various and improbable candidates, contrive so to scatter their votes, as to bring the appointment of the President ultimately before themselves. Upon the whole, he thought the new mode of appointing the President, with some amendments, a valuable improvement; but he could never agree to purchase it at the price of the ensuing parts of the Report, nor befriend a system of which they make a part.

Mr. GOUVERNEUR MORRIS expressed his wonder at the observations of Mr. WILSON, so far as they preferred the plan in the printed Report to the new modification of it before the House; and entered into a comparative view of the two, with an eye to the nature of Mr. WILSON'S objections to the last. By the first, the Senate, he observed, had a voice in appointing the President out of all the citizens of the United States; by this they were limited to five candidates, previously nominated to them, with a probability of being barred altogether by the successful ballot of the Electors. Here, surely was no increase of power. They are now to appoint Judges, nominated to them by the President. Before, they had the appointment without any agency whatever of the President. Here again was surely no additional power. If they are to make treaties, as the plan now stands, the power was the same in the printed plan. If they are to try impeachments, the Judges must have been triable by them before. Wherein, then, lay the dangerous tendency of the innovations to establish an aristocracy in the Senate? As to the appointment of officers, the weight of sentiment in the House was opposed to the exercise of it by the President alone; though it was not the case with himself. If the Senate would act as was suspected, in misleading the States into a fallacious disposition of their votes for a President, they would, if the appointment were withdrawn wholly from them, make such representations in their several States where they have influence, as would favor the object of their partiality.

Mr. WILLIAMSON, replying to Mr. MORRIS, observed, that the aristocratic complexion proceeds from the change in the mode of appointing the President, which makes him dependent on the Senate.

Mr. CLYMER^[21] said, that the aristocratic part, to which he could never accede, was that, in the printed plan, which gave the Senate the power of appointing to offices.

Mr. HAMILTON^[22] said, that he had been restrained from entering into the discussions, by his dislike of the scheme of government in general; but as he meant to support the plan to be recommended, as better than nothing, he wished in this place to offer a few remarks. He liked the new modification, on the whole, better than that in the printed Report. In this, the President was a monster, elected for seven years, and ineligible afterwards; having great powers in appointments to office; and continually tempted, by this constitutional disqualification, to abuse them in order to subvert the Government. Although he should be made re-eligible, still, if appointed by the Legislature, he would be tempted to make use of corrupt influence to be continued in office. It seemed peculiarly desirable, therefore, that some other mode of election should be devised. Considering the different views of different States, and the different districts, Northern, Middle, and Southern, he concurred with those who thought that the votes would not be centered, and that the appointment would consequently, in the present mode, devolve on the Senate. The nomination to offices will give great weight to the President. Here, then, is a mutual connection and influence, that will perpetuate the President, and aggrandize both him and the Senate. What is to be the remedy? He saw none better than to let the highest number of ballots, whether a



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majority or not, appoint the President. What was the objection to this? Merely that too small a number might appoint. But as the plan stands, the Senate may take the candidate having the smallest number of votes, and make him President.

Mr. SPAIGHT^[23] and Mr. WILLIAMSON moved to insert “seven,” instead of “four” years, for the term of the President.

On this motion, – New Hampshire, Virginia, North Carolina, aye, – 3; Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, Georgia, no, – 8.

Mr. SPAIGHT and Mr. WILLIAMSON then moved to insert “six;” instead of “four.”

On which motion, – North Carolina, South Carolina, aye, – 2; New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Georgia, no, – 9.

On the term “four” all the States were aye, except North Carolina, no.

On the question on the fourth clause in the Report, for appointing the President by Electors, down to the words, “entitled in the Legislature,” inclusive, – New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Georgia, aye, – 9; North Carolina, South Carolina, no, – 2.

It was moved, that the Electors meet at the seat of the General Government; which passed in the negative, – North Carolina only being, aye.

It was then moved to insert the words, “under the seal of the State,” after the word “transmit,” in the fourth clause of the Report; which was disagreed to; as was another motion to insert the words, “and who shall have given their votes,” after the word “appointed,” in the fourth clause of the Report, as added yesterday on motion of Mr. DICKINSON.^[24]

On several motions, the words, “in presence of the Senate and House of Representatives,” were inserted after the word “counted”; and the word “immediately,” before the word “choose”; and the words, “of the electors,” after the word “votes.”

Mr. SPAIGHT said, if the election by Electors is to be crammed down, he would prefer their meeting altogether, and deciding finally without any reference to the Senate; and moved, “that the Electors meet at the seat of the General Government.”

Mr. WILLIAMSON seconded the motion; on which all the States were in the negative, except North Carolina.

On motion, the words, “But the election shall be on the same day throughout the United States,” were added after the words, “transmitting their votes.”



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New Hampshire, Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, aye, – 8; Massachusetts, New Jersey, Delaware, no, – 3.

On the question on the sentence in the fourth clause, “if such number be a majority of that of the Electors appointed,” – New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, South Carolina, Georgia, aye, – 8; Pennsylvania, Virginia, North Carolina, no, – 3.

On a question on the clause referring the eventual appointment of the President to the Senate, – New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, ay, – 7; North Carolina, no. Here the call ceased.

Mr. MADISON, made a motion requiring two-thirds at least of the Senate to be present at the choice of a President.

Mr. PINCKNEY seconded the motion.

Mr. GORHAM thought it a wrong principle to require more than a majority in any case. In the present, it might prevent for a long time any choice of a President.

On the question moved by Mr. MADISON and Mr. PINCKNEY, – New Hampshire, Maryland, Virginia, North Carolina, South Carolina, Georgia, aye, – 6; Connecticut, New Jersey, Pennsylvania, Delaware, no, – 4; Massachusetts, absent.

