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Tick, Tick, Tick ... The Electoral College, A Ticking Time Bomb

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THE ELECTORAL COLLEGE, A TICKING TIME BOMB

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A constitutional time bomb is ticking. When it explodes, few attorneys will be involved in the ensuing litigation but many will be called upon by clients and friends to explain (1) what happened, (2) how it happened, and (3) what can be done about it. The bomb was planted in the United State's Constitution when its authors worked out a compromise on presidential election and left us with the old dilemma of reconciling the letter of the law with its spirit.[199]

(1) What can happen? The people's choice for President may be defeated by the electoral college system. This happened in the elections of 1824, 1876, 1888, and probably in 1960.[200]

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[199] *See* U.S. CONST. art. II, § 1; *see* U.S. CONST. amend. XII. *See generally* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 160-72 (1913) (discussing the election of the president); THE RECORDS OF THE FEDERAL CONVENTION OF 1987 (Robert Famighetti ed. 1999); Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, at 678-79, 69th Congress (Charles C. Tansil ed. 1927).

[200] *See* THE WORLD ALMANAC AND BOOK OF FACTS 2000, at 500 (Robert Famighetti ed. 1999) [hereinafter Famighetti].

(2) How could a loser become the winner? The simplest case results when a candidate with fewer votes nationally wins a majority of electoral votes.[201]

A second way that a loser could overtake the winner is when no candidate receives the required majority of electoral votes. The election would then be resolved by the United States House of Representatives, voting by states with each state casting one vote. A majority of all the states would be required to win. Perhaps no candidate could muster the required 26 states and even if one did, the apparent majority might be very tenuous. We shall examine this in more detail.[202]

A third and more ominous possibility is that the presidential electors might violate the spirit of our electoral system by claiming a right to vote as they choose.[203] This possibility will be addressed below. Fearing the consequences of an election in the House of Representatives, or for other reasons of their own, electors pledged to different candidates might conspire to elect a person who was not even running in the general election.[204]

(3) What can be done about this ticking bomb? Nothing short of a constitutional amendment can stop the clock. Many amendments to change the electoral college system have been proposed.[205] Some have

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[201] *See* U.S. CONST. amend. XII.

[202] Famighetti, *supra* note 2, at 500.

[203] *See* THE MISSOURI COMPROMISES AND PRESIDENTIAL POLITICS, 1820-1825, FROM THE LETTERS OF WILLIAM PLUMER, JR. REPRESENTATIVE FROM NEW HAMPSHIRE 53, 61, 62 (Everett S. Brown ed. 1926); MEMOIRS OF JOHN QUINCY ADAMS, COMPROMISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 279 (Charles F. Adams ed. 1975); James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Electors*, 1962 LAW & CONTEMP. PROBS. 497-504 (discussing when a faithless elector casts an unauthorized vote); *see also* NEAL R. PEIRCE, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE 117 (1968) (discussing that when mandamus is issued but disobeyed, elector's vote cannot be changed or cast differently). *See* literature on William Plumer a New Hampshire elector in 1820 for a more in depth discussion.

[204] *Infra* at 2 (discussing the possibility of electors reacting in response to their political parties). *Infra* at 7 (discussing what occurs when an election is decided in the House of Representatives).

[205] *See* Amend the Constitution to Abolish the Electoral College System: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary, 82nd Cong. (1951); Nomination and Election of President and Vice President and Qualifications for Voting, Hearings before the Subcomm. on Constitutional Amendments of the Senate Committee of the Judiciary, 87th Cong. (1961); Election of the President: Hearings before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 90th Cong. (1967); ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896, 111, 119 (Herman V. Ames ed. 1897) (". . . more amendments have been proposed on this subject than upon any other."); *see also* Michael Lind, *If a Swing State Cares, It's an Issue*, N.Y. TIMES, Oct. 2, 2000, at A27; Martin Dyckman, *Give Voters Two Choices*, ST. PETERSBURG TIMES, Sept. 17, 2000, at 3D.

cleared either house of Congress, but not one has reached the states for ratification since the Twelfth Amendment. We consider some possibilities to stop the clock below.

WHAT CAN HAPPEN?

