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# DIRECT ELECTION OF THE PRESIDENT WITHOUT A CONSTITUTIONAL AMENDMENT: A CALL FOR STATE ACTION

Dale Read, Jr.\*

Many Americans believe that every four years they go to the polls to vote for a presidential candidate and that the national popular vote winner becomes the country's chief executive. In fact, they vote only for electors who subsequently vote for the President and Vice President. This indirect election mechanism is the electoral college. The present operation of the electoral college reflects both the mandate of the Constitution and the historical evolution of the electoral system. During the 200 years of America's existence no other part of our governmental framework has been the subject of such continuous opposition—more than 500 constitutional amendments have been proposed to remedy the perceived evils of its operation.<sup>1</sup> Yet the prospects for constitutional change remain remote. This article will suggest that this focus on the constitutional amendment process for changing the electoral college has been misdirected. The states, without federal action, possess the capability of implementing the direct popular election of the President. This article will examine the background of electoral college reform and will propose a "National Vote Plan" to achieve direct popular presidential election independently of the constitutional amendment process.

## I. THE BACKGROUND OF ELECTORAL COLLEGE REFORM

### A. *History of the Electoral College*

The Constitution provides for the election of the President of the United States by electors from each state "equal to the whole Number

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1. See N. PEIRCE, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE* 151 (1968) [hereinafter cited as PEIRCE]. Only one such proposal has become law—the twelfth amendment which was ratified in 1804.

of Senators and Representatives to which the State may be entitled in the Congress"<sup>2</sup> and chosen "in such Manner as the legislature [of each state] may direct."<sup>3</sup> An examination of the electoral college<sup>4</sup> system, therefore, requires an understanding of the work of the Constitutional Convention.

Although many proposals for choosing the President were considered at Philadelphia, only three generated much interest.<sup>5</sup> The Convention failed to reach a consensus on the first—direct election by the people—for a number of reasons: delegates feared that problems of travel and communication would prevent the electorate from adequately evaluating the candidates; representatives of small states sought a greater voice in the selection of the President; the South feared a loss of power because of the nonvoting slave population; and many delegates desired to insulate the President from direct popular process.<sup>6</sup> The second alternative, election by Congress, was rejected by the Convention because the delegates feared that such an election would be dominated by political intrigue and that the President would be too subservient to the Congress that had chosen him.<sup>7</sup> The third proposal, election by intermediate electors, was therefore chosen, not because it was intrinsically attractive, but because it constituted an attainable compromise.<sup>8</sup>

Having reached this basic decision, the Convention needed to resolve crucial details to implement the intermediate electoral system. The delegates sidestepped the most important detail, how the electors should be selected, by leaving this decision to the state legislatures. A

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2. U.S. CONST. art. II, § 1.

3. *Id.*

4. The term "electoral college" is not used in the Constitution; it is a popular label which has evolved since the Constitutional Convention. In fact, the term is a misnomer because electors do not gather in one place: the Constitution provides only that they "shall meet in their respective states." *Id.*

5. See generally PEIRCE, *supra* note 1, at 39-50; L. LONGLEY & A. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* 22-28 (1972) [hereinafter cited as LONGLEY & BRAUN]; Feerick, *The Electoral College: Why It Was Created*, 54 A.B.A.J. 250-52 (1968).

6. See PEIRCE, *supra* note 1, at 41-50; LONGLEY & BRAUN, *supra* note 5, at 24; Feerick, *The Electoral College—Why It Ought To Be Abolished*, 37 *FORDHAM L. REV.* 1, 6-7 (1968).

7. See PEIRCE, *supra* note 1, at 39-41; LONGLEY & BRAUN, *supra* note 5, at 24; Feerick, *The Electoral College—Why It Ought To Be Abolished*, *supra* note 6, at 6.

8. Like the other proposals, the indirect election plan had been defeated in previous votes during the Convention. In the end, however, it represented the program that could be most readily "sold" to the Framers' constituents. See PEIRCE, *supra* note 1, at 43-50.

second detail, deciding the number of electors for each state, was resolved near the end of the Convention without serious debate.<sup>9</sup> A final problem involved balancing the interests of the large and small states. Because the Framers evidently felt that most state electors would vote for candidates from their own states, they feared that although no one would receive a majority of electoral votes, candidates from the larger states would receive the greatest number.<sup>10</sup> The Convention resolved the problem of state interests by requiring an absolute majority of the electoral college for election. In the event that no candidate received a majority, the House of Representatives would elect a President from among the top five;<sup>11</sup> because the delegates from each state were allocated only one vote, this constituted a significant concession to the small states.<sup>12</sup>

The Convention's scheme provided the framework of the electoral system, but the states developed the modern electoral college. Two factors influenced this development. First, the deliberately vague constitutional mandate that each state legislature provide for the appointment of state electors made change possible. Second, the development of organized political parties that selected a candidate and sought his election made evolution of the system imperative.

The evolution of the present electoral college system consisted of three distinct elements. First, electors became firmly bound by tradition to vote for a particular candidate. This development, which resulted from the growth of national political parties, was completed by the election of 1800, at which time party loyalty was so strong that no elector defected.<sup>13</sup> The second element, which resulted from action by the state legislatures, was the trend away from legislative and toward

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9. In reporting the Convention discussion of the final indirect election proposal, Madison does not record any debate on the allocation of electors. The delegates agreed to the recommendation of the Committee of Eleven, a group chosen to draw up a compromise plan. See J. MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 506-32 (G. Hunt & J. Scott ed. 1920). The final decisions on the electoral college were made on September 6, 1787; on September 17, the Constitution was sent to the states for ratification.

10. *Id.* See also Comment, *State Power to Bind Presidential Electors*, 65 COLUM. L. REV. 696, 697-98 (1965).

11. While Article II of the Constitution originally provided for election from among the top five candidates, the twelfth amendment, ratified in 1804, reduced the number to three.

12. See Feerick, *The Electoral College—Why it Ought To Be Abolished*, *supra* note 6, at 10. See also PEIRCE, *supra* note 1, at 37.

13. See generally PEIRCE, *supra* note 1, at 65-71. See also note 62 *infra*.

popular selection of electors.<sup>14</sup> This trend was important in making the Presidency reflect the popular will. Finally, all state legislatures provided for the election of a single slate of electors for an entire state, replacing a system initially used in many states of choosing individual electors by districts within a state.<sup>15</sup> These three changes occurred within 50 years of the Constitutional Convention and transformed the ill-defined system of the Framers into the present mechanism for electing the President.

### B. *Problems with the Electoral System*

As it has evolved, the electoral college system represents a melange of constitutional requirements, state laws, and political party practices. It is not surprising, therefore, that it has produced adverse effects. In order to understand the need for electoral reform it is necessary to understand these problems.<sup>16</sup>

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14. See LONGLEY & BRAUN, *supra* note 5, at 30-31. The transition to popular election was largely completed by the election of Jackson to his second term in 1832. For a list of the various methods used by the states to choose electors in the early elections see PEIRCE, *supra* note 1, at 309-11.

15. See PEIRCE, *supra* note 1, at 77. This winner-take-all system was instituted to enhance the individual state's impact on electoral voting. This change was also largely complete by Jacksonian times. As a creation of state law, this approach can be modified by state law. In fact, Maine changed the winner-take-all system in 1969. See ME. REV. STAT. ANN. tit. 21, §§ 1181-A, 1184(1)(A) (Supp. 1975), providing that one elector shall be chosen in each (of two) congressional districts, and that two shall be chosen statewide. In 1966 Delaware challenged the winner-take-all system, but its suit for an injunction was denied by the Supreme Court in a memorandum decision. *Delaware v. New York*, 385 U.S. 895 (1966).

