ELECTORAL COLLEGE REFORM:

DIRECT POPULAR VOTE

WITHOUT A CONSTITUTIONAL AMENDMENT

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I. ORIGIN AND DEVELOPMENT OF THE ELECTORAL COLLEGE

> 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, is he is faithful, and dangerous, if he is not.
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> —Senate Document No. 22
> 19th Cong., 1st Sess.
> (1826) 4.

A perceptive citizen, reading this Senate report in 1826, would have been struck by two facts which have continued to amaze observers through the intervening centruy and a half of American history. The first of these facts is the tremendous adaptability of our political institutions. Not forty years after the writing of the Constitution, the Framer's once-praised scheme for choosing the President had gone through an extra-Constitutional change that had completely revolutionized the electoral process. The second fact is that by 1826 this revolution had transformed the electoral college from a solemn institution into a vestigal organ, a veritable political appendix that could become inflamed at any time. No longer highly praised, as it has been at its inception, it was already an archaic device in need of drastic revision.

Yet, in the years since 1826, no significant change has been made in the electoral college. In fact, the only change at all oc-

cured in the next few years, as the process that had already transformed most electors into "mere agents" of the public was made complete. One may legitimately ask why, if the American system is so noted for its capacity for change, such an outmoded and potentially dangerous system — concerned not with some peripheral element of the political process but with the vitally important function of electing a President — has managed to survive unchanged for so many years. Some possible explanations of this anomaly will be discussed later; at this stage, it is important to study the origins of the electoral college and the remarkable evolution that occured in its first forty years.

A. THE CONSTITUTIONAL CONVENTION

When the Framers met in Philadelphia in the summer of 1787 it was apparently conceded that some form of national executive would be essential. The weakness of the government under the Articles of Confederation had stemmed in large part from the absence of any executive power, except in so far as Congress was willing or able to administer the laws it had enacted.[1] It was this weakness which led Congress to issue the call for a new Constitutional Convention, and every plan of government put before the Convention made some provision for a national executive.[2]

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[1] N. Peirce, The Peoples President 31 (1968) (Hereinafter cited as Peirce).

[2] J. Feerick, The Electoral College: Why it was Created, 54 ABAJ 249 (1968) (Hereinafter cited as Feerick, 54 ABAJ).

1. How Should the President be Chosen?

But the question of how that executive was to be chosen was not so easily resolved. The problem was first seriously considered on June 2, just two days after the Convention began its substantive deliberations, was debated many times throughout the summer, and was not finally settled until September 6, the next to the last day. In the intervening three months the Covention had resolved such emotion-laden questions as the Great Compromise and slavery, but so vexing was the problem of Presidential selection that James Wilson of Pennsylvania could say that it was, "in truth, the most difficult of all on which we have had to decide".[3]

During the course of these debates the Framers considered at least ten major proposals and many lesser ones. But only three basic plans appear to have received much support: direct election by the people, some form of election by Congress, and some form of indirect election by electors. Direct election, though repeatedly proposed by such luminaries as Wilson and James Madison, was not adopted by the Convention. The most important reason for this rejection was a fear that the electorate could not become sufficiently informed to make an intelligent choice; as George Mason stated, "The extent of the Country makes it impossible that the people can have the requisite capacity to judge the respective pretensions of the Candidates."[4] Although this fear was perhaps overstated, in view of how quickly the various states adopted popular election, it was certainly not ill-founded. The Framers met before the telegraph, or even the Pony

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[3] Id. at 252.

[4] 2 M. Farrand, The Records of the Federal Constitutional Convention of 1787 606 (Hereinafter cited as Farrand).

Express, had made possible relatively quick communications. And travel was no better. Roads were almost non-existant in the South, and so bad in the North that it could take six days to get from New York to Boston.[5]

Nor was this the only objection to direct vote. Other serious problems were the fear that the large states would totally dominate such an election (something that has happened anyway) and the disadvantage to the Southern states arising from the fact that their Negro slaves — who were partially counted for purposes of Congressional representation — could not vote in any direct election.[6]

An entirely different set of considerations led the Framers to reject election by Congress, though that plan had great appeal and was even adopted on at least five occasions.[7] The appeal of Congressional election is not hard to understand, for it was a system with which most of the Framers were thoroughly familiar: in 1787 the governors of eight of the thirteen states were chosen by their legislatures, and there was more than simple logic behind the belief that the executive, who was to execute the laws of Congress, should be responsible to Congress.[8] In the end, however, this plan was rejected. Governor Morris expressed the fears of many when he stated that an election by Congress would lead to "intrigue, cabal, and faction",

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[5]Ferrick, 54 ABAJ at 249.

[6]Peirce, at 34-39.

[7]J. Ferrick, The Electoral College — Why it Ought to be Abolished, 37 Fordham LR 1 (1968) (Hereinafter cited as Ferrick, 37 Fordham).

[8]Ferrick, 54 ABAJ at 249-250.

thereby relpacing "real merit" as the criteria for election.[9] It was also feared that an incumbent President, planning ahead for his own re-election, would be too subservient to Congress.[10]

Therefore, when the Framers finally approved a system of indirect election by electors, they did so not because of that plan's merits per se, but because it avoided the faults of the various alternative plans. Specifically, the electors would presumably be among the states' better-informed men, so they would be able to vote intelligently for one of the various candidates. And they would not be subject to "intrigue, cabal, and faction" becuase they would not — like Congress — be a permanent body that met regularly to discharge other duties. They would not even meet in one place, where they could deliberate together, but would be scattered widely in the various state capitals.[11]

2. Details of the Intermediate Elector Plan.

Having decided on an independent elector plan in principle, however, still left several key details unresolved. These were: 1) How were the electors to be chosen? 2) How many electors should there be? And 3) How would the interests of the large states and small states be balanced?

The first of these problems, how to choose the electors, was

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[9] Farrand, at 29.

[10] Feerick, 37 Fordham at 6.

[11] What is now known as the "electoral college" was therefore never intended as a college at all. That term, never used in the Constitution, has evolved since.

the most obvious. None of the many elector proposals that were offered during the course of the Convention could even have been debated rationally without knowing how the all-important electors were to be selected. Perhaps the Framers already realized, though only subconsciously, that whoever was given the power to select the electors would soon make the electors his agents, and would reserve to himself the power to decide who would be President. Though there were many suggestions as to who should have this power, the two principle plans of selection were to have the electors chosen by the legislatures or elected by the people.[12] The Framers neatly satisfied both factions by providing, simply, that "Each State shall appoint, in such Manner as the Legislature thereof may direct, ... [its] Electors".[13]

Unlike the problem of chosing electors, the question of how many there were to be was never seriously debated by the Convention. Most proposals seem to have ignored this issue altogether, and the others appear to have done no more than incorporate some arguably supportable plan, such as allocating one elector each to the small states, two to the medium states, and three to the large states.[14] Like the plan to let the legislatures determine how the electors were to be chosen, the proposal that they be "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"[15] apparently originated in a select Com-

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[12]Feerick, 54 ABAJ at 250-51.

[13]U.S Const., art. II, §1.

[14]Feerick, 54 ABAJ at 250-51.

[15]U.S. Const., art. II, §1.

mittee of Eleven[16], and was accepted by the Convention with no serious debate.[17] Most importantly, there is no evidence that this plan was the result of any compromise between the large and small states, whereby the small states gained proportionately greater influence because they were to have three electors regardless of their population. This characteristic of the system was never mentioned, either in several days of debate at the Convention or in the subsequent ratification debates in the various states, and could not have been considered important. [18]

If the allocation of electors did not solve the Framer's third problem — that of balancing the large and small states — the plan for a contingent election in the House of Representatives did. Since a majority of all electoral votes was required to elect a President, and since it was felt that the electors would most likely vote for men from their own states, the Framers generally believed that very few elections would be decided by the electors. The votes would be so scattered among various candidates that none would have a majority, but candidates from the large states would have the most votes. The actual electoral voting, therefore, was viewed as little more than a nomination process, with the final election being made in a special House election.[19] In this election the interests of the small states

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[16]This committee, with one member from each state then present, was created near the end of the Convention to report on all matters still unresolved.

[17]Peirce, at 36-37 and 43-45, and Feerick, 54 ABAJ at 252-53, both discuss the Convention's debate on the committee's work, but neither records any mention of these points.

[18]Peirce, at 36-37.

[19]Feerick, 37 Fordham at 10, and 54 ABAJ at 253. See also Peirce, at 37.

would be protected by a provision that each state have but one vote, with a majority of all states necessary for election.[20] The danger of "intrigue" was lessened by a provision that the House begin balloting immediately upon counting the electoral votes and learning of the electoral deadlock.

B. THE RATIFICATION DEBATES:

In the ratification debates this method of choosing the President escaped unscathed. Writing six months after the Convention had completed its work, Alexander Hamilton was able to say in The Federalist that "The mode of appointment of the chief magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from [the Constitution's] opponents".[21] And Wilson echoed these sentiments when he noted the plain fact that the election process "is not objected to".[22] This lack of criticism was remarkable considering the wide differences of opinion on an electoral method revealed during the Convention itself. It was even more remarkable when it is realized that the Framers took strong and inconsistent stands on the true effect of the electors, and that no one criticized even these blatant ambiguities.

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[20] U.S. Const., art. II, §1. The Committee of Eleven had originally proposed a Senate election, but the Framers substituted the one-vote-per-state House election because they feared the Senate's confirmation and ratification powers should not be increased by including the power to elect the President.

[21] The Federalist No. 68, at 457-58 (Cooke ed. 1961).

[22] 2 J. Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 2ND ed (Washington, 1836) 511. (Hereinafter cited as Elliott).

The Framers divided into two main camps. On the one hand, many agreed with James Monroe (not a Framer) that the electors would be chosen by the legislatures and that the President would therefore owe his election "to the state governments and not to the people at large".[23] On the other hand Edmund Randolph claimed that, in spite of the deliberately vague wording of the Constitution, "the electors must be elected by the people at large" (emphasis supplied).[24] C.C. Pinckney went even further when he said that the President himself was to be popularly elected, albeit "through the medium of electors chosen particularly for that purpose".[25] George Mason disagreed, claiming that the electors were a sham and deception upon the people, "thrown out to make them believe they were to choose [the President]".[26] And others, like Madison, came down squarely on each side of the issue, claiming both that "The President is indirectly derived from the choice of the people"[27] and also that "the state legislatures ... must in all cases have a great share in [the election], and will perhaps in most cases of themselves determine it".[28]

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[23] 3 Elliott at 488.

[24] id. at 486.

[25] 4 Elliott at 304.

[26] 3 Elliott at 493.

[27] The Federalist No. 39, at 252 (Cooke ed. 1961).

[28] The Federalist No. 45, at 311 (Cooke ed. 1961).

C. EVOLUTION OF A WORKABLE ELECTORAL SYSTEM

1. The Need for Immediate Change.

Opponents of ratification for some reason never seized on these ambiguities or contradictions, but modern observers have, and their conclusion is inescapable: after failing for three months to agree on either direct vote, Congressional election, or one of the many other plans that were devised, the Framers rather hastily "invented a system that could be 'sold' in the immediate context of 1787".[29] Madison himself lent credence to this view when he later noted that the electoral college had been created at the end of the Convention, and it "was not exempt from a degree [though less so than usual] of the hurrying influence produced by fatigue and impatience in all such bodies".[30]

The electoral college therefore, was a "jerry-rigged improvisation",[31] and the electors themselves "were but an essential ingredient [in] a masterpiece [of] deliberately vague political compromise which enabled the Framers to agree on their most difficult issue and yet allowed those [for, and those against, direct election] to return home and claim they had carried the day".[32]

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[29] Peirce, at 52.

[30] Letter to George Hay, Aug. 23, 1823, at 3 Farrand 458.

[31] J. Roche, The Founding Fathers: A Reform Caucus in Action, 55 American Political Science Review 811.

[32] J. Kirby, Limitations on the Power of State Legislatures over Presidential Elections, 27 Law & Contemporary Problems 495, 506.

With these inherent defects, it is not surprising that the electoral college was poorly suited to carry out its only function, the election of Presidents. Its chief merit was merely that it avoided the defects inherent in any other system, while its own defects were not apparent because the Framers had not had any experience with intermediate-elector political structures, and could not evaluate the practical ramifications of their creation. Its origins were deeply mired in period politics, but even then its creators were unable or unwilling to agree on just how it was supposed to operate. It is therefore easy to understand why the electoral college rapidly evolved into something that was, if still imperfect, at least workable. Two factors were especially important in this evolution. The first, the development of organized political parties that competed for the Presidency, made change imperative. And the second, the deliberately vague Constitutional mandate that each state should appoint its electors "in such Manner as the Legislature thereof may direct", made change possible.

2. The States and Political Parties Create the Present Electoral System.

This early evolution can be broken down into three distinct elements: 1) the change from legislative to popular election of the electors, 2) the change from electing them in districts within the state to electing one slate, state-wide (the "general ticket" or "winner-take-all " system), and 3) the change in the role of the elector, from being free to exercise his independent judgment in the election of the President to being a "mere agent", morally bound to

carry into effect the judgment of those who elected him. Though these three elements will be discussed separately, it should be emphasized that they did not always occur in this order, or independent of one another, or even in one continual sweep of "progress" that excluded temporary reversions to "less democratic" methods.

The most important of these elements, in terms of making the Presidency reflect the popular will, was the change from Legislative to popular election. It has already been seen that the Framers themselves did not agree on which method was better, and the first election (in 1788-89) reflected this split of opinion. Of the ten states that had ratified the Constitution and appointed their electors in time, four used legislative selection, four used popular election, and two used a mixture of these.[33] Sixty per cent of the states used legislative selection in 1792, while 1796 was again an almost even split. 1800 was the high-water mark of the legislatures, when ten of the then sixteen states used legislative selection. By 1820, however, a clear majority of the states used popular vote, and by 1832 only South Carolina retained legislative selection.[34]

During these early years, though the trend was towards popular election, the behavior of individual states was frequently erratic,

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[33] This and the other facts in this paragraph are from Peirce, at 309-11.

[34] South Carolina did not adopt popular election until its readmission after the Civil War, having retained legislative selection through 1860. Peirce, 311.

There have been two or three other deviations from popular election since the 1830s, but these have been limited to unique and understandable situations, as in 1876 when newly-admitted Colorado did not have time to set up the necessary election laws. Feerick, 37 Fordham at 10.

at best, or nearly corrupt, at worst. In the eight elections from 1796 through 1824 Massachusetts never used the same system in two consecutive elections, and tried some five systems in all.[35] At least some of these about faces, in Massachusetts and elsewhere, were the result of an outgoing or even lame-duck legislature saving their state's electoral votes for their party when popular sentiment seemed sure to carry the state for the opposing party.[36]

If the shift from legislative to popular election was sometimes politically motivated, the shift from election in districts to election of a state wide general ticket was totally so. It appears that many, even most, of the Framers who anticipated popular election thought that the electors would be elected individually in districts within the state, as Madison said in 1823 that this method was "mostly, if not exclusively, in view when the Constitution was framed and adopted."[37] Though election by districts brought the electoral college closer to the individual voters, it had the effect of splitting a state's electoral vote. Therefore the several legislatures, to enhance their states' impact in the electoral voting and to increase their states' share in the new administration's patronage, changed their election laws to have electors run on a general ticket, state-wide.[38]

Legislative realization of this effect came early to some

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[35] Peirce, at 310-11.

[36] Cooley, Methods of Appointing Presidential Electors, 1 Michigan Law Journal 1.

[37] Letter to George Hay, supra n. 30.

[38] Peirce, at 77.

states, as Maryland and Pennsylvania used it in the first election (though both were to experiment with other procedures before adopting winner-take-all for good[39]). Moreover, the general ticket proved so effective in maximizing a states' influence at the national level that all states were forced to adopt it, irrespective of any preference for the district system, in order to remain competitive.[40] It was used in 18 of 24 states in 1828, and in all but South Carolina (which was still using legilsative selection) by 1836.[41] Since the general ticket has been used in every election, with the exception of Michigan in 1892. This deviation will be discussed in detail later.

