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THE ELECTORAL COLLEGE: AN ENIGMA IN A DEMOCRATIC SOCIETY

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The difficulty of finding an unexceptionable process for appointing the Executive Organ of a Government such as that of the United States, was deeply felt by the Convention; and as the final arrangement took place in the latter stages of the session, influence produced by fatigue and impatience in all such bodies; tho' the degree was much less than usually prevails in them.¹

INTRODUCTION

We have had 190 years to find exception with the "arrangement" for electing a President and Vice-President which the Constitutional Convention created in its last weary days. The scheme on which the delegates finally agreed, the electoral college, was struck as a compromise between the proponents for a direct election by the people and those who favored election by the United States Congress. In the words of historian John Roche, the electoral college "was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content The future was left to cope with the problem of what to do with this Rube Goldberg mechanism."²

Over 500 constitutional amendments have been offered in Congress to simplify and correct the weaknesses which soon became apparent in the electoral college. Only the twelfth amendment, passed in 1803 and ratified in 1804, has effected any major revision. Efforts to effect change were intensified by the close elections of 1960, 1968, and 1976, and by the continuing democratization of American

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1. Letter from James Madison to George Hay, August 23, 1823, reprinted in 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787* 458 (1937) [hereinafter cited as FARRAND].

2. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 810 (1961).

political institutions.³ Hearings on reform of the electoral college have been held before the Senate Judiciary Committees since 1952.

In contending that a system of direct election would provide United States voters with a more meaningful exercise of their franchise, this article highlights existing shortcomings in the electoral college system and rebuts the arguments which have been put forth by opponents of the direct election method.

DEFECTS OF THE ELECTORAL COLLEGE

The electoral college system has three principal faults:

(1) *It permits election of a President and Vice-President who have received fewer popular votes than their opponents.* That has occurred three times in our history: 1824, 1876 and 1888. It almost happened in 1976.

(2) *All votes do not count the same.* Under the unit rule a President can be elected by carrying the eleven largest electoral vote states by slim margins, even though losing all other states and the nationwide vote by a landslide. Also, all votes for the candidate who loses a state are cast for the candidate who wins the state.

(3) *The American people do not actually cast the votes which elect their President; the electors do.* These electors are free to disregard the preference of the voters who chose them and cast their electoral votes for anyone. George Mason, one of the delegates to the Constitutional Convention, perceived the delusion of the electoral college. He stated that the elector system "was a mere deception—a mere *ignis fatuus* on the American people—and thrown out to make them believe they were to choose" the President.⁴

There are four features of the electoral college as it operates today which illustrate these defects.

Faithless Electors

The founding fathers envisioned a congregation of "men most capable of analyzing the qualities adopted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice" as Alexander Hamilton explained in Number 68 of the Federalist Papers. Because of this requisite wisdom, the Constitution of necessity left the electors independent.

3. See R. Claude, *Nationalism of the Electoral Process*, 6 HARV. J. LEGIS. 139 (1969).

4. 3 FARRAND at 492.

Our legacy from this provision has found wisdom irrelevant and consternation universal when the elector exercises his independent thought. As early as 1796 an irate voter wrote in the *United States Gazette*: "What, do I chuse Samual Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to *act*, not to *think*."⁵

The potential for danger from the faithless elector remains today. In January, 1969, Congress confirmed this 18th century prerogative by accepting the vote of a popularly chosen Republican elector from North Carolina who had cast his vote in the electoral college for George Wallace, the American Independent Party candidate. Again in 1973, a Republican elector from Virginia was allowed to cast his vote for one Dr. John Hospers of the Liberation Party. Mike Padden from Washington cast his vote for his personal choice, Mr. Reagan, in the last election.

In 1976, if about 5,560 votes had switched from Carter to Ford in Ohio, Carter would have lost the state, and the electoral vote would have stood at 272, only two more than the minimum needed of 270. Two or three individual electors could conceivably have been persuaded to withhold their electoral votes or even change them, and thus make the outcome very uncertain.

The Unit Rule

The most dangerous of the defects of the electoral college is the winner-take-all or unit rule. A consequence of the unit rule is that it discourages the minority in a one-party state. Where there is no hope of carrying a state, there is little reason for the members of the losing party to turn out. The majority party on the other hand also has little incentive to increase its turnout. This certainly accounts in part for the poor voter participation in the United States.

Perhaps most importantly, the unit rule means that all votes are not equally important. A voter in Indiana, for example, has an opportunity to swing 13 electoral votes; a voter in New York can theoretically produce 41. The consequence of this factor is to inflate the voting power of voters in the handful of large, closely contested states where blocs of electoral votes can be won on the basis of narrow popular vote margin.