The electoral college system has produced a President regularly every four years starting with George Washington. Sometimes the electoral vote and the popular vote approximately coincide. At other times they diverge as explained in further detail below. Then, the ticking bomb might produce strange results.

There are three possibilities in a presidential election. First, a candidate can win a majority of both popular and electoral votes and be elected President. Second, a candidate can win a plurality (less than a majority) of the popular vote and be elected by the electoral college. We have had "minority" presidencies seventeen times.[206] Third, a candidate can win a plurality, even a majority, of the popular vote and lose the election either in the electoral college or in a run-off in the U.S. House of Representatives.[207] Andrew Jackson (1824) and Grover Cleveland (1888) were plurality winners who lost the election. Jackson was defeated in the House[208] and Cleveland in the electoral college.[209] Samuel J. Tilden (1876) had a majority of the vote as counted, but Benjamin Harrison was elected by the electoral college.[210]

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[206] The national popular vote has been counted starting since the election of 1824. The "minority" winners were Adams (1824), Polk (1844), Taylor (1848), Buchanan (1856), Lincoln (1860), Hayes (1876), Garfield (1880), Cleveland (1884 and 1892), Harrison (1888), Wilson (1912 and 1916), Truman (1948), Kennedy (1960), Nixon (1968), and Clinton (1992 and 1996); THOMAS H. MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 1789 TO 1901; CONVENTION, POPULAR, AND ELECTORAL VOTE 22-23, 56-57, 103-04, 118-19, 179-81, 198-200, 229-31, 287-89, 257-59 (1901); EDWARD STANWOOD, A HISTORY OF THE PRESIDENCY FROM 1788 TO 1897, 134 (1916); Famighetti, *supra* note 2, at 502.

[207] *See* U.S. CONST. amend. XII.

[208] JABEZ D. HAMMOND, THE HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW YORK FROM THE RAMIFICATION OF THE FEDERAL CONSTITUTION TO DECEMBER 1840, at 188-90 (1842); Everett S. Brown, *The Presidential Election of 1824-1825*, POL. SCI. Q. 384, 401 (1925); PAUL J. PICCARD, THE TWENTY-SEVENTY DISCUSSION AND DEBATE MANUAL 129, 134-35; The Resolution of Electoral Deadlocks by the House of Representatives, *in* I SELECTING THE PRESIDENT (Bower Aly ed. 1953).

[209] Famighetti, *supra* note 2, at 502.

[210] The electoral count of 1876-77 was contested and resolved with the help of an ad hoc commission. *See* EDWARD S. CORWIN, THE PRESIDENT, OFFICE, AND POWERS 1787-1984, at 49 (5th ed. 1984); PAUL L. HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876, at 236 (1906); DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES 426 (1878); ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 705 (1935).

The presidential electors chosen in November may decide to vote for a loser of the popular vote or even for someone who was not on the original ballot. The death of the Democrat's defeated presidential candidate, Horace Greeley, between the popular and electoral votes in 1872 enabled his electors to vote for different people.[211] The death of the Republican's vice presidential candidate just before the November election of 1912 had been anticipated.[212] His electors were instructed by their party to vote for Nicholas Butler.[213] Some day, however, a winning November candidate may be dead before the electors vote in December, thereby, precipitating an unprecedented crisis.

Another aspect of the 1912 election, however, raises the possibility of the election of a President by the electors on their own or in response to instructions from their political parties. The Republican party nominated William Howard Taft. Theodore Roosevelt bolted the party and ran as a Progressive ("Bull Moose"). Woodrow Wilson won a majority of the electors[214] and became President. If Wilson had won only a plurality short of a majority, the combined Roosevelt and Taft electors would have been a majority and they could have elected either Roosevelt (who ran second in the popular vote), Taft (who ran third), or someone else who had not been a candidate in November.[215]

HOW COULD SUCH ABERRATIONS OCCUR?