It is important to note that these two elements of the electoral system, popular election and winner-take-all, are not required by anything in the Constitution. Though they are vital to modern electoral politics, they are wholly the creatures of state law and may be changed at any time. The only limitation on the states is one of equal protection: if they choose electors by popular vote they can not deny their citizens the right to vote on the basis of race,[42] sex,[43] age,[44] etc, nor can they rigidly restrict the right of minor parties to be on the ballot.[45]

The third important change in electoral practice, that of

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[39]Peirce, at 309.

[40]Peirce, at 77.

[41]Peirce, at 309.

[42]U.S. Const., Amend. XV.

[43]U.S. Const., Amend. XIX.

[44]42 U.S.C. §1973 bb et. seq.

[45]Williams V. Rhodes, 393 U.S. 23, 89 S. Ct. 5 (1968).

"binding" the electors to vote in a particular way, is even more remarkable in that it began and became firmly established without any legislative act at all. The practice of binding electors was not just the only change that developed without statutory law, it was also the first of these changes to occur; in fact, it can be argued that it represented no "change" at all but merely confirmed the Framer's intentions. It has already been seen that some Framer's expected the electors to carry out either the popular will or the legislative will in the election of a President.[46] Alexander Hamilton is most frequently cited for the opposite position, that electors were to choose the President themselves, because he wrote that "It was ... desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the [Presidency]."[47] Not even Hamilton wanted the electors to operate in a vaccuum, though, for he wrote it was also "desirable that the sense of the people should operate" - in choosing a President.[48]

Although under the electoral college structure, proponents of both the popular will and elector independence claimed victory, a full-fledged debate never occured. Perhaps this was because George Washington was so clearly everyone's choice to be the first President that no one really bothered with whether the electors would, technically, exercise the public's will or their own. In any event, it would seem probable that the election of Washington for two terms

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[46] See text, supra, accompanying n. 23-28.

[47] The Federalist No. 68, at 458 (Cooke ed. 1961).

[48] id.

furthered the idea that electors were to give effect to the popular will. Certainly by the third election, in 1796, the emerging political parties had seized on this as a way of procuring the election for their candidates, and the electors voted, almost to a man, as expected.[49] The concept of bound electors was also taking root in the popular mind as well, for when one elector did defect a constituent exclaimed "What! Do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to act, not to think."[50]

In 1800 not a single elector defected, and the Democratic slate of Jefferson and Burr tied for the Presidency; not even any Federalist electors tried to defeat Jefferson by defecting to Burr. The tie electoral vote had to be resolved in the House, where Burr — the Vice-Presidential candidate — decided to try for the Presidency. Jefferson won, but not until after 36 ballots and much of the "intrique, cabal, and faction" so feared by the Framers.[51]

1800 firmly established the precedent of rigid elector loyalty; since then, there have been only five recognized violations (in 1820, 1948, 1956, 1960, and 1968) plus some uncertain cases arising from

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[49]Peirce, at 63-64.

[50]Stanwood, A History of the Presidency 51 (1926).

[51]Peirce, at 65-71. This tie vote arose because under the original Constitution each elector voted for two men, but could not specify that he voted for one of them as Vice-President. The experience of 1800 proved so harrowing that the Twelfth Amendment — providing for separate electoral balloting for President and Vice-President — was passed before the next election: to this day, this remains the only substantive Constitutional change in the "jerry-rigged improvisation" of the Framers.

the confusing four-way election of 1824.[52] The electors truely were, as the Senate recognized in 1826, "mere agents" of the popular will.

D. SUMMARY

It can be seen that the electoral college was created in the Constitutional Convention's "adjournment rush", that its full ramifications were not realized at the time, that its primary merit was in avoiding the defects inherent in more logical electoral systems, and that its structure was left vague and undefined so that as many people as possible could read their own preferences into it. As a result, it is not surprising that it proved an imperfect system, and that the states and political parties rapidly transformed it into something more workable.

The result of these transformations is the electoral system used today. The basic structure, of having the President chosen by electors who are allocated to each state on the basis of Congressional representation, was created by the Constitution. But all the important details — the fact that electors are popularly chosen, the winner-take-all or general ticket system, and the rigid loyalty of the electors — were created afterwards by the states and the political parties.

It is now necessary to examine the defects that remain in the electoral system, and to discuss possible cures.

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[52]Peirce, at 123-24, and Comment, The Problem of the Faithless Elector, 6 Harvard Journal of Legislation 254 (1969).

II. THE NEED FOR FURTHER REFORM IN THE ELECTORAL COLLEGE.

> I think that if the man who wins the popular vote is denied the Presidency, the man who gets the Presidency would have a very great difficulty in governing.
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> — Richard M. Nixon, Oct 15, 1968
> 26 Congressional Quarterly 2955

When then-candidate Nixon made this statement the inter-relationship between third-party politics and the electoral college was, next to the policies and personalities of the candidates, the most important part of a heated Presidential campaign. But he spoke, not about the unique politics of 1968, but about the one most obvious fault of the electoral college system: the possibility that a man favored by most of the voters could lose the Presidency. This possibility is so foreign to the idea of democracy that most people would rather not think about it, yet it is inherent in our indirect electoral system and must be faced every four years.

A. THE POPULAR VOTE WINNER CAN LOSE

This spectre of a minority President has in fact occured on three occasions in American history.[1] The first was in 1824, when Andrew Jackson won 42% of the popular vote to lead a four-man field, but fell far short of the Constitutionally required electoral majority. The House therefore had the responsibility of choosing the President, and it by passed Jackson when Henry Clay — who had been

[1] As used in this paper, "minority President" refers to those situations in which a candidate was elected even though another candidate received more votes. It does not refer to the fairly common situation where the winning candidate receives less than 50% of all votes cast.

third in popular votes but fourth in electoral votes and therefore ineligible for House consideration — joined forces with second-place John Quincy Adams.

The next minority election is by far the best known. In 1876 the Republicans nominated Rutherford B. Hayes, a popular and capable governor of Ohio, in the hope he could overcome the scandals that had plagued the Grant administration. The Democratic nominee, Samuel Tilden, was in many ways the Thomas Dewey of his era: lawyer, reform governor of New York, and ineffective national campaigner. Unlike Dewey, however, he did win a clean popular majority, only to fall one vote short of an electoral majority. But this electoral count omitted the returns from three states, where each party claimed a victory while accusing the other of wholesale vote fraud. If any of these questionable states had gone for Tilden he would win, but if all had gone for Hayes he would have an electoral majority of one vote in spite of his popular defeat.

To resolve these disputed returns Congress created a special 15 member Electoral Commission, to be composed of seven Democrats, seven Republicans, and one independent. But when the independent, a respected Supreme Court justice, was named to a Senate vacancy in his state another Republican was appointed to the Commission. Although the members had sworn to "dismiss every consideration that would cloud their intellects or warp their judgment", they divided on straight party lines to find for each of the disputed Hayes states and declare him the winner.[2]

[2]For a more complete account of this election and its Electoral Commission, see N. Peirce, The People's President, 86-92. (1968). (Hereinafter cited as Peirce).

The third time the Electoral College failed to elect the popular vote winner, in 1888, was the only time that a popular loser — Benjamin Harrison — won an undisputed electoral majority over the popular winner — Grover Cleveland. Unlike 1824 or 1876, there was nothing for Congress to decide, and Harrison was duly inaugurated.

It is important to note from these examples that the simple case of a popular vote loser amassing an electoral majority, though the most obvious defect, is only one of several ways in which an electoral system can deny the Presidency to a popular vote winner. It is also possible that a three-way race could deny any candidate an electoral majority, and political maneuvering would almost certainly outweigh the popular vote in the subsequent House election. Also, a close election in any state would force Congress to decide which set of electoral votes to count, and if the national election was also close, such as in 1876, the winner would again be chosen by a politically-motivated Congress.

If the possibility of a minority President is the most obvious fault in our electoral system, it is by no means the only one. There are at least seven other ways in which the electoral college distorts our political system, and these distortions are not all limited — as is the possibility of a minority President — to fairly rare situations. They are inherent in the system, and affect every Presidential campaign.

B. THE ELECTORAL COLLEGE DISTORTS THE VOTING POWER OF ALL CITIZENS

The most important of these defects is the way in which the electoral college mechanism greatly inflates the voting power of some voters, and greatly diminishes the voting power of others. This inequality arises from two structural characteristics of the electoral system. First, a state's electoral votes are not porportionate to the number of people in that state. And second, the winner-take-all system awards the entire electoral vote to one candidate, regardless of how narrowly he may have beaten his opponent. Each of these problems needs to be examined in some detail.

The fact that electoral votes are not proportionate to population is the result of the fact that every state has at least two Senators and one Representative — and therefore three electoral votes — regardless of its population. Alaska for example, has one electoral vote for every 98,000 citizens, while California only has one for every 438,000.[3] Voters in Alaska (and other small states), are therefore over-represented in the electoral college. Another element in this disproportionate strength is that the electoral college apportionment is based on census figures, which may be ten years old. In most states this effect is negligible, but in fast growing areas like California or Florida the effect can be substantial.

The second factor that makes the electoral college unrepresentative has just the opposite effect, increasing the voting power

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[3] Based on the 1970 Census (1971 World Almanac 409) and the preliminary reapportionment based on that census (U.S. News and World Report, Sept. 21, 1970, p.26).

of those in the large states, at the expense of those in the small states. This factor is the winner-take-all system, which awards all of the state's electoral votes to the popular vote winner. Thus, though a large-state voter has much less chance of casting the vote which will decide how his state's electoral vote will be cast, if he does cast such a deciding vote he will control many more electoral votes than the small-state voter, and will therefore be far more influential in the total Presidential election.

Though these contradictory effects have been appreciated for years, it was not known which of them was the more important. Some claimed that the electoral system discriminated in favor of the small-state voter because there were so many more electoral votes per voter and each voter had a greater influence in how the whole slate would be cast; others that it discriminated in favor of the large-state voter because, in spite of his diminished ability to affect how the slate would be cast, the large blocs of electoral votes were far more influential in electing Presidents.

To resolve this problem Professor Banzhaf recently conducted a computer analysis of how the electoral college affects a person's voting power in Presidential elections.[4] After defining two citizens' relative voting power to be the relative liklihood that each would cast the deciding vote in a Presidential election, he first analyzed each person's chance of casting the deciding vote in his own state, and then each state's chance of casting the deciding

[4] J. Banzhaf, One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College, 13 Villanova Law Review 303 (1968). (Hereinafter cited as Banzhaf).

electoral vote in the national election.[5] As a result of this two-step process, he concluded that large-state voters had significantly more voting power: a New Yorker, for example, had 3.312 times the voting power of a District of Columbia resident.[6] Though the exact figures varied for each state, the results consistantly indicated greater voting power for the citizens of large states.[7]

Commenting on this analysis, Senator Birch Bayh, a leading advocate of electoral reform, noted the central fact that it is the independent voter in the large states who really selects the President. His conclusion was that

> For all practical purposes the outcome of presidential elections today is determined by a small group of ... [swing] voters in eleven or twelve large, politically doubtful, states. By inflating the value of these individual popular votes, our presidential election machinery effectively denies to millions of Americans an equal opportunity to affect the outcome of presidential elections.[8]

Banzhaf's analysis and Bayh's conclusions do not stand apart

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[5]A complete description of Banzhaf's technique is beyond the scope of this paper. Anyone with an interest in the subject is urged to read his article, particularly pages 304-318. It is worthy of note that his basic technique was relied on by the Court of Appeals of New York in invalidating the apportionment of a county Bond of Supervisors (Ianucci v Bond of Supervisors, 20 NY 2d 244, 251, 229 NE 2d 195, 198) and was noted by the Supreme Court in reviewing a Texas reapportionment plan (Kilgarlin v Hill, 386 U.S. 120, 125, 87 S. Ct. 820, 823).

[6]Banzhaf, at 329. These figures will have changed somewhat, as Banzhaf's article, published in 1968, was based on the 1960 census and apportionment.

[7]id.

[8]Comment, Sen. Birch Bayh, 13 Villanova Law Review 333, 334-35 (1969).

as a merely theoretical framework. They are supported by empirical evidence. One would expect that if large states are disproportionately vital to a candidate's election he would devote a disproportionately large amount of his campaign resources — money, time, and staff support — to the large states, and, though precise statistics are unavailable, this does in fact appear to be the case.[9] Moreover, one would expect political parties to select their nominees from the large states. This too, is the case. From 1868 through 1968 New Yorkers have captured one-third of the Presidential nominations, and six large states account for two-thirds of the total (Presidential and Vice-Presidential) nominations.[10] In the forty-six elections since the Constitution was adopted New York has helped elect the winner in all but seven, and in five of those it vindicated the defeated party's choice of candidates by voting for a current or former New York Governor.[11] In short, the common sense of politicians has long told them what Banzhaf has only recently proven: big states elect Presidents, and small states count for even less than their smaller population would indicate.

One further point in the area of voter inequality should be clarified. That is that in analyzing voting power Banzhaf unfortunately used each state's total population and not the number of actual voters in the most recent election. Since in most cases the two figures are roughly proportionate his basic conclusions remain

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[9] Banzhaf, at 324.

[10] J. Feerick, The Electoral College — Why it Ought to be Abolished, 37 Fordham Law Review 1, 25 (1968).

[11] id.

valid. But it should be noted that in particular cases this produces another significant distortion in a given individual's voting power. In 1968, for example, more people voted in New Jersey than in Texas, but the Texas voters controlled half a again as many electoral votes (25) as did the New Jersey voters (17).[12] It is therefore obvious that the fact that awarding electoral vote strength on the basis of population discriminates against voters who live in high-turnout states, and is another way in which the electoral college structure distorts a voters' ability to affect the outcome.

C. ELECOTRS CAN DEFECT

The third major defect in the electoral college is the ever-present possibility that an elector may violate his moral duty, and his constituents' expectations, to vote for someone other than the candidate on whose slate he was elected. Although such cases have been fairly rare, and have never changed the outcome of an election, the number of these incidents have risen markedly since World War II[13]. Indeed, it is reasonable to think that the reason there have not been more of them has been the absence of any election in which the electoral vote (as opposed to the popular vote) was relatively close. If is is assumed that in any election the number of potential defeating electors is fairly small the electoral count would have to be fairly close for them to change the result. And unless the

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[12] id. at 13.

[13] Of five clear cases since 1800, four have been since 1948. Peirce, at 123-24, and Comment, The Problem of the Faithless Elector, 6 Harvard Journal on Legislation 254 (1969).

count was fairly close, most of them could well decide not to back the system, when the only practical result of their action would be to draw attention to their own untrammeled power. But if the electoral count were close they could be expected to defect, and then the practical result of their action would be to elect their man President. But in doing so they would have taken unto themselves the power of deciding who would, for four years, be President of all Americans.

To place such power in a handful of men is, under the best of conditions, totally inconsistent with any theory of democracy or representative government. But to do so when this handful of men is elected merely on the basis of past service as loyal party functionaries, when they are unknown to Americans generally and even to their own immediate constituents, and — above all—when they are responsible to no electorate for their actions, is a procedure for more undemocratic then that found in most totalitarian regimes.

D. INDEPENDENT ELECTORS CAN BARGAIN FOR THE PRESIDENCY.

A problem closely related to elector defection is the possibility that some avowedly independent electors will be chosen, with the express purpose of deciding among themselves who will be President. This was the theory of the Wallace campaign in 1968, which, in spite of all the traditional "We're in this to win" talk, was really based on the hope that neither Nixon nor Humphrey would obtain an electoral majority and that the Wallace electors would hold the balance

of power.[14] This strategy for using independent electors was far more democratic than the possibility that pledged electors would defect and decide an election, because the Wallace voters were well aware of the strategy. If these electors had been in a position to decide the Presidency they would have been fulfilling the function they were elected to perform.