The winner-take-all rule also empowers third-party candidates to swing elections when they can gather votes in large, closely balanced states. For example, Eugene McCarthy in 1976, with less

5. E. STANWOOD, A HISTORY OF THE PRESIDENCY FROM 1788 TO 1897 51 (1898).

than 1% of the popular vote, came close to tilting the election through his strength in close pivotal states. In four states—Iowa, Maine, Oklahoma and Oregon, totaling 26 electoral votes—McCarthy's vote exceeded the margin by which Ford defeated Carter. In those states, McCarthy's candidacy *may* have swung those states to Carter. Even more significantly, had McCarthy been on the New York ballot, it is likely Ford would have carried that state with its 41 electoral votes, and with it the election—despite Carter's national vote majority.⁶

Constant Two Votes

The third *election* feature of the electoral college which illustrates its defects is the constant two electoral votes apportioned to each state regardless of state size. Obviously, voters in very small states wield something of a disproportionate influence when their state population might not otherwise allow them two votes. Traditionally hailed as a significant advantage to the smallest states, the effect of the unit rule more than overcomes this advantage, as will be discussed later.⁷

Contingency Plan

Finally, the contingency feature of the electoral college provides that in event of less than a majority in electoral vote, the top three candidates will be voted on by the House of Representatives. The members of the Constitutional Convention felt that "19 times out of 20" the election would devolve onto the Congress.⁸ It is only fortunate for the country that this has not turned out to be the case.

In recent years, the danger has been only too real. For example, in 1960, a switch of less than 9,000 popular votes from Kennedy to Nixon in Illinois and Missouri would have prevented either man from receiving an electoral college majority. Similarly, in 1968, a 53,000 vote shift in New Jersey, Missouri, and New Hampshire, would have resulted in an electoral college deadlock, with Nixon

6. *Hearings on S.J.Res.1, Before the Subcommittee on Constitutional Amendments, 95th Cong., 1st Sess., (Feb. 1, 1977)* (statement of Lawrence Longley, Assistant Professor at Lawrence University). In four states, Iowa, Maine, Oklahoma, and Oregon, totaling 26 electoral votes, McCarthy's vote exceeded the margin by which Ford defeated Carter. In those states, McCarthy's candidacy *may* have swung those states to Carter. Even more significantly, had McCarthy been on the New York ballot, it is likely that Ford would have carried that state with its 41 electoral votes, and with it the election—despite Carter's national vote majority.

7. See notes 12-14 *infra* and accompanying text.

8. 2 FARRAND 501 (statement of George Mason).

receiving 269 votes; one short of a majority. Finally, in the 1976 election, if some 11,950 votes in Delaware and Ohio had gone from Carter to Ford, Ford would have carried these two states. The result would then have been an exact tie in electoral votes; 269-269. The Presidency would have been decided *not* on election night, but through deals or switches by electoral college members, or in the political uncertainty of the House of Representatives.

The present electoral college system is an archaic system, one that contains the potential for many undemocratic resolutions of Presidential elections. These undemocratic tendencies must force us to question its value and seek better, more democratic systems of election.

DIRECT ELECTION

One electoral system which would remedy the structural defects inherent in the electoral college is election by direct popular vote. Although a variety of alternative plans has been presented, the major initiatives for reform have come from those who seek to replace the present system with direct election. Proponents of direct election have just recently begun a renewed effort in Congress to do away with the electoral college. Senate Joint Resolution 1, as amended, was passed by the House of Representatives in September 1969. It was made the pending order of business in the Senate in September, 1970, but two attempts to limit floor debate by invoking cloture failed, and on October 5, the Senate agreed to a unanimous consent request of Senator Mansfield to return Senate Joint Resolution 1 to the calendar. No further action was taken.⁹ There may

9. As set out in *unpublished Report* of the Subcommittee on Constitutional Amendments in 1975, the major provisions of the proposed direct election amendment are the following:

The resolution contains the customary provisions that the proposed new article to the Constitution shall be valid as part of the Constitution only if ratified by the legislatures of three-fourths of the States within 7 years after it has been submitted to them by the Congress.

Section 1 of the proposed article would abolish the electoral college system of electing the President and Vice-President of the United States and provide for their election by direct popular vote. The people of every State and the District of Columbia would vote directly for President and Vice-President. This section prevents a candidate for either office from being paired with more than one other person. Candidates must consent to run jointly.

Section 2 provides that voters for President and Vice-President in each State must meet the qualifications for voting for the most numerous branch of the State legislature in that State. The term "electors" is retained, but instead of referring to the electoral college, the term

henceforth means qualified voters, as it does in existing provisions dealing with popular election of members of Congress. This clause also permits the legislature of any State to prescribe less restrictive residence requirements and is necessary in order to prevent invalidation of relaxed residence requirements already or hereafter adopted by the States for voting in presidential elections.

