

**Comment**

**BUSH, GORE, AND THE 2000 PRESIDENTIAL ELECTION: TIME FOR THE ELECTORAL COLLEGE TO GO?**

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In 2000, for the first time in over a century, a presidential candidate captured the White House despite losing the nationwide popular vote. Not surprisingly, the extraordinary 2000 presidential election renewed a long-standing debate regarding the Electoral College system of selecting America's Presidents. David W. Abbot and James R. Levine have described the Electoral College as "curiously out of step with . . . democratic developments, a relic of a bygone age when it was thought proper to limit the role of the people." [FN1] An earlier American Bar Association report called it "archaic, undemocratic, complex, ambiguous, indirect, and dangerous." [FN2] On the other hand, Electoral College supporters, like Senator Byron Dorgan, are equally convinced of the College's merits: "Born in compromise, the system accommodates the tensions that otherwise could cause chronic conflict. It gives voice to regional concerns . . . and it amplifies the impact of minorities on the big stage of presidential politics. The nation is the better for it." [FN3]

This Comment inquires into whether America should retain the Electoral College to select its Presidents. It first discusses the College historically, beginning with the circumstances and debates surrounding its creation in Philadelphia in 1787. It then examines the four elections in which a President assumed office \*718 without winning the popular vote. Next, it considers the merits of several proposals to reform the College, analyzing three modern elections where slight vote shifts would have deprived the popular vote winner of the Presidency. Finally, this Comment urges replacement of the Electoral College system with direct presidential election.

I

The Origins of the Electoral College

A. The Articles of Confederation

Following the signing of the Declaration of Independence in 1776, the American colonists quickly realized that some form of common government was necessary to fight the impending war for independence against Great Britain. To address this need, delegates at the June 1776 Continental Congress voted to adopt the Articles of Confederation. [FN4] The Articles established a weak system of national government, in which each state remained largely sovereign. The national legislature consisted of a single house, with each state having a single vote. The chief executive, whose main duty was to preside over the legislature, had no real power.

The Articles also failed to provide means to enforce legislation passed by Congress and, as a result, the young nation teetered on the verge of bankruptcy as the states routinely failed to pay taxes to the national government. [FN5] Amending the Articles required unanimous approval of the states, making any changes virtually impossible. [FN6] To deal with these problems, several nationalist leaders, including Alexander Hamilton and James Madison, drafted an address to the states urging them to send delegates to Philadelphia to revise and strengthen the national government. [FN7]

B. The Constitutional Convention

The Constitutional Convention convened in May 1787, and the \*719 delegates first focused their attention on the

composition of the national legislature. [FN8] Delegates from populous states advocated a scheme known as the Virginia Plan, which based legislative representation on each state's population. [FN9] In contrast, small-state delegates urged adoption of the New Jersey Plan, where each state received one vote in a unicameral legislature. [FN10] In response to this conflict, Connecticut delegate Roger Sherman devised the Connecticut Compromise. Sherman's plan provided for a bicameral system, with one house based on popular representation and the other predicated on equal representation for each state. [FN11] The Convention eventually approved the Compromise on July 16. [FN12] Later, on July 23, the delegates voted to allow each state two senators, with each senator voting individually. [FN13]

With the contentious issues surrounding the national legislature settled, the delegates turned their attention to the selection method and power of the national executive. Earlier, on July 17, the delegates had agreed that the executive should consist of a single person. [FN14] Gouverneur Morris of Pennsylvania argued that an executive chosen by Congress "will be the mere creature of the legislature if appointed and impeachable by that body [and] real merit will rarely be the title to the appointment." [FN15] In contrast, Sherman maintained that the "sense of the nation would be better expressed by the legislature, than by the people at large." [FN16] The people would "never be sufficiently informed of characters [to select the executive properly and would] never give a majority of votes to any one man." [FN17] Pennsylvania delegate James Wilson responded by suggesting that in the event no candidate received an electoral majority, the national legislature could then select an executive from among the several candidates. [FN18] Wilson pointed out that Massachusetts successfully employed \*720 a similar method in gubernatorial elections. [FN19] According to Wilson, such a system "would restrain the choice to a good nomination at least, and prevent in a great degree intrigue and cabal." [FN20] Despite spirited arguments by Wilson and Morris, the Convention rejected popular election of the executive by a vote of nine to one. [FN21]

On August 6, the Convention's Committee of Detail, charged with drafting the actual wording of the Constitution, reported the following proposed language regarding the executive:

The Executive Power of the United States shall be vested in a single person. His stile shall be, "The President of the United States of America;" and his title shall be, "His Excellency." He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time. [FN22]

The delegates began debating this provision on August 24. South Carolina delegate John Rutledge immediately suggested that both houses of the legislature elect the executive, with each member having a single vote. [FN23] Delegates from small states, like Sherman and Jonathan Dayton of New Jersey, objected on grounds that large states would undoubtedly control the selection process. [FN24] The Convention delegates ultimately adopted Rutledge's amendment by a vote of seven to four. [FN25]

At this point, Morris moved for election of the executive "by electors to be chosen by the people of the several states." [FN26] The motion failed by a vote of six to five, suggesting that a significant number of delegates remained in favor of popular election of the executive. [FN27] But the delegates were unable to agree on the length of the executive's term and whether he would be eligible for reelection. [FN28] On August 31, the Convention referred these and other undecided items to a special committee composed of one delegate from each state. [FN29]

#### \*721 C. The Electoral College is Born

The special committee's final recommendations, reported to the Convention on September 4, bore the modern-day Electoral College. Both the President and Vice President would serve four-year terms and be eligible for reelection. [FN30] This method reflected a compromise between more populous and smaller states. Each state would select "a number of electors equal to the whole number of senators and members of the House of Representatives to which the state may be entitled in the legislature." [FN31] The state legislatures had the freedom to choose electors in any manner they wished. [FN32] Electors would cast votes for two candidates, one of whom was required to be from a different state than the elector. [FN33] The candidate receiving the most votes, if the sum constituted a majority of the total number of electors, would become President. [FN34] If no candidate garnered a majority, the Senate would choose the President from among the five candidates receiving the most popular votes. [FN35] The candidate with the second-highest number of votes would become Vice President. [FN36]

For three full days, the Convention debated the committee's proposal. Some delegates believed that the system

would encourage a large number of candidates and prevent a single candidate from receiving a majority of electoral votes. [FN37] Virginia delegate George Mason speculated that the Senate would select the President "nineteen times in twenty." [FN38] Abraham Baldwin of Georgia disagreed, saying that the "increasing intercourse among the people of the [s]tates" would lead to better-known candidates who were likely to obtain electoral vote majorities. [FN39] Other delegates, like Pinckney, worried that the executive would be too dependent on the aristocratic Senate, which also had the power to \*722 remove the President by impeachment. [FN40]

On September 6, Sherman offered a final compromise. In case of a tie or the failure of a candidate to obtain an electoral vote majority, the House of Representatives, rather than the Senate, would choose the President. [FN41] Selection of the Vice President under such circumstances would remain in the Senate. To give smaller states a voice in presidential selection, Sherman proposed that each state's delegation in the House, regardless of size, receive one vote. [FN42] The Convention, with little debate, approved this proposal by an overwhelming margin. [FN43]

Commentators advance several reasons why the Convention endorsed Sherman's proposal so readily. First, after four months in Philadelphia, delegates were undoubtedly anxious to complete their work and return home. Second, no immediate threat existed because the nation expected George Washington to serve as President indefinitely. Finally, the delegates also were under pressure to approve the new Constitution and begin the ratification process. According to Neal R. Peirce and Lawrence D. Longley, "[t]he most basic reason for the invention of the electoral college was that the convention was deadlocked on simpler schemes like direct election and choice by Congress. It devised a system that could be 'sold' in the immediate context of 1787." [FN44] Others suggest that the system resulted from the framers' recognition that the country suffered from limited means of communication and a low level of literacy, making it difficult for citizens to avoid deception in elections. [FN45] Uninformed citizens would likely favor candidates from their own states, resulting in a significant \*723 advantage for candidates from the larger states. [FN46] The framers assumed "that the electors, to whom the people would delegate their franchise, would be the wise men of the community" and therefore able to make an informed and disinterested choice. [FN47]

Following approval of Sherman's compromise, the bulk of the delegates' work was complete. They appointed a committee to combine the various resolutions passed into a single, uniform document. [FN48] The state delegations unanimously approved the new Constitution on September 15. [FN49] Two days later, the delegates signed the document, and the Convention adjourned. [FN50] The delegates then faced the difficult task of convincing nine of the thirteen states to ratify the Constitution. [FN51]

#### D. The Ratification Debate

The issues surrounding selection of the national executive received relatively little attention during the ratification debates. [FN52] Alexander Hamilton noted that the process for selecting the executive was "the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation." [FN53] According to Hamilton, "if the manner of [selecting the executive] be not perfect, it is at least excellent." [FN54] Hamilton also argued that the process established by the framers "affords a moral certainty that the office of \*724 President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications." [FN55] James Wilson told the Pennsylvania ratifying convention that "[t]he manner of appointing the president of the United States, I find is not objected to . . . . I flatter myself the experiment will be a happy one for our country." [FN56] By June 1788, the required nine state legislatures ratified the Constitution. [FN57] Electors met in the various state capitals on February 4, 1789, and unanimously elected Washington President with sixty-nine electoral votes. [FN58] John Adams received thirty-four electoral votes and became Vice President. [FN59]

## II

### Early Presidential Elections

Following Washington's decision to forego a third term, the nation witnessed for the first time a competitive race between two candidates. Simultaneously, a potential pitfall of the presidential election process began to emerge. In the event each elector cast votes for the party's candidate for President and Vice President, the resulting tie would

throw the election into the House of Representatives. Furthermore, if electors withheld votes from a vice presidential candidate, the losing party's candidate for President could possibly obtain the second-highest number of electoral votes and become Vice President.

#### A. The Election of 1796

The presidential election of 1796 produced such a scenario. Federalist members of Congress nominated Adams for President and Thomas Pinckney for Vice President. Republicans selected Thomas Jefferson for President and Aaron Burr as Vice President. To prevent a tie between Adams and Pinckney and the resulting election in the House of Representatives, Federalist electors in several states withheld votes from Pinckney. [FN60] With 138 electors casting votes, Adams received seventy-one electoral \*725 votes, and Pinckney fifty-nine. [FN61] Sixty-eight electors cast their votes for Jefferson, giving him the second-highest electoral vote total. [FN62] The result was a Republican Vice President, Jefferson, in Adams's Federalist administration.

