GUIDE TO U.S. PRESIDENTIAL ELECTIONS FOR FOREIGN VISITORS

AMA Standing Committee on Election Law

AMERICAN BAR ASSOCIATION
GUIDE TO U.S. PRESIDENTIAL ELECTIONS FOR FOREIGN VISITORS

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I  WHO CAN BE PRESIDENT?

Requirements as mandated by the U.S. Constitution:

- Natural Born U.S. Citizen
- At least 35 years of age
- Resident of the U.S. for 14 years

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE 2, SECTION 1, CLAUSE 5

SEPTEMBER 17, 1787

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.
II  RUNNING FOR THE OFFICE OF PRESIDENT

Political Parties and Primaries and Caucuses

What are the different political parties?

Traditionally, candidates for office of the Presidency of the United States have been represented by either the Republican (GOP) or Democratic Party. In recent years, there has been a resurgence of Independent candidates, and candidates from the Libertarian or Green Parties.

How are candidates from different political parties chosen?

Candidates, representing a particular political party, are typically chosen in a primary or caucus. These are held in each of the various states under the laws of that state. There is no single, national primary or caucus. The national conventions held in the late summer confirm the results of the state proceedings which are usually well decided by the state primaries.

What's the difference between a primary and a caucus?

Primaries are a method of electing a candidate to represent a political party. Primaries are elections in each of the several states staring early in the presidential election year and ending in early summer. A primary can be “open” (i.e., open to all registered voters who may vote for any candidate); “closed” (i.e., restricted to voters who are registered to the political party for which the election is being held); or “semi-closed” (i.e., restricted to voters who are registered to the political party for which the election is being held, but open to Independent voters).

Caucuses, unlike primaries, are not elections but instead are held through a series of smaller, local meetings in each of the states. Support is shown by hand voting and usually only voters registered with the specific political party are allowed to participate.

When are primaries and Caucuses held?

Political party primaries and caucuses are held from January to June of the year of the presidential election (every four years) the most recent election years have been 2000, 2004, 2008, 2012 and 2106. Under this process voters in the 50 states, Washington, DC, and US territories select party delegates for their respective national conventions.

The primary and caucus season, while focusing on early states, to gain an advantage, comes in to full swing on “Super Tuesdays”, days when a large number of states hold primaries or caucuses for one or both parties on the same day.

Nominating Conventions

Each political party’s nominating convention is the culmination of the primary and caucus battles that were waged from January to June. The delegates that were selected to represent a candidate during that process are pledged to support that candidate at the convention.

National party conventions are held in late summer (July, early August), typically about two and a half months before the election. Candidates are formally nominated by delegates representing the 505 states, Washington, DC and territories.
Delegates to the convention are state representative of the various primaries and caucuses. There are also “unpledged” or “super delegates” who are generally party leaders or elected officials. Each delegate or super delegate is entitled to one vote.

A Republican candidate must win 1,237 delegates to win a majority, and a Democratic candidate must have the support of 2,383 delegates to gain a majority.

Once a candidate has reached the required threshold majority, they are confirmed as the candidate of the political party and will represent that party in the general election.

After the selection of the candidate the convention is used a method of congratulating and promoting the candidate, announcing the vice-presidential candidate, and publicizing the candidate and party’s message and themes for the election.

**General Election Campaigning**

Once the candidates for the various political parties have been chosen, the focus shifts to the general election. Prior to the nominating convention, candidates are focused on reaching out to members of their political parties in order to gain the support of the nomination.

During the general election, with a known opponent from the opposing party there is a great influx of national advertising and campaign rallies. Also, nationally televised presidential debates are held, where candidates look to get their message out to the general public and to make their case for their candidacy.

As in many countries, there are some parts of the United States that are historically known to support a particular party. They are known to be reliably “red” (republican) or “blue” (democrat). But there are also some states that are called “battleground” states – they are “purple” (a mix of republican and democrat) – these are the states that could go either way during the election. During the final months and weeks of the presidential election much attention is focused on these states in an effort to turn the state either “blue” or “red.” Phone banks are put in place, where potential supporters and voters are called in an effort to gain a pledge of support; voter registration drives are held, in an effort to register more voters; and canvassing is done, as means of personally reaching out supporters by visiting them at home.
III ELECTION OF THE PRESIDENT

The election of the president of the United States of America is always held on the first Tuesday after the first Monday in November.

Voting is done either in person or by mail. Traditionally voters only voted on Election Day, now, however, there is a growing trend to allow an early voting period (starting as early as the beginning of October in some states), where voters can go to centralized locations to cast their ballots prior to Election Day. Early voting can be for the convenience of the voter or as a means to vote absentee early.

The choice of each voter is reflected in the “popular vote.” But, the president is not elected by popular vote. Instead, the president is chosen by the Electoral College.

What is the Electoral College?

The Electoral College is comprised of 538 electors, representing each state, and the number of electors is based on the population of the state. The number of delegates is also equal to the number of congressional districts for each state, plus two senators. As an example, large states like California and Texas, have 55 and 38 electors respectively, and smaller states like Delaware and Vermont, and the District of Columbia, each only have 3 electors. A small state can play an important role as did New Hampshire, a generally “blue” state, split its popular vote between Al Gore and Ralph Nader, an independent, which led to George W. Bush receiving the most votes and that state’s three elector votes. This denied Al Gore the 270 elector votes needed and placed in Florida in play to determine the election.

The first candidate to cross the Electoral College vote threshold of 270 is elected President of the United States. Generally speaking, the winner of the popular vote in a state, is awarded all of the delegates from that state, with two exceptions, Nebraska and Maine.

Electors are generally required to vote for the candidate to which they are pledged, based on the popular vote results for their state. If an elector casts a vote against the instruction of its state delegation, they are labelled as “faithless electors.”

Electors are chosen by their respective political parties prior to the elections, typically at the national convention. Following Election Day, electors will meet in the capital of their state and cast their votes. The results of the Electoral College are announced on January 6 to the U.S. Senate. The new president is inaugurated on 20 January.

When the United States was first founded, it was not possible to have a national election, given the size, lack of widespread ability to communicate with one another, and the nascent nature of a “national” identity for a new country. The founding fathers did not want the president to be elected by Congress or purely by popular vote – as there was fear that larger states would have a disproportionate advantage to vote for their own candidates.

Although the concept of the Electoral College is confusing, in this country’s over 200-year history of presidential elections, there have only been 4 contested elections.

- 2000: Republican George W. Bush is elected president with 271 electoral votes, although Democrat Al Gore had 540,520 more votes based on the popular vote
• 1888: Republican Benjamin Harrison is elected president with 233 electoral votes, although Democrat Grover Cleveland had 100,456 more votes based on the popular vote
• 1876: Republican Rutherford B Hayes is elected president with 185 electoral votes, even though Democrat Samuel J Tilden had 264,292 more votes based on the popular vote
• 1824: Four candidates split the electoral college, and the House of Representative elected John Quincy Adams as president even though Andrew Jackson had amassed more electoral votes and popular votes

If no candidate receives a majority of Electoral College votes, then under the 12th Amendment to the U.S. Constitution, the U.S. House of Representatives is to elect the president, and each state delegation is given a total of one vote. The Vice President would then be chosen by the Senate, with each senator having one vote.

**How are Presidential Elections Financed?**

In the past, presidential elections were financed through public financing. Eligible candidates used federal funds in primary and general election campaigns in exchange for agreeing to a cap on spending. Funds received by the candidates is the result of a “check-off” on individual federal income taxes, whereby individuals can allocate, at present time, three dollars of that individual’s tax return to be given to the Presidential Election Campaign Fund, this amount was increased in 1993 from the original one dollar “check-off” in 1971.

