

Chapter 1

The Initial Design of the Electoral College: Basic Ideas, Logical Mistakes, and Overlooked Problems

Abstract Almost every American has either studied something about the Electoral College in school or at least heard of it. Yet to many people used to electing municipal, state, and federal officials by the democratic principle “the one who gets the most votes always wins,” the Electoral College looks quite mysterious and antiquated. The mystery concerns how such a system could have existed for so long, and why it has not been replaced by a system that is based on the above democratic principle. In contrast, people who are curious about the election system often try to grasp (a) how the Electoral College could have emerged in the first place, and (b) what could have been the Founding Fathers’ logic of designing the system for electing a President and a Vice President. This Chapter considers the Electoral College origins and analyzes a logical mistake made by the originators of the Constitution, which still remains in its text, as well as the election problems that were overlooked by the Founding Fathers in the original design of the Constitution.

Keywords 1787 Great Compromise • Article 2 of the Constitution • Committee of Eleven, Electoral College • Electors • Electoral votes • Executive power • Founding Fathers • Founding Fathers’ logical mistake • “One state, one vote” principle • Slavery

Almost every American has either studied something about the Electoral College in school or at least heard of it. Yet to many people used to electing municipal, state, and federal officials by the democratic principle “the one who gets the most votes always wins,” the Electoral College looks quite mysterious and antiquated. The mystery concerns how such a system could have existed for so long, and why it has not been replaced by a system that is based on the above democratic principle.

In contrast, people who are curious about the election system often try to grasp (a) how the Electoral College could have emerged in the first place, and (b) what could have been the Founding Fathers’ logic of designing the system for electing a President and a Vice President.

This chapter considers the Electoral College origins and analyzes a logical mistake made by the originators of the Constitution, which still remains in its text,

as well as the election problems that were overlooked by the Founding Fathers in the original design of the Constitution.

The titles and the context of the sections of this chapter contain questions and answers addressing the above concerns raised by both people's curiosity and the alleged mystery and antiquity of the Electoral College. The questions are those the author has often heard Americans ask.

1.1 The Founding Fathers' Electoral College: A Monster or a Masterpiece?

For many of those who do not understand how the Electoral College works, it may look like a monster [3]. Even those who believe it has served the country quite well for more than two centuries may not understand how it works. The opinions about the Electoral College differ, as do the people who hold them. This is business as usual.

Traditionally, Americans attribute two meanings to the phrase "the Electoral College."

1. Constitutionally, there is a group of people—called (presidential) electors—who elect a President and a Vice President every four years. This group is often called the Electoral College though there are no such words in the text of the Constitution. This meaning is equivalent to the phrase "all the presidential electors appointed by (currently) 50 states and by D.C. (since the 1964 election) as Article 2 and Amendment 23 of the Constitution direct."

Each state is entitled to appoint as many electors as it has members of Congress. The total number of members of the House of Representatives is determined by Congress, and it is apportioned among the states. The number of Representatives that the state is entitled to in the House of Representatives depends on the number of people living in the state. This number is determined based upon the results of the census that is conducted in the country every ten years. According to Article 1 of the Constitution, each state is entitled to two U.S. Senators in Congress, despite the state's size.

In 1912, Congress set the size of the House of Representatives equal to 435, and this has been the number of Representatives ever since. The only exception was made in 1960 for the 1960 presidential election, when the number of Representatives was temporarily made equal to 437.

From 1948 to 1959, the Union consisted of 48 states, and Congress consisted of 435 Representatives in the House of Representatives and 96 Senators. Thus, 531 presidential electors could be appointed during those years. Alaska and Hawaii joined the Union in 1959, and for the 1960 election, the number of Representatives

in the House of Representatives was made equal to 437 to let each of the two states appoint the minimum number of presidential electors that each state could have in the election. Thus, the number of all the electors that could be appointed in that election was equal to 537 (since the number of Representatives in the House of Representatives was 437, and 50 states had 100 Senators in the Senate). In 1961, Amendment 23 of the Constitution gave the District of Columbia the right to have as many presidential electors as the least populous state in the Union. Currently, this number equals three, so since the 1964 presidential election, the (maximum) number of electors that could be appointed has been 538 [1, 4].

In each particular election, each state can appoint the maximum number of presidential electors that the state is entitled to appoint. However, any state may choose to appoint fewer electors or may simply fail to appoint all (or some) electors, for instance, by the time specified by a federal statute. Though such situations are certainly rare exceptions, they have taken place in the past [4].

2. Colloquially, the whole U.S. presidential election system is often called the Electoral College though the Electoral College as such is only a part of the whole system yet the decisive one since the 1828 election. The 1824 presidential election was the second (and the last) one in which Congress rather than the Electoral College elected both a President and a Vice President [4].

