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## A History of Elector Discretion

Michael L. Rosin

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# A History of Elector Discretion

MICHAEL L. ROSIN\*

*In its opinion in Chiafalo v. Washington, the Supreme Court disposes of the actual history of elector discretion as too inconsequential to merit its serious analysis. A history of elector discretion not only includes a history of the electors who exercised discretion when casting electoral votes, it also includes a history of commentary on the role of electors as the Constitution was created and, more importantly, as Congress was attempting to amend it. The Court almost completely ignores this history. When Congress crafted the Twelfth Amendment in 1803 it recognized that “the right of choice [of president] [...] devolve[s] upon” the House of Representatives from the Electoral College. Section 4 of the Twentieth Amendment twice repeats this text. As the House Committee reporting the Twentieth Amendment reported it to the full House in 1932 it acknowledged that electors are free to exercise discretion. Earlier versions of this Article served as the primary input to amicus briefs filed in the author’s name in Chiafalo. This Article reviews the relevant episodes of congressional history as well as election history to demonstrate that Congress has never understood the Constitution to allow electors to be bound with legal consequences.*

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## I. INTRODUCTION

In its opinion in *Chiafalo v. Washington*, the Supreme Court disposes of the actual history of elector discretion as too inconsequential to merit its serious analysis.

The history going the opposite way is one of anomalies only. The Electors stress that since the founding, electors have cast some 180 faithless votes for either President or Vice President. But that is 180 out of over 23,000. And more than a third of the

faithless votes come from 1872, when the Democratic Party's nominee (Horace Greeley) died just after Election Day. Putting those aside, *faithless votes represent just one-half of one percent of the total*. Still, the Electors counter, Congress has counted all those votes. But because faithless votes have never come close to affecting an outcome, only one has ever been challenged. True enough, that one was counted. But the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years.<sup>1</sup>

A generation earlier in *Planned Parenthood of Southeastern Pennsylvania v. Casey* the Court was not so hesitant to look at the exceptions rather than the rule, “[t]he analysis does not end with the one percent . . . upon whom the statute operates; it begins there . . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”<sup>2</sup> Nothing in the *Chiafalo* opinion suggests that the Court would have been any more receptive to the history of elector discretion if the one percent threshold of *Casey* had been met, or a two percent level, for that matter.

A history of elector discretion not only includes a history of the electors who exercised discretion when casting electoral votes, it also includes a history of commentary on the role of electors as the Constitution was created and, more importantly, as Congress was attempting to amend it. The Court almost completely ignores this history when it declares “Whether by choice or accident, the Framers did not reduce their thoughts about electors’ discretion to the printed page.”<sup>3</sup> The *Framers* may not have reduced their thoughts about elector discretion to the printed page in 1787, but the crafters of the Twelfth Amendment did. Contrary to the Court’s declaration that “the Twelfth Amendment . . . give[s] electors themselves no rights,”<sup>4</sup> that amendment’s third sentence reads:

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1. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020) (emphasis added). For a very recent comment on this case see Article II — Electoral College — Faithless Electors — *Chiafalo v. Washington*, 134 HARV. L. REV. 420 (2020).

2. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992) (emphasis added).

3. *Chiafalo*, 140 S. Ct. at 2318-19.

4. *Id.* at 2328. This sentence begins “Article II and the Twelfth Amendment give States broad power over electors.” The second clause of Article II, § 1 certainly does give states broad powers over electors. The Twelfth Amendment changes that not one iota which is unremarkable since the Twelfth Amendment replaces the third clause of Article II, § 1 and has no impact on the second clause.

And if the House of Representatives shall not choose a President *whenever the right of choice shall devolve upon them*, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.<sup>5</sup>

The *right of choice* referenced in this text devolves on the House from somewhere else, namely the Electoral College.<sup>6</sup> When the Twentieth Amendment changed the start of the presidential term this provision had to be replaced. As Section 3 of that amendment, which includes the replacement, became too bulky Congress twice inserted the italicized text into Section 4.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President *whenever the right of choice shall have devolved upon them*, and for the case of the death of any of the persons from whom the Senate may choose a Vice President *whenever the right of choice shall have devolved upon them*.<sup>7</sup>

The 1932 House committee report accompanying the Twentieth Amendment explained why that amendment contains no provision concerning candidate death prior to the casting of electoral votes.

A constitutional amendment is not necessary to provide for the case of the death of a party nominee before the November elections. Presidential electors, and not the President, are chosen at the November election. The electors, under the present Constitution, *would be free* to choose a President, notwithstanding the death of a party nominee. Inasmuch as the electors *would be free* to choose a President, a constitutional amendment is not necessary to provide for the case of the death of a party nominee after the November elections and before the electors vote.<sup>8</sup>

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5. U.S. CONST. amend. XII (emphasis added). In its opinion the Court twice ignores all but the first sentence of the Twelfth Amendment. *See Chiafalo*, 140 S. Ct. at 2320, 2324.

6. *See infra* Part IV.B.3.a).

7. U.S. CONST. amend. XX, § 4 (emphasis added).

8. H.R. REP. NO. 72-345, at 5 (1932) (emphasis added). For further detail *see* Part VI.A (2021).

This was the last time Congress sent an amendment to the states changing the presidential election process.

Earlier versions of this Article served as the primary input to amicus briefs filed in the author's name in *Chiafalo v. Washington* and *Colo. Dep't of State v. Baca*,<sup>9</sup> the two elector discretion cases decided on July 6, 2020. This Article reviews the relevant episodes of congressional history as well as election history to demonstrate that Congress has never understood the Constitution to allow electors to be bound with legal consequences.

Part II of this Article presents a taxonomy of electors beyond just a faithful/faithless binary. This taxonomy facilitates a richer analysis of past elections. In particular, it distinguishes twelve different categories of *anomalous* electors who do not vote faithfully for their party's two nominees. Although the Twelfth Amendment has disabled three of these classes of anomalous electors, another nine remain even after the ratification of that amendment.

Part III analyzes the roles played by anomalous electors in the four presidential elections held prior to ratification of the Twelfth Amendment.

Part IV analyzes the congressional debates leading to the Twelfth Amendment. It stresses that members of Congress were concerned about distinguishing electoral votes for president from electoral votes for vice president and keeping the election out of the House of Representatives. At no point did any member of Congress express concern about binding electors to pledges they might have made.

Part V presents additional evidence from the remainder of the nineteenth century. Part V.A. presents evidence from congressional debates on proposed constitutional amendments that would have changed the role of electors or eliminated them while retaining integral electoral votes. Part V.B presents evidence from the nineteenth century's classic constitutional commentaries. Part V.C presents evidence of the large number of electoral votes anomalously cast in the nineteenth century, including votes for vice president, which are often overlooked, but just as relevant from a constitutional perspective. Finally, Part V.D considers the 1836 electoral vote as it might have played out if William Henry Harrison had carried Pennsylvania, thereby denying Martin Van Buren an Electoral College majority. Had that happened James Madison's recognition that electors might switch to a second choice in a three (or more) way race might have swung the election to Harrison.

Part VI shifts the focus to Congress in the twentieth century as it amended and implemented the Constitution. Part VI.A reviews Congress's pronouncements on elector discretion as it crafted what would become the Twentieth Amendment. Part VI.B jumps ahead to the early 1960s. In Part VI.B.1 the Article reviews the very brief congressional debates on the Twenty-Third Amendment in 1960. This amendment allows the District of Columbia to participate in presidential elections. Part VI.B.2 reviews a 1961

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9. *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020).

Senate subcommittee hearing in which Henry Irwin, an Oklahoma elector in 1960 who anomalously cast his electoral votes, testified. Part VI.B.3 reviews congressional debates that same year as Congress crafted legislation implementing the Twenty-Third Amendment. Part VI.C moves the calendar forward to 1969, the one time Congress debated whether or not to accept an anomalously cast electoral vote. It shows that a member of Congress grossly misinterpreted passages from the Twelfth Amendment debates as he attempted to show that the Eighth Congress intended that the will of the people not be violated. The Eighth Congress was concerned that *the House of Representatives* might ignore the will of the people of the entire nation and put an intended vice presidential candidate in the Chief Magistrate's chair.

Part VII presents an account of anomalous electors in the last hundred years. Part VII.A tells the story of *statement-making* electors in this period. Part VII.B covers electors not simply making a statement. Part VII.B.1 tells the interesting story of Tennessee elector Preston Parks who appeared on both the Democratic slate and the States' Rights slate in 1948. Part VII.B.2 turns its attention to the States' Rights movement's attempt to deny John Kennedy a presidential victory in the Electoral College. This attempt to form a coalition of *alternative-seeking* electors foreshadows the Hamilton Electors' attempt to deny Donald Trump an electoral vote majority in 2016. Part VII.C reviews the anomalous electors of 2016.

Finally, Part VIII contemplates possibilities for anomalous electors with *Chiafalo* now the law of the land.

## II. A TAXONOMY OF ELECTORS (AND ELECTOR CANDIDATES)

A presidential elector casts two electoral votes.<sup>10</sup> Prior to the ratification of the Twelfth Amendment an elector could not distinguish which

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10. U.S. CONST. art. II, § 1, cl. 3. The text of the Elector Clause in Article II clearly specifies that an elector *must* cast both electoral votes and they must be for different persons. "The electors shall meet in their respective states, and vote by ballot for two persons, . . . ." U.S. CONST. art. II, § 1, cl. 3. The text of the Twelfth Amendment is less clear. "The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President . . . ." U.S. CONST. amend. XII.

Seth Barrett Tillman has noted "The fact that President and Vice-President are now voted for separately does not make it mandatory that the electors vote for *distinct* persons. See U.S. CONST. art. II, § 1, cl. 3. 'The Electors shall . . . vote by Ballot for *two* Persons . . . ' (emphasis added), *amended by* U.S. CONST. amend. XII. 'The Electors shall . . . vote by ballot for President and Vice-President . . . .'" Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 611 (2003); Seth Barrett Tillman, *Between Principle and Practice: Tara Ross's Defense of the Electoral College*, 1 N.Y.U. J.L. & LIBERTY 922, 927 n.11 (2005) (reviewing TARA ROSS, ENLIGHTENED

electoral vote was meant to be for president and which for vice president, nor could he even indicate whether he wished to make such a distinction. Following ratification of the Twelfth Amendment the electoral votes must be distinguished. Not surprisingly, a binary classification that only distinguishes *faithless* electors from *faithful* electors will prove inadequate for the analysis to follow. Instead, we distinguish faithful electors from anomalous electors and then further classify anomalous electors. We do this in terms of the electorate's<sup>11</sup> expectation of how an elector will vote and how the elector actually votes.

- *Faithful elector* – The electorate expects this elector to vote for both persons on a party's ticket and the elector votes as expected.<sup>12</sup> In the 2020 election all 538 electors were faithful.

The first two categories of anomalous electors make their anomalous intentions known before *their* election.

- *Renegade elector* – The electorate understands that this elector has made a commitment not to cast both votes for both persons on a party's ticket. In 1836 Virginia's twenty-three Democratic electors had been chosen in convention with the intention that they vote for Martin Van Buren for president and Alabama's William Smith for vice president rather than Van Buren's running mate, and future

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DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE (2004)) (discussing the possibility of an *elector* voting for the same person for president and vice president).

This change was undoubtedly unintentional. Nevertheless, with designation it was no longer absolutely necessary for an elector to cast his electoral votes for two different persons as a Minnesota elector did not do in 2004 casting both electoral votes for John Edwards. *See infra* text accompanying notes 30–31. A historically grounded example will illuminate the far reaching structural consequences of designation.

In 1824 Henry Clay received two electoral votes for vice president and Andrew Jackson thirteen, including all three from Missouri whose electors cast their presidential electoral votes for Clay. *See infra* text accompanying notes 276–285. With designation in place Congress could be sure how each of the three Missouri electors had cast their votes. In the absence of the original Article II provision that the electors “vote by ballot for two persons” a list showing three undesignated electoral votes for Clay and three for Jackson could have been generated by all three electors voting for Clay and Jackson or one elector voting twice for Clay, one voting twice for Jackson, and one voting for Clay and Jackson. Only the requirement that each elector “vote by ballot for two persons” *and* its enforcement in Missouri's electoral college prevented the possibility of such an ambiguity.

11. The Constitution allows a state legislature to choose its state's electors. In that case the members of the state legislature would be considered “the electorate.”

12. In 1836 the Whig party ran regional tickets. The Whig ticket of Hugh White and John Tyler won the state of Tennessee. Just to the north the Whig ticket of William Henry Harrison and Francis Granger won the state of Kentucky. The fifteen electors in each of these two states voted faithfully even though they voted for different Whig tickets. For the Whig party in this election *see* Richard P. McCormick, *Was There a "Whig Strategy" in 1836?*, 4 J. EARLY REPUBLIC 47 (1984); MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 33–59 (1999).



vice president, Richard Mentor Johnson.<sup>13</sup> When Virginia chose these electors they voted for Van Buren and Smith as promised.<sup>14</sup>

- *Unpledged elector* – The electorate understands that this elector has not made a commitment for at least one and most likely both of her electoral votes and will decide how she will cast her unpledged electoral vote(s) after the general election. In 1960 five of Alabama's eleven Democratic electors were pledged to the Democratic ticket. The other six were unpledged. In Mississippi, a faction of the Democratic Party opposed to civil rights ran a ticket of eight unpledged electors against a Democratic slate and a Republican slate. After the Democratic slate won in Alabama and the unpledged slate won in Mississippi, all fourteen unpledged electors cast their presidential electoral votes for Virginia Senator Harry Byrd and their vice presidential electoral votes for South Carolina Senator Strom Thurmond.<sup>15</sup>

Electors in the next two categories could reveal their anomalous intentions before their election but would generally wait until after their election to make their intentions known.

- *Statement-making elector* – The electorate expects this elector to vote for both persons on a party's ticket but the elector casts one or both of her electoral votes contrary to expectation, to no benefit to her party in the current election, and with no expectation that the anomalous vote is anything more than a statement. Former New Hampshire Senator William Plumer may have been the first explicitly statement-making anomalous elector when he voted for John Quincy Adams for president rather than James Monroe in 1820.<sup>16</sup>
- *Alternative-seeking elector* – An alternative-seeking elector hopes to form a coalition that sends the election to the House of Representatives, possibly with a candidate not on the general election ballot, by denying a majority to the putative Electoral College winner. If there is a candidate who has carried states and districts with

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13. *Legislative Convention*, RICHMOND ENQUIRER, Jan. 16, 1836, at 3. *See infra* text accompanying notes 293–298.

14. 13 CONG. DEB. 1656 (1837).

15. For the electoral votes *see* 107 CONG. REC. 277, 288 (1961). For an account of the Alabama and Mississippi electors *see* *Nomination and Election of President and Vice President and Qualifications for Voting: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 87th Cong. 414-15 (1961). [hereinafter *S. Subcomm. on Constitutional Amendments Hearings*]. The report noted “Nothing unexpected happened when the [Alabama] electors cast their ballots in the electoral college on December 19, 1960.” *Id.* at 413.

16. For details on Plumer *see infra* text accompanying notes 249–252. Statement-making electors reemerged in the second half of the twentieth century. *See* Part VII.A (2021).

a majority of the electors being appointed then a successful alternative-seeking coalition must include electors the electorate expects to vote for the putative winner. The first prominent attempt to deny Electoral College election to such a putative winner occurred in 1960.<sup>17</sup> The second occurred in 2016 when Washington elector Bret Chiafalo and Colorado elector Micheal Baca, both Democrats, formed the *Hamilton Electors* movement that hoped to persuade at least thirty-seven Republican electors to vote for someone other than Donald Trump. Chiafalo and Baca were the lead plaintiffs in the two Elector cases decided by the Court.<sup>18</sup>

The four types of elector just described are possible both before and after the ratification of the Twelfth Amendment. The next three categories of elector about to be described could only have been possible before the ratification of the Twelfth Amendment.

- *Coordinated sloughing elector* – The electorate expects this elector to vote for both persons on a party’s ticket. However, *for his party’s benefit* the coordinated sloughing elector sloughs off his electoral vote for his party’s intended vice presidential candidate in favor of someone else not in the running.<sup>19</sup> If all goes well the coordinated sloughing elector’s party’s presidential candidate receives more electoral votes than his vice presidential running mate. In 1800 one of the four Federalist electors in Rhode Island sloughed off his second electoral vote for Federalist John Jay instead of casting it for John Adams’s running mate Charles Cotesworth Pinckney of South Carolina.<sup>20</sup> No coordinated sloughing elector emerged for Jefferson’s Republican party and as a result seventy-three electoral votes were cast for both Thomas Jefferson and his running mate

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17. See Part VII.B.2 (2021).

18. See Part VII.C (2021).

19. The same effect could be achieved if this elector simply abstained from casting his second electoral vote and only cast an electoral vote for his party’s presidential candidate, provided abstention was constitutional under Article II. There is a slight functional difference between a coordinated slougher’s casting his second vote for someone and abstaining. If Georgia’s four electoral votes for Jefferson and four electoral votes for Burr had not been counted as valid in 1801, as Bruce Ackerman has suggested might have happened, then Jefferson and Burr would have each received sixty-nine electoral votes, Adams sixty-five, Pinckney sixty-four, and Jay one. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 55–76 (2005). With 138 electors having been appointed, seventy were needed for a majority, a majority no one would have received. By virtue of the single electoral vote cast by a coordinated slougher for John Jay the House of Representatives could have elected Jay president, something they could not have done if the Rhode Island elector had merely abstained from casting his second electoral vote.

20. 10 ANNALS OF CONG. 1024 (1801).

Aaron Burr thereby sending the election to the House of Representatives which took thirty-six ballots to choose Jefferson.<sup>21</sup>

- *En passant sloughing elector* – The electorate expects this elector to vote for both persons on a party's ticket. However, when his party's ticket wins, the *en passant* sloughing electors decides to vote against the wishes of his party by sloughing off his electoral vote for his party's intended presidential candidate in favor of someone else not in the running.<sup>22</sup> As a result his party's intended vice presidential candidate receives the greatest number of electoral votes, thereby winning the presidency in the Electoral College. In December 1801 the aptly named James Cheetham wrote to Thomas Jefferson that Aaron Burr had tried to get New York elector Anthony Lispenard to slough off his electoral vote originally intended for Jefferson thereby electing Burr president (and Jefferson vice president) in the Electoral College.<sup>23</sup>
- *Subversive sloughing elector* – The electorate expects this elector to vote for both persons on a party's ticket. However, when his party's ticket loses, *for the benefit of his party* the subversive sloughing elector sloughs off his electoral vote for his party's intended vice presidential candidate in favor of the other (winning) party's vice presidential candidate. If the other winning party does not respond with a sloughing strategy of its own the Electoral College elects the winning party's vice presidential candidate president and its presidential candidate vice president. In 1802 the same James Cheetham published a monograph claiming that Burr had tried to persuade a Federalist elector in New Jersey and another in Connecticut to slough off their electoral vote originally intended for Adams's running mate Charles Cotesworth Pinckney in favor of Burr. Had that happened Burr would have been elected president (and Jefferson vice president) in the Electoral College.<sup>24</sup>

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21. *Id.* at 1024–33.

22. Once again, the same result can be achieved by simply abstaining from casting the electoral vote at issue, provided abstention was constitutional under Article II. *See supra* note 19.

23. Letter from Cheetham to Jefferson (Dec. 10, 1801), in 36 THE PAPERS OF THOMAS JEFFERSON 82–88 (Julian P. Boyd et al. eds., 1950). [hereinafter JEFFERSON PAPERS]. For further details *see infra* text accompanying note 89.

24. JAMES CHEETHAM, A VIEW OF THE POLITICAL CONDUCT OF AARON BURR, ESQ., VICE-PRESIDENT OF THE UNITED STATES 44 (1802), <https://catalog.hathitrust.org/Record/006540014> [<https://perma.cc/CYP8-NDDX>]. For further details *see infra* text accompanying notes 90–91.

Another set of anomalous elector types don't quite fit into any of the categories just presented because their names are associated with more than one ticket or more than one party *before* the election.

- *Fusion elector* – A *fusion* elector appears on the slates of different parties backing the same presidential ticket. The electorate expects this elector to vote for that presidential ticket regardless of the mix of votes received on each ticket. “Today, multiple-party candidacies are permitted in just a few States, and fusion plays a significant role only in New York.”<sup>25</sup> In 1980 a slate of Reagan-Bush electors appeared on both the Republican Party line and the Conservative Party line in New York. In 1960 a slate of Kennedy-Johnson electors appeared on the Democratic and Liberal lines in the Empire State. Both Reagan and Kennedy needed the combined vote of their two party lines to carry New York.<sup>26</sup> The electors committed to Reagan and Kennedy cast their electoral votes in accord with the expectations of the electorate. However, if Reagan or Kennedy had died and been replaced by Bush or Johnson by the major party, it is entirely possible that the minor party would not have endorsed the replacement. The Conservative Party might have judged George H. W. Bush not conservative enough. The Liberal Party might have judged Lyndon Johnson not liberal enough.
- *Confusion elector* – In contrast to a fusion elector, a *confusion* elector appears on the slates of different parties backing *different* presidential tickets. The electorate knows that a confusion elector cannot satisfy both parties. In 1948 Preston Parks was a confusion elector

25. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997).

26. If Nixon had received New York's forty-five electoral votes the outcome would have been Nixon 264, Kennedy 258, Other 15, sending the election to the House of Representatives.

The following tables present these popular votes.

Ticket	Party	Votes
Reagan-Bush	Republican	2,637,700
	Conservative	256,131
	Total	2,893,831
Carter-Mondale	Democrat	2,728,372

Ticket	Party	Votes
Kennedy-Johnson	Democrat	3,423,909
	Liberal	406,176
	Total	3,830,085
Nixon-Lodge	Republican	3,446,419

For 1980 *see* ALICE V. MCGILLIVRAY & RICHARD M. SCAMMON, AMERICA AT THE POLLS, 1960-1992 531-32 (1994). For 1960 *see id.* at 536-37. Images of the Certificates of Ascertainment courtesy of the National Archives and Records Administration on file with the author.

appearing on both the Democratic and States' Rights slates in Tennessee. He cast his presidential electoral vote for States' Rights candidate Strom Thurmond rather than Democrat Harry Truman.<sup>27</sup>

- *Bipotent elector* – When it goes to the polls the electorate is unsure how this elector will cast his electoral votes. A bipotent elector appears on the slate of a political party in a given state for a party running multiple candidates nationwide, most likely on a regional basis. Although a bipotent (more generally multipotent) elector is nominally committed to a particular ticket in her state, she has made it clear that if appropriate she will vote strategically for the best positioned of her party's candidates nationwide, determining who that is *after* the general election. In 1836 Whig slates in several states pledged to vote for William Henry Harrison, the Whig candidate in the North (except Massachusetts), or Hugh Lawson White, the Whig candidate in the South. Democrat Martin Van Buren won that election in the Electoral College so there was no need for strategic voting on the part of Whig electors, but there might have been had Van Buren not narrowly carried Pennsylvania.<sup>28</sup>

Not quite fitting into any of these categories are

- *Fission candidates* – Two or more *fission* candidates may appear in an individual election for elector, most likely at the district level, all pledged to the same presidential candidate. In 1796 a pair of fission candidates in Virginia's second electoral district split the pro-Adams vote allowing a pro-Jefferson elector to be appointed.<sup>29</sup>

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27. See Part VII.B.1 (2021).