#### B. The Election of 1800

Similar problems arose in the election of 1800. Adams stood for reelection with Charles Pinckney, the brother of his previous running mate. Republicans again chose Jefferson as the party's presidential candidate and Burr for Vice President. Electors cast seventy-three votes for Jefferson, compared to sixty-five for Adams. [FN63] Republican electors failed to withhold any votes from Burr, however, causing both candidates to receive seventy-three electoral votes. [FN64] Burr refused to step aside for Jefferson, and the election was thrown into the House of Representatives. [FN65]

On February 11, 1801, the 106 members of the House, fifty-eight Federalists and forty-eight Republicans, convened to break the deadlock. [FN66] On the first ballot, Burr received fifty-three votes to Jefferson's fifty-one. [FN67] The Constitution provided that each of the sixteen state delegations had a single vote, with a majority of nine votes needed to secure election. [FN68] Eight states voted for Jefferson and six for Burr, with Vermont and Maryland evenly divided. [FN69] Despite twenty-seven separate ballots during this first session, the deadlock remained. [FN70] A number of political maneuvers by both sides followed, including strong efforts by Alexander Hamilton to thwart Burr's election. [FN71] On February 17, after thirty-six ballots, the House elected Jefferson President by a vote of ten states to four. [FN72]

### \*726 III

#### The Twelfth Amendment

The presidential elections of 1796 and 1800 "demonstrated both the impracticality and the dangers in the Constitution's requirement that each presidential elector cast two equal, undifferentiated votes for President." [FN73] Moreover, the possibility remained that a losing party might switch votes to the opposing party's vice presidential candidate and elect him President. At the urging of several state legislatures, the House of Representatives, on May 1, 1802, approved the "designation" amendment, a constitutional amendment requiring electors to cast separate votes for President and Vice President. [FN74] The Senate failed, however, by a single vote to garner the two-thirds vote needed for approval. [FN75] Gouverneur Morris expressed fear that separate votes for President and Vice President would result in persons of lower stature obtaining the Vice Presidency. [FN76] Residents of smaller states also opposed the proposed change. They feared that separate voting for President and Vice President would lessen the chances of an election being decided in the House, where each state had one vote regardless of size. [FN77] Federalists argued in favor of casting two votes for President, mainly because they hoped their presidential candidate in 1804 would at least capture the Vice Presidency. [FN78]

To prevent a repeat of the Jefferson-Burr crisis of 1801, the House of Representatives renewed consideration of the designation amendment. Following extensive debate, the House approved the measure by the requisite majority of eighty-eight to thirty-nine on October 28, 1803. [FN79] On December 2, 1803, the Senate approved its own amendment requiring separate voting for President and Vice President by a vote of twenty-two to ten. [FN80] The

Senate amendment provided that the House would select \*727 from the top three candidates in a contingency election, rather than the five specified in the House legislation. [FN81] On December 8, 1803, the House concurred with the Senate amendment, sending the Twelfth Amendment to the states for ratification. [FN82] By September 1804, the required number of states ratified the amendment, and it remains almost entirely in effect today. [FN83]

The most significant change contained in the Twelfth Amendment was the requirement that electors cast separate votes for President and Vice President. [FN84] This condition remedied the two dangers that emerged in 1796 and 1800. It extinguished the possibility of an electoral vote tie between presidential and vice presidential candidates, and made the election of a President and Vice President from opposing parties nearly impossible. To prevent electors from favoring candidates from their own states, the amendment also required at least one of each elector's two votes to be for a candidate who was not an inhabitant of the elector's state. [FN85] The provisions of the Twelfth Amendment unquestionably \*728 cured several major flaws of the framers' electoral system. New issues, however, emerged in the presidential selection process as the country grew in population, nationalist sentiment increased among the citizenry, and many states turned to direct popular elections. Chief among these issues was the possibility that a candidate who lost the national popular vote could nevertheless become President.

## IV

### Electoral Vote Winners, Popular Vote Losers

#### A. The Elections of 1824, 1876, and 1888

Before the election of 2000, only three Presidents took office without winning the popular vote: John Quincy Adams in 1824, Rutherford B. Hayes in 1876, and Benjamin Harrison in 1888. [FN86] In 1824, Adams, Andrew Jackson, Speaker of the House Henry Clay, and Secretary of the Treasury William H. Crawford sought the Presidency. [FN87] For the first time in history, a majority of the twenty-four states conducted direct popular elections. [FN88] Jackson emerged as the clear popular vote winner with 152,933 votes, compared to 115,696 for Adams. [FN89] Despite Jackson's popular vote victory, he failed to obtain a majority of the electoral votes cast. [FN90] In the ensuing election in the House of Representatives, Clay threw his support to Adams, who prevailed on the first ballot. [FN91]

\*729 Republican Rutherford B. Hayes, the governor of Ohio, won the 1876 presidential election after intense, and most likely fraudulent, dealing. New York Governor Samuel J. Tilden, the Democratic nominee, won the popular vote by more than 250,000 votes. [FN92] Republican operatives quickly realized that if Hayes could overturn Tilden's apparent victories in South Carolina, Florida, and Louisiana, he would defeat Tilden by a single electoral vote. [FN93] Using a variety of corrupt tactics, Republicans went to work on changing the outcome in these three states. [FN94] Ultimately, several states submitted two sets of returns, and Congress established a special electoral commission to settle the dispute. [FN95] Following numerous unsavory activities by both parties, the commission sided with Hayes in each dispute and Congress eventually certified his election. [FN96]

The election of 1888 marked, until 2000, the last time a popular vote loser gained the Presidency. Republicans nominated Benjamin Harrison of Indiana to challenge the Democratic incumbent, President Grover Cleveland. Following an unexciting campaign that focused mainly on tariff issues, Cleveland won the popular vote by nearly 100,000 votes. [FN97] But Harrison edged Cleveland in New York by a mere 13,373 votes and gained the state's all-important thirty-six electoral votes, which were enough to deny Cleveland a consecutive second term. [FN98]

#### B. The Election of 2000

The 2000 presidential election between Al Gore and George W. Bush saw a popular vote loser capture the Presidency for only the fourth time in history. As early returns filtered in, Gore emerged as the clear winner of the popular vote. [FN99] Gore's popular vote margin, however, was due largely to substantial victories \*730 in New York and California. [FN100] Not surprisingly, Bush emerged victorious in Texas, carried the South, and secured an important Midwest victory in Ohio. Throughout election night, as Bush and Gore exchanged victories in different states, neither candidate emerged with a commanding electoral vote lead. With the election in a dead heat,

all eyes eventually turned to Florida and its twenty-five electoral votes. It soon became evident that the candidate who carried the state of Florida would have a majority of electoral votes and obtain the Presidency.

The first complete returns showed Bush winning Florida by a margin of 1,784 votes, giving him 271 electoral votes, one more than the 270 needed for victory. [FN101] Florida law provides for an automatic statewide recount in elections where a victor's margin is one-half of one percent or less. [FN102] The resulting recount trimmed Bush's lead to only 327 votes. [FN103] Gore then sought hand recounts in several Democratic-leaning counties, and the Florida Supreme Court ordered that the counties complete hand recounts by November 26, nearly three weeks after election day. [FN104] The court also ordered that the amended tallies be included in the state's official total. [FN105] Two counties, Palm Beach and Miami-Dade, failed to complete recounts by the deadline, \*731 and Florida Secretary of State Katherine Harris certified Bush as the winner by a margin of 537 votes on November 26. [FN106] On December 8, after numerous legal challenges by both candidates, the Florida Supreme Court ordered a continuation of the Palm Beach and Miami- Dade hand recounts. [FN107] The following day, the United States Supreme Court stayed the recounts and agreed to review the decision of the Florida Supreme Court. [FN108] On December 12, the Supreme Court declined by a vote of five to four to overturn Florida's certification and discontinued the recounts. [FN109] Like Richard Nixon forty years earlier, Gore had the unhappy task of presiding over a joint session of Congress that certified the election of his presidential opponent. [FN110]

## V

### Proposals for Reform

Following the 2000 presidential election, a number of alternatives, both old and new, emerged as potential replacements for the Electoral College. [FN111] This Comment next considers four proposals to reform the Electoral College system: direct popular election, the district plan, the bonus plan, and the proportional plan.

#### A. Direct Popular Election

The most common reform proposal advanced by Electoral College opponents is direct popular election. Senator Dick Durbin describes the Electoral College as

undemocratic and unfair. It distorts the election process, with some votes by design having more weight than others. Imagine for a moment if you were told as follows: We want you to \*732 vote for President. We are going to give you one vote in selection of the President, but a neighbor of yours is going to have three votes in selecting the President. You would say that is not American, that is fundamentally unfair. We live in a nation that is one person--one citizen, one vote. But that is exactly what the electoral college does. [FN112]

Durbin, along with Representative Ray LaHood, advocates a plan that provides for election of the President by popular vote, with the proviso that a single candidate must receive at least forty percent of the total popular votes cast. [FN113] If no candidate obtains forty percent in the general election, the two candidates receiving the highest number of popular votes participate in a runoff election. Other notable figures, including Senator Hillary Rodham Clinton, also voiced support for direct popular vote. Shortly after her election to the Senate in November 2000, Clinton called the Electoral College "an anachronism" and stated her intention to sponsor legislation requiring popular election of the President. [FN114] In the three months following the 2000 election, members of Congress introduced five measures to abolish the Electoral College in favor of direct popular election. [FN115]

\*733 The obvious benefit of a direct election system, because ascension to the Presidency by a loser of the popular vote is impossible, is that direct election eliminates questions surrounding the legitimacy of a President who loses the popular vote but prevails in the Electoral College. Criticisms of direct election proposals generally focus on federalism concerns. [FN116] Electoral College proponents argue that the framers intended to establish a system under which neither large states nor a particular region dominated presidential elections. By providing three electoral votes to each state regardless of size, proponents maintain that the framers intended small states to be able to tip the balance in a close election, thereby forcing the candidates to address regional concerns and campaign in less-populated areas. Critics of direct popular election also cite the possibility of a nationwide recount as another serious drawback.

## B. District Plan

Another reform proposal receiving significant attention is the district plan. Under the district plan, the presidential candidate who receives the most votes in a particular congressional district wins that district's single electoral vote. The candidate who receives the highest total of votes statewide receives two at-large votes, representing each state's number of senators. First advocated in 1800 by Representative John Nicholas, several states, especially in early presidential elections, have utilized the district plan. [FN117] For many years, the district plan's champion was Senator Karl Mundt of South Dakota, who actually gained Senate approval for a modified version of the district plan in 1956. [FN118] Currently, only Maine and Nebraska utilize the district plan. [FN119]

\*734 At first glance, the district plan appears to strike an agreeable balance between federalism concerns and majority rule. The district plan fails, however, to address the problem of a popular vote loser gaining the Presidency. For instance, if the 2000 election were decided under the district plan, Bush's total number of electoral votes would have increased to 288 from 271, giving him a significantly greater electoral vote margin of victory despite the fact that he lost the popular vote by more than 500,000 votes. [FN120] Similarly, the district plan would have resulted in an electoral vote tie between Ford and Carter in 1976, even though Carter defeated Ford by more than 1.7 million popular votes. [FN121] In 1960, the district plan would have dramatically changed the electoral vote outcome and put Nixon in the Oval Office with 280 electoral votes, compared to 252 for Kennedy. [FN122] As noted in Part VI.A.1 below, the Alabama totals and fraud allegations make it virtually impossible to tell who actually won the 1960 popular vote. It is safe to say, however, that using the district plan in 1960 could have easily made the popular vote loser President. Thus, in the eleven most recent presidential elections, the district plan would have awarded the Presidency--on three different occasions--to a candidate who lost the popular vote.