Mr. WILLIAMSON suggested, as better than an eventual choice by the Senate, that this choice should be made by the Legislature, voting by States and not per capita.

Mr. SHERMAN suggested, “the House of Representatives,” as preferable to “the legislature”; and moved accordingly, to strike out the words, “The Senate shall immediately choose,” etc. and insert: “The House of Representatives shall immediately choose by ballot one of them for President, the members from each State having one vote.”

Colonel MASON liked the latter mode best, as lessening the aristocratic influence of the Senate.

On the motion of Mr. SHERMAN, – New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, aye, – 10; Delaware, no, – 1.

Mr. GOUVERNEUR MORRIS suggested the idea of providing that, in all cases, the President in office should not be one of the five candidates; but be only re-eligible in case a majority of the Electors should vote for him. (This was another expedient for rendering the President independent of the Legislative body for his continuance in office.)^[25]



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Mr. MADISON remarked, that as a majority of members would make a quorum in the House of Representatives, it would follow from the amendment of Mr. SHERMAN, giving the election to a majority of States, that the President might be elected by two States only, Virginia and Pennsylvania, which have eighteen members, if these States alone should be present.

On a motion, that the eventual election of President, in case of an equality of the votes of the Electors, be referred to the House of Representatives, – New Hampshire, Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, aye, – 7; New Jersey, Delaware, Maryland, no, – 3.

Mr. KING moved to add to the amendment of Mr. SHERMAN, “But a quorum for this purpose shall consist of a member or members from two-thirds of the States, and also of a majority of the whole number of the House of Representatives.”

Colonel MASON liked it, as obviating the remark of Mr. MADISON.

The motion, as far as “States,” inclusive, was agreed to. On the residue, to wit: “and also of a majority of the whole number of the House of Representatives,” it passed in the negative, – Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, aye, – 5; New Hampshire, New Jersey, Delaware, Maryland, South Carolina, Georgia, no, – 6.

The Report relating to the appointment of the Executive stands, as amended, as follows:

“He shall hold his office during the term of four years; and, together with the Vice President, chosen for the same term, be elected in the following manner:

“Each State shall appoint, in such manner as its Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives to which the state may be entitled in the Legislature.

“But no person shall be appointed an elector who is a member of the Legislature of the United States, or who holds any office of profit or trust under the United States.

“The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves; and they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the General Government, directed to the President of the Senate.

“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.

“The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot



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one of them for President; the representation from each State having one vote. But if no person have a majority, then from the five highest on the list the House of Representatives shall, in like manner, choose by ballot the President. In the choice of a President by the House of Representatives, a quorum shall consist of a member or members from two-thirds of the States, (and the concurrence of a majority of all the States shall be necessary to such choice.)* And in every case after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them the Vice President.

“The Legislature may determine the time of choosing the electors, and of their giving their votes; and the manner of certifying and transmitting their votes; but the election shall be on the same day throughout the United States.”

Adjourned.

* [Madison’s note]

This clause was not inserted on this day, but on the seventh of September.

FOOTNOTES

1. David Brearly, New Jersey
2. abbreviation of the Latin videlicet (namely)
3. The draft of the Constitution, with articles and sections, delivered by the Committee of Detail on August 6 is the document that the Brearly Committee is discussing. The delegates argued over the contents of the Committee of Detail Report throughout the month of August and settled the powers of Congress, the shape of the Judiciary, and the future of the slave trade. The creation of the presidency had not yet been settled, however; the main stumbling block was how to elect the president.
4. an abbreviation of nemine contradicente, Latin for “no one dissenting”
5. Nathaniel Gorham, Massachusetts
6. Roger Sherman, Connecticut
7. James Madison, Virginia
8. Gouverneur Morris, Pennsylvania
9. Edmund J. Randolph, Virginia
10. Charles Pinckney, South Carolina
11. George Mason, Virginia



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12. Pierce Butler, South Carolina
13. Hugh Williamson, North Carolina
14. Abraham Baldwin, Georgia
15. James Wilson, Pennsylvania
16. that is, when the people consider what the Convention proposes as the new constitution
17. Rufus King, Massachusetts
18. Elbridge Gerry, Massachusetts
19. George Read, Delaware
20. a lower ranking customs officer who works at the docks
21. George Clymer, Pennsylvania
22. Alexander Hamilton, New York
23. Richard D. Spaight, North Carolina
24. John Dickinson, Delaware
25. The sentence inside the parentheses is Madison's explanatory comment.



CORE READING 2: FEDERALIST 68 | MARCH 14, 1788

SOURCE: <https://teachingamericanhistory.org/document/federalist-no-68/>

THE mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure or which has received the slightest mark of approbation from its opponents. The most plausible of these, who has appeared in print, has even deigned to admit that the election of the President is pretty well guarded. I venture somewhat further, and hesitate not to affirm that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages the union of which was to be desired.

It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at the particular conjuncture.

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

It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate who was to have so important an agency in the administration of the government as the President of the United States. But the precautions which have been so happily concerted in the system under consideration promise an effectual security against this mischief. The choice of *several* to form an intermediate body of electors will be much less apt to convulse the community with any extraordinary or violent movements than



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the choice of *one* who was himself to be the final object of the public wishes. And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.

Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort with the most provident and judicious attention. They have not made the appointment of the President to depend on any pre-existing bodies of men who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust all those who from situation might be suspected of too great devotion to the President in office. No senator, representative, or other person holding a place of trust or profit under the United States can be of the numbers of the electors. Thus without corrupting the body of the people, the immediate agents in the election will at least enter upon the task free from any sinister bias. Their transient existence and their detached situation, already taken notice of, afford a satisfactory prospect of their continuing so, to the conclusion of it. The business of corruption, when it is to embrace so considerable a number of men, requires time as well as means. Nor would it be found easy suddenly to embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives which, though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.

