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## THE DIRECT ELECTION OF THE PRESIDENT: THE FINAL STEP IN THE CONSTITUTIONAL EVOLUTION OF THE RIGHT TO VOTE

To lose their votes, is the fate of all minorities, and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed.<sup>1</sup>

### I. Introduction

Voting in a Presidential election in the United States is viewed by many of its electorate as a simple process whereby the candidate with a plurality,<sup>2</sup> if not a majority,<sup>3</sup> of the vote receives the honor and accepts the responsibility of the greatest elected position in the world for a term of four years. This assumption that the popular vote winner will be elected has not always been realized however. The elections of 1824, 1876 and 1888 gave the office of the President to a man who had been rejected at the polls. The reason behind this result is the use of the Presidential election plan known as the Electoral College.

The Electoral College system allocates to each state a number of Presidential electors which equals the aggregate of Representatives and Senators the state sends to Congress. These electors are selected every four years by the voting citizens of each state, from a choice of usually two slates representing the Republican and Democratic parties. The method most often used to determine which slate of electors will represent that particular state in the Electoral College balloting is known as the general ticket system. This provides for the party who wins a plurality of the state's popular vote to receive, *en bloc*, all of its electors who are as a matter of course loyal party members. As a result, it does not matter if the Republicans win a state's popular vote by 1,000 or 1,000,000 votes; they get all of that state's electoral votes while the Democrats are not represented at all by that state in the Electoral College. This practice allows a candidate to win the Presidency while losing at the polls if he wins the several states with large electoral vote counts, although losing the popular vote nationally.

Other blatant defects of this system are the method of allocation of electoral votes by Congressional representatives and the unit system of voting. This mode of representation guarantees each state at least three electoral votes, one Representative and two Senators, no matter how small in number its population may be. It allows for unequal state representation in electoral voting seemingly permitting a favoring of the smaller states since Congressional districts are not equally represented on a national scale. However, since a state casts its electoral votes *en bloc*, a voter from a state with a large bloc has a much greater chance to affect the outcome of a Presidential election than a citizen from a small state whose vote will affect a much smaller unit of electoral votes which in turn has a comparatively insignificant effect on the determination of the President.

It is the character of this note to attack the "archaic, undemocratic, complex,

1 41 ANNALS OF CONG. 170 (1823-24) (remarks of Sen. Benton).

2 This term shall be used in the context of this article to indicate a situation where a candidate receives, or will receive, less than fifty per cent of the total vote cast but more than any other candidate for the same office.

3 A total of more than fifty per cent of the total vote won or to be won by a candidate.

ambiguous, indirect and dangerous"<sup>4</sup> Electoral College system and to suggest the abandonment of such a system replacing it with a direct popular voting scheme to determine the President. In order to demonstrate the necessity for the abolition of the Electoral College, a brief history of the events leading up to the adoption of this compromise by the Federal Constitutional Convention of 1787 is set forth. In conjunction with this, a succinct synopsis of the evolution of the franchise is developed. The express purpose of such an outline is the demonstration of the step-by-step development and expansion of the right to vote in our society culminating, for purposes of this note, with the Supreme Court decisions of the 1960's setting down the one-man, one-vote doctrine. With the development of this one-man, one-vote principle established, examples of past election inequalities are offered to demonstrate how the Electoral College violates the ideal of voter equality and the fact that only direct popular Presidential election procedures can foster the democratic ideal of one man, one vote.

## II. The Current Method of Presidential Election

### A. *The Electoral College: Its Beginning*

The Federal Constitutional Convention of 1787 had before it the huge and laborious task of designing an orderly, stable government out of the chaos which existed from the degeneration of the Confederation government. Questions confronting this august body<sup>5</sup> ranged from the slave trade to the number of Senators each state should be allowed to have in the upper house of the National Legislature, but of all the questions presented and of all the difficulties to be overcome, the issue of how to appoint a Chief Executive would seem, at first blush, to lend itself to a quick and easy solution. Yet, no other issue held the attention of the Convention longer or caused more discussion. Indeed, James Wilson, a delegate from Pennsylvania remarked during the convention debates that: "This subject has greatly divided the house, and will also divide the people out of doors. It is in truth the most difficult of all on which we have had to decide."<sup>6</sup>

During the course of the Constitutional Convention, three major plans for the appointment of the President were presented: Election by Congress; election by a direct vote of the people throughout the nation; and election by intermediate electors.<sup>7</sup> An integral part of each plan was the basic concept of the

4 AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON ELECTORAL COLLEGE REFORM, ELECTING THE PRESIDENT 3-4 (1867).

5 An interesting note and one which should be kept in mind is "the fact that twenty-five of the fifty-six signers of the Declaration of Independence, (and) thirty-one of the forty-five members of the Constitutional Convention . . . were men who had been trained in the law." Chroust, *The American Legal Profession: Its Agony and Ecstasy*. 46 NOTRE DAME LAWYER 487 at 487 (1971).

6 2 RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787, at 501 (M. Farrand ed. 1911 & 1937) (hereinafter cited as FARRAND).

7 N. PIERCE, THE PEOPLE'S PRESIDENT 39 (1968) (hereinafter cited Pierce). In addition, numerous alternative plans were brought forward, ranging from proposals that the state Governors choose the President to one that 15 members of Congress be chosen by lot to elect the next Chief Executive. None of these alternatives aroused much interest, and all were shunted aside with little debate. *Id.*

In all, more than fifteen proposals for electing the President were set forth at the Convention. See, Feerick, *The Electoral College: Why It Was Created*, 54 A.B.A.J. 249 (1968).

office itself. To be sure, the issues concerning the feasibility of a singular Executive, the re-eligibility of a President and a possible Executive Council to "aid" the President had to be discussed before the more advanced question of the mode of election could be settled.

The respected opinion of James Wilson "preferred" as he put it, "a singular magistrate, as giving the most energy dispatch and responsibility to the office."<sup>8</sup> The ultimate opinion was that a single man would feel the greatest responsibility and administer the public affairs best.<sup>9</sup> Opposition to this motion came from Elbridge Gerry who favored a "policy of annexing a Council to the Executive in order to give weight (and) inspire confidence" and from Edmund Randolph who opposed a single Executive which "he regarded as the fetus of monarchy."<sup>10</sup> Wilson argued that a single Executive "instead of being the fetus of monarchy would be the best safe guard against tyranny."<sup>11</sup>

With the discussion of the issue of the term of the Executive, came suggestions which would have made the term as short as three years or as long as nine years. Of necessity, coupled with this question was the issue of re-eligibility of the Executive. Roger Sherman was against the idea of ineligibility since it would throw "out of office the men best qualified to execute its duties,"<sup>12</sup> but these considerations were determined to be preliminary points of discussion to be resolved with the selection of the mode of election of the Executive.

The method most often receiving approval throughout the Convention was election of the Executive by Congress.<sup>13</sup> Roger Sherman was of the opinion that the office of the President was "nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons ought to be appointed by and accountable to the Legislature only, which was the depository of the supreme will of the Society."<sup>14</sup> Elbridge Gerry, opposing this scheme, urged that the appointment be made by the Executives of the states, stating that:

If the appointment should be made by the National Legislature (Congress), it would lessen that independence (of the Executive) which ought to prevail, would give birth to intrigue and corruption between the Executive and Legislature previous to the election, and to partiality in the Executive afterwards to the friends who promoted him.<sup>15</sup>

Gouverneur Morris of Pennsylvania was directly opposed to Congressional election of the Executive. He felt such a system would reduce the Executive to the status of "a mere creature of the Legislature." He argued that:

If the Legislature elect, it will be the work of intrigue, of cabal, and of

<sup>8</sup> 1 FARRAND at 65.

<sup>9</sup> *Id.* Although supporting a singular Executive, John Rutledge was not in favor of giving him the power of war and peace. *Id.*

<sup>10</sup> *Id.* at 66.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 68.

<sup>13</sup> It was approved on June 2 (for a term of seven (7) years) 1 FARRAND 81; on July 17 2 FARRAND 32; July 24, 2 FARRAND 101; on July 26 (term of seven (7) years) 2 FARRAND 121; on August 24 (on this day it was decided "both" houses would appoint the executive) 2 FARRAND 403.

<sup>14</sup> 1 FARRAND at 65.

<sup>15</sup> *Id.* at 175.

faction: it will be like the election of a Pope by a conclave of cardinals; real merit will rarely be the title to the appointment.<sup>16</sup>

Concurring with Morris, James Madison argued against Congressional election on the basis that the three branches of government should be independent as well as separate of each other.<sup>17</sup>

The issue of re-eligibility became paramount when discussing Congressional appointment. Many delegates expressed the opinion that of necessity the Executive would be ineligible for a second term if Congress should so elect. This in turn, it was opined, would have a deleterious effect on the incentive and drive of the Executive to achieve excellence while in office. Also, the fact was realized that men capable and best qualified would be thrown out of office.<sup>18</sup>

A proposal offered to counter that of Congressional election was a plan of direct popular vote. In support of this suggestion James Wilson offered the experience of the election of the Governors of New York and Massachusetts as evidence of the viability, success and soundness of this system.<sup>19</sup> Governor Morris agreed with the feasibility of direct election as demonstrated by the many state gubernatorial systems and added: "If the people should elect, they will never fail to prefer some man of distinguished character, or services; some man, if he might so speak, of continental reputation."<sup>20</sup> James Madison, John Dickinson and Daniel Carroll were also among those eager to see the argument for direct popular election become a reality, noting that it was the purest and fittest source of election.<sup>21</sup> Madison noted that:

There was one difficulty however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of Negroes.<sup>22</sup>

Madison in further comment to this difficulty stated "that local considerations must give way to the general interest. As an individual from the Southern States he was willing to make the sacrifice."<sup>23</sup>

Voicing an objection, which was to crop up repeatedly in future years, Charles Pinkney declared that "the most populous States by combining in favor

16 2 FARRAND at 29.

17 *Id.* at 34. "The Executive could not be independent of the Legislators, if dependent on the pleasure of that branch for a re-appointment." *Id.* Besides the general influence of Congressional election on the independence of the Executive, Madison suggested:

1. The election of the Chief Magistrate would agitate & divide the legislature so much that the public interest would materially suffer by it. 2. The candidate would intrigue with the legislature, would derive his appointment from the predominant faction, and be apt to render his administration subservient to its views. 3. The Ministers of foreign powers would have & make use of, the opportunity to mix their intrigues & influence with the Election.

*Id.* at 109. See also *id.* at 500.

18 1 FARRAND 68.

19 *Id.* In fact at this time in the history of the United States governors were elected by the people in Connecticut, Massachusetts, New Hampshire, New York and Rhode Island. In the other eight states they were elected by the legislatures. Feerick, *supra* note 7, at 249.

20 2 FARRAND at 29.

