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THE CONSTITUTION, CONGRESS, AND PRESIDENTIAL ELECTIONS

*Albert J. Rosenthal**

ALTHOUGH Alexander Hamilton characterized the method provided in the Constitution for the selection of the President as "almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents,"¹ its critics soon made up for lost time, and it has probably been the subject of more proposed amendments than any other provision of the Constitution.² Recent years have seen an intensification of interest in the subject, reflecting both widespread concern that a President might be chosen who was not the leader in popular votes and fear over the dangers of a stolen or stalemated election. This heightened attention may have sprung in part from the near crises of 1948 and 1960,³ but undoubtedly it has also been influenced by the rapid growth in the power and significance of the presidency itself. Evidence for this may be seen in the fact that of the last six constitutional amendments adopted, five have concerned the presidency in whole or in part.⁴

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Since this Article was in page proofs before November 5, it has been possible to make only minor changes to reflect the results of the most recent presidential election. The author believes, however, that none of the points made herein need be qualified in response to that election.

1. THE FEDERALIST No. 68, at 508 (J. Hamilton ed. 1868) (Hamilton).

2. Through 1966, 513 resolutions proposing amendments to the provisions of the Constitution pertaining to the election of the President were introduced in Congress. N. PEIRCE, THE PEOPLE'S PRESIDENT 151 (1968) [hereinafter PEIRCE].

3. In both of these close elections, a shift of only a few thousand votes in certain key states would have prevented either major party candidate from obtaining a majority of the electoral votes; a "Dixiecrat" candidate would have held the balance of power. The election would then have been referred to the House of Representatives, in which the delegation from each state would have cast one vote, and a majority of all the states would have been required for election. In each instance, the House was closely enough divided that a stalemate might well have ensued. See page 15 *infra*.

There is some doubt as to whether demonstration of the shortcomings of the system in a recent election is in itself sufficient to induce a change. In five successive elections from 1876 through 1892, the winning candidate failed to obtain a majority of the popular vote; in two of them the popular leader lost; in all five an infinitesimal shift of votes would have reversed the result; and in one (1876) a national crisis was narrowly averted. Yet the Constitution was not amended. While some modern observers might conclude that the quality of the candidates in those elections was such that it mattered little who won, it is unlikely that the people of the time so regarded it.

4. The twentieth amendment changed the President's term of office and provided for the death of the President-elect or his failure to qualify. The twenty-second amendment limited the President to two terms; the twenty-third provided for representation

Still, the basic method of electing the President has continued almost without change.

While a wide variety of amendments intended to remove various apparent shortcomings in the method of selecting our Presidents have been proposed over the years, the current drive is centered on the proposal to employ a direct, nationwide, popular vote. This would eliminate the possibility that the popular favorite might be defeated, as was Grover Cleveland in 1888, by an opponent with fewer popular but more electoral votes. If coupled with a provision that less than a majority of the popular votes (for example, 40 per cent) would suffice for election, or that a runoff election would be held if no candidate obtained a required percentage,⁵ this proposal would defeat the strategy of regional third-party candidates who seek to deprive either major party candidate of a majority of electoral votes and to throw the election into the House of Representatives where a stalemate could easily result. Finally, a direct popular vote would also prevent the "theft" of an election by the action of presidential electors defying the mandate of the voters who had selected them on the assumption that they would support their party's nominees.

It is not surprising that this proposal has garnered widespread support. It has been recommended by a prestigious commission of the American Bar Association⁶ and endorsed by the ABA's House of Delegates. The Bar Association of the City of New York, which had previously recommended a different proposed amendment,⁷ has now shifted its support to direct popular vote,⁸ as has Senator Birch Bayh, Chairman of the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary.⁹ A

of the District of Columbia in the electoral college; the twenty-fourth eliminated the poll tax in elections for the President and Congress; and the twenty-fifth provided for the disability of the President and the designation of a Vice President when that office is vacant.

Fortunately, few of our recent Presidents have been either drunkards or teetotalers; hence the twenty-first amendment, repealing Prohibition, cannot be viewed as bearing with any particular emphasis on the presidency.

5. For example, S.J. Res. 2, 90th Cong., 1st Sess. (1967), introduced by Senator Bayh and a bipartisan group of 18 other senators. *See also* the recommendations of the A.B.A. Commission, *infra* note 6.

6. ABA COMM. ON ELECTORAL COLLEGE REFORM, ELECTING THE PRESIDENT (1967). *See also* Feerick, *The Electoral College—Why It Ought To Be Abolished*, 37 *FORDHAM L. REV.* 1 (1968).

7. The amendment which had been supported by the Association provided for automatic award of the electoral votes of each state to the candidate securing a plurality of the popular vote therein, eliminating the presidential electors as such. *See* 20 *RECORD OF N.Y.C.B.A.* 503 (1965); text accompanying note 125 *infra*.

8. 6 *REPS. OF COMM. CONCERNED WITH FEDERAL LEGISLATION, ASSOC. OF THE BAR OF THE CITY OF N.Y.* 9 (1967).

9. *See* note 5 *supra*; *Hearings on S. J. Res. 4 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., 90th Cong., 1st Sess., 245-46 (1968).

Gallup poll indicates that 66 per cent of the nation supports this amendment, with only 19 per cent opposed.¹⁰

It must be remembered, however, that a decision to amend the Constitution is, as a practical matter, usually an irreversible step.¹¹ It is the purpose of this Article to examine the gravity of the evils sought to be eliminated, the possibility that the proposed amendment might give rise to undesirable side effects, and the availability of alternative remedies.

I. DEFEAT OF THE POPULAR CHOICE

We still choose our chief magistrate by a method which is both anachronistic and undemocratic. There is much that is attractive in the view that the President should be chosen by a completely democratic process—that if the principle of “one man—one vote” has validity elsewhere it ought to be applied here. For a nation professing dedication to democratic ideals, the selection of its most important officer through a method not completely democratic must, inevitably, be a source of dissatisfaction. And under *any* system in which the presidency is determined by some method other than direct popular vote, there is necessarily a possibility that the popular favorite may not win.

There are, however, difficulties with a completely democratic selection process both in principle and practicality. As an abstract proposition, complete equality of influence of every voter in the country might well be a worthy goal. But we are not living under an abstract proposition. In other parts of the real system under which we live, voters do not always have equal influence: compare the Senate. The way in which the President is chosen must be considered in the context of the entire governmental structure rather than in isolation. Moreover, since there is no real possibility of achieving total equality in every component of our political life, it may be particularly pertinent to consider the desirability of direct popular election of the President in terms of practical consequences as well as democratic theory. What forces in our society would be strengthened, and what weakened, if the change were made? Which needs would be likely to be served and which put aside?

The Founding Fathers, of course, did not contemplate a purely democratic procedure for choosing the President. The device selected was the product of a compromise between those favoring and

10. See N.Y. Times, Sept. 22, 1968, at 61, col. 2.

11. Constitutional amendments are difficult to pass. The provisions of the original Constitution are seldom changed; amendments, by hypothesis more nearly contemporary, are even more difficult to alter once adopted. Only one, the eighteenth, has ever been repealed.

those opposing popular participation in the choice;¹² it also reflected an earlier compromise between the large and the small states as to congressional representation.¹³ Even the right to vote for presidential electors was not assured, since each state could "appoint" its electors as it saw fit. In fact, in some states—South Carolina until 1860¹⁴—the legislatures retained this power.

The original constitutional framework has, with minor exceptions,¹⁵ remained unchanged to this day; yet, as a practical matter the manner of presidential selection evolved very quickly into a form which would have been unrecognizable to the Framers. With the growth of political parties, the elector soon became a mere functionary expected to vote for his party's candidates.¹⁶ And with the advance of democracy, each state eventually directed that its electors be chosen by universal suffrage. However, the electors are still chosen on a state-by-state basis, and in turn, they elect the President.¹⁷

When the voters first began choosing electors, many states were divided into electoral districts with the result that if party strength differed from district to district a mixed delegation of electors was chosen. A few states, however, employed statewide balloting, and the party that prevailed in total vote secured the entire electoral count. This device enabled a state to achieve an influence far greater than a state whose electoral vote was divided; by a sort of Gresham's Law, the states in the latter group felt obliged, in self-defense, to

12. See, e.g., 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 132, 166 (1937); L. WILMERDING, *THE ELECTORAL COLLEGE* 19-22 (1958); Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 810-11 (1961); cf. Kirby, *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROB. 495, 506 (1962); Truman, Book Review, 59 COLUM. L. REV. 838, 840 (1959). See also Gray v. Sanders, 372 U.S. 368, 376 n.8 (1963): "The electoral college was designed by men who did not want the election of the President to be left to the people."

13. PEIRCE 35-37.

14. In 1876 Colorado, just admitted to the Union and perhaps lacking sufficient time to provide for elections, chose its electors by legislative appointment.

15. Article I, section 2, provided that each elector vote for two persons; the one with the greatest number of votes (if a majority) became President and the next highest Vice President. Following the election of 1800, when all Democratic electors voted for both Jefferson and Burr causing a tie which had to be resolved in the House of Representatives, the twelfth amendment was adopted providing for separate balloting for President and Vice President and making several other minor changes.

The fourteenth, fifteenth, nineteenth, twentieth, twenty-third, twenty-fourth, and twenty-fifth amendments have all had some bearing on the process of selecting the President but have not changed the basic mechanical structure set forth in article II, section 1, as amended by the twelfth amendment.

16. J. DOUGHERTY, *THE ELECTORAL SYSTEM OF THE UNITED STATES* 17-18 (1906).

17. Since the electors meet in each of the state capitals, "electoral college" (not a constitutional phrase) in the singular is a misnomer. A single deliberative body was never contemplated.

follow suit. Before long, the statewide or "general ticket" method became universal, and it has seldom been departed from in the last century.¹⁸

Thus, as the system now operates in practice, the candidate obtaining a plurality¹⁹—however small—of a state's popular votes receives its entire complement of electoral votes. A candidate carrying a number of states by small margins can therefore prevail over his opponent whose total popular vote may be greater. Although this has seldom happened, the possibility cannot be ignored.

Three elections are often cited as examples of the defeat of the popular favorite—those of 1824, 1876, and 1888. In 1824, the two-party system had temporarily broken down, and all four candidates—Andrew Jackson, John Quincy Adams, William H. Crawford, and Henry Clay—were, nominally at least, Democrats. No candidate received either a majority of the electoral vote or a majority of the popular vote in the eighteen (out of twenty-four) states in

18. In 1892, the Michigan legislature, controlled by Democrats, correctly foresaw a statewide victory by the Republican presidential candidate and sought to salvage something for his Democratic opponent by dividing the state into separate electoral districts. This was challenged, but sustained by the Supreme Court in *McPherson v. Blacker*, 146 U.S. 1 (1892). In 1896 Michigan reverted to the general ticket method.