28. For details on the 1836 election see *infra* Part V.D., especially text accompanying notes 329–336.

29. Philip J. Lampi, *Virginia 1796 Electoral College, District 2, A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC'Y, <https://elections.lib.tufts.edu/catalog/12579t073> [<https://perma.cc/HZ4T-ENW4>] [hereinafter *A New Nation Votes*]. In 1800 John Mayo ran as a Federalist to succeed John Marshall in the Thirteenth congressional district. He lost to Republican Littleton Tazewell. Philip J. Lampi, *A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC'Y, <https://elections.lib.tufts.edu/catalog/vm40xt161>. Thomas Griffin was successfully elected to the Eighth House as a Federalist in 1803. Philip J. Lampi, *Virginia 1803 U.S. House of Representatives, District 12, A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC'Y, <https://elections.lib.tufts.edu/catalog/000000132> [<https://perma.cc/Q3X6-ZPCP>]. I have not found any newspaper accounts of Mayo and Wilkinson. They might have differed on how they intended to cast their second electoral vote.

In that election two *fission* Republican candidates in Virginia's ninth electoral district almost handed the election to a pro-Adams elector. Republican candidate Robert Walker barely edged Federalist William Munford 517-504 with Republican Alexander MacRea receiving 176 votes. Philip J. Lampi, *Virginia 1796 Electoral College, District 9, A New Nation Votes: Amer-*

Candidate	Nathaniel Wilkinson	John Mayo	Thomas Griffin
Party	Republican	Federalist	Federalist
Preference	Jefferson	Adams	Adams
Votes	467	339	155
Total	467	494	

**Table 1 - 1796 Popular Vote, Virginia Second Electoral District**

Two more categories remain.

- *Careless elector* – The careless elector either commits a scrivener’s error or simply doesn’t know what he is supposed to do. In 2005 Congress tallied Minnesota’s electoral votes as follows:

JOHN F. KERRY of the Commonwealth of Massachusetts received 9 votes for President, that John Edwards of the State of North Carolina received 1 vote for President, and John Edwards of the State of North Carolina received 10 votes for Vice President.<sup>30</sup>

When this result surfaced after Minnesota’s electors voted none of them stepped forward and took credit. One declared that “somebody made a mistake.”<sup>31</sup>

In 1948 Michigan’s Republican electors were so upset by Thomas Dewey’s unexpected loss that only thirteen of nineteen bothered to show up at the state capitol to exercise their function. With the legislature out of session “[s]ix individuals who happened to be around the State house building were rounded up” to fill the vacancies. One of them, a J. J. Levy of Royal Oak, “had to be restrained by his colleagues from casting his electoral vote for Mr. Truman and Mr. Barkley.” Mr. Levy, “a Republican and fighting proud of it” “thought we had to vote for the winning candidate” . . . nationwide, it appears. His fellow Republican electors had to disabuse him of that notion.<sup>32</sup>

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*ican Election Returns 1787-1825*, AM. ANTIQUARIAN SOC’Y, <https://elections.lib.tufts.edu/catalog/76537149f> [<https://perma.cc/Z6HJ-WLQR>]. Had fourteen voters shifted from Walker to MacRea pro-Adams candidate Munford would have won the district.

30. 151 CONG. REC. H84 (daily ed. Jan. 6, 2005).

31. *Minnesota Elector Gives Edwards a Vote; Kerry Gets Other Nine*, MINN. PUB. RADIO (Dec. 13, 2004), [http://news.minnesota.publicradio.org/features/2004/12/13\\_ap\\_electors/](http://news.minnesota.publicradio.org/features/2004/12/13_ap_electors/) [<https://perma.cc/DD6T-ZEPH>].

32. Massachusetts Republican Senator Henry Cabot Lodge, Jr. had this amusing story read into the record as the 81st Congress considered altering the mode of presidential election. It was part of an unpublished paper titled “Presidential Election Reform” by University of Michigan Political Science Professor Joseph E. Kallenbach, a leading mid-century authority on the Electoral College. Kallenbach’s paper cites a story in the Dec. 14, 1948 edition of the *Ann Arbor News*. See 95 CONG. REC. 4449 (1949).

- *Ordinary faithless elector* – Finally, we come to the ordinary faithless elector. This is an elector *who cannot be fit into any of the previous categories* who the electorate expects to vote for one major presidential candidate but ends up voting for a different major presidential candidate.<sup>33</sup> There are, at most, only a handful of candidates for this category.

The most prominent candidate is Samuel Miles, a Pennsylvania elector on the Federalist slate in 1796 who voted for Thomas Jefferson rather than John Adams. We will argue that a good case can be made that Miles was not an ordinary faithless elector at all but was actually honoring the will of the electorate by voting for Jefferson.<sup>34</sup>

Other candidates for the category of ordinary faithless elector come from the election of 1824. A Delaware elector initially appeared inclined to vote for Henry Clay for president. In the end he cast his presidential electoral vote for William Crawford and his vice presidential vote for Clay.<sup>35</sup> Andrew Jackson received a single electoral vote from New York in that same election after the legislature had chosen a slate of twenty-five electors for John Quincy Adams, seven for Henry Clay, and four for William Crawford. Most likely one of the Clay-pledged electors voted for Jackson.<sup>36</sup>

Since 1824 only one elector pledged to one major presidential candidate (still living) has actually cast a presidential electoral vote for a different major presidential candidate. In 1968 Lloyd Bailey, a Republican elector in North Carolina, cast his electoral vote for George Wallace. Congress considered an objection to this anomalous vote and decided to accept Bailey's electoral vote.<sup>37</sup>

As we review electoral history, we may not always be able to determine precisely what sort of anomalous vote an elector cast. However, we can always determine whether an elector voted faithfully or anomalously.

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33. Any candidate who receives the most popular votes in a state or elector district should be considered a major presidential candidate for our purposes. In the last hundred years Strom Thurmond (1948) and George Wallace (1968) satisfied this criterion. Thurmond received the electoral vote of Preston Parks who appeared on the Democratic slate. But Parks also appeared on the State's Rights slate. We have classified Parks as a *confusion* elector. See *supra* text accompanying note 27. I would also classify a candidate who won a significant portion of the nationwide popular vote as a major presidential candidate. With 18.9% of the popular vote in 1992 Ross Perot certainly satisfies this criterion. Perot's 8.4% in 1996, Eugene Debs' 6.0% in 1916, and Henry Wallace's 2.4% in 1948 are less compelling.

34. See *infra* text accompanying notes 61–73. Late in his life Miles wrote an autobiographical sketch in which he suggested that he had been an *unpledged* elector. See *infra* note 72.

35. For details see *infra* text accompanying notes 282–284.

36. For details see *infra* text accompanying note 259.

37. For details see Part VI.C (2021).

### III. ANOMALOUS ELECTORS PRIOR TO THE TWELFTH AMENDMENT

Electors exercised discretion casting electoral votes in each of the four presidential elections held prior to the ratification of the Twelfth Amendment. This should come as no surprise given a model on which the Electoral College was based and one state's 1792 implementation of a mechanism based on the Electoral College.

Maryland's system for choosing its state senators likely served as a model for the Electoral College created by Article II.<sup>38</sup> The Maryland Constitution of 1776 explicitly envisioned electors chosen in each county electing nine state senators from the western shore and six from the eastern shore by voting according to their "judgment and conscience."<sup>39</sup>

In 1792 the newly created state of Kentucky adopted an electoral college system to choose its governor and state senate. The Kentucky constitution charged state electors "to elect . . . such person for governor, and such persons for senators, as they in their best judgment and conscience believe best qualified for their respective offices."<sup>40</sup>

#### A. THE ELECTION OF 1789

Coordinated sloughing electors abounded in the first presidential election.

The *New York Packet* published Federalist No. 68 on March 14, 1788.<sup>41</sup> In it, Publius-Hamilton famously wrote

THE mode of appointment of the Chief Magistrate of the United States is 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. . .

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38. See Robert J. Delahunty, *Is the Uniform Faithful Presidential Electors Act Constitutional?*, CARDOZO L. REV. DE NOVO 165, 171-72 (2016); see also 6 THE LIFE AND CORRESPONDENCE OF RUFUS KING 532-34 (Charles R. King ed., 1900) ("[I]n this way the Senate of Maryland is appointed; and it appears . . . Hamilton proposed this very mode of choosing the Electors of the President.").

39. MD. CONST. of 1776, art. XVIII; 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1263, 1694 (1909). This process remained in place until 1837 when it was replaced by direct popular election of state senators. *Id.* at 1706-07.

40. KY. CONST. of 1792, art. I, §§ 10-14; *id.* art. II, § 2; FRANCIS NEWTON THORPE, *supra* note 39, at 1265-66, 1268. These systems were abandoned in 1799. See KY. CONST. of 1799, art. II, § 14; *id.* art. III, § 2; FRANCIS NEWTON THORPE, *supra* note 39 at 1279, 1281.

41. *Federalist Papers: Primary Documents in American History*, LIBR. OF CONG., <https://www.congress.gov/resources/display/content/The+Federalist+Papers> [<https://perma.cc/V4YD-2XTE>].



. I venture somewhat further, and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent.<sup>42</sup>

Ten months later Hamilton was not so sure. On January 25, 1789, *after the electors were appointed but before they cast their votes*,<sup>43</sup> he wrote about his concerns in a letter to James Wilson.

Every body is aware of that defect in the constitution which renders it possible that the man intended for Vice President may in fact turn up President. Every body sees that unanimity in Adams as Vice President and a few votes insidiously withheld from Washington might substitute the former to the latter.<sup>44</sup>

Hamilton concluded that it would "be prudent to throw away a few votes say 7 or 8; giving these to persons not otherwise thought of. Under this impression I have proposed to friends in Connecticut to throw away two to others in Jersey to throw away an equal number."<sup>45</sup> Hamilton was not the first to notice the defect caused by an elector's inability to designate his electoral votes. At least five other commentators are recorded as having noticed the defect before Hamilton's letter to Wilson.<sup>46</sup>

After the electoral votes had been cast in 1789 Thomas Jefferson wrote to William Carmichael that "The only candidates for the vice presidency, with their own consent, are Mr. Hancock & Mr. J. Adams."<sup>47</sup> On April 6, 1789, Senate President John Langdon opened the certificates transmitting the

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42. ALEXANDER HAMILTON, THE FEDERALIST No. 68, 457-58 (Jacob E. Cooke ed., 1961).

43. The Continental Congress set the schedule for the first presidential election. [T]he first Wednesday in Jany [the 7th] next be the day for appointing Electors in the several states, which before the said day shall have ratified the said constitution; that the first Wednesday in feby. [the 4th] next be the day for the electors to assemble in their respective states and vote for a president; and that the first Wednesday in March [the 4th] next be the time ... for commencing proceedings under the said constitution.

34 JOURNALS OF THE CONTINENTAL CONGRESS 523 (1788).

44. 5 THE PAPERS OF ALEXANDER HAMILTON 248 (Harold C. Syrett & Jacob E. Cooke eds., 1961) [hereinafter HAMILTON PAPERS].

45. *Id.* at 248-49.

46. See, e.g., Letter from Christopher Gore to Theodore Sedgwick (Aug. 17, 1788), in 4 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 53 (Merrill Jensen et al. eds., 1976) [hereinafter DHFFE]; A Federalist to Mr. Russell in the Massachusetts *Centinel* [Boston], Aug. 20, 1788, *id.* at 56; William Tilghman to Tench Coxe, Jan. 2, 1789, *id.* at 125; Henry Hollingsworth to Levi Hollingsworth, Jan. 5, 1789, 2 *id.* at 186; Rev. William Smith to James Wilson, Jan. 19, 1789, 4 *id.* at 143-44. See also 1 DHFFE, *supra* at 401, for a letter from Benjamin Rush to Tench Coxe on Feb. 5, 1789.

47. 14 JEFFERSON PAPERS, *supra* note 23, at 615.

electoral votes before both houses of Congress. All sixty-nine electors voting had cast an electoral vote for George Washington, thirty-four of them cast an electoral vote for John Adams, and only four cast an electoral vote for John Hancock. John Jay, a non-consenting “candidate for vice president,” according to Jefferson, received nine electoral votes. Eight other non-consenting candidates for vice president received a total of twenty-five electoral votes.<sup>48</sup> Finishing second, Adams was elected vice president in spite of falling just short of amassing the votes of a majority of the electors appointed.

The *Independent Chronicle* in Adams’s home town of Boston recognized why so many electors who might have been expected to cast an electoral vote for Adams did not do so. Speaking of Connecticut, New Jersey, and Pennsylvania, the Chronicle wrote, “[t]hese three States, it is supposed, really wished to have Mr. Adams Vice-President, and would have been unanimous for him, had they not been fearful it might have excluded the Great Washington from the Presidential Chair.”<sup>49</sup> No one other than John Adams was particularly upset by all of the (somewhat) coordinated sloughing electors who cast their second electoral votes for someone other than the nation’s first vice president. Writing to Elbridge Gerry, Adams complained

The Right and Duty of throwing away Votes I cannot cleverly comprehend, having never read of any such Morality or Policy in my youth. . . . For myself I only regret that the first great Election should be tarnished in the Eyes of the World and of Posterity with the appearance or suspicion of an Intrigue.<sup>50</sup>

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48. For the results see 1 ANNALS OF CONG. 17 (1789) (Joseph Gale ed., 1834).

49. DHFFE, *supra* note 46, at 180. Two of Connecticut’s seven electors cast their second electoral vote for Samuel Huntingdon. Five of New Jersey’s six electors cast their second electoral vote for John Jay. Two of Pennsylvania’s ten electors cast their second electoral vote for John Hancock. 1 ANNALS OF CONG. 17 (1789) (Joseph Gale ed., 1834).

50. DHFFE, *supra* note 46, at 203. Adams would not let go of the slight of not even receiving the electoral votes of half the electors. On June 9, 1789 he wrote to Benjamin Rush

There was a dark and dirty Intrigue, which propagated in the Southern States that New England would not vote for G. Washington, and in the Northern States that New York Virginia and South Carolina would not vote for him but that all would vote for me, in order to Spread a Panick least I should be President, and G.W. Vice President: and the manœuvre made dupes even of two Connecticut Electors.

*Id.* at 285. On April 15, 1790 he wrote to John Trumbull, “The doctrine of *throwing away votes* is itself a Corruption. . . . Throwing away a vote is betraying a Trust, it is a Breach of the Honour, it is a Perjury – it is equivalent to all this in my Mind.” *Id.* at 291-92.

In contrast, Madison calmly wrote to Jefferson that “The secondary votes were given, among the federal members, chiefly to Mr. J. Adams, one or two being thrown away in order to prevent competition for the Presidency.”<sup>51</sup>

#### B. THE ELECTION OF 1792

The election of 1792 is perhaps the least studied of all presidential elections.<sup>52</sup> Of course no one opposed George Washington’s bid for a second term. However, the Jeffersonians mounted an opposition to Vice President John Adams. For a while New York Senator Aaron Burr considered running as the Jeffersonian candidate for vice president. Ultimately, the thirty-six-year-old Burr dropped his bid leaving the field to New York Governor George Clinton.

On February 6, 1793, Vice President Adams counted the electoral vote before a joint session of Congress. All 132 voting electors cast an electoral vote for George Washington, seventy-seven cast an electoral vote for Adams, fifty for Clinton, four for Thomas Jefferson, and one for Burr.<sup>53</sup> All four of Kentucky’s electors cast their second electoral vote for Jefferson. Burr’s lone electoral vote came from South Carolina, whose other seven electors cast their second electoral vote for Adams.

Lampi writes “None of the [South Carolina] electors are listed as declared for any particular candidate but all of them voted for George Washington. Seven of the eight voted for John Adams and the remaining elector voted for Aaron Burr.”<sup>54</sup> We may never know exactly how to classify the anomalous elector who voted for Burr. Was he an ordinary faithless elector who consciously voted against John Adams, the preferred Federalist candidate for vice president, and against George Clinton, the preferred vice presidential candidate of the Jeffersonians? Or was he simply an unpledged elector who ended up voting for Burr?

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51. Letter from James Madison to Thomas Jefferson (March 29, 1789), in 12 THE PAPERS OF JAMES MADISON 37 (William T. Hutchinson et al. eds.) [hereinafter MADISON PAPERS].

52. See JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC 229–236 (1993); NOBLE E. CUNNINGHAM, THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATION, 1789–1801 45–49 (1967); JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 57–58 (1993).

53. See 3 ANNALS OF CONG. 646, 874–75 (1793). Two electors in Maryland and one in Vermont failed to cast their electoral votes. Neither record in the *Annals* indicates how many electors were appointed or how many electoral votes were needed for election. The *Senate Journal* states “the Vice President declared George Washington unanimously elected President of the United States.” SENATE J., 2d Cong., 2d Sess. 486 (1793).

54. *A New Nation Votes*, *supra* note 29, at <https://elections.lib.tufts.edu/catalog/tufts:sc.presidential.1792> [<https://perma.cc/7Y23-MFUJ>].

## C. THE ELECTION OF 1796

Of the four elections held prior to the ratification of the Twelfth Amendment the election of 1796 saw the greatest variety of anomalous electors.<sup>55</sup> They appeared in ten different states. The sixteen states of the Union appointed 138 electors in 1796. Seventy-one of them voted for John Adams; sixty-eight of them voted for Thomas Jefferson.<sup>56</sup>

One of the 138 electors (at least) had to vote for both Adams and Jefferson.<sup>57</sup> This supremely anomalous elector was John Plater from Maryland.<sup>58</sup> Jeffrey Pasley, the leading authority on the 1796 election, claims that Plater “wasted his second vote on Jefferson in order to reduce the Pinckney total.”<sup>59</sup> Given the closeness of the election this seems an extremely risky way to slough off a vote originally intended for Adams’s running mate Thomas Pinckney of South Carolina. It could have resulted in a Jefferson victory. Nevertheless, Pasley’s explanation rings true. If Plater wasted his second electoral vote on Jefferson then Jefferson earned the electoral votes of only three faithful electors in Maryland, the same number cast in that state for his running mate Aaron Burr.

The anomalous elector from 1796 best known to history is Pennsylvania’s Samuel Miles, usually described as the first ordinary faithless elector.<sup>60</sup> Miles cast his electoral votes for Jefferson and Pinckney rather than Adams and Pinckney. A well-known attack on Miles’ vote for Jefferson published in the *Gazette of the U.S.* by someone calling himself an *Adamsite* is usually presented as

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55. The analysis presented here should be compared with the Court’s cursory treatment. “... with the Nation’s first contested election in 1796. Would-be electors declared themselves for one or the other party’s presidential candidate.” *Chiafalo*, 140 S. Ct. at 2326.

56. For the electoral vote totals by state, see 6 ANNALS OF CONG. 2096–98 (1797).

57. Clark reports that in Maryland Williams Deakins ran as what we have termed an *unpledged elector* promising “that he would learn as much as possible about all of the Presidential aspirants and cast his lot for the one who should appear best qualified . . . . When David Craufurd pledged himself to vote for both Adams and Jefferson, Deakins and another contender, Walter Bowie, resigned in Craufurd’s favor.” Malcolm C. Clark, *Federalism at High Tide: The Election of 1796 in Maryland*, 61 MARYLAND HISTORICAL MAGAZINE 210, 218 (1966). Craufurd must have dropped out of the race as well. There are no votes recorded for him. *Id.* at 225, 227.

58. Charles Carroll to James McHenry (Dec. 5, 1796), in BERNARD CHRISTIAN STEINER, *THE LIFE AND CORRESPONDENCE OF JAMES MCHENRY, SECRETARY OF WAR UNDER WASHINGTON AND ADAMS* 204–05 (1907). Plater won a three-way race in Maryland’s first electoral district (along the southern part of the western shore) with less than a majority of the popular vote. CLARK, *supra* note 57, at 225.

59. JEFFREY L. PASLEY, *THE FIRST PRESIDENTIAL CONTEST: 1796 AND THE FOUNDING OF AMERICAN DEMOCRACY* 395 (2013). Pasley’s claim appears to be without attribution although he does cite Clark at the end of the paragraph. Clark does not report whether Plater ran with the intention of voting for Adams and Jefferson.

60. The analysis presented here should be compared to the Court’s cursory treatment of Samuel Miles. See *Chiafalo*, 140 S. Ct. at 2326 n.7.

“What, 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*.”<sup>61</sup>

A more complete rendition prefaces that remark as follows.

“[W]hen I voted for the Whelen ticket, I voted for John Adams; and if Israel [Whelen] had got in, I think he would have had sense enough to know it, and candour to act accordingly.”<sup>62</sup>

Under the statute in effect for that election, returns were due to be delivered to the governor two weeks after election day (November 4).<sup>63</sup> Initial returns received by November 22 showed all fifteen Adams electors ahead of all of the Jefferson electors. However, these returns did not include results from Westmoreland, Fayette, and Greene counties in the far southwestern corner of the state.<sup>64</sup> Concerned that he would be accused of letting his political leanings interfere with his ministerial obligations, *Republican-leaning* Governor Thomas Mifflin is reported to have dispatched notifications to the entire Adams slate declaring them elected.<sup>65</sup>

Although Pennsylvania law required county returns to be delivered to the governor by November 18, that same law merely instructed him to notify elector candidates of their election “on or before the last Wednesday in the said month.”<sup>66</sup> When the returns from Westmoreland and Fayette County appeared by November 25 they showed thirteen Republicans moving into the top fifteen slots as we see in Table 2.<sup>67</sup>

61. For example see LAWRENCE D. LONGLEY AND NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 2000 24 (1999).

62. GAZETTE OF THE U.S., Dec. 15, 1796, <https://panewsarchive.psu.edu/lccn/sn83025881/1796-12-15/ed-1/seq-3.pdf> [<https://perma.cc/EU6T-ZXFZ>].

63. For the timetable governing the election see *An Act Directing the Manner, Time and Places for Holding Elections for the Electors of a President and Vice-President of the United States*, 15 THE STATUTES AT LARGE OF PENNSYLVANIA, FROM 1682 TO 1801 428 (James T. Mitchell and Henry Flanders eds., 1911) [hereinafter PENNSYLVANIA 1796 STATUTE].

64. *Election Returns*, GAZETTE OF THE U.S., Nov. 22, 1796. In this tally the Federalist electors received between 11,983 and 11,861 votes. The Republican electors received between 11,009 and 10,363 votes.

65. For Mifflin’s reputation see PASLEY, *supra* note 59, at 363. For a report of the early dispatch see WESTERN TELEGRAPH (Washington, Penn.), Dec. 6, 1796.