Certainly, the second meaning attributed to the phrase “Electoral College” is no more than a jargon. However, it has widely been used in publications on American presidential elections, as well as in the media reports.

Thus, the Electoral College can be construed as a collection of all the appointed presidential electors, or as a manner in which America elects its presidents, or both. It is a matter of personal perception. From this viewpoint, there is nothing in the Electoral College either monstrous or possessing a masterpiece quality. But the devil is in details, which are to be discussed further in this book.

The author hopes that the book will help the reader decide whether the Electoral College is a monster, or a masterpiece, or neither, or both, or something else.

It seems important to distinguish people's personal impressions about the Electoral College from the interpretation of facts and constitutional provisions by those who offer their opinions on this election mechanism, especially regarding the explanations of why the 1787 Constitutional Convention participants adopted decisions reflected in the text of the Constitution.

The Supreme Court is the only body that can ultimately interpret the text of the Constitution. Therefore, any “interpretations” or “explanations” by any other organizations or individuals are no more than the opinions of their authors, no matter how plausible and convincing they may seem.

1.2 Neither the People, nor Congress: Why Electors?

There are numerous publications “explaining” what the Founding Fathers “were up to” by creating the Electoral College [5–11]. However, the Constitution does not provide either such explanations or any hints about why the Electoral College as a manner of electing a President was adopted at the 1787 Constitutional Convention.

Here are the most widespread beliefs about the reasons underlying the Electoral College creation in a nutshell.

1. The Founding Fathers did not want an elected President to be dependent on those in power who elected him, especially on those who constituted a legislative branch of the government. This seems to be in line with the “checks and balances” system of government, which the 1787 Constitutional Convention participants embedded in the Constitution. According to this system, all three branches of government—legislative, executive, and judicial—should be independent of each other and should complement and “balance” each other.
2. The Founding Fathers did not want the people to elect a President directly. They believed that ordinary people could hardly make the right choice of a President due to their lack of knowledge about individuals who would make good Presidents. Also, many researchers believe that the Founding Fathers wanted to avoid the “tyranny of majority,” which would depreciate the role of small states in electing a President [12–14].

This particular reason has been intensively discussed both in scientific publications and in the media, and certain extreme viewpoints have been and still are expressed in the discussions. For instance, some researchers assert or believe that at least a majority of the Founding Fathers simply did not trust the people, did not appreciate democracy, etc. These views are often offered despite the fact that the Founding Fathers did not prohibit the election of state presidential electors by popular elections. (Nevertheless, they left the right to choose a manner of appointing electors to state legislatures.) One should notice that the authors of all these viewpoints always manage to find appropriate citations in the Federalist papers [15], which they interpret as those supporting their cause.

3. Committee of Eleven, appointed by the 1787 Constitutional Convention, suggested to adopt a principle of dual representation of the states in electing a President that was similar to the one that had already been adopted for Congress [1]. The Committee proposed that each state would be entitled to the number of presidential electors equaling the total number of members of Congress that the state was entitled to (i.e., to the total number of Representatives in the House of Representatives plus two Senators for each state) [6, 16].
4. The Founding Fathers could not find the best solution to the problem of choosing a manner of electing a President after they had refused the election of a President by the people, by Congress, and by Governors several times. They were too tired to continue to discuss this particular matter and came up with a compromise [6, 17].

5. The Founding Fathers wanted to have an independent body, an intermediate “Congress” that would convene once in four years only for the purpose of electing a President and a Vice President. This “Congress” would consist of knowledgeable, wise people from all the states, who would choose real statesmen to the highest offices in the country. The number of such people from each state would depend on the number of people living there. The Founding Fathers did not prohibit these knowledgeable people from deliberating their choices within each state. However, they did not allow presidential electors—members of this “Congress”—to gather in one place to deliberate their choices and to work out a collective decision on behalf of the whole country.

Whatever reason seems either true or plausible, the Founding Fathers decided to vest on the electors the privilege of exercising the first attempt to elect a President and a Vice President. They reserved to Congress the right to exercise the second attempt to elect a President and a Vice President there if the first attempt were to fail. In electing both executives in Congress, all the states would vote as equal members of the Union, with an equal number of votes despite the state’s size [18].

1.3 The 1787 Great Compromise and the Electoral College

The 1787 Great Compromise was an agreement between the small states and the large states of free settlers, reached by the Founding Fathers at the 1787 Constitutional Convention. The major part of the Compromise was the establishing of a dual representation of the states in Congress.

The people needed equal representation as individuals, and the states wanted to keep their equality as they had under the Articles of Confederation [6]. The Founding Fathers agreed that people of every state would be represented in Congress via the House of Representatives by congressional districts in their states of residence. At the Convention, they agreed that the number of districts in each state would depend on the number of people living in the state to be counted as follows: free people would be counted by the number of individuals, and each slave would be counted as three-fifths of a free person (the so-called “three-fifths clause” [19]).

