# Chapter 2
# The Electoral College Today

**Abstract** Today's Electoral College and the one created by the Founding Fathers are two different election mechanisms. The Founding Fathers might have expected that the Electoral College would only select the candidates for both the Presidency and the Vice Presidency, and Congress would choose both executives from among the selected candidates. In any case, the equality of the states in electing both executives in Congress was expected to compensate for the inequality of the states in the Electoral College. This chapter discusses the current election system and attempts to help the reader comprehend whether this system is a historical anachronism or a unique element of the system of "checks and balances" embedded in the Constitution. This chapter presents a list of constitutional articles and amendments relating to the election system, along with a brief description of how each of these parts of the Constitution affects the functioning of the system. It discusses the basic principles of the current election system, along with seven puzzles of the Twelfth Amendment that have remained unsolved since its ratification in 1804.

**Keywords** Abstaining electors · Concepts and basic principles of the election system · Double-balloting principle of voting in the Electoral College · Electoral tie · Faithless electors · Supreme Court decisions · Twelfth Amendment · Twentieth Amendment · "Winner-take-all" method for awarding state electoral votes

The Electoral College created by the Founding Fathers and today's are two different election mechanisms. The Founding Fathers might have expected that the Electoral College would only select the candidates for both the Presidency and the Vice Presidency, and Congress would choose both executives from among the selected candidates. In any case, the equality of the states in electing both executives in Congress was expected to compensate for the inequality of the states in the Electoral College.

The Twelfth Amendment has substantially changed the initial design of this election mechanism and turned the Electoral College into the body that has determined the outcomes of almost all the presidential elections held after 1804, when the amendment was ratified. Moreover, the adoption of the "winner-take-all"



A.S. Belenky, *Who Will Be the Next President?*,
DOI 10.1007/978-3-319-44696-7_2

method for awarding state electoral votes by 48 states, and the use of a slight modification of this method in the states of Maine and Nebraska have eliminated the deliberative nature of the Electoral College. This method has transformed it into an outlandish scheme for determining the election winner by the states with different numbers of electors, and these numbers depend on the states' sizes.

This chapter discusses the current election system and attempts to help the reader comprehend whether this system is a historical anachronism or a unique element of the system of "checks and balances" embedded in the Constitution. This chapter presents a list of constitutional articles and amendments relating to the election system, along with a brief description of how each of these parts of the Constitution affects the functioning of the system. It discusses basic principles of the current election system, along with seven puzzles of the Twelfth Amendment, which have remained unsolved since its ratification.

The aim of this chapter is (a) to acquaint the reader with the changes that the initial design of the Electoral College has undergone, and (b) to outline the concepts and the basic principles underlying today's Electoral College to help the reader understand what place the Electoral College occupies in the current presidential election system.

## 2.1 Which Constitutional Amendments Defined the Electoral College

There are two groups of constitutional amendments that affected the structure of both the Electoral College and the other parts of the initial design of the election system. Amendments 12, 20, 22, 23, and 25 contain explicit changes to the initial design of the election system, whereas Amendments 13, 14, 15, 17, 19, 24, and 26 concern important issues relating to the changes. The reader can learn more about these amendments further in this chapter.

The Twelfth Amendment still determines the basic scheme for electing a President and a Vice President. It left unchanged some parts of the initial system design while substantially changing the other parts of the system.

The Twelfth Amendment left unchanged the three-level structure of the election system. Also, it left unchanged the basic principle of forming the Electoral College as a set of state presidential electors to be appointed in the manner that the state "… Legislature thereof may direct …." [19]. However, the Twelfth Amendment substantially changed the manner in which the second and third levels of the initial system operate.

With respect to the second level of the system, the Twelfth Amendment directs that each presidential elector is to cast two votes, one for President and the other for Vice President.

With respect to the third level of the system, the Twelfth Amendment directs that

(a) in an election in which electing both executives is to be thrown into Congress, the House of Representatives begins voting for President and the Senate begins voting for Vice President independently, at the same time;
(b) in electing a President, the House of Representatives is to choose a President from among no more than the three top electoral vote-getters (of votes in favor of President);
(c) in electing a Vice President, the Senate is to choose a Vice President between the two top electoral vote-getters (of votes in favor of Vice President);
(d) a quorum of at least two-thirds of all the Senators is needed to start electing a Vice President in the Senate, and the voting should not necessarily be by ballot;
(e) only a majority of the whole number of Senators can elect a Vice President in the Senate by favoring the same person once the voting procedure has started.

The introduction of the principle for separately voting for President and for Vice President in the Electoral College made a difference in presidential elections. Under the principle, a President can be elected after a Vice President has been elected.

Let us assume that a person voted for as Vice President in the Electoral College receives a majority of all the electoral votes that are in play in the election. Further, let us assume that electing a President is thrown into the House of Representatives and that this body elects a President by Inauguration Day. Then, unlike the Vice President-elect, the President-elect is not a recipient of electoral votes from a majority of all the appointed electors. In contrast, under the election rules determined by Article 2 of the Constitution, such an election outcome was impossible (see Sects. 1.5 and 1.6).

Also, the Twelfth Amendment for the first time provided for the case in which a new President shall not have been elected to the office by Inauguration Day. Also, it set an eligibility requirement for the office of Vice President though it did not specify whether this requirement relates only to getting elected to the office.

## 2.2 The Twelfth Amendment Puzzles that Remain Unsolved

There are at least seven puzzles in the text of the Twelfth Amendment, which have remained unaddressed since 1804, when the amendment was ratified, and the absence of clear answers to them may affect the outcomes of presidential elections.

***Puzzle 1***. The status of electors has not been addressed either in Article 2 of the Constitution or in the other articles and constitutional amendments, including the Twelfth Amendment.

Currently, there exist two viewpoints on the matter. Some scholars argue that the Founding Fathers reserved to electors the absolute freedom to vote their choice.

According to the opposite viewpoint, electors were to express the will of those who appointed them. Several times the Supreme Court has rendered opinions relating to this issue. However, the Court has never addressed the issue itself directly [1, 4, 22]. In addition, statements made by the Court in its decisions may support both viewpoints.

For instance, in *Ray v. Blair* [24], the text of the Supreme Court decision contains the phrase "… even if … promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, 1., to vote as he may choose in the electoral college … ." This phrase seems to suggest that the Court supports the viewpoint that the Founding Fathers might have intended the absolute freedom of an elector to vote his choice in the Electoral College.

In contrast, in *McPherson v. Blacker* [25], the Supreme Court stated that "… Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated … ." This phrase seems to suggest that the Court supports the viewpoint that the Founding Fathers might not have intended absolute freedom of electors to vote their choice in the Electoral College. (One should, however, bear in mind that this phrase refers to the implementation of basic ideas of the Constitutional Convention participants rather than to the ideas themselves.) Moreover, in the same *McPherson v. Blacker* [25], the Supreme Court stated that " … But we can perceive no reason for holding that the power confided to the states by the Constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created… . " This phrase seems to suggest that, at least, constitutionally, the absolute freedom of electors to vote their choice should be respected.

Over the years, the discussion about the elector's status has been focused on these two viewpoints. However, in [22] the author has suggested another viewpoint, which cannot, apparently, be ruled out. That is, the Founding Fathers might not have so much been concerned about the elector's status and might purposely have left this issue unaddressed. They might have expected that new generations of Americans would reconsider the compromise that resulted in the creation of the Electoral College. Also, they might have believed that the new generations would propose a better presidential election system or at least a better compromise [18]. The Founding Fathers might even have believed that the absence of a definitive status of electors would motivate a search for a new compromise or a new election system as the country developed [1, 18].

No matter which of these three viewpoints may prevail under particular circumstances, the formal status of electors remains that of free agents [4]. Moreover, the intent of the Founding Fathers on the status of electors remains unknown.

