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## That Dog Don't Hunt: The Twelfth Amendment after Jones v. Bush

Christopher Scott Maravilla

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# **THAT DOG DON'T HUNT: THE TWELFTH AMENDMENT AFTER *JONES V. BUSH***

**Christopher Scott Maravilla**

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"At some point, they're going to have to take stock and realize this dog don't hunt."<sup>1</sup>

- Cheney spokeswoman Juleanna Glover Weiss  
on the plaintiffs' case in *Jones v. Bush*.

## I. INTRODUCTION

While the nation was enthralled by the Florida recount controversy that culminated with the Supreme Court decision in *Bush v. Gore*, another controversy involving the 2000 U.S. presidential election was making its way through the Federal courts. On November 9, 2000, Boca Raton attorney Lawrence Caplan filed an action in U.S. District Court in Southern Florida seeking to enjoin the Secretary of State of the State of Texas from certifying the slate of Texas Electors for Bush and Cheney.<sup>2</sup> They claimed that both Governor George W. Bush and Secretary Richard Cheney were "inhabitants" of the State of Texas under the provision of the Twelfth Amendment, which bars electors from casting their votes for candidates from the same state.<sup>3</sup> The issue had been brewing since the summer of 2000 when Secretary Cheney was selected by Governor Bush to be the vice presidential nominee of the Republican Party. Todd Gillmann, a journalist for the Dallas Morning News, observed during the Republican National Convention that "[t]he Constitution makes it tough for a president and vice president to come from the same state."<sup>4</sup> Caplan says that he filed this action in response to the Florida recount controversy,<sup>5</sup> although he has insisted in interviews that his action was not partisan.<sup>6</sup> Caplan has said, "I voted for Ronald Reagan[,] I listen to Rush Limbaugh[,] I'm a regular Democrat . . . ."<sup>7</sup> The case was subse-

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1. Alan Clendenning, *Vice Presidential Candidate Wins Residency Question at Federal Appeals Court*, TIMES-PICAYUNE (New Orleans), Dec. 7, 2000, <http://www.n. . . residency&&news&newsflash-louisiana> (on file with the Pace Law Review).

2. Angus M. Thuermer, Jr., *Suit Challenges Cheney's Wyoming Residency*, JACKSON HOLE NEWS, Nov. 15, 2000, at 1, <<http://www.jacksonholenews.com/Archives/NewsArchive/2000/001115-News.html>>.

3. *Id.*

4. Robert Dennis, *Cheney's Problem with the Constitution: The Illegal Ticket*, TomPaine.common sense (Aug. 28, 2000), at <<http://www.tompaine.com/feature.cfm/ID/3566>>.

5. Thuermer, *supra* note 2, at 1.

6. *Id.*

7. *Id.*

quently dismissed by the Southern District of Florida for lack of venue,<sup>8</sup> re-filed and later dismissed by the Northern District of Texas for lack of standing,<sup>9</sup> and affirmed orally by the U.S. Court of Appeals for the Fifth Circuit.<sup>10</sup>

The prohibition against electors casting both votes for candidates from the same state was initially adopted into Article II, Section 1 of the Constitution at the Constitutional Convention. Article II, Section 1 states:

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 . . . .

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.<sup>11</sup>

Prior to the 1804 presidential election, electors did not cast separate ballots for President and Vice President.<sup>12</sup> The candidate receiving the most votes was elected President and the runner up, Vice President.<sup>13</sup> To differentiate between the party's choices for each office, one elector was designated to cast an odd vote so that the two candidates would not receive identical totals.<sup>14</sup> The latent difficulty with this provision came to the fore in 1800 when the Democratic-Republican nominees deadlocked. The Twelfth Amendment was subsequently adopted to correct this defect, and, thereafter, electors have been required to cast separate ballots for President and Vice President.<sup>15</sup> Amendment XII states:

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

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8. *Caplan v. Bush*, No. 00-9010-CIV-MOORE (S.D. Fla. November 20, 2000) (order dismissing the complaint).

9. *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000).

10. *Jones v. Bush*, 244 F.3d 134 (5th Cir. 2000).

11. U.S. CONST. art. II, § I, cl. 3 (superseded by U.S. CONST. amend. XII).

12. *Id.*

13. *Id.*

14. See NOBLE E. CUNNINGHAM, JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 231 (1987).

15. U.S. CONST. amend. XII.

name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President . . .<sup>16</sup>

The prohibition against casting electoral votes for candidates from the same state was retained in the Amendment.<sup>17</sup>

Although the District Court's decision with regards to the definition of "inhabitant" in *Jones v. Bush* is not binding precedent, it does call for an examination of the Twelfth Amendment's meaning of "inhabitant" and the role of the Federal judiciary in the certification process of electoral votes. The court ruled that the term "inhabitant," as used in the Twelfth Amendment, is coextensive with the legal doctrine of domicile used in determining state residency for the purpose of establishing diversity jurisdiction in Federal courts.<sup>18</sup> This interpretation effectively swallows whole the requirement that both candidates standing for election for President and Vice President be from different states. It also contravenes both the text of the Twelfth Amendment, and the intentions of the Framers to prevent two favorite sons of the same state from running together. Based upon the decision in *Jones v. Bush*, future presidential candidates could reasonably read it to allow the selection of running mates that may be clearly inhabitants of the same state under the Twelfth Amendment, but cosmetically change their residence in order to run for high office.

This Article seeks to: (II) examine the decision in *Jones v. Bush* and its implications regarding the future of the Twelfth Amendment's inhabitancy requirement, (III) examine the meaning of the term "inhabitant" as intended by the Framers and as it applies to the Cheney case, and (IV) argue that the interpretation of the meaning of the term "inhabitant" in the Twelfth Amendment is intended to be made by the United States Congress in its capacity as the certifier of electoral votes, not the Judiciary, thereby coming under the rubric of the Political Question Doctrine.

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16. *Id.*

17. *Id.*

18. *Jones v. Bush*, 122 F. Supp. 2d 713, 719-20 (N.D. Tex. 2000).

## II. BACKGROUND

### A. *Selecting the President: How the Electoral College Works*

The Constitutional Convention of 1787 considered a plethora of methods to select the chief executive. Among those methods of election considered by the Convention were: "selection by Congress, by the governors of the states, by the state legislatures, by a special group of Members of Congress chosen by lot, and by direct popular election."<sup>19</sup> Unable to resolve the issue initially, it was referred to the Committee of Eleven on Postponed Matters, which came up with the electoral college system as a compromise among the proposals.<sup>20</sup> The electoral college was intended to reconcile the state and federal interests in selecting the chief executive, provide some measure of popular participation by the citizenry, ensure the less populous states with a voice, and, most of all, preserve the presidency's independence from the legislature.<sup>21</sup>

The selection of the President through the electoral college is a two-tier system. Generally, the public votes in popular elections for presidential electors who in turn select the chief executive. The voter casts his or her vote for a single slate of electors, nominated by the political parties in each state, with the slate that receives the most popular votes going to the electoral college.<sup>22</sup> Maine and Nebraska use the district system where two electors are chosen on an at-large basis, and one is selected for each congressional district.<sup>23</sup> Although election by popular vote is the method used throughout the nation today, it is not required under the Constitution. The Constitution merely requires electors to be chosen "in such [m]anner as the [State] Legislature thereof may direct."<sup>24</sup>

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19. See CONGRESSIONAL RESEARCH SERVICE, 106TH CONG., CRS REPORT FOR CONGRESS, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 2 (Thomas H. Neale 1999), <http://freedom.house.gov/electoral/crs-ec.asp> [hereinafter ELECTORAL COLLEGE].

20. *Id.* at 2.

21. *Id.* at 2.

22. *Id.* at 1.

23. *Id.*

24. U.S. CONST. art. II, § 1, cl. 2.

The Constitution assigns each state a number of electors equal to its combined representation to Congress.<sup>25</sup> Currently there are 538 total electors. A majority, 270 votes, is needed to elect the President and Vice President respectively.<sup>26</sup> Any citizen may be appointed an elector except Members of Congress and individuals holding offices of "Trust or Profit" under the Constitution.<sup>27</sup>

Electors assemble in their respective states on the Monday after the second Wednesday in December.<sup>28</sup> They are pledged to a single candidate, however, in most states they are not legally required to vote for those candidates.<sup>29</sup> The electors cast separate ballots for President and Vice President as provided for under the provisions of the Twelfth Amendment.<sup>30</sup> An elector is prohibited from casting both votes for presidential and vice presidential candidates when both are "inhabitants" of his or her state.<sup>31</sup>

Sometimes disputes arise over the validity of electoral votes cast. Congress, through the 1887 election laws, has attempted to place the settlement of all controversies with the state.<sup>32</sup> The governor of the state is required to certify the electoral votes "as soon as practicable" after the final assessment of who have been selected to serve as electors, or after a controversy has been settled under the state's statutory procedures.<sup>33</sup>

The electoral votes are certified at a joint session of Congress on January 6th of the year succeeding the election.<sup>34</sup> In years where January 6th falls on a Sunday, Congress has in the

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25. *Id.*

26. ELECTORAL COLLEGE, *supra* note 19, at 1.

27. U.S. CONST. art. II, § 1, cl. 2.

28. 3 U.S.C. § 7 (2002).

29. *See Ray v. Blair*, 343 U.S. 214, 231 (1952) ("Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge.").

30. U.S. CONST. amend. XII.

31. *Id.*

32. CONGRESSIONAL RESEARCH SERVICE, 107TH CONG., MEMORANDUM, OVERVIEW OF ELECTORAL COLLEGE PROCEDURE AND THE ROLE OF CONGRESS 1-2 (Stanley Bach and Jack Maskell, 2000), <http://freedom.house.gov/electoral/crsmemo.asp> [hereinafter MEMORANDUM]. *See also*, 3 U.S.C. § 5 (2002).

33. MEMORANDUM, *supra* note 32, at 2; *see also* 3 U.S.C. § 5 (2002).

34. *See* 3 U.S.C. § 15 (2002).

past changed the date.<sup>35</sup> A concurrent resolution, which incorporates by reference the applicable provisions of the United States Code, for a joint session of Congress, originating in the Senate, is passed in order for both Chambers to meet to count the electoral votes.<sup>36</sup> The procedures set forth in those provisions of the Code constitute a joint rule of the two Houses for the occasion, and govern the procedures used by both Houses in the event they divide to consider an objection to the validity of an electoral vote.<sup>37</sup> The Vice President presides over the joint session in his or her capacity as President of the Senate.<sup>38</sup> The certificates for the electoral votes are opened in alphabetical order, passed to four tellers, two chosen by each chamber, who announce the results.<sup>39</sup> The votes are then counted with the result announced by the President of the Senate.<sup>40</sup>

Should no candidate receive a majority of the electoral votes cast, the House of Representatives chooses the President in a contingent election; the Senate chooses the Vice President.<sup>41</sup> The newly elected Congress conducts the election.<sup>42</sup> In the House of Representatives, the President is selected from the top three vote getters in the electoral college with each state delegation casting a single vote.<sup>43</sup>

An internal poll is taken by each delegation.<sup>44</sup> If no single candidate receives a majority of the votes cast within the delegation then that state's vote is counted as "divided," and, subsequently, barred from that round of voting.<sup>45</sup> This is what occurred in 1825, although, this process was explicitly adopted by Congress as non-binding precedent.<sup>46</sup> A simple majority of

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35. ELECTORAL COLLEGE, *supra* note 19, at 6 n.9.

36. LEWIS DESCHLER, 3 DESCHLER'S PRECEDENTS OF THE UNITED STATES, HOUSE OF REPRESENTATIVES, ch. 10, § 2 (1974).

37. 3 U.S.C. § 15.

38. *Id.* See also U.S.CONST. art. I, § 3, cl. 4.

39. 3 U.S.C. § 15.

40. *Id.*

41. U.S. CONST. amend. XII.

42. THOMAS H. NEALE, CONGRESSIONAL RESEARCH SERVICE, 106TH CONG., CRS REPORT FOR CONGRESS, ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: CONTINGENT ELECTION 1 (1999) [hereinafter CONTINGENT ELECTION].

43. *Id.* at 1.

44. *Id.*

45. *Id.*

46. *Id.*



votes taken by the delegations is needed to win the presidency.<sup>47</sup>

The Senate in turn selects from among the top two vote getters in the electoral college for Vice President.<sup>48</sup> Each senator casts a single vote with a simple majority needed to win.<sup>49</sup> What is notable about this process is that it is placed entirely in the hands of the state legislature to appoint the electors by any manner of their choosing, for the governor of the state to certify the slate of electors, and for Congress to count the votes and resolve any and all disputes.