The last 20 years has shown a drastic change in how elections are financed in the U.S. In 2010, in a landmark campaign finance decision, the U.S. Supreme Court held, in *Citizens United v. Federal Election Commission*, that First Amendment protections of speech applied to independent political expenditures by non-profit organizations. This decision has also been subsequently applied to the independent expenditures of for-profit corporations, labor unions, and other organizations. Prior to the decision corporations and unions were prohibited from “electioneering communication,” which is defined as any advertisement mentioning a candidate within 30 days before a primary or 60 days before a general election. The decision in *Citizens United* opened the floodgates of money spent on advertising that is created “independent” of a candidate. Today, in 2016, there are nearly over 6,000 political action committees (PACs), and nearly 1,500 Super PACs, as well as other organizations spending money to affect or influence elections.

In order to respond to these “outside” (i.e., non-candidate or party run) organizations spending millions of dollars in support of or against a candidate, presidential candidates are increasing not accepting public funding during the primary/caucus races and now into the general election campaign. The prospect of receiving funding in return for agreeing to a cap on spending is not tenable to an increasing number of candidates. In 2016, in order for a candidate to receive $96.14 million in general election funding and $48.07 million in primary funding that candidate must agree to abide by spending limits, yet the external organizations described above have no such limits. The inability of candidates, with of limits on spending in exchange for public financing, to properly compete with limitless spending by outside organizations has led to a growing trend of privately financed bids for the office of president. The trend began with candidates not accepting public funding during the primary and caucus seasons, as they worked to receive the nomination of the party, but still accepting public financing for the general election. The year 2000 marked the last year any major party candidate accepted public financing
during the primary/caucus stage, Al Gore, Jr. was the last candidate to use such funds. In 2008, candidate Barack Obama became the first presidential candidate not to accept public funding for the general election, he was ultimately elected president. Presidential campaigns, of the major parties, are funded by private contributions, the national parties, PACs, and the candidate’s own wealth.

**What is the Role of the Federal Election Commission?**

The Federal Election Commission (FEC), founded in 1975, is an independent regulatory agency that was created to regulate campaign finance laws in the U.S. Its duties are to disclose campaign finance information, enforce provisions of campaign finance laws (including limits and prohibitions on contributions); and overseeing the Presidential Election Campaign Fund. Members of the FEC, six in total, are appointed by the President of the U.S. Each member is appointed to a six-year term, with two seats up for appointment every two years. The structure of the FEC is purposefully politically balanced so that no more than three members of the Commission can be members of the same political party and official FEC action requires four votes. The Chairmanship and Vice Chairmanship of the FEC rotates every year between the two political parties. The requirement for political balance has caused the Commission to become grid-locked on many important finance related issues.
GLOSSARY OF FREQUENTLY USED TERMS IN PRESIDENTIAL ELECTIONS

**Ballot initiative:** If a petition is signed by a certain minimum number of registered, the petition is put to the voter as a proposed change to the law. If it gathers enough votes, the proposed change becomes law.

**Battleground state:** A state where Democratic and Republican candidates both have a good chance of winning:

**Bellwether state:** A state that historically tends to vote for the winning candidate, perhaps because it has a population that is representative of the entire U.S.

**Blue state:** A state where people tend to vote for the Democratic Party.

**Caucus:** A meeting of party members at which they select the candidates for elections. Meetings take place in local communities, and delegates are allocated based on the level of support. The delegates from the local meetings are then tallied on a state-wide level. In a “winner-take-all” state, the candidate with the most delegates is awarded all of the state delegates. In a “proportional” state, the delegates are allocated to candidates based on the proportion of delegates won.

**Congress:** The legislative branch of the US government as prescribed in Article I of the US constitution. In addition to drafting and implementing laws, Congress can also: Investigate matters of public concern, declare war, approve and ratify treaties, appropriate funding for federal agencies; increase and decrease taxes, confirm federal and judicial nominations and appointments; impeach federal officials, including the president and vice-president, and override presidential vetoes with a two-thirds majority in both the House and Senate. It is made up of two houses - the 435-member House of Representatives and 100-member Senate.

**Congressman/woman:** A member of the House of Representatives, typically. The term can refer to a member of the Senate.

**Constitution of the United States:** The fundamental and founding law of the US federal system of government. The US constitution was ratified in 1788, and was most recently amended in 1992, with a total of 27 amendments. It is the oldest written national constitution in effect.

**Delegates:** Authorized party members sent to the national convention of their party to officially determine the party’s presidential candidates.

**Donkey, Democratic:** The donkey is the unofficial political symbol of the Democratic Party. The symbol was first used in the 1800s presidential campaign of Andrew Jackson.

**Down Ballot/Down Ticket Races:** Political contests that are below the presidential race on the ballot, to include the election of Senators, members of the House of Representatives, and any local races.

**Electoral College:** The 538 electors who officially elect the president and vice-president of the United States. A candidate must win 270 votes to win the president. Each state’s number of votes is equal to the total of its senators and representatives in Congress.
Elephant, Republican: Like the donkey for the Democratic Party, the elephant is the unofficial symbol for the Republican Party. It was first used during Abraham Lincoln’s campaign.

Election Assistance Commission: The U.S. Election Assistance Commission (EAC) was established by the Help America Vote Act of 2002 (HAVA). EAC is an independent, bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration. EAC also accredits testing laboratories and certifies voting systems, as well as audits the use of HAVA funds. The four EAC commissioners are appointed by the president and confirmed by the U.S. Senate.

Federal Election Commission (FEC): The Federal Election Commission was created in 1975 as an independent agency to administer elections and enforce election laws. The FEC discloses campaign finance information, enforces the law and oversees the public funding of presidential elections. By law, no more than three of the six presidentially appointed members of the commission can be members of the same political party.

Front-loading: When a primary or caucus date is moved to the beginning of the presidential nomination period. This has the effect of giving a state more influence in the selection of candidates.

Gerrymandering: When the boundaries of a voting districts are manipulated in a manner so as to favor one party, class, ethical group, etc.

Grand Old Party (GOP): The traditional nickname for the Republican Party.

Green Party: A Green party is a formally organized political party based on the principles of “green politics”, such as social justice, environmentalism and nonviolence. The Green Party is one of the minor parties in American politics.

The House of Representatives: The House is the larger of the two houses of U.S. Congress. The 435 members of the House are known as Representatives, Congressmen or Congresswomen and serve two-year terms. The number of representatives allotted to each state is determined by the population of each state.

House Majority Leader: The House Majority Leader is the second most powerful member of the majority party in the House of Representatives, after the Speaker of the House.

House Minority Leader: The leader of the minority party in the House of Representatives.

Inauguration: The ceremony that marks the beginning of the new president’s term of office. Under the U.S. Constitution, this happens January 20th of the year following the election.

Independent: Registered voters who have not declared a party affiliation.

Libertarian: A voter whose concerns are driven by belief in a small government, fiscal conservative ideas and notions of individual liberty.
**National convention:** The party specific assembly held every four years. At each party’s convention, state delegates nominate the party’s candidates for president and vice president. The candidates are usually chosen during the primary process, but are formally nominated here.

**Primary:** A state-level election held to nominate a party's candidate for office. Each state has specific rules for how they are held.

**Purple state:** Another term for a swing state. A state which could vote Democratic (blue) or Republican (red).

**Red state:** A state where people tend to vote for the Republican Party.

**Running mate:** The presidential nominee's candidate for the vice-presidency.

**Senate:** The upper house of the U.S. Congress, with 100 elected members. Each state has 2 senators, each serving a six-year term.

**Senate Majority Leader:** The leader of the majority party in the Senate, and the most powerful member of the upper house of Congress.

**Senate Minority Leader:** The leader of the minority party in the Senate.

**Senator:** Member of the Senate, the upper house of Congress. Each state has a junior and a senior senator, according to tenure in the Senate.

**Speaker of the House:** The leader of the majority party in the House of Representatives, the highest ranking member of the House of Representatives and is the presiding officer of the House.

**Supermajority:** The vote margin of two-thirds or three-quarters of the quorum, as opposed to a simple majority of 50% plus one.

**Super Tuesday:** The day in the campaign calendar, usually in February or early March of an election year, when a large number of states hold primary elections.

**Swing states:** States in which the voters are relatively evenly split between Republicans and Democrats.

**Third-party candidate:** A candidate who does not belong to one of the two main US political parties, the Republicans or the Democrats.

