

**Select Joint Committee on the  
Manner of Appointment of  
Presidential Electors**

**Report and Recommendations**

**December 4, 2000**

**Senator Lisa Carlton, Co-Chairman  
Representative Johnnie Byrd, Co-Chairman**

December 4, 2000

The Honorable John McKay  
President of the Senate

The Honorable Tom Feeney  
Speaker of the House of Representatives

Dear President McKay and Speaker Feeney:

Your Select Joint Committee on the Manner of the Appointment of Presidential Electors having met, and after full and free conference, do recommend to their respective houses as follows:

1. The Florida Legislature convene in Special Session for the purpose of addressing the manner of appointment of presidential electors for the State of Florida; and, that
2. The Florida Legislature carefully consider the broad authority granted to it under Section I of Article III of the United States Constitution to establish the manner of appointment of the electors for the State of Florida; and, that
3. The Florida Legislature take appropriate action to ensure that Florida's 25 electoral votes for President and Vice President in the 2000 Presidential Election are counted.

Respectfully submitted,



Senator Lisa Carlton, Co-Chairman



Representative Johnnie Byrd, Co-Chairman

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**MEMBERS OF THE  
SELECT JOINT COMMITTEE ON THE  
MANNER OF APPOINTMENT OF PRESIDENTIAL ELECTORS**

\*Not all members voted for the report. Please see signature page for members in support of the motion.

**Senate Members:**

Senator Lisa Carlton, Co-Chair

Senator Betty Holzendorf

Senator Jim Horne

Senator John Laurent

Senator Tom Rossin

Senator Rod Smith

Senator Dan Webster

**House Members:**

Representative Johnnie Byrd, Co-Chair

Representative Annie Betancourt

Representative Gaston Cantens

Representative Mario Diaz-Balart

Representative J. Dudley Goodlette

Representative Kenneth Gottlieb

Representative Dwight Stansel

# THE FLORIDA LEGISLATURE



JOHN MCKAY  
*President of the Senate*



TOM FEENEY  
*Speaker of the House of  
Representatives*

November 27, 2000

The Honorable Faye W. Blanton  
Secretary of the Senate

The Honorable John Phelps  
Clerk of the House of Representatives

Dear Ms. Blanton and Mr. Phelps:

The State of Florida has been enmeshed in protracted rounds of counts and recounts of votes for electors for president and vice president of the United States, and the Supreme Court of Florida has used its equitable power to extend the deadline for certifying elections returns from November 14 to November 26, 2000. Protracted uncertainty could result in all Florida voters being disenfranchised in the 2000 presidential election. Therefore, pursuant to our authority as President of the Senate and Speaker of the House of Representatives, respectively, and in order to ensure that the fundamental right of Florida voters to participate in the 2000 presidential election is protected through the lawful selection of the electors to the electoral college, we hereby create a joint select committee as described herein.

The specific charge to this committee is:

To review all relevant federal and state law and the manner in which that law was applied at the state and local levels in the Presidential 2000 election. The select joint committee shall also review the responsibilities and options of the Florida Legislature with respect to final determination of the appointment of Florida's Presidential Electors. The conclusions of the select joint committee shall be forwarded to the President of the Senate and the Speaker of the House of Representatives as soon as practicable.

The following members are appointed to the select joint committee:

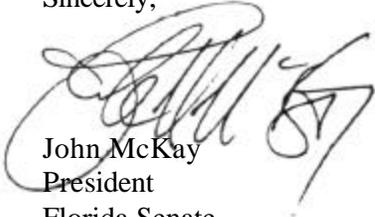
Senator Lisa Carlton, Co-Chair, R-Osprey, Senator Dan Webster, R-Winter Garden, Senator John Laurent, R-Bartow, Senator Jim Home, R-Orange Park, Senator Tom Rossin, D-West Palm Beach, Senator Betty Holzendorf, D-Jacksonville, and Senator Rod Smith, D-Gainesville, Rep. Johnnie Byrd, Co-Chair, R-Plant City, Rep. Gaston Cantens, R-Miami, Rep. Mario Diaz-Balart, R-Miami, Rep. J. Dudley Goodlette, R-Naples, Rep. Kenneth Gottlieb, D-Miramar, Rep. Annie Betancourt, D-Miami, Rep. Dwight Stansel, D-Live Oak.

November 28, 2000

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The Committee should be referred to as the "Select Joint Committee on the Manner of Appointment of Presidential Electors."

Sincerely,

A handwritten signature in black ink, appearing to read "John McKay".

John McKay  
President  
Florida Senate

A handwritten signature in black ink, appearing to read "Tom".

Tom Feeney  
Speaker  
Florida House of Representatives

K/st

## **History/Pending Litigation<sup>1</sup>**

On Tuesday, November 7, 2000, the State of Florida conducted its general election for President and Vice President of the United States. Because the overall difference in the total votes cast for each candidate was less than one-half of one percent of the total votes cast for that office, an automatic recount was triggered pursuant to section 102.141(4), Florida Statutes. The first set of unofficial results from the general election and the mandatory statewide recount, respectively, are as follows: Bush/Cheney 2,909,135 votes, Gore/Lieberman 2,907,351 votes; and Bush/Cheney 2,910,492 votes, Gore/Lieberman 2,910,192 votes.<sup>2</sup>

Following the automatic recount, the Florida Democratic Executive Committee requested a manual recount be conducted in several counties pursuant to section 102.166(4), Florida Statutes. On November 12, the Palm Beach County Canvassing Board voted to have a countywide manual recount. Concluding that the recount could not be completed by the statutory deadline for filing certified results, the Palm Beach County Canvassing Board requested an advisory opinion from the Division of Elections interpreting the deadline set forth in sections 102.111 and 102.112, Florida Statutes. On November 13, 2000, the Division of Elections issued Advisory Opinion DE 00-10, stating that absent unforeseen circumstances, returns from the county must be received by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.

On Monday, November 13, 2000, the Florida Secretary of State issued a statement that she would not accept returns of the manual recounts received by the Florida Department of State after Tuesday, November 14, 2000, at 5 p.m. On the same day, the Volusia County Canvassing Board filed suit in the Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking declaratory and injunctive relief. The presidential candidates and the Palm Beach County Canvassing Board, among others, were allowed to intervene. The trial court held that although the November 14 deadline was mandatory, the Secretary of State had discretion to accept amended returns received late. It further directed the Secretary to consider all relevant facts and circumstances in determining whether or not to ignore late-filed returns. Subsequent to the ruling, each supervisor of elections was asked by the Secretary of State to submit, by November 15, 2000, a written statement of “the facts and circumstances” that would justify certification of amended returns after the statutory deadline. Four county canvassing boards responded. After reviewing the submitted statements, the Secretary of State announced on Wednesday, November 15, 2000, that she would not accept the amended returns but rather would rely on the earlier certified returns of the four counties. The Secretary of State further stated her intent to certify the

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<sup>1</sup> The historical facts stated in this portion of the report were drawn from the presentation of L. Clayton Roberts, Director, Division of Elections, Department of State, and as referenced in the Florida Supreme Court’s opinion dated November 21, 2000, Palm Beach County Canvassing Board v. Katherine Harris, etc., et al., Nos. SC00-2346, SC00-2348 & SC00-2349 (Fla. November 21, 2000).

<sup>2</sup> Figures cited from correspondence dated November 22, 2000 from L. Clayton Roberts, Director, Division of Elections, Department of State, to The Honorable Tom Feeney, Speaker, The Florida House of Representatives, on file with the Office of the Clerk.

results of the presidential election on Saturday, November 18, 2000, to include the results of the overseas absentee ballots due by 5 p.m., November 17, 2000.<sup>3</sup>

On November 17, 2000, the Florida Supreme Court accepted jurisdiction of an appeal of an Order of the Circuit Court of the Second Judicial Circuit in Leon County, Florida, denying a motion to compel the Secretary of State to accept amended returns. The Court enjoined the Secretary of State and the Elections Canvassing Commission<sup>4</sup> from certifying the results of the presidential election until further order.

Subsequently, the Florida Supreme Court addressed the following issues:

- Under what circumstances may a county canvassing board authorize a countywide manual recount pursuant to section 102.166(5), Florida Statutes;
- Must the Secretary of State and the Elections Canvassing Commission accept such recounts when the returns are certified and submitted by the county canvassing board after the seven day deadline set forth in sections 102.111 and 102.112, Florida Statutes.

The court ultimately concluded that, “we must invoke the equitable powers of this court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here.”<sup>5</sup> The Court extended the filing date for amended certifications to 5 p.m. on Sunday, November 26, 2000, and ordered the Elections Canvassing Commission to include amended returns accepted through that date.<sup>6</sup>

On Sunday, November 26, 2000, the Elections Canvassing Commission certified the final results as follows: the Republican Presidential Electors for the State of Florida received 2,912,790 votes, and the Democratic Presidential Electors for the State of Florida received 2,912,253 votes. Subsequently, the Governor signed a Certificate of Ascertainment of Presidential Electors that

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<sup>3</sup>In 1982, the State entered into a consent decree with the United States Department of Justice to settle claims that Florida election statutes were inconsistent with federal law regarding voting by overseas personnel. Rule 1C-7.13, Florida Administrative Code was enacted in 1984 in direct response to the consent decree. That rule section, now Rule 1S-2.013, Florida Administrative Code, provides that overseas ballots be counted if they are postmarked *or* signed and dated before the election and received within 10 days after the election.