Although it may not be anti-democratic for an interest group to use independent electors in order to maximize its influence in the political system, it is certainly anti-good government. Americans simply do not like the idea that the Presidency can be bought and sold in secret back-room deals, where only a handful of players know the price that is being paid. The mere suspicion of such deal-making when the House of Representatives decided the Jackson-Adams-Clay campaign in 1824 was enough to taint Adams' Presidency, impair his effectiveness as a national leader, and make him an easy target for Jackson four years later.[15]

Even if the major-party candidates rejected this strategy and refused to make any deals, and the independent electors decided on their own whom to support, it seems unlikely that the winning candidate would be able to fully rebut the inevitable change that he had, in fact, made a deal. Changes of such a deal would be doubly serious, for not only would the deal itself have been made, but it would have been made with a group that was independent of the two-party structure — presumably because its beliefs were near enough to the

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[14]B. Bayh, Electing a President — The Case for Direct Popular Election, 6 Harvard Journal on Legislation 127, 128 (1969).

[15]Peirce, at 84-85.

edges of the political spectrum that neither major party could seek to merge with them, as the Democrats were able to do with the Populists in the 1890's. If Adams could not survive charges that he had made a deal with a major candidate, surely no modern President could survive charges that he had made a deal with a minor-party candidate.

E. FRAUD AND ERROR ARE MAGNIFIED IN IMPORTANCE.

The current electoral system also places a premium on fraud and error in vote counting. Most people will remember Illinois is 1960, when Kennedy carried the state by less than 9,000 votes amid Republican charges that up to 100,000 votes had been "stolen" for the Democrats in Chicago alone.[16] Though these fraud charges were neither proven nor disproven, the fact remains that a shift of less than 4,500 votes (less than 0.1% of the total cast) would have changed the result, delivered Illinois to Nixon, and brought Kennedy within five votes of electoral defeat. If the result had been that close, some electors might well have defected to elect Nixon or to throw the election into the House. Thus a few thousand fraudulently obtained votes, while having only minimal effect on the national popular vote totals even in a close election like 1960, could prove decisive because of their ability to control a large bloc of electoral votes.

Though fraud is perhaps the most obvious case of shifting a few popular votes, it is not the only one. Human error or bad weather can also affect vote totals, and, in a close race these factors

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[16] id. at 105.

in a key state can change the election. For example, in 1884 severe weather in heavily Republican upstate New York almost certainly cost James G. Blaire the state (which Grover Cleveland won by only 1,000 votes) and therefore the election.[17] In short, as long as the electoral system emphasizes winning in a few large states, any fraud, accident, or mere human error in one of those states can elect a President, irrespective of the popular support the candidates have received nationally.

F. THE TWO-PARTY SYSTEM IS IMPAIRED.

Since the electoral college structure places such great importance on winning states, as opposed simply to winning votes, it also tends to inhibit the development of the two party system in one party states. National parties and campaign organizations will of course spend their time and money in states where they have some arguable chance of winning. They will not devote much effort in states they have no chance at all. Although it is true that whether a state is "one-party" or "two-party" depends far more on local conditions than on the quadrennial campaign efforts of the national parties, the resources expended during a national campaign do help to sustain and encourage local party organizations. To the extent that a state does not receive its share of these resources because it is a one-party state, the development of an effective two-party system is further hindered.

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[17] *id.* at 93.

G. EFFECTIVE POLITICAL COALITIONS ARE IMPAIRED.

In addition to inhibiting the growth of second parties in one-party states, the electoral college's emphasis on winning states also prevents many effective political coalitions. A fairly large number of people who share common interests, and who would normally constitute a visible interest group, will lose much of their effectiveness if they are scattered throughout many states. Their votes in Presidential elections can not be counted together unless the states they live in all happen to vote for the same candidate; this is the well-recognized and obvious result of the winner-take-all system which prevents minorities in one state from pooling their votes with similar — or even majorities — in other states.

But winner-take-all also operates in a far more subtle way to deny effective political representation to such groups. Because they are precluded from joining together nationally, and because they will also have different individual interests and different party structures in their respective states, they will not all join the same political party. What influence they might have in national conventions or in Congress is therefore diffused, not concentrated. This effect is, admittedly, not as serious as it might appear at first. For if these voters believe strongly in whatever cause is involved they will be able to form an interest group that transcends state lines and can work effectively in one— or even both — political parties. The real problem, then, is that the electoral college structure virtually cancels out any national influence of a loosely-knit group

that is scattered widely in different states, while it magnifies out of all proportion the influence of smaller loosely-knit groups that could hold the balance of power in one or two key states.

H. THE CONTINGENT ELECTION PROCEDURE IS UNDESIRABLE.

A final defect of the electoral college is the procedure for a contingent election in the House of Representatives. The three times that Congress has had a finger in the electoral pie, in 1800, 1824, and 1876, certainly vindicate the Framers fears that any election by Congress would result in unsavory "intrigue, cable, and faction". The likelihood that political considerations would predominate in such an election is reason enough to fear it, but the voting procedure is an even greater fault. When the House meets to elect the President each state is given but one vote: therefore the six Representatives from the six smallest states, able to cast one state vote each, would have as much power as the 178 Representatives from the six largest states, and the seventy-five Representatives from the twenty-six smallest states could choose the next President, even though they represented only one-sixth of the people.[18] The third defect in a House election is that while the House is choosing the President, the Senate is choosing the Vice-President. There is nothing to prevent the two houses from choosing a Republican for one office and a Democrat for the other. With all of these faults built into a House election, it is readily apparent why "a certain amount of perserverance is needed in order to discover something good to

[18]These figures are based on the 1970 census and apportionment. See n. 3, supra.

say about the possibility of an election in the House of Representatives".[19]

I. SUMMARY

The electoral college distorts our entire political system. There are several different ways in which it can allow men to be elected President in spite of a popular vote defeat. It increases the power of large-state voters and diminishes that of small-state voters. It permits individual electors, responsible to no one for their actions, to defect and take into their own hands the choice of who shall be President. It permits independent electors to make a deal for the Presidency, but in giving one candidate a victory they would also give him the unanswerable taint of back-room political dealing, and would deal a fatal blow to his leadership at the very start of his administration. It emphasizes popular victories in a few key states, and thereby converts otherwise minor incidents of vote fraud or error in those states into election-deciding events. It provides little incentive to campaign for votes in states where there is no hope of victory, so the one-party system in those states is perpetuated by default. It cancels out many votes at an intermediate stage in the

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[19] P. Piccard, The Resolution of Electoral Deadlocks by the House of Representatives, in Selecting the President: The Twenty-seventh Discussion and Debate Mannal (Aly ed. 1953-54), reprinted in Hearings Before the Sub comm. on Const. Amendments of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., at 826, 828 (1961).

It should be noted that the problem of reforming the contingent election procedure in the House is largely independent of structural electoral college reform...By and large the several plans for contingent election reform can be interchanged with the several plans for structural reform. Since the next chapter is devoted to structural reform, the treatment of contingent election reform will be deferred until the last chapter.

election process, thereby impairing groups with common interests from uniting to promote those interests — unless they are lucky enough to live in the decisive large states. And, if it fails to elect a President, it thrusts that choice upon a politically-motivated Congress, which must use an undemocratic election procedure and which could well elect men of different parties to the two highest positions in the government. Clearly the electoral college is, as the American Bar Association found, "archaic, undemocratic, ... and dangerous".[20]

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[20]Electing the President: A Report of the Commission on Electoral College Reform, American Bar Association, January 1967.

III. PROPOSALS FOR ELECTORAL COLLEGE REFORM

> I would do away with the whole electoral college. I would do away with it completely. I would have the people elect the President of the United States on election day. . . . Let the man who gets the most votes be President. It is as simple as that. That is my idea of representative government. Everything else beyond that is a gimmick.
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> — Sen. John Pasture, 1956
> 102 Congressional Record 5162

When Sen. Pasture spoke on electoral reform he did so with a simple bluntless, direct and to the point, that is too often lacking in political speeches. For all his eloquence, however, his cause was doomed: direct popular vote was clearly an idea whose time had not yet come. There were too many other proposals for reform, each of which had strong support, for direct election to stand any chance of adoption. In fact, there were too many proposals for any of them to be able to command the two-thirds support needed for a Constitutional Amendment, and electoral reform died in Congress in 1956, just as it had many times in the past.

A. PLANS OF REFORM

What were these other proposals? Although well over 500 proposals for electoral reform Amendments have been introduced in Congress, they can readily be grouped into only four basic plans, including direct popular vote.[1] The others are the "district plan", in

[1] N. Peirce, The People's President 31 (1968) (Hereinafter cited as Peirce).

which the winner-take-all system would be abolished and electors chosen in districts within their states; the "proportional plan", in which a state's electoral vote is divided among the candidates in proportion to their popular vote in the state; and the "automatic plan", which would elevate the winner-take-all system to Constitutional status but would eleminate the possibility of elector defection by eliminating the office of elector. Each of these plans needs to be considered individually.

1. The District Plan

The district plan was first proposed to Congress in 1800, and has been strongly supported ever since. It was very nearly approved and sent to the states in 1820, but it failed to gain two-thirds of the House. The populous large states, with the most Representatives, realized the advantages they derived from the winner-take-all system.[2] The district plan, as it is most often proposed now, would retain the electoral votes but would abolish the office of elector. It would automatically award one electoral vote to the popular vote winner of each district, and two to the popular vote winner of each state.

The basic characteristic of the district plan, of course, is that it breaks up the winner-take-all system and its crucial blocks of electoral votes. In effect, it brings the intermediate elector closer to the people; the electoral vote would more closely reflect the popular vote and — since the electoral units would be smaller — there would be less tendency to inhibit two-party growth and less national effect from localized fraud or error. Moreover, it is ar-

[2] id. at 152.

gued, since the district plan would shift the emphasis from winning in a few large states to winning in half of the Congressional districts, the constituencies of the President and of Congress would become roughly the same and conflicts between the executive and legislative branches would become less pronounced.

In opposition to the district plan, it is argued that though it would break up the large blocks of electoral votes, it would still retain the winner-take-all system in smaller units. Therefore, the two-party system would still be hindered in "safe" districts, campaign emphasis would still be on "swing" districts, and fraud or error —though they wouldn't affect a large bloc of votes — would still have a greater impact in the electoral vote than they would in the popular vote. Unifying the constituencies of President and Congress, while perhaps more efficient in an absolute sense, would also destroy an important element of the checks and balances between the branches of government.

The most serious objection to the district plan, however, is that it is still an indirect plan of election. Therefore, it can elect a popular vote loser as President; accurate statistics on the effect of the district plan are only available for elections beginning with 1952, but in the five elections since then the district plan

would have elected Nixon over Kennedy in 1960.[3] As an indirect system it also introduces a distortion in translating popular votes into electoral votes, so that voting power of citizens in different states is widely unequal. As under the present system, some voters would have over three times the voting power of others, but because the large blocks would be broken up it would be the voters in the small states who enjoyed the advantage.[4]

The final drawback to the district plan, and a fault which no other plan shares, is the opportunity it presents for gerrymandering. The way in which the district lines were drawn would affect not only who went to Congress, but who went to the White House as well. This would provide an additional reason for legislatures to draw district lines for political purposes, and could well give the legislatures the key role in the election process.

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[3] id. at 259.
Peirce, p 359.
Direct comparisons of who would have been elected President, in a given year under a given electoral system, are very risky. Because any system helps determine the way in which campaigns are conducted (the current system, for example, emphasizes winning the large states), a different system would have meant different campaign strategy and perhaps a different result.
And such comparisons are doubly risky for 1960, because of serious questions about who really won the popular vote that year. See Peirce, at 103-104. It is possible therefore, that the district system would have succeeded in electing Nixon where the current system failed, but the basic point remains valid: under any indirect system the chance for a misfire is always present, especially in close elections.

[4] J. Banzhaf, One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College, 13 Villanova Law Review 303, 331 (1968).

2. The Proportional Plan

The second major proposal for electoral reform, the proportional plan, was first proposed in 1848, and resurfaced occasionally in succeeding years, but did not draw wide-spread interest until 1948 when it was approved by the Judiary Committees of both the House and Senate.[5] The basic idea of the proportional plan is to retain each state's electoral vote, but to abolish the office of elector and automatically award the electoral votes to the candidates in proportion to their popular vote in each state. This proportional division would be carried to three decimal places, and as a result the correlation between the popular vote and the electoral vote would be fairly accurate. In effect, the proportional plan goes the district plan one better; not only does it break up the large blocks of electoral vote, it also does away with any vestige of the winner-take-all plan.

The advantages of the proportional plan lie in this elimination of winner-take-all. The electoral vote of each candidate will most closely reflect his popular vote, the effect of fraud or error will be minimal, because only a fraction of an electoral vote can be shifted from one column to another, and, since all popular votes are reflected in the electoral totals, parties will campaign for votes everywhere and thereby promote the two party system.

The objections to this plan are, again, that because it is indirect it can result in a popular vote winner losing and it distorts voting power. In fact, this distortion is greater under the

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[5]Peirce, at 164.

proportional plan (5:1) than under either the existing system or the district plan (3:1).[6] As in the district plan, it is the voters in the small states (who get three electoral votes regardless of population) that have the greatest voting power. Tending to confirm the fact that voting power inequalities are greater with the proportional plan, it has been shown that it would have elected more minority Presidents in the past century than has the present system. Although it would have made Presidents out of two popular vote winners, Tilden in 1876 and Cleveland in 1888, it would also have elected three popular vote losers, Hancock in 1880, Bryan in 1896, and Nixon in 1960[7]. A fourth election, in 1900, would have been a virtual dead heat, and Bryan may have won it, too.[8] Again, it is apparent that any indirect system has a high potential for failure in a close election.

3. The Automatic Plan

The third proposal for change, the automatic plan, has been introduced in Congress intermittently over the years, but has never been able to generate much enthusiasm; even with the full backing of the Kennedy and Johnson administrations in the 1960's, it was never even brought to a vote.[9] The reason for this is not difficult to understand. The automatic plan would write the winner-take-all

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[6]Banzhaf, supra n. 4, at 330.

[7]Peirce, at 358. The reader is again reminded that such compromises have only limited usefulness; see n. 3, supra.

[8]Kefauver, The Electoral College: Old Reforms Take on a New Look, 27 Law and Contemporary Problems 188, 205 (1962). Contra, Peirce, at 358.

[9]Peirce, at 177, 180, 160.

system into the Constitution; its only "reform" would be to abolish the office of elector and the possibility of elector defection. But it is the winner-take-all system that is at the root of many of the faults in the current system, and is the main target of most electoral college reformers. To their minds any reform that leaves winner-take-all untouched — even strengthened — is no reform at all.

4. Direct Popular Vote.

The final proposal for reform is, as Sen. Pastore phrased it, to "do away with the whole electoral college ... [and] have the people elect the President."[10] It is readily apparent that total abolition of intermediate electors, and adoption of direct popular election, is the only plan for reform that eliminates all the faults of the current system. By definition, the popular vote winner could never be denied the Presidency. All voters would have an equal opportunity to affect the outcome since there would be no distinction between votes cast in different states. Individual electors could no longer take the election into their own hands. Fraud and error would no longer be magnified in their effect on the outcome. The unnatural barrier which prevents voters in different states from pooling their common interests would be eliminated. And, since every vote would be just as crucial as every other vote, a true nationwide campaign would eliminate both "safe" states and "key" states.

Of course some of these faults would be corrected by the various other proposals. But only direct vote can assure a popular winner in every election, and only direct vote can assure that all

[10] 102 Congressional Record 5162 (1956).

voters have an equal voice in the election. Since these objectives are so important, and since only direct vote guarantees them, it has been argued that direct vote is the only rational way to choose our President.[11] This reasoning, however, begs the question, for it reflects a preconceived value judgment that popular winners and equal voting power are not only important but are the most important characteristics in an electoral system.

It is better to approach the issue of electoral reform from the other direction, and ask: Are there any other values, inherent in the present system or in other plans, but not present in direct vote, that are more important to our political system than either popular winners or voter equality? This, and not whether direct vote can cure the defects of the present system, is the central question that must be answered by the proponents of direct popular vote.