**Vice-President:** The presiding officer of the US Senate and the person who assumes the office of the president in the event of the resignation, removal, incapacitation or death of the incumbent president.
V BACKGROUND READING

History of Voting in the United States
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Picking the President
History of Voting in the United States

How constitutional amendments and federal laws extended the right—and the ability—to vote to most Americans

Elizabeth M. Yang


Voting is an integral part of American citizenship. It is a fundamental right and privilege of democracy that quite often is neither appreciated nor understood. Over 200 years ago, only a limited part of the population was allowed to cast a ballot, and now nearly all citizens over the age of 18 are entitled to vote.

Black's Law Dictionary defines the word vote as "suffrage or the expression of one's will, preference or choice." The ability to express an opinion through voting is a concept that is easily understood and has become a part of daily life. After all, some form of voting can be found at all levels of society—in politics, schools, social situations, and the workplace. Suffrage, on the other hand, is a concept that is not as easily grasped or perceived. A further look into Black's Law Dictionary reveals that suffrage is defined as "a vote; the act of voting; the right or privilege of casting a vote at public elections." This definition is often ignored by or unknown to the average citizen. In order to fully understand suffrage, or rather the concept of voting as a privilege in our society, we must examine the relevant amendments to the Constitution and the accompanying landmarks in the history of the United States, which have resulted in the current electoral process.

The Right to Vote

Many people would be amazed to know that the Constitution originally allowed the states to bestow the right to vote only on white males who either owned property or paid poll taxes. Article I, Section 2 refers to "the People of the several States" having the right to vote for members of the House of Representatives, which at that time meant adult white males. Approximately 6 percent of the adult male population was actually eligible to vote because individual states were able to dictate various religious and property requirements. By 1850, all states had abolished these, and thus the number of adult white males who were entitled to vote grew, but the poll tax still remained a barrier to some. The fact that all adult white males were still not eligible to vote even 50 years after the formation of the United States illustrates the long process that the nation would have to undergo in order to expand the voting franchise even further. Amendments to the Constitution have provided the basis for extending the right to vote to other parts of the population.

Fifteenth Amendment—The Elimination of Racial Barriers to Voting

The aftermath of the Civil War created another opening for the expansion of the right to vote. The groundwork was laid in 1865, when the Thirteenth Amendment to the Constitution outlawed slavery, and in 1868, the Fourteenth Amendment granted citizenship to all people born or naturalized in the United States. Finally, in 1870, the Fifteenth Amendment was adopted, which stated, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

By 1870, as a matter of federal law, the right to vote had been extended to all male citizens of the United States. The reality of the matter was, of course, rather far from fact. In the South, various methods, such as poll taxes, grandfather clauses, and literacy tests, were used to deny African-American males the ability to exercise their right to vote. Poll taxes created a monetary barrier to voting that excluded even poor white males. Several Southern states adopted grandfather clauses that excepted anyone who had voted before 1866—or who was a descendant of someone who had voted before that time—from being subject to other restrictions to voting, such as literacy tests, educational or "good character" tests, or poll taxes. Literacy tests were administered in a discriminatory fashion, ranging from requiring the basic ability to read and write to requiring the ability to read and under-
stand the U.S. or state constitution. In other words, African Americans were faced with barriers that white males were exempt from, by virtue of the fact that white males or their ancestors had voted in a period when African Americans could not vote.

**Nineteenth Amendment—Women’s Right to Vote**

In 1920, the Constitution was again amended, this time to declare that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.” This amendment was the result of the women’s suffrage movement, which originated in the late 1800s and early 1900s. Women now worked both inside and outside the home and were becoming a growing and united voice in the quest for the vote. Women across the country began to demonstrate, picket, and make speeches in support of their right to vote. In 1872, Susan B. Anthony voted in a national election and was subsequently convicted of voting without having a legal basis to do so. Critics to extending the vote portrayed women as being weak and lacking both the ability and the temperament necessary to make the decision involved in casting a ballot. In the West, where women, of necessity, were more active as laborers and wage earners, the women’s suffrage movement was more successful. By 1912, nine of the eleven Western states had granted women the full right to vote in state and local elections.

The onset of World War I in 1914 provided the final push for the suffrage movement. Women began to protest even more vehemently that it was absurd for the United States to deny female citizens the right to vote when the country was in the midst of fighting a war based on world democracy. On August 18, 1920, Tennessee became the thirty-sixth state to approve the Nineteenth Amendment, which was ratified on August 26, 1920. Women were at last given the vote, 137 years after white men.

**Twenty-third Amendment**

When the District of Columbia was founded in 1802, from portions of Virginia and Maryland, the residents were denied the right to vote in presidential elections. In 1960, with the adoption of the Twenty-third Amendment to the Constitution, the residents of the District were given the right to vote.

**Twenty-fourth Amendment—The End of the Poll Tax**

In 1964, the poll tax was abolished. Although the majority of the states had already rescinded their laws instituting taxes as a barrier to voting, five Southern states continued to require citizens to pay to vote. The Twenty-fourth Amendment effectively denied the states the ability to consider a citizen’s economic status as a factor in the voting process.

**Voting Rights Act of 1965**

The repeal of poll taxes should have opened the polls to all citizens, yet a disproportionate number of African Americans in the South had still not registered to vote. The Voting Rights Act of 1965 was passed by Congress in an effort to increase voter registration by repealing the requirements for literacy tests and similar devices, which denied otherwise eligible citizens the right to vote. The statute affected only states that had registered less than 50 percent of the voting-age population by November 1, 1964.

In 1970, Congress passed legislation prohibiting uses of literacy tests and requiring that bilingual ballots be used in areas where at least 5 percent of the population could not speak or understand English. The Voting Rights Act resulted in massive voter registration drives by African Americans and other minorities, thus effectively broadening the right to vote.
Twenty-sixth Amendment—Reduction of the Voting Age

In 1971, Congress passed a bill that, when approved by the states as the Twenty-sixth Amendment, extended voting rights to those citizens 18 (from 21) years and older. The driving force behind this extension of voting rights was the student protest movement that sprang up in opposition to the Vietnam War. Just as women in the early twentieth century had used the First World War to argue for their right to vote, students began to decry the fact that they were considered old enough to fight for their country, but not old enough to vote.

Conclusion

The extensions of the right to vote to all United States citizens 18 or older, regardless of race or gender—with the exception of convicted felons and the mentally incompetent—did not come about without great struggle and determination. It is interesting to note how the events of American history helped provide each part of the population with the right to vote. The Revolutionary War gave the vote; the Civil War enabled African Americans to be recognized as citizens and thus enabled them to vote; the First World War became the focal point for women’s right to vote; and the Vietnam War reduced the age for voting. The passion that resulted from those earlier trying times should not be forgotten or forsaken.

The exercise of one’s right to vote is, unfortunately, not as common as one would think. People in many countries struggle daily for the opportunity to voice their opinions freely and without fear of reprisal. Suffrage is, indeed, a privilege and a right that should not be taken lightly or for granted. Voting is not only an expression of opinion, but a fundamental and inherent part of citizenship—as it allows individuals to let their voices be heard. ♦
Paradoxes of Political Parties in American Constitutional Development

By Richard J. Hardy

It is impossible to comprehend the workings of the United States electoral process without a firm grasp of American political parties. Political parties are groups of people with shared interests or principles that are organized to nominate candidates for public office in order to win elections, control government, and set public policy. They are complex, multifaceted organizations with varying functions and ever-changing personnel, perspectives, and positions on public policies.

American political parties are replete with paradoxes. A paradox is any statement that appears self-contradictory, but expresses a possible truth. This article explores nine paradoxes relating to the origin, nature, functions, organization, leadership, legal status, and development of political parties in our constitutional system. Exploring these paradoxes may enable the reader to better understand the institutions that have proven vital, if not indispensable, to the development and sustenance of our American electoral process.

PARADOX ONE. Although political parties play a vital role in American government, there is no mention of them in the Constitution of the United States.

