Fordham Law Review

Volume 38 | Issue 1 Article 1

1968

The Electoral College - Why It Ought To Be Abolished

John D. Feerick
Fordham University School of Law

The Electoral College - Why It Ought To Be Abolished

Cover Page Footnote

Member, New York Bar. The author served as advisor to the American Bar Association Commission on Electoral Reform and currently is a member of the Special Committee on Electoral College Reform of the American Bar Association.

FORDHAM LAW REVIEW

1968-69

VOLUME XXXVII

EDITORIAL AND GENERAL OFFICES

Lincoln Center, 140 West 62nd Street, New York, N.Y. 10023

Published four times a year—October, December, March, and May. Member, National Conference of Law Reviews. Printed by the Heffernan Press Inc., Worcester, Massachusetts. Second class postage paid at Worcester, Mass.

SUBSCRIPTION PRICE $7.50, SINGLE ISSUE $2.50. Make checks payable to FORDHAM LAW REVIEW. Subscription renewed automatically unless notified to contrary.

TABLE OF LEADING ARTICLES—TITLES

TABLE OF LEADING ARTICLES—AUTHORS

TABLE OF BOOKS REVIEWED

COMMENTS

INDEX DIGEST

TABLE OF CASES

Case names prefixed with an asterisk are the subjects of Case Notes

ADDENDUM

ERRATA

Page 15, note 60, 6th line from end. For "five-sixths" read "five-elevenths."
Page 115, note 1. For "1-202(2)(a)" read "1-102(2)(a)."
Page 120, line 18. For "we" read "he."
Page 131, line 7. Delete "five-to-four."
Page 132, lines 4-6. For sentence "Mr. Justice . . . holding." read "Mr. Justice Douglas' concurring opinion disagreed with the basic reasoning of the Court in several critical respects including the resultant narrowness of the holding."
Page 284, note 1, line 2. For "2000-2" read "2000a-2."
Page 317, 11 lines from bottom of text. Delete "in."
Page 369, note 69, line 8. Delete line and substitute "v. Landsman, supra, such as Lodati v. Lodati, 261 App. Div." 2d to last line. For "rev'd" read "rev'g."
Page 405, * line 2. For "Profesor" read "Professor."
Page 421, line 19. For "C." read "2." Line should be in Roman type.
Page 477, note 5, lines 5, 10 and 15. For "Security" read "Securities."
Page 477, note 6, line 2. For "with" read period. Delete remainder of note to word "Diamond."

THE ELECTORAL COLLEGE—WHY IT OUGHT TO BE ABOLISHED

*JOHN D. FEERICK**

IF the popular-vote winner were to lose a presidential election, or if the House of Representatives were required to select the President or the Senate the Vice President, resentment, unrest, public clamor for reform and an atmosphere of crisis would probably ensue. Yet these and other situations can, and do, arise under the electoral college system. Inherent in this system is the possibility that the will of the people will be frustrated. In the forty-five presidential elections under the electoral college system, three popular-vote losers were elected President, two Presidents were selected by the House of Representatives, one Vice President was chosen by the Senate, and one President was elected as a result of a straight party vote by members of an electoral commission appointed by Congress. In fifteen other elections a shift of less than one percent of the national vote cast would have made the popular-vote loser President. In five elections a minor shift of the popular vote would have thrown the election into Congress. Within the last twenty years, two elections narrowly missed being decided by Congress; Democratic and Republican electors defected and voted against their party nominees in the electoral college; and voters in one state were afforded no opportunity in two elections to vote for the national candidates of one of the major parties.

To many observers in the United States and abroad, the election of the President and Vice President has appeared to be a relatively simple matter: Every four years, on the Tuesday after the first Monday in November, many millions of people go to the polls and express their choice for President and Vice President. Later that day or early the next they expect to learn via the communications media whom they have elected. They assume that the popular-vote winners will take office on January 20 as President and Vice President.

Actually, the election of the President and Vice President is not so simple. It involves a system which has been characterized by a prestigious commission of the American Bar Association as "archaic, undemocratic, complex, ambiguous, indirect, and dangerous."[1] This article discusses

* Member, New York Bar. The author served as advisor to the American Bar Association Commission on Electoral College Reform and currently is a member of the Special Committee on Electoral College Reform of the American Bar Association.

1. American Bar Association, Report of the Commission on Electoral College Reform, Electing The President, at 3-4 (1967) [hereinafter referred to as "Electing The President"]. See notes 132-33 infra.

that system—how it operates; how it was intended to operate; its defects and dangers; and the proposals for changing the system.[2]

I. The Electoral College System

When the people go to the polls in November of every presidential election year, they do not vote for the candidates themselves but rather for electors in whose hands they place the choice of President and Vice President. The Constitution provides that each state has as many electors as it has Senators and Representatives in Congress.[3] At present, 538 electoral votes are allocated among the fifty states and the District of Columbia.[4]

Since presidential elections are decided on the basis of electoral votes, each of the major parties nominates, in presidential election years, a slate of electors in every state and the District of Columbia. The size of the slate corresponds to the number of electoral votes to which the state is entitled. The members of these slates are usually selected because of their service and devotion to the party. The method of nomination of electors is governed by the provisions of state law and varies from state to state.[5] State party conventions, state party committees, and state primaries are the usual methods.

The appearance on the ballot of the names of each party's electors and candidates is also governed by state law.[6] Two-thirds of the states use the presidential short ballot, which prints the names of the presidential and vice presidential candidates on the ballot in lieu of the names of the electors. In fourteen states the names of the candidates and the electors appear on the ballot. In one state only the names of the electors appear.

Thus, in the November election the people in each state normally choose as a unit the electoral slate of one of the parties.[7] The voting is

2. The definitive work in the field is N. Peirce, The People's President (1968). Other good treatises are J. Dougherty, The Electoral System of the United States (1906); C. O'Neil, The American Electoral System (1887); L. Wilmerding, Jr., The Electoral College (1958).

3. U.S. Const. art. II, § 1; U.S. Const. amend. XII.

4. The District of Columbia was given a voice in presidential elections by the twenty-third amendment, which guarantees to it a number of electors "equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State . . . ." The number of electoral votes to which each state is presently entitled, together with the present ratio of electoral votes to population, is set forth in App. A.

5. The pertinent laws of the fifty states and the District of Columbia are summarized in R. Hupman & R. Tienken, Nomination and Election of the President and Vice President of the United States, U.S. Government Printing Office Pub. No. 3671 (Jan. 1968).

6. See id. See also N. Peirce, supra note 2, at 338-39.

7. In some states voters ballot separately for electors, and it is possible to vote for electors on different slates, or write in the name of a person for an elector. Thus in the

on a statewide basis and the electoral slate which receives a plurality of popular votes is elected, except in Georgia where a majority vote is required.[8] While electors are today chosen by the people in every state, this is due solely to state law and not to any popular election requirement contained in the Constitution. The Constitution simply requires the states to appoint electors in such manner as their legislatures may direct.[9]

The electors who are chosen in each state are required by federal law to meet in their respective states on the Monday after the second Wednesday in December (or forty-one days after the November election) to cast their votes for President and Vice President.[10] On that day, fifty-one separate electoral college proceedings take place. The electors participating in each, who are generally unknown to the public, are expected to vote for the nominees of their party. Although it is generally recognized that electors are under no *legal* obligation to vote for the candidates of their party, most electors regard themselves as being under a moral and political, if not legal, obligation to do so.[11]

The electoral college proceedings of the several states and the District

---

election of 1896 a split ticket of electors was chosen in California and Kentucky; in 1904 and 1908, in Maryland; in 1912, in California; and in 1916, in West Virginia. Where a presidential candidate is endorsed by more than one party, it is important that the slates of electors of each party be the same; otherwise, the votes received on each party's line can not be pooled. See N.Y. Times, August 29, 1968, at 28, col. 1; N.Y. Times, August 30, 1968 at 8, cols. 2-6; N.Y. Times, Sept. 6, 1968, at 1, cols. 2-3, concerning a dispute as to the Republican electors running on the Conservative Party line. In 1960 Kennedy received more than 400,000 votes in New York on the Liberal Party line. Since there was a joint slate of Democratic-Liberal electors, he received all of New York's electoral votes. If there had been separate slates, the votes received on both lines could not have been pooled, and Kennedy would have lost New York's electoral votes and the election.

8. Where no electoral slate receives a majority in Georgia, the two top slates participate in a runoff election two weeks after the general election. Ga. Code Ann. § 34-1514 (Supp. 1967).

9. U.S. Const. art. II, § 1; U.S. Const. amend. XII. See note 47, infra, and accompanying text.

10. 3 U.S.C. § 7 (1964).

11. Only in a few states do candidates for elector pledge themselves, or take an oath, to vote for their party nominees (e.g., Alaska, Florida, Oklahoma and Oregon). In the vast majority of the states, the pledge is merely an implied one, as where the names of the candidates and not the electors appear on the ballot and a vote for one of the candidates is deemed a vote for the party's slate of electors; or where the candidates and electors of each party are listed on the ballot as a group. In about one-third of the states there are statutory provisions requiring electors to vote for the national candidates of their party; and in a few states, it is a crime for an elector to violate his pledge (e.g., Oklahoma). The constitutionality of these laws, however, is in doubt. See note 79, infra, and accompanying text. See generally Nomination and Election of the President and Vice President of the United States, supra note 5; Proposals To Change the Method of Electing the President, 46 Cong. Dig. 263, 288 (1967).

of Columbia are of a non-deliberative and formal nature. Invocations are offered, the roll is called, vacancies in the electoral college membership are filled, welcoming speeches are made, temporary and permanent officers are selected, resolutions dealing with travel and per diem expenses are passed, motions for adjournment for lunch are passed, further speeches are heard and finally, near the end of the day, the electors vote for President and Vice President.[12] They vote separately for each office. Although the Constitution requires the votes to be by ballot (*i.e.*, by secret vote), the electors in many of these proceedings announce orally or by signature the candidates for whom they vote.[13] Once the votes are cast, the electors in each state make and sign certificates listing the votes cast for President and Vice President. The certificates, to which lists of the names of the electors are annexed, are sent to the President of the Senate, the secretary of state of the state, the Administrator of General Services, and the judge of the district in which the electors assembled.[14]

By federal law, the certificates of the electors are not opened until January 6.[15] That day, before a joint session of Congress meeting in the Hall of the House of Representatives beginning at 1:00 P.M., the electoral certificates are opened by the President of the Senate, who is the Vice President of the United States. The certificates are opened in the alphabetical order of the states and are given to tellers—two from each House. The tellers announce the results of each state's voting and compile the national totals.[16] The President of the Senate then announces the total number of electoral votes received by each of the candidates. The candidates with a majority are declared President elect and Vice President elect.

---

12. The proceedings of a typical electoral college are described in Dixon, Jr., Electoral College Procedure, 3 West. Pol. Q. 214, 219-20 (1950). See Proceedings of the Electoral College of the State of New York (1964).

13. See L. Wilmerding, supra note 2, at 43.

14. 3 U.S.C. § 11 (1964).

15. 3 U.S.C. § 15 (1964).

16. Electoral vote disputes are handled in the following manner: Where one set of elector returns is received from a state, and the governor has certified under the state's seal the appointment of those electors, the returns must be accepted unless the two Houses of Congress concurrently reject them. If more than one set is received from a state, Congress must accept the returns of those electors whose appointments have been "finally" determined in accordance with state law, provided the determination was made at least six days before the meeting of electors in December. If there has been no final determination by the prescribed time, then the approval of both Houses of Congress is necessary before any votes can be counted, except that if the Houses disagree, the votes of the electors whose appointments have been certified by the state governor must be counted. 3 U.S.C. § 15 (1964). In the election of 1960 three sets of electoral certificates were received from Hawaii. One certified the election of Republican electors; another, Democratic electors; and the third, signed by the governor of the state, Democratic electors. When the electors met on December 19,

If no candidates have a majority of the votes for these offices, the Constitution requires the House of Representatives to select the President from "the persons having the highest numbers not exceeding three on the list of those voted for as President," and the Senate to select the Vice President from the "two highest numbers."[17] In the House, each state has one vote, a quorum consists of representation from two-thirds of the states, and a majority (*i.e.*, twenty-six) of the votes of all the states is necessary for election. Under the rules of the House, the vote of a state is awarded to the candidate who receives a majority of the votes cast by the state's congressional delegation on any one balloting.[18] If a state delegation is evenly divided, as several are at present, that state casts no vote. The rules of the House also provide for continuous balloting for President. The balloting is by the newly-elected House of Representatives and begins on January 6 and continues until a President is chosen.

In the Senate, each Senator has one vote, a quorum consists of two-thirds of the whole number of Senators, and the votes of a majority of the whole number are necessary for election as Vice President. In the event the House failed to make a choice by Inauguration Day (January 20), the Vice President, if one had been selected by the Senate, would act as President until the House reached a decision and the President was qualified.[19] If the Senate had also failed to make a choice, the powers and duties of President would devolve on the Speaker of the House of Representatives in accordance with the Succession Law of 1947. He would continue as acting President until a President or Vice President qualified.[20]

Nixon was the apparent winner, although a court-ordered recount was in progress. Both Democratic and Republican electors met that day in Hawaii and voted for the candidates of their respective parties. On December 30, a lower court ruled in favor of the Democrats but, since the period in which to appeal had not expired, this judgment was not final when the electoral votes were counted on January 6, 1961. Nixon, who as Vice President presided at the joint session, suggested that the Democratic returns be accepted, and this was followed without objection. 107 Cong. Rec. 288-90 (1961).

17. The twelfth amendment is not clear as to whether the "three" refers to "persons" or "numbers;" or as to whether the House of Representatives could limit its choice to the top two candidates regardless of the antecedent of "three." If the reference be to "numbers," it is possible for more than three candidates to have the highest three numbers of electoral votes. Query: Would the House have to consider all such candidates? The debates preceding the adoption of the amendment are inconclusive. See 14 Annals of Cong. 92, 97-105, 109-24, 678-82 (1803-04).

18. These are the rules as adopted for the House election in 1825. 1 Cong. Deb. 361, 490-515 (1824-25). See N. Peirce, supra note 2, at 335-37.

19. See Baker, The Picking of the President, 1968, The Saturday Evening Post, March 9, 1968, at 19.

20. 3 U.S.C. § 19 (1964), as amended, 79 Stat. 669 (1965) and 80 Stat. 948 (1966), which also sets forth a line of succession beyond the Speaker. It should be pointed out that the Speaker is appointed after each new Congress convenes in January.