Finally, the Supreme Court position on whether presidential electors may vote their own choice, despite their pledges, remains unclear.

However, if some electors vote faithlessly, i.e., not in line with their pledges, the Electoral College may produce weird or even extreme election outcomes.

*Example 2.1* [1, 18, 22]. Let us consider a presidential election in which presidential candidate A who either represents a non-major political party or is an independent candidate wins at least one electoral vote. None of the other participating candidates win at least 270 electoral votes in the election. Candidate A decides (or agrees) to transfer the electoral votes she/he won to a presidential candidate from a major political party for whatever reasons. The transferred votes (vote) may let the candidate from a major party be elected President if (a) all the electors who are to favor this major party candidate cast their ballots faithfully, (b) the electors of the non-major party candidate vote faithlessly, favoring the major party candidate, (c) no electoral votes are rejected by Congress in the course of their counting in the January that follows the election year, and (d) the total number of electoral votes favoring this major party candidate is sufficient to win the election.

*Example 2.2* [1, 18, 22]. Let us consider a presidential election in which three presidential candidates, A, B, and C, win fewer than 270 electoral votes each. For instance, let they win 268, 150, and 120 electoral votes, respectively. Let candidate A (with 268 electoral votes) also receive a majority of the popular vote nationwide and have support from a majority of all the 50 delegations in the House of Representatives.

While the election is supposed to be thrown into Congress, candidates B and C block this course of the election. They do so by agreeing that a particular pair of the candidates will be elected President and Vice President. Such a pair of the candidates can be formed out of these two candidates and their running-mates. As part of this agreement, all the electors of candidates B and C vote according to the instructions of their candidates. Thus, the agreed upon pair receives 270 electoral votes in December of the election year. If Congress does not object to this move in the course of counting electoral votes, this pair of the candidates becomes elected President and Vice President.

Theoretically, in the absence of clarity regarding the status of electors, the following two weird outcomes may emerge: 1) Presidential electors elect Vice President a presidential candidate and elect President a vice-presidential candidate within one pair of the running mates, and 2) presidential electors elect President and Vice President either persons who have had no presidential electors in a particular presidential election or persons whose presidential electors have not won electoral votes.

*Example 2.3* [1, 18, 22]. In the 1988 election, an elector of the Democratic Party candidates voted for Michael Dukakis' running mate as President and for Michael Dukakis as Vice President.

*Example 2.4* [1, 18, 22]. In the 1976 election, one of the Republican Party electors voted for Ronald Reagan as President though Ronald Reagan was not either a presidential or a vice-presidential candidate in the election.

If enough electors decide to vote faithlessly in the Electoral College like indicated in these two examples, the above two extreme outcomes may become possible. Moreover, Congress may not be able or willing to reject enough faithlessly cast electoral votes to block such extreme election outcomes. Also, one should bear in mind that "massive" faithlessness of electors has never been put to a test [4].

At first glance, these moves of presidential electors may seem too theoretical and too exotic. However, one should bear in mind that such moves may be strategic ones undertaken by a political party. These moves can be made for whatever reasons, for instance, due to a split within the party with respect to supporting its own presidential nominee. Should this be the case in voting for President in the Electoral College, (a) some of the electors of a major political party decide to favor someone who is supported by a sizable part of the party (whose name, however, may even not be on the ballot), (b) the number of faithlessly cast votes is sufficient to throw the election of President into Congress, and (c) the House of Representatives is expected to be controlled by this party in the January that follows the election year, this someone may become elected President in Congress. (See Chap. 3 for more details.)

Some states do not even formally bind their electors to favor particular presidential and vice-presidential nominees in presidential elections [4]. According to the federal Register, the number of these states (which currently control 208 electoral votes combined) equals 21. Electors from these states may eventually decide not to vote in favor of the presidential candidates who head the winning slates of electors in their states. In addition, the Supreme Court may not find a reason to interfere in the election to block the above extreme election outcomes [1]. Finally, the vote of a faithless elector cast in the 1968 election was upheld by Congress, which rejected the objection of several U.S. Senators and Representatives, who challenged this vote [4, 7]. Thus, the ability of Congress to reject faithlessly cast votes seems limited.

***Puzzle 2***. The requirement for presidential electors to vote for President and for Vice President does not make it clear whether the electors should necessarily favor any particular persons to be voted for as President and as Vice President. Therefore, if a presidential elector abstains by casting blank ballots, should this be considered a violation of the Constitution?

When the Electoral College voted in December 2000, one Democratic Party elector abstained by casting blank ballots for President and Vice President [1, 4, 18, 22]. However, this was not considered a violation of the Constitution. Moreover, this manner of voting may even meet the requirements of the Twelfth Amendment. This may be the case if a presidential elector casts a ballot though this ballot cannot be recognized as a vote advantaging any person. The ballot cast blank may still be considered as a vote against all those whom an elector could have advantaged had this elector decided to do so. Such a viewpoint reflects a logically possible interpretation of the phrase "to vote for" [22].

Here, the abstention of an elector is understood as a vote that is physically cast. However, this vote does not advantage any person whom this elector could have advantaged. In particular, it does not advantage the presidential and vice-presidential candidates whose slates of electors form the Electoral College.

Abstention by casting a ballot not recognizable as a vote advantaging any person seems to be a legitimate manner of voting in the Electoral College at least until the Supreme Court provides an interpretation of the phrase "to vote for" and any rules regarding the above-mentioned (assumed) absolute freedom of the electors to vote their own choice. This interpretation may require that every presidential elector casting a ballot should favor, for instance, the presidential and vice-presidential candidates who head the slate of electors to which the elector belongs. On the contrary, this interpretation may confirm that the (assumed) absolute freedom of electors to vote at their own discretion includes their freedom to abstain by casting a blank ballot or a ballot that cannot be recognized as a vote advantaging any person. In the absence of such an interpretation of the phrase "to vote for," the Electoral College can produce other extreme election outcomes [1, 18, 22].

*Example 2.5* [1, 18, 22]. Let presidential candidates A and B win 270 and 268 electoral votes, respectively. Further, let one of the electors of candidate A abstain by casting a ballot that cannot be recognized as a vote advantaging any person. Then neither candidate receives electoral votes from a majority of all the appointed electors as a result of counting electoral votes in Congress.

The election is thrown into Congress, and the House of Representatives elects President candidate B, who received 268 electoral votes. This may happen even if candidate A received a majority of the popular vote nationwide, and even if her/his electors received majorities of the popular vote from each place from a majority of the 51 places (states and D.C.).

Formally, abstaining electors are faithless in a traditionally accepted sense, since they broke their pledges. However, one should distinguish abstaining electors from any other faithless electors. The distinction is associated with the inability of Congress to counteract this phenomenon.

Indeed, Congress can at least try to reject certain electoral votes faithlessly cast but still favoring somebody. Unlike this situation, no actions aimed, for instance, at reassigning electoral votes that did not advantage any person seem reasonable and fair. The example of the 2000 election illustrates how abstaining electors could change the election outcome [1, 18, 22]. Had only two electors of G.W. Bush abstained in the 2000 election, he would have received 269 electoral votes. Then the election would have been thrown into Congress, and the fate of the Presidency would have been decided there rather than in the Electoral College.

Abstaining electors may eventually change the outcome of a presidential election to be thrown into Congress.

*Example 2.6* [1, 18, 22]. Let us consider a presidential election in which four candidates, A, B, C, and D, win 270, 265, 2, and 1 electoral votes, respectively. Further, let 5 electors from among the electors of candidate A (with 270 electoral

votes) vote faithlessly by advantaging candidate B and making this candidate the winner in the Electoral College. Also, let one of the faithlessly cast votes be rejected by Congress in the course of counting electoral votes. Then the election is to be thrown into Congress.