66. PENNSYLVANIA 1796 STATUTE, *supra* note 63, at 429.

67. Philip J. Lampi, *Pennsylvania 1796 Electoral College, A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC’Y, <http://elections.lib.tufts.edu/catalog/tufts:pa.presidentialelectors.1796> [<https://perma.cc/3ZA8-L5FA>]. These revised returns must have included later reporting or corrections from other counties. *A New Nation Votes* reports the Fayette County returns by elector with the Republicans receiving between 409 and 398 votes and the Federalists between 73 and 66. It does not report Westmoreland County by elector. Instead, it shows 872 for the Republican[s] and 52 for the Federalist[s]. See *id.* These are not enough to account for all of the changes between the November

Rank	Republican	Votes		Votes	Federalist	Rank
1	Thomas MacKean	12,306		12,217	Robert Coleman	13
2	James Boyd	12,294		12,214	Samuel Miles	14
3	William Brown	12,282		12,197	Samuel Postlethwaite	17
4	John Whitehill	12,280		12,190	William Wilson	18
5	Peter Muhlenberg	12,274		12,185	Israel Whelen	19
6	Abraham Smith	12,271		12,175	John Carson	20
7	Jacob Morgan	12,269		12,164	Henry Wynkoop	22
8	James Hanna	12,267		12,158	Thomas Bull	23
9	John Smilie	12,266		12,145	Jacob Hay	24
10	Joseph Heister	12,260		12,137	Benjamin Elliott	25
10	John Piper	12,260		12,136	John Woods	26
12	William Irvine	12,237		12,134	Valentine Eckhart	27
15	William Maclay	12,208		12,132	Ephraim Douglass	28
16	Jonas Hartzell	12,201		12,096	John Arndt	29
21	James Edgar	12,173		12,071	Thomas Stokely	30
	Total	183,848		182,351	Total	

**Table 2 - 1796 Pennsylvania Revised Vote Totals by Elector - Including Westmoreland and Fayette Counties, Excluding Greene County**

This left Miles and fellow Federalist Robert Coleman barely ahead of the two Republican candidates who appeared to have just been nosed out. As Table 3 shows, Coleman, the best performing Federalist, appeared to have captured only forty-four more votes than James Edgar, the poorest performing Republican.

Rank	Candidate	Party	Votes
13	Robert Coleman	Fed.	12,217
14	Samuel Miles	Fed.	12,214

22 returns that excluded Westmoreland and Fayette Counties (*see PASLEY supra* note 59) and the November 25 returns presented in Table 2.

15	William Maclay	Rep.	12,208
16	Jonas Hartzell	Rep.	12,201
21	James Edgar	Rep.	12,173

**Table 3 - 1796 Pennsylvania Revised Vote Totals – Critical Region**

Upon receipt of the vote totals from Westmoreland and Fayette counties Governor Mifflin immediately recalled his premature notifications to the thirteen Adams electors, no longer in the top fifteen slots, and sent out notices to the thirteen Jefferson electors now elected.<sup>68</sup>

Given Jefferson's strong showing in western Pennsylvania in general, and in Westmoreland and Fayette counties in particular, returns from Greene County would have elected the entire slate of Republican electors. When the returns from Pennsylvania's most recently created county<sup>69</sup> finally appeared in Governor Mifflin's office they did just that,<sup>70</sup> but it was too late for Governor Mifflin to make yet another revision.<sup>71</sup>

Samuel Miles *may* have switched his vote from Adams to Jefferson in response to public pressure to vote in accord with the wishes of the Pennsylvania electorate after the late arriving Greene County results had been added to the state's official tally.<sup>72</sup> In any case, Miles *did not* run afoul of the *Adamsite's* complaint, "when I voted for the Whelen ticket, I voted for John Adams."<sup>73</sup> Even without the votes from Greene County, the Adams *ticket* clearly lost to the Jefferson ticket.

Miles's decision not to switch his second electoral vote from Pinckney to Burr has been left unexplained. That decision might have elected Pinckney

68. WESTERN TELEGRAPH (Washington, Penn.), Dec. 6, 1796.

69. The legislature created Greene County on February 9, 1796. See PENNSYLVANIA 1796 STATUTE, *supra* note 63, at 380.

70. *A New Nation Votes* does not report Greene County by elector. It only shows 210 for the Republican[s] and 44 for the Federalist[s]. See Lampi, *supra* note 67.

71. At least one newspaper reports that Hartzell and Edgar, the nosed-out Republican electors, appeared at the meeting of Pennsylvania's electoral college and tried to claim their right to office. *From the New World*, AURORA (Philadelphia), Dec. 13, 1796.

72. PASLEY, *supra* note 59, at 362–63. Miles died in 1805. In 1873 *The American Historical Record, and Repertory of Notes and Queries* published a two-part "Auto-Biographical Sketch of Samuel Miles" written in 1802, provided by John B. Linn of Bellefonte, Pennsylvania. *Auto-Biographical Sketch of Samuel Miles*, 2(14) THE AMERICAN HISTORICAL RECORD, AND REPERTORY OF NOTES AND QUERIES 49 (Feb. 1873), <https://babel.hathitrust.org/cgi/pt?id=hvd.32044094455078&view=1up&seq=63>. In it, Miles claimed that although nominated by the Federalists he was actually undecided between Jefferson and Adams and that he ultimately cast his electoral vote for Jefferson because he thought the Virginian would resolve tensions with France better than Adams would. *Auto-Biographical Sketch of Samuel Miles*, 2(15) THE AMERICAN HISTORICAL RECORD, AND REPERTORY OF NOTES AND QUERIES 114, 117–18 (March 1873), <https://babel.hathitrust.org/cgi/pt?id=hvd.32044094455078&view=1up&seq=133>. Miles did not argue that he was respecting the will of the electorate nor did he explain why he cast his second vote for Thomas Pinckney.

73. For the full complaint see *supra* text accompanying notes 61–62.

president rather than John Adams. Thanks to a New England centered response to Alexander Hamilton's chicanery the persistence of Miles's second vote for Pinckney did not elect the South Carolinian president. Dissatisfied with the prospect of an Adams presidency, the wily Hamilton hoped to exploit the lack of electoral vote designation to elect South Carolina's Pinckney chief magistrate by combining unified pairs of electoral votes in the Federalist strongholds east of the Delaware River (and Delaware itself) with electoral votes from Pinckney's home state of South Carolina, where Federalist chieftain Edward Rutledge held Jefferson in higher esteem than Adams.<sup>74</sup> Hamilton's plan succeeded spectacularly when the eight renegade electors chosen by South Carolina's legislature each cast one electoral vote for Jefferson and one for Pinckney.

That would have elected Pinckney president if Federalists to the north had not gotten wind of Hamilton's plan and sloughed off votes from Pinckney. All six of New Hampshire's electors voted for Adams and Chief Justice Oliver Ellsworth. Rhode Island's four electors did the same. Only four of Connecticut's electors faithfully voted for Adams and Pinckney. The other five voted for Adams and New York Governor John Jay. As a whole Massachusetts' sixteen electors were more faithful than Connecticut's nine. Only three sloughed off their second vote from Pinckney. One of them voted for Ellsworth, the other two for former North Carolina Senator and Governor Samuel Johnston. On the shores of Chesapeake Bay Thomas Pinckney received only four electoral votes in Maryland compared to seven for running mate Adams. One Adams elector cast his second electoral vote for Jefferson, while the remaining two were cast for Maryland's Federalist Senator Joseph Henry.

John Adams captured one electoral vote in Virginia, and so did his running mate Thomas Pinckney. However, they were not cast by the same elector.<sup>75</sup> As he campaigned in Virginia's twenty-first elector district (Fauquier and Loudon Counties) elector candidate Leven Powell "named 'GEORGE WASHINGTON' as his choice for president, with John Adams 'to act with him.'" When elected, Powell voted that way.<sup>76</sup> Powell was, at the very least,

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74. This account is largely drawn from PASLEY, *supra* note 59, at 380–403.

75. In the absence of documentary evidence or constitutional prohibitions to the contrary we assign an individual elector's pair of electoral votes in a way that minimizes anomalies. Thanks to the documentary evidence and the constitutional prohibition to be presented this is the most prominent case of violating the running mate parsimony rule just stated.

76. PASLEY, *supra* note 59, at 329, citing the COLUMBIAN MIRROR AND ALEXANDRIA GAZETTE, Oct. 1, 1796. Powell was the only Virginia elector who could have constitutionally cast his second electoral vote for fellow Virginian George Washington. The other twenty Virginia electors cast an electoral vote for fellow Virginian Thomas Jefferson. Commenting on the anticipated results of the election, on Jan. 9, 1797, Jefferson wrote to Thomas Mann Randolph:



a renegade elector. The retiring president was no one's intended candidate for vice president.

Powell's was the only electoral vote Jefferson failed to capture in his home state. Thanks to his own Hamilton-like machinations, Aaron Burr was not so fortunate. While Hamilton plied the South looking for anomalous electors to vote for the Federalists' vice presidential candidate, but not presidential candidate, Burr did the same on his own behalf in New England. On October 15, 1796, John Beckley wrote to James Madison

Burr has been out electioneering these six weeks in Connecticut, Vermont, R: Island & Massachts., but I doubt his efforts are more directed to himself than any body else. You well know him; *would it not be prudent to vote one half of Virga. for Clinton?*<sup>77</sup>

Burr's efforts proved to be worse than fruitless. Neither Burr nor Jefferson captured any electoral votes east of the Delaware. Burr's comeuppance came south of the Potomac.

Virginia's twenty Republican electors outperformed Beckley's suggested strategy. Only one of them voted for Burr. Nineteen voted for someone else. Three voted for George Clinton, fifteen voted for Samuel Adams, and one must have voted for *Adams's running mate* Thomas Pinckney.<sup>78</sup>

In 1796 North Carolina chose its twelve electors from single elector districts.<sup>79</sup> Thomas Jefferson received eleven electoral votes, John Adams only

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It seems probable from the papers that the 2d. call will fall on me – as between Mr. Adams and myself the vote has been little different from what I always expected. It stands as 68. and 71. but was in reality 69. and 70. *It is fortunate Powell gave the vote he did because that has put the election out of question. Had his vote been otherwise, a very disagreeable question might have arisen, because the 15th. elector for Pennsylvania, really elected attended and tendered his vote for me, which was refused, and one admitted to vote for Mr. Adams, who had not been really elected.* This proceeded from the delay of the votes of Greene county and it would have been a dangerous question how far the Governor's proclamation declaring a man elected who was not elected, could give him a right to vote. For suppose a governor in the face of fact was to declare a whole set of men elected who had not even been voted for. We cannot conceive any law of the state could make that good which the constitution declares not so. *I am sincerely rejoiced that the question is become useless, as well as that it is the 2d. and not the 1st. vote which falls on me; if any does.*

29 JEFFERSON PAPERS, *supra* note 23, at 261 (emphases added).

77. 16 MADISON PAPERS, *supra* note 51, at 409 (emphasis added).

78. See *supra* note 76.

79. NORTH CAROLINA, THE ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA: PASSED DURING THE SESSIONS HELD IN THE YEARS 1791, 1792, 1793 AND 1794 48–49 (Francis X. Martin ed., 1795).

one as did Thomas Pinckney. Aaron Burr received only six. Of the five remaining electoral votes from North Carolina, native son and Supreme Court Justice James Iredell received three, Pinckney's brother and Adams's 1800 running mate Charles Cotesworth Pinckney received one, and so did retiring President George Washington.

Burr's southern rout concluded in Georgia where all four electors cast their votes for Jefferson and George Clinton.<sup>80</sup> All told, only seventy-nine electors cast both of their electoral votes faithfully in 1796. Fifty-nine cast an anomalous electoral vote. Samuel Miles of Pennsylvania anomalously cast his electoral vote for Thomas Jefferson for president while faithfully casting his second electoral vote for Thomas Pinckney. In Maryland John Plater faithfully cast his electoral vote for John Adams for president while very anomalously casting his second electoral vote for Thomas Jefferson rather than Pinckney. The other fifty-seven anomalous electors cast their second electoral votes for someone other than the running mate of the recipient of their first electoral vote.

If Thomas Jefferson had captured the stray electoral votes in Virginia, North Carolina, and Pennsylvania that went to Adams he would have achieved a bare majority of seventy without the benefits of John Plater's risky vote for him in Maryland. Even if Samuel Miles and those three additional Jefferson electors had also voted for Burr, the New Yorker would have only received four more votes than the measly thirty he actually accumulated.

Burr had only himself to blame for finishing a distant fourth place in the actual electoral vote tally. Had there been no need for a Republican response to his attempt to curry favor among New England's Federalist electors, a total of twenty-eight Republican electors in Virginia, North Carolina, and Georgia might not have defected from him. If that had happened in conjunction with the Jefferson victory just proposed, Burr would have accumulated sixty-two electoral votes, eight short of Jefferson's hypothesized total of seventy. Alexander Hamilton's plan to elect Pinckney president would have denied the vice presidency to Burr and given John Adams a third term in the second office in the land.

The twenty sloughing Federalist electors from New England and Maryland preserved John Adams's victory against two possible threats. The first and better known was Alexander Hamilton's machinations to get South Carolina's electors to vote for Jefferson and Pinckney. Boston merchant Stephen Higginson suggested a second, undoubtedly apocryphal threat in a letter to the very same Hamilton. Despairing of Jefferson's chances to win the elec-

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80. Pasley suggests that Burr's land dealings may have caused him trouble in Georgia. PASLEY, *supra* note 59, at 405.

toral vote, some Republican electors might act as *subversive sloughing electors* and throw one of their votes to Pinckney, thereby relegating John Adams to a third term as vice president.<sup>81</sup>

The sloughing Federalist electors turned out in such numbers that they also cost Pinckney the vice presidency and put Thomas Jefferson into that office. A recent commentator on South Carolina politics in the 1790s has written that that state's Federalist Representative William L. Smith "remarked bitterly that Pinckney had been deprived of the second highest office in the land 'by the folly and mismanag[emen]t of his friend E[dward] R[utledge].'"<sup>82</sup>

If electoral vote designation had been in place in 1796 Alexander Hamilton's only hope of getting Thomas Pinckney elected president would have been to slough off presidential electoral votes from Adams to Pinckney thereby denying anyone an electoral vote majority. Hamilton would have realized that there was no way the lame duck Fourth House would have elected Pinckney. He would have realized that with Jefferson's allies in control of eight delegations (and three evenly divided) it would have been much more likely that the House would have elected the Virginian president. The most likely outcome of electoral vote designation would have been Pinckney's election as vice president. At worst, with only a handful of sloughers on both sides of the aisle the vice presidential election would have been thrown to the lame duck Fourth Senate dominated by Federalists.

But electoral vote designation was not in place in 1796 and Thomas Jefferson was elected vice president.

After the electoral votes were cast in December 1796, but before they were counted in February 1797, the same William L. Smith who had bemoaned Pinckney's loss of the vice presidency proposed the following constitutional amendment on the floor of the House:

*Resolved*, That the third clause of the first section of the second article of the Constitution of the United States ought to be amended in such manner as that the Electors of a President and Vice President be directed to designate whom they vote for as President, and for whom as Vice President.<sup>83</sup>

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81. Higginson to Hamilton, Dec. 9, 1796 in 20 HAMILTON PAPERS, *supra* note 44, at 437-38. This story is undoubtedly apocryphal. On Dec. 17, 1796 Jefferson wrote to James Madison that in case of an electoral vote tie between Jefferson and Adams "It is both my duty and inclination therefore to relieve the embarrassment should it happen: and in that case I pray you and authorize you fully to solicit on my behalf that Mr. Adams may be preferred." 29 JEFFERSON PAPERS, *supra* note 23, at 223.

82. JAMES HAW, JOHN AND EDWARD RUTLEDGE OF SOUTH CAROLINA 266 (1997).

83. 6 ANNALS OF CONG. 1824 (1797).

Additional electoral vote designation proposals were introduced in the Senate on January 24, 1798, by Kentucky Federalist Humphrey Marshall;<sup>84</sup> in the House on February 8, 1799, by New Hampshire Federalist Abiel Foster;<sup>85</sup> and in the House on February 4, 1800, by an unnamed movant.<sup>86</sup> None of these proposals were ever debated.

#### D. THE ELECTION OF 1800

Anomalous electoral votes abounded in 1796, but not so in 1800. When Vice President Thomas Jefferson counted the electoral vote before a joint session of Congress on February 11, 1801,<sup>87</sup> the count revealed that there had been only one anomalous elector, the coordinated slougher from Rhode Island, who cast his second electoral vote for John Jay rather than Charles

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84. 7 ANNALS OF CONG. 493 (1798). This resolution concluded by proposing “Should no one person, voted for as Vice President, have a majority of the whole number of electors in his favor, then the Senate shall elect the Vice President among those voted for as Vice President.” *Id.*

85. 9 ANNALS OF CONG. 2919 (1799). The *Annals* do not present a proposed text. The *House Journal* does not even mention the proposal. See H. JOURNAL, 5th Cong., 3rd Sess. 479–80 (1799).

86. 10 ANNALS OF CONG. 510 (1800). The proposal specified:  
[T]he person having the greatest number of votes for Vice President, if such number be a majority of the whole number of electors, shall be Vice President; and if there be no choice, and two or more persons shall have the highest number of votes, and those equal, the Senate shall immediately choose, by ballot, one of them for Vice President; and if no person shall have a majority, then the Senate shall, in like manner, choose a Vice President from the five highest on the list: but in choosing the Vice President, the votes shall be taken by States, the Senators from each State having one vote.

*Id.*

This text undoubtedly came from a resolve passed by the Vermont legislature. It specified:

[T]he person having the greatest number of votes for Vice-President, if such number be a majority of the whole number of electors, shall be Vice-President. And if there be no choice, and two or more persons shall have the highest number of votes, and those equal, the Senate shall immediately chuse, by ballot, one of them for Vice President. And if no person shall have a majority, then the Senate shall, in like manner, choose a Vice-President from the five highest on the list: but in chusing the Vice President, the votes shall be taken by States, the Senators from each State having one vote.

1799 Vt. Acts & Resolves

The Vermont legislature and the unnamed movant unwittingly parroted the text of Article II concerning election of the president. First, they failed to realize that with designation no more than one candidate for vice president could receive a majority of electoral votes. Second, by having each state’s pair of senators vote as a delegation the proposal invited halving of a state’s vote and stalemate.

87. 10 ANNALS OF CONG. 1024 (1801).

Cotesworth Pinckney. The Jeffersonians failure to identify a coordinated sloughing elector left Jefferson and Burr tied with seventy-three electoral votes each, a majority of the 138 electors appointed, thereby sending the election to the House of Representatives which took thirty-six ballots before finally electing Jefferson president rather than Burr, its only other option.<sup>88</sup>

The Rhode Island elector who voted for Jay may have been the only elector who actually cast an anomalous electoral vote. However, by the time Congress undertook serious consideration of a designation amendment, stories had begun to surface that *after electors had been chosen* Aaron Burr had tried to persuade a handful of them to cast an electoral vote anomalously so that he could win the presidency in the Electoral College.

In a letter dated December 10, 1801, the aptly named New York journalist James Cheetham wrote to President Thomas Jefferson that Anthony Lispenard, one of the Jefferson-Burr electors in New York, *almost* sloughed off his electoral vote for Jefferson for someone else. Only the presence of DeWitt Clinton forced the electors to display their ballots to each other.<sup>89</sup> Had Lispenard sloughed off his vote for Jefferson in an *en passant* manner Burr would have been elected president with seventy-three electoral votes, one more than Jefferson.

In 1802 Cheetham published *A View of the Political Conduct of Aaron Burr, Esq., Vice-President of the United States* in which he claimed that the Federalist electors in New Jersey had planned to throw their votes to Burr if they realized that Adams had no hope of victory.<sup>90</sup> In addition, according to Cheetham, Burr tried to persuade his brother-in-law and former tutor Tapping Reeve and Samuel Stanhope Smith, the President of The College of New Jersey (now Princeton University) and relative of Burr's by marriage, Federalist electors in Connecticut and New Jersey, to cast their votes for him. According to Cheetham, they stayed true to the Federalist cause hoping that South Carolina would cast at least some electoral votes for Adams and favorite son Pinckney.<sup>91</sup> If even one of these electors had subversively sloughed off his second electoral vote from Pinckney to Burr, Burr would have once again received (at least) one more electoral vote than Jefferson.

Both of Cheetham's claims demonstrated that the efforts to generate anomalous electoral votes could wait until after electors had been chosen, and only a very small number of such anomalously cast electoral votes would be needed to tip the election. Some historians doubt the veracity of Cheetham's claims.<sup>92</sup> Whether they were true or not does not matter. They

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88. *Id.* at 1024–33.

89. 36 JEFFERSON PAPERS, *supra* note 23, at 82–88.

90. CHEETHAM, *supra* note 24, at 44 (“Mr. Jonathan Dayton has openly declared, since the election, that this was their plan.”).

91. *Id.* at 45.

92. *See, e.g.*, MILTON LOMASK, 1 AARON BURR 322 (Farrar, Straus, Giroux 1979).

were in the air in Washington by 1802 as Congress considered a designation amendment.

Standard accounts of the Twelfth Amendment recognize that it was crafted to avoid the need for a coordinated sloughing elector to slough off an electoral vote originally intended for his party's vice presidential candidate to ensure that his party's presidential candidate would receive the greatest number of electoral votes. These standard accounts are certainly accurate in that regard and with respect to the other substantive changes wrought by the Twelfth Amendment.<sup>93</sup> However, there are at least eight comments made during the Twelfth Amendment debates concerning the election of a "Federal vice president" that only make sense if we understand the congressional actors to have been aware of a wider range of anomalous electors and concerned to avoid the problems raised by subversive sloughing electors. Very few accounts of the Twelfth Amendment consider these issues.<sup>94</sup>

By requiring electors to designate their electoral votes, the Twelfth Amendment also protects against *en passant* sloughing electors. Nowhere in the debates does anyone express concern for ordinary faithless electors, renegade electors, or unpledged electors nor is there any suggestion that such anomalous electors can be bound by either the amendment itself or by a state statute empowered by the Tenth Amendment.<sup>95</sup>

#### IV. THE TWELFTH AMENDMENT DEBATES

The election of 1800 clearly demonstrated the need to amend the Constitution to require an elector to distinguish an electoral vote for president

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93. For the additional substantive changes see *infra* text accompanying notes 167–171.

94. Kuroda provides the best account of the Twelfth Amendment and treats subversive sloughing electors. See TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804*, at 66, 72, 87–88, 118, 125–26, 138, 141 (1994). Other scholars recognizing the possibility of one or both of the Burr strategies include James W. Ceaser, Richard P. McCormick, Bruce Ackerman, Akhil Reed Amar, and Jeremy D. Bailey. See JAMES W. CEASER, *PRESIDENTIAL SELECTION* 104 (1979); RICHARD P. MCCORMICK, *THE PRESIDENTIAL GAME* 82 (1982); BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 353 n.21 (2005); AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 338–39 (2005); JEREMY D. BAILEY, *THOMAS JEFFERSON AND EXECUTIVE POWER* 199 (2007).

95. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."). UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT, NAT'L CONF. COMM'R ON UNIF. L. (2010), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c98d06fd-0be3-aff9-a9ab-af16d701c771&forceDialog=0> [https://perma.cc/BC8H-RNXE]. The material presented on this web page suggests no constitutional grounds for a state's power to enact such a statute. For that criticism see Delahunty, *supra* note 38, at 190–91. Delahunty provides other criticisms specific to the proposed uniform act. *Id.* at 189–94.

from an electoral vote for vice president. The lame duck session of the Sixth Congress had little time to consider a designation amendment. Before the Jefferson-Burr debacle became apparent, Republican John Nicholas of Virginia introduced a proposed constitutional amendment that would have required popular election of presidential electors from single elector districts as well as popular election of representatives from single representative districts.<sup>96</sup> It made no reference to designation. Three weeks before the electoral vote was tallied, a committee of three Federalists and two Republicans reported back to the House that there was no need to bind the states with an amendment such as Nicholas had proposed. If a state wished to elect its electors or representatives by district it was constitutionally empowered to do so.<sup>97</sup>

On September 14, 1801, Secretary of the Treasury Albert Gallatin wrote to President Thomas Jefferson endorsing constitutional amendments (1) requiring popular election of electors from single-electtor districts and (2) “distinguishing the [electoral] votes for the two offices.”<sup>98</sup> Gallatin explained the impetus for a designation amendment in terms of the dilemma the Republicans faced regarding Jefferson’s successor. Gallatin held Aaron Burr in low regard. James Madison was the obvious choice to succeed Jefferson.<sup>99</sup> Madison’s potential succession of his fellow Virginian posed a particular constitutional problem. It would be difficult, if not impossible, to launch Madison’s succession from the vice presidency.<sup>100</sup> That raised the issue of whether or not to put Aaron Burr on the ticket in 1804. Gallatin continued

it seems to me that there are but two ways, either to support Burr once more, or to give only one vote for President, scattering our votes for the other person to be voted for. If we do the first, we run, on the one hand, the risk of the federal party making B. president; & we seem, on the other, to give him an additional pledge of being eventually supported hereafter by the republicans for that office. If we embrace the last party, we not only lose the Vice President,

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96. 10 ANNALS OF CONG. 785 (1800). Nicholas’s proposal called for election “by the *persons* within each of those districts who shall have the qualifications requisite for Electors of the most numerous branch of the Legislature.” (emphasis added).

97. The Federalist members were Connecticut’s Roger Griswold, South Carolina’s Robert Goodloe Harper, and Virginia’s Thomas Evans. In addition to Nicholas the other Republican member was Nathaniel Macon of North Carolina. *Id.* For the committee’s report see *id.* at 941–45.

98. 35 JEFFERSON PAPERS, *supra* note 23, at 286.

99. *Id.* (“Where is the man we could support with any reasonable prospect of success? Mr Madison is the only one, & his being a Virginian would be a considerable objection.”).

100. *Id.* (“But, if without thinking of events more distant or merely contingent, we confine ourselves to the next election which is near enough, the embarrassment is not less; for, even Mr Madison cannot on that occasion be supported with you[.]”).

but pave the way for the federal successful candidate to that office to become President.<sup>101</sup>

Gallatin recognized a way out of this dilemma. “All this would be remedied by the amendt. of distinguishing the votes for the two offices.”<sup>102</sup> He did not suggest binding electors to pledges.

A. THE SEVENTH CONGRESS FAILS TO SEND A DESIGNATION AMENDMENT TO THE STATES

The Seventh Congress barely failed to send a designation amendment to the states. During the life of that Congress, Federalist members who had previously been friends of designation turned into implacable foes.

In February 1802, New York Federalists Benjamin Walker and Gouverneur Morris introduced a resolution approved by their state’s legislature calling for two constitutional amendments. The first required popular election of electors from single elector districts. The second required an elector to designate his presidential electoral vote from his vice presidential electoral vote.<sup>103</sup> In contrast to the proposals made in 1798 and 1800, neither designation proposal indicated whether a majority of the electoral vote was needed for the vice presidency and neither made provision for a contingent election of the vice president.<sup>104</sup> Nor did a resolution proposed by New York Republican Senator DeWitt Clinton on April 12, 1802, limited to electoral vote designation.<sup>105</sup>

On April 30, 1802, the House moved to adjourn the next day, Saturday, May 1.<sup>106</sup> A day later the Senate agreed to an adjournment on Monday, May

101. *Id.*

102. *Id.* As noted above Gallatin also endorsed elector selection by popular vote from single-electors districts. *See supra* text accompanying note 98. Four days later Jefferson replied to Gallatin endorsing “a different amendment which I know will be proposed, to wit, to *have no electors*, but let the people vote directly, and the ticket which has a plurality of the votes of any state, to be considered as receiving thereby the whole vote of the state.” Sep. 18, 1801. 35 JEFFERSON PAPERS, *supra* note 23, at 314. (emphasis added).

103. Walker introduced his resolution in the House on Feb. 15, 1802. 11 ANNALS OF CONG. 509 (1802). Four days later it is reproduced in the *Annals*. *Id.* at 602–03. Morris presented his resolution in the Senate on Feb. 24, 1802. *Id.* at 191. The two resolutions present identical designation text, have no substantive differences, and present only minor stylistic variations with respect to districting. Both of these proposals limited the electorate to *citizens* qualified to vote for the most numerous branch of each state’s legislature.

104. For the 1798 proposal *see supra* note 84. For the 1798 proposal *see supra* note 86.

105. 11 ANNALS OF CONG. 259 (1802). Clinton’s text is identical to the Walker/Morris designation text.

106. *Id.* at 1253.



3,<sup>107</sup> and when the House convened on May 1, it agreed to the additional day of business.<sup>108</sup>

After the House voted not to recommit a report on the disbursement of public funds, New York Republican Philip Van Cortlandt asked for consideration of the two proposed constitutional amendments introduced in February.<sup>109</sup> Federalists Abiel Foster of New Hampshire, Benjamin Huger of South Carolina, and James Bayard of Delaware joined by Kentucky Republican Thomas Davis complained that there was too little time left in the session to give the amendments the consideration they deserved.<sup>110</sup> Their complaints failed to carry the day when the House voted thirty-eight to thirty, largely on party lines, to resolve itself into the Committee of the Whole to take up the two resolutions.<sup>111</sup> The *Annals* presents the text of the bare bones designation amendment as the House resolved itself into the Committee of the Whole “[t]hat, in all future elections of President and Vice President, the persons voted for shall be particularly designated, by declaring which is voted for as President, and which as Vice President.”<sup>112</sup>

The Committee of the Whole held only the briefest of debates on the designation amendment.<sup>113</sup> During the debate New York Republican Samuel Mitchill spoke in favor of the designation amendment by noting that it formalized a procedure already being practiced.

Under the Constitution electors are to vote for two persons, one of whom does not reside in the State of the electors; but it does not require a designation of the persons voted for. Wise and virtuous as were the members of the Convention, experience has shown that the mode therein adopted cannot be carried into operation; for *the people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President.* Therefore,

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107. *Id.* at 302.

108. *Id.* at 1255.

109. *Id.* at 1285.

110. 11 ANNALS OF CONG. 1285-86 (1802).

111. *Id.* at 1288. New York’s Thomas Morris was the only Federalist to vote for consideration. Seven Republicans joined the remaining twenty-three Federalists opposing consideration.

112. *Id.*

113. The entire debate in the Committee of the Whole takes no more than three pages in the *Annals*. *Id.* at 1288-91. The entire subsequent debate in the House proper takes the same number of pages and is devoid of substantive comment. *Id.* at 1291-94. David Currie described the Republicans as having “rammed the proposed amendment through in a single day, without significant debate on the merits.” DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 40 (2001).

practically, the very thing is adopted, intended by this amendment.<sup>114</sup>

House Federalists made no comment on designation beyond Connecticut's Samuel Dana's questioning whether a vice president was even needed.<sup>115</sup> They were more concerned that the districting amendment not be forgotten. It was equally important to them.<sup>116</sup>

At this point the text in the *Annals* becomes a model of opacity that can only be clarified with the help of the *House Journal*. The *Annals* records, "The question was then taken on the resolution of amendment, ..." and fell just short of a two-thirds majority by an unrecorded 42–22 vote, after which the Committee of the Whole rose in favor of the House proper.<sup>117</sup> With the House proper reconvened,

Mr. Samuel Smith reported that the Committee of the Whole House on the state of the Union had, according [to] order, had the second of the said proposed articles of amendment under consideration, and that two-thirds of the members composing the committee not having concurred in their agreement to the same, he was directed to report to the House their disagreement to the said second article of amendment; which he delivered in at the Clerk's table.<sup>118</sup>

With only Federalist Thomas Morris and Rhode Island Republican Thomas Tillinghast crossing party lines, the House proper rejected the districting amendment by a vote of 24–48.<sup>119</sup> With the districting amendment

114. 11 ANNALS OF CONG. 1289–90 (1802) (emphasis added). Passages such as this one *must* be read in their proper and complete context. In the highlighted sentence Mitchill is clearly talking about an elector's vote to elect the *running mate* vice president. It has nothing to do with binding electors.

115. *Id.* at 1290. Dana also interjected a suggestion that the Three-Fifths rule be revisited.

116. *Id.* (Rep. Huger).

117. *Id.* at 1291. Following this vote there was some debate whether a two-thirds majority or only a simple majority was needed. The Committee chose not to decide since the House proper would need to decide the question by a two-thirds vote.

118. H. JOURNAL, 7<sup>th</sup> Cong., 1<sup>st</sup> Sess. 232 (1802).

119. 11 ANNALS OF CONG. 1293 (1802). The *Annals* records the vote as being "on concurring in the report of the Committee in their disagreement to the amendment." *Id.* at 1292–93. The *House Journal* records the vote as being "On the question that the House do concur with the Committee of the Whole House on the state of the Union in their disagreement to the said second article of amendment, ..." H. JOURNAL, 7<sup>th</sup> Cong., 1<sup>st</sup> Sess. 233 (1802). If the House proper voted 24–48 *against* concurring in the Committee's disagreement, then it should have proceeded to consider the districting amendment. It did not. This procedural confusion may explain how the districting amendment received forty-two votes in the Committee of the Whole when all but one of forty-eight Republicans voted against it in the 24–48 vote. Perhaps

disposed of, the House Republicans quickly moved the designation amendment to a final 47–14 vote.<sup>120</sup> All forty-six Republicans who voted, voted for designation with New York’s Killian Van Rensselaer being the only Federalist joining them. Nine Federalists, who had cast votes in favor of postponing debate and then in favor of the districting amendment, chose to abstain on the final vote. Their nine votes against the designation amendment would have put it perilously close to falling short of the two-thirds threshold needed for final approval.<sup>121</sup> These nine Federalists may have approved of designation, but they were most likely even greater supporters of the districting amendment and found themselves unable to vote for the former after the failure of the latter.

With the House not voting on the designation amendment until the end of the day on May 1, the Senate did not receive word of the amendment’s approval until it convened on May 3.<sup>122</sup> After passing three bills relating to the District of Columbia, another ““for the relief of sick and disabled seamen,”” and another ““for the relief of Fulwar Skipwith,””<sup>123</sup> the Senate took up the designation amendment. With no recorded debate, the Senate voted 15–8 in favor of the amendment, just failing to reach the two-thirds majority required for approval.<sup>124</sup> North Carolina Republican David Stone was the only senator to cross party lines.<sup>125</sup>

When Pennsylvania Republican Michael Leib introduced a designation amendment in the lame duck session of the Seventh House, the chamber immediately referred the matter to the Committee of the Whole from which it

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twenty or more Republicans misunderstood the question as it was voted on in the Committee of the Whole.

120. 11 ANNALS OF CONG. 1293–94 (1802).

121. Federalist Thomas Morris who had voted against the districting postponement and against districting abstained from the final vote as did Republicans Willis Alston from North Carolina, William Helms from New Jersey, and Joseph Varnum from Massachusetts. For the postponement vote see *supra* note 119. For the districting vote see *id.* at 1293. These four members may have provided sufficient reserve for the Republicans to be unconcerned with negative votes from the bloc of nine abstaining Federalists.

122. *Id.* at 303–04.

123. *Id.*

124. *Id.* at 304.

125. Stone *likely* had the good sense to recognize that the designation amendment the House sent to the Senate was woefully incomplete. It failed to state a rule determining vice presidential election in the Electoral College and failed to specify a process for continuing a vice presidential election (in the Senate) in case the Electoral College failed to make an election. The *Annals* does not record Stone making any comments during the Eighth Senate’s debates on the Twelfth Amendment. Nineteen months later Virginia Republican Senator Wilson Cary Nicholas wrote to former Senator DeWitt Clinton, by then mayor of New York City, a day after the Eighth Senate approved the Twelfth Amendment. “Last night at 10 o’clock we carried the amendment to the constitution by the vote of Mr. Stone who was induced to vote for it by some alterations that I think have changed it for the better.” DEWITT CLINTON PAPERS; Box 2 and Folder 44; Rare Book and Manuscript Library, Columbia University Library (Dec. 3, 1803); (emphasis added).

never emerged.<sup>126</sup> Somewhat later in the session, Benjamin Huger reintroduced the Federalist's preferred amendment requiring popular choice of electors by district.<sup>127</sup> The House also referred this resolution to the Committee of the Whole and the Republican majority twice blocked Federalist attempts twice to bring it up for consideration.<sup>128</sup>

#### B. THE EIGHTH CONGRESS APPROVES THE TWELFTH AMENDMENT

Following the elections of 1802–1803 Jefferson's Republican party expanded its majorities in both houses of the Eighth Congress so much that it could hope to achieve a two-thirds majority for a designation amendment in each chamber, in spite of some defections and no Federalist support. Virginia Republican John Dawson introduced a bare, designation only amendment in the House, two days after the first session of the Eighth Congress convened.<sup>129</sup> A day later, Federalist Benjamin Huger once again introduced an amendment requiring popular choice of electors by district.<sup>130</sup> Huger's amendment went nowhere.<sup>131</sup> Congress spent the next seven weeks fleshing out the base designation proposal in order to integrate elector designation with the other presidential and vice presidential election mechanisms specified in Article II. The debates on these additional issues have been ably covered elsewhere.<sup>132</sup> Our concern is with the core issue of designation.

Designation's Republican sponsors made it clear that they had two goals in mind. The first was to prevent the House of Representatives from *inverting* the will of the people by choosing a party's *intended* vice presidential candidate as president; thereby making the party's intended presidential candidate vice president, when all of a party's presidential electors cast their two electoral votes faithfully and none acted as a coordinated slougher. The Republican sponsors also made it clear that the designation amendment was designed to prevent the losing party from *subverting* the will of the people by having

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126. 12 ANNALS OF CONG. 304 (1803).

127. *Id.* at 449.

128. *Id.* at 472, 481–86.

129. 13 ANNALS OF CONG. 374 (1803) (“That, in all future elections of President and Vice President, the persons voted for shall be particularly designated, by declaring which is voted for as President, and which as Vice President.”).

130. *Id.* at 381. Huger's proposal, like previous Federalist proposals, limited the choice of representatives to citizens qualified to vote for the most numerous branch of a state legislature. *See supra* text accompanying note 96. An earlier Republican proposal for choosing electors by district did not limit the electorate to citizens. *See supra* text accompanying note 103. In 1803 only Georgia, Kentucky, Pennsylvania, and South Carolina included citizenship among the qualifications for suffrage. *See* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 315–19 (Basic Books 2d ed. 2009).

131. KURODA, *supra* note 94, at 128.

132. *Id.* at 127–52. In its *Chiafalo* opinion the Court never even cites the Twelfth Amendment debates.

some of the losing party's electors cast one of their electoral votes for the winning party's intended vice presidential candidate. There are at least eight comments made during the Twelfth Amendment debates that make no sense, unless avoiding such subversion was one of the Republicans' clearly understood goals for the Twelfth Amendment.<sup>133</sup>

1. *Avoiding the House Contingent Election in General and Inversion by the House in Particular*

The House election of 1801 still stuck in the Jeffersonians' craw as they moved the Twelfth Amendment through the Eighth Congress. Thomas Jefferson had been their presidential candidate and Aaron Burr their candidate for vice president, yet the lame duck, Federalist Sixth House had almost elected Burr president. The designation amendment, Tennessee Republican George Campbell told his House colleagues, would "secure to the people the benefits of choosing the President, so as to prevent a contravention of their will as expressed by Electors chosen by them."<sup>134</sup> The House contingent election should come into play

only in extraordinary cases: and when this should be rendered necessary, so guarding the exercise of Legislative power, that those only should be capable of Legislative election who possessed a strong evidence of enjoying the confidence of the people.<sup>135</sup>

After echoing Campbell's concern that "the will of the people should be done; and that the elections should be according to the will of the people,"<sup>136</sup> Virginia Republican John Clopton operationalized Campbell's concern that only those "who possessed a strong evidence of enjoying the confidence of the people"<sup>137</sup> be eligible for election by the House. Clopton suggested that House election of the president or Senate election of the vice president "should be restrained to the smallest number above an unit, or to those persons who have equal electoral votes."<sup>138</sup> The reason was obvious to Clopton.

[H]e believed the provision, if conformed to the ideas suggested by him, would be more likely to insure the ultimate election of President and Vice President according to the will of the people, as the

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133. See *infra* Part 0.

134. 13 ANNALS OF CONG. 421 (1803). Campbell reiterated this concern on the final day of House debate. *Id.* at 720.

135. *Id.* at 421.

136. *Id.* at 423.

137. *Id.* at 421.

138. *Id.* at 424.

electoral votes are to be considered as their expression of the public will.<sup>139</sup>

He thought the number should be two. He reasoned that under the original terms of Article II the number was five, each of whom might have received electoral votes from two-fifths of the total number of electors appointed. With designation, no more than two candidates could receive the electoral votes of at least two-fifths of the electors appointed.<sup>140</sup> In the end, the Eighth Congress relaxed Clopton's threshold just a bit, setting the number of candidates eligible for the House contingent election at three. However, the amendment's supporters, such as Virginia Republican Senator Wilson Nicholas, made it clear that the intention was that

by taking the number three instead of five, you place the choice with more certainty in the people at large, and render the choice more consonant to their wishes....[i]t was a most powerful reason for preferring three, that it would render the Chief Magistrate dependent only on the people at large, and independent of any party or any State.<sup>141</sup>

This portion of the Twelfth Amendment debates focused on the House of Representatives inverting the will of the people, with or without designation in place. It had nothing to do with anomalous electors, as some members of the Ninety-First Congress would contend in 1969.<sup>142</sup> In fact, the debate about inverting the will of the people in the absence of designation supposed that nearly all of the winning party's electors had voted faithfully. Responding to Federalist concerns that the reduction from five to three favored large states at the expense of small states, Virginia Republican Senator John Taylor of Caroline stated, "The controversy is not therefore between larger and smaller States, but *between the people of every State and the House of Representatives*."<sup>143</sup>

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139. 13 ANNALS OF CONG. at 377.

140. *Id.* at 376.

141. *Id.* at 103. Also see the comment of Maryland Republican Senator Samuel Smith. "[T]he election of the Executive should be in the people, or as nearly as was possible, consistent with public order and security to the right of suffrage." *Id.* at 120.

142. See Part VI.C (2021).

143. *Id.* at 183 (emphasis added).

## 2. *Avoiding Elector Subversion*

Even Federalists acknowledged that Article II's original method of choosing the president "was pregnant with mischief," as Massachusetts Federalist Timothy Pickering told the Senate.<sup>144</sup> In 1796 the South Carolina legislature had chosen a slate of eight renegade electors committed to voting for Jefferson and Pinckney.<sup>145</sup> Without a robust response by Federalist electors in the north sloughing off votes from Pinckney, the South Carolinian would have been elected president.<sup>146</sup> Aaron Burr was rumored to have been up to some similar form of mischief in the New England states before that year's election.<sup>147</sup> One Federalist had even suggested that in 1796 Thomas Jefferson was so bothered by the prospect of Adams' election that the Virginian would instruct some of his electors to cast their second electoral vote for Thomas Pinckney.<sup>148</sup>

By the time the Eighth Congress convened in 1803 rumors abounded that in 1800 Aaron Burr had tried to steal the presidency in the Electoral College *after the electors had been chosen*. The first rumor suggested that Burr had tried to lure one of his own party's electors to be an *en passant sloughing* elector by not voting for Jefferson.<sup>149</sup> The second suggested that he had tried to persuade one or two of the opponent party's electors to be *subversive sloughing electors* by voting for Burr rather than Adams' running mate Charles Cotesworth Pinckney.<sup>150</sup> Burr and the Federalists might successfully connive at something in the upcoming election.<sup>151</sup>

The threat posed by an *en passant sloughing elector* from the winning ticket's party could be addressed with party discipline. Pick electors who could not be lured into sloughing off their vote for their own winning party's intended presidential candidate as Burr had almost lured Anthony Lispenard. The threat posed by *subversive sloughing electors* from the losing party could be handled, but there might be undesirable consequences. The twenty *coordinated sloughing* northern Federalist electors who cast their second vote for someone other than Adams's running mate Thomas Pinckney in 1796 had denied Thomas Pinckney the presidency. However, that came at the cost of also denying Pinckney the vice presidency and electing the losing party's presidential candidate, Thomas Jefferson, as vice president instead.

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144. *Id.* at 196.

145. *See supra* text accompanying note 74.

146. *See supra* text accompanying notes 74–76.

147. *See supra* text accompanying note 77.

148. *See supra* text accompanying note 81. As noted above, this claim is undoubtedly apocryphal. Nevertheless, such a rumor was in circulation and could serve as a warning of the potential mischief lurking in the absence of designation.

149. *See supra* text accompanying note 89.

150. *See supra* text accompanying notes 90–91.

151. For Treasury Secretary Gallatin's letter to Thomas Jefferson *see supra* text accompanying note 98.

Now that the Jeffersonians were in power they wanted to make sure that the parties' roles would not be reversed and a Federalist would not be elected vice president alongside a Republican president. Republican supporters of designation did not shy away from making this concern clear. South Carolina's Pierce Butler told his Senate colleagues

if you do not alter the Constitution, the people called Federalists will send a Vice President into that chair[.]<sup>152</sup>

Tennessee Senator William Cocke expressed the same sentiments.

[T]he object of our amendment was to prevent a Federal Vice President being elected. ... for himself he would avow that he was actuated by a strenuous wish to prevent a Federal Vice President being elected to that Chair.<sup>153</sup>

Ultimately, John Taylor of Caroline grounded the concern on democratic principles.

[O]ne object of this amendment is to bestow upon the majority a power to elect a Vice President.<sup>154</sup>

During the House debates George Campbell twice repeated Taylor's argument.<sup>155</sup>

Not surprisingly, Federalist opponents of designation acknowledged the mischief incipient in the absence of designation. Connecticut Senator Uriah Tracy recognized that if Burr had received even one electoral vote from some Federalist eastern state he would have been elected president by the Electoral College.<sup>156</sup> Tracy also acknowledged the Republicans' interest in thwarting the possibility of a Federalist vice president serving alongside a Republican president.<sup>157</sup> So did Timothy Pickering.<sup>158</sup>

No Federalist voted for the Twelfth Amendment in either house of Congress. With the Eighth Congress having given no consideration to the Federalist proposal to require elector election by district, elector subversion was the only way for the Federalists to hope to hold on to some power in the Executive branch, even if the seat of that meager amount of power was the vice presidency. With Republican Pierce Butler joining nine Federalists to vote nay, the Senate barely approved the Twelfth Amendment by a vote of

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152. 13 ANNALS OF CONG. 87 (1803).

153. *Id.* at 98.

154. *Id.* at 186.

155. *Id.* at 720, 721.

156. 13 ANNALS OF CONG. 171 (1803).

157. *Id.* at 178.