For the 2000 General Election, the deadline for receiving overseas absentee ballots was November 17, 2000. The final results, including the overseas absentee ballots, that were received by this deadline were: 2,911,872 votes for George W. Bush and 2,910,942 votes for Albert Gore, Jr. Letter from L. Clayton Roberts, Director, Division of Elections, Department of State, to The Honorable Tom Feeney, Speaker, The Florida House of Representatives (November 22, 2000).

<sup>4</sup>Under section 102.111, Florida Statutes, the Elections Canvassing Commission is comprised of the Governor, the Secretary of State, and the Director of the Division of Elections. Governor Jeb Bush voluntarily recused himself from sitting on the Commission and the Director of the Division of Elections, under his statutory authority, appointed the Commissioner of Agriculture to serve on the Commission.

<sup>5</sup>Palm Beach County Canvassing Board v. Katherine Harris, etc., et al, Nos. SC00-2346, SC00-2348 & SC00-2349 (Fla. November 21, 2000) at page 39.

<sup>6</sup>Palm Beach County Canvassing Board v. Katherine Harris, etc., et al, Nos. SC00-2346, SC00-2348 & SC00-2349 (Fla. November 21, 2000).

was then communicated by registered mail under the seal of the State to the Archivist of the United States, pursuant to 3 U.S.C. section 6.

Additional lawsuits have been filed by the Gore campaign and the Bush campaign,<sup>7</sup> as well as numerous other parties,<sup>8</sup> challenging different aspects of the presidential election in Florida. Most of these lawsuits are still pending resolution by the various state and federal courts.

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<sup>7</sup>Gore, et al v. Harris, et al., (Leon County Circuit Court Case No. 00-2808) (related Petition for Writ of Mandamus filed in the Florida Supreme Court on November 30, 2000, Case No. SC-00-2385) (contest of election); Gore v. Miami-Dade County Canvassing Board, (Florida Supreme Court Case No. 00-2370) (force a manual recount in Miami-Dade County); Bush, et al. v. Palm Beach County Canvassing Board, et al., (U.S. Supreme Court, Case No. 00-836)(constitutionality of Florida Supreme Court decision) (this is the case in which the Florida Senate and House of Representatives filed an *Amici Curiae* Brief); Bush, et al. v. Hillsborough County Canvassing Board, (Hillsborough County Circuit Court Case No. 00-8898); Bush et al. v. Okaloosa County Canvassing Board, (Okaloosa County Circuit Court Case No. 004206-CA); Bush, et al. v. Orange County Canvassing Board, (Orange County Circuit Court Case No. CI00AA35); Bush, et al. v. Pasco County Canvassing Board, (Pasco County Circuit Court Case No. CA2000-7693); Bush, et al. v. Polk County Canvassing Board, (Polk County Circuit Court Case No. GCG2000-04199); Bush, et al. v. Bay County Canvassing Board, (Leon County Circuit Court Case No. 00-2799) (These six circuit court cases all relate to overseas absentee ballots); Bush, et al. v. Hillsborough County Canvassing Board, et al., (U.S. District Court for the Northern District of Florida Case No. 3:00cv533-LAC) (overseas absentee ballots).

<sup>8</sup> Siegel, et al. v. LePore, et al., (U.S. 11<sup>th</sup> Circuit Court of Appeals Case No. 00-15981) (constitutionality of manual recount); Touchston, et al. v. McDermott, et al., (U.S. 11<sup>th</sup> Circuit Court of Appeals Case No. 00-15985) (constitutionality of manual recount); Fladell, et al. v. Palm Beach County Canvassing Board, et al., (Florida Supreme Court Case No. SC00-2373; Florida Fourth District Court of Appeal Case Nos. 4D00-4146, 4153; Palm Beach County Circuit Court Case Nos. CL-00-10965, 10970, 10988-AB, 10992-AB, 11000-AB) (butterfly ballot confusion requires a new election in Palm Beach County); Butler v. Harris and Butterworth, (Florida 1<sup>st</sup> District Court of Appeal Case No. 1D-00-4513) (constitutionality of manual recount); Miller v. Harris, et al., (U.S. District Court for the Southern District of Florida Case No. 00-9004-Civ-Ryskamp) (butterfly ballot); Florida Democratic Party v. Broward County Canvassing Board, (Broward County Circuit Court case No. CA-CE-00-019324) (count dimpled chads); McCauley v. Bay County Canvassing Board et al., (Leon County Circuit Court Case No. 00-2810) (absentee ballots); Harrell, et al. v. Harris, (Leon County Circuit Court Case No. 00-2803) (constitutionality of manual recount); Keller v. Harris, et al., (Leon County Circuit Court Case No. 00-2779) (overseas absentee ballots); Martin v. Harris, (Leon County Circuit Court Case No. 00-2746) (statewide recount); Jacobs, et al. v. Seminole County Canvassing Board, (Leon County Circuit Court Case No. 00-2816) (absentee ballots); Harris v. Circuit Judges of the 11<sup>th</sup>, 15<sup>th</sup>, and 17<sup>th</sup> Judicial Circuits of Florida, (Florida Supreme Court Case No. SC-00-2345) (cease manual recounts); Fox v. Harris, (Florida Supreme Court Case No. SC-00-2347) (new statewide election); Florida Democratic Party v. Palm Beach County Canvassing Board, (Palm Beach County Circuit Court Case No. CL-00-11078) (count dimpled chads). The number of cases filed in different courts throughout the State of Florida is extensive and dynamic and many were consolidated with other, similar cases. Therefore, this list may not include every case that has been filed.

## Joint Committee Action

On Friday, November 24, 2000, John McKay, President of the Florida Senate, and Tom Feeney, Speaker of the Florida House of Representatives, announced that a select joint committee would be formed for the purpose of examining issues surrounding the 2000 Florida Presidential Election. The Select Joint Committee on the Manner of Appointment of Presidential Electors (“the Joint Committee”) was charged with reviewing the Florida Legislature’s responsibilities and options with respect to the appointment of Florida’s 25 electors. The Joint Committee met in Tallahassee from November 28-30, 2000, and heard testimony from numerous constitutional scholars, law professors, election law experts, and the public.

The following persons testified before the Joint Committee:

- Professor John Yoo --- *University of California, Berkeley, Boalt Hall School of Law*
- Professor Einer Elhauge --- *Harvard Law School and Counsel for Florida House of Representatives*
- Bob Kerrigan, Esq. --- *Kerrigan, Estes, Rankin & McCloud, Pensacola, Florida; Counsel for Senate Democratic Caucus*
- Roger Magnuson, Esq. --- *Dorsey & Whitney, L.L.P., Minneapolis, Minnesota; Dean of Oak Brook College of Law and Government Policy; Counsel for the Florida Senate*
- Thomas Julin, Esq. --- *Hunton & Williams, Miami, Florida*
- Members of the Public
- L. Clayton Roberts, Esq. --- *Director, Division of Elections, Florida Department of State*
- Professor David Strauss --- *University of Chicago Law School*
- Professor Bruce Ackerman --- *Yale Law School*
- Dr. John Eastman --- *Chapman University School of Law*

Professor Yoo, Professor Elhauge, and Roger Magnuson testified that the Florida Legislature has the clear legal authority, and indeed a constitutional duty, to provide for the manner of appointment of electors. They stated that the source of this legislative authority is Article II, Section 1, of the United States Constitution, which grants plenary power to the state legislatures to determine the manner of appointing electors. Further, the United States Code provides that if a state has “failed to make a choice” of electors by a date certain, the state legislature may appoint them. These experts also cited the U.S. Supreme Court case of *McPherson v. Blacker*<sup>9</sup> that expressly confirmed the state legislature’s absolute power to determine the state’s electors.<sup>10</sup>

Professor Yoo, Professor Elhauge, and Mr. Magnuson advocated that the Florida Legislature convene in special session to provide the manner of appointment of Florida’s 25 electors. These experts identified a significant risk that Congress will not count the electors certified on November 26, 2000, if either: 1) there are any court cases pending on December 12, 2000; or, 2) there is a determination that the electors were appointed pursuant to laws different from those in place in Florida on November 7, 2000. The experts all agreed that it is highly unlikely that the

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<sup>9</sup> 146 U.S. 1 (1892).

<sup>10</sup> 146 U.S. at 35.

election contests and legal proceedings pending or yet to be filed will all conclude by December 12, 2000. Testimony of Professor Elhauge indicated that historically the shortest contest of a Florida election on record was 16 days, and that case was not appealed to the Supreme Court of Florida or to the United States Supreme Court. He stated that historically, on average, an election contest takes 17.7 months to be resolved. There was general consensus among these experts that the Florida Supreme Court changed pre-existing statutory law by extending the deadline for state certification of election results to November 26, 2000. The imminent risk of Congress not counting the votes of Florida's certified electors calls for decisive action by the Florida Legislature to prevent the disenfranchisement of Florida's voters.

While the experts concurred in the need to act, there was some discussion as to when the Florida Legislature should act to ensure that Florida's electoral votes will be counted in the Electoral College. Some of the experts testified that it would be advisable for the Florida Legislature to act by December 12, 2000, but others, particularly Mr. Magnuson, stated that there is a strong argument that Congress would be bound to count the votes of Florida's electors appointed by the Florida Legislature as long as the electors were selected in time to vote on December 18, 2000.