19. Georgia requires a majority, rather than a mere plurality, of the popular vote, to elect presidential electors. In the event of a failure of any slate to attain a majority, GA. CODE ANN. § 34-1514 (Supp. 1967) calls for a run-off between "the two candidates receiving the highest number of votes." This provision, applicable to other offices as well, would seem not to be readily adaptable to the election of a number of presidential electors. It replaced GA. CODE ANN. § 34-2503 (1962), which called, instead, for appointment of the electors by the state legislature in the event of failure to attain a majority of the popular vote.

The selection of electors must be made on the first Tuesday after the first Monday in November, the date set by Congress pursuant to art. II, § 1, par. 4 of the Constitution. It has been held that this constitutional provision also requires that the day be uniform throughout the nation, and that the receipt and counting of absentee ballots after that date would violate the requirement of uniformity. *Maddox v. Board of State Canvassers*, 116 Mont. 217, 149 P.2d 112 (1944). This would imply that any run-off election (as provided by Georgia law) would be invalid. But the language of the Constitution does not compel that interpretation. It reads: "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." The last clause may be regarded as applying only to the "Day" on which the electors are to give their votes, and not to the "Time" of "chusing the Electors." Congress has apparently adopted this construction, since it has provided [3 U.S.C. § 2 (1964)]: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." See also 3 U.S.C. § 4 (1964).

Maryland, while apparently permitting an elector to be chosen by a mere plurality, until recently required its electors to cast their ballots for the presidential and vice presidential candidates receiving "the majority of the votes cast in the State of Maryland." MD. ANN. CODE art. 33, §§ 153, 156 (1957). The Election Code of which this provision was a part was repealed in 1967, and its replacement requires Maryland electors to vote for the candidates receiving a plurality of the popular vote in the state. *Id.* art. 33, § 20-24 (Supp. 1967).

which the people chose their electors by popular vote. The vote was divided as follows:²⁰

<i>Candidate</i>	<i>Popular</i>	<i>Electoral</i>
Jackson	152,933	99
Adams	115,696	84
Crawford	46,979	41
Clay	47,136	37

Pursuant to the Constitution, the choice devolved upon the House of Representatives, with each state casting one vote and a majority (thirteen states) necessary for election. Clay threw his support to Adams, who won on the first ballot. The result has generally been interpreted as a defeat for democratic principles, and that interpretation was successfully employed by Jackson in his return match with Adams four years later. But because in six states the electors were chosen by the legislatures rather than at the polls, and because of the possibility that Adams may well have been the second choice of most of the supporters of Clay and Crawford, Adams' election is not a conclusive case of a defeat of the popular will.

In 1876, by anyone's count, Democrat Samuel J. Tilden secured a clear popular majority over Republican Rutherford B. Hayes.²¹ However, disputes arose in four states, and double sets of returns were sent to Congress. Apart from the disputed votes, Tilden had 184 electoral votes and Hayes 165; twenty electoral votes were at stake, and Tilden needed only one of these to win.²² Congress established an Electoral Commission to resolve the disputes, and the Commission, by a strict eight-to-seven party vote, found for Hayes in each instance. Thus, the final count was 185 for Hayes and 184 for Tilden. In this instance, the defeat of the popular choice may be ascribed to the election frauds which generated the controversy and to the party-line votes of the Electoral Commission, rather than to the unresponsiveness of the electoral college to the popular vote. Yet, even under the Republicans' count of popular votes, Tilden had a majority; this demonstrates that the system itself could have

20. S. PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS 18 (1963) [hereinafter PETERSEN].

21. PEIRCE 87.

22. Colorado's three electors, chosen by the legislature rather than the voters (*see* note 14 *supra*), voted for Hayes. PETERSEN 45, 46. If those electoral votes had not been counted, Tilden would have had a clear majority of the valid votes, even accepting the Republicans' position as to all twenty disputed electoral votes. It is striking that in all of the protracted debate in Congress, in the Electoral Commission, and elsewhere, the argument never seems to have been advanced that direct appointment by the legislature was invalid. *See* *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

thwarted the popular will even if there had been no controverted returns.

The only apparently clear example of defeat of the popular will was the election of 1888, in which Grover Cleveland, who led Benjamin Harrison in popular votes, was decisively defeated in the electoral count. The vote was tabulated as follows:²³

<i>Candidate</i>	<i>Popular</i>	<i>Electoral</i>
Harrison	5,445,269	233
Cleveland	5,540,365	168
Minor Parties	404,205	0

Although neither candidate had a majority of the popular vote, this would seem to be an unquestionable instance in which the plurality candidate lost the election. Yet we cannot be certain that, had the President been elected by direct popular vote, Cleveland necessarily would have won. If the ground rules regarding election had been different, the candidates would presumably have campaigned differently, aiming at total votes rather than at carrying critical states. A larger voter turnout would have been likely in those one-sided states where interest lagged because the choice of electors was fairly certain. For example, a more active attempt to bring out Republican votes in the then solid Democratic South might have been made. Of course, this could have been outweighed by an even larger turnout of otherwise complacent Democrats. In short, we will never know.

A significant feature of the 1888 election was that, while Cleveland's 95,096 popular vote plurality availed him nothing, a switch of a mere 7,189 votes out of well over 1,000,000 in New York would have swung its thirty-six electoral votes to his column and enabled him to win by 204 to 197.²⁴ Ironically, four years earlier, Cleveland had beaten Blaine by 219 electoral votes to 182, also prevailing in the popular vote by a margin of 23,737. Yet a shift of 575 votes in New York would have elected Blaine (218-183), despite Cleveland's nationwide plurality.²⁵

The tremendous potential significance of a handful of votes in the larger states has not been overlooked; the party conventions usually choose candidates from the largest states, and campaigns are tailored to capture their electoral votes. Yet this seemingly swollen influence of the large-state voter appears inconsistent with the mathematics of the electoral college. The smaller states seem to be

23. PETERSEN 55.

24. PETERSEN 54.

25. PETERSEN 51-52.

accorded disproportionately large representation because each state, regardless of population, is accorded two electoral votes corresponding to its two senators as well as one for each representative; thus, Alaska casts one electoral vote per 75,389 inhabitants, as contrasted with California's one per 392,930.²⁶

Whose vote, then, really does count for more? Does the large-state voter wield more influence than his counterpart in the small state? Is the answer dictated by the electoral vote/population ratio or is the instinct of the politicians more accurate? Not until this year has the solution been forthcoming. In a brilliant mathematical analysis, John E. Banzhaf, III, has demonstrated algebraically that the general ticket system accords each large-state voter a greater chance than his smaller-state counterpart to affect the ultimate result of an election despite his smaller theoretical share of the electoral vote.²⁷ In effect, the voters in a state may be compared to participants in a caucus, each of whom agrees to cast his vote in accordance with the decision of the majority; each thereby gains potential power, and the larger the number of participants in the caucus the greater the power. This factor outweighs the higher electoral vote/population ratio of the smaller states; a voter in California or New York has been calculated to have almost three times the chance of affecting the final result as a voter in any of several smaller states.²⁸

Despite the difficulties encountered by the Constitutional Convention in resolving the competing interests of the large and small states, few issues have polarized the nation along such a dividing line. Until about twenty years ago, proposals to change the system were at least ostensibly predicated more upon theoretical objections to unequal voting power and to the possibility of a popular winner becoming an electoral-college loser than upon fostering or frustrating any interests supposedly concentrated in a particular group of states classified by size. Over the years, the types of changes proposed have taken several forms. A perennial favorite has been the reversal, by constitutional amendment, of the practice of employing the general ticket. Mandatory choice of electors by separate districts within a state was first proposed in 1800 and has since been repeatedly urged; its current champion is Senator Mundt of South Dakota. A proposal to split each state's electoral vote in proportion to its popular vote was first offered in 1848; under the sponsorship of Senator Lodge of Massachusetts and Representative Gossett of Texas

26. These figures are based on the 1960 Census.

27. Banzhaf, *One Man, 3312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968).

28. *Id.* at 329.

it came close to success in 1950, when it carried the Senate by more than the required two-thirds but died in the House. A combination of both proposals, whereby a state could choose either procedure but could not adhere to the present winner-take-all method, picked up no fewer than fifty-four sponsors in the Senate but nevertheless failed to carry, largely because of the brilliant opposition of Senator Paul Douglas and freshman Senator John F. Kennedy. Depending on the observer's political leanings, he may find poetic justice or irony in the fact that, under either of the two procedures, Kennedy probably would have lost to Nixon in 1960.

Pursuant to either the district or the proportional plans, the small states would retain the mathematical advantage stemming from their higher electoral vote/population ratios, while the larger states would lose the advantage of the countervailing "caucus" factor. Banzhaf has calculated that under the district plan, a voter in Alaska would have over three times the influence of one in California or New York, and under the proportional plan, over five times as much.²⁹

But by the 1950's something new had entered the picture. Theoretical considerations undoubtedly motivated some of the proponents of change, but there were many who openly deplored what they regarded as the growing influence of urban minority and labor groups upon the selection of Presidents and their conduct in office. They attributed this influence to the concentration of electoral votes in the populous states, where these minority and labor groups might hold the balance of power.³⁰ While direct election of the President would have eliminated these supposed discrepancies, the essentially conservative leadership of the drive for the district and the proportional amendments soundly defeated direct popular vote

29. *Id.* at 330, 331.

30. See, e.g., remarks of Congressman Gossett of Texas, in *Hearings on Amendment of Constitution To Abolish Electoral College System Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 82d Cong., 1st Sess. 264-65 (1951):

Now, please understand, I have no objection to the Negro in Harlem voting and to his vote being counted, but I do resent the fact that both parties will spend a hundred times as much money to get his vote, and that his vote is worth a hundred times as much in the scale of national politics as is the vote of a white man in Texas. I have no objection to a million folks who cannot speak English voting, or to their votes being counted, but I do resent the fact that because they happen to live in Chicago, or Detroit, or New York, that their vote is worth a hundred times as much as mine because I happen to live in Texas. Is it fair, is it honest, is it democratic, is it to the best interest of anyone in fact, to place such a premium on a few thousand labor votes, or Italian votes, or Irish votes, or Negro votes, or Jewish votes, or Polish votes, or Communist votes, or big-city-machine votes, simply because they happen to be located in two or three large, industrial pivotal States? Can anything but evil come from placing such temptation and such power in the hands of political parties and political bosses? They, of course, will never resist the temptation of making undue appeals to these minority groups whose votes mean the balance of power and the election of President. Thus, both said groups and said politicians are corrupted and the Nation suffers.

when it was proposed.³¹ Instead, this leadership strove for changes which would have discriminated *against* the large-state and large-city voters in the choice of the President, despite the fact that these voters already faced disadvantages in the composition of the Senate, the districting of the House of Representatives, and the apportionment of the state legislatures.