158. *Id.* at 196.



twenty-two to ten.<sup>159</sup> In the House Nathaniel Macon had to come down out of the speaker's chair to provide the crucial eighty-fourth vote in favor of the amendment, exactly enough to overcome the forty-two nay votes that resulted when six Republicans crossed party lines to join with all thirty-six Federalists voting nay.<sup>160</sup>

In early January Thomas Jefferson received word of Pennsylvania's ratification from Governor Thomas McKean.<sup>161</sup> Jefferson responded

[T]hat great opposition is and will be made by federalists to this amendment is certain. [T]hey know that if it prevails, neither a Presid[en]t or Vice President can ever be made but by the fair vote of the majority of the nation, of which they are not. [T]hat either their opposition to the principle of discrimination now, or their advocacy of it formerly was on party, not moral motives, they cannot deny. [C]onsequently they fix for themselves the place in the scale of moral rectitude to which they are entitled.<sup>162</sup>

On September 24, 1804, Secretary of State James Madison sent a circular letter to the governors of the several states informing them of the amendment's ratification.<sup>163</sup> With designation in place "the election for the ensuing 4. years seems to present nothing formidable" as Jefferson had written to Elbridge Gerry earlier in the year.<sup>164</sup> As New York Secretary of State Thomas Tillotson wrote to James Madison

It is become necessary from the proceedings in Congress that Mr. Burr should change his pursuits. In

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159. 13 ANNALS OF CONG. 209 (1803). Butler had expressed concern that reducing from five to three the number of candidates for the House contingent election would put the small states at a disadvantage relative to the large states. *Id.* at 86. On Nov. 24 he voted in favor of five, and against three. *Id.* at 124.

160. 13 ANNALS OF CONG. 776 (1803). Phanuel Bishop and William Eustis from Massachusetts and Virginia's Matthew Clay had voted in favor of designation in 1802. Eustis objected to the provision allowing the vice president to act as president if the House failed to make a choice by March 4. *Id.* at 773. Pennsylvania's William Hoge spoke out in favor of designation but against the other provisions that had been added to the amendment. *Id.* at 727. The two remaining Republican nay voters were from Massachusetts: Joseph Varnum and Ebenezer Seaver. Each of them had voted for sending only three candidates to the House and for designation by itself. *Id.* at 683, 684. Presumably, they objected to the provision allowing the vice president to act as president.

161. Letter from McKean to Jefferson (Jan. 8, 1804), in 42 JEFFERSON PAPERS, *supra* note 23, at 243.

162. Letter from Jefferson to McKean (Jan. 17, 1804). *Id.* at 307.

163. 8 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 84 (Mary A. Hackett et al. eds., 1987) [hereinafter MADISON PAPERS, SECRETARY OF STATE SERIES].

164. Letter from Jefferson to Gerry (March 4, 1804), in 42 JEFFERSON PAPERS, *supra* note 23, at 580.

consequence of the Electors designating the Characters they vote for as President and Vice President, the field for management and intrigue is very much circumscribed. Neither Mr. Burr or his adherents can well afford to sink down to their former indigence.<sup>165</sup>

A running mate could no longer usurp the Chief Magistrate's chair thanks to a few strategically motivated anomalous electors (or the House of Representatives).<sup>166</sup>

### 3. *The Eighth Congress's Understanding of the Role of Electors*

In 1796 Alexander Hamilton's machinations almost put John Adams's running mate Thomas Pinckney into the Chief Magistrate's chair. Only the sloughing responses of northern Federalists who voted for someone other than Pinckney prevented this, but in the process they elected Thomas Jefferson vice president. The Federalists in Congress responded by proposing designation amendments. The election of 1800 demonstrated the two-fold value of designation. By designating electoral votes by office, designation inhibited the subversion Hamilton tried to effect in 1796 and Burr may have tried to effect in 1800 that would have elected a vice presidential candidate president in the Electoral College. Designation also prevented the House of Representatives from inverting the results and electing the vice presidential candidate president as it almost did in 1801. Congress never attempted to address either of these problems with an amendment binding electors to their pledges. In the absence of designation, binding would have condemned elections to be resolved in the House of Representatives, forcing exposure to inversion. If combined with designation, binding added little value. Designation by itself solved the twin problems of subversion and inversion.

#### a) *Acknowledging an Elector's Right of Choice*

In addition to designation the Twelfth Amendment added the following provisions.<sup>167</sup>

1. If no one receives the presidential electoral votes of a majority of the electors appointed it reduces from five to three the number of

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165. Letter from Tillotson to Madison (Dec. 20, 1803), in 6 MADISON PAPERS, SECRETARY OF STATE SERIES, *supra* note 163, at 189.

166. Mike Pence received 305 electoral votes in 2016, one more than Donald Trump. Pence was elected vice president; Trump president. 163 CONG. REC. H190 (2017).

167. In its opinion the Court twice ignores all but the first sentence of the Twelfth Amendment. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2320, 2324 (2020).

candidates that can be considered by the House of Representatives in the contingent election.<sup>168</sup>

2. Prior to the Twelfth Amendment vice presidential election by the Electoral College did not require a majority vote. Article II gave no quorum requirement for the Senate contingent election and left the requirement for a majority at best unclear. The new amendment explicitly added a majority requirement for election by the Electoral College as well as quorum and election threshold requirements for Senate election of the vice president.<sup>169</sup>
3. The election of the vice president no longer waits on the election of the president. By making vice presidential election (in the Electoral College or the Senate) a process parallel to election of the president (in the Electoral College or the House), the Twelfth Amendment made it possible for the new vice president to act as president in case the House failed to elect a new president by March 4.<sup>170</sup>
4. Finally, since the Twelfth Amendment made it clear that electors were casting their ballots for two distinct offices the new amendment explicitly specified the qualifications for the vice presidency, making them coincide with the qualifications for the presidency.<sup>171</sup>

Our concern is with the third of these provisions and its expression of “the right of choice” of the president “devolve[ing]” on the House.

And if the House of Representatives shall not choose a President *whenever the right of choice shall devolve upon them*, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.<sup>172</sup>

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168. U.S. CONST. amend. XII. (*Compare* “and if no person have a majority, then from the five highest on the list”, *with* “and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.”).

169. *Id.* (*Compare* “But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.”, *with* “The person having the greatest number of votes as Vice-President, shall be Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.”).

170. *Id.* (“And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.”).

171. *Id.* (“But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

172. U.S. CONST. amend. XII (emphasis added).

The Eighth Congress waited until December 1, 1803, the penultimate day of Senate debate, to address the issue of who would act as president in case the House failed to make a choice by Inauguration Day. Federalist Timothy Pickering of Massachusetts made the initial proposal.

But if within twenty-four hours no election shall have taken place, then the President shall be chosen by law.<sup>173</sup>

This was a matter of grave concern to Pickering. “This amendment he offered as a remedy by which we could avoid that civil war threatened on a former occasion.”<sup>174</sup>

Pickering soon recognized that he need not leave the entire matter to *law*. He could fill at least some of the gap with a *constitutional* provision.

And in case the House of Representatives shall not, within \_\_\_\_ days, effect the choice in manner aforesaid, and there be a Vice President duly elected, the said Vice President shall discharge the powers and duties of the President of the United States. But if the office of Vice President be also vacant, then the said powers and duties of President of the United States shall be discharged by such person as Congress may by law direct, until a new election shall be had, in manner already prescribed by law.<sup>175</sup>

At this point the text was devoid of any mention of a *right of choice*. According to this text the House merely “*effect[s]* the choice.”

Virginia Republican John Taylor of Caroline brought the text much closer to its final form with a proposal he made at the end of the day.

That whenever the *right of choosing* a President shall *devolve* upon the House of Representatives, the Vice President shall act as President, in case they fail to make such choice, in like manner as in case of the death or resignation of the President.<sup>176</sup>

According to this text the *right of choice* to choose a president does not suddenly appear *de novo* in the House. It *devolves* upon the House *from* its former locus in the Electoral College. This is no different than the *transfer* of power from the president to the vice president specified in the original Presidential Succession Clause.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge

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173. 13 ANNALS OF CONG. 128 (1803).

174. *Id.*

175. *Id.* at 132.

176. *Id.* at 136 (emphasis added).

the powers and duties of the said office, the same shall *devolve* on the Vice President, ...<sup>177</sup>

When the next day's session began Taylor tightened up his text just a bit more to make it clear when the vice president would commence acting as president.

And if the House of Representatives shall not choose a President whenever the *right of choice* shall *devolve* upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other Constitutional disability of the President.<sup>178</sup>

Massachusetts Federalist John Quincy Adams objected that Taylor's proposal did not reach the case of a failure to elect either a president or a vice president.<sup>179</sup> After the Senate approved Taylor's text Adams made a proposal for additional text.

And if there shall be no Vice President duly elected within ten days after the fourth of March, then the power and duties of the President of the United States shall be discharged by such person as shall be by law invested with that power, until such time as a new election by Electors shall take place.<sup>180</sup>

Maryland Republican Robert Wright noted that in the ten day interregnum allowed by the Adams proposal there simply was no president in office to call Congress into session to draft such a law.<sup>181</sup>

Pickering made one last proposal eliminating the ten day waiting period after Adams's proposal went down to defeat without division.<sup>182</sup>

But if on the 4th of March the office of Vice President shall be vacant, then the powers which *devolve* by the Constitution on the Vice President, shall be exercised by such persons as the law shall direct, until a new election.<sup>183</sup>

Senator Hillhouse urged his colleagues to approve Pickering's proposal but that proved to be of no avail as the Senate rejected the Pickering proposal without a division.<sup>184</sup>

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177. U.S. CONST. art. II, § 1, cl. 6 (emphasis added) (now superseded by U.S. CONST. amend. XXV, §§ 1, 3).

178. S. JOURNAL, 8th Cong., 1st Sess. 319 (1803) (emphasis added). The *Annals of Congress* records this slightly differently. It uses the numeric form "4<sup>th</sup>" rather than "fourth" and omits the word "the" in "as in the case." See 13 ANNALS OF CONG. 136 (1803).

179. *Id.*

180. *Id.* at 137.

181. *Id.* at 138.

182. S. JOURNAL, 8th Cong., 1st Sess. 139 (1803).

183. *Id.* (emphasis added).

184. *Id.*

While the Pickering proposal was under consideration the draft text of the amendment read as follows.

And if the House of Representatives shall not choose a President whenever the *right of choice* shall *devolve* upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other Constitutional disability of the President.

But if on the [four]th of March the office of Vice President shall be vacant, then the powers which *devolve* by the Constitution on the Vice President, shall be exercised by such persons as the law shall direct, until a new election.

In this version we see clearly that the *right* to choose a president *devolves*, i.e. transfers, from the Electoral College to the House in certain circumstances, just as the powers of the presidency *devolve*, i.e. transfer, from the president to the vice president in certain circumstances.

The functional content of the final text would have been unchanged if Congress had not included the *right of choice* text (as shown with strikethrough).

And if the House of Representatives shall not choose a President ~~whenever the right of choice shall devolve upon them~~, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other Constitutional disability of the President.

But Congress did include the *right of choice* text, contrary to the *Chiafalo* Court's claim that "the Twelfth Amendment ... give[s] electors themselves no rights."<sup>185</sup> The functional aspects of this text drew criticism in Congress,<sup>186</sup> but there was no comment on the *right of choice* text itself.<sup>187</sup> That would have to wait for the Twentieth Amendment.<sup>188</sup>

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185. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020).

186. For the comments of Representatives James Elliott of Vermont, Calvin Goddard of Connecticut, William Hoge of Pennsylvania, John Dennis of Maryland, and William Eustis of Massachusetts *see* respectively 13 ANNALS OF CONG. 668, 717, 727, 753–55, 773 (1803). Elliott, Goddard, and Dennis were Federalists. Hoge and Eustis were two of just six Republicans to vote against approval of the Twelfth Amendment. *Id.* at 776. Eustis had voted for a bare designation amendment in the Seventh Congress. 11 ANNALS OF CONG. 1293 (1802).

187. For the Senate debates of Dec. 1–2 *see id.* at 126–210. For the House debates of Dec. 6–8 *see id.* at 646–776.

188. *See* Part VI.A (2021).

b) *The Role of Electors in an Election to Fill a Double Vacancy*

At no point during the Twelfth Amendment debates in the Seventh or Eighth Congress did any member of Congress suggest that electors be legally bound to cast their electoral votes as pledged.<sup>189</sup> Under the presidential election law in place at the time there were circumstances in which electors might very well have to exercise their judgment after running as unpledged.

Section 9 of the Presidential Election and Succession Act of 1792 specified that if the office of president and vice president both became vacant, then the President *pro tempore* of the Senate would “act as President of the United States until the disability be removed or a President shall be elected.”<sup>190</sup> Section 10 of the Act provided that if the double vacancy occurred at any time during the first two years, seven months of a presidential term, then

the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state, ... specifying that electors of President of the United States shall be appointed or chosen in the several states within the thirty-four days preceding the first Wednesday in December then next ensuing: *Provided*, There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday in December;

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189. Indeed, Delaware’s Federalist Senator Samuel White thought that designation would increase the likelihood of attempts to influence how electors cast their electoral votes.

The United States are now divided, and will probably continue so, into two great political parties; whenever, under this amendment, a Presidential election shall come round, and the four rival candidates be proposed, two of them only will be voted for as President—one of these two must be the man; the chances in favor of each will be equal. *Will not this increased probability of success afford more than double the inducement to those candidates, and their friends, to tamper with the Electors, to exercise intrigue, bribery, and corruption*, as in an election upon the present plan, where the whole four would be voted for alike, where the chances against each are as three to one, and it is totally uncertain which of the gentlemen may succeed to the high office?

13 ANNALS OF CONG. 141 (1803).

Such corruption is, of course, impossible if the Twelfth Amendment supposes electors are bound to pledges.

Given the Federalists’ unanimous self-interested opposition to designation, all of their arguments against it must be read with skepticism.

190. Presidential Succession Act of 1792, ch. 8, 1 Stat. 239, 240 (repealed 1886).

and if the term for which the President and Vice President last in office were elected shall not expire on the third day of March next ensuing, ... the electors shall be appointed or chosen within the thirty-four days preceding the first Wednesday in December in the year next ensuing... and the electors shall meet and give their votes on the said first Wednesday in December...<sup>191</sup>

Section 12 of the Act specified that the president and vice president so chosen would be inaugurated on the fourth day of March following their election and serve full four year terms.<sup>192</sup>

On this schedule a double vacancy occurring as late as very early October would result in electors being chosen in the thirty-four days leading up to the first Wednesday in December. It is hard to imagine parties picking tickets and choosing *pledged* electors if such a sudden *and unexpected* election took place.<sup>193</sup> It is much more likely that, as Publius-Hamilton had suggested in Federalist No. 68

[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice.<sup>194</sup>

The idea of such a snap election with electors possibly exercising their own judgment was not lost on the Eighth Congress at it expressed its concern over the House contingent election in general and in particular with the provision that the vice president act as president in case the House failed to make a choice. New Hampshire Federalist Senator James Hillhouse suggested that in case of election by the House “there should be provision made for the choice so made, to remain only *until such period as the Electors could be called again*.”<sup>195</sup> Pennsylvania Republican Representative Andrew Gregg, who, like Hillhouse, had served in the Congress that enacted the Presidential Election and Succession Act in 1792, suggested a similar solution when the House failed to elect a president and the vice president acted as president.

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191. *Id.* at 240–41.

192. *Id.* at 241.

193. In a letter to Washington dated July 5, 1796 Alexander Hamilton suggested that the president not announce his intention to retire until “*Two months* before the time for the Meeting of the Electors.” Hamilton continued “This will be sufficient. *The parties will in the mean time electioneer conditionally*[.]” 20 HAMILTON PAPERS, *supra* note 44, at 247 (emphasis added).

194. THE FEDERALIST, *supra* note 42, at 458.

195. 13 ANNALS OF CONG. 132 (1803) (emphasis added).



I could have wished that this provision had extended further, and directed the vacancy to be supplied by an extraordinary election within one year from the commencement of such vacancy.<sup>196</sup>

Connecticut Federalist Representative Calvin Goddard objected to the proposal to allow the vice president to act as president.<sup>197</sup> He asked

But why not provide for a new election *immediately* by Electors, and designate some officer of the Government to administer in the meantime?<sup>198</sup>

To repeat, at no point during the Twelfth Amendment debates in the Seventh or Eighth Congress did any member of Congress suggest that electors were legally bound to cast their electoral votes as pledged.

#### V.EVIDENCE FROM THE REMAINDER OF THE NINETEENTH CENTURY

Over the remainder of the nineteenth century there was ample opportunity for historical actors to comment on the role of presidential electors following the ratification of the Twelfth Amendment. These comments arose in three different fora. Part A reviews proposals made in Congress that would have enhanced or eliminated the role of presidential electors. Part B reviews relevant comments made by great constitutional authorities during the nineteenth century. Part C reviews the absence of comment made by anyone in Congress as it accepted anomalously cast electoral votes, many of them for vice president, over the course of the nineteenth century. Part D considers the 1836 electoral vote as it might have played out if William Henry Harrison had carried Pennsylvania, thereby denying Martin Van Buren an Electoral College majority. Had that happened, James Madison's recognition that electors might switch to a second choice in a three (or more) way race might have swung the election to Harrison.

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196. *Id.* at 703 (emphasis added). Hillhouse and Gregg were two of ten members of the Eighth Congress who had also served in the Congress that had enacted the Presidential Election and Succession Act in 1792. Kentuckian John Brown, the Senate President *pro tempore*, had served in the Second Congress as did Eighth Senate members Abraham Baldwin (Georgia), Stephen Bradley (Vermont), Jonathan Dayton (New Jersey), and Thomas Sumter (South Carolina) had served in the Second Congress. Nathaniel Macon, Speaker of the Eighth House, had also served in the Second Congress as had Eighth House members William Findley (Pennsylvania) and Daniel Hiester (Maryland).

197. *Id.* at 717.

198. *Id.* at 718 (emphasis added). Many amendments proposed in the first third of the nineteenth century included provisions for sending the choice back to the electors in case the Electoral College initially failed to elect a president by a majority vote. *See infra* Part V.A.

A. EVIDENCE FROM PROPOSED AMENDMENTS CALLING FOR CHANGES TO THE ELECTORAL COLLEGE

Over the course of the nineteenth century, Congress teemed with proposals to modify the method of choosing the president and vice president.<sup>199</sup> None of them retained the office of elector while adding text legally binding electors to cast their electoral votes as pledged. Proposals for direct popular election of the president and vice president eliminated any role for presidential electors.<sup>200</sup> So did proposals to allocate fractional electoral votes (to at least three places to the right of the decimal point).<sup>201</sup>

Of more interest are proposals that could have retained presidential electors but chose to eliminate them. Surely such proposals would have been unnecessary if electors were legally bound to vote as pledged. Some of these proposals were made on a standalone basis.<sup>202</sup> Others were combined with proposals to require the states to choose all of their electors by popular vote on a statewide, winner take all basis.<sup>203</sup> Still others were combined with proposals to require the states to choose all (or all but two) of their electors by popular vote by district.<sup>204</sup>

Two members of the House made explicit their objections to presidential electors as they made their proposals. In 1826 South Carolina Representative George McDuffie told his colleagues “*I do not believe the Electors to be of any possible utility in the system, and can perceive considerable objections to retaining them even thus partially.*”<sup>205</sup> Two decades later Kentucky Whig Presely Ewing proposed a district plan

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199. One commentator counts 224 proposals over the course of the Constitution’s first century. NEAL R. PEIRCE, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 151 (1968) citing HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 80–114 (1897).

200. For the first such proposal *see* the proposal made by Kentucky Representative Joseph Underwood on March 23, 1842. CONG. GLOBE, 27th Cong., 1st Sess. 350. For a more complete list *see* AMES, *supra* note 199, at 87–89.

201. For the first such proposal *see* the one made by Alabama Representative Gabriel Moore on Feb. 4, 1828. HOUSE J., 20th Cong., 1st Sess. 246. For a more complete list *see* AMES, *supra* note 199, at 94–98.

202. Louisiana Democratic Representative John Slidell’s made the first standalone proposal. CONG. GLOBE, 28th Cong., 2nd Sess. 41. Dec. 17, 1844.

203. New York Representative Erastus Root twice made such a proposal in the Twenty-Second Congress. 8 CONG. DEB. 1964 (1832); 9 CONG. DEB. 940 (1833). A decade later New York Democratic Representative Amasa Dean offered a proposal that would have allowed states to eliminate or retain the office of elector. CONG. GLOBE, 28th Cong., 1st Sess. 144. Jan. 15, 1844.

204. Missouri Senator Thomas Hart Benton made the first such proposal. 41 ANNALS OF CONG. 32 (1823).

205. 2 CONG. DEB. 1365 (1826) (emphasis added). McDuffie was clearly very willing to change his mind on the value of electors. *See infra* note 207 and text accompanying note 209.

without the intervention of electoral agents, *upon whom, at present, there rests no other than a moral obligation – no political or legal obligation – to carry out faithfully the will of their constituents.*<sup>206</sup>

The proposals just reviewed eliminated presidential electors, others expanded their roles.

As the 1824 election approached many members of Congress anticipated that it would ultimately be thrown to the House of Representatives. Recognizing how unpalatable the House contingent election would be, at least four members of Congress presented proposals that would have sent an election back to the electors for a second round of electoral votes in case no one received a majority of the electoral vote in the first round.

For our purposes, the most significant proposal came from Virginia Senator John Taylor of Caroline.

if it shall appear that no person has received the votes of a majority of the Electors appointed, the President of the United States shall, forthwith, by proclamation, and also by notifications to the Executives of each State, publish the number of votes given to each person as President, *whereupon the said Electors shall again meet* on the \_\_\_ day of \_\_\_ next succeeding their first meeting, and vote for one of the two persons as President who shall have received at their first meeting the greatest number of votes for that office; or if it should happen that more persons than two should have received the greatest number, and also an equal number of votes, the said Electors shall vote for one of them as President.<sup>207</sup>

Taylor had played an active role in the Eighth Senate's debates crafting the Twelfth Amendment.<sup>208</sup>

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206. CONG. GLOBE, 33rd Cong., 1st Sess. 283, Jan. 30, 1854 (emphasis added).

207. 41 ANNALS OF CONG. 45 (1823) (emphasis added). The other four proposals were made by South Carolina Senator Robert Hayne, *id.* at 41, Dec. 16, 1823; South Carolina Representative George McDuffie, *id.* at 864–66, Dec. 22, 1823; New York Senator Martin Van Buren, *id.* at 74, Dec. 29, 1823; and Louisiana Representative Edward Livingston, *id.* at 1179–81, Jan. 24, 1824. The proposals made by McDuffie, Van Buren, and Livingston also required that electors be chosen by popular vote by district. The proposals from Taylor and Hayne proposed no change to the method of elector selection. In 1838 Virginia Representative Alexander Dromgoole made a proposal that in case no one received a majority of the electoral vote the election be sent back to “the said electors, or such others as may be appointed in their stead by each or any of the States.” CONG. GLOBE, 25th Cong., 2nd Sess. 306, Feb. 19, 1838.

208. See *supra* text accompanying notes 143 and 154.

In an 1824 letter to George McDuffie, the sponsor of one such proposal, James Madison wrote “The expedient of resorting to a second meeting of the Presidential Electors, in order to diminish the risk of a final resort to Congress, has certainly much to recommend it[,]” and then went on to suggest that a contingent election by the two houses of Congress voting per capita might be better.<sup>209</sup>

Two years later Madison wrote much more positively in favor of the role of electors when commenting on Thomas Hart Benton’s proposed amendment that would have required states to choose all of their electors by district while remaining silent on the role of electors.<sup>210</sup>

The amendment reported by the Committee of the Senate is very ably prepared & recommended. But I think there are advantages in the intervention of Electors, and inconveniences in a direct vote by the people, which are not sufficiently adverted to in the Report.