Professors Bruce Ackerman and David Strauss expressed an alternative view. Professor Ackerman testified that "it's illegal under the Federal statutes for the Florida Legislature to intervene at this time to select its own slate of electors." Both scholars asserted that Florida's choice of electors occurred when the Secretary of State certified Florida's returns on November 26, 2000, and the Certificate of Ascertainment designating Florida's 25 electors was sent to the Archivist of the United States. According to this view, since Florida has not failed to make a choice, 3 U.S.C. section 2 bars the Florida Legislature from further intervention.

Professors Ackerman and Strauss also testified that if the Florida courts determine that Vice President Gore has won the State's electoral votes then there would be another certification of electors. However, the first slate of electors pledged to Governor George W. Bush would remain on file with the Archivist of the United States and would not be replaced, discarded, or stricken. Accordingly, two slates of electors would have been transmitted to Congress. Florida would not have failed to act but, to the contrary, would have acted twice, rendering legislative intervention unnecessary.

The Joint Committee took testimony from Dr. John Eastman, an expert on the Electoral College and the process Congress undertakes in counting the votes of presidential electors under 3 U.S.C. section 15. While the procedures in section 15 are complex, Dr. Eastman testified that when Congress receives a single slate of electors from the executive of a state, Congress must count that slate provided the electors were lawfully certified and their votes were regularly given. If there is more than one slate of electors from a state, a process is triggered whereby both houses of Congress must agree on a given slate. If both houses cannot agree, then a section 15 process dictates that the slate certified by the executive of the state is the slate of electors that must be counted.

Mr. Thomas Julin provided the Joint Committee with a review of the election law appellate process. Mr. Julin stated that the appellate process for challenges to the election process is time-intensive and deliberative by nature such that the current judicial challenges to the presidential

election are very unlikely to be resolved by December 12, 2000. Therefore, in light of pending litigation, legislative intervention may be appropriate given the greater danger resulting from legislative inaction. Acknowledging that there is no precedent for such legislative intervention, Mr. Julin used an analogy to the first amendment abridgement of free speech to suggest that prior to taking action, the Joint Committee might first determine whether there is a significant governmental interest in legislative intervention.

Mr. Bob Kerrigan, representing the Senate Democratic Caucus, indicated that he was neither a constitutional scholar nor election law expert. Mr. Kerrigan challenged the procedural appropriateness of the Joint Committee process and questioned the impartiality of the Florida Legislature's *amici curiae* brief filed in the pending U.S. Supreme Court case *Bush v. Palm Beach County Canvassing Board, et al.*, No. 00-836.

Mr. L. Clayton Roberts, Director of the Division of Elections of the Department of State, provided an overview of state election law and local election procedures. Mr. Roberts also updated the Joint Committee on the Secretary of State's efforts to adhere to statutory obligations following the election held on November 7, 2000.

On November 29, 2000, the Joint Committee scheduled and took public testimony regarding the constitutional issue of the selection of electors. However, the majority of the public testimony focused on voting irregularities, which these voters believe caused them either not to vote, to vote inaccurately, or to vote improperly. Seventy-two citizens filled out appearance cards. When the designated time for the public hearing had concluded, 60 members of the public had presented testimony. Citizens were recognized to speak in the order in which their appearance cards were received. Additionally, any interested party was asked to fill out a form provided by the Joint Committee for the purpose of relating any particular instance of anecdotal evidence regarding voting difficulties. It was announced at the public hearing that these documents would be transmitted to the appropriate legislative committees for introduction into the public record to be considered during the regular legislative session in March 2001. Twenty-four persons signed a form indicating voting problems. In addition, one citizen who was unable to testify due to time constraints had written testimony introduced into the record, upon his request at the meeting. Most of the speakers, the majority of whom were from Palm Beach County, objected to legislative action to send a slate of electors to Congress. Additional written public comments and documents were accepted and reviewed by the Joint Committee.

After discussion of the testimony presented to the Joint Committee, the following motion was moved by Senator John Laurent and adopted by the Joint Committee on an 8-5 vote:

[Comments and motion by Senator Laurent]

It is clear from the expert testimony presented to this Committee that the Legislature has the fundamental obligation under Article II of the United States Constitution to ensure that Florida's electors are counted on January 6 when Congress counts the votes of the Electoral College. Based on the entire testimony presented to this Committee, there appears to be a significant risk that all of Florida's voters may be disenfranchised if the

Legislature does not act to fulfill its responsibility. If the election controversies and contests now pending are not finally and conclusively determined by December 12, there can be no assurance that Congress will count the votes of Florida's 25 electors. From the testimony presented, it appears likely that the determination necessary to ensure Congress counts the votes will not occur by December 12 and that, even if made, such determination may not be conclusive because of post-election changes in the election laws.

I, therefore, move that this committee recommend to the President of the Senate and the Speaker of the House of Representatives that the Legislature convene in special session to determine the manner in which the electors of this state shall be appointed and to consider, and if necessary, take such other action to ensure that Florida's 25 electoral votes for President and Vice President in the 2000 Presidential Election are counted.

I further move that a special session be held as soon as practicable with such action to be accomplished by appropriate legislative means.

I further move that staff be directed to memorialize, under the supervision of the co-chairs, this recommendation in detail sufficient to explain the necessity to act and the manner in which that action may be taken. The report shall be signed by all committee members voting in favor of this motion and then forwarded to the President and Speaker.

Representative Ken Gottlieb moved a substitute motion that the Legislature take no action to interfere with the lawful ongoing election process created prior to the election of November 7, 2000. That motion was defeated by the Joint Committee on a 5-8 vote.

## **Discussion**

The Joint Committee review of the manner of appointing Florida's electors is one of the most significant questions that any state legislature will have to address. It encompasses the entire federal and state mechanisms for electing this country's leaders. A discussion of this issue is now necessary because the state mechanism is likely to fail to produce a slate of Florida electors which the United States Congress must conclusively accept.

Testimony before the Joint Committee and debate by its members clearly revealed the complexity of the topic. A discussion of every aspect and every scenario possible under the application of controlling federal law would be an undertaking of indeterminate duration. Books have been devoted, and legal scholars have dedicated their professional lives to the subject. More directly, such an extensive discussion is beyond the scope of this report. The purpose of this report is to explain the Joint Committee's recommendation to convene a special session to ensure that Florida's 25 electoral votes in the 2000 presidential election are counted, as reflected in the motion adopted by the Joint Committee. The relevant discussion supporting that motion follows.

The United States Constitution provides that the President and Vice President shall be elected through the Electoral College process. The Constitution further vests in the legislature of each state the sole authority for determining the manner in which electors are appointed to the Electoral College.<sup>11</sup>

The legislature's authority to direct the manner in which electors are appointed is an absolute authority that cannot be exercised by the judicial or executive branch of government. This authority is so powerful that the United States Supreme Court has stated that, whatever statutory provisions may exist for the choosing of electors, there is no doubt of the legislature's right to resume the power to choose electors at any time.<sup>12</sup> Significantly, the U.S. Supreme Court stated that the legislature's constitutional power to choose electors can never be taken away.<sup>13</sup>

The Florida Legislature has specifically provided for the appointment of electors through a general election where citizens cast their votes. Florida laws govern the manner and method of the election. The electors representing each of the presidential candidates are initially selected by the respective political parties prior to the general election. Although the names of the presidential candidates appear on the ballot, a vote cast for the presidential candidate is actually a vote for the electors representing that candidate. The candidate receiving the highest number of votes is entitled to have his or her electors cast Florida's 25 electoral votes in the Electoral College.<sup>14</sup>

Intertwined with the constitutional and statutory provisions concerning the appointment of electors and the voting of the Electoral College are federal laws that govern when the electors vote and how Congress will count their votes. Federal law provides that Congress must conclusively accept and count the vote of Florida's electors if the appointment of the electors is

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<sup>11</sup> Article II, Section 1, U.S. Constitution.

<sup>12</sup> 146 U.S. at 35.

<sup>13</sup> *Id.*

<sup>14</sup> Section 103.011, F. S. (2000).

done in accordance with the laws of Florida as they existed on the date of the appointment, the November 7, 2000 general election, and any controversies or contests related to the appointment are resolved by December 12, 2000.<sup>15</sup> Another section of federal law requires the electors to meet on December 18, 2000, as the Electoral College for the purpose of casting their votes for President and Vice President.<sup>16</sup> If all of these requirements are not met, Congress may reject the vote of Florida's electors. Thus, the pending litigation and allegations that Florida's Supreme Court and county canvassing boards have altered Florida's election law subsequent to November 7, 2000, could result in Florida's electoral votes not being counted by Congress unless resolved by December 12, 2000. If resolved, then Florida's lawfully certified electors must vote as part of the Electoral College on December 18, 2000.

In summary, in order for there to be a definitive answer as to whether the currently certified slate of electors will be counted, the following three uncertainties must be conclusively resolved:

- All lawsuits must be conclusively resolved by December 12, 2000. The Florida presidential election results are currently the subject of over 20 lawsuits. According to the testimony received by the Joint Committee, historically, contests of Florida elections have taken an average of 17.7 months to conclude. It is highly improbable that all of these lawsuits will be resolved through the appellate process by December 12 to ensure that Congress conclusively accepts Florida's electoral votes.
- Additionally, all allegations of law changes would need to be resolved by December 12, 2000. The U.S. Supreme Court is currently reviewing the decision of the Florida Supreme Court and has been requested to determine that the Florida Supreme Court changed Florida election law in allowing additional time to file returns after November 14, 2000. The manner of counting ballots by the county canvassing boards is an issue in an election contest currently before Leon County Circuit Court. Depending on how these issues are resolved by the courts, Florida's Electoral College votes may be subject to challenge in Congress.
- The last major federal requirement is for Florida's electors to be selected in time to ensure they can vote on December 18, 2000. If they do not vote on that date as required by Congress, the votes are subject to a congressional challenge during the counting for not being "regularly given." Thus, to eliminate one major challenge to the counting of Florida's Electoral College votes, those votes must be cast on December 18, 2000.