Another and no less important desideratum was that the executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official



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consequence. This advantage will also be secured, by making his re-election to depend on a special body of representatives, deputed by the society for the single purpose of making the important choice.

All these advantages will happily combine in the plan devised by the convention; which is, that the people of each State shall choose a number of persons as electors, equal to the number of senators and representatives of such State in the national government who shall assemble within the State, and vote for some fit person as President. Their votes, thus given, are to be transmitted to the seat of the national government, and the person who may happen to have a majority of the whole number of votes will be the President. But as a majority of the votes might not always happen to center on one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that, in such a contingency, the House of Representatives shall select out of the candidates who shall have the five highest number of votes the man who in their opinion may be best qualified for the office.

The process of election affords a moral certainty that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the Constitution by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration. Though we cannot acquiesce in the political heresy of the poet who says: "For forms of government let fools contest-That which is best administered is best,"-yet we may safely pronounce that the true test of a good government is its aptitude and tendency to produce a good administration.



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The Vice-President is to be chosen in the same manner with the President; with this difference, that the Senate is to do, in respect to the former, what is to be done by the House of Representatives, in respect to the latter.

The appointment of an extraordinary person, as Vice-President, has been objected to as superfluous, if not mischievous. It has been alleged that it would have been preferable to have authorized the Senate to elect out of their own body an officer answering that description. But two considerations seem to justify the ideas of the convention in this respect. One is that to secure at all times the possibility of a definite resolution of the body, it is necessary that the Presidents should have only a casting vote. And to take the senator of any State from his seat as senator, to place him in that of President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote.

The other consideration is that as the Vice-President may occasionally become a substitute for the President, in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one apply with great if not with equal force to the manner of appointing the other. It is remarkable that in this, as in most other instances, the objection which is made would lie against the constitution of this State. We have a Lieutenant-Governor, chosen by the people at large, who presides in the Senate, and is the constitutional substitute for the Governor, in casualties similar to those which would authorize the Vice-President to exercise the authorities and discharge the duties of the President.



SUPPLEMENTARY READING 1: THE ELECTORAL COLLEGE | OCTOBER 18, 2023

The Electoral College

Americans do not vote directly for the President of the United States. Instead, they vote for electors, who then vote for the president and vice-president. This process is called the Electoral College. The process occurs in three stages, the selection of the presidential electors; the vote of the electors for the President and Vice-President; and the counting of the electoral votes.

Choosing Electors

Each state has the same number of electors as the combined number of its Representatives in the House of Representatives and its two Senators. The number of representatives each state has depends on its population. Delaware, for example, with a population of a little over a million people has three electoral votes because it has one Representative in Congress and two Senators. California, which has a population of almost forty million, has fifty four electoral votes because it has fifty two Representatives and two Senators. According to the [twenty-third Amendment](#) to the Constitution, the District of Columbia, the national capital, has three electoral votes, even though it has neither a voting member of the House of Representatives, nor Senators.

To win the electoral College vote, a candidate must receive 270 votes, which is a majority of the 538 available votes.

In each state, the political parties who have candidates running for president and vice-president choose electors at some point before the general election, the election at which the people of each state vote for president. The process for choosing electors [varies according to state laws](#) because the U.S. Constitution, Article II, section 1, specifies that each state will appoint its electors “in such Manner as the Legislature” of the state “may direct.” (In addition to these state laws, a number of [constitutional provisions and federal laws](#) govern aspects of Electoral College procedures.) The electors chosen are called a slate of electors. When the people in each state vote for a presidential candidate, they are voting for his or her slate of electors.

The Vote of the Electors

Following the general election, the Governor of each state (and the mayor of the District of Columbia) signs what is called a Certificate of Ascertainment. The Certificate must be ready at least six days before the electors meet. The certificate lists the slates of electors for each candidate, the votes each slate received, and specifies the slate chosen as the state’s electors for that election according to which



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candidate received the most votes. Here is an example of a Certificate of Ascertainment [[link to Oregon 2012 Cof A](#)].

Article II, section 1 of the U.S. Constitution states that Congress determines the day on which the electors cast their votes. Where they cast them is up to the state legislatures. The votes are cast on the first Tuesday after the second Wednesday in December after the general election, usually in the state capital. Neither the U.S. Constitution nor any federal law requires that the electors cast their votes according to the popular vote in their state. The vote of the electors is recorded on a document called the Certificate of Vote. The Certificate of Vote contains a list for the President and another for the Vice President of all the electors who voted for each. All the electors sign the Certificate of Vote, which is then attached to an original of the state's Certificate of Ascertainment. Both documents are then sealed up and sent to the National Archive.

In 37 states, the state official in charge of overseeing the state electoral process is the Secretary of State. The other states except one have a Board of Elections or a Commissioner of Elections who does this. In one state, Utah, the Lieutenant Governor is the chief election official.

Counting the Electoral Votes

Electoral votes are counted at a Joint Session of Congress (the House and Senate meeting together) that takes place on January 6. This day is determined by federal law. The Vice President of the United States, acting in his or her role as the President of the Senate, presides over the counting and announces who has been elected president and vice-president.

Key Dates for the 2024 Presidential Election

November 5, 2024 Election Day

By December 11, 2024 Electors Appointed – Certificate of Ascertainment

December 17, 2024 Electors vote – Certificate of Vote

December 25, 2024 Electoral votes delivered to the President of the Senate and the Federal Archivist no later than the fourth Wednesday in December

January 6, 2025 Congress counts the vote

January 20, 2025 Inauguration Day

What Happens in Contested Elections?