One advantage of Electors, is, that as Candidates, & still more as competitors, personal [sic] known in the Districts, they will call forth the greater attention of the people. Another advantage is, that altho’ generally the mere mouths of their Constituents, they may be intentionally left sometimes to their own judgement, guided by further information that may be acquired by them: *And finally, what is of material importance, they will be able, when ascertaining, which may not be till a late hour, that the first choice of their Constituents is utterly hopeless, to substitute, in their electoral vote the name known to be their second choice.*<sup>211</sup>

These are hardly the comments of someone holding the view that the Twelfth Amendment legally binds electors to their pledges.

Nearly twenty years later Benton made a slightly different proposal. It would have eliminated the Office of Elector and required each of a state’s electoral votes to be determined by popular vote by district.<sup>212</sup> Benton’s proposal received no attention in the Twenty-Eighth Congress.

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209. Madison to George McDuffie, Jan. 3, 1824, in 3 PAPERS OF JAMES MADISON, RETIREMENT SERIES 196 (David B. Mattern et al. eds.) [hereinafter MADISON PAPERS, RETIREMENT SERIES].

210. For Benton’s proposal see S. JOURNAL, 19th Cong., 1st Sess. (1825).

211. Madison to Robert Taylor, Jan. 30, 1826, in 3 MADISON PAPERS, RETIREMENT SERIES, *supra*, note 209, at 677–78 (emphasis added).

212. CONG. GLOBE, 28th Cong., 1st Sess. 687. (1844).

## B. EVIDENCE FROM THE CLASSIC COMMENTARIES

Madison shared authorship of the first great commentary on the Constitution, before its ratification and before the addition of the Twelfth Amendment. Over the course of the nineteenth century some of the great commentaries on the Constitution took note of the Twelfth Amendment.

Kesavan and Paulsen identify seven canonical treatises on the Constitution from before the Civil War, “works [that] are simply good constitutional commentary by members who were or nearly were members of the political community within which the Constitution was adopted.”<sup>213</sup> Story’s *Commentaries on the Constitution of the United States* is the most widely cited of these classics.<sup>214</sup>

Justice Story began his account of the presidential selection process with language echoing the *right of choice* acknowledgement in the Twelfth Amendment.

One motive, which induced a change of the choice of the president from the national legislature, unquestionably was, to have the sense of the people operate in the choice of the person, to whom so important a trust was confided. This would be accomplished much more perfectly by committing *the right of choice* to persons, selected for that sole purpose at the particular conjuncture, instead of persons, selected for the general purposes of legislation.<sup>215</sup>

Story’s use of the phrase “the right of choice” in this context merits comparison with his use of the phrase in other contexts.

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213. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1178 (2003). The seven are: James Wilson, *Lectures on Law* (1791); St. George Tucker, *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* (1803); William Rawle, *A View of the Constitution of the United States of America* (1825); Chancellor James Kent, *Commentaries on American Law* (1826); Justice Joseph Story, *Commentaries on the Constitution of the United States* (1833); William Alexander Duer, *Course of Lectures on the Constitutional Jurisprudence of the United States* (1843); John C. Calhoun, *A Disquisition on Government and a Discourse on the Constitution and Government of the United States* (1851).

214. Kesavan & Paulsen, *supra* note 213, at 1178.

215. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 1450 (1833) (emphasis added). Story continued with language similar to that used by Publius-Hamilton in Federalist No. 68. “A small number of persons, selected by their fellow citizens from the general mass for this special object, would be most likely to possess the information, and discernment, and independence, essential for the proper discharge of the duty.” *Id.* § 1451.

With respect to the direct election of House members, Story wrote

But this fundamental principle of an immediate choice by the people, however important, would alone be insufficient for the public security, if *the right of choice* had not many auxiliary guards and accompaniments. It was indispensable, secondly, to provide for the qualifications of the electors.<sup>216</sup>

Congress, on the other hand, was another matter. In some context it had a genuine right of choice, but not in all contexts. Explaining the latitude given to Congress by the Necessary and Proper Clause, Story argued

If the legislature possesses a *right of choice* as to the means, who can limit that choice? Who is appointed an umpire, or arbiter in cases, where a discretion is confided to a government? The very idea of such a controlling authority in the exercise of its powers is a virtual denial of the supremacy of the government in regard to its powers. It repeals the supremacy of the national government, proclaimed in the constitution.<sup>217</sup>

In contrast to Congress's *right of choice* when crafting legislation, the Senate had no such right of choice in the appointment process.<sup>218</sup> That body

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216. *Id.* § 576 (emphasis added). Story employed this phrase two more times in the context of direct election of the House.

"Congress might prescribe the times of [House] election so unreasonably, as to prevent the attendance of the electors; or the place at so inconvenient a distance from the body of the electors, as to prevent a due exercise of *the right of choice*." *Id.* § 813 (emphasis added). In the context of rotten boroughs in Great Britain Story wrote:

in others, very populous cities have no *right to choose* any representatives at all; in some cases, a select body, forming a very small part of the inhabitants, has the exclusive *right of choice*; in others, non-residents can control the whole election; in some places a half million of inhabitants possess *the right to choose* no more representatives, than are assigned to the most insignificant borough, with scarcely an inhabitant to point out its local limits.

*Id.* § 584 (emphasis added).

217. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 1242 (1833). ("The senate has but a slight participation in the appointments to office. The president is to nominate and appoint; and the senate are called upon merely to confirm, or reject the nomination. They have *no right of choice*; and therefore must feel less solicitude, as to the individual, who is appointed.") (emphasis added).

218. *Id.* § 750 (emphasis added).

could only approve or reject a presidential nominee. It lacked the right to choose a nominee itself.

After explaining the original process for presidential election, Story turned to the impact of the Twelfth Amendment.

The issue of the contest of 1801 gave rise to an amendment of the constitution *in several respects, materially changing the mode of election of president*. In the first place it provides, that the ballots of the electors shall be separately given for president and vice-president, instead of one ballot for two persons, as president; ...<sup>219</sup>

At no point did Story suggest that the elector's role was materially changed. When he used the phrase "right of choice" he meant to imply a genuine right to exercise discretion well beyond the mere Aye or Nay vote on a presidential nomination. Someone possessed of a right of choice was performing more than a mere ministerial function.

James Wilson's 1791 *Lectures on Law* predates the Twelfth Amendment. St. George Tucker's *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* appeared the year the Twelfth Amendment was composed by Congress. Neither of them contains commentary on the Twelfth Amendment and any impact it might have had on the roles of electors. Similarly, neither James Kent's *Commentaries on American Law*<sup>220</sup> nor John C. Calhoun's *A Disquisition on Government and a Discourse on the Constitution and Government of the United States*<sup>221</sup> comment on the impact of the Twelfth Amendment.

William Rawle and William Alexander Duer are the two other antebellum authorities who do comment on the role of electors. In the first, 1825 edition of his *View of the Constitution*, Rawle wrote

the electors *do not assemble* in their several states  
*for a free exercise of their own judgments*, but for

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219. *Id.* § 1460 (emphasis added).

220. Kent titles Lecture XIII "Of the President" roughly half of which focuses on the mode of appointment. JAMES KENT, COMMENTARIES ON AMERICAN LAW 254-63 (O. Halsted 1826). He writes:

The constitution ... confid[es] the power of election to a small number of select individuals in each state, chosen only a few days before the election, and solely for that purpose. ... These electors assemble in separate and distantly detached bodies, and they are constituted in a manner best calculated to preserve them free from all inducements to disorder, bias, or corruption.

*Id.* at 261-62.

221. For Calhoun's most focused comments on presidential election see JOHN A. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 224, 369-71 (R. K. Crallé ed., Steam Power 1851)..

the purpose of electing the particular candidate who happens to be preferred by the predominant political party. *In some instances the principles on which they are chosen are so far forgotten, that the electors publicly pledge themselves to vote for a particular individual, and thus the whole foundation of this elaborate system is destroyed.*<sup>222</sup>

In the second, 1829 edition Rawle added the underlined phrase in a revised version of the text just presented.

the electors *do not assemble* in their several states *for a free exercise of their own judgments*, but for the purpose of electing the particular candidate who happens to be preferred by the predominant political party *which has chosen those electors. In some instances the principles on which they are chosen are so far forgotten, that the electors publicly pledge themselves to vote for a particular individual, and thus the whole foundation of this elaborate system is destroyed.*<sup>223</sup>

He also added the following text a few pages earlier to make it clear that the compulsion felt by the electors was political and not legal: “The election is to be by ballot, the mode of proceeding best calculated *to secure a freedom of choice.*”<sup>224</sup>

Duer expressed a similar view in his *Lectures*.

Experience, however, has proved that the electors do not, in fact, assemble for a strictly free exercise of their own judgments, but for the purpose of sanctioning the choice of a particular candidate, previously designated by their party leaders. In some instances, the principles on which they are constituted have been so far forgotten, that the individual opinion of the electors has submitted to the dictation of those by whom he was chosen; and in others the electors have even pledged themselves beforehand to vote for a candidate prescribed to them by the

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222. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 51 (H. C. Carey & I. Lea 1825) (emphasis added).

223. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 57–58 (Phillip Nicklin 2d, 1829) (emphasis added).

224. *Id.* at 53 (emphasis added).



managers of their party; and thus the whole foundation of the elaborate theory on which this part of the Constitution was built has been subverted in practice.<sup>225</sup>

At the end of the nineteenth century Thomas Cooley took a similar view.

The theory of the Constitution is that there shall be chosen by each State a certain number of its citizens, enjoying the general confidence of the people, *who shall independently cast their suffrages for President and Vice President of the United States, according to the dictates of their individual judgments.* This theory was followed in the first three presidential elections, but from that time it fell into practical disfavor, and now not only is the theory obsolete, *but it would be thought in the highest degree dishonorable if an Elector were to act upon it.* In practice, the persons to be voted for are selected by popular conventions, in advance of the choice of Electors, and *these officers act as mere automata in registering the will of those who selected them.*<sup>226</sup>

Three of the great nineteenth century constitutional commentaries recognized electors to be bound by political compulsion. None recognized any legal compulsion.

#### C. EVIDENCE FROM ELECTORAL VOTES ANOMALOUSLY CAST IN THE NINETEENTH CENTURY

Following the ratification of the Twelfth Amendment, only four nineteenth century elections saw electors anomalously cast their votes *for president*.<sup>227</sup> Ten saw electors anomalously cast their votes *for vice president*.

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225. WILLIAM ALEXANDER DUER, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES: DELIVERED ANNUALLY IN COLUMBIA COLLEGE, NEW-YORK 96 (Harper 1843).

226. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 161 (Little, Brown, & Company 3d ed. 1898).

227. In 1808 New York's legislature chose the state's nineteen electors. Their electoral votes deserve a brief explanation. Thirteen cast their electoral votes for James Madison for president and George Clinton for vice president. Three electors put Clinton's name of their presidential ballot and Madison's on their vice presidential ballot. Three more voted for Clinton for president and James Monroe for vice president. Kaminski describes these apparently anomalous electoral votes as "a face-saving gesture for both Clinton and the legislature" following Clinton's very lukewarm campaign for the presidency. KAMINSKI, *supra* note 52, at 288.

Thanks to the sometimes thin historical record it is not always possible to classify these anomalous electors precisely. What matters is that their electoral votes were cast anomalously and Congress paid no attention as it tallied these electoral votes.<sup>228</sup> We begin with the well known election of 1872 when Horace Greeley's sudden death threw the whole Twelfth Amendment process out of kilter.<sup>229</sup>

1. *Electoral Votes Cast Anomalously Because of the Death of the Candidate*

Greeley, the Liberal Republican candidate, was alive on November 5, 1872, when he and his running mate, B. Gratz Brown, won the popular vote in six states entitled to a total of sixty-six electors. He died on November 29, 1872, five days before the day on which the electors cast their electoral votes.

The Twelfth Amendment commands the electors to "name in their ballots the *person* voted for as President, and in distinct ballots the person voted for as Vice-President."<sup>230</sup> When the electors met to cast their ballots, Greeley was no longer a person, so he could not be named in the electors' ballots.<sup>231</sup> Nevertheless, three Georgia electors cast their presidential electoral votes for him. When the two houses of Congress met in joint convention to tally the electoral vote, Massachusetts Republican Representative George Frisbee Hoar objected that these three electoral votes "cannot be counted, because the person for whom they purport to have been cast was dead at the time of the assembling of the electors in that State."<sup>232</sup> Following the twenty-second joint rule, the two chambers immediately separated to debate and vote on whether to count these three votes. The Senate voted 44-19 to accept them,<sup>233</sup> but the House voted 101-99 to reject them.<sup>234</sup> Without the concurrence of both houses to accept the electoral votes they were rejected.<sup>235</sup> *This is the*

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228. For a survey of congressional debates questioning the legitimacy of electoral votes see Vasan Kesavan, *Is The Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1654, 1678-94 (2002).

229. William Howard Taft's vice president and 1912 running mate James Sherman died on October 30, 1912, six days before the general election. The Taft ticket reduced the mass of the constitutional conundrum significantly by winning only two states having a total of eight electors. These eight electors cast the vice presidential electoral votes for Nicholas Murray Butler, President of Columbia University. See 49 CONG. REC. 3027 (1913).

230. U.S. CONST. amend. XII (emphasis added).

231. U.S. CONST. amend. XIV, §2. Section 2 of the recently ratified Fourteenth Amendment begins "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state ..." Greeley would not have been counted if a census had been held on Dec. 4, 1872 since he was no longer a person.

232. CONG. GLOBE, 42nd Cong., 2nd Sess. 1296 (1873).

233. *Id.* at 1287.

234. *Id.* at 1298.

235. *Id.* at 1299.

*only case in which Congress rejected electoral votes because of the name on the ballot, a case in which the electors had voted for someone to whom they had been pledged!*

If the Liberal Republican electors could not vote for Greeley for president because he was dead, for whom could they cast their electoral vote for president? Eighteen cast their electoral votes for president for Greeley's running mate, former Missouri Governor and Senator B. Gratz Brown, and someone other than Brown for vice president. Forty-five Liberal Republican electors cast their electoral vote for someone other than Brown (or Greeley) for president. Forty-four of them dutifully cast their vice presidential electoral vote for Brown, one did not.<sup>236</sup>

That elector came from Missouri which had fifteen electors. It gave Brown eight presidential votes and six vice presidential votes. Missouri's certificate had the good sense to include the following clarification:

And it is hereby further certified that none of said electors who voted for B. Gratz Brown for President voted for him for Vice President.<sup>237</sup>

That was enough for Wisconsin Republican Senator Matthew Carpenter to withdraw a threatened objection to counting Missouri's electoral votes, presumably because as many as six Missouri electors *might* have cast electoral votes for a Missourian for president and a Missourian – the same one – for vice president.<sup>238</sup>

Indiana Republican Senator Oliver Morton attempted to make a somewhat similar objection to the electoral votes from Georgia.

[I]n the State of Georgia the certificate shows that two votes were cast for Mr. Jenkins, a citizen of the State of Georgia, for President, and five votes for Mr. Colquitt, a citizen of the State of Georgia, for Vice President, which is in contravention of the twelfth article of amendment to the Constitution[.]<sup>239</sup>

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236. Indiana Democratic Senator Thomas Hendricks received forty-two votes for president, former Georgia Governor Charles Jenkins received two (from Georgia), and Supreme Court Justice David Davis one (from Missouri). Brown received a total of forty-seven electoral votes for vice president including, presumably, the votes of the three Georgia electors who had cast ballots for Greeley for president. If he had received the vice presidential electoral votes of all forty-five electors who did not vote for him for president he would have a total of forty-eight. For the final electoral vote *see id.* at 1305.

237. CONG. GLOBE, 42nd Cong., 2nd Sess. 1300 (1872).

238. *Id.* Six Missouri electors might have voted for Brown for both offices but none *must have* voted for Brown for both offices.

239. *Id.* at 1299.

Vice President Schuyler Colfax ruled Morton's objection out of order. It had come too late.<sup>240</sup>

Congress also scrutinized the electoral votes from Texas, Mississippi, Arkansas, and Louisiana.<sup>241</sup> The Greeley-Brown ticket carried Texas. Its eight electors cast their electoral votes for Thomas Hendricks for president and Gratz Brown for vice president. The electoral votes from Texas drew the attention of Congress because its certificate lacked the governor's signature and four of the electors originally chosen filled vacancies created when the other four electors originally chosen failed to appear. Congress was able to accept the electoral votes from Texas when it learned that state law required a majority of the electors *present* to fill any vacancies.<sup>242</sup>

The Forty-Second Congress raised objections to the electoral votes returned from six of the thirty-seven states. None of the objections concerned electoral votes necessarily cast anomalously as a result of the death of Horace Greeley, not even the one by the elector from Missouri who did not cast an electoral vote for running mate Gratz Brown for either of the top two offices.<sup>243</sup>

## 2. *Presidential Electoral Votes Cast Anomalously for Reasons Other Than Candidate Death*

We now turn to the three nineteenth century elections in which electors anomalously cast electoral votes for president without compulsion.

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240. *Id.* at 1300. Once again, two Georgia electors *might* have cast electoral votes for Jenkins and Colquitt, but with eight electors, not counting the three who attempted to vote for Greeley, there were more than enough to avoid concluding that two actually did vote that way.

241. Illinois Republican Lyman Trumbull objected to counting Mississippi's electoral votes "for the reason that it does not appear from the certificate of said electors that they voted by ballot." *Id.* at 1298. They were accepted. CONG. GLOBE, 42nd Cong., 2nd Sess. 1288, 1299. Louisiana Republican Senator J. Rodman West objected to counting his state's electoral vote because its certificate "was not made in pursuance of law." *Id.* at 1303. Louisiana Republican Representative Lionel Sheldon objected that the certificate was not properly signed and the vote not properly canvassed. *Id.* Matthew Carpenter objected that Louisiana lacked a government that was republican in form.

Arkansas Republican Senator Benjamin Rice objected that his state's electoral votes because "the persons certified ... as elected, were not elected as electors ...; and secondly, because the returns read by the tellers are not certified according to law." *Id.* Arkansas and Louisiana were poised to give their electoral votes to the Republican ticket of Ulysses Grant and Henry Wilson. Whatever the concerns might have been they were not about electors anomalously casting electoral votes.

242. *Id.* at 1289–91, 1300–01.

243. Three Greeley states escaped notice altogether. Maryland's eight electors each cast their electoral votes for Hendricks for president and Brown for vice president. Tennessee's twelve electors did the same as did eight of Kentucky's twelve electors, presumably. In Kentucky Brown received four electoral votes for president, former Kentucky Governor Thomas Bramelette received three electoral votes for vice president, and sitting Kentucky Senator Willis Machen received one electoral vote for the second office in the land.

In 1816 Maryland chose eleven electors from nine districts.<sup>244</sup> Federalists elector Thomas Ennalls won his district by a very narrow margin. Fellow Federalists William Beall and Littleton Dennis won their districts by massive margins.<sup>245</sup> When Maryland's electors met, each cast a blank ballot.<sup>246</sup> No one at the joint convention of Congress mentioned these abstentions.<sup>247</sup> In contrast, some energy was spent debating whether Indiana had become a state in time to participate in the election.<sup>248</sup>

Four years later New Hampshire's William Plumer, Sr. was the only elector not to vote for James Monroe for president. He voted for John Quincy Adams instead. Over the course of the nineteenth century a myth developed that Plumer had done this so that George Washington would remain the only president to have received an electoral vote from every elector casting one.<sup>249</sup> That was the myth.<sup>250</sup>

Plumer, a former New Hampshire senator and governor, had been nominated to be a Republican elector, pledged to vote for Monroe and his running mate Daniel Tompkins. His anomalously cast electoral vote had little to do with preserving the glory of George Washington. He simply thought that Monroe had been doing a bad job as president and that John Quincy Adams would be an improvement.<sup>251</sup> Plumer's electoral vote for Adams came as a surprise. The *Portsmouth Oracle* declared that "he would not have received

244. For the controlling statute see Act of Jan. 25, 1805, ch. XCVII, § III, 1805 Md. Laws 360 (reducing and regulating elections into the several Acts of Assembly). This statute remained in place until 1826. See Ryan Polk, *An Analysis of Laws relating to the Electoral College in Maryland*, ARCHIVES OF MD. ONLINE, <http://aomol.msa.maryland.gov/000001/000207/html/am207ap--1.html> [<https://perma.cc/UX5B-4FB5>].

245. *A New Nation Votes*, *supra* note 29, at <https://elections.lib.tufts.edu/catalog/tufts:md.presidentialelector8.1816> [<https://perma.cc/2CQG-TXLS>] <https://elections.lib.tufts.edu/catalog/tufts:md.presidentialelector1.1816> [<https://perma.cc/A58L-BP4J>], and <https://elections.lib.tufts.edu/catalog/tufts:md.presidentialelector9.1816> [<https://perma.cc/LHS6-8YZY>].

246. *A New Nation Votes*, *supra* note 29, at <https://elections.lib.tufts.edu/catalog/tufts:md.presidentialelector8.1816> [<https://perma.cc/2CQG-TXLS>] <https://elections.lib.tufts.edu/catalog/tufts:md.presidentialelector1.1816> [<https://perma.cc/A58L-BP4J>], and <https://elections.lib.tufts.edu/catalog/tufts:md.presidentialelector9.1816> [<https://perma.cc/LHS6-8YZY>].

247. For the congressional tally see 30 ANNALS OF CONG. 949 (1817).

248. *Id.* at 945–49.

249. The myth was most prominently presented by McMaster. See JOHN BACH MCMASTER, 4 A HISTORY OF THE PEOPLE OF THE UNITED STATES, FROM THE REVOLUTION TO THE CIVIL WAR 517–18 (D. Appleton & Co. 1895). Plumer's electoral vote for Adams would have been anomalous even if he had cast it that way to preserve Washington's unique place in the pantheon.

250. The myth was first punctured in 1916. C. O. Paullin, *The Electoral Vote for John Quincy Adams in 1820*, 21 AMER. HIST. REV. 318, 318–19 (1916).

251. Lynn W. Turner, *The Electoral Vote Against Monroe in 1820—An American Legend*, 42 MISS. VALLEY HIST. REV. 250, 253 (1955).

a hundred votes had his opposition to Monroe been anticipated.”<sup>252</sup> We have classified an elector such as Plumer a *statement-making* anomalous elector.<sup>253</sup>

When Congress met in joint convention the *Annals of Congress* records eighteen pages of debate on the issue of whether Missouri had become a state in time to participate in the election of 1820.<sup>254</sup> Not one comment was made about Plumer’s anomalously cast electoral vote.

Plumer’s son William Plumer, Jr. commented on his father’s anomalously cast vote.

Governor Plumer did not regard himself in this, more than in other acts of his life, as the tool of or the mere exponent of other men’s opinions. By the provisions of the Constitution, the people choose the Electors; and it is the duty of those Electors to choose the President.<sup>255</sup>

If any anomalous elector should have been familiar with the Eighth Congress’ understanding of the role of an elector it was William Plumer, Sr. He had served in that Congress as one of New Hampshire’s senators!<sup>256</sup>

At least two New York electors cast anomalous electoral votes for president in 1824. Following the election Henry Clay wrote to James Brown “*accident* alone prevented my return to the H. of R. and, as is generally now believed, my election.”<sup>257</sup> Clay’s first accident came in New York, a state in which the legislature chose the electors.<sup>258</sup> After some jousting, the legislature’s two chambers agreed on a set of twenty-five electors for John Quincy Adams, seven for Henry Clay, and four for William Crawford. Had Clay received seven electoral votes from New York and Crawford only four, the two of them would have ended up in a forty–forty tie in third place in the Electoral

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252. LYNN W. TURNER, *THE NINTH STATE: NEW HAMPSHIRE’S FORMATIVE YEARS* 334 (1983).