II. The Design of the Framers

The Framers of the Constitution had considerable difficulty in deciding on a method for electing the President. As James Wilson of Pennsylvania remarked during the debates at the Constitutional Convention: "This subject has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide."[21]

More than fifteen proposals for electing the President were presented to the Convention.[22] An election by Congress was the method most frequently approved throughout the Convention.[23] Roger Sherman, as well as others, argued that the Executive "ought to be appointed by and accountable to the Legislature only, which was the despositary of the supreme will of the Society."[24] In the end, however, this method was rejected because of the fear that it would involve intrigue, "cabal" and "corruption," would lead to interference in the election process by foreign governments, and would render the President subservient to Congress.[25] Said Gouverneur Morris: "If the Legislature elect, it will be the work of intrigue, of cabal, and of faction: it will be like the election of a pope by a conclave of cardinals; real merit will rarely be the title to the appointment."[26] A number of delegates expressed the view that a legislative election would require the President to be ineligible for another term. Otherwise, he would be totally dependent on Congress, since he would have to court its members for re-election. Generally, the delegates were opposed to an ineligibility requirement, believing it would remove some of the incentive for excellence and would deprive the country of further service from Presidents who had demonstrated a capacity to govern.

An election directly by the people was supported by a number of leading delegates, including James Wilson, James Madison, Gouverneur

21. 2 Records of the Federal Convention of 1787, at 501 (M. Farrand ed. 1911 & 1937) [hereinafter cited as Farrand].

22. The author traces the development of the electoral college provision in his article, Feerick, The Electoral College: Why It Was Created, 54 A.B.A.J. 249 (1968).

23. It was approved on June 2, July 17, July 24 and July 26, 1787, and on August 24 the delegates decided that the election should be by joint ballot of both Houses. 1 Farrand 81; 2 Farrand 32, 101, 121, 403.

24. 1 Farrand 65.

25. See 1 Farrand 175; 2 Farrand 29, 34, 500. The concern of the Framers about interference from foreign governments seems to have been based on the method of selecting kings in Poland. The king was selected for life by noblemen who, experience indicated, were interfered with in the process by representatives of other countries. 2 Farrand 109-10. The Polish experience was also used as an argument against letting the people elect the President. Id. at 30.

26. Id. at 29.

Morris, Daniel Carroll, and John Dickinson.[27] The principal arguments advanced in support of the method were that it had worked well in the election of state governors, that it would make the President independent of Congress and the states, that it would nearly always result in the selection of persons of distinguished character and national reputation,[28] and that the people constituted the "purest"[29] and "fittest"[30] source of election. If the President "is to be the Guardian of the people," declared Gouverneur Morris, "let him be appointed by the people. . . ."[31] Madison stated that although he was from the South where suffrage was limited, he was willing to support direct election because "local considerations must give way to the general interest."[32] Other delegates, however, strongly felt that the method was impractical for the times. George Mason stated:

> [I]t would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.[33]

Elbridge Gerry said the "ignorance of the people" would make it possible for an organized group to "elect the chief Magistrate in every instance, if the election be referred to the people."[34] The method was also criticized on the grounds that the partiality of the people for persons from their own states would favor the large states; the Southern States would be placed at a disadvantage because of their limited suffrage; and a majority of the people would be unable to agree on one person. Largely due to these arguments, direct election was rejected on the two occasions it was put to a vote.[35]

An intermediate elector plan was proposed early in the Convention by James Wilson, who suggested that the election be by the electors chosen by the people in districts within each state.[36] This proposal, under which all the electors would meet at the same place, was promptly rejected. One

27. See 1 Farrand 68-69; 2 Farrand 29, 56-57, 109-11, 114, 402.

28. 2 Farrand 56, 114-15. At the time of the Convention governors were elected by the people in Connecticut, Massachusetts, New Hampshire, New York, and Rhode Island. In the other eight states they were elected by the legislatures.

29. Id. at 114.

30. Id. at 56.

31. Id. at 53.

32. Id. at 111.

33. Id. at 31.

34. Id. at 114.

35. It was rejected on July 17, by 9 to 1, with Pennsylvania voting in favor, and on August 24, by 9 to 2, with Delaware and Pennsylvania voting in favor. Id. at 32, 402.

36. 1 Farrand at 80.

month later Luther Martin suggested an election by electors appointed by the state legislatures.[37] Although it was defeated on the day it was proposed, it was approved by the Convention two days later.[38] Shortly thereafter, the Convention rejected the proposal and reinstated election by Congress.[39] In the following month Gouverneur Morris' proposal that the election be by electors chosen by the people failed by an equal vote.[40]

When the Committee of Eleven was appointed on August 31, 1787, to settle a number of open questions, election by Congress was still the dominant proposal. A substantial majority of the Committee, however, favored other methods of election.[41] On September 4, the Committee recommended an office of Vice President and the electoral college system of electing the President.[42]

The debates at the Convention reveal that the objections to a legislative election and doubts about the capability of the people to elect were principal factors in leading to settlement on the present method. By creating an electoral college, the delegates felt they had avoided the possibility of "cabal" and "corruption" and had created a mechanism through which the "sense of the people" would operate in the choice of the President.[43] Thus, the President would be selected by electors chosen specially for that purpose from among the people rather than by a preestablished body which could be tampered with; members of Congress and persons holding places of trust or profit under the United States would not be eligible for the office of elector, as they might be partial to the President in office; the electors would meet on the same day within their respective states, which would expose them to fewer pressures than if they were all to meet at one place; the electors would vote by ballot,

37. 2 Farrand at 32.

38. Id. at 58.

39. Id. at 101.

40. Id. at 404.

41. The Committee consisted of Abraham Baldwin of Georgia, David Brearley of New Jersey, Pierce Butler of South Carolina, Daniel M. Carroll of Maryland, John Dickinson of Delaware, Nicholas Gilman of New Hampshire, Rufus King of Massachusetts, James Madison of Virginia, Gouverneur Morris of Pennsylvania, Roger Sherman of Connecticut and Hugh Williamson of North Carolina. During the debates Wilson, Madison, Morris, Dickinson and Carroll, as noted, had expressed strong support for direct election. See supra note 27. Williamson had indicated that he might support such a method, suggesting that each voter cast three votes so that small state candidates would be in the field. 2 Farrand 113. Madison, Morris, King and Wilson also supported election by electors chosen by the people. 1 Farrand 80; 2 Farrand at 56-57, 403-04. Butler had proposed a system of electors chosen by the state legislatures, with the votes of all states equal. Id. at 112. Sherman had supported an election by Congress. 1 Farrand 68; 2 Farrand 29.

42. Id. at 496-99.

43. See generally The Federalist No. 68 (P. Ford ed. 1898) (A. Hamilton).

which would assure the secrecy of their votes; the electoral votes would be listed, certified, sealed and transmitted to the President of the Senate and then opened and counted before a joint session of Congress, which would preserve the secrecy of the vote until the results were announced before an open forum; and, in the event no one had a majority of the votes of the electors, the House of Representatives would choose the President "immediately" before any pressures could be brought to bear on its members.

The evidence is compelling that the Framers envisioned a system under which persons of the highest caliber would be chosen as electors. These electors would meet in their various states, evaluate the merits of various persons for President, and each vote for two persons for President. In casting their votes, they would take into account the views of the people, but not be bound by them, as they were to exercise their own judgment.[44] Said Hamilton in No. 68 of *The Federalist*:

> It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.[45]

Although the Framers left the manner of selecting the electors to the

---

44. There is a view that the Framers did not intend the electors to operate independently of the people. L. Wilmerding, supra note 2, at 21; Roche, The Founding Fathers: A Reform Caucus in Action, 55 Am. Pol. Sci. Rev. 799, 810-11 (1961). As the text indicates, this author is of a different opinion. Thus, during the debates on September 4, 1787, Charles Pinckney of South Carolina objected to the electoral college because "[t]he Electors will be strangers to the several candidates and of course unable to decide on their comparative merits." 2 Farrand 501. Abraham Baldwin of Georgia replied that "increasing intercourse among the people of the States, would render important characters less & less unknown . . . ." Id. This is one of the few references in the debates to the contemplated role of the electors. See also id. at 58 and 100. The Federalist Papers contain a number of references pointing to their independent status. An excerpt from No. 68 appears in the body of the text. Hamilton also stated in that paper: "The choice of several, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements than the choice of one who was himself to be the final object of the public wishes. And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time in one place." The Federalist No. 68, at 453 (P. Ford ed. 1898) (A. Hamilton). He added that because of a number of safeguards against corruption, the electors "will at least enter upon the task free from any sinister bias. Their transient existence, and their detached situation, already taken notice of, afford a satisfactory prospect of their continuing so to the conclusion of it." Id. at 454.

45. Id. at 452.

state legislatures, it appears that many of them assumed that the legislatures would provide for popular election.[46] Not until the second half of the nineteenth century, however, did this become a reality in all states. During the first half of the century, various systems of selecting electors were used.[47] Election by the state legislatures themselves was employed by many states in the first eleven elections.[48] It was not until 1832 that every state except South Carolina had abandoned this method in favor of popular election. South Carolina continued the practice until the 1860's, and the method was used under special circumstances by Massachusetts in 1848, when no electors received a majority of the popular vote, by the newly reconstructed state of Florida in 1868, and by the newly admitted state of Colorado in 1876.

In allotting electoral votes to the states in accordance with the total representation of the states in Congress, the Framers gave something to both small and large states. All states, regardless of size, received three electoral votes, corresponding to the two Senators and one Representative to which they would be entitled. The large states won the right to have the element of population recognized, since the assignment of electoral votes would also depend on the state's representation in the House of Representatives.

However, this apportionment received scant attention in the debates and appears not to have been the result of any significant compromise between small and large states. Indeed, many of the Framers believed that this provision would make the large states dominant in the electoral voting. In order to balance this influence, the Framers provided that when no candidate received a majority of the electoral votes, the House of Representatives would select the President from the top five, with all states having equal voting power. This feature of the system received considerable attention in the debates and represented a compromise of great significance, because a number of delegates were of the view that many elections would be thrown into the House.[49]

---

46. See Feerick, supra note 22, at 253-54 nn.40-44.

47. These are described in C. Paullin, "Political Parties and Opinions, 1788-1930," in Atlas of the Historical Geography of the United States 88-89 (1932). See Hearings on Nomination and Election of President and Vice President and Qualifications for Voting Before The Subcomm. on Constitutional Amendments of The Senate Comm. on The Judiciary, 87th Cong., 1st Sess., pt. 2 at 446 (1961) [hereinafter cited as 1961 Senate Hearings]. See also N. Peirce, supra note 2, at 309-11, 74-78; L. Wilmerding, supra note 2, at 42-67.

48. In the period between 1812 and 1820, nine state legislatures chose the electors for their state. Six did so in 1824 and two in 1828. C. Paullin, supra note 47.

49. The Committee of Eleven actually suggested that the contingent election of President be assigned to the Senate. However, during the debates on September 4, 5 and 6 considerable opposition developed to this recommendation. Alarm was expressed that, in view

The design of the Framers in creating the electoral college never really was carried out. In the first two elections, George Washington was everyone's choice for President, receiving the votes of all the electors. There was no need for the electors to deliberate. By 1800, political parties, which had not been contemplated by the Framers, were part of the American scene. This development brought an end to the independent elector and gave rise to the pledged elector, a member of a publicly-announced party slate of electors under instructions to vote for his party's candidates. This unexpected change in the role of the presidential elector led a Senate Select Committee to state in 1826:

> In the first election held under the constitution, the people looked beyond these agents, fixed upon their own candidates for President and Vice President, and took pledges from the electoral candidates to obey their will. In every subsequent election, the same thing has been done. Electors, therefore, have not answered the design of their institution. They are not the independent body and superior characters which they were intended to be. They are not left to the exercise of their own judgment; on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents. They have degenerated into mere agents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous, if he is not.[50]

One commentator later said:

> This usurpation of the electors' functions, though peaceably achieved, amounted to a *coup d'état*. It was an amendment of the written Constitution by the unwritten Constitution. The electors, while retaining their legal status of independence, became henceforth hardly more than men in livery taking orders from their parties.[51]

III. Defects and Dangers of the Electoral College

While the country has been fortunate in the caliber of its Presidents, it has not been fortunate in the actual operation of the electoral college. Experience has demonstrated that the electoral college is filled with defects and dangers which pose a serious threat to the stability of our presidential system. The nature and history of these defects and dangers are discussed here.

A. *The Popular-Vote Winner Can Lose*

What is necessary to win the Presidency is a majority of electoral, not popular, votes. Such a majority is attainable without having a plurality of the total popular vote.[52] In fact, it is possible for a candidate to

---

of its roles in the appointive, treaty-making and impeachment processes, the Senate would become too powerful if it also had this function. Thus, on September 6, on motion of Roger Sherman of Connecticut, the House of Representatives was substituted for the Senate by a vote of 10 to 1. 2 Farrand 527.

50. S. Doc. No. 22, 19th Cong., 1st Sess. 4 (1826).

51. A. Schlesinger, Paths to the Present 114 (1949).

52. Since presidential elections are decided on the basis of electoral votes, there is no

win a majority of the electoral votes with considerably less than one-fourth of the total popular votes. If a candidate were to win a plurality of the popular votes in eleven large states plus one other state, he would have a majority of the electoral votes, even if he received no popular votes in the remaining thirty-eight states.[53] This is an extreme example but it serves to underscore the disproportion between the electoral and popular votes. This disproportion is attributable to a number of factors.

First, the disproportion is due in part to the fact that each state is entitled to at least three electoral votes regardless of its population.[54] As a result, the ratio of electoral votes to population varies from state to state. It is one to 75,389 in Alaska; one to 260,452 in Arizona; one to 330,579 in Virginia; and one to 392,930 in California.[55] While it might seem that the apportionment of electoral votes favors residents of small states, the converse is more likely the case, since large state voters potentially affect a greater number of electoral votes. A voter in Alaska, Delaware, Nevada, Vermont, or Wyoming can only influence three electoral votes, while a voter in New York can influence forty-three electoral votes.[56] Indeed, the electoral votes of New York alone constitute more than fifteen percent of the number necessary for election. And, the combined electoral votes of New York and California equal the combined electoral votes of twenty other states.

---

established national machinery for even certifying the number of popular votes received by various candidates. The popular vote is usually computed, however, by adding together the number of votes cast for each slate of electors in each state. In states which permit separate voting for electors or split ticket voting, each elector on a slate may have a different vote. The traditional practice is to award the candidates the number of popular votes received by the highest-polling elector pledged to him in the state. The sources for all popular vote figures used in this article are, for the elections of 1824 through 1916, S. Petersen, A Statistical History of the American Presidential Elections (1963), and, for the elections of 1920 through 1964, R. Scammon, America at the Polls (1965). While discrepancies will be found among various sources reporting the popular vote, these sources are considered the most authoritative. N. Peirce, supra note 2, at 302.