Disputes over who won an election may occur in the states or at the Joint Session of Congress when the electoral vote count takes place. Some states have laws that require a recount if the election is particularly close or if, under certain circumstances, a candidate requests one. Candidates may go to



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state or federal court depending on whether they think the election process violated state or federal law or state or federal constitutional provisions. In 2000, the dispute over the election reached the [Supreme Court](#). In 2020, Arizona's Certificate of Ascertainment included information about court cases over the 2020 election that were decided or still pending. [[link to AZ Cof A](#)]

When the Joint Session of Congress meets to count the electoral votes and declare who the next President and Vice-President will be, any objections to the electoral votes of the states must be made by at least one-fifth of the members of the House and one-fifth of the Senators.

If an objection has that level of support, the House and Senate meet separately to consider the objections. According to federal law, Representatives and Senators may consider only two objections to the electoral vote: the electors were not certified legally by a Certificate of Ascertainment or the vote of an elector was irregular in some way. An objection is sustained only if both the House and the Senate vote to do so.

If objections to the electoral vote leaves no Presidential candidate with at least 270 electoral votes, or if this is the result of the election, then according to the [12th Amendment](#) to the Constitution, the House of Representatives decides the Presidential election. The House chooses from among the top three vote getters in the Electoral College by majority vote. Each state has one vote. The District of Columbia would not have a vote because it does not have a voting member in the House.

If no Vice Presidential candidate wins at least 270 electoral votes, then according to the 12th Amendment the Senate elects the Vice President. The Senate chooses between the two top vote getters by majority vote. Each Senator has a vote.

Why does the Electoral College exist?

The Electoral College process gives roles to the states and to the federal government. It thus respects the [federal character](#) of the United States, in which both the states and the federal government have certain authorities and responsibilities. In the [Constitutional Convention](#), which established the Electoral College process, the delegates saw various advantages and disadvantages to the system they devised.



**SUPPLEMENTARY READING 2: IN DEFENSE OF THE ELECTORAL COLLEGE, HERBERT
STORING | JULY 22, 1977**

SOURCE: This is a statement Storing submitted to the Subcommittee on the Constitution of the Senate Judiciary Committee addressing a proposal to replace the electoral college with the direct popular election of presidents. Storing testified before the committee on July 22, 1977.

Statement on Proposals for Direct Popular Election of the President of the United States.

The most worrisome aspect of the movement to adopt some form of direct popular election of the president of the United States is, in my view, the erroneous understanding of American government on which it is based. That erroneous understanding, which I shall call "simplistic democracy," has for our present understanding, which I shall call "simplistic democracy," has for our present purposes two main elements. Simplistic democracy assumes, first, that government is good so far as it is responsive to popular wishes: the business of democratic government is simply to do whatever the people want it to do. Not all advocates of direct popular election of the president hold this view in all its starkness, but it is the underlying premise. (I should also say that it is the premise of many opponents of direct popular election, which is one of the reasons why many of those opponents have had a hard time explaining their opposition.) The second element of simplistic democracy, and the one directly in-volved here, is the notion that in a democratic election the only thing that counts is that the person wanted by the most people should be elected to office. For any other consideration to affect the outcome is unfair, irrational, undemocratic.

Clearly there is a great deal to be said for these principles. Government *should* be responsive. And elections *do* rest on an assumption that the electors should choose whom they want for their representatives. Any gross departure from either of these principles would surely and properly be resisted by all Americans. The question, however, is not whether there is truth in these principles but whether they are *sufficient*. And in fact the great architectural principle of the American government as it was conceived by its framers is precisely that responsiveness to public opinion is a necessary but not a sufficient condition of good government. The chief danger of the movement for direct popular election of the president is its tendency to weaken further our already loose grasp on this vital principle.

Mitigated Popular Government

To say that democratic responsiveness is necessary but not sufficient implies that government ought to be responsive to public opinion in general and over time but that it need not be - indeed that it should not be - merely responsive. A merely responsive government is likely to tend toward instability, ignorance, and indifference to individual and minority rights. The government the American framers built was



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erected on public opinion, but that opinion was to be checked, guided, and channeled when appropriate by the constitutional system and the officers serving under it. The aim was to provide for a government that would be competent, stable, and just, as well as responsive.

I want to make two points about this great design of the American framers, one a broad and very important background consideration and the other directly pertinent to the question of the method of presidential election. The background point is that this notion of a "mitigated" popular government, as James Madison called it, is itself altogether consistent with democracy: it is not something foisted on the people from outside. Just as any one of us is likely to arrange his own affairs so that circumstances will help him resist his own vices or deficiencies (like most of you, I suppose, I deliberately accept specific deadlines as ways of anticipating and dealing with my probable future laziness and procrastination), so a people, as Madison explained, might anticipate its own probable future flightiness or foolishness and try to build into its constitution institutions to counteract those tendencies. The "antidemocratic" or nondemocratic devices in our Constitution are democracy's own inventions of prudence to deal with its own harmful tendencies. These ideas are not very familiar to us today, so influenced are we all by doctrines of simplistic democracy. Yet my own experience (teaching undergraduates, for example) is that their good sense is obvious once they are explained.

Of course, these broad considerations do not settle the question of direct popular election of the president. They do suggest, however, that an institution or a procedure of government should not be judged merely in terms of its responsiveness or nonresponsiveness to public opinion. That is a very important point in the present context, because the beginning and the end of the case for direct popular election are the fact that under the present system a man might be elected president even though he had fewer popular votes than his opponent. That fact *in itself* is widely thought to demonstrate the evils of the present system. (That is precisely the initial assumption of my undergraduates until they begin to think through the question and see that it is a good deal more complicated than that.) Such a possibility should surely be carefully watched, especially if it seems likely to occur with some frequency (which it does not); it is not, however, the end of the story but the bare beginning.