This representation definitely favored large states and gave them more influence in Congress. To balance this disparity, the Founding Fathers agreed that each state as a whole would also be represented in Congress via the Senate. They agreed that all the states would be represented there as equal members of the Union, despite their sizes. The Founding Fathers decided that each state would be entitled to two Senators to be appointed by the state legislators. Thus, the advantage that the large states had over the small states in the House of Representatives was balanced by the proposed structure of Congress.

Moreover, the Founding Fathers went even further in their intent to balance the above advantage of the large states. They agreed that all the states would be equal

members of the Union in electing a President and a Vice President in Congress, as well as in ratifying amendments to the Constitution.

The Founding Fathers decided that in electing a President in the House of Representatives, each state delegation—i.e., all the Representatives from the state—would have a single vote, no matter how many Representatives the state was entitled to have there. In electing a Vice President in the Senate, each Senator was given one vote so that each state was given two votes. Thus, all the states were equal in electing a President and a Vice President in Congress—one vote in electing a President in the House of Representatives and two votes in electing a Vice President in the Senate. This equality was given to the states independently of their sizes.

Two forms of state representation in Congress—of the residents of each state in the House of Representatives and of each state as a whole in the Senate—constitute the core of the 1787 Great Compromise. With respect to presidential elections, the equality of the states as members of the Union (a) in electing a President and a Vice President, and (b) in amending the Constitution was a key element of the 1787 Great Compromise.

In the Constitution, the Founding Fathers set the basic principles of the structure of the executive power in the U.S. These principles reflected the underlying concepts of the Presidency, and they have remained unchanged ever since [18].

The Founding Fathers vested all the executive power in one person, the President of the United States. Thus, one may construe this decision as the intent to see the elected President as Chief Executive to run the Union. The Founding Fathers seem to have believed that by electing a President, the states forming the Union would give the elected person a mandate to govern the country. This mandate should come from the states, no matter whether or not it coincided with the will of the set of individuals entitled to vote.

Of course, a President could eventually receive such a mandate from all the voting voters as well. This could be the case, since a manner of choosing state electors was to be determined by the state legislatures of all the states, who could decide to hold statewide elections to choose state presidential electors. If this were the case, one could talk about the will of all eligible voters in the country, and this will could coincide with the will of the states, expressed by presidential electors. However, such a coincidence does not seem to have been a priority for the Founding Fathers. For instance, at the Convention, they did not discuss whether a majority or only any plurality of voting voters favoring a particular person could reflect the will of voting voters.

Thus, choosing the best Chief Executive to run the Union according to the will of the states was and constitutionally remains the goal of presidential elections in the U.S. Detecting a person who was favored by all the voting voters did not become either necessary or even relevant for this goal. The Founding Fathers allowed the states to exercise two attempts to elect a President: first in the Electoral College, and second in Congress, should the Electoral College fail to elect the Chief Executive.

As mentioned earlier, a disproportionate representation of the state population in the Electoral College was part of the 1787 Great Compromise. This unequal

representation has been a source of sharp criticism of the system for electing a President. In contrast, the equal representation of the states in the Senate, which is unequal from the viewpoint of representation of the state population, has never been a subject of serious discussion though it was another part of the 1787 Great Compromise.

There exists the widely widespread belief that the Founding Fathers did not expect the Electoral College to elect a President. Rather they might have believed that most of the time, presidential electors would only form a list of the best choices for the office of President. If this were the case, then electing a President by the states as equal members of the Union might have been the Founding Fathers' major goal in presidential elections. So they might have believed that the "one state, one vote" principle would be the ultimate principle for electing a President.

Thus, both the two-chamber Congress and the Electoral College as an election mechanism for electing a President and a Vice President were part of the 1787 Great Compromise, which all the states have honored for more than 220 years.

In today's America, there are political scientists, reporters, and ordinary citizens and residents who believe that this compromise is outdated and should no longer be honored by the states. They favor an equal representation of all the states in both the Senate and the Electoral College, and they believe that the Electoral College should be eliminated. (Some of them even believe that the Senate should be abolished as well [20].) Proponents of this viewpoint believe that the fairness of state representation in any matters of national importance should require representation proportional to the size of the state population in the country.

Though proponents of abolishing the Electoral College call for eliminating the Senate, they focus on the Electoral College as the major "evil." They insist on the introduction of a direct popular election of a President and a Vice President. Many of them suggest that the "one man, one vote" (or the "one person, one vote") principle should underlie the presidential election system, since it is the fundamental principle of democracy [5].

Further in the book, the reader will find an analysis of whether abolishing the Electoral College has a chance of succeeding, along with an analysis of whether such an idea really has support in the country.