16. The problems discussed in the text inhere in an indirect electoral system and can be characterized as structural defects. There are two other electoral problems that deserve mention, however. The first of these is the constitutionally-required procedure for a contingent election in the House of Representatives in the event no candidate receives a majority of electoral votes. U.S. CONST. art. II, § 1. The procedure has been utilized on two occasions, in the elections of 1800 and 1824, and the results suggest that political considerations, rather than merit or the popular will, become the determinative factors for selecting the winner. See notes 17 & 62 *infra*. See also Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 14-16 (1968). Numerous proposals to implement direct popular election include plans to change the contingent election procedure. The most frequently mentioned mechanism is the runoff provision of the A.B.A. proposal that was passed by the House and introduced in the Senate in 1969. This proposal would require a second election between the two leading candidates if neither received 40% of the popular vote. See AMERICAN BAR ASSOCIATION COMMISSION OF ELECTORAL COLLEGE REFORM. ELECTING THE PRESIDENT 8-11 (1967) [hereinafter cited as A.B.A. REPORT] which concluded that 40% of the electorate constitutes a sufficient popular mandate for a President. Much of the criticism of the direct election approach has focused on the runoff procedure. See, e.g., A. BICKEL, REFORM AND CONTINUITY 26-27 (1971); W. SAYRE & J. PARRIS, VOTING FOR PRESIDENT 74-76 (1970) [hereinafter cited as SAYRE & PARRIS]; David, *Reforming the*

The first and most obvious fault of any indirect electoral system is that the candidate receiving a plurality vote can lose the determinative electoral vote to a person receiving fewer popular votes. This has happened at least twice in our history<sup>17</sup> and is a possibility in any close election. When this occurs the popular will is thwarted and faith in political institutions may be undermined.

Second, the electoral college distorts the voting power of each voter in every election. This problem is two-fold: each state receives a min-

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*Presidential Nominating Process*, 27 LAW & CONTEMP. PROB., 159, 161-64 (1962). Indeed, this provision has been considered a primary reason why the direct vote proposal has been stalled in Congress. See Eagleton, *Direct Election vs. Vox Populi*, 56 A.B.A.J. 543 (1970), pointing out that a runoff election could result in an undesirable delay in the process, proliferate the number of candidates on the first ballot, and lead to the election of a candidate who was not the first choice of the majority of voters. Proponents of the A.B.A. proposal acknowledge these problems but argue that the danger of a President supported by less than 40% of the electorate mandates use of the runoff. See A.B.A. REPORT, *supra*, at 8-10. This author believes, however, that this conclusion is erroneous and advocates election of the plurality winner regardless of the percentage of the total vote received. Americans have come to realize that Presidents will often have less than a majority of all votes cast; this has occurred in 15 of the 38 popular vote elections, including three of the last seven. See PEIRCE, *supra* note 1, at 304-08. Moreover, if voters realize that they have but one chance to affect the outcome of an election they would be less likely to vote for a minor party candidate in the hope of forcing a runoff. Thus, a single ballot should draw support toward, rather than away from, centrist candidates. Finally, only one Presidential election has produced a winner who received less than 40% of the vote; this was in 1860, when Lincoln, who was not on the ballot in 10 out of 33 states, won 39.8% of the vote. These factors suggest that the fear of a President without a "popular mandate" may be illusory, and that the dangers of a runoff procedure outweigh its advantages.

The second nonstructural problem is the possibility of a candidate dying before the popular vote election, or between the election and the time when electors vote. Because the possibility of a candidate's death is present regardless of the prevailing electoral mechanism, this problem is independent of the issue of electoral college reform and will not be discussed in this article. For a discussion of the potential problems see Feerick, *The Electoral College—Why It Ought To Be Abolished*, *supra* note 6, at 23-24 and PEIRCE, *supra* note 1, at 134-36.

17. In 1876 Democrat Samuel Tilden won the popular vote, obtaining 50.9% of the votes cast and more than a 250,000 vote plurality, but he was one vote short of an electoral majority. Returns from three southern states were disputed, and each party accused the other of wholesale vote fraud. Congress created a 15 member commission (8 Republicans, 7 Democrats) to review the returns from each of these states. By straight party voting, it found for each of the three Republican elector slates, thereby electing Rutherford B. Hayes by one electoral vote. The election results of 1888 were more straightforward: Benjamin Harrison won an outright electoral victory notwithstanding a popular plurality for incumbent Grover Cleveland. See generally PEIRCE, *supra* note 1, at 86-93. In 1960 the Kennedy popular vote reflected votes cast for unpledged Alabama Democratic Party. Subsequent computations suggest that appropriate distribution of those votes may have given Nixon a national plurality. For a discussion of the problem and alternative computations see *id.* at 102-04; LONGLEY & BRAUN, *supra* note 5, at 4-6; Kefauver, *The Electoral College: Old Reforms Take on a New Look*, 27 LAW & CONTEMP. PROB. 188, 189-90 (1962).

imum of three electors regardless of its population,<sup>18</sup> and each state casts its electoral votes as a bloc.<sup>19</sup> While these two factors tend to offset one another, on balance each large-state voter has a significantly greater opportunity to affect the outcome of an election with his or her single vote than does the small-state voter.<sup>20</sup>

Third, under the present system electors can defeat their constituents' expectations by voting for someone other than the candidate on whose slate they were elected. Although few defections have occurred, the possibility exists that in any election where the electoral vote is close a small number of electors could personally decide which candidate would be President.<sup>21</sup> It is inconsistent with our system of representative government to vest electors with such power, particularly since they do not answer to the electorate and are not bound by standards in the exercise of their power.

Closely related to the defecting elector problem is the possibility of independent electors, who may run with the express purpose of winning sufficient votes to deny an electoral majority to either major party candidate. These electors could cast decisive votes for the candidate who would make the most favorable concessions to their political objectives.<sup>22</sup> Such a bargained-for Presidency would be dangerous,

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18. As a result of this requirement, Alaska gets approximately five times as many electors per capita as does California. See PEIRCE, *supra* note 1, at 139.

19. California's electoral votes have 15 times the impact of those from Alaska, Delaware, Nevada, North Dakota, Vermont, Wyoming or the District of Columbia, each of which possess the minimum number of electors. See LONGLEY & BRAUN, *supra* note 5, at 179-80 (giving electoral votes by state through 1980).

20. See Banzhaf, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 303 (1968). The author utilizes computer analysis to examine the likelihood that a voter will cast the deciding vote in each state, as compared to the likelihood that each state's slate of electors will cast the deciding electoral votes. He concludes that the large-state voter generally has significantly more voting power than the small-state voter. The author's basic mathematical technique was relied upon by the New York Court of Appeals in invalidating the apportionment of a county board of supervisors. See *Iannucci v. Board of Supervisors*, 20 N.Y.2d 244, 251, 229 N.E.2d 195, 198 (1967). The technique was also noted by the United States Supreme Court in reviewing a Texas reapportionment plan. *Kilgarlin v. Hill*, 386 U.S. 120, 125 (1967). For a critical examination of the Banzhaf methodology and his conclusions see Sickels, *The Power Index and the Electoral College: A Challenge to Banzhaf's Analysis*, 14 VILL. L. REV. 92 (1968).

21. The possibility of such defection appears to be increasing. Electors have defected in four of the last five elections. See J. BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* 38-40 (1975). See also PEIRCE, *supra* note 1, at 123-24.

22. This was the admitted purpose of some avowedly independent electors who ran in 1960. See PEIRCE, *supra* note 1, at 106. It was also the real thrust of the Wallace third-party campaign in 1968. See Bayh, *Electing a President—The Case for Direct Popular Election*, 6 HARV. J. LEGIS. 127, 128-29 (1968).

not only because of the spectre of a political deal, but also because of the likelihood that the deal would be made with a group that is at the edges of the political spectrum and not representative of most voters.

A fifth defect is the magnification of the impact of vote fraud or counting error. In the 1960 election, for example, Kennedy carried Illinois by fewer than 9,000 votes. A shift of less than 0.1 percent of the total votes cast would have delivered Illinois to Nixon and brought Kennedy within five votes of electoral college defeat. In such a situation, the defection of a few electors could have resulted in a President elected by the House of Representatives.<sup>23</sup> Under the present system, therefore, a few thousand miscounted or fraudulently obtained votes, while having only a minimal impact on the national popular vote even in a close race such as that of 1960,<sup>24</sup> can prove decisive by shifting large blocs of electoral votes.