21 *Id.* at 56-57, 109-111, 114, 402.

22 *Id.* at 57.

23 *Id.* at 111.

of the same individual will be able to carry their points."<sup>24</sup> Elbridge Gerry was fearful of the "ignorance of the people," that this would allow organized groups to exert influence and "elect the Chief Magistrate in every instance, if the election be referred to the people."<sup>25</sup> George Mason put it more forcefully when he stated:

[I]t would be as unnatural to refer the choice of a proper character for Chief Magistrate to the people, as it would to the people, as it would to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.<sup>26</sup>

In rebuttal to these objections, Gouverneur Morris argued:

It is said that in case of an election by the people the populous States will combine & elect whom they please. Just the reverse. The people of such States cannot combine. If their (sic) be any combination it must be among their representatives in the Legislature. It is said the people will be led by a few designing men. This might happen in a small district. It can never happen throughout the continent. In the election of a Governor of New York, it sometimes is the case in particular spots, that the activity & intrigues of little partisans are successful, but the general voice of the State is never influenced by such artifices. It is said the multitude will be uninformed. It is true they would be uninformed of what passed in the Legislative Conclave, if the election were to be made there; but they will not be uninformed of those great & illustrious characters which have merited their esteem & confidence.<sup>27</sup>

Because of the predominant opinion that the electorate of the young country was too ignorant and too vulnerable to the wills of designing men, the motion to provide for the direct popular election of the President was defeated on the two occasions it was brought to a vote.<sup>28</sup>

As a result of this non-decision, springing from the conflict of the "Congress to elect group," and those favoring direct election, and because of a number of other questions, a committee of eleven was appointed on August 31 to suggest solutions to these issues which would then be acted on by the committee of the whole.<sup>29</sup>

At the time of the formation of this committee, a substantial majority of

24 *Id.* at 30.

25 *Id.* at 114.

26 *Id.* at 31.

27 *Id.* at 30-31.

28 The tally after the first vote on July 17 was 9 to 1 against: Massachusetts, no; Connecticut, no; New Jersey, no; Delaware, no; Maryland, no; Virginia, no; South Carolina, no; Georgia, no; North Carolina, no; Pennsylvania, yes. 2 FARRAND 32. On August 24 the defeat was decisive, albeit this time two states went on record favoring direct election. New Hampshire, no; Massachusetts, no; Connecticut, no; New Jersey, no; Maryland, no; Virginia, no; North Carolina, no; South Carolina, no; Georgia, no; Pennsylvania, yes; Delaware, yes. *Id.* at 402.

29 Feerick, *The Electoral College—Why It Ought To Be Abolished* 37 FORD. L. REV. 1, 8 (1968). The Committee was made up of a remarkable aggregate of political talent—Rufus King of Mass., Gouverneur Morris of Pa., James Madison of Va., Daniel Carroll of Md., John Dickinson of Del., Abraham Baldwin of Ga., Pierce Butler of S. C., Nicholas Gilman of N. H., David Brearley of N. J., Hugh Williamson of N. C. and Roger Sherman of Conn. *Id.* at 8 n.41; PIERCE at 44.

this group favored different methods of election than the prominent one at the moment, which was election by Congress.<sup>30</sup> Although divided among themselves as to what mode of election was preferable, the committee spared no time in reaching their ingenious compromise. Indeed, they returned to the Convention just four days later on September 4 with their plan. At this time it was recommended to the Convention that the office of the Vice-President be established and the mode of election be through intermediate electors—the Electoral College.<sup>31</sup> This plan resulted because of the objections to a legislative appointment and the serious misgivings about the competency of the people to elect a man of grand stature.<sup>32</sup> The suggestion was the end product of a group of skillful men who were well aware of what could be “sold” to the people of their respective states.

The larger states were recognized with the population-based apportionment in determining the number of electoral votes each state would cast;<sup>33</sup> the small states would realize equal voting rights if the electors could not agree;<sup>34</sup> appeasement of the states’ rights advocates was seen in the provision allowing the state legislature the right to decide how the electors would be chosen;<sup>35</sup> and “those who wanted to entrust the choice of the President to the people could see at least the potentiality for popular vote in the scheme presented.”<sup>36</sup>

This plan was thought to remove cabal and intrigue from an election by the Congress. It was seen as a safeguard against those who would scheme and devise ways to sway and influence the people, since men of great stature and public confidence and knowledge would be the electors. They, the electors, were envisioned as making their own decisions while taking into account the desires of the people.<sup>37</sup> Even with these advantages there were still serious objections to the compromise. Mason was opposed, since the President would be selected by the Senate, an improper body for that purpose, if the electors failed to give a majority vote to a candidate. Charles Pinkney was of the same opinion stating that the “same body of men which will in fact elect the President” will be his judges in the case of an impeachment.<sup>38</sup> The problem of the Senate selecting the President in the event of the failure of the electors to choose one was over-

30 Feerick, *supra* note 29 at 8. Wilson, Madison, Morris, Dickinson and Carroll, as noted, voiced strong desire for direct election. *See supra* notes 19, 20, 21, 23 and 27 and text accompanying. Williamson had indicated he might back this proposal, suggesting each voter cast three votes in order that the small states would be heard. 2 FARRAND 113. Madison, Morris, King and Wilson also supported election by electors chosen by the people. 1 FARRAND 80; 2 FARRAND 56-57, 403-04. Butler supported a system of electors chosen by state legislatures, with the states all having an equal number of votes. *Id.* at 112. Sherman had supported an election by Congress. 1 FARRAND 68; 2 FARRAND 29.

31 *Id.* at 496-99, also set forth at this time were the Legislature’s tax powers, Senate impeachment power, Presidential qualifications and Presidential appointment power among others.

32 Feerick *supra* note 29 at 8. It is also suggested the problem of the large states versus the small states was a reason for this compromise. PIERCE at 34-37. *See generally* a letter from James Madison to Thomas Jefferson, October 24, 1787, for an outline of the problems with respect to the Executive. 3 FARRAND 131-33.

33 In addition to the two electoral votes representing the two Senators from each state.

34 2 FARRAND at 500; it was felt that nineteen out of twenty times the Senate, later the House, would choose the President because of state interests.

35 Although the Framers left the manner of selecting the electors to the state legislature, it appears that many of them assumed that the legislatures would provide for popular election. Feerick, *supra* note 6 at 253-54 nn. 40-44.

36 PIERCE at 44.

37 3 FARRAND 458-59, for a discussion of this see Feerick, *supra*, note 29, at 9 n.44.

38 2 FARRAND at 500-01.

come on September 6 when the House was given the task, replacing the Senate.<sup>39</sup>

The pressure and tension on the delegates were factors involved in the production of this imperfect system. Indeed, as James Madison had remarked:

The difficulty of finding an unexceptional process for appointing the Executive Organ of a Government such as that of the U.S., was deeply felt by the Convention; as the final arrangement of it took place in the latter stage of the Session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies: tho' the degree was much less than universally prevails in them.<sup>40</sup>

It is with this background and history that the Electoral College system would function for nearly two centuries, drawing severe criticism from the moment of its conception to the present day.

### B. *The Electoral College—Procedure*

The procedure for counting thousands of votes cast for the various Presidential candidates and then ascertaining the final result varies from state to state.<sup>41</sup> In general, the names of the Presidential and Vice-Presidential candidates appear on the ballot, albeit some states list the names of the electors.<sup>42</sup> Voting is done on a statewide basis and the candidates receiving a plurality of the state votes win the slate of electoral votes in that state. This process is repeated in all of the states and the District of Columbia. After all of the electors throughout the country have been appointed, a meeting takes place on "the first Monday

39 *Id.* at 519.

40 Letter to George Hay, August 23, 1823, 3 FARRAND 458.

41 See Wroth, *Election Contests and the Electoral Vote*, 65 DICKINSON L. REV. 321, 322 (1961); Feerick, *supra* note 29 at 2-3.

42 Presidential and Vice-Presidential candidates listed: ALASKA STAT. § 15.30.050 (1970); ARK. STAT. ANN. §§ 3-206, 3-207 (Supp. 1969); CAL. ELECTION CODE §§ 10204-5 (West 1961); COLO. REV. STAT. ANN. § 49-11-7 (3) (Perm. Cum. Supp. 1969); CONN. GEN. STAT. ANN. § 9-175 (1967); DEL. CODE ANN. tit. 15, § 4502 (a) (Cum. Supp. Pamphlet 1970); FLA. STAT. ANN. § 103.011 (Supp. 1971-72); GA. CODE ANN. § 34-1330 (e) (1970); HAWAII REV. STAT. tit. 2, § 12-33 (1968); IDAHO CODE § 34-904 (Supp. 1969); ILL. ANN. STAT. ch. 46, § 21-1 (Smith-Hurd 1965); IND. STAT. ANN. § 29-3901-05 (Burns 1969); IOWA CODE ANN. §§ 49-32.33 (1949), 49.42 (Supp. 1970); KAN. STAT. ANN. §§ 25-602, 603a (Supp. 1970); KY. REV. STAT. § 118.170 (6) (1962); LA. REV. STAT. § 18.671 (a) (1969); ME. REV. STAT. ANN. tit. 21, § 1181 (1965); MD. ANN. CODE art. 33, § 20-2 (1971); MASS. ANN. LAWS ch. 54, § 43 (1971); MICH. STAT. ANN. § 168.45 (1967); MINN. STAT. ANN. 208.04 (1962); LAWS OF MONT. ch. 368, §§ 214-15 (1969); NEB. REV. STAT. §§ 32-421, 22 (1968); NEV. REV. STAT. tit. 24, § 293.477 (1969); N.H. REV. STAT. ANN. §§ 59: 3, 7 (1971); N.J. STAT. ANN. § 19: 14-8.1 (1964); N.M. STAT. ANN. § 3-15-4 (1970); N.Y. ELECTION LAWS § 107 (McKinney 1964); N.C. GEN. STAT. § 163-209 (Supp. 1969); N.D. CODE ANN. 16-11-06 (1960); OHIO REV. CODE ANN. § 3505.10 (Page Supp. 1970); OKLA. STAT. ANN. tit. 26, § 513 (1955); ORE. REV. STAT. § 250.110 (2) (1969); PA. STAT. ANN. tit. 25, § 3056 (f) (1963); R.I. GEN. LAWS § 17-19-3 (d) (1970); S.C. CODE ANN. 23-400.11 (c) (Supp. 1970); S.D. COMPILED LAW ANN. § 12-16-6 (1967); TENN. CODE ANN. § 2-403 (Supp. 1970); TEX. ELECTION CODE art. 6.01 (1967), art. 6.05 (4) (Supp. 1970-71); UTAH CODE ANN. § 20-7-5 (1969); VA. CODE ANN. § 24.1-160 (Supp. 1971); WASH. REV. CODE ANN. § 29.71.020 (1965); W.VA. CODE § 3-6-2 (1966); WIS. STAT. ANN. § 5.64 (Supp. 1971-72); WYO. STAT. ANN. § 22-139.37 (Supp. 1971).