Nowhere in the Constitution is there any reference to political parties. The reason is obvious: political parties did not exist when the Constitution was drafted in 1787. Although the concept of political party had been referenced by Edmund Burke, noted English lawmaker and philosopher, in 1770 and in the Federalist Papers during the ratification of the Constitution, the world’s first political parties, the Democratic-Republicans and the Federalists, did not appear until George Washington’s first term, when they were forged out of necessity. Thus, the U.S. Constitution provides no specific guidance for the regulation of political parties. The regulation of political parties has historically come under the regulation of state constitutions and state laws.

PARADOX TWO. The framers of the Constitution disliked political parties but depended upon them to forge our fledgling government.

The seeds of political parties were planted during the ratification of the U.S. Constitution, when proponents and opponents of the newly proposed document divided roughly into “federalists” and “anti-federalists,” respectively. It was not until George Washington’s first administration, however, that our nation’s first political parties formed—the Democratic-Republicans and the Federalists. Historians have chronicled critical events that led to the development of the first party system, but most consider the struggle over the creation of the Bank of the United States to be the central turning point.

Early in Washington’s first administration, the nation faced serious economic problems. Alexander Hamilton of New York, the first Secretary of Treasury, was convinced the nation needed a banking system even though the Constitution was silent on this topic. Hamilton believed the power was implied from the express powers in Article I, Section 8 that gave the Congress the power to do what is “necessary and proper to carry out the foregoing powers.”

Thomas Jefferson of Virginia, Washington’s first Secretary of State, however, strongly opposed the creation of a national banking system, insisting that without a specific constitutional mandate, banking regulation should remain the exclusive preserve of the state governments. The political rivalry
between Hamilton and Jefferson soon accelerated. Jefferson forged a coalition to oppose the creation of a national bank and other policies advanced by Hamilton and his followers. Jefferson and his allies, including fellow Virginian James Madison, became known as the “Jefferson-Republicans” or “Democratic-Republicans” or “Republicans”—a term that should not be confused with the modern-day Republican Party. Hamilton and his followers, most notably John Adams of Massachusetts, became known as the Federalist Party.

President Washington eventually sided with Hamilton and signed the bill establishing the First Bank of the United States. Thus, political parties were essential to our Republic during its formative years. President Washington, while recognizing the need for legislative coalition building, refused to be drawn into the fray and warned against the evils of excessive partisanship. In his Farewell Address, President Washington warned, “However [political parties] may now and then answer popular ends, they are likely in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.”

Other prominent leaders echoed Washington’s words. John Adams, the first Federalist Party nominee to run for president, wrote, “There is nothing which I dread so much as a division of the republic into two great parties [emphasis added], each arranged under its leader, and concerting measures in opposition to each other. This, in my humble apprehension, is to be dreaded as the greatest political evil under our Constitution.” And Thomas Jefferson, Adams’s bitter rival and founder of the modern-day Democratic Party, chagrined: “If I could not go to heaven but with a (political) party [emphasis added], I would not go there at all.”

**PARADOX THREE.**

While political parties were neither planned nor revered by our founders, it is doubtful our Constitution could last without them.

The U.S. Constitution is now 225 years old. It is the oldest, continuing written nation-state constitution in the world. The major American political parties have promoted stability by building coalitions and serving as buffers to cushion the collision of extreme factions. The United States is obviously a nation of immigrants, comprised of complex multifaceted ethnic, racial, social, religious, economic, regional, ideological, and cultural interests. The major political parties, in order to win elections, forge coalitions among these diverse interests. And to forge coalitions, the parties develop platforms and foster legislative compromises among competing interests.

American political parties also help recruit government leaders and administrators. Modern governments depend on energetic, competent, and knowledgeable leaders. The political parties thus serve as informal personnel agencies by identifying and recruiting men and women to run for public office.

The major political parties help organize our legislatures. Think of the legislative logjam that might accrue if each of the 435 members of the U.S. House of Representatives or 100 U.S. Senators introduced dozens of bills, in their respective chambers, at the same time without leaders to prioritize the bills.

Moreover, political parties help develop public policies. In an effort to win elections, the political parties set forth platforms containing planks with stances on issues or specific proposals to remedy some societal problems. “Party platforms,” as Harry S. Truman once observed, “are contracts with the people.” They provide legislative blueprints for elected officials. Indeed, some of the most notable policy initiatives in American history derive from party platforms, including Theodore Roosevelt’s “Square Deal” (to regulate trusts, expand conservation, and protect consumers), John F. Kennedy’s “New Frontier” (to expand space exploration and educational opportunities), and Lyndon Johnson’s “Great Society” (to extend civil rights and fight poverty).
Finally, political parties foster civic engagement and help inform voters. In an effort to win elections, political parties identify supporters, organize at the grassroots level, mount voter registration drives, and get people to the polls on election day. In waging political campaigns, political parties expend money for television and radio advertising, develop podcasts, display billboards, make telephone calls, and generate flyers and handbills. Party leaders engage in public debates, appear on radio and television talk shows, and conduct town hall meetings. In the process, the parties send messages and make the voters more aware of current issues.

**PARADOX FOUR.**
Minor political parties rarely score electoral victories, but they play a vital role in American politics.

American history is replete with minor or third parties. Among them: the states’ rights Nullifier Party of 1828; Anti-Masonic (Freemasons “secret society”) Party of 1832; anti-slavery Liberty Party of 1840; the pro-homestead and anti-slavery Free Soil Party of 1848; the pro-Protestant, anti-immigrant (German and Irish-Catholic) Know-Nothing Party of 1848; the Equal Rights Party of 1872; the anti-monopoly, pro-paper currency Greenback Party of 1874; the Union Labor Party of the 1870s; the anti-elite, pro-agrarian, Populist Party in the 1890s; and the pro-sociopolitical reform-based Progressive Party of 1924. Each of these parties, in varying degrees, helped stir the cultural caldron and add spice to our political stew.

Yet, rarely has a third party come close to winning a national election. The best electoral showing was in 1912, when Bull Moose Party candidate Teddy Roosevelt won 27.4 percent of the vote and garnered a very respectable 88 of 531 Electoral College votes.

Nevertheless third parties provide vital functions in American democracy. Minor parties serve as political weather vanes to signal shifting political winds. Oftentimes the two major political parties are slow to react to pressing societal problems. Third-party activities tend to accelerate in an effort to draw attention to these unresolved problems and are often incubators of innovative public policies. Indeed, some of our nation’s most successful significant legislation—child labor laws, collective bargaining, Social Security, unemployment compensation, civil rights acts—began as third-party planks.

**PARADOX FIVE.** Despite the proliferation of minor political parties, the United States has consistently maintained a strong two-party system.

For all practical purposes, the United States has a strong, two-party political system. However, it has not always been a strong two-party system, nor has it always been the same two parties. As detailed earlier, the first two-party rivalry was the Federalist and Democratic-Republicans. By the election of 1828, the Democratic-Republicans split into two new parties—the Democrats and the Whigs. In 1854, the Republican Party burst onto the political stage, consisting primarily of northerners and westerners who opposed slavery. Soon after, during the Civil War (1861–1865) and until 1932, the Republican Party came to dominate the Congress and the White House, winning all but four presidential elections.

Since World War II, America’s leadership has seesawed between Democrats and Republicans with neither party gaining a long, sustained partisan edge.

What accounts for this two-party system when so many options are available to American voters? One explanation is tradition—the two-party system is so deeply rooted in our history that Americans simply embrace it out of force of habit. Some attribute our two-party system to the achievement of social consensus. According to the theory, if a society can agree on its fundamental values, then all that is needed are two major parties to work out the details of the secondary issues. Historically, for example, both major political parties, be it Federalists or Democratic-Republicans or Whigs and Democrats, reached agreement on such central political tenets as capitalism and respect for private property. While the two major parties may haggle over marginal tax rates, for example, they agree that the government should not completely redistribute income. Such a consensus, it is believed, obviates
the need for third parties. Others suggest our two-party system is rooted in political socialization. Studies reveal that the transmission of party identifications rests primarily on the American family and that most American parents are either Democrats or Republicans or lean to one of the two major parties. Very few American families socialize their children to identify with third parties. But none of these so-called “explanations” is completely ironclad.