As mentioned previously, the U.S. Supreme Court has acknowledged that "[w]hatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."<sup>17</sup> The experts testified that the *McPherson* case clearly spells out the Florida Legislature's constitutional obligation to affirmatively act so that Florida's electors will

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<sup>15</sup> 3 U.S.C. s. 5.

<sup>16</sup> 3 U.S.C. s. 7.

<sup>17</sup> 146 U.S. at 35.

be counted in this presidential election. The experts further testified that federal law provides that, in the event a state's election has failed to make a choice of electors, the Florida Legislature can directly appoint the electors in any manner it desires.

The testimony received by the Joint Committee revealed that there is little or no precedent to guide the Florida Legislature through this process. There was testimony that the judicial resolution of Florida's election results could take months, if not years, to conclude. It is improbable that the lawsuits will be over before December 12, 2000, thereby jeopardizing Florida's electoral votes. The Legislature has a constitutional duty to make sure Florida's electoral votes are counted so that the nearly 6 million Florida voters who cast their votes on election day are not disenfranchised. The only way to ensure this happens is for the Legislature to exercise its constitutional authority to convene in special session to decide the manner of appointing presidential electors.

Because of the significance given to the electors voting on December 18, the Legislature has a constitutional duty to ensure that the electors are appointed by that date. Therefore, the special session must be convened at a time to allow for appropriate consideration of the issues, application of legislative procedures, and selection of the electors prior to December 18, 2000.

There are a number of options available to the Florida Legislature to meet its constitutional obligation to decide the manner of appointing electors, in light of the current election uncertainty. The Florida Legislature could directly appoint a slate of 25 electors. The Legislature could also affirm the slate of electors already certified and forwarded to Washington, D.C. Since the manner of determining how the electors are chosen is a plenary power of the Florida Legislature, the Legislature could choose any other manner of selection that it deems appropriate under these unique circumstances.

There are several ways the Florida Legislature may act to direct the manner of appointing a slate of electors. The Legislature may enact a bill, joint resolution, concurrent resolution, or memorial.

In general, a bill proposes to create or amend existing provisions of the Florida Statutes or Chapter Laws of Florida. A bill may have statewide or local effect of law. A joint resolution is specifically used to propose an amendment to the constitution, to reapportion the legislature, or to extend a legislative session. A concurrent resolution has been used historically for a number of purposes including certifying the Florida Supreme Court recommendations for additional judges or reconfiguration of the judicial circuits, recalling a bill from the Governor's office, ratifying amendments to the U.S. Constitution, and expressing commendations relating to matters of statewide non-political significance. A memorial is typically used to send a message to or petition Congress, the President of the United States, or other governmental entity or official to take specific action within its jurisdiction.

Each of these legislative measures has distinct requirements and legal significance. A bill must be read three times by each house of the Legislature, must be adopted by a majority vote for passage, and requires the Governor's approval or alternatively becomes law seven days after being presented to the Governor, without the Governor's signature. Resolutions require no less than two readings, may be adopted by a majority vote, and do not require the Governor's

approval. These requirements should be kept in mind as the Legislature determines the most effective method of carrying out its plenary power to ensure the votes of Florida's Presidential electors are counted on January 6, 2001.

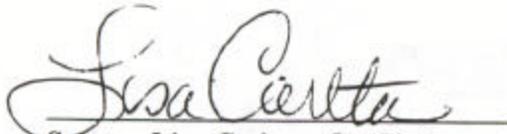
## **Joint Committee Recommendations**

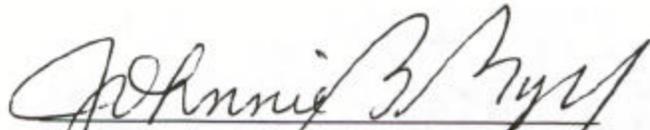
The Joint Committee heard testimony from invited experts, interested parties and the general public presented in public meetings held in Tallahassee on November 28 and 29, 2000. On November 30, 2000, in a public meeting held in Tallahassee, the Joint Committee's membership deliberated and debated the testimony and the related issues. It is the opinion of this Joint Committee that the Florida Legislature has a duty to be prepared to take legislative action in the event that by December 12, 2000, current legal challenges to Florida's 2000 Presidential Election have not been fully determined and all allegations of past election changes to Florida election law have not been resolved.

Our state legislators are elected to uphold the constitutions and laws of the State of Florida and of the United States of America. Further, the legislators are elected to represent the people of the State of Florida. Failure to take appropriate legislative action in order to protect the rights of the nearly six million Florida voters to have their votes counted in the Electoral College would be tantamount to an abdication of the members' sworn duty to uphold the Constitution of the United States of America.

Therefore, the Select Joint Committee on the Manner of Appointment of Presidential Electors recommends to the President of the Senate and the Speaker of the House of Representatives that:

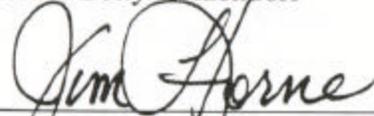
1. The Florida Legislature convene in Special Session for the purpose of addressing the manner of appointment of presidential electors for the State of Florida; and, that
2. The Florida Legislature carefully consider the broad authority granted to it under Section 1 of Article II of the United States Constitution to establish the manner of appointment of the electors for the State of Florida; and, that
3. The Florida Legislature take appropriate action to ensure that Florida's 25 electoral votes for President and Vice President in the 2000 Presidential Election are counted.

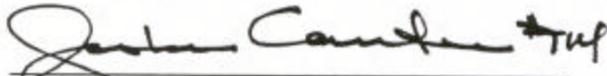
  
\_\_\_\_\_  
Senator Lisa Carlton, Co-Chairman

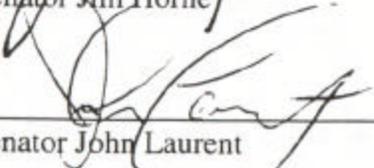
  
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Representative Johnnie Byrd, Co-Chairman

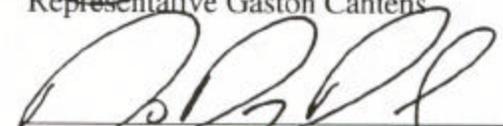
\_\_\_\_\_  
Senator Betty Holzendorf

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Representative Annie Betancourt

  
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Senator Jim Horne

  
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Representative Gaston Cantens

  
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Senator John Laurent

  
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Representative Mario Diaz-Balart

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Senator Tom Rossin

  
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Representative J. Dudley Goodlette

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Senator Rod Smith

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Representative Kenneth Gottlieb

  
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Senator Daniel Webster

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Representative Dwight Stansel

# Appendices

# U.S. Constitution --- Article II, Section 1

## **ARTICLE II.**

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the Same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

<sup>[5]</sup>The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if

there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

<sup>[5]</sup>Note. — This clause has been affected by the 12th amendment.

## U.S. Constitution --- 12<sup>th</sup> Amendment

### ARTICLE XII.]<sup>[9]</sup>

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; 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. But in choosing the President, the votes shall be taken by states, the

representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. 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. The person having the greatest number of votes as Vice-President, shall be the 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. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

<sup>[9]</sup>Note. — This amendment was proposed by Congress on December 9, 1803; ratification was completed on June 15, 1804. This amendment has been affected by the 20<sup>th</sup> amendment..

## U.S. Constitution --- 20<sup>th</sup> Amendment

### ARTICLE [XX.]<sup>[17]</sup>

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SEC. 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.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

<sup>[17]</sup>Note. — This amendment was proposed by Congress on March 2, 1932; ratification was completed on January 23, 1933.

### **3 U.S.C. Section 1**

#### **Section 1. Time of appointing electors**

The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

### **3 U.S.C. Section 2**

#### **Section 2. Failure to make choice on prescribed day**

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

### **3 U.S.C. Section 5**

#### **Section 5. Determination of controversy as to appointment of electors**

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

### **3 U.S.C. Section 6**

#### **Section 6. Credentials of electors; transmission to Archivist of the United States and to Congress; public inspection**

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

### **3 U.S.C. Section 7**

#### **Section 7. Meeting and vote of electors**

The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.

### 3 U.S.C. Section 15

#### Section 15. Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be

### 3 U.S.C. Section 15 (cont.)

a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

\*3 13 S.Ct. 3

146 U.S. 1, 36 L.Ed. 869

**McPHERSON et al.**

**v.**

**BLACKER, Secretary of State.**

**No. 1,170.**

October 17, 1892.

In error to the supreme court of the state of Michigan. Affirmed.