### B. *The Twelfth Amendment*

The Twelfth Amendment was ratified in 1804 in order to address some of the problems associated with the 1796 and 1800 presidential elections. In 1796, Thomas Jefferson was elected to the vice presidency as a member of the opposition Republican Party, while Vice President John Adams ascended to the presidency as a member of the Federalist majority. The Framers had not contemplated political parties when drafting Article II. The votes in the electoral college were John Adams with 71 electoral votes, Thomas Jefferson with 68, Thomas Pinckney with 59, and Aaron Burr with 30.<sup>50</sup> As Vice President, Jefferson was able to organize the Republicans' electoral victory four years later.

The more serious Constitutional crisis occurred in the election of 1800. Pursuant to Article II, Section 1, electors did not vote separately for President and Vice President. The electors would cast both votes in favor of the candidates to whom they were pledged. The political parties would then make arrangements for at least one elector to cast their vote for another candidate in order to avoid a tie.<sup>51</sup> For example, the Federalists in 1800 arranged for one of their electors to cast a vote for John Jay, the governor of New York.<sup>52</sup> The Republicans had failed to make a similar arrangement in 1800 with each state believing

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47. CONTINGENT ELECTION, *supra* note 42, at 1.

48. *Id.*

49. *Id.*

50. CUNNINGHAM, *supra* note 14, at 203-04.

51. *Id.* at 231.

52. *Id.*

that it would be the duty of another to cast the lone vote.<sup>53</sup> As a result, the electoral college voted 73 for Thomas Jefferson, 73 for Aaron Burr, 65 for John Adams, 64 for Thomas Pinckney, and 1 for John Jay.<sup>54</sup> It therefore ended in a deadlock between Jefferson and Burr that sent the decision to the House of Representatives.<sup>55</sup> The House that would be deliberating the choice for the next President was not the incoming Chamber, which was majority Republican, but the extant Federalist House.<sup>56</sup> There was a great deal of concern about Federalist mischief making including the possibility of not having a President-elect by the time of the inauguration.<sup>57</sup> The latter fears were put to rest when the House agreed on February 9, 1801 that they would go into continuous session until a new President was chosen.<sup>58</sup> On February 17, after much deliberating and with some help from his old adversary Alexander Hamilton, Thomas Jefferson was elected, on the 36th ballot, President of the United States.<sup>59</sup> The Twelfth Amendment was ratified four years later, and included an explicit provision that electors would cast separate ballots for President and Vice President.<sup>60</sup> To also aid in avoiding deadlocks in the future, the Amendment retained Article II, Section 1's disincentive for two candidates from the same state to run on the same ticket for fear of forfeiting their state's electoral votes.

### C. Bush v. Caplan: *The Beginning*

On November 9, 2000, Lawrence Caplan, a Boca Raton, Florida attorney, filed an action in the U.S. District Court for the Southern District of Florida, before Judge E. Michael Moore, seeking to enjoin the Secretary of State of Texas from certifying the electoral votes of the State of Texas in favor of Governor George W. Bush and Secretary Richard Cheney, the respective winners of that state's popular vote for President and Vice President, on the grounds that to do so would violate the

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53. *Id.*

54. *Id.* at 230-31.

55. CUNNINGHAM, *supra* note 14, at 231.

56. *Id.* at 232.

57. *Id.* at 233-34.

58. *Id.* at 235.

59. *Id.*

60. US CONST. amend. XII.

Twelfth Amendment.<sup>61</sup> Caplan alleged that Bush and Cheney were both inhabitants of the State of Texas, as conceived by the Twelfth Amendment, as of November 7, 2000, the date of the presidential election.<sup>62</sup> During the election, Cheney claimed Jackson Hole, Wyoming, where he had served six terms as Wyoming's lone Representative to the U.S. House, as his place of residence.<sup>63</sup> On July 21, 2000, prior to being selected as Governor Bush's running mate, Cheney changed his voter registration to Teton County, Wyoming, where he and his wife owned a home since 1993.<sup>64</sup> Caplan rejected Cheney's claim of inhabitancy in Wyoming as "extremely undemocratic and something that would go on in Haiti."<sup>65</sup>

In his complaint, the plaintiff initially named as defendants: George W. Bush, Richard Cheney, and the Electors of the State of Texas.<sup>66</sup> The Texas Secretary of State was subsequently added as a defendant in an amended complaint filed on the same day.<sup>67</sup> In the amended complaint, plaintiff sought a declaration

that both George Bush and Richard Cheney were "inhabitants" of the state of Texas at the time of the election, and . . . are not entitled to receive the thirty-two (32) electoral votes of the state of Texas . . . . Furthermore, Petitioner asks this Court to issue a permanent injunction preventing the Secretary of State of the State of Texas from certifying its slate of electors in favor of George Bush and Richard Cheney . . . .<sup>68</sup>

After an initial determination by the court that venue was improper, plaintiff filed a second amended complaint naming Vice President Albert Gore as a defendant in his capacity as Presi-

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61. Complaint, Caplan v. Bush, No. 00-9010-CIV-MOORE (S.D. Fla. filed Nov. 9, 2000).

62. *Id.* at 2.

63. Jones v. Bush, 122 F. Supp. 2d 713, 720 (N.D. Tex. 2000).

64. *Id.*

65. Theurmer, *supra* note 2.

66. Complaint at 1, Caplan v. Bush, No. 00-9010-CIV-MOORE (S.D. Fla. filed Nov. 9, 2000).

67. Amended Complaint at 1, Caplan v. Bush, No. 00-9010-CIV-MOORE (S.D. Fla. filed Nov. 9, 2000).

68. *Id.* at 7.

dent of the United States Senate and “certifier of the Electoral Votes of the United States.”<sup>69</sup>

The court concluded that venue was improper in the action.<sup>70</sup> Although Vice President Gore was added as a defendant, the court noted that no relief was sought from him, and that his addition as a co-defendant could only serve as a means to circumvent the venue requirements.<sup>71</sup> The case was thereafter dismissed on November 20, 2000 without prejudice.<sup>72</sup> The case against Bush and Cheney was then re-filed in the Northern District of Texas on the same day that the Florida district court issued its order of dismissal.<sup>73</sup>

#### D. Jones v. Bush: *The Decision by the U.S. District Court*

On November 20, 2000, a second civil action was filed in the U.S. District Court for the Northern District of Texas by three Texas residents, Stephen E. Jones, Linda D. Lydia, and Caroline Franco, all of whom were registered Texas voters and had voted in the November elections.<sup>74</sup> The action sought to enjoin the Texas Electors from casting their votes for both Governor George W. Bush and Secretary Richard Cheney on December 18, 2000, when the electors were to meet in Austin, because both candidates were allegedly “inhabitants” of the State of Texas.<sup>75</sup> The plaintiffs presented a detailed list of Secretary Cheney’s activities regarding his residential status in support of their argument. First, Secretary Cheney owned a home in Highland Park (an affluent suburb of Dallas) for the five years prior to seeking the vice-presidency, and he neither put his residence up for sale (until November 16, 2000, after the election), nor did he make any overt act of abandonment of the premises.<sup>76</sup> Cheney paid local real estate taxes, voted in Precinct

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69. Second Amended Complaint at 1, Caplan v. Bush, No. 00-9010-CIV-MOORE (S.D. Fla. Filed November 20, 2000).

70. Caplan v. Bush, No. 00-9010 CIV-MOORE (S.D. Fla. Nov. 20, 2000) (order dismissing action for improper venue).

71. *Id.* at 3-4.

72. *Id.* at 5.

73. Complaint at 1, Jones v. Bush, 122 F. Supp. 2d 713 (N.D. Tex. 2000) (No. 300 CV-2543D).

74. *Id.* at 1.

75. *Id.* at 1,3.

76. *Id.* at 4-5.

1227, was president and CEO of Haliburton Corporation in Dallas, held a Texas driver's license, filed Federal income taxes listing himself as a Texas resident, did not pay income taxes to another state, received his mail at his Dallas address, listed his Dallas address on his Federal Election Commission forms when donating money to the nascent Bush for President campaign, listed his Dallas address on the annual report for Brown & Root Holdings, Inc. and other official corporate records, was treated by Texas doctors for his health, did his banking in Dallas, and availed himself of the Texas homestead exemption.<sup>77</sup> The plaintiffs contended that the only measure Secretary Cheney undertook to support the Constitutional requirement that the presidential and vice presidential candidates be from separate states was that he flew on July 20, 2000 to Wyoming to change his voter registration from Texas to Wyoming.<sup>78</sup> He did this apparently without informing the Bush campaign according to campaign director Karen Hughes.<sup>79</sup> Governor Bush's status as an inhabitant of Texas for Twelfth Amendment purposes was not disputed.<sup>80</sup>

The court dismissed the case on the grounds that the plaintiffs lacked standing to bring suit.<sup>81</sup> To satisfy the standing requirement of Article III of the Constitution, "plaintiffs must show, at an 'irreducible constitutional minimum,' that they have 'suffered injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant[s], and that the injury will likely be addressed by a favorable decision."<sup>82</sup> If the Constitutional requirements are met, "the court's exercise of jurisdiction must also satisfy the 'prudential considerations that are part of judicial self-government.'"<sup>83</sup> The plaintiffs argued that the harm they would suffer would be a violation of their rights under the Constitution by the denial of casting a "meaningful vote."<sup>84</sup> For

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77. *Id.* at 4-5.

78. Complaint at 5, *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000) (No. 300 CV-2543D).

79. Terry M. Neal, *GOP Hails Cheney's Inclusion on Ticket, Democrats Prepare to Fight 'Big Oil'*, WASH. POST, July 26, 2000, at A1.

80. *Jones v. Bush*, 122 F. Supp. 2d 713, 715 n.2 (N.D. Tex. 2000).

81. *Id.* at 715.

82. *Id.* at 716 (alteration in original) (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992))).

83. *Id.* at 716 (quoting *Lujan*, 504 U.S. at 560).

84. *Id.* at 716.

Article III purposes, “an injury in fact must be ‘concrete . . . and actual or imminent, not conjectural or hypothetical’”<sup>85</sup> and it must “‘affect the plaintiff in a personal and individual way.’”<sup>86</sup> The court ruled that the plaintiffs would not suffer any personal or irreparable harm, noting that the Supreme Court has held that “[a] general interest in seeing that the government abides by the Constitution is not sufficiently individuated or palpable to constitute such an injury.”<sup>87</sup> Plaintiffs, citing *Anderson v. Celebrezze*, *Bullock v. Carter*, and *Henderson v. Fort Worth Independent School District*, also asserted a right to litigate the issue on behalf of the interests of the Democratic ticket.<sup>88</sup> The court denied this as well on the grounds that the cited cases only “recognize that voters may have an independent interest . . . that may be harmed by the same action that adversely affects the candidate.”<sup>89</sup>

In the interest of appellate review, the court went on to address the merits of the plaintiffs’ motion for preliminary injunction by holding that the term “inhabitant” under the Twelfth Amendment is coextensive with the legal concept of “domiciliary.”<sup>90</sup> Thus, Secretary Richard Cheney was not an inhabitant of Texas for purposes of the Texas Electors’ ability to cast both ballots for him and Bush.<sup>91</sup> In interpreting the term “inhabitant,” as used in the Twelfth Amendment, the court relied upon definitions found in dictionaries contemporary with the Framers.<sup>92</sup> A 1792 law dictionary defined “inhabitant” as:

with respect to the public assessments, and the like, [inhabitants] are not only those who dwell in an house there, but also those who

85. *Jones*, 122 F. Supp. 2d at 716 (quoting *Lujan*, 504 U.S. at 560).

86. *Id.* at 715 (quoting *Lujan*, 504 U.S. at 560 n.1).

87. *Id.* at 717 (citing *Allen v. Wright*, 468 U.S. 737, 754 (1984)) (“This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”).

88. *Id.* at 717 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Bullock v. Carter*, 405 U.S. 134 (1972); *Henderson v. Fort Worth Indep. School Dist.*, 526 F.2d 286 (5th Cir. 1976)).

89. *Id.*

90. *Jones*, 122 F. Supp. 2d. at 719-20.

91. *Id.* at 721.