## C. Bonus Plan

The bonus plan, although retaining the main characteristics of the Electoral College, calls for the winner of the nationwide popular vote to receive a bonus two electoral votes for each state and the District of Columbia, resulting in a bonus of 102 electoral \*735 votes. According to historian Arthur Schlesinger, a member of the committee formulating the plan and a former advisor to President Kennedy, the "bonus plan would balance the existing federal bonus--the two electoral votes conferred by the Constitution on each state--and would preserve both the constitutional and practical role of the states in the presidential election process." [FN123] Indeed, the bonus plan would have elected the popular vote winner as President in every election. [FN124] Schlesinger argues that the bonus plan would encourage "parties to maximize their vote in states they have no hope of winning, would stimulate [voter] turnout, reinvigorate state parties, enhance voter equality and contribute to the vitality of federalism." [FN125]

The most persistent drawback of direct election, namely the prospect of a nationwide recount, would also be present under the bonus plan. In a close popular election, the 102-vote bonus would almost always be greater than the margin between two candidates. For instance, Nixon ultimately lost the 1960 election by eighty-four electoral votes, eighteen less than the bonus amount of 102. The possibilities of numerous recounts and legal battles still remain under the bonus plan. According to Schlesinger, electing a President who loses the popular vote results "in an intolerable predicament. It is intolerable because it is undemocratic. And it is intolerable because it imposes a fatal burden on the minority President." [FN126] If the goal of the bonus plan is to ensure that the winner of the popular vote becomes President, direct election appears to be a more sensible alternative to the artificial nature of the bonus plan.

## D. Proportional Plan

The concept underlying the proportional system is simple: electoral votes are awarded in the same proportion as a state's popular vote. Similar to the district system, the proportional plan perpetuates the concept of federalism by preserving the state-by-state allocation of electoral votes. Further, because the \*736 plan allocates a state's electoral votes on the basis of its popular vote percentages, individual electors are abolished.

Advocates of the proportional plan argue that the system lessens the likelihood of electing the loser of the national popular vote. But analyses of past elections suggest otherwise. Under the proportional system, the presidential popular vote loser would have been elected President in 1880, 1896, 1960, and 2000. [FN127] Since the proportional plan also incorporates some of the characteristics of the direct popular election, the proportional plan also potentially weakens the two major parties, encourages faction, and increases the chance of a nationwide recount in close elections. Therefore, the proportional system appears to possess the two least desirable characteristics of both direct popular election and the Electoral College system, namely the possibility of a nationwide recount and election of a popular vote loser.

## VI

### The Case for Direct Election

#### A. Modern Near Misses

One argument commonly advanced in support of the Electoral College is that popular vote losers rarely assume the Presidency. For instance, Senator Peter Fitzgerald argues that "[t]he occasional difference between the electoral and popular vote tallies is a small price to pay for a system that helps preserve national unity and gives small groups significant voices and protections in our presidential contests." [FN128] Indeed, prior to 2000, the last time a popular vote loser prevailed in a presidential election was in 1888. But the threat of such an occurrence is more than just an occasional one. A close examination of the ten elections prior to 2000 reveals three separate incidents in which a popular vote winner nearly failed to obtain an electoral vote majority.

##### 1. The Election of 1960

The 1960 presidential election between John F. Kennedy and Richard M. Nixon resulted in one of the closest popular vote contests in history. Kennedy received 34,220,984 votes compared \*737 to 34,108,157 for Nixon, a margin of less than 0.2%. [FN129] Despite his narrow popular vote victory, Kennedy emerged as the clear electoral vote winner with 303 electoral votes to Nixon's 219. [FN130] Senator Harry Flood Byrd of Virginia received fifteen electoral votes, primarily from unpledged Democratic electors in Mississippi and Alabama. [FN131]

Kennedy's actual popular vote margin was most likely even smaller. Alabama law provided that the names of each party's individual electors appear on the ballot, and each party's slate of electors contained eleven names, the total number of Alabama's electoral votes. [FN132] All Republican electors were pledged to Nixon, and the highest Republican elector received 237,981 votes. This figure provides an unambiguous popular vote total for Nixon in Alabama. [FN133] Prior to the general election, Alabama Democrats held a primary to determine which electors would appear on the November ballot. The result was six unpledged elector candidates, along with five candidates pledged to support the eventual Democratic nominee, who was ultimately Kennedy. [FN134] In the general election, the highest unpledged Democratic elector received 324,050 votes, compared to 318,303 for the highest Kennedy elector. [FN135] These 318,303 votes were included in Kennedy's popular vote total, giving him a nationwide margin of 112,827 votes. This result is misleading because it effectively counts the votes of Alabama's Democratic voters twice, once for Kennedy and once for the unpledged elector slate.

A method developed by Congressional Quarterly provides a more accurate method of tallying the Alabama popular vote. This method starts with the highest number of votes received by a Democratic elector in Alabama, 324,050, and divides it proportionally between unpledged electors, who constituted six-elevenths of the total electors, and Kennedy electors, who made up the remaining five-elevenths. [FN136] The result avoids a double-count of Democratic votes and provides a remarkable outcome. Instead \*738 of the 318,303 votes included in his official Alabama total, Kennedy would have received only 147,295. In turn, this would have resulted in a Nixon national popular vote lead of 51,181 votes. [FN137] Regardless of the Alabama popular vote tally, Kennedy still held a substantial lead in the Electoral College.

In addition to the confusion regarding the popular vote in Alabama, claims of voting irregularities in other states



began to surface. Kennedy carried Illinois by only 8,858 votes, and Republicans speculated that Nixon could reverse the Illinois outcome on fraud grounds and win the state's twenty-seven electoral votes. [FN138] Without Illinois, Kennedy's electoral vote total would have been reduced to 273, and some believed that four Southern electors might desert Kennedy and throw the election into the House of Representatives. [FN139] Despite strong evidence of fraud in both Illinois and Texas, Nixon declined to pursue any vote recounts. [FN140] Even without recounts, several relatively minor vote shifts would have affected the electoral vote outcome in 1960. Shifts of 4,480 votes in Illinois and 4,491 in Missouri would have deprived Kennedy of an electoral vote majority and thrown the election into the House of Representatives. [FN141] Additional shifts of fifty-eight votes in Hawaii, 1,247 in Nevada, and 1,148 in New Mexico would have given Nixon an electoral vote majority and the Presidency. [FN142]

The 1960 election illustrates several key shortcomings of the Electoral College system. As evidenced by Kennedy's thin margin in Illinois and the fraud allegations, the election demonstrates the potential impact of fraud in the Electoral College's winner-take-all system. The election of 1960 also showed that a third-party candidate, with little national support, can deprive a candidate of an Electoral College majority. Also, the potential for a \*739 faithless elector to affect the outcome increases dramatically in a close election. Lastly, considering the results in Illinois and Missouri, the election proves that very minor shifts in the popular vote change the result in the Electoral College. Peirce and Longley also note that, in light of Alabama's electoral system in 1960, accurate national popular vote totals will be difficult to calculate if states are permitted to choose electors in any manner they wish. [FN143]

## 2. The Election of 1968

Following his 1960 presidential defeat and failed California gubernatorial candidacy in 1962, Richard Nixon reemerged as the Republican nominee for President in 1968. Nixon's opponent was Vice President Hubert H. Humphrey, who became the Democratic frontrunner after the assassination of Senator Robert F. Kennedy. For the first time since 1948, a formidable third-party candidate challenged the nominees of the two major parties. George C. Wallace, a former governor of Alabama, ran as the nominee of his own creation, the American Independent Party. Wallace's candidacy, like Strom Thurmond's in 1948, was largely based on a platform of segregation and states' rights. However, unlike Thurmond's, Wallace's appeal extended beyond the South. Wallace supporters placed elector slates pledged to him on the ballots of all fifty states. [FN144] Although Wallace had little chance of capturing the Presidency, his strength in the South and ability to draw votes away from the major party candidates presented a viable threat.

Nixon ultimately beat Humphrey by approximately 500,000 popular votes and received 301 electoral votes. [FN145] Wallace's candidacy undoubtedly affected the final electoral vote outcome. He carried five states in the Deep South and received forty-six electoral votes. [FN146] A total shift of 53,024 votes from Nixon to Humphrey in Missouri, New Hampshire, and New Jersey, would have reduced Nixon's electoral vote total to 269, one less than the 270 required for election. [FN147] Wallace's candidacy would have played an even greater role had Nixon failed to capture an electoral \*740 vote majority. According to Wallace, he would have instructed his electors to cast their votes for Nixon "because we were violently opposed to Mr. Humphrey's philosophy and ideology." [FN148] Wallace also stated that he would have likely asked Nixon to halt enforcement of certain civil rights laws and busing before taking such action. [FN149]

The election of 1968 also reveals several potential problems with the Electoral College system. First, with relatively minor vote shifts in three states, no candidate would have received an electoral vote majority. Wallace's comments after the election show how a third-party candidate with relatively low levels of national support could play the role of kingmaker by shifting the votes of his electors to one candidate or another. In 1968, such a scenario would have undoubtedly caused the eventual winner to make concessions to Wallace. Furthermore, given Wallace's opposition to desegregation, such concessions would have likely undermined many of the civil rights advances of the early 1960s. This possibility would be all but extinguished under a direct election system.

