

“I am not an advocate of frequent changes in laws and constitutions, but laws and constitutions must go hand in hand with the progress of the human mind as that becomes more developed, more enlightened, as new discoveries are made, new truths discovered, and manners and opinions change. With the change of circumstances institutions must advance also to keep pace with the times.”

-Thomas Jefferson

# House Memorial 56

Sponsored by Rep. Mary Helen Garcia  
Chair of House Voters and Elections  
Committee

Calls on the Secretary of State to:  
Study and compare the current  
electoral college system to the  
national popular vote system  
Results of the study to be presented  
to the New Mexico Legislative Council  
and the appropriate interim  
committee by November 2011

	Congress: House	Congress: Senate	Executive (President)	Judicial (Supreme Court)
Constituency	District within state	State	National	None
Type of Office Apportionment	Electoral (Proportional)	Electoral (Federal)	Electoral (Proportional, Plus Federal)	Appointive
Term	2 years	6 years (rotating)	4 years	Life appointment
Membership	435	100 (2X50)	1	9

KIM



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# Electoral College (EC) Origins



# Context: The Two Tyrannies

- The origins of the EC are shaped by the Founding Fathers' fear of tyranny
- Two-strands of tyranny:
  - Tyranny from above
  - Tyranny from below



# Tyranny from Above: A Repressive Government

- Prior to independence, American colonies lacked political representation in the British Parliament
- This led to a series of 'unjust' acts, such as the Quartering Acts, the Stamp Act, and the Intolerable Acts
- Taxation, lawmaking, policymaking without representation or means of legal redress

# Tyranny from Above: Fear of the King

- Fear of king (King George III)
  - No system of checks and balances or institutional control to counter king
- Declaration of Independence cites the king as having “absolute tyranny over [the] states”
  - Forbade governors to pass laws
  - Called legislative bodies at times/places inaccessible to the public
  - Dissolved representative bodies
  - Refused to established judiciary powers; judges dependent on his will





# Tyranny from Below: Chaos of the Masses

- The creation of the US Constitution and its provisions including the EC also occurred against the backdrop of mass insurrection
- Shays' Rebellion:
  - Banks confiscated farmlands/homes to pay war debts
  - Farmers (many were vets) organized and formed a militia
  - Protesters shut down local courts to prevent judges from collecting and enforcing debts
- Produced fears that the Revolution's democratic impulse had grown unruly
- Created fear that private liberty could be threatened by public liberty

# The Two Tyrannies: Background Summary

- Created a situation where fear of masses and fear of concentrated political power competed to shape government institutions
- Fed 10: Guard against the power of a few and the “confusion of the multitude”
- Fed 51: Guard against the oppression of rulers and injustice of dominance by various factions

# Federalist Paper 68: Electing the President

- Electors would be most likely to possess information
- Feared disorder in administration
- Given this context, how was their decision relevant for us?



# The Framers' Intentions

- Intentions can be framed in two themes:
  1. The desire to minimize corruption
  2. The desire to make the presidency and the EC institutionally separate from the other branches of government
- Goal was to create a system where neither the electors nor the president were beholden to a preexisting institution

# The Framers' Intentions: Legislative Intrigue

- By making electors beholden to their states, the founders sought to minimize electoral drama (no fighting/factions in national legislature)
- The most prominent desire was to limit the potential for corruption, control (making the president beholden to an existing body, i.e. Congress), and factionalism (competing power blocs)

# The Framers' Intentions: Presidential Independence

- The founders worried that a president selected by the state legislature would be unable to exercise independence
- Focus on separation of powers; EC is institutionally independent
- Electors would never be a standing body of the same persons

# The Framers' Intentions: Voter Parochialism

- The founders doubted voters' abilities to make reasoned choices
  - Lack of education and literacy
  - Lack of access to information
  - Questionable journalism quality
- The geography of the nation prevented knowledge from spreading
- Overwhelming evidence of support for presidential election 'by the people'

# The Framers' Intentions: The Necessity of Intermediaries

- Founders believed that electors would exercise discretion
- Electors would be extraordinary citizens and civil servants
- Electors would serve as a buffer between the president and the masses
- No clear definition of the role of the popular will



# The Framers' Intentions: Presidential Power

- The founders were against concentrated power in electing the president (like that of a king); the EC was a body of persons
- They feared that direct election would consolidate power/influence in one person
- They had no previous experience designing an electoral system