1.4 An Unpleasant Heritage: Is the Electoral College a Vestige of Slavery?

There are prominent constitutional lawyers who believe that this is the case, and that the Electoral College "... was designed in part to cater to slavery..." [21]. Their logic is based on the fact that at the time of the Constitutional Convention, the Southern states had many slaves, each of whom was to be counted as three-fifths of a free person, but could not vote in elections.

The rules for calculating the number of electors that every state was entitled to were based on the number of all the inhabitants in the state. So the Southern states with large numbers of slaves could have more presidential electors than the states that did not have that many slaves. Some proponents of this idea assert that this was the major reason the Southern states supported the idea that presidential electors would choose a President.

While this assertion looks quite logical, there is, however, no reason to believe that the Electoral College is a vestige of slavery more than is the House of Representatives.

Indeed, the Committee of Eleven simply proposed that the states would be represented in the Electoral College in just the same manner as they would be represented in Congress. Moreover, by the time of this proposal, the Founding Fathers had already agreed on the manner in which the states would be represented in Congress. Thus, the major portion of the total number of the state electors was to be equal to the number of Representatives in the state's share in the House of Representatives. The more slaves a state had, the larger share of Representatives in the House of Representatives it would have. Consequently, the more slaves the state had, the more electors in the Electoral College this state would be entitled to.

Thus, by agreeing to the Electoral College the Southern states did "benefit" twice from the large numbers of slaves that they had. However, this does not mean that the Electoral College initiated the slavery argument that played a role in reaching the 1787 Great Compromise.

Certainly, one may assume that the Founding Fathers could have found a different manner of choosing a President, not based on the number of all the inhabitants in a state. However, the same assumption would then be applicable to the House of Representatives.

Did slavery play a role in choosing the structure of Congress? It certainly did. Was slavery the underlying cause for creating the Electoral College? Nothing suggests that it was, since the apportionment of electoral votes among the states could have been different from the one used in designing the structure of the House of Representatives. However, though slavery did not initiate the Electoral College design, it did affect the Electoral College structure in just the same manner as it did the structure of the House of Representatives, which was chosen first. Thus, those who consider the Electoral College as a vestige of slavery should be consistent in their perception and consider the House of Representatives to be the same.

However, for unknown reasons, critics of the current election system attribute the slavery label to the origins of the Electoral College only.

1.5 The Electoral College: A Decisive Body or a Selecting Committee?

As mentioned in Sect. 1.3, it is widely believed that the Founding Fathers did not expect the Electoral College to elect a President and a Vice President. They might have expected that most of the time, presidential electors would be the best to select a set of potential candidates for these two offices. The selected candidates would further be considered by Congress (see Sect. 1.3).

This expectation of the Founding Fathers might have contributed to convincing the small states to join the Union, since in electing a President and a Vice President in Congress, states would vote as equal members of the Union.

Article 2 of the Constitution introduced a three-level presidential election system. At the first level, states were to appoint state presidential electors. According to the restrictions that Sect. 1 of the article imposed on candidates to the office of elector [19], not everyone could become a presidential elector. The Founding Fathers authorized the state legislature of each state to choose a manner in which the state electors would be appointed. The state legislature of every state could decide to hold a popular statewide election to choose state presidential electors [18, 19].

At the second level, all the state presidential electors appointed in a particular election year were charged to vote for President. All the electors together constituted the Electoral College for that election year, and they were to vote for President on one and the same day. That day was to be established by Congress.

Each appointed elector was to vote in his respective state for any two persons as President.

The only restriction imposed on the electors was as follows: At least one of the persons each elector could favor could not be an inhabitant of the elector's state. Article 2 of the Constitution did not specify for whom each state elector could vote, and for whom this elector could not vote. Nor did the article operate with the notion of "presidential candidate." By favoring particular persons, appointed electors, in fact, would attribute the status of presidential candidates to those persons.

Thus, the article does not specify which particular persons electors were to favor. The only requirement to the electors was to vote by ballot. The voting procedure in each state was to result in compiling a list of all the persons voted for as President, and the total number of (electoral) votes received by each such person ought to be present on the list [22].

The Founding Fathers considered Congress as the ultimate authority in deciding the election outcome (see Sect. 1.3). They authorized Congress (a) to count electoral votes cast in favor of all the persons as President, (b) to prepare a list of all the persons who received electoral votes, and (c) to indicate there the number of electoral votes received by each of the persons. The list was supposed to be ordered, and the preparation of the list constituted the first stage of the election procedure at the third level of the election system [22].

If none of the persons on the list was a recipient of electoral votes from a majority of all the appointed electors, the election was to be transferred to (thrown into)

Congress. If this were the case, the House of Representatives was to elect a President from the "... five highest on the List ..." of those voted for as President in the Electoral College [19]. Thus, at the second stage of the election procedure at the third level, Congress was to either declare President one of the persons from the list or to transfer the election of a President to the House of Representatives.