## 3. The Election of 1976

Virtually unknown nationally at the beginning of the 1976 campaign, Jimmy Carter, the former governor of Georgia, emerged from a crowded Democratic field to take on incumbent President Gerald R. Ford. Carter began

the fall campaign with a sizable lead, but found himself in a dead heat with Ford by the beginning of October. [FN150] As the race tightened, both campaigns focused significant attention and resources on the nine largest electoral states, which together held 245 of the 270 electoral votes needed for victory. [FN151] In the end, Carter claimed a popular vote victory of nearly 1.7 million votes, or 2.1% of the votes cast. [FN152] Carter captured 297 electoral votes, compared to 240 for Ford. [FN153] In California, Ford received all of the state's forty-five \*741 electoral votes despite a razor-thin edge in the popular vote. [FN154] Likewise, Carter gained New York's forty-one electoral votes with a similarly small popular vote margin. [FN155]

With slight popular vote shifts in two states, Ford would have garnered a majority of electoral votes despite losing the nationwide popular vote by more than two percent. In Ohio, Carter defeated Ford by only 11,116 votes out of more than four million cast. [FN156] Therefore, a shift of 5,560 votes from Carter to Ford in Ohio would have given the state's twenty-five electoral votes to Ford, reducing Carter's electoral vote total to 272. In addition, a shift of 3,687 votes in Hawaii from Carter to Ford would have given Ford the state's four electoral votes. [FN157] Had Ford overcome Carter's slim margins and prevailed in Ohio and Hawaii, he would have won the 1976 election with 270 electoral votes despite losing the nationwide popular vote by more than 1.7 million votes. [FN158] Further, even if Ford had gained the necessary 5,560 votes to win Ohio, Carter would have had only 272 electoral votes, only two greater than the 270 needed for victory. In such a close election, "two or three individual Democratic electors seeking personal recognition or attention to a pet cause could withhold their electoral votes and thus make the election outcome very uncertain." [FN159]

Like the 1960 election, the election of 1976 demonstrated the potential relationship between fraud and the Electoral College system. Allegations of voting irregularities began to surface in New York, whose forty-one electoral votes were more than enough to elect Ford. [FN160] Although Carter eventually prevailed in New York by 287,767 votes, Republicans sounded calls for a recount \*742 on election night. [FN161] Ford approved an initial effort to secure New York voting booths, but later abandoned any recount hopes as Carter's sizable lead in the national popular vote grew. [FN162] Despite allegations of fraud and other irregularities, Ford also refused to contest election returns in Ohio and Wisconsin. [FN163] The fraud allegations in New York are especially significant because, if true, Carter's margin of 287,767 votes in New York decided the election. In contrast, under a direct popular election system, the outcome would have only been affected if irregularities plagued more than 1.7 million votes, the size of Carter's national popular vote plurality. Further, Ford's credibility and effectiveness would have certainly been compromised had he retained the Presidency despite losing the popular vote by such a large margin.

## B. Federalism Concerns

Supporters of the Electoral College also maintain that the system preserves the concept of federalism that was so important to the framers. Opponents of direct election claim that presidential candidates would focus on states like California, New York, and Texas at the expense of less populous states. They maintain that the Electoral College requires candidates to campaign in nearly every state and address regional issues. [FN164]

This notion that small states would suffer neglect under a direct election plan lacks merit. Common sense dictates that presidential candidates will expend limited amounts of time and effort in states that are dominated by either Republicans or Democrats. For example, neither Bush nor Gore visited Idaho during the 2000 general campaign, an overwhelmingly Republican state with only four electoral votes. [FN165] In similar fashion, Bush made one brief campaign stop in the Republican stronghold of Utah, while Gore bypassed the state entirely. [FN166] Even small swing states received little attention in 2000. In Nevada, a poll taken one week \*743 before the election showed that Bush's lead over Gore was within the poll's margin of error. [FN167] But during the campaign, Bush visited Nevada only once, and Gore stopped in Las Vegas twice. [FN168] These data suggest that direct election would actually encourage presidential candidates to visit states where the popular vote outcome is a foregone conclusion. If every vote for President receives the same weight, candidates would campaign wherever additional votes might be obtained. Under a direct election system, states like Idaho and Utah would actually see more of the presidential candidates than under the Electoral College system.

## C. Nationwide Recount

Critics also maintain that the direct vote alternative is fraught with administrative difficulties. One such difficulty is the potential for a nationwide recount in a close popular vote contest. [FN169] The election of 1960 provided such a scenario. Obtaining a nationwide popular vote figure would have been nearly impossible given Alabama's eccentric method of counting popular votes and the fraud allegations present in other states. With direct election, the nation would have undoubtedly been subject to numerous recounts and legal battles to determine the 1960 popular vote winner.

With technological advances and the possibility of congressional funding for a national voting system, conducting an efficient and timely nationwide recount is far from an impossible task today. Individual states are also currently taking steps to modernize obsolete voting systems. For example, Florida legislators recently approved a bill that eliminates punch-card voting machines and provides new uniform standards for vote recounts. [FN170] Such improvements will certainly make future recounts \*744 faster and more accurate. Furthermore, state election officials are able to complete statewide recounts in a sufficiently expeditious manner. The 2000 U.S. Senate race in Washington state between Slade Gorton and Maria Cantwell illustrates this point. Washington, like Florida, requires a statewide recount when a candidate's margin of victory is less than one-half of one percent. [FN171] Washington officials completed the mandatory recount in twenty-four days, eleven days less than the time needed to resolve the Florida vote controversy. [FN172] The Gorton-Cantwell recount was also prolonged by the fact that Washington absentee ballots need only be postmarked by election day to be valid. [FN173] Assuming that Congress followed most states and required a national recount only when one percentage point or less separated the top two presidential candidates, the 1960, 1968, and 2000 elections would have been subject to recounts. [FN174]

#### D. Other Criticisms

Other critics suggest that utilization of a direct vote plan will encourage multiple candidates and fail to guarantee victory to the candidate with the most support in a multi-candidate presidential race. [FN175] For instance, in a crowded field, a candidate with far less than a majority of the popular vote might become President. One way to alleviate this problem is to utilize a runoff election when no candidate receives a suitable percentage of the popular vote. In 1992, Bill Clinton won the election with only forty-three percent of the popular vote. [FN176] Similarly, both George W. Bush and Al Gore failed to win a majority of the \*745 popular vote in 2000. Given these percentages, a minimum popular vote threshold, such as the Durbin-LaHood forty percent requirement, should satisfy any concerns about a candidate becoming President with substantially less than a popular vote majority.

#### E. Flaws of the Winner-Take-All System

Turning to the weaknesses of the current system, the Electoral College's principal flaw stems from the winner-take-all systems operative in most states. [FN177] Under the winner-take-all system, whichever candidate obtains the highest popular vote total in a state, regardless of his margin of victory, obtains all of the state's electoral votes. For example, despite his minuscule margin of victory in Florida, George W. Bush obtained all twenty-five of Florida's electoral votes, nearly one-tenth of the total needed for victory.

The winner-take-all system allows larger states, like California, New York, and Texas, to disproportionately affect the outcome of presidential elections. California's current number of electoral votes provides approximately twenty percent of the total required to obtain a majority in the Electoral College. Consequently, a vote for President in Los Angeles is, at least strategically, far more valuable than one in a more sparsely populated locale. For instance, a statistical study based on the 1990 census found that the Electoral College gave a voter in California 2.663 times the ability of a Montana voter to decide a presidential election. [FN178] The same study concluded that the Electoral College system resulted in disproportionate voting power for the nine most populous states. [FN179] John F. Banzhaf's oft-cited analysis \*746 of state voting power in the Electoral College reached a similar conclusion:

The existing Electoral College system discriminates against voters in the small and middle-sized states by giving citizens of the large states an excessive amount of voting power. Citizens of states like New York and California have over two and one-half times as much chance to affect the election of the President as residents of some of the smaller states and over three times as much chance as citizens of the District of Columbia. Disparities in voting power of over 200% have been demonstrated and disparities of over 100% are not uncommon. Citizens of 32 states and the District of Columbia have less than average voting power. [FN180]

Thus, the Electoral College undermines the important political value that every citizen should have an equal voice in deciding who assumes the Presidency.

Only a direct election system gives individual votes equal weight. In *Gray v. Sanders*, [FN181] the Supreme Court stated: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing--one person, one vote." [FN182] *Gray* involved a challenge to Georgia's indirect primary system, where candidates for statewide offices were elected by county unit vote rather than direct popular vote. Georgia attempted to analogize its unit voting system to the Electoral College, but the Court dismissed the analogy as "inapposite" and struck down the statute as unconstitutional. [FN183] The Court's only justification for this conclusion was that the text of the Constitution explicitly provides for the Electoral College. Reconciling the Court's holding in *Gray*, which required an equal dispersal of votes among a candidate's constituency, with the winner-take-all system of the Electoral College is difficult at best. Unless mere mention of the Electoral College in the text of the Constitution "exempts all of its various nontextual facets from scrutiny, the Court too quickly dismissed Georgia's \*747 analogy." [FN184]

The disparity in state voting power that results from the Electoral College significantly enhances the possibility that a single state will determine the outcome of an election, regardless of the reliability of its vote results or the methods used to select presidential electors. To witness this effect, one need go no farther than the 2000 presidential election between Bush and Gore. Despite the controversies surrounding inconsistent vote-counting standards, antiquated equipment, and confusing ballots, the results in Florida effectively decided the 2000 presidential election. Only direct election of the President, with each person having one vote, remedies these unequal effects of the winner-take-all system.

#### F. Role of Electors

Another factor supporting direct election of the President is that the role of the presidential elector has changed substantially since 1787. The Constitution's only restriction on the eligibility of electors is that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." [FN185] By entrusting the selection of electors to the state legislatures, the framers undoubtedly believed that, the "wise men of the community" would select the President. [FN186] As early as 1826, however, a Senate committee noted that electors were "usually selected for their devotion to party, their popular manners, and a supposed talent for electioneering." [FN187] Today, the criteria for selecting presidential electors have changed dramatically. The most common traits shared by current electors are service to and financial support of a political party. [FN188] Longley describes today's electors as "little more than a motley state-by-state collection of political hacks and fat cats usually selected because of their past loyalty and support for \*748 their party." [FN189] Noted author James Michener, a Pennsylvania presidential elector in 1968, agreed with Longley's assessment:

In my case I was chosen to be an elector because I had worked hard for my party. I was passed upon by no public hearing, no primary vote, no board of qualifications, no review of my prior public service. My finest credentials were that each year I contributed what money I could to the party. [FN190]

The notion that the nation somehow relies on the special knowledge and expertise of presidential electors in choosing a President is weak at best.

Further, although electors are not bound by the Constitution to vote for a particular candidate, the reality is that electors rarely exercise discretion and almost always vote for their party's nominee. [FN191] Between 1796 and 1988, only nine presidential electors voted for a candidate not supported by their party, and no faithless elector has ever changed the outcome of a presidential election. [FN192] Nevertheless, the danger remains that in a close election, an elector seeking publicity for a particular cause or personal notoriety might switch or withhold his or her vote, causing a popular vote winner to lose or throwing the election into the House of Representatives.

Moreover, due to the limited means of communication present \*749 at the time of the founding, the framers believed that citizens would have limited access to information about candidates from other states. Because the top two vote-getters became President and Vice President, the obvious solution to this problem was to require a voter to vote for two different candidates from different states. This proposition presented the framers with a dilemma. An

individual would undoubtedly have the necessary information about a candidate from his state, but how could a voter in Georgia learn about a presidential candidate from New York in 1787? [\[FN193\]](#) The establishment of the Electoral College was undoubtedly, at least in part, an effort to address this problem. A small number of electors, prominent in government and chosen by the state legislatures, were much more likely to be familiar with the various presidential candidates than the average citizen. The delegates alleviated their fear that electors would blindly support home-state candidates by requiring electors to vote for at least one candidate who was not an inhabitant of their state.