Perhaps the most plausible explanation for the perpetuation of the American two-party system rests with our legal system. Political parties are largely regulated by state election laws and the states have imposed myriad legal obstacles for third parties to surmount. For example, in most states, Democrats and Republicans are provided permanent ballot slates; their nominees are automatically placed on the ballot. Third parties, however, must either submit petitions signed by a specified number of registered voters, usually from designated voting districts within a very limited time, or win a specified number of votes in a preceding election, say 5-8 percent of the vote in the preceding gubernatorial election, in order to get on the ballot.

Another legal impediment to third parties is the manner in which legislators are elected. In the United States, virtually all members of Congress, state legislators, and city council members are elected from election districts where the “winner-takes-all.” This makes it extremely difficult for third parties to gain a legislative toehold in the United States because a third party candidate is unlikely to secure the most votes.

PARADOX SIX.

Democrats and Republicans are both similar and different.

What is the difference between Democrats and Republicans? This may be the most perplexing query in American politics. Stereotypical responses include “Republicans are the party of the rich and Democrats are the party of the poor” or “Republicans are the party of the status quo and Democrats are the party of change.” Others believe there are no differences between the two parties. Social critic Gore Vidal wrote, “There is only one party in the United States, the Property Party ... and it has two right wings: Republican and Democrat.” Likewise, Alabama Governor George Wallace, independent candidate for president in 1968, quipped: “There’s not a dime’s worth of difference between the Democrat and Republican Parties.”

Both the Democratic and Republican parties are ideologically flexible organizations that occupy the center, or mainstream, of American politics. They are willing to moderate their stances on issues and public policies in order to get more votes. Another way in which Democrats and Republicans are alike is in the selection of members. All that is needed to become a Democrat or a Republican is a simple declaration. Since no membership tests or dues are required, the Democratic and Republican parties are frequently referred to

Political Parties at the Supreme Court

Regarding Primary Elections:

Newberry v. United States (1921)
In ruling that spending limits placed on general election campaigns do not extend to primary campaigns, the Supreme Court suggests that political party primaries were private activities beyond federal regulation.

Grovey v. Townsend (1935)
Court rules that Texas’s all white primary is constitutional because the Texas Democratic Party is a voluntary association of private persons, not an instrument of the state or federal government.

Smith v. Allwright (1944)
Court reverses Grovey and rules that political parties are semipublic agents of the state, and thus subject to the U.S. Constitution. All white primaries are ruled unconstitutional.

Court rules that imposed blanket, or wide-open, primaries may be unconstitutional within a state, forcing political parties to assemble with possible party raiders, or those who generally do not affiliate with the party or rivals.

Regarding Party Patronage:

Elrod v. Burns (1976)
Court rules that termination of nonpublic workers based on political party patronage violates the First Amendment.

Branti v. Finkel (1980)
Effectively extends the Elrod decision to include public workers.

Rutan v. Republican Party of Illinois (1990)
Supreme Court rules that the patronage practice of hiring, promoting, and discharging public workers on the basis of partisanship violates the First Amendment.

Want to learn more? Find more cases and more stories online at www.insightsmagazine.org.
Discussion Questions

1. Why do you think early leaders such as George Washington and John Adams advised against the formation of political parties? How do you think such warnings would be received today?
2. Do you think that government regulation of political parties is adequate? If not, what reforms would you propose?
3. Can you think of other institutions in our society that are not mentioned in the Constitution but influence our government as significantly as political parties?

Suggested Resources


as “mass” political parties. In sum, the Democratic and Republican parties are similar in that they are “broker” and “mass” political parties.

Aside from the people who support Democrats and Republicans, there are significant differences between the two parties with respect to public policy. The overarching policy differences concern the efficacy and limits of government with respect to three important principles of American democracy—liberty, security, and equality. In general, Democrats favor liberty over security and equality over liberty, while Republicans favor security over liberty, but liberty over equality. A Democrat might oppose provisions of the Patriot Act as a violation of privacy, while a Republican might support those same provisions as a matter of national security.

PARADOX SEVEN.
America is known as a two-party system, but there are at least 50 Democratic parties and 50 Republican parties today.

It may appear there is but one Democratic Party and one Republican Party in the United States with each party organized like a pyramid with authority flowing downward from the respective national party chairs to local precinct captains. However, the Democratic and Republican parties must rank among the most decentralized organizations in the world. In reality, there are at least 50 state Democratic and 50 state Republican parties. While both national parties hold committee meetings throughout the year, the only time the entire party comes together is once every four years when the parties hold their respective national conventions to adopt their platforms and nominate their presidential and vice presidential standard bearers.

This diffusion of authority within the Democratic and Republican parties helps explain the wide variations even within the respective parties. Even within each state, there are sometimes enormous ideological differences within each party.

PARADOX EIGHT.
Political parties are private, semipublic organizations.

Even though the U.S. Constitution is devoid of any reference to political parties, there is nevertheless an evolving body of constitutional law regarding political parties. The central problem the Supreme Court has struggled with over the years is the nature of political parties. Early on, political parties were considered private organizations that enjoyed all the constitutional protections for freedom of expression. However, because political parties significantly influence our election process and the rights of citizens to vote, they are considered semipublic organizations.

PARADOX NINE.
Political parties have played a critical role in American constitutional history, yet they are often vilified.

Political scientist E. E. Schattschneider perhaps underscored this best when he forcefully wrote: “The rise of political parties is indubitably one of the principal distinguishing marks of modern government. The parties, in fact, have played a major role as makers of governments, more especially they have been the makers of democratic government...democracy is unthinkable save in terms of the parties...the most important distinction in modern political philosophy, the distinction between democracy and dictatorship, can be made best in terms of party politics. The parties are not therefore merely appendages of modern government; they are the center of it and play a determinative and creative role in it.”

Unfortunately, Americans do not always appreciate the important nature and functions of political parties. They are frequently vilified in the media, shunned by many citizens, and the fodder for political pundits, late night comedians, and even politicians themselves.

The challenge for civic educators is to convey truthful and balanced information about political parties. The task is not easy. Many social studies textbooks downplay or even ignore the critical role political parties play in American democracy. Teachers, too, often avoid discussions about political parties, out of fear they will be accused of injecting partisanship into their classrooms. The prudent course of action is to allow students the opportunity to engage in civil discourse and ultimately decide for themselves. Such is the nature of American democracy.

IN
1. What is the Electoral College?
The Electoral College is a body of people appointed by each U.S. state and the District of Columbia, who elect the president and vice president. Voters in each state and the District of Columbia select electors to be the authorized participants in each presidential election. The electors cast electoral votes after the general election and officially elect the president and vice president. Since 1964, there have been 538 electors in each presidential election, comprised of the total number of members of the U.S. House of Representatives (435), plus the total number of U.S. Senators (100), plus three electoral votes for the District of Columbia.

2. What does the U.S. Constitution say about the Electoral College?
Article II, Section I of the U.S. Constitution outlines that each state should appoint electors, sets the number of electors for each state (number of senators + number of representatives = total representatives in Congress), restricts members of Congress and federal employees from serving as electors, and details both the post-election meeting process within the states and final certification of the election results by Congress.

There are also two amendments to the Constitution related to the Electoral College. The Twelfth Amendment, ratified in 1803, made an important change to the electoral voting protocol. As the Electoral College was outlined in the Constitution, electors in each state cast two votes for president, and the candidate who received the most votes would become president while the candidate with the second most votes would become vice president. After the election of 1800, electors cast an equal number of votes for candidates Thomas Jefferson and Aaron Burr. The Electoral College was tied. Who would be president and who would be vice president? Ultimately, the House of Representatives decided in Jefferson's favor for the presidency. The Twelfth Amendment, however, stipulates that electors still casting two votes will specify one candidate for president and one candidate for vice president. Finally, the Twenty-Third Amendment, ratified in 1961, granted three electoral votes to Washington, D.C.