Lastly, the existing electoral college mechanism impairs the effectiveness of interstate political coalitions. While a small intrastate group may hold the balance of power in the election process of an individual state, a group of similar size scattered among several states cannot exercise the same influence.<sup>25</sup>

### C. *Proposals for Electoral College Reform*

Because of the many serious defects and distortions attributable to the electoral college, its reform is a recurring issue in American government. Although numerous proposals have been suggested, there are only four basic plans for reform.<sup>26</sup>

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23. Some analysts have calculated that, assuming no elector defections, the right shift of 8971 votes in Illinois and Missouri would have thrown the 1960 election into the House. Claims of vote fraud involving up to 100,000 votes in Chicago alone underscore the narrowness of this margin. See PEIRCE, *supra* note 1, at 109. See also LONGLEY & BRAUN, *supra* note 5, at 1-7. The problem of the Alabama vote count for Kennedy in light of the unpledged elector slate casts a further cloud over the election. See note 17 *supra*.

24. In an historical context, the 1960 popular vote was "close" with only approximately 112,000 or 58,000 votes separating the two leading candidates. (The former is the more commonly accepted count. See PEIRCE, *supra* note 1, at 307, for an explanation of the latter, alternative count.) The popular vote was not so close, however, that the small numbers of strategically-placed votes that could have changed the electoral college outcome would have resulted in a new popular vote winner.

25. See Feerick, *The Electoral College—Why It Ought To Be Abolished*, *supra* note 6, at 25.

26. See generally LONGLEY & BRAUN, *supra* note 5, at 42-73; PEIRCE, *supra* note 1, at 151-204; SAYRE & PARRIS, *supra* note 16, at 69-134; Banzhaf, *supra* note 20, at 318-22; Feerick, *The Electoral College—Why It Ought To Be Abolished*, *supra* note 6



### 1. *The district plan*

As it is generally proposed, the district plan would abolish the office of elector and would automatically award one electoral vote to the winner of each congressional district and two additional electoral votes to the winner in each state.<sup>27</sup> Although this would break up the statewide winner-take-all system, it would retain winner-take-all in smaller units. The distortions in the present system would be retained, but their impact would be more localized. A new fault also would be introduced into the political system: the possibility of Presidential gerrymandering. The drawing of district boundaries would affect not only congressional elections, but the Presidential election as well, and would give state legislatures a commanding role in the election process.

### 2. *The proportional plan*

The proportional plan would retain the electoral college format, but would automatically allocate to each candidate a share of the state's total electoral vote based on his proportion of that state's popular vote.<sup>28</sup> In so doing, the impact of the smaller states' higher per-capita electoral votes would be maximized, and the relative voting power of their citizens would be far greater than the relative voting power of citizens of the large states under the present system.<sup>29</sup>

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at 26-42; Kefauver, *supra* note 17, at 193-207; Comment, *The Electoral College: Proposed Changes*, 21 Sw. L.J. 269, 276-83 (1967).

27. This format is essentially that proposed in the Mundt-Coudert plan of the late 1940's and 1950's. Numerous permutations have been suggested, some maintaining the role of electors and some creating new districts for their election. On several occasions during the early 19th century, district plans passed at least one house of Congress. See generally A.B.A. REPORT, *supra* note 16, at 34, LONGLEY & BRAUN, *supra* note 5, at 57-64; PEIRCE, *supra* note 1, at 152-64; SAYRE & PARRIS, *supra* note 16, at 102-17.

28. Such a plan was first introduced in 1848 and subsequently has been proposed on numerous occasions. The high water mark for the proportional plan occurred in 1950 when the Senate passed the Lodge-Gossett proposal by the required two-thirds vote; the measure subsequently was defeated in the House. See generally A.B.A. REPORT, *supra* note 16, at 34-35; LONGLEY & BRAUN, *supra* note 5, at 49-56; PEIRCE, *supra* note 1, at 164-77; SAYRE & PARRIS, *supra* note 16, at 118-34.

29. See Banzhaf, *supra* note 20, at 325. Relative voting power of voters in the most advantaged state vis-à-vis the least advantaged would be approximately 5 to 1 under the proportional plan, but only 3 to 1 under the present system or the district plan. See *id.* at 329-32 where the author tabulates relative voting power under each of the proposals discussed herein.

### 3. *The automatic plan*

The automatic plan would abolish the office of elector, but would otherwise retain the present election mechanism by automatically awarding a state's total electoral votes to its popular-vote winner. Except for the possibility of elector defections,<sup>30</sup> this plan would retain the problems inherent in the present system.

### 4. *Direct popular vote*

Under the direct popular vote proposal, the popular-vote winner automatically becomes President; the intermediate elector system is abolished. Although each of the other plans would address some of the faults of the present system, only direct popular vote eliminates all of the inequities and distortions that arise from an indirect electoral system. Only complete abolition of an indirect electoral system, moreover, will eliminate both the possibility that a second-place finisher could become President and the disparity in voting power between the citizens of different states.<sup>31</sup> The direct election system has not gone without criticism, however. It has been rejected as a constitutional amendment over 100 times.<sup>32</sup> Moreover, some of the opposition arguments raise fundamental questions about the nature of the American political system and its underlying principles.

Opponents of the direct election of the President maintain that it would derogate the fundamental system of federalism. As applied to the debate on electoral college reform, federalism is the concept that the states—as states—must retain some influence in the electoral

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30. Like other reform plans, the automatic plan has been proposed in Congress on numerous occasions dating from 1826. Despite its endorsement by President Johnson in 1965, it has continued to attract little support. See generally LONGLEY & BRAUN, *supra* note 5, at 43–49; PEIRCE, *supra* note 1, at 177–81; SAYRE & PARRIS, *supra* note 16, at 90–101.

31. This discussion is not intended to exhaustively analyze the voluminous debate on the relative merits of the direct election vis-à-vis the existing mechanism or the other proposals. Rather, its purpose is to establish the general efficacy of direct election by suggesting its strengths and pointing to weaknesses in the arguments of its opponents, and to propose an alternative mechanism for its implementation. For a more thorough discussion of the viability of the direct election system vis-à-vis the existing system compare PEIRCE, *supra* note 1, at 253–300; LONGLEY & BRAUN, *supra* note 5, at 74–128; Feerick, *The Electoral College—Why It Ought To Be Abolished*, *supra* note 6, at 11–26, with J. BEST, *supra* note 21, at 42–45; A. BICKEL, *supra* note 16, at 21–29; SAYRE & PARRIS, *supra* note 16, at 69–89.

32. See A.B.A. REPORT, *supra* note 16, at 35.

system. This consideration was important to the Framers, and they sought some method to protect the small states. The evolution of political parties and the winner-take-all system, however, had the opposite effect, and buried small-state electoral power under an avalanche of large-state electoral blocs. The real thrust of the federalism argument, therefore, is that any electoral college reform should return to the Framers' original intention of protecting the small states by adopting the district or the proportional plan; either of these proposals would eliminate the present advantage enjoyed by the large states and would restore relatively greater influence to the small states, which receive at least three electoral votes regardless of population.<sup>33</sup> This argument, however, does not recognize either the realities of the Constitutional Convention or the subsequent evolution of the present electoral college system,<sup>34</sup> and would replace one pattern of inequities with another. A federalist electoral system should not be achieved at the expense of grossly unequal voting power and occasional minority Presidents.

Direct election opponents also maintain that the present system should be retained because of the advantage it provides urban interests in the populous states.<sup>35</sup> This reasoning, however, can be challenged both in theory and in practical effect. First, the theory that "one group can be granted greater voting strength than another is hos-

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33. See Banzhaf, *supra* note 20, at 318-21.

34. The Convention did not consider the distribution of electoral votes to be a significant compromise between large and small states. See PEIRCE, *supra* note 1, at 36. Rather the Framers' solution to the large versus small states conflict, in the electoral college context, was the electoral majority and contingent election mechanism. See notes 10 & 11 and accompanying text *supra*. Therefore, it is fallacious to argue that the existing plan favoring large-state voters should be replaced by one favoring small-state voters on the basis of an imputed but nonexistent intent to provide the small states with extra voting power. Moreover, this argument ignores two fundamental realities. First, small states do not need such special protection inasmuch as they have not been victimized by the large states in the 200 years of the country's history. See PEIRCE, *supra* note 1, at 262, where the author labels the large state versus small state argument the "Great Irrelevancy." Second, all states long ago delegated to their citizens the right to vote for the President; as states, they have not exercised direct electoral influence for 150 years.