America is today, of course, a markedly different nation than it was in 1787. National broadcast and print media provide extensive coverage of presidential campaigns from start to finish. From the moment a presidential candidate declares his candidacy, his every move, speech, or comment is transmitted to all fifty states and around the world by newspapers and television. The television networks beam presidential debates into millions of homes nationwide. Americans certainly do not lack information about a candidate's views, positions, or personal life. Particular mediums, such as the cable network C-SPAN, provide continuous programming exclusively related to government and politics, including substantial coverage of presidential elections. Current voting trends also suggest that residents of a particular state are unlikely to vote for a candidate solely because he or she is a resident of the voter's home state. Indeed, Al Gore did not carry his home state of Tennessee in 2000, and, ironically, his failure to capture the state's eleven electoral votes cost him the election. [\[FN194\]](#)

#### **\*750 G. Election by the House of Representatives**

Under the Electoral College system, the potential for deadlock exists when no candidate receives a majority of electoral votes. As noted previously, the House of Representatives then elects the President in accordance with the Twelfth Amendment. If no person qualifies for the office of President on inauguration day, then the Vice President-elect, assuming he or she qualifies, assumes the role of acting President. [\[FN195\]](#) When the House is unable to elect a President under the Twelfth Amendment procedure, the Senate is also likely to encounter similar difficulty in selecting a Vice President. The potential for deadlock is exacerbated when both parties control similar numbers of seats in either house of Congress, which is currently the case. If no vice presidential candidate receives a majority of electoral votes, the likelihood of a closely divided Senate giving a majority vote to any one candidate is very slim. Congress recognized this possibility when it enacted the Automatic Succession Act of 1947, which provides the order of succession to the Presidency if no person qualifies for either office. [\[FN196\]](#)

#### **H. Third-Party Presidential Candidates**

In contrast to the current domination of the presidential electoral process by the two major political parties, the framers envisioned presidential elections with numerous candidates. They believed that because an elector would favor a presidential candidate **\*751** from his own state, a single candidate would rarely obtain a majority of the electoral votes cast. Consequently, the framers expected the House of Representatives to decide most elections. Only twice, however, in 1800 and 1824, has a presidential election been thrown into the House. In fact, the only recent election where resort to the House contingent procedure was even a remote possibility occurred in 1968, when George Wallace's candidacy threatened to deprive the major party candidates of an electoral vote majority. [\[FN197\]](#)

But the possibility of a third-party candidate receiving enough electoral votes to throw an election to the House of Representatives today is remote. Despite the recent independent candidacies of Ralph Nader, Ross Perot, and Pat Buchanan, the two major parties have a virtual lock on the presidential election process. [\[FN198\]](#) One substantial factor in this domination is the federal matching campaign funds program, enacted by Congress in 1974 in response to President Nixon's perceived fundraising abuses in the 1972 campaign. [\[FN199\]](#) To qualify for matching funds during the presidential primary, a candidate must raise a minimum of \$5,000 in each of twenty states, and the contributions must also be of **\*752** \$250 or less and from individual donors. [\[FN200\]](#) Candidates who accept matching funds are subject to a spending limit during the primary election. [\[FN201\]](#) The advantage to the two major parties is even greater in the general election, where a party that obtains twenty-five percent or greater of the popular vote in the previous presidential election is considered a "major party" and qualifies for substantial federal matching funds. [\[FN202\]](#) Minor parties qualify for a smaller amount if they garner more than five percent of the popular vote

in the previous election. [\[FN203\]](#)

In light of the two major parties' enormous edge in fundraising, the current system strongly favors Republicans and Democrats. Matching funds provided by the government only enhance the financial gulf between the major parties and smaller parties. In addition to enormous amounts of money, parties seeking matching funds must also have a widespread, national organization. The requirements needed to obtain matching funds are a likely reason why no third-party candidate after the advent of federal matching funds has come even remotely close to depriving a candidate of an electoral vote majority.

As a result of Perot's performance in the 1996 election, the Reform Party qualified for federal matching funds in 2000. Perot's relative success in 1992 and 1996 was in large part self-financed: he contributed millions to both campaigns and limited outside contributions to very small amounts. [\[FN204\]](#) Further, Perot provided the bulk of the resources necessary for the Reform Party to build an organization large and widespread enough to qualify for matching funds. In short, to obtain federal funds for a presidential campaign, a candidate must be the nominee of a major party or be independently wealthy.

Under the current system, the possibility of the House deciding **\*753** an election between multiple presidential candidates is highly unlikely. Consequently, the federal matching funds system, in conjunction with the Electoral College, perpetuates the domination of presidential elections by the two major parties. This notion alleviates, to some extent, concerns that direct election of the President by popular vote will encourage splinter candidacies and promote faction.

## VII

### Legitimacy

Finally, and perhaps most importantly, losing the popular vote seriously threatens a President's legitimacy. Allowing a President to win office despite losing the popular vote is contrary to America's time-honored principles of majoritarian democracy. Akhil Amar predicted in 1995 that "[o]ne day, we will end up with a clear Loser President--clear beyond any quibbles about uncertain ballots. And the question is, will this Loser/Winner be seen as legitimate at home and abroad?" [\[FN205\]](#) Others agree with Amar's assessment. Instances where a popular vote loser prevails in the Electoral College are "fraught with danger. The legitimacy and governability of a president without a popular vote majority is prima facie suspect. A system that does not include direct expression of the voice of the people undermines the principle of a government with the consent of the governed." [\[FN206\]](#) Electing a President who loses the popular vote "undermines respect for the system and compromises the new president's mandate to govern." [\[FN207\]](#)

Indeed, following the Supreme Court decision that effectively handed George W. Bush the 2000 presidential election, questions immediately arose regarding Bush's legitimacy as President. [\[FN208\]](#) Although time will tell just how Bush's precarious electoral vote victory affects his ability to govern, history provides some guide. **\*754** Prior to 2000, three candidates obtained the Presidency despite losing the popular vote: Adams in 1824, Hayes in 1876, and Harrison in 1888. The administrations of these three Presidents were largely unsuccessful. In 1828, Andrew Jackson avenged his prior loss and soundly defeated Adams in both the Electoral College and popular vote. [\[FN209\]](#) By the end of his term, Hayes was so unpopular among members of his own party that he declined to run for reelection. [\[FN210\]](#) Like Jackson before him, Grover Cleveland returned to deny Harrison a second term in 1892. [\[FN211\]](#)

Gerald Ford faced similar problems after assuming the Presidency in 1974. Earlier, Congress confirmed Ford as Nixon's Vice President following the resignation of Nixon's first Vice President, Spiro Agnew. [\[FN212\]](#) Following Nixon's resignation in August 1974, Ford faced the daunting prospect of governing a nation that had neither elected him to the Presidency nor the Vice Presidency. Without the popular mandate a President gains by virtue of winning an election, Ford found little support in Congress for his legislative proposals. In slightly more than two years in office, he vetoed a remarkable sixty-six bills. [\[FN213\]](#) Although Ford's circumstances are somewhat different from those of a popular vote loser who obtains the Presidency, they demonstrate the difficulties faced by a President who is viewed, at least by some, as lacking a popular mandate. The bottom line is that the Electoral College system has

the potential to create a significant crisis with respect to the legitimacy and effectiveness of a President. Implementation of a direct popular vote system in presidential elections is the only way to fully address this concern.

### Conclusion

For more than 200 years, the United States has relied on the Electoral College to select its Presidents. Under this system, four Presidents have assumed office despite losing the popular vote. \*755 On several other occasions, including the elections of 1960, 1968, and 1976, minor vote shifts in key states would have turned popular vote losers into Presidents. These results are contrary to the essence of democracy. Furthermore, as the election of 2000 demonstrated, the Electoral College can create tremendous uncertainty in presidential elections. This uncertainty threatens the legitimacy of the office of the President at home and abroad.

Beyond these concerns, the Electoral College's unit voting method, where some votes receive more weight than others, is simply unfair. Even Alexander M. Bickel, an ardent proponent of the Electoral College, conceded that the current system "was unquestionably intended to serve ends we no longer care to serve, and which it no longer serves. Only in form does it remain what it was invented to be." [FN214] Yet Electoral College supporters continue to assert that it advances the federalism principles that were so important to the framers. On several occasions, however, the nation has seen fit to alter the Constitution when it disagreed with the framers' skeptical views toward popular democracy. The Reconstruction era amendments to the Constitution discarded the framers' views on white supremacy. Similarly, the Seventeenth Amendment took the power to elect United States senators away from state legislatures and provided for direct election of senators by the people. The Nineteenth Amendment gave American women the right to vote, despite the framers' specific prohibitions on women's suffrage. Likewise, regardless of which state he or she calls home, each voter should have an equal voice in selecting our nation's President. Throughout the United States, voters choose governors, senators, and mayors by direct popular election. The result is simple: the candidate who receives the most votes wins. We should elect the President in similar democratic fashion. The time has come for the Electoral College to go.

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[FN1]. David W. Abbot & James P. Levine, Wrong Winner 152 (1991).

[FN2]. Martin Diamond, The Electoral College and the American Idea of Democracy, in *After the People Vote* 44, 44 (Walter Berns ed., 1992).

[FN3]. Byron Dorgan, Electoral College Works Quietly, Just as Founders Intended, *Roll Call*, Jan. 15, 2001, at B35.

[FN4]. Christopher Collier & James Lincoln Collier, *Decision in Philadelphia* 4 (1986).

[FN5]. *Id.*

[FN6]. *Id.*

[FN7]. *Id.* at 32. Significant doubt existed with respect to whether states would even send delegates to Philadelphia. *Id.* Virginia responded first and named George Washington as a member of its delegation. *Id.* at 33. Washington's presence gave the proceedings much-needed legitimacy, and all states except Rhode Island eventually sent

delegations to the Convention. *Id.* at 43-44.

[FN8]. James Madison, *Notes of Debates in the Federal Convention of 1787*, at 23 (1966).

[FN9]. Collier & Collier, *supra* note 4, at 55.

[FN10]. *Id.* at 108.

[FN11]. *Id.* at 95.

[FN12]. Madison, *supra* note 8, at 297.

[FN13]. *Id.* at 354.

[FN14]. *Id.* at 306. At the time of the Convention, all thirteen states had a single executive. Collier & Collier, *supra* note 4, at 219.

[FN15]. Madison, *supra* note 8, at 306.

[FN16]. *Id.*

[FN17]. *Id.*

[FN18]. *Id.* at 307.

[FN19]. *Id.*

[FN20]. *Id.*

[FN21]. *Id.* at 307-09.

[FN22]. *Id.* at 392.

[FN23]. *Id.* at 523.

[FN24]. *Id.* at 523-24.

[FN25]. *Id.* at 525.



[FN26]. *Id.* at 526.

[FN27]. *Id.*

[FN28]. Collier & Collier, *supra* note 4, at 226.

[FN29]. Madison, *supra* note 8, at 569.