Statement by Mr. Chief Justice FULLER:

William McPherson, Jr., Jay A. Hubbell, J. Henry Carstens, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, Henry A. Haigh, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock filed their petition and affidavits in the supreme court of the state of Michigan on May 2, 1892, as nominees for presidential electors, against Robert R. Blacker, secretary of state of Michigan, praying that the court declare the act of the legislature, approved May 1, 1891, (Act No. 50, Pub. Acts Mich. 1891,) entitled 'An act to provide for the election of electors of president and vice president of the United States, and to repeal all other acts and parts of acts in conflict herewith,' void and of no effect, and that a writ of mandamus be directed to be issued to the said secretary of state, commanding him to cause to be delivered to the sheriff of each county in the state, between the 1st of July and the 1st of September, 1892, 'a notice in writing that at the next general election in this state, to be held on Tuesday, the 8th day of November, 1892, there will be chosen (among other officers to be named in said notice) as many electors of president and vice president of the United States as this state may be entitled to elect senators and representatives in the congress.'

The statute of Michigan (1 How. Ann. St. Mich. § 147, c. 9, p. 133) provided: 'The secretary of the state shall, between the 1st day of July and the 1st day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this state a notice in writing that, at the next general election, there will be chosen as many of the following officers as are

to be elected at such general election, viz.: A governor, lieutenant governor, secretary of state, state treasurer, auditor general, attorney general, superintendent of public instruction, commissioner of state land office, members of the state board of education, electors of president and vice president of the United States, and a representative in congress for the district to which each of such counties shall belong.'

A rule to show cause having been issued, the respondent, as secretary of state, answered the petition, and denied that he had refused to give the notice thus required, but he said 'that it has always been the custom in the office of the secretary of state, in giving notices under said section 147, to state in the notice the number of electors that should be printed on the ticket in each voting precinct in each county in this state, and following such custom with reference to such notice, it is the intention of this respondent in giving notice under section 147 to state in said notice that there will be elected one presidential elector at large and one district presidential elector and two alternate presidential electors, one for the elector at large and one for the district presidential elector, in each voting precinct, so that the election may be held under and in accordance with the provisions of Act No. 50 of the Public Acts of the state of Michigan of 1891.'

By an amended answer the respondent claimed the same benefit as if he had demurred.

Relators relied in their petition upon various grounds as invalidating Act No. 50 of the Public Acts of Michigan of 1891, and, among them, that the act was void because in conflict with clause 2 of section 1 of article 2 of the constitution of the United States, and with the fourteenth amendment to that instrument, and also in some of its provisions in conflict with the act of congress of February 3, 1887, entitled 'An act to fix the day for the meeting of the electors of president and vice president, and to provide for and regulate the counting of the votes for president and vice president, and the decision of questions arising thereon.' The supreme court of Michigan unanimously held that none of the objections urged against the validity of the act were tenable; that it did not conflict with clause 2, § 1, art. 2, of the constitution, or with the fourteenth amendment thereof; and that the law was only inoperative so far as in conflict with the law of congress in a matter in reference to

which congress had the right to legislate. The opinion of the court will be found reported, in advance of the official series, in 52 N. W. Rep. 469.

Judgment was given, June 17, 1892, denying the writ of mandamus, whereupon a writ of error was allowed to this court.

The October term, 1892, commenced on Monday, October 10th, and on Tuesday, October 11th, the first day upon which the application could be made, a motion to advance the case was submitted by counsel, granted at once in view of the exigency disclosed upon the face of the papers, and the cause heard that day. The attention of the court having been called to other provisions of the election laws of Michigan than those supposed to be immediately involved, (Act No. 190, Pub. Acts Mich. 1891, pp. 258, 263,) the chief justice, on Monday, October 17th, announced the conclusions of the court, and directed the entry of judgment affirming the judgment of the supreme court of Michigan, and ordering the mandate to issue at once, it being stated that this was done because immediate action under the state statutes was apparently required and might be affected by delay, but it was added that the court would thereafter file an opinion stating fully the grounds of the decision.

Act \*3 No. 50 of the Public Acts of 1891 of Michigan is as follows:

'An act to provide for the election of electors of president and vice president of the United States, and to repeal all other acts and parts of acts in conflict herewith.

'Section 1. The people of the state of Michigan enact that, at the general election next preceding the choice of president and vice president of the United States, there shall be elected as many electors of president and vice president as this state may be entitled to elect of senators and representatives in congress in the following manner, that is to say: There shall be elected by the electors of the districts hereinafter defined one elector of president and vice president of the United States in each district, who shall be known and designated on the ballot, respectively, as 'eastern district elector of president and vice president of the United States at large,' and 'western district elector of president and vice president of the United States at large.' There shall also be elected, in like manner, two alternate electors of president and vice

president, who shall be known and designated on the ballot as 'eastern district alternate elector of president and vice president of the United States at large,' and 'western district alternate elector of president and vice president of the United States at large;' for which purpose the first, second, sixth, seventh, eighth, and tenth congressional districts shall compose one district, to be known as the 'Eastern Electoral District,' and the third, fourth, fifth, ninth, eleventh, and twelfth congressional districts shall compose the other district, to be known as the 'Western Electoral District.' There shall also be elected, by the electors in each congressional district into which the state is or shall be divided, one electors of president and vice president, and one alternate elector of president and vice president, the ballots for which shall designate the number of the congressional district and the persons to be voted for therein, as 'district elector' and 'alternate district elector' of president and vice president of the United States, respectively.

'Sec. 2. The counting, canvassing, and certifying of the votes cast for said electors at large and their alternates, and said district electors and their alternates, shall be done as near as may be in the same manner as is now provided by law for the election of electors or president and vice president of the United States.

'Sec. 3. The secretary of state shall prepare three lists of the names of the electors and the alternate electors, procure thereto the signature of the governor, affix the seal of the state to the same, and deliver such certificates thus signed and sealed to one of the electors, on or before the first Wednesday of December next following said general election. In case of death, disability, refusal to act, or neglect to attend, by the hour of twelve o'clock at noon of said day, of either of said electors at large, the duties of the office shall be performed by the alternate electors at large, that is to say: The eastern district alternate elector at large shall supply the place of the eastern district elector at large, and the western district alternate elector at large shall supply the place of the western district elector at large. In like case, the alternate congressional district elector shall supply the place of the congressional district elector. In case two or more persons have an equal and the highest number of votes for any office created by this act as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such

office, and it shall be the duty of the governor to convene the legislature in special session for such purpose immediately upon such determination by said board of state canvassers.

'Sec. 4. The said electors of president and vice president shall convene in the senate chamber at the capital of the state at the hour of twelve o'clock at noon, on the first Wednesday of December immediately following their election, and shall proceed to perform the duties of such electors as required by the constitution and the laws of the United States. The alternate electors shall also be in attendance, but shall take no part in the proceedings, except as herein provided.

'Sec. 5. Each of said electors and alternate electors shall receive the sum of five dollars for each day's attendance at the meetings of the electors as above provided, and five cents per mile for the actual and necessary distance traveled each way in going to and returning from said place of meeting, the same to be paid by the state treasurer upon the allowance of the board of state auditors.

'Sec. 6. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.' Pub. Acts Mich. 1891, pp. 50, 51.

Section 211 of Howell's Annotated Statutes of Michigan (volume 1, c. 9, p. 145) reads:

'For the purpose of canvassing and ascertaining the votes given for electors of president and vice president of the United States, the board of state canvassers shall meet on the Wednesday next after the third Monday of November, or on such other day before that time as the secretary of state shall appoint; and the powers, duties, and proceedings of said board, and of the secretary of state, in sending for, examining, ascertaining, determining, certifying, and recording the votes and results of the election of such electors, shall be in all respects, as near as may be, as hereinbefore provided in relation to sending for, examining, ascertaining, determining, certifying, and recording the votes and results of the election of state officers.'

Section 240 of Howell's Statutes, in force prior to May 1, 1891, provided: 'At the general election next preceding the choice of president and vice president of the United

States, there shall be elected by general ticket \*3 as many electors of president and vice president as this state may be entitled to elect of senators and representatives in congress.'

The following are sections of article 8 of the constitution of Michigan:

'Sec. 4. The secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of state auditors, to examine and adjust all claims against the state, not otherwise provided for by general law. They shall constitute a board of state canvassers, to determine the result of all elections for governor, lieutenant governor, and state officers, and of such other officers as shall by law be referred to them.

'Sec. 5. In case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such office. When the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected.' 1 How. Ann. St. Mich. p. 57.

Reference was also made in argument to the act of congress of February 3, 1887, to fix the day for the meeting of the electors of president and vice president, and to provide for and regulate and counting of the votes. 24 St. p. 373.

#### SUPREME COURT--JURISDICTION--POLITICAL QUESTIONS--CONSTITUTIONAL LAW--APPOINTMENT OF PRESIDENTIAL ELECTORS BY CONGRESSIONAL DISTRICTS--TIME OF MEETING.

1. Whether or not Pub. Acts Mich. 1891, No. 50, providing for the election of presidential electors by congressional districts instead of by the people of the state at large, is repugnant to the constitution and laws of the United States, is a judicial, and not a political, question, which the supreme court has power to determine, the validity of the act having been sustained by the Michigan supreme court.

#### SUPREME COURT--JURISDICTION--POLITICAL QUESTIONS--CONSTITUTIONAL

LAW--APPOINTMENT OF PRESIDENTIAL ELECTORS BY CONGRESSIONAL DISTRICTS--TIME OF MEETING.

2. Such act does not violate Const. art. 2, § 1, which declares that 'each state shall appoint, in such manner as the legislature may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress,' since, by the construction placed on the constitution contemporaneously with and for many years after its adoption, such constitutional provision conferred on the state legislature plenary power to prescribe the method of choosing electors, and did not require the state, in appointing electors, to act as a unit. 52 N. W. Rep. 469, affirmed.