53. At present, a majority is 270 votes. The electoral votes of New York (43), California (40), Pennsylvania (29), Illinois (26), Ohio (26), Texas (25), Michigan (21), New Jersey (17), Florida (14), Massachusetts (14), and Indiana (13), the eleven largest states, total 268. The population of these states constitutes 56.78 percent of the national population (based on the 1960 census).

54. If the number of congressional seats were based exclusively on population, each congressman would represent about 400,000 people. By virtue of their small populations, Alaska, Nevada, Vermont and Wyoming would be entitled to no congressman. U.S. Const. art. I, § 2, however, guarantees them at least one Representative.

55. See App. A.

56. This aspect of the system is the subject of an excellent article, Banzhaf, Reflections on the Electoral College, One Man, 3.312 Votes. A Mathematical Analysis of the Electoral College, 13 Vill. L. Rev. 303 (1968).

Second, the assignment of electoral votes to the states does not reflect population changes occurring between decennial censuses. The number of Representatives to which a state is entitled is determined after each census, and the official assignment does not become effective until two years later. Thus, a presidential election which falls in the same year as a census is governed by the apportionment based on the census of a decade before. This operates to the disadvantage of voters in rapidly growing states.

A third reason for the disproportion is that a state's electoral votes remain fixed regardless of whether one person or one million persons vote in the state. For example, in the 1964 election three times as many people voted in Delaware as in Alaska; yet each state cast three electoral votes. More people voted in New Jersey than in Texas; yet Texas had twenty-five electoral votes while New Jersey had only seventeen. In Alaska, 67,259 voters influenced the assignment of three electoral votes, at a ratio of one electoral vote for every 22,419 voters. In New York the ratio was one electoral vote for every 166,657 voters. In the 1960 election about as many people voted in Mississippi as in South Dakota; yet Mississippi cast twice as many electoral votes as South Dakota.

Fourth, under the electoral college system, as presently constituted, the winner of the highest number of popular votes cast in a state receives all of that state's electoral votes. This is the "winner-take-all, loser-take-nothing" feature of the system. It cancels out at an intermediate stage all popular votes cast in a state for candidates other than the plurality winner. The plurality winner receives 100 percent of a state's electoral vote while the other candidates receive zero. In the election of 1960, for example, 3,224,099 Democratic popular votes in California failed to yield any electoral votes. In 1944, Thomas E. Dewey received approximately three million votes in ten states from which he obtained sixty-two electoral votes. He received 2,987,647 popular votes in New York alone but no electoral votes. In 1924, John W. Davis received 136 electoral votes in the states where he obtained about two million popular votes. He received no electoral votes for approximately another six million popular votes.

As Senator Thomas Hart Benton of Missouri, a leading advocate of electoral reform in the first half of the nineteenth century, stated: "To lose their votes, is the fate of all minorities, and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed."[57] The "minority" referred to by Senator Benton may in fact be a majority of the state's voters because the combined popular votes received by the

57. 41 Annals of Cong. 170 (1824).

losing candidates could exceed those cast for the winner. In the election of 1912, for example, the winning percentage of the popular vote was less than forty percent in twenty states, and less than thirty-five percent in three of those states.[58]

The "winner-take-all" feature not only fails to give any recognition to minority (sometimes, majority) votes cast in a state, but it also prevents voters of similar persuasions in different states from pooling their popular votes on a national basis. In 1964, for instance, President Johnson received 948,540 votes in Florida while Barry Goldwater obtained 905,941. Therefore, Johnson won Florida's fourteen electoral votes. In Misssissippi Johnson received 52,618 popular votes and Goldwater 356,528. Consequently, Mississippi gave its seven electoral votes to Goldwater. Although Goldwater won a substantial majority of the popular votes on a two-state basis, he received only one-third of their combined electoral votes. In 1960, President Kennedy obtained 2,377,846 votes in Illinois while Richard M. Nixon received 2,368,988. Kennedy, therefore, was awarded Illinois' twenty-seven electoral votes. On the other hand, in Indiana Nixon received 1,175,120 popular votes and Kennedy 952,358. Hence, Indiana gave its thirteen electoral votes to Nixon. On a two-state basis, Nixon received a majority of the popular votes but less than one-third of their combined electoral votes.

This disproportion between electoral and popular votes can be found in every election. Appendix B shows the percentages of the popular and electoral votes received by major party candidates from 1824 to 1964. As these reflect, fourteen persons were elected President with less than a majority of the popular vote. Three of the fourteen were the *popular-vote losers*. John Quincy Adams, with fewer popular and electoral votes than Andrew Jackson, was chosen President by the House of Representatives in the election of 1824.[59] In the election of 1876, Samuel J. Tilden lost the Presidency by one electoral vote, although he had over 250,000 popular votes more than Rutherford B. Hayes. In 1888, Benjamin Harrison defeated Grover Cleveland, who had 100,000 more popular votes.[60]

58. In fifteen other states the winning percentage was between forty and fifty percent. Examples of other elections in which the winner of a state's electoral votes received less than a majority of its popular votes are 1892 (nineteen states), 1908 (nine states), 1924 (thirteen states), and 1948 (thirteen states).

59. It should be noted that in the election of 1824, the legislatures of Delaware, Georgia, New York, Louisiana, South Carolina and Vermont selected the electors for their states, so that the national popular vote figures are not complete.

60. While Kennedy is generally credited with having received about 112,000 more popular votes than Nixon in 1960, there is a view that Nixon was the popular-vote winner. The correctness of this view is tied up with the counting of the popular votes cast in Alabama. The traditional practice of reporting the popular vote as the vote received by the elector

In a number of other elections, a small shift in the total popular vote could have resulted in a major shift in the electoral vote and reversed the outcome. This is because a shift in the popular vote in a few key states would have changed the disposition of all of their electoral votes. Thus, in 1884, a shift of 575 popular votes in New York would have resulted in the election of James G. Blaine, and in 1916, a shift of 1,983 popular votes in California would have elected Charles Evans Hughes, while President Wilson would have been the popular-vote winner by a margin of approximately 580,000 votes. In 1948, a shift of a total of 29,294 votes in Illinois, California and Ohio would have resulted in Thomas E. Dewey's election, with President Truman having over 2,000,000 more popular votes. Other elections in which a minor shift would have changed the outcome appear in Appendix C.

In his treatise on the electoral college system, Neal R. Peirce states: "Careful analysis shows that the danger of an electoral college misfire [of the popular-vote winner losing] is not just historical but immediate in any close contest."[61] He adds:

> With spirited two-party competition in every region of the country, there is every possibility that the nation may experience a string of close elections like those of the 1870s and 1880s. And if history and mathematics can be our guide, the country will run a high chance of electoral disaster in every such election.[62]

---

candidate polling the largest state-wide vote on each of the competing elector tickets has developed against the background of elector tickets pledged to vote for the candidates of their parties. In 1960 the Democratic slate of electors in Alabama consisted of eleven electors who were nominated in a state primary. Six of the eleven were unpledged, and eventually voted in the electoral college for Senator Harry F. Byrd. Five were pledged, and eventually voted for Kennedy. The highest unpledged elector received 324,050 popular votes while the highest pledged elector received 318,303. Kennedy's nationwide plurality of about 112,000 includes the 318,303 figure. It is said that is unfair because most, if not all, of the same voters also voted for unpledged electors. If the 324,050 and 318,303 figures are both counted, then the Alabama Democratic votes are, in effect, counted twice. Congressional Quarterly has suggested dividing the 324,050 votes into eleven parts and awarding five-sixths (147,295) of them to Kennedy. When this is done, Nixon has approximately 58,000 more popular votes nationwide than Kennedy. 19 Cong. Q. Weekly Rep. 286 (1961). It is noteworthy that this proportional vote formula was used by the Democratic National Committee in determining Alabama's votes at the 1964 Democratic National Convention. The Official Manual for the Democratic National Convention of 1964, at 17-18 (prepared by Clarence Cannon, 1964).

61. N. Peirce, supra note 2, at 141. In his book, Peirce sets forth an analysis of electoral voting patterns done by Charles W. Bischoff of the Massachusetts Institute of Technology. In any election as close as 1960, says Mr. Peirce, there is a fifty-to-fifty chance that the popular-vote winner will lose in the electoral college. According to the analysis, there is one chance in three that the popular-vote winner will lose if his lead is one half million votes; one in four, where the lead is between a half million and a million and a half; and one in eight, where the lead is two million. Id. at 141-42.

62. Id. at 145.

B. *The House Could Elect the President and the Senate the Vice President*

As earlier noted, if no candidate receives a majority of the electoral votes for President, the House of Representatives selects the President with each state, regardless of population, having one vote and with the votes of a majority of *all* the states necessary for election. In an election by the House, the five smallest states, with one Representative each and a combined population of less than two million, would have the same voting power as the five largest states, with a total of 154 Representatives and a combined population of 64 million. Alaska, with one Representative and a population of 226,167, would have the same influence as New York, with forty-one Representatives and a population of 16,782,304. The twenty-six smallest states, with seventy-six Representatives (out of a total of 435) and a total population of about thirty-one million (out of a national total of about 180 million),[63] would be able to elect the President. Fifty-nine of the seventy-six Representatives would have it within their power to cast the votes of these states.

If an election were thrown into the House, it could result, as history demonstrates, in members casting their votes against the candidate who carried their districts or states.[64] If voting in the House followed party lines, and if the party of the popular-vote loser had control of the necessary number of state delegations, he would win the election.

An election in Congress would likely involve wheeling and dealing[65] and, because of the "one state, one vote" method of voting in the House of Representatives, the election of a President could depend on the votes of states supporting a third party candidate. Another possibility is that the House might be unable to reach any decision by Inauguration Day, in which event the Vice President would act as President until the House selected the President and he qualified. Furthermore, it is not inconceivable that the Senate and House could select a split ticket—the President from one party and the Vice President from another. This is possible because the political composition of the two bodies might be different and because the methods of voting, the requirements for election and the numbers of candidates considered are not the same.[66]

---

63. Population figures used in this article are based on the 1960 census. The District of Columbia, whose population is larger than that of eleven states, has no voice in a contingent election, since it has no representation in Congress.

64. See notes 69-70, infra.

65. It is interesting to note that following the House election in 1825, an attempt was made to eliminate the possibility of the House ever again having to decide the election of the President. Indeed, the House itself passed a resolution to this effect in 1826 by a vote of 138 to 52. 2 Cong. Deb. 2004 (1826).

66. The dual voting feature of the original Constitution resulted in a split ticket in the

On four occasions in American history Congress has been intimately involved in the election of the President or Vice President. In the election of 1800 the Democratic-Republican electors voted for Thomas Jefferson and Aaron Burr, intending Jefferson for President and Burr for Vice President. Since there was no separate ballot for Vice President under the original method of election, Burr received as many electoral votes as Jefferson. The House, consequently, was required to choose between them for President, electing Jefferson on the thirty-sixth ballot.[67] The defect in the Constitution which caused this tie was eliminated by the Twelfth Amendment's requirement of separate ballots for President and Vice President in the electoral college.

The House of Representatives had to choose the President again in the election of 1824.[68] Andrew Jackson, John Quincy Adams and William H. Crawford, as the recipients of the highest three numbers of electoral votes, were the candidates considered by the House. Adams was selected on the first ballot, receiving the votes of thirteen of the twenty-four states. Seven states gave their votes to Jackson and four to Crawford. A change of only one vote in any of six of the thirteen states voting for Adams would have prevented his election.[69]

In the election of 1836 Martin Van Buren won a majority of the electoral votes. His running mate, Richard Mentor Johnson, failed to receive the votes of the Virginia electors, and therefore ended up receiving only one half of the electoral votes for Vice President. Since he did not have a

---

election of 1796 and a tie in the election of 1800. If it had not been changed by the Twelfth Amendment, this feature could have resulted in other split tickets or, possibly, intended vice presidential candidates receiving more electoral votes than their presidential running mates. This is because under the original method, party A had to be careful that its electors did not cast all their votes for their intended vice presidential candidate. Otherwise, he might be tied for President with the intended presidential candidate of the party. Thus, some electors of party A had to throw away their "second place" votes. If too few were thrown away, party B's electors might vote for party A's vice presidential candidate and make him President. If too many, party B might be able to elect its presidential candidate as Vice President. See L. Wilmerding, supra note 2, at 34-41.

67. On each of the first thirty-five ballots, taken over a one week period, Jefferson received the votes of eight states, Burr of two states and two states were evenly divided. Due to the influence of Alexander Hamilton, who could not see Burr as President, the Federalist member in the congressional delegation of one of the two states which had been evenly divided, absented himself for the thirty-sixth ballot, and the Federalist members of the other state cast blank votes. As a result, only Democratic-Republicans were left to cast the votes of these two states (Maryland and Vermont), and they voted for Jefferson. See generally, E. Roseboom, A History of Presidential Elections 39-47 (1965).

68. See id. at 84-88.

69. Three of the thirteen states had cast all their electoral votes for another presidential candidate (Henry Clay); three had cast a majority of their votes for Jackson; and one had divided its electoral votes among the four presidential candidates. S. Petersen, supra note 52, at 18.

majority, the Senate was required to choose between Johnson and vice presidential candidate Francis Granger. Johnson was elected by a vote of thirty-three to sixteen.[70]

In the election of 1876 a question arose over the awarding of the electoral votes of four states, each of which had sent double sets of elector returns to the President of the Senate.[71] A Republican-controlled Senate and a Democratic-controlled House disagreed on which returns to accept. An electoral commission consisting of eight Republicans and seven Democrats was formed to resolve the controversy. By a strict party vote of eight to seven, all of the disputed electoral votes were awarded to President Hayes. Hayes' margin of victory was *one* electoral vote, and a shift of only 116 popular votes in one of the four states would have given Samuel J. Tilden, instead of Hayes, an electoral majority of 185 to 184.[72]

A shift of a few popular votes in the elections of 1836, 1856, and 1860 would have thrown those elections into Congress.[73] In 1948 shifts of 12,487 votes in California and Ohio, or 20,361 votes in Illinois and Ohio, or 25,740 votes in California and Illinois would have sent the election to Congress, where no party had control of the necessary twenty-five state delegations in the House of Representatives.[74] In 1960 a shift of 4,480 votes in Illinois and 4,491 in Missouri would have resulted in no candidate winning a majority of the electoral votes.[75]

Due to the candidacy of George C. Wallace, the 1968 election could be the first since 1824 to be decided in the House of Representatives.[76] It is

70. Three Democratic Senators voted for Johnson notwithstanding that their states had cast their electoral votes for Granger. One Senator, whose state had given its electoral votes to Johnson, voted for Granger.

