Scholar Exchange: Learning About National Elections

Briefing Document

INTERACTIVE CONSTITUTION RESOURCES

- Resources for Learning About National Elections

ESSENTIAL QUESTIONS

- What is the basic constitutional framework for elections in the United States?
- When do they happen, and why?
- What is the Electoral College, and how does it work?
- Why did the Framers create the Electoral College, and what were the arguments behind their decision?
- What was the Twelfth Amendment, and how did it alter the original Constitution's Electoral College system?
- How have the states implemented the Electoral College over time?
- What has the Supreme Court said about the Electoral College?
- What are the modern debates over the Electoral College?

INTRODUCTION TO AMERICAN ELECTIONS

Let's begin—as we always do when interpreting the Constitution—with the Constitution's text.

What does the Constitution say about elections, and why does it matter? When it comes to elections and voting, it's worth pausing on a series of constitutional provisions. Beginning with the Original Constitution, there are *four* main provisions addressing voting:

- **ARTICLE I, SECTION 2**: Sets qualification for voters in U.S. House elections (matches the qualifications for voters for the lower house of each state legislature). For its day, this is a fairly democratic provision—requiring states to elect national representatives with the same rules that apply to the most democratic component of each state government—its lower house.
- **ARTICLE I, SECTION 3**: Leaves the election of U.S. Senators to the state legislatures. (Revised by the Seventeenth Amendment.)
- **ARTICLE I, SECTION 4**: Leaves the time, place, and manner of elections to the state legislatures, but subject to regulation by Congress.
- **ARTICLE II, SECTION 1**: Sets up the Electoral College.

BIG TAKEAWAYS

First, the Original Constitution left elections and voting largely to the states. So, it's a story of federalism and state power. That's why elections for things like state Governors, state legislators, mayors, county legislatures, town councils, and school boards happen at different times in different places.

The Constitution left those decisions largely to the state and local governments themselves. So, some of your parents may be voting for Governors and school board members this year. And some of them may have to wait for another year.

Apart from important local elections like those for school board, some of the biggest races in 2021 include:

- Races for Governor in New Jersey and Virginia.
- And mayoral races in Boston, New York City, San Antonio, and Seattle.
- But there are races for countless other state and local government positions throughout the nation.

Second, the Original Constitution created different election timetables for different parts of the *national* government. Members of the U.S. House of Representatives are elected every *two* years. Members of the U.S. Senate are elected every *six* years—with only 1/3 of the Senate up for election at any time. The President is elected every *four* years. So, the President's term is in between those of the U.S. House (the shortest) and the U.S. Senate (the longest).

VOTING AMENDMENTS

Turning away from the Original Constitution, we see many constitutional amendments touching on elections and voting.

- **TWELFTH AMENDMENT**: Alters the Electoral College.
- **FOURTEENTH AMENDMENT***:*
    - Section 2 provides a mechanism for penalizing states when they deny African American men over the age of 21 access to the ballot box.
    - The Supreme Court eventually uses the Equal Protection Clause to protect voting in a series of twentieth-century cases.
- **FIFTEENTH AMENDMENT***:* Bans racial discrimination in voting.
- **SEVENTEENTH AMENDMENT:** Provides for the popular election of U.S. Senators.
- **NINETEENTH AMENDMENT**: Bans gender discrimination in voting.
- **TWENTY-THIRD AMENDMENT**: Grants the District of Columbia three Electors in the Electoral College—giving D.C. a voice in presidential elections.
- **TWENTY-FOURTH AMENDMENT**: Bans poll taxes in national elections.
- **TWENTY-SIXTH AMENDMENT**: Protects voting rights for those eighteen and older.

BIG TAKEAWAYS

Several Amendments extend protections to new groups, including protections based on race (Fifteenth Amendment), sex (Nineteenth Amendment), and age (Twenty-Sixth Amendment). While the states still play a central role in elections, various Amendments establish an increased role for the national government in some contexts—most notably, through the enforcement clauses of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. (This is still a federalism story.)

And we also see a new role for voters in Senate elections (Seventeenth Amendment) and DC voters in presidential elections (Twenty-Third Amendment).