Finally, let candidate C (with 2 electoral votes) have support from majorities of at least 26 state delegations in the House of Representatives. While this candidate has a chance to be elected President, both of candidate C's electors abstain. As a result of these abstentions, the House of Representatives will have to vote for the candidates who do not have support from majorities of 26 delegations there.

Here, the phrase "the highest numbers" from the amendment phrase "… from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. …" (from the Twelfth Amendment [19]) is construed as follows: If (a) there are at least three persons each of whom receives electoral votes as President from less than a majority of all the appointed electors, and (b) no person receives electoral votes from such a majority, three persons always make it onto the list of those to be considered by the House of Representatives in electing a President there.

Thus, Example 2.6 suggests that abstaining electors can make a difference in the number of persons voted for as President in the Electoral College who are to be considered in electing a President in the House of Representatives.

***Puzzle 3***. Let only three persons be voted for as President in the Electoral College and receive different numbers of electoral votes, each less than a majority of all the electoral votes that are in play in the election. The phrase "… not exceeding three…" from the Twelfth Amendment can be attributed (a) to the word "persons," or (b) to the word "numbers," which may affect the number of the candidates who are to be considered in electing a President in the House of Representatives.

*Example 2.7* Let three persons voted for as President receive 269, 267, and 2 electoral votes. Then, in cases (a) and (b), constitutionally, the House of Representatives may consider either only two persons—with 269 and 267 electoral votes—in electing President there or all the three. Let now three persons voted for as President receive 268, 135, and 135 electoral votes, respectively. Then, in case b), all the three candidates are to be considered.

Abstaining electors can also make a difference in electing a President under either interpretation of the above phrase from the Twelfth Amendment. For instance, in case (a), in the situation from Example 2.6, the number of the candidates eligible to participate in electing a President in the House of Representatives may change (from three to two) if both electors of candidate C abstain. This may be the case, if the House of Representatives decides that as long as candidate C, who has support from majorities in at least 26 state delegations, cannot participate in electing a President there, only candidates A and B should be considered in electing a President in the House of Representatives, since they received substantially more electoral votes than did candidate D. (One should mention, that, under interpretation (a), the House

of Representatives may always decide to consider two rather than three persons, even if more than two persons received electoral votes.)

***Puzzle 4***. Many constitutional scholars believe that the electoral tie in the 1800 election caused the introduction of the principle for separately voting for President and for Vice President in the Electoral College [4, 6, 8, 10]. However, the way the language of the Twelfth Amendment is traditionally construed may formally leave the case of an electoral tie in the Electoral College uncovered by the amendment [1].

Indeed, let there be a tie in the Electoral College between two recipients of the same number of electoral votes as President in an election, and let no other person receive electoral votes. Further, let the phrase "the highest numbers" be attributed to electoral votes received by these two persons (as constitutional scholars usually believe [22]). Then, formally, there are two persons having "the highest number" (one and the same) rather than two persons having "the highest numbers" of electoral votes. The use of the plural noun "numbers" means that, formally, this part of the amendment does not cover the case of an electoral tie in the Electoral College when only the tied persons are the electoral vote recipients. Indeed, one should attribute the sense of singularity to the plural noun "numbers" to cover this case. The situation seems to be different when at least two electoral vote recipients are tied, and there are other electoral vote recipients. Under both interpretations (a) and (b) of the phrase "… not exceeding three …," the amendment lets the House of Representatives choose a President from among the electoral vote recipients.

However, let the phrase "the highest numbers" from the amendment refer to positions "… on the list of those voted for as President …" [22]. Then if certain requirements to compiling the list of persons voted for as President are met [22], the tie under consideration will be covered by the Twelfth Amendment [1].

The reader interested in a more detailed analysis of the language employed in the Twelfth Amendment should turn to the author's book [22] and to the author's article [26]. However, one should bear in mind that the aim of the provided analysis is to draw the reader's attention to the existence of a particular uncertainty in the text of the Twelfth Amendment. It neither intends to offer the author's opinion on how the phrase "the highest numbers" from the amendment should be understood nor does to discuss how exotic the presented logic with respect to the electoral tie may (or should) seem.

***Puzzle 5***. Let us assume that at least four persons voted for as President in the Electoral College received one and the same greatest number of electoral votes from among the recipients of electoral votes as President in a particular election year. (Such a situation covers the cases in which not all the appointed electors cast their ballots that could be recognized as votes favoring a particular person.) As in Puzzle 3, under both cases (a) and (b), it is unclear how many electoral vote recipients will be eligible to be considered by the House of Representatives in electing a President there, and how they can be selected from at least the four. The Twelfth Amendment does not provide such a mechanism, and Congress does not have any constitutional authority to establish it.

The same is true for selecting two persons voted for as Vice President in the Electoral College from among at least three recipients of one and the same greatest

number of electoral votes among the recipients of electoral votes as Vice President in a particular election year. (Depending on the number of all the electors appointed in a particular election, there may also be recipients of fewer electoral vote numbers.)

A problem similar to the first of these two problems existed under the initial double-balloting principle for voting for President, determined by Article 2 of the Constitution [22]. (This kind of a problem could emerge under this principle, if, for instance, at least six persons voted for as President in the Electoral College received the same greatest number of electoral votes.)

***Puzzle 6***. The Twelfth Amendment did address the problem of not electing a President by Inauguration Day (see Sect. 2.1). However, it left unclear whether "the Vice President," mentioned in the text of the amendment, is the sitting one or a newly elected one.

Many scholars in the field believe that the phrase "the Vice President" should be construed as the newly elected Vice President. Based on this belief, they assert that Sect. 3 of Amendment 20 of the Constitution superseded the sentence from the Twelfth Amendment containing this provision. The footnote to the text of the Twelfth Amendment, which is published by the U.S. Government Printing Office, asserts the same [19]. However, this assertion may be incorrect [1, 18], and this may make a difference in the event of not electing both a President and a Vice President by Inauguration Day (see Chap. 3).

No matter how strange and egregious the above assumption (that this may be the sitting Vice President rather than a newly elected one) may look, this possibility should be analyzed, since both a President and a Vice President might not have been elected by Inauguration Day in any presidential election held from 1789 to 1932. Indeed, only the Twentieth Amendment, ratified in 1933, addressed for the first time the case of not electing both a President and a Vice President by Inauguration Day. Only in the Twentieth Amendment, for the first time, a President-elect and a Vice President-elect were mentioned in the Constitution.

The authority given by Article 2 of the Constitution to Congress to provide by law for the "… Case of the Removal of the President from Office or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office …" and for the "… Case of Removal, Death, Resignation or Inability, both of the President and Vice President …" was given only with respect to both the acting President and the acting Vice President. (Congress used this authority for the first time in 1792 by adopting the President Succession Act of 1792.) However, the above circumstances, listed in Article 2, do not include the situation in which (a) neither a new President nor a new Vice President have been chosen (elected) by either the Electoral College or Congress by Inauguration Day, or (b) both a President and a Vice President have been chosen (elected) by either the Electoral College or Congress but have failed to meet the constitutionally eligibility requirements of the office of President by Inauguration Day. The phrase "the Vice President" cannot be attributed to any person who has not been sworn in as Vice President and has not taken the office.

Moreover, in this situation, the Twelfth Amendment did not give to Congress any constitutional authority to act, for instance, by assigning anyone to act as

President if neither a President nor a Vice President were chosen by Inauguration Day. Thus, from the 1804 election to the 1932 election, an election stalemate would have been the only alternative to the interpretation of the phrase "the Vice President" from the Twelfth Amendment as the sitting Vice President. Whether the possibility of this situation to emerge was a result of a logical flaw in the text of the Twelfth Amendment, or the amendment sponsors meant the extension of the authority of the sitting Vice President under this circumstance remains a puzzle.