[FN30]. *Id.* at 574. In 1947, following Franklin D. Roosevelt's four successive terms as President, the Republican-controlled Congress passed resolutions calling for a constitutional amendment limiting future Presidents to two terms in office. William Peters, *A More Perfect Union 190-91* (1987). By February 1951, the required three-fourths of the states ratified the proposed amendment. See U.S. Const. amend. XXII.

[FN31]. Madison, *supra* note 8, at 574.

[FN32]. *Id.*

[FN33]. *Id.*

[FN34]. *Id.*

[FN35]. *Id.*

[FN36]. *Id.*

[FN37]. *Id.* at 576-77.

[FN38]. *Id.* at 577.

[FN39]. *Id.* at 578.

[FN40]. *Id.* at 582.

[FN41]. *Id.* at 592.

[FN42]. *Id.*

[FN43]. *Id.*

[FN44]. Neal R. Peirce & Lawrence D. Longley, *The People's President* 30 (rev. ed. 1981). Thirty-six years after the Constitutional Convention, Madison described the framers' deliberations regarding selection of the executive:

The difficulty of finding an unexceptionable process for appointing the Executive Organ of a Government such as that of the U.S., was deeply felt by the Convention; and 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 usually prevails in them.

Letter from James Madison to George Hay (Aug. 23, 1823), in 3 *The Records of the Federal Convention of 1787*, at 458, 458 (Max Farrand ed., 1937).

[FN45]. William T. Gossett, *Electing the President: New Hope for an Old Ideal*, 53 *A.B.A. J.* 1103, 1103 (1967).

[FN46]. *Id.*

[FN47]. *Id.*

[FN48]. Madison, *supra* note 8, at 615.

[FN49]. *Id.* at 652.

[FN50]. *Id.* at 659. Only Mason, Edmund Randolph of Virginia, and Elbridge Gerry of Massachusetts refused to sign the final document. *Id.*

[FN51]. See U.S. Const. art. VII.

[FN52]. For criticisms leveled at the Electoral College system during the ratification debate, see Tadahisa Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804* (1994). Delegates in Massachusetts and Georgia sought an increase in the number of presidential electors. *Id.* at 18. Benjamin Gale of Connecticut believed that members of the state legislatures would fail to reach consensus in selecting electors, resulting in a deprivation of popular will. *Id.* Similarly, Virginia delegate and future President James Monroe felt that the system gave too much power to state legislatures at the expense of the people. *Id.* Rawlins Lowndes of South Carolina claimed that governmental deadlock would result if no candidate obtained a majority of electoral votes. *Id.* at 19. In response, Federalists argued that electors were merely extensions of the people, possessed a higher degree of familiarity with the candidates, and were protected from undue influence. *Id.* at 20-21.

[FN53]. *The Federalist* No. 68, at 411-12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN54]. *Id.*

[FN55]. *Id.* at 414.

[FN56]. James Wilson, *Speech to the Pennsylvania Convention* (Dec. 11, 1787), in 1 *The Debate on the Constitution*

832, 849-50 (Bernard Bailyn ed., 1993).

[FN57]. Collier & Collier, *supra* note 4, at 258.

[FN58]. 2 Congressional Quarterly's Guide to the Presidency 1635 (Michael Nelson ed., 2d ed. 1996) [hereinafter Guide to the Presidency].

[FN59]. *Id.*

[FN60]. Peirce & Longley, *supra* note 44, at 35.

[FN61]. 2 Guide to the Presidency, *supra* note 58, at 1636.

[FN62]. *Id.*

[FN63]. Bernard A. Weisberger, *America Afire* 255-56 (2000).

[FN64]. *Id.* at 256.

[FN65]. Lawrence D. Longley & Alan G. Braun, *The Politics of Electoral College Reform* 32 (1972).

[FN66]. Peirce & Longley, *supra* note 44, at 40.

[FN67]. *Id.*

[FN68]. *Id.*

[FN69]. Weisberger, *supra* note 63, at 272.

[FN70]. *Id.*

[FN71]. Longley & Braun, *supra* note 65, at 32.

[FN72]. Weisberger, *supra* note 63, at 275.

[FN73]. Peirce & Longley, *supra* note 44, at 41.

[FN74]. Kuroda, *supra* note 52, at 119-21.

[FN75]. *Id.* at 121.

[FN76]. *Id.*

[FN77]. Peirce & Longley, *supra* note 44, at 43.

[FN78]. *Id.*

[FN79]. Kuroda, *supra* note 52, at 130-31.

[FN80]. *Id.* at 142-43. The Senate vote on the Twelfth Amendment was largely on party lines. Federalists were almost united in opposition to the designation amendment, believing that Republicans advanced the proposal in order to prevent election of a Federalist Vice President. See *id.* at 142. Only one Republican, Peirce Butler of South Carolina, opposed the amendment. *Id.* at 142-43.

[FN81]. *Id.*

[FN82]. *Id.* at 151.

[FN83]. *Id.* at 156-61.

[FN84]. U.S. Const. amend. XII ("The Electors... shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President...").

[FN85]. *Id.* ("The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves..."). Today, the practical effect of this requirement is that a party's candidates for President and Vice President are typically inhabitants of different states. One facet of the 2000 presidential election illustrates the effect of this requirement. George W. Bush easily carried his home state of Texas in the general election. Three Texas residents filed a lawsuit alleging that the Twelfth Amendment prevented Texas electors from voting for both Bush and Dick Cheney, the Republican nominee for Vice President. Sam Attlesey, *Attorney's Suit Questions Validity of Texas' Votes for Bush*, Dallas Morning News, Nov. 19, 2000, at 40A. Shortly after he joined the Republican ticket, Cheney resigned as chief executive officer of a Texas oil company, sold his Texas residence, registered to vote in Wyoming, obtained a Wyoming driver's license, and declared that his home in Jackson Hole, Wyoming was his primary residence. The district court dismissed the suit on standing grounds. Jones v. Bush, 122 F. Supp. 2d 713, 717-18, (N.D. Tex.), *aff'd mem.*, 244 F.3d 134 (5th Cir. 2000), cert. denied, 531 U.S. 1062 (2001). To expedite appellate review, the court also reached the merits of the case and held that Cheney was an inhabitant of Wyoming. *Id.* at 719-20.

In reality, the debate over Cheney's residency status was largely an academic exercise. The Twelfth Amendment examines a candidate's state of inhabitancy at the time presidential electors cast their votes. See U.S. Const. amend. XII. By statute, the Electoral College votes in mid-December. 3 U.S.C. § 7 (1994) ("The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment..."). Cheney was clearly an inhabitant of Wyoming by that time. Even if Texas electors were prohibited from voting for Cheney, the likelihood of the Senate installing anyone other than Bush's choice for Vice President was remote. See James C. Ho, Much Ado About Nothing: Dick Cheney and the

Twelfth Amendment, 5 Tex. Rev. L. & Pol. 227, 239-40 (2000). For an argument in favor of allowing voters to split their tickets between presidential and vice presidential candidates of opposing parties, see Akhil Reed Amar & Vik Amar, President Quayle?, 78 Va. L. Rev. 913 (1992).

[FN86]. Peirce & Longley, *supra* note 44, at 49-50.

[FN87]. *Id.*

[FN88]. *Id.*

[FN89]. *Id.* at 50. The accuracy of these popular vote totals is questionable, however, because six states did not conduct popular elections. See *id.*

[FN90]. *Id.*

[FN91]. *Id.* at 50-51. After taking office, Adams appointed Clay as Secretary of State. Although the evidence is circumstantial, some historians believe that Clay supported Adams in the House election in exchange for the appointment. Compare Joseph M. Rogers, The True Henry Clay 136 (1904) (Adams "frankly offered the position of premier to Clay, who... most unfortunately accepted."), with Glyndon G. Van Deusen, The Life of Henry Clay 187 (1937) ("The whole situation was calculated to arouse suspicion, but there is absolutely no reason to believe that any bargain had been struck...").

[FN92]. Lloyd Robinson, The Stolen Election 134-35 (1968).

[FN93]. *Id.* at 128-29.

[FN94]. *Id.* at 139-51.

[FN95]. *Id.* at 168-73.

[FN96]. *Id.* at 175-204.

[FN97]. Peirce & Longley, *supra* note 44, at 57-58.

[FN98]. *Id.*

[FN99]. The final certified popular vote results showed Gore with 50,996,116 votes and Bush with 50,456,169, a margin of more than 500,000. David Stout, The 43rd President: The Final Tally, N.Y. Times, Dec. 30, 2000, at A11.

[FN100]. *Id.*

[FN101]. Chronology of Events in the Florida Election, Balt. Sun, Dec. 13, 2000, at 25A [hereinafter Florida Chronology].

[FN102]. Fla. Stat. Ann. § 102.141(4) (West 1982 & Supp. 2001).

[FN103]. Florida Chronology, supra note 101, at 25A.

[FN104]. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1240 (Fla.), vacated by 531 U.S. 70 (2000).

[FN105]. Id. In addition to the suits involving recounts, several Palm Beach County residents sought a new election on grounds that the county's ballots violated Florida election law. Fladell v. Palm Beach County Canvassing Bd., 772 So. 2d 1240 (Fla. 2000). Specifically, the plaintiffs alleged that the ballot's confusing "butterfly" design prompted them to cast multiple votes for President or to vote for a candidate other than the one they intended. Id. at 1242. The Florida Supreme Court determined that the Palm Beach County ballot met Florida's statutory requirements and denied relief. Id. A subsequent examination of the Palm Beach County ballots revealed that 5,330 voters invalidated their ballots by voting for Gore and Reform Party candidate Pat Buchanan, whose name appeared directly above Gore's. Joel Engelhardt & Scott McCabe, Over-Votes Cost Gore the Election in Florida, Palm Beach Post, Mar. 11, 2001, at 1A. Another 2,908 voters cast votes for Gore and Socialist Party nominee David McReynolds, the candidate whose name appeared directly below Gore's on the ballot. Id. The examination also showed that 1,631 voters voted for both Bush and Buchanan. Id. Although the entire number of over-votes cannot be attributed to Palm Beach County's ballot design, the butterfly ballot probably cost Gore the number of votes that he needed to overcome Bush's slim margin in Florida.

[FN106]. Florida Chronology, supra note 101, at 25A.

[FN107]. Gore v. Harris, 772 So. 2d 1243, 1262 (Fla.), rev'd, 531 U.S. 98 (2000).

[FN108]. Bush v. Gore, 531 U.S. 1046, 1046 (2000). Following Bush's inauguration, several news organizations reviewed the 10,644 ballots that failed to register a vote for President in Miami-Dade County. Miami Count Suggests Gore Still Falls Short, N.Y. Times, Feb. 27, 2001, at A21. The review found a gain of only forty-nine votes for Gore which, when combined with Gore's gains in the Broward and Palm Beach County recounts, failed to overcome Bush's lead in Florida. Id.

[FN109]. Bush v. Gore, 531 U.S. 98 (2000); see also Dan Balz & Charles Lane, Court Overturns Recounts, Wash. Post, Dec. 13, 2000, at A1.