92. *Id.* at 719 (In support of this proposition, the court cited *United States v. Lopez*, 514 U.S. 549, 585-602 (1995) (Thomas, J., concurring) (using contemporary dictionaries to determine the common meaning of the term “commerce” at the time of ratification)).

occupy lands within such town or parish, although they be dwelling elsewhere. But the word inhabitants doth not extend to lodgers, servants, or the like; but to householders only.<sup>93</sup>

Webster's in 1828 defined "inhabitant" as a "dweller, one who dwells or resides permanently in a place or who has a fixed residence, as distinguished from an occasional lodger or visitor . . . . One who has a legal settlement in a town, city or parish."<sup>94</sup> The court equated these two definitions with the modern legal concept of domiciliary.<sup>95</sup> A domicile is "established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there."<sup>96</sup> Thus, the court held that the test for "inhabitant" under the Twelfth Amendment parallels the test for domiciliary: (1) the individual possesses a physical presence in the state, (2) with the intent to remain indefinitely.<sup>97</sup>

In determining an individual's domicile, the court should "look to all evidence [of] . . . [the] litigant's intention[s] . . . [including] the places where the litigant exercises civil and political rights, pays taxes, owns real and personal property, has driver's and other licenses, maintains bank accounts, belongs to clubs and churches, has places of business or employment, and maintains a home for his family."<sup>98</sup> The court ruled that Cheney had both a physical presence in Wyoming with the necessary intent to remain there indefinitely.<sup>99</sup> The key factors in the court's conclusion were the facts that Cheney was "born, raised, educated, and married in Wyoming," and served for six terms in the U.S. House of Representatives as the Member from Wyoming.<sup>100</sup> According to the Qualification Clauses to the Con-

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93. *Id.* at 719 (quoting RICHARD BURN & JOHN BURN, LAW DICTIONARY (1792)).

94. *Id.* at 719 (alteration in original) (quoting NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Facsimile Edition by Foundation for American Christian Education 5th ed. 1828, 1967, 1987) (not paginated), quoted in Charles Wood, Losing Control of America's Future: The Census, Birthright Citizenship, and Illegal Aliens, 22 HARV. J. L. & PUB. POL'Y 465, 478 (1999)).

95. *Jones*, 112 F. Supp. 2d at 719.

96. *Id.* at 719 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989)).

97. *Id.* at 719-20.

98. *Id.* at 720 (quoting *Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996) (used these factors to determine if a Texas citizen was domiciled in France)).

99. *Id.*

100. *Jones*, 122 F. Supp. 2d at 720.

stitution found in Article I, Section 2, Clause 2 and Article I, Section 3, Clause 3, a Member of Congress is deemed an inhabitant of the state from which he or she has been elected.<sup>101</sup>

In New Orleans, Judges Patrick E. Higginbotham, Rhesa H. Barksdale and Jacques L. Wiener, Jr. of the Fifth Circuit Court of Appeals, after an hour long oral argument followed by a short recess, unanimously agreed that Cheney was a Wyoming resident, and affirmed the District Court's decision without further elaboration.<sup>102</sup>

### III. TOWARD A DEFINITION OF INHABITANT

#### A. *What "Inhabitant" Means*

The decision in *Jones v. Bush* presents a definition of "inhabitant" that is both contrary to the text of the Constitution and the intent of the Framers. The court's reasoning renders the inhabitancy provision a nullity. It may also lead to confusion in future elections where presidential nominees may rely upon it when deliberating upon whom to select as a running mate. A further examination of the term "inhabitant" reveals a different meaning than that found by the court in *Jones v. Bush*. An "inhabitant" under the plain meaning of the text is an individual who physically dwells in a place or owns real property therein. The laws of a state with regards to legal residency and state citizenship are inapplicable to the Twelfth Amendment. The term "inhabitant" is also incongruent with the terms "domicile" and "resident" as they are used in civil procedure. In deliberating upon which state a candidate may be considered an "inhabitant," where the candidate possesses more than one residence thus obfuscating the plain meaning as a sole determining factor, one should examine the multiple residences in light of the intent of the Framers in order to derive the appropriate place of inhabitancy.

#### 1. *The Plain Meaning of The Text*

Generally, the methodology for determining the meaning of a word or phrase in a constitutional provision is the intent of

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101. *Id.* at 721.

102. Clendenning, *supra* note 1.



the Framers derived from the unambiguous language of the text.<sup>103</sup> The Supreme Court has stated:

The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.<sup>104</sup>

At the textual level, the term “inhabitant” is synonymous with resident. Webster’s Dictionary defines an “inhabitant” as “[a] resident.”<sup>105</sup> Black’s Law Dictionary in turn defines a “resident” as “[a] person who has residence in a particular place.”<sup>106</sup> “Residence” itself is defined as “[t]he act or fact of living in a given place for some time.”<sup>107</sup>

The term “inhabitant” also denotes some measure of permanence to the area. Specifically, ownership of property may support a claim of inhabitancy.<sup>108</sup> This is because the term “inhabitant” is defined to “not extend to lodgers, servants, or the like; but to households only.”<sup>109</sup> The property owner may also be an inhabitant of that area without it being his or her primary place of residence.<sup>110</sup> Utilizing a definition used by the court in *Jones v. Bush* from a 1792 law dictionary, an inhabitant may include “those who occupy lands within such town or parish, although they be dwelling elsewhere.”<sup>111</sup> Moreover, the Framers used the term “inhabitant” because it “would not exclude persons absent occasionally for a considerable time on public or private business.”<sup>112</sup> Thus, an “inhabitant” in terms of the plain

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103. *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

104. *Id.*

105. WEBSTER’S NEW COLLEGE DICTIONARY 570 (2d ed.1995).

106. BLACK’S LAW DICTIONARY 1311 (7th ed. 1999).

107. *Id.* at 1310.

108. For purposes of this discussion, I am also including leasing of property as part of the ownership of property concept.

109. *Jones v. Bush*, 122 F. Supp. 2d 713, 719 (N.D. Tex. 2000) (quoting RICHARD BURN & JOHN BURN, LAW DICTIONARY (1792)).

110. *Id.* at 719.

111. *Id.* (quoting RICHARD BURN & JOHN BURN, LAW DICTIONARY (1792)).

112. *Schaefer v. Townsend*, 215 F.3d 1031, 1036 n.5 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 216 (Max Farrand Ed. 1911), *reprinted in* 2 THE FOUNDERS’ CONSTITUTION 71 (Philip B. Kurland & Ralph Lerner Eds., 1987)).

meaning of the text is one who physically dwells in a place or owns real property therein.

However, when the plain meaning of “inhabitant” is applied to the Twelfth Amendment in terms of the concepts of state residency, domiciliary and residency, as the latter two are defined in civil procedure, it contravenes both the text and its underlying intent. The term “inhabitant” can neither be interpreted to mean legal residency under state law, nor can the term be coextensive with domiciliary or residency. Black’s Law Dictionary states that “[a] resident is not necessarily either a citizen or a domiciliary.”<sup>113</sup>

## 2. State Citizenship

First, “inhabitant” cannot be coextensive with the concept of citizenship or legal residency under state law as the plaintiffs in *Jones v. Bush* suggest.<sup>114</sup> The Framers purposefully used the term “inhabitant” in the Twelfth Amendment and in Article I on the requirements for standing for election to the House of Representatives and the Senate, in place of the term “citizen.”<sup>115</sup> There is nothing to suggest that “inhabitant” means something altogether different in the Twelfth Amendment than it does in Article I. What constitutes citizenship in a state (i.e. legal residency) is different from what it means to be an inhabitant of a state. A closer examination of how these terms are used in the Constitution will illustrate this point. The Privileges and Immunities Clause, Article IV, section 2, provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.”<sup>116</sup>

This provision removes “from the citizens of each State the disabilities of alienage in the other States.”<sup>117</sup> The Clause

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113. BLACK’S LAW DICTIONARY 1311 (7th ed. 1999).

114. Complaint at 8, *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000) (No. 300 CV-2543D).

115. See U.S. CONST. art. I, § 2; U.S. CONST. art. I, § 3; U.S. CONST. amend. XII.

116. U.S. CONST. art. IV, § 2.

117. *Paul v. Virginia*, 75 U.S. 168, 180 (1869) (“[W]ithout some provision . . . removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.”).

grants recently arrived residents of a state, and visiting citizens of another state the same rights as those of existing citizens. However, the protections of the Clause are not absolute as "it does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it."<sup>118</sup> The purpose behind the Privileges and Immunities Clause "was to help fuse into one Nation a collection of independent, sovereign States."<sup>119</sup> It reflects the idea that citizens of the United States "have two political capacities, one state and one federal" each co-equal with the other.<sup>120</sup> By creating uniformity of the rights of citizens under both Federal law and state law, the Constitution recognizes that the two are merged into a single nation.<sup>121</sup>

In contrast to the Privileges and Immunities Clause, Article I, Section 2, on the requirements for election to the House of Representatives, states: "No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."<sup>122</sup> On the requirements for election to the Senate, Article II, section 3, similarly states: "No Person shall be a Senator who shall not have . . . been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."<sup>123</sup> The Twelfth Amendment, as well as Article II, Section 1, which it supersedes, also uses the term "inhabitant" instead of "citizen." The term "inhabitant" is less restrictive than "citizen."

While the privileges of "citizens" throughout the Union were made equal under the Constitution, the criteria of state citizenship were omitted in terms of standing for public office. When standing for Federal office, one is seeking election in his or her capacity as a citizen of the United States, not as a citizen

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118. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

119. *Id.* at 395.

120. *Saenz v. Roe*, 526 U.S. 489, 504 (1999); *see also* ELECTORAL COLLEGE, *supra* note 19.

121. *Paul*, 75 U.S. at 176.

122. U.S. CONST. art. I, § 2, cl. 2.

123. U.S. CONST. art. I, § 3, cl. 3.

of the state in question. If the requirement read "citizen" of a state rather than "inhabitant," state law would, in effect, govern the election of federal office holders as the candidate would first have to qualify as a citizen of the state. An individual under such circumstances could effectively be barred from seeking federal office as he or she is seeking to establish state citizenship. To prevent this outcome, the Framers used the term "inhabitant" in lieu of "citizen." To be an "inhabitant" of the state, an individual merely must reside there or own property. This is consistent with the intent behind the Privileges and Immunities Clause in which one is availed to all rights under federal citizenship as well as state citizenship. One is free to stand for federal public office at any time, leading to the establishment of a truly national legislative body independent from, yet co-equal with, the state legislatures.

Furthermore, the U.S. Supreme Court has held that a state cannot promulgate additional restrictions upon the eligibility of candidates for federal office outside of those enumerated in Article II. In *U.S. Term Limits v. Thornton*, the Court struck down "an amendment to the Arkansas State Constitution that prohibit[ed] the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate ha[d] already served three terms in the House of Representatives or two terms in the Senate."<sup>124</sup> The Court held that "[a]llowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States" as a whole.<sup>125</sup> The Court reasoned that "[t]he Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby 'divested' States of any power to add qualifications."<sup>126</sup> The majority emphasized that "[t]he Congress of the United States . . . is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people."<sup>127</sup>

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124. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 783 (1995).

125. *Id.*

126. *Id.* at 800-01.

127. *Id.* at 821.

The holding of the Court is consistent with the proclamations of the Framers on this subject. James Madison reasoned, "A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect."<sup>128</sup> He emphasized this point by citing the British Parliament's attempts to regulate qualifications. Madison observed that "the abuse they had made of it was a lesson worthy of our attention."<sup>129</sup> Hugh Williamson expressed concern at the Constitutional Convention that if a majority of the legislature should happen to be "composed of any particular description of men, of lawyers for example, . . . the future elections might be secured to their own body."<sup>130</sup> In addition, Alexander Hamilton wrote:

The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the national government . . . . [T]he qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the Constitution; and are unalterable by the legislature.<sup>131</sup>

Justice Story commented on the ability of state legislatures to set additional requirements to stand for federal office:

[I]t would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others.<sup>132</sup>

The reasoning behind the Framers' wording of the Qualifications Clause was similar to that behind using the term "inhabitant" in lieu of "citizen" in order to form a national representative branch of government uniting the separate, yet

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128. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 250 (Max Farrand ed. 1911).

129. *Id.* at 250.

130. *Id.* at 250.

131. THE FEDERALIST No. 60, at 408-09 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

132. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 625 (3d ed. 1858).

sovereign, states into a single nation. This reasoning of the Framers' behind the Qualifications Clause also applies to the use of the term "inhabitant" with regards to electing the President and Vice President. By using the term "inhabitant" in lieu of "citizen," the Framers assured that the states could not indirectly add qualifications to candidates outside of those enumerated in Article II by merely adding additional qualifications to becoming a lawful citizen of the state.

Therefore, state residency requirements cannot be coextensive with the term "inhabitant" in Articles I and II and in the Twelfth Amendment. The requirements to establish legal residency in a given state, if applied to standing for federal office, would effectively serve as additional requirements to those enumerated in Articles I and II. The Supreme Court has struck down attempts by the states to set additional electoral requirements for standing for federal office. To read the inhabitancy requirement in these terms leads to an outcome that has been held unconstitutional and is contrary to the intentions of the Framers with regards to national unity.