Electoral college arithmetic is bizarre. The popular vote in November is counted state-by-state and in the District of Columbia. Close to 90 million votes are then collapsed into pockets of 1 to 54 votes each. Nebraska[216] and Maine[217] each choose one elector by each congressional district and two at large; California with 54 electors, like the rest of the states, normally lumps all of them together. These unit votes produce strange anomalies. For example, in 1996:[218]

Clinton Popular	**Clinton Electora**	**Dole Popular**	**Dole Electoral**

[211] *See* York Wilbern, *Discretion of Presidential Electors*, ALA. L. REV. 40, 43 (1948).
[212] *See* HERBERT W. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION 53 (1925); Lucius Wilmerding, Jr., *Reform of the Electoral System*, POL. SCI, Q. 1, 18 n.35 (1949).
[213] Wilmerding, *supra* note 14, at 18 n.35. Apart from the renegade electors, the deaths of Horace Greeley and James Sherman (President Taft's original running mate) illustrate the role electors can play.
[214] Famighetti, *supra* note 2, at 502.
[215] *Id.*
[216] NEB. REV. STAT. § 32-710 (1998).
[217] ME. REV. STAT. ANN. tit. 21-A, § 802 (West 1964).
[218] Famighetti, *supra* note 2, at 470.

	Vote	l Vote	Vote	Vote
Georgia	1,053,849	0	1,080,843	13
Rhode Island	233,050	4	104,683	0
Totals	1,286,899	4	1,185,526	13

Trailing President Clinton by over 100,000 votes, Senator Dole nevertheless gained 9 electoral votes. Such distortions may be repeated on a national scale. That is what happened to Jackson,[219] Tilden,[220] and Cleveland[221]--and probably Richard Nixon in 1960. We examine this next. The electoral college system not only distorted the popular vote in 1960, as it tends to do, but it further skewed the results in Alabama, where the names of individual candidates for elector were on the ballot.[222] Among the candidates on the Democratic ticket were 6 unpledged candidates opposed to the Democratic nominee, John F. Kennedy, and 5 loyalists who would vote for Kennedy.[223] The biggest vote-getter among the unpledged candidates received 324,050 votes; Kennedy's top elector received 318,303.[224] Because these candidates appeared as Democrats on the presidential ballot, votes cast for them were reported as votes for Kennedy, which they were not.[225] Had votes for the divided Alabama Democrat electoral ticket been adjusted 5/11ths for Kennedy and 6/11ths for the unpledged electors, the results in Alabama and nationally would have appeared:[226]

	Reported National	Adjusted National	Adjusted Alabama
Nixon	34,108,546	34,108,157	237,981
Kennedy	34,227,096	34,049,976	147,295
Unpledged Alabama	_____	_____	176,755
Plurality	**Kennedy 118,550**	**Nixon 58,181**	**Nixon 61,226**

[219] BROWN, *supra* note 10, at 384.
[220] *Supra* note 12.
[221] *Supra* note 11.
[222] Peirce, *supra* note 5, at 103-04 (accounting the difficulty of reporting the popular vote in Alabama in 1960). See that Peirce's figures sometimes differ marginally from those in Famighetti.
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.* at 104.

Reliance on state unit votes produces another problem. It greatly exaggerates the importance of a few thousand votes in pivotal or "battleground" states, especially if they are large. A bloc of a few thousand honest votes may tip the balance in a key state. A corrupt count of a relatively small number might accomplish the same result. Votes which considered nationally would amount to a drop in the bucket, thus, become critical.

A dramatic illustration of the importance of a few votes in a swing state occurred in 1916.[227] President Wilson received a popular vote plurality of 594,186 votes and 277 electoral votes to 254 electoral votes for Charles Evans Hughes, the Republican candidate.[228] Ten states each held Wilson's victory in their hands.

State	**Wilson's Plurality**	**Electoral Votes**
Alabama	70,847	12
California	3,773	13
Georgia	116,430	14
Kentucky	28,136	13
Missouri	28,693	18
North Carolina	47,493	12
Ohio	90,408	24
Tennessee	36,766	12
Texas	222,561	20
Virginia	53,467	12

Nationally, Wilson had 594,186 more votes than Hughes, but his lead of over a half million would have been wiped out by a switch of 1,887 popular votes in California, or by the turnout of 3,774 more Republican voters.[229]

If the presidential election in 1916 had been conducted as a national popular election, with 594,186 votes separating the candidates, 1,887 votes would not have mattered. What made such a small number