As mentioned earlier, according to Article 2 of the Constitution, each appointed presidential elector could cast two electoral votes. However, he could not cast both votes in favor of one and the same person. To win the Presidency in the Electoral College, a person voted for as President was to receive votes from a majority of all the appointed electors [19].

It is widely believed that the Founding Fathers gave two undifferentiated votes to each elector purposely, since they expected that most of the time, each elector would favor a son of his own state, by casting one of his votes in favor of that person. Also, it is widely believed that the Founding Fathers have expected that each elector would always cast the other electoral vote for a true statesman [6, 18].

While one can argue whether or not these beliefs have any grounds, the collection of the "second" votes cast by presidential electors was apparently supposed to determine the most appropriate Chief Executive to govern the Union [18]. Indeed, if each elector cast both votes in line with the constitutional requirements, a majority of the "second" votes could turn out to be sufficient to win the Presidency in the Electoral College, since the number of votes in this majority would coincide with the number of electors who cast these votes.

Thus, the Founding Fathers might not have considered the Electoral College as a decisive body in electing a President.

1.6 The Same Qualities Required: The Choice of a President and a Vice President

Outcomes that could occur under the rules of presidential elections set by Article 2 of the Constitution differ from those that the current election system may produce. Moreover, some of the outcomes possible under the old rules may seem weird under the current rules.

Outcome 1. Only one person voted for as President in the Electoral College received electoral votes from a majority of all the appointed electors. Then this person would be declared President.

Outcome 2. One person received the greatest number of electoral votes from among two or three persons who received electoral votes from majorities of all the appointed electors. This person would be declared President.

It is clear that in no case could each of more than three persons voted for as President receive a majority of all the electoral votes. However, each of three persons voted for as President could receive such a majority [1, 18]. The following example from [18] is illustrative of this statement:

Example 1.1 Let us consider the 1800 presidential election, and let us assume that all the 138 appointed electors cast their votes in favor of four persons. Further, let us assume that no two of the four persons were from the same state. (In the 1800 election, five persons received electoral votes from all the appointed electors [6, 8].) Finally, let us assume that all the electors cast their votes as follows:

The first group consisting of 69 electors voted in favor of person A (69 votes), in favor of person B (35 votes), and in favor of person C (34 votes).

The second group consisting of 34 electors voted in favor of person B (34 votes) and in favor of person C (34 votes).

The third group consisting of 7 electors voted in favor of person A (7 votes), in favor of person C (1 vote), and in favor of person D (6 votes).

The fourth group consisting of 7 electors voted in favor of person B (7 votes) and in favor of person C (7 votes).

The fifth group consisting of 7 electors voted in favor of person C (7 votes) and in favor of person D (7 votes).

The sixth group consisting of 7 electors voted in favor of person A (7 votes) and in favor of person D (7 votes).

The seventh group consisting of 7 electors voted in favor of person B (7 votes) and in favor of person D (7 votes).

Had this hypothetical distribution of electoral votes among the four persons taken place, then persons A, B, and C would have received electoral votes from a majority of 83 electors each, and person D would have received 27 electoral votes, as the following table illustrates:

	Person A	Person B	Person C	Person D
Group 1	69	35	34	0
Group 2	0	34	34	0
Group 3	7	0	1	6
Group 4	0	7	7	0
Group 5	0	0	7	7
Group 6	7	0	0	7
Group 7	0	7	0	7
Total	83	83	83	27

In all the other possible cases, the House of Representatives was to elect a President, and the following two situations [21] could emerge:

- (a) Two or three persons voted for as President in the Electoral College received one and the same greatest number of electoral votes from majorities of all the appointed electors, and
- (b) no person voted for as President received electoral votes from a majority of all the appointed electors.

In situation (a) the House of Representatives was to choose a President between those two or from among those three persons. In situation (b) the House of Representatives was to choose a President from "... the five highest on the List ..." (of persons voted for as President).

Under the rules determined by Article 2 of the Constitution, a Vice President was to be elected from the same list of persons voted for as President in the Electoral College. However, both in the Electoral College and in Congress, a Vice President could be elected only after a President had been elected.

Depending on how a President was to be elected, the mechanism for electing a Vice President in Congress worked differently.

Outcome 3. Only two persons among those voted for as President received electoral votes from majorities of all the appointed electors, and one of those persons received more votes than the other. Then the person with the greatest number of the electoral votes received was to be declared an elected President, and the other person was to be declared an elected Vice President.

Outcome 4. Only two persons among those voted for as President received electoral votes from majorities of all the appointed electors, and both received the same number of electoral votes. Then the House of Representatives was to choose a President between those two persons, and the person who were to lose the election in the House of Representatives would be declared an elected Vice President.