B. OBJECTIONS TO DIRECT POPULAR VOTE

There are six basic arguments that have been raised against instituting direct popular vote. These are 1) that since the United States is a federal union of otherwise sovereign states it is necessary that the states, as states, retain some influence in the election of the President; 2) that if the power of the various groups in our political system is to be kept in balance, the cities must be given greater power in the election of the President to offset their lesser power in Congress; 3) that there can not be a direct national elec-

[11] B. Bayh, Electing a President — the Case for Direct Popular Election, 6 Harvard Journal on Legislation 127, 133 (1969).

tion as long as states determine what candidates will be on the ballot, and can keep legitimate major party candidates off the ballot; 4) that the difficulties in counting the national popular vote accurately are insurmountable, so that the plan can not be made to work; 5) that a change to direct popular vote would so change the method of electing Presidents and campaigning for office that the two-party system would be weakened; and 6) that politics is the art of the possible and that direct popular vote — which stands no chance of passage — should not be put forward at the expense of other electoral reform plans which would stand a better chance. Each of these objections will be considered individually.

1. Federalism

Federalism, the concept that in a federal union state influence must be preserved in the electoral system, is at once the most serious and most tenacious argument that has been raised against direct vote. It was initially brought up as soon as the first direct vote amendment was introduced in Congress, in 1816.[12] In the intervening years many other objections have been raised, and most of them discarded, but always federalism remains. Like a great boulder wedged in the mouth of a cavern it blocks any attempt at passage. The argument has retained its vitality for so many years because it raises a serious question about the very nature of the government. If indeed the electoral college embodies some fundamental relationship between the states then it can not be abolished without threatening the continued existence of the federal government.

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[12]Peirce, at 182.

But is the electoral college really an integral part of the checks and balances in our federal system of states: Many distinguished men assert that it is. Sen. Karl Mundt claims that the ineducable minimum of three electoral votes per state is "part of the compromise which made the Constitution possible" in that "the larger states could not dictate the selection of the President." To abolish this protection by the adoption of direct popular vote would be to "disregard the intent of the framers of the Constitution and rupture our federal system - the cornerstone of our democratic government".[13] And former Sen. Thruston B. Morton says that "I think we are a republic, and as a republic I think the states, by virtue of being states, should have some additional weight in the electoral college".[14]

The validity of this argument depends upon the origins of the electoral college; was it really created, and were electoral votes allocated, to preserve a certain minimal power to states as states? And, if so, is such an intentional mis-allocation of voting influence still necessary or even valid in view of the many changes that have accured in over 180 years of Constitutional government?

It seems clear that the Framers intended the electoral college to be a key compromise that would preserve some power to each state. The power struggle between the large and small states was perhaps the most crucial problem at the Convention. It permeated

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[13]Comment, Sen. Karl Mundt, 13 Villanova Law Review 336, 337 (1969).

[14]Hearings Before the Subcomm. on Const. Amendments of the Senate Committee on the Judiciary, 87th Congress, 1st Sess., at 114 (1961).

virtually every issue, including the selection of the President.[15] Yet when the electoral college proposal emerged from committee, and was debated for several days, the fact that the small states were given added representation was never even mentioned.[16] It is hard to believe that, if the allocation of electoral votes was an important compromise on such a devisive issue, it would have been approved so routinely. The explanation is that the compromise lay not in the allocation of votes — the characteristic of the electoral system now invoked as the very embodiment of federalism — but in the fact that the states were to be given equal power in a contingent House election. This would give greater influence to the small states, offsetting the greater influence of the large states in the initial electoral balloting.[17]

The fact that the Framers did not conceive of the allocation of electoral votes as the chief component of federalism does not answer the underlying objection, however. For there can be no doubt that they were extremely troubled by the problem of balancing the interests of the states, as states. And if their solution to this problem (the electoral college - contingent election procedure) has not worked as intended, then there is something to be said for using other parts of their system (i.e., the allocation of electoral votes) in order to carry out their clear purpose and preserve state interests. Only by this indirect reasoning can it be claimed that the allocation of

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[15] Peirce, at 34-37.

[16] id. at 37.

[17] id.

electoral votes, with each state receiving at least three, represents "part of the compromise that made the Constitution possible".[18]

But even this indirect reasoning on federalism is not, alone, enough to justify retaining the electoral college. It must still be determined whether the electoral college, as it operates, serves to carry out the intention which the Framers had in creating it. In other words, does it protect the position of the small states against the great power and influence of the large states? As has been seen, the electoral college has exactly the opposite effect.[19] Because of the winner-take-all system it enhances the already great influence of the large states, at the expense of further diminishing the power of the small states. Direct vote, in which the extraordinary power of the large states would be broken, would therefore be a more perfect reflection of the Framers' intent than is the present electoral system.

But even this fact does not answer the main thrust of the federalism argument. For it is after these principles are understood — that the Framers intended to protect the interests of the small states but that the electoral college has failed miserably in doing so — that one reaches the underlying rationale behind the district or proportional plans of reform: namely, that either of these electoral plans, which would give relatively greater influence to the small states, are superior to direct vote and are necessary in order to restore the original plan of the Framers.

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[18]Mundt, supra, n.13.

[19]See text accompanying n. 4-11, Chapter II, supra.

But when the federalism issue is viewed in this perspective it literally falls of its own weight. For if a federalistic election system is such an important characteristic of our government that it must be preserved at the expense of grossly unequal voting power and occasional minority Presidents, why has America survived and prospered in the 150 years since the winner-take-all electoral system destroyed small-state power? To this question there can be no answer, and it becomes obvious that federalism is not needed in the electoral system.

There are three reasons why this is so. The first and most obvious is that "the Senate is the key to the protection of State interests".[20] The states' equal representation in the Senate was considered so important that it is the only unamendable clause in the Constitution[21], and it guarantees that if any state or group of states has a vital stake in any legislation they can not be defeated merely because the other states are larger or more powerful. Perhaps the second reason is a result of the Senate's ability to protect state interests. For whatever the Framers' feared about the large states dominating Presidential elections (something that, because of winner-take-all, has in fact occured) the President, once elected, "is regarded as a man of the people and not of the states. ... In that respect, at least, the principle of federalism is dead".[22] The third reason for abandonig the concept of electoral federalism is probably

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[20]Sen. Mike Mansfield, 102 Cong. Rec. 350 (1961).

[21]U.S. Const., art. V.

[22]Comment, Electoral College Reform: The Proposals and Prospects, 14 St. Louis U. Law Journal 121, 137 (1969).

the most important. The small states need only minimal protection because they have no interests, as small states, which pit them against the big states. As Neal Peirce put it, "None of the great battles of American political history — in Congress, or in Presidential elections — has been fought on the basis of small versus large states. The arguments have had ideological, economic, and regional points of departure, but never has the line of demarcation been based on the size of the states".[23]

The concluding argument against federalism as an element of the electoral process was best stated by Rep. William McCulloch during the 1969 House debate on direct popular vote. Recognizing the central fact that federalism is really just a means to achieve an effective government, and not an end in itself, he said

> The proponents of the district plan embrace the bonus votes as the hallmark of federalism. But I have yet to hear what they think federalism is and precisely how it is impaired by the direct plan. To me, federalism is a form of government designed to allow the popular will to be more precisely expressed and effectuated by an allocation of responsibility to various levels of government.
>
> We sometimes forget in the heat of debate that under both the direct plan and the district plan, the people vote. The difference is how the votes are counted. To me, it is truly federalism and truly republicanism to count every vote and elect the man with the most votes. To defend distortion of the popular will in the name of federalism and republicanism is incomprehensible to me.[24]

2. "Urban Interests"

The second objection against direct popular vote is in many ways the opposite of the federalism argument. While to give effect to

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[23]Comment, Neal R. Peirce, 13 Villanova Law Review 342, 344 (1968).

[24]115 Cong. Rec. 25820 (1969).

federalism with either the district or proportional plans would enhance the power of the small states, to retain the present system would preserve the power of the big states. Some people argue that is is necessary to do just this (or to adopt the automatic plan, which would serve only to abolish the office of elector) because the power of the big states is reduced by other characteristics of our political system.

Their argument runs like this: The Framers obviously never intended for their electoral system to insure equality. Rather, it was designed to insure that the great political interest groups which then existed were given influence in the political system. Although we no longer face the same alignment of forces, there is nothing unholy in insuring, through the electoral system, that the great interest groups of modern America are represented in the political process. The interest group that most needs protection now is urban America; the large cities are facing a crisis of immense proportions, and if this crisis is to be solved we should do nothing to diminish their political influence. Since the large cities are located in the large states[25], this means the existing influence of the large states in the electoral college should be preserved. Such a policy is all the more imperative because Congress, the other elected branch of the government, is generally rural-oriented: the Senate apportionment greatly over-represents the small states and the House, though more equally apportioned, gives great influence to rural members who are

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[25]According to the 1970 census, eleven of the fifteen largest cities are in the seven largest states. These states (in 1972) have 211 electoral votes, about 80% of the number required to elect a President.

more likely to acquire seniority and the important committee chairmanships. Professor Rosenthal sums up this whole argument when he writes

> The result [of Negro migration into the cities] is the most serious domestic crisis the nation has had to face in a century. ...
>
> The plight of the cities is becoming increasingly desperate. Racial tensions seem to be worsening rapidly. Compared with the magnitude of the problems, little enough has been done about them even under the existing rules. Should the rules be changed in a way which will undoubtedly just those influenes which might prod us toward implementing the measures we so badly need?[26]

Depending on one's political beliefs, this reasoning may, at first reading, appear impressive. But there are two major defects — one theoretical and the other practical — in it. It is wrong in its theory that certain voters should deliberately be given greater power, especially when justified by partisan political expediency, and it is wrong in its supposed practical effect that urban interests will be better protected under the current electoral system than under direct vote.

Theoretically, "the notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government".[27] And "any election system that lessens the power of any individual's vote in order to enlarge another's, on whatever grounds, rationale, or pretext, is inequitable ... and in-

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[26] A. Rosentahl, The Constitution, Congress, and Presidential Elections, 67 Michigan L. R. 1, 12-13 (1968).

[27] MacDougall V. Green, 335 V.S. 281, 290 69 S. Ct. 1, 5 (1948) (Dissenting opinion of Mr. Justice Douglas).

defensible" (emphasis supplied).[28]

If deliberately distorting the voting process is indefensible as a general proposition, it is all the more so when done in response to existing political alignments. Remember that the proponents of the present system do not seek to promote some greater value that deserves a permanent place in our political system, but merely to promote the voting power of those whom they feel are most likely to share their political beliefs. Sen. Bayh rightly wonders whether these proponents would "argue for retaining the present system, with its alleged advantages, if the Conservative Party held the balance of power of New York's 43 electoral votes?"[29] Rosenthal himself seems to admit that his argument would lose much of its force if the "leadership of the civil rights movement [passes] to the small towns, or even to a new generation of liberals in the South".[30]

It is important to realize that the "political alignment" argument is in fact two separate arguments. One, alluded to above, is that America's Presidential electoral structure should not be based on the current political views of the big-city states. But neither should it be structured as a counterweight to the current political views of Congress, for those, too, are but transitory phenomena. The Senate, in theory the more conservative house, is in fact the more liberal. No simplistic political theory about conservative small states can account for Sen. Hatfield of Oregon or Sen. McGovern of

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[28]W. Gossett, Electing the President: New Hope for an Old Ideal, 53 ABAJ 1103 (1967).

[29]Bayh, supra n. 11, 6 Harvard Journal on Legislation at 132.

[30]Rosenthal, supra n. 26, 67 Michigan L.R. at 13, n. 47.

Sourth Dakota, any more that it can explain Sen. Buckley of New York or Sen. Tower of Texas. And in the House, the recent challenge to the Democratic leadership and the vote against the SST indicate to many observers that the stereotype of recent years is no longer valid.

Sen. Bayh summarizes the argument against basing our electoral structure on political grounds when he notes that we are electing "the President, who represents all Americans", and that

> Political expediency, simply, is hardly the foundation upon which to build a sound and democratic electoral process — a process that insures every American, white and black, North and South, of the same opportunity to vote directly and equally for the candidate of his choice and guarentees a popular choice every time.[31]

As strong as these theoretical reasons are for not retaining the present system because of its supposed political effects, one must also seriously question the underlying rationale that the electoral college, by its structure favors the cities per se. Conceding arguendo the basic assumption that America's large cities — from New York to Los Angeles, from Houston to Chicago — are sufficiently like one another that they constitute a national urban constituency, the fact remains that these cities are but parts of large and diverse states. And these states, which the theory says will cast their large blocks of electoral votes for the urban-oriented candidate who will win the cities, are so different from one another that they will be carried by different candidates. Their large blocks of electoral votes will therefore cancel one another out rather than building together to provide an electoral majority. If there is such a thing as a national urban constituency it would be far better served by direct

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31Bayh, supra n. 11, 6 Harvard Journal on Legislation at 132.

vote, in which the votes from all the cities could be combined with one another in the national totals, rather than split apart in the electoral college. Under direct vote the interests of the cities would not, as some fear, be ignored. They would be a campaign issue, for the simple reason that most voters live in and around cities. Any campaign that was aimed at rural or small-town America at the expense of the cities would obviously be doomed, either under the present system or under direct vote.[32]

3. The Common Weakness of the Two "State Interest" Objections.

Before considering the other objections that have been raised against direct vote it would be well to compare the competing claims that the small states should be given electoral preference (federalism) and that the large states should be given preference (urban interests). The author has made clear his conviction that both theories fail when considered on their own merits. There are, to begin with, serious conceptual problems in designing a democratic political system that will deny full political power to one group in order to give extra power to another group. Additionally, it has been shown that the small states don't need such protection, because we have thrived and prospered for 150 years without it. And the big states certainly don't need it, because they have enough voters to weild substantial influence without requiring any special protection. But these arguments skirt around the basic fallacy in both of these claims, which is that groups of states, as groups of states, have overriding common interests solely because of their common size. New York,

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[32] J. Feerick, The Electoral College — Why it Ought to be Abolished, 37 Fordham Law Review 1, 38-39 (1968).

California, and Texas have no more in common than do Rhode Island, North Dakota, and Nevada. It is people, not states, that have interests, and the interests that people have bear no demonstrable relationship to the size of the state they live in. Wheat ranchers from Texas and North Dakota, for example, have more interests in common with each other than they do with most of their co-citizens. Nor would a voter's interests be any different if he lived on the California shore of Lake Tahoe instead of the Nevada shore. Therefore, when one argues that one or the other group of states be given special preference in the electoral system, he is in fact arguing that the individual voters in those various states — both the liberals and the conservatives, the rural and the urban dwellers, the hawks and the doves — be given special preference. This is nothing more than giving a person voting power because of the accident of his residence, and there can be no justification for this result.

4. Administering Direct Vote

The third and fourth objections to direct popular vote deal with completely different considerations. Instead of concerning who would be hurt or benefitted by electoral reform, they concern the practical mechanics of running a national popular election. The first problem involved is whether such a national election is even a feasible concept in view of the fact that condidates are listed on state ballots, and that states can -- and have-- kept major party candidates off the ballot. And the second is whether it is possible to count every vote in the nation accurately.

The simple answer to these problems is that any Constitutional Amendment on electoral reform can give Congress the authority to

pass such laws as may be necessary to insure that national candidates are on the ballot nationwide and that the vote is tabulated accurately. And, in fact, the proposed direct vote amendment includes just such a provision.[33] Legislation guaranteeing every candidate a place on the ballot would be a simple matter, and legislation requiring a national vote count would be just as easy because there is already an official count for each state which must be reported to the federal government.[34]

This leaves unanswered the question of practicality of a national count. Certainly it is utopian to think that, even with federal legislation, all fraud and error in vote counting could be eliminated. And if fraud and error can't be eliminated there will be demands for a full national recount in close elections. Now, at least, recounts are only statewide, and are crucial only if that state's electoral votes could change the national result. But it must be remembered that there will always be close elections, regardless of whether direct voting or electoral voting is used, and recounts may occur after any close election. Moreover close elections and recounts are no radical departure, but are a common fixture of American politics. Nearly every election year produces at least one major race (Governor or Senator) that must be recounted. And even when the final tally is extremely close — sometimes less than 100 votes — the public accepts the result as the fair reflection of the popular will.[35]

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[33] Peirce, at 353-54.

