

# Choosing the Pilot

PROPOSED AMENDMENTS TO THE PRESIDENTIAL SELECTION PROCESS, 1809-29

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“ON NO PROBLEM did the Convention of 1789 expend more time,” wrote Professor Corwin, “than that of devising a suitable method of choosing a President.”<sup>1</sup> Direct popular election was rejected out of fear that the people were incapable of making an informed choice,<sup>2</sup> election by Congress on the basis of concern for the independence of the Executive.<sup>3</sup> Article II, § 1 embodied the

ingenious solution: The President would be chosen by “electors,” selected in each state “in such manner as the legislature thereof shall direct.”<sup>4</sup>

In some respects Article II was quite precise about the electoral process. The electors were to “meet in their respective states” and cast two votes apiece, one of which should be for a candidate from some other state. They were to

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<sup>1</sup> Edward S. Corwin, *The President: Office and Powers* 50 (NYU, 1940).

<sup>2</sup> “[I]t would be as unnatural to refer the choice of a proper character for the Chief Magistrate to the people,” said George Mason at the Convention, “as it would, to refer a trial of colours to a blind man.” M. Farrand, 2 *The Records of the Federal Convention of 1787* at 31 (rev ed 1937) [hereinafter cited as Farrand].

<sup>3</sup> A President chosen by Congress, said Gouverneur Morris, would be “the mere creature of the Legisl[ature].” *Id.* at 29. See also *The Federalist* No 68 (Hamilton); J. Story, 3 *The Constitution of the United States* §§ 1450-51 (1833) [hereinafter cited as Story].

<sup>4</sup> To reinforce the President’s independence, the same section provided that no member of Congress and no “person holding an office of trust or profit under the United States” was eligible to serve as an elector. See 3 Story, § 1467.

transmit a signed and certified list of their votes to the President of the Senate, who was to open the envelopes “in the presence of the Senate and House of Representatives,” and the votes were then to be counted. The person receiving the most votes became President, if he had a majority; the runner-up became Vice-President. There were detailed provisions for an election by the House of Representatives in case of a tie or the failure of any candidate to receive a majority.

From the beginning there was dissatisfaction with these provisions, and repeated efforts were made to amend them.

In reaction to the election of 1800, which had illuminated perils lurking in the original provisions of Article II, the twelfth amendment had prescribed separate ballots for President and Vice-President.<sup>5</sup> Occasional malcontents made efforts to repeal that revision,<sup>6</sup> but they never got to first base. More important were the repeated attempts in Congress during the second and third decades of the nineteenth century to deal with other issues of presidential selection that the twelfth amendment had left unresolved.

It all started in 1813, when North Carolina Congressmen presented a memorial from their state legislature urging that the Constitution be amended to require that states be divided into districts of equal population and

that one elector be chosen by the voters of each district.<sup>7</sup> Article II, Representatives Israel Pickens and William Gaston later explained, left it to each state to decide how its electors should be chosen.<sup>8</sup> In some states they were elected by districts; in some they were elected by “general ticket,” i.e., at large; in others they were chosen by the legislature. By adopting a winner-take-all system, a large state could maximize its influence in the presidential election; a closely divided state that chose to create districts would cancel out most of its electoral votes.<sup>9</sup> Thus the existing provisions created an inexorable incentive to give all of a state’s electors to the candidate who received the most support.

But that, North Carolina argued, was undemocratic, for it effectively disfranchised the entire minority in every state. Worse, it meant that the votes of the minority were counted for the candidate they had opposed. The upshot was that a winner-take-all system made it all too easy to elect a President supported by fewer than half the voters; election by districts would make it more likely that the result of the election would reflect the popular will.<sup>10</sup>

This argument showed how far the prevailing understanding of the electoral process had evolved since the Constitution was adopted. By 1814 the electors were supposed to vote just

5 See David P. Currie, *The Twelfth Amendment*, in David E. Kyvig, ed, *Unintended Consequences of Constitutional Amendment 73* (Georgia, 2000).

6 E.g., 41 *Annals of Congress* 59-62 (Gales & Seaton, eds, 1823) (Sen. Mills) [hereinafter cited as *Annals*]; 2 *Register of Debates in Congress* 940 (Gales & Seaton, eds, 1826) (Rep. Phelps) [hereinafter cited as *Cong Deb*]; id at 1418 (Rep. Buchanan); id at 1462 (Rep. Hemphill).

7 25 *Annals* at 57 (Sen. Turner); id at 848 (Rep. Pickens). The Senate approved this proposal by a vote of 22-9; it disappeared in the House. See 25 *Annals* at 91, 1080, 1082.