3. Why do we have an Electoral College in the first place?
The system of each state appointing electors to elect the president was, for the Framers, the most workable solution to a very tricky problem. Just how do we elect a president in a new nation comprised of 13 large and small states, with 13 perspectives about states’ rights and governmental powers? Delegates at the Constitutional Convention in 1787 considered several possible methods of selecting a president. One idea was to have Congress choose the president. This idea was rejected because of fears of division and corruption in Congress, as well as fear of upsetting the balance of power among the three branches of government. A second idea was to have state legislatures select the president. This idea was also rejected out of fear that a president would be beholden to the state legislatures, thereby eroding federal authority. The third idea—presidential election by direct popular vote—also posed concerns because, without sufficient information about
candidates from outside their state, people might only vote for candidates from their own states or region, and no candidate would emerge with a majority vote, or the largest and most populous states would control elections.

Finally, delegates assigned to the Committee of Eleven at the Convention proposed an indirect election system aligned with the already approved system of apportioning representation among the states in Congress. The Constitutional Convention approved the Committee’s Electoral College proposal on September 6, 1787.

4. Do the electors meet?
The members of the Electoral College never meet as one group. The Constitution mandates, however, that they meet in their respective states and Washington, D.C., on the same day—the first Monday after the second Wednesday in December in all years divisible by four, or presidential election years. State legislatures may determine the location of the meeting, and if it is open to the public.

Procedures in each state vary slightly, but, typically, the meeting is called to order by the election certification official, often each state’s secretary of state or equivalent officer. The official reads aloud the state’s Certificate of Ascertainment, a document provided by the governor of each state to the Congress that lists the names of the electors chosen by the voters—typically tied to the political party of the presidential candidate who won the popular vote—and the number of votes received, as well as all other candidates for elector and the numbers of votes received. Electors cast votes in writing for president and vice president and sign the state’s Certificate of Vote, a document noting all persons receiving votes for president and vice president. The Certificates of Ascertainment and the Certificates of Vote are then mailed to Congress.

5. Must electors vote for the candidate that received the most popular votes in their state?
No. There is no constitutional provision or federal law that requires electors to vote according to the results of the popular vote in their states. Some states, however, may require electors to pledge their votes to the winner of the popular vote in the state, and 24 states have laws providing that so-called “faithless actors” may be subject to fines or replaced by a substitute elector. To date, no elector has ever been penalized for casting a faithless vote, so the U.S. Supreme Court has never ruled on the constitutionality of such laws.

The Supreme Court has ruled, however, on the constitutionality of pledge laws. The decision in Ray v. Blair (1952) was that it is constitutional for a state to require electors to pledge votes before actually voting because electors are actors of their respective state, not the federal government, and thereby governed by the state. The case officially defined electors as representatives of their respective states even though they are performing a federal function in assisting with a national election.

Electors are required by the Twelfth Amendment, however, to cast at least one vote, for either president or vice president, for a candidate not from their home state. This prevents electors from voting only for “favorite sons or daughters.” For this reason, political parties tend not to nominate candidates...
and running mates from the same state.

6. If the electors never actually meet together, how do we know who wins the election?
The Twelfth Amendment mandates that the Congress assemble in joint session to count the electoral votes and declare the winners of the election. After all of the Certificates are received from the states and the District of Columbia, they are arranged—unopened—in alphabetical order. The Senate and the House of Representatives each appoint two tellers, who open and read aloud the Certificates for each state, in alphabetical order.

Members of Congress can object to any state’s vote count provided that the objection is presented in writing and signed by at least one member of each house of Congress. A state’s Certificate of Vote may be rejected only if both houses of Congress vote to accept the objection. If this happens, the votes from the state are simply ignored. Never in our nation’s history, however, has Congress voted to reject a state’s Certificate of Vote.

After the Certificates from all states are read and the votes counted, the presiding officer announces the final result of the vote and, as long as the required majority of votes is achieved, declares the names of the candidates elected president and vice president. If the requisite majority was not achieved, then the House of Representatives is required to vote to determine the winning candidates. The House of Representatives has selected the president only twice—in 1801 to break a tie in votes and in 1825 because no candidate secured a majority of electoral votes.

7. How do states select electors?
The U.S. Constitution allows each state to decide how to select its respective electors. Initially, some state legislatures appointed electors. Other states selected electors through direct popular vote, either by congressional district, or at large throughout the whole state. By 1860, all states had moved to choosing their electors by a direct statewide popular vote. Today, all states choose their electors by direct statewide election, except for Maine and Nebraska which (in 1969 and 1991 respectively) changed to selecting two electors by a statewide popular vote and the remainder by the popular vote in each congressional district.

8. How does the “winner-take-all” system fit into this?
Along with the trend toward direct statewide election of electors came the trend toward the “winner-take-all” system of choosing electors. Under this system, the presidential and vice presidential candidates who win the most popular votes within a state win all of that state’s electors.

Critics of the winner-take-all system suggest the smaller states possess an influence on the electoral outcome disproportionate to their populations, compared to larger states. They also suggest that it disenfranchises voters who select electors for candidates who do not win the popular vote within the state.

Today, only Maine and Nebraska are not winner-take-all states. This means that if Candidate A received 60 percent of the popular vote, then he or she would receive 60 percent of the state’s electoral votes. Candidate B would receive the remaining 40 percent. Colorado proposed a similar plan for proportional distribution of votes in 2004, but it was defeated when placed on the ballot.

9. Have political parties influenced this process?
Political parties do benefit from the winner-take-all system, as it becomes easier for candidates from one party to win the requisite Electoral College majority. Political parties have most directly influenced the process through
Members of the 2008 Electoral College Reflect on Their Experiences

Michelle Boxell, Indiana
When my name was entered as elector at the state convention, I expected never to hear about it again. After all, the last time Indiana went Democratic in a presidential election was 1964. In the aftermath of the election, I was surprised to receive a handful of letters from angry voters (none from my own state) who demanded that I not vote for the person who had, in fact, won the election, Barack Obama. I found their anger and bitterness disturbing. Despite this, being an elector was an amazing experience: going to the Indiana State Capitol, sitting in Chambers and casting our district’s electoral vote for Barack Obama was a tremendous honor.

Michelle Boxell is a community relations manager for a nonprofit organization, Cardinal Services, in Fort Wayne, Indiana.

Lou Paulson, California
It was a very special experience to be a member of the Electoral College. I am one of the few people in the United States that can say that I actually voted for the president! The day we voted was a wonderful moment that I shared with friends and family; everyone who voted knew that we were a part of history.

The most surprising part of being an elector was being sued! I was part of the lawsuit over the validity of the president’s birth certificate. At first it was a little disconcerting, but as time wore on it became rather funny.

Lou Paulson is president of California Professional Firefighters, the state council for the International Association of Firefighters, in Sacramento.

Tracie Reed, Maine
I had a homemade “Barack Obama for President ’08” bumper sticker on my car back in 2006 and was involved as a volunteer throughout the campaign organizing for the caucus’ and general election in Maine. I knew I wanted to run for both elector and national delegate at our state convention and was lucky enough to be elected to serve in both capacities despite only being 26 years old. It is funny, most people either don’t know what the Electoral College is, and if they do, are surprised to learn that I cast my ballots here in Maine at the Statehouse. Everyone assumes I traveled to Washington, D.C. I felt such a great sense of pride in casting my vote for President Obama and in what we had accomplished in the campaign. It was a historical day for America, and I felt privileged to be a part of it as a volunteer, voter, and elector. What I’ve taken away from all of my experiences is that getting involved is easy, just do it. You would be surprised at the difference one person can make and where your hard work can take you.

Tracie Reed is an architect in Portland, Maine. She has been working with campaigns since she was old enough to vote.

Susan Thomas, Wyoming
I was elected by the Wyoming Republican State party to be one of three electors for Wyoming. This much and long debated process truly helps small states like ours to play a larger part in the Electoral College. Our population is the smallest in the nation, and would be totally lost if we went to popular vote only. I was honored to participate in our democratic system in this way, and I look forward to the 2012 election as we each practice our incredible right to vote in the United States.