[34] 3 U.S.C. §6.

[35] Peirce, at 286.

Therefore, if direct popular vote is an other wise desirable system, the possibility of a recount should not preculde its being instituted. Moreover, recounts are less likely under direct vote than under the current system. This is because, now, the result usually rides on the outcome in a few large states, and only a minor shift of the votes in those states would change the electoral result, while a major national shift would be required to change the popular result. This fact is confirmed by the close elections of recent history. In both 1960 and 1968 it would have taken a shift of five times as many votes to have a new popular vote winner as to have a new electoral vote winner.[36] And in 1948 it would have taken thirty-five times as many votes to change the popular outcome as to change the electoral outcome.[37] Thus, although fraud and error can never be eliminated, to abandon the present system and adopt direct vote would lessen the possibility of a recount by eleminating the premium that the winner-take-all system places on winning in the "key" states.

5. The Two-Party System

The fifth argument against direct popular vote is that it would work such a fundamental change in the central objective of American politics — electing a President — that the two-party system could be weakened. After so many years of experience under the current electoral method many subtle characteristics have become a part of our political system, and it is claimed that to change the ground rules now would have unpredictable and possibly disasterous effects. It

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[36]Peirce, at 321, and Proposed Constitutional Amendment Providing for Direct Election of the President and Vice-President, report of the Committee on Federal Legislation, Association of the Bar of the City of New York, reprinted in 40 Oklahoma Bar Journal 1419, at 1423 (1969).

[37]Peirce, at 321.

is argued that, though the current electoral system is clearly imperfect, it has — in spite of its faults — worked fairly well and we should not tamper with it when the risks are so great. Although this concern is legitimate, it is misdirected. For all available evidence tends to indicate that it is the current electoral system which is more conducive to third-party politics. Direct popular vote would strengthen the two-party structure.

To understand why this is the case it is first necessary to understand why we have a two-party system to begin with. "An extensive body of political research has identified many reasons for American's adherence to the two-party system: the electoral college is not among them."[38] Among these many reasons are the "dual divisions on great issues at critical points in our history";[39] the fact that "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";[40] the fact that the Presidency, the great objective of political parties, "can not, [like a multi-party cabinet], be parcelled out among miniscule parties";[41] the fact that our system provides for only one election with no runoff, so that voters are not likely to waste their vote on a minor party, safe in the knowledge that they can cast a "real" vote in the

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[38] id. at 258

[39] V.O. Key, Jr., Politics, Parties, and Pressure Groups 210 (5th ed. 1964).

[40] C. Rossiter, Parties and Politics in America 8 (1962).

[41] Key, supra n. 39.

run-off;[42] and the many "electoral laws, campaign practices, and social patterns" which have grown up around the two party system, and "which make it extremely difficult for minor parties to attain even secondary nationwide influence".[43] The most important factor, though, is probably the single-member district. Virtually every political campaign in America, from President to dog-catcher, is fought in an arena where there can be but one winner. Where candidates run at large, so that several top vote-getters are elected, is is possible for a minor party to win political representation by placing fifth or sixth on the list. But where only one is elected, the second-place candidate has lost and the third-place finisher is rarely even in the same league. This political fact of life tends to "stimulate coalition within the electorate before the election, rather than in the parliament after the popular vote."[44] As a result, no more than two parties can, in the long run, compete effectively for political office.

The one partial exception to this pattern of single-member districts is the Presidency itself. It is an exception, not in that there can be more than one winner, but in that the electoral college intervenes between the choice of the voters and the final determination of a winner. And it is in national campaigns for the Presidency, and not in local or state campaigns, that third parties are most likely to emerge. This strongly indicates that if there is any relationship

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[42]Testimony of R. Scammon, Hearings on Electoral College Reform before the Subcomm. on Const. Amend. of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess., at 341 (1969).

[43]Peirce, at 259.

[44]Key, supra n. 39.

between the electoral college and third parties, then the electoral college must be promoting them rather than impeding them. The reason for this is readily apparent. The Constitutional requirement of an electoral majority means that in a close Presidential race a third party that wins electoral votes may prevent a victory by either side. That third party would then be in a position to make a deal for its electoral votes with which ever major party was willing to pay the higher price. It would weild extraordinary influence in American politics, far more than it would have if it had worked within one of the major parties to help provide a broad national majority.

The electoral college system may also be responsible for statewide, as opposed to national, third parties, although it must be admitted that the evidence is not as conclusive. In his article proving that each vote in a large state is worth far more in Presidential elections than each vote in a small state, Banzhaf suggested that local third parties might develop in the larger states.[45] They would be able to form a true "swing" bloc of voters who could decide the Presidential outcome in their state and possibly, the nation. Although this theory can be neither proven nor disproven, it is worthy of note that the most developed minor parties in America are in New York, which since 1810 has had more electoral votes than any other state. And in California, which will take over the electoral vote lead in 1972, both major parties are badly split into rival factions. This may be a prelude to the formation of minor parties there.

In discussing the effect of the electoral college on third

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[45]Banzhaf, supra n. 4, 13 Villanova Law Review at 324.

parties it should not be forgotten that it also tends to inhibit the growth of genuine two-party structures in one-party states. This phenomenon, discussed earlier,[46] stems from the fact national parties are not likely to waste campaign resources in states where the outcome is a forgone victory for the opposition. This lack of national support, in turn, makes the development of a local party more difficult.

It therefore becomes apparent that abolishing the electoral college, rather than throwing a monkey wrench into the two-party system, would strengthen it from both directions. It would cut down on the power of third parties who are able to use the unique mathemetics of electoral politics for their own advantage, adn it would promote the growth of two-party political systems in heretofore one-party states.

6. Can Direct Vote Pass?

The final objection to direct popular vote is that, no matter how good it is, it can not command enough support to get two-thirds majorities in both houses of Congress, as well as ratification by thirty-eight state legislatures. If any electoral reform at all is to be passed, therefore, some other plan must be proposed. Although this has been the case for 150 years, the past five years have seen a significant increase in support for direct vote.[47] Leading Senators and political scientists who had previously backed other plans have endorsed direct vote. Public opinion polls show over whelming support for direct vote, among both the public and the state legislators who

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[46]See discussion, supra, in Chapter II.

[47]Peirce, at 189-93.

would have to ratify an amendment. And a special commission of the American Bar Association, after an exhaustive study of all reform proposals, endorsed direct vote. It is now apparent that direct vote is the only plan which has enough support to be passed, and that it is the supporters of other plans who must accomodate themselves to direct vote, rather than vice versa.[48]

But whether this new wave of support will be strong enough to actually win passage, rather than just prevent passage of another plan, is still quite uncertain. Throughout our history the other plans for electoral reform have seemed headed for passage, only to fall short. And, in fact, direct vote has been stalled in Congress for over a year and a half since passing the House in the fall of 1969.[49]

An affirmative plan for enacting direct vote will be presented in the remainder of this paper. The important fact at this stage is that direct vote can no longer be objected to on the grounds that, as a plan with only minimal support, it is blocking meaningful electoral reform.

C. SUMMARY

Direct vote is only one of several plans of electoral reform that have been proposed. The other plans — district, proportional, or automatic — share the common defect that they fail to correct all the faults in the present electoral system. Only direct vote will insure that the popular vote winner will be elected President, and

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[48] W. Flittie, The Real Case for Direct Elections of Presidents, 34 Texas Bar Journal 149, 152.

[49] New York Times, Sept. 19, 1969, p.1.

only direct vote will insure that every voter will have an equal opportunity to affect the outcome.

But it is not enough to show merely that direct vote is the only plan which will correct the faults of the electoral college. It must also be shown that direct vote is a workable alternative, and that in adopting it we will not destroy other values that may be more important to our political system than having popular vote winners and voter equality.

To consider the practical objections first, Congress would clearly have the power to insure that in direct vote the citizens of every state could vote for the candidate of their choice. And an aggregate national vote could be computed easily from the returns in the fifty states. Although a recount might be necessary in a very close election, no electoral system can avoid this, and direct vote does have the advantage of making a recount less likely.

The political influence objections go to the central question of who should be favored by the structure of the electoral system. For various reasons, it is argued both that the small states should have proportionately greater influence (federalism) and ALTERNATIVELY, that the large states should (urban interests). ~~also.~~ Neither of these claims, however is able to sustain its burden of proof that the sought-for special influence is necessary to the effective functioning of our political system. Moreover, both of them fail to recognize the central idea that it is voters — not states — who have interests. Any electoral plan except direct vote would therefore hinder voters in different states from combining together to promote their common interests, and would also allocate voting power on the wholly unjustifiable ground

of state residence.

Contrary to the objection that direct vote would weaken the two-party system, it would actually strengthen it. It would inhibit third parties that sought to exploit the current system, and would promote two-party political systems where one party systems now exist.

Finally, direct vote can not be accused of being a "spoiler" that is preventing essential electoral reform. Rather, it is the other plans which are now preventing the implementation of direct vote.

IV. THE NATIONAL VOTE PLAN FOR ELECTORAL REFORM

> The cause of electoral reform seems endangered by two age-old threats - the unwillingness of reformers to agree on a single system and the insistence of some that they could reform the system for their own partisan advantage
>
> — Neal R. Peirce
> The People's President, 201

These twin impediments to reform threaten, once again, to block passage of any electoral Amendment. Since the first big effort at reform in the 1820s the proponents of reform have always divided sharply among themselves — both out of personal conviction and out of partisan interest. Then, after a few years of unproductive effort, the clamor for reform would die down, the leaders of reform would devote their energies to the other problems of our government, and the issue would remain dormant until a new generation of leaders entered Congress. This cycle is showing disquieting signs of repeating itself one more time, as the memory of recent close elections recedes further and other issues preoccupy the nation's attention.

What is needed is a fresh new approach to the issue of reform. Not a new plan of reform, for it is highly unlikely that a new plan could be devised that would be better than direct vote or even better than any of the other basic plans we have now. What is needed is a new way of enacting reform. Ever since the states took over the Framers' scheme and created a workable electoral system in the early 1800s, reformers have tried to correct the remaining evils with an endless stream of Constitutional Amendments. Every one has failed, adn current prospects are hardly more encouraging.

A. THE NATIONAL VOTE PLAN

This exclusive reliance on Constitutional electoral reform has been misplaced. For our present electoral system is as much the product of state action as it is of Constitutional directives, and it is clearly as proper to change state practices as it is to amend the Consititutional language. It is therefore necessary for the states to take up the cause of electoral reform that they abandoned years ago.

The states can institute direct popular vote, and they can do so more quickly and even better than can a Constitutional Amendment. All that is required is for the states to change their election laws so that electors will be pledged to support the national popular vote winner, not the state-wide winner. This proposal, the "National Vote Plan", would do away with the winner-take-all system and all the inequities that stem from it. Technically, this is still an "indirect" electoral system, but because the electors would vote for the national winner the faults of an indirect system — the possibility of a popular loser and the distortion of voting power — would be eliminated. A Presidential candidate would still have to win an electoral majority, but he could win the electoral votes only by winning a nationwide popular mandate. Direct popular vote would become a reality.

This same result, of course, could be accomplished without any state action. The individual electors could decide to "defect" from their candidate to vote for the national winner. Or, a defeated candidate could release his electors, asking them to vote for the victor. Hopefully, either of these actions would soon become traditional, so that direct popular vote would become a <u>de facto</u> reality.

But both of these actions would be such a break with tradition that they must be considered highly unlikely. While it would be just as much of a break with tradition for a state to enact this reform, the responsibility for that action would not rest, as would the others, with an individual. Rather, it would be done only after legislative debate and consideration, and would represent a popular consensus — not an individual decision — that the old practice should be abandoned. While it is to be desired that individual electors and candidates take this action on their own, the rest of this discussion will be limited to the possibility of the states doing so.

B. OBJECTIONS TO THE NATIONAL VOTE PLAN.

The thought of the states becoming the avenue to direct popular vote is a radical departure from all current thinking on electoral reform, and immediately raises some serious questions: Do the states even have the power to take such action? If so, is it wise to have the individual states take action on what is clearly a problem of uniform national concern? Is is right to use the national popular vote to elect a President in the absence of a national law that requires all states to list the major candidates on their ballots? And if this problem is solved, so that national popular vote becomes a meaningful concept, who is to compile the nationwide vote count? What about recounts? What if no candidate gets a majority? Can the electors be bound, legally, so that they will cast their vote for the national winner? Each of these questions poses a serious issue about reforming the electoral college by state action. Moreover, they are cummulative. Each one must be answered satisfactorily if the national

vote plan is to be workable. Therefore each will be considered at length.

1. State Power to Act.

There should be little doubt about the states' power to take this action. The Consitiution says simply that "each State shall appoint [its electors] in such Manner as the Legislature thereof may direct.",[1] and the United States Code does no more than set the time for such appointment.[2] In fact, two primary ingredients of the present electoral system, popular election of the electors and election of a statewide general ticket, are wholly the creatures of state law and may be changed at any time. When, in 1892, Michigan reverted to a district plan (the Democratic legislature, foreseeing a Republican victory in November, wanted to save some electoral votes for the Democrats) the Supreme Court upheld the legislature. After an extensive review of the Constitutional Convention and the early elections, a unanimous Court found that throughout our history "the practical construction of [this] clause has conceded plenary power to the state legislatures in the matter of the appointment of electors".[3] Moreover, this construction had prevailed so long and so uniformly that it "must be treated as decisive".[4] "In short", the Court held, "the appointment and mode of appointment of electors belong exclusively to

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[1] U.S. Const., art II, §1.

[2] 3 U.S.C. §1.

[3] McPherson v. Blacker, 146 U.S. 1, 35, 13 S. Ct. 3, 10 (1892).

[4] id., 146 US at 36, 13 S Ct. at 11.

the states",[5] and the states' power in this field "has not ceased to exist because the operation of the [electoral] system has not fully realized the hopes" of the Framers.[6]

But is this power of the states so broad that they can make the appointment of their electors partially dependent on events, such as who wins the national popular vote, that happen outside the state? Although there is no legal precedent on this point, both history and logic would indicate that they can. On at least two occasions electors have pledged to vote for whichever of two national candidates most needed their help. In 1824 the Jackson and Adams forces in North Carolina, fearing defeat by Crawford, joined forces behind one anti-Crawford slate pledged to vote for whichever candidate (Jackson or Adams) stood the best chance of national success.[7] And in 1912, South Dakota's Progressive slate (pledged to Roosevelt) also pledged themselves to vote for Taft if Taft were in a better position, nationally, to defeat Wilson.[8] More recently, in a closely analagous situation, Wallace's 1968 electors were pledged (by notarized oath) to vote for Wallace "or whomsoever he may direct".[9] Although all of these cases were motivated by partisan politics, and not be a desire to reform the electoral college or elect the national popular winner, they do illustrate the point that electors may wait until the national returns

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[5] id., 146 US. at 35, 13 S. Ct. at 10.

[6] id., 146 U.S. at 36, 13 S. Ct. at 11.

[7] L. Wilmending, The Electoral College 181 (1958).

[8] id.

[9] B. Bayh, Electing a President — The Case for Direct Popular Vote, 6 Harvard Journal on Legislation 127, 128 (1969).

are in before deciding how to cast their vote.

It may be pointed out, and correctly, that these cases concern the acts of individual electors, and do not constitute official state action in appoi nting electors who will represent the whole nation — not just the state — when they vote. There are two answers to this objection. First, the winner-take-all system began as a device to allow states to maximize their impact on national elections, and by now adopting the national vote plan and guaranteeing that they will be on the winning side in every election they will increase their impact even more. Second, and far more important, the state legislature can find that because of the operation of the electoral system, nationwide, their citizens are precluded from exercising a full and effective franchise in Presidential elections. This, in turn, constitutes an undesirable situation that contravenes the strong public policy, as reflected in the law giving the people the right to choose the electors, that the public should elect the President. The only way to correct this situation is by direct popular vote, and the only way the states can insitute direct vote is by instructing their electors to vote for the national popular vote winner.