The Congress is also empowered to establish uniform residence qualifications. This authority would in no way affect the provisions dealing with residency requirements in presidential elections adopted as part of the proposed Voting Rights Act of 1970. The Voting Rights Act would abolish residency requirements for voting in presidential elections and establishes nationwide, uniform standards relating to absentee registration and absentee voting in presidential elections. This provision, moreover, does not modify or limit in anyway existing constitutional powers of the Congress to legislate on the subject of voting qualifications. The District of Columbia is not referred to in section 2 because Congress now possesses the legislative power to establish voting qualifications for the District under article 1, section 8, clauses 17 and 18.

Section 2 is modeled after the provisions of article 1, section 2, and the 17th amendment to the Constitution regarding the qualifications of those voting for Members of Congress. As a result, general uniformity within each State regarding the qualifications for voting for all elected Federal officials is retained. Use of the expression "Electors of the most numerous branch of the State legislature" does not nullify by implication or intent the provisions of the 24th amendment that bar payment of a poll tax or any other tax as a requisite for voting in Federal elections. The Supreme Court, moreover, has held that a poll tax may not be enacted as a requisite for voting in Federal elections. The Supreme Court, moreover, has held that a poll tax may not be enacted as a requisite for voting in State elections as well. *Harper v. Board of Supervisors*, 383 U.S. 663, (1966).

Section 3 requires that candidates obtain at least 40 percent of the whole number of votes cast to be elected President and Vice-President. The expression "whole number of votes cast" refers to all valid votes counted in the final tally. The term "whole number" is consistent with prior expressions in the Constitution, as in the 12th amendment. Section 3 further provides that if no pair of persons receives at least 40 percent of the whole number of votes cast for President and Vice-President, a popular runoff will be held among the two pairs of persons who receive the highest number of votes.

Section 4 embodies provisions imposing duties upon the Congress and the States in regard to the conduct of elections. The first part of this section requires the State legislatures to prescribe the times, places, and manner of holding presidential elections and entitlement to inclusion on the ballot—subject to a reserve power in Congress to make or alter such regulations. This provision is modeled after similar provisions in article 1 and the 17th amendment dealing with elections of members of Congress. States will continue to have the primary responsibility for regulating the ballot. However, if a State sought to exclude a major party candidate from appearing on the ballot—as happened in 1948 and 1964—the Congress would be empowered to deal with such a situation.

never have been a measure before Congress which has been more fully debated than direct election. Hearings on electoral reform go back to 1952, and hundreds of hours of testimony have been heard. The questions arising from the proposed direct election amendment have been extensively studied and commented on by many individuals, from many perspectives. Each objection raised by opponents can be effectively and convincingly countered.

Direct Election Will Not Weaken Our System Of Federalism

Perhaps the most frequent argument made by opponents of direct election is that the electoral college is an important compo-

Section 4 also requires Congress to establish by statute the days for the regular election and any runoff election, which must be uniform throughout the United States. This conforms to the present constitutional requirement for electoral voting (article 11, section 1), to which Congress has responded by establishing a uniform day for the election of electors (3 U.S.C. 1).

Section 4 further requires Congress to prescribe the time, place, and manner in which the results of such election shall be ascertained and declared. The mandatory language is comparable to the mandatory duties imposed upon the States to provide popular election machinery for Members of Congress. In implementing this section, Congress may choose to accept State certifications of the popular vote as it now accepts electoral vote certifications under the provisions of 3 U.S.C. 15. Federal enabling legislation will be required to provide the specific legislative details contemplated in the broad constitutional language of the amendment.

Section 5 empowers Congress to provide by legislation for the death, inability, or withdrawal of any candidate for President and Vice-President either before or after a regular runoff election, but before a President or Vice-President has been elected. Once a President and Vice-President have been elected, existing constitutional provisions would apply. Thus, the death of the President-elect would be governed by the 20th amendment and the death of the Vice-President-elect would be governed by the procedure for filling a Vice-Presidential vacancy contained in the 25th amendment. Section 5 also empowers the Congress to provide by legislation for the case of the death of the President-elect and Vice-President-elect.

Section 6 confers on Congress the power to enforce this article by appropriate legislation. The power conferred upon Congress by this section parallels the reserve power granted to the Congress by numerous amendments to the Constitution. Any exercise of power under this section must not only be "appropriate" to the effectuation of the article but must also be consistent with the Constitution.

Section 6 provides that the article shall take effect one year after ratification. Since State and Federal legislation will be necessary to fully implement and effectuate the purposes of the proposed amendment, a reasonable period of time should be provided between the date of ratification and the date on which the amendment is to take effect.

ment in preserving the power of the states in our federal system. Even at the Constitutional Convention, however, the electoral college was not intended to serve that purpose. The electoral college was effected primarily as a compromise between advocates of popular election such as James Madison, James Wilson and Gouverneur Morris and those who wanted the executive chosen by the legislative branch.