[227] Paul J. Piccard, *The Electoral Colleges of President Wilson*, FLORIDA STATE UNIVERSITY STUDIES No. 23, 29 (1956).
[228] EDGAR E. ROBINSON, THE PRESIDENTIAL VOTE: 1896-1932 (1947). *See generally* Famighetti, *supra* note 2, at 502.
[229] *Id.*; Piccard, *supra* note 29, at 45; Frederick M. Davenport, *Did Hughes Snub Johnson [in California]? An Inside Story*, AMERICAN POLITICAL SCIENCE REVIEW, Apr. 1949, at 321.

important was the electoral college system and its nearly universal reliance on state unit votes. We have looked at California because it is the most dramatic, but a shift of less than 15,000 votes in either Kentucky or Missouri that year would have had the same effect. A very few thousand votes in a small number of key states can overturn a large national plurality.

In addition to the distortions caused by the unit vote, of states or congressional districts, further discrepancies result from the allocation of two electors to each state regardless of size and the guarantee of at least three per state. Alaska, with a population in 1990 of 550,043 has three presidential electors;[230] Florida has about 23.5 times the population of Alaska and about 8 times its electoral vote.[231] Thus, at the polls, one Alaskan is worth about three Californians.[232]

State	**Population**	**Electoral Votes**	**People Required to Equal One Alaskan**
Alaska	550,043	3	1.0
California	29,785,857	54	2.9
Florida	12,938,071	25	2.8
Virginia	6,189,197	13	2.5

On the other hand, eleven big states plus any two more electoral votes elsewhere can elect the President despite the vote in the rest of the country. Those big states might each give one candidate a small plurality, much smaller than a majority, but their electors would out vote even lopsided majorities for the loser in all the other states. We have 538 electors with only 270 needed to win. The eleven largest states and their electoral vote are:

California	54
New York	33
Texas	32
Florida	25
Pennsylvania	23

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231 Famighetti, *supra* note 2, at 500.

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Illinois	22
Ohio	21
Michigan	18
New Jersey	15
Virginia	13
Massachusetts	12
Eleven-State Subtotal	**268**[233]

Thus, the eleven largest states plus two more electoral votes may reach the magic number, 270. Eleven states and the District of Columbia could out vote the rest of the nation.

Such are the vagaries of electoral college arithmetic. November's winner could be December's loser. Under other circumstances, December's third-place candidate could be elected President of the United States by the U.S. House of Representatives. We now turn our attention to the imbroglio that would ensue in the House.

ELECTION OF THE PRESIDENT BY THE HOUSE OF REPRESENTATIVES

The Twelfth Amendment is the controlling law when the presidential electors fail to produce a majority. The election is thrown into the House of Representatives. The House then votes by states rather than by members. The quorum is two-thirds of the states and twenty-six states are now required for victory.[234]

Typically, a few states have delegations evenly divided between Republicans and Democrats.[235] As long as party lines hold, these states would lose their vote and twenty-six states would still be required to elect the President. In many state delegations, the state's vote is held at the mercy of one Representative who might deadlock the state's delegation or who in other cases might give the state to the opposition.[236]

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234 *See* U.S. CONST. amend. XII.

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236 If a state delegation is evenly divided, each Representative is able to give the state to the opposition by abstaining. With a margin of one, any Representative in the majority can deadlock the state by abstaining or give the state to the opposition by switching sides. With a margin of two, any Representative in the majority can deadlock the state by switching.

The composition of the House of Representatives in the future cannot be predicted but the experience of the past illustrates the problems. The elections of 1800 and 1824 were decided in the House of Representatives.[237] The elections of 1912,[238] 1924,[239] and 1948[240] involved major third-party candidates. A comfortable majority in the House, as in 1995, does not guarantee a majority of state delegations.[241]

Numbers of States/Representatives in Critical Position*

	Tied States/Reps	**Margin of 1 States/Reps**	**Margin of 2 States/Reps**	**Totals States/Reps**
1801	2/10	3/5	3/10	8/25
1825	0/0	7/13	2/20	9/33
1913	3/12	10/12	5/10	18/34
1925	4/22	8/31	6/17	18/70
1949	3/10	7/38	13/50	23/98
1995	6/54	12/40**	9/31	27/125

*A single Representative in a "critical position" could change the vote of a state.

**Not counting the one Independent Representative from Vermont. He could not move his state from one party to the other, nor could he give it to one party by abstaining, but he could give it to either party.