This puzzle can be eliminated by a clarification and interpretation of the corresponding part of the text of the Twelfth Amendment, and this can be done either by the Supreme Court or by means of adopting a new constitutional amendment. Any opinions of any constitutional scholars on the matter are no more than their opinions, no matter how convincing they may seem.

Finally, theoretically, it is possible that for whatever reasons, all the appointed presidential electors act faithlessly, i.e., all the Electoral College members in a particular election year cast ballots that cannot be recognized as votes favoring any persons or cast blank ballots. Had this happened, the only provision to complete the election (held from 1804 to 1932) would have been the Twelfth Amendment if the Supreme Court confirmed that "the Vice President," mentioned in the amendment, is the sitting Vice President rather than a newly elected one.

Generally, as long as the text of the Constitution creates some room for logically possible variants of understanding its particular parts, these parts may, eventually, require corresponding interpretations. However, this is likely to happen only when uncertainties embedded in such parts of the text cause events requiring the immediate attention of the Supreme Court in the course of a particular election campaign. At the same time, the chances of not having elected a President, or a Vice President, or both by Inauguration Day look slim. So any interpretations of the above phrases by the Supreme Court (see Chap. 3) in the future seem unlikely.

Once again, the aim of the provided analysis is to draw attention to a particular uncertainty that is present in the text of the Twelfth Amendment rather than to offer the author's opinion on how the phrase "the Vice President" from the amendment should be understood.

***Puzzle 7***. The Twelfth Amendment has determined that in electing a Vice President in the Senate,

(a) "… a quorum for the purpose shall consist of two-thirds of the whole number of Senators …", and
(b) "… a majority of the whole number shall be necessary to a choice."

Unlike in requirement (a) from the text of the Twelfth Amendment, it is not clear a majority of what "the whole number," mentioned in requirement (b), was meant by the amendment sponsors. It seems natural to understand the phrase "the whole number" in both requirements (a) and (b) as the whole number of the appointed Senators rather than the number of the voting Senators that are present in the Senate at the time of electing a Vice President there and form a quorum needed to start the voting there. This understanding seems to be in line with the text of the amendment

though, logically, this phrase may imply a majority of the Senators who would vote in electing a Vice President in the Senate (provided there is a quorum required in (a) to start the voting procedure there). Yet both interpretations of the above phrase raise the same question: How should one understand the right of the sitting Vice President to cast a vote according to the phrase "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided," from Article 1 of the Constitution [19], in electing a Vice President there?

It seems that the authorization to break a tie once the votes of the Senators are equally divided works only if no special requirements to be met to consider a vote in the Senate decisive are stipulated. Attaining a majority of votes of "…the whole number … ," which is "… necessary to a choice … ," seems to be such a requirement in both (logically) possible variants of understanding the phrase "…the whole number … " from the amendment. Thus, if "… a majority of the whole number …" of votes of all the Senators (or of only voting ones) is not attained while the votes are equally divided, the sitting Vice President, apparently, cannot break a tie in the Senate in voting for a new Vice President there. In any case, it should be clarified whether "… a majority of the whole number …" should necessarily be understood as that of the votes from all the appointed Senators or as that of those who would vote in electing a Vice President in the Senate (provided a quorum required in (a) to start the voting procedure there exists).

Once again, the aim of the provided analysis is to draw attention to a particular uncertainty that is present in the text of the Twelfth Amendment rather than to offer the author's opinion on how the phrase "… a majority of the whole number …" from the amendment should be understood.

## 2.3 The Electoral College: Concepts and Basic Principles

Article 2 of the Constitution reflects the following three basic ideas underlying the Electoral College [1, 18]:

(1) All the states should be fairly represented in presidential elections. The 1787 Constitutional Convention participants believed that the states should be represented in these elections in the same manner in which the states are represented in Congress.
(2) A President and a Vice President are to be elected by state presidential electors. Each elector is to be chosen in the state of his residence "… in such Manner as the Legislature thereof may direct …" [19].
(3) The first choice of electors from among persons voted for as President by the Electoral College was to be President, provided only one such person had received the greatest number of electoral votes from a majority of all the

appointed electors. The first choice of electors from among the residual persons (after electing a President) voted for as President by the Electoral College was to be Vice President, provided only one person from among the residual persons had received the greatest number of electoral votes.

If the Electoral College were to fail to elect either executive or both of them, the election was to be thrown into Congress.

Article 2 of the Constitution stipulated the rules for electing either executive or both in Congress.

Two principles—unequally dividing the election power among the states and allocating blocs of electors to the states—incorporate the first and the second basic ideas of a fair representation of all the states in electing a President.

The double-balloting principle of voting in the Electoral College, the "one state, one vote" principle in electing a President in the House of Representatives, and the "one state, two votes" principle of electing a Vice President in the Senate incorporated the third basic idea into the election system.

Article 2 of the Constitution requested each elector to cast two undifferentiated votes for two persons as President. However, no uniform manner in which electors should vote was proposed in the Constitution (see Sect. 2.2).

The Twelfth Amendment has substantially modified the third basic idea of the Founding Fathers. First, the amendment introduced the principles for separately voting for President and for Vice President both in the Electoral College and in Congress. Second, due to these principles, the election can produce an acting rather than an elected President (at least for a certain period of time). Third, unlike under Article 2 of the Constitution, the House of Representatives could no longer affect the election of a Vice President (see Sect. 1.6.)

Today, the above three original ideas of the Founding Fathers are present in the election system in the following forms:

(a) The election power is unequally divided among the states by allocating blocs of electors to the states.
(b) The distribution of the population among the states determines the sizes of the blocs of electoral votes allocated to the states. The number of electors for the District of Columbia is determined by Amendment 23 of the Constitution (since the 1964 election).
(c) Three groups of people rather than the American electorate have the power to elect a President and a Vice President. State presidential electors constitute the first group, and they are appointed in a manner determined by the state legislatures and by the D. C. authorities. Members of the House of Representatives constitute the second group, and members of the Senate constitute the third group. Though both the second and third group together tally the votes cast by presidential electors, they are to elect either or both executives only if the Electoral College fails to elect them. The House of Representatives then elects a President, and the Senate elects a Vice President.

These ideas of the Founding Fathers work together with the following two new election principles introduced as the election system has evolved:

(d) The "winner-take-all" principle for awarding state electoral votes, a particular manner of choosing state electors, introduced into the system under "… the influence of political parties …" [27] (see about this principle later in Sect. 2.4).
(e) The principles for separately voting for President and for Vice President both in the Electoral College and in Congress. These principles replaced the double-balloting principle for voting in the Electoral College and the schemes for electing a President and a Vice President in Congress, determined by Article 2 of the Constitution.

The Twelfth Amendment employs the following definition of a person elected President:

A person voted for as President in the Electoral College is considered elected President in two cases:

1. This person received electoral votes from a majority of all the appointed electors. This fact is established by Congress as a result of counting electoral votes there in the January that follows the election year.
2. This person received votes from a majority of (currently 50) state delegations if the election of a President is thrown into Congress. This is established by tallying the votes cast by the state delegations in the House of Representatives.

Throughout the book, this definition is referred to as the first concept of the current election system [1, 18].

Article 2 and Amendment 23 of the Constitution determine the formal procedures by which electoral vote quotas are assigned to the states and to D.C., respectively. Throughout the book, these procedures are referred to as the second concept of the current election system [1].