In addition to its role as a tool of compromise, the electoral college concept also served to ameliorate several other extraneous worries prevalent at the Convention. It reduced, for example, the fear that legislative election would involve cabal, corruption and possible foreign influence. The inconvenience and hazards of travel argued for decentralized voting. The manner of choosing the President was debated sporadically over the summer of 1787, and resolved finally by the contrivance of an appointed Committee of Eleven in the early days of September as a matter of practical politics.¹⁰ A highly restricted franchise was broadly acceptable in 1787, and few quibbled with the principle that a small sample of learned men were entitled to act as surrogates for the larger mass in the selection of an executive. This worked well as an arbitration device in 1787 but quickly diminished in utility thereafter.¹¹

It is clear that the well-known Great Compromise between large and small states was not a major factor in shaping the electoral college.

The Great Compromise was devised to settle the dispute over representation in Congress, not the electoral college. It was presented to the Convention on July 5, 1787, and constituted the agreement that made the Federal Union possible. Today it represents a central pillar of the American federal system which few men have seriously suggested disturbing . . . At no point in the minutes of the Convention can one find any reference to the application of the Great Compromise to the electoral

10. See J. Feerick, *The Electoral College: Why It Was Created*, 54 AM. BAR J. 294 (1968). The manner of choosing the President was debated sporadically over the summer of 1787, and resolved finally by the contrivance of an appointed Committee of Eleven in the early days of September as a matter of practical politics.

11. As early as the first election in 1789, two problems were apparent: First, the manner of choosing electors was unclear; second, "double balloting," or two votes cast by each elector for President, meant that there was no distinction made for preference for President and Vice-President. See N. PEIRCE, *THE PEOPLE'S PRESIDENT* 58-78 (1968) [hereinafter cited as PEIRCE].

college's apportionment as important to the federal system or to the overall structure of the Constitution which was adopted. Indeed, it was never mentioned directly at all. Only in *The Federalist Papers*, where James Madison argued at one point that the electoral base for the Presidency would be a "compound" of national and state factors because of the mixed apportionment base, does the argument appear. But no more than indirect reference was made to the apportionment of the electoral college in the states ratifying conventions, or in fact by any of the nation's leaders until some years after ratification of the Constitution. The argument that the founding fathers viewed the special federal nature of electoral college apportionment as central to the institution of the Presidency, or to the entire Constitution, is simply false. The small states thought they would gain special advantage, but by another provision—their equal votes in the House in contingent elections.¹²

The question of whether the small states have in fact been favored by the electoral college system is one which is still hotly debated, although the growing weight of evidence points unequivocally to the conclusion that any advantage accruing to the small states by virtue of the initial two votes is soon dissipated by virtue of the effect of the unit rule. In other words, the potential which any voter in a large electoral vote state such as New York, has to affect the outcome of the election, easily outweighs the simple mathematical disadvantage of having more voters per number of electoral college members than would have a voter in one of the smallest states. This conclusion, reached by electoral scholars in the 1960's,¹³ has been buttressed and documented by empirical analyses of political scientists and economists in the 1970's.¹⁴

12. PEIRCE at 261-262.

13. If a voter finds he is in the minority in his state under the prevailing general ticket system, then he knows his vote will be completely negated in the national electoral vote count. His state may have enjoyed some theoretical right—and in fact cast an electoral vote several times over its actual right by population—but for the individual on the losing side, the alleged "right" is an empty one indeed.

PEIRCE at 264.

14. See L. LONGLEY & A. BRAUN, *THE POLITICS OF ELECTORAL REFORM* (2d ed. 1975); J. YUNKER & L. LONGLEY, *THE ELECTORAL COLLEGE: ITS BIASES NEWLY MEASURED FOR THE 1960'S AND 1970'S* (1976); Banzhof, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 303 (1968); Blair, *Electoral College Reform and the Distribution of Voting Power*, 4 and 19 (Nov. 1976)

Perhaps the best answer that can be given to the questions which arise under the name of federalism is that of Senator Mike Mansfield in 1961:

[T]he Federal system is not strengthened through an antiquated device which has not worked as it was intended to work when it was included in the Constitution and which, if anything, has become a divisive force in the Federal system by pitting groups of States against groups of States. As I see the Federal system in contemporary practice, the House of Representatives is the key to the protection of district interests as district interests, just as the Senate is the key to the protection of State interests as State interests. These instrumentalities, and particularly the Senate, are the principal constitutional safeguards of the Federal system, but the Presidency has evolved, out of necessity, into the principal political office, as the courts have become the principal legal bulwark beyond districts, beyond States, for safeguarding the interests of all the people in all the States. And since such is the case, in my opinion, the Presidency should be subject to the direct and equal control of all the people.¹⁵