[FN110]. Edward Walsh & Juliet Eilperin, Gore Presides as Congress Tallies Votes Electing Bush, Wash. Post, Jan. 7, 2001, at A1.

[FN111]. Matthew Vita & Helen Dewar, Congress Debates Election Reform, Wash. Post, Nov. 17, 2000, at A20.

[FN112]. 146 Cong. Rec. S11,619 (daily ed. Dec. 6, 2000) (statement of Sen. Durbin). Durbin renewed his previous

calls for direct popular election of the President following Bush's victory in 2000. Press Release, Senator Dick Durbin, Electoral College Members to Cast Votes Today for President; Durbin Urges Direct Election of President (Dec. 18, 2000), available at <http://www.senate.gov/durbin/PressReleases/001218.htm>.

[FN113]. Both Durbin and LaHood sponsored legislation to replace the Electoral College with direct popular election prior to the 2000 election. See, e.g., S.J. Res. 56, 106th Cong. (2000) (sponsored by Durbin); H.R.J. Res. 23, 106th Cong. (1999) (sponsored by LaHood).

[FN114]. Maggie Haberman, I'd K.O. Electoral College: Senator Hillary, N.Y. Post, Nov. 11, 2000, at 15. Citing the difficulty of passing a constitutional amendment, Clinton later retreated and instead sought "a national conversation about how we elect our president." Interview by Robin Roberts with Senator-elect Hillary Rodham Clinton (Nov. 28, 2000), available at LEXIS, News Library, Allnews File. Clinton also urged Senate leaders to take steps to modernize voting equipment and create uniform standards for counting votes nationwide. Letter from Senator Hillary Rodham Clinton to Senator Pete Domenici & Senator Kent Conrad (Feb. 8, 2001), available at <http://clinton.senate.gov/clinton/news/2001/02/2001208B55.html>.

[FN115]. See, e.g., H.R.J. Res. 1, 107th Cong. (2001) (introduced by Rep. James E. Clyburn); H.R.J. Res. 3, 107th Cong. (2001) (introduced by Rep. Gene Green); H.R.J. Res. 5, 107th Cong. (2001) (introduced by Rep. William Delahunt); H.R.J. Res. 17, 107th Cong. (2001) (introduced by Rep. Eliot L. Engel); H.R.J. Res. 18, 107th Cong. (2001) (introduced by Rep. Eliot L. Engel). During the same period, legislators also introduced bills calling for studies of voting processes nationwide. See, e.g., S. 218, 107th Cong. (2001) (introduced by Sen. Mitch McConnell). Similar activities took place at the state level, where legislators filed over 1,500 bills dealing with election reform following the 2000 election. David S. Broder, Electoral Reform, a Hit Last Fall, Goes Amiss, Wash. Post, Apr. 21, 2001, at A1. In January 2001, former Presidents Ford and Carter agreed to serve as honorary co-chairs of the National Commission on Federal Election Reform. Hill Legislators Propose Study of All Election Procedures, Wash. Post, Jan. 31, 2001, at A7. Some of the commission's final recommendations, released in August 2001, included the adoption of statewide voter registration systems, making election day a national holiday, and allowing felons to vote upon completion of their sentences. Nat'l Comm'n on Electoral Reform, Final Report 6-8 (2001), available at [http://www.reformelections.org/data/news/full\\_report.pdf](http://www.reformelections.org/data/news/full_report.pdf).

[FN116]. See generally Robert M. Hardaway, *The Electoral College and the Constitution* (1994).

[FN117]. Longley & Braun, *supra* note 65, at 57.

[FN118]. *Id.* at 57-58.

[FN119].

The presidential electors at large shall cast their ballots for the presidential and vice-presidential candidates who received the largest number of votes in the State. The presidential electors of each congressional district shall cast their ballots for the presidential and vice-presidential candidates who received the largest number of votes in each respective congressional district.

Me. Rev. Stat. Ann. tit. 21-A, § 805(2) (West 1993).

Each at-large presidential elector shall cast his or her ballot for the presidential and vice-presidential candidates who received the highest number of votes in the state. Each congressional district presidential elector shall cast his or her ballot for the presidential and vice-presidential candidates who received the highest number of votes in his or her congressional district.

Neb. Rev. Stat. § 32-714 (1998).

[FN120]. Rhodes Cook, This Just In: Nixon Beats Kennedy, Wash. Post, Mar. 25, 2001, at B2.

[FN121]. Id.

[FN122]. Id.

[FN123]. Arthur Schlesinger, Jr., Fixing the Electoral College, Wash. Post, Dec. 19, 2000, at A39.

[FN124]. Hardaway, supra note 116, at 150.

[FN125]. Schlesinger, supra note 123, at A39.

[FN126]. Id.

[FN127]. Hardaway, supra note 116, at 146-47.

[FN128]. Peter G. Fitzgerald, Electoral College Doesn't Need Fixing, Chi. Sun-Times, Jan. 6, 2001, at 17.

[FN129]. Lawrence D. Longley & Neal R. Peirce, The Electoral College Primer 2000, at 184-85 (1999).

[FN130]. Id.

[FN131]. 2 Guide to the Presidency, supra note 58, at 1654.

[FN132]. Longley & Peirce, supra note 129, at 49.

[FN133]. Id.

[FN134]. Id.

[FN135]. Id.

[FN136]. Longley & Braun, supra note 65, at 5.

[FN137]. Id.

[FN138]. Longley & Peirce, supra note 129, at 52-53.



[FN139]. *Id.* at 53. One faithless elector sought to effect such a result in 1960. Republican elector Henry Irwin of Oklahoma unsuccessfully attempted to persuade Republican and Southern Democratic electors to desert Nixon and Kennedy and deadlock the Electoral College. Longley & Braun, *supra* note 65, at 6. Irwin ultimately cast his electoral vote for Byrd. *Id.*

[FN140]. Edmund F. Kallina, Jr., *Courthouse Over White House* 96-107 (1988). Nixon believed that recounts would hinder the transfer of power, cause "incalculable and lasting damage" to the country, and set a poor example for democracies around the world. Richard M. Nixon, *Six Crises* 413 (1962).

[FN141]. Longley & Peirce, *supra* note 129, at 56.

[FN142]. *Id.*

[FN143]. *Id.* at 57.

[FN144]. Peirce & Longley, *supra* note 44, at 73-74.

[FN145]. *2 Guide to the Presidency*, *supra* note 58, at 1668.

[FN146]. *Id.* at 1655. Wallace carried Alabama, Arkansas, Georgia, Louisiana, and Mississippi, and also received one vote from a Nixon elector in North Carolina. *Id.*

[FN147]. Peirce & Longley, *supra* note 44, at 77.

[FN148]. *Id.* at 75.

[FN149]. *Id.*

[FN150]. Gerald M. Pomper, *The Presidential Election*, in *The Election of 1976*, at 54, 67 (Marlene M. Pomper ed., 1977).

[FN151]. Peirce & Longley, *supra* note 44, at 81.

[FN152]. Carter received 40,830,763 popular votes; Ford received 39,147,793. *2 Guide to the Presidency*, *supra* note 58, at 1668.

[FN153]. *Id.*

[FN154]. Pomper, *supra* note 150, at 56-59.

[FN155]. Id.

[FN156]. Id.

[FN157]. Id.

[FN158]. This result assumes that the Republican elector who cast his vote for Ronald Reagan in 1976 would have voted for Ford. See 2 Guide to the Presidency, *supra* note 58, at 1634. If the elector persisted in withholding his vote from Ford, reducing his hypothetical electoral vote total to 269, the House of Representatives would have decided the election because no candidate received a majority of electoral votes.

[FN159]. Longley & Peirce, *supra* note 129, at 77-78. Although recognized as a possible outcome, the 2000 election did not witness this phenomenon. Bush received the votes of every Republican elector, giving him 271 electoral votes, one greater than the 270 votes needed for election. Charles Babington, Electors Reassert Their Role, *Wash. Post*, Dec. 19, 2000, at A1.

[FN160]. Longley & Peirce, *supra* note 129, at 71.

[FN161]. Id.

[FN162]. Richard Steele, A Long Goodbye, *Newsweek*, Nov. 15, 1976, at 26.

[FN163]. Gerald R. Ford, A Time to Heal 434-35 (1979).

[FN164]. See, e.g., Mike Simpson, Electoral College Enhances Idaho's Voice, *Idaho Falls Post Reg.*, Nov. 19, 2000, at A9; Dale Wetzel, Electoral College Enhances N.D. Political Standing, Officials Say, *Bismarck Trib.*, Nov. 20, 2000, at 1A.

[FN165]. Simpson, *supra* note 164, at A9. Bush captured sixty-eight percent of the Idaho popular vote, compared to just twenty-eight percent for Gore. Elizabeth Becker et al., The 2000 Elections: State by State, *N.Y. Times*, Nov. 9, 2000, at B17.

[FN166]. Bob Bernick Jr., Utahns Clearly Favor Bush, *Deseret News* (Salt Lake City, Utah), Oct. 17, 2000, at A1. Bush ultimately trounced Gore in Utah by more than forty percentage points. Becker et al., *supra* note 165, at B17.

[FN167]. Jane Ann Morrison, Campaign Trail: Nevada Up for Grabs, *Las Vegas Rev.-J.*, Oct. 31, 2000, at 1A.

[FN168]. Id. The final margin separating Bush and Gore in Nevada was slightly more than 20,000 votes. Becker et al., *supra* note 165, at B17.

[FN169]. See Judith Best, The Case Against Direct Election of the President: A Defense of the Electoral College

193-94 (1975).

[FN170]. Dana Canedy, Florida Leaders Sign Agreement for Overhaul of Election System, N.Y. Times, May 4, 2001, at A1. Florida Governor Jeb Bush signified his intention to sign the bill, which also provides funds to modernize voting equipment statewide. Id.

[FN171]. Wash. Rev. Code Ann. § 29.64.015(1) (West 1993 & Supp. 2001).

[FN172]. Kathleen Best, Cantwell Gets a Victory, Seattle Post-Intelligencer, Dec. 2, 2000, at A1.

[FN173]. Wash. Rev. Code Ann. § 29.36.045 (West 1993).

[FN174]. See, e.g., Colo. Rev. Stat. § 1-10.5-101(1) (2000); Del. Code Ann. tit. 15, § 5702(c) (1999); Fla. Stat. Ann. § 102.141(4) (West Supp. 2001); Ga. Code Ann. § 21-2-495(c) (Harrison 1998); Idaho Code § 34-2309 (Michie 1995); Ind. Code Ann. § 3-12-11-10(b)(2) (Michie Supp. 2000); Iowa Code Ann. § 50.48(2) (West 1999); Mass. Ann. Laws ch. 54, § 135 (Law. Co-op. Supp. 2001); Mo. Ann. Stat. § 115.601(1) (West Supp. 2001); Neb. Rev. Stat. § 32-1119(1) (1998); N.C. Gen. Stat. § 163-192.1(b) (1999); N.D. Cent. Code § 16.1-16-01(1)(b) (Supp. 1999); Ohio Rev. Code Ann. § 3515.011 (Anderson 1996 & Supp. 2000); Or. Rev. Stat. § 258.280(1)(b) (1999); S.D. Codified Laws § 12-21-15 (Michie 1995); Va. Code Ann. § 24.2-800(B) (Michie 2000); Wash. Rev. Code Ann. § 29.64.015(1) (West Supp. 2001).