While proposed from time to time over the years, the direct popular vote amendment has only recently attracted much support. Hesitation may have sprung from the assumption that the smaller states would never accept the destruction of their theoretical advantage; since over half of the states partook of that advantage, the possibility that three fourths of them would ratify such a constitutional amendment seemed remote indeed.³² Other factors, however, would seem necessary to explain the almost two-to-one vote against the proposal among 254 heads of university political science departments in a 1961 survey conducted by the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee.³³ It may be that the political scientists were moved by the same consideration asserted by John F. Kennedy in the 1956 Senate debate: "[I]t is not only the unit vote for the Presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider all the others."³⁴ Kennedy was talking about the proposed district or proportional systems, but the same considerations would apply, albeit with somewhat less force, to direct popular election.

Of course, Kennedy was speaking—and the political scientists were voting—before *Baker v. Carr*,³⁵ *Reynolds v. Sims*,³⁶ and *Wesberry v. Sanders*,³⁷ which invalidated the subordination of the cities to the rural areas in the composition of state legislatures and the House of Representatives. Much of the reason for retaining the disproportionate influence of the large states (and therefore of the large cities within those states)³⁸ in the choice of the President as

31. An amendment introduced by Senator Humphrey in 1950 was defeated 63-28. 96 CONG. REC. 1276-77 (1950). A similar amendment introduced by Senator Lehman in 1956 was also defeated 66-17. 102 CONG. REC. 5657 (1956).

32. See PEIRCE 185; L. WILMERDING, *THE ELECTORAL COLLEGE* 97-98 (1958); Kefauver, *The Electoral College: Old Reforms Take on a New Look*, 27 LAW & CONTEMP. PROB. 188, 195-96 (1962).

33. *Hearings on S.J. Res. 1 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., 691-714 (1961).

34. 102 CONG. REC. 5150 (1956).

35. 369 U.S. 186 (1962).

36. 377 U.S. 533 (1964).

37. 376 U.S. 1 (1964).

38. See note 42 *infra* and accompanying text.

a countervailing inequality to balance their weakness in other political areas has since disappeared. In the light of these more recent constitutional developments, a fresh look at the problem is needed.

Is there any longer a respectable case for opposing direct popular election? I, for one, believe that there is. First of all, it is too soon to assume that the reapportionment decisions are going to stick. As the readers of the March 1968 issue of this *Review* must be especially aware, a substantial effort has been mounted to reverse those decisions, either through an ordinary constitutional amendment or through the calling of a new constitutional convention.³⁹ Before the populous states and cities previously prejudiced by malapportionment should be asked to give up whatever advantage they are accorded by the present method of choosing the President, they might want some assurance that there will be no reversion to the dominance of state legislatures and the House by rural interests.⁴⁰

Apart from the danger of a recrudescence of rural domination of legislatures and the House, the permanent underrepresentation of larger states in the Senate is frozen into the Constitution even beyond the reach of the amending process.⁴¹ Each Alaskan's vote counts seventy-four times as much as each New Yorker's in the composition of the Senate; by comparison, the advantage accorded to New Yorkers by the present method of electing the President is slight indeed. Even without regard to legislative apportionment, therefore, we still must face the issue which Senator Kennedy raised in 1956. Too many elements in the "solar system of governmental power" are still loaded against the voter in the large states to warrant the conclusion that fairness obliges him to give up the one advantage which he retains.

Perhaps more significant than countervailing inequalities are the practical consequences of the proposed change. It would scarcely be prudent to effect a permanent alteration in our political structure

39. *Symposium on the Article V Convention Process*, 66 MICH. L. REV. 837-1016 (1968), especially Dirksen, *The Supreme Court and the People*, *id.* at 837, and Ervin, *Proposed Legislation To Implement the Convention Method of Amending the Constitution*, *id.* at 875.

40. Attempts to delay the redistricting of congressional seats have also come close to success. See N.Y. Times, April 28, 1967, at 27, col. 4.

41. "... Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V. It seems clear that this article, establishing the amending process, cannot itself be amended to permit destruction of the guaranty of equal representation of the states in the Senate.

Even the process of amending the Constitution is itself loaded in favor of the smaller states. Three groups participate in the normal amendment process: the Senate, the House of Representatives, and the state legislatures. Of these, only the House comes close to reflecting population; in the Senate and in counting the ratification votes of the state legislatures, the rule is not one man-one vote, but one state-one vote.

without careful examination of its probable effects on governmental processes. What influences would be strengthened, what weakened, if Presidents were to be chosen by direct vote?

The most obvious consequence of the proposed change would be a reduction in the importance of the large states in the choice of the President. But, as mentioned above, issues in American politics have rarely been polarized between large and small states, so at first glance the change might not seem to be very significant. But large states do contain large cities; according to the 1960 census, of the eight largest cities, seven are located, one each, in the seven largest states.⁴² And the cities, until recently the victims of rural-dominated apportionment of state legislatures and unequal districting in the House of Representatives, are in serious trouble. To whatever extent our Presidents may be influenced by the voting strength of the urban voters, it would seem imperative that this influence not be curtailed.

Even more important, there has in recent years been an enormous influx of Negroes into the cities—to a point where over two thirds of all Negroes outside of the South are concentrated in our twelve largest cities,⁴³ with all signs pointing to even further concentration in the future. The appalling conditions imposed upon all but a tiny fraction of them has been detailed elsewhere.⁴⁴ The result is the most serious domestic crisis the nation has had to face in a century. Can we afford to reduce, even in the slightest, the likelihood that the federal government will take the heroic measures urgently needed to cope with this crisis?⁴⁵

Changing the method of choosing the President means much more than turning a potential losing candidate into a winner and vice versa. The choice of a party candidate reflects at least in part the judgment of the convention delegates as to his chances for

42. The eight largest cities, in order of population, were New York, New York; Chicago, Illinois; Los Angeles, California; Philadelphia, Pennsylvania; Detroit, Michigan; Baltimore, Maryland; Houston, Texas, and Cleveland, Ohio. The seven largest states were New York, California, Pennsylvania, Illinois, Ohio, Texas, and Michigan.

43. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 243 (Bantam ed. 1968) [hereinafter COMMISSION REPORT]. According to Banzhaf's computations, all major cities except Baltimore and Washington, D.C., are in states in which voters have a greater voice than the national average in the election of the President. Banzhaf, *supra* note 27, at 329.

44. See, e.g., COMMISSION REPORT.

45. See COMMISSION REPORT 455:

The principal burden for funding the programs we have proposed will fall upon the Federal Government. Caught between an inadequate and shrinking tax base and accelerating demands for public expenditures, the cities are not able to generate sufficient financing. Although there is much more that state governments can and should do, the taxing resources available at this level are far from adequate.

victory; under the present structure great attention must necessarily be paid to the popularity of the candidate with urban and Negro voters.⁴⁶ If we reduce the influence of those voters, we will reduce the attention which conventions will pay to urban and Negro preferences when nominating candidates. Similarly, an incumbent President seeking re-election—or hoping that his successor will be of the same party—will probably pay more attention to urban and Negro needs under the present system than if the balance of power were changed.

The plight of the cities is becoming increasingly desperate. Racial tensions seem to be worsening rapidly. Compared with the magnitude of the problems, little enough has been done about them even under existing rules. Should the rules be changed in a way which will undoubtedly diminish just those influences which might prod us toward implementing the measures we so badly need?⁴⁷

* * *

Advocates of direct popular vote do not rest their case on equalization of voting power alone. They point out two additional weaknesses in the present system which would be cured by their proposed amendment: the possibility of a standoff in the electoral college followed by a stalemate in the House of Representatives, and the danger that a sufficient number of electors to deprive the apparently victorious candidate of the presidency will vote contrary to the expectation of the voters. Do these dangers, considered together or separately, justify adoption of the proposed amendment?

46. Possible illustrations include: President Franklin Roosevelt's alleged instruction, "Clear it with Sidney [Hillman]," with respect to the Democratic nomination for Vice President in 1944—probably resulting in the choice of Truman over Byrnes; the Republican nomination of Eisenhower rather than Taft in 1952 (even if based on misconceptions as to the former's political philosophy); and Kennedy's victory over Johnson and others in the 1960 Democratic Convention. This factor seems to have been less influential in the 1968 Conventions. *See also* note 30 *supra*.

47. We have no assurance, of course, that the leverage now exercised by the large states will continue to be applied in favor of improvement of the condition of Negroes. Disquieting signs of "backlash" have appeared in some of these states. At the least, however, political concentration upon the vote in the "swing" states should serve to keep attention upon the sore spots in our society.

The time may come when leadership of the civil rights movement will pass to the small towns, or even to a new generation of liberals in the South. It is fair to assume, however, that for the time being at least the voting power of the metropolitan areas will weigh in the balance in favor of the amelioration of the plight of the Negroes—and of the cities as well.

There are additional political consequences, of possibly undesirable character, which may follow adoption of direct popular election of the President, but which are beyond the scope of this Article. For example, some feel that the two-party system, with its tendency to exclude doctrinaire extremism and one-issue parties from the mainstream of American politics, may be jeopardized if this change is made. *Compare* Brown, *Proposed Amendment a Power Vacuum for Political Blackmail?*, *TRIAL* June/July 1967, at 15, with *REPORT OF THE A.B.A. COMM. ON ELECTORAL COLLEGE REFORM* 5-6 (1967).

II. THE CONTINGENT ELECTION PROCEDURE

Criticism has perennially been directed at the procedures applicable if no candidate secures a majority of the electoral vote. In such cases, the election is thrown into the House of Representatives, which must choose among the three leading candidates. In the House, each state's delegation casts one vote, and the votes of a majority of states (twenty-six today) are required for election.

Only twice has this procedure been invoked⁴⁸—and not since 1824—but there have been several near misses. A third-party candidate whose total popular vote is large but evenly spread throughout the nation may not secure any electoral votes and thus could not normally prevent one of the major party nominees from attaining a majority in the electoral college.⁴⁹ The danger arises from a regional candidate, such as George Wallace, who carried five Southern states; if the major party candidates run closely enough, a candidate like Wallace can hold the balance of power. There is reason to believe that this was a major purpose of the Wallace candidacy and of the campaigns of his "Dixiecrat" predecessors. If a standoff in the electoral college were followed by a stalemate in the House, Wallace would have presumably tried to trade his support to one of the major party candidates in return for assurances of retrogression on civil rights and perhaps for promises to appoint conservatives (or even racists) to the Supreme Court and to other sensitive positions such as that of the Attorney General.