Direct Election Will Not Encourage Fraud

According to the Minority Report from the Committee on the Judiciary in 1970, "One of the most calamitous and probable consequences of direct popular election will be the increased incidence of election fraud."¹⁶ The argument is that if fraud occurs under the present system, the impact is limited to determining the outcome in one state alone. "The incentive to steal votes is now restricted to close contests in States which have a sufficiently large electoral vote to alter the final result. Thus, fraud can be profitable only in a few states, and is seldom capable of affecting the national outcome."¹⁷

In reality, the incentive to steal votes "now" as described above is a fair argument for why the electoral college system itself encourages fraud. A relatively few irregular votes can reap a healthy reward in the form of a bloc of electoral votes, because of

(unpublished study at the Wharton School, Department of Economics, University of Pennsylvania).

15. 107 CONG. REC. 350 (1961).

16. COMMITTEE ON THE JUDICIARY, DIRECT POPULAR ELECTION OF THE PRESIDENT, S. Rep. No. 91-1123, 91st Cong., 2nd Sess. 42 (1970).

17. *Id.*

the unit rule. In short, under the present system, fraudulent popular votes are likely to have a greater impact than a like number of fraudulent popular votes under direct election. This is especially true in the larger states. In New York, cries of voting irregularities arose on election night, 1976. At stake were 41 electoral votes—more than enough to elect Ford over Carter in the electoral college. Carter's popular margin was 290,000. The calls for recount were eventually dropped, but *if* fraud had been present in New York, Carter's plurality of 290,000 would have been enough to determine the outcome of the election. Under direct election, at least *1.7 million votes*, Carter's national margin, would have had to be irregular to affect the outcome.

Opponents of direct election charge that a popular vote would increase the incentive for fraud because in a close election every vote would count. It is precisely for this reason that we would have better policing of the polling places by the parties themselves, and possibly even better counting methods and procedural safeguards. The kinds of fraud and voting irregularities which have occurred under the electoral college are frequently in places controlled by one party. And under the electoral college system, there is no incentive for the other party to watch the polls when there is no possibility of carrying the entire state and hence, its electoral votes.

Direct Election Will Not Encourage Recounts

Critics of direct election have urged that this reform would result in a much higher frequency of recounts and challenges, and that the delays caused would be interminable. T.H. White has spoken of the prospect as a "nightmare".¹⁸ Such arguments ignore the dangers which now exist under the electoral college, and exaggerate the dangers which might arise under direct election.

A disgruntled candidate is more inclined to insist upon a recount when and if he perceives that it may change the results of the election in his favor. This is more likely with the electoral college system than with direct election. As the present system magnifies the temptation for voter fraud, it magnifies the likelihood of recounts: it places too much premium on a close race in a small number of key states. L. Kinvin Wroth testified before the Subcommittee on Constitutional Amendments on February 1, 1977:

It is sometimes said that the effect of a direct election procedure would be to encourage contests in every

18. *Id.* at 44.

precinct. Exactly the converse seems true. Contests are most fruitful to the challenger in a situation like that of 1976 where, under the winner-take-all system, the reversal of one large state's result would mean the capture of the electoral college. Under a direct election system, President Carter would have had to have lost far more than a few thousand votes in New York and Ohio to lose the election.

Furthermore, experience shows that actual state-wide recounts reveal an almost miniscule shift in the number and percent of votes.¹⁹

Except in a case of truly massive fraud, the chances of success are rendered greatly uncertain by the common tendency in such proceedings for errors on both sides to cancel each other out. In the unusual case where a contest is both practical and successful, the winner of a contested direct election, who has changed the result of the national popular vote in his favor, will stand in a far better political position than would a winner under the present

19. The table below gives a breakdown of five major statewide recounts during the 1960's.

Election	Total votes	Initial margin	Final margin	Vote shift	% shift
Hawaii Pres, 1960 (Kennedy-Nixon) . . .	185,000	N:141	K:115	-256	-0.14
Mass. gubernatorial, 1962 (Peabody- Volpe)	2,109,000	P:252	P:3,091	+ 2,839	+ 0.13
Minn. gubernatorial, 1962 (Rolvaag- Anderson)	1,247,000	R:276	R:91	-185	-0.015
Oregon senatorial, 1968 (Packwood- Morse)	814,000	P:3,445	P:3,263	-182	-0.023
S. Dakota senatorial, 1962 (McGovern- Bottum)	254,000	M:271	M:516	+ 245	+ 0.094
Total	4,609,000			+ 2,461	+ 0.53