# The Framers' Intentions: Population Differences Among States

- States were varied widely regarding population
- The founders feared that large states would overwhelm small states
- Faced the burden of consolidating competing states/regions into a cohesive nation
- EC was a result of compromise between large and small states



# The Framers' Intentions: Slavery

- Divide was not just between large/small but also slave/non-slave
- Southerners feared direct vote would shift the balance of power to the North (larger population and wider suffrage rights)
- EC protected slave owners: based EC votes partially on slave population

# Short-Term Goals

- The Philadelphia Convention was beset with tensions and rivalries
- The EC was created out of the pressure to avoid conflict and fatigue. It was a practical consideration.
- The EC was NOT the result of a coherent design. It was the result of compromises and conflicts.

# Short-Term Goals

- The first choice of few delegates; generally seen as the ‘least bad’ option
- Most delegates believed the EC’s problems would not be immediate (could be addressed later)
- Knew that George Washington would be elected, which bought more time to address these issues

# Contemporary Relevance: Social and Political Conditions

- Threat of a king/dictator is unthinkable
- Threat of mob rule is unthinkable
  - Well developed election administrations, police forces, national guards, etc.
  - Automated voting and vote counting (reduces fraud and enables recounts, verification)
  - Many voters feel that their presidential vote doesn't matter; i.e. we need *more* democracy

# Contemporary Relevance: Social and Political Conditions

- Voters have incredible access to information through internet, television, radio, newspapers; literate society
- Defending slavery is unthinkable
- Legislative election is not an option for changing the Electoral College
- The powers granted to the president would not change if election rules changed

# Contemporary Relevance: Institutional Design

- Although many of the social and political factors contributing to the creation of the EC are outdated, aspects of the institutional design and functioning of the EC are relevant
- The Founders had relevant concerns about
  - Institutional design and complexity
  - The nature of representation and democracy
  - The role of states in elections



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# Electoral College Basics

The Intent of the Founding Fathers  
&  
How the EC works



# US Constitution and Federal Law

- Art. II:
  - “The executive Power shall be vested in a President of the United States of America. He shall hold Office during the Term of four years, and, together with the Vice President, chosen for the same Term, be elected as follows:
  - Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in Congress...”

# US Constitution and Federal Law

- 12<sup>th</sup> Amendment:
  - “The Electors shall meet in their respective states, and vote by ballot for President and Vice-president, one of whom, at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President...and [shall] transmit sealed to the seat of the government of the United States, directed to the President of the Senate.”

# US Constitution and Federal Law

- Elector Election Day:
  - The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President. USC, Title 3, Chapter 1, Section 1.

# US Constitution and Federal Law

- Election of the President
  - “The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such state shall direct.” USC Title 3, Chapter 1, Section 7
- This statute was enacted in 1934 after the 20<sup>th</sup> Amendment changed the date for the presidential inauguration from March 4 to January 20.

# US Constitution and Federal Law

- Under the Constitution, the people have the right to vote for:
  - US Representatives
  - And in 1913, with the 17<sup>th</sup> Amendment, US Senators (who had been previously elected by state legislatures pursuant to the US Constitution)

# US Constitution and Federal Law

- We have NO federal constitutional right to vote for President or Vice President....

OR

- To vote for presidential electors (See above).



# US Constitution and Federal Law

- As the US Supreme Court observed in 1892:
  - “The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors.”

McPherson v. Blacker, 146 U.S. 1 at 27, 1892.

# US Constitution and Federal Law

- In 2000, the US Supreme Court reiterated this principle:
  - “The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”

Bush v. Gore, 531 U.S. 98, 2000

# US Constitution and Federal Law

- There is only one state where the right of the people to vote for presidential electors is guaranteed by a **state** constitution – Colorado
  - “The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.”

# How Many Electors?

- EC representation is equal to Congressional representation.
- Each state is guaranteed at least 3 electoral votes: 2 for Senate, 1 for House.
- Each Census, Congress adjusts congressional representation.
- This does not account for population shifts in between (1990 estimates were used for every election until 2004)
- Thus, the EC *always* over/under represents some states
- Example: CA population in 1988 translated to 54 EC votes, but it only received 47



# Who Nominates the Electors?

- The most common procedure is state conventions of political parties
- Second most common is the state's central committee making the nominations
- Most unusual: Pennsylvania, which authorizes each party's presidential nominee to select electors on its behalf



# Who are the Electors?

- Cannot be members of Congress or federal officials.
- Were intended to be distinguished citizens
- As early as 1826, electors recognized as party loyalists, large donors (not necessarily what was intended).
- Example: best selling author James Michener.