8 See US Const, Art II, § 1: “Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled . . .”

9 See also 29 *Annals* at 219 (1816) (Sen. Macon): “A small State, unanimous for one candidate, might by general ticket counterbalance the weight of two large States voting by districts.” See also 33 *Annals* at 155 (1819) (Sen. Barbour).

10 26 *Annals* at 828-44 (1814). See also 30 *Annals* at 301-04 (1816) (Rep. Pickens); 29 *Annals* at 216 (1816) (Sen. King).

as their people told them to; in 1789 they had been expected to think for themselves – and for the voters too.<sup>11</sup> Senator Abner Lacock of Pennsylvania drew the logical conclusion: Since the electors were nothing but conduits for popular opinion, there was no need for them; the people should elect the President directly.<sup>12</sup>

The suggestion made perfect sense; as Lacock said, once it was clear the elector was not to exercise independent judgment, his election was nothing but an invitation to mischief.<sup>13</sup> Missouri Senator Thomas Hart Benton would make much of this argument in 1824,<sup>14</sup> but it was essentially a diversion. If electors were to be puppets, it didn't much matter whether we had them or not.<sup>15</sup>

The decisive question, not surprisingly, was

whose ox was being gored. The districting proposal was renewed almost annually throughout the period of this study.<sup>16</sup> Repeatedly approved by the Senate,<sup>17</sup> it lost regularly in the House.<sup>18</sup> For it was in the House that the larger states had power commensurate with their population; and districting was widely regarded as reducing their power by forbidding them to pool their votes.<sup>19</sup>

Indeed, said Virginia Senator John Taylor in 1823, the small states already had too much influence in Presidential elections. For if no candidate received a majority of the electoral votes, the House of Representatives would choose the President, and each state would cast an equal vote.<sup>20</sup> To redress this imbalance Taylor proposed that, if no candidate received a majority, the electors should meet again to

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11 Even Senator Barbour, who thought the existing provisions adequate, shared the new understanding: “The Elector ... is the mere organ of public sentiment, on a question in regard to which there is no sort of difficulty in ascertaining the will of the people.” 29 *Annals* at 218 (1816).

12 *Id.* at 220. See also *id.* at 223-24 (Sen. King).

13 29 *Annals* at 220.

14 41 *Annals* at 178:

[E]very Elector is pledged, before he is chosen, to give his vote according to the will of those who choose him. He is nothing but an agent, tied down to the execution of a precise trust. Every reason which induced the Convention to institute Electors has failed. They are no longer of any use, and may be dangerous to the liberties of the people.

See also W. Rawle, *A View of the Constitution* 57-58 (1829):

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.

15 It was true that eliminating the electors could reduce the risk that even a districting system might result in a minority President; as Representative Grosvenor said, that was a possibility whenever the President was not directly elected. 30 *Annals* at 351.

16 See, e.g., 29 *Annals* at 158 (1816) (Sen. Varnum); 41 *Annals* at 32, 100 (1823) (Sen. Benton); 2 *Cong Deb* at 1365 (1826) (Rep. McDuffie).

17 See 25 *Annals* at 91 (1813); 33 *Annals* at 207 (1819); 35 *Annals* at 277 (1820).

18 See, e.g., 25 *Annals* at 1080, 1082 (1813); 34 *Annals* at 1420 (1819); 36 *Annals* at 1912 (1820); 37 *Annals* at 967 (1821); 2A *Cong Deb* at 2004-05 (1826).

19 See, e.g., 30 *Annals* at 326 (1816) (Rep. Randolph) (insisting on his duty to oppose “any proposition which went in any degree to change the actual existing compromise of weight and influence in this Government, between the greater and smaller States”); 33 *Annals* at 154 (1819) (Sen. Barbour).

20 US Const, Art II, § 1 and Amend 12. This had been the procedure followed in 1800, when there was a tie in the electoral college between the Republican candidates for President and Vice-President. See David P. Currie, *The Constitution in Congress: The Federalist Period* 292-94 (Chicago, 1997). For discussion of early debates over the vexing question (see 3 USC § 5) who should resolve disputes concerning the choice of electors or the validity of their votes see *id.* at 288-91.

choose between the two who had obtained the greatest number of votes, with the House to intervene only if there was still no decision.<sup>21</sup> A few days later he amended this proposal to reduce the small-state advantage still further: If a second round of electoral voting proved insufficient, the House and Senate should decide in joint session, with each member having one vote.<sup>22</sup>