The case *for* direct popular election of the president collapses, it seems to me, once the dangerous shallowness of the doctrine of simplistic democracy is exposed and understood. That in itself is reason enough to leave a working and reasonably satisfactory system in place; but is there really a case to be made *for* the electoral college system? There is, indeed; but it is a *complex* case, and for that reason alone it is distasteful to those who seek to solve our political problems with a single stroke of reform.

To see the case for the present constitutional system of electing the president requires a shift in point of view from that usually taken by the critics of the present system. They tend to view elections in terms of *input* - in terms of the right to vote, equal weight of votes, who in fact votes, and the like. The framers thought it at least as important to consider the *output* of any given electoral system. What kind of men does it bring to office? How will it affect the working of the political system? What is its bearing on the political character of the whole country?



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There is much room for disagreement and uncertainty about the results for our political system of a change to direct popular election of the president. I would surely not pretend that my very brief sketch is comprehensive or conclusive. What I want to stress, however, is that no proposal for electoral reform can be intelligently considered by looking at only one end of the electoral process. Elections are means to some *ends*, and some attempt has to be made to establish what the ends are and to compare different methods of election in the light of those ends. The *output* of any given method of election is at least as important as the *input*.

The paradox of the constitutional system for electing the president is that while it does not work as the framers intended it to work, it nevertheless achieves to a remarkable extent the ends the framers wanted to achieve. Despite the framers' pride in their invention of the electoral college system-and it was one of the least criticized parts of the Constitution-it may have been a bit too clever and the first stage too loosely tied to popular elections. (If the state legislatures today were to start choosing electors themselves, or assigning that task to, say, college professors, as they might constitutionally do, I would start agitating for constitutional amendment.) But the framers surely saw very dearly what such a system of elections should do; and the system as it works today does those things rather well. It does them largely through our system of political parties; and it is another paradox that while the framers opposed parties as they knew them, the American party system today is one of their most remarkable achievements.

Once one turns to the question of output, to the ends that a method of election should aim for (and that requires putting aside the blinders of simplistic democracy), there is likely to be fairly wide, though not universal, agreement. The ends of any system for electing the president, as the framers saw them, were something like the following: (1) it should provide for significant participation by the people at large; (2) it should foster political stability and avoid the excesses of partisanship and factionalism which tend to form around important elections; (3) it should give some special place of influence to some individuals who are specially informed about and committed, to the process of government; (4) it should recognize that this is a nation of states and give some weight to the interests of states as such; (5) it should leave the president independent of any other institution of the government; and (6) it should, of course, tend to produce presidents of respectable character and intelligence. It is striking how little concern there is among the proponents of direct popular elections with these objectives. There is little or no argument that the individuals chosen under a system of direct popular elections would be better presidents; that policies would be more intelligent; that presidential behavior would be more prudent or equitable; or that American politics as a whole would be improved in stability, moderation, competence, or justice.

And, on the other side, it is fairly obvious that our present system does secure these goals to a reasonable degree. This seems to be connected with our present two-party system, and it is generally agreed - even among advocates of direct popular election of the president - that the main elements of our present party system should be maintained. There are many issues here, but I pass them over to come to



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what seems to be the vital question, about which there is serious disagreement. That is whether the American two - party system, which underlies most of these benefits, is in any way dependent on the way we now elect our president.

The American Two-Party System

This crucial question is by no means easy to answer. It would take more space than I have to give even an adequate sketch of the issue. On the one side the argument is that by giving the popular vote-winner in any state all the electoral votes of that state (which is of course not constitutionally required but is and is likely to remain the almost universal practice), the electoral college system tends to freeze out minority parties (who cannot hope to win a state's whole electoral vote). The system effectively creates a powerful incentive to drive all interests into one of two great parties, each of which can realistically hope to win in the "all or nothing" electoral vote game if it makes a broad enough appeal. Without this practice, the argument goes, there would be much more incentive for minorities to strike out on their own and much less incentive for the two great parties to cast their nets very widely; and there would, in consequence, be a decay of the two-party system.

Proponents of direct popular election contend, on the other side, that the basic shape of American politics is determined by forces far more fundamental than the way we elect the president. They refer to the long tradition of two-party politics. They point out that the fact that the presidency is a single office itself tends to discourage the formation of minority parties in presidential politics; minorities could no more hope to win the presidency as independent parties under direct popular election than they can today-perhaps (remembering the George Wallace phenomenon) even less so.

It is not only difficult to weigh these and similar arguments. It is also difficult to know how various modes of direct popular election would affect the pattern of American politics. Presumably, for example, a major reason for requiring a 40 percent plurality of popular vote to win is to discourage minority parties. Yet it is not entirely clear whether this would in fact discourage minority parties (on the theory that they cannot hope to get 40 percent of the vote) or encourage them (on the theory that by remaining independent they may be able to influence a probable runoff election). It should also be observed that many other forces in the electoral system-public financing, for example - may be as important or more important than the electoral college versus direct popular election issue in determining the basic character of American politics in the next decade.

Yet one thing seems reasonably clear. To the extent that direct popular election does have an effect, it is likely to be in the direction of weakening or further weakening our traditional two-party system. The tendency of minority groups to go directly into presidential politics, either in hopes of influencing a runoff election, or with the intention of bargaining for other advantages, or even to provide an organizational focus for interest-group activity of a fundamentally nonelectoral kind, seems very likely to increase. Similarly, the role of the states, and specifically state party organizations, already weakened in various respects, seems likely to be further undermined. Direct popular election of the president would foster a more open, volatile system of national politics-one less rooted in state political organizations, less influenced by the party professionals or quasi-professionals, and dominated by shifting personal alliances of nationally oriented personalities, ideologues, interest-group spokesmen,



and media specialists. We could anticipate a political system pulled, in the one direction toward fragmentation and, in the other direction, toward plebiscitary unity rooted not in party organization but in an individual president's personality and personal staff.