This argument has particular force in the District of Columbia and the 32 states that, according to Banzhaf's analysis, are disadvantaged under the current electoral system.[10] But a similar argument may be used in the larger states. These states also have a strong public policy that the people should elect the President. And by finding that the present system perpetuates many inequities that

[10] J. Banzhaf, One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College, 13 Villanova Law Review 303, 329 (1968).

distort political life, that these inequities are inconsistant with the national character of the Presidency, and that the advantage enjoyed by their citizens is of comparitively lesser importance, the large state legislatures could adopt the national vote plan as the only way to make the Presidency reflect the national will.

2. The Wisdom of State Action.

The states, then, have the power to appoint their electors as they think best, even to the extent of directing their own electors to vote for the national, not the state, popular vote winner, if that is necessary in order to fully implement their policy that the choice of the President belongs to the people. But is it right to change the method of electing the President without the broad national consensus that would be reflected in passing a Constitutional Amendment? In arguing that the Presidency is of such national importance that this plan is imperative, aren't the states also admitting that it is of such national importance that there should be uniform national reform, not state-by-state action?

The answer to these questions is largely historical. It will be remembered that the Convention debated the pros and cons of popular election at length,[11] and that in devising the electoral college it created "a deliberately vague political compromise which enabled the Framers to agree on their most difficult issue, and yet allowed those of each viewpoint to return home and claim they had carried the day".[12]

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[11] See text, Chapter I supra, accompanying n. 4-6.

[12] J. Kirby, Limitations on the Power of State Legislatures over Presidential Elections, 27 Law and Contemporary Problems 495, 506 (1962).

This deliberately vague compromise solved the immediate problem of allowing the different states to choose their own method of selecting electors, but it also gave them wide latitude for experimentation. As a result of this experimentation the states fairly quickly settled on a uniform method, but if this state-adopted method is no longer satisfactory then the states have the right — even the duty — to again experiment with other plans.

It is true that electoral reform is a national concern, and uniform nationally-enacted reform would be desirable, but as long as Congress is unable to agree on which plan of reform is best then this national concern must not be of such overriding importance that the states should decline to take any action of their own. In adopting the national vote plan of reform the states would be saying that they felt the President should be elected in a true national election, just as in an earlier era they said that electors should be popularly chosen. To argue that state-by-state electoral reform is inconsistent with the states' necessary findings that the Presidency is national in character misses the central point. This is that the Framers left to the states the discretion to decide for themselves what form of Presidency they envisioned. If the states envision a truly national Presidency then they should adopt a form of election to insure this result. Therefore, as long as Congress and the states can not pass a Consitiutional Amendment that reflects nationwide opinion, there is nothing inconsistent about the individual states taking action to create a national Presidency through direct popular vote.

3. The Effect if Some States Do Not Act.

But what if not all states adopt the national vote plan. Can it work if some states use it while others keep the present system. There is no reason why it can not. The states that adopt it would be, for electoral purposes, like one big state whose electoral votes would be cast for one candidate. If their electoral votes were only one half of the total, obviously no candidate would be elected without a popular vote victory, and direct vote would be a reality. The political distortions and inequities caused by the present state-by-state winner-take-all campaigns would be eliminated whether the other states adopted the national vote plan or not.

But, suppose less than half the electoral votes are involved. It seems obvious that if just less than half of the electoral votes are committed to the national winner the plan will still work. For any candidate who won the national majority needed to win this large block of electoral votes would also win in enough other states to put him over the top. In other words, although it is possible for a candidate to be elected with an electoral majority in spite of a popular defeat, there is almost no chance — if the national vote plan were only partially adopted — that a losing candidate would win. To do so he would not only have to win in states whose electoral votes gave him a majority, but he would also have to win this electoral majority in states that had not adopted the national vote plan.

The question then becomes one of how few national vote plan electoral votes are necessary to make the plan effective. The answer seems to be 20%-25% of the total, or between 108 and 135 electoral votes.

This conclusion is supported by historical evidence. In any election where the shift of a few popular votes in a key state could have changed the electoral outcome this number of electoral votes, added to the winner's total, would have conclusively decided the election. This is true even if one assumes that well over half of these electoral votes (say, 65 to 80) would have come from states that he carried anyway, so that he would be receiving only 45 or so extra electoral votes. More importantly, in any election where the popular vote winner actually did lose, another 45 electoral votes would have put him over the top.[13] Based on historical experience, it is therefore logical to conclude that this number of electoral votes (120 or so) is enough to guarantee a popular vote winner. It just does not seem to be possible to win over half the popular vote without, as a direct result, winning in enough states to have close to half of the electoral vote, and any candidate who won a popular victory would therefore need only a few more electoral votes to be guaranteed of an electoral victory as well.

It is therefore seen that the national vote plan would be fully effective if only 20-25% of the electoral votes are committed to it. If this conclusion appears surprising, or even unwarrented, it should be noted that it is analagous to the well-recognized fact of life in corporate law: if there are a sizeable number of shareholders (states) who each own a relatively small portion of the total shares (electoral

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[13]This discussion omits 1824, a strange four-way race where all contenders were Democrats. Figures on electoral votes in past elections may be found in N. Peirce, The People's President 303-308 (1968). (Hereinafter cited as Peirce). For a list of close elections where a small popular vote shift in a key state would have been decisive, see Peirce at 317-321.

votes), then effective control of the corporation (electoral college) requires far less than 50% of the total voting power.

The problem originally posed, that of whether the national vote plan of electoral reform would be workable if not all states adopted it, therefore has relevance only if some relatively small number of electoral votes — probably less than 120 — are committed to it. Any number above that and direct vote would, for all practical purposes, become a reality.

Although the plan would not work if only a few electoral votes are involved, would there be any adverse effect on the political system if most states retained winner-take-all, but some states adopted this national vote plan? If there would be, then the plan may be legitimately criticized, for the first states adopting it could not be certain that enough other states would adopt it to make it work. They might well, therefore, prudently decide not to adopt it rather than run the risk of creating a bifurcated electoral system, partially direct vote and partially winner-take-all, that would adversely affect the political system.[14]

As legitimate as this concern is, no such adverse effects can be imagined. Most states and the vast majority of electoral votes would still be under the old system. There would be no effect from the fact that candidates would face an electoral structure where most

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[14]As will be made clear, the author does not think there would be any such adverse effects. If a state legislature felt differently, however, it could still adopt the national vote plan contingently, to go into effect only when other states with 120 electoral votes had also adopted it.

electoral votes were awarded by states and a few were awarded nationally. Even under the current system they campaign for the national popular vote. They are well aware that the public expects the President to be the candidate who had the most popular support, and no President would want to begin his administration as an "accidental" victor, if for no other reason than that his popular defeat would decrease his influence in Congress and shorten the traditional "honeymoon". The defect in campaigns under the current system is not that candidates ignore the popular vote, but that they give far more weight to some votes than to others. This and all the other defects in the current electoral system would remain if the national vote plan were only partially adopted, but they would not be intensified, nor would any new defects be created.

In fact, such a bifurcated electoral structure would probably have beneficial results. For to the extent that the small number of "national vote" electoral votes would have any effect at all, that effect would have to be to make the candidates even more aware of the importance of the popular vote. If they were to change their campaign strategies as a result, the change would necessarily be more towards a national campaign and away from a state-by-state campaign. An additional benefit would be that if this small number of national vote plan electoral votes became decisive in the final outcome they would be decisive in favor of the popular vote winner, and would thereby overcome one of the major defects in the present system.

There would, therefore, be no undesirable results from a partial acceptance of the national vote plan. Either so few electoral

votes would be involved that no significant effects would be noticeable, or somewhat more would be involved, causing only minor — but positive — effects, or enough would be involved to make direct vote a reality.

4. The Lack of Federal "National Ballot" Legislation.

The remaining objections are practical rather than theoretical. They are not concerned with whether the national vote plan can or should be enacted, but with whether it can be made to work if it is enacted. What, for instance, should be done about the lack of a national ballot? A Constitutional Amendment would give Congress express authority to see that all the national candidates appeared on the ballot in each state. And even without a specific grant it appears that Congress already has authority to pass such legislation under its power to regulate federal elections.[15] But if it declines to exercise such authority some might argue that it would be better to use the present electoral system instead of using a "national" popular vote that denied some voters a full choice.

The possibility of such a denial is not, as it might seem at first impression, fairly remote. To get on the ballot a candidate (technically, his slate of electors) must qualify under state law, and there are two situations in which he can be kept off. Both stem from the fact that state election laws give preference to the two major parties, since they qualify automatically by having polled X% of the vote in the last election, while new parties must qualify in other

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[15]For an analagous case, recognizing Congress' broad power over federal elections, see U.S. v Arizona, 91 S. Ct. 260 (1970), upholding Congressional power to grant 18 year olds the right to vote.

means. The first problem, therefore, is the one faced by Wallace in 1968: the fact that as the candidate of a new party he had to satisfy each state's requirements as to filing petitions, holding conventions, and the like. The second problem accurs when the local state party supports someone other than the national nominee, and thereby "pre-empts" the official ballot listing for their candidate. This happened in 1860, when Lincoln did not appear on the ballot in ten of thirty-three states, in 1912 when California Republicans supported Roosevelt, and in 1948 and 1952 when Alabama Democrats supported Thurmond and independent elector slates, respectively.[16]

The first of these problems, that faced by minor party candidates in qualifying, has been eliminated by the Supreme Court's decision in Williams v Rhodes.[17] This case arose directly from the Wallace campaign of 1968, and was brought to compel Ohio election authorities to list his American Independent Party on the ballot. The Court recognized Ohio's valid interests in promoting a two party system, in insuring that new parties had broad popular support and were well-organized, and in having majority — not just plurality — winners. It held, however, that the Ohio election laws (Which were both complex and rigorous, and appeared to be the most restrictive in the nation.[18]) could not be justified by any "compelling state interest"[19] in accomplishing these objections. Looking to the much less restric-

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[16]Peirce, at 137.

[17]393 U.S. 23, 89 S. Ct 5 (1968).

[18]For example, to get on the ballot a new party in Ohio had to file petitions signed by 15% of the electorate. By comparision, forty-two states require 1% or less, and no other state requires over 5%. See n. 10 in Mr. Justice Harlan's concurring opinion, 393 U.S. at 47, 89 S. Ct at 19.

[19]393 U.S. at 31, 89 S. Ct. at 11.

tive laws in other states, and even to Ohio's own experience with prior election laws, the Court concluded that Ohio could have protected its interests far more simply. As it was, their laws were a denial of equal protection and violated both "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.".[20] In short, Wallace was entitled to a place on the Ohio ballot, and by implication no state could use such election laws to keep a party off the ballot once it had demonstrated more than de minimis public support.

The second problem, that occuring when the state party repudiates the national nominee and thereby denies him an automatic place on the ballot, was also covered by Williams. Although this was not the issue directly before the Court and the Court's language is therefore dicta, a key passage of the opinion noted that

> since the identity of the likely major party nominees may not be known until shortly before the election, [any independent party] will rarely if ever be a cohesive or identifiable group until a few months before the election. Thus, Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group from even getting on the ballot and ... thus denies ... [them] a choice on the issues.[21]

This same principle would apply where the state party, after the national convention, decided to support an independent. The loyalist faction, to preserve their "choice on the issues", could obtain ballot listing by satisfying state requirements for an independent par-

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[20] 393 U.S. at 30, 89 S. Ct. at 10.

[21] 393 U.S. at 33, 89 S. Ct. at 11.

ty, or by suing in federal court if those requirements were unduly restrictive.

On the strength of Williams any minor party, whether a true independent party or the national faction of the local party, would have a very strong case, as they could allege both an infringement of their right to associate to promote political beliefs, and a denial of the electorate's right to vote effectively. But their case would be strengthened even more if other states had adopted the national vote plan. Under the present electoral system these voters would have no chance to affect the outcome of the election, since the fact that they did not have enough strength to obtain an official ballot listing for their candidate would indicate they did not have enough strength to carry the state — and its electoral votes — for that candidate. But if the national vote plan were in operation in other states, so that the Presidency would be decided by the national popular vote, any denial of their ability to vote for a national candidate would deny them the chance to affect the outcome of the election. Their popular votes, when added to the national totals, could be decisive, whereas they would never be able to be decisive in the electoral college. This fact, when added to the reasoning already in Williams, should conclusively establish their right to a place on the ballot.

But if some legislature felt that Williams might not be applied in all cases (and, in fact, a companion case to Williams held that a party which had made little or no effort to comply with Ohio law, and was tardy in seeking judicial relief, was not entitled to a

ballot listing[22] would it be justified in not adopting the national vote plan? It wouldn't, if it otherwise felt direct popular vote was the best way to elect a President and should be implemented. To refuse to adopt the national vote plan because some state might succeed in keeping a legitmate national candidate off the ballot would mean giving that state the power to play dog-in-the-manger, and to decide — for all states — whether they wanted a popularly elected President. There is a more important reason why they should still adopt the plan, however. Although a popular vote plan that did not guarantee every voter in the nation a full choice would be an imperfect system, it would be hard to claim that the isolated instances in which Williams would not be applied would make the national vote plan more imperfect than the present system, which distorts the voting power of every citizen in every election. Additionally, as has been seen, the adoption of the national vote plan would strengthen the rationale of Williams, and make it even less likely taht a candidate could be kept off the ballot.

5. The Lack of Federal "National Count" Legislation.

Unlike the problem of getting candidates on the ballot, for which a judicial remedy is readily available, the problem of counting the popular vote will require a legislative solution. The most obvious difficulty here, that of obtaining an official national vote count, is really no problem at all. Congress has already provided that each Governor shall file with the Administration of General Services a list of all candidates for elector and the votes received by each. These certificates are to be "open to public inspection", so that com-

[22] Socialist Labor Party v. Rhodes, 393 U.S. 23, 89 S. Ct. 5, (1968).

piling the national popular vote totals would entail no more than adding up the various state returns.[23] Each state adopting the national vote plan could require their chief elections officer or his authorized agent (presumably the Administrator of General Services, if he were willing) to compile national totals from these official returns, and then officially notify that state's electors of the national popular vote winner.

But there are two difficulties involved in counting the national vote that do pose a problem. First, the returns in one or more states may not be final by the time the electors meet in mid-December.[24] In that event there would be no official state results which could be included in the national totals. And second, the national totals may be so close that the popular vote winner is in dispute. Normally this would call for a recount, but the states adopting the national vote plan could do no more than order recounts within their own borders. If other states, where one electoral slate was a clear victor, chose not to go to the trouble and expense of a recount they could not be compelled to do so.

The most obvious and by far the best, solution to these problems would be for Congress to pass a "National Popular Vote Count Act". Such an act would be well within their authority to regulate federal

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[23] 3 U.S.C. §6.

[24] Like election day, this day is set by Congress. It is the "first Monday after the second Wednesday in December" (3 U.S.C. §7) which will always come forty one days after election day.

elections,[25] and should contain provisions for the official compilation and dissemination of the national popular vote, procedures for determining when recounts would be necessary, regulations for such recounts, and (to fit in with states using the national vote plan) provisions for delaying the meeting of electors until such recounts were completed.

Even if Congress fails to enact such a law, however, the states would be able to adopt the national vote plan, with but one proviso limiting its effectiveness in extremely close elections. The first vote count problem, that occuring when state "X" has not finally determined its own popular vote totals, would present a real problem only if the national totals were close. The chief elections officer in the national vote plan state could be given sufficient statutory discretion to find from state "X"'s unofficial or preliminary totals that the final state "X" totals would be within a certain range.[26] Unless the national totals were close the national popular vote outcome could not be affected by any final state"X" totals within this range.

The real problem with the national vote plan would come when the national totals were extremely close and, since this is assuming the lack of any Congressional action, there would be no procedure for a recount. Such a close election could arise either if the national

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[25]See, for example, 42 U.S.C. §1973 bb et seq. (granting 18 year olds the right to vote) or 18 U.S.C. 591 et seq. (regulating various election practices including campaign expenditures, intimidation of voters, etc.).