Mahlon Dickerson of little New Jersey, who had been a leading advocate of districting, offered a compromise. Electors should be chosen in districts of equal population; if the electors could not agree on a President, he should be chosen by a joint session of both Houses, as Taylor had just proposed.<sup>23</sup>

The small States will consider the adoption of that proposition as a relinquishment of a portion of their power. But ... [t]he advantage now possessed by the small States against the large, of choosing a President in the last resort, is not at all greater than that possessed by the large States, in choosing Electors. In both cases the power is calculated to defeat the will of a majority of the people of the United States. The safety of the Union demands a mutual concession of these powers.<sup>24</sup>

In short, both large and small states should yield something in the interest of the common good;<sup>25</sup> for “[t]he most important point is, that the President should be elected by a majority, and not a minority, of the people.”<sup>26</sup>

This was a statesmanlike proposal that would have gone a long way to democratize the procedure for electing the President. South Carolina’s George McDuffie in the House, and Martin Van Buren of mighty New York in the Senate, went one better by combining districting with Taylor’s proposal of a backup selection by the electors themselves.<sup>27</sup> In terms of minimizing the chances of electing a minority President and the allocation of power between large and small states, this scheme was the same as Dickerson’s.<sup>28</sup> As its sponsors emphasized, it had the additional advantage of avoiding an election in Congress and thus of furthering the Framers’ purpose of ensuring independence of the executive from the legislative branch.<sup>29</sup>

Compromise was in the air. Dickerson stressed the urgency of finding a solution. The 1824 election was approaching, and as everyone knew a number of highly prominent statesmen had thrown their hats in the ring.<sup>30</sup>

21 40 Annals at 100-01.

22 Id at 158-59. He was not foolhardy enough to suggest elimination of the small states’ ultimate advantage, the two extra electors given each state to reflect its equal representation in the Senate. Once in a while someone would propose going that extra mile. See, e.g., Representative Wright’s proposal for direct election of the President by a simple majority of voters, without regard to state lines. 5 Cong Deb at 362 (1829).

23 40 Annals at 176-77. A committee chaired by Senator Benton made a similar proposal in 1824. 41 Annals at 100-01.

24 40 Annals at 221.

25 See also 41 Annals at 403-06 (Sen. Dickerson). Senator Lowrie, from the other side of the fence, stressed the need for compromise: Pennsylvania would not surrender its right to speak as a unit without an equivalent concession from the smaller states. Id at 373. Dickerson made clear that compromise was a two-way street: The small states would not yield their power in the House without the compensation of districting. Id at 416.

26 40 Annals at 210.

27 41 Annals at 74, 864.

28 See id at 406 (Sen. Dickerson).

29 Id at 69 (Sen. Van Buren); id at 1077-78 (Rep. McDuffie).

30 Adams, Jackson, Crawford, Clay, and Calhoun had all been mentioned, and each of them had a substantial following.

The election would be fraught with risk if the House had to choose among three candidates, as seemed likely under the existing provisions.<sup>31</sup>

Rufus King, the New York Federalist who had been at the Philadelphia Convention, saw it differently. The eve of a hotly contested election was the worst time to undertake fundamental revisions of the election rules; Congress could never resolve the matter correctly in the heat of partisan battle.<sup>32</sup> The Senate agreed and postponed all proposed amendments respecting presidential elections indefinitely, by a vote of 30-13.<sup>33</sup>

As Dickerson had feared, it was the House of Representatives that ultimately resolved the 1824 election. In so doing it illustrated most graphically the deficiencies of the constitutional scheme. Andrew Jackson received the most popular votes, and the most electoral votes as well; a majority of states voted for John Quincy Adams in the House.<sup>34</sup> Plainly the House was within its rights; plainly the Representatives were expected to exercise their own judgment.<sup>35</sup> If as McDuffie argued the House was required to endorse the candidate the greatest number of electors had favored,<sup>36</sup> there was no point in asking it to vote; the Constitution might as well have made a simple plurality of the electors sufficient for election. At the same time it

could hardly be said that the choice of Adams reflected the popular will,<sup>37</sup> and another major debate on the election provisions was held the following year.

There was a bewildering variety of proposals; there seemed to be almost as many ideas for reform as there were members of Congress.<sup>38</sup> The focus of debate, however, was McDuffie's restatement of Dickerson's suggested compromise, stripped of details in the hope of achieving consensus:

*Resolved*, That, for the purpose of electing the President and Vice President of the United States, the Constitution ought to be so amended, that a uniform system of voting by districts, shall be established in all the States; and that the Constitution ought to be further amended, in such manner as will prevent the election of the aforesaid officers from devolving upon the respective Houses of Congress.<sup>39</sup>

The time was ripe for action. The need for reform was clear. The proposed solution was worthy. Future President James Knox Polk, then a freshman Representative from Tennessee, spoke eloquently in favor of McDuffie's resolution: The President should neither be beholden to Congress nor chosen by a minority of the people.<sup>40</sup>

The House voted overwhelmingly to take itself out of presidential elections but rejected districting yet again.<sup>41</sup> That was the end of it,

31 41 Annals at 369.