The above list includes states which list the candidates for electors as well as the candidates for the President and Vice-President on the ballot.

The following states list the electors for President and Vice-President: ALA. CODE tit. 17, § 154 (1959); ARIZ. REV. STAT. ANN. § 16-844 (Supp. 1970-71), 16-845 (1956); MISS. CODE ANN. § 3107-14 (Supp. 1970); MO. STAT. ANN. § 128.010 (1966); VT. STAT. ANN. tit. 17, §§ 1751, 52 (1968).



after the second Wednesday in December<sup>43</sup> following their appointment.<sup>43</sup> On this date there are fifty-one Electoral College meetings throughout the United States.<sup>44</sup> At this meeting the appointed electors cast their votes for the President and Vice-President, making and signing six separate lists for each and also annexing a list of their names.<sup>45</sup> These certificates are sealed and certified<sup>46</sup> and sent to the President of the Senate,<sup>47</sup> the Secretary of State of the state from which they are elected, the Administrator of General Services and to the Judge of the District in which the electors have assembled.<sup>48</sup>

In accordance with federal law the sealed certificates are opened on January 6 before a joint session of Congress meeting in the Hall of the House of Representatives.<sup>49</sup> The President of the Senate opens each certificate in alphabetical order. After a determination of the count he announces the candidates with a majority of the electoral votes as President and Vice-President. If in fact no candidate should realize a majority of the electoral votes cast, the House then would choose the President from the three highest candidates. The Senate would choose the Vice-President from the two highest candidates for that office. In the House a quorum would require representation from two-thirds of the states, and a majority vote—twenty-six states—is necessary to decide upon the President.<sup>50</sup> According to the Rules of the House of Representatives,<sup>51</sup> a state's vote is determined by the vote of the majority of representatives who comprise that Congressional delegation and if perchance the delegation is evenly split the state casts no vote.

The decision of who would be Vice-President is determined by a majority of the whole number of the Senate, a quorum consisting of two-thirds of the whole number of Senators.<sup>52</sup> If the House was deadlocked and failed to appoint the President by January 20 (Inauguration Day), the Vice-President would assume the position of acting President until the House so decided. In a situation where neither a President nor a Vice-President is so designated by January 20, the Speaker of the House, who is appointed at the start of each new Congress, would act as President until one was decided upon.<sup>53</sup>

### C. Electoral College—How Its Members Are Appointed

The Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ."<sup>54</sup> Pursuant to this directive, electors are appointed on the

43 3 U.S.C. § 7 (1970).

44 The term Electoral College is a misnomer since there are fifty-one separate meetings; the term should be pluralized.

45 3 U. S. C. § 9 (1970).

46 3 U. S. C. § 10 (1970).

47 Who is the Vice-President of the United States at that time.

48 3 U. S. C. § 11 (1970).

49 3 U.S.C. § 15 (1970).

50 U.S. CONST. art. 11 § 1; U.S. CONST. amend. XII.

51 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, Vol. III, pp. 292-93. (Washington, 1970). U.S. CONST. amend. XII.

52 Feerick, *supra* note 29, at 5.

53 3 U.S.C. § 19 (1970).

54 U.S. CONST. art. II § 1.

Tuesday after the first Monday in November.<sup>55</sup> Although now appointed by popular vote, the selection of electors in this manner was not realized on a universal scale until the second half of the nineteenth century.<sup>56</sup> Even though the decision as to how the electors were to be chosen was left to the state legislature, it was felt by the delegates that the states would provide for the election of the electors by the people.<sup>57</sup> Nevertheless, from the first election to the election of 1836, legislative selection of the electors ran from a high of ten states in 1800 to a low of one state in 1836.<sup>58</sup>

During the first elections the manner of choosing electors varied, depending on what party was in power and the greatest benefit to be derived from the various alternatives.<sup>59</sup> Of the choices available—direct choice by the legislature,<sup>60</sup> popular choice of electors by district<sup>61</sup> and a popular vote under a general ticket system—the general ticket system, after 1836, was the most popular.<sup>62</sup> This scheme gained rapid popularity because of the winner-take-all advantage and also because it was felt this system gave a small state much more influence in deciding the outcome of a President when its votes were cast *en bloc*. Because of this big plus gained from the use of the general ticket system, most states felt a sense of obligation and self-defense in their decision to follow along and adopt this method of selecting electors.<sup>63</sup>

The general ticket system has seldom been departed from, but in 1892, the Michigan Legislature, which was controlled by the Democrats, attempted to salvage a few votes for their Presidential candidate since it was believed the Republicans were to be victorious in their state. The plan so advanced by the Democratic legislature was simple—a reversion back to the district system. This action brought an almost instant reaction and was challenged in the courts. Much to the chagrin of the Republicans, however, the system was upheld by the Supreme Court which decided that the legislative action was in fact within Constitutional limitations.<sup>64</sup> This system was short-lived though, as Michigan changed back to the general ticket system in 1892, but now it seems to have

55 3 U.S.C. § 1 (1970).

56 Feerick, *supra* note 29, at 10.

57 When the report of the Committee on style was considered on September 12, 1787, James Madison remarked: "He (the President) is now to be elected by the people and for four years." 2 FARRAND 587. Concerning the appointment of the President by intermediate electors chosen by the states which passed on July 19, 1787, Madison later stated on July 26: "It has been proposed that the election should be made by Electors chosen by the people for that purpose." 2 FARRAND 119; see also Letter from James Madison to George Hay, August 23, 1823, in 3 FARRAND 458; Note: *State Power to Bind Presidential Electors*, 65 COLUM. L. REV. 696, 697 (1965).

58 PIERCE, appendix B at 309.

59 PIERCE, at 74-78.

60 The obvious advantage to this system was that it took the choice out of the hands of the people, a great aid if the Legislature foresaw defeat of their party if the choice of electors was left to the people.

61 Madison noted in 1823 that: "The district mode was mostly, if not exclusively, in view when the Constitution was framed and adopted . . ." Letter to George Hay 3 FARRAND at 458-59.

62 The reasons for its wide acceptance are that the developing ideas of the People's President and democratic ideals were unwilling to leave the crucial choice of Presidential electors in the hands of state Legislatures; and this system suited the political factions — it was no longer necessary to share the state's electoral vote with the opposing party. PIERCE at 77.

63 Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 4-5 (1968).

64 *McPherson v. Blacker*, 146 U.S. 1 (1892).

resurfaced in two other states, Missouri<sup>65</sup> and Maine.<sup>66</sup> The state of Maine now provides Electoral College action in the following manner:

Presidential Electors at large shall cast their ballots for President and Vice-President of the political party which received the largest number of votes in the State. The Presidential Electors of each congressional district shall cast their ballots for President and Vice-President of the political party which received the largest number of votes in each congressional district.<sup>67</sup>

#### D. Electoral College—Independence of Electors

The evidence is compelling that the Framers envisioned a system under which persons of the highest caliber would be chosen as electors. These electors would meet in their various states, "evaluate the merits of various persons for President, . . . and in casting their votes, they would take into account the views of the people, but not be bound by them, as they were to exercise their own judgment."<sup>68</sup>

Indeed, few of the Framers of the Constitution foresaw the emergence of political parties, their effect on elections—national and local—and the fact that because of the existence of these parties the preliminary selection of electors would now be regarded as the actual vote for a certain Presidential candidate.<sup>69</sup> A fact of life that we live with employing this electoral scheme is that although the Framers intended that the position of elector be filled by a wise, intelligent pillar of society, these positions have gone "to the party faithful as a reward for past service, presumably on the basis that being an elector today is merely an honorary ceremonial position."<sup>70</sup> The fact that the American people have grown "to regard the Electoral College as a matter of minor importance,"<sup>71</sup> is underscored by the Presidential voting laws in the several states.<sup>72</sup> The overwhelming majority of the states do not make provision for the listing of the names of the electors for President and Vice-President on the ballots. Instead the names of the candidates themselves are listed and a vote for them is deemed a vote for the electors of their respective parties.<sup>73</sup> So common had this system

65 MO. ANN. STAT. 128.010 (1966).

66 MAINE REV. STATS. 21 § 1184 (1-A) (Supp. 1970-71).

67 *Id.*

68 Fearick, *supra* note 29, at 9; Ray V. Blair, 343 U.S. 214, 232-33 (1952) (Justice Jackson dissenting).

69 *McPherson v. Blacker*, 146 U.S. 1, 36 (1892); Rosenthal, *supra* note 63, at 17.

70 Comment, *The Problem of the Faithless Elector*, 6 HARV. J. LEGIS. 254, 260 (1969).

71 Thomas V. Cohen, 146 N.Y. Misc. 836, 841, 262 N.Y. Supp. 320, 326 (1953).

72 See note 42 *supra*.

73 See note 42 *supra*. See, e.g., N.J. STAT. ANN. 19: 14-8.1 (1964). Ballots for presidential electors: When Presidential Electors are to be elected, their names shall not be printed upon the ballot, either paper or voting machine, but in lieu thereof, the names of the candidates of their respective parties or political bodies for President and Vice-President of the United States shall be printed together in pairs under the title "Presidential Electors For." All ballots marked for the candidate for President and Vice-President of a party or political body, shall be counted as votes for each candidate for Presidential Elector of such party or political body.

IND. STAT. ANN. 29-3904 (1969). Votes cast for President and Vice-President construed as votes for electors — counting, canvassing and certifying of votes.

Every vote cast or registered for the candidate for president and vice-president of any one (1) political party or group of petitioners shall be conclusively deemed to be a vote cast or registered for all of the candidates of such political party or group of petitioners for the presidential electors of such party or group of petitioners, and shall be counted as such. \* \* \*

become that as early as 1933 it was asked whether this practice of the electors casting their ballots for the state's popular vote winner could be seen as to have amended the Constitution to a level where an elector voting against the popular would be deemed as to have broken the law. A lower court of the state of New York answered in the affirmative. In *Thomas v. Cohen*<sup>74</sup> the constitutionality of listing only the names of the candidates for President and Vice-President, while omitting the names of the electors for these offices, was brought to task. The argument challenging this practice went along the lines of the intended free choice of the electors and the subsequent need of the voting public to be aware of the identity of the electors. The court recognized the design of the Framers that the electors can indeed follow their own judgment, nevertheless, it decided that the long practice embroidered upon the electors the obligation that they vote for their party's candidate if elected. Judge Cuff went on to say:

The electors are expected to choose the nominee of the party they represent, and no one else. So sacred and compelling is that obligation upon them, so long has its observance been recognized by faithful performance, so unexpected and destructive of order in our land would be its violation, that the trust that was originally conferred upon the electors by the people, to express their will by the selections they make, has, over these many years, ripened into a bounden duty—as binding upon them as if it were written into the organic law. The elector who attempted to disregard that duty could, in my opinion, be required by mandamus to carry out the mandate of the votes of his State.<sup>75</sup>

In 1936, however, this practice of omitting the electors' names from the ballots was upheld in the Ohio decision of *Hawke v. Myers*<sup>76</sup> on the basis of the broad authority conferred upon the states by the Constitution to direct the manner in which the Presidential electors are to be chosen.