As previously discussed, one argument put forth in the plaintiffs' complaint in *Jones v. Bush* was that Secretary Cheney did not meet the requirements of legal residency in Wyoming. The plaintiffs argued that changing his voter registration from Texas to Wyoming only proved that Cheney was not an "inhabitant" of Wyoming under the Twelfth Amendment.<sup>133</sup> Section 23-1-102(a)(ix), W.S. 2001 states:

"Resident" means a United States citizen who has been a resident of Wyoming and domiciled in Wyoming for not less than one (1) year and who has not claimed residency elsewhere for any purpose during that one (1) year period immediately preceding the date of application for a license, permit, or certificate.<sup>134</sup>

Furthermore, the Wyoming Election Code, Section 22-1-102 defines "residence" as the place of one's actual habitation.<sup>135</sup> Under Wyoming State law, at the time of the election, Cheney was likely not a legal resident of Wyoming. Cheney had previously been a legal resident of Wyoming, but for the five years

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133. Complaint at 8-9, *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000) (No. 300 CV-2543D).

134. WYO. STAT. ANN. § 23-1-102(a)(ix) (Michie 2001).

135. WYO. STAT. ANN. § 22-1-102 (xxx) (Michie 2001).

prior to the election had availed himself to the rights and privileges of Texas residency. Nevertheless, the status of citizenship in a state (i.e. legal residency) is inapplicable in terms of the Twelfth Amendment's application to running for federal office. The term "inhabitant" cannot be read to mean "citizen" of a state as used in the Constitution. Living in the state and owning property are sufficient alone to denote inhabitancy. Therefore, Cheney's status as either a legal resident of Texas or Wyoming is irrelevant for purposes of ascertaining inhabitancy under the Twelfth Amendment.

### 3. *"Inhabitant" Is Not Coextensive With Domicile*

Next, the term "inhabitant," as used in the Twelfth Amendment, cannot be coextensive with the legal concept of "domicile." To find that "inhabitant" is coextensive with domicile is to bring in a subjective concept that would render the prohibition contained in the Twelfth Amendment a nullity.

An individual's "domicile" is determined by physical presence in a particular state and the intent to make his or her home there indefinitely.<sup>136</sup> A person can have one and only one domicile at any moment in time, and the only way to lose domiciliary status in one state is to gain such status in another.<sup>137</sup> "[F]or purposes of diversity jurisdiction, a natural person is considered to be a citizen of the state in which he or she is domiciled."<sup>138</sup> In this context, "citizenship" is synonymous with "domicile."<sup>139</sup> "A person's domicile is the place where the person has his or her true, fixed home and principal establishment, and to which he or she has the intention of returning whenever

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136. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) ("For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there.").

137. *Williamson v. Osenton*, 232 U.S. 619, 624 (1914) ("The essential fact that raises a change of abode to a change of domicile is the absence of any intention to live elsewhere, . . . or, as Mr. Dicey puts it in his admirable book, 'the absence of any present intention of not residing permanently or indefinitely in' the new abode.") (citations omitted); *Crowley v. Glaze*, 710 F.2d 676, 678 (10th Cir. 1983) ("To effect a change in domicile, two things are indispensable: First, residence in a new domicile, and second, the intention to remain there indefinitely.").

138. 15 JAMES WM. MOORE ET. AL., *MOORE'S FEDERAL PRACTICE*, § 102.34[2] (3d ed. 1999) (citing *Palazzo v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000)).

139. *Galva Foundry Co. v. Heiden*, 924 F.2d 729, 730 (7th Cir. 1991).

absent.”<sup>140</sup> Domicile “has both a physical and a subjective component, and is more than an individual’s residence, although the two typically coincide.”<sup>141</sup> “Citizenship is not necessarily lost by protracted absence from home, if the intention to return remains.”<sup>142</sup> “However, mere ‘mental fixing’ of citizenship, without physical presence, is not sufficient to establish” a domicile.<sup>143</sup>

“A person is deemed to have a domicile at all times,”<sup>144</sup> although, “[a]t any given time, a person has but one domicile.”<sup>145</sup> “Once a domicile is established in one state, it is presumed to continue in existence, even if the party leaves that state, until the adoption of a new domicile is established.”<sup>146</sup> “The fact that a person resides in a particular state is not, by itself, determinative of citizenship for the purpose of federal court jurisdiction because one can reside in one place but be domiciled in another if the person intends to return to a prior residence.”<sup>147</sup>

The determination of a person’s domicile is a mixed question of law and fact.<sup>148</sup> “Questions as to a person’s intent to change or not change domicile from one state to another are factual questions.”<sup>149</sup> “No single factor is conclusive.”<sup>150</sup> “In determining which of the person’s residences is his or her domicile, the court must focus on the intent of the party, which requires an examination of the entire course of a person’s conduct.”<sup>151</sup> “There is no durational, or minimum period of residence that is

140. 15 JAMES WM. MOORE ET. AL., MOORE’S FEDERAL PRACTICE, § 102.34[2] (3d ed. 1999).

141. *Id.* (citing *Nat’l Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1228 (S.D.N.Y. 1991)).

142. *Id.*

143. *Id.* (citing *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954)).

144. *Id.* § 102.34[2].

145. MOORE, *supra* note 140, § 102.34[2] (citing *Palazzo v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000)).

146. *Id.* § 102.34[7]. (citing *Anderson v. Watt*, 138 U.S. 694, 706 (1891)).

147. *Id.* § 102.34[8]. (citing *Mas v. Perry*, 489 F.2d 1396, 1399-1400 (5th Cir. 1974)).

148. *Palazzo*, 232 F.3d at 42.

149. MOORE, *supra* note 140, § 102.34[4] (citing *Palazzo*, 232 F.3d at 42).

150. *Id.* (citing *Nat’l Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1228 (S.D.N.Y. 1991)).

151. *Id.* § 102.34[9] (citing *Nat’l Artists Mgmt.*, 769 F. Supp. at 1227).



required to establish domicile.”<sup>152</sup> “A person may change domiciles only by taking up residence in a different state either with the intention to remain there, or at least without any specific intention to live anywhere else.”<sup>153</sup> “The intention and the act must concur to effect the change of domicile.”<sup>154</sup> “Neither the physical presence nor the intention to change domicile, standing alone, is sufficient to effect the change.”<sup>155</sup> There is no requirement that the individual state an intention to remain permanently, only that the individual state no intention to go elsewhere.<sup>156</sup> “Motive in changing domiciles is irrelevant unless it bears on the issue of intent.”<sup>157</sup> All circumstances must be evaluated in their entirety.<sup>158</sup> Some of the factors courts weigh in determining an individual’s intent are:

1. Voting registration and voting practices;
2. Place of employment or business;
3. Current residence;
4. Affidavits of intention;
5. Transfer requests;
6. Location of real property rented or owned;
7. Location of personal property (for example, furniture and automobiles);
8. Location of spouse and family;
9. Driver’s licenses;
10. Automobile registration;
11. Licenses other than driver’s license;
12. Location of brokerage and bank accounts;
13. Payment of taxes;
14. Tax return addresses;
15. Membership in unions;
16. Location of religious organizations with which affiliated;
17. Location of fraternal organizations, clubs, and other social associations;
18. Location of business and financial transactions;

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152. *Id.* § 102.34[10] (citing *White v. All Am. Cable & Radio, Inc.*, 642 F. Supp. 69, 72 (D.P.R. 1986)).

153. *Id.* § 102.35[1] (citing *Williamson v. Osenton*, 232 U.S. 619, 624 (1914)).

154. MOORE, *supra* note 140, § 102.35[1] (citing *Palazzo*, 232 F.3d at 42).

155. *Id.*

156. *Hawes v. Club Ecuestre El Comandante*, 598 F.2d 698, 701 (1st Cir. 1979); *Gallagher v. Philadelphia Transp. Co.*, 185 F.2d 543, 546 (3d Cir. 1950).

157. MOORE, *supra* note 140, § 102.35[3] (citing *Williamson*, 232 U.S. at 625).

158. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 12 (1st Cir. 1991).

19. Exercise of civil and political rights;
20. The location of a person's physician, lawyer, accountant, dentist, and stockbroker;
21. Payment of utilities;
22. Acquisition and listing of telephones;
23. Receipt of mail;
24. Membership in professional organizations;
25. Membership in civil organizations.<sup>159</sup>

"The place where a person votes is a factor that perhaps may carry more weight than other factors" under certain circumstances.<sup>160</sup>

If the conclusion of the court in *Jones v. Bush* is that the term "inhabitant" is coextensive with domiciliary then that requirement of the Twelfth Amendment which states that two candidates must be from different states or cede their home state's electoral votes has been voided for all practical purposes. While the Framers by adopting the requirement of inhabitancy instead of citizenship provided flexibility in changing one's place of residence in terms of standing for public office, they could not have intended for that criteria to be so subjective that it could readily be avoided. Moreover, how could it reasonably be suggested that the Framers intended the term "inhabitant" to be defined by a legal concept not in existence at the time of ratification? It is the subjective aspect of the latter criteria that makes domicile so incompatible with the concept of inhabitancy under the Twelfth Amendment.

#### 4. "Inhabitant" Is Not Coextensive With "Resident"

Finally, while the plain meaning of "inhabitant" means "resident," the term cannot be coextensive with the legal concept of residency used in civil procedure. Residence is a broader and more inclusive concept than domiciliary, reflecting the reality that a person can live in more than one state at a given time.<sup>161</sup> According to Black's Law Dictionary, "residence" "[usually] just means bodily presence as an inhabitant in a given

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159. MOORE, *supra* note 140, § 102.36[1] (citations omitted).

160. *Id.* §102.36[3] (citing *Lundquist*, 946 F.2d at 12).

161. *E.g.*, *Holyfield*, 490 U.S. at 48 ("Domicile" is not necessarily synonymous with 'residence,' and one can reside in one place but be domiciled in another.") (citations omitted); *See also Lundquist*, 946 F.2d at 10.

place [while] domicile [usually] requires bodily presence plus an intention to make the place one's home."<sup>162</sup> The problem that arises in defining "inhabitant" as meaning residence alone is that if an individual has more than one residence, then any state in which he or she is resident may be construed as a place of inhabitancy for purposes of the Twelfth Amendment. This plainly leaves the requirement a mess as the candidate can pick and choose his or her state of inhabitancy. Such a practice contravenes the intent of the provision. A candidate could clearly be from one state for political purposes, such as serving as the state's governor for example, and claim inhabitancy in a second state where he or she owns real property for purposes of satisfying the Twelfth Amendment. This would allow two candidates from the same state to run together contrary to the intentions of the Framers. Therefore, the requirement that the candidates for President and Vice President not be inhabitants of the same state cannot be read to mean residency in a broad sense.

### 5. *The Intent of the Framers*

The electoral college was a compromise among the Framers between having the chief executive selected by Congress or by direct election. The Framers preferred this method to the other proposed methods because they thought that it posed "little opportunity for cabal[ ] or corruption."<sup>163</sup> Eldridge Gerry of Massachusetts feared that through direct election "[t]he ignorance of the people would put it in the power of some one set of men dispersed through the Union [and] acting in Concert to delude them into any appointment."<sup>164</sup>

The electoral college itself posed two potential problems: the disproportionate number of voters between the North and South, and the probability that electors would cast their ballots only for candidates from their state.<sup>165</sup> In other words, electors would favor "favorite sons" when casting their ballots in the electoral college. Webster's New College Dictionary defines a favorite son as "[a] candidate favored by his own state delegates

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162. BLACK'S LAW DICTIONARY 1310 (7th ed. 1999).

163. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 365 (W.W. Norton & Co. 1987) [hereinafter DEBATES].

164. *Id.* at 368.

165. *Id.* at 365.

. . . .”<sup>166</sup> One of the objectives behind the inhabitancy requirement was to prevent this tendency that could lead to the domination of the executive branch by a single state or small group of states. Madison summed up the latter problem by observing that it is “the disposition in the people to prefer a Citizen of their own State . . . .”<sup>167</sup>

The electoral college as originally conceived did not provide for a separate ballot for President and Vice President, and the method of selection of electors was left to the state legislatures.<sup>168</sup> Thus, should the states be allowed unfettered to cast both of their ballots for favorite sons it could lead to two possible problems: that larger states would come to dominate the executive by electing both the President and Vice President from their state, and there lingered the possibility of a deadlock on the first ballot if every state cast their votes for favorite sons.<sup>169</sup> The latter dilemma left open the possibility that the electoral college could become a preliminary election with the House of Representatives selecting the President and the Senate selecting the Vice President. The Framers explicitly intended for election by Congress to merely serve as a contingency should the electoral college fail to select the President and Vice President. They did not wish for the executive to be chosen by the legislature which, they feared, would weaken its independency. Therefore, by requiring divided votes from each state’s slate of electors, the threat of deadlocks in the electoral college as the norm would be lessened, and the strength of larger states would be slightly diminished. Thus, one of the aims was to break up voting blocks by requiring that electors cast their ballots for candidates from different states.