Example 1.2 Let us consider the above hypothetical 1800 presidential election in which all the 138 electors were appointed and cast their ballots in favor of persons A, B, C, and D. Let person A and person B receive 80 electoral votes each, whereas persons C and D receive 58 electoral votes each. Further, let person A be elected President in the House of Representatives. Then person B would be declared an elected Vice President.

Outcome 5. Three persons received electoral votes from majorities of all the appointed electors, and one of the three received the greatest number of the electoral votes cast. This person was to be declared an elected President. If the other two received the same number of votes, the Senate was to choose a Vice President between them.

Outcome 6. Three persons received electoral votes from majorities of all the appointed electors, and all the three received one and the same number of electoral votes. Then the House of Representatives was to elect a President from among them, and after electing a President, the Senate was to choose a Vice President between the remaining two persons.

Outcome 7. Three persons received electoral votes from majorities of all the appointed electors, and two of the three were recipients of the same greatest number of electoral votes. Then, the House of Representatives was to choose a President between the two top electoral vote-getters, and the person who were to lose the election there would be declared an elected Vice President.

Example 1.3 Once again, let us consider the above hypothetical 1800 presidential election. Let us assume that person A received 85 electoral votes, persons B and C

received 83 electoral votes each, and person D received 25 electoral votes. Then person A would become President, whereas the Senate would have to choose a Vice President between persons B and C.

Now, let us assume that persons A, B, and C received 83 electoral votes each, and person D received 27 electoral votes in the same 1800 hypothetical election. Further, let us assume that the House of Representatives elected person A to the office of President. Then the Senate would have to choose a Vice President between persons B and C.

Outcome 8. No person received electoral votes from a majority of all the appointed electors. Then the House of Representatives would have to elect a President from among the "... five highest on the List..." of those voted for as President. After electing a President, if there were a person with the highest number of electoral votes received, this person would be declared an elected Vice President. Otherwise, the Senate would have to elect a Vice President from among persons with the same highest number of electoral votes received who would remain after the election of a President. If this were the case, a person with more electoral votes than the elected President received could become an elected Vice President [18, 22].

Example 1.4 Let us assume that all the 138 appointed electors cast their votes in favor of five persons in the 1800 hypothetical election. Further, let us assume that each elector voted for two persons as Article 2 of the Constitution directs. Finally, let us assume that persons A and B received 60 electoral votes each, whereas persons C, D and E received 59, 51, and 46 electoral votes, respectively. Then all the five persons would participate in electing a President in the House of Representatives.

Let us assume that person D had been elected President. If this had been the case, according to Article 2 of the Constitution, the Senate would have to choose a Vice President between persons A and B. If, say, person A had been elected the next Vice President, this person would have been the one who received more electoral votes in the Electoral College (60 electoral votes) than the next President (51 electoral votes).

Outcome 9. No person received electoral votes from a majority of all the appointed electors in the above 1800 hypothetical election. Moreover, let us assume that after electing a President in the House of Representatives, more than four persons voted for as President in the Electoral College with the same number of electoral votes received would remain. According to Article 2 of the Constitution, all those persons would be eligible to participate in electing a Vice President in the Senate. Indeed, the article did not put any limit on the number of persons with the same number of electoral votes received who would be eligible to participate in electing a Vice President in the Senate. In particular, the article did not specify that only those from the "... five highest on the List ..." who would remain after electing a President in the House of Representatives would be eligible to participate in electing a Vice President in the Senate.

Example 1.5 Let us assume that in the 1800 hypothetical election, one person received 66 electoral votes, and six more persons received 35 electoral votes each. Further, let us assume that four persons from among six persons with 35 electoral votes each were selected to be included in "... the five highest on the List ...," together with the person who received 66 electoral votes. (However, Article 2 of the Constitution did not propose a mechanism for selecting those four persons from among the six persons with 35 electoral votes.) Finally, let us assume that the House of Representatives elected President the person with 66 electoral votes. Then all the above six persons with 35 electoral votes each would be eligible to participate in electing a Vice President in the Senate.

The same situation could have emerged if in the above 1800 hypothetical election, one person received 72 electoral votes (i.e., a majority of votes from all the appointed electors), whereas six more persons received 34 electoral votes each. According to Article 2 of the Constitution, after declaring the person with 72 electoral votes an elected President, the Senate would have to chose a Vice President from among all the six persons with 34 electoral votes each.

The voting procedure in electing a Vice President in Congress was to be held by ballot, and each Senator was to vote as an individual, not necessarily in line with the preferences of his state. In the case of a tie in electing a Vice President in the Senate, the sitting Vice President could break this tie, as Sect. 1.3 of Article 1 of the Constitution allowed, since he could break any tie that could occur in voting in the Senate on any matters.