Jefferson finally prevailed in 1801 when some Federalists abstained.[242] In 1825, John Quincy Adams needed every one of his 13 state delegations, including Maryland and New York.[243] In each of those two states, a wavering Representative had to be held in line.[244]

[237] Famighetti, *supra* note 2, at 502.
[238] CONCISE DICTIONARY OF AMERICAN HISTORY 143 (Wayne Andrews ed. 1962).
[239]
[240] *Id.* at 145-46.
[241] THEODORE W. COUSENS, POLITICS AND POLITICAL ORGANIZATIONS IN AMERICA 93-94 (1947); EDWARD STANWOOD, A HISTORY OF THE PRESIDENCY 71-72; PICCARD, *supra* note 10, at 132-35; Famighetti, *supra* note 2, at 81-87.
[242] STANWOOD, *supra* note 43, at 71.
[243] COUSENS, *supra* note 43, at 93; STANWOOD, *supra* note 43, at 71.
[244] One was Stephen Van Rensselaer from New York; the other Henry R. Warfield from Maryland. Hammond, *supra* note 10, at 190; Brown, *supra* note 10, at 402; Peirce, *supra* note 5, at 85.

If we assume that party lines would have held in four other illustrations of the composition of the House of Representatives, at least for a first ballot, the results would have been:

	1913	**1925**	**1949**	**1995**
Democrat	23	21	25	20
Republican	22	23	20	23
Divided (lost vote)	3	4	3	6
Independent	-	-	-	1

Only in 1949 did one party have a nominal majority. However, the Democrats that year had only 21 states whose electors voted for President Truman.[245] The other four "Democrat" states had cast their electoral votes for J. Strom Thurmond, the States Rights ("Dixiecrat") candidate.[246] If the Dixiecrats had cast their votes in the House for Thurmond, the election would have been deadlocked. At that point any one of 98 Representatives, acting alone, could have changed the state tally. Eventually, we suppose, as in 1801,[247] some of them would have abstained or switched parties in order to elect a President. Our supposition, however, is a flimsy foundation on which to construct a presidency. If the House failed to resolve the matter, the Senate would choose a Vice President who would "act as President until a President shall have qualified."[248]

The election of 1994 gave the House Republicans a comfortable majority of 230-204 but as is often the case, the majority party did not have a majority of the state delegations.[249] We imagine considerable turmoil between November's election and the eventual action by the House of Representatives the following January; perhaps the presidential electors would intervene in December. This possibility will be considered next.

INDEPENDENT PRESIDENTIAL ELECTORS

Presidential electors are bound by some state laws and certainly by the spirit of the Constitution, but they do have some freedom to act on their

[245] Piccard, *supra* note 10, at 133-34.
[246] *Id.* at 134. Proposing an Amendment to the Constitution of the United States Providing for the Election of President and Vice-President, Sen. Rpt. 602, 81st Cong., 1st Sess. (1949).
[247] Cousens, *supra* note 43, at 94; Stanwood, *supra* note 43, at 71-72.
[248] U.S. CONST. amend. XX, § 3.
[249] *See* THE WORLD ALMANAC 1995, 78-85.

own,[250] in concert with others, or under the direction of their political parties.[251] We have had some renegade electors and their votes have been counted.

Many people, including jurists,[252] have argued that the "original intent" of the Constitution was to have independent, presumably wise, electors choose the President. However, the best scholarship on the topic is weighted the other way.[253] The electoral college system was pushed through the Constitutional Convention of 1787 by the proponents of a popular election for the presidency who saw it as the best way to elect George Washington.[254] Popular election was impossible because of the widely varying state suffrage qualifications and exacerbated by the political necessity of allowing the slave states to count three-fifths of their slaves.[255] The electoral college solved these problems by incorporating the Three-Fifths Compromise. This gave each state the same number of electoral votes that it had for Representatives and Senators regardless of the size of its electorate.[256]

Arguments about the framers' intent were mooted by the adoption of the Twelfth Amendment in 1804. The electors in the preceding elections showed no signs of independence, except for Samuel Miles of Pennsylvania.[257] The election of 1800 demonstrated rigid political party domination of electors, so that the choice of the voters or state legislatures would be carried out.[258] The authors of the Twelfth Amendment, and the state legislatures that ratified it, understood how the system worked with the original language of Article II of the Constitution. By 1800, if not before, that language described partisan electors who did the bidding of the voters or legislatures who "appointed"[259] them.