The term “inhabitant” cannot be defined solely in a broad sense as resident or domicile when a candidate possesses residences in multiple states. To do so would contravene the intent of the Framers. The Framers could not have conceived of the situation where an individual residing in multiple states through property ownership would be selected as a running mate, putting him or her in conflict with the inhabitancy re-

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166. WEBSTER’S NEW COLLEGE DICTIONARY 499 (1995).

167. DEBATES, *supra* note 163, at 365.

168. U.S. CONST. art. II, § 1.

169. DEBATES, *supra* note 187, at 365.

quirement. At the time of ratification, there were no methods of easy transportation among the states. America had no roads like modern ones during this period.<sup>170</sup> The majority were Indian trails and rough pathways with tree stumps in them and wagon ruts on either side.<sup>171</sup> "Most folks could not afford carriages or wagons."<sup>172</sup> "Coastal vessels transported goods and people along the coasts . . ."<sup>173</sup> "Bateau, canoes and rafts were mainly used in the wilderness . . ."<sup>174</sup> People traveled mainly by horse, wagons, coaches and carriages.<sup>175</sup> While some individuals may have possessed a residence in one state and been absent for durations on public or private business, they likely did not generally take up residence, in terms of acquiring property with occasional occupancy, in multiple states. Moreover, one's attachment to his or her state was likely greater.

Thus, a dilemma presents itself in circumstances where the candidate, whose status as an inhabitant of a state is in question, resides in multiple states. The plain meaning of the term "inhabitant" is "resident," defined as an individual who physically dwells in a place or owns real property therein. However, resident cannot be interpreted broadly where each state of residency could satisfy the inhabitancy requirement. Such an interpretation would serve to undermine the Framers' desire to discourage candidates from the same state from running together. This is because either nominee could claim a second residence as his place of inhabitancy even though he or she could be simultaneously serving as an elected official or active party participant of the same state as his or her running mate.

When a candidate possesses multiple dwellings in which he or she could claim inhabitancy, the appropriate one for purposes of the Twelfth Amendment should be determined by looking at the plain meaning of the text in light of the intent of the Framers. This means looking at the political activity of the particular candidate, which may demonstrate the state in which he or

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170. Rick Brainard, *18th Century Transportation*, 18TH CENTURY HISTORY, July 2, 1997, at <<http://www.history1700s.com/article1011.shtml>>.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Rick Brainard, *18th Century Transportation*, 18TH CENTURY HISTORY, July 2, 1997, at <<http://www.history1700s.com/article1011.shtml>>.

she may be considered a favorite son by its indigenous political establishment. This would avoid scenarios where a candidate would serve in the political establishment of one state while claiming to be the inhabitant of another in order to run for high office. It becomes more difficult to ascertain inhabitancy where the individual in question has never before held public office or been active in a state's political establishment. Primary place of residency may be one solution. However, any inquiry should be made purely on a factual basis.

### B. *The Application of the Jones Definition*

The definition of "inhabitant" adopted by the *Jones* court contravenes both the text of the Constitution, and the intent of the Framers to discourage two candidates arising from the same state from running together. To illustrate this point, the following hypothetical delineates the purpose of the Amendment and how the *Jones* court's interpretation would undermine it. Suppose Governor Bush, looking to reach out to female voters and desiring a running mate with experience in Washington, had decided to select United States Senator Kay Bailey Hutchison of Texas as his choice for the Republican nomination for Vice President. The Twelfth Amendment clearly prohibits such a scenario because both candidates would be "inhabitants" of Texas under any of the definitions discussed so far. Both own property in Texas, reside in Texas, and hold public office in Texas. A Bush-Hutchison ticket would have to forfeit the electoral votes of Texas if they won them in the election. However, the decision in *Jones v. Bush* presents a solution to the aforementioned dilemma. Senator Hutchison need only move to Oklahoma, for example, and declare her intent to reside there indefinitely. Under this hypothetical let us further assume that Senator Hutchison's intentions are sincere. She will live in Oklahoma even if she loses in her bid to become Vice President. Under the reasoning of the *Jones* court, Hutchison is now a domicile of Oklahoma, and an "inhabitant" of Oklahoma to satisfy the Twelfth Amendment. Thus, there are no Constitutional obstacles to a Bush-Hutchison ticket. The above scenario illustrates how the ruling in *Jones v. Bush* would essentially nullify the inhabitancy requirement of the Twelfth Amendment, and is inconsistent with the intentions of the Framers.

When the candidate possesses residency in more than one state, then the inquiry should center upon the state in which that candidate may be considered a favorite son in terms of the electoral college as the Framers' envisioned, not the definition adopted by the court in *Jones v. Bush*. This interpretation effectively breaks up the Kay Bailey Hutchison dilemma discussed earlier. Even if Senator Hutchison already owned property in Oklahoma, if she tried to claim Oklahoma residency status for purposes of the Twelfth Amendment it would fail. Her political ties would cast her as a favorite son of Texas. This would mean that officeholders, party leaders and others with strong ties to the same state as the other candidate on the national ticket would both still be barred from seeking high office and gaining their state's electoral votes as the Framers' intended.

To further illustrate this point, the case of former Secretary of State James Baker is useful to inspect. What if prior to the Republican National Convention in 1992, Secretary Baker had changed his voter registration from Texas to Wyoming, where he owned a fishing cabin, so he could run as President George Bush's running mate thereby supplanting the incumbent Vice President, Dan Quayle. Had this scenario played out, Baker would have been an inhabitant of Texas under the Twelfth Amendment despite having been a resident of Wyoming simultaneously through property ownership as Cheney had been in 2000. The Twelfth Amendment does not allow a candidate to merely choose among their places of residency in determining which state a candidate is considered to be an "inhabitant." To read the language of the Twelfth Amendment in this way would lead to the same fallacy as interpreting "inhabitant" to be coextensive with "domicile." In other words, we end up right back at the situation where Kay Bailey Hutchison and George W. Bush run on the same ticket.

The controlling factor under such circumstances is the political activity of the candidate. Baker had been a partner in the Houston law firm Baker and Botts, he had run George Bush's unsuccessful 1970 campaign for the U.S. Senate seat from Texas, he had, himself, run for Texas State Attorney General in 1978, and he had continued to own property in Texas throughout his career in Washington. To find that Secretary Baker otherwise was not an inhabitant of Texas would be a

farce. The same would go for Kay Bailey Hutchison, an incumbent U.S. Senator elected from Texas, had she run on a ticket with George W. Bush by claiming inhabitancy in another state. Another good case would be former Tennessee Senator and Cabinet Secretary Bill Brock. He served as a U.S. Senator from Tennessee, and later ran unsuccessfully for the U.S. Senate from Maryland in 1988. Had he been selected as a running mate for a presidential candidate from Maryland, and claimed to be an inhabitant of Tennessee based upon his prior service in the U.S. Senate from that state, he would still be considered an inhabitant of Maryland under the definition of inhabitant intended by the Framers. By seeking elective office from Maryland and living in Maryland, he cut his political ties to Tennessee and became a favorite son of Maryland.

*C. Dick Cheney and the Twelfth Amendment*

The late Judge Roger B. Andewelt of the United States Court of Federal Claims was fond of observing that in some instances the correct answer to a legal question may be a 51 to 49 decision.<sup>176</sup> The vice presidential candidacy of Richard Cheney in the 2000 election is such an instance. With an election in the balance, Cheney did deserve, and received, the utmost deference from the courts regarding his candidacy. At the time of the election, Cheney could be considered a resident of three states: Virginia, where he owned a home in McLean, Wyoming, and Texas. By switching his voter registration from Texas to Wyoming, Cheney affirmed that he was seeking the Office of Vice President as an inhabitant of Wyoming. Based upon the earlier discussion of the meaning of the term "inhabitant," it does not matter which state Cheney possessed legal residency under state law. Under the plain meaning of the term "inhabitant," Cheney resided in three states in which he could potentially claim inhabitancy. The Framers could not have intended for Cheney to be barred from running for office under three states because of the intention to bar voting for two favorite sons from receiving their home state's slate of electors. Circumstances like those of Cheney were not regularly in existence at the time

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176. Telephone Interview with Judge Roger B. Andewelt, U.S. Court of Federal Claims (February 5, 2001).



of ratification. In order to assess Cheney's status, applying the definition of inhabitant in light of the intent of the Framers leads to the conclusion that, for purposes of the Twelfth Amendment, Cheney was an inhabitant of Wyoming, not Texas. Cheney served six terms as a House Member from Wyoming, and continued to own property there after leaving government service as Secretary of Defense in 1993. Cheney, just as importantly, was not involved in Texas state politics, nor had he ever been.

Under circumstances like Richard Cheney's where a nominee resides in one state, yet whose political affiliations are with another, the test becomes which of the two states can he or she be considered a favorite son. Ultimately, Cheney's running as an inhabitant of Wyoming did not defeat the purpose behind the Twelfth Amendment, nor does it contravene the meaning of the term "inhabitant" as discussed above.

#### IV. THE POLITICAL QUESTION DOCTRINE AND THE ENFORCEMENT OF THE TWELFTH AMENDMENT

Judicial review of the qualifications of presidential and vice presidential candidates as they pertain to the validity of electoral votes comes under the aegis of the Political Question Doctrine. Therefore, the issue of whether or not candidates are "inhabitants" of the same state is not justiciable. It is to be resolved by Congress in its capacity as the final arbiter of the electoral vote. Finally, there is no identifiable textual limitation on the authority of Congress that would deny it the authority to interpret the meaning of the term "inhabitant" as it pertains to the certification of electoral votes.

##### A. *The Political Question Doctrine*

The Political Question Doctrine's roots lie in Chief Justice John Marshall's dicta in *Marbury v. Madison*:<sup>177</sup>

The province of the court is, solely, to decide on the rights of individuals, not inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their

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177. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.<sup>178</sup>

In the subsequent 1849 case of *Luther v. Borden*, "Chief Justice John Marshall's *Marbury* dictum distinguishing political and legal questions became the basis for an . . . exception to the scope of . . . judicial authority."<sup>179</sup> The Court would clarify this exception over the course of subsequent opinions.

The Political Question Doctrine has its origins in the 1849 case *Luther v. Borden*.<sup>180</sup> The case arose out of circumstances surrounding an insurrection in Rhode Island that took place in 1841 and 1842.<sup>181</sup> Martin Luther brought a claim for trespass against Luther M. Borden and others in the Circuit Court for the District of Rhode Island for the breaking and entering of his home.<sup>182</sup> The defendants asserted that they were acting on the orders of the state pursuant to their military service in order to control those individuals seeking to overthrow the lawful government of Rhode Island by force, and that Luther was one of those actively engaged in those efforts.<sup>183</sup> The governor placed the state under martial law in order to deal with the crisis.<sup>184</sup> The defendants' superiors gave them orders to enter Luther's home and place him under arrest.<sup>185</sup> They were also given specific instructions to cause as little damage as possible in their endeavor.<sup>186</sup>

The plaintiff called into question the legitimacy of the Government of Rhode Island.<sup>187</sup> Prior to the acts of trespass at issue in the case, the lawful Government of Rhode Island was the one established at the time of the Declaration of Independence, generally referred to as the "charter government" because, at the time, it still existed under a 1663 charter from Charles the Second which had been amended by the state legislature for in-

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178. *Id.* at 170.

179. See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 104 (1988).

180. *Luther v. Borden*, 48 U.S. (1 How.) 1 (1849).

181. *Id.* at 34.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Luther*, 48 U.S. (1 How.) at 34.

186. *Id.*

187. *Id.* at 35.

dependence.<sup>188</sup> Prior to the conflict, many citizens in Rhode Island were displeased with the charter government's restrictions on suffrage.<sup>189</sup> An informal election had taken place in which delegates were elected to a non-state sanctioned constitutional convention.<sup>190</sup> The delegates framed a new constitution that extended the right to vote to all males twenty-one years and older.<sup>191</sup> Elections took place shortly thereafter to elect state officials under this new constitution. After the election, the new constitution was declared ratified and the charter government null.<sup>192</sup> Thomas W. Dorr, the governor elected under the new constitution asserted his position by calling upon supporters to overthrow the charter government.<sup>193</sup> The state declared martial law and called up the militia to suppress the insurrection.<sup>194</sup> Meanwhile, the charter government, through the 1842 session of the State Legislature, called a convention to revise its state charter.<sup>195</sup> A second constitution, this one drafted pursuant to the orders of the charter government, was promulgated and ratified by the citizens of Rhode Island.<sup>196</sup> A new government was elected under this constitution, and took office in May of 1843.<sup>197</sup> The plaintiff argued that he was not part of a general insurrection against the charter government, but, rather, actively engaged in supporting the lawful government of Rhode Island under Thomas Dorr.<sup>198</sup>

The Court with Chief Justice Taney writing for the majority took up the issue of whether the government of Rhode Island had been nullified by the constitution of the dissidents.<sup>199</sup> The Court observed that to declare the charter government a nullity would have dire political and social consequences upon the state.<sup>200</sup>

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188. *Id.*

189. *Id.*

190. *Luther*, 48 U.S. (1 How.) at 35-36.