[26]If for any reason he could not obtain state "X"'s unofficial returns directly, he could be directed to use the figures being reported in the media, as compiled by the News Election Service. For official recognition of the role the media play in Presidential elections, see Oregon Revised Statutes §249-368.

totals were completely tallied and showed a close result, or if the national totals were incomplete and the range within which the missing state returns were likely to fall (as found by the chief elections officer) indicated that the final result might be close. In either event, the chief elections officer would not be able to certify a national popular vote winner to his state's electors. The solution to this problem would require a tri-partite legislative finding with respect to close elections. The legislatures adopting the national vote plan would decide, in effect, how close is "close". Since American elections, by and large, are accurately counted, and since recounts only rarely change the outcome of even extremely close races,[27] it is suggested that any count in which the leading candidates were separated by 0.2% of the total votes case (a margin 22% greater than the 1960 Kennedy-Nixon race) be accepted as valid for the purposes of determining who won. Conversely, when the count shows a separation of less than 0.08% or 0.1% ($\frac{1}{2}$ to $\frac{5}{8}$ of the Kennedy-Nixon margin) it should be regarded as being too close to determine who really won. And finally, for cases in the intermediate range (from 0.08% or 0.1% to 0.2%) the chief elections officer should be given discretion to declare that the leader is the winner, or that the election is too close to call. The factors he should be directed to weigh before making this decision should include two principle criteria. First, the closeness of the results. It obviously makes a difference if they are at one extreme or the other of this intermediate range. And second, the extent to which the results in various states are being attacked

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[27] Peirce, at 286.

as fraudulent or erroneous, along with the probable validity of such attacks, the number of votes involved, etc.[28] Additionally, to lessen the possibility of conflicting findings in different states, he should be directed to reach his decision only after consultation with the chief election officers in the other national vote plan states.

This broad grant of discretion to the chief election officers, which in effect gives them the power to decide who was elected President, may be opposed as being illegal or at least unwise. It appears to be legal, however, for broad discretion, even more broad than that outlined here, has already been granted to state elections officers to decide who will appear on Presidential primary ballots.[29] Nor is this grant of discretion unwise, for although the national vote plan would vest it at the final and decisive stage of the election process, it is inescapable that someone or some board will always have to be given the power to declare the winners in close elections. Perhaps, owing to the importance of the Presidency, it would be better to give this power to a non-partisan elections board or the state Supreme Court; that is for the legislature to decide — this paper has not used "chief elections officer" with the intent of precluding such a legislative choice.

This discretion must be completely distinguished from the other situation where a few men could have the power, in a close election,

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[28] A statute directing him to evaluate this information, as reported in the national media, would almost certainly be valid. See Oregon Revised Statutes §249-368.

[29] Oregon Revised Statutes §249-368 grants "sole discretion" to the Secretary of state.

to decide the Presidency. That is the situation when electors defect. There, a handful of people, responsible to no electorate, decide on their own whim who they will elect President. By comparison, what is proposed here is for a few public officials, experienced in administering and evaluating elections, to decide — pursuant to standards adopted by the legislature — who has been elected Prsident by the voters. There can be no comparision between these two situations.

This analysis has narrowed the scope of the problem of close elections, but it has not solved it. What if the election is, by actual count or by finding of the chief elections officer, too close to call? It is at this point that the national vote plan will not work, for electors can not cast their votes for the winner unless the winner is known, and under this hypothesis — a close race and no provision for a national recount — the winner is not known. The national vote plan should still be enacted, with the proviso that in any such close election the electors should vote for the winner in their state.

This solution is imperfect, and the reasons why it is reccomended should be understood. The other two possible solutions would be to simply declare the leader the winner, or to vest the chief elections officer (or someone else) with the responsibility to determine the winner. Vesting this responsibility would be unwise, because it appears doubtful that in any election this close a state official could obtain enough accurate and unbiased information about the conduct of the election in the 49 other states to be able to make anything more than a guess about who really won. In view of the overriding importance of the Presidency it would not be appropriate to have such

an extremely close election decided by men who could not have the facts needed to make an intelligent decision.

The second possibility, that of simply allowing the popular vote leader to be elected, would be quite similar to the reccomended solution of reverting to the present electoral system. Both plans would rather arbitrarily select a winner when, by definition, the vote count would be too close to do so. And both, being automatic and impersonal, would be better than allowing elections officials to do so. Election by the present system is preferred because in such a close election the premium on fraud would be less under it than under a direct vote election where no recount was possible. This may appear surprising, in light of the fact that the current electoral system is condemned because it exaggerates the effect of fraud and error. Such exaggeration occurs, however, only when the results in a given state are so close that they can be changed by fraud.

In an extremely close national election two factors would work to make any fraud less significant when counted state-by-state than when counted nationally. First, by definition the national vote is so close that it is analagous to a single state, in that any fraud anywhere could well be enough to change the outcome. Second, though the results in one or two states will probably be equally close, the results in most states will be much more one-sided; it is only in the aggregate that they will be close. In each of these states, therefore, the likelihood that fraud could affect the outcome would be less under the winner-take-all system — operating solely within the state — than under the much closer aggregate national count.

Although using the present system in an extremely close election can be seen to be better than any alternative, it does raise a serious question about the national vote plan. Namely, why bother with it al all? It is only in a close election that the current system can misfire and elect a popular vote loser, and the national vote plan will revert to the current system in just that sort of close election. There are four answers to this question. First, Congress may well enact a national recount law. Importantly, the likelihood of its doing so will be increased if the states adopt the national vote plan, which would require an accurate determination of the popular vote and thereby point up the need for a recount law. Second, there are close elections and there are close elections. In extremely close elections (such as 1960) the national vote plan may not preclude using the existing electoral college, but in most close elections (such as 1948 and 1968) it will. Third, the only elections in which the states would revert to the current statewide winner-take-all system would necessarily be extremely close. And though in such cases the popular vote winner might not be elected, the reason for this is very basic: in any election that close neither the current system nor the national vote plan could determine the winner without a recount. Fourth, and most important, the national vote plan will correct the other defects of the electoral college even if in a rare close election it can not guarantee a popular vote winner. If the national vote plan were adopted, candidates would campaign for a popular majority by placing equal emphasis on all voters. Voting power, though it might become unequal if the election were decided

under the present electoral college, would be treated as equal during the campaign, and this alone would be a significant improvement over the present system. Moreover, such a campaign would remove the twin distortions that the present system creates in the two-party system, those of aiding one-party political structures where they exist, and of aiding third party candidates in Presidential elections. In short, the national vote plan, in the absence of a national recount law, would not absolutely preclude the election of a minority President, but it would preclude this from happening unless the two contenders finished in a virtual dead heat, and it would correct the other defects of the electoral college..

6. If No Candidate Receives a Majority

The next question that can be raised against the national vote plan, and one closely related to the vote count problem, is what to do if no candidate receives a majority — or some lesser percentage — of the popular vote. This, in effect, is the problem of what to do about the current contingent election procedure, in which the House elects the President if no candidate receives an electoral majority. The best answer is simply to elect the candidate with the most votes, regardless of how many he has. Americans have come to realize that Presidents will rather frequently have less than a majority of all votes cast; this has happened in fifteen of the thirty-seven popular vote elections, including three of the last six.[30] What they do not want is for a President to be elected with less votes than his major opponent, something that has happened in three of the fifteen elec-

[30] Peirce, at 304-308.

tions.

Any other proposal for dealing with a plurality winner, as opposed to a majority winner, would have highly undesirable side-effects. The ABA proposal for a direct vote amendment, in which there was to be a nationwide run-off election if no candidate got 40% of the vote, could not, of course, be instituted by states adopting the national vote plan. More fundamentally, however, this proposal has been widely attacked on its merits, and is one reason why electoral reform has been stalled in Congress.[31] The primary thrust of these attacks is that a run-off procedure would lead to a proliferation of candidates on the first ballot. If people have only one chance to vote most of them will tend to support a candidate with at least an arguable chance of winning, as to do anything else would leave them with no real influence at all in the election. But if there was to be a run-off, people would be more likely to "vote their convictions" the first time, confident in the knowledge that they would still have another chance to cast a "real" vote; besides, if the field were wide-open enough, their man might make second place and get in the run-off.[32] This system would draw support away from the centrist candidates on the first ballot, and towards the more extreme candidates, and would therefore increase the likelihood of run-off between two candidates supported by only narrow segments of the electorate. For example, one can envision a run-off in 1968 between Gov. Reagan and Sen. McCarthy — a choice that would have left most voters unexcited, to

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[31] Eagleton, Direct Election vs. Vox Populi, 56 ABAJ 543.

[32] id.

say the least.

The other two proposals for deciding an election, if no candidate gets a given percentage of the vote, are scarcely any better. One would use some variety of election by Congress, but the three times Congress has been involved in choosing a President (in 1800, 1824 and 1876) point up all too clearly the Framers' fears that "intrigue, cabal, and faction" would dominate such an election. The other plan would revert to some form of indirect electoral mechanism, but this suffers from the obvious defect that, in order to obtain a national leader when no candidate polls enough votes to claim that role, such a system could well elect a man who received even less votes.

The alternative proposed here, that of electing the man with the most votes regardless of how many he has, is far superior to these other plans. Although an electoral system in which a candidate can win with too few votes to constitute a clear mandate is imperfect, such a system is better than the other alternatives of indirect election, Congressional election, or run-off popular election. Perhaps most important of all, a straight forward direct vote would all but eliminate the chance that no candidate would get a mandate. After soliciting testimony from both political scientists and politicians the ABA Commission concluded that a 40% vote was a sufficient mandate to govern and to provide national unity.[33] The only election in which no candidate received 40% was in 1860, when Lincoln fell just short with 39.8%, and he almost certainly would have done better if he had not been kept off the ballot in ten of thirty-three states.[34]

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[33]Electing the President: A Report of the Commission on Electoral College Reform, American Bar Association, January, 1967.

[34]Peirce, at 137 and 305.

As it was, that election can rightly be said to have been a symptom, rather than a cause, of the fact that no candidate could provide national unity. It is therefore extremely unlikely that another candidate will poll less than 40%, even under the current system. And adopting direct popular vote would make this more unlikely by removing many of the incentives for forming a third party rather than supporting one of the major candidates. This conclusion is supported by evidence gathered from campaigns for state governor, which, of course, are direct vote. Looking only to the thirty most competitive states, in the 170 gubernatorial elections from 1952 to 1964 no winning candidate received less than 40% and only two received less than 45%.[35]

In adopting the national vote plan, therefore, the states would assure that a condidate has an electoral majority and would eliminate the present system's use of a House election when no candidate got such a majority. Though they would be taking no affirmative action to deal with the possibility of no candidate receiving a sufficient popular mandate, there is really no desirable action they could take. And by instituting direct popular vote they would be reducing as far as possible the chance that a winning candidate would have an insufficient mandate.

7. The Problem of Independent and Defecting Electors.

The final objection to the national vote plan is that since it retains the individual electors there is no assurance that it will work. The individual electors may still run as independents, and thus bargain for the Presidency, or they could still defect, and thus usurp

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[35] id., at 295.

to themselves the power to choose the President. Treating first the problem of the independent elector, it is readily apparent that they could still be used. Nothing the national vote plan states could do would preclude independent slates running and winning in other states. But the likelihood of this would be nil, for by insuring that the popular vote winner would be elected President the plan would deprive the independent elector of his special bargaining power. No more voters could be expected to throw their vote away on such an independent slate than now do so on the true minor party slates.

The second objection to retaining electors is that they will retain their independence. Therefore they would still be able to vote for whomever they please and frustrate the public's will. The short answer to this objection is that, although this is admittedly an undesirable situation, it is no worse than the present system. It is even some better. For under the national vote plan the vast majority of electors will, as now, honor their moral duty to vote as expected. And since they would be voting for the national popular vote winner electoral majorities would become even greater. Therefore the number of defecting electors that would be necessary to change the outcome would become greater, and the chances would become much less that this many electors would defect.

There is, moreover, a strong chance that the electors could be legally bound to vote for the national winner. Before discussing the underlying legal issue, it would be well to consider the practical problems involved in enforcing such a law. Court action does not appear to be a practical solution. There is, to begin with, a "close

question" as to whether a suit to enforce such a pledge is even justifiable, or whether it would be a "political question".[36] But even if it is justiciable, there would be no case or controversy unless an elector had indicated in advance that he planned to defect. And if he had been so considerate as to indicate this, neither mandamus or injunction would be an effective remedy: if the elector violated a a mandamus order no one would be able to re-cast his ballot for the right candidate, and if an injunction were issued to prevent his voting for another he could abstain and not vote at all.[37] On the other hand, if he defected but gave no advance indication of his plans, any post-vote legal action would have to be brought against Congress, who must officially count the votes.[38] And if a suit directly against the elector is close to being a non-justiciable political question, a suit against Congress is almost certainly one.[39] And, even if this is overcome, the fact remains that the only remedy is a half-way measure. Congress can be enjoined from counting the vote, but it does not have the power to re-cast it.

Judicial action is not the only way to enforce a law binding electors. Congress itself has the power to decide whether an electoral

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[36]For a thorough and well-reasoned discussion of the "political question" problem, see A. Rosenthal, The Constitution, Congress, and Presidential Elections, 67 Michigan Law Review 1, 26-30 (1968).

[37]Kirby, supra n. 12, 27 Law and Contemporary Problems at 509.

[38]3 U.S.C. §15.

[39]Rosenthal, supra n. 36. But see the Adam Clayton Powell case, where the Supreme Court held that it was justiciable, in spite of the Constitutional provision (Art I, §5) that "each House shall be the Judge of the ... Qualifications of its own Members", to review the exclusion of a member. Powell v McCormack, 395 U.S. 486, 89 S. Ct. 1946 (1969).

vote has been "regularly given", and to "reject" it if it hasn't.[40] However, the one time it was asked to take such a step against a defector's vote (after the 1968 election) it refused to do so, although in that case there was no state law requiring the elector to vote as expected.[41] But even if a later Congress should distinguish this case and decide to reject a defector's vote, it would still lack the power to affirmatively re-cast it.[42]

Thus, even if the national vote plan was adopted, and electors were legally required to vote for the national winner, neither the courts nor Congress would be able to effectively enforce such a law. The one procedure that could insure that all electoral votes were cast as directed would be to make the electors' appointment conditional upon the "good and faithful performance of their duties". If any elector failed to vote as expected he would be deemed to have defaulted in the performance of his duties and would immediately forfiet his office.[43] The resulting vacancy in the electoral college could be filled on the spot; most states, pursuant to a federal statute authorizing the states to fill electoral vacancies,[44] already have statutes delegating to the electors themselves the power to fill a vacancy.[45]

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[40] 3 U.S.C. §15.

[41] 115 Cong. Rec. 170 and 246.

[42] Rosenthal, supra n. 36, 67 Michigan Law Review at 33.

[43] Kirby, supra n. 12, 27 Law and Contemporary Problems at 509.

[44] 3 U.S.C. §4.

[45] Peirce, at 128. On at least some occasions the electors who show up have been seen "scouring the hallways of the state capitol for likely candidates" to take the place of their absent colleagues.

The objection to such a conditional appointment is that the electors' votes would have to be given openly, while the Constitution directs that they shall "vote by ballot".[46] The most logical construction of "vote by ballot" would require some form of secret voting[47] and, although in many states the electors vote openly or even orally,[48] a state law providing for conditional appointment would probably be challenged as violating this Constitutional directive. A possible way around this would be to use secret voting, but to declare the whole slate to have forfieted their offices if any vote is miscast, and then empower the Governor or Secretary of State to appoint a whole new slate. This would preserve the secrecy of the individual ballot, while insuring that all electoral votes were cast as directed. The counter-argument to this, of course, is that the ballots are "cast" as soon as they are marked, and to have any sort of verification — whether singly or collectively — before formally "counting" them would violate the Constitutional independence of the elector.

