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Comment

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THE ELECTORAL COLLEGE has digressed widely by custom and usage from what was perhaps the cardinal purpose of its genesis: the independent election of a President by electors.[1] It is but an empty shell in the constitutional fabric of our government.[2] Therefore, a fundamental desire for legal correctness, especially among members of the bar, might well compel us as a nation to make some obviously necessary changes.

This assumption, however, does not justify discounting as frivolous the fact that there are in existence definite opposing forces, *e.g.*, the element of resistance to discarding what is in reality a tradition, albeit based to a certain extent on superficial reasoning, and a somewhat hypercritical view of constitutional values. Nor does the assumed need for a change justify ignoring other arguments. One such argument is that the present system, with all of its mere honorary formalities of certifying the votes of electors, at least affords a state unit or geographical system of voting that could well contribute more to a balanced government,[3] in the long run, than the other extreme of direct election of President and Vice President irrespective of state or geographical considerations.

While not criticizing unduly the able and informative work that has been done in Mr. Banzhaf's article, *One Man, 3.312 Votes: A*

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1. Article II, section 1 of the Constitution of the United States, prior to being amended by the twelfth amendment, required electors to vote by ballot for two persons, and provided that "The Person having the greatest Number of Votes shall be President, if such Number be a Majority. . . ." The selection of a President was intended to be removed from the complete control of the people by means of a double election. At one point in the Constitutional Convention, consideration was given to allowing Congress to select the President. *See* the remarks of Mr. Wilson at the Pennsylvania Convention, 2 J. ELLIOT, THE DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 511 (1859). The Electoral College once agreed on, however, seems to have been accepted with complacency and was referred to at times as the mode of appointment of the chief magistrate of the United States. *See, e.g.*, THE FEDERALIST No. 67 (Hamilton).

2. The presidential electors have become a mere cog-wheel in the machine; a mere contrivance for giving effect to the decision of the people. Their personal qualifications are a matter of indifference. They have no discretion, but are chosen under a pledge — a pledge of honour merely, but a pledge which has never (since 1796) been violated — to vote for a particular candidate. In choosing them the people virtually choose the President, and thus the very thing which the men of 1787 sought to prevent has happened — the President is chosen by popular vote. 1 J. BRYCE, THE AMERICAN COMMONWEALTH 41 (1893).

3. In addition to the geographic protection afforded by the Electoral College, both article II, section 1 of the Constitution and the twelfth amendment contain the language that when the House of Representatives must select a President "the Votes shall be taken by States, the Representation from each State having one Vote. . . ." Protection of small states from the overwhelming power of larger states is a traditional norm of balance in our form of government.

Mathematical Analysis of the Electoral College, it might be observed that the term "relative voting power" computed mathematically or otherwise is indeed a relative term. Under the present system it may be relative to whether the state is to be carried successfully by the voter's party. Under direct elections, while each vote is equal, the percentage value of a vote could relate to light or heavy voting. This in turn may relate to concentrations in presidential campaigns which would normally favor large states and densely populated areas. It might also be observed that the true and balanced constitutional values to be sought may not lie in attempting to assure an exactly equal value to the last mathematical degree of each and every vote for President and Vice President. On the contrary, we should consider broad and long term values. I feel that we should discard the "winner take all" unit-voting system[4] and abolish the positions of electors.[5] At the same time, we should maintain voting balance in keeping with the spirit of other balances provided in the Constitution and intended by our founding fathers in the provision in article II, section 1 of the Constitution that each state shall be entitled to a number of electoral votes "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[6] This principle of representative government was not changed by the twelfth amendment ratified in 1804, and as recently as 1961 it was affirmatively recognized and approved in the ratification of the twenty-third amendment, which gave the District of Columbia a voice, not to exceed that of the least populous state, in the election of the President and Vice President.[7]

The general arguments for popular election of the President and Vice President could be met by providing that the electoral votes of a state, which are subject to change by the census,[8] should not be cast as a unit, but on the basis of a direct percentage relation to the actual votes

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4. All of the electoral votes of a state by custom or statute are cast for the candidate who carries the state irrespective of the margin of victory. The Supreme Court has refused to hear a petition challenging this practice. Delaware v. New York, 385 U.S. 895 (1966).

5. This proposal would repeal the second paragraph of article II, section 1 of the Constitution which reads "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . ." It would repeal also all references to electors in the twelfth amendment.