191. *Id.* at 36.

192. *Id.*

193. *Id.* at 37.

194. *Id.*

195. *Luther*, 48 U.S. (1 How.) at 37.

196. *Id.*

197. *Id.*

198. *Id.* at 35.

199. *Id.* at 38.

200. *Luther*, 48 U.S. (1 How.) at 38-39.

For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, —if it had been annulled by the adoption of the opposing government, —then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.<sup>201</sup>

Nonetheless, the Court concluded that the “political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.”<sup>202</sup>

[T]he Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State.<sup>203</sup>

It is therefore the role of Congress, the Court reasoned, to decide which is the lawfully established government in a state before a determination can be made whether that government is republican.<sup>204</sup> The decision of Congress is binding, and cannot be called into question by the courts.<sup>205</sup> Chief Justice Taney established that “[i]f the judicial power extends so far, the guarantee contained in the Constitution of the United States is a

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201. *Id.*

202. *Id.* at 39.

203. *Id.* at 42.

204. *Id.*

205. *Luther*, 48 U.S. (1 How.) at 42.

guarantee of anarchy, and not of order.”<sup>206</sup> The Court also noted that “[u]nquestionably a military government, established as the permanent government of the State, would not be a republican government . . . .”<sup>207</sup> However, even if a non-republican form of government came into existence, “it would be the duty of Congress to overthrow it,” not the courts.<sup>208</sup>

The next major case to address the Political Question Doctrine was *Colegrove v. Green*, a plurality opinion decided in 1946.<sup>209</sup> The petitioners in that action were three qualified voters of Illinois, who resided in Congressional districts with substantially larger populations than other districts, and sought to enjoin state officials from conducting an election in 1946 because the districts “lacked compactness of territory and approximate equality of population.”<sup>210</sup> The Court reasoned that the issue was “peculiarly political [in] nature,” and, therefore, beyond judicial scrutiny.<sup>211</sup> Congressional apportionment is rife with political controversy and strife going all the way back to Massachusetts Governor Eldridge Gerry (the father and namesake of Gerrymandering).<sup>212</sup> Justice Frankfurter, writing for the plurality, stated that the “petitioners ask of this Court what is beyond its competence to grant.”<sup>213</sup> Although the State of Illinois failed to redistrict its Congressional districts in order to reflect changes in population, Frankfurter reasoned that a court does not possess the power to draw the maps for new districts.<sup>214</sup> The most the Court could do was to declare an election invalid because of the boundaries of the districts.<sup>215</sup> The Court ruled by citing the provision of the Constitution, Article I, Section 5, Clause 1, which allows the House to reject a delegation of Representatives-at-large.<sup>216</sup> Article I, Section 4 of the Constitution further provides that “[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in

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206. *Id.* at 43.

207. *Id.* at 45.

208. *Id.*

209. *Colegrove v. Green*, 328 U.S. 549 (1946).

210. *Id.* at 550-51.

211. *Id.* at 552.

212. *Id.* at 554.

213. *Id.* at 552.

214. *Colegrove*, 328 U.S. at 552-53.

215. *Id.* at 553.

216. *Id.*

each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”<sup>217</sup> The Court reasoned that the Constitution has conferred upon Congress the exclusive authority to determine whether the states have fulfilled their responsibility of providing for fair representation in the U.S. House of Representatives.<sup>218</sup> If Congress fails to exercise its authority over these matters then the remedy lies with the voters, not the courts.<sup>219</sup>

The decision in *Colegrove v. Green* was revisited in *Baker v. Carr*.<sup>220</sup> Justice William Brennan, writing for the majority, clarified the contours of the Political Question Doctrine.<sup>221</sup> An action was brought under 42 U.S.C. sections 1983 and 1988, the civil rights statutes, to redress the deprivation of Constitutional rights by a 1901 Tennessee state statute that malapportioned members of the State General Assembly among the 95 counties.<sup>222</sup> The plaintiffs argued that the districts, as they were drawn, denied them the equal protection guaranteed under the Fourteenth Amendment by diluting their votes.<sup>223</sup> The lower court held that it lacked the subject matter jurisdiction to hear the case, and further, that the plaintiffs had failed to state a claim upon which relief could be granted.<sup>224</sup> The district court, citing the Court’s prior decision in *Colegrove v. Green*, believed that the subject matter was nonjusticiable.<sup>225</sup> The Supreme Court, taking a different view than in *Colegrove v. Green*, did not consider the matter to be foreclosed to judicial scrutiny.<sup>226</sup> Instead, the Court identified the relevant inquiry as whether the duty asserted can be identified, its breach judicially determined, and, in addition, whether protection for the right asserted can be upheld.<sup>227</sup> The Court ruled that the doctrine does not literally preclude from judicial scrutiny all cases involving

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217. *Id.* at 554.

218. *Id.*

219. *Colegrove*, 328 U.S. at 554.

220. 369 U.S. 186 (1962).

221. *Id.*

222. *Id.* at 187.

223. *Id.* at 187-88.

224. *Id.*

225. *Id.* at 198.

226. *Baker*, 369 U.S. at 198.

227. *Id.* at 198.

elements of politics.<sup>228</sup> Article III, Section 2 of the Constitution provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority . . . .”<sup>229</sup> The Court held that the challenge to a legislative apportionment “presents no nonjusticiable ‘political question.’”<sup>230</sup>

First, Justice Brennan stated that “the mere fact that a suit seeks protection of a political right does not mean that it presents a political question”<sup>231</sup> outside of a court’s competence.<sup>232</sup> He distinguished the Guaranty Clause line of cases going back to *Luther v. Borden* saying, “that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause.”<sup>233</sup> The Guaranty Clause cases involve elements of the Political Question Doctrine, and “for that reason and no other, they are nonjusticiable.”<sup>234</sup> Justice Brennan, commenting on the Court’s decision in *Luther v. Borden*, further stated that:

several factors were thought by the Court in *Luther* to make the question there “political”: the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican.<sup>235</sup>

The attributes of the Political Question Doctrine, depending upon the circumstances, “diverge, combine, appear, and disappear in seeming disorderliness.”<sup>236</sup> “[I]n the Guaranty Clause cases, and in the other ‘political question’ cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s rela-

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228. *Id.* at 209.

229. U.S. CONST. art. III, § 2.

230. *Baker*, 369 U.S. at 209.

231. *Id.* at 209.

232. *See id.*

233. *Id.*

234. *Id.* at 218.

235. *Baker*, 369 U.S. at 222.

236. *Id.* at 210.

tionship to the States, which gives rise to the 'political question.'<sup>237</sup> The nonjusticiability is derived from the separation of powers on a case-by-case basis.<sup>238</sup> Deciding whether a subject matter has been committed by the Constitution to a coordinate branch of government, or whether an action of a branch exceeds its authority is the proper inquiry.<sup>239</sup> The Political Question Doctrine serves to maintain order, and should not be applied in any manner so as "to promote only disorder."<sup>240</sup> The doctrine was described more fully as:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>241</sup>

A subject matter, therefore, constitutes a nonjusticiable "political question" when any of these characteristics are present.<sup>242</sup> Unless one of them is inextricable from the action in question, it is nonjusticiable.<sup>243</sup> The question presented in *Baker v. Carr* dealt specifically with the consistency of state action with the provisions of the Constitution.<sup>244</sup> Brennan stated that there were no questions presented by the parties that were more properly suited for consideration by another branch of government.<sup>245</sup> Nor in adjudicating the issue did the Court risk embarrassing the government abroad, nor would it perpetuate domestic disturbance at home.<sup>246</sup> Finally, the Court did not

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237. *Id.* at 210.

238. *Id.* at 210-11.

239. *Id.* at 211.

240. *Baker*, 369 U.S. at 215.

241. *Id.* at 217.

242. *See id.*

243. *Id.*

244. *Id.* at 226.

245. *Baker*, 369 U.S. at 226.

246. *Id.*



need to make a policy determination that the issue lacked judicially manageable standards because the Equal Protection Clause was an appropriate basis for adjudication.<sup>247</sup>

B. *The Political Question Doctrine and Congress*

In cases dealing with an enumerated power of Congress, the Court has generally given great deference to the decisions of that branch of government. In *Coleman v. Miller*, decided in 1939, Chief Justice Charles Evans Hughes, writing for the majority, held that Congress possesses sole authority for deciding whether a proposed Constitutional amendment has been ratified.<sup>248</sup> "In June 1924, the Congress proposed an amendment to the Constitution, known as the Child Labor Amendment."<sup>249</sup> "In January, 1925, the Legislature of Kansas adopted a resolution rejecting the proposed amendment and a certified copy of the resolution was sent to the Secretary of State of the United States" in Washington.<sup>250</sup> Later, in January 1937, the Kansas Senate adopted a second resolution this time ratifying the CLA with the Lieutenant Governor casting the tie breaking vote.<sup>251</sup> The Kansas House of Representatives subsequently adopted the measure.<sup>252</sup> In response, twenty-one members of the Kansas Senate and three members of the Kansas House challenged the validity of the resolution in the Kansas Supreme Court to the effect that the Lieutenant Governor improperly cast his vote for the CLA.<sup>253</sup> They also asserted that the amendment, having not been ratified by the requisite number of states from 1924 to 1927, had not been ratified within a reasonable time with the time for Kansas to ratify it expired.<sup>254</sup> The Kansas Supreme Court held that the Lieutenant Governor could cast the deciding vote, and, therefore, the adoption of the resolution in the Kansas Senate was proper.<sup>255</sup>

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247. *Id.*

248. *Coleman v. Miller*, 307 U.S. 433, 454 (1939).

249. *Id.* at 435.

250. *Id.*

251. *Id.* at 435-36.

252. *Id.* at 436.

253. *Coleman*, 307 U.S. at 435-36.

254. *Id.*

255. *Id.* at 437.

The U.S. Supreme Court, on appeal, held that the efficacy of ratifications by state legislatures should be regarded as a political question with the ultimate authority resting with Congress in its exercise of control over the adoption of amendments.<sup>256</sup> The Court cited as historical precedents the New Jersey Legislature's initial rejection of the Thirteenth Amendment in 1865 and its later ratification and acceptance by Congress.<sup>257</sup> The Court also pointed out that in 1866, the legislatures of Georgia, North Carolina and South Carolina initially rejected the Fourteenth Amendment but then adopted it, after a change in the composition of the government.<sup>258</sup> Congress accepted the second votes and counted them as part of three fourths needed for ratification.<sup>259</sup> The Court observed that the "more serious question is whether the proposal by the Congress of the amendment had lost its vitality through lapse of time and hence it could not be ratified by the Kansas legislature in 1937."<sup>260</sup> Congress in proposing an amendment possesses the power to fix a reasonable time frame for ratification by the states.<sup>261</sup> In *Dillon v. Gloss*, the Court "sustained the action of the Congress in providing in the proposed Eighteenth Amendment that it should be inoperative unless ratified within seven years."<sup>262</sup> The petitioners in *Coleman v. Miller* argued that, in the absence of a limitation placed by Congress, the Court should infer a reasonable time for ratification.<sup>263</sup> The Court explicitly rejected this line of reasoning stating that there are no criteria for judicial determination anywhere in the Constitution for determining what is a reasonable time for ratification.<sup>264</sup> The Court noted "[O]ur decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that

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256. *Id.* at 449.

257. *Id.* at 448.

258. *Coleman*, 307 U.S. at 448.

259. *Id.*

260. *Id.* at 451.

261. *Id.* at 452 (citing *Dillon v. Gloss*, 256 U.S. 368 (1921)).

262. *Id.*

263. *Coleman*, 307 U.S. at 452.

264. *Id.* at 453.

the question, what is a reasonable time, lies within the congressional province."<sup>265</sup>

The Court has also, in some instances, recognized the limits of Congressional power in addressing otherwise political matters related to that body. In *Powell v. McCormack*, a 1969 decision authored by Chief Justice Earl Warren, Adam Clayton Powell, after having been elected to serve in the House of Representatives for the 90th Congress, was denied his seat through the adoption of House Resolution No. 278, which the Speaker ruled would exclude Powell from the House Chamber.<sup>266</sup> The House had taken action upon learning of charges that Powell had misappropriated public funds, and abused the processes of the New York courts.<sup>267</sup> The House adopted the Resolution by a vote of 248 to 176.<sup>268</sup>

In 1966, Adam Clayton Powell, Jr. was re-elected to the House from the 18th Congressional District in Harlem, New York.<sup>269</sup> "During the 89th Congress, a Special Subcommittee on Contracts of the Committee on House Administration conducted an investigation into the expenditures of the Committee on Education and Labor, of which [Powell served as] chairman."<sup>270</sup> A report concluded "that Powell and certain staff employees had deceived the House authorities as to travel expenses."<sup>271</sup> "Strong evidence that certain illegal salary payments had been made to Powell's wife at his direction" also was included in the report.<sup>272</sup> Powell filed suit, arguing that the Resolution barred his seating in violation of Article I, Section 2, Clause 1 of the Constitution, contrary to the mandate that House members be elected by the people of each State, and contrary to Clause 2 which sets forth the qualifications for membership to the House of age, citizenship, and residence.<sup>273</sup> The Court's examination of the relevant historical precedents led it to conclude that Powell was correct in that the Constitution leaves the House without

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265. *Id.* at 454.