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[250] Wilbern, *supra* note 13, at 43.

[251] *Id.* Apart from renegade electors, the deaths of Horace Greeley and James Sherman (President Taft's original running mate) illustrate a role the electors can play.

[252] *See* Ray v. Blair, 343 U.S. 214,. 232 (1952) (Jackson, J., dissenting) (stating that the electoral "plan originally contemplated . . . that electors would be free agents, to exercise an independent and nonpartisan judgment . . . .").

[253] *See* Paul J. Piccard, JOURNAL OF POL., May 1959, at 324 (reviewing Lucius Wilmerding, Jr., The Electoral College (1958)).

[254] At the Constitutional Convention Washington was "the man universally expected to be the first President . . . ." Andrews, *supra* note 39, at 759; Piccard, *supra* note 54, at 324.

[255] James Madison in the Constitutional Convention, July 25, 1787. Tansill, *supra* note 1, at 451.

[256] U.S. CONST. Art. II, § 2.

[257] Peirce, *supra* note 5, at 107.

[258] State legislatures chose the electors in 6 states in 1789, 10 states in 1792 and 1796, and 11 states in 1800. Voters in districts or at large generally elected electors in other states, but with some variations. Stanwood, *supra* note 43, at n.22; McPherson v. Blacker, 146 Y.S. 1 (1892).

[259] U.S. CONST. Art. II, § 2 (quoting "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors . . . .") (emphasis added).

Even so, the idea of independent electors persisted and took on new life as conservatives, especially in the South, resented the liberal programs of the New Deal in the 1930s. This group also opposed the civil rights movement of that era and opposed its place in the Democratic Party platform of 1948.[260] So far these efforts have been limited to protest votes cast by electors opposed to the likes of Adlai Stevenson, John F. Kennedy, and Jimmy Carter.[261] Ronald Reagan received one electoral vote from the state of Washington in 1976 and Lloyd Bentsen got one from West Virginia in 1968.[262]

The largest defection was Senator Harry F. Bird's 15 electoral votes in 1960.[263] He received fourteen votes from unpledged electors in Alabama and Mississippi and one vote from Harry D. Irwin, a disaffected Republican in Oklahoma, who "could not stomach" Richard Nixon.[264] Between the popular vote in November and the electoral vote in December, "Alabama's six unpledged electors met in Birmingham and announced their desire to cast their Presidential vote 'for an outstanding Southern Democrat who sympathizes with our peculiar problems in the South.' They stated that 'our position remains fluid so that we can cooperate with other unpledged electors for the preservation of racial and national integrity.'"[265]

The unpledged Alabama electors then met with the those 7 in Mississippi and agreed to vote for Senator Byrd.[266] They tried to recruit support from pledged Southern electors.[267] Their "stated hope [backed by Mississippi Governor Ross Barnett and Louisiana White Citizens Council leaders]. . . was that if the election reached the House, all Southerners would vote for Byrd and that the Republicans, 'being fundamentally opposed to the liberalism of Senator Kennedy,' would follow suit."[268]

Harry Irwin of Oklahoma also tried to recruit support for the cause. He telegraphed his fellow Republican electors, stating that, "sufficient conservative Democratic electors available to deny labor Socialist nominee."[269] These Southerners were invoking the letter of the law to frustrate the spirit of the law.

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[260] *Platform: Southern Exodus*, N.Y. TIMES, July 15, 1948, at 4.
[261] Famighetti, *supra* note 2, at 502.
[262] *Id.*
[263] *Id.*
[264] Peirce, *supra* note 5, at 107.
[265] *Id.* at 106.
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*

Senator Bird's 15 electoral votes form the precedent for a larger movement by electors away from the nominees of their parties. The situation, when it develops, will be unique. Under the Twelfth Amendment[270] the electoral college has failed to produce a majority only once. We accomplish little by trying to imagine the circumstances but, however they develop, they will produce at least a three-way split of the electoral vote, probably with a regional base for one of the candidates.