# Who Elects the Electors?

- Generally speaking, up until the middle of the 20<sup>th</sup> Century, electors appeared on the ballot rather than the candidates for President and Vice-President.
- Un-pledged Presidential Electors
  - 1960, Kennedy-Nixon, Alabama
- Rise of the “short ballot.”



# How do we Elect Electors?



- When we vote for a presidential candidate, we are actually voting for an elector.
- Many ballots omit the phrase “Presidential electors for [candidate].”
- Thus, many voters are unaware they are not actually voting for a presidential candidate.
- For most current ballots, voters chose one entire elector slate as a unit.



# New Mexico Ballot

OFFICIAL GENERAL ELECTION BALLOT - BALOTA OFICIAL DE ELECCION GENERAL  
November 4, 2008 - 4 de noviembre, 2008



A	BERNALILLO COUNTY	B	CONDADO DE BERNALILLO	C	PRECINCT 001
<p>INSTRUCTIONS: To vote complete the oval to the LEFT of your choice, like this (●).</p> <p>INSTRUCCIONES: Para votar complete el óvalo a la IZQUIERDA de su selección, como esto (●).</p>					
<p><b>STRAIGHT PARTY</b></p>		<p><b>DISTRICT JUDGE</b> <b>JUEZ DE DISTRITO</b></p>		<input type="radio"/>	<p>YES / (SI)</p>
<p><input type="radio"/>  <b>DEMOCRATIC</b></p>		<p>2nd JUDICIAL DISTRICT - 2° DISTRITO JUDICIAL DIVISION 25 - DIVISIÓN 25 VOTE FOR ONE - VOTE POR UNO</p>		<input type="radio"/>	<p>Shall NEIL C. CANDELARIA be retained as District Judge - 2nd Jud Dist (Div 6)? ¿Retendremos a NEIL C. CANDELARIA como Juez de Distrito - 2° Dist Jud (Div 6)?</p>
<p><input type="radio"/>  <b>REPUBLICAN</b></p>		<p><input type="radio"/> <b>ELIZABETH WHITEFIELD</b> DEMOCRATIC PARTY - PARTIDO DEMOCRATA</p>		<input type="radio"/>	<p>YES / (SI)</p>
<p><b>PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES</b> <b>PRESIDENTE Y VICE PRESIDENTE DE LOS ESTADOS UNIDOS</b> VOTE FOR ONE - VOTE POR UNO</p> <p><input type="radio"/> <b>BARACK OBAMA and JOE BIDEN</b> DEMOCRATIC PARTY - PARTIDO DEMOCRATA</p>		<p><b>DISTRICT JUDGE</b> <b>JUEZ DE DISTRITO</b></p> <p>2nd JUDICIAL DISTRICT - 2° DISTRITO JUDICIAL DIVISION 26 - DIVISIÓN 26 VOTE FOR ONE - VOTE POR UNO</p> <p><input type="radio"/> <b>CHARLES W. BROWN</b> DEMOCRATIC PARTY - PARTIDO DEMOCRATA</p>		<input type="radio"/>	<p>NO / (NO)</p> <p>Shall JOHN J. ROMERO JR. be retained as District Judge - 2nd Jud Dist (Div 7)? ¿Retendremos a JOHN J. ROMERO JR. como Juez de Distrito - 2° Dist Jud (Div 7)?</p>
<p><input type="radio"/> <b>JOHN MCCAIN and SARAH PALIN</b> REPUBLICAN PARTY - PARTIDO REPUBLICANO</p>		<p><b>DISTRICT ATTORNEY</b> <b>FISCALES DE DISTRITO</b></p> <p>2nd JUDICIAL DISTRICT - 2° DISTRITO JUDICIAL VOTE FOR ONE - VOTE POR UNO</p>		<input type="radio"/>	<p>YES / (SI)</p>
<p><input type="radio"/> <b>CYNTHIA MCKINNEY and ROSA CLEMENTE</b> GREEN PARTY - PARTIDO VERDE</p>		<p><input type="radio"/> <b>KARI E. BRANDENBURG</b> DEMOCRATIC PARTY - PARTIDO DEMOCRATA</p>		<input type="radio"/>	<p>NO / (NO)</p>
<p><input type="radio"/> <b>CHUCK BALDWIN and DARRELL CASTLE</b> CONSTITUTION PARTY - PARTIDO CONSTITUCION</p>		<p><input type="radio"/> <b>LISA TORRACO</b> REPUBLICAN PARTY - PARTIDO REPUBLICANO</p>		<input type="radio"/>	<p>YES / (SI)</p>
<p><input type="radio"/> <b>RALPH NADER and MATT GONZALEZ</b> INDEPENDENT PARTY - PARTIDO INDEPENDIENTE</p>		<p><input type="radio"/> <b>PUBLIC EDUCATION COMMISSION</b> <b>COMISIÓN DE EDUCACIÓN</b></p> <p>DISTRICT 1 - DISTRITO 1</p>		<input type="radio"/>	<p>NO / (NO)</p>
<p><input type="radio"/> <b>BOB BARR and WAYNE A. ROOT</b> LIBERTARIAN PARTY - PARTIDO LIBERTARIO</p>		<p><input type="radio"/> <b>YES / (SI)</b></p>		<input type="radio"/>	<p>Shall VALERIE A. HULING be retained as District Judge - 2nd Jud Dist (Div 13)? ¿Retendremos a VALERIE A.</p>