35. See, e.g., A. BICKEL, *supra* note 16, at 12-14; SAYRE & PARRIS, *supra* note 16, at 71-73. A derivative argument is that the direct election of the President would adversely affect the political power of ethnic groups and minorities because they tend to live in urban areas. See, e.g., Rosenthal, *supra* note 16, at 12-13; Sindler, *Presidential Election Methods and Urban-Ethnic Interests*, 27 LAW & CONTEMP. PROB. 213 (1962). This position is subject to the same theoretical and practical criticisms as the broader urban interests argument discussed herein.

tile to our standards for popular representative government.”<sup>36</sup> Second, while individual populous states undeniably are favored by the existing system, this does not mean that a constituency of large states or urban interests actually exists. In fact, the diversity of interests among states with large blocs of electoral votes frequently results in their voting for different candidates, thereby cancelling out the effects of their votes rather than accumulating them.

The common thrusts of the urban-interest and federalism arguments are that certain states deserve greater influence in our political system because of their size, and that states of similar size share overriding common interests. However, it is people, not states, who have interests, and the relative population of the state in which a person lives does not determine the nature of his interests as much as do economic, social, and political considerations. Therefore, to give a group of states an electoral advantage is to give their individual voters special preference based upon nothing more than the accident of the voter’s residence. Such a preference cannot be justified. Moreover, while urban and rural areas have certain identifiable interests, the conclusion that large or small states will therefore vote as a bloc largely ignores the fact that local realities, as well as other demographic and social characteristics, make the states different.

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36. *MacDougall v. Green*, 335 U.S. 281, 290 (1948) (Douglas, J., dissenting). While *MacDougall* involved the narrow question of state restrictions on the formation of new political parties, the issue addressed by Justice Douglas recurs in discussions of the electoral college. Indeed, his belief underlies the position of direct election advocates. See, e.g., A.B.A. REPORT, *supra* note 16, at 7; PEIRCE, *supra* note 1, at 296–98; Bayh, *supra* note 22, at 136–37. In the years since *MacDougall*, the reapportionment decisions have firmly established the tenet of “one person, one vote” as a fundamental principle of American government. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963). Although these decisions cannot be directly applied to the electoral college because of its validation in the Constitution, they do underscore its anomalous position. The language of Chief Justice Warren, speaking in the context of legislative reapportionment, in *Reynolds v. Sims* makes the disparity clear:

To the extent that a citizen’s right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. [T]he weight of a citizen’s vote cannot be made to depend on where he lives. . . . A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution’s Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln’s vision of “government of the people, by the people, [and] for the people.”

377 U.S. at 567–68.

The third major argument against direct election of the President is that it would weaken the two-party system.<sup>37</sup> This concern is legitimate but over-emphasizes the importance of the electoral college in the development of the American political party system. As one commentator has pointed out, critics of direct popular vote rarely provide a detailed explanation of how the two-party system would be weakened by its adoption.<sup>38</sup> On the other hand, political scientists and commentators have detailed several reasons for the two-party system and the electoral college is not one of them.<sup>39</sup> Abolishing the electoral college would not affect these reasons, thus indicating that the two-party system would endure.

## II. THE NATIONAL VOTE PLAN

### A. *A New Proposal for Electoral College Reform*

The historical failure of electoral reform efforts indicates that a fresh approach is required. Since the early 1800's when the present

37. See, e.g., A. BICKEL, *supra* note 16, at 21-29; SAYRE & PARRIS, *supra* note 16, at 73-82.

38. Bayh, *supra* note 22, at 136. During their 1966-67 study, the A.B.A. Commission on Electoral College Reform found six generally cited reasons for the existence of two-party politics in the United States:

1. the persistence of initial form
2. the election of officials from single-member districts by plurality votes
3. the normal presence of a central consensus on national goals
4. a cultural homogeneity
5. a political maturity
6. a general tendency toward dualism

LONGLEY & BRAUN, *supra* note 5, at 88. The premise that the two-party system would continue in the absence of the electoral college underlies the A.B.A. proposal. See A.B.A. REPORT, *supra* note 16, at 5.

39. Among these reasons are the election laws, campaign practices, and social patterns that make it difficult for minor parties to become established, and the high cost of campaigning which makes it difficult for an emerging group to become an effective political force. Of greater significance is the fact that American political offices (including the Presidency) cannot be parcelled out among minor parties in a coalition cabinet, and the fact that, in the United States, the single-member district is used, in which only the top vote-getter is elected, rather than the "at-large" system in which a minor party can win political representation by placing fourth or fifth in the election. See generally V.O. KEY, JR. POLITICS, PARTIES & PRESSURE GROUPS 205-10 (5th ed. 1964); E. SCHATTSCHNEIDER, PARTY GOVERNMENT 65-84 (1960).

Analogy to local political realities suggests that the absence of the electoral college may have a beneficial effect on the two-party system. This author's observations indicate that fewer third party campaigns occur in state and local elections where there is a direct vote than in Presidential campaigns where there is not; thus, the abolition of the electoral college may actually strengthen the two-party system.

system took shape, the proponents of change have attempted to correct its recognized shortcomings with an endless stream of constitutional amendments. Each attempt has failed, and the prospects for success through constitutional amendment remain uncertain at best. This exclusive reliance on constitutional electoral reform has been misplaced. As explained above, our present electoral system is as much the product of state law as of constitutional directive. In light of this historical evolution, it is as appropriate to institute reform by changing state practices as it is to do so by amending the Constitution's language.

The states possess the power to institute direct popular vote and they can do so more readily than the Constitution can be amended. Reform can be accomplished if the states change their election laws to require electors to support the national popular-vote winner, rather than the individual state winners. In effect, electors of both parties would pledge to vote for the candidate receiving the national plurality. This National Vote Plan would eliminate the winner-take-all system and its resulting inequities just as effectively as would a constitutional amendment implementing direct popular vote. Technically, an indirect electoral system would remain, but the faults presently attributable to such a system would be substantially eliminated, because the electors would vote for the national winner. Although a Presidential candidate would still have to win an electoral college majority, he would receive the requisite electoral votes only by winning a nationwide popular mandate. Even if all states did not adopt the National Vote Plan, the action of a few, as will be demonstrated, could effectively implement the proposal. Direct popular vote would become a reality, and it would result from state efforts rather than constitutional change.<sup>40</sup>

### *B. Problems with the National Vote Plan*

The suggestion that the states should become the vehicle for imple-

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40. This same result could be accomplished without state legislative action: individual electors could decide to defect from their candidate and vote for the national winner or a defeated candidate could release his electors, asking them to vote for the victor. If either of these actions became tradition, de facto direct election would result. Because neither of these possibilities is likely to occur, however, the focus here is exclusively on state legislative enactment.

menting direct popular vote departs radically from current thinking on electoral reform and raises several problems that must be fully explored.

### 1. *Viability of state action*

The National Vote Plan, which seeks to implement electoral reform by means of state action, presents several issues concerning the basic role of the states in the electoral system. The first of these issues is whether states have the power to act in this area. It is clear that they do. State legislatures possess very broad power under the Constitution to appoint electors; federal law merely sets the time for such appointment and establishes a vote count mechanism.<sup>41</sup> In fact, the two primary ingredients of the present electoral system—popular election of the electors and choice of a statewide ticket—are wholly creations of state law, subject to change at any time by the states. The Supreme Court has confirmed this view. In 1892 when Michigan reverted to a district plan, the Court, in *McPherson v. Blacker*,<sup>42</sup> upheld the legislation. After an extensive review of the Constitutional Convention and the early elections, a unanimous Court found that throughout our history “the practical construction of the clause [Art. II, § 1, cl. 2] has conceded plenary power to the state legislatures in the matter of the appointment of electors.”<sup>43</sup> The Court concluded:<sup>44</sup>

The question before us is not one of policy but of power . . . . The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive.

The Court’s decision in *McPherson* makes possible the consideration of other closely related issues.

One such issue is whether states can appoint electors based upon

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41. 3 U.S.C. §§ 1–18 (1970).

42. 146 U.S. 1 (1892).

43. *Id.* at 35.