Governmental Legitimacy

All of this seems to most proponents of direct popular election to be largely beside the point. What we are dealing with, they contend, is not so much a question of achieving certain political ends but a question of legitimacy, a question of the principle that ties the people to their government and continues to persuade them that government is entitled to obedience and support, if not affection.

The trump card in the hand of the proponents of direct popular election of the president is the possibility that a man might receive a majority of the electoral votes who had nevertheless received fewer popular votes than an opponent. This has never happened in this century (leaving aside the arguable case of 1960), but it could happen, as it did in the nineteenth century. If the United States survives, and its system for electing the president remains intact, it probably will happen again.

It is worth reiterating at this point that the constitutional system for electing the president, as it was conceived and as it works today, is basically a system of popular election, though mitigated in various ways for various purposes. While it is very hard to know what effect direct popular election of the president would have had, or would have in the future, on the whole shape of American politics and on the candidates and the issues involved (itself a good reason for being skeptical about the proposed amendments), there is no doubt that the broad result of our present system of electing the president has in fact been to choose the man desired by most of the voters. Any solid exceptions to this - as Benjamin Harrison's choice over Grover Cleveland in 1888; any probable exceptions to it-as John F. Kennedy' s choice over Richard Nixon in 1960; any future exceptions to it - of the kind warned against by the proponents of direct election - can be only that, exceptions. Indeed, these have been rare and will surely continue to be rare exceptions to an electoral system that has on the whole reflected and will continue to reflect the choice of the American people.

To the proponents of direct popular election, however, these exceptions are unacceptable. Part of the reason for this is the simplistic democrat's blindness to electoral considerations other than mere responsiveness. But another part is a fear that even a single occurrence of this exceptional result of the election of a president with fewer popular votes than his opponent would shake the whole system to its foundation, or at least introduce a crack in popular confidence that would be deeply harmful. I doubt it. Unless there were other reasons for widespread loss of confidence, I think the system would weather such a tremor without much trouble. I would expect a flurry of newspaper editorials, some revival of doctrines of simplistic democracy, another push for the (I trust) yet unpassed constitutional amendment for direct popular election of the president; but on the whole I think politics would continue much as usual. I would be surprised if the defeated candidate were to make any serious attempt to undermine his opponent's constitutional authority; I would imagine instead that he would use his popular plurality as a major weapon in his next campaign. I think it is shallow and misleading to portray such an event as the probable downfall of governmental legitimacy in the United States. Legitimacy is, as wise politicians and political thinkers have always known, a complex and mysterious force, not necessarily determined by electoral success, as the cases of Richard Nixon and Gerald Ford remind us.



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Legitimacy is considerably more complex than numbers of votes. It depends on those qualities the founders tried to build into the American system and that we have on the whole enjoyed: stability, adequate representation of our diversity, a recognition of our federal character, a capacity to govern well, as well as popular responsive-ness. In no one of these respects is the present system of electing the president perfect; the main reason for that is that they are to some extent in tension. We are hying to have the best of several worlds-- the world of political stability, the world of social diversity, the world of governmental confidence, as well as the world of democratic responsiveness. The proponents of direct popular election seem bent on resolving this complex set of worlds into the single one of numerical preponderance.

That world, the world of simplistic democracy, would be, I am confident, a good deal less satisfactory than what we have now. It would also tum out to be a good deal less simple than it seems to be on the surface. Would a series of extremely close popular votes, in contrast with our history of substantial electoral majorities, foster legitimacy? Will we have to institute compulsory voting to secure numerical legitimacy? Does the doctrine of numerical legitimacy have any adequate answer to the complaint of the voter who is always on the losing side? And does the doctrine of numerical legitimacy not logically imply majoritarianism? Yet I know of no serious proposal for direct popular election of the president that would require a majority. Does not any form of election by mere plurality, however, leave open the possibility - indeed under our circumstances the probability - that the victor will be someone who was not preferred by most of the voters? How solid, on numerical grounds, would be the legitimacy of such a president? And what of the vast problems of the inevitable runoff elections? Would the close results, the public bickering and bargaining, the decline in participation in runoff elections be likely to reconcile all parts of the public to the final result and to the whole political system better than does our present system of the electoral college, managed by our great, aggregating political parties? I doubt it.

The case against the present constitutional system for electing the president rests upon a simplistic view of American democracy that is contrary to our traditions and dangerously shallow. It tends to ignore or to downgrade all the characteristics other than popular responsiveness that our government needs. When viewed in terms of results, as well as in terms of capacity to attract the respect and loyalty of the American people, the existing system, while surely imperfect, appears to be far superior to any form of direct popular election of the president.



SUPPLEMENTARY READING 3: FAITHLESS ELECTORS | 2020

Chiafalo v. Washington
2020

Justice Kagan delivered the opinion of the Court.

Every four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns. Those few “electors” then choose the President.

The States have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. With two partial exceptions, every State appoints a slate of electors selected by the political party whose candidate has won the State’s popular vote. Most States also compel electors to pledge in advance to support the nominee of that party. This Court upheld such a pledge requirement decades ago, rejecting the argument that the Constitution “demands absolute freedom for the elector to vote his own choice.” *Ray v. Blair*, [343 U. S. 214](#), 228 (1952).

Today, we consider whether a State may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State’s popular vote. We hold that a State may do so....

Our Constitution’s method of picking Presidents emerged from an eleventh-hour compromise....

The provision [the Constitutional Convention delegates] approved about presidential electors is fairly slim. Article II, §1, cl. 2 says:

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”....