The Supreme Court has not decided, as of the moment, this issue, although dicta in a number of state court decisions indicate that this independence of decision still endures.<sup>77</sup> However, the question was touched upon tangentially in *Ray v. Blair*<sup>78</sup> where it was held that a candidate could be excluded from a party primary for the position of a Presidential elector if he failed to pledge to support the party's candidate.

This action was the result of a situation in Alabama where political parties were authorized to set qualifications and select their nominees for the position of Presidential elector in a primary. The Executive Committee of Alabama's Democratic party required a pledge to be taken of all candidates, indicating their support for the Democratic Presidential nominee, if they are so elected. One candidate, Edmund Blair, did not take such a pledge, as a result he was not certified. Lower courts ordered a mandamus directing he be certified. This

74 146 N.Y.Misc., 836, 262 N.Y.Supp. 320 (Sup. Ct. 1933).

75 *Id.* at 841-42, 262 N.Y.Supp. at 326.

76 132 Ohio St. 18, 4 N.E.2d 397 (1936).

77 *See, e.g.,* State ex rel. Beck v. Hummel, 150 Ohio St. 127, 146, 80 N.E.2d 899, 908 (1948); Opinion of the Justice, No. 87, 250 Ala. 399, 400, 34 So. 2d 598, 600 (1948); Breidenthal v. Edwards, 57 Kan. 332, 337, 46P. 469.

78 343 U.S. 214 (1952).

action was upheld by the Alabama Supreme Court, which held such a pledge was an unconstitutional limitation on an elector's discretion.<sup>79</sup>

Upon appeal to the United States Supreme Court this decision was reversed in a five-to-two decision, Justice Reed stating that:

A State's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party. It is an exercise of the State's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose.<sup>80</sup>

Nevertheless, the Court has never approved the action of a state which purports to bind an elector *after* his certification. Indeed, it has suggested that such a statutory requirement may perhaps be legally unenforceable.<sup>81</sup>

The two dissenting Justices, Jackson and Douglas, in *Ray* did indicate squarely that they regard the elector's freedom of choice to be untrammelled.<sup>82</sup> They declared that "the balloting (of the electors in the Electoral College) cannot be constitutionally subject to any such control because it was intended to be free, an act performed after all functions of the electoral process left to the states have been completed."<sup>83</sup>

Many states,<sup>84</sup> and the District of Columbia,<sup>85</sup> however, have disregarded the dicta of the majority and the strong dissent in *Ray* and have enacted statutory provisions binding an elector to cast his vote for his party's Presidential nominee. The validity of these statutes is suspect since a perusal of the Constitution reveals no specific requirement binding electors to vote for the candidates of their party. An expert in the field of Electoral College law has stated that "[b]ecause of the design of the Framers that electors be free agents, the predominant view is that they are under no legally enforceable obligation to do so."<sup>86</sup>

### E. *The Electoral College—In Practice*

On its very first try, the Electoral College was a success, electing General George Washington President of the new Republic. The electors cast their ballots unanimously for Washington and gave John Adams of Massachusetts thirty-four

79 257 Ala. 151, 57 So. 2d 395 (1952).

80 343 U.S. at 227.

81 *Id.* at 229-30.

82 *Id.* at 232. (Jackson dissenting.)

83 *Id.* at 233. (Jackson dissenting.)

84 ALASKA STAT. § 15.30.090 (1970); CAL. ELECTION CODE § 25105 (1961); COLO. REV. STAT. ANN. § 49-20-1(5) (1970); CONN. REV. STATS. § 9-176 (1967); FLA. STAT. ANN. § 34-904 (Supp. 1971-72); HAWAII REV. LAWS § 16-11 (1968); IDAHO CODE ANN. § 34-904 (Supp. 1969); MD. ANN. CODE art. 33, § 20-4 (Supp. 1970); NEV. REV. STAT. § 298.050 (1967); N.M. STAT. ANN. § 3-10-1.1 (1970); OHIO REV. CODE ANN. § 3505.40 (Supp. 1970); OKLA. STAT. ANN. tit. 25, § 519-21 (Supp. 1970-71); ORE. REV. STAT. § 248.355 (1970); TENN. CODE ANN. § 2-403 (Supp. 1970). See also CODE OF VA. § 24.1-162 (Supp. 1971), declaring how electors are "expected" to vote.

85 D.C. CODE ANN. 1-1108(g) (1966).

86 Ferick, *supra* note 29, at 19. For an argument that state power to bind electors would implement the purpose of the Framers, see Note, *State Power To Bind Presidential Electors*, 65 COLUM. L. REV. 696 (1965); cf. Kirby, *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROB. 495, 505-06 (1962).

of the sixty-nine votes cast making him the first Vice-President.<sup>87</sup> Along with this initial success, two problems with this system became apparent. The first lay in the method by which the Presidential electors would be chosen.<sup>88</sup> The second, which was a more immediate difficulty, was "double balloting." Each elector was required to cast two votes for President; he was not given the latitude to indicate whom he desired to be President. Although a serious problem, it did not surface completely until the election of 1800.

When Jefferson's time came to guide the nation, he found victory in the electoral contest of 1800 almost unreachable. There was much bitterness during this campaign and the seeming closeness of the projected outcome induced both the Decocratic-Republicans, who sponsored Thomas Jefferson and Aaron Burr, and the Federalists, John Adams and Charles Pinckney, to regulate the mode of selecting the Presidential electors so as to maximize any of their strength while minimizing that of their opponent.<sup>89</sup> When the electors of Jefferson's party voted they failed to take the precaution of withholding one vote from Burr; the result was a tie with the necessity of the House of Representatives choosing between Jefferson and Burr. As might have been expected there was much planning and persuading and dealing. The situation was resolved, however, on the thirty-sixth ballot.<sup>90</sup> The malady of double voting was remedied with the adoption of the Twelfth Amendment on June 15, 1804, in time for the election of 1804.<sup>91</sup>

The election of Jefferson ushered in a quarter century of Virginia Presidents all of whom were members of his Democratic-Republican party—or as it was later denominated—the Democratic Party. James Madison won easily in 1808 and again in 1812. James Monroe had little difficulty achieving victory in 1816 since the Federalists were weak to the point of offering little if any organized opposition. Monroe's "Era of Good Feeling" had raised his popularity to such a point that had it not been for the action of elector Samuel Plumer he would have shared Washington's distinction as being the unanimous choice of that electoral college. Mr. Plumer in voting contrary to the expectations of his constituents and casting his ballot for John Q. Adams became the first "unfaithful elector."<sup>92</sup>

In 1824 the two-party system was not functioning as usual and four men—John Q. Adams, loser of the 1820 election, Andrew Jackson, William H.

87 PIERCE at 59.

88 See notes 54 to 67 and text accompanying.

89 PIERCE at 67.

90 E. ROSEBOOM, A HISTORY OF PRESIDENTIAL ELECTIONS, pp. 39-47 (1963).

91 27 CONG. Q. WEEKLY REP. 1433 (1971). This amendment was the record holder for the time needed to ratify at six months, six days. However, this record was almost cut in half with the adoption of the Twenty-sixth Amendment which was ratified on June 30, 1971, requiring only three months, seven days.

The Twelfth Amendment provided that: (1) electors must vote separately for President and Vice-President; (2) If the House must choose because of the failure of a candidate to win a majority of the electoral vote, the House shall pick from the top *three* electoral vote recipients, instead of the five stipulated in the original Constitution; (3) If it is necessary for the House to pick the President and it has not done so by March 4 — now January 20 as per the Twentieth Amendment — the new Vice-President would act as President until the House chose; (4) A majority of the electoral votes was also required for the election of a Vice-President; (5) The eligibility requirements for the Vice-President were made the same as those of the President.

92 Rosenthal, *supra* note 63, at 17.

Crawford, and Henry Clay—all Democrats at least in name, were nominated for the Presidency.<sup>93</sup> As a result, no one received the majority vote needed; in accordance with the Constitution the House determined the outcome. After Clay had thrown his support to Adams the issue was settled on the first ballot with Adams winning, receiving the vote of thirteen of the twenty-four states; Jackson and Crawford tallied the votes of seven and four states respectively.<sup>94</sup> Thus, another first was recorded in the annals of the Electoral College—the election of a man who was rejected by the popular will.<sup>95</sup>

The election of 1836 was a success in so far as a President was elected, but failed in the attempt to choose a Vice-President. Martin Van Buren received a majority of the electoral vote; but because of the social behavior of his running mate, Richard Mentor Johnson, the electors from Virginia withheld their votes from him. The Senate had to choose a Vice-President for the first and only time; they elected Johnson thirty-three to sixteen over the runner-up in the Presidential electoral vote, Francis Granger.<sup>96</sup>

The election of 1876, because of disputes and double returns, ended in the House with the popular vote-getter the loser. Democrat Samuel J. Tilden was the recipient of a majority of the popular vote, even by the Republican vote tabulation.<sup>97</sup> Notwithstanding the disputed returns in four states, Tilden had secured 184 electoral votes and Republican Rutherford B. Hayes won 165 votes.<sup>98</sup> A fifteen-member commission was created to decide how the twenty disputed votes would be cast. Prior to the selection of the fifteenth member of the commission, its membership was evenly split, seven Republicans, seven Democrats. The men selected represented the Senate, House and Supreme Court, each institution placing five of its own on the committee. The fifteenth man was by design to be an independent to be selected by the four committeemen from the Supreme Court. This man, Justice Joseph Bradley, was the man who chose the President that year, for he was a Republican and did so vote on every disputed vote. The result as Neil R. Pierce notes, was that, "The vote of one man—Justice Bradley—nullifies the voice of the majority and places the usurper in the chair."<sup>99</sup>

The Presidential contest between Grover Cleveland and Benjamin Harrison in 1888 is a striking example of a defeat of the popular will although neither candidate had a majority. After the polls closed a tabulation showed Democratic Grover Cleveland with 5,540,365 popular votes, which won him 168 electoral votes, and Republican Benjamin Harrison with 5,445,269 votes and an all important majority of 233 electoral votes giving him the Presidency.<sup>100</sup> Cleve-

93 PIERCE appendix A at 304; Rosenthal, *supra* note 63, at 5.

94 E. Roseboom, *supra* note 85, at 84-88.

95 This charge is somewhat suspect, however, since of the twenty-four states participating in the election, electors of six of the states were chosen by the legislatures, not at the polls, also, "because of the possibility that Adams may well have been the second choice of most of the supporters of Clay and Crawford, Adams' election is not a conclusive case of defeat of the popular will." Rosenthal, *supra* note 63, at 6.