266. *Powell v. McCormack*, 395 U.S. 486, 492-93 (1969).

267. *See id.* at 489-90.

268. *Id.* at 493.

269. *Id.* at 489.

270. *Id.* at 489-90.

271. *Powell*, 395 U.S. at 490.

272. *Id.*

273. *Id.* at 486.

authority to exclude any person elected by his constituents who meets the enumerated requirements for election in Article II.<sup>274</sup> The Framers' understood that "the qualifications for members of Congress had been fixed in the Constitution."<sup>275</sup> For almost the first 100 years of its existence, "[C]ongress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution."<sup>276</sup> In 1807, "the eligibility of William McCreery was challenged, because he did not meet additional residency requirements imposed by the State of Maryland."<sup>277</sup> "[I]n recommending that he be seated, the House Committee of Elections reasoned: . . . Qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications; and that, by that instrument, Congress is constituted the sole judge of the qualifications prescribed by it, and are obliged to decide agreeably . . . ."<sup>278</sup>

In 1868, the House voted to exclude two members-elect because they had given aid and comfort to the Confederacy.<sup>279</sup> Since that case Congressional practice had been erratic.<sup>280</sup> Whether any of these examples serve as precedent, the Court noted "[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."<sup>281</sup> The Court held "that Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth," therefore, the issue is justiciable.<sup>282</sup> The House asserted that its power to "be the Judge on the Elections, Returns and Qualifications of its own Members" was a textual commitment of unreviewable authority.<sup>283</sup> However, this interpretation is defeated by the existence of a separate provision enumerating the specific qualifications for House membership. The decision as to

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274. *Id.* at 522.

275. *Id.* at 540.

276. *Powell*, 395 U.S. at 542.

277. *Id.*

278. *Id.* (quoting 17 ANNALS OF CONG. 871 (1807)).

279. *Id.* at 544.

280. *Id.* at 544-45.

281. *Powell*, 395 U.S. at 546-47.

282. *Id.* at 548.

283. *Id.* at 485.

whether a Member satisfied these qualifications was placed with the House, but the decision as to of what these qualifications consisted was not. The holding was based on the fixed meaning of "qualifications" set forth in Article I, Section 2.

However, in *Nixon v. United States*, a 1993 opinion by Chief Justice William Rehnquist, the Court distinguished its holding in *Powell v. McCormack*.<sup>284</sup> Walter L. Nixon, Jr., a former federal judge removed from office by Congress pursuant to the Impeachment Clause of the Constitution, petitioned the Supreme Court to review "whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate," violates Article I, Section 3, Clause 6 of the Constitution.<sup>285</sup> The Impeachment Clause states that the "Senate shall have the sole power to try all Impeachments."<sup>286</sup> "Nixon, a former Chief Judge of the United States District Court for the Southern District of Mississippi, was convicted by a jury of two counts of making false statements before a federal grand jury and sentenced to prison."<sup>287</sup> "On May 10, 1989, the House of Representatives adopted three Articles of Impeachment" against Nixon.<sup>288</sup> The Senate soon thereafter "voted to invoke its Impeachment Rule XI, under which the presiding officer appoints a committee of Senators to 'receive evidence and take testimony.'"<sup>289</sup> The Senate then voted as a whole by more than the required two-thirds needed to convict Nixon on the first two articles.<sup>290</sup>

The Court ruled that "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards."<sup>291</sup> A "lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."<sup>292</sup> Under Article I, Section 3, Clause 6, which determines "the scope of

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284. *Nixon v. United States*, 506 U.S. 224 (1993).

285. *Id.* at 226.

286. U.S. CONST. art. I, § 3, cl. 6.

287. *See Nixon*, 506 U.S. at 226.

288. *Id.*

289. *Id.* at 227.

290. *Id.* at 228.

291. *Id.* at 227-28.

292. *Nixon*, 506 U.S. at 228-29.

authority conferred upon the Senate” by the Constitution regarding the impeachment of federal judges, Nixon argued “that the word ‘try’ in the first sentence imposes by implication an additional requirement” that any proceedings undertaken by the Senate must be in the form of a judicial trial.<sup>293</sup> Unlike the case in *Powell v. McCormack*, “there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the meaning of the word ‘try’ in the Impeachment Trial Clause.”<sup>294</sup> The Court concluded, “that the word ‘try’ in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority” of the Senate.<sup>295</sup>

C. *Congressional Procedures and Precedents in Resolving Disputed Electoral Votes*

The authority to count the electoral votes and adjudicate disputes is placed in the hands of a coordinate political department by the Constitution. The Constitution authorizes the President of the Senate to count the electoral votes during a joint session of Congress, and any disputes that may arise as to the validity of those votes is given to Congress to resolve.<sup>296</sup> Article II, Section 1, states, in part:

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.<sup>297</sup>

Through 3 U.S.C. § 15, Congress has the authority to certify electoral votes, and interpret the meaning of “inhabitant” as the issue may arise during the certification process. Congress possesses this power under the statute pursuant to the Necessary and Proper Clause. Article I, section 8 states that Congress has

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293. *Id.* at 229.

294. *Id.* at 237.

295. *See id.* at 238.

296. *See* U.S. CONST. art. II, § 1.

297. *Id.*

the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>298</sup>

There is ample legislative precedent for resolving disputes concerning the validity of ballots cast in the electoral college.

The procedure for counting the electoral votes and resolving any objections to their validity during a joint session of Congress is laid out in 3 U.S.C. § 15:

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

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298. U.S. Const. Art. I, § 8.

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 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.<sup>299</sup>

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299. 3 U.S.C. § 15 (2002).



The grounds for an objection are that the vote was not “regularly given” by an elector, or that the elector was not legally certified under the state’s procedures. Title 3 U.S.C. section 15 states: “no electoral vote . . . regularly given by electors whose appointment has been . . . received shall be rejected.”<sup>300</sup> Any objection to the validity of an electoral vote or votes “shall state clearly and concisely, and without argument, the ground thereof . . . .”<sup>301</sup> At least one Senator and one Member of the House must sign a written objection.<sup>302</sup> Upon receipt of an objection, the joint session goes into recess, and each chamber deliberates separately over the objection.<sup>303</sup> Debate is limited to two hours.<sup>304</sup> During debate, each Senator and Representative may speak for or against the objection for no more than five minutes, and may not address the chamber more than once.<sup>305</sup> After the close of debate, each chamber votes separately whether or not to uphold the objection.<sup>306</sup> After the two chambers have voted, they immediately reconvene in joint session, and the President of the Senate announces the results.<sup>307</sup> In order to sustain an objection, both chambers must vote to uphold.<sup>308</sup> If the two chambers do not agree then the objection falls and the votes are counted.<sup>309</sup> Also, under the statute, “[n]o 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.”<sup>310</sup> These procedures were invoked in 1969, the only time since their enactment in 1887 when this has occurred, when a Representative and a Senator objected to the vote of an elector from North Carolina who had cast his votes for Governor George Wallace for President and General Curtis E. LeMay for Vice President, the nominees of the American Independent Party.<sup>311</sup>

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300. *Id.*

301. *Id.*

302. DESCHLER, *supra* note 36, Ch. 10, § 1.

303. *Id.*

304. 3 U.S.C. § 17 (2002).

305. *Id.*

306. 3 U.S.C. § 15 (2002).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. DESCHLER, *supra* note 36, Ch. 10, § 3.6.

On January 6, 1969, Representative James G. O'Hara of Michigan and Senator Edmund S. Muskie of Maine objected to votes cast by a North Carolina elector for George Wallace for President and Curtis LeMay for Vice President respectively.<sup>312</sup> The vote of North Carolina was stated to be twelve for Richard M. Nixon and Spiro T. Agnew for President and Vice President respectively, and one for George Wallace and Curtis LeMay for President and Vice President respectively.<sup>313</sup> The objection stated:

We object to the votes from the State of North Carolina for George C. Wallace for President and for Curtis E. LeMay for Vice President on the ground that they were not regularly given in that the plurality of votes of the people of North Carolina were cast for Richard M. Nixon for President and for Spiro T. Agnew for Vice President and the State thereby appointed thirteen electors to vote for Richard M. Nixon for President and for Spiro T. Agnew for Vice President and appointed no electors to vote for any other persons. Therefore, no electoral vote of North Carolina should be counted for George C. Wallace for President or for Curtis E. LeMay for Vice President.

JAMES G. O'HARA, M.C.

EDMUND S. MUSKIE, U.S.S.<sup>314</sup>

After the President of the Senate concluded that the objection was filed in accordance with law, the joint session recessed in order for the two chambers to separately consider the objection.<sup>315</sup> The legal basis for the objection was based on 3 USC § 15, which states:

[A]nd 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.<sup>316</sup>

"Those supporting the objection in the House and Senate contended that the votes of one North Carolina elector had not been

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312. *Id.*

313. *Id.* § 3.6.

314. 115 CONG. REC. 146 (1969).

315. DESCHLER, *supra* note 36, Ch. 10, § 3.6.

316. 3 U.S.C. § 15 (2002).

'regularly given' and should therefore be rejected."<sup>317</sup> Senator Muskie eloquently stated this position during the Senate debate:

In this case, a North Carolina elector was nominated as an elector by a district convention of the Republican Party in North Carolina. He did not reject that nomination. His name was not placed on the ballot because under North Carolina law, as in the case of 34 other States, only the names of the party's presidential and vice-presidential candidates appear, and electors are elected for the presidential and vice-presidential candidates receiving the plurality of the vote in North Carolina.

Dr. Bailey and 12 other North Carolina Republican electors were so elected on November 5. The election was certified. Dr. Bailey did not reject that election or that certification. So up to that moment, so far as the people from North Carolina understood, he was committed as an elector on the Republican slate, riding under the names of Richard M. Nixon and Spiro T. Agnew, to vote for that presidential and vice-presidential ticket.

On December 16, the electors of North Carolina met in Raleigh to cast their votes . . . . It was at that point that Dr. Bailey decided to cast his vote for the Wallace-LeMay ticket instead . . . .

[A]s I understand it, the Constitution, as interpreted by the debates in the Constitutional Convention, clearly makes an elector a free agent. However, from the beginning of the country's history, political parties developed, and political parties arranged for slates of electors assigned to their presidential and vice-presidential candidates. That political party slate of candidates has always been regarded, with but five other exceptions, as binding upon those who are electors on that slate.

So I argue that in light of that tradition, when an elector chooses to go on a party slate, he is indicating his choice for President.

I say, secondly, that in the case of North Carolina and this statute, which is found also in 34 other States, the fact that only the presidential and vice-presidential names appear on the ballot is confirmation of this tradition; that when an elector accepts a place on a slate under these circumstances, in the light of this tradition, he knows that to the public at large he is saying, by his action, "I am for Nixon for President." He is saying implicitly, in my judgement, "If I am elected an elector under these circumstances, I will vote for Richard Nixon for President."

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317. DESCHLER, *supra* note 36, Ch. 10, § 3.6.

I believe that is the tradition. I believe that this undergirds the responsibility of an elector; and once he has set that train of understanding in motion, he cannot, after election day, when it is too late for the voters to respond to any change of mind on his part, say, "I changed my mind, and I am going to vote for somebody else." It is in the nature of estoppel.<sup>318</sup>

Those supporting the objection argued that the elector in question possessed, in the least, a moral commitment to vote for the Republican ticket to which he had pledged his support.<sup>319</sup> Congressional members considered this argument compelling in light of custom and practice since the ratification of the Constitution with electors casting their votes for whom they were pledged, and the reliance by the voters of North Carolina upon the elector's explicit intentions.<sup>320</sup>

"[T]hose opposed to the objection argued that the electors were free agents" permitted to vote their conscience under the Constitution.<sup>321</sup> Under title 3 U.S.C. section 15, Congress only possesses an administrative role in counting the votes, and cannot reject them unless they were not regularly cast or authentic.<sup>322</sup> In support of this position, it was noted that North Carolina had not adopted a law like other states to explicitly bind its electors.<sup>323</sup> Senator Edward M. Brooke of Massachusetts said:

In a system of constitutional government matters of procedure often become vital issues of substance. I submit that such a case is now before us. There are strong constitutional grounds for the authority of a State to bind its electors to vote as they are pledged. If a State has so bound its electors, I would contend that Congress can properly act to see that State's legal requirements are fulfilled. This would be a reasonable construction of the 1887 statute which provides that Congress can reject an elector's vote which has not been regularly given.