Within a few decades, the party system also became the means of translating popular preferences within each State into Electoral College ballots. In the Nation’s earliest elections, state legislatures mostly picked the electors, with the majority party sending a delegation of its choice to the Electoral College. By 1832, though, all States but one had introduced popular presidential elections....At first, citizens voted for a slate of electors put forward by a political party, expecting that the winning slate would vote for its party’s presidential (and vice presidential) nominee in the Electoral College. By the early 20th century, citizens in most States voted for the presidential candidate himself; ballots increasingly did not even list the electors....After the popular vote was counted, States appointed the electors chosen by the party whose presidential nominee had won statewide, again expecting that they would vote for that candidate in the Electoral College.

In the 20th century, many States enacted statutes meant to guarantee that outcome—that is, to prohibit so-called faithless voting. Rather than just assume that party-picked electors would vote for their party’s winning nominee, those States insist that they do so. As of now, 32 States and the District of Columbia have such statutes on their books. They are typically called pledge laws because most demand that electors take a formal oath or pledge to cast their ballot for their party’s presidential (and vice presidential) candidate. Others merely impose that duty by law. Either way, the statutes work to ensure that the electors vote for the candidate who got the most statewide votes in the presidential election.



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Most relevant here, States began about 60 years ago to back up their pledge laws with some kind of sanction. By now, 15 States have such a system. Almost all of them immediately remove a faithless elector from his position, substituting an alternate whose vote the State reports instead. A few States impose a monetary fine on any elector who flouts his pledge.

Washington is one of the 15 States with a sanctions- backed pledge law designed to keep the State's electors in line with its voting citizens....At the time relevant here, the punishment was a civil fine of up to \$1,000. See §29A.56.340 (2016).

This case involves three Washington electors who violated their pledges in the 2016 presidential election. That year, Washington's voters chose Hillary Clinton over Donald Trump for President. The State thus appointed as its electors the nominees of the Washington State Democratic Party. Among those Democratic electors were petitioners Peter Chiafalo, Levi Guerra, and Esther John (the Electors). All three pledged to support Hillary Clinton in the Electoral College. But as that vote approached, they decided to cast their ballots for someone else....the State fined the Electors \$1,000 apiece for breaking their pledges to support the same candidate its voters had.

The Electors challenged their fines in state court, arguing that the Constitution gives members of the Electoral College the right to vote however they please....

Article II, §1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint.⁴ As noted earlier, each State may appoint electors "in such Manner as the Legislature thereof may direct." Art. II, §1, cl. 2; see *supra*, at 2. This Court has described that clause as "conveying the broadest power of determination" over who becomes an elector. *McPherson v. Blacker*, [146 U. S. 1](#), 27 (1892).⁵ And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect. A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period. Or more substantively, a State can insist (as *Ray* allowed) that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote. See *Ray*, 343 U. S., at 227 (A pledge requirement "is an exercise of the state's right to appoint electors in such manner" as it chooses). Or—so long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State's appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington's.

And nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington does. The Constitution is barebones about electors. Article II includes only the instruction to each State to appoint, in whatever way it likes, as many electors as it has Senators and Representatives (except that the State may not appoint members of the Federal Government). The [Twelfth Amendment](#) then tells electors to meet in their States, to vote for President and Vice President separately, and to transmit lists of all their votes to the President of the United States Senate for counting. Appointments and procedures and . . . that is all. See *id.*, at 225....

The Electors argue that three simple words stand in for more explicit language about discretion. Article II, §1 first names the members of the Electoral College: "electors." The [Twelfth Amendment](#) then says that electors shall "vote" and that they shall do so by "ballot." The "plain meaning" of those terms, the Electors say, requires electors to have "freedom of choice." Brief for



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Petitioners 29, 31. If the States could control their votes, “the electors would not be ‘Electors,’ and their ‘vote by Ballot’ would not be a ‘vote.’ ” *Id.*, at 31.

But those words need not always connote independent choice. Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he “votes” or fills in a “ballot.” In those cases, the choice is in someone else’s hands, but the words still apply because they can signify a mechanical act. Or similarly, suppose in a system allowing proxy voting (a common practice in the founding era), the proxy acts on clear instructions from the principal, with no freedom of choice. Still, we might well say that he cast a “ballot” or “voted,” though the preference registered was not his own. For that matter, some elections give the voter no real choice because there is only one name on a ballot (consider an old Soviet election, or even a down-ballot race in this country). Yet if the person in the voting booth goes through the motions, we consider him to have voted. The point of all these examples is to show that although voting and discretion are usually combined, voting is still voting when discretion departs. Maybe most telling, switch from hypotheticals to the members of the Electoral College. For centuries now, as we’ll later show, almost all have considered themselves bound to vote for their party’s (and the state voters’) preference.... Yet there is no better description for what they do in the Electoral College than “vote” by “ballot.” And all these years later, everyone still calls them “electors”—and not wrongly, because even though they vote without discretion, they do indeed elect a President.

The Electors and their *amici* object that the Framers using those words expected the Electors’ votes to reflect their own judgments.... Hamilton praised the Constitution for entrusting the Presidency to “men most capable of analyzing the qualities” needed for the office, who would make their choices “under circumstances favorable to deliberation.” *The Federalist* No. 68, p. 410 (C. Rossiter ed. 1961). So too, John Jay predicted that the Electoral College would “be composed of the most enlightened and respectable citizens,” whose choices would reflect “discretion and discernment.” *Id.*, No. 64, at 389.

But even assuming other Framers shared that outlook, it would not be enough. Whether by choice or accident, the Framers did not reduce their thoughts about electors’ discretion to the printed page. All that they put down about the electors was what we have said: that the States would appoint them, and that they would meet and cast ballots to send to the Capitol. Those sparse instructions took no position on how independent from—or how faithful to—party and popular preferences the electors’ votes should be. On that score, the Constitution left much to the future. And the future did not take long in coming. Almost immediately, presidential electors became trusty transmitters of other people’s decisions....