If the average of all five races is taken, the net shift was 2,500 votes in five elections in which 4.6 million people cast ballots, a shift of 5/100ths of one percent.

system, who has changed the electoral vote count but remains the loser in the popular vote.²⁰

Minorities Would Not Lose Impact Under Direct Election

Some have defended the present electoral college approach on the theory that the system as it operates gives disproportionate voting influence to racial or ethnic minorities, thereby offsetting some of the economic or social deprivations historically suffered by these groups. The late Professor Alexander M. Bickel of Yale Law School was a major proponent of this view. In hearings before the Senate Judiciary Committee during a previous consideration of electoral reform he stated,

The system is, therefore, in effect malapportioned in favor of the large industrial states, in which party competition is vigorous, and which generally swing by small percentages of the popular vote. Not only that but the system is in effect malapportioned in favor of cohesive interest, ethnic or racial groups within these large states, which often go nearly in block for a candidate, and can swing the state and its entire electoral vote.²³

This view, however, is by no means universally held; various statistical studies have tended to refute this contention. Sayre and Parris,²⁴ for example, believe that urban minority groups would lose influence under a direct election system; an opinion shared by Spilerman and Dickens.²⁵ The preponderance of analyses, however, find evidence to the contrary.²⁶ A recent study completed by

20. *Hearings on S.J.Res.1, Before the Subcommittee on the Constitutional Amendments, 95th Cong., 1st Sess., (Feb. 1, 1977)* (statement by L. Kinvin Wroth, University of Maine Law School).

21. Professor Wroth is convinced that the present Electoral Count Act poses a problem of equal magnitude with that of the faithless elector or the winner-take-all rule. See Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321 (1961).

22. STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 94th Cong., 1st Sess., REPORT ON DIRECT POPULAR ELECTION OF THE PRESIDENT 29 (Comm. Print 1975).

23. *Hearings on S.J.Res.1 on Direct Popular Election of the President, 91st Cong., 2d Sess. 50* (1970).

24. W. SAYRE & J. PARRIS, *VOTING FOR PRESIDENT: THE ELECTORAL COLLEGE AND THE AMERICAN POLITICAL SYSTEM* (Brookings Institution, 1970).

25. Spilerman & Dickens, *Who Will Gain and Who Will Lose Influence Under Different Electoral Rules*, 80 AM. J. SOC. 443 (1974).

26. See, i.e., L. LONGLEY & A. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* (1972) [hereinafter cited as LONGLEY & BRAUN]; J. YUNKER & L. LONGLEY, *THE ELECTORAL COLLEGE: ITS BIASES NEWLY MEASURED FOR THE 1960's AND 1970's* (1976); H. ZEIDENSTEIN, *DIRECT ELECTION OF THE PRESIDENT* (1973).

Douglas H. Blair of the University of Pennsylvania, for example, contends that this view is incorrect:

Still others have suggested that, while metropolitan areas are indeed advantaged under the existing electoral procedures, Bickel and Sayre and Parris have misidentified the pivotal groups. In fact, as William J.D. Boyd has suggested, it is the suburbs and not the central cities which would lose power if direct election were instituted.

* * *

The empirical findings of this essay suggest that suburban native whites, the most economically advantaged of nine demographic groups also wield the most political power in the selection of the president under either of two power measures. They further indicate that this power would be diminished by abolition of the electoral college. Blacks, on the other hand, the least economically advantaged of the groups, are shown to have below average voting power under the electoral college procedure according to each index; they would gain power under direct election. It would seem to be no very strenuous normative leap, for an egalitarian to the conclusion that electoral reform is in order.²⁷

The belief that the electoral college system benefits racial or ethnic minorities in large urban areas is heavily based on the assumption that these population centers are located in heavily populated states and that Presidential candidates are attracted to these areas because they command large numbers of electoral votes. This "advantage" of the present system over a direct election system, however, is more illusory than real. While it is, of course, correct that large states are more politically powerful because they can deliver more electoral votes, it is also evident that under a direct election approach, areas of the country with large populations will continue to draw significant candidate attention simply because of the greater number of potential voters gathered there.

Certainly, any advantage the electoral college system may have for ethnic or racial groups concentrated in large industrial states, is outweighed by the unit rule provision. This system, which awards all of a state's electoral votes to the candidate who wins a majority of the popular vote, can have an impact on minority voting

27. PEIRCE at 282-283.

strength that is little short of devastating. The rule can, in effect, obliterate the minority vote completely. For example, although 95% of the black voters in Indiana supported President Carter in the 1976 general election, these votes, in a very real sense, were wasted. Because Ford succeeded in gaining a majority of the popular vote and was awarded *all* 13 of the State's electoral votes, the great majority of the black voters' preference could not be recorded.