HOW DOES THE ELECTORAL COLLEGE WORK?

So, what's the Electoral College, and how does it work?

Today, many democratic nations elect their executives by direct popular vote. But we don't. Instead, we use a system known as the "Electoral College." The Electoral College is made up of 538 electors drawn from the states and the District of Columbia.

Under Article II of the Constitution, the states are given a number of electors equal to their congressional delegation. (So, if your state has two members in the U.S. House and two U.S. Senators, you get 4 Electoral Votes in the Electoral College.) And the Twenty-Third Amendment granted Washington, D.C., its three electoral votes.

Today, the American people vote for President and Vice President on Election Day. But, technically speaking, these votes don't directly determine the outcome of the election.

Technically, these popular votes determine which electors will be appointed to the Electoral College from each state. The electors eventually meet in December to cast their votes for President and Vice President. If a candidate receives a majority of these votes in the Electoral College, she wins—even if she lost the popular vote. But if no candidate secures a majority in the Electoral College, then the election is sent to *Congress*. (As happened in the Election of 1824.) The U.S. House of Representatives—voting as states, *not* individuals—selects the President. And the Senate selects the Vice President.

Few people today would consider the Electoral College to be a genuinely "deliberative" body. Electors are instead appointed mechanically to winners according to the popular votes cast by the wider electorate in most states. Although electors do meet in their state capitols at a December date set by Congress to cast their ballots, in practice they usually follow the election returns.At these meetings, they don't conduct substantive discussions or debates about who should be President.

Under Article II, the actual electors themselves are appointed according to rules set by the state legislature in each state. So, we've seen a great deal of change and variety in elector selection rules over time.

Today, 48 states appoint all of their electors on a "winner-take-all" basis from slates provided by the party of the top vote-getter in their statewide popular election for President. But two states—Maine and Nebraska—award electors by congressional district and give their remaining two electoral votes to the statewide winner.

BIG TAKEAWAYS

At the Founding, the Electoral College was a compromise between those who supported congressional election of the President and those who supported a role for the American people in selecting a President. Over time, the Electoral College has remained in place, but within this system (and beginning in our nation's earliest years), the American people have played a key role in presidential elections.

HYPOTHETICAL QUESTION

This hypo is based on a pair of cases decided in 2020 in the Supreme Court—*Chiafalo v. State of Washington* and *Colorado Department of State v. Baca*.

Here's the question: **Can a state punish an Electoral College elector when she casts her vote for a presidential candidate that differs from the one that actually won the popular vote in that state?** (*McPherson v. Blacker* (1892), *Chiafalo v. State of Washington* (2020), and *Colorado Department of State v. Baca* (2020))

THE FOUNDING STORY

Now that we know what the Electoral College is, and how it works, the question is where did the idea come from and why did they make it so tricky?

The Founding-era story brings us back to the Constitutional Convention held in Independence Hall in Philadelphia in 1787—and the debate between the Convention delegates over the Presidency itself, how to select a President, and the Electoral College.

To understand the debate over the Electoral College, it's important first to understand a bit about the Framers' debates over the Presidency itself. It's fair to say that the Framers struggled with how to structure the Presidency.

This was driven, in part, by the lack of historical examples to follow. When the Framers looked to Europe, they saw powerful kings. And when they looked to their own state constitutions, they saw executives too weak to govern effectively. (Some states (PA) had executive counsels and no single President/unitary executive.) Something had to give. At the same time, the Framers feared executive power. They remembered the abuses of King George III and his officials in colonial America—abuses that helped lead to the American Revolution. Turning to the Convention itself, the Framers as a whole had a range of opinions when it came to the new Executive.

On one end of the spectrum, Alexander Hamilton and John Dickinson voiced admiration for the limited monarchy of Great Britain—and a vision of a single, strong national executive. And, on the other end of the spectrum, Roger Sherman viewed the Executive as **"nothing more than an institution for carrying the will of the Legislature into effect."** So, a very weak President and a very strong Congress.

In the end, the debate over the Electoral College was closely connected to these broader debates over the Presidency itself. And an important—but largely forgotten Founder—played a key role throughout these debates, Pennsylvania's James Wilson.