32 *Id* at 355 (1824).

33 41 Annals at 417.

34 The popular vote was 153,544 for Jackson, 108,740 for Adams, 46,618 for Crawford, and 47,136 for Clay. Jackson received 99 electoral votes, Adams 84, Crawford 41, and Clay 37. In the House, 13 states voted for Adams, 7 for Jackson, and 4 for Crawford. Clay, eliminated by the electors, supported Adams in the House and became Secretary of State; he was widely castigated for a "corrupt" bargain that later generations would regard as par for the course. See 1 Cong Deb at 526-27.

35 See 1 Cong Deb at 457, 492 (Rep. Mangum) (citing *The Federalist* No 68); *id* at 502 (Rep. McLane).

36 1 Cong Deb at 449.

37 See 2a Cong Deb at 1712 (Rep. Lecompte).

38 See especially 2 Cong Deb at 1365-1475.

39 *Id* at 1365.

40 2a Cong Deb at 1633-53 (also urging the abolition of electors, *id* at 1647-48).

41 *Id* at 2004.

of course. You can't have a quid without a quo; it had long been clear that one reform could not succeed without the other. A committee assigned to draft an amendment to establish a new tie-breaker never reported. In the following Congress the issue hardly surfaced at all.<sup>42</sup>

In the course of the final debates on presidential elections, interesting views were expressed about the amending process itself. The familiar contention that the amending power did not extend to "essential" constitutional principles<sup>43</sup> met with the familiar replies.<sup>44</sup> A passel of speakers rightly urged that the amending power be sparingly exercised lest the Constitution lose that aura of untouchability so essential to its capacity to protect against momentary passions.<sup>45</sup> "Sir," argued D.J. Pearce of Rhode Island in the House,

it was never intended that the Constitution should be affected by every wind; that it should become the sport of the whim, or caprice, or passion, of every discontented individual, or every man who fancied himself aggrieved or injured. ... Cherish this spirit of innovation, this disposition to make the Constitution bend to all the grievances that some men suppose exist, and what will our Constitution be, in a few years to come? A *Mosaic* pavement, in truth; here a piece of white stone, and there a piece of black.<sup>46</sup>

History had shown, added Representative Thomas Whipple of New Hampshire, "that departures from the original landmarks of the social compact, have resulted in the most disastrous consequences to the liberties and immunities of those who have permitted changes to be lightly or hastily made." He proceeded to quote Vattel: "Great changes in a State" should never be made "without the most pressing reasons or absolute necessity."<sup>47</sup>

John Randolph, who had made many foolish assertions in his time, made the foolish assertion that he would oppose *any* constitutional amendment that did not restore the purity of the original Constitution or curtail federal authority.<sup>48</sup> Ebenezer Herrick of Maine, who was relatively new at making foolish assertions in Congress, was more restrained: The Constitution should be amended to permit Congress to propose constitutional amendments only once every ten years.<sup>49</sup>

Mr. Herrick wisely declined to be a candidate for reelection, and a year later he was safely home in Maine. But we still had a lousy system for electing the President. For the tide was at the flood in 1826, but Congress missed the boat. To this day presidential elections remain bound in shallows and miseries that with a little more good will might long since have been left behind. *GB*

42 Proposals by Representatives Smyth and Wright were never taken up for discussion. 5 Cong Deb at 119 (1828); id at 362 (1829).

43 2 Cong Deb at 1570-72 (Rep. Everett). See also 2A Cong Deb at 1825 (Rep. Whipple):

It is not ... competent for the National Legislature to propose amendments to the People, or to the States, which strike at the foundations of the Federative principle, and destroy the power of the States of this Union, or of the People of the States.

44 2 Cong Deb at 1626 (Rep. Bryan). For earlier views on this question see Currie, *The Twelfth Amendment* (cited in note 5).

45 See *The Federalist* No 49 (Madison) (discouraging frequent appeals to the people on this ground).

46 2A Cong Deb at 1654 (giving horrible examples of amendments that had actually been proposed).

47 Id at 1821. See also id at 1846-49 (Rep. Miner).

48 2 Cong Deb at 405-06.

49 Id at 1554.