71. See E. Roseboom, supra note 67, at 243-49.

72. S. Petersen, supra note 52, at 45-47.

73. In 1836, the required shift was 2,183 votes in Pennsylvania; in 1856, 17,427 votes in Indiana, Illinois and Delaware; and in 1860, 18,050 votes in California, Illinois, Indiana, and Oregon, or 25,069 votes in New York. If the election had gone into the House in 1860, an impasse might have resulted since no party had control of the necessary eighteen state delegations. See id. at 22, 33, 35; N. Peirce, supra note 2, at 318-19.

74. The Democrats controlled twenty-one state delegations, the Republicans twenty, the Dixiecrats four, and three were evenly divided. The Dixiecrats, whose candidate, Senator Strom Thurmond, had received thirty-nine electoral votes, would have held the balance of power. In the Senate, the Democrats controlled fifty-four seats and the Republicans forty-two. Barkley's chances of being selected Vice President would have been good.

75. Kennedy received 303 electoral votes and Nixon 219. A majority at that time was 269 votes.

76. The political alignment of the House will depend on the November 1968 elections, since all 435 seats are up for election. In the Senate, where the election of the Vice President would be decided, the Democrats currently control sixty-three seats and the Republicans thirty-seven. Thirty-four Senate seats are up for election. Twenty-three of these belong to Democrats and eleven to Republicans.

reported that he could win the forty-seven electoral votes of Alabama, Georgia, Louisiana, Mississippi and South Carolina.[77] Moreover, his presence on the ballot in other states could split the states in such a way as to prevent the major candidates from obtaining a majority (*i.e.*, 270 votes). In such a case Wallace could be in a position to decide the election in the electoral college itself, by instructing his electors to vote for one of the major candidates, or in Congress, if he had the support of several state delegations.

In an attempt to meet the possibility of the 1968 election being thrown into Congress, Representatives Charles E. Goodell and Morris K. Udall suggested, but without success, that both major parties write into their platforms planks pledging their members of Congress to vote for the candidate who had received the highest popular vote.[78] Under their plan the major candidates would have pledged not to make any deals with Wallace, each candidate for the House would have pledged, if elected, to vote for the plurality winner for President, and each candidate for the Senate, if elected, and each Senator would have pledged to vote for the plurality winner for Vice President. The extent to which such a makeshift arrangement could bind Congress in advance and keep it bound would largely depend on the willingness of its members to honor their pledges. The parties could not bind Congress, and the electors themselves would not be covered by the plan.

C. *Electors Could Frustrate the Will of the People*

Nowhere in the Constitution is there any specific requirement binding electors to vote for the candidates of their parties. Because of the design of the Framers that electors be free agents, the predominant view is that they are under no legally enforceable obligation to do so.[79] The fact that

77. N.Y. Times, July 30, 1968, at 27, col. 2.

78. See N. Y. Times, July 27, 1968, at 26, cols. 1-2; July 25, 1968, at 22, cols. 2-4; July 18, 1968, at 23, col. 1.

79. Several state decisions have held that electors cannot be compelled to vote a particular way. See Opinion of the Justices, No. 87, 250 Ala. 399, 34 So. 2d 598 (1948); Breidenthal v. Edwards, 57 Kan. 332, 339, 46 P. 469, 471 (1896); State ex rel. Beck v. Hummel, 150 Ohio St. 127, 146, 80 N.E.2d 899, 909 (1948). Contra, Thomas v. Cohen, 146 Misc. 836, 841-42, 262 N.Y.S. 320, 326 (Sup. Ct. 1933). The Supreme Court has never squarely passed on the question. However, in Ray v. Blair, 343 U.S. 214 (1952), the Court held that a party could exact a pledge to support its nominees as a condition to certification as a candidate for elector in a party primary.

Support for the freedom of electors to vote for whom they please can also be found in the fact that when electors defected in the past, their votes were counted by Congress. In Kirby, Limitations on the Power of State Legislatures over Presidential Elections, 27 Law & Contemp. Prob. 495, 509 (1962), it is stated: "If an elector chooses to incur party and community wrath by violating his trust and voting for some one other than his party's can-

electors almost always vote for their party's candidates might seem to indicate that no real danger exists in this area.[80] However events in several recent elections have emphasized that there is genuine peril in having intermediate electors.

In 1960, Henry D. Irwin of Oklahoma was chosen as one of eight Republican electors in his state. When Oklahoma's electoral college met on December 19, 1960, Irwin voted for Senator Harry F. Byrd, who was not even a candidate for President. Relying upon his so-called constitutional freedom to vote for whom he pleased, Irwin stated: "I was prompted to act as I did for fear for the future of our republic form of government. I feared for the immediate future of our Government under the control of socialist-labor leadership. . . . I executed my constitutional right and . . . duty."[81] Irwin also said that he wanted to insure "a return to respect for the Constitution by the election of a conservative coalition government."[82] Four years earlier, in the election of 1956, the Democratic Party was the victim of the defection of an elector. W. F. Turner was selected as a Democratic elector in Alabama when Stevenson and Kefauver obtained 56.5 percent of the popular vote in that state. At the meeting of the Alabama electoral college, Turner broke his party oath and voted for one Walter B. Jones, a circuit court judge of Alabama, stating: "I have fulfilled my obligations to the people of Alabama. I am talking about the white people."[83] In the election of 1948 Preston Parks ran as an elector on both the Democratic and States' Rights tickets in Tennessee. The Democrats carried the state, but at the meeting of Tennessee's electoral college in December, Parks voted for the States' Rights candidates, who had received only 13.4 percent of the popular vote cast in the state. While Parks had announced he would vote that way prior to

---

didate, it is doubtful if there is any practical remedy. Once he is appointed, he is to vote. Legal proceedings which extended beyond the date when the electors must meet and vote would be of no avail. If mandamus were issued and he disobeyed the order, no one could change his vote or cast it differently. If he were enjoined from voting for anyone else, he could still abstain and deprive the candidate of his electoral vote."

80. It has been calculated that of the 15,245 electoral votes cast between 1820 and 1964, at most twelve were cast contrary to "instructions." N. Peirce, supra note 2, at 124. In 1876, when one electoral vote was the margin of victory, Republican elector James Russell Lowell refused, despite urging to do so, to vote for Tilden, stating: "In my own judgment I have no choice and am bound in honor to vote for Hayes, as the people who chose me expected me to do. They did not choose me because they have confidence in my judgment but because they thought they knew what the judgment would be. If I told them that I should vote for Tilden, they would never have nominated me. It is a plain question of trust." Letter from Lowell to Leslie Stephen, quoted in id. at 124.

81. 1961 Senate Hearings at 446.

82. Id. at 596.

83. N.Y. Times, December 18, 1956, at 34, col. 6.

the November election, the Democratic voters of Tennessee nevertheless had no opportunity to cast a vote for a full slate of Democratic electors who intended to vote for their party's nominees.

A problem related to that of the unfaithful pledged elector is that of the unpledged elector. Unpledged electors disappeared from the American scene around 1800 only to reappear in 1960 in a few states permitting the nomination of such electors. In the June 1960 Democratic primary in Alabama, six unpledged and five pledged electors were nominated as the Democratic electors. This combination slate was chosen in November; and, at Alabama's electoral college, the unpledged electors voted for Senator Harry Byrd for President. The Democratic voters of Alabama had no way of voting for a slate of eleven electors pledged to Kennedy.

Unlike Alabama, the voters of Mississippi and Louisiana in 1960 had a choice between Democratic pledged and unpledged slates of electors. The unpledged electors won in Mississippi while the pledged electors won in Louisiana. The eight unpledged Mississippi electors voted for Byrd. Although the Louisiana electors voted for Kennedy, an unsuccessful attempt was made in that state, before the electoral college met, to suspend the state's electoral laws and appoint independent electors.[84]

Following the voting in November 1960, Republican elector Irwin joined an Alabama attorney, Mr. R. Lea Harris, in a movement designed to elect some third candidate in the electoral college.[85] The plan was to get Republican electors, who otherwise would cast useless votes for Nixon, to join with defecting Southern Democratic electors and the fourteen unpledged electors in favor of some third party candidate. Although the plan did not succeed, it calls attention to the freedom of electors and demonstrates that defecting electors and unpledged electors could hold the balance of power in the electoral college in a close election.[86]

In the 1964 election the unpledged elector once again appeared. In the Alabama Democratic primary, a full slate of unpledged electors was nominated. As a result, the Democratic voters of that state had no opportunity to register a vote for Johnson and Humphrey. Since the Republican Party carried the state, its slate of pledged electors voted for Goldwater for President.

The use of intermediate electors can also at times lead to confusion

84. See 1961 Senate Hearings at 415; N. Peirce, supra note 2 at 106.

85. The plan is described in 1961 Senate Hearings at 596-656, and N. Peirce, supra note 2, at 106-08. See also "The Electoral College," Memorandum prepared by the staff of the Senate Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. at 9-10 (1961).

86. For the closeness of elections generally, see App. C.

among the voters or cause a state to lose some or all of its electoral votes.[87] In the election of 1948 only the names of the Democratic and Republican presidential candidates appeared on the ballot in Ohio. On the other hand, only the names of the electors of the Progressive Party appeared. This arrangement confused thousands of voters who voted for some Progressive electors as well as for either Truman or Dewey. These votes had to be invalidated. In 1856 a blizzard prevented the electors of Wisconsin from voting on the statutory day, and Congress was unable to decide whether or not those votes should be counted. In the election of 1880 the electors of Georgia voted on the wrong day, with the result that their votes were not counted. In the elections of 1820 and 1832 the votes of certain states were rejected on technical grounds. While most of these situations are not likely to recur, other situations arising from the use of electors can occur in any election.

D. *State Legislatures Could Also Frustrate the Will of the People*

Under the Constitution, the state legislatures have the power to determine the manner by which the electors are to be selected. While today the electors are popularly elected in every state on election day on a general ticket or at large basis, it is not inconceivable that in the future some legislatures might use this power for partisan purposes.

Indeed, this power was so used by the Michigan legislature in 1892. The legislature was controlled by Democrats who feared that the Republican ticket would carry the state and receive all of its electoral votes in the presidential election. In order to prevent this from happening, the legislature changed the state's method of awarding electoral votes from the general ticket to a district system, under which each of the state's twelve congressional districts became a separate electoral district, and two at large districts, one Eastern and one Western, were established. The new law provided that the winner of the most popular votes in each district received one electoral vote. The Legislature's action, which split the state's electoral votes in the election, was sustained by the Supreme Court in *McPherson v. Blacker*.[88] The Court held that "the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States."[89] In dictum, the Court stated that "[t]here is no color for the contention that under the [fourteenth and fifteenth] amendments every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote for

87. See generally, "The Electoral College," supra note 85, at 15-16.

88. 146 U.S. 1 (1892). In the 1892 election, Michigan awarded five electoral votes to Grover Cleveland and nine to Benjamin Harrison.

89. Id. at 35.

presidential electors."[90] "[F]rom the formation of the government until now," the Court said, "the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors."[91]

Because of the long history of popular election, it is doubtful that any state today would prevent its citizens from voting in a presidential election. But the power of the states over such elections can be used in ways that effectively deprive voters of the opportunity to cast meaningful votes. Thus, in 1948 the voters of Alabama had no opportunity to vote for Truman and Barkley because the Democratic party in that state supported Senator Strom Thurmond.[92] In 1960 the voters of the same state could not cast a vote for a full slate of electors pledged to Kennedy and Johnson; and in 1964 the same voters could not vote for any electors pledged to Johnson and Humphrey.

E. *The Death of a Candidate Could Lead to Uncertainty*

While the passage of the Twenty-Fifth Amendment has greatly strengthened our system of presidential succession, there are still certain gaps which have not been closed. These arise because of the electoral college. If a candidate were to die (or withdraw) after the November voting and before the electors met in December, there would be uncertainty as to his successor. Although the national committees of both major parties have been authorized by their parties to fill vacancies occurring before or after elections, a committee's choice might not be accepted by the electors pledged to the deceased candidate.[93] Some might feel released of any

90. Id. at 39.

91. Id. at 35.

92. This was also true in 1912, when Theodore Roosevelt, the Progressive Party candidate, ran on the Republican line in California. The voters had no way of expressing a choice for the national candidates of the Republican Party, William Howard Taft and James S. Sherman, without writing in the names of electors pledged to them. In 1860 the voters in ten states had no opportunity to vote for an elector slate pledged to Lincoln.

93. See J. Feerick, From Failing Hands; The Story of Presidential Succession 324-25 (1965), where the procedures are set forth. In 1860 the Democratic National Committee filled the vacancy which occurred when Senator Benjamin Fitzpatrick of Alabama declined the vice presidential nomination after the convention had adjourned. Herschel V. Johnson, a former governor of Georgia, was chosen in his place. In 1872 Democratic presidential candidate Horace Greeley died shortly after the November election. No one was appointed to fill the vacancy. When the electors met, Greeley's sixty-six electoral votes were distributed among four persons. His vice presidential running mate received only eighteen of the votes. Three were cast for Greeley himself, but they were not counted because Greeley was not alive when they were cast. Cong. Globe, 42d Cong., 3d Sess. 1285-1305 (1873). In 1912 Vice President James S. Sherman, who was running for re-election, died a few days before the election. It was not until after the November voting that the Republican National Committee appointed Nicholas Murray Butler, then President of Columbia University, to receive

obligation to vote for the new nominee, since they were elected to vote for the deceased candidate and his running mate, and no others.

The death of a candidate between the meeting of the electoral college and the counting of the electoral votes on January 6, when the candidates with a majority of the electoral votes are declared President elect and Vice President elect, would result in uncertainty as to whether his electoral votes could be counted. If they were not and if the deceased candidate were the presidential contender with a majority of the electoral votes, the election of President would devolve on the House while there would be a Vice President elect. In the author's opinion, the electoral votes of a deceased candidate should be counted because the counting is a nondiscretionary act and because the Twelfth Amendment appears to require only that the person be alive when the votes are cast. The subject, however, is not free from doubt.

If a President elect and Vice President elect were declared on January 6 and one of them died before January 20, the provisions of the Twentieth and Twenty-Fifth Amendments would be applicable. If the President elect died, the Vice President elect would become President on January 20 by virtue of the Twentieth Amendment, and he would be empowered under the Twenty-Fifth Amendment to nominate a person for Vice President, who would take office when confirmed by a majority of both Houses of Congress. If the Vice President elect died, the President elect, upon taking office, would be able to nominate a person for Vice President under the Twenty-Fifth Amendment.