Besides the above two concepts of the current election system, the following principles of the system are referred to as the basic ones [1, 18]:

– the "winner-take-all" principle of (method for) awarding state electoral votes (currently employed in 48 states and in the District of Columbia),
– the method for awarding state electoral votes in the state congressional districts and at large (currently employed in the states of Maine and Nebraska),
– the principle for separately voting for President and for Vice President both in the Electoral College and in Congress, and
– the rules of 1825, determining the voting procedure in electing a President in the House of Representatives.

## 2.4 The "Winner-Take-All" Principle and the 1787 Great Compromise

According to Article 2 of the Constitution, the legislature of a state directs the manner in which state electors are appointed in each presidential election. Nowadays, 48 states and the District of Columbia choose their electors by popular vote [4, 6]. Constitutionally, Congress determines the manner of appointing D.C. electors [19, 27]. However, in 1973, Congress delegated the privilege to choose this manner to the D.C. Council [5].

Each person recognized as a presidential candidate in any of these 49 places (48 states and D.C.) is entitled to submit a slate of electors there. The number of electors in this slate equals the number of electors that the place is entitled to in a particular presidential election (see Sect. 1.1.) Voting voters can favor any slate of electors from among all the slates submitted by the participating presidential candidates in a state or in D.C. Under this manner of choosing electors in these 49 places, no voter can favor electors from different slates.

Formally, voting voters vote for presidential electors, whose names are supposed to be on the ballot. However, currently, D.C. and a majority of the states use the so-called "short ballots." Only the names of presidential and vice-presidential candidates heading the slates of their electors appear on these ballots. In each of the 48 states, the slate of electors that receives at least a plurality of the votes cast statewide (in November of the election year) wins the right to represent the state in the Electoral College. The slate of electors that receives at least a plurality of all the votes cast in D.C. wins the right to represent D.C. in the Electoral College.

This manner of choosing presidential electors in each of the 48 states and in D.C. is called the "winner-take-all" method. This name comes from the fact that only one pair of presidential and vice-presidential candidates whose slate of electors wins the popular vote statewide "takes all" the state electoral votes. The other participating candidates, as well as all the voters who supported their electors, are left with nothing.

The state of Maine and the state of Nebraska elect their electors in a slightly different manner. The state of Maine elects two electors statewide (at large) and one elector in each of its two congressional districts. The state of Nebraska elects two electors statewide (at large) and one elector in each of its three congressional districts. An elector who receives at least a plurality of votes cast in a congressional district of either state wins the right to represent this district of the state in the Electoral College.

In each of these two states, two electors who receive at least a plurality of votes statewide win at large. These two electors are to represent the state in the Electoral College, along with the electors who are to represent congressional districts of the states in the Electoral College as well [28, 29]. Both states use the "short ballots" so that voters in either state may believe that they vote directly for the corresponding pairs of the candidates (as may the voters in the other states and in D.C.).

Nevertheless, they vote for one elector in each congressional district and for two electors at large.

Only these two states may have electors who are to favor different pairs of presidential and vice-presidential candidates. Up to four pairs of presidential and vice-presidential candidates may win electoral votes in Nebraska, and up to three pairs of the candidates may win electoral votes in Maine.

Though both the state of Maine and the state of Nebraska do not use the "winner-take-all" method in the form in which the other 48 states and D.C. do, their manner of appointing state presidential electors remains the "winner-take-all." [30].

*Example 2.8.* [18, 22]. Consider a hypothetical presidential election in the state of Maine in which three presidential candidates submit slates of electors. Let these candidates receive 16000 votes total, and let the slates of electors, submitted by the candidates, receive the following numbers of the votes cast:

| Slates of electors | District 1 | District 2 | Total (at large) |
|---|---|---|---|
| Candidate 1 | **2000** | 3000 | 5000 |
| Candidate 2 | 1900 | 3900 | **5800** |
| Candidate 3 | 1100 | **4100** | 5200 |

Here, the slate of electors of candidate 1 wins one electoral vote (in Congressional District 1), the slate of electors of candidate 3 wins one electoral vote (in Congressional District 2), and the slate of electors of candidate 2 wins two electoral votes (at large) though no slate of electors of candidate 2 wins in the districts.

*Example 2.9* [18, 22]. Consider a hypothetical presidential election in the state of Nebraska in which four presidential candidates submit their slates of electors. Let these candidates receive 20000 votes total, and let the slates of the candidates receive the following numbers of the votes cast [18]:

| Slates of electors | District 1 | District 2 | District 3 | Total (at large) |
|---|---|---|---|---|
| Candidate 1 | 1250 | 2000 | 3500 | **6750** |
| Candidate 2 | **2000** | 1500 | 1500 | 5000 |
| Candidate 3 | 500 | **2250** | 1000 | 3750 |
| Candidate 4 | 250 | 250 | **4000** | 4500 |

Here, the slate of electors of candidate 2 wins one electoral vote (in Congressional District 1), the slate of electors of candidate 3 wins one electoral vote (in Congressional District 2), the slate of electors of candidate 4 wins one electoral vote (in Congressional District 3), and the slate of electors of candidate 1 wins two electoral votes (at large) though no slate of electors of candidate 1 wins in the districts.

Thus, Maine since 1969 and Nebraska since 1991 have become the only states in the Union in which the electors of a pair of presidential candidates can win electoral votes without winning in the whole state [31]. The reader can find a complete analysis of all possible election outcomes in the states of Maine and Nebraska in [22].

It seems natural that voting voters expect electors who win the right to represent the states and D.C. in the Electoral College under the "winner-take-all" principle to favor those pairs of presidential and vice-presidential candidates whose slates of electors these electors represent. However, if the electors were obliged to vote in such a manner in the Electoral College, this might raise questions about whether the election system is in line with the 1787 Compromise. All depends on how the elector's status is construed.

Under the 1787 Compromise, only presidential electors can exercise the first attempt to elect a President. Neither the people nor the states can do this directly. The Founding Fathers might have believed that only electors—who apparently were supposed to be distinguished individuals in the nation—would possess the necessary knowledge, judgment, etc. about the best persons to fill both highest offices in the country. Moreover, the Founding Fathers might have believed that the double-balloting system for voting for President would help identify either the best two such persons or a list of the persons the most suitable to be Chief Executive of the Union and his Vice President [22].

The 1787 Constitutional Convention participants wanted electors to vote in their respective states on one and the same day. One may believe that this was done to avoid any pressure that some electors could impose on others [18]. If the electors were to fail, the states would determine the election outcome in the second attempt to elect a President and a Vice President. The House of Representatives would elect a President according to the principle "one state, one vote," and the Senate would elect a Vice President according to the principle "one state, two votes," despite the states' sizes.

What happens if one assumes that presidential electors must vote according to the will of their respective states and D.C.? This would mean that the states and D.C. themselves, rather than state and D.C. presidential electors exercise the first attempt to elect a President. However, the states and D.C. would not do this according to the "one state, one vote" and "one state, two votes" principles of electing a President and a Vice President by the states, respectively, and each state would not have the same number of votes independently of its size. This would contradict the 1787 compromise.

Some people who believe that in voting in the Electoral College, the electors chosen under the "winner-take-all" principle for appointing state and D.C. presidential electors exercise their free judgment may, however, refer to the opinion of the Supreme Court in *Ray v. Blair* [24]. This opinion, in particular, states that "… the Amendment does not prohibit an elector's announcing his choice beforehand… ." They may also refer to *McPherson v. Blacker* and may believe that by following "… the will of the appointing power in respect of a particular candidate …" [25], electors exercise their free judgment [1, 18]. Also, by upholding the vote cast by a faithless elector in the 1968 election [6], Congress, in fact, confirmed that free judgment may not be prohibited to electors, since choices other than those announced beforehand can be made.