1.7 The Founding Fathers' Mistake: Should Anybody Care?

It could happen that none of the persons voted for as President in the Electoral College were to receive electoral votes from a majority of all the appointed electors (see Sect. 1.6). Article 2 of the Constitution determined which persons voted for as President in the Electoral College could then participate in electing a President in the House of Representatives.

The article states that if this were the case, a list of those voted for as President in the Electoral College was to be compiled by Congress in the course of counting the electoral votes. Only the "... five highest on the List ..." would be eligible to be considered by the House of Representatives in electing a President there.

This phrase means that if the Electoral College were to fail to elect a President, five persons, each with the number of electoral votes fewer than a majority of all the electoral votes in play in the election, would always be available.

However, this assertion is incorrect, since if the number of all the appointed electors were even in a presidential election, it could have happened that only four rather than five persons would have received all the electoral votes cast. Thus, only

four rather than five persons would have been available to be included on the above "List" [1, 22, 23].

Indeed, in the 1792, 1796, and 1800 election the number of all the appointed electors was even. For instance in the 1800 election, 138 presidential electors were appointed, and 276 electoral votes were in play. Let us show by a counterexample that it could have happened that the electors could favor only four persons by giving each of them one-fourth of all the 276 electoral votes, i.e., 69 electoral votes. Such a counterexample to the above assertion from Article 2 of the Constitution, which is subject of consideration, was first developed in [22] for the 1800 election.

Let us consider the 1800 election in which five persons were voted for as President in the Electoral College (2 Democratic-Republicans and 3 Federalists). Those persons received 276 electoral votes from 138 electors from 16 states then forming the Union [1, 22]. Further, let us assume that presidential electors from the states of Georgia or Kentucky had decided to vote in favor of (Federalists) John Adams and Charles Pinckney and to give each of them four electoral votes. Also, let us assume that one elector from Rhode Island had decided to give one of his two electoral votes to John Adams and the other to Charles Pinckney instead of giving one of these two electoral votes to John Jay from New York (as it took place in the 1800 election).

Had this been the case, only four persons voted for as President in the Electoral College would have received 69 electoral votes each. One can easily be certain that the requirement from Article 2 of the Constitution for each elector to cast his two ballots in favor of two persons at least one of whom was not an inhabitant of the same state with the elector would have been met.

However, only four persons would have received all the 276 electoral votes (69 electoral votes each), and none of the persons would have been a recipient of electoral votes from a majority of all the appointed electors.

To be certain how close the real distribution of the electoral votes was to the suggested one, both distributions are presented below [1, 22].

The actual electoral vote distribution among five persons voted for as President in the Electoral College in the 1800 election—two Democratic-Republicans (Thomas Jefferson and Aaron Burr) and three Federalists (John Adams, Charles Pinckney, and John Jay)—looks as follows [1, 22]:

Thomas Jefferson (from Virginia), 73 electoral votes: Georgia (4), Kentucky (4), Maryland (5), New York (12), North Carolina (8), Pennsylvania (8), South Carolina (8), Tennessee (3), Virginia (21).

Aaron Burr (from New York), 73 electoral votes: Georgia (4), Kentucky (4), Maryland (5), New York (12), North Carolina (8), Pennsylvania (8), South Carolina (8), Tennessee (3), Virginia (21).

John Adams (from Massachusetts), 65 electoral votes: Connecticut (9), Delaware (3), Maryland (5), Massachusetts (16), New Hampshire (6), New Jersey (7), North Carolina (4), Pennsylvania (7), Rhode Island (4), Vermont (4).

Charles Pinckney (from South Carolina), 64 electoral votes: Connecticut (9), Delaware (3), Maryland (5), Massachusetts (16), New Hampshire (6), New Jersey (7), North Carolina (4), Pennsylvania (7), Rhode Island (3), Vermont (4).

John Jay (from New York), 1 electoral vote, Rhode Island (1).

The distribution of the electoral votes among four out of the same five persons voted for as President in the Electoral College in the 1800 election—two Democratic-Republicans (Thomas Jefferson and Aaron Burr) and three Federalists (John Adams, Charles Pinckney, and John Jay)—that was suggested in the mentioned counterexample from [1, 22] looks as follows:

Thomas Jefferson (from Virginia), 69 electoral votes: Kentucky (4), Maryland (5), New York (12), North Carolina (8), Pennsylvania (8), South Carolina (8), Tennessee (3), Virginia (21).

Aaron Burr (from New York), 69 electoral votes: Kentucky (4), Maryland (5), New York (12), North Carolina (8), Pennsylvania (8), South Carolina (8), Tennessee (3), Virginia (21).

John Adams (from Massachusetts), 69 electoral votes: Massachusetts (16), Connecticut (9), New Jersey (7), Pennsylvania (7), New Hampshire (6), Maryland (5), Georgia (4), North Carolina (4), Rhode Island (4), Vermont (4), Delaware (3).