96 PIERCE at 133-34.

97 Rosenthal, *supra* note 63, at 6.

98 PIERCE at 87.

99 PIERCE at 91.

100 PIERCE at 93. Equally as startling is the fact that:

While Cleveland's 95,096 popular vote plurality availed him nothing, a switch of a mere 7,189 votes out of well over 1,000,000 in New York would have swung its thirty-six electoral votes to his column and enabled him to win by 204 to 197. Ironically,

land's plurality of 95,096 gave him not so much more than a moral victory.

This election confirmed what was known and feared for decades—the Electoral College system is defective, it has in the past and can in the future elect a man the people have clearly rejected.

### III. Evolution of the Franchise

The further the electoral rights are extended, the greater is the need for extending them: for after each concession, the strength of democracy increases and its demands increase with its strength.<sup>101</sup>

#### A. *The First Voters*

The delegates to the Constitutional Convention of 1787 considered the question of voter qualifications on a national scale, but because of their differences and the fact that the states would have been reluctant to ratify a constitution which changed the suffrage laws of the individual states, the issue was not acted upon.<sup>102</sup> Indeed, the only voting right assured the people on a national scale was that concerning the selection of the members of the House of Representatives.<sup>103</sup>

At the inception of the new republic the number of those who participated in the various elections was in no way great. The reason for this is twofold: first, the concept of public concern was at best underdeveloped; and secondly, the possibility that those citizens who did feel a sense of participation would be allowed to cast their ballots was severely restrained by the existence of restrictive suffrage laws.<sup>104</sup> The majority of these laws reflected the requirement that the prospective voter possess something of value or at least evidence of it, which could be shown by the payment of taxes for example.<sup>105</sup>

Delegate David Buel, Jr. argued against the property concept, charging the difference between Europe and America as the core of his theory. According to him, it was the design of the aristocracy of Europe to keep the bulk of the land in a few hands. One of the distinguishing aspects of the American society was its laws of descent which were causing a steady division of the great estates, enabling the many to own land. Buel demanded that:

Our community is an association of persons—of human beings—not a partnership founded on property. . . . Property is only one of the incidental rights of a person who possesses it; and, as such, it must be made secure; but it does not follow that it must therefore be represented specifically in any branch of the government.<sup>106</sup>

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four years earlier, Cleveland had beaten Blaine (the Republican nominee of 1884) by 219 electoral votes to 182, also prevailing in the popular shift of 575 votes in New York would have elected Blaine (218-183), despite Cleveland's nationwide plurality.

Rosenthal, *supra* note 63, at 7.

101 Claude, *Nationalization of the Electoral Process*, 6 HARV. J. LEGIS. 139, 141 (1969), quoting from DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 56-57 (1955).

102 PIERCE at 209.

103 U. S. CONST. art. 1 § 2.

104 For a summary of these laws see *Minor v. Happersett*, 88 U.S. 162, 172-73 (1874).

105 PIERCE at 207.

106 MASON, *FREE GOVERNMENT IN THE MAKING* (1949) pp. 406-07 *cited in* PIERCE at 249 n.20.



Even though this argument was recognized and suffrage was expanding progressively, Blacks were still regarded as second-class citizens and as such were not allowed the privilege of the ballot box.

### B. *Black Suffrage*

The plight of the Black man continued even after the American Civil War. President Andrew Johnson's plan for the Confederate states was conspicuous by its very lack of basic civil liberties for Blacks. Compounding this was the fact that immediately following the cessation of hostilities of the Civil War many of the Southern states held conventions or legislative sessions. During these meetings not one of the states of the Confederacy extended the right to vote to newly freed people whom they exploited for centuries. On the contrary, the infamous "Black Codes" were enacted. This legislation severely limited the Black man's rights as to employment and mobility.<sup>107</sup>

Following this, the Fourteenth Amendment<sup>108</sup> was proposed by Congress on June 13, 1866, and was adopted by the states on July 21, 1868. This amendment was then supplemented by the Fifteenth Amendment which provided that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color or previous conditions of servitude."<sup>109</sup>

The United States Supreme Court, however, decided a series of opinions which emasculated the two new amendments and the enabling legislation relative to them. Chief Justice Waite, speaking for the Court in *United States v. Reese*<sup>110</sup> and *United States v. Cruikshank*<sup>111</sup> decided that the Fifteenth Amendment did not confer upon the citizens of the United States the right of suffrage, rather it had the negative effect of preventing discrimination on the basis of race, color or previous condition of servitude—from this it seems that the franchise is not characteristic of national citizenship. The right to participate in any election held within the boundaries of a state comes from the state although protection from discrimination comes from the Federal Government. Chief Justice Waite also stressed the fact that the Fifteenth Amendment did not prohibit an individual from subverting the vote.

White factions relentlessly continued their determined drive to eliminate completely the possibility of Black voting in any election.<sup>112</sup> A number of discriminatory devices were designed and used in furtherance of this goal. Common for this period were items such as a poll tax, literacy tests, increased residency requirements and the famous "grandfather clauses." In fact, all eleven states of

107 See U. S. COMMISSION ON CIVIL RIGHTS, REPORT (1959) pp. 25-28.

108 U. S. CONST. amend. XIV.

109 U. S. CONST. amend. XV; "The Southern States agreed to this amendment as well (as to the Fourteenth), in large part because of the presence of Northern troops and large numbers of Negroes in the new Southern legislatures." PIERCE at 215.

110 92 U.S. 214 (1876).

111 92 U.S. 542 (1876).

112 See generally Claude, *Constitutional Voting Rights and Early U.S. Supreme Doctrine, J. Negro Hist.*, Vol. LI, pp. 114-24 (1966).

the old Confederacy enacted some form of these "Jim Crow Statutes" between 1889 and 1902.<sup>113</sup>

Since the grandfather clauses, which were designed with the intention of disfranchising Blacks while overlooking illiterate Whites, were struck down in 1915,<sup>114</sup> a new more subtle approach was sought. Because of the dominance of the Democratic Party in the South, all that was required of a candidate for election to the office sought was a victory in the primary which equaled victory in the election. With this in mind, a new type of discrimination was developed. Since many states permitted the parties to determine who could vote in a primary, it was easy to preclude Blacks from casting an effective vote. This was accomplished through the practice of disallowing Black participation in the primaries by denominating them something other than Democrats.<sup>115</sup> With the exclusion of Blacks from the primary selection, the discriminatory goal was accomplished since a vote against the Democrats in the general election amounted to nothing.

This concept was brought before the courts and in 1927 the United States Supreme Court ruled the "White primary practice" unconstitutional.<sup>116</sup> Although challenged under the Fourteenth and Fifteenth Amendments, Justice Holmes found it unnecessary to consider the Fifteenth Amendment since it seemed hard for him "to imagine a more direct and obvious infringement of the Fourteenth Amendment"<sup>117</sup> than the Texas statute then challenged.<sup>118</sup>

Following this action, the Texas legislature promptly repealed the statute condemned by Justice Holmes and substituted another bearing the same number as the repealed statute. The new legislation provided in pertinent part that:

Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party.<sup>119</sup>

This was also challenged by the same petitioner and, upon a writ of certiorari, decided by the Supreme Court. Justice Cardozo disallowed this statute, arguing that it was a delegation of state power to the executive committee and as such made the committee's determinations conclusive irrespective of any expression of the party's will. Thus the committee's action, barring Blacks from participation in party primaries, was deemed state action, the type of which is prohibited by the Fourteenth Amendment.<sup>120</sup>

Undaunted, the plan then pressed by Southern strategy removed any mention or suggestion of racial restrictions from the state laws but still gave the individual parties a free hand to determine who could participate in primaries. Pursuant to this, the State Democratic Convention of Texas adopted a resolution

113 U. S. COMMISSION ON CIVIL RIGHTS, REPORT (1959) pp. 31-32.

114 *Guin v. United States*, 283 U.S. 347 (1951).

115 *PERCE* at 217.

116 *Nixon v. Herndon*, 273 U.S. 536 (1927).

117 *Id.* at 540-41.

118 In pertinent part, the statute stated that "in no event shall a Negro be eligible to participate in a Democratic party primary election in the State of Texas." *Id.* at 540.

119 *Nixon v. Condon*, 286 U.S. 73, 82 (1932).

120 286 U.S. at 88-89.

which effectively precluded Blacks from Democratic Party membership and participation in its deliberations. This resolution finally achieved what was long sought—the elimination of the Black vote—since it was upheld by the Supreme Court on the theory that it was the action of a political party and not that of the state.<sup>121</sup>

This precedent stood for nine long years before the Court reversed itself and finally outlawed the concept of the White primary altogether. Because of the claimed inconsistency between the case of *United States v. Classic*<sup>122</sup> which determined, *inter alia*, that under Louisiana statutes a party primary was in fact part of the procedure for the choice of federal officials<sup>123</sup> and the decision in *Grove v. Townsend* allowing political parties the power to exclude Blacks from primaries, the Supreme Court settled the issue by forbidding the White primary in the case of *Smith v. Allwright*.<sup>124</sup>

The Court reasoned that where a party acts in conformance with state statutes and takes its character from these statutes, the actions so carried out by the party are not private laws. "When primaries become a part of the machinery for choosing officials, state and national, . . . the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election."<sup>125</sup> The Court specifically overruled *Grove*, holding that this action came within the meaning of the Fifteenth Amendment.<sup>126</sup>

In an effort to supplement many of the Court's decisions and ensure franchise rights, a series of Voting Rights were passed by Congress, the latest being the Voting Rights Act Amendments of 1970.<sup>127</sup> The effect of this legislation was to amend the Voting Rights Act of 1965<sup>128</sup> by extending the 1965 Act to 1975; and also by adding two new supplemental provisions which abolished residency requirements longer than thirty days for Presidential elections and lowered the voting age to eighteen.

The 1965 act suspended literacy tests in areas where less than fifty percent of the voting age citizens had been registered for the 1964 election. It also provided that anyone who was educated to the sixth-grade level in an American flag school where languages other than English were used could not be denied the right to vote because of a lack of facility in the English language. Although challenged, the education section was upheld in *Katzenbach v. Morgan*<sup>129</sup> and *Cardona v. Power*.<sup>130</sup>

The age, literacy and residence provisions of the 1970 act have, like the 1965 act, also been upheld by the Court in the recent case of *Oregon v. Mitchell*.<sup>131</sup> Justice Black's opinion announcing the decisions of the Court expressed the unanimous view that the provision suspending the use of literacy

121 *Grove v. Townsend*, 295 U.S. 45 (1935).

122 313 U.S. 299 (1941).