In any case, the "winner-take-all" method for appointing state and D.C. presidential electors is no more than one such method. Though this method is currently used both in all the states and in D.C., the legislature of any state can replace it with

any other method at any time, as long as it is done in line with the federal statute requirements [1]. No matter in which particular form this method is applied, its use by all the states and D.C. may raise constitutional questions on whether the current election system works in line with the 1787 Great Compromise.

## 2.5 Electing a President in the House of Representatives

The Constitution provides very basic principles for electing a President in the House of Representatives in an election thrown into Congress. The House of Representatives is entitled to set its own rules for the voting procedure there [6], and such rules are not part of the Constitution. Thus, the Constitution allows each newly elected House of Representatives either to change the already accepted rules or to follow these rules.

The House of Representatives set the rules for electing a President in 1825, and these rules have remained unchanged ever since [6, 18].

Article 2 of the Constitution provided for certain situations in which an elected President could not "… discharge the Powers and Duties of the said Office, …" [19]. However, the article did not provide for situations in which a President was not elected in the House of Representatives in an election thrown into Congress (see Sect. 1.8). Moreover, this article requires a new Vice President to be elected only after a President has been elected.

In contrast, the Twelfth Amendment considers the case in which a President shall not have been elected by a particular time and separates the election of a Vice President from the election of a President.

According to the Twelfth Amendment, not electing a President by Inauguration Day in the House of Representatives is a legitimate election outcome there. The Twentieth Amendment, ratified in 1933, provides additional rules for the case in which a President shall not have been elected by a particular time. Both amendments reconfirm that not electing a President by the House of Representatives by Inauguration Day can be a legitimate election outcome.

The rules of 1825, however, seem to eliminate such an option, which looks contradictory to the constitutional provisions stipulated by both amendments. Indeed, according to the 1825 rules, "… in case neither of those persons shall receive the votes of a majority of all the States on the first ballot, the House shall continue to ballot for a President, without interruption by other business, until a President be chosen." [4, 18].

Thus, formally, the rules of 1825 do not require that electing a President in the House of Representatives must necessarily result in electing President a person voted for as President in the Electoral College, particularly, before Inauguration Day. However, it is hard to imagine that the House of Representatives will vote for President "… without interruption by other business …" through the next presidential election if there is a quorum to start the voting procedure there, since the option to adjourn [4] can eventually be used.

## 2.6 The Electoral College and Amendments 20, 22, 23, and 25

Besides the basic concepts of the election system, set by Article 2 and Amendment 12 of the Constitution, there are several constitutional provisions that determine a set of particular rules of presidential elections. These election rules reflect developments of the system that have taken place over the years, and they embody certain principles of the system.

Some of these rules have further diverted the election system from its initial design.

Amendment 20 of the Constitution reconfirmed that a President may be chosen after electing a Vice President, which was first established by the Twelfth Amendment (see Sect. 2.2). Also, the Twentieth Amendment provides for certain situations in which a President shall not have been elected at least by the beginning of the new presidential term.

Amendment 22 of the Constitution has substantially changed the initial design of the election system. This amendment limited the right of an eligible citizen to be elected President.

Certain limitations on the length of the term of a President in the office were proposed in the course of the 1787 Constitutional Convention [18]. However, no limitations on the eligibility of citizens to be elected President were imposed by the 1787 Constitutional Convention. From this viewpoint, the limitations imposed by Amendment 22 of the Constitution may be viewed as a punishment for success in governing the country by a person who has either been elected President twice, or has been elected President once, or has served as President for more than two years of somebody else's term. Nevertheless, the motives underlying the amendment are understandable.

Also, the Twenty Second Amendment has created a constitutional puzzle.

The amendment, particularly, limited the right of a citizen who has been elected President twice to be elected President again. Yet it did not say anything about the eligibility of such a citizen to be elected Vice President or to fill the vacancy of the office of President according to the Presidential Succession Act of 1947.

Article 2 of the Constitution uses the phrase "eligible to the office." Black's Law Dictionary treats this phrase as "capable of being chosen," whereas the Merriam-Webster Dictionary treats the word "eligible" as "qualified to participate or be chosen." So the use of the phrase "No person shall be elected to the office of the President…" instead of the phrase "No person shall be eligible to the office of the President…" in the Twenty Second Amendment may suggest that the amendment affects only the right of particular persons to be elected to the office of President rather than their eligibility to the office, which includes that to serve in the office.

The Constitution addresses the cases in which someone other than a person who has been elected President can serve in the office of President. This may happen as a result of (a) tragic or unfavorable events, a decision to resign, or the inability of an elected President to discharge the powers and duties of the office of President

(as Article 2 and Amendment 25 of the Constitution read), and (b) the application of the Presidential Succession Act of 1947 due to the inability of a person—who has been chosen by either the Electoral College or the House of Representatives but has not met the constitutional eligibility requirements of the office of President—to swear in as President (in the case addressed by the Twentieth Amendment). Thus, the phrase "constitutionally ineligible to the office of President" from the Twelfth Amendment requires clarification, since this phrase was the only one on the matter of the eligibility of a person to be elected to the office of Vice President from 1804 until the ratification of the Twenty Second Amendment in 1951.

Sect.1 of Article 2 of the Constitution set the same constitutional eligibility to the offices of President and Vice President in 1788. That is, a person is eligible to either office if this person is (a) "a natural born Citizen," (b) "has been fourteen Years a Resident within the United States," and (c) has "attained to the Age of thirty five Years," and the Twelfth Amendment left the eligibility to both offices unchanged. The Twenty Second Amendment has prohibited particular persons otherwise eligible to the office of President from being elected to this office [19]. However, the amendment left unclear whether (a) the notion of the eligibility of a person to the office of President that existed from 1788 to 1951 changed, and (b) the phrases "to be eligible to the office of President" and "to be elected to the office of President" are to be treated as synonyms.

After the ratification of the Twenty Second Amendment, though the difference between the above two options to construe the eligibility with respect to the office of President seems clear, only the Supreme Court may decide how this eligibility should be construed. That is, only the Court may decide whether the meaning of the eligibility to the office of President that existed in the country from 1788 to 1951 has changed, or it remains the same, and the amendment imposed limitations only on the right of particular persons to be elected to this office.

A description of the consequences of both possible Supreme Court decisions may encourage the clarification of the phrase "eligible to the office of President."

First, let us assume that the Court decides that beginning from 1951, the eligibility of a person to the office of President has meant that the person (a) is "a natural born Citizen," (b) "has been fourteen Years a Resident within the United States," (c) has "attained to the Age of thirty five Years," and (d) has not been elected to the office twice or has not served "… two years of a term to which some other person was elected President …" and then has been elected President once. Then a person who was elected to the office of President twice cannot (a) be elected Vice President, and (b) fill the office of President by the application of the Presidential Succession Act. This understanding of the eligibility does not make a person banned from being elected President if she/he has held the office of President once and then "… acted as President, for more than two years of a term to which some other person was elected President …." Yet had such a person been elected President again, this person would have turned out to be the one elected President twice having served "… two years of a term to which some other person was elected President …," which would seem to contradict the amendment provision. However, it is unclear whether the amendment covers this case, since, formally,

such a person is not mentioned in the text of the amendment, whereas a person who acted as President for more than two years first and then was elected President cannot be elected President again. Only the Supreme Court can decide whether the Twenty Second Amendment, nevertheless, covers the above case.

Now consider the second option. Let the Court decide that the eligibility of a person to the office of President is still determined only by Sect.1 of Article 2 of the Constitution, whereas, particularly, a person who has been elected to the office twice cannot be elected President. If this is the case, this person cannot be elected to the office of President while remaining eligible to the office of Vice President. Thus, such a person can (a) be elected Vice President, and (b) fill the office of President as a result of the application of the Presidential Succession Act, and (c) become an Acting President in line with the Twenty Fifth Amendment provisions. (This person could also act as President if the Supreme Court decided that "the Vice President," mentioned in the text of the Twelfth Amendment, is the sitting one.)