# How do States Allocate their EC Votes?

- Since the mid 19<sup>th</sup> century, states have almost exclusively used the winner-take-all method
- The candidate with the most votes receives all the state's EC votes
- Historically, district division of EC votes was common until 1836
- Maine (1969) and Nebraska (1992) allocate EC votes by congressional district

# When do Electors Cast their Vote?

- In Mid-December
  - On a specified day every 4<sup>th</sup> year, a group of electors meets in the state capital to vote for president (on the “first Monday after the second Wednesday in December next following their appointment...”)

# How are Electoral Votes Counted?

- Who does it?
  - The President of the Senate (12th amendment)
- When is it done?
  - January 6

# Are Electors Bound?

- Mostly not
- 26 states attempt to bind electors
- New Mexico requires an oath or pledge under penalty of law; 4<sup>th</sup> degree felony for an elector to vote for a candidate other than the one that received the highest number of votes in the state

# What are Faithless Electors?

- When electors break their pledges or violate public expectations, they are referred to as “faithless”
- Defections have never changes an electoral outcome, although they have occurred many times
- Nixon is the only person in U.S. history to suffer electoral defections on 3 occasions (1960, 1968, 1972)
- No faithless elector has been prosecuted

# Summary

- Constitutional and legal structure
- The mechanics of how it works
- The intentions of the founding fathers
- The Results:
  - An intentionally indirect method for electing the only national office in the United States.
  - The mechanism for which was intentionally left to the states.

# The Changing Electoral College

## Constitutional Intent

- Free Electors - Statesmen
- Two Step Process
- Legislative Selection of Electors
- District Rule For Apportionment of Vote
- Electors Voted For One Candidate, Winner was President, Second was VP

## Evolution Over Time

- Pledged Electors
- Single Step Process
- Popular Selection of Electors
- Winner Take All Rule of Apportionment of Vote
- Electors Cast a Ballot for President and For VP





# The Electoral College Today

- The original US Constitution did not specify in detail the manner of electing the President and Vice-President.
- The flexibility built into the constitution permitted the development of a system that is today very different from the one that the Founding Fathers had envisioned.
- This built-in flexibility of the original US Constitution remains today, and honors the idea of State sovereignty and authority to implement how its citizens will elect the President.



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## Alternative Plans:

- Proposed Federal  
Constitutional Amendments
- State Plans



# Federal Constitutional Plans

- Fractional Proportional Allocation of Electoral Votes
  - In this plan, a state's electoral votes are divided proportionally according to the percentage of votes received in that state by each presidential slate (percentages are carried out to 3 decimal places).
  - Was first introduced in US Senate, Senate Joint Resolution 33, in 1969 by Senator Howard Cannon (D-NV).
  - Didn't really go anywhere

# Federal Constitutional Plans

- District Allocation of Electoral Votes
- First introduced in 1969 by Senator Karl Mundt (R-South Dakota)
- In this approach, voters elect two presidential electors statewide and one presidential elector for each district.
- Also didn't go anywhere

# Federal Constitutional Plans

- Direct nationwide popular election
- Sponsored by Representative Emmanuel Celler in 1969, passed the House 338-70.
- Died in the Senate from a filibuster
- Through the 1970s several nation wide direct popular election plans were introduced in the US Senate and in 1979 it got 51 votes. Several have also been proposed in the 90s and after the 2000 election.