In the past the potential for an electoral college failure has come from the Progressive Party as manifested by Theodore Roosevelt (1912), Robert M. La Follette (1924), and Henry A. Wallace (1948), and from the candidacies of J. Strom Thurmond (1948), George C. Wallace (1968), John B. Anderson (1980), and H. Ross Perot (1992 and 1996).

Theodore Roosevelt had sufficient strength in enough states to win 88 electoral votes,[271] while La Follette drew only 13 electors.[272] In 1948, Strom Thurmond's appeal was regional and provided 39 votes.[273] Henry Wallace had almost as many popular votes as Thurmond that year (1,157,172 to 1,269,021),[274] but his were scattered and provided no electoral votes. Likewise Perot's nearly 20 million popular votes the first time and over 8 million the second bore no fruit.[275] Now we can imagine a strong showing by a third candidate, but our crystal ball is too cloudy to reveal the future turmoil that may persuade presidential electors to set aside the November election and avoid having the House of Representatives fulfill its constitutional role of tie breaker. A third party with a strong presidential candidate, but with few, if any seats in Congress, might be especially tempted to short-circuit the system.

We have been considering some unwanted developments: a failure of the electoral college, a fiasco in the House of Representatives, and a run-away group of presidential electors. Can the time bomb ticking down to one of these possibilities be defused?

PROPOSED REMEDIES

The simplest solution to all these problems is (1) abolition of the whole electoral college system, getting rid not only of the human electors but also of the artificial state votes representing each state's congressional delegation. This would raise some other problems and many objections.

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[270] *See id.* at 83-84; *see also* Famighetti, *supra* note 2, at 500 (noting that no candidate pulled a majority in 1822).
[271] Famighetti, *supra* ntoe 2, at 502.
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*

Some middle ground reforms include: (2) abolishing the electors but retaining the assigned state vote, (3) abolish the electors, retain the assigned state vote, but divide that vote in the same ratio as the state's popular vote, (4) requiring the states to choose electors by district voting, (5) abolishing the electoral college majority requirement so that a plurality would produce a winner, or (6) allowing the House of Representatives to vote by members instead of by states if called upon to choose the President.

All of these proposals run up against a fundamental political principle: Those in power do not like change. However poorly the system works in the future the sitting President and White House staff will owe their positions to the existing system. From their perspective they may reasonably conclude that despite all the objections, from their perspective the system works.

(1) Popular election of the President. One problem with popular election is that we would sometimes lose the fiction of a majority winner. In 1860 President Lincoln had only 40 percent of the popular vote.[276] Wilson had 42 percent in 1912.[277] John Quincy Adams, Polk, Taylor, Buchanan, Hayes, Garfield, Cleveland twice, Benjamin Harrison, Wilson again in 1916, Truman, Kennedy, Nixon in 1968, and Clinton twice were minority presidents.[278] Americans could pretend that these minority Presidents had a stronger mandate than was the case.

Another objection may also be viewed as an advantage. The present system bestows extraordinary influence on small blocs of votes in key states. People who profit from these votes would be reluctant to see them folded into the larger national pool of votes where all votes would be equal.

(2) Abolish the human electors but keep the state unit vote. This reform would solve only a small part of the problem[279] and might not be worth a constitutional amendment. It would guarantee that any failure to produce a majority would go to the House of Representatives. We would also lose the possibility of dealing with the death of a candidate, as electors now might have between the votes of November and December.

(3) Divide the states' electoral votes in the same ratio as the popular vote. This proposal has come the closest to adoption by Congress. As

[276] *See supra* note 8.
[277] *Id.*
[278] *Id.*
[279] It would preclude the possibility of a conspiracy between the November and December votes to override the results of the general election.

passed by the Senate in 1950 it provided for calculating each state's vote to three decimal places. More recent versions have relied on whole votes or fractions of one-tenth.[280] This reform would reduce the electoral vote to a close approximation of the popular vote but it raises the specter of admitting that we have minority Presidents. It also would suffer from its perceived role in dividing the states' votes in proportion to the popular vote. American politicians committed to the two-party system quiver at the sound of the word "proportion." This is true even when only one officer is being elected by the vote and so cannot be divided into pieces in proportion to anything.