SUPREME COURT--JURISDICTION--POLITICAL QUESTIONS--CONSTITUTIONAL LAW--APPOINTMENT OF PRESIDENTIAL ELECTORS BY CONGRESSIONAL DISTRICTS--TIME OF MEETING.

3. The fact that all the states gradually adopted a uniform method of popular election for presidential electors by general ticket, and that such system has prevailed among the states for many years, have not deprived the legislature of any state of its power to adopt a different method. 52 N. W. Rep. 469, affirmed.

SUPREME COURT--JURISDICTION--POLITICAL QUESTIONS--CONSTITUTIONAL LAW--APPOINTMENT OF PRESIDENTIAL ELECTORS BY CONGRESSIONAL DISTRICTS--TIME OF MEETING.

4. The power thus confided to the states by the constitution has not ceased to exist because the original expectation of the framers of the constitution in respect to the independence of electors may be said to have been frustrated in practice.

SUPREME COURT--JURISDICTION--POLITICAL QUESTIONS--CONSTITUTIONAL LAW--APPOINTMENT OF PRESIDENTIAL ELECTORS BY CONGRESSIONAL DISTRICTS--TIME OF MEETING.

5. The power of a state to change its mode of choosing presidential electors was not taken away by the fourteenth and fifteenth amendments, because of the additional rights and guaranties therein secured to citizens in respect to voting at national elections, although at the time of their adoption all the states chose their electors by elections at large. 52 N. W. Rep. 469, affirmed.

SUPREME COURT--JURISDICTION--POLITICAL QUESTIONS--CONSTITUTIONAL LAW--APPOINTMENT OF PRESIDENTIAL ELECTORS BY CONGRESSIONAL DISTRICTS--TIME OF MEETING.

6. The provision of Pub. Acts Mich. 1891, No. 50, which conflicts with Act Cong. Feb. 3, 1887, in that it fixes a different date for the electors to meet and give their votes, is separable from and does not vitiate the whole act. 52 N. W. Rep. 469, affirmed.

**STATUTES k64(2)**

361 ----  
361I Enactment, Requisites, and Validity in General  
361k64 Effect of Partial Invalidity  
361k64(2) Acts relating to particular subjects in general.

U.S. 1892  
The fact that Pub.Acts Mich.1891, No. 50, providing for the election of presidential electors, conflicts with Act Cong. Feb. 3, 1887, in that it fixes a different date for the electors to meet and give their votes, does not vitiate the whole act.

**UNITED STATES k25**

393 ----  
393I Government in General  
393k25 Presidential electors.

U.S. 1892  
Pub.Acts Mich.1891, No. 50, providing for the election of presidential electors by congressional districts, does not violate U.S.C.A.Const. art. 2, § 1, which declares that "each state shall appoint, in such manner as the legislature may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress," since, by the construction placed on the constitution

contemporaneously with and for many years after its adoption, such constitutional provision conferred on the state legislature plenary power to prescribe the method of choosing electors, and did not require the state, in appointing electors, to act as a unit.

**UNITED STATES k25**

393 ----

393I Government in General

393k25 Presidential electors.

U.S. 1892

The fact that all the states gradually adopted a uniform method of popular election for presidential electors by general ticket, and that such system has prevailed among the states for many years, have not deprived the legislature of any state of its power to adopt a different method.

**UNITED STATES k25**

393 ----

393I Government in General

393k25 Presidential electors.

U.S. 1892

The power thus confided to the states by the constitution has not ceased to exist because the original expectation of the framers of the constitution in respect to the independence of electors may be said to have been frustrated in practice.

**UNITED STATES k25**

393 ----

393I Government in General

393k25 Presidential electors.

U.S. 1892

The power \*3 of a state to change its mode of choosing presidential electors was not taken away by the fourteenth and fifteenth amendments, because of the additional rights and guaranties therein secured to citizens in respect to voting at national elections, although at the time of their adoption all the states chose their electors by elections at large.

**CONSTITUTIONAL LAW k68(1)**

92 ----

92III Distribution of Governmental Powers and

Functions

92III(B) Judicial Powers and Functions

92k68 Political Questions

92k68(1) In general.

U.S. 1892

Whether or not Pub.Acts Mich.1891, No. 50, providing for the election of presidential electors by congressional districts instead of by the people of the state at large, is repugnant to the constitution and laws of the United States is a judicial, and not a political, question, which the supreme court has power to determine the validity of the act having been sustained by the Michigan supreme court.

Henry M. Duffield, W. H. H. Miller, and Fred A. Baker, for plaintiff in error.

[146 U.S. 19] Otto Kirchner, A. A. Ellis, and John W. Champlin, for defendant in error.

[146 U.S. 22] Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

[146 U.S. 23] The supreme court of Michigan held, in effect, that if the act in question were invalid, the proper remedy had been sought. In other words, if the court had been of opinion that the act was void, the writ of mandamus would have been awarded.

And having ruled all objections to the validity of the act urged as arising under the state constitution and laws adversely to the plaintiffs in error, the court was compelled to, and did, consider and dispose of the contention that the act was invalid because repugnant to the constitution and laws of the United States.

We are not authorized to revise the conclusions of the state court on these matters of local law, and, those conclusions being accepted, it follows that the decision of the federal questions is to be regarded as necessary to the determination of the cause. De Saussure v. Gaillard, 127 U. S. 216, 8 Sup. Ct. Rep. 1053.

Inasmuch as, under section 709 of the Revised Statutes of the United States, we have jurisdiction by writ of error to re-examine and reverse or affirm the final judgment in any suit in the highest court of a state in which a decision could be had, where the validity of a

statute of the state is drawn in question on the ground that it is repugnant to the constitution and laws of the United States, and the decision is in favor of its validity, we perceive no reason for holding that this writ was improvidently brought.

It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the congress.

But the judicial power of the United States extends to all cases in law or equity arising under the constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained. [146 U.S. 24] *Boyd v. State*, 143 U. S. 135, 12 Sup. Ct. Rep. 375. And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. *Hartman v. Greenhow*, 102 U. S. 672.

As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitely disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.

The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state, as revised by our own.

On behalf of plaintiffs in error it is contended that the act is void because in conflict with (1) clause 2, § 1, art. 2, of the constitution of the United States; (2) the fourteenth and fifteenth amendments to the constitution; and (3) the act of congress, of February 3, 1887.

The second clause of section 1 of article 2 of the constitution is in these words: 'Each state shall appoint,

in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.'

The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve congressional districts into which the state of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act. It is insisted that it was not competent for the legislature to direct this manner of appointment, because the state is to appoint as a body politic and corporate, and so must act as a unit, and cannot delegate the authority to subdivisions created for the purpose; and it is argued that the appointment[146 U.S. 25] of electors by districts is not an appointment by the state, because all its citizens otherwise qualified are \*3 not permitted to vote for all the presidential electors.

'A state, in the ordinary sense of the constitution,' said Chief Justice Chase, (*Texas v. White*, 7 Wall. 700, 731,) 'is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.' The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The \*7 legislative power is the supreme authority, except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words, 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the

insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket, and not by districts. In other words, the act of appointment is none the less the act of the state in its entirety because arrived[146 U.S. 26] at by districts, for the act is the act of political agencies duly authorized to speak for the state, and the combined result is the expression of the voice of the state, a result reached by direction of the legislature, to whom the whole subject is committed.

By the first paragraph of section 2, art. 1, it is provided: 'The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature;' and by the third paragraph, 'when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.' Section 4 reads: 'The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators.'

Although it is thus declared that the people of the several states shall choose the members of congress, (language which induced the state of New York to insert a salvo as to the power to divide into districts, in its resolutions of ratification,) the state legislatures, prior to 1842, in prescribing the times, places, and manner of holding elections for representatives, had usually apportioned the state into districts, and assigned to each a representative; and by act of congress of June 25, 1842, (carried forward as section 23 of the Revised Statutes,) it was provided that, where a state was entitled to more than one representative, the election should be by districts. It has never been doubted that representatives in congress thus

chosen represented the entire people of the state acting in their sovereign capacity.

By original clause 3, § 1, art. 2, and by the twelfth amendment, which superseded that clause in case of a failure in the election of president by the people the house of representatives is to choose the president; and 'the vote shall be taken by states, the representation from [146 U.S. 27] each state having one vote.' The state acts as a unit, and its vote is given as a unit, but that vote is arrived at through the votes of its representatives in congress elected by districts.

The state also acts individually through its electoral college, although, by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided.

The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the contemporaneous practical exposition of the constitution being too strong and obstinate to be shaken or controlled. *Stuart v. Laird*, 1 Cranch, 299, 309.

It has been said that the word 'appoint' is not the most appropriate word to describe the result of a popular

election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as \*8 conveying the broadest power of determination. It was used in article 5 of the articles of confederation, which provided that 'delegates shall be annually appointed in such manner as the legislature [146 U.S. 28] of each state shall direct;' and in the resolution of congress of February 21, 1787, which declared it expedient that 'a convention of delegates who shall have been appointed by the several states' should be held. The appointment of delegates was, in fact, made by the legislatures directly, but that involved no denial of authority to direct some other mode. The constitutional convention, by resolution of September 17, 1787, expressed the opinion that the congress should fix a day 'on which electors should be appointed by the states which shall have ratified the same,' etc., and that, 'after such publication, the electors should be appointed, and the senators and representatives elected.'