In the event no candidate received a majority of the electoral votes on January 6 and one of the candidates to be considered by Congress in the contingent election died, Congress would be empowered under the Twentieth Amendment to provide for the case. However, Congress has never passed any implementing legislation to cover this contingency.

F. *Other Defects*

While it may not be capable of precise measurement, the "winner-take-all" feature of the system undoubtedly overemphasizes the political importance of the heavily populated states. Since elections are usually won by capturing their electoral votes, it has not been surprising that most presidential candidates have come from those states.[94] Seventeen of the fifty-two nominations for President of the two major parties from 1868 through 1968 have gone to New Yorkers. Of the total of 104 nominations

Sherman's eight electoral votes. The eight electors honored the committee's choice and voted for Butler.

94. Some of the statistics used in this section are taken from the excellent brief filed by the State of Delaware in Delaware v. New York, 385 U.S. 895 (1966).

for President and Vice President, residents of New York have been nominated twenty-five times. Six large states account for sixty-nine of the total of 104 nominations. During this period twenty-four states have failed to have citizens nominated for either President or Vice President.

As for electing a President, thirty-six states, including eight of the original thirteen, have never had one of their citizens elected to the Presidency. New York, Ohio, Massachusetts and Virginia have had twenty-one elected for a total of thirty terms. It is interesting to note that from 1792 through 1964, New York supported the winning candidate in thirty-eight of the forty-four elections. In five of the six where New York did not, it cast its electoral votes for either a current or former New York governor.

Not only does the "winner-take-all" feature favor large states, but it gives excessive power to organized groups in such states, since they may be able to swing the entire electoral vote of the state from one candidate to the other and, with it, possibly the election. This feature also can be viewed as placing a premium on the effects of fraud, accident and other factors, since a change of a few popular votes could influence the disposition of all of a state's electoral votes.[95]

Another feature of the system came to light this year because some of the possible presidential and vice presidential combinations in each party involved residents of the same state. [96] This called attention to the restriction contained in the Twelfth Amendment that: "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 . . . ."

This provision of the Twelfth Amendment was carried over from Article II. The original provision, however, was part of a scheme where the electors cast two votes for President. The Framers felt that such a provision was needed because of the anticipated problem of the electors being partial to, and voting for, inhabitants of their own states for President, which would favor large state candidates. The Framers believed that if the electors were required to cast one of their two votes for President for an inhabitant of another state, persons of national reputation rather than local favorites would be elected President. With the passage of the Twelfth Amendment, requiring separate votes for President and Vice

95. See generally, "The Electoral College," supra note 85, at 36. One interesting case in point appears to have occurred in the election of 1916, where a shift of 1,983 popular votes in California would have swung the election to Charles Evans Hughes. Hughes allegedly lost the electoral votes of California by failing to meet with Governor Hiram Johnson while campaigning in that state. It seems that Hughes made every effort to see Johnson and at one point both were in the same hotel at the same time. See E. Roseboom, supra note 67, at 385-86; see App. C.

96. See N.Y. Times, July 22, 1968, at 30, col. 1.

President, and the development of political parties, the reasons for the original provision largely disappeared. Little attention appears to have been given the provision in the debates preceding the adoption of the Amendment.[97]

As the provision now stands, the political parties are not prohibited from nominating a ticket of citizens of the same state. The provision, which simply prohibits the electors of the state from voting for *both* candidates, would become important where those candidates won the most popular votes in their state and the electoral votes of the state were necessary for election. The electors of the state could only vote for one of them, while the electors of other states would not be subject to the same restriction.

In an attempt to circumvent this provision, a number of suggestions have been advanced. One that has received some notoriety is that one of the candidates could move to and become an "inhabitant" of another state before the electoral college met.[98] Whether this would be effective is debatable. It can be argued that leaving one's state either shortly before or after the November voting would violate the spirit of the provision. The only effective solution is to eliminate the prohibition altogether, as it clearly has no present day merit.

IV. Changing the Electoral College

A. *Legislative Developments, 1797-1962*

On January 6, 1797, Representative William L. Smith of South Carolina introduced in Congress the first proposal for reform of our system of electing the President.[99] Since then, more than 500 such proposals have been offered in Congress.[100] Apart from the changes effected by the Twelfth Amendment, the constitutional provisions for electing the President and Vice President have withstood all attempts at reform.[101]

In 1813, 1819 and 1820 the Senate passed district vote plans for choosing the President, but none could muster the necessary two-thirds

97. See generally, 14 Annals of Cong. 21, 89, 95, 161 (1803-04).

98. N.Y. Times, Aug. 5, 1968, at 24, col. 1; July 22, 1968, at 30, col. 1; see New York Post, August 7, 1968, at 7, cols. 1-4 (quoting interview with Professor Paul Freund of Harvard Law School).

99. Tienken, Proposals to Reform our Electoral System, Library of Congress Legislative Reference Service 20 (1966).

100. N. Peirce, supra note 2, at 151.

101. The Amendment provides for separate votes for President and Vice President by the electors; requires a majority vote for election to either office; and limits the House's choice to the "persons having the highest numbers [of electoral votes] not exceeding three," and the Senate's to the persons with the "two highest numbers." See note 17, supra.

vote in the House of Representatives.[102] The 1813 plan would have divided each state into separate districts for the selection of electors, with each state having as many districts as it had Senators and Representatives. The proposals which passed in 1819 and 1820 provided for the selection of two electors at large and the rest on a district basis.

In 1823 Senator Thomas Hart Benton proposed a district system based on the direct vote of the people for the President and Vice President.[103] His proposal contemplated the elimination of electors and the division of each state into as many districts as the number of its members of Congress. Although Benton's plan was unable to obtain sufficient votes in either House of Congress, his views were echoed by Presidents Andrew Jackson and Andrew Johnson in special messages to Congress in the 1830's and 1860's.[104]

In 1875 committees of both Houses, following the lead of Senator Oliver P. Morton of Indiana, recommended a district system of election similar to Benton's proposal, except that the number of districts was limited to the number of Representatives to which a state was entitled and the popular-vote winner in the state received two electoral votes.[105] Congress, however, failed to act. In 1878 and 1880 a proportional vote proposal was endorsed by a select committee of the House, but no vote was taken in Congress.[106] This plan, like the district proposals before it, would have retained the formula for allocating electoral votes among the states. It differed in that it would have divided each state's electoral vote in proportion to the division of the popular vote in the state.

---

102. The proposals are discussed in Ames, "The Proposed Amendments to the Constitution of the United States During the First Century of Its History," Annual Report of the American Historical Association for 1896, 81-84 (1897) (the pertinent excerpts are reprinted in 1961 Senate Hearings at 812-13). The evidence is compelling that many of the Framers contemplated electors being chosen in districts. Madison said that this method "was mostly, if not exclusively in view when the Constitution was framed and adopted . . . ." Letter from James Madison to George Hay, August 23, 1823, in 3 Farrand 458-59. Jefferson, Hamilton, Madison, Jackson, Van Buren, John Quincy Adams and Daniel Webster were early supporters of such a method. Wilmerding, supra note 2, at 58. Madison said that the district system "was exchanged for the general ticket & the legislative election, as the only expedient for baffling the policy of the particular States which had set the example." 3 Farrand 459. Jefferson said: "All agree that an election by districts would be best, if it could be general; but while ten States choose either by their legislatures or by a general ticket, it is folly and worse than folly for the other six not to do it." 10 The Writings of Thomas Jefferson 134 (Library ed., 1903). Forms of the district plan were used on fifty-two occasions during the period between 1789 and 1892. Maryland used it in all elections prior to 1836, except the first two. See Paullin, supra note 47, at 89.

103. Ames, supra note 102 at 89. (1961 Senate Hearings 812).

104. Id. at 90-91 (1961 Senate Hearings 812-13).

105. Id. at 92-93 (1961 Senate Hearings 813-14).

106. Id. at 97-98 (1961 Senate Hearings 817).

In 1891 President Benjamin Harrison urged the adoption of an automatic vote system which would have written into the Constitution the "winner-take-all" system of casting electoral votes.[107] Congress again refused to act and interest in the subject faded. In the 1920's and 1930's Senator George W. Norris of Nebraska and Representative Clarence F. Lea of California introduced proportional plans in Congress, but none came to a vote on the floor, although committees of the House approved Lea's proposal in 1933 and 1934. In 1934 the Senate narrowly failed to pass an automatic vote proposal of Senator Norris, under which the office of presidential elector would have been abolished and the "winner-take-all" system frozen into the Constitution.[108]

Following World War II, a concerted attempt was made in Congress to push through some thoroughgoing reform. In this period Senator Henry Cabot Lodge of Massachusetts and Representative Ed Gossett of Texas became the leading advocates of the proportional vote plan, and Senator Karl E. Mundt of South Dakota and Representative Frederic R. Coudert, Jr. of New York of the district vote plan. Their proposals were similar to some of the proportional and district vote plans of the nineteenth century. The Lodge-Gossett plan, as it came to be called, provided for the retention of the formula for assigning electoral votes on the basis of Senators and Representatives, the division of the electoral votes of each state in proportion to the popular vote cast in the state, the elimination of the office of elector, and a plurality of the electoral vote for election as President and Vice President.[109] The Mundt-Coudert plan also contemplated retaining the method of apportioning electoral votes, but it would have retained the office of elector, divided each state into electoral districts equal in number to the number of its Representatives in Congress, awarded two electoral votes to the statewide popular-vote winner, and in the event no one received a majority of the electoral votes, referred the contingent election to a joint session of Congress with each member having one vote.[110]

107. 9 J. Richardson, Messages and Papers of the Presidents, 1789-1897, 208-10 (1910).

108. 78 Cong. Rec. 9127 (1934). The vote was forty-two in favor and twenty-four against, or seven short of a two-thirds vote.

109. See S.J. Res. 2, 81st Cong., 1st Sess. (1949); H.J. Res. 2, 81st Cong., 1st Sess. (1949). The proposal counted votes to the nearest thousand. When it came up for discussion in the Senate, it was amended so as to require a plurality of at least forty percent for election as President and Vice President, with the contingent election being referred to a joint session of Congress, in which each member would have one vote. 96 Cong. Rec. 1275 (1950). It should be noted that Senator Lodge personally favored a popular vote system, but he felt it had no chance of passage. 96 Cong. Rec. 882 (1950). See 28 Cong. Digest 199 (1949).

110. See H.J. Res. 192, 81st Cong., 1st Sess. (1949); H.J. Res. 1, 83d Cong., 1st Sess. (1953); S.J. Res. 95, 83d Cong., 1st Sess. (1953).

In 1950 the Lodge-Gossett plan was vigorously debated in Congress.[111] Its proponents argued that it would more accurately reflect the popular strength of the candidates than the present system; would encourage political activities in every state, and would eliminate defects in the system arising out of the "winner-take-all" feature, the use of presidential electors and the formula for electing a President in the House of Representatives. Its opponents urged that it would endanger our two-party structure by making it possible for splinter groups to obtain electoral votes; would weaken our federal system, since states no longer would have a voice as to the method of selecting electors; and would give inordinate influence to one-party states and states with low voter turnout inasmuch as their electoral votes would not be effectively split, as it was assumed would be the case in large states.

On February 1, 1950, the Senate passed the Lodge-Gossett proposal by a vote of 64 to 27.[112] However, it failed to pass the House.[113] In 1951 it was endorsed by the House and Senate Judiciary Committees, but no action was taken on the floor of Congress. In 1955 it was reported out by the Senate Judiciary Committee and in March of the following year Senator Price Daniel of Texas, a strong advocate of the proportional plan, moved to substitute for the Committee's proposal a proposal which would give each state a choice between the district and proportional plans.[114] By coupling the support for one with the support for the other, he hoped to get the necessary two-thirds vote for passage.

In the ensuing debate, opponents of the proposal, led by Senators Paul H. Douglas of Illinois and John F. Kennedy of Massachusetts, argued that a change to a proportional or district vote system would greatly enhance the power of conservatives in both parties.[115] They reasoned that the large states, where two party competition was keen, would likely split their electoral votes between the parties, whereas the conservative southern states would continue to cast most, if not all, of their votes for Democratic candidates, thereby increasing the influence of that wing of the party. Since the importance of large states and their urban centers, where liberal Republicans would have their strength, would be decreased, the influence of conservative rural interests of the Republican Party would be increased. Kennedy forcefully argued in favor of the present system, stating that the nation's big cities and the minority groups within

111. See 96 Cong. Rec. 877-86, 1064-85, 1148-63, 1259-79 (1950).

112. Id. at 1278.

113. Id. at 10427-28. On a motion to suspend the rules for its consideration, 210 Representatives voted against and 134 in favor.

114. The substitute was to S.J. Res. 31, 84th Cong., 1st Sess. (1955).

115. See 102 Cong. Rec. 5150, 5248-54, 5539-64 (1956).

them were greatly underrepresented in the state legislatures and in Congress. The electoral college, said Kennedy, compensated for these inequities by giving urban centers and their minority groups an influential role in presidential elections. Said Kennedy: "[I]t is not only the unit vote for the Presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider all the others."[116] Addressing himself to the nature of the substitute proposal, Kennedy declared:

> The two schemes joined together by this shotgun wedding . . . are wholly incompatible, the sponsors of each having thoroughly and accurately assailed the merits of the other over the years. The Mundt proposal multiplies the general ticket system; the Daniel proposal [his proportional vote proposal] abolishes it. The Mundt proposal continues the importance of States as units for electoral purposes; the Daniel proposal reduced it. . . . And yet it is now proposed that the Senate, being unable to give its approval to either system, should lump them together and give each State its choice. No surer method of introducing confusion and loss of public confidence in our electoral system could be devised.[117]

On March 27, 1956, the Daniel proposal passed, by a vote of 48 to 37, as a substitute for the proportional vote plan recommended by the Senate Judiciary Committee in 1955.[118] Since the vote was short of two-thirds, Daniel and others decided not to submit the measure for a final vote and the proposal was recommitted to the Senate Judiciary Committee. No proposed amendment has reached the floor of either House of Congress since then. While the proportional and district plans were receiving careful attention in 1950 and 1956, direct election proposals received scant attention and were soundly defeated in the Senate.[119] In 1961 extensive hearings were held by the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, and the following year the Subcommittee reported a district plan to the full committee, where it died.

B. *Recent Developments, 1963-1968*

During the past few years renewed interest has been focused on the subject of electoral reform. A number of reasons for this can be cited.