44. *Id.* at 35–36.

events occurring outside the state, for example, the nationwide popular vote count. Despite an absence of legal precedent, historical examples suggest that the power of the states, as recognized by the Court in *McPherson*, should be sufficient to permit this. On a number of occasions electors have made contingent pledges of their votes. In 1824 North Carolina backers of candidates Jackson and Adams, fearing defeat by Crawford, combined in support of a single anti-Crawford slate pledged to vote for the candidate most likely to win.<sup>45</sup> Similarly, South Dakota's 1912 Progressive slate, which was pledged to Roosevelt, indicated that it would vote for Taft if he was in a better position nationally to defeat Wilson.<sup>46</sup> More recently, George Wallace's 1968 electors promised by notarized oath to vote for Wallace "or whomsoever he may direct."<sup>47</sup> Although partisan politics, and not the desire to implement electoral reform, motivated such actions, they do indicate that electors may wait until the national vote has been tabulated before deciding how to cast their ballots.

Assuming that states possess the requisite power to implement the National Vote Plan, the advisability of such action must be considered. For 32 states and the District of Columbia, the answer is reasonably clear. By adopting the National Vote Plan they can achieve direct election of the President and thereby eliminate their voters' present disadvantages.<sup>48</sup> All states, moreover, share an interest in removing an antiquated barrier between the popular will and the Presidency, thus "assuring every citizen an equal opportunity to participate in the election of a man who will serve as our highest national officer and as a symbol and spokesman equally for all Americans."<sup>49</sup>

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45. See L. WILMERDING, *THE ELECTORAL COLLEGE* 181 (1958).

46. *Id.*

47. See Bayh, *supra* note 22, at 128.

48. Professor Banzhaf's study concluded that the following 18 states possess greater than average voting power under the electoral college system: Alaska, California, Florida, Georgia, Illinois, Indiana, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Virginia, and Wisconsin. The relative voting power of the remaining states is less than it would be under a system of direct popular election. See Banzhaf, *supra* note 20, at 329. According to the 1960 census relied upon by Banzhaf, seventeen of these states were the nation's most populous states, and possessed the 17 largest electoral blocs. Alaska, the least populous state, appears on the list because it has so few voters that it enjoys a disproportionately large per capita allocation of electoral votes.

49. See Banzhaf, *supra* note 20, at 328. The 18 states with greater than average relative voting power would sacrifice some of that strength if direct presidential election were implemented. This fact, however, should not lead to the conclusion that their legislatures will necessarily oppose the National Vote Plan. Concerned legislators



An additional issue inherent in using state efforts to achieve this type of electoral reform is whether the plan will work if not all states act. The National Vote Plan can successfully implement the popular election of the President even if some states do not adopt it. For electoral purposes, the adopting states would constitute one large state whose votes would be cast for a single candidate. Clearly, if their electoral votes equalled one-half of the total, a candidate could be elected only by winning a popular victory, and direct election of the President would be a reality. The plan can work even if fewer than one-half of the electoral votes are committed to the national winner, because the winner will undoubtedly receive electoral votes from states that retain the existing system. Indeed, states that hold 20–25 percent of the total electoral college votes (108–135 electoral votes) can effectively implement the system.<sup>50</sup> Even if the first states adopting the National Vote Plan had too few electoral votes to guarantee the popular election of the President, their action would reduce the distortions inherent in the present system by shifting campaign strategies from a state-by-state to a nationwide focus. This shift in focus would be sufficient reason for individual states to begin adopting the National Vote Plan.

## 2. *Independent and defecting electors*

Because the National Vote Plan retains individual electors, it also retains possibilities of independent elector slates bargaining for the Presidency and of individual elector defections. These problems, however, would be of less significance under the plan than under the present system, and could be eliminated by state legislation irrevocably binding the electors.

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in such states could conclude that the national disadvantages of the electoral college outweigh the advantages of greater local power in presidential elections. The increasingly national orientation of the country's population and the popularity of the direct election approach as reflected in the Gallup Polls should reinforce the predisposition of such legislators. See PEIRCE, *supra* note 1, at 189–90, citing a 1966 Gallup Poll indicating that 63% of those polled favored abolition of the electoral college. See also A.B.A. REPORT, *supra* note 16, at 7, citing a poll of state legislators reflecting a 59% preference for the direct popular vote. Additionally, once other states have adopted the plan, large states might follow suit to avoid the stigma of parochialism.

50. Assume that the National Vote Plan existed in states representing 20% of the total electoral votes to be cast. These states, therefore, would cast approximately 108 electoral votes for the popular winner. In order to win the election, the national loser must carry states with 63% of the remaining electoral votes. The possibility of a

As a practical matter, the likelihood of independent elector slates and defecting electors would be lessened under the National Vote Plan. First, if a sufficient number of states enacted the plan to ensure the election of the popular-vote winner, an independent slate would be deprived of its special bargaining power and could not affect the outcome of a Presidential election. In such a situation voters may be deterred from casting futile ballots.<sup>51</sup> Similarly, if enough states implemented the plan, the possibility that enough electors would defect to affect the election would be virtually eliminated.

Any chance of elector defection can be solved by legally binding the electors to vote for the national winner. While the power of the states to bind electors has not been passed upon by the Supreme Court,<sup>52</sup> convincing arguments can be made that they possess the requisite power. The central question in making this determination is whether the Constitution mandates elector independence.

Two arguments underlie the position that, under the Constitution, electors must be independent. First, the language of Alexander Hamilton in explaining the merits of an electoral college in *The Federalist* contemplates such independence:<sup>53</sup>

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

Hamilton's view suggests that state power was restricted to the appointment of electors and not the control of their votes. The second

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candidate receiving less than a plurality of popular votes while winning such a substantial number of electoral votes is remote.

51. The extent to which this deterrence would actually affect voter behavior is unknown. Logically, an independent slate in such circumstances should receive no more votes than a true minor party receives in present elections.

52. In *Ray v. Blair*, 343 U.S. 214, 230 (1952), the Supreme Court expressly reserved judgment on the issue. See text accompanying note 66 *infra*.

53. THE FEDERALIST NO. 68, at 412 (Mentor ed. 1961) (A. Hamilton). Of the authors of THE FEDERALIST PAPERS, only Hamilton enthusiastically endorsed the electoral college system, remarking that "if the manner of it be not perfect, it is at least excellent." *Id.* at 411-12. Many of the commentators on the electoral college point to Hamilton's language in concluding that the Framers contemplated that electors cannot be bound. See, e.g., Rosenthal, *supra* note 16, at 17; Feerick, *The Electoral College—Why it Ought To Be Abolished*, *supra* note 6, at 9.

argument supporting the independence of electors focuses upon the Constitution's requirement that they "vote by ballot."<sup>54</sup> This language implies a secret vote by individuals capable of making a choice, and has been so interpreted by at least one Supreme Court Justice.<sup>55</sup>

Although these arguments are cogent, some commentators have concluded that they are not convincing.<sup>56</sup> A number of factors support the contrary conclusion that states constitutionally can bind their electors. The appointment power, delegated by the Constitution to the states, is broad and unqualified<sup>57</sup> and has been so construed by the Supreme Court.<sup>58</sup> Although the Court has superimposed constitutional protections where the state chooses to appoint its electors by popular election,<sup>59</sup> state power to appoint can be deemed to encompass the capacity to bind its electors to vote in accordance with the popular will.

The early history of the country also suggests that the Framers did not intend the President to be chosen by independent electors. During the ratification debates, several of the Framers, arguing for various processes to choose electors, strongly implied that those who selected

54. U.S. CONST. art. II, § 1.

55. See *Ray v. Blair*, 343 U.S. 214, 232 (1952) (Jackson, J., dissenting). Justice Jackson, in arguing that state law is limited to the appointment of electors, stated: "[N]o state law could control the elector in performance of his federal duty, any more than it could a United States Senator who also is chosen by, and represents, the State." *Id.*

56. See, e.g., L. WILMERDING, *supra* note 45, at 21; Kirby, *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROB. 495 (1962); Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799 (1961); Comment, *supra* note 10, at 696.

57. U.S. CONST. art. II, sec. 1.

58. *McPherson v. Blacker*, 146 U.S. 1, 41-42 (1892).