# State Level Action

- The office of the presidential elector is established by the Constitution and therefore cannot be eliminated without a federal constitutional amendment. However, the manner of choosing the presidential electors is determined on a state-by-state basis by means of state legislation (McPherson V. Blackner 1892).

# State Plans

- Whole Number Proportional Approach
  - State's electoral votes are divided proportionally – rounded to the nearest whole number—according to the percentage of voters received in the state by each presidential slate
    - Defeated by Colorado voters in 2004



# State Plans

- Congressional District approach (same as one proposed Constitutional amendment) –retains the existing statewide winner take all approach for both of the state’s senatorial electors; however, it would use a district level winner-take all rule for the state’s remaining presidential electors.
  - Maine uses this since 1969 (Perot just missed an elector here in 1992)
  - Nebraska since 1992

# State Plans

- National Popular Vote Initiative
  - The National Popular Vote bill would guarantee the Presidency to the candidate who receives the most popular votes in the entire United States.
  - The bill preserves the Electoral College, while ensuring that *every* vote in *every* state will matter in *every* presidential election.
  - The National Popular Vote law has been enacted by states possessing 132 electoral votes — 49% of the 270 electoral votes needed to activate it (States include: CA, HI, IL, MA, MD, NJ, VT, WA, and the District of Columbia).

# National Popular Vote Continued

- Under the National Popular Vote bill, all the electoral votes from the enacting states would be awarded to the presidential candidate who receives the most popular votes in all 50 states and DC.
- The bill would take effect only when enacted by states possessing a majority of the electoral votes — that is, enough electoral votes to elect a President (270 of 538).

# National Popular Vote Continued

- Under this measure the national popular vote winner is guaranteed the president through an interstate compact, which would be a law in each state that passes it.
- The compact would not be in effect until it was enacted by states collectively possessing the necessary 270 electoral college votes to win the presidency.

# National Popular Vote Continued

- The Compact would not change any state's internal procedures for conducting or counting its presidential vote.
- After the people cast their ballots in early November of presidential election years, the popular vote counts from all 50 states and DC would be added together to obtain a national grand total for each presidential slate and each state in the compact would then award their electoral votes to the popular vote winner

# National Popular Vote Continued

- Each chief election officer would be responsible for determining the national winner.
- He or she would be required to treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination of votes for president and for electors.



# National Popular Vote Continued

- Member states are required to send to other member states a an official statement of their popular vote totals.
- Non member states totals must be obtained through other means by the state's chief election officer.
- The chief election officer must release to the public all vote counts and statements as they are determined for transparency

# Scheme of Representation

- As citizens deliberating a particular issue, we want to be able not only to understand American political life, but we also want to make judgments about it.
- To make evaluations, however, we need a measuring stick, a standard based on widely shared values, that is essentially self-evident.
- One such standard is the ideal of democracy and how well democratic values are embedded in our institutions.



# Fundamental Principles of Representative Democracy

- Representative democracy is a republic, rule by the people, exercised indirectly through elected representatives.
  - Additional benchmarks:
    - Political sovereignty
    - Political equality
    - Political liberty

# Popular sovereignty

- Definition: ultimate source of all public authority in a democracy is the people and that government does the people's bidding.
  - Majority rules

# Political Equality

- Each citizen should have equal influence over public outcomes
- Implies electoral democracy, one person one vote
- Elections are the only place where each person is equal

# Political Liberty

- These are basic freedom essential to the formation and expression of the popular will and its translation into policy.
  - Freedom of speech, conscience, press, assembly, association, as well as freedom from arbitrary arrest and the right to run for public office

“I am not an advocate of frequent changes in laws and constitutions, but laws and constitutions must go hand in hand with the progress of the human mind as that becomes more developed, more enlightened, as new discoveries are made, new truths discovered, and manners and opinions change. With the change of circumstances institutions must advance also to keep pace with the times.”

-Thomas Jefferson