Amendment 23 of the Constitution has given the District of Columbia the right to appoint as many presidential electors as the least populous state in the country has, which currently equals three.

Amendment 25 of the Constitution determines the rules of (a) filling the office of President in "… case of removal of the President from the office …," (b) filling the vacancy in the office of Vice President, and the procedures for filling the offices of President and Vice President in the case of disability of the President.

Besides the considered situations, Amendment 25 determines the rules to be applied if either a President-elect or a Vice-President-elect makes an unexpected decision to resign before Inauguration Day. Also, Amendments 20 and 25 authorize Congress to provide for situations that may occur in the elections under certain tragic circumstances.

The reader interested in studying such situations is referred to the book [4].

## 2.7 Electoral Requirements and Amendments 13, 14, 15, 19, 24, and 26

The Thirteenth Amendment prohibited slavery in the United States of America, changed the composition of the American electorate and, consequently, the apportionment of the seats in the House of Representatives among the states.

The Fourteenth Amendment guaranteed equal "privileges or immunities" and "equal protection of the laws" to all citizens of the United States of America. Also, it determined who cannot be a member of the Electoral College in any election year.

The Fifteenth Amendment gave the right to vote to all U.S. citizens, independently of their "race, color, or previous condition of servitude."

The Nineteenth Amendment prohibited both the denial and the abridgment of the right to vote based on sex, giving American women the right to vote.

The Twenty Fourth Amendment prohibited both the denial and the abridgment of the right to vote due to the failure to pay any taxes.

The Twenty Sixth Amendment gave the right to vote to all American citizens who have attained the age of 18.

## 2.8 American Beliefs About the Election System

The Constitution does not address certain issues relating to the voting behavior of electors in the Electoral College. Nor does it address issues relating to nominating presidential and vice-presidential candidates. Nevertheless, many Americans believe that the following assumptions always hold in presidential elections though this may not be the case:

(a) Many eligible voters always vote in every state and in D.C. "… on the Tuesday next after the first Monday in the month of November…" (Election Day) [1] of the election year. The voter turnouts in each state and in D.C. are sufficient to allow one to consider legitimate the appointing of electors according to the popular vote there. (The electors of) one pair of presidential and vice-presidential candidates at least from each of (currently) two major political parties participate in the election on Election Day.

Voting voters vote for participating pairs of presidential and vice-presidential candidates (though they really vote only for slates of electors submitted by the candidates rather than for the candidates themselves).

Replacing the candidates from both major political parties before Election Day is possible, and the rules for replacing candidates from both major political parties under certain circumstances are legitimate. (Both major political parties have declared rules governing such replacements [4]). However, the Constitution does not address this issue, which was indicated, in particular, by President Lyndon Johnson in his message to Congress laid before the Senate on January 20, 1966.

(b) On the first Monday after the second Wednesday in December of the election year, each state elector casts two ballots. One ballot is recognizable as a vote favoring a person as President, and the other is recognizable as a vote favoring a person as Vice President. At least one of these two persons is not "… an inhabitant of the same state…" [19] with the elector.

However, each elector can decide to favor two persons from the elector's state, making one of her/his votes not possible for tallying by Congress in the January that follows the election year.

(c) Persons voted for as President or as Vice President by the Electoral College are those who had received at least one electoral vote from all the appointed electors.

However, a person can be voted for as President or as Vice President but receive zero electoral votes. Indeed, as free agents, presidential electors can abstain by

casting ballots that cannot be recognized as votes, for instance, by casting blank ballots (see Sect. 2.2).

(d) The voting procedure in the Electoral College usually results in electing a President and a Vice President. If unsuccessful, quorums to hold elections in the House of Representatives and in the Senate are always available. These voting procedures there result in electing a President in the House of Representatives and in electing a Vice President in the Senate by Inauguration Day. If the voting in either Chamber of Congress or in both of them is still unsuccessful, Amendments 20 and 25 of the Constitution, along with statutory provisions for presidential selection, always determine who are to fill the offices of President and Vice President [18]. These provisions are either currently in force or can be introduced by Congress [4].

However, there are situations of not electing a President and a Vice President by Inauguration Day that may not be covered by the Twentieth and Twenty Fifth Amendments. These situations may cause election stalemates (see Chap. 3 for details).

Under the assumptions made, the current election system guarantees that two eligible citizens will always fill the offices of President and Vice President on Inauguration Day as a result of a presidential election without run-off elections [1].

However, even under these assumptions, there is no constitutional guarantee that presidential and vice-presidential nominees whose electors form the Electoral College will be among persons favored by the electors. This means that voting voters play only quite a limited role in presidential elections.

Indeed, constitutionally, with respect to presidential elections, eligible citizens may choose only electors in the places of their residence (states and D.C.). Moreover, the Constitution allows the citizens to play even this limited role only as long as "… the Legislature thereof…" directs choosing state electors by popular vote in the states of their residence (and in D.C.) [1]. Only electors chosen by any manner can then choose a President and a Vice President. All presidential electors are free to nominate whomever they want to be voted for as President and as Vice President. They can put any names on the elector ballots, and, constitutionally, they can elect their own nominees President and Vice President. A majority of the votes cast by all the appointed electors and received by any person, can make this person the election winner in the Electoral College.

Thus, electors can elect President and Vice President whomever they want rather than necessarily presidential and vice-presidential candidates whose slates of electors won in the states and in D.C. Even if presidential and vice-presidential candidates are those or are among those whom electors decide to favor, these candidates cannot be guaranteed to be elected to the offices according to the status they have on the ballots in November of the Election Year. Electors are free to favor vice-presidential candidates as President and to favor presidential candidates as Vice President. They can even favor the same person as President and as Vice President, which might have been the case in the 2004 election.

If the Constitution does attribute the status of free agents to presidential electors, then the electors are free to exercise their judgment in any manner they want. It remains questionable whether the binding that (currently) 29 states and D.C. impose on electors is enforceable [4, 10].

While (currently) more than 200 million voters are eligible to participate in one election process—vote for slates of presidential electors—the decision on the election outcome in each presidential election is currently made by no more than 1073 citizens in the framework of another election process (provided no court interferes in the election process). Indeed, currently, only all the appointed presidential electors, whose number does not exceed 538, and 535 members of Congress determine the election outcome as a result of this another election process. Here, the number of electors equals 538 only if all the states and D.C. appoint all the electors that they are entitled to appoint [18].

There is nothing in the Constitution that suggests that the outcomes of both election processes should necessarily be connected. Of course, if the electors chosen under the "winner-take-all" principle do not follow the will of their states and D.C., it may cause extreme election outcomes in the Electoral College (see Sect. 2.2). However, the Constitution does not prevent the country from the emergence of such outcomes.

No matter how illogical this may seem at first glance, according to the Constitution, voters may participate in presidential elections in the states only to choose state electors. The Founding Fathers did not agree that the will of the nation should matter in presidential elections, and this disagreement among the Constitutional Convention participants is part of the 1787 Great Compromise. Even the will of the states matters only if the electors do not reach consensus on who should be the next President. This explains why the "winner-take-all" principle, applied by all the states (in both variants) and by D.C. as a manner of choosing state presidential electors, seems to distort the role that the Founding Fathers attributed to presidential electors (see Sect. 2.4).

Weird outcomes in presidential elections, some of which were considered earlier (see Sect. 2.2), may emerge due to the absence of a formal connection between the above two election processes. Even if assumptions (a)–(d), cited in this section, along with the assumption that electors are to vote for only presidential and vice-presidential candidates hold, extreme election outcomes still may occur. Moreover, the omission of combinations of these assumptions, or certain parts of them may cause additional extreme election outcomes. These weird and extreme outcomes are among the subjects of consideration in the author's books [1, 18, 22].