Over time, the delegates wrestled with *four* big issues:

- How to elect the President.
- How long the President's term should be.
- Whether the President should be allowed to run for reelection.
- And the question of impeachment and removal.

The Framers repeatedly learned that a decision made on one of these issues would affect what they thought about all of the others.

So, how did we get the Electoral College?

James Madison's initial plan for the new government—the Virginia Plan—shaped many of the early discussions at the Convention. The Virginia Plan proposed that there should be an Executive, chosen by Congress—not by the people directly or through an Electoral College, but by *Congress*—to serve for a single term (so, no running for reelection!).

Above all, the Electoral College was a compromise—between those like James Wilson who wanted the direct popular election of the President and those who supported other presidential selection systems (most notably, congressional election).

Over time, the Framers debated a range of ways to select the President, including direct election by popular vote (Wilson's preference), by Members of Congress (the preference of many Framers), or by an electoral college (a compromise).

For much of the Convention, the election of the President seemed like an unsolvable problem. Each idea had its own problems.

Election by Congress had the advantage of placing the decision in the hands of some of the nation's most knowledgeable leaders. However, the concern was, as Gouverneur Morris warned, that the result would eventually be the **"work of intrigue, of cabal, and of faction,"** producing a President who would become a mere tool of his supporters in Congress.

Election by popular vote—proposed by Wilson (and supported, at various times, by Morris and Madison)—had the advantage of rooting the Presidency in popular sovereignty. (Rule by "We the People.") But some Framers opposed this idea based on sheer elitism.

Others (like George Mason) didn't so much fear that the American people would be easily duped by demagogues, but instead were concerned that the size of the country would make it difficult to carry out a national election—and for the average voter to know anything about an out-of-state candidates' record. (In other words, everyone would know (and love) Washington. But in the future, there probably wouldn't be many (or any) other Washingtons.)

The third—and final—key idea was the Electoral College. The key advantage of this proposal was that it would keep the President independent of the legislature. He would have his own independent base of support that would dissolve after the election. Key disadvantages were the logistics of how to get the Electors to meet and the related expenses.

Some Framers also feared whether they'd be able to attract Electors **"of the 1st or even the 2nd grade in the States."** Many delegates preferred congressional election. And wide majorities voted in favor of this method multiple times.

However, the Framers settled on the Electoral College in the closing weeks of the Convention.

The Framers supported the Electoral College for a range of reasons. For James Wilson—who supported the popular election of the President—the Electoral College was a second (or third) best option. Here's how Wilson explained it: **"The choice of the President is brought as nearly home to the people as is practicable. With the approbation of the state legislature, the people may elect with only one remove."**

For those who supported congressional election, the Electoral College would still have the U.S. House—voting by state, not by individual Members—decide the President among the top vote-getters if no candidate received a majority in the Electoral College. And many Framers assumed that—after Washington—*many* elections would go to the House. (In other words, that no candidate would have a big enough national reputation to secure a majority of the electoral vote.) As Mason put it, the electors would fail to generate a winner **"nineteen times in twenty."**

And, finally, for some Founders like Alexander Hamilton, the Electoral College represented a way of guarding against dangerous demagogues and leaving the presidential election, ultimately, to the votes of national elites serving in the Electoral College.

THE ELECTION OF 1800

Our second set of stories turns to the Election of 1800 (a battle between two Founders—John Adams and Thomas Jefferson—and, of course, one made famous by Lin-Manuel Miranda's *Hamilton*), the Twelfth Amendment, and the history of the Electoral College.

We ended the last part of the lesson with a New Constitution, a new national executive (the President), and a new system for selecting the President (the Electoral College). So, what happened next?

Let's begin with the earliest elections under the Electoral College—and especially the controversial Election of 1800. Under the Original Constitution, electors cast ballots not for *one* Presidential candidate, but for *two* of them, with the second-place finisher becoming the Vice President.

The Framers didn't expect that there would be national parties that nominated candidates (and offered their own tickets for President and Vice President). However, political parties quickly emerged, and the strange two-vote system led almost immediately to a serious political crisis.