If there is no majority in the electoral college, it is highly unlikely that there will be a majority of states supporting one candidate in the House. This conclusion does not rest solely upon the probability that the political complexion of each state's congressional delegation will resemble the distribution of its presidential vote. If the delegation of a state is evenly divided it can cast no vote; yet a majority of all the states, voting or not, is necessary to elect a President. Under the current apportionment, twenty-nine of

48. In 1800, all Democratic electors voted for both Jefferson and Burr, resulting in a tie. In the House of Representatives, eight states initially voted for Jefferson, six for Burr, and two were tied—giving no candidate the necessary majority of nine out of the total sixteen states. It was not until the thirty-sixth ballot that Jefferson prevailed.

The other such case, in 1824, is discussed in the text accompanying note 20 *supra*. John Quincy Adams was chosen on the first ballot in the House, but only following considerable maneuvering on behalf of the respective candidates.

49. Since there are usually an odd number of Representatives and an even number of Senators, until recently there would generally have been an odd total of electors. In 1961, however, the twenty-third amendment accorded the District of Columbia what will almost always be three electoral votes, thus resulting in an even total of votes and a possibility of a tie even when there are only two candidates obtaining electoral votes.

the fifty states are assigned an even number of representatives; in a close year, at least a few evenly split delegations are inevitable. Such a stalemate almost occurred in 1948. Truman led Dewey by over 2,000,000 popular votes, and by 303 electoral votes to 189. The State's Rights candidate, Strom Thurmond, garnered only slightly more than 1,000,000 votes but carried four states and secured thirty-nine electoral votes. Hence, no resort to the House was necessary. But if there had been a small shift in the popular vote in key states,⁵⁰ there would have been no electoral vote majority. Assuming that all representatives would have supported the candidates of their respective parties and that the delegations from the states carried by Thurmond would have supported him, the House vote would have been:⁵¹

<i>Candidate</i>	<i>States</i>
Truman	21
Dewey	20
Thurmond	4
Evenly Divided	3

How the impasse would have been resolved is a matter, fortunately, only of conjecture. Edward S. Corwin has remarked that we continue to rely "on the intervention of that Providence which is said to have fools and the American people in its special care."⁵²

Again in 1960, a shift of only 9,421 votes in Illinois and Missouri, or several other combinations of small numbers of votes in other states,⁵³ would have thrown the election into the House of Representatives with no clear assurance as to the outcome there. Certainly, the present method for contingent election is unsatisfactory—indeed, it is dangerous. As Professor Paul J. Piccard stated: "A certain amount of perseverance is needed in order to discover something good to say about the possibility of an election of the President by the House of Representatives."⁵⁴ But it does not follow that the entire electoral system must be overhauled merely to eliminate this one undesirable feature. If the advocates of change are motivated primarily by fear of the success—this year or some year—of a Wallace-type candidate in stalemating the election, their purpose can be achieved by curing the objectionable part of the procedure.

50. For example, a shift of only 12,487 votes in California and Ohio. PETERSEN 102.

51. See Wechsler, *Presidential Elections and the Constitution: A Comment on Proposed Amendment*, 35 A.B.A.J. 181 (1949).

52. E. CORWIN, *THE PRESIDENT, OFFICE AND POWERS* 67 (1957).

53. PETERSEN 112.

54. Piccard, *The Resolution of Electoral Deadlocks by the House of Representatives*,

Any number of remedies suggest themselves. The simplest might be to reduce the portion of the electoral vote needed for election of the candidate receiving a plurality from an absolute majority to something less—40 per cent or one third. American electoral practices with respect to the requirement of a majority, as distinguished from a mere plurality, have been ambivalent; in most instances, pluralities are sufficient. In almost all states, we choose our Senators, Representatives, and governors by plurality vote.⁵⁵ And within each state except Georgia,⁵⁶ a plurality is sufficient to elect the presidential electors themselves. The winners of fifteen presidential elections⁵⁷ have received less than a majority of the popular vote; indeed, this was true in nine of thirteen elections from 1844 to 1892, and has again been true in 1948, 1960, and 1968.

Another solution would be to call an immediate run-off election between the two leading candidates, with all electors required to vote for one or the other.⁵⁸ Still another alternative which would work in most though not all cases would be to replace the contingent election by states in the House of Representatives with a joint session of the House and the Senate, in which each senator and representative would vote as an individual.⁵⁹ In brief, there is no shortage of possible remedies for this part of the problem, and there is no need to throw out the entire system to cure one objectionable element.

III. THE FAITHLESS ELECTOR

The third weakness in the present system for choosing the President springs from the possibility that presidential electors will vote contrary to the assumption of the voters who selected them. If

in SELECTING THE PRESIDENT: THE TWENTY-SEVENTH DISCUSSION AND DEBATE MANUAL (Aly ed. 1953-1954), reprinted in *Hearings*, *supra* note 33, at 826, 828.

55. The Georgia Constitution has an unusual provision that if no candidate for governor receives a majority of the votes, the General Assembly shall choose the governor from between the two candidates with the largest number of votes. This provision was sustained by the Supreme Court in *Fortson v. Morris*, 385 U.S. 231 (1966). The requirement of a majority in primary elections is common in the South but not elsewhere in the country.

56. See note 19 *supra*.

57. Those elections were in 1824, 1844, 1848, 1856, 1860, 1876, 1880, 1884, 1888, 1892, 1912, 1916, 1948, 1960, and 1968.

58. This proposal is being strenuously urged by Congressman Jonathan Bingham of New York. See Bingham, *Keep It out of the House*, ATLANTIC, Sept., 1968, at 85.

59. This alternative was apparently first proposed by James Madison in 1823. Piccard, *supra* note 54, at 840. It has also been included in amendments advocated by Presidents Kennedy and Johnson which would abolish the electoral college and substitute automatic computation of the electoral vote of each state in favor of the candidate polling a plurality of the popular vote therein. See, e.g., S.J. Res. 58, 89th Cong., 1st Sess. § 3 (1965); H.R.J. Res. 278, 89th Cong., 1st Sess. § 3 (1965). See also text accompanying note 125 *infra*.

such action on the part of a sufficient number of electors were to reverse the decision of the voters, the ensuing dispute over the legitimacy of the election of a new President might well inflict grave injuries upon the nation. If we assume that discretion on the part of electors to override the expectations of their constituents must be eliminated, there are three possible ways in which this may be accomplished: by the courts under existing law, by statute, or by constitutional amendment.

The Founding Fathers intended the electors to be free agents,⁶⁰ but they did not foresee the growth of political parties. Hamilton's concept of the electors as "men most capable of analyzing the qualities adapted to the station . . . likely to possess the information and discernment requisite to such complicated investigations"⁶¹ did not accurately reflect the situation for long. In 1788 and 1792 Washington was everyone's choice anyway. By 1796, political parties were evolving, and electors were being pledged to support their respective parties' candidates. In that year, Samuel Miles, a Federalist elector from Pennsylvania, voted for Jefferson instead of Adams, evoking this comment from a Federalist voter: "Do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to act, not to think."⁶² By 1800, party discipline had already evolved to a point where it caused the Democrats acute embarrassment. In that year, each of their electors dutifully voted for both Jefferson and Burr, causing a tie that could be resolved only with the assistance of some of the Federalist members of the House of Representatives.⁶³ With the removal of this problem by the twelfth amendment, the compulsion for the strict adherence to party mandate grew even stronger.

In 1820, elector Samuel Plumer—contrary to the expectations of his constituents—voted for John Quincy Adams instead of James Monroe, thereby preventing Monroe from sharing Washington's distinction of being the unanimous choice of the electoral college. But apart from some unclear cases arising from the four-way election of 1824,⁶⁴ there has not until recently been a single subsequent instance of an elector following his own bent.⁶⁵ Indeed, in 1876, when James

60. See *Ray v. Blair*, 343 U.S. 214, 232-33 (1952) (Justice Jackson dissenting); *THE FEDERALIST* No. 68 (Hamilton).

61. *THE FEDERALIST* No. 68, at 508-09 (J. Hamilton ed. 1868).

62. E. STANWOOD, *A HISTORY OF THE PRESIDENCY* 51 (1928).

63. See notes 15 and 48 *supra*.

64. See PEIRCE 123.

65. As Thomas Hart Benton wrote, in S. REP. NO. 22, 19th Cong., 1st Sess. 4 (1826):

In the first election held under the constitution, the people looked beyond these agents [electors], fixed upon their own candidates for President and Vice President, and took pledges from the electoral candidates to obey their will. In every subsequent election, the same thing has been done. Electors, therefore, have not

Russell Lowell, a Republican elector from Massachusetts, might have cast his vote for Tilden and thereby spared the nation the crisis that followed,⁶⁶ he felt obliged not to do so. He wrote to Leslie Stephen:

In my own judgment I have no choice, and am bound in honor to vote for Hayes, as the people who chose me expected me to do. They did not choose me because they had confidence in my judgment, but because they thought they knew what that judgment would be. If I had told them that I should vote for Tilden, they would never have nominated me. It is a plain question of trust. The provoking part of it is that I tried to escape nomination all I could, and only did not decline because I thought it would be making too much fuss over a trifle.⁶⁷

As Justice Jackson stated in 1952:

Electors, although often personally eminent, independent, and respectable, officially became voluntary party lackeys and intellectual nonentities to whose memory we might justly paraphrase a tuneful satire:

"They always voted at their Party's call

And never thought of thinking for themselves at all."

As an institution the Electoral College suffered atrophy almost indistinguishable from *rigor mortis*.⁶⁸

Three electors have voted contrary to mandate in recent years. In 1948, Preston Parks appeared on two slates in Tennessee, one committed to Truman and one to Thurmond. Although the Truman ticket carried the state, Parks cast his vote for Thurmond. In 1956, W. F. Turner, a Democratic elector in Alabama, cast his vote for Walter E. Jones, a local judge, instead of supporting Adlai Stevenson, the party nominee. In these cases, as with Samuel Plumer in 1820, the votes involved had no consequence, and the purpose of the electors was apparently to make a gesture rather than to affect the choice of the President. But in 1960 a much more disquieting incident occurred.

Shortly after election day, one Lea Harris of Montgomery, Alabama, circularized the newly chosen electors, urging them to withhold electoral votes from Kennedy (and Nixon as well) and to agree upon a ticket acceptable to conservative sentiment, particularly in the South. As one of several such tickets, Harris suggested Byrd for

answered the design of their institution. They are not the independent body and superior characters which they were intended to be. They are not left to the exercise of their own judgment; on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents. they have degenerated into mere agents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous, if he is not.

66. See text accompanying note 21 *supra*.

67. 2 H. SCUDDER, JAMES RUSSELL LOWELL 216-17 (1901).