Charles Pinckney (from South Carolina), 69 electoral votes: Massachusetts (16), Connecticut (9), New Jersey (7), Pennsylvania (7), New Hampshire (6), Maryland (5), Georgia (4), North Carolina (4), Rhode Island (4), Vermont (4), Delaware (3).

The presented counterexample shows that the case in which only four rather than necessarily five persons (as the Constitution states) could have received all the electoral votes as President in the Electoral College when the number of electors was 138 was possible.

However, this leaves open the question on whether the same case could have existed for any even number of electors. The answer to this question was given in [1, 22, 23], where it was mathematically proven that only four rather than necessarily five persons could have been available in any election held under the rules determined by Article 2 of the Constitution when the number of the electoral votes in play was even. In particular, this could have been the case in the 1792, 1796, and 1800 presidential elections.

The Twelfth Amendment has changed both the manner of electing a President and a Vice President in Congress and the number of persons eligible to be considered in electing a President in the House or Representatives. Thus, the presented counterexample currently has only historical interest. But the question is: should anybody care that the text of the Supreme Law of the Land

- (a) contains a detected logical mistake, which is equivalent to the assertion “ $4=5$ ” [18], and
- (b) no remarks on this matter is present in the footnotes to this text?

Should the U.S. Government Printing Office make a corresponding remark on this matter in new editions of the Constitution to be published in the years to come?

From the author’s viewpoint, it is inappropriate to have such a logical mistake in the text of the Constitution without any notes, but the readers may disagree.

1.8 What Did the Founding Fathers Miss?

Conventional wisdom suggests that the Founding Fathers have created a remarkable document—the Constitution of the United States—in which they offered their vision on how the country should be governed. With respect to presidential elections, they seem to have intended to create a system that would avoid election stalemates—i.e., situations in which the election held according to the rules would not allow one to determine who would be the next President.

Section 1.7 describes a situation in which, formally, the election rules could not have been applied, and the language of Article 2 of the Constitution would have to be changed to let the country complete the election.

The Founding Fathers seem to have believed that every presidential election would inevitably result in electing a President. At least, in the initial design of the election system, there were no rules determining how to continue the election if both the Electoral College and the House of Representatives were to fail to elect a President, at least by a certain day.

The Founding Fathers did not provide for any run-offs in the Electoral College, and they did not let presidential electors change their vote if no person received a majority of votes from all the appointed electors. This seems to be in line with the belief that the Founding Fathers considered the Electoral College more as a selection committee than a decisive body (see Sect. 1.3). In contrast, the Founding Fathers allowed state delegations in the House of Representatives to change their vote as many times as they may need to reach consensus about the best person to fill the office of President. The same freedom to change the vote they reserved for the Senators in electing a Vice President in the Senate. (One should, however, bear in mind that, as mentioned earlier, the Senate could start electing a Vice President only after a President had been elected by the House of Representatives.)

Despite the above-mentioned freedom to change the vote given to both state delegations in the House of Representatives and the Senators, it is clear that the voting procedure in the House of Representatives might not have even started due to the absence of a quorum or could have not resulted in electing a President there. Both outcomes could be results of particular maneuvers that the lower chamber of Congress could eventually undertake, even in the absence of political parties. However, Article 2 of the Constitution did not specify either who should be considered President in both cases, or how long the House of Representatives could continue to elect a President. Moreover, the Constitution did not give any authority to Congress to intervene in the election process in any of such situations.

Only in 1933, the issue of not electing a President and a Vice President by Inauguration Day was addressed in the Twentieth Amendment, which specified how the election should be completed though only in some of such situations (see Chaps. 2 and 3 for details.)

1.9 Who Can Be President or Vice President?

Article 2 of the Constitution specifies that only "... 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..." So only persons meeting the above requirements were eligible to the office of President, provided that these persons had attained the age of 35 years, and any such person had been "... fourteen Years a Resident within the United States."

This norm has remained in force since the ratification of the Constitution.

In the course of the 2016 U.S. presidential election, U.S. Senator Ted Cruz participated in the race for the right to be nominated a U.S. presidential candidate from the Republican Party. However, his the eligibility to the office of President was questioned. Though he was born abroad, his mother was a U.S. citizen, and Pennsylvania Senior Judge Dan Pellegrini ruled that Ted Cruz is to be recognized as a natural born citizen. In his ruling, the Judge referred to the opinion of constitutional scholars Paul Clement and Neal Katyal, published in Harvard Law Review on March 11, 2015. This opinion suggests that persons who are "...U.S. citizens at birth with no need to go through a naturalization proceeding at some later time ..." should be recognized as natural born citizens. In the 2008 U.S. presidential election campaign, a similar question was raised with respect to Senator John McCain, who was born on a U.S. military base in the Panama Canal Zone, outside the United States.

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