The first two presidential elections—in 1788 and 1792—went smoothly. Every single elector cast their first vote for George Washington, who remains the only candidate ever chosen unanimously by the Electoral College. And John Adams received a substantial majority of electors' second votes and became the first Vice President.

However, the next two elections were problematic. In 1796, Vice President Adams faced off against former Secretary of State Thomas Jefferson. Even as early as 1796, political parties had already begun to emerge. And Adams (a Federalist) and Jefferson (a Democratic-Republican) were already associated with opposing political parties.

In the end, Adams won 71 electoral votes to Thomas Jefferson's 69. But the electors' second votes were scattered. As a result, none of the Federalist candidates for Vice President received more total votes than Jefferson, so he became Adams's—his *opponent's*—Vice President!

This resulted in many conflicts between Adams and Jefferson during the Adams Administration. It's awkward to have your political opponent as your Vice President when he spends four years actively undermining you in DC and in the press! As a thought experiment: Imagine Donald Trump as Joe Biden's Vice President!

Adams and Jefferson squared off again in the Election of 1800, but this time Jefferson defeated Adams by a vote of 73 to 65 in the Electoral College. The Election of 1800 was one of the most important elections in American history.

It was the first time that an incumbent leader was defeated in an election—leading to a peaceful transfer of power from one person (and political party) to another. But not without controversy. It also marked the true arrival of the two-party system and was a bitterly contested election beyond the Electoral College controversy.

Even as Jefferson outpaced Adams in the Electoral College, he actually tied his fellow party member—and nominal running mate—Aaron Burr 73-73 in the Electoral College. (This happened because an elector didn't do his job. To avoid a tie, a Democratic-Republican elector was supposed to throw out a vote to ensure that Jefferson had more votes than Burr, but that Burr still had enough votes to become Vice President. But this didn't happen!)

Even though everyone knew that Jefferson was really at the top of the ticket, Burr tried to game the system and refused to stand aside. This threw the process into the U.S. House of Representative. The resulting House process took place in the lame-duck, Federalist-controlled Congress—the one that the voters just voted out of office! It lasted for six days and 36 ballots before the House chose Jefferson.

By then, at least two Jeffersonian Governors—from Pennsylvania and Virginia—threatened to call out their state militias and order them to march on the new national capitol in Washington, D.C.
In the end, the Federalists—including key party members outside of Congress like Alexander Hamilton—concluded that Jefferson was the lesser of two evils. (Hamilton had a huge influence—convincing several Federalists to either vote for Jefferson or to abstain.) And Jefferson was peacefully inaugurated—again, setting an important precedent for the

peaceful transfer of power in early America. Even so, John Adams refused to show—leaving early on inauguration morning to avoid Jefferson. Their relationship wouldn't thaw for another 12 years.

Following the Election of 1800, we moved quickly to reform the Electoral College. The result?: The Twelfth Amendment.

This Amendment ironed out some of the most glaring bugs in the original system—most notably, the real possibility of ties and the fact that the President and Vice President could come from different parties. With the Twelfth Amendment, electors in the future would still cast two votes, but one of the two votes would be for President and the other would be for Vice President. The Twelfth Amendment was proposed by Congress on December 9, 1803, and sent to the states three days later for ratification. The Amendment was ratified in 1804, and all future elections were carried out under its rules.

How was the Electoral College implemented over time?

The Electoral College has experienced significant change through the years. Consider the first presidential election—which gave us George Washington. Five state legislatures—in Connecticut, Delaware, Georgia, New Jersey, and South Carolina—simply designated presidential electors without having any popular election at all. In four states, the voters elected all of the electors. In Virginia, the General Assembly divided the Commonwealth into twelve presidential districts and conducted a popular election.

In later elections, states have taken different approaches. But perhaps the most interesting point is that once some states began to give their voters a direct say in the choice of electors—as happened from the very beginning—it would prove hard in the long run for other states to keep this power from their own voters.