This is particularly devastating to ethnic or racial minorities which often share common political goals and interests throughout the country. Under the present electoral college system, their votes are "washed out" in unsuccessful winner-take-all state by state contests rather than being pooled with other ethnic or minority group votes as would be possible under a direct election system. As Neal R. Pierce has noted on the question of whether ethnic or minority group members would lose voting power under a direct election system,

The answer is clearly no. . . . They would be able to transfer their voting strength to the national stage instead—and be just as effective there Negroes from Southern States like Georgia and Alabama would be able to combine their Presidential votes with Negroes from New York, Illinois and Michigan and thus constitute a formidable national voting bloc that the parties would ignore at their peril.²⁸

Similarly, even when minority and ethnic group voters support the winning candidate in a particular state they also may find numbers of their votes "wasted." For example, the Joint Center for Political Studies estimates that in the 1976 election, blacks cast some 298,000 votes for President Carter in Pennsylvania. However, since Carter beat Ford in that state by 123,372 votes there is a valid argument to be made that 174,628 of the black votes had absolutely no effect on the election on a national level. These votes therefore are essentially meaningless since they were unnecessary for the needed majority to carry the State and to capture the electoral votes.

Direct Election Will Not Weaken The Two-Party System

Another of the serious charges leveled at the direct election amendment is that substitution of direct election for the electoral

28. V. KEY, *PARTIES AND PRESSURE GROUPS* 209 (5th ed. 1964). See also LONGLEY & BRAUN at 88-90.

college will destroy the two-party system. This objection centers around two perceived threats: 1) the prospect that direct election will weaken the system and the structures of the two existing parties; 2) the fear that direct election will encourage minor party candidates who will fragment and eventually destroy the two-party system.

The first question to be asked in addressing this criticism is what in the American scheme of political life has caused the two-party system. Is the electoral college an integral part of the solid political structure we have built? Many theories for our two-party system have been advanced by political scientists. Few contend that the electoral college has been responsible for the two-party system or even plays an essential role in our party system. The broadest consensus clusters around one goal which encourages and strengthens the information of the two major parties: the single indivisible office of the Presidency. Since the presidency itself is a winner-take-all office in which the victor need not share power with any of the other candidates, there will always be an incentive for smaller parties to amalgamate with larger parties in order to have a modicum of control over the policies of the party in office. V. O. Key, a prominent political scientist, expressed the concept:

The Presidency, unlike a multiparty cabinet, cannot be parceled out among miniscule parties. The circumstances stimulate coalition within the electorate before the election rather than in parliament after the popular vote. Since no more than two parties can for long compete effectively for the Presidency, two contending groups tend to develop, each built on its constituent units in each of the 50 states.²⁹

Several other broad theories explaining our unique party system should also be mentioned. The first is that general forces or aspects of American society have mitigated against large and effective dissenting groups. The very successes of American economy and the unity of the people have worked to thwart radical political efforts. "[Socialism] foundered long ago, as Werner Sombart remarked despairingly, 'on the shoals of roast beef and apple pie.'"³⁰

Akin to this concept is the theme of Allan Sindler, that underlying the nation is a broad consensus, a willingness to accept

29. C. ROSSITER, *PARTIES AND POLITICS IN AMERICA* 8 (1962).

30. SINDLER, *POLITICAL PARTIES IN THE UNITED STATES* 53-54 (1966).

political disagreement.³¹ The South of not long ago, on the other hand, is given as an example of a region too united in its political views. "The continuance of stable and moderate two-party systems depends upon a happy balance struck between consensus and conflict."³²

Other theorists point to our system of electing single representatives as the foundation for two parties.³³ What these scholars see is a magnifying effect built into the single-member district in which the winning party is able to acquire more seats per number of votes, the greater the percent of total vote the party can win. Success in winning votes across the country in effect inflates the relative power of the winning party. The converse is also true: The less successful the losing party, the more votes it will take to elect a representative. Major parties do not disappear, however, because they are liable to remain strong regionally or in certain kinds of areas. That the effect is devastating on minor parties, however, is borne out by the fact that minor parties have not held more than two of the U.S. House seats since 1944.³⁴

In the Senate debates on S.J. Res. 1, the direct election amendment, great concern was voiced over the weakening of the state party structures should the amendment be accepted. The answer to this concern is that abolition of the electoral college will not weaken the structure of the existing national parties in that there is very little actual national structure of the two major parties to destroy. Many question the extent to which the two major parties now operate on a truly national level. When one of the parties is out of office, its national base is little more than a coalition of strong state parties. When the party is in office, its national organization is directed by officers effectively selected by the candidate, more according to his preferences than to any national party ideology. Many assert that it is the strong state and local parties which account for whatever strength the national parties can claim. Since these state and local parties are organized around the election of state and local officials, there is no reason to assume direct election will have any impact on them.