The journal of the convention discloses that propositions that the president should be elected by 'the citizens of the United States,' or by the 'people,' or 'by electors to be chosen by the people of the several states,' instead of by the congress, were voted down, (Jour. Conv. 286, 288; 1 Elliot, Deb. 208, 262,) as was the proposition that the president should be 'chosen by electors appointed for that purpose by the legislatures of the states,' though at one time adopted, (Jour. Con v. 190; 1 Elliot, Deb. 208, 211, 217;) and a motion to postpone the consideration of the choice 'by the national legislature,' in order to take up a resolution providing for electors to be elected by the qualified voters in districts, was negatived in committee of the whole, (Jour. Conv. 92; 1 Elliot, Deb. 156.) Gerry proposed that the choice should be made by the state executives; Hamilton, that the election be by electors chosen by electors chosen by the people; James Wilson and Gouverneur Morris were strongly in favor of popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the legislatures; and Roger Sherman, appointment by congress. The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed.

Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to

find, as we do, [146 U.S. 29] that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting indistricts and partly by the people voting in districts and partly by the candidates voted for by the people in districts; and in other ways, as, notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the constitution, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable.

At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina. Pennsylvania, by act of October 4, 1788, (Acts Pa. 1787-88, p. 513,) provided for the election of electors on a general ticket. Virginia, by act of November 17, 1788, was divided into 12 separate districts, and an elector elected in each district, while for the election of congressmen the state was divided into 10 other districts. Laws Va. Oct. Sess. 1788, pp. 1, 2. In Massachusetts, the general court, by resolve of November 17, 1788, divided the state into districts for the election of representatives in congress, and provided for their election, December 18, 1788, and that at the same time the qualified inhabitants of each district should give their votes for two persons as candidates for an elector of president and vice president of the United States, and, from the two persons in each district having the greatest number of votes, the two houses of the general court by joint ballot should elect one as elector, and in the same way should elect two electors at large. Mass. Resolves 1788, p. 53. In Maryland, [146 U.S. 30] under elected on general ticket, five being residents elected on general ticket, five being residents of the Western Shore, and three of the Eastern Shore. Laws Md. 1788, c. 10. In New Hampshire an act was passed November 12, 1788, (Laws N. H. 1789, p. 169,) providing for the election of

five electors by majority popular vote, and in case of no choice that the legislature should appoint out of so many of the candidates as equaled double the number of electors elected. There being no choice, the appointment was made by the legislature. The senate would not agree to a joint ballot, and the house was compelled, that the vote of the state might not be lost, to concur in the electors chosen by the senate. The state of New York lost its vote through a similar contest. The assembly was willing to elect by joint ballot of the two branches or to divide the electors with the senate, but the senate would assent to nothing short of a complete negative upon the action of the assembly, and the time for election passed without an appointment. North Carolina and Rhode Island had not then ratified the constitution.

Fifteen states participated in the second \*9 presidential election, in nine of which electors were chosen by the legislatures. Maryland, (Laws Md. 1790, c. 16; Laws 1791, c. 62,) New Hampshire, (Laws N. H. 1792, pp. 398, 401,) and Pennsylvania, (Laws Pa. 1792, p. 240,) elected their electors on a general ticket, and Virginia by districts, (Laws Va. 1792, p. 87.) In Massachusetts the general court, by resolution of June 30, 1792, divided the state into four districts, in each of two of which five electors were elected, and in each of the other two three electors. Mass. Resolves, June, 1792, p. 25. Under the apportionment of April 13, 1792, North Carolina was entitled to ten members of the house of representatives. The legislature was not in session, and did not meet until November 15th, while under the act of congress of March 1, 1792, (1 St. p. 239,) the electors were to assemble on December 5th. The legislature passed an act dividing the state into four districts, and directing the members of the legislature residing in each district to meet on the 25th of November, and choose three electors. 2 Ired. N. C. [146 U.S. 31] Laws, 1715-1800, c. 15 of 1792. At the same session an act was passed dividing the state into districts for the election of electors in 1796, and every four years thereafter. Id. c. 16.

Sixteen states took part in the third presidential election, Tennessee having been admitted June 1, 1796. In nine states the electors were appointed by the legislatures, and in Pennsylvania and New Hampshire by popular vote for a general ticket. Virginia, North Carolina, and Maryland elected by districts. The Maryland law of December 24, 1795, was entitled 'An act to alter the mode of electing electors,' and provided for dividing the state into ten

districts, each of which districts should 'elect and appoint one person, being a resident of the said district, as an elector.' Laws Md. 1795, c. 73. Massachusetts adhered to the district system, electing one elector in each congressional district by a majority vote. It was provided that, if no one had a majority, the legislature should make the appointment on joint ballot, and the legislature also appointed two electors at large in the same manner. Mass. Resolves, June, 1796, p. 12. In Tennessee an act was passed August 8, 1796, which provided for the election of three electors, 'one in the district of Washington, one in the district of Hamilton, and one in the district of Mero,' and, 'that the said electors may be elected with as little trouble to the citizens as possible,' certain persons of the counties of Washington, Sullivan, Green, and Hawkins were named in the act and appointed electors to elect an elector for the district of Washington; certain other persons of the counties of Knox, Jefferson, Sevier, and Blount were by name appointed to elect an elector for the district of Hamilton; and certain others of the counties of Davidson, Sumner, and Tennessee to elect an elector for the district of Mero. Laws Tenn. 1794, 1803, p. 209; Acts 2d Sess. 1st Gen. Assem. Tenn. c. 4. Electors were chosen by the persons thus designated.

In the fourth presidential election, Virginia, under the advice of Mr. Jefferson, adopted the general ticket, at least 'until some uniform mode of choosing a president and vice president of the United States shall be prescribed by an amendment[146 U.S. 32] to the constitution.' Laws Va. 1799-1800, p. 3. Massachusetts passed a resolution providing that the electors of that state should be appointed by joint ballot of the senate and house. Mass. Resolves, June, 1800, p. 13. Pennsylvania appointed by the legislature, and, upon a contest between the senate and house, the latter was forced to yield to the senate in agreeing to an arrangement which resulted in dividing the vote of the electors. 26 Niles' Reg. 17. Six states, however, chose electors by popular vote, Rhode Island supplying the place of Pennsylvania, which had theretofore followed that course. Tennessee, by act October 26, 1799, designated persons by name to choose its three electors, as under the act of 1796. Laws Tenn, 1794-1803, p. 211; Acts 2d Sess. 2d Gen. Assem, Tenn. c. 46.

Without pursuing the subject further, it is sufficient to observe that, while most of the states adopted the general

ticket system, the district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824, and 1828. Massachusetts used the general ticket system in 1804, (Mass. Resolves, June, 1804, p. 19;) chose electors by joint ballot of the legislature in 1808 and in 1816, (Mass. Resolves 1808, pp. 205, 207, 209; Mass. Resolves 1816, p. 233;) used the district system again in 1812 and 1820, (Mass. Resolves 1812, p. 94; Mass. Resolves 1820, p. 245;) and returned to the general ticket system in 1824, (Mass. Resolves 1824, p. 40.) In New York the electors were elected in 1828 by districts, the district electors choosing the electors at large. Rev. St. N. Y. 1827, tit. 6, p. 24. The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont, and New Jersey in 1812.

In 1824 the electors were chosen by popular vote, by districts, and by general ticket, in all the states excepting Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, where they were still chosen by the legislature. After 1832 electors were chosen by general ticket in all the states excepting South Carolina, where the legislature chose them up to and including 1860. Journals 1860, Senate, pp. 12, 13; House, 11, [146 U.S. 33] 15, 17. And this was the mode adopted by Florida in 1868, (Laws 1868, p. 166,) and by Colorado in 1876, as prescribed by section 19 of the schedule to the constitution of the state, which was admitted into the Union, \*10 August 1, 1876, (Gen. Laws Colo. 1877, pp. 79, 990.) (FN1)

Mr. Justice Story, in considering the subject in his Commentaries on the Constitution, and writing nearly 50 years after the adoption of that instrument, after stating that 'in some states the legislatures have directly chosen the electors by themselves; in others, they have been chosen by the people by a general ticket throughout the whole state; and in others, by the people by electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district,'--adds: 'No question has ever arisen as to the constitutionality of either mode, except that by a direct choice by the legislature. But this, though often doubted by able and ingenious minds, (3 Elliot, Deb. 100, 101,) has been firmly established in practice ever since the adoption of the constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to

adjudicate upon it.' And he remarks that 'it has been thought desirable by many statesmen to have the constitution amended so as to provide for a uniform mode of choice by the people.' Story, Const. (1st Ed.) § 1466.