By 1804, most states let voters pick electors. And after 1828, only *one* state—South Carolina—continued to resist. In 1961, the Twenty-Third Amendment granted the District of Columbia three electoral votes—adding their voters to the presidential selection process.

Perhaps James Wilson put it best at the very beginning. Expressing optimism about the system, he predicted, **"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 them."** Furthermore, he predicted that the process would become increasingly democratic over time. And so it has.

Of course, the Electoral College doesn't guarantee that the winner of a national popular vote will become President. In fact, in five presidential elections—1824, 1876, 1888, 2000, and 2016—the winner of the national popular vote did *not* become President.

Finally, while there haven't been that many "Electoral College" cases at the Supreme Court, it's worth noting at least one of them—*McPherson v. Blacker* (1892). There, an 1891 Michigan law set up a new system of choosing presidential electors: one elector would be chosen by an election within each of the state's congressional districts, and two would be chosen from a statewide, at-large district.

Several Michigan voters challenged the law, arguing that it violated Article II of the Constitution. The Supreme Court—in an opinion by Chief Justice Melville Fuller— unanimously rejected this challenge and upheld the Michigan law.

Turning to the Constitution's text, Fuller noted that Article II didn't place any limits on the state legislatures' choice of electoral method. Instead, it granted the states broad authority over the manner of awarding their electors.

Chief Justice Fuller: **"The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object. . . . In short, the appointment and mode of appointment of Electors belong exclusively to the states under the constitution of the United States."**

FAITHLESS ELECTOR CASES

How does the Electoral College work today—and what are some of the modern debates over the system?

To begin (and as a quick reminder), the Supreme Court decided a pair of Electoral College cases in 2020—*Chiafalo v. State of Washington* and *Colorado v. Department of State*. Let's turn to what happened there, the constitutional question, and the arguments on each side. But first, let's place one additional Supreme Court decision on the table.

We've already discussed the *McPherson* case from the late 1800s. The Supreme Court decided another case in 1952—*Ray v. Blair*—which recognized a state's authority to require an elector to pledge her support in the Electoral College for a particular candidate.

Under Alabama law, the Alabama Democratic Party chose its nominees for presidential electors through the state primary system. The Democratic Party, in turn, was empowered to determine who was qualified to be a candidate for all primary elections. It required that every candidate for the position of presidential elector pledge to support the Democratic nominee for President.

Edmund Blair—a would-be elector who refused to sign the pledge—argued that the pledge requirement unconstitutionally infringed on an elector's ability to exercise independent judgment.

The Supreme Court—in a 5-2 decision, with a majority opinion by Justice Stanley Reed (Justices Black and Frankfurter didn't participate in the case)—rejected Blair's argument and upheld the Alabama system.

Although the state had delegated the choice of electors to the party, and the party to its primary process, this was still **"an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose."**

The Court rejected the argument that the Twelfth Amendment implicitly **"demands absolute freedom for the elector to vote his own choice, uninhibited by pledge. . . . The suggestion that, in the early elections, candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. History teaches that the electors were expected to support the party nominees."**

Finally, the Court said that even if these pledges can't be enforced (an issue the Court did not squarely address, but that was at the heart of the "Faithless Elector Cases" earlier this year), there is no reason why the state—and by extension the Democratic Party—couldn't require electors to make the pledge as a condition of their selection.

Justice Robert Jackson dissented (joined by Justice William O. Douglas). Jackson argued that **"[n]o one faithful to our history can deny that the plan originally contemplated what is implicit in its text—that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices."**

And although the original plan had **"suffered atrophy almost indistinguishable from *rigor mortis*,"** Justice Jackson rejected the argument that a state could control the behavior of its electors any more than it could have controlled the behavior of its Senators (who once were likewise chosen by the state legislatures). Thus, Jackson charged the majority with **"elevat[ing] the perversion of the forefathers' plan into a constitutional principle."**

So, that's a bit more about how the Supreme Court has treated the Electoral College in previous cases.

What happened in the "Faithless Elector Cases," and what were the arguments on each side of the case?