Susan Thomas taught U.S. Government in the Washington, D.C., area for 18 years while her husband, Craig Thomas, served as the U.S. Representative for Wyoming. She will serve as an elector for Wyoming again in 2012.
focus on states with large numbers of electoral votes, or “swing” states whose electoral votes may not be cast for a clear favorite. Other critics suggest the Electoral College system is unnecessarily complex and contributes to low voter turnout or voter apathy.

In our nation's history, there have been over 700 proposals in Congress to reform or abolish the Electoral College, more than any other subject of constitutional reform. Only two—the Twelfth and Twenty-Third Amendments—ever reached the stage of ratification.

11. What do supporters of the Electoral College say?
Supporters of the Electoral College argue that the system prevents a candidate from winning the presidency by simply winning popular votes in large urban areas, and maintains the federal character of our polity, a system of shared federal and state powers. In order to win, candidates must expand their campaigns to include smaller states and rural areas.

The Electoral College also allows for states to conduct elections using methods it chooses without affecting other states. Likewise, it also isolates the impact of problems such as election fraud and ballot recounts. Supporters argue that a direct popular vote for president would result in comprehensive federal voting statutes that would take power away from the states.

Supporters also suggest that the Electoral College model neutralizes voter turnout disparities among states. Things like weather, high profile campaigns, initiatives, and constitutional amendments at the state level affect voter turnout. Because the allocation of electoral votes is independent of each state’s voter turnout, the Electoral College helps to neutralize disparities between states.

12. Are there any current proposals to reform the Electoral College?
One of the most prominent proposals to reform the Electoral College is the National Popular Vote Interstate Compact, in which individual states agree to allocate their electoral votes to the winner of the national popular vote. State legislatures of the joining states would organize direct elections, effectively circumventing the Electoral College. Eight states—California, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Vermont, Washington—and the District of Columbia have joined the compact. Together they possess 132 electoral votes, or 49 percent of the 270 needed to enact the compact.

Tiffany Middleton works in the American Bar Association’s Division for Public Education. She is the managing editor of Insights on Law & Society.

The content in this article does not necessarily represent the official policies of the American Bar Association, its Board of Governors, or the ABA Standing Committee on Public Education.

SUGGESTED RESOURCES:

C-SPAN Classroom
www.c-spanclassroom.org/
Download free video clips, posters, and lesson plans related to the Electoral College, just in time for Election 2012.

National Archives and Records Administration
www.archives.gov/federal-register/electoral-college/
This site is rich with resources for teachers, including lesson plans, PDF copies of each state’s Certificates of Ascertainment and Certificates of Vote, and formal instructions for state officials coordinating their elector meetings.

National Popular Vote
www.nationalpopularvote.com
Learn more about the proposed compact, where your state stands on its adoption, and what will happen next if it is enacted.

Win the White House
www.icivics.org
From iCivics, a free online interactive game where students at all grade levels run a presidential campaign, then collect electoral votes to win the presidency.
Picking the President

By Dewey Clayton

The presidency was established by Article II of the U.S. Constitution when the framers of the Constitution met at the Constitutional Convention in the spring and summer of 1787 in Philadelphia, Pennsylvania. They agreed that a strong executive would be needed to balance the powers of the legislature; however, differences arose over the structure of the institution, the powers vested in the institution, and the selection process of the President. After some debate, the delegates decided on a single executive. The framers wanted a strong executive but not so strong as to threaten the other institutions of the national government. They initially sought to limit the executive powers to making sure that the laws were faithfully executed and to appointing officials.

Constitutional Framework

The U.S. Constitution, Article II, places only three requirements on those seeking to hold the highest office in the land. First, the President must be a “natural-born citizen.” That includes anyone born on United States territory. Scholars have debated whether a child born abroad of an American parent is considered a “natural-born citizen.” Congress has adopted the rule of *jus sanguinis* (law of the blood) to apply in special circumstances. Under the rule, one may be a citizen of the United States if born abroad, provided that either or both of one's parents are citizens. Persons born in foreign countries who later become citizens by naturalization are not eligible to be President. President Barack Obama found himself at the center of controversy during the 2008 presidential election and throughout his first term by a group of Americans who have insisted that he was not a “natural-born citizen” and thus does not meet the requirements to be President. Known as the birther movement, some of these conspiracy theories hold that Obama was not born in Hawaii but in Kenya, the birthplace of his father, and that therefore he is not eligible to
be President of the United States. The controversy persisted so much so that in April 2011, the White House released a certified copy of President Obama’s Certificate of Live Birth (the long-form birth certificate).

Second, the President must be at least 35 years old. The youngest President ever elected was John F. Kennedy, at age 43. The youngest President to serve, however, was Theodore Roosevelt, who took office at age 42 upon the death of William McKinley. Third, the President must have lived in the United States for at least fourteen years. The fourteen years do not have to be consecutive. Herbert Hoover and Dwight Eisenhower had lived outside of the United States for several years before their election as President.

The Electoral College
Determining how the executive would be chosen was a difficult task. The framers considered several methods: election by the people, election by Congress, and election by a group of electors. Direct election by the people was rejected because the framers believed that the masses of people would not make informed, intelligent decisions because of the size of the country and lack of communication and information. Election by Congress was rejected because that would compromise the concept of an independent executive. Ultimately, the framers reached a compromise on selection of the president called the Electoral College (the Constitution does not use this term) which allows for indirect popular voting. According to the original plan (Article II, Section 1), each state was allotted a number of electors equal to its number of U.S. Senators (2), plus its number of U.S. Representatives (which may change each decade according to the size of each state’s population as determined in the decennial census). This design gave the larger populated states the larger share of electoral votes, and it gave the smaller populated states a two-seat bonus based on their senators. Each state is allowed to choose its slate of electors as determined by the state legislatures. No elector may be a member of Congress or hold any other federal office.

The Twelfth Amendment
The Electoral College of today differs somewhat from the original plan created. The first of these changes resulting from the Twelfth Amendment, adopted in 1804, was designed to clear up the confusion that arose in the election of 1800. Originally, the Electoral College was set up so that each elector would vote for two candidates. The candidate receiving the greatest number of electoral votes, provided it was a majority, would become President: the runner-up would become Vice President. If no candidate received an absolute majority or if there were a tie, then the U.S. House of Representatives would choose the President. Each state would cast one vote. This arrangement worked well for the first two elections won by George Washington with unanimous votes in the Electoral College. However, by the end of Washington’s second term, the first two political parties had been established: the Federalists and the Democratic-Republicans. For the election of 1796 John Adams, a Federalist, was chosen as President and Thomas Jefferson, a Democratic-Republican, was elected as Vice President. No one had anticipated that the President and Vice President could be chosen from different political parties.

An even more unusual situation would arise with the election of 1800. Because each elector cast two votes for his party’s two candidates, Democratic-Republican presidential candidate Thomas Jefferson and his vice presidential candidate Aaron Burr, tied with the largest number of votes, 73. Because of the tie, the election would be decided by the U.S. House of Representatives. After numerous ballots Jefferson was finally elected President and Burr was elected Vice President. The framers had not anticipated the new political party

They [framers of the Constitution] agreed that a strong executive would be needed to balance the powers of the legislature; however, differences arose over the structure of the institution, the powers vested in the institution, and the selection process of the President.
Abolish the Electoral College?

Critics of the Electoral College system suggest that it is anachronistic, left from a time when people were not able to learn about all of the candidates. This simply is not a problem in our wired world. Critics suggest that the system makes the national popular vote irrelevant, even disenfranchising individual voters as their votes are not actually representative of one vote per person for president and vice president, but votes for electors.

The winner-take-all system of awarding electoral votes is also criticized for allowing candidates to focus on states with large numbers of electoral votes, or “swing” states whose electoral votes may not be cast for a clear favorite. Other critics suggest the Electoral College system is unnecessarily complex and contributes to low voter turnout or voter apathy.

In our nation’s history, there have been over 700 proposals in Congress to reform or abolish the Electoral College, more than any other subject of constitutional reform. Only two—the 12th and 23rd Amendments—ever reached a stage for ratification.