“Long settled and established practice” may have “great weight in a proper interpretation of constitutional provisions.” *The Pocket Veto Case*, [279 U. S. 655](#), 689 (1929). As James Madison wrote, “a regular course of practice” can “liquidate & settle the meaning of” disputed or indeterminate “terms & phrases.” Letter to S. Roane (Sept. 2, 1819), in *8 Writings of James Madison* 450 (G. Hunt ed. 1908); see *The Federalist* No. 37, at 225. The Electors make an appeal to that kind of practice in asserting their right to independence. But “our whole experience as a Nation” points in the opposite direction.... Electors have only rarely exercised discretion in casting their ballots for President. From the first, States sent them to the Electoral College—as today Washington does—to vote for pre-selected candidates, rather than to use their own judgment. And electors (or at any rate, almost all of them) rapidly settled into that non-discretionary role....

Begin at the beginning—with the Nation’s first contested election in 1796. Would-be electors declared themselves for one or the other party’s presidential candidate. (Recall that in this election



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Adams led the Federalists against Jefferson’s Republicans. See *supra*, at 3.) In some States, legislatures chose the electors; in others, ordinary voters did. But in either case, the elector’s declaration of support for a candidate—essentially a pledge—was what mattered. Or said differently, the selectors of an elector knew just what they were getting—not someone who would deliberate in good Hamiltonian fashion, but someone who would vote for their party’s candidate. “[T]he presidential electors,” one historian writes, “were understood to be instruments for expressing the will of those who selected them, not independent agents authorized to exercise their own judgment.” Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 *Ariz. L. Rev.* 903, 911 (2017). And when the time came to vote in the Electoral College, all but one elector did what everyone expected, faithfully representing their selectors’ choice of presidential candidate....

Courts and commentators throughout the 19th century recognized the electors as merely acting on other people’s preferences....The electors, the Court noted, were chosen “simply to register the will of the appointing power in respect of a particular candidate.” *McPherson*, 146 U. S., at 36.

State election laws evolved to reinforce that development, ensuring that a State’s electors would vote the same way as its citizens....to remove any doubt, States began in the early 1900s to enact statutes requiring electors to pledge that they would squelch any urge to break ranks with voters. See *supra*, at 5. Washington’s law, penalizing a pledge’s breach, is only another in the same vein. It reflects a tradition more than two centuries old. In that practice, electors are not free agents; they are to vote for the candidate whom the State’s voters have chosen....

The Electors’ constitutional claim has neither text nor history on its side. Article II and the [Twelfth Amendment](#) give States broad power over electors, and give electors themselves no rights. Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule....



SUPPLEMENTARY READING 4: FLUNKING THE ELECTORAL COLLEGE | NOVEMBER 19, 2008

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On Dec. 15, the United States will endure a quadrennial ritual born in the economics and politics of slavery and the quill-pen era. Members of the Electoral College are scheduled to meet in each of the 50 states and the District of Columbia to formally choose the next president.

There is no real doubt about how the electors will vote, but it is disturbing that they have any role at all in making this vital choice in the 21st century. The Electoral College is more than just an antiquated institution: it actively disenfranchises voters and occasionally (think 2000) makes the candidate with fewer popular votes president. American democracy would be far stronger without it.

There is no reason to feel sentimental about the Electoral College. One of the main reasons the founders created it was slavery. The southern states liked the fact that their slaves, who would be excluded from a direct vote, would be counted as three-fifths of a white person when Electoral College votes were apportioned.

The founders also were concerned, in the day of the wooden printing press, that voters would not have enough information to choose among presidential candidates. It was believed that it would be easier for them to vote for local officials, whom they knew more about, to be electors. It is hard to imagine that significant numbers of voters thought they did not know enough about Barack Obama and John McCain by Election Day this year.

And, while these reasons for the Electoral College have lost all relevance, its disadvantages loom ever larger. To start, the system excludes many voters from a meaningful role in presidential elections. If you live in New York or Texas, for example, it is generally a foregone conclusion which party will win your state's electoral votes, so your vote has less meaning and it can feel especially meaningless if you vote on the losing side. On the other hand, if you live in Florida or Ohio, where the outcome is less clear, your vote has a greatly magnified importance.

Voters in small states are favored because Electoral College votes are based on the number of senators and representatives a state has. Wyoming's roughly 500,000 people get three electoral votes. California, which has about 70 times Wyoming's population, gets only 55 electoral votes.

The Electoral College also makes America seem more divided along blue-red lines than it actually is. If you look at an Electoral College map, California appears solidly blue and Alabama solidly red. But if you look at a map of the popular votes, you see a more nuanced picture. More than 4.5 million Californians voted for Mr. McCain (roughly as many votes as he got in Texas), while about 40 percent of voters in Alabama cast a ballot for Mr. Obama.



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One of the biggest problems with the Electoral College, of course, is that three times since the Civil War most recently, with George W. Bush in 2000 it has awarded the presidency to the loser of the popular vote. The president should be the candidate who wins the votes of the most Americans.

The best way to abolish the Electoral College is to amend the Constitution. Until that happens, a national popular vote movement is working to get states representing a majority of the electoral votes to agree to award their votes to the candidate who has the most votes nationally. That would effectively end the Electoral College. Several states, including New Jersey and Illinois, have already enacted popular vote laws, and others are considering it.

When the 2012 presidential election approaches, efforts to reform the electoral system will be viewed through a partisan prism, with a focus on which party they would help or hurt. With the next election still four years away, now is an ideal time to get serious about abolishing the Electoral College.