## 2.9 Is the Electoral College Impervious to Change?

Almost a thousand attempts to reform the Electoral College have been undertaken. All these attempts, including those to replace the Electoral College with a direct popular election *de jure*, by amending the Constitution, have failed.

This idea to introduce a direct popular election has long existed in the United States, and it recurs each time a new presidential election nears. If the results of the polls are trustworthy, this idea is supported by an overwhelming majority of the respondents. However, it is doubtful whether the poll results bear evidence that the country would benefit from such a replacement. The seeming simplicity of a direct popular presidential election in the U.S. is quite deceptive. The clear separation of powers between the states and the federal government has existed for more than two centuries. So any change of the balance between the two would have hidden drawbacks that the media and the pollsters usually fail to communicate.

The existing Electoral College-based system of electing a President is complicated, and the simplistic media coverage of American social and political phenomena fails to educate voters about nuances of that system. In fact, pollsters ask people whether they favor replacing the Electoral College, a system that many respondents do not sufficiently understand, with direct popular election, a system that many respondents also do not necessarily understand [32].

There seem to be objective reasons for the failure to change the Electoral College-based election system.

1. Despite all its deficiencies, the Electoral College seems to have served the underlying idea of the Constitution well. Many Americans believe that the Electoral College is one of the key elements of the "checks and balances" system, which the Founding Fathers put in place as a result of the debates at the 1787 Constitutional Convention. Since the country was founded as a Union of the states, it seems that only the states, rather than any number of respondents to any polls should decide whether to replace this system with any other system.
2. Only the states can decide whether to surrender the privileges they are entitled to, even if some of the states have not used them for a particular historical period of time. Moreover, the states can surrender these privileges only via a constitutional amendment, which is not easy to initiate and pass.
3. The manner of the state representation in the Union, invented by the Founding Fathers as a result of the 1787 Great Compromise, seems to have been favored by all the states. The states have dual representation in Congress—in the House of Representatives by congressional districts and in the Senate as equal units. The representation in the House of Representatives reflects the size of the state population, whereas the representation in the Senate reflects the equality of all the states as members of the Union.

The same type of dual representation is embedded in the Electoral College (though, possibly, not in the best way). Any attempt to replace this dual representation of the states in electing a President by any form of a singular representation of the people only is unlikely to succeed unless all the states agree to such a replacement.

4. The current structure of the Constitution and the Supreme Court decisions regarding issues relating to presidential elections do not seem to let one do away with the Electoral College in its existing form other than by means of a

constitutional amendment. A recent attempt to replace the current Electoral College-based presidential election system with the National Popular Vote plan (see Chap. 6) does not seem to be an exception.

Its originators and backers claim that the plan leaves the Electoral College unchanged while introducing a direct popular election without amending the Constitution. Numerous lobbyists have succeeded in convincing state legislatures of (currently) 10 states and D.C. to make this plan a state law. They have managed to do this by exploiting the lack of knowledge in the country about both the Electoral College and constitutional provisions designed to block attempts to usurp any form of power, including the power of a group of states to decide the presidential election outcome. The plan does not seem to be able to withstand scrutiny in any federal court or in the Supreme Court due to the brittle logical cornerstones of the plan [33]. Chapter 6 contains a detailed analysis of this plan, first presented in the author's book [18].

5. Despite well-known deficiencies, "the winner-take-all" principle of (method for) awarding state electoral votes is viewed by state legislatures as the best one to determine the will of a state in electing a President. Poorly contested, not "battleground" states have tried to get rid of this method in an attempt to change their "safe" status. These states usually propose principles of awarding electoral votes that would encourage major party presidential candidates to campaign in the state. There are two principles of (methods for) determining the state's will that help understand why any attempts to get rid of "the winner-take-all" principle that are not based on new ideas are doomed to fail.

The Maine-like district method for determining presidential election results in a state is one of the two.

Today, voters in most of all the 435 congressional districts in the country favor one or the other major party in all elections, including presidential ones. Gerrymandering in drawing the district borders within a state is what causes this phenomenon. For instance, currently, voting voters in at least 19 out of 53 California congressional districts favor the Republicans though the state at large favored the Democrats in the last five presidential elections. In 2008, a proposal to switch California to the Maine-like district method for awarding state electoral votes failed to make it on the ballot. But even if it did, and California adopted this method, this would not motivate the major party presidential candidates to campaign in the state.

Indeed, the adoption of this method would almost guarantee that the Republicans would receive 19 electoral votes out of 55 electoral votes and the Democrats would receive 36 electoral votes (34 electoral votes in congressional districts and two electoral votes at large). These guarantees make it unreasonable for the Democratic candidate to campaign in predominantly Republican districts and for the Republican candidate to campaign both in predominantly Democratic districts and in the state at large [30].

Thus, under the Maine-like district method for awarding state electoral votes in California, both major party presidential candidates would have no reason to intensify their election campaigns in the state. The election outcome would be quite predictable for both candidates, leaving the state with the same status, which is not a "battleground" one.

What would happen if every state in the country adopted the Maine-like district method for awarding state electoral votes? Most likely, the "battleground" districts together with all the "battleground" states—in which the candidates could compete for two at-large electoral votes— would become the places on which both major party candidates would focus their campaigns.

The 2008 election illustrates how this may happen. In the state of Nebraska, Barack Obama campaigned in only one closely contested congressional district. He did not campaign either in the other two congressional districts or in the state at large, since they were not closely contested in the predominately "Republican" state of Nebraska. Indeed, John McCain easily won in the other two congressional districts, as well as at large.

If the Maine-like district method was adopted by all the states, a major party candidate may eventually find it more reasonable to campaign in two congressional districts in different states than to compete in a "battleground" state for two electoral votes at large.

The proportional method for awarding state electoral votes is not much better for a "safe" state from the viewpoint of getting rid of this status. In a closely contested state, each major party candidate is almost guaranteed to receive half of all the state electoral votes. What then would be a reason for a major party candidate to campaign in such a state? Any strong election campaign in the state by either major party candidate would likely give this candidate no more than two extra electoral votes.

For instance, let a closely contested state be entitled to eight electoral votes in a particular election. Further, let half of the state's electorate favor one of the two major party candidates, and let the other half of the electorate favor the other major party candidate. Then the outcomes for the major party candidates are quite predictable. Most likely they will be as follows: (a) four electoral votes each if neither candidate campaigns, (b) five electoral votes and three electoral votes if one of the two candidates campaigns there, (c) four electoral votes each if both candidates campaign in the state equally intensively.

In a state that is not closely contested, the outcomes are also quite predictable. Let 60 % of all likely voters who are likely to favor major party candidates favor candidate A. Then for major party candidate B, all depends on how many voters are likely to favor non-major party candidates and independent ones, and how many likely voters remain undecided. However, the margin of electoral votes that candidate A would win if he decided to campaign in the state would hardly be significantly higher than the one "guaranteed" by the above 60 % voter support [30].

What would happen if all the large and medium-size states adopted the proportional method for awarding state electoral votes? Most likely, the number of "battleground" states in which major party candidates could decide to campaign

would increase. Indeed, the states in which both candidates could increase the number of electoral votes by two could interest the candidates.

In small states that are not closely contested, the situation is likely to be different. Neither major party candidate may find a reason to campaign there, since the candidate who is not a state favorite is unlikely to increase the numbers of electoral votes that he can win by more than one.

Neither these two plans, nor many others, considered, for instance, in [1, 6, 10, 18] address the major complaint of poorly contested states. That is, how can one make these states as valuable for presidential candidates as are the "battleground" ones and encourage major party candidates to campaign there?

The answer to this question is discussed in Chaps. 6 and 7.