253. *See supra* text accompanying note 16.

254. 37 *ANNALS OF CONG.* 1147–65 (1821).

255. *LIFE OF WILLIAM PLUMER, BY HIS SON, WILLIAM PLUMER, JUNIOR. ED., WITH A SKETCH OF THE AUTHOR’S LIFE* 493 (A. P. Peabody ed., Boston, Phillips, Sampson and Company 1857).

256. Plumer was a Federalist when he was a senator. He voted against the Twelfth Amendment. 13 *ANNALS OF CONG.* 209 (1803). During the debates Plumer expressed concern about reducing the number of candidates passed to the House for the contingent election. *See id.* at 15, 27, 38, 154–55.

257. HENRY CLAY, 4 *THE PAPERS OF HENRY CLAY* 38 (James F. Hopkins ed.) [hereinafter *CLAY PAPERS*].

258. Earlier in the year Treasury Secretary William Crawford’s supporters in the New York Senate had beaten back an attempt to enact a law placing the selection of presidential electors in the hands of the voters. *See* THURLOW WEED, *AUTOBIOGRAPHY* in 1 *LIFE OF THURLOW WEED INCLUDING HIS AUTOBIOGRAPHY AND A MEMOIR EMBELLISHED WITH PORTRAITS AND OTHER ILLUSTRATIONS COMPLETE IN TWO VOLUMES* 105 (Harriet Weed ed., Boston, Houghton, Mifflin 1884).

College. But New York did not cast its electoral vote that way. When the electors met on December 1 two Clay electors were absent and replaced by Adams supporters. Although the replacement electors may not have been anomalous, a third Clay elector, who voted for Jackson, certainly was.<sup>259</sup> With an Adams elector anomalously voting for Crawford, the New York electoral vote was Adams twenty-six, Crawford five, Clay four, and Jackson one.

When Congress met to tally the electoral vote, no one had time to question these two electoral votes from New York. The Senate needed to withdraw, so that the Speaker of the House, Henry Clay, could preside over the House election of the president.<sup>260</sup>

3. *Vice Presidential Electoral Votes Cast Anomalously (for Reasons Other Than Candidate Death)*

Any Twelfth Amendment provision with respect to electoral votes anomalously cast for president must apply with equal force to electoral votes anomalously cast for vice president. Nevertheless, electoral votes anomalously cast for vice president have almost universally been overlooked in the Electoral College literature.<sup>261</sup> There were many more of them in the nineteenth century than there were electoral votes anomalously cast for president. In almost all of these cases, the historical record is exceptionally thin and many of these cases remain subjects for further research. A divided electoral vote for vice president in a state choosing its electors on a statewide basis is

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259. ROBERT V. REMINI, *MARTIN VAN BUREN AND THE MAKING OF THE DEMOCRATIC PARTY* 82 (1959). Remini writes that "It is futile to guess what took place during these two short weeks [leading up to the electors' vote]." Crawford's biographer Chase Mooney writes:

Probably no one will ever know exactly what happened, but there have been several speculations and accounts. Roger Skinner, writing to Van Buren on December 1, said John Taylor (who had been appointed to one of the vacancies) was active, as was Ambrose Spencer, in trying to secure six votes for Crawford. Hammond and others, according to Skinner, said the Adamsites had violated a pledge to give Clay eight votes in consideration of Clay's friends' support of the successful ticket. Jackson's friends had attended the meeting of the electors and had sought to effect a division of the votes between Jackson and Adams.

CHASE C. MOONEY, *WILLIAM H. CRAWFORD* 294–95 n.6 (1974).

260. For the electoral vote tally *see* 1 CONG. DEB. 526 (1825). For the entire meeting of the joint convention *see id.* at 525–26. For the House election of Adams *see id.* at 526–27.

261. Even a scholar as prominent as Larry Sabato gets this wrong when he writes "In all, nine faithless electors have defected since the inception of the Electoral College." LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY* 297 n.41 (2007).

often the best evidence of electors casting their vice presidential votes anomalously.

In 1812 New Hampshire chose all eight of its electors by statewide popular vote.<sup>262</sup> All eight of them voted for Federalist DeWitt Clinton for president. Seven of them cast their vice presidential electoral votes for Jared Ingersoll, Clinton's running mate. One of them cast his vice presidential electoral vote for James Madison's running mate, Elbridge Gerry, from neighboring Massachusetts.

Clinton also won the presidential electoral votes of all twenty-two Massachusetts electors. Twenty of them also voted for Ingersoll for vice president, but two voted for native son Gerry. In 1812 Massachusetts chose its electors from six multi-electoral districts.<sup>263</sup> The two electors who voted for Gerry might have been renegades, but they were most likely just ordinary faithless electors. When Congress tallied the electoral vote, no one objected to any of the anomalous votes for Gerry.<sup>264</sup>

Four years later Rufus King, the presidential candidate of the dying Federalist party, carried three states with a total of thirty-five electors. With one Delaware elector not voting, King received only thirty-four electoral votes. The thirty-four King electors scattered their vice presidential electoral votes among *four* persons in the three states he won. The twenty-two from Massachusetts all went to James Howard. The three electors voting in Delaware cast their electoral votes for Robert Goodloe Harper. In Connecticut the state legislature chose the nine electors.<sup>265</sup> Five of them cast their vice-presidential electoral votes for former Pennsylvania Senator James Ross. The other four cast their vice presidential electoral votes for Chief Justice John Marshall. The most charitable explanation possible is that the Federalist electors in Connecticut, and perhaps Massachusetts and Delaware, were unpledged with respect to their vice presidential vote. Whatever the case may be, no one commented when Congress tallied the electoral vote.<sup>266</sup>

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262. Philip J. Lampi, *New Hampshire 1812 Electoral College, A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC'Y, <https://elections.lib.tufts.edu/catalog/tufts:nh.electors.1812> [<https://perma.cc/3YB9-X2FP>].

263. Massachusetts General Court, *Resolve for Districting the Commonwealth for the Purpose of Choosing Electors of President and Vice President*, ACTS AND RESOLVES OF MASSACHUSETTS, 1812-1815 94 (Russell, Cutler & Co. 1815).

264. For the electoral vote tally *see* 25 ANNALS OF CONG. 1021 (1813). For the entire meeting of the joint convention *see id.* at 1020-21.

265. THOMAS DAY ET AL., *An Act Directing the Mode of Appointing Electors of President and Vice-President of the United States*, in 1 THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 256 (Hudson & Goodwin 1808).

266. For the electoral vote tally *see* 30 ANNALS OF CONG. 949 (1817). For the entire meeting of the joint convention *see id.* at 943-49.



The 1820 election is known for William Plumer's anomalously cast electoral vote for John Quincy Adams for president.<sup>267</sup> Plumer was undoubtedly the New Hampshire elector who gave his vice presidential electoral vote for Richard Rush rather than Daniel Tompkins, Monroe's vice president.<sup>268</sup> Although Monroe won every other electoral vote, Tompkins did not.

Delaware's legislature chose all four of its electors.<sup>269</sup> They all cast their vice presidential electoral votes for former representative and future senator Daniel Rodney, a native son. Maryland continued to choose its eleven electors from nine districts until 1826.<sup>270</sup> Although ten of them cast their vice presidential vote for Tompkins, one gave his to native son Robert Goodloe Harper. In 1820 Massachusetts' voters chose one elector from each of its thirteen House districts and two statewide.<sup>271</sup> Seven of the Monroe electors gave Tompkins their vice presidential votes. Eight of them gave their vice presidential votes to New Jersey's Richard Stockton.

No one commented on any of these electoral votes when Congress met to tally them. As noted above, Congress was too consumed with the question of whether or not Missouri had become a state in time to participate in the election of 1820.<sup>272</sup>

1824 gave us the one presidential election of the sort anticipated by George Mason at the Convention. The Electoral College would winnow down the field to three candidates (thanks to the Twelfth Amendment) and the House of Representatives would choose one of them.<sup>273</sup> In the early years of James Monroe's second term Secretary of War John Calhoun ran for the presidency.<sup>274</sup> When he recognized the impact of Andrew Jackson's whirlwind candidacy, the South Carolinian focused his efforts on the vice presidency<sup>275</sup> and coasted to the vice presidency winning 182 of the 261 electoral votes cast.

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267. See *supra* text accompanying notes 249-256.

268. For the electoral vote tally see 37 ANNALS OF CONG. 1154 (1821). For the entire meeting of the joint convention see *id.* at 1147-65.

269. *An ACT for the Appointment of Electors for the Election of a President and Vice-president of the United States*, in 3 LAWS OF THE STATE OF DELAWARE, FROM THE SECOND DAY OF JANUARY, ONE THOUSAND SEVEN HUNDRED AND NINETY-EIGHT, TO THE TWENTY-FIFTH DAY OF JANUARY, ONE THOUSAND EIGHT HUNDRED AND FIVE 143-44 (Bradford & Porter 1816) (repealed 1829).

270. See *supra* note 244.

271. Massachusetts General Court, *Resolve Regulating the Choice of Electors of President and Vice President of the United States*, ACTS AND RESOLVES OF MASSACHUSETTS, 1820 245 (Russell & Gardner 1820).

272. See *supra* text accompanying note 254.

273. For Mason's classic comment that the Electoral College would fail to elect a president nineteen times out of twenty see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 500 (Max Farrand ed., Yale rev. ed. 1937).

274. See DONALD RATCLIFFE, *THE ONE-PARTY PRESIDENTIAL CONTEST: ADAMS, JACKSON, AND 1824'S FIVE-HORSE RACE* 38-40, 42, 45-48, 110-112 (2015).

275. *Id.* at 128, 167-68.

None of the presidential candidates received the required majority of 131 and the presidential election went to the House of Representatives, which chose John Quincy Adams, rather than Andrew Jackson or William Crawford (or Henry Clay who finished fourth in the electoral vote for president).<sup>276</sup> In addition to the electoral votes they received for president, Jackson and Clay respectively received thirteen and two electoral votes for vice president.<sup>277</sup>

Jackson's thirteen vice presidential votes came from four states.

State	Presidential Electoral Votes				Vice Presidential Electoral Votes	
	Adams	Crawford	Jackson	Clay	Calhoun	Jackson
Connecticut	8					8
Maryland	3	1	7		10	1
Missouri				3		3
New Hampshire	8				7	1

**Table 4 - Andrew Jackson's 1824 Vice Presidential Votes**

Maryland and Missouri each chose their entire slate of electors by district and Jackson received votes in every one of these districts. He most likely received his vice presidential electoral vote in Maryland from Crawford elector James Sangston, who won the Eighth Electoral District on the Eastern Shore with 1,407 votes. Pro-Adams candidate Daniel Martin finished second with 1,216 votes. Pro-Jackson candidate Daniel Haddaway finished a distant third with a mere 75 votes.<sup>278</sup> Jackson finished second to Clay in all three of

276. For the electoral vote tally *see* 1 CONG. DEB. 526 (1825). For the entire meeting of the joint convention *see id.* at 525–26.

277. In addition, New York's Nathan Sanford received seven of his state's thirty-six electoral votes, probably from the electors chosen to vote for Henry Clay. Remini, *supra* note 259, at 76–77. Sanford also won seven of Kentucky's fourteen votes and all sixteen of Ohio's votes. Fellow New Yorker Martin Van Buren won the vice presidential electoral votes of all of Georgia's nine electors, all of whom cast their presidential ballots for William Crawford. All twenty-four Crawford electors in Virginia also cast their vice-presidential votes for North Carolina's Nathaniel Macon. Finally, one Adams elector in Rhode Island cast no electoral vote for vice president.

278. Philip J. Lampi, *Maryland 1824 Electoral College, District 8, A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC'Y, <https://elections.lib.tufts.edu/catalog/v405sb92k> [<https://perma.cc/9DRF-CDFS>]. For the complete set of popular vote returns for 1824 *see* Philip J. Lampi, *1824-1826 Electoral College, A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC'Y, [https://elections.lib.tufts.edu/?f%5Bof-fice\\_id\\_ssim%5D%5B%5D=ON056&range%5Bpub\\_date\\_facet\\_isim%5D%5Bbegin%5D=1824&range%5Bpub\\_date\\_facet\\_isim%5D%5Bend%5D=1826&search\\_field=dummy\\_range](https://elections.lib.tufts.edu/?f%5Bof-fice_id_ssim%5D%5B%5D=ON056&range%5Bpub_date_facet_isim%5D%5Bbegin%5D=1824&range%5Bpub_date_facet_isim%5D%5Bend%5D=1826&search_field=dummy_range) [<https://perma.cc/BWC6-KPV6>].

Missouri's electoral districts, including the third which he lost to Clay 327-317.<sup>279</sup>

In 1824 Connecticut<sup>280</sup> and New Hampshire<sup>281</sup> chose all of their electors by statewide popular vote. All eight Connecticut electors cast electoral votes for John Quincy Adams for president and Andrew Jackson for vice president. Jackson received only one of New Hampshire's eight electoral votes for vice president. John Calhoun received the other seven. All eight electors named John Quincy Adams on their presidential ballots.

These vice presidential electoral votes for Jackson would not have given him the presidency if they had been converted to presidential votes. That would have left him with 112 presidential electoral votes, still far short of the 131 needed for a majority. The vice presidential electoral votes for Jackson may be taken as little more than curiosities. The two vice presidential votes for Clay cannot be so construed. They might have cost him the presidency.

The two vice presidential votes for Clay came from Delaware, whose legislature chose its three electors.

For President		For Vice Pres.	
Crawford	2	Clay	2
Adams	1	Calhoun	1

**Table 5 - Delaware's Electoral Votes in 1824**

*Niles Weekly Register* initially reported that elector John Caldwell "is for Mr. Clay."<sup>282</sup> A week later it reported "Messrs. [Isaac] Tunnell and Caldwell are expected to vote for Mr. Crawford, though the latter was first said to

279. For the Missouri returns see Philip J. Lampi, *Missouri 1824-1826 Electoral College, A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC'Y, [https://elections.lib.tufts.edu/?f%5Bof-fice\\_id\\_ssim%5D%5B%5D=ON056&f%5Bstate\\_name\\_sim%5D%5B%5D=Missouri&range%5Bpub\\_date\\_facet\\_isim%5D%5Bbegin%5D=1824&range%5Bpub\\_date\\_facet\\_isim%5D%5Bend%5D=1826&search\\_field=dummy\\_range](https://elections.lib.tufts.edu/?f%5Bof-fice_id_ssim%5D%5B%5D=ON056&f%5Bstate_name_sim%5D%5B%5D=Missouri&range%5Bpub_date_facet_isim%5D%5Bbegin%5D=1824&range%5Bpub_date_facet_isim%5D%5Bend%5D=1826&search_field=dummy_range) [https://perma.cc/XU9M-6FAE].

280. *An Act Providing for the Appointment of Electors of President and Vice-President of the United States*, in PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT, PASSED SUBSEQUENT TO THE REVISION OF 1821 41-42 (Charles Babcock 1824). For the election results see Philip J. Lampi, *Connecticut 1824 Electoral College, A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC'Y, <https://elections.lib.tufts.edu/catalog/3197xm38c> [https://perma.cc/HBW3-GSYN].

281. *An Act Directing the Mode of Choosing and Appointing Electors of President and Vice President of the United States*, in 9 LAWS OF NEW HAMPSHIRE: SECOND CONSTITUTIONAL PERIOD, 1821-1828 269 (1921). For the election results see Philip J. Lampi, *New Hampshire 1824 Electoral College, A New Nation Votes: American Election Returns 1787-1825*, AM. ANTIQUARIAN SOC'Y, <https://elections.lib.tufts.edu/catalog/mg74qn75g> [https://perma.cc/3GA8-TCPZ].

282. *Presidential Election*, NILES WEEKLY REGISTER, Nov. 13, 1824, at 162, <https://babel.hathitrust.org/cgi/pt?id=njp.32101064077074&view=1up&seq=180> [https://perma.cc/9GTP-V2RZ].

be friendly to Mr. Clay.”<sup>283</sup> Had Caldwell cast his presidential electoral vote for Clay rather than Crawford, he would have cut the gap between their electoral vote totals in half to Crawford forty, Clay thirty-eight. If Tunnell had also voted that way Crawford and Clay would have ended up in a third-place tie with thirty-nine presidential electoral votes each. Both of their names would have gone to the House of Representatives<sup>284</sup> where, as Speaker, he was in good position to win the contingent election.

If the Twelfth Amendment had done anything to bind electors, it certainly appears to have had little impact on the *vice presidential* electoral votes cast for Clay and Jackson in 1824, especially the three cast for Jackson in Missouri. Of course, no one in Congress made any mention of these anomalous votes. There was much more important work that needed to be addressed on one end of the capital: the election of the president by the House of Representatives.<sup>285</sup>

Four years later Andrew Jackson had his revenge and handily defeated John Quincy Adams in the Electoral College by a vote of 178 to 83.<sup>286</sup> With Adams having chosen Treasury Secretary Richard Rush to be his running mate, Vice President John Calhoun became Andrew Jackson’s running mate.<sup>287</sup> Thanks to lingering resentment against the South Carolinian from William Crawford’s stalwarts in his home state of Georgia, seven of that state’s nine electors,<sup>288</sup> all chosen by the electorate on a statewide basis,<sup>289</sup> cast their vice presidential votes for South Carolina Senator William Smith.

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283. *Presidential Election*, NILES WEEKLY REGISTER, Nov. 20, 1824, at 187, <https://babel.hathitrust.org/cgi/pt?id=njp.32101064077074&view=1up&seq=205> [<https://perma.cc/JJ6B-EMLM>].

284. In what is a leading candidate for the most opaque text in the Constitution, the Twelfth Amendment states, in part, “if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.” U.S. CONST. amend. XII. Surely, the names of the candidates in a third-place tie would all go to the House. For additional problematic outcomes see Tillman, *Reliable Historical Source*, *supra* note 10, at 608 n. 29; (discussing odd possibilities, such as four-way ties, two-way ties for third place, etc., creating difficulties and conundrums where the Twelfth Amendment prescribes sending only the top three candidates to the House for a contingency election); *id.* at 609 n.30 (noting similar difficulties extend to Senate contingency elections for VP, where there are no readily identifiable top two candidates for VP in the electoral college because of three-way tie, etc.).

285. For the contingent election see 1 CONG. DEB. 527 (1825).

286. For the entire meeting of the joint convention see 5 CONG. DEB. 350–51 (1829).

287. LYNN HUDSON PARSONS, *THE BIRTH OF MODERN POLITICS: ANDREW JACKSON, JOHN QUINCY ADAMS, AND THE ELECTION OF 1828* 157, 171 (2009).

288. *Id.* at 181.

289. *An Act to Prescribe the Mode of Choosing the Electors of President and Vice President of the United States to Which This State is Entitled by the Constitution of the United States*, in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, PASSED AT MILLEDGEVILLE AT AN ANNUAL SESSION IN NOVEMBER AND DECEMBER 1824 58 (Camak & Ragland 1825).

If this caught the attention of anyone in Congress, no one bothered to say anything when the electoral vote was tallied.

The elections of 1832 and 1836 each saw a state elect a slate of electors on a statewide basis pledged to vote for their party's presidential candidate, but someone other than their party's vice-presidential candidate. After Vice President John Calhoun's falling out with President Andrew Jackson, Martin Van Buren replaced Calhoun as Jackson's running mate in 1832.<sup>290</sup> Van Buren was not universally backed by Jackson's supporters. In Pennsylvania the party chose a slate of electors pledged to cast their vice presidential electoral votes for native son Senator William Wilkins.<sup>291</sup> When Jackson carried Pennsylvania these renegade electors did just that and no one said a word when Congress tallied the electoral vote.<sup>292</sup>

In May 1835 the Democratic National Convention in Baltimore chose Martin Van Buren as its candidate for president and Senator Richard Mentor Johnson of Kentucky as his running mate.<sup>293</sup> Upset by the fact that Johnson had a mulatto common law wife and angered that its native son William Cabell Rives had not received the Democratic nomination for vice president, Virginia's Democratic party chose twenty-three electors pledged to Van Buren and William Smith, a former senator from South Carolina and now a state representative in Alabama.<sup>294</sup> When Virginia's electorate chose them, these renegade electors voted for Van Buren and Smith. Prior to the tally the Senate debated whether Michigan had become a state in time to participate in the election.<sup>295</sup> When the two chambers met in joint convention they agreed not to resolve that issue and reported the vote "[i]f the votes of Michigan be

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290. CHARLES M. WILTSE, JOHN C CALHOUN, NULLIFIER, 1829–1839, 139–42 (1949). For Calhoun's estrangement from Jackson see *id.* at 83–120.

291. SAMUEL RHEA GAMMON JR., THE PRESIDENTIAL CAMPAIGN OF 1832 97 (1922).

292. For the electoral vote tally see 9 CONG. DEB. 1723 (1833). For the entire meeting of the joint convention see *id.* at 1722–23.

293. Robert Bolt, *Vice President Richard M. Johnson of Kentucky: Hero of the Thames—Or the Great Amalgamator?*, 75 REG. KY. HIST. SOC'Y 191, 198 (1977).

294. *Id.* at 202; *Legislative Convention*, RICHMOND ENQUIRER, Jan. 16, 1836. Only one vote was cast in favor of Johnson, the remainder were cast for Smith. *Id.* Notice the nuance in a contemporary commentator's account.

The candidates had been selected by a convention of delegates from the different states, who were pledged to acquiesce in the decision. But Virginia, having presented one her own citizens as a candidate for the Vice-presidency, who was not preferred by the convention, did not hold herself bound by the pledge, and gave her electoral vote against Col. Johnson.

ASAHEL LANGWORTHY, A BIOGRAPHICAL SKETCH OF COL. RICHARD M. JOHNSON, OF KENTUCKY 43 (Saxton & Miles 1843).

295. 24 CONG. DEB. 698–701 (1837).

counted[.]” and “[i]f the votes of Michigan be not counted[.]”<sup>296</sup> No one questioned the vice-presidential votes from Virginia.<sup>297</sup> Without Virginia’s electoral votes Johnson captured the votes of exactly half of the 294 electors appointed (assuming Michigan, which voted for Van Buren and Johnson, was a state). For the only time in our history the vice-presidential election went to the Senate, which promptly chose Johnson.<sup>298</sup>

Johnson remained Van Buren’s running mate in 1840 almost by default. No one else wanted the spot on a ticket likely to be defeated. Although the Democratic Convention did not repudiate Johnson’s candidacy, it allowed state conventions to choose an alternate candidate.<sup>299</sup> That most likely explains why all eleven electors from South Carolina cast their presidential electoral votes for Van Buren and their vice-presidential electoral votes for former Virginia Governor and Senator Littleton Tazewell. It does not explain why Arthur Smith was the sole Virginia elector to cast his vice-presidential vote for future President James Polk (and his presidential vote for Van Buren) while the other twenty-two Virginia electors voted for Van Buren and Johnson.<sup>300</sup> Arthur Smith was likely nothing more than an ordinary faithless elector. When Congress met to tally the electoral vote, no one paid him any attention.<sup>301</sup>

With the exception of the anomalous electoral votes cast in 1872 as a result of Horace Greeley’s death,<sup>302</sup> there would be no more anomalously cast electoral votes until 1896. In that year’s election William Jennings Bryan accepted the presidential nominations of the Democratic and the Populist parties with different running mates, Democrat Arthur Sewall and Populist Thomas Watson.<sup>303</sup> Bryan’s strategy was to run a single slate of electors in as many states as possible, some pledged to himself and Sewall, others pledged to himself and Watson.<sup>304</sup> Kansas was not one of them. In that state

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296. *Id.* at 1656–57.