It is at this point that one reaches the central legal issue involved in trying to bind electors. That is whether a pledge, enforced either by a conditional appointment or by some other means, is even permissible, or whether it violates the elector's Constitutional duty to exercise his own best judgment. In other words, does the

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[46]U.S. Const., art II, §1; Amend XII.

[47]The Random House Dictionary for example, defines "ballot" as "the means of secret voting", but also as "voting in general".

[48]Peirce, at 129. The fact that electors do not always ballot secretly lends support to the theory that "vote by ballot" does not require secret voting. See Smiley v Holm, 285 U.S. 355, 369, 52 S. Ct. 397, 400 (1932), to the effect that customary official action can help interpret the true meaning of legal phrases.

Constitution make the electors totally independent, beyond any limitation by the states that appointed them, or beyond even any self-imposed limitation? It seems inconceivable that the Framers, who created such an otherwise perfect system of checks and balances, intended to place the election of the President in the hands of men who would have to answer to no one but their own consciences. All other public officials must answer to their colleagues; additionally, the executive and the legislature must answer to one another, and to their electorates; even the judiciary, albeit indirectly, and collectively instead of individually, must answer to the executive and legislature which appoint them. Would it be consistent with this intricate structure to place the electors beyond any control at all?

A better view would be that the states, whose broad power to "appoint" is limited only by the requirements of equal protection if they provide for appointment by popular election, have the power to appoint electors who will be bound to act as agents for the public rather than free to carry out their own will. This conclusion is supported by two facts of constitutional history. First, the electoral college was a "deliberately vague ... compromise"[49] that, by leaving the manner of appointment to the states, was designed to allow as many people as possible to read their own schemes or preferences into the system. In binding the electors, therefore, the states would not be going beyond the broad powers they possess as part of their Constitutional power to appoint. Second, and more important, the Framers seem to have assumed that the real power to choose the Presi-

[49]Kirby, supra n. 12, 27 Law and Contemporary Problems at 506.

dent would lie with those who were given the power to choose the electors. Implicit in both the argument that the President was to be popularly elected "through the medium of electors",[50] and the opposing argument that he would owe his election "to the state governments",[51] is the assumption that the electors would be chosen because they would carry into effect the wishes of their electorate — whether the general public or the legislature. Although Hamilton apparently felt differently, that the electors would be largely independent,[52] his position is weakened both by the number of those who seemed to assume that the electors carry out another's will and by the amazing speed with which electors came to be bound. All but a handful of electors were faithful in electing Adams, the second President, and none at all defected in electing Jefferson, the third.[53] And when Jefferson and Burr tied, the calls for reform were aimed not at insuring elector independence but at instituting separate elector ballots for President and Vice-President.[54] This series of events, which occured so soon after ratification that they have almost Constitutional significance, is far more consistent with the view that the electors could be bound than it is with Hamilton's view of independence.

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[50] J. Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution (2nd ed, Washington, 1836) 304.

[51] 3 id. 488.

[52] The Federalist No. 68 (Cooke ed. 1961) 458. See generally Chapter I, supra.

[53] Peirce, at 64-68.

[54] Peirce, at 71-74, makes no mention of elector independence in reviewing the arguments on electoral reform that followed the election of 1800.

There are, then, no less than five reasons in the Constitution and in Constitutional history which support the principle that states may, if they choose, bind their electors. These are the deliberately vague provisions of the Constitution and the virtual blank check given to the states with regard to the manner of appointment, the fact that unlimitable elector power would violate the principle of checks and balances, the number of Framers who implicitly assumed that electors would not be independent, the speed with which the electors lost any independence they might have had, and the lack of any public displeasure with this loss of independence.

The opposing evidence consists only of Hamilton's statement, which is more than offset by the opinions of other Framers, and the crucial "vote by ballot" language. While this language is in the Constitution itself and must be given substantial weight, it must be remembered that this phrase does not necessarily preclude some form of open voting or vote verification.[55] More importantly, the states' broad power of appointment is also in the Constitution, and ~~that~~ contemporaneous historical events seem to favor a power of appointment that includes the power to bind. If this Constitutional power of appointment does include the power to bind, then it must be presumed that such "bindings" are to be enforceable. And since the only method of enforcement would be a conditional appointment, whereby an elector forfiets his office if he mis-casts his vote, "vote by ballot" can not be construed to prevent some sort of verification — secret or public — of an elector's vote before it is formally "counted". All this, of course, does not mean that electors are Constitutionally

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55See n. 47 supra.

bound; it merely means that states have the Constitutional power, if they choose to exercise it, of binding their electors.

An alternative argument, based on the notion of estoppel and not resting on the power of the state to appoint electors, can also be used to justify state laws that bind electors. Even if the elector's independence is Constitutionally sacrosanct, beyond the realm of state interference, it is still possible for the individual electors to pledge themselves to vote for a given candidate. This pledge may be explicit, as in cases where the party requires some sort of "loyalty oath" from its elector candidates.[56] In any event, though, such a pledge may be implied from the elector's silence or non-denial of a pledge in the light of long-established historical precedent, at least in the thirty-five states that don't even print the electors' names on the ballot, and most likely in the fourteen more that print the candidates and the electors together.[57] Relying on these pledges, and noting the lack of any adequate judicial remedy to compel obedience, states would be justified in passing a statute requiring the elector to forfiet his office if he didn't honor them. Thus the state would not be binding the elector, but instead would be providing the means, on behalf of its citizens, whereby an elector who had

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[56] In Ray v. Blair, 343 U.X. 214, 72 S. Ct 654 (1952), the Supreme Court overruled the Alabama Supreme Court and held that these party oaths were Constitutional.

[57] Only Alabama prints only the electors, with no mention of the candidate on the ballot. 114 Cong. Rec. 21057 (1968).

bound himself, explicitly or implicitly, could be held to his word.[58] To overturn such a statute would require a judicial determination that elector independence was a Constitutional mandate, giving the elector broad powers that he could not abdicate. Especially in light of the early Constitutional history of the electoral college, this type of finding would appear to be extremely unlikely.

Lending support to the conclusion that either the power to appoint, or the power to endorce the elector's own pledge, do give states the power to bind their electors is the fact that at least seventeen states have passed statutes purporting to do so. Significantly, Congress has too, in its capacity as legislature for the District of Columbia.[59] All statutes carry a presumption of Constitutionality[60], and while common or widespread statutes are not necessarily Constitutional, the fact that many different legislatures have reached the same result must certainly create a very strong presumption in their favor. And this presumption is even stronger when the statutes in question do not break new legal ground, but merely regularize the electors' long-standing refusal to exercise any independent discretion in voting for President, and to vote instead as the public expects them to.

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[58]Support for this position is found in Ray v. Blair, supra n. 56, where the Supreme Court said "Surely [a candidate for elector] may voluntarily assume obligations to vote for a certain [Presidential] candidate". (343 U.S. at 230, 72 S. Ct at 662) If the elector is "obligated" presumably this obligation is enforceable, but the fact remains that the Court specifically declined to review the enforceability of pledges. (fn. 10, 343 U.S. at 223, 72 S. Ct at 658).

[59]For a table of the law in all 50 states, and the District of Columbia, see 114 Congressional Record 21057 (1968).

[60]McDonald v. Bd of Election Commissioners of Chicago, 394 U.S. 802, 809, 89 S. Ct. 1404, 1408 (1969).

As chief Justice Hughes recognized, "General acquiescence can not justify departure from the law, but long and continued interpretation in the course of official action under the law may aid in removing doubts as to its meaning".[61]

And even if, on one pretext or another, it should be held that there was no way to bind electors, it must be remembered that the national vote plan, with unbound electors, would still be a major improvement over the present electoral college, with unbound electors. There is every reason to believe that under either system almost all electors would honor their pledges. And a system in which most electors voted for the national popular vote winner would be far preferable to the current system, with the unequal allocation of electoral votes, the many distortions produced by the winner-take-all system, and the possibility of a close electoral result where a few electors could change the outcome.[62]

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[61] Smiley v. Holm, 285 U.S. 335, 369, 52 S. Ct. 397, 400 (1932).

[62] This discussion on the legality of binding electors has omitted any discussion of the several cases in the field. This has been because there are only a few cases and none are really helpful. The one case where the issue of elector independence arose squarely was the advisory Opinion of the Justices, No. 87, 250 Ala. 399, 34 SO 2nd 598 (1948), which invalidated a state binding law and held that electors were Constitutionally independent. Four years later the Alabama court relied on this opinion in Ray v. Blair, 257 Ala. 151, 57 SO 2nd 395 (1952), holding that for a political party to bind its electors also violated the Constitution. But this holding was reversed by the Supreme Court, Ray v. Blair 343 U.S. 214, 72 S. Ct. 654 (1952), which held a party pledge was a permissible incident of party discipline. It declined to discuss, however, the larger questions of whether the pledge was enforceable, or whether a state law -- as opposed to a party oath -- would be Constitutional.

There are only four other cases. In two, the courts give dicta to the effect that electors are independent (Breidenthal v. Edwards, 57 Kan 332, 46 P 469 (1896); State ex rel Back v. Hummel, 150 Ohio St. 127, 80 NE 2d 899 (1948) but in the other two there is dicta to the effect electors are -- or may be -- bound (Thomas v. Cohen, 146 NY Misc 836, 262 MYS 320 (1932); State ex rel Nebraska Republican State Central Committee v. Wait, 92 Neb. 313, 138 NW 159 (1912).

C. ADVANTAGES OF THE NATIONAL VOTE PLAN.

After this discussion on the possible objections to the national vote plan it would be helpful to weigh those objections against the advantages. How does this plan compare against adopting a Constitutional Amendment to achieve direct vote?

The advantages of an Amendment are that electors would be abolished for good, and that Congress — in adopting the Amendment — would presumably also adopt a National Ballot Act and a National Vote Count Act. These advantages, however, are only slightly greater than the national vote plan's answer to these problems. Defecting electors would pose only a theoretical problem, because electoral majorities would become much larger and the chance that the outcome would be changed by a large number of defecting electors would be virtually eliminated. Additionally, it appears probable that the electors could be legally bound, and this would eliminate the problem of defecting electors as effectively as if electors were abolished. The problem of a national ballot has been solved by the Supreme Court in Williams v. Rhodes. Although judicial remedies are not as efficient or as simple as legislatively proscribed procedures, the fact remains that any logical reading of Williams makes it clear that any serious Presidential candidate can not be kept off the ballot by unduly restrictive requirements. Finally, a national count, accurate enough to determine the winner, already exists in all but the closest elections. The chance that we will have another election this close before Congress would pass such a law on its own is relatively slight. And even if there is such an election, the effect on our political life of hav-

ing an uncertain result in an extremely close election would be far less serious than the distortions caused by the current electoral system in every election.

With these three minor exceptions, then, the national vote plan would bring about direct popular vote just as effectively as would a Constitutional Amendment. But there are also two advantages to the plan which, on balance, make it the superior alternative. The first of these is coldly pragmatic: the national vote plan stands a much better chance of passage than does an Amendment. There are many plans of electoral reform before Congress, and each has strong adherents. In addition to the four major plans discussed in this paper there are variations and combinations of these plans that are too numerous to mention. The chance that any of them will obtain a two-thirds majority of each house, and then be ratified by three-fourths of the states, appears very slim. The national vote plan, on the other hand, can be adopted if states with only 120 or so eletoral votes enact it.

The second reason for preferring the national vote plan is far more substantive. This is the fact that since it is enacted by the states, without the necessity of a Constitutional Amendment, it can also be repealed by them if for any reason it does not work. Many objections to direct vote are built around the theme that it is too great a departure from current practices and that therefore its full consequences can not be predicted in advance. Because of this, the reasoning goes, we are better off keeping a known, if imperfect, system then we would be to replace it with another, one that could fundamentally alter the distribution of political power, the interplay

between President and Congress, the two-party system, and the like. Although the available evidence strongly indicates that these fears are greatly exaggerated,[63] if they do have merit the national vote plan is an ideal solution. If direct vote becomes a reality, and any adverse effects do develop, it will be much easier to repeal the national vote plan and return to the current system than it would be to pass another Constitutional Amendment.

For these reasons, then, electoral college reformers should try to obtain the passage of the national vote plan. It is the virtual equal of a Constitutional Amendment in its substantive effects, while being much easier to repeal if some unknown evil lurks in direct election.

D. SUMMARY

The need for electoral reform has been recognized for nearly 150 years, but the reformers have always been too divided to pass a Constitutional Amendment. Since the current electoral system is as much the result of state law as it is on Constitutional provisions, there is no reason to rely exclusively on reforming the Constitution when reforming state laws can be just as effective.

The states should amend their election laws to have their electors vote for the national popular vote winner, not the statewide winner. This "National Vote Plan" would not eliminate the office of elector, but in all other respects it would result in de facto direct popular vote, since a popular majority would be nec-

[63] See Chapter III, supra.

essary in order to win the necessary electoral votes. States clearly have the power to pass such a law under their broad, Constitutional power to "appoint" electors. In taking this action they would be recognizing that the President has become a vital national official who should rightly be chosen by all the people, and that the current electoral system subverts this objective. By adopting the national vote plan they would be making perfect their existing public policy, as reflected in the laws giving the people the right to choose the electors, that the President should be popularly elected.

This plan would become fully effective if states with only 120 or so electoral votes adopted it. It is no more essential to have all, or even half, of the total electoral votes to make direct vote a reality than it is to have all, or half, of the total stock to control a corporation. Nor would there be any adverse effects if states with less than 120 votes adopted the plan, for the only effect of tying some electoral votes to the national popular vote — while most are still awarded on a state-by-state basis — would be to make candidates even more aware of the importance of all votes and less likely to structure their campaigns around "key" of "safe" states.

The problem of making the national vote meaningful, by assuming that voters in all states have the right to vote for all major candidates, has been solved by the Supreme Court's decision in Williams v. Rhodes. This case recognized the electorate's right to vote effectively, and held it was a denial of equal protection for states to unduly restrict their ballot.

Obtaining an accurate national vote count would be no problem, as national figures could easily be compiled from the official state

returns which must be filed with the federal government. The real counting problem would occur if the national totals were too close to be meaningful. Congress has the power to pass a national recount law to deal with this possibility, but if it fails to do so the national vote plan could not guarantee a popular winner in extremely close elections. Neither, however, could any other system that didn't provide for a recount. Modifying the national vote plan to revert to the present system in such an election has the advantage of eliminating all the defects in the current system except for the possibility of a minority winner, while reducing as much as possible the chance that fraud would determine the outcome.

A problem closely related to that of counting the popular votes is what to do if no candidate receives a majority. The best solution is to elect the man with the votes, regardless of how few that is. Based on historical experience, both in Presidential and gubernatorial elections, there is virtually no chance that a winning candidate would have too few votes to constitute a mandate, and this chance would be reduced even further by a straightforward popular vote, with no electoral college and no run-off.

The final objection to the national vote plan is that because it retains the individual electors it can not work. This is not the case. Although independent electors would still be possible, they would become meaningless in an electoral system that declared the popular vote winner to be President. Similarly, individual electors would still be able to defect, but the chances of an election being decided by defecting electors is far less if most electors vote for the popular vote winner than it is if they vote for their state's

winner. More importantly, a close reading of the Constitution and of Constitutional history indicates that the states have the power to legally bind their electors to vote as expected. Such laws may be based upon the states' broad power to "appoint" electors, or, in the alternative, upon the states' power to enforce -- on behalf of its citizens -- a pledge made by the electors to the voters. These laws have already been adopted by seventeen states and by Congress, and may be overturned only upon a finding that the Constitution enshrines elector independence so strongly that both the states and the electors themselves are precluded from any effective action to limit it.

The national vote plan, therefore, is seen to be a perfectly workable system of electoral reform. It would completely eliminate the distortions in voting power and other inequities produced by the winner-take-all system, and would lead to true national elections for the Presidency.

Moreover, it would be far easier to adopt than would a Constitutional Amendment, and far easier to repeal if any adverse effects should develop. It should be adopted by the states.