Opponents of popular election and its approximation through the splitting of state votes express a fear of splinter parties.[281]

The present system seems to provide more incentive for small, minority parties, like the States Rights Party of 1948, than would a general election. In a nation-wide election the splinters are too small to accomplish very much. With the electoral college they can threaten real mischief.

Another objection to the splitting of state votes into fractions is that a political party with a solid grip on a state or region would get nearly all the electoral votes, while parties with smaller pluralities elsewhere would get only their minority fractions of the vote. The absence of key swing blocs of votes, as with national popular elections, also raises objections from beneficiaries of today's distortions of the popular vote. Finally, explaining to nearly half the voters that their candidate lost the election at some decimal place could be a problem.

(4) Require district elections. Reducing the size of unit votes from as many as California's fifty-four down to a single vote would bring the popular and electoral votes closer but as we see from the British example, it would not solve the problem of a popular plurality winner losing the election in the electoral college.

The British use 659 electors (Members of Parliament) to choose the Prime Minister[282] but there, too, carrying lots of constituencies by small margins has provided a majority in the House of Commons despite the opposition's overall lead in the total national vote. Thus, choosing

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[280] NELSON W. POLSBY & AASON WILDAVSKY, PRESIDENTIAL ELECTIONS: CONTEMPORARY STRATEGIES OF AMERICAN ELECTORAL POLITICS 281 (1980).
[281] *Id.* at 282.
[282] Facts About the British Prime Minister (xiv. 1995). In 1997 the Labour [sic] Party won 418 (63.4 percent) of the seats in the House of Commons with 44.3 percent of the popular vote; the Conservatives 195 seats (25 percent) with 31.5 percent of the vote; the Liberal Democrats 46 seats (7 percent) with 17.2 percent of the vote. The Europe World Year Book 3620 (2d ed. 1999).

presidential electors by districts might mitigate the effects of state unit, votes but the problem of distortion would remain.

(5) Abolish the majority requirement. The closest we have come to abolishing the majority requirement has been a proposal to require forty percent of the decimalized (ratio) electoral vote.[283] The problem seems insurmountable in debate, but voters faced with a single member constituency, like the presidency, normally coalesce into two opposing camps on their own.[284] Minnesota elected a low-percentage governor in 1998,[285] but most governors, United States Senators, and others get either a majority or a large plurality (not necessarily a large margin but anyway close to a majority) without any constitutional requirement for a majority. Ironically, requiring 40 percent might encourage spoilers who would otherwise have less incentive to siphon off votes without that requirement. When the South was a one-party region, the problem was solved by having a run-off primary election. Few people wish to face a run-off presidential election.[286] Run-offs have the disadvantage of pitting the extremes against each other when the voters might prefer a middle-ground compromise candidate.

(6) Allow the House of Representatives to vote by members. Since the election has not been sent to the House since 1825, and since few people are worried about the scenario of the ticking bomb (our readers now excepted), this proposal has no drive behind it. It would, however, be a great improvement over the present system with its huge number of Representatives each sitting in the catbird seat. The small states would still be over-represented but we would not have the possibility of the 26 smallest states, with about 17 percent of the nation's population, and only 73 Representatives out of 435, out-voting the 24 largest states and the District of Columbia.

CONCLUSION

The American political system is always changing. Our political parties are being transformed and marginalized. Some people have already taken advantage of the letter of the law of presidential electors to manipulate the electoral vote as a protest. The worst possibilities considered above are no longer as remote as they were. We can subscribe

[283] *See* "Lucas Amendment" to the "Lodge-Gossett" Amendment, Cong. Rec. 81st Cong., 2d Sess. 10426, 10427 (1950). This proposal was adopted by the Senate but never went to the States for ratification because it failed to pass the House of Representatives.

[284] MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE (trans. 1955); THE POLITICS OF AMERICAN DEMOCRACY 311 (Marian D. Irish & James W. Prothro summaries 1959).

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[286] Dyckman, *supra* note 7, at 3D.

to the proposition, "If it ain't broke, don't fix it." However, when we see the warning signs of a breakdown we can do some heavy preventive maintenance. The electoral college system, with its overemphasis on large, swing states already misshapes our presidential campaigns. It promises to do much worse when the ticking bomb goes off.