59. See *McPherson v. Blacker*, 146 U.S. 1 (1892), in which the Court held that while a state need not select its electors by popular vote its choice to do so results in the attachment of fourteenth amendment protections. In *McPherson* the Court cited its decision in *In re Green*, 134 U.S. 377 (1890), in which Justice Gray stated that state power over Presidential elections is "unaffected by anything in the Constitution and laws of the United States . . ." *Id.* at 380 (dictum). Clearly, such a statement is overbroad in light of the provisions of the fourteenth, fifteenth, and nineteenth amendments which provide Congress power to enact enforcing legislation. Moreover, Congress without opposition has legislated concerning the manner of certifying elector appointments, transmission of credentials, filling vacancies, resolving contests and other administrative details. See 3 U.S.C. §§ 1-18 (1970). See also *Ex parte Yarbrough*, 110 U.S. 651 (1884), in which the Court sustained legislation punishing conspiracy to prevent citizens from lending aid to electors, and *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934), in which the Federal Corrupt Practices Act was applied to electors. Yet no exercise of congressional power has attempted to usurp the state appointment mechanism and efforts to bind electors. See generally Kirby, *supra* note 56.

the electors would select the President.<sup>60</sup> Following ratification, the issues of elector independence quickly disappeared. By the first contested election in 1796, when Washington declined to run for a third term, the emerging political parties had been largely successful in securing the appointment of electors who would vote for their party's candidate.<sup>61</sup> Four years later not one elector voted against his party's candidate.<sup>62</sup> Significantly, in the constitutional crisis following the Jefferson-Burr tie in that election, reform efforts were directed at instituting separate electoral ballots for President and Vice President, not at ensuring elector independence. These events, which occurred within a few years of the ratification of the Constitution and within the lifetimes of many of the Framers, add credence to the conclusion that elector independence is not a constitutional requirement.

Legislative and judicial authority also support the proposition that state power to appoint electors includes the power to bind them. Numerous states have enacted statutes purporting to bind their electors to vote for the statewide popular-vote winner.<sup>63</sup> Indeed, Congress

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60. A number of statements are particularly revealing. For example, Madison stated: "Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it." THE FEDERALIST No. 45, at 291 (Mentor ed. 1961). C.C. Pinckney of South Carolina argued that the President should be popularly chosen "through the medium of electors chosen particularly for that purpose." 4 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 304 (2d ed. 1937). While such statements do not directly repudiate Hamilton's position, they do suggest that many Framers visualized a circumscribed independence for electors. Moreover it has been suggested that Hamilton's views may have reflected his personal aspirations. See Kirby, *supra* note 56, at 507.

61. See generally PEIRCE, *supra* note 1, at 62-65.

62. See PEIRCE, *supra* note 1, at 65-71. This lack of defection created one of the great crises of early American political history. Since the Constitution originally provided that each elector should vote for two candidates, the Republican slate of Jefferson and Burr—receiving the total loyalty of their electors—tied for President in the election of 1800. Burr, presumably the vice presidential candidate, took advantage of the tie to seek the presidency. After 36 ballots the House of Representatives ultimately elected Jefferson. The twelfth amendment resolved this problem by providing *inter alia* that electors vote separately for President and Vice President, rather than casting two undifferentiated votes.

63. See, e.g., ALASKA STAT. §§ 15.30.040, -090 (1971); CAL. ELEC. CODE § 25105 (West 1961); COLO. REV. STAT. ANN. § 1-17-101(5) (1973); CONN. GEN. STAT. ANN. § 9-176 (1967); OKLA. STAT. ANN. tit. 26, §§ 10-102, -109 (1976). The most interesting such provision is that of Oklahoma, which imposes a \$1,000 fine for defection and was enacted following the defection of one of the state's Republican electors in 1960. See PEIRCE, *supra* note 1, at 125. In addition, the short ballot now in general use carries an implied pledge that the electors will vote for the named candidate. See Kirby, *supra* note 56, at 507-08; Comment, *supra* note 10, at 699. Indeed, a New York court has held that the long standing practice of voting for the state winner

itself has passed such legislation for the District of Columbia.<sup>64</sup> Although the Supreme Court has not adjudicated the constitutionality of these provisions, the judiciary has deferred to state election procedures. State courts have recognized the broad power of the political parties to discharge elector nominees for threatened defection prior to the election.<sup>65</sup> The Supreme Court in *Ray v. Blair*,<sup>66</sup> although reserving the issue of elector independence following election, nevertheless upheld a political party requirement that electors pledge to vote for the party nominee as a prerequisite to appointment. Such decisions, together with longstanding legislation, provide a substantial foundation for the argument that binding electors is constitutionally permissible.

The enforceability of a law binding electors poses a separate and troublesome question. If an elector announces an intention to defect, a suit to prevent his action may constitute a nonjusticiable political question.<sup>67</sup> Even if the suit is justiciable, available remedies cannot preclude defection or change the vote once cast.<sup>68</sup> Similarly, once the vote is cast, no effective mechanism exists either to prevent Congress from counting it or to recast the ballot even if it is not counted.<sup>69</sup>

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ripened into a legal duty which bound the elector and which could be enforced against him by mandamus. *Thomas v. Cohen*, 146 Misc. 836, 841-42, 262 N.Y.S. 320, 326 (Sup. Ct. 1933). *But see* *Breidenthal v. Edwards*, 57 Kan. 332, 46 P. 469 (1896); *State ex rel. Beck v. Hummel*, 150 Ohio St. 127, 80 N.E.2d 899 (1948).

64. D.C. CODE ANN. § 1-1108(g) (1973).

65. *See, e.g., State ex rel. Nebraska Republican Central Comm. v. Wait*, 92 Neb. 313, 138 N.W. 159 (1912) (announced intent to defect constituted breach of an implied pledge to vote for the party's candidate and allowed forfeiture of elector's office); *Browne v. Martin*, 19 So. 2d 421 (La. Ct. App. 1944) (state party can rescind nomination of elector at its discretion absent fraud or violation of state statute); *Seay v. Latham*, 143 Tex. 1, 182 S.W.2d 251 (1944) (party can remove elector nominee prior to certification for ballot).

66. 343 U.S. 214 (1952).

67. *See* *Rosenthal*, *supra* note 16, at 27-30. *But see* *Powell v. McCormack*, 395 U.S. 486 (1969), in which the Court found the House of Representatives' exclusion of Adam Clayton Powell justiciable notwithstanding the constitutional mandate of Article I, § 5 that each House of Congress shall be the judge of the qualifications of its members.

68. *See* *Kirby*, *supra* note 56, at 509.

69. Under federal election law, the governor of each state certifies its electors and forwards the certificate to the Administrator of General Services who thereafter transmits the certificates of all states to the Congress on the date prescribed for counting the ballots. 3 U.S.C. § 6 (1970). Controversies as to the appointment of electors are to be determined by the states prior to certification. *Id.* § 5. Congress is empowered officially to count the certified electors' ballots and to reject votes not "regularly given." *Id.* § 15. The only statutory mechanism to challenge an electoral vote in Congress requires a written objection to counting the vote, signed by at least one Representative and one Senator. Such a challenge has been made only once, in the case of a defecting

Though yet untested, a procedure can be implemented whereby elector fidelity can be assured even when electors do not announce in advance their intention to defect. This can be accomplished by appointing electors subject to the condition that they properly perform their duties. If those duties included a pledge to vote for the national winner, and an elector failed to vote as mandated by the pledge, then he would be in default in the performance of those duties, and his appointment would be vacated automatically.<sup>70</sup> The vacancy would be filled immediately pursuant to state law.<sup>71</sup> This procedure probably would be challenged on the basis that the Constitution's "vote by ballot" language compels a secret process, but the fact that electors in many states now vote openly militates against such an interpretation.<sup>72</sup> Even if secrecy were required, state procedures could declare that *all* electors forfeit their positions in the presence of a single defec-

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North Carolina elector in 1968. Congress, however, refused to sustain the challenge and counted the electoral vote. In so doing, it indicated a reticence to invalidate electors' votes once they have been certified by the state, although it is perhaps significant that North Carolina had no statute binding electors to vote for a particular candidate. See 115 CONG. REC. 146-70, 197-247 (1969). In light of this uncertain precedent the meaning of "regularly given," and the practicality of any congressional challenge to a "miscast" electoral vote remain unclear. See Comment, *The Problem of the Faithless Elector*, 6 HARV. J. LEGIS. 254 (1969). The possibility of an action by a voter against Congress for an injunction or mandamus also exists, but the courts would be likely to find the case nonjusticiable. See Rosenthal, *supra* note 16, at 31. But see *Powell v. McCormack*, 395 U.S. 486 (1969).