[FN175]. Hardaway, supra note 116, at 152-53.

[FN176]. 2 Guide to the Presidency, supra note 58, at 1669.

[FN177]. For a description of the winner-take-all system and its practical effects, see Matthew M. Hoffman, The Illegitimate President: Minority Vote Dilution and the Electoral College, 105 Yale L.J. 935, 942-49 (1996).

[FN178]. Longley & Peirce, supra note 129, at 149-54.

[FN179]. Id. at 153. Invoking the Supreme Court's original jurisdiction in cases involving two or more states, Delaware and twelve other states sued New York and the thirty-six remaining states on grounds that the Electoral College's unit voting scheme deprived small states of an equal voice in presidential elections. Richard Claude, The Supreme Court and the Electoral Process 243-46 (1970). The Supreme Court declined to hear the case. Delaware v. New York, 385 U.S. 895 (1966). Subsequent suits challenging the Electoral College's unit voting method have also been unsuccessful. See, e.g., Hitson v. Baggett, 446 F. Supp. 674 (M.D. Ala. 1978); Williams v. Va. State Bd. of Elections, 288 F. Supp. 622 (E.D. Va. 1968), aff'd mem., 393 U.S. 320 (1969); Penton v. Humphrey, 264 F. Supp. 250 (S.D. Miss. 1967); Lowe v. Treen, 393 So. 2d 459 (La. Ct. App. 1980); see also Graham v. Fong Eu, 403 F. Supp. 37 (N.D. Cal. 1975) (challenging California Republican presidential primary's winner-take-all system).

[FN180]. John F. Banzhaf III, One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College, 13 Vill. L. Rev. 304, 324-25 (1968).

[FN181]. 372 U.S. 368 (1963).

[FN182]. Id. at 381.

[FN183]. Id. at 378.

[FN184]. Michael J. O'Sullivan, Note, Artificial Unit Voting and the Electoral College, 65 S. Cal. L. Rev. 2421, 2436 (1992).

[FN185]. U.S. Const. art. II, § 1, cl. 2.

[FN186]. Gossett, *supra* note 45, at 1103.

[FN187]. S. Rep. No. 19-22, at 4 (1826), quoted in Peirce & Longley, *supra* note 44, at 92.

[FN188]. This Comment does not suggest that current electors are in any way unqualified to select a President. Rather, it merely attempts to point out the inconsistencies between the factors used to select current electors and the role of the elector envisioned by the framers.

[FN189]. Lawrence D. Longley, The Electoral College Should Be Abolished, in Controversial Issues in Presidential Selection 200, 204 (Gary L. Rose ed., 2d ed. 1994).

[FN190]. James A. Michener, Presidential Lottery 9 (1969).

[FN191]. A number of states have enacted statutes that require presidential electors to cast their votes for the presidential and vice presidential candidates of the party that nominated them. See, e.g., Alaska Stat. § 15.30.090 (Michie 2000); Cal. Elec. Code § 6906 (West 1996); Colo. Rev. Stat. § 1-4-304(5) (2000); Conn. Gen. Stat. Ann. § 9-176 (West 1989); Md. Ann. Code art. 33, § 8-505(c) (Supp. 2000); Okla. Stat. Ann. tit. 26, § 10- 102 (West 1997); Or. Rev. Stat. § 248.355 (1999); Tenn. Code Ann. § 2-15- 104(c)(1) (1994). The Oklahoma statute requires electors to vote for his party's presidential and vice presidential candidates, and subjects "faithless" electors to misdemeanor charges and a \$1,000 fine. Okla. Stat. Ann. tit. 26, § 10-109 (West 1997). Significant doubt exists regarding the constitutionality of these statutory provisions. According to Peirce and Longley, "[t]he preponderance of legal opinion seems to be that statutes binding electors, or pledges that they may give, are unenforceable." Peirce & Longley, *supra* note 44, at 100; see also Note, State Power to Bind Presidential Electors, 65 Colum. L. Rev. 696, 700-04 (1965).

[FN192]. 2 Guide to the Presidency, *supra* note 58, at 1634. In light of Bush's popular vote loss and the controversy in Florida, some Republican electors faced pressure to cast their votes for Gore. See Wanted: Three Electors, Nation, Dec. 25, 2000, at 3. These attempts were unsuccessful. In fact, the only "nonconformist elector" was a Gore elector who withheld her vote in protest over the District of Columbia's lack of representation in Congress. Babington, *supra* note 159, at A1.

[FN193]. Senator Durbin recognized this concern. See 147 Cong. Rec. S24 (daily ed. Jan. 4, 2001) (statement of Sen. Durbin).

[FN194]. Claudia Kolker & Mark Z. Barabak, *The Presidential Transition: Electoral College Endorses Bush*, L.A. Times, Dec. 19, 2000, at A22.

[FN195]. U.S. Const. amend. XX, § 3.

[FN196]. If no person qualifies as President or Vice President, the Presidency first goes to the Speaker of the House, then to the President pro tempore of the U.S. Senate, and then to various cabinet officers. 3 U.S.C. § 19(a)-(d) (1994). Longley and Peirce illustrate the pitfalls of the contingent election procedure using a hypothetical presidential election between Bush, Gore, and Colin Powell. Although Gore and Bush received a substantially greater number of popular and electoral votes than Powell, Powell captured enough electoral votes to throw the election into the House of Representatives. Longley & Peirce, *supra* note 129, at 1-11. Despite intense political maneuvering, Bush and Gore both failed to gain the support of a majority of the state delegations. *Id.* at 12-13. The Senate, split equally between Republicans and Democrats, also failed to elect a Vice President. *Id.* at 13-14. Thus, no President or Vice President qualified for office on inauguration day, and Speaker of the House J. Dennis Hastert became acting President. *Id.* at 14-16. Several members of Congress questioned the constitutionality of the Automatic Succession Act at the time of its enactment. William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones"*, 75 *Geo. L.J.* 1389, 1424- 26 (1987); see also Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 *Stan. L. Rev.* 113 (1995).

[FN197]. Prior to 1968, the only third-party presidential candidate to receive a substantial number of electoral votes was former South Carolina Governor Strom Thurmond. As the States' Rights Party candidate in 1948, Thurmond enjoyed significant support in the South and nearly deprived the eventual winner, Harry S. Truman, of an electoral vote majority. The bulk of Thurmond's support came from southern voters opposed to racial integration, and he carried Alabama, Louisiana, Mississippi, and South Carolina. 2 *Guide to the Presidency*, *supra* note 58, at 1653. Despite winning only 2.4% of the national popular vote, Thurmond received thirty-nine electoral votes, nearly ten percent of the total. Peirce & Longley, *supra* note 44, at 61. Henry Wallace, the Progressive Party candidate, received a popular vote total similar to Thurmond's, but failed to obtain a single electoral vote. *Id.* Although the final tally showed Truman with 114 more electoral votes than runner-up Thomas E. Dewey, a shift of only 12,487 votes in California and Ohio would have denied Truman an electoral vote majority. *Id.* at 62. At the age of ninety-nine, Thurmond is currently the oldest and longest-serving member of the U.S. Senate. Kevin Merida, *The Seniority of Strom Thurmond*, *Wash. Post*, Apr. 26, 2001, at A1.

[FN198]. Significant opportunity still remains for a third-party candidate to affect the outcome in a close presidential election. In 2000, assuming that a substantial number of Green Party candidate Ralph Nader's supporters in Florida and New Hampshire would have voted for Gore, Nader's third-party candidacy quite possibly cost Gore the election. Bush's margin of victory over Gore in each state was substantially less than Nader's vote totals of 97,419 in Florida and 22,156 in New Hampshire. William Schneider, *Florida Saved the Electoral College*, 33 *Nat'l J.* 450 (2001).

[FN199]. For a general overview of the presidential matching funds program, see Fed. Election Comm'n, *The Presidential Public Funding Program* (1993), available at <http://www.fec.gov/info/pfund.htm>.

[FN200]. 26 U.S.C. § 9033(b) (1994).

[FN201]. *Id.* In the 2000 election, the primary spending limit was approximately \$40,000,000. John Mintz & Ruth Marcus, *Bush's Costly Victory Erases His Funding Edge*, *Wash. Post*, Mar. 9, 2000, at A1. To avoid the limit, Bush chose to forego federal matching funds in the primary election. *Id.*

[FN202]. 26 U.S.C. § 9004(a)(1) (1994). As the major party nominees, both Al Gore and George Bush each received \$67,560,000 in federal funds for the general election campaign. Press Release, Fed. Election Comm'n, FEC Announces 2000 Presidential Spending Limits (Mar. 1, 2000), available at <http://www.fec.gov/press/preslimits2000.html>.

[FN203]. 26 U.S.C. § 9004(a)(2)-(3) (1994).

[FN204]. Perot received 18.9% of the popular vote in 1992 and 8.4% in 1996, but did not garner a single electoral vote in either election. Longley & Peirce, *supra* note 129, at 186-87.

[FN205]. Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, 12 *Const. Comment.* 143, 145 (1995).

[FN206]. Mark A. Siegel, *It's Time to Reform Electoral College Before Next Crisis*, Roll Call, Jan. 15, 2001, at B34.

[FN207]. 147 Cong. Rec. E65 (daily ed. Jan. 30, 2001) (statement of Rep. Delahunt).

[FN208]. See Malcolm J. Gross, *President Bush Can Gain Legitimacy if He Acts to Abolish Electoral College*, Morning Call (Allentown, Pa.), Jan. 22, 2001, at A13. But see Dave Boyer, *Democrats Hit Bush's First 100 Days in Office*, Wash. Times, Apr. 27, 2001, at A4 (noting Bush's sixty-three percent approval rating three months after taking office).

[FN209]. The final vote tally showed Jackson with 642,553 popular votes and 178 electoral votes, compared to 500,897 and eighty-three for Adams. 2 *Guide to the Presidency*, *supra* note 58, at 1667.

[FN210]. Robinson, *supra* note 92, at 213-20.

[FN211]. Cleveland received 5,551,883 popular votes and 277 electoral votes, while Harrison received 5,179,244 and 145, respectively. 2 *Guide to the Presidency*, *supra* note 58, at 1668.

[FN212]. See U.S. Const. amend. XXV, § 2 ("Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.").

[FN213]. Abbot & Levine, *supra* note 1, at 45.

[FN214]. Alexander M. Bickel, *Reform and Continuity: The Electoral College, the Convention, and the Party System* 4 (1971).