68. Dissenting, in *Ray v. Blair*, 343 U.S. 214, 232 (1952).

President and Goldwater for Vice President. One Republican elector, Henry D. Irwin of Oklahoma, sent out further solicitations of his own. In the end, however, he alone switched, and since his vote represented a shift from Nixon to Byrd it did not diminish Kennedy's majority. Called to testify before a Senate Judiciary subcommittee considering constitutional amendments relating to the election of the President, Irwin claimed to have had the "tacit support" of the Republican National Committee, but on cross-examination it was established that he had garnered little more than vague expressions of sympathy from a few national committeemen and had been rebuffed in many quarters.⁶⁹ But it is disquieting to speculate on what a better-organized campaign to subvert electors might have achieved, or what Messrs. Harris and Irwin themselves might have accomplished if Kennedy had had only, say, two or three instead of thirty-four electoral votes over the 269 necessary for a majority.

Still, four runaway electors in 144 years is not very many, especially when balanced against the 15,245 electoral votes⁷⁰ cast in all the elections between 1820 and 1964. Adherence to party candidates is still, overwhelmingly, the norm. The insignificance of the electors is reflected in the election laws of thirty-five states, which do not even list them on the ballots or voting machines. Instead, these states recite the names of the presidential and vice-presidential candidates, in some cases prefaced by the phrase "Electors for."⁷¹ Clearly, the people believe they are voting for the President, and on the Wednesday after the first Tuesday after the first Monday in November the newspapers unhesitatingly report the election results with complete confidence that the electoral vote will be cast in accordance with the preferences of the voters.

Despite this solidly established practice of fidelity on the part of electors, suppose a plan such as that of Messrs. Harris and Irwin were to succeed, and a sufficient number of electors voted contrary to pledge or expectation to defeat the candidate who would have won and confer victory upon his opponent. Can the Constitution be regarded as having been changed by almost two centuries of nearly consistent practice, so that the preference of the voters can take precedence over the decision of the electors? And even if the disobedient vote of an elector is regarded as legally improper, is there an effective judicial remedy for its correction?

The first question is whether such an unfaithful vote would be illegal at all. Certainly, electors' discretion conforms to the original

69. See *Hearings*, *supra* note 33, at 562-656.

70. PEIRCE 124.

71. PEIRCE 338.

concept of the Framers⁷² and has never been changed by explicit constitutional amendment. Can the practice of the ensuing years be deemed nevertheless to have amended the Constitution to the point where an elector who attempted to vote contrary to the voters' mandate would be deemed to have violated a legal, as distinguished from a moral, obligation? The Constitution is an evolving instrument, but can it evolve to a point diametrically opposite its original import?

A lower New York court once answered this question affirmatively. In *Thomas v. Cohen*,⁷³ a voter challenged the constitutionality of the practice of putting only the names of the presidential and vice-presidential candidates on the voting machines, arguing that since he was voting for electors who would be free to exercise discretion he had a right to know for whom he was voting. While conceding that the Framers intended electors to use their own judgment, the court concluded that intervening history had imposed a legal obligation on the electors to vote for their parties' nominees:

The electors are expected to choose the nominee of the party they represent, and no one else. So sacred and compelling is that obligation upon them, so long has its observance been recognized by faithful performance, so unexpected and destructive of order in our land would be its violation, that the trust that was originally conferred upon the electors by the people, to express their will by the selections they make, has, over these many years, ripened into a bounden duty—as binding upon them as if it were written into the organic law. The elector who attempted to disregard that duty could, in my opinion, be required by mandamus to carry out the mandate of the voters of his State.⁷⁴

The court relied⁷⁵ on a quotation from Chief Justice Hughes' opinion in *Smiley v. Holm*: "General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning."⁷⁶ Since the New York court conceded, however, that the original intention was clear, the use of practical construction to alter it would seem to go well beyond Hughes' reference. It should be noted in passing that the practice of omitting the electors' names from the ballot might have been sustained without deciding that the electors no longer have discretion. The practice was upheld in Ohio,

72. The requirement in both art. II, § 1 and the twelfth amendment that the electors "vote by ballot" may be regarded as implying a written, secret vote, adding further support for the notion of untrammelled discretion. But, "by common practice since the earliest days, the ballot is not secret and sometimes is not even a ballot at all." PEIRCE 129-30.

73. 146 N.Y. Misc. 836, 262 N.Y. Supp. 320 (Sup. Ct. 1933).

74. 146 N.Y. Misc. at 841-42, 262 N.Y. Supp. at 326.

75. 146 N.Y. at 846, 262 N.Y. Supp. at 330-31.

76. 285 U.S. 355, 369 (1932).

for example, on the basis of the broad authority conferred upon the states by the Constitution to direct the manner in which electors are to be chosen.⁷⁷

Thomas v. Cohen stands almost alone.⁷⁸ The issue has seldom arisen squarely, but dicta in a number of state court decisions indicate that the discretion of the electors still endures.⁷⁹ The Supreme Court has never passed on the issue, but it arose tangentially in *Ray v. Blair*⁸⁰ in 1952.

Alabama had authorized political parties to choose their respective presidential electors in a state-controlled party primary election and to fix the qualifications for the candidates. The State Executive Committee of the Democratic Party required all candidates for presidential elector to take a pledge to support the nominees of their party's national convention. One Edmund Blair refused to take such a pledge, and the Executive Committee refused to certify him as a candidate. He obtained from the Alabama courts a mandamus directing the chairman of the Executive Committee to certify him as a candidate for elector in the forthcoming primary, and the state supreme court upheld the mandamus on the ground that the pledge requirement was an unconstitutional restriction on an elector's discretion to vote as he chose in the electoral college.⁸¹

The Supreme Court of the United States reversed in a five-to-two decision, declaring:

77. *State ex rel. Hawke v. Myers*, 132 Ohio St. 18, 4 N.E.2d 397 (1936).

78. *State ex rel. Nebraska Republican State Cent. Comm. v. Wait*, 92 Neb. 313, 325, 138 N.W. 159, 163 (1912), may also be regarded as premised upon the notion of a legal duty on the part of electors to support their party's nominees. Theodore Roosevelt won the 1912 Nebraska Republican preference primary, but Taft received the national Republican nomination. Six Roosevelt supporters who had been nominated by the Republican Party as Nebraska electors were also chosen as the nominees of the state Progressive Party. The petitioner was awarded a peremptory writ of mandamus to compel the secretary of state to print the names of other persons as Republican candidates for electors instead of the six Roosevelt men. The Nebraska supreme court affirmed on the ground that the six had forfeited their position as Republican candidates by accepting the Progressive nomination. The court stated:

Here the persons who have been nominated as presidential electors, having, if elected, but a single duty to perform, viz., to vote for the candidates nominated by the party by whose votes they were themselves nominated, openly declare that they will not perform that duty, but will vote for the candidates of another and distinctly antagonistic party. This would make performance of their duty impossible, and a judicial determination of the existence of a vacancy was, therefore, unnecessary. The candidates had by their own acts, vacated their places as Republican presidential electors.

See also *Johnson v. Coyne*, 47 S.D. 138, 142, 196 N.W. 492, 493 (1923), holding that despite a state law permitting only one office for each nominating petition, a single petition for an entire slate of electors was valid, because "presumably this group stands as a unit for one candidate for President."

79. See, e.g., *Opinion of the Justices*, No. 87, 250 Ala. 399, 400, 34 S.2d 598, 600 (1948); *Breidenthal v. Edwards*, 57 Kan. 332, 337, 46 P. 469, 470 (1896); *State ex rel. Beck v. Hummel*, 150 Ohio St. 127, 146, 80 N.E.2d 899, 908 (1948).

80. 343 U.S. 214.

81. 257 Ala. 151, 57 S.2d 395 (1952).

A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party. It is an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose. U. S. Const., Art. II, § 1.⁸²

The Court went on to point out that pledges to support party nominees were common from the earliest days of the Republic:

This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary.

However, even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional.⁸³

Justice Jackson's dissent, joined by Justice Douglas, pointed out the atrophied independence of the elector,⁸⁴ but nevertheless declared that "the balloting [of the electors in the electoral college] cannot be constitutionally subject to any such control because it was intended to be free, an act performed after all functions of the electoral process left to the states have been completed."⁸⁵ He added:

It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice. If custom were sufficient authority for amendment of the Constitution by Court decree, the decision in this matter would be warranted. Usage may sometimes impart changed content to constitutional generalities, such as "due process of law," "equal protection," or "commerce among the states." But I do not think powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse. A political practice which has its origin in custom must rely upon custom for its sanctions.⁸⁶

Two Justices thus indicated squarely that they regarded the elector's freedom of choice to be untrammelled. The majority did not directly reach the issue.

Thus, the question of whether a state may bind the vote of an elector is still open. At least thirteen states⁸⁷ and the District of

82. 343 U.S. at 227.

83. 343 U.S. at 229-30.

84. See text accompanying notes 60-71 *supra*.

85. 343 U.S. at 233.

86. 343 U.S. at 233.

87. ALASKA STAT. § 15.30.090 (1962); CAL. ELECTIONS CODE § 25105 (West 1961);

Columbia⁸⁸ now have legislation which may be regarded as doing so, and it can be argued that all thirty-five states which omit the names of the electors from the ballot implicitly do the same thing.⁸⁹ While the Supreme Court has not been noticeably reluctant in recent years to invalidate the laws of large numbers of states when issues of civil rights or civil liberties have been involved, there is nevertheless a heavy presumption in favor of the constitutionality of legislation the enactment of which has been widespread. It may follow that there is a stronger case for upholding a restriction on the freedom of electors where it has been decreed by state legislation than where it has not. *Thomas v. Cohen* is all the more remarkable for having been decided as it was in the absence of express statutory provisions purporting to bind the electors.

Apart from the long-standing practice of elector fealty and the state legislation on the subject, there are two additional points which might add strength to the case for binding electors. First, Congress itself has in one area attempted to bind electors. The twenty-third amendment was adopted in 1961, providing for representation of the District of Columbia in the electoral college, and declaring:

The District . . . shall appoint in such manner as the Congress may direct [a designated number of electors who] shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.⁹⁰

Congress promptly enacted implementing legislation prescribing the procedures for participation by the District of Columbia in presidential elections, stating in pertinent part: "Each person elected as elec-

COLO. REV. STAT. ANN. § 49-20-1(5) (1963); CONN. GEN. STAT. REV. § 9-176 (1967); FLA. STAT. ANN. § 103.021 (Supp. 1968); HAWAII REV. LAWS § 11-221 (Supp. 1965); IDAHO CODE ANN. § 34-904 (Supp. 1967); MD. ANN. CODE art. 33, § 20-4 (Supp. 1967); NEV. REV. STAT. §§ 298.050 (1967); N.M. STAT. ANN. § 3-10-1.1 (Supp. 1967); OKLA. STAT. ANN. tit. 26, § 519-21 (Supp. 1967); ORE. REV. STAT. § 248.355 (Replacement Part 1965); TENN. CODE ANN. § 2-403 (1956). See also VA. CODE ANN. § 24-290.6 (1950), declaring how electors are "expected" to vote. None of these laws appears to have come before the courts.