70. Having suggested such a conditional vote mechanism, Kirby summarily concludes that the best solution would be a federal constitutional amendment implementing the automatic system. See Kirby, *supra* note 56, at 509.

71. Congress has expressly authorized the states to fill vacancies that may arise in their elector slates. 3 U.S.C. § 3 (1970). Pursuant to this provision, most states now have statutes authorizing the remaining electors to fill such vacancies. See, e.g., WASH. REV. CODE § 29.71.040 (1975) (electors present fill vacancy by viva voce and plurality of votes). See also DEL. CODE ANN. tit. 15, §§ 7331-32 (1975) (General Assembly fills vacancy by majority of votes); ILL. REV. STAT. ch. 46, § 21-1 (Supp. 1975) (state committee of the political party or group fills vacancy and certifies it to the State Board of Elections); MASS. GEN. LAWS ANN. ch. 54, § 138 (1971) (electors present fill vacancy by choosing from among citizens of the Commonwealth); MD. ANN. CODE art. 33, § 20-3 (1971) (electors present fill any vacancy at first meeting after election); N.J. STAT. ANN. § 19:1321 (Supp. 1975) (vacancy filled by any committee to which power may be delegated, otherwise by state committee of the political party); PA. STAT. ANN. tit. 25, § 3193 (1963) (electors present fill vacancy by viva voce); TEX. ELEC. CODE ANN. art. 11.05 (1967) (qualified electors present fill vacancy by majority of votes). See generally PEIRCE, *supra* note 1, at 128.

72. The longstanding practice has been to vote openly. Electors in various states vote by signed ballot, by oral announcement only, or by unsigned ballot accompanied by a public announcement of how each voted. Open voting by electors lends support to the theory that "vote by ballot" does not require secret voting. See *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (customary official action can help interpret the true meaning of legal phrases).

tive ballot. Their votes would be invalidated, and a new elector slate would be selected to vote for the prescribed candidate. Such a compromise would both preserve any requirement of secrecy of the individual electoral ballot and eliminate elector defection.

### 3. *Lack of a national ballot*

Although the Presidency is a national office, state law determines voting procedures. Individual states thus determine the qualifications of candidates for their own ballots.<sup>73</sup> While this would not affect the basic operation of the National Vote Plan, it does present practical difficulties that arguably undermine the plan's merits. Under the National Vote Plan, voters of some states could be denied a full choice in the presidential election, absent congressional action implementing uniform national prerequisites for ballot qualification.<sup>74</sup> State ballot requirements could preclude the expression of voters' preferences in two types of situations. First, if the candidate of a new party did not meet a state's requirements he would be excluded from its ballot.<sup>75</sup> Second, if the local state party supported someone other than the party's national nominee it would preempt the official ballot position.<sup>76</sup>

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73. This problem could be solved, of course, by a "National Ballot Act," establishing uniform ballot access rules for Presidential candidates. Most proposals for a direct vote amendment include a clause authorizing Congress to pass such an act. See A.B.A. REPORT, *supra* note 16, at 11-12. However, it would appear that Congress possesses such authority even in the absence of specific constitutional language. This authority could be premised on any of several clauses in the Constitution (see the opinion of Mr. Justice Black in *Oregon v. Mitchell*, 400 U.S. 112, 124 n.7 (1970), upholding federal legislation granting the 18 year old vote), but would perhaps be more logically premised as a legislative implementation of the holding in *Williams v. Rhodes*, 393 U.S. 23 (1968). Congress, after appropriate legislative findings that *Williams* left uncertain the precise limits of permissible ballot access requirements, could, in the interest of orderly campaigns for the presidency, establish those precise limits within the principles set forth in *Williams*. See notes 77-81 and accompanying text *infra*.

74. The American Bar Association in its direct election constitutional amendment proposal, incorporated a recommendation that Congress specifically be authorized to deal with exclusions of national candidates from state ballots. See A.B.A. REPORT, *supra* note 16, at 12.

75. This was the problem faced by George Wallace in 1968 and which gave rise to *Williams v. Rhodes*, 393 U.S. 23 (1968). In *Williams*, the challenged Ohio provision required petitions signed by 15% of the electorate (based on the number of votes cast in the preceding gubernatorial election) in order for a new party to be listed on the presidential ballot. *Id.* at 24-25. Even at the time of *Williams* most states required petitions signed by less than 1% of the electorate. *Id.* at 47 n.10 (Harlan, J., concurring in the result).

76. This has occurred a number of times in American history. In 1860 Lincoln's name did not appear on the ballot in ten of the thirty-three states. In 1912 California's

Both these problems stem from state election laws that allow the two major parties to qualify automatically for the ballot, while requiring new parties or different candidates to meet other prerequisites.

The problem faced by minor-party candidates has been essentially eliminated by *Williams v. Rhodes*,<sup>77</sup> in which the Supreme Court struck down Ohio election law limitations that prevented George Wallace from obtaining a place on the state's 1968 ballot. Although the Court recognized that Ohio possessed valid interests in promoting a two-party system, ensuring that new parties have broad popular support and adequate organizations, and having majority winners, it held that these interests did not amount to a "compelling state interest" that would sustain its restrictive election laws.<sup>78</sup> Because less restrictive alternatives existed, the Court held that Ohio's laws violated equal protection guarantees as well as "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."<sup>79</sup> By implication, the Court suggested that a state could not use its election laws to keep a party off the state's ballot if it demonstrated more than de minimis public support.

The *Williams* decision can also be applied to the problem of the major-party candidate preempted from the state ballot. Although the Court did not address this issue, its language can be applied to the problem:<sup>80</sup>

[S]ince the identity of the likely major party nominees may not be known until shortly before the election, [the] disaffected 'group' will rarely if ever be a cohesive or identifiable group until a few months before the election. Thus, Ohio's burdensome procedures . . . operate to prevent such a group from ever getting on the ballot and the Ohio system thus denies the 'disaffected' not only a choice of leadership but a choice on the issues as well.

This reasoning would apply where a state party decided to support an independent candidate and thus deprive the national nominee of a

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Republican electors were pledged to Roosevelt, the Progressive Party candidate. Finally, in 1948 and in 1964 the Alabama electorate could not vote for the national Democratic Party nominees because the state party had appropriated the electoral slate. See PEIRCE, *supra* note 1, at 137.

77. 393 U.S. 23 (1968).

78. *Id.* at 31.

79. *Id.* at 30.

80. *Id.* at 33.



position on the ballot. Under the *Williams* rationale, backers of the major-party candidate in that state could obtain ballot listing by satisfying state requirements for an independent party. If such requirements were overly restrictive, they could seek relief in federal court to preserve their "choice on the issues."

The *Williams* decision, therefore, reduces the possibility that a national candidate will be deprived of a ballot position in a state because of its election requirements. Even if some possibility remains,<sup>81</sup> it should not undermine the adoption of the National Vote Plan. Failure to adopt the plan for fear that one state might succeed in keeping a legitimate national candidate off the ballot would encourage obstructionist tendencies and would allow that state to decide for all states whether they wanted a popularly elected President. More importantly, future situations that might not be covered by *Williams* must be balanced against the existing system's distortions. The latter clearly outweigh the former.

#### 4. *Counting the votes*

Because the National Vote Plan focuses on the popular winner, an official nationwide vote count assumes added importance. This problem, unlike that of getting candidates on the ballot, necessitates a legislative solution. There are three possible ways to determine the national winner: utilization of the present vote count system, passage of federal legislation, or adoption of new procedures at the state level.

By utilizing the existing vote count system, each state could compile national totals from all states' official returns.<sup>82</sup> Such an approach would lack adequate provision for dealing with close elections, however. The problems of analyzing the returns and determining a winner

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81. In the companion case to *Williams*, the Court held that the Socialist Labor Party, which had made little effort to comply with Ohio law and was late in seeking judicial relief, was not entitled to ballot listing because of the disruptive effect on the election process that would result. *Socialist Labor Party v. Rhodes*, 393 U.S. 23, 34-35 (1968). Thus, these decisions did not provide third parties with a carte blanche to gain access to state ballots exclusively at their discretion.

82. 3 U.S.C. § 6 (1970) provides that each state's executive submit by registered mail to the Administrator of General Services a certificate indicating the electors selected and the number of votes cast for each. Such certificates must be preserved for one year and made part of the public record. Thus, each state adopting the National Vote Plan could authorize an official to compile the submitted data and then to officially notify its electors of the national popular vote winner.

in a close election require a more systematic approach to the vote count issue than merely compiling national totals.