6. However, the provision in article II, section 1, giving each state an electoral vote "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress," would be retained.

7. The District of Columbia has been allowed 3 electoral votes, which as of 1964 was the same number as those of Alaska, Delaware, Nevada, Vermont, and Wyoming.

8. Article I, section 2 of the Constitution assures each state of at least one Representative in the House of Representatives and requires an enumeration of the House every ten years. Section 2 of the fourteenth amendment clarifies the apportionment-by-population language of article I. As the number of Representatives from a state changes, the number of electoral votes changes.

cast for the respective candidates. In this manner each voter would know that his vote would be counted in favor of the candidate of his choice regardless of whether or not his state was carried by that candidate or by the political party which he represented.[9]

I have supported proposals of this nature in both the House of Representatives and the Senate, including the Lodge-Gossett proposal which received the necessary two-thirds vote of the Senate in 1950.[10] In both the 89th and 90th Congresses I have introduced joint resolutions which would amend the Constitution to this extent.[11]

Proportionate division of the electoral vote according to the popular vote in each state would require candidates to give attention to the issues of interest to citizens in all areas of the country. Likewise, it would broaden the eligibility of candidates who are not from the majority party of a large state,[12] and would eliminate the neglect of smaller states that are inclined to favor one party consistently.

The "one man, one vote" theory expounded by the Supreme Court as a means of enforcing state reapportionment, including congressional districts,[13] has no true procedural applicability in the instant matter,

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9. If a candidate for President received 60% of the votes cast in a state with 10 electoral votes, then by automatic certification that candidate would receive 6 electoral votes. The remaining 4 electoral votes would be cast for his opponent or opponents. This would obviate in the main the possibility of a President being elected with a smaller popular vote than the candidate who was defeated, which was the case with Presidents Adams, Hayes and Harrison.

10. 96 CONG. REC. 1278 (1950). See for a summary of S.J. Res. 2, 81st Cong., 2d Sess., 96 CONG. REC. APPENDIX 1112 (1950). For an explanation of this resolution, as reported by the Judiciary Committee of the House, see remarks of Mr. Gossett, in 96 CONG. REC. 10414–27 (1950). However, the resolution failed to pass because the House voted not to suspend the rules, and adopt the joint resolution. 96 CONG. REC. 10428 (1950).

11. S.J. Res. 138, 89th Cong., 2d Sess. (introduced February 24, 1966, for myself and Senators Dodd and Saltonstall); S.J. Res. 84, 90th Cong., 1st Sess. (introduced May 14, 1967, for myself and Senators Dodd and Ervin). These resolutions would abolish the positions of electors, provide for proportional casting of a state's electoral votes as based on the popular vote, and would abolish the one vote per state system of selection of a President by the House of Representatives, substituting in lieu thereof selection by a constitutional majority at a joint session of the House and the Senate in the event the election is referred to the Congress.

12. A strong but still a minority vote in any state would enter into political considerations regarding nominations. Without the electoral vote, however, direct elections might cause concentration on heavily populated areas to the neglect of small states. *Cf.* records of Virginia, New York and Ohio in producing Presidents. Virginia led the nation in electoral votes for many years, *e.g.*, 22 electoral votes in 1800. Seven of its eight Presidents were elected prior to 1849 (several of whom of course were among our founding fathers). New York took the lead in 1830 with 40 electoral votes and Van Buren was nominated and elected in 1836. Three other Presidents have come from New York. Ohio went to 21 electoral votes in 1840 and since 1867 has produced seven Presidents.

13. This line of cases began with Baker v. Carr, 369 U.S. 186 (1962), and was subsequently explicated in Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); and Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964). *See also* Lucas v. Forty-fourth Gen. Assembly of Colo., 377 U.S. 713 (1964).

which deals fundamentally with changing the Constitution itself. For example, the Senate of the United States ipso facto contravenes that theory by its numerical membership,[14] while at the same time remaining a bastion of protection for our balanced and well-tested form of government.

Proportionate division of electoral votes according to the popular vote in each state would improve and make more meaningful our system of presidential elections and at the same time would maintain a balance in government which we must preserve.

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14. *Compare* the seventeenth amendment which requires popular election of two Senators from each state (irrespective of population) *with* the "one man, one vote" theory. Originally article I, section 3 of the Constitution provided that two Senators from each state shall be "chosen by the Legislature thereof."