88. D.C. CODE ANN. § 1-1108(g) (1967).

89. While some of these state laws prescribe criminal punishment for violation of an elector's pledge, none expressly purports to reverse his vote in such a case.

A law which would fully test legislative power over elector discretion would be one which automatically forfeited his office upon casting a defecting vote. Other electors or party officials could be authorized to fill the vacancy on the spot. His initial appointment would have been conditional upon his performing his promise. This would require open voting and would certainly encounter a contention that the balloting must be secret.

Kirby, *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROB. 495, 509 (1962).

90. U.S. CONST. amend. XXIII.

tor of President and Vice President shall, in the presence of the Board, take an oath or solemnly affirm that he will vote for the candidates of the party he has been nominated to represent, and *it shall be his duty to vote in such manner in the electoral college.*"⁹¹ This would seem to reflect a determination by Congress either that all electors are bound to vote for their party's candidates, or that since the states are empowered to bind electors so to vote, Congress, acting like a state legislature with respect to the District of Columbia, can do the same. We therefore have what might be regarded as a contemporaneous construction of a constitutional amendment by Congress, which, although not necessarily decisive,⁹² should be accorded great weight.⁹³ But the construction is contemporaneous only with respect to the twenty-third amendment, while its principal significance lies in connection with the much more ancient article II, section 1, and the twelfth amendment.

Second, the twenty-fourth amendment, ratified in 1964, abolishing the poll tax in connection with presidential and congressional elections, speaks of the right to vote "in any primary or other election for *President or Vice President*, for electors for President or Vice President, or for Senator or Representative in Congress"⁹⁴ The legislative history does not explain why it was deemed necessary to include the italicized phrase, but a possible inference is that Congress and the ratifying states regarded the voters, at least in those states not listing the electors on the ballot, as voting directly for the President and Vice President.⁹⁵ If so, the argument that the electors are bound would seem to be strengthened.

None of the foregoing adds up to a clear case for the proposition that the elector is bound to vote for his party's choices, or even that the state legislatures may so bind him. But there seems to be at least a respectable argument for either of these propositions.⁹⁶ Let us

91. D.C. CODE ANN. § 1-1108(g) (1967) (emphasis added) (derived from Act of Oct. 4, 1961, 75 Stat. 818).

92. Cf., e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

93. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

94. U.S. CONST. amend. XXIV.

95. Another possible purpose might have been to cover presidential preference primaries, where held. Cf. *Hearings on S. J. Res. 4 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., 90th Cong., 1st Sess., 145 (1968).

96. See Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 12 (1934): "[W]herever there are today established practices 'under' or 'in accordance with' the Document, it is only the practice which can legitimize the words as being still part of our going Constitution. It is not the words which legitimize the practice. This is the first principle of a sane theory of our constitutional law. Its necessity is patent wherever practice has flatly abrogated a portion of this 'supreme law of the land.' Discretion in the electoral college is the classic instance; can any doubt that if that college should today disregard their mandate, such action

assume that our constitutional system has indeed evolved to a point where the elector is no longer free. How would his obligation to honor the voters' mandate be enforced in a concrete case?

Thus far, in those few instances in which an elector disregarded his party mandate, the results of the election were unaffected; there was no interest in instituting litigation to compel or reverse his vote.⁹⁷ Suppose, however, that in a close election a sufficient number of electors were persuaded, or even bribed, to vote in such fashion as to deprive the apparent winner of a majority in the electoral college—either throwing the election into the House of Representatives or handing victory to the apparent loser. Would, and could, the courts act to prevent such a “theft” of the presidency?

First of all, let us assume a case in which the intention of the runaway electors was manifested in advance. Presumably actions would be instituted, in either the state or federal courts, to test the propriety of their expected conduct.

As for state court actions, a case might be based either on the theory that the Constitution now forbids elector discretion or on a state statute purporting to restrict it; in the latter case, the constitutionality of the state statute would of course be an issue. In any event, it would not be safe to generalize as to whether state courts would find that a candidate, state official, voter, or taxpayer has sufficient standing to raise the issue. Moreover, it is not clear whether relief in mandamus or by way of injunction could be granted. While mandamus would seem appropriate enough to test the contention that the duties of electors are purely ministerial, there may be doubt as to the propriety of mandamus where the time for the official to act has not yet arrived.⁹⁸ And there may still be some vitality in the discredited doctrine that injunctions are not granted to protect mere political rights.⁹⁹ Mere declaratory relief, without sanction, might not be a sufficient deterrent. If what is really sought is a quick dispositive ruling by the United States Supreme Court, there would be no way

would be contrary to our Constitution? Yet “vote by ballot”—the original language, repeated in the Twelfth Amendment—is a strange way of saying “act as rubber stamps.” [Emphasis in the original].

For an interesting and persuasive argument that state power to bind electors would implement, rather than defeat, the purposes of the Framers, see Note, *State Power To Bind Presidential Electors*, 65 COLUM. L. REV. 696 (1965); cf. Kirby, *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROB. 495, 505-06 (1962).

97. In each such instance, Congress counted the electoral votes as actually cast.

98. While one frequently encounters the statement that even where the duty of a public official is merely ministerial, mandamus will not lie if the violation of duty has not yet occurred but has merely been threatened for the future [see, e.g., 55 C.J.S. MANDAMUS § 33 (1948)], it is doubtful whether most courts would refuse to grant mandamus on that ground. See, e.g., *People ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 241, 99 N.E. 568, 571 (1912).

to ensure that the delay involved in appeals through the state judicial system would not exhaust, many times over, the precious few days remaining before the electors were to cast their ballots.¹⁰⁰

Federal court actions would seem to offer more hope. *Baker v. Carr*¹⁰¹ probably assures standing to voters alleging that their votes are about to be nullified.¹⁰² Since electors have been characterized as state rather than federal officials,¹⁰³ even though they perform a federal function, the mandamus jurisdiction conferred by section 1311 of the Judicial Code¹⁰⁴ would probably be inapplicable. Injunctive relief, however, would appear to be available under section 1343(3) of the Judicial Code, which reads:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . .

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.¹⁰⁵

If, as we are assuming *arguendo*, a voter has a constitutional right to cast an effective vote for President, an elector who casts his ballot contrary to the voters' mandate may be said to be acting under color of state law to deprive the voters of that constitutional right. While section 1343 was intended primarily to implement the Reconstruction amendments,¹⁰⁶ and while the limitations on state action under the Reconstruction amendments dwarf those under all other provisions of the Constitution, the provision has nevertheless been used occasionally to redress deprivations of other constitutional rights.¹⁰⁷

99. See Note, *Injunctive Protection of Political Rights in the Federal Courts*, 62 HARV. L. REV. 659, 666-67 (1949); cf. *Giles v. Harris*, 189 U.S. 475, 486, 488 (1903).

100. Supreme Court review of state court decisions may apply only to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" 28 U.S.C. § 1257 (1964).

101. 369 U.S. 186, 204-08 (1962).

102. A candidate himself would apparently also have standing to raise the question.

103. See *Ray v. Blair*, 343 U.S. 214, 224-25 (1952).

104. 28 U.S.C. § 1311 (1964).

105. 28 U.S.C. § 1343(3) (1964).

106. See *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 71-72 (1900).

107. See *Hague v. C.I.O.*, 307 U.S. 496, 531 (1939) (opinion of Justice Stone) (The test is whether the "gist of the cause of action was not damage or injury to property, but unconstitutional infringement of a right of personal liberty not susceptible of valuation in money."); *Anglo-American Provision Co. v. Davis Provision Co.*, 105 Fed. 536 (C.C.S.D.N.Y. 1900) (full faith and credit clause).

28 U.S.C. § 1331(a) (1964) might also confer jurisdiction upon federal district courts, since the action seemingly "arises under the Constitution . . . of the United States," but the \$10,000 jurisdictional amount would probably defeat any plaintiff other than the presidential or vice-presidential candidates themselves.

The losing party in an action under section 1343 could seek speedy Supreme Court review by immediately docketing an appeal in the court of appeals and asking the Supreme Court to grant certiorari before decision by the court of appeals pursuant to section 1254(1) of the Judicial Code.¹⁰⁸ If the Supreme Court were willing, it could also render a quick decision in advance of the preparation of full opinions.¹⁰⁹

It is far from clear, however, whether the Supreme Court would either consider the case or permit lower federal or state courts to do so. There is a serious chance that the action would be barred as raising a "political question." Although *Baker v. Carr* held the political question doctrine inapplicable in one type of voting rights case (state legislative apportionment), the Court stated that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"¹¹⁰ While issues of federal-state relationships are obviously present in an action challenging the vote of an unfaithful elector, the main problem involves the intrusion of the courts into a decision-making process which arguably has been committed finally to Congress. The twelfth amendment requires the electors in each state to sign and certify lists of their votes for President and Vice President

and transmit [them] sealed to the seat of government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed¹¹¹

This is not definitely a final commitment to Congress of the power to resolve disputed votes, but it has some of the hallmarks of one. In using the passive voice—"the votes shall then be counted"—the Framers broke one of the cardinal rules of draftsmanship;¹¹² yet it

108. 28 U.S.C. § 1254(1) (1964).

109. For examples of announcement of the decision prior to publication of the opinion in cases involving presidential elections, see *McPherson v. Blacker*, 146 U.S. 1, 22 n.1 (1892); *Ray v. Blair*, 343 U.S. 154, *full opinion delivered*, 343 U.S. 214 (1952).

While an attempt might be made, instead, to invoke the original jurisdiction of the Supreme Court, it seems unlikely that a state would be a proper plaintiff, and even more improbable that either the United States or another state would be the appropriate defendant.

110. 369 U.S. 186, 210 (1962).

111. U.S. CONST. amend. XII.

112. "The famous phrase of the Constitution 'the votes shall then be counted' has been like an apple of discord almost since the beginning of the Government." J. DOUGHERTY, *THE ELECTORAL SYSTEM OF THE UNITED STATES* 254 (1906). The respective roles of the Vice President and of the two houses of Congress were the subject of

seems clear that the counting shall be done by the President of the Senate (usually the Vice President of the United States) or by some individual, committee, or the whole of the legislative branch. On the other hand, it can be argued that "[t]he person having the greatest number of votes" connotes an objective standard, and is not the same as saying "the person having the greatest number of votes, as so counted."