Reasons to keep things as they are

Supporters of the Electoral College argue that the system prevents a candidate from winning the presidency by simply winning popular votes in large urban areas, and maintains the federal character of our polity, a system of shared federal and state powers. In order to win, candidates must expand their campaigns to include smaller states and rural areas.

The Electoral College also allows for states to conduct elections using methods it chooses without affecting other states. Likewise, it also isolates the impact of problems such as election fraud and ballot recounts. Supporters argue that a direct popular vote for president would result in comprehensive federal voting statutes that would take power away from the states.

Supporters also suggest that the Electoral College model neutralizes voter turnout disparities among states. Things such as weather, high-profile campaigns, initiatives, and constitutional amendments at the state level affect voter turnout. Because the allocation of electoral votes is independent of each state’s voter turnout, the Electoral College helps to neutralize disparities between states.

Proposals for reform

One of the most prominent proposals to reform the Electoral College is the National Popular Vote Interstate Compact, in which individual states agree to allocate their electoral votes to the winner of the national popular vote. State legislatures of the joining states would organize direct elections, effectively circumventing the Electoral College. Eight states—California, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Vermont, Washington—and the District of Columbia have joined the compact. Together they possess 132 electoral votes, or 49 percent of the 270 needed to effectively implement the compact.

The total number of Electoral College votes today is fixed at 538. This number is based on 435 representatives in the U.S. House of Representatives and 100 U.S. Senators, plus three votes for the District of Columbia (Twenty-third Amendment). To become President, one needs 270 electoral votes (a simple majority of 50 percent plus one).

Today, presidential elections are held every year divisible by four on the Tuesday after the first Monday in November. This is the day for actually selecting electors and not voting for the President. Many Americans are unaware of this step. In most of the states, the electors’ names do not even appear on the ballot. In those states, a vote for a presidential candidate is assumed to be a vote for the corresponding electors.

The original plan of the framers was to have each state choose its electors in the manner it deemed appropriate (state legislatures selected the electors in most states). The electors would meet as the Electoral College and exercise their own judgment in selecting the President and Vice President. Today, electors are not directly chosen by state legislatures. They are chosen by the electorate of each state and, since 1800, political parties have chosen them. Each of the major political parties will select a separate set of electors. As a result, presidential electors are not truly independent; they cast their votes for the candidate of their party.

Once the voters have cast their ballots, it is up to each state to determine how that electoral vote will be distributed. In all but two states (Maine and Nebraska), the presidential candidate who wins the popular vote wins all of the state’s Electoral College votes. In Maine and Nebraska, the electoral votes are divided proportionately to the popular vote. One elector would be chosen from each congressional district in that state based on the presidential candidate with a plurality of the popular vote (more votes than any other candidate) in that district. Two more electors are chosen at-large from the entire state. Their votes go to the candidate with a plurality of votes statewide.

Technically, the popular vote does not count and the President is not elected until the first Monday following the second Wednesday in December. After
the electors sign and cast their electoral ballots in their respective state capitals, the ballots are sent to Washington, D.C., where on January 6, of the following year, the ballots are unsealed, counted and certified by the President of the Senate before a joint session of Congress. The electors pledge themselves to vote for their party’s candidates for President and Vice President, although the Constitution allows them to use discretion (only rarely have electors broken this pledge). The candidates who receive a majority of the Electoral College votes are certified as President-elect and Vice President-elect. If no candidate wins a majority in the Electoral College, the House of Representatives chooses the President, voting by state delegations with one vote to a state; the Vice President is decided by the Senate from between the two highest candidates, with each Senator having one vote.

**Flaws in the Electoral College**

It is possible for a candidate with the most votes in the Electoral College to lose the presidency in the House. This happened to Andrew Jackson in 1824. The election was unusual because the Federalist Party had dissolved and the country was left with only one national political party (Democrat-Republicans). Jackson led in both popular and electoral votes in a four-way race but did not have a majority of Electoral College votes. Thus, it was left to the House of Representatives to decide among the top three candidates who the President would be. This process eliminated Henry Clay, the Speaker of the House, who had come in fourth. Clay gave his support to John Quincy Adams, who won the election in the House of Representatives even though he had received roughly 45,000 fewer popular votes than Jackson.

The Electoral College has on three occasions failed to elect a President and Vice President. In addition to the elections of 1800 and 1824, (discussed previously), this also occurred in the highly controversial election of 1876, which pitted Democrat Samuel Tilden against Republican Rutherford B. Hayes. Tilden won the popular vote by 250,000 votes nationwide and won 184 Electoral College votes to 165 for Hayes. Twenty electoral votes in three southern states were in dispute (South Carolina, Florida, and Louisiana). After recounts in all three states were unsuccessful, Congress created a commission to resolve the dispute. It consisted of eight Republicans and seven Democrats (five selected from the House of Representatives, five from the Senate, and five from the Supreme Court). The commission voted along party lines giving all 20 disputed votes and the presidency to Rutherford B. Hayes by a 185 to 184 margin.

One criticism of the Electoral College is that it is possible for a candidate to win a majority in the Electoral College and not win a majority or even a plurality of the total popular vote. This situation has occurred three times: in 1876, 1888, and 2000. The election of 1876 (see above) was full of illegal voting and ballot fraud and though Rutherford B. Hayes received 250,000 fewer popular votes than Samuel Tilden, he was still elected President. In 1888, the winner of the popular vote lost in the Electoral College. Democrat Grover Cleveland received 90,596 more popular votes than Republican Benjamin Cleveland, but he was still elected President. In 2000, the election was decided by the Supreme Court in a 5-4 vote, giving George W. Bush the presidency.

### Discussion Questions

1. Why do you think the framers included the requirements for the presidency in the Constitution? Were they reasonable? Are these requirements adequate today? Why or why not?
2. Do you think that the Electoral College should be abolished? Why or why not? If so, what should replace it?
3. Why do you think that the original Constitution placed no limits on political campaigns? Was it a product of the time in which it was written? Why?

### Suggested Resources

Harrison. Nonetheless, Cleveland had garnered only 168 electoral votes as opposed to Harrison's 233, thus, Harrison was elected President. This situation has only occurred once in modern times: the presidential election of 2000 between George W. Bush and Al Gore. Gore won 600,000 more popular votes than Bush nationwide and led Bush in the electoral vote total by 267 to 246. Neither candidate had the 270 majority needed. However, Florida had 25 electoral votes that were hotly disputed due to widespread voting irregularities. After 37 days of numerous recounts and legal maneuvering, in Bush v. Gore (2000), the Supreme Court decided that Florida's 25 electoral votes would go to Bush, effectively awarding him the presidency.

Electoral College Reform

The Electoral College is part of the original design of the Constitution. On the one hand, it benefits larger states because they have more Electoral College votes, which often cause the presidential candidates to spend more time and resources in those states. On the other, the Electoral College benefits smaller states, because these states gain more influence in the Electoral College than they would otherwise have by virtue of the two votes given to every state. The Electoral College has come under criticism because candidates who have received a minority of the popular vote have won elections; electors no longer perform the selecting function that was the original design of the framers; the rule that mandates all of a state's Electoral College votes go to that party that receives a statewide plurality (winner-take-all) of the popular vote is unfair to other candidates who are on the ballot in a state. Small states, in particular, fear that if the country moved to the direct election of the President nationwide, they would be overwhelmed by the larger urban vote. The two major political parties have concerns that a change would allow minor parties a much larger role and possibly prevent...
any one candidate from receiving a majority of electoral votes.

This nation is vastly different today from the one that existed when the Electoral College was created in 1787. In some respects, our system of electing the President is anachronistic because the majority of Americans now have access to information and communication to make an informed decision. Some have called for reforms such as direct election of the President, but the Congress has rejected several constitutional amendment proposals to eliminate or substantially change the Electoral College.

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* Parts of this article were adapted from “The Electoral College: An Idea Whose Time Has Come and Gone,” *The Black Scholar*, Volume 37, No. 3, Fall 2007, pp. 28-42.