123 And Congress has the power to protect rights of Federal suffrage secured by the Constitution in primary as in general elections. *Id.* at 314-15.

124 321 U.S. 649 (1944).

125 *Id.* at 664.

126 *Id.* at 666.

127 PUB. L. No. 91-285, 84 Stat. 314 (June 22, 1970).

128 79 Stat. 437, 42 U. S. C. 1973.

129 384 U.S. 641 (1966).

130 384 U.S. 672 (1966).

131 ----- U.S. ----- 27 L. Ed. 2d 272, 91 S. Ct. ----- (1970).

tests in both federal and state and local elections was valid. Regarding the issue of residency requirements, absentee registrars and voting in Presidential elections, eight members of the Court expressed the view that these provisions were valid. The controversial determination, however, was that dealing with the lowering of the minimum voting age. This provision was held valid as applied to federal elections but invalid as applied to state and local elections. Nevertheless, the voting age has achieved uniformity with the ratification and adoption of the Twenty-sixth Amendment.<sup>132</sup>

### C. *Woman Suffrage*

The campaign for the female right to vote was neither as difficult nor as long coming as the Black man's battle for the ballot. At its inception, the movement for woman suffrage was generally allied with other social movements such as the extension of education and the Black problem.<sup>133</sup>

Americans had no tradition of female voting, indeed most of the early state laws did not allow women to own property and therefore they could not vote. The only exceptions to the male-only rules were in Massachusetts where women could vote from 1691 to 1780 and in New Jersey which granted all inhabitants who had a worth of \$250 or more the right to vote.<sup>134</sup>

After the burden of property requirements and taxpaying qualifications were removed from state constitutions, the female demand became louder and the movement acquired more verve. In 1872, Mrs. Virginia Minor applied to be registered as a voter in the state of Missouri, but was refused because she was not a male. She sued the registrar who in turn demurred. The Supreme Court affirmed, deciding that since the "Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several states which commit that important trust (voting) to men alone are not necessarily void," it could not give the petitioner the relief requested.<sup>135</sup>

Some fifteen years passed after the Supreme Court was heard in the *Minor* decision until Wyoming came into the Union. It was the first state to provide for woman suffrage in its constitution. In the mid-1890's, Colorado, Utah, and Idaho granted women the right to vote. A great lull was seen in this respect until the second decade of the twentieth century. This ten-year period witnessed the beginning of the modern-day demand for an expanded franchise. In 1912 the Seventeenth Amendment was ratified and adopted providing for the direct election of each United States Senator. Also during this period at least thirty states were added to the growing list of jurisdictions allowing women the right to vote. The impact of this trend was readily felt in the close Presidential election of 1916. President Wilson, campaigning on an anti-war theme, won many of the western states where women had newly won the right to vote.<sup>136</sup> It would seem appropriate to speculate that Wilson's peace campaign appealed to the

132 U. S. CONST. amend. XXVI.

133 *Woman Suffrage*, 29 ENCYCLOPEDIA AMERICANA 102 (1971 ed.).

134 S.C. CIVIL RIGHTS COMMISSION REPORT 20 (1959).

135 *Minor v. Happersett*, 88 U.S. 162, 178 (1875).

136 *Woman Suffrage*, *supra* note 133, at 104; PIERCE at 222.

newly enfranchised women and they in turn gave him their votes. Indeed, if there had been a shift of 1,983 votes from Wilson to Hughes in California (a state which allowed woman suffrage) the election would have gone to Hughes.<sup>137</sup>

The Nineteenth Amendment was ratified and declared in effect on August 26, 1920, thus eliminating discrimination on the basis of sex with respect to voting rights.

#### D. Sanctity of the Ballot

Coexistent with the Black voting equality movement and woman's suffrage was the development of the "sanctity of the ballot." Notwithstanding, the fact that each state may prescribe the "Times, Places and Manner" of the election of its Representatives and Senators, "Congress may at any time by Law make or alter such Regulations."<sup>138</sup> Although it had this reserve power, Congress made almost no attempt to use it until the Fourteenth Amendment set forth clear standards to apply to determine the honesty of the ballot count. In 1880, the Court upheld the Congressional authority which provided a statute making it a penal offense to neglect to perform or violate any duty with regard to an election for a Representative in Congress.<sup>139</sup> In a later case which concerned itself with an indictment charging the defendants conspired to intimidate a Black citizen who attempted to exercise his franchise the Court again upheld the Congressional right to safeguard the popular elections.<sup>140</sup> Justice Miller argued that:

"It is essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be."<sup>141</sup> Regarding the question of Congressional protection of the vote the Court reasoned that once the franchise has been extended, there is a Constitutional right to have an honest vote count. Justice Holmes speaking for the Court in *United States v. Mosley*<sup>142</sup> stated that "we regard it as . . . unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."<sup>143</sup> This principle was extended to primary elections for federal office as well.<sup>144</sup>

Although the Court recognized in *McPherson v. Blacker*<sup>145</sup> the right of the state legislatures to appoint Presidential electors, if they so desire, it warned that if these electors are so appointed by popular election, the right to vote cannot be denied or abridged without a violation of the Fourteenth Amendment.<sup>146</sup> While noting that Presidential electors are not federal officers or agents, Justice Sutherland upheld the right of Congress to pass a corrupt practices act regarding Presidential elections, stating that "they exercise Federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the

137 PIERCE appendix E at 321.

138 U. S. CONST. art. I § 4.

139 Ex Parte Siebold, 100 U.S. 371 (1880).

140 Ex Parte Yarbrough, 110 U.S. 651 (1884).

141 Id. at 666.

142 238 U.S. 383, 386 (1915).

143 Id. at 386.

144 United States v. Classic, 313 U.S. 299 (1941).

145 146 U.S. 1 (1892).

146 Id. at 39.

United States."<sup>147</sup> The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress.<sup>148</sup>

Indeed the guiding principle concerning governmental voting protection was stated in *Ex Parte Yarborough*<sup>149</sup> when the Court said:

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the greatest consideration.<sup>150</sup>

### E. Reapportionment

Prior to the landmark decisions of the 1960's the leading case concerning Congressional redistricting was the equivocal precedent of *Colegrove v. Green*.<sup>151</sup> There the Court held that reapportionment matters were not "justiciable." Justice Frankfurter stated that: "The Courts ought not to enter the political thicket."<sup>152</sup>

In 1962 the Court held in *Baker v. Carr*<sup>153</sup> that the question of apportionment of state legislatures may be reviewed by federal courts. Following this landmark decision, *Gray v. Sanders*<sup>154</sup> outlawed the Georgia unit system, a scheme which is closely related to the Electoral College system. The Georgia system allocated units to counties on the basis of population blocks. Candidates for statewide positions were required to obtain a majority of these county-unit votes in order to be entitled to nomination in the first primary. The effect of this system was that the vote of each citizen was worth less as the population of the county in which he resides increases. This allowed the counties which had about only one-third of the total population of the state to give a candidate a majority.

The Court, in answering the analogy argument concerning the Electoral College, acknowledged its "inherent numerical inequality," noting the inclusion of it in the Constitution validated it but refused to apply its principle to the states.<sup>155</sup>

Justice Douglas noted that since a White vote could be given no more weight than a Black vote and the urban vote no more weight than rural vote, "The conception of political equality from the Declaration of Independence, to

147 *Burroughs and Cannon v. United States*, 290 U.S. 534, 545 (1934).

148 *Id.* at 547.

149 110 U.S. 651 (1884).

150 *Id.* at 657.

151 328 U.S. 549 (1946). See 45 MICH. L. REV. 368 (1947).

152 328 U.S. at 556; for a discussion of this case in relation to *Baker v. Carr*, see Freideltaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673, 676-94 (1962).

153 *Baker v. Carr*, 369 U.S. 186 (1962).

154 372 U.S. 368 (1963).

155 *Id.* at 378.

Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote.<sup>156</sup>

Even though *Baker* held that federal courts have jurisdiction over claims that state legislative apportionments have violated the Fourteenth Amendment, that such claims are justiciable and voters do have standing to assert such claims and *Gray* extended the principle of one-man, one-vote to state elections, the question of whether the Court would act to correct inequality in Congressional districting was still open to dispute. The reason for this can be seen in the Constitution which vests in Congress the ultimate supervisory power over Congressional apportionments.<sup>157</sup>

The decision of *Wesberry v. Sanders*<sup>158</sup> put an end to this speculation. A Georgia statute constructing ten Congressional districts was ruled null and void because of the vast inequity created among the many districts. Relying on article one, section two of the Constitution, the Court held the verbiage therein that "Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a Congressional election is to be worth as much as another's."<sup>159</sup>

Following these pronouncements the mammoth decision of *Reynolds v. Sims*<sup>160</sup> was handed down by Chief Justice Warren. There the Court held, *inter alia*, that legislators represent people not areas;<sup>161</sup> weighting votes differently according to where citizens reside is discriminatory;<sup>162</sup> representation in both Houses of a states's bicameral legislature must be apportioned on a population basis;<sup>163</sup> and that the resemblance of an apportionment plan to the scheme used in the federal Congress affords no basis for sustaining such a plan.<sup>164</sup>

Indeed it is inconceivable that a state would be permitted to allow a citizen to cast multiple ballots and in the same effect it was held unconstitutional that a state allow some of its voters to have the power of their ballots multiplied, while others within the same jurisdiction cast but one vote. As Chief Justice Warren stated:

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." The Equal Protection Clause demands no less than substantially equal State legislative representation for all citizens, of all places as well as of all races.<sup>165</sup>

The notion that this case acknowledging the Constitutional necessity of en-

156 *Id.* at 381.

157 U. S. CONST. art. 1 §§ 4, 5. See also Carpenter, *Wesberry v. Sanders: A Case of Oversimplification*, 9 VILL. L. REV. 415, 416 (1964).

158 376 U.S. 1 (1964).

159 *Id.* at 7-8.

160 377 U.S. 533 (1964).

161 *Id.* at 562.

162 *Id.* at 563-68.

163 *Id.* at 568-76.

164 *Id.* at 571-77.

165 *Id.* at 568.

suring voting equality when choosing one's representatives has solved other related problems in the "political thicket" is at best puerile. Indeed, Supreme Court action subsequent to *Reynolds* has explained or extended the principle of one-man, one-vote in many instances,<sup>166</sup> but many voting inequities still remain unresolved. Paramount among these is the Electoral College,<sup>167</sup> which at the same time dilutes the worth of one citizen's vote while increasing that of another.

#### F. *The Sixth Voting Theory*<sup>168</sup>

In addition to the five theories<sup>169</sup> upon which the right to vote is from time to time based, it is now being suggested that a sixth theory, built upon the Constitution, has developed.