The second objective to direct election centers around the alleged tendency of direct popular election to encourage prolifera-

31. *Id.* at 57.

32. *See, e.g.*, E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* (1960).

33. PEIRCE at 260.

34. LONGLEY & BRAUN at 130.

tion of their parties. Again, the first counter to this objection is to point to the manner in which the electoral college itself operates. It has been convincingly argued by many that it is the electoral college which provides fertile ground for minor party candidates. Larry Longley among others has pointed out that the electoral college engenders third parties in two respects.³⁵ First, it provides incentives for a regional third party candidate such as George Wallace, by virtue of the possibility of carrying a bloc of states with a thin margin, and thereby throwing the two major candidates into a deadlock in the House of Representatives.

In addition to the threat of deadlock, one must also take into account the crucial role played by minor party candidates within the states representing large numbers of electoral votes.³⁶ Even if an ideologically based third-party candidate cannot possibly hope to win the popular majority (and thus the electoral votes) of any given state, his supporters may always detract from one major party candidate a sufficient number of popular votes to swing the state to the opposing major party candidate. Thus, the minor party candidate, while receiving no electoral votes of his own with which to bargain, holds the reins over all the electoral votes in any state in which the major party candidate's margin of victory is less than or equal to the minor party candidate's percentage of the popular vote.

A major argument in support of the hypothesis that direct election will lead to the proliferation of parties and the eventual destruction of the two-party system, centers on the provision of S.J. Res. 1 calling for a run-off in the event none of the candidates receives at least 40% of the popular vote. Critics of direct election claim that a minor party candidate or coalition of candidates can effectively control the outcome of the election, either by selling their votes to one of the major party candidates before the election, or by forcing a run-off and then using their percentage of supporters won in the initial election to bargain for concessions from the two candidates remaining in the run-off. There are several flaws in this line of reasoning.

First, it must be kept in mind that a third party would necessarily have at least twenty percent of the vote. In the event that each of the major party candidates receives just less than 40% of the popular vote, a 20% vote for a minor party candidate or a group of candidates will prove determinative in forcing a run-off.

35. The campaign of Eugene McCarthy in 1976 is an example of this.

36. LONGLEY & BRAUN at 4.

However, merely amassing 20% of the popular vote (no small feat for minor party candidates) will not be sufficient to compel a run-off without simultaneously preventing either of the major party candidates from receiving at least 40% of the vote. Thus, the minor party candidate who hopes to spoil an election by securing a good bargaining position or by forcing a run-off, must do more than siphon off a considerable number of votes; he must siphon them off from *both* parties.

Assuming, however, that a minor party candidate or group of candidates is able to garner 20% of the popular vote and simultaneously preclude either major party candidate from receiving at least 40% of the remaining votes, the bargaining position obtained may be less than would at first appear. The ability of the candidate to control the votes of all those individuals who once claimed to support him is not tantamount to the influence held by a candidate over electors pledged to him. Thus, it is unlikely that a minor party candidate will be able to deliver all the votes of his supporters, even if he endorses one of the major party candidates. Moreover, once the 20% ceases to represent a unified coalition, the bargaining power of the minor party candidates decreases substantially.

CONCLUSION

Direct national election was first proposed in Congress on March 20, 1816 by Senator Abner Lacock of Pennsylvania.³⁷ Perhaps not surprisingly, the arguments heard against it that day have echoed down to the present. There were warnings of loss of the balance of power in the Confederacy, of too great a disparity between voting qualifications in the different states, interminable delays in counting, and finally, weakening of the federal system. Lacock ultimately took his place as the first sponsor of a direct election amendment to lose the battle.

Few of us would disagree on its face with the statement of Alexander Bickel echoing the great Edmund Burke:

There are great virtues in a conservative attitude towards structural features of government. The sudden abandonment of institutions is an act that reverberates in ways no one can predict and many come to regret.³⁸

37. 29 ANNALS OF CONG. 220 (1816).

38. Comment, *New Republic* 5, 8 (May 7, 1977).

As applied toward the direct election amendment, however, it is inappropriate. The idea of reforming our antiquated electoral mechanism has never been a "liberal" or "conservative" one. Support has always been bi-partisan, and inclusive of widely differing political philosophies. "Conservative" as employed by Mr. Bickel reflects merely an unfocused fear of change. It also at times reflects a certain perceived interest in maintaining things as they are.

Hopefully, this article has made clear that the effects of adoption of direct election are in great part predictable, and in few ways regrettable. Certainly after 160 years or more of consideration no one can accuse the proposed amendment of being "sudden." Senator Lacock asked: "What could make us so much one people, as to give to all the people this equal privilege?"³⁹ It is still a timely and valid question.

39. 29 ANNALS OF CONG. 220 (1816).