297. *Id.* For the entire meeting of the joint convention *see id.* at 1655–58.

298. *Id.* at 738–39.

299. Thomas Brown, *The Miscegenation of Richard Mentor Johnson as an Issue in the Election Campaign of 1835–1836*, 39 CIV. WAR HIST. 5, 27 (1993).

300. For the identification of Arthur Smith as the anomalous elector *see* 59 NILES NATIONAL REGISTER 217, Dec. 5, 1840, <https://babel.hathitrust.org/cgi/pt?id=hvd.32044106527153;view=1up;seq=241> [<https://perma.cc/T6TJ-6KTM>].

301. CONG. GLOBE, 26th Cong., 2nd Sess. 160 (Feb. 10, 1841). For the entire meeting of the joint convention *see id.* at 159–60.

302. *See supra* Part 0.

303. KARL ROVE, *THE TRIUMPH OF WILLIAM MCKINLEY: WHY THE ELECTION OF 1896 STILL MATTERS* 295–96, 302, 304–05 (2015). One commentator has described the Bryan campaign as “the pre-eminent fusion campaign of the late nineteenth century[.]” Peter H. Argersinger, “A Place on the Ballot”: *Fusion Politics and Antifusion Laws*, 85 AMER. HIST. REV. 287, 297–98 (1980).

304. WILLIAM JENNINGS BRYAN, *THE FIRST BATTLE. A STORY OF THE CAMPAIGN OF 1896* 293 (Chicago, W. B. Conkey Company 1896).

two separate Bryan lines appeared on the ballot with the same set of electors. The Democratic line identified the electors for Bryan and Sewall, the Populist line identified them for Bryan and Watson.<sup>305</sup> Knowing that the Bryan electors all intended to vote for Sewall rather than Watson, Kansas Populist Party chairman John Breidenthal brought suit to have Watson's name removed from the ballot. The Kansas Supreme Court ruled against Breidenthal and Watson seven days before the general election.

The allegation in the answer that the electors named in the certificate will not vote for Thomas E. Watson for vice president is clearly not one of fact, and the court should not be guided by the pretense of any one to the powers of divination. In such cases courts must deal with facts, not with prophecies. *Besides, if these electors should be chosen, they will be under no legal obligation to support Sewall, Watson, or any other person named by a political party, but they may vote for any eligible citizen of the United States. (Article 12 of amendments to the constitution of the United States.)* And neither the secretary of state nor any court may interfere with them in the performance of their duties.<sup>306</sup>

In addition to capturing single electors in California and Kentucky, Bryan swept twenty-two states with a total of 174 electors making a total of 176.<sup>307</sup> In Kansas and eleven other Bryan states the electors all voted for Arthur Sewall, Bryan's Democratic running mate. In the remaining ten Bryan states the electors split their vice-presidential votes between Sewall and Thomas Watson, Bryan's running mate on the Populist ticket. Sewall captured 149 of these 176 electoral votes, Watson the remaining twenty-seven.

In its coverage of the election results the *New York Times* indicated whether there was a fusion of Democratic and Populist electors for the Bryan ticket and if so, the numbers.<sup>308</sup> In nine of the ten Bryan states that split their vice-presidential votes, the split matches the split in the fusion ticket as reported by the *Times*.<sup>309</sup> Nevertheless, there were a handful of apparently anomalous electoral votes.

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305. Breidenthal v. Edwards, 46 P. 469 (Kan. 1896).

306. *Id.* at 470 (emphasis added).

307. For the tally see 29 CONG. REC. 1694, 1715 (1897).

308. *Election in All States*, NEW YORK TIMES, Nov. 4, 1896.

309. I am including South Dakota which the *Times* lists as having "No fusion on electors. Democrats and Populists have the same State ticket." *Id.* South Dakota's Bryan electors split their vice-presidential vote 2-2. I am also including Wyoming which split 2-1 but the *Times* fails to include the last three states in alphabetical order, West Virginia, Wisconsin, and Wyoming, in its account. I am also making allowance for the Silver Republican electors reported by the *Times* on the Bryan fusion tickets in Montana and South Dakota voting for Watson. *Id.*

The *Times* reported North Carolina as having five Democrats and six Populists on the Bryan ticket. When the electoral votes were tallied there were six for Democrat Sewall and five for Populist Watson. Additionally, there were two states that gave all of their votes to Democrat Sewall that the *Times* reported as having Bryan fusion tickets: Colorado and Idaho.<sup>310</sup>

No one commented on the split of the vice-presidential electors votes for the Bryan ticket when Congress met in joint convention to tally the electoral vote.<sup>311</sup> With the McKinley ticket defeating the Bryan tickets the vice-presidential votes for the latter were little more than an historical curiosity.

The great mystery is what Bryan and his running mates would have done if Bryan had defeated McKinley. Nationwide there were at least seventy-one Populist and six Silver Republican electors pledged to Bryan.<sup>312</sup> Would the Bryan forces have rallied their electors behind one of their vice-presidential candidates to avoid sending the vice-presidential election to the Republican controlled Senate? They could not have done that if the Twelfth Amendment bound electors to their vice-presidential pledges.

#### D. THE 1836 ELECTION REPLAYED WITH VAN BUREN LOSING PENNSYLVANIA TO HARRISON

In a January 30, 1826, letter to Robert Taylor, James Madison identified a significant advantage of electors able to act with discretion. “[T]hey will be able, when ascertaining, which may not be till a late hour, that the first choice of their Constituents is utterly hopeless, to substitute, in their electoral vote the name known to be their second choice.”<sup>313</sup> Ten years later Madison’s insight might have elected William Henry Harrison president if he had carried the state of Pennsylvania.

Over the course of Andrew Jackson’s second term as president, opposition to Old Hickory formed into what would soon become the Whig Party.<sup>314</sup> In particular, anti-Jackson forces united in their opposition to Old Hickory

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310. The *Times* reports Colorado’s ticket having two Democrats, one Populist, and one Silver Republican. It reports Idaho’s ticket as having two Democrats and one Populist. *Id.*

311. For the meeting of the joint convention see 29 CONG. REC. 1694–95, 1714–16 (1897).

312. In addition to Wyoming, the *Times* fails to include West Virginia and Wisconsin in its account. They cast six and twelve and twelve votes respectively for the McKinley-Hobart ticket. See *supra* note 308.

313. Madison to Robert Taylor, Jan. 30, 1826, in 3 MADISON PAPERS, RETIREMENT SERIES; 41 ANNALS OF CONG. 32, 677–78 (1823). For a more complete quotation see CONG. GLOBE, 33rd Cong., 1st Sess. 283 (1854).

314. A leading authority on the Whig Party explains “To call all who opposed the Jackson administration before 1836 [‘]Whigs[‘] or to speak of a [‘]Whig[‘] party in the mid-1830s is more a literary convenience than an accurate description of fact.” HOLT, *supra* note 12, at 39.



all but anointing Vice President Martin Van Buren as his successor.<sup>315</sup> But who would run against Van Buren? The opposition to Jackson could have united on Henry Clay,<sup>316</sup> but he had lost badly to Jackson in 1832 and had no desire to run again.<sup>317</sup>

With the likelihood that a national convention would do little more than exacerbate sectional tensions in their ranks, the anti-Jackson forces held conventions at the state level to nominate anti-Jackson candidates with the best chance of winning elector races at the state level.<sup>318</sup> As the Twenty-Fourth Congress convened in December 1835, pro-Jackson forces held a comfortable per capita majority in the House.<sup>319</sup> However, their forty-seat margin came entirely from New York (with thirty-one of forty seats), Virginia (sixteen of twenty-one), and Georgia (all nine seats). When measured by delegation, the critical dimension for a House election of the president, the pro-Jackson forces controlled eleven state delegations, the anti-Jackson forces ten, and three delegation were evenly split. A tactic of running multiple candidates aimed at winning individual states held out promise to the anti-Jackson coalition that it could deny Martin Van Buren an Electoral College majority and throw the election to the House of Representatives, which would choose someone other than Van Buren.<sup>320</sup>

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315. Letter from Henry Clay to Francis Brooke (Aug. 2, 1833), in 8 CLAY PAPERS, *supra* note 257, at 661.

316. WILLIAM H. SEWARD, AUTOBIOGRAPHY OF WILLIAM H. SEWARD, FROM 1801 TO 1834 147 (New York, D. Appleton & Co. 1877).

317. Letter from Clay to Brooke (May 30, 1833), in 8 CLAY PAPERS, *supra* note 257, at 645.

318. HOLT, *supra* note 12, at 39; McCormick, *supra* note 12, at 65; Sister Mary Raimonde Bartus, F.D.C., The Presidential Election of 1836 19 (1967) (unpublished Ph.D. dissertation Fordham University). This is the only book length treatment of this underappreciated election.

319. On Dec. 7, 1835 James K. Polk received 132 of 225 votes cast for speaker. *See* CONG. GLOBE, 24th Cong., 1st Sess. (1835). 3. For party affiliations *see* MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997: THE OFFICIAL RESULTS OF THE 1ST THROUGH 105TH CONGRESSES 109–12 (1998).

320. McCormick asserts:

There could be no national ‘Whig strategy’ because there was no national Whig party. The multiple candidacies that developed were unavoidable, especially in view of the peculiar concerns that motivated the opposition in the South. Talk of ‘throwing the election into the House’ represented not party strategy, but a scare tactic that originated with and was exploited by the Democrats in their attempt to undermine White’s support.

McCormick, *supra* note 12, at 70.

There may not have been a national Whig Party from which a strategy flowed outward to the states. Additionally, pro-Van Buren forces did raise alarms about the election being thrown to the House. Nevertheless, there is more than enough evidence from members of the anti-Jackson coalition recognizing tactics to throw the election to the House. For anti-Jacksonian recognition of this tactic *see* Letter from Jerome Watson Webb to Daniel Webster (April 9, 1835),

A slate of electors pledged to Daniel Webster appeared on the ballot in Massachusetts. Slates pledged to William Henry Harrison appeared in all but one of the other states that would remain loyal to the Union a quarter century later. The exception was Missouri. Tennessee Senator Hugh Lawson White's name appeared on the ballot in that state and in eight of the nine states that would secede from the Union. (The exception was South Carolina whose legislature chose the state's electors until the Civil War.)

The anti-Jackson force's prospects for defeating Van Buren in a House election faded over the course of 1836. Their seven-to-six control of the North Carolina delegation was immediately imperiled when pro-Jacksonian David Newland contested anti-Jacksonian James Graham's seven vote margin in the election in North Carolina's twelfth district.<sup>321</sup> During debate on the contest, North Carolina anti-Jacksonian Abraham Rencher recognized the importance of control by delegation. "The Van Buren party, who now constitute a majority in this House, must be anxious to obtain the casting vote from North Carolina, *should the election of President come to the House of Representatives.*"<sup>322</sup> On March 30, 1836, the House declared the seat vacant voting on almost straight party lines not to seat Graham and only choosing not to seat Newland when twenty-two pro-Jackson members joined all but

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in 4 THE PAPERS OF DANIEL WEBSTER SERIES 1, CORRESPONDENCE 42 (Charles M. Wiltse ed. 1980) [hereinafter WEBSTER PAPERS]; Letters from Henry Clay to John Bailhache (July 14, 1835), Clay to William Woods (July 16, 1835), Clay to James Heaton (July 18, 1835), Clay to Brooke (July 20, 1835), Clay to Brooke (July 24, 1835), Clay to Samuel L. Southward (July 31, 1835), in 8 CLAY PAPERS, *supra* note 257, at 784, 787–88, 788, 792, 793, 794. There are also many news items from the anti-Jackson press supporting the tactic of throwing the election to the House.

Perhaps the best evidence that the anti-Jackson forces welcomed sending the election to the House came from Supreme Court Justice John McLean who had been considered a possible anti-Jackson candidate. In August 1835, he wrote:

... since my name has been spoken of in reference to the presidency, I have given, my friends to understand in conversations, and by communications that have been published, that I would not be a party to a contest that shall be likely to lead to an election of chief magistrate by the house of representatives. As a matter of choice I would not take the office through the instrumentality of the house.

John McLean, *Withdrawal of Judge McLean*, NILES' WEEKLY REGISTER, Sept. 26, 1835, at 52.

321. For details of the Graham-Newland contest see CHESTER H. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789-1901 105 (1901); Asher C. Hinds, 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES: INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE 1013–17 (1907).

322. 12 CONG. DEB. 3879 (1836) (emphasis added).

one anti-Jackson members to deny him the seat by a 99-100 vote.<sup>323</sup> Graham would handily win his seat in the second session of the Twenty-Fourth Congress, but no one could know that until the election was held on August 11, 1836.<sup>324</sup>

While resolution of the North Carolina contested election moved that state out of the anti-Jackson column, the admissions of Arkansas and Michigan were expected to move these newly created states into the pro-Jackson column.<sup>325</sup> Not surprisingly, the final votes for both admissions fell largely on party lines.<sup>326</sup>

The fourth blow to the anti-Jacksonian's hopes of winning an election in the House came on July 31, 1836, when Mississippi anti-Jacksonian David Dickson died at the age of forty-two while Congress was adjourned. With Dickson's seat vacant Mississippi's only remaining representative was John Claiborne, a Jacksonian. That put Mississippi into the Van Buren column, at least until the vacancy was filled, and, indeed, for the remainder of the Twenty-Fourth Congress after Jacksonian Samuel Gholson was elected and sworn in.<sup>327</sup> Given the two states being admitted Dickson's death gave the pro-Jackson forces control of fourteen of twenty-six House delegations.<sup>328</sup>

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323. The vote to deny Graham a seat was 114-87. For the votes *see* 13 CONG. DEB. 3013-14 (1836). Richard Mentor Johnson, Van Buren's running mate, voted for giving the seat to Newland rather than Graham. Harrison's running mate Francis Granger voted just the opposite. *Id.*

324. Graham received 4,791 votes compared to 3,177 for Newland. *See* DUBIN, *supra* note 319, at 113.

325. Michigan had already elected pro-Jackson Isaac Crary to the House in October 1835. *See id.* For Arkansas *see* Letters from (soon to be elected) Representative Archibald Yell to James Polk (Dec. 28, 1835, Jan. 13, 1836, Feb. 2, 1836, Feb. 25, 1836, Aug. 23, 1836) in 3 CORRESPONDENCE OF JAMES K. POLK: 1835-1836 416, 435, 482, 517, 709 (Herbert Weaver & Kermit L. Hall eds.) [hereinafter POLK CORRESPONDENCE].

326. THOMAS HART BENTON, THIRTY YEARS' VIEW 637-38 (1854). The Arkansas bill passed the Senate 31-6 with support from all twenty-three pro-Jackson members and eight of fourteen anti-Jacksonians. CONG. GLOBE, 24th Cong., 1st Sess. 316 (1835). It passed the House 143-50 with thirty-eight of the nay votes coming from free-state anti-Jacksonians. *Id.* at 551.

The Michigan bill passed the Senate by a 24-17 vote with only Indiana anti-Jacksonian William Hendricks' aye vote preventing an absolutely straight party line vote. *Id.* at 316. In the House final passage of the Michigan bill was done without division. *Id.* at 558. The last procedural vote was 153-45 with all but two pro-Jackson members voting aye and anti-Jackson members voting 38-43 with somewhat more support from the slave states than the free states. *Id.* at 550.

327. For Gholson's election *see* DUBIN, *supra* note 319, at 113. For his seating *see* CONG. GLOBE, 24th Cong., 2nd Sess. 176. (Jan. 7, 1837).

328. Arkansas' admission was effective immediately. 5 Stat. 50 (1836). Michigan's admission was conditioned on it relinquishing its claim to the Toledo Strip. 5 Stat. 49-50 (1836). Without Michigan's admission the pro-Jackson forces would have controlled thirteen of twenty-five delegations on Dickson's death. For a history of the Toledo Strip *see* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 88-108 (1987).

Throwing the election to the House was no longer attractive to the anti-Van Buren coalition. It had to find another tactic.

The tactic that emerged among the anti-Van Buren coalition was to inform the electorate in many states that slates nominally pledged to Harrison or White would vote for either of the candidates. We have classified such electors as *bipotent*.<sup>329</sup>

The best evidence for this change in tactics comes from Virginia. A year before the election the pro-Whig *Lynchburg Virginian* ran a lengthy article urging the nominating of a slate of electors pledged to Hugh Lawson White.<sup>330</sup> Three months later a Whig Convention in Richmond obliged.<sup>331</sup> Three months after that the *Lynchburg Virginian* proposed different tactics. After noting that “concert of action among the opponents of Martin Van Buren is essential to ensure his defeat at the next Presidential Election,”<sup>332</sup> it offered a proposal to a Whig convention scheduled to meet at Staunton. “[A] common Electoral Ticket for White and Harrison, with the understanding that should the ticket succeed, *the vote of the electoral college shall be given to him who may receive the highest popular vote.*”<sup>333</sup> The Convention obliged.<sup>334</sup> An advertisement run in the *Lynchburg Virginian* just before the election promoted this tactic.

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329. See *supra* text accompanying note 28.


330. LYNCHBURG VIRGINIAN, Nov. 9, 1835, at 3.

331. Bartus, *supra* note 318, at 192 (citing the NATIONAL INTELLIGENCER, Feb. 17, 1836).

332. *Anti-Van Buren Meeting*, LYNCHBURG VIRGINIAN, May 16, 1836, at 4.

333. *Id.*

334. Bartus, *supra* note 318, at 198.



**LYNCHBURG VIRGINIAN.**

**Monday, October 31, 1836.**

*The People, Against Official Dictation.*  
**REPUBLICAN WHIG TICKET.**

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FOR PRESIDENT,  
 HUGH LAWSON WHITE, of *Tennessee*,  
 OR  
 WILLIAM HENRY HARRISON, of *Ohio*.  
 As the vote for the one or the other may prevent  
 an election by the House of Representatives,  
 and secure a choice by the PEOPLE.

FOR VICE-PRESIDENT,  
 That tried Republican Statesman and Patriot,  
 JOHN TYLER, of *Virginia*.

Figure 1 - Advertisement for Bipotent Harrison-White Slate of Electors in Virginia<sup>335</sup>

335. *The People Against Official Dictation Republican Whig Ticket*, LYNCHBURG VIRGINIAN, Oct. 31, 1836, at 2.

The Whigs slate lost in Virginia, perhaps *because of* the “double-shot-ted” ticket.<sup>336</sup> There is evidence of similar tactics pursued in Illinois and North Carolina,<sup>337</sup> two more states the Whigs lost.

Commentators had long anticipated Pennsylvania to be the tipping point state in 1836.<sup>338</sup> It would not disappoint.

Initial reports out of Pennsylvania were favorable to Harrison. As late as November 12 one Boston newspaper published an article about the Pennsylvania results titled, “Harrison Triumphant.”<sup>339</sup> On November 15 Daniel Webster did what many had expected he might do,<sup>340</sup> he released the slate of Massachusetts electors pledged to him.

*[I]t is my earnest wish that they should act with entire freedom from all considerations merely personal to myself; and that they should give the vote of the state in the manner they think most likely to be useful, in supporting the constitution and laws of the country, the union of the states, the perpetuity of our republican institutions, and the important interests of the whole country; and in maintaining the character of Massachusetts for integrity, honor, national patriotism, and fidelity to the constitution.*<sup>341</sup>

Webster was no ordinary presidential candidate bending the Constitution to his party's needs. As a recent Solicitor-General put it, “he is widely regarded as the greatest advocate ever to argue in an American court. . . . In the realm of advocacy, Webster doesn't merely sit in the Pantheon: He is Zeus

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336. OLIVER PERRY CHITWOOD, JOHN TYLER CHAMPION OF THE OLD SOUTH 150–51 (1939).

337. Charles Mansfield Thompson, *The Illinois Whigs Before 1846*, 4 UNIV. ILL. STUD. SOC. SCIS. 1, 55 (1915); William S. Hoffmann, *The Election of 1836 in North Carolina*, 32 N.C. HIST. REV. 31, 49–51 (1955).

338. Letter from Henry Clay to James Barbour (Aug. 2, 1835), in 8 CLAY PAPERS, *supra* note 257, at 795. Also see McCormick, *supra* note 12, at 63; Bartus, *supra* note 318, at 365.

339. *Election Returns*, [Boston] COLUMBIAN CENTINEL, Nov. 12, 1836, at 5. Pennsylvanians went to the polls on Friday, November 4. Bartus, *supra* note 318, at 372. For other favorable reports reaching Massachusetts see *Pennsylvania Elections*, BOSTON COURIER, Nov. 7, 1863, at 3; *The Elections*, SALEM GAZETTE, Nov. 8, at 2; *Good News from Pennsylvania*, [Boston] COLUMBIAN CENTINEL, Nov. 9, 1836, at 4.

340. A Boston newspaper wrote of the electors “You can have no doubt that should any unexpected emergency occur before they are called to its discharge, they will act as becomes independent and patriotic citizens.” *Boston Courier*, Sep. 22, 1836, at 1. Also see, for example, the letter from pro-Jackson New York Senator Silas Wright to James Polk (Oct. 3, 1836), in 3 POLK CORRESPONDENCE, *supra* note 325, at 751.

341. See 4 WEBSTER PAPERS, *supra* note 320, at 161–62 (letter published in the Dec. 17, 1836 NILES WEEKLY REGISTER) (emphasis added).

himself.”<sup>342</sup> The Boston newspapers published accounts of Van Buren’s victory in Pennsylvania the same day Webster released his electors.<sup>343</sup>

The fifteen Webster electors in Massachusetts could have voted for Harrison just as the fifteen White electors in Tennessee and eleven in Georgia could have done. But that would not have denied Van Buren an Electoral College majority of 170 out of 294.

Van Buren defeated Harrison by only 4,233 votes in Pennsylvania.<sup>344</sup> If the Keystone State had chosen thirty Harrison electors rather than Van Buren electors, then Van Buren would have won only 140 electors, eight short of a majority in the Electoral College. If the fifteen Webster electors in Massachusetts and twenty-six White electors in Tennessee and Georgia had also switched their votes to Harrison Old Tippecanoe would have received 143 electoral, five short of a majority. The election would have been decided by the eleven South Carolina electors chosen by their legislature on December 6, the day before the electors gave their votes.<sup>345</sup> *Bipotent anomalous electors almost decided the presidential election of 1836.*

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342. Seth P. Waxman, *In the Shadow of Daniel Webster: Arguing Appeals in the Twenty-First Century*, 3 J. APP. PRAC. & PROCESS 521, 522-523 (2001).

343. *The Election*, BOSTON COURIER, Nov. 15, 1836, at 2.

344. W. DEAN BURNHAM, *PRESIDENTIAL BALLOTS, 1836-1892* 704 (1955).

345. ACTS AND JOINT RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA 149 (S. Weir 1837).