116. Id. at 5150.

117. Id. at 5159.

118. Id. at 5673.

119. In 1950, William Langer of North Dakota recommended a direct vote, coupled with national nominating primaries. It was rejected by a margin of 60 to 31. 96 Cong. Rec. 1276 (1950). Senator Hubert Humphrey's substitute amendment providing only for direct election was defeated by a vote of 63 to 28. Id. at 1276-77. Senator Langer's proposal was rejected in 1956 by a vote of 69 to 13. 102 Cong. Rec. 5637 (1956). Senator Herbert Lehman of New York then offered an amendment providing only for direct election, which was defeated by a vote of 66 to 17. Id. at 5657.

In 1962, 1963 and 1964 the Supreme Court rendered its historic decisions in the field of legislative reapportionment, which removed numerous inequities from the political scene and firmly established the principle of "one person, one vote."[120] In a message to Congress on January 28, 1965, President Johnson urged reform of the electoral college so as to "assure the orderly continuity in the Presidency that is imperative to the success and stability of our system."[121] The President stated: "Today there lurks in the electoral college system the ever-present possibility that electors may substitute their own will for the will of the people. I believe that possibility should be foreclosed."[122] The President said that the general ticket system of awarding electoral votes should be retained as it was "an essential counterpart of our Federal system. . . ."[123] Accompanying the President's message was a draft of a proposed constitutional amendment which would retain the electoral votes of each state, abolish the office of elector, provide for the automatic casting of electoral votes for the plurality winner in the state, and refer the contingent election to the Senate and House meeting jointly. Thereupon, proposals incorporating the President's recommendations were introduced in Congress by Senator Birch Bayh of Indiana and Representative Emanuel Celler of New York.[124] However, no action was taken in Congress with respect to these or other proposals.

---

120. In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court broke into the thicket of legislative apportionment, holding that the federal courts had jurisdiction over the apportionment of the state legislatures. Less than one year later, in Gray v. Sanders, 372 U.S. 368 (1963), the Court held that Georgia's county unit vote system violated the equal protection clause of the Fourteenth Amendment, stating: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote. . . . The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." Id. at 379-80. In 1964, in Wesberry v. Sanders, 376 U.S. 1, the Court found that a Georgia congressional districting statute violated Article I, Section 2 of the Constitution, which "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Id. at 7-8. Four months later, in Reynolds v. Sims, 377 U.S. 533 (1964), the Court held that the equal protection clause "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." Id. at 568. Finally, in Avery v. Midland County, 390 U.S. 474 (1968), the Court held that "the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." Id. at 484-85.

121. Public Papers of the Presidents of the United States, 1 Lyndon B. Johnson 103 (1965).

122. Id. at 102-03.

123. Id.

124. S.J. Res. 58, 89th Cong., 1st Sess. (1965); H.J. Res. 278, 89th Cong., 1st Sess. (1965). See also H. J. Res. 469, 90th Cong., 1st Sess. (1967).

On January 20, 1966, the President renewed his recommendation for electoral reform.[125] On July 20, 1966, the State of Delaware moved in the United States Supreme Court for leave to file a complaint against the other forty-nine states and the District of Columbia. Delaware asked the Court to issue an injunction against continued use of the "winner take all" formula, arguing that it was unconstitutional. Following the bringing of this suit, twelve other states, both large and small, moved to be joined as plaintiffs. New York opposed the motion and on October 17, 1966, the Supreme Court, without opinion, declined to hear the complaint.[126] Suits seeking similar relief were subsequently commenced by interested citizens in Mississippi, Virginia and California. They have either suffered or are likely to suffer the same fate as the Delaware suit.[127]

In 1966 and 1967 the Chamber of Commerce of the United States announced that it favored abolishing the present system in favor of a district system or direct nationwide popular vote,[128] and Gallup polls showed that a substantial majority of the people favored its elimination

125. 112 Cong. Rec. 703-04 (1966).

126. Delaware v. New York, 385 U.S. 895, rehearing denied 385 U.S. 964 (1966). The states which moved to be joined as plaintiffs were Arkansas, Florida, Iowa, Kansas, Kentucky, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, West Virginia, and Wyoming. See Cong. Q. Weekly Rep., Aug. 19, 1966, at 1811-15.

127. In Penton v. Humphrey, 264 F. Supp. 250 (S.D. Miss. 1967), a citizen's suit to enjoin the appointment of electors by any method not designed to reflect the will of the people as evidenced by its popular vote was dismissed. In so deciding, the court relied on the Supreme Court's decision in Delaware v. New York, 385 U.S. 895 (1966), and the Supreme Court's recognition in Gray v. Sanders, 372 U.S. at 380, that the inequities of the electoral college are an exception to the one person, one vote doctrine. On March 21, 1968, a group of citizens representing each of Virginia's congressional districts commenced an action to have the state's presidential electors elected from districts and to bar in Virginia the continued use of the winner take all system of selecting electors. On July 16, 1968, a specially-convened three-judge court dismissed plaintiffs complaint, holding that the winner take all system was permissible under the Constitution, that no specific method of appointing electors can be forced upon the state legislatures, and that any successful modification of the electoral college must be done on a nationwide basis and by way of a constitutional amendment. Williams v. Virginia State Bd. of Elections, 37 U.S.L.W. 2065 (E.D. Va. July 7, 1968); see N.Y. Times, March 22, 1968, at 38, col. 3. On May 6, 1968, a suit was filed in California by four residents of that state against the United States and the governor and secretary of state of California, seeking to declare void and unconstitutional and to enjoin the election of the President and Vice President by electors selected pursuant to the winner take all system. On July 29, 1968, the United States was dismissed as a party defendant, California's motion to dismiss the complaint was denied, and the convening of a three-judge panel was ordered. The court is not expected to decide the question before it (i.e., whether or not the general ticket system is constitutional) until early 1969. Letter to the author from James R. Hagan (a lawyer and one of the plaintiffs), dated August 22, 1968. See N.Y. Times, May 7, 1968, at 27, col. 5.

128. N. Peirce, supra note 2, at 189.

and the substitution of a popular-vote system.[129] A poll of the nation's state legislators revealed that about ninety percent of those who responded favored reform.[130] Of these, 58.8 percent supported direct election.

Also in 1966 Senator Birch Bayh withdrew his support for the automatic vote system recommended by the President, and introduced a proposed constitutional amendment providing for direct election.[131] On January 7, 1967, a commission of the American Bar Association, composed of governors of both parties, judges, practicing lawyers, law professors, political scientists, and representatives of labor and management, released the results of a year-long study of the system.[132] It suggested the complete abolition of the electoral college in favor of direct election. The recommendations of the Commission subsequently were adopted by the American Bar Association and embodied in proposals introduced in Congress.[133]

129. Id. at 360-61.

130. The poll was taken by Senator Quentin N. Burdick of North Dakota. He received responses from about 2,500 of the country's approximately 8,000 state legislators. Cong. Q. Weekly Rep., Dec. 16, 1966, at 3030; see N. Peirce, supra note 2, at 192-93.

131. S.J. Res. 163, 89th Cong., 2d Sess. (1966). The proposal was also co-sponsored by Senators Alan Bible of Nevada, Robert C. Byrd of West Virginia, Joseph S. Clark, Jr. of Pennsylvania, Paul H. Douglas of Illinois, Warren G. Magnuson of Washington, Wayne Morse of Oregon, Edmund S. Muskie of Maine and Gaylord Nelson of Wisconsin. This proposal required at least a forty percent plurality for election and provided that in the event no candidate received such a number, Congress would select the President and Vice President in a joint session, with each member having one vote. In 1967 Senator Bayh introduced a similar proposal, except that the contingent election was changed to a popular vote runoff election between the top two teams. S.J. Res. 2, 90th Cong., 1st Sess. (1967). In providing for the runoff, Senator Bayh adopted a recommendation made by the American Bar Association Commission on Electoral College Reform. See note 133, infra.

132. "Electing the President," supra note 1. The members were Robert G. Storey, its chairman, Dean Emeritus of the Southwestern Legal Center, and a former ABA President; Henry Bellmon, a former Republican governor of Oklahoma; Professor Paul Freund of Harvard Law School; E. Smythe Gambrell, Georgia attorney and a former ABA President; Ed Gossett, Texas attorney and a former Democratic member of the House of Representatives from Texas; William T. Gossett, current President of the ABA, former President of the American Bar Foundation and former general counsel to the Ford Motor Company; William J. Jameson, a former ABA President and a federal district court judge in Montana; Kenneth B. Keating, an associate judge on the New York Court of Appeals and a former United States Senator from New York; Otto E. Kerner, then Democratic Governor of Illinois and now a federal court of appeals judge; James C. Kirby, Jr., a professor of law and former chief counsel to the Senate Judiciary Subcommittee on Constitutional Amendments; James M. Nabrit, Jr., former President of Howard University and former Deputy United States Representative to the United Nations; Herman Phleger, California attorney and former legal advisor to the United States Department of State; C. Herman Pritchett, former President of the American Political Science Association; Walter P. Reuther, President of the United Automobile Workers Union; and Whitney North Seymour, New York attorney and former President of the ABA. Id. at vii-viii.

133. The Commission recommended that an amendment to the Constitution be adopted so as to:

In 1966 and 1967 the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee conducted extensive hearings on the subject, at which witnesses testified in favor of the four basic plans for reform.[134] Although its hearings have concluded, the Subcommittee has not yet reported out a proposal, and no hearings have been scheduled by

1. provide for the election of the President and Vice-President by direct, nationwide popular vote;
2. require a candidate to obtain at least forty percent of the popular vote in order to be elected President or Vice-President;
3. provide for a national runoff election between the two top candidates in the event no candidate receives at least forty percent of the popular vote;
4. require the President and Vice-President to be voted for jointly;
5. empower Congress to determine the days on which the original election and the runoff election are to be held, which days shall be uniform throughout the United States;
6. provide that the places and manner of holding the presidential election and the inclusion of the names of candidates on the ballot shall be prescribed in each state by the legislature thereof, with the proviso that Congress may at any time by law make or alter such regulations;
7. require that the voters for President and Vice-President in each state shall have the qualifications requisite for persons voting therein for Members of Congress, with the proviso that each state may adopt a less restrictive residence requirement for voting for President and Vice-President provided that Congress may adopt uniform age and residence requirements; and
8. contain appropriate provisions in case of the death of a candidate. "Electing the President," supra note 1, at 3.

See the following direct election proposals: S. J. Res. 2 (Senator Birch Bayh and eighteen co-sponsors), S. amend. No. 163 to S.J. Res. 2 (Senator Everett M. Dirksen), 6 (Senator Margaret Chase Smith), 15 (Senator Quentin N. Burdick), 90th Cong., 1st Sess. (1967); S.J. Res. 179 (Senator Mike Mansfield), 90th Cong., 2d Sess. (1968); H.J. Res. 470 (Representative Emanuel Celler), 447 (Representative Charles E. Bennett), 90th Cong., 1st Sess. (1967). S.J. Res. 6 requires a majority vote for election, while the others provide for a plurality of at least forty percent of the popular vote.

134. Hearings Relating to the Election of the President, Before Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess.; 90th Cong., 1st Sess. (1968). 85 persons testified or submitted statements. Support for the proportional plan was expressed, among others, by Senators Holland, Smathers, Sparkman and Ervin. See 113 Cong. Rec. 6587-88 (daily ed. May 9, 1967), 6824 (daily ed. May 15, 1967); S.J. Res. 3 (Senator George Smathers), 7 (Senator Spessard Holland), 84 (Senator John Sparkman and two co-sponsors), 90th Cong., 1st Sess. (1967). Senators Karl E. Mundt, Hugh Scott and Thruston B. Morton spoke in favor of the district proposal. See 113 Cong. Rec. 1586-87 (daily ed. Feb. 6, 1967); S.J. Res. 12 (Senator Karl Mundt and ten co-sponsors), 90th Cong., 1st Sess. (1967); see also S.J. Res. 25 (Senator Hugh Scott), 55 (Senator Norris Cotton), 86 (Senator Ernest Gruening), 90th Cong., 1st Sess. (1967). Senator Robert Kennedy and then Attorney General Nicholas Katzenbach indicated their support for the automatic vote plan; while Senators Birch Bayh, Everett Dirksen, Stephen Young, Margaret Chase Smith and others urged a change to direct election. See 113 Cong. Rec. 1551-52 (daily ed. Feb. 6, 1967).

the House of Representatives. In August, 1968, the Republican and Democratic Conventions adopted platform planks calling for electoral reform.[135] Whether the Ninety-First Congress will accept the opportunity presented to improve our electoral system remains to be seen.

C. *The Basic Plans*

When Congress does deal with the problem of electoral reform, the main proposals before it will undoubtedly be the proportional, district, automatic and direct vote plans. Of these plans, the author believes that direct, nationwide popular vote is superior in all basic respects to the rest. All the electoral vote plans are subject to serious objections. Since they would retain the formula for distributing electoral votes among the states, they would not eliminate the inequities arising out of the use of that formula. Each state would continue to cast its assigned electoral votes regardless of vote turnout or population changes occurring between decennial censuses; and the ratio of electoral votes to population would vary from state to state. Consequently, the proportional, district and automatic vote proposals all leave open the possibility of the popular vote loser being elected President.[136] Since each provides for an election by Congress when no candidate receives the required number of electoral votes, an area for widespread wheeling and dealing remains, in which the plurality winner in the nation could lose.[137]

---

135. Neither Convention endorsed a specific proposal. The Republicans proposed "to reform the Electoral College system, establish a nation-wide, uniform voting period for Presidential elections, and recommend that the states remove unreasonable requirements, residence and otherwise, for voting in Presidential elections." N.Y. Times, Aug. 5, 1968, at 25, col. 8. The Democratic plank provided: "We urge reform of the electoral college and election procedures to assure that the votes of the people are fully reflected."

136. In his article, John F. Banzhaf, III, shows by way of mathematical analysis that: (i) under a winner take all system, citizens of thirty-two states and the District of Columbia have less than average voting power (i.e., ability to affect the election by his vote), while citizens of such states as New York and California have two and one-half times the voting power of citizens of some of the smaller states; (ii) under a proportional vote system, citizens of thirty-six states and the District of Columbia would have less than average voting power, while citizens of such states as Alaska and Nevada would have more than four times the voting power of citizens of states like New York and California; and (iii) under a district vote system, citizens of thirty-four states would have less than average voting power. Only under direct election, he concludes, would all citizens have "equal voting power and an equal chance to affect the outcome of the election." Banzhaf, supra note 56, at 325.

137. None of the major plans suggest a contingent election other than in Congress. An automatic vote proposal introduced in the House by Representative Jonathan Bingham, however, does provide for a runoff election. H.J. Res. 1086, 90th Cong., 2d Sess. (1968). A proposal by Representative Edward Hutchinson of Michigan would simply change the contingent election provision so as to provide for a joint vote of both Houses, with each member having one vote. H.J. Res. 1112, 90th Cong., 2d Sess. (1968).