Such an amendment was urged at the time of the adoption of the twelfth amendment, the suggestion being that all electors should be chosen by popular vote, the states to be divided for that purpose into districts. It was brought up again in congress in December, 1813, but the resolution for submitting the amendment failed to be carried. The amendment was renewed in the house of representatives in December, [146 U.S. 34] 1816, and a provision for the division of the states into single districts for the choice of electors received a majority vote, but not two thirds. Like amendments were offered in the senate by Messrs. Sanford of New York, Dickerson of New Jersey, and Macon of North Carolina. December 11, 1823, Senator Benton introduced an amendment providing that each legislature should divide its state into electoral districts, and that the voters of each district 'should vote, in their own proper persons,' for president and vice president, but it was not acted upon. December 16 and December 24, 1823, amendments were introduced in the senate by Messrs. Dickerson, of New Jersey, and Van Buren, of New York, requiring the choice of electors to be by districts; but these and others failed of adoption, although there was favorable action in that direction by the senate in 1818, 1819, and 1822. December 22, 1823, an amendment was introduced in the house by Mr. McDuffie, of South Carolina, providing that electors should be chosen by districts assigned by the legislatures, but action was not taken. (FN2) The subject was again brought forward in 1835, 1844, and subsequently, but need not be further dwelt upon, except that it may be added that, on the 28th of May, 1874, a report was made by Senator Morton, chairman of the senate committee on privileges and elections, recommending an amendment dividing the states into electoral districts, and that the majority of the popular vote of each district should give the candidate one presidential vote, but this also failed to obtain action. In this report it was said: 'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in

districts, as are members of congress, which was the case formerly in many states; and it is not doubt competent for the legislature to authorize the governor, or the [146 U.S. 35] supreme court of the state, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.' Senate Rep. 1st Sess. 43d Cong. No. 395.

From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.

Even in the heated controversy of 1876-77 the electoral vote of Colorado cast by electors chosen by the legislature passed unchallenged, and our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action.

In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States. They are, as remarked by Mr. Justice Gray in *Re Green*, 134 U. S. 377, \*11 379, 10 Sup. Ct. Rep. 586, 'no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as the electors of representatives in congress.' Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded.

The question before us is not one of policy. but of power; and, [146 U.S. 36] while public opinion had gradually brought all the states as matter of fact to the pursuit of a uniform system of popular election by general ticket, that fact does not tend to weaken the force of contemporaneous and long-continued previous practice when and as different views of expediency prevailed. The prescription of the written law cannot be overthrown because the states have laterally exercised, in a particular way, a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive.

It is argued that the district mode of choosing electors, while not obnoxious to constitutional objection, if the operation of the electoral system had conformed to its original object and purpose, had become so in view of the practical working of that system. Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated. *Miller*, Const. Law, 149; *Rawle*, Const. 55; *Story*, Const. § 1473; *Federalist*, No. 68. But we can perceive no reason for holding that the power confided to the states by the constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created. Still less can we recognize the doctrine that because the constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may therefore be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.

[146 U.S. 37] Nor are we able to discover any conflict between this act and the fourteenth and fifteenth amendments to the constitution. The fourteenth amendment provides:

'Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

'Sec. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.'

The first section of the fifteenth amendment reads: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.'

In the Slaughterhouse Cases, 16 Wall. 36, this court held that the first clause of the fourteenth amendment was primarily intended to confer citizenship on the negro race; and, secondly, to give definitions of citizenship of the United States, and citizenship of the states; and it recognized the distinction between citizenship of a state and citizenship of the United States by those definitions; that the privileges and immunities of citizens of the states embrace generally those fundamental civil rights for the security and establishment of which organized[146 U.S. 38] society was instituted, and which remain, with certain exceptions mentioned in the federal constitution, under the care of the state governments; while the privileges and immunities of citizens of the United States are those which arise out of

the nature and essential character of the national government, the provisions of its constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of congress by the second clause of the fourteenth amendment.

We decided in *Minor v. Happersett*, 21 \*12 Wall. 162, that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the fourteenth amendment, and that that amendment does not add to these privileges and immunities, but simply furnishes an additional guaranty for the protection of such as the citizen already has; that, at the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the state, nor was it at the time of the adoption of the constitution; and that neither the constitution nor the fourteenth amendment made all citizens voters.

The fifteenth amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States, but the last has been. *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Reese*, Id. 214.

If, because it happened, at the time of the adoption of the fourteenth amendment, that those who exercised the elective franchise in the state of Michigan were entitled to vote for all the presidential electors, this right was rendered permanent by that amendment, then the second clause of article 2 has been so amended that the states can no longer appoint in such manner as the legislatures thereof may direct; and yet no such result is indicated by the language used, nor are the amendments necessarily inconsistent with that clause. The first [146 U.S. 39] section of the fourteenth amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged to any male inhabitant of the state having attained majority, and being a citizen of the United States, then the basis of representation to which each state is entitled in the congress shall be proportionately reduced. Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged

without invoking the penalty; and so of the right to vote for representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the state. There is no color for the contention that under the amendments every male inhabitant of the state, being a citizen of the United States, has from the time of his majority a right to vote for presidential electors.

The object of the fourteenth amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. In re Kemmler, 136 U. S. 436, 10 Sup. Ct. Rep. 930.

The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Milling Co. v. Pennsylvania, 125 U. S. 181, 188, Sup. Ct. Rep. 737.

In Hayes v. Missouri, 120 U. S. 68, 71, 7 Sup. Ct. Rep. 350, Mr. Justice Field, speaking for the court, said: 'The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the fourteenth amendment: 'Class legislation, discriminating against some [146 U.S. 40] and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U. S. 27, 32, 5 Sup. Ct. Rep. 357.'

If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made. Unless the authority vested in the legislatures by the second

clause of section 1 of article 2 has been divested, and the state has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect.

The third clause of section 1 of article 2 of the constitution is: 'The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.'

Under the act of congress of March 1, 1792, (1 St. p. 239, c. 8,) it was provided that the electors should meet and give their votes on the first Wednesday in December at such place in each state as should be directed by the legislature thereof, and by act of congress of January 23, 1845, (5 St. p. 721,) that the electors should be appointed in each state on the Tuesday next after the first Monday in the month of November in the year in which they were to be appointed: provided, that each state might by law provide for the filling of any vacancies in its college of electors when such college meets to give its electoral vote: and provided that when any state shall have held an election for the purpose of choosing electors, \*12 and has failed to \*13. make a choice on the day prescribed, then the electors may be appointed on a subsequent day, in such manner as the state may by law provide. These provisions were carried forward into sections 131, 133, 134, and 135 of the Revised Statutes, (Rev. St. tit. 3, c. 1, p. 22.)

By the act of congress of February 3, 1887, entitled 'An act to fix the day for the meeting of the electors of president and vice president,' etc., (24 St. p. 373.) it was provided that the electors of each state should meet and give their [146 U.S. 41] votes on the second Monday in January next following their appointment. The state law in question here fixes the first Wednesday of December as the day for the meeting of the electors, as originally designated by congress. In this respect it is in conflict with the act of congress, and must necessarily give way. But this part of the act is not so inseparably connected, in substance, with the other parts as to work the destruction of the whole act. Striking out the day for the meeting, which had already been otherwise determined by the act of congress, the act remains complete in itself, and capable of being carried out in accordance with the legislative intent. The state law yields only to the extent

of the collision. Cooley, Const. Lim. \*178; Com. v. Kimball, 24 Pick. 359; Houston v. Moore, 5 Wheat. 1, 49. The construction to this effect by the state court is of persuasive force, if not of controlling weight.

We do not think this result affected by the provision in Act No. 50 in relation to a tie vote. Under the constitution of the state of Michigan, in case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention chooses one of these persons to fill the effice. This rule is recognized in this act, which also makes it the duty of the governor in such case to convene the legislature in special session for the purpose of its application, immediately upon the determination by the board of state canvassers.

We entirely agree with the supreme court of Michigan that it cannot be held, as matter of law, that the legislature would not have provided for being convened in special session but for the provision relating to the time of the meeting of the electors contained in the act, and are of opinion that that date may be rejected, and the act be held to remain otherwise complete and valid.

And as the state is fully empowered to fill any vacancy which may occur in its electoral college, when it meets to give its electoral vote, we find nothing in the mode provided for anticipating such an exigency which operates to invalidate the law.

[146 U.S. 42] We repeat that the main question arising for consideration is one of power, and not of policy, and we are unable to arrive at any other conclusion than that the act of the legislature of Michigan of May 1, 1891, is not void as in contravention of the constitution of the United States, for want of power in its enactment.

The judgment of the supreme court of Michigan must be affirmed.

FN1 See Stanwood, Presidential Elections, (3d Ed.) and Appleton, Presidential Counts, passim; 2 Lalor, Enc. Pol. Science, 68; 4 Hild. Hist. U. S. (Rev. Ed.) 39, 382, 689; 5 Hild. Hist. U. S. 389, 531; 1 Schouler, Hist. U. S. 72, 334; 2 Schouler, Hist. U. S. 184; 3 Schouler, Hist. U. S. 313, 439; 2 Adams, Hist. U. S. 201; 4 Adams, Hist. U. S. 285; 6 Adams, Hist. U. S. 409, 413; 9 Adams, Hist. U. S. 139; 1 McMaster, Hist. People U. S. 525; 2 McMaster, Hist. People U. S. 85, 509; 3 McMaster, Hist. People U. S. 188, 189, 194, 317; 2 Scharf, Hist. Md. 547; 2 Bradf. Mass. 335; Life of Plumer, 104; 3 Niles' Reg. 160; 5 Niles' Reg. 372; 9 Niles' Reg. 319, 349; 10 Niles' Reg. 45, 177, 409; 11 Niles' Reg.

FN2 1 Benton, Thirty Years' View, 37; 5 Benton, Cong. Deb. 110, 677; 7 Benton, Cong. Deb. 472-474, 600; 3 Niles' Reg. 240, 334; 11 Niles' Reg. 258, 274, 293, 349; Annals Cong. (1812-13,)