In any event, Congress has taken this function unto itself. While disagreements in the past concerned the credentials of opposing slates of electors rather than the validity of votes cast by electors whose title to the office was undisputed, nevertheless Congress itself established the procedures whereby the Hayes-Tilden imbroglio was decided¹¹³ and has since enacted permanent legislation purporting to regulate future disputes.¹¹⁴

In *McPherson v. Blacker*,¹¹⁵ an 1892 decision in which the United States Supreme Court upheld Michigan's statute providing for the district system for selection of electors, counsel for the state contended that the "political question" doctrine barred court action. The Court rejected this contention for the reason that "the validity of the state law was drawn in question as repugnant to [the United States] constitution and laws, and its validity was sustained."¹¹⁶ A mere recital of the statutory basis for what was then the jurisdiction of the Court on writ of error does not meet the "political question" contention; the doctrine is normally invoked in cases in which the statutory basis for jurisdiction is undisputed. If the vote of an unfaithful elector were challenged today, the statutory basis would be present in a federal district court, or in the Supreme Court on review from either a lower federal court or the highest state court. There would remain, however, the question whether the case was appropriate for judicial action. The principal distinction between such a case and *McPherson* is that the way in which the electors are

frequent congressional debates over the years, and passions frequently rose high over what was only of theoretical importance in every election save that of 1876. *See id.*, chs. 2, 4; Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321 (1961).

113. Act of Jan. 29, 1877, ch. 37, 19 Stat. 227.

114. 3 U.S.C. §§ 5, 15-18 (1964). 3 U.S.C. § 15 (1964) permits the rejection of electoral votes even of electors whose appointments have been lawfully certified by proper state authority if both houses of Congress "agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified." *Cf.* J. DOUGHERTY, *supra* note 112, at 235. No definition of "regularly given" is provided, and while Congress has thus far always recorded the electoral votes as actually cast, it might at some time treat this clause as authorizing it to reject votes cast contrary to pledge or expectation. At most, this would seem only to cancel such votes and not to record them in favor of the party candidates.

115. 146 U.S. 1.

116. 146 U.S. at 23.

chosen is committed by the Constitution to the states, while the way in which the votes of the electors are counted may arguably be regarded as having been committed to Congress.¹¹⁷

In *Coleman v. Miller*,¹¹⁸ the Court held nonjusticiable under the political question doctrine the issue of whether a state legislature's attempted ratification of a proposed constitutional amendment was invalid either because of prior rejection by the same state or because of an excessive lapse of time. The Court based its decision on "the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."¹¹⁹ But the commitment to Congress is even less clear in the case of constitutional amendments than it is in the case of presidential elections. Lapse of time is usually provided for in the joint resolution proposing an amendment, so perhaps the lack of such a clause in the child labor amendment involved in the *Coleman* case may be regarded as raising an issue for congressional determination. But there is not a whisper in the language of the Constitution as to any function committed to Congress in connection with the ratification of amendments it has proposed to the states, and it may be assumed that an amendment takes effect when a sufficient number of ratifications are reported even if Congress is not in session at the time. On this basis, the argument for nonjusticiability would be even stronger in the presidential election case than it was in *Coleman*.

On the other hand, the Court in *Coleman* stated: "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."¹²⁰ Viewed in the light of this pronouncement, the issue is less clear. A decision by the courts rendered before transmission of the electoral votes to Congress would not upset the finality of something Congress had already done; yet the possibility of conflict would remain, since Congress might make its own determination at variance with the decision of the Court. In any event, there would quite clearly be "satisfactory criteria for a judicial determination" in the case of an unfaithful elector; whether an elector is or is not obliged

117. In a recent case challenging the method used by the states in choosing electors—specifically the general ticket system—the Supreme Court refused to entertain a complaint brought before it pursuant to its original jurisdiction. *Delaware v. New York*, 385 U.S. 895 (1966). No reason for the refusal was stated. See also *Williams v. Virginia State Bd. of Elections*, 37 U.S.L.W. 2065 (E.D. Va. July 16, 1968); *Penton v. Humphrey*, 264 F. Supp. 250 (S.D. Miss. 1967).

118. 307 U.S. 433 (1939).

119. 307 U.S. at 450.

120. 307 U.S. at 454-55 (footnote omitted).

to vote for the candidates of his party, and whether or not a specific elector has in fact done so, are readily manageable judicial questions.

Returning to *Baker v. Carr*, the Supreme Court's last word on the problem, some guidance may have been intended by Justice Brennan's summary:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹²¹

The implication seems to be that if any one of these elements is present, the courts should abstain. Some of them are at least arguably involved in the counting of electoral votes. Whether that process may be regarded as having been finally committed to Congress has been discussed above.¹²² Lack of respect for Congress might be harder to find if the Court acted before Congress did. In any event, a judicial decision would seemingly have to be rendered before Congress counted the votes, or not at all; once a President was proclaimed by Congress to have been elected, anything short of "unquestioning adherence" to its decision would probably provoke a far more serious crisis than that which the courts were seeking to avert.

This is not an attempt to analyze in depth the problem of whether the issue of electors' independence is to be regarded as justiciable, but merely an effort to show that the question is a close one, with no assurance that a judicial determination could be obtained. Moreover, even if such a determination were obtained, the possibility that an elector would defy an injunction and vote contrary to his mandate should not be overlooked; with the stakes so high, fear of contempt proceedings might not prove to be a sufficient deterrent. A further stretching of legal theory would be required in order to negate or reverse a vote so cast.

As uncertain as the prospects appear for securing effective aid from the courts to prevent electors from voting contrary to the voters' expectations if the electors are cooperative enough to reveal

121. 369 U.S. at 127. See also *Powell v. McCormack*, 395 F.2d 577, 591-96 (D.C. Cir. 1968) (opinion of Burger, J.).

122. See text accompanying notes 111-14 *supra*.

their intentions in advance, the problems would be magnified if knowledge of their defection were to trickle out only after they had cast their votes. It would then be too late to enjoin them from voting in such fashion, and perhaps too late to enjoin the certifying officials of their states from reporting their votes as cast. Even if an aberrant vote could be nullified on some theory (thus dividing its effect in half), could it be treated affirmatively as cast in accordance with the expectations of the voters? Once the "list" of electoral votes has been transmitted to Congress, against whom would a lawsuit be brought? The purpose would have to be to control the counting of the electoral votes. But courts would obviously be most reluctant to issue an injunction or mandamus against the President of the Senate¹²³ or the Congress as a whole.¹²⁴

Thus, in addition to the chance that our present electoral system would give the presidency to the less popular candidate and the danger of a stalemate in the House of Representatives, there is the possible nightmare of a dispute over a "stolen" presidency. But while this eventuality would be prevented by the proposed constitutional amendment providing for direct popular election, there are other ways of accomplishing the same result with perhaps fewer side effects.

Both the Kennedy and Johnson Administrations have advocated the adoption of an amendment preserving the present method of assigning electoral votes to the several states, but recording the electoral votes automatically upon the basis of the popular votes cast in each state, eliminating the electors as such.¹²⁵ As part of this plan, the general ticket system—now universally employed by custom—would become mandatory.¹²⁶ Originally gaining substantial support, including sponsorship by Senator Bayh and endorsement by the Bar Association of the City of New York, the proposal has more recently been eclipsed by the strong drive in favor of direct popular election. Nevertheless, it has the distinct virtue of completely eliminating the problem of the straying elector without causing the shift in the political balance of power discussed above.¹²⁷

Could Congress solve the problem without the necessity of a con-

123. One can imagine, in the 1968 election, a case entitled *Humphrey v. Humphrey*; or *Nixon v. Nixon* in 1960.

124. "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500 (1866).

125. See *Hearings on S.J. Res. 1 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., 363-91 (1961); *Hearings*, *supra* note 95, at 151-71; H.R. Doc. No. 364, 89th Cong., 2d Sess. 5-6 (1966).

126. See *Hearings*, *supra* note 125.

127. See text accompanying note 29 *supra*.

stitutional amendment? Would an act of Congress providing that all electoral votes are to be counted as votes for the candidates of the electors' respective parties be valid? Could such a statute at least provide for this result in those states in which the names of the presidential and vice-presidential candidates appear on the ballots? (Or where, in addition, the electors' names do not appear?) At the outset, we are faced with the difficulty that the Constitution appears to entrust the process of choosing electors to the discretion of the respective state legislatures. Congress is authorized only to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."¹²⁸ Otherwise, the process of selecting electors is committed to the states, and, as pointed out above, need not even be by election.¹²⁹

A possible foothold may be found in the fact that the states are obliged to transmit their lists to the President of the Senate, who "shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted."¹³⁰ It is at least arguable that some power to decide how the votes are to be counted is thereby conferred, if not upon Congress per se in its legislative capacity, nevertheless upon the two houses of Congress in a special vote-counting capacity.

Is this a sufficient basis for Congress to legislate? It should be remembered that Congress is granted power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [presumably the powers specifically enumerated in article I, section 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹³¹ The power to count electoral votes is a power vested in the President of the Senate and the members of both houses of Congress, all of whom are officers of the United States. Congress presumably legislated on this basis when it prescribed the procedures for resolution of the Hayes-Tilden controversy in 1876-1877,¹³² as well as in enacting its permanent rules pertaining to the counting of electoral votes.¹³³

Assuming some power of Congress over the procedures governing the count of electoral votes, does this power extend, beyond determining which of two contending slates of electors was validly chosen, to the question of how to count the vote of an elector whose right

128. U.S. CONST. art. II, § 1.

129. See text accompanying note 14 *supra*.

130. U.S. CONST. art II, § 1.

131. U.S. CONST. art I, § 8, cl. 17 (emphasis added).

132. See note 113 *supra*.

133. See note 114 *supra*.

to office is undisputed? Is there any basis for concluding that Congress may prescribe that the vote of an unfaithful elector shall be counted as though he had voted for his party's candidate rather than as he actually voted? It may well be that whatever Congress does in this respect is immune from scrutiny by the courts.¹³⁴ But Senators and Representatives, like judges, are bound by oath or affirmation to support the Constitution¹³⁵ and should, and presumably would, act conscientiously in accordance with their conception of its requirements.

Even though the choice of electors is committed to the states, Congress has been held to have at least some power in this realm. In *Ex Parte Yarbrough*,¹³⁶ the Supreme Court upheld the constitutionality of two Reconstruction statutes punishing conspiracies to intimidate a person in the exercise of a constitutional right¹³⁷ and conspiracies to prevent, by force, intimidation, or threat, a citizen entitled to vote from supporting a candidate for presidential elector or Congress.¹³⁸ While the indictment in question involved only a congressional election and was based on intimidation of Negro voters—undoubtedly a special case under the fifteenth amendment—the reasoning of the Court went much further:

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.

. . . [T]he importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes. It equally affects the government, it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their

¹³⁴ See text accompanying notes 110-24 *supra*.

¹³⁵ U.S. CONST. art. VI, cl. 3.

¹³⁶ 110 U.S. 651 (1884).