The best solution would be passage of a National Popular Vote Count Act by Congress. Such an Act should contain provisions for officially compiling and disseminating the national popular vote results, determining the necessity of a recount, and conducting a recount. Even if Congress does not enact such a law, the states could adopt the National Vote Plan and incorporate provisions for dealing with close elections. Although uniform federal legislation is preferable, the rarity of elections requiring recounts and the increasing accuracy of existing vote counting procedures suggest that a state-implemented system would also be viable.<sup>83</sup> Problems would still arise in two circumstances. In the first, one state's election results might not be final by the time the electors meet.<sup>84</sup> This would present no difficulty unless the national election was close. In the absence of such a close race, the electors in states under the National Vote Plan could be instructed to vote for the national winner even though the results of one or more states were not final. Close national results pose a more serious difficulty, however. Incorporating parameters for vote totals into the state legislation adopting the National Vote Plan would mitigate but not solve this problem. Such legislation would define a conclusive margin of victory and declare a winner if the votes for a candidate exceeded the requisite margin.<sup>85</sup> When this occurred, state officers would so inform the appropriate slate of electors.

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83. Technological advances in ballot counting and modern voting equipment reduce the chances of voting irregularity and correspondingly increase the accuracy of the vote totals. This further reduces the statistically small possibility of a recount in a presidential election. See PEIRCE, *supra* note 1, at 284-89. It is significant to note that the A.B.A. proposal recommends continued utilization of state election procedures, with reserve power vested in Congress to make and alter voting regulations. See A.B.A. REPORT, *supra* note 16, at 11-12.

84. Electors meet and cast their votes on the first Monday after the second Wednesday in December following their appointment. They meet at a place designated by each state's legislature. 3 U.S.C. § 7 (1970). This problem arose in the 1960 election in which weeks passed before the victor in Hawaii was determined. See PEIRCE, *supra* note 1, at 285.

85. For example, a three tier system could be adopted. First, a vote separation between the leading candidates in excess of 0.2% of the total votes cast could be considered conclusive. This is a margin 22% greater than the separation in the 1960 Kennedy-Nixon election. See note 24 *supra*. When the margin is between 0.1% and 0.2% the state's election official could be authorized to declare a winner if the vote count appeared definitive, or to implement contingent election procedures if it appeared unreliable or too close to call. The implementing legislation should enumerate the criteria for the official to examine in making this decision, such as actual vote

This analysis narrows the scope of the problem, but does not solve it. There will still be elections that are so close that a winner cannot be determined within the enumerated criteria. It is at this point that the National Vote Plan fails to function: absent either a determination as to the national winner, or a nationally enforceable recount mechanism for making such a determination, a stalemate will result. In this event, electors should be instructed to vote for the winner in their home states. The existing electoral system would constitute the contingency election mechanism under the National Vote Plan.

Although this solution is imperfect, it is preferable to the two other available alternatives. Under the first, the appropriate state officer could declare the winner of the Presidential election just as he would for elections of state officials. However, it would be unwise to vest such substantial power in a person who does not have the capacity to accumulate the data necessary to make an appropriate decision, and it would lead to the possibility of disparate results among states operating under the National Vote Plan. The possibility of arbitrary decisions in such a circumstance counsels against this approach. Under the second alternative, the leading candidate could be declared the automatic winner according to a previously agreed upon vote totalling method without the evaluation of a state official. This second alternative, however, avoids the issue of irregularities in the voting process that affected the election results. Under the popular vote system, the entire country would be analogous to a single state, and fraud anywhere could influence the outcome in a close election. By reverting to the present system when an election is too close to call, vote fraud or other irregularities could affect the outcome in one state, but would be unlikely to have as great an impact on the country as a whole.

Although using the present system in an exceptionally close election is the best alternative absent federal legislation, it poses a profound question as to the worth of the National Vote Plan. It is only in a close election that the current system can misfire and elect a popular-vote loser, yet the National Vote Plan will revert to the current system in

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separation, the apparent reliability of the vote count, and consensus of other state election officers. A state's election official should not be given the authorization to declare a winner in such circumstances because in such an election he could not obtain sufficient accurate and unbiased information on the conduct of the election in the other 49 states to more than guess at the winner. Finally, a separation of less than 0.1%, approximately  $\frac{5}{8}$  the Kennedy-Nixon margin in 1960, would be considered too close to declare a winner, and contingent election provisions would be implemented.

just such a close election. A number of factors mitigate this inconsistency. First, the problem arises only if Congress does not enact national vote count legislation. If states adopt the National Vote Plan, increased attention will be focused on the popular-vote winner, and Congress may be spurred into action. Second, state legislation to define the requisite majority margin will minimize the problem of the close election. Finally, candidates would conduct their campaigns on the assumption that the Presidency will be gained through direct election. Each popular vote would be recognized as carrying equal weight and only secondarily would groups of voters receive special attention because of their ability to affect a large bloc of electoral votes. Only after election day would the voting disparities created by the existing electoral college system be reintroduced. In short, although the National Vote Plan cannot preclude the election of a minority-vote President absent federal vote count legislation, neither could any other electoral plan. The National Vote Plan has two advantages in that it can spur the passage of such a law, as well as provide for the election of the people's candidate in all elections that produce a clear popular winner.

### III. CONCLUSIONS—THE EFFICACY OF THE NATIONAL VOTE PLAN

The purposes of this discussion have been to suggest that the states can initiate electoral reform independently of federal action, and to demonstrate that the National Vote Plan can provide a viable mechanism for electing the President. The merits of the proposal can best be seen when they are compared to the advantages and disadvantages of a constitutional amendment implementing a direct election plan.

The difficulties of the present electoral college would be eliminated by passage of a constitutional amendment accompanied by national ballot and national vote count legislation. To the extent that ballot and vote count legislation were not implemented, similar problems would exist under either the National Vote Plan or a constitutional amendment. But even when balanced against tripartite federal reform, the National Vote Plan compares favorably. Defecting electors would pose only a theoretical problem because electoral majorities would become larger, and the possibility that the outcome would be affected by such defections would be correspondingly reduced. Moreover, le-

gally bound electors would effectively eliminate the possibility of defection. The problem of a national ballot has, as a practical matter, been solved by *Williams v. Rhodes*. Although judicial remedies to guarantee ballot listing may be more burdensome than congressionally prescribed procedures, *Williams* nonetheless suggests that serious national candidates cannot be excluded from state ballots. Finally, a national vote count accurate enough to determine the winner in all but the closest elections already exists. In the event that the popular winner cannot be ascertained in a close election, the National Vote Plan would revert to the existing system, thus producing a victor with a minimum of delay and uncertainty. Moreover, adoption of the National Vote Plan by some states should encourage congressional enactment of vote count legislation.

The National Vote Plan possesses advantages over the constitutional amendment mechanism that may make it the superior alternative. The first advantage is pragmatic: the plan stands a much better chance of success than an amendment. Numerous constitutional amendment proposals languish in Congress, each with vocal adherents but none with enough strength to obtain the requisite two-thirds majority of both Houses and subsequent ratification by three-fourths of the states. On the other hand, the National Vote Plan can effectively implement the direct election of the President if states with approximately 120 electoral votes enact it.

The second advantage is related to the first. Because the National Vote Plan would not be a constitutional amendment, it could be repealed by the enacting states if problems arose. Some critics object to direct election because it constitutes a substantial departure from existing political institutions and practices, and may lead to a fundamental alteration in the distribution of political power—both between the branches of federal government and the national political parties. While some of these concerns seem illusory, the National Vote Plan provides the flexibility to deal with unforeseen problems because it could be repealed more readily than could a constitutional amendment. In addition, the National Vote Plan does not abolish the electoral college as would a constitutional amendment; it merely changes its form. Repeal of the National Vote Plan would allow reversion to the existing system.

On balance therefore, the National Vote Plan does not merely suggest a viable proposal for electoral reform; it provides a superior one.

## Electoral College

Its substantive effect is essentially the same as a constitutional amendment implementing the direct vote. Additionally, however, it provides an effective and flexible method to shake loose from the constitutional amendment impasse and bring about long overdue reform.