Indeed as Dean Kirby has noted:

The equal protection clause of the Fourteenth Amendment, as applied under the one-man, one-vote, has produced a new theory of voting rights which partakes both the natural rights and ethical theories; but it is best understood as a new theory of its own, couched in political equality. The right to vote now flourishes under the simple principle that, except as dictated by necessity, citizens should have equal voices in the electoral process.<sup>170</sup>

Although, not specifically stated in the Constitution, the right to vote has been recognized by the Court to be a fundamental right;<sup>171</sup> it has also been acknowledged as "preservative of all rights."<sup>172</sup>

In *Griswald v. Connecticut*,<sup>173</sup> the Court invalidated a Connecticut statute which forbade the use or dissemination of contraceptives. The opinion of Justice Douglas relied upon the "penumbra" of the First Amendment and other areas of the Bill of Rights, identifying particular rights not so mentioned therein as being protected. Can it now be argued that the established right to vote is not similarly protected? It is no longer open to question that the right to vote is embroidered with the same characteristics as those other rights which cannot be denied or diluted without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."<sup>174</sup>

166 See, e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), where the good faith effort to achieve precise mathematical equality was required in lieu of the de minimus approach, *id.* at 530-31; *Burns v. Richardson*, 384 U.S. 73 (1966) where Hawaii was allowed to apportion on the basis of registered voters because of special circumstances; *Hadley v. Junior College Dist.*, 397 U.S. .... (1970) extending one-man, one-vote to the election of trustees of a junior college district.

167 The winner-take-all system was upheld in *Williams v. Virginia*, 288 F. Supp. 622 (1968), *aff'd*, 393 U.S. 320 (1969), and in *Delaware v. New York* 385 U.S. 895 (1966) refusing Delaware leave to file a multiparty suit challenging the winner-take-all system.

168 See generally Kirby, *The Constitutional Right to Vote*, 45 N.Y.U. L. REV. 995 (1970).

169 They are: 1) the citizenship theory, 2) the vested privilege theory, 3) the natural rights theory, 4) the government function theory, and 5) the ethical theory. *Id.* at 996.

170 *Id.* at 1005.

171 *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966); *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

172 *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

173 381 U.S. 479 (1965).

174 *Powell v. Alabama*, 287 U.S. 45, 67 (1932).



## IV. Direct Presidential Election

A. *The Inequities of the Electoral College System*

If oppression, dilution and debasement of the vote have been disallowed in local, state, Congressional and Senatorial contests, there is no reason it should continue on the Presidential level.

The use of the present Presidential election scheme gives a citizen living in the most heavily populated states more potential for affecting the outcome of a Presidential election contest than a citizen residing in a sparsely populated state. At first it might seem that just the opposite would be true. However, even though a voter in Alaska with its three electoral votes might have a greater chance in effecting the outcome of the selection of his state's electors than a voter in California with forty-five electoral votes, the California voter has a much greater chance of affecting the outcome of the entire election because of the size of the electoral bloc his vote may potentially effect. More simply put, a voter in New York or Texas with electoral blocs of forty-one and twenty-six votes respectively has much more influence on the choice of the President than does a voter in a state such as Alaska or Nevada with only three electoral votes.<sup>175</sup>

Each state is allowed a certain number of Congressional representatives based on the previous census count. This number plus two, corresponding to the two United States Senators, makes up the number of electoral votes the state will cast until the next census which may or may not alter this count. This system does not account for increases or decreases from Presidential election to Presidential election. Indeed, the electoral vote count allocated to each state in the election of 1960 was based on a census of ten years earlier, 1950. Moreover, a state's electoral votes remain stagnant regardless whether 1,000 or 1,000,000 citizens participate in the Electoral selection within the state. Startling examples can be seen in a comparison of several states. In the election of 1964 Delaware and Alaska each cast three electoral votes but the number voting in Delaware was three times as great as the turnout in Alaska. More voters took advantage of the franchise in New Jersey than in Texas, albeit Texas certified a bloc of twenty-five electoral votes while New Jersey was "represented" with seventeen.<sup>176</sup>

Disproportion can also be seen in the aggregate totals of two or more states when the percentage of the popular votes won is compared with the percentage of electoral votes won. In 1960 President Kennedy won Illinois' twenty-seven electoral votes with a popular vote of 2,377,846, Richard Nixon receiving no electoral votes for his 2,368,988 votes. In the state of Indiana, Nixon polled 1,175,120 popular votes receiving thirteen electoral votes while Kennedy tallied only 952,358 votes. The combined totals of the two states reveal that Kennedy received 67.5% of the electoral votes from Indiana and Illinois though he won only 48.7% of the total popular vote. Mr. Nixon on the other hand won a

175 Banzhaf, *One Man, 3,312 Votes: A Mathematical Analysis of the Electoral College*, 13 *VILL. L. REV.* 304, 317 (1968).

176 Feerick, *supra* note 29, at 13.

majority 51.6% of the two state totals realizing but 32.5% of the electoral college vote.<sup>177</sup>

Even more extreme is the possibility that a candidate can win a slight majority in eleven of the largest states receiving only about thirty per cent of the national popular vote but still have 270 electoral votes, enough to place him in the White House.<sup>178</sup> Although this possibility is extremely improbable, the mammoth political significance of these states has received acute attention from the parties and candidates; "the party conventions usually choose candidates from the largest states, and campaigns are tailored to capture their electoral votes."<sup>179</sup> The importance given this group of states is excessive, and inconsistent with our representative form of government. This fact has been understood in eight of the twenty-eight elections from 1860 to the present where a shift of the electoral vote of one state to the losing candidate would have given him the election.<sup>180</sup>

Another serious shortcoming of the Electoral College system is its ability to frustrate the will of the people. This is seen in the blatant examples of the elections of 1824, 1876 and 1888.<sup>181</sup> This undemocratic result was ominously close in the 1960 and 1968 elections, accordingly with this trend of the last decade of extremely narrow victories the possibility that the nation will have to tolerate an administration which was rejected at the polls seems all the more likely. This danger is only one of many which can be placed under the heading of frustrating the will of the people.

The problem of the faithless elector<sup>182</sup> has also resurfaced in the past decade in the controversial elections of 1960<sup>183</sup> and 1968. Although chosen by the voters of Oklahoma in 1960 as one of eight Republican electors, Henry D. Irwin cast his ballot for Senator Harry F. Byrd who was not a candidate for the Presidency. Even more threatening was the action of Dr. Lloyd W. Bailey in the 1968 campaign who cast his electoral ballots for George C. Wallace and Curtis E. LeMay. The action of this obscure elector did not change the election, nor did he throw it into the House, although it did very definitely frustrate the will of the people of North Carolina.<sup>184</sup> More importantly, however, it demonstrated the power an elector has and how it could be used in a close Presidential race. It also suggested the fact that the Wallace campaign did have significance in that

177 24 CONG. Q. WEEKLY REPT. 1811 (Aug. 19, 1966).

178 California 45; New York 41; Illinois 26; Texas 26; Ohio 25; Michigan 19; New Jersey 17; Florida 17; Massachusetts 14; Indiana 13. Count based on 1970 census figures 29 CONG. Q. WEEKLY REPT. 646 (March 26, 1971).

179 Rosenthal, *supra* note 63, at 7.

180 *Hearings on Electoral College Reform Before the Committee on the Judiciary of the House of Representatives*, 91st Cong. 1st Sess. at 360 (1969) (hereinafter cited as *1969 House Hearings*).

181 See notes 93 to 100, *supra*, and text accompanying.

182 See notes 68 to 86, *supra*, and text accompanying.

183 See Feerick, *supra* note 29, at 20.

184 See generally Comment, 6 HARV. J. LEGIS. 254 (1969).

The sham of the Electoral College system was revealed to us in the most startling form as Members of Congress debated the case of the infamous "faithless elector" from North Carolina. It is, to me, incredible how reasonable men can continue to argue that the Electoral College is meant as "a safeguard," when Dr. Bailey's action, in essence, disenfranchised one-thirteenth of the voters of his State. *1969 House Hearings* at 97.

a third-party candidate probably would never win an election but could throw it into the House. Before the House could select a President, Wallace or any such candidate could demand certain concessions in return for which he would instruct his electors as to how they should vote, giving the accommodating candidate the Presidency before the House could act.

Another stultifying effect of the Electoral College system is the practice of completely disregarding the popular vote in the individual states which is cast for a candidate other than the state's electoral vote winner. This effectively precludes the votes from one state from being added to those of other states and thus allows the possibility of Presidents whom the people have rejected and encourages the styling of a campaign for the largest state's electoral votes instead of a campaign directed at all voters nationally.

### B. Remedies Available

The first proposal to reform the Electoral College system was brought before the Congress on January 6, 1797, by Representative William L. Smith of South Carolina.<sup>185</sup> Since then the College has been criticized with consistency, yet it has not been reformed to this day. However, within the past decade the movement to abolish the Electoral College has gained new life and it is now apparent a different system to elect the President will be adopted some time in the future. The three major plans now suggested are: the district system, the proportional system, and the direct popular election of the President.

The district system would use the present Electoral College allocation of votes to each state but would do away with the electors and the winner-take-all aspect of the present system. Instead, it provides for the award of an electoral vote for each Congressional district a candidate wins and gives the candidate who captures a plurality of the state's popular vote the two electoral votes at-large which correspond to the two United States Senators. This method is viewed by many as a fairer system, one that would reflect the wishes of the people. Indeed, at least one state, Maine, has installed the district method for use in the 1972 elections for precisely these reasons.<sup>186</sup>

Although an improvement over the present mode of Presidential elections, the winner-take-all aspect is perpetuated in five states which have only one Representative in Congress,<sup>187</sup> when awarding the two votes corresponding to the Senators, in one-party states and in the District of Columbia. The district system would still allow a candidate to win a majority of the state's electoral votes while polling a minority of the popular vote. This could be realized in a state where a candidate won a majority of the districts by razor-thin margins. It would also promote an attempt to gerrymand districts in order to gain partisan advantage.

More importantly, it would continue the unequal voting power of a citizen in one district as compared to another district. This is seen in the fact that the

185 Feerick, *supra* note 29, at 26.

186 Letter from Joseph T. Edgar, Secretary of State of the state of Maine, August 4, 1971, on file with the *Notre Dame Lawyer*.

187 Alaska, Nevada, Wyoming, Delaware and Vermont. 29 CONG. Q. WEEKLY REPT. 646 (March 26, 1971).

871,862 voters in California's thirty-fifth district elect one elector as do the 288,482 voters in North Dakota's second district.<sup>188</sup> The elector from California in this example represents more than two and one-half times the people than the elector from North Dakota does. Each one of the ten largest districts throughout the nation represents at least twice as many people as any one of the eight smallest districts does. Even if all states could be redistricted in a manner creating exactly equal districts within each state, there would still be wide population variances between districts in the nation. Again as with the Electoral College the district system is based on a census which can be as old as ten years if the Presidential election falls in a census year. Also it does not matter how many people are in the district since each district is allowed one vote no matter what the turnout is.