¹³⁷ Act of May 31, 1870, ch. 116, § 6, 16 Stat. 141, the present equivalent of which is 18 U.S.C. § 241 (1964).

¹³⁸ Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13, 14, which resembles the present 18 U.S.C. § 594 (1964).

election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by law of the United States, or by their united result.

. . . .
In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.¹³⁹

Again, in *Burroughs v. United States*,¹⁴⁰ the Court upheld a provision of the Federal Corrupt Practices Act of 1925¹⁴¹ requiring any political committee accepting contributions or making expenditures in two or more states for the purpose of influencing the election of candidates for presidential elector to render certain financial reports. The Court stated:

The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. It in no sense invades any exclusive state power.

While presidential electors are not officers or agents of the federal government (*In re Green*, 134 U.S. 377, 379), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.¹⁴²

The Court has also held that Congress may make the miscounting of votes in congressional elections and primaries a federal crime.¹⁴³ While such cases rest upon the express grant of power to Congress

139. 110 U.S. at 657-58, 663, 666.

140. 290 U.S. 534 (1934).

141. 2 U.S.C. §§ 241-56 (1964).

142. 290 U.S. at 544-45.

143. *United States v. Classic*, 313 U.S. 299 (1941); *Ex Parte Siebold*, 100 U.S. 371

to regulate "the Times, Places and Manner of holding elections for Senators and Representatives,"¹⁴⁴ and although there is no corresponding grant of power with respect to selection of electors, the inherent power of the federal government to protect the election of its officials from corruption, discussed in *Yarbrough* and *Burroughs*, would seem applicable where votes for presidential electors are fraudulently counted.

But of what avail is it to be able to protect a voter against interference with the casting or counting of his ballot in the first stage of the process—the choosing of electors—if Congress cannot ensure that his vote will be *effective* in the election of the President? It would of course be easier to sustain a federal statute punishing bribery of presidential electors designed to reverse the popular choice than it would be to uphold one punishing such an effort based on political persuasion. It would be still more difficult to uphold a statute which, in either circumstance, substituted for the electoral votes cast the votes which would have been cast if the electors had been faithful to their trust. (It would be easier to make bribery of a Senator a crime than to nullify, after the fact, the vote of a Senator who has been bribed.) Yet Congress might well conclude that the stakes in the choice of the President are sufficiently high that no criminal sanction consistent with the constitutional prohibition of cruel and unusual punishment would deter an errant elector who had both the desire and the reason to believe that his vote might be decisive; nothing short of nullification of the unfaithful vote would ensure the effectuation of the voters' wishes. Such a judgment on the part of Congress would seem well within the range of the necessary and proper clause.¹⁴⁵

Such a statute need not ride completely roughshod over the power accorded the states to choose the means by which their electors are "appointed." If a state should choose to revert to the once-frequent practice of entrusting the choice of electors to its legislature, or if its ballot should list only the names of the electors without those of the presidential and vice-presidential candidates, the voters might not be deceived if an elector were to ignore his

(1879). In *United States v. Mosely*, 238 U.S. 383, 386 (1915), Justice Holmes stated: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in the box."

144. U.S. CONST. art. I, § 4.

145. See *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934):

The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship of the means adopted and the end to be attained, are matters for congressional determination alone.

mandate; in either case there would perhaps be no authority for congressional interference.¹⁴⁶ But where the ballot names the presidential and vice-presidential candidates, a gross deception is practiced upon the voters if any of the chosen electors votes contrary to expectation. Would not the sanctity of the ballot be protected by legislation nullifying the vote of an unfaithful elector just as it is by legislation forbidding the miscounting of votes?¹⁴⁷ Such legislation would be unconstitutional only if one reads into the constitutional provision empowering electors to choose the President a rigid rule that nothing may interfere with the electors' discretionary power.

Legislation injected into so delicate an area as the choice of the President would be much more salutary if enacted to provide for future eventualities rather than directed to an existing election controversy. And if such a law were once enacted, it would be unfortunate for Congress to overturn it in order to favor one of several candidates in a specific controversy. Yet as matters now stand, such an eventuality is possible. The twentieth amendment provides that the new Congress shall take office on January 3, while a federal statute¹⁴⁸ prescribes the counting of electoral votes on January 6; repeal or amendment of a previously enacted law to achieve ad hoc purposes would thus be conceivable between January 3 and 6. But the likelihood of obtaining acquiescence of both houses of Congress and the President (or two-thirds of both houses without the President) in that short a time would be small indeed, especially at a time when, by hypothesis, a close presidential vote had just taken place.

146. Cf. *United States v. Classic*, 313 U.S. 299 (1941); a state may be under no constitutional obligation to provide primary elections, but if it does they fall within the reach of congressional regulatory power.

147. Section 5 of the fourteenth amendment may serve as an alternative basis of congressional power. Cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Some doubt arises, however, as to which provision of section 1 of the fourteenth amendment Congress would be enforcing. If *all* voters are denied an effective vote for President, the equal protection clause may be inapplicable. The right to cast a meaningful vote, however, may be protected as a "liberty" under the due process clause. And, while there is no Supreme Court holding presently extant finding a violation of the privileges and immunities clause, the right to vote for President might fall within the test suggested in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 79 (1873), as among those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws." But cf. *Pope v. Williams*, 193 U.S. 621 (1904). Perhaps an argument could also be based on the rights of citizenship conferred by the first sentence of the fourteenth amendment. Cf. *Schneider v. Rusk*, 377 U.S. 163, 166 (1964). In invalidating the Ohio laws that made it difficult for third-party candidates to appear on the ballot, the Supreme Court recently held that the equal protection clause protects "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 37 U.S.L.W. 4001, 4003 (Oct. 15, 1968). 37 U.S.L.W. at 4006. Whether it follows that the fourteenth amendment forbids breaches of faith by presidential electors, as a denial of the right to cast effective votes, a determination by Congress that such conduct violates the fourteenth amendment might be upheld.

148. 3 U.S.C. § 15 (1964).

Assuming such a statute was not repealed, is there any assurance that Congress as legislature can bind Congress as vote-counter? Even if there were a law directing a count of electoral votes in accordance with the voters' intentions, could the two houses, in joint session, nevertheless revert to counting the electoral votes as actually cast? Is there any way, short of a constitutional amendment dispensing with *any* action by the electors or Congress, for "Congress sober" to guard against "Congress drunk"?

One possible solution is the inclusion in the statute of a provision for expedited judicial review of any action in the course of vote counting contrary to the statutory mandate. Original jurisdiction (with appropriate enforcement power) could be vested in the Federal District Court for the District of Columbia, perhaps a three-judge court, with direct expedited appeal to the Supreme Court.

I revert to the earlier discussion of whether questions pertaining to the counting of electoral votes are justiciable, or whether they fall instead into the "political question" category because they are regarded as entrusted by the Constitution to final determination by Congress.¹⁴⁹ Suppose it is decided that these questions fall into the latter category, but Congress enacts legislation designed to confer upon the judiciary the authority, indeed the obligation, to pass upon them. Would such a jurisdictional grant be constitutional? Can Congress confer upon the judiciary a power to decide questions which, in the absence of such legislation, would be deemed inappropriate for judicial decision as "political" in nature? Is the "political question" doctrine a constitutional command or merely a judicially created rule of practice?

This issue seems not to have come before the Supreme Court;¹⁵⁰ moreover, it may not be susceptible of a single answer. To the extent that the "political question" characterization reflects a determination that the case involves issues or requires remedies so different from those usually considered by courts that the constitu-

149. See text accompanying notes 110-22 *supra*.

150. An unsuccessful attempt to raise such an issue was made by appellants' counsel in *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). The Supreme Court had previously held that the "act of state" doctrine prevented the courts from examining the validity of certain acts of the Cuban Government. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The "Hickenlooper Amendment," 22 U.S.C. §§ 2370(e)(2) (Supp. III 1968) provided, in part, that "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law. . . ." On remand, the *Banco Nacional de Cuba* contended that this was an unconstitutional attempt to confer upon the courts jurisdiction over non-justiciable questions. The Court of Appeals for the Second Circuit interpreted the *Sabbatino* decision as not based upon the Constitution, but as a choice "among a number of constitutionally permissible alternative rules" (383 F.2d at 181), and proceeded to apply the modifying statute.

tional requirement of "case or controversy"¹⁵¹ is lacking, no act of Congress can create jurisdiction.¹⁵² On the other hand, where a decision of nonjusticiability is based on notions of convenience, propriety, or deference to Congress not constitutionally compelled, Congress can presumably free the courts from their self-imposed reticence.¹⁵³ Much can be said for the conclusion that such legislation would be valid. A "judicially manageable standard" would have been provided, and a case or controversy—at least to the extent that there would be a real adversary proceeding leading to a final meaningful judgment—would be present. Any qualms based upon the unseemliness and possible ineffectiveness of an attempt by the courts to give directions to Congress¹⁵⁴ would be answered by reference to the fact that Congress itself had consented to the courts' action.

In short, it would seem that there are a number of ways of coping with the problem of a "theft" of the presidency by independent action on the part of the electors. This problem may be dealt with alone; it need not be part of an omnibus reform—such as the direct popular vote proposal—which would change the political balance of power in the country, possibly in a direction which would prove disastrous. The Court might hold electors bound to respect the choice of the voters without further legislation or constitutional amendment; but we cannot be sure. A legislative solution is possible; but its effectiveness could never be completely free from doubt, and it is most important that any possibility of a disputed presidency be avoided. Such legislation might serve as a temporary expedient, however, pending adoption of a constitutional amendment expressly removing the discretion of electors or, preferably, providing for counting electoral votes automatically. Thus, although changes in the present method of electing our Presidents are urgently needed, an amendment providing for direct popular election is neither the only, nor the best, solution.

151. U.S. CONST. art. III, § 2.

152. *Cf. Muskrat v. United States*, 219 U.S. 346 (1911).

153. *Cf. Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937). This may be true even if the bar to court action is found in the Constitution—not in the lack of a case or controversy under article III, but in the sense that the Constitution has conferred final decision-making power upon Congress. Conceivably, Congress might be deemed empowered to withdraw that barrier to court action. (This would clearly not be possible if the function involved were inherently of a nonjudicial nature, such as the determination whether to enact legislation or ratify a treaty; but it may be possible where the types of questions to be considered and relief requested are similar to those often coming before courts.)

Perhaps there is an analogy to be found in the areas of state interference with interstate commerce and intergovernmental immunities: courts have held state action to violate the Constitution in the absence of congressional expression, but Congress may legislate to remove the barrier. *Compare Leisy v. Hardin*, 135 U.S. 100 (1890), with *In re Rahrer*, 140 U.S. 545 (1891).

154. *Cf. Powell v. McCormack*, 395 F.2d 577, 595-96 (D.C. Cir. 1968) (opinion of Burger, J.).