The automatic vote proposal is particularly objectionable because it would freeze the "winner-take-all" system into the Constitution, thus perpetuating one of the most criticized features of the electoral college. While it might appear not to be the case, the "winner-take-all" system could effectively continue in a number of states under a district vote system. This would be true in the five states which have only one Representative, in the District of Columbia, in one-party states, in states where party strengths are uniform throughout, and in the voting in each state for the two electors corresponding to its two Senators.[138] Even in states where the electoral votes would be split, the votes of the minority in each district would be suppressed at an intermediate stage. Indeed, it would be possible for the popular vote loser in a state to obtain a majority of its electoral votes. This could happen where a candidate won a majority of districts by narrow margins and lost a minority of districts by large margins. The district vote proposal is subject to the further objections that it could lead to the gerrymandering of districts for partisan advantage and that it would favor small states by reducing the importance of large states. As one authority observed:

> The basic conservative bias of the district system could be expected to reassert itself in election after election because the balance of the existing general ticket system—the inflated electoral vote power of conservatives in small states versus the swing power of liberal groups in the large states—would be erased. Conservatives, moreover, would frequently win more of the districts in large states than their percentage of the statewide vote would justify, because the popular vote majorities in conservative suburban and rural districts generally tend to be less than the liberal majorities in center-city districts. . . . There would be a continuing danger of minority Presidents in close Presidential elections.[139]

While the proportional vote plan would more accurately reflect the popular vote cast in each state than the district and automatic vote plans, it would favor citizens of the smaller states and introduce new inequities. This is because larger states would lose the advantage they possess by reason of the "winner-take-all" or unit vote rule feature of the present system, while small states would retain the voting advantage they have by reason of the unequal distribution of electoral votes, which gives such states greater electoral votes per resident. Another defect in the propor-

138. In the fifty-two instances that district vote plans were used between 1789 and 1892 (see supra note 102), all of a state's electoral votes were cast as a unit thirty-six times. In 1960, if the then existing congressional districts were employed as electoral districts, twenty-one states would have cast their votes as a bloc; seven would have cast all but one as a bloc; and in six states, the minority party would have won under twenty-five percent of the votes. The electoral votes of most large states, on the other hand, would have been effectively split. Under such a district system in 1960, Nixon would have won a substantial majority of the electoral votes. "The Electoral College," supra note 85, at 21.

139. N. Peirce, supra note 2, at 163.

tional plan is that it could seriously weaken the two party system by encouraging third parties to enter candidates in an effort to split the electoral vote and throw the election into Congress. The ability of splinter groups to do so would be substantially increased, since each state's electoral votes would be divided among all the candidates in proportion to their statewide popular vote.[140]

When examined, the objections which have been addressed to direct election do not present a very good case against such a change in our system. Perhaps the most serious objection which has been levelled is that direct election would lead to a proliferation of parties and thereby weaken our two-party system. Extensive research by political scientists has pointed to numerous reasons for our two-party system.[141] A renowned political scientist stated that:

> [S]everal factors conspired toward the development of the American dual party pattern. These included the accidents of history that produced dual divisions on great issues at critical points in our history, the consequences of our institutional forms, the clustering of popular opinions around a point of central consensus rather than their bipolarization, and perhaps others.[142]

Another said:

> The bounty of the American economy, the fluidity of American society, the remarkable unity of principle of the American people, and, most important, the success of the American experiment have all militated against the emergence of large dissenting groups that would seek satisfaction of their special needs through the formation of political parties. Third-party politics is generally radical politics, and surely we need not rehearse once again the obvious fact that the appeals of radicalism have gone unheeded in America . . . .[143]

Others have concluded that our state party structure and the selection of representatives by plurality vote from single member districts have strongly contributed to the two-party system.[144] The Presidency itself is regarded as a principal factor because it,

> unlike a multiparty cabinet, cannot be parceled out among minuscule parties. The circumstances stimulate coalition within the electorate before the election rather than within the parliament after the popular vote. Since no more than two parties can for long compete effectively for the Presidency, two contending groups tend to develop, each built on its constituent units in each of the 50 states. [145]

140. See N. Peirce, supra note 2, at 358-59.

141. The material in this section is derived from the work papers of the American Bar Association Commission on Electoral College Reform.

142. V. Key, Jr., Politics, Parties and Pressure Groups 210 (5th ed., 1964).

143. C. Rossiter, Parties and Politics in America 8 (1962).

144. See W. Goodman, The Two Party System in the United States 30-32 (1956); E. Schattschneider, Party Government 69-84 (1942). See also V. Key, Jr., supra note 142, at 208-09; A. Sindler, Political Parties in the United States 50-56 (1966).

145. V. Key, Jr., supra note 142, at 209.

The abolition of the electoral college would not change these and other contributing factors. If anything, direct election could strengthen the two-party system, since a third party would no longer have the ability to influence the outcome of an election, as at present, with a small number of electoral and popular votes. Furthermore, a direct election system can be coupled with institutional safeguards which would operate to support the system.[146]

It has been suggested that direct election would destroy our federal system and wipe out state lines.[147] At the base of this argument is the contention that the allotment of two electoral votes to each state, corresponding to its two Senators, represented a great compromise reached between small and large states at the Constitutional Convention and, therefore, the abolition of the electoral college would vitiate a compact which made the Constitution possible. As earlier noted, the historical facts are to the contrary; and, as Senator Mike Mansfield put it:

> [T]he Federal system is not strengthened through an antiquated device which has not worked as it was intended to work when it was included in the Constitution and which, if anything, has become a divisive force in the Federal system by pitting groups of States against groups of States. As I see the Federal system in contemporary practice, the House of Representatives is the key to the protection of district interests as district interests, just as the Senate is the key to the protection of State interests as State interests. These instrumentalities, and particularly the Senate, are the principal constitutional safeguards of the Federal system, but the Presidency has evolved, out of necessity, into the principal political office, as the courts have become the principal legal bulwark beyond districts, beyond States, for safeguarding the interests of all the people in all the States. And since such is the case, in my opinion, the Presidency should be subject to the direct and equal control of all the people.[148]

Furthermore, it has also been suggested that direct election would weaken the position of minority groups and cause many of their grievances to go unheeded.[149] This argument is based on the view that the present system gives them greater voting strength than their numbers would justify and forces the political parties to be responsive to their needs, since they may be able to influence the disposition of all the electoral votes of their state. This reasoning runs contrary to the fundamental principle of representative government in the United States today,

146. See pages 40-41, infra.

147. See 113 Cong. Rec. 1586-87 (daily ed. Feb. 6, 1967), 113 Cong. Rec. 6586-88 (daily ed. May 9, 1967). See Spering, How to Make the Electoral College Constitutionally Representative, 54 A.B.A.J. 763 (1968).

148. 107 Cong. Rec. 350 (1961).

149. This view is articulated by Professor Albert J. Rosenthal of Columbia Law School. See Rosenthal, "The Last Graduation of the Electoral College," to be published in The New Leader in the fall of 1968; Rosenthal, "The Constitution, Congress, and Presidential Elections," to be published in the Michigan Law Review in the fall of 1968.

namely, "one person, one vote," without regard to race, sex, economic state, or place of residence. "The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government."[150]

Theory aside, it is questionable whether minority groups would be any less effective under a system of direct election. Since presidential elections would be decided on the basis of popular votes, neither of the parties could afford to alienate any large groups of voters. In addition, under direct election, groups in one state could unite with groups in other states and the votes of all would be counted at the national level. This factor could well increase the voting strength of groups whose members were distributed throughout the United States.

One objection that used to be urged was that despite its defects and dangers, the electoral college should be retained because it is the only institution weighted in favor of the interests of large states and their urban centers.[151] It was further argued that representation in Congress and the state legislatures was weighted, due largely to malapportionment and gerrymandering, in favor of the interests of small states and their rural areas. Thus, the electoral college was part of a "solar system" in which the interests of all were represented. However this was before the "one person, one vote" decisions of the Supreme Court which have substantially changed the "solar system" of the 1950's and early 1960's and have brought new standards of political equality to the field of legislative reapportionment. The corresponding rationale for the electoral college has now largely disappeared as a result of these decisions.

On the positive side, direct election is the only method that can assure that the candidate with the largest number of popular votes will be elected President. It is the only method that would eliminate once and for all the principal defects of our system: the "winner-take-all" feature and its cancellation of votes; the inequities arising from the formula for allocating electoral votes among the states; the anachronistic and dangerous office of presidential elector; and the archaic method by which contingent elections are handled. There would no longer be "sure states" or "pivotal states" or "swing voters" because votes would not be cast in accordance with a unit rule and because campaign efforts would be directed at people regardless of residence. Factors such as fraud and accident could not decide the disposition of all of a state's votes. Direct election would bring to presidential elections the principle which is used and has worked well in elections for Senators, Representatives, governors, state legislators, may-

150. MacDougall v. Green, 335 U.S. 281, 290 (1948).

151. This argument was effectively articulated during the 1956 Senate debates by Senators Paul H. Douglas, John F. Kennedy, and others. See 102 Cong. Rec., supra note 115.

ors, and thousands of other officials at all levels of government. That principle, "one person, one vote," would make the votes cast by all Americans in presidential elections of equal weight. All votes would be reflected in the national tally. None would be magnified or contracted. All citizens would have the same chance to affect the outcome of the election. Finally, under a popular vote system, presidential elections would operate the way most people think they operate and expect them to operate.

With respect to the implementation of such a system, the recommendations of the American Bar Association Commission on Electoral College Reform offer a practical and workable formula.[152] The Commission, as already noted, suggested a constitutional amendment requiring a popular plurality of at least forty percent to be elected President and Vice President[153] and in the event no candidate received such a number, a runoff between the top two candidates. The requirement of a plurality rather than a majority would be consistent with the rule which prevails in every other election, including the election of electors, and with the total popular vote received by fourteen of our Presidents. The ABA Commission chose a forty percent figure so as to render remote the possibility of a contingent election and to assure a reasonable mandate to the person elected President. The Commission felt that a forty percent figure, together with a national runoff, would operate to discourage splinter parties from trying to decide the outcome of an election. The Commission reasoned that it would seldom happen that neither of the major candidates would receive a forty percent plurality, even with third party candidates in the field; and that it would be unlikely that a minor party candidate could ever obtain such a plurality.[154] However, even if a third party candidate obtained more than twenty percent of the popular vote and succeeded in

152. See "Electing the President," supra note 1; see supra note 133.

153. The Commission recommended that each voter cast a vote jointly applicable to both offices so as to eliminate the possibility of a split ticket and implement the expectation of the people that the presidential and vice presidential candidates of the same party will be elected. This recommendation is similar to provisions which appear in the various state constitutions requiring a joint vote for governor and lieutenant governor. E.g., Conn. Const. art. 4, § 3; Hawaii Const. art. IV, § 2; N.M. Const. art. V, § 1; N.Y. Const. art 4, § 1.

154. Only in the elections of 1856 and 1912 did a third party candidate receive more than twenty percent of the popular vote, and on both occasions a major party candidate received more than forty percent of the popular vote. In the elections of 1824, 1848, 1860, and 1924 third party candidates received between ten and twenty percent of the popular vote, while one or both (1848) major candidates had more than forty percent. In 1860, Lincoln received 39.8 percent of the popular vote, even though his name was not on the ballot in ten states and in the face of two third party candidates who obtained a total of 30.8 percent of the popular vote. In the close election of 1948, J. Strom Thurmond and Henry A. Wallace each received under three percent of the popular vote. See Appendices B and C.

preventing the election of a President in the first election, he would not be able to decide the election in Congress or in such an archaic device as the electoral college. [155] The people, in a runoff between the top two candidates, would decide the election. As the Commission stated:

> A runoff between the highest two would seem to have the tendency to limit the number of minor party candidates in the field in the original election because it is improbable that a minor candidate would be one of the top two; and the influence of such a group would be asserted more effectively, as now, before the major party nominations and platforms are determined.[156]

The Commission's recommendation that the qualifications for voting in a presidential election be the same as those for voting for members of Congress would make substantially uniform the voting qualifications in both federal and state elections. This is because qualifications for voting in congressional elections are defined by state law and are tied in with the qualifications for voting for members of the most numerous branch of the state legislatures.[157] However, under the ABA's recommendations, a state could prescribe less stringent residence requirements for presidential elections, as many have already done,[158] and Congress could establish

155. While elections and nominations usually are settled on the basis of plurality voting at the state level, the runoff has been used with success in primary elections in the following states: Alabama, Arkansas, Georgia, Florida, Iowa, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, and Virginia. In most of these states, the runoff is resorted to when no candidate receives a majority of the popular votes and it is limited to the top two vote getters in the first election. Iowa and South Dakota, however, require a plurality of thirty-five percent. See generally, C. Ewing, Primary Elections in the South (1953); V. Key, Jr., Southern Politics in the State and Nation 416-23 (1949). The runoff is used in connection with presidential elections in France and in a number of Latin American and African countries. In December 1965, France held its first presidential election by direct election. Due to the presence of six candidates, no one received a majority of the popular vote and a runoff between Charles De Gaulle and Francais Mitterrand was held two weeks later. Valuable information on the workings of runoff elections in the United States and abroad appear in the unpublished papers of the ABA Comm'n on Electoral College Reform.

156. "Electing the President," supra note 1, at 6.

157. U.S. Const. art. I, § 2, and U.S. Const. amend. XVII require voters for members of Congress to have the "qualifications requisite for electors of the most numerous branch of the State legislatures." The twenty-fourth amendment prevents a state from imposing a poll or other tax as a voting qualification in elections for President or Vice President, for presidential electors, or for Senators or Representatives. The recommendation of the ABA Commission would likely operate to prevent a state from unreasonably reducing its voting requirements so as to gain some special advantage in presidential elections from the number of its voters, since the reduction would apply to elections for state legislators and Congressmen as well. It does not follow, therefore, as some have maintained, that the nationalization of voting qualifications would be the by-product of direct election. See 113 Cong. Rec. 6587 (daily ed. May 9, 1967).

158. More than one-half of the states have relaxed their residence rules for voting in

uniform residence and age requirements should the need ever arise for it to do so.[159]

The Commission's recommendation that the state legislatures be authorized to prescribe the places and manner of holding presidential elections, subject to a reserve power in Congress to make or alter such regulations, is similar to provisions now in article I governing elections for Senators and Representatives.[160] The recommendation that Congress be given the residual power to legislate on the question of appearances on the ballot would, if accepted, represent an expansion of congressional power. The ABA Commission regarded it as essential that the people of every state have the right to vote for major party candidates. Were a state to exclude the name of a major candidate from the ballot, Congress would have the power to deal with such a case.[161]

On balance, the author believes that a system of direct, nationwide popular vote presents the only real alternative to the existing electoral college system.