In the "Faithless Elector Cases," electors in the 2016 presidential election challenged state attempts to punish them for voting for presidential candidates other than the ones that they had pledged to support. In Washington state, the state fined three Democratic electors $1,000 each for casting their electoral votes in 2016 for Colin Powell rather than Hillary Clinton. And in Colorado, the state discarded an electoral vote from a Democratic elector who wanted to cast a ballot for Governor John Kasich of Ohio.

Since the Founding, there have been 157 "faithless electors." For instance, consider the following example from the Election of 1796. The elector was Samuel Miles—a Federalist from Pennsylvania. He had pledged himself to John Adams, but voted for Thomas Jefferson in the Electoral College. In response, an angry voter wrote a letter, published in the *Pennsylvania Gazette*: **"What, do I choose Samuel Miles to determine for me whether John Adams or Thomas Jefferson should be President? No! I choose him to act, not to think."**

"The Faithless Elector Cases" asked the question that's a natural follow-up question after *Ray v. Blair*: *Can a state punish an Electoral College elector when she casts her vote for a presidential candidate that differs from the one that actually won the popular vote in that state?*

The faithless electors said no. For them, the Constitution preserves the free electoral choice of the electors. While the Constitution grants the states broad power to choose the manner in which the electors are appointed, they may not control what they do *after* they're appointed.

In 2016, two states did something that no state had ever done: they penalized electors in the electoral college on the basis of the electors' votes. These unprecedented sanctions interfered with the right of choice vested by the Constitution in "Electors."

In their view, the Supreme Court should restore the practice that has governed for more than 220 years and make clear that while states have broad power "to appoint" electors, it is the "Electors" who have the power "to vote" free of state control.

On the other side, the states argued that they have the power to *both* require electors to pledge their support for a particular presidential candidate *and* to enforce that pledge with punishments, if necessary.

The Constitution's text and history—affirmed by centuries of historical practice and by previous decisions of the Supreme Court—show that states can bind presidential electors to the popular votes of the states' voters.

The Constitution's text grants **"each State" the power to "appoint" electors "in such Manner as the Legislature thereof may direct . . . ."** And the Supreme Court has granted the states broad authority in this area, concluding in *McPherson* that **"the appointment and mode of appointment of electors belong exclusively to the states."**

This power includes the power to remove or sanction those who violate the conditions of their appointment—in other words, who violate their pledge of support to a particular presidential candidate. And the country's enduring historical practice is that electors have voted as directed. Less than one percent have ever been faithless. And before 2016, no elector had ever broken a pledge in a state with laws penalizing such conduct.

Finally, the electors' position would also lead to bizarre and dangerous consequences—leading voters to conclude that popular elections for President are and always have been hollow exercises because electors can simply disregard the outcome.

It was an interesting issue—and a rare opportunity for the Court to weigh in on the Electoral College. In the end, the Supreme Court—in an opinion by Justice Elena Kagan—voted 9-0 *against* the Faithless Electors. Kagan's opinion affirmed the states' broad authority in this context—including the authority to punish Faithless Electors.

And of course, for many Americans, one of the final "Electoral College" questions is a question of constitutional reform: Should we keep the Electoral College, or should we get rid of it?

We've already discussed the Founding-era history (how we got the system) and how the system works. But many modern debates focus on whether we should keep the system or reform it.

While we won't take a position on that policy question, it's worth ending with a quick review of the arguments on both sides of this issue—arguments that we can easily trace back to the history that we've already reviewed.

In other words, we've given you the history and the constitutional tools to discuss this issue with your friends and family, but always remember to do it in a way that keeps the Constitution's text and history in mind. Here are the arguments on each side.

Supporters of the Electoral College argue that it preserves a role for federalism in our presidential elections and works to guarantee that our Presidents secure nationwide support from a variety of states and types of voters.

Critics counter that as it works in practice today, the Electoral College makes most states mere spectators in presidential elections—as campaigns spend nearly all of their time and money campaigning in a small number of "swing states"—and this, in turn, drags down voter turnout in the remaining states and reduces the real field of play to fewer than a dozen states.

In the end, the Constitution sets out a method for amending it in Article V, and the Constitution remains *very* difficult to amend. But as America's constitutional history suggests, it isn't impossible, either.