A second mode advanced by some is the proportional system. This method allocates the electoral vote to each candidate based on the percentage of the popular vote he receives. For example, if the Republican candidate won eighty percent of Georgia's popular vote while the Democrats received the remaining twenty percent, the allocation of electoral votes would be 9.6 and 2.4 respectively. Again this system continues the Electoral College practice of allocating votes based on Congressional representation. The same objections are applicable here as were stated for the Electoral College system. An example of the injustice of this system can be seen in the application of this mode to the 1968 Presidential returns in Missouri and Virginia, each of which has twelve electoral votes. Both Nixon and Humphrey won forty-three percent of the total votes in Virginia and Missouri. However, Nixon received only 590,315 votes in Virginia while Humphrey garnered 791,444 votes in Missouri, yet under the proportional system each would have received 5.2 electoral votes. In this situation, Mr. Humphrey had to win 201,129 more votes than Mr. Nixon in order to receive the same number of electoral votes.

In addition to the above-mentioned objections "[i]t would appear that a proportional division of electoral votes is an open invitation to splinter groups to disrupt the party structure by playing an increasingly important role in Presidential elections."<sup>189</sup> This being so since a third-party candidate has the opportunity of accumulating his fraction of the electoral vote received from state to state. Thus the possibility that such a candidate might win enough electoral votes to prevent either of the two major party candidates from receiving a majority of the electoral total is enhanced greatly.

The direct popular election proposal is the most compatible with our one-man, one-vote representative type of government. It is far more preferable than the district or proportional systems since each of these retains some aspect of the Electoral College. Direct popular election eliminates the inequalities which exist under the present system and which would continue under any modification of it; it eliminates the dangerous possibility of the faithless elector, and it eliminates the archaic practice of the House choosing the President if no candidate receives a majority vote. Also such facts as "sure" states, pivotal states, the unit rule can-

188 *Id.* at 645.

189 Bayh, *Electing a President — The Case for Direct Popular Election*, 6 HARV. J. LEGIS. 127, 135 (1969).

celling out the majority vote, and fraud affecting the disposition of a state's electoral bloc would disappear.<sup>190</sup>

The insignificance of the Electoral College is seen in the ballot laws of the several states, a majority of which list only the names of the candidates, not the electors. Indeed, the Electoral College "has suffered atrophy almost indistinguishable from rigor mortis."<sup>191</sup>

The demise of the whole electoral system would not impress me as a disaster. At best it is a mystifying and distorting factor which may resolve a popular defeat into an election victory. At its worst it is open to local corruption and manipulation, once so flagrant as to threaten the stability of the country. To abolish it and substitute direct election of the President, so that every vote wherever cast would have equal weight in calculating the result, would seem to me a gain for simplicity and integrity of our governmental process.<sup>192</sup>

When this nation adopted the Seventeenth Amendment which provided for the popular election of Senators it chose the fairest, simplest, most democratic method. With the adoption of this amendment the "nation forgot about small counties versus large counties, rural citizens versus urban citizens (and) liberal votes versus conservative votes."<sup>193</sup>

The objections to direct popular election are many although in essence meaningless. One, the fear of the destruction of the two-party system, is fanciful at best. Since under the direct-election system a third-party candidate would have no electors to instruct as to how to cast their ballots, much of the strength of their campaigns would be lost. Also, if such a campaign polled enough votes to prevent a major party candidate from receiving forty percent of the popular vote, then a runoff election would be conducted to determine the winner instead of a House election.<sup>194</sup>

The concern that the minority groups would lose their voice overlooks the fact that with the direct voting system their votes are added to that of groups from other states with similar political feelings. Thus the voting strength of minorities would increase beyond what it is under the present system to a level of equality with every other voter in the nation.

The concern for these minority groups rises from the fact that in certain

190 For examples of additional controversies affecting a State's electoral vote see Wroth, *supra* note 41, at 323.

191 Ray v. Blair 343 U.S. 214, 232 (1952) (dissenting opinion of Jackson, J.).

192 *Id.* at 224.

193 *Hearings on Electing the President Before the Subcommittee on Constitutional Amendments of the Committee of the Judiciary of the United States Senate*, 91st Cong. 1st Sess. at 65 (1969) (hereinafter cited as *1969 Senate Hearings*).

194 Forty percent is the minimum requirement most often suggested. See ELECTING THE PRESIDENT, A REPORT OF THE COMMISSION OF ELECTORAL COLLEGE REFORM, AMERICAN BAR ASSOCIATION at 8 (1967); a run-off is proposed by the A. B. A. *Id.* But Senator Bayh's revised proposal introduced on January 28, 1971, eliminate the run-off provision, providing that:

If no pair of candidates received 40 percent of the vote, but if the pair of candidates with the largest popular vote won an electoral college majority — with the votes cast automatically under the unit rule on the basis of the popular outcome in each State — that pair of candidates would be elected President and Vice-President.

117 CONG. REC. 92nd Cong. 1st Sess. S 464 (Daily ed.) (January 28, 1971). If still no candidate is selected final selection would be made by Congress from the two highest candidates. *Id.* at S 465.

areas they have the power to determine how a "swing" state will ultimately go and possibly affect the election. This greater voting power is the result of the Electoral College and with this status these groups command more attention and force the candidates to be more responsive to their desires. The fact of the matter is that this reasoning is directly opposed to the concept of one man-one vote without regard to sex, color, residence or economic state. "The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government."<sup>195</sup>

In answer to direct election, it has also been suggested that state lines would be wiped out in a Presidential election and the very basis of our federal system threatened. Although there would be no "state vote" as is the practice under the present system, each jurisdiction would retain a significant role to play in the electoral process. The states "would continue to have the primary responsibility for regulating the places and manner of holding the Presidential election, for establishing qualifications for voting in such elections, and for controlling political activity within their State boundaries."<sup>196</sup> Perhaps the most compelling explanation of the continued existence of the federal system with the practice of a direct popular vote for the President was advanced by Senator Mansfield when he stated:

[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.<sup>197</sup>

In an effort to thwart its adoption, some have even argued that an election of President by direct popular vote would obviate the intention and design of the Framers of the Constitution. To subscribe to such a theory, a person would of necessity have to overlook, indeed, disregard the reasoning which the Framers gave as an explanation for this compromise.<sup>198</sup> The primary reason the election of the President directly by the people was rejected by the Constitutional Convention was the alleged ignorance of the people. But the Electoral College was designed long before our current levels of education, political sophistication, mass transportation and communication which would have given the delegates confidence in the average voter's ability to choose wisely between candidates.<sup>199</sup>

195 *MacDougal v. Green* 335 U.S. 281, 290 (1948) (Douglas dissenting).

196 ELECTING THE PRESIDENT, *supra* note 194, at 6.

197 107 CONG. REC. 350 (1961) (remarks of Senator Mansfield).

198 *See generally* notes 32 to 36, *supra*, and text accompanying.

199 1969 *Senate Hearings* at 64.

At the present moment, the electorate of the United States is "sufficiently well-informed and politically aware to provide for the election of the President and Vice-President by the direct popular vote."<sup>200</sup> As President Lincoln declared in his first inaugural address: "This country, with its institutions, belongs to the people who inhabit it . . . Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?"<sup>201</sup>

The most serious threat to the potential viability of direct popular election is the fear that the states will not ratify it. Earlier in our nation's history, this may have posed a problem, but at the present time with the recent expansion of the franchise, the recognized power of the ballot and the innate desire for equality, politically as well as socially, the efficacy of such a threat is substantially lessened.

A recent poll of state legislators by Senator Quentin M. Burdick of North Dakota, showed that of the 2,500 out of 8,000 legislators who replied, a significant 58.8% favored the direct vote. Equally interesting is that support from large and small states was almost equal.<sup>202</sup> The first national poll concerning direct popular election demonstrated that 63% of those interviewed supported this method.<sup>203</sup> A later poll showed an increase of 3% to 66% support for direct election.<sup>204</sup> In 1968, more than 80% of the nation "favored an amendment of the Constitution to do away with the Electoral College and base the election of a President on the total vote cast throughout the Nation."<sup>205</sup>

The adoption of an amendment to provide for the direct election of the President would ensure every voter an equal chance of affecting the outcome of such an election. No other existing proposal can even approximate such equality.

## V. Conclusion

Political equality demands the principle of voter equality on every election level. As the state of Delaware argued in its brief attacking the Electoral College: "Both Equal Protection and Due Process should mean that no citizen must go to the polls under the threat of such potential debasement of his vote."<sup>206</sup>

Potential debasement has been mathematically demonstrated;<sup>207</sup> the Supreme Court has stated that when this is the case such an election system will be meticulously scrutinized and its proponents will bear the heavy burden of justifying the continuance of such a system.<sup>208</sup> It is difficult to imagine a logical argument purporting to justify the continuance of the Electoral College at the present time.

As stated the only alternative is the substitution of a direct election system under which:

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200 1969 *House Hearings* at 97.  
 201 1969 *Senate Hearings* at 67.  
 202 1969 *House Hearings* at 45.  
 203 20 CONG. Q. WEEKLY REPT. 1042 (1966).  
 204 N. Y. Times, Sept. 22, 1968 at 61 Col. 1.  
 205 1969 *House Hearings* at 508. A Harris poll showed 78% favored direct election of the President. *Id.*  
 206 See brief of Delaware v. New York 385 U.S. 895 (1966). 1969 *Senate Hearings* at 757.  
 207 See Banzhaf, *supra* note 175, and text accompanying.  
 208 Reynolds v. Sims, 377 U.S. 533 (1964).

every voter casts one vote, a whole vote, which is just as good and just as important as the vote cast by any other voter in the country. \*\*\*This is the final step in the constitutional evolution which began with the Declaration that all men are created equal and continued with the assertion that no man or woman may be denied the right to vote for arbitrary reasons. Now we must make the suffrage an equal suffrage, and repudiate arbitrary and discriminatory geographical basis for denying or reducing the importance of the votes of some of our citizens.<sup>209</sup>

The necessity for such a change in the determination of the President is compelling. Indeed, men have demanded that they should not be governed without their consent; but there were those who pointed to the Black man. Men said they could not be taxed without representation, but there were those who pointed to women. Men have stated that the concept of universal suffrage was a glorious ideal; but there were those who pointed to minors.<sup>210</sup> Men have said democracy is a universal concept; but there were those who pointed to the election of the President.

The most impressive fact about democracy is: the greater the franchise is extended, the greater is the need for everyone to participate in it on an equal basis, for without equality such a democracy is empty.

*Alfred J. Lechner, Jr.*

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209 99 CONG. REV. 1726 (1953) (remarks of Senator Humphrey).

210 Kirby, *supra* note 168, at 1000.