V. Conclusion

The workings of the electoral college over a period of almost two centuries have demonstrated the compelling need for substantial reform. The electoral college is ridden with defects and dangers which could operate to reject the popular-vote winner—the man intended by the people to be their President. Its continuance plainly constitutes a serious threat to the smooth functioning of our governmental system.

The philosophy behind the electoral college belongs to a bygone age.[162] The college was designed for an age when America was an agrarian society, when isolation, poverty and illiteracy were common, when transportation and communication were in their infancy, when the right to vote was severely restricted, when political parties did not exist, when the principle of popular vote was not firmly established and when our leaders

presidential elections. See Nomination and Election of the President of the United States, supra note 5, at 252-59. See also The Wall Street Journal, March 20, 1968, at 1, col. 1.

159. For the residence and age requirements of the states, see The Council of State Governments, The Book of the States, 1968-69. The voting age is eighteen in Georgia and Kentucky, nineteen in Alaska, twenty in Hawaii, and twenty-one in forty-six states and the District of Columbia.

160. U.S. Const. art. I, § 4.

161. See note 92 supra, and accompanying text. In order to get on the ballot, a political party must comply with the requirements imposed by state laws. These requirements are easily met in some states, while in other states they are difficult to meet. See generally Nomination and Election of the President and Vice President of the United States, supra note 5.

162. The Supreme Court gave recognition to this fact in Gray v. Sanders, 372 U.S. 368, 376-77 n.8 (1963).

doubted the capability of the people to choose the President. The reasons which motivated the Framers to create the electoral college no longer exist.

The America of today is a highly industrialized and sophisticated society and the world's leader in free enterprise. Most of the people enjoy a good standard of living, are literate, and are in constant contact with others near and far. Transportation is rapid and communication almost instantaneous. The right to vote is nearly universal,[163] and political parties present the various choices for President. And, most important, the principle of popular election has met the test of time so that today, in the United States, it is a cherished and firmly established principle of representative government.

Not only have the reasons for the electoral college long since vanished, but the institution has not fulfilled the design of the Framers. Today it represents little more than an archaic and undemocratic counting device. There is no good reason for retaining such a formula for electing the President of the United States.

As it exists today, the nature of the Presidency demands that there be no election barrier between the President and the people. The President stands at the head of our government. He serves as our highest national officer and as the symbol and spokesman for all the people. The United States, not any particular section, state or group of voters, is his constituency. His powers and duties are national in character, and the problems and issues with which he must deal are national and worldwide in scope. He has been aptly described as First Executive, First Legislator, First Diplomat, Commander-in-Chief, and Leader of his Party.[164]

Because the President plays so large a role in the affairs of our nation, it is all the more essential that he be elected by a method which assures fair and equal votes for all and not by a method which could operate to frustrate the workings of democracy, undermine the office of President, and render suspect from the outset his administration. "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[165] Surely, the time has arrived when we should recognize this principle in the election of our nation's two highest officials.

163. See N. Peirce, supra note 2, at 205-48.

164. L. Heren, The New American Commonwealth 34-35 (1968).

165. Gray v. Sanders, 372 U.S. 368, 381 (1963).

APPENDIX A

Present Distribution of Electoral Votes and Ratio of Votes to Population (Based on 1960 Census)

State	Votes	Ratio*	Rank†
Alabama	10	326,674	33
Alaska	3	75,389	1
Arizona	5	260,452	17
Arkansas	6	297,712	23
California	40	392,930	51
Colorado	6	292,325	21
Connecticut	8	316,904	29
Delaware	3	148,764	5
District of Columbia	3	254,652	16
Florida	14	353,682	40
Georgia	12	328,593	34
Hawaii	4	158,193	8
Idaho	4	166,798	9
Illinois	26	387,736	48
Indiana	13	358,654	42
Iowa	9	306,369	25
Kansas	7	311,230	28
Kentucky	9	337,573	37
Louisiana	10	325,702	32
Maine	4	242,316	15
Maryland	10	310,069	26
Massachusetts	14	359,984	44
Michigan	21	372,533	45
Minnesota	10	341,386	38
Mississippi	7	311,163	27
Missouri	12	359,984	43
Montana	4	168,692	10
Nebraska	5	282,266	19
Nevada	3	95,093	2
New Hampshire	4	151,730	6
New Jersey	17	356,870	41
New Mexico	4	237,756	14
New York	43	390,286	49
North Carolina	13	350,473	39
North Dakota	4	158,112	7
Ohio	26	373,325	46

APPENDIX A (Continued)

State	Votes	Ratio*	Rank†
Oklahoma	8	291,036	20
Oregon	6	294,781	22
Pennsylvania	29	390,323	50
Rhode Island	4	214,872	12
South Carolina	8	297,824	24
South Dakota	4	170,129	11
Tennessee	11	324,281	31
Texas	25	383,187	47
Utah	4	222,657	13
Vermont	3	129,960	4
Virginia	12	330,579	36
Washington	9	317,024	30
West Virginia	7	265,774	18
Wisconsin	12	329,315	35
Wyoming	3	110,022	3

* This column shows the number of persons (based on the 1960 census) per electoral vote in each state and the District of Columbia. The national average per electoral vote is 333,314. See 1961 Senate Hearings at 670.

† This column shows the rank of each state (and the District) by reason of its ratio. It will be noted that states with few electoral votes have low ratios and high ranks.

APPENDIX B

*Percentage of Popular Vote and Electoral Vote of Presidential Candidates, 1824-1964**

Year	Candidates	Percentage of Popular Vote	Percentage of Electoral Vote
1824	*John Q. Adams*	31.9	32
	Andrew Jackson	42.2	38
	William H. Crawford	13.0	16
	Henry Clay	13.0	14
1828	Andrew Jackson	56.0	68
	John Q. Adams	44.0	32
1832	Andrew Jackson	54.5	77
	Henry Clay	37.5	17
	William Wirt	8.0	2
1836	Martin Van Buren	50.9	58
	William H. Harrison	36.6	25
	Hugh L. White	9.7	9
1840	William H. Harrison	52.9	80
	Martin Van Buren	46.8	20
1844	*James K. Polk*	49.6	62
	Henry Clay	48.1	38
1848	*Zachary Taylor*	47.3	56
	Lewis Cass	42.5	44
	Martin Van Buren	10.1	0
1852	Franklin Pierce	50.9	86
	Winfield Scott	43.8	14
1856	*James Buchanan*	45.6	59
	John C. Fremont	33.3	39
	Millard Fillmore	21.1	2
1860	*Abraham Lincoln*	39.8	59
	Stephen A. Douglas	29.4	4
	John C. Breckinridge	18.2	24
	John Bell	12.6	13
1864	Abraham Lincoln	55.2	91
	George B. McClellan	44.9	9

APPENDIX B (Continued)

Year	Candidates	Percentage of Popular Vote	Percentage of Electoral Vote
1868	Ulysses S. Grant	52.7	73
	Horatio Seymour	47.3	27
1872	Ulysses S. Grant	55.6	82
	Horace Greeley	43.8	18†
1876	*Rutherford B. Hayes*	47.9	50 (185 votes)
	Samuel J. Tilden	50.9	50 (184 votes)
1880	*James A. Garfield*	48.3	58
	Winfield S. Hancock	48.2	42
1884	*Grover Cleveland*	48.5	55
	James G. Blaine	48.3	45
1888	*Benjamin Harrison*	47.8	58
	Grover Cleveland	48.6	42
1892	*Grover Cleveland*	46.0	62
	Benjamin Harrison	43.0	33
	James B. Weaver	8.5	5
1896	William McKinley	51.0	61
	William J. Bryan	46.7	39
1900	William McKinley	51.7	65
	William J. Bryan	45.5	35
1904	Theodore Roosevelt	56.4	71
	Alton B. Parker	37.6	29
1908	William H. Taft	51.6	66
	William J. Bryan	43.1	34
1912	*Woodrow Wilson*	41.9	82
	Theodore Roosevelt	27.4	16.5
	William H. Taft	23.2	1.5
	Eugene V. Debs	6.0	0
1916	*Woodrow Wilson*	49.3	52
	Charles E. Hughes	46.1	48
1920	Warren G. Harding	60.3	76
	James M. Cox	34.1	24

APPENDIX B (Continued)

Year	Candidates	Percentage of Popular Vote	Percentage of Electoral Vote
1924	Calvin Coolidge	54.0	72
	John W. Davis	28.8	26
	Robert M. LaFollette	16.6	2
1928	Herbert C. Hoover	58.2	84
	Alfred E. Smith	40.8	16
1932	Franklin D. Roosevelt	57.4	89
	Herbert C. Hoover	39.6	11
1936	Franklin D. Roosevelt	60.8	98
	Alfred M. Landon	36.5	2
1940	Franklin D. Roosevelt	54.7	85
	Wendell Willkie	44.8	15
1944	Franklin D. Roosevelt	53.4	81
	Thomas E. Dewey	45.9	19
1948	*Harry S Truman*	49.6	57
	Thomas E. Dewey	45.1	36
	J. Strom Thurmond	2.4	7
	Henry A. Wallace	2.4	0
1952	Dwight D. Eisenhower	55.1	83
	Adlai E. Stevenson	44.4	17
1956	Dwight D. Eisenhower	57.4	86
	Adlai E. Stevenson	42.0	14
1960	*John F. Kennedy*	49.5	62
	Richard M. Nixon	49.3	36
1964	Lyndon B. Johnson	61.1	90
	Barry M. Goldwater	38.5	10

* All electoral percentages are rounded to the nearest whole number and only the names of candidates are listed who received more than five percent of the total popular vote cast, except for the close election of 1948. The winning candidate in each election is listed first. Those whose names are italicized were elected President with less than a majority of the popular vote. See supra note 52 for the sources upon which the popular vote is based.

† Since Greeley died before the electors met (see supra note 93), the sixty-six electoral votes which he would have received were distributed among four other persons. The chart reflects the percentage of the electoral vote these sixty-six votes represented.

APPENDIX C

*Elections in Which a Minor Shift of Popular Vote in Certain States Would Have Elected Popular Vote Loser President**

Election	Required Shift	States	Major Candidates	Popular and Electoral Votes Received By Major Candidates	Popular and Electoral Votes After Required Shift	Popular Vote Margin After Shift
1828	11,517 (0.997%) (2.189%)	Ohio, Ky., N.Y., La. and Ind.	Andrew Jackson John Q. Adams	647,292(178) 507,730(83)	635,775(129) 519,247(132)	116,528
1836	14,061 (0.937%) (4.600%)	N.Y.	Martin Van Buren William H. Harrison	764,198(170) 549,508(73)	750,137(128)† 563,569(115)	186,568
1840	8,386 (0.349%) (0.949%)	Me., N.J., N.Y. and Pa.	William H. Harrison Martin Van Buren	1,275,612(234) 1,130,033(60)	1,267,226(144) 1,138,419(150)	128,807
1844	2,555 (0.097%) (0.544%)	N.Y.	James K. Polk Henry Clay	1,339,368(170) 1,300,687(105)	1,336,813(134) 1,303,242(141)	33,571
1848	3,227 (0.125%) (1.824%)	Del., Ga. and Md.	Zachary Taylor Lewis Cass	1,362,101(163) 1,222,674(127)	1,358,874(142) 1,225,901(148)	132,973
1864	38,111 (0.947%) (1.994%)	Conn., Ind., Md., N.Y., Pa., Ore. & Wisc.	Abraham Lincoln George B. McClellan	2,219,362(212) 1,805,063(21)	2,181,251(116) 1,843,174(117)	338,077
1868	29,862 (0.522%) (1.923%)	Ala., Calif., Conn., Ind., Nev., N.C., & Pa.	Ulysses S. Grant Horatio Seymour	3,013,313(214) 2,703,933(80)	2,983,451(144) 2,733,795(150)	249,656
1884	575 (0.006%) (0.051%)	N.Y.	Grover Cleveland James G. Blaine	4,875,971(219) 4,852,234(182)	4,875,396(183) 4,852,809(218)	22,587

APPENDIX C (Continued)

Election	Required Shift	States	Major Candidates	Popular and Electoral Votes Received By Major Candidates	Popular and Electoral Votes After Required Shift	Popular Vote Margin After Shift
1892	37,364 (0.317%) (1.349%)	Calif., Ind., N.J., N.Y. and Wisc.	Grover Cleveland Benjamin Harrison	5,556,982(277) 5,191,466(145)	5,519,618(197) 5,228,830(225)	290,788
1896	20,296 (0.150%) (1.207%)	Calif., Del., Ind., Ky., Ore., & W. Va.	William McKinley William J. Bryan	7,113,734(271) 6,516,722(176)	7,093,438(223) 6,537,018(224)	556,420
1900	74,755 (0.551%) (2.848%)	Ind., Kan., Md., Neb., Ohio, Utah, & Wyo.	William McKinley William J. Bryan	7,219,828(292) 6,358,160(155)	7,145,073(222) 6,432,915(225)	712,158
1908	75,041 (0.533%) (2.204%)	Del., Ind., Kan., Md., Mo., Mont., Ohio, and W. Va.	William H. Taft William J. Bryan	7,679,114(321) 6,410,665(162)	7,604,073(241) 6,485,706(242)	1,118,367
1916	1,983 (0.0112%) (0.0214%)	Calif.	Woodrow Wilson Charles E. Hughes	9,131,511(277) 8,548,935(254)	9,129,528(264) 8,550,918(267)	578,610
1948	29,294 (0.063%) (0.275%)	Calif., Ill., and Ohio	Harry S Truman Thomas E. Dewey	24,179,345(303) 21,991,291(189)	24,150,051(225) 22,020,585(267)	2,129,466
1960	11,424 (0.0167%) (0.157%)	Hawaii, Ill., N. Mex., Mo., and Nev.	John F. Kennedy Richard M. Nixon	34,220,984(303) 34,108,157(219)	34,209,560(253) 34,119,581(269)	89,979

* The "required shift" column shows the number of popular votes that could have changed the outcome. The first percentage figure represents the percentage of the total national votes cast which such number constitutes. The second represents the percentage of the total popular vote cast in the selected states which such number constitutes. The nature of the other columns is self-explanatory. The source materials used in the preparation of the chart are N. Peirce, supra note 2, at 317-21, and Petersen, supra note 52.

† Although neither candidate would have had an electoral majority, it is believed that the required shift would have induced the other Whig presidential candidates, who had won forty electoral votes, to throw their votes to Harrison and thereby make him President. In that event, Harrison would have had 155 electoral votes, seven more than a majority. See Petersen, supra note 52, at 22.