But it is my considered opinion that, unless the State chooses to bind its electors, Congress cannot do so after the fact.

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318. 115 CONG. REC. 211-12 (1969).

319. DESCHLER, *supra* note 36, Ch. 10, § 3.6.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

Among the many serious implications of this situation, one lesson in particular stands out:

No official should ever be granted discretionary authority unless the people clearly understand that, under some circumstances, he may actually use it. And if such authority, once granted, is deemed excessive or unwise, the people should explicitly and promptly rescind it.

As I understand the relevant constitutional guidelines, the power to remedy this particular problem lies with the people of North Carolina acting through their representative institutions at the State level . . . .

In addition, however, there is a national interest in removing so critical a loophole in our constitutional system. If the electoral college is to remain an element in our political life, surely we should move to design a constitutional amendment which, once and for all, binds electors to vote for the candidates to whom they are pledged. I hasten to add that this possible change in our electoral system will certainly not suffice. Indeed, one of the paramount tasks of this Congress will be to examine the full range of constitutional proposals to create a fair and secure procedure for presidential elections.<sup>324</sup>

As further support for this position, the Supreme Court decision in *Ray v. Blair*,<sup>325</sup> which upheld state laws binding electors, was cited as persuasive.<sup>326</sup> After debate, the House and Senate both voted to strike the objection.<sup>327</sup>

Another relatively recent electoral vote dispute was settled by Congress under these procedures where the certificates of electoral votes had been received from different slates of electors from Hawaii, and each slate purported to be the one duly appointed.<sup>328</sup> On January 6, 1961, the President of the Senate, Richard Nixon, handed the tellers the certificates of electoral votes from two different slates of electors from the State of Hawaii.<sup>329</sup> "A recount of ballots in Hawaii, which was concluded after the Governor of that state had certified the election of the Republican slate of electors, threw that state into the Democratic column; the Governor then sent a second communication

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324. 115 CONG. REC. 213 (1969).

325. *Ray v. Blair*, 343 U.S. 214 (1952).

326. DESCHLER, *supra* note 36, Ch. 10, § 3.6.

327. *Id.*

328. *Id.* Ch. 10, § 1.2.

329. 107 CONG. REC. 288-91 (1961).

to the Administrator of General Services which certified that the Democratic slate of electors had been lawfully appointed.”<sup>330</sup> However, “[b]oth slates of electors met on the day prescribed by law, cast their votes, and submitted them to the President of the Senate.”<sup>331</sup> The incident occurred as follows:

THE VICE PRESIDENT: . . . The Chair has knowledge, and is convinced that he is supported by the facts, that the certificate from the Honorable William F. Quinn, Governor of the State of Hawaii, dated January 4, 1961, received by the Administrator of General Services on January 6, 1961, and transmitted to the Senate and the House of Representatives on January 6, 1961, being Executive Communication Number 215 of the House of Representatives, properly and legally portrays the facts with respect to the electors chosen by the people of Hawaii at the election for President and Vice President held on November 8, 1960. As read from the certificates, William H. Heen, Delbert E. Metzger, and Jennie Wilson were appointed as electors of President and Vice President held on November 8, 1960, and did on the first Monday after the second Wednesday of December, 1960, cast their votes for John F. Kennedy of Massachusetts for President and Lyndon B. Johnson of Texas for Vice President.

In order not to delay the further count of the electoral vote here, the Chair, without the intent of establishing a precedent, suggests that the electors named in the certificate of the Governor of Hawaii dated January 4, 1961, be considered as the lawful electors from the State of Hawaii.

If there be no objection in this joint convention, the Chair will instruct the tellers - and he now does - to count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961 - those votes having been cast for John F. Kennedy, of Massachusetts, for President and Lyndon B. Johnson, of Texas, for Vice President.

Without objection the tellers will accordingly count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961.

There was no objection.

The tellers then proceeded to read, count and announce the electoral votes of the remaining States in alphabetical order.<sup>332</sup>

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330. *Id.*

331. DESCHLER, *supra* note 36, Ch. 10, § 3.5.

332. 107 CONG. REC. 288-91 (1961).

"Without objection, the Chair instructed the tellers to count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961."<sup>333</sup> As binding precedent thereafter, "[t]he two Houses, meeting in joint session to count the electoral votes, may by unanimous consent decide which of two conflicting electoral certificates from a state is valid; and the tellers are then directed to count the electoral votes in the certificate deemed valid."<sup>334</sup>

Thus, Congress has the power under the Constitution to certify the electoral votes, and resolve any disputes that may arise thereunder. Pursuant to its authority, Congress has enacted rules and procedures to make objections to the validity of electoral votes, and to deliberate upon any objections. Congressional precedents have been established to resolve these disputes and upon what grounds. While court decisions are often persuasive in debate, Congress has retained the authority to rule on the actual vote or votes in question in its capacity as the certifier of the electoral votes.

#### D. *The Political Question Doctrine Applied to the Twelfth Amendment*

Congress possesses the authority, under the Constitution, to bear witness as the President of the Senate counts the votes, and certify the results by resolving any disputes that may arise. Pursuant to its authority, Congress has established procedures to resolve disputes over the validity of votes cast in the electoral college. The appropriate procedure by which to contest the validity of a state's votes when both candidates may be inhabitants of the same state is for a member of Congress to bring forth an objection, which must be seconded by a colleague, during special session. Should a court rule on the issue of whether two candidates are inhabitants of the same state, thereby validating or invalidating a state's electoral votes, the ruling could potentially countermand the authority of Congress to make such a finding. A court does not possess the intrinsic authority to certify electoral votes. That authority has been committed to Congress by the Constitution. Also, there is no separate provi-

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333. DESCHLER, *supra* note 36, Ch. 10, § 1.2.

334. *Id.* Ch. 10, § 3.5.

sion of the Constitution that would be undermined by allowing Congress to interpret the meaning of the term "inhabitant" in the Twelfth Amendment pursuant to its power to certify the electoral votes. Moreover, multifarious pronouncements on the meaning of the term and the validity of electoral votes certified thereunder can only lead to confusion and embarrassment on the part of the Government. Therefore, a court should refrain from issuing a declaration on the status of a candidate as an inhabitant of a state pursuant to the Political Question Doctrine. Should Congress so blatantly certify the electoral votes for presidential and vice presidential candidates who are without question inhabitants of the same state, then the resolution of such actions lies with the electorate in selecting their future representation.

Factors which a court may weigh in ascertaining whether an action by a coordinate branch of government arises under the Political Question Doctrine include whether the matter has been committed by the Constitution to a coordinate branch of government, the impossibility of a court to undertake an independent resolution and still give due respect accorded to another branch, the necessity to adhere to a political decision already made, and the potential for embarrassment arising from counter proclamations made by co-equal branches of government.

These criteria are inextricable from a case where a court issues a ruling as to whether two candidates standing for President and Vice President can be considered "inhabitants" of the same state for purposes of the Twelfth Amendment. The decision regarding inhabitancy is placed by the Constitution with Congress in its capacity as the certifier of electoral votes. Given the strict deadlines in which the electoral college meets and Congress certifies the results, the text does not provide for the courts to play an extended role in the process. With expedited proceedings, a court may make some rulings to clarify aspects of the electoral process, but practical difficulties would result if a court either ruled counter to a decision by Congress, or attempted to bind Congress to a decision in which it is its prerogative to make. Furthermore, any interdiction in the certification process by the courts would also contravene the intent of the



Framers to have as expeditious as possible the election of the Executive.

One of the main purposes behind the Political Question Doctrine is the maintenance of government order. This rationale underlies all of the enumerated factors for assessing whether an issue before a court is justiciable. Much in the way multiple pronouncements by Congress and the Supreme Court over the impeachment of a federal judge or the President would result in confusion, so too would differing rulings on the legitimacy of electoral votes cast also promote disorder. In a case such as the 2000 election, Should a court ruling result in the forfeiture of electoral votes? What would be the remedy if they were already cast and certified? While individual members of Congress would no doubt take a court ruling into consideration in deliberating upon whether to challenge a slate of electoral votes on the grounds they were cast for two candidates who are both inhabitants of that state, there is no provision in the Constitution to review the decision of Congress. Should a court rule otherwise, two different interpretations of "inhabitant" made by co-equal branches of government would result in confusion. There is nothing to say that the interpretation made by one or the other is somehow illegitimate. Therefore, a pronouncement by a court as to the inability of a ticket to receive the electoral votes of a state as per the requirements of the Twelfth Amendment could only result in confusion or embarrassment should Congress disagree and certify those electoral votes under scrutiny.

Next, the decision of whether two candidates are both "inhabitants" of the same state is textually committed to the legislative branch in its capacity as the certifier of the electoral votes. The Constitution grants the power to determine the method of selection for electors to the state legislatures, sets the timetable for the electoral college to meet, and provides for the President of the Senate to count the votes before a joint session of Congress. The entire process is placed in the hands of the political branches of government. Most importantly, it is left to Congress to count and certify the votes, and for Congress to hold a contingent election should no candidate receive a majority in the electoral college. There is no provision for the courts to review the decisions made by Congress in counting the votes.

This is consistent with what the Framers intended. The process of selecting the chief executive should be as swift as possible. One source for the intentional expediency of elections is Alexis de Toqueville's seminal work *Democracy in America*. Justice Sandra Day O'Connor has described de Tocqueville as a "perceptive commentator on our country."<sup>335</sup> The Supreme Court also has cited the observations of de Tocqueville as support in some of its opinions.<sup>336</sup> As de Toqueville noted with regard to the framers choosing an electoral system that would attempt to elect the executive with as little delay as possible:

As it had been noticed that assemblies responsible for choosing heads of government in countries with elective systems inevitably became centers of passion and of intrigue, that they sometimes took over powers not belonging to them, and that often their proceedings, with the uncertainty resulting therefrom, could drag on so long that they put the state in danger - for all these reasons it was settled that all the electors should vote on a fixed day, but without assembling together.

....

... [I]t was arranged that the votes should be sent under seal to the president of the Senate; he was to break the seals on the appointed day in the presence of the two houses. If none of the candidates had obtained a majority, then the House of Representatives itself was to proceed immediately to elect a President

...<sup>337</sup>

Finally, there is no textual conflict between the Twelfth Amendment and any other provision of the Constitution that would prevent Congress from making a reasonable interpretation of the term "inhabitant." In *Powell v. McCormack*, the Supreme Court held that Congress can only judge those qualifications set forth in the Constitution in deliberating whether someone is qualified to be sworn into office.<sup>338</sup> Chief Justice William Rehnquist in *Nixon v. United States* clarified the Court's earlier decision in *Powell* by ruling that no separate

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335. *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (Burger, J., dissenting).

336. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 710-11 (Kennedy, J., dissenting); *City of Chicago v. Morales*, 527 U.S. 41, 75-78 (Scalia, J., dissenting).

337. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 121 (George Lawrence trans., J.P. Mayer ed.) (1966).

338. *Powell v. McCormack*, 395 U.S. 486, 522 (1969).

provision of the Constitution could be defeated through the Senate's authority to interpret the meaning of the word "try" in the Impeachment Clause. The same reasoning applies to the authority of a joint session of Congress to interpret the term "inhabitant." To allow Congress to define the term would not contradict any other provision. Thus, the interpretation of the term "inhabitant" is textually committed to Congress as the certifier of the electoral votes, and there is no other provision of the Constitution that would aid in leading to a conclusion otherwise.

## V. CONCLUSION

The ruling by the U.S. District Court for the Northern District of Texas in *Jones v. Bush* that the term "inhabitant" in the Twelfth Amendment is coextensive with the concept of domicile in civil procedure is contrary to both the text of the Constitution and the intent of the Framers. The term "inhabitant" means an individual who physically resides or owns real property in a given state. Under circumstances where a candidate resides in more than one state, the place of inhabitancy should be determined in light of the Framers' intentions to deter two candidates from the same state from seeking high office together. This generally means that the candidates' participation in state politics will often be the determining factor in deriving an individual's place of inhabitancy for purposes of the Twelfth Amendment. Finally, the process of counting and certifying the electoral votes cast is committed to Congress by the Constitution with the President of the Senate conducting the actual count. The interpretation of the term "inhabitant" as it arises under this provision is for Congress to decide. A court should refrain from a pronouncement on such an issue under the Political Question Doctrine.