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SOME DOUBTS CONCERNING THE PROPOSAL TO
ELECT THE PRESIDENT BY DIRECT
POPULAR VOTE

ALBERT J. ROSENTHAL†

WITH THE GROWING INTEREST IN, and support for, proposals to change the method of electing the President of the United States,¹ the recent Symposium on the subject in the *Villanova Law Review*² is particularly timely. Equally welcome is the invitation for additional commentary on the subject.

The faults in the existing method of choosing our Presidents are well known. The current drive to replace it with direct nationwide popular election has obvious appeal — so obvious in fact that it has garnered much uncritical support. Concentration upon the defects in the present system, however, may have diverted attention from possible shortcomings in the substitute proposed. The purpose of this Comment is to point out some of them.

Although the provision for choice of the President was one of the few parts of the proposed Constitution to escape widespread criticism in the ratification debate,³ it has been a source of almost continuous dissatisfaction and controversy ever since and has probably generated more proposed amendments than any other provision of the Constitution. Despite the attention long focused on the subject, however, analysis had been hampered by the inability of observers to explain a notable paradox: when the electoral vote of a State was divided by its population, a single voter in a small State was represented by a larger fraction of an elector than one in a large State; yet politicians and amateurs alike knew that somehow the influence of each large-State voter was greater than that of his counterpart in a small State.

The superb mathematical analysis presented by Mr. John Banzhaf⁴ disposes of this problem by demonstrating how and why the large-State

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1. See, e.g., N. PEIRCE, *THE PEOPLE'S PRESIDENT* (1968); COMMISSION ON ELECTORAL COLLEGE REFORM, *AMERICAN BAR ASS'N, ELECTING THE PRESIDENT* (1967), reprinted in 53 A.B.A.J. 219; COMMITTEE ON FEDERAL LEGISLATION, *BAR ASS'N OF THE CITY OF N.Y., PROPOSED CONSTITUTIONAL AMENDMENT PROVIDING FOR DIRECT ELECTION OF PRESIDENT AND VICE PRESIDENT* (1967).

2. *Reflections on the Electoral College*, 13 VILL. L. REV. 303 (1968).

3. THE FEDERALIST No. 68, at 457 (J. Cooke ed. 1961) (Hamilton): "The mode of appointment of the chief magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents . . ."

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

voter does in fact exert a disproportionately large influence on the final result. His contribution constitutes a major breakthrough and should clear the way toward a better understanding of the entire problem and a rational basis for its solution.

In addition to delineating the degree of advantage accorded the large-State voter by the present system, Mr. Banzhaf demonstrates the even greater disparities in favor of small-State voters which would follow adoption of either the proportional system⁵ or the district plan⁶ which were urged upon Congress during the last two decades and are still advocated by Senators Sparkman⁷ and Mundt⁸ respectively in their contributions to this Symposium. I do not understand Mr. Banzhaf, however, to be asserting that it is necessary that we adopt the one device which would ensure that the principle of "one man, one vote" would be applied in presidential elections — the nationwide direct popular vote. Senator Bayh⁹ and Mr. Peirce,¹⁰ however, do draw this conclusion from his study. It is this conclusion, and not Mr. Banzhaf's analysis, that I feel impelled to question.

It is hard to quarrel with the view that equal influence among all voters in the nation is a desirable goal. If we regard the method of electing the President in isolation, the case for a direct nationwide popular vote would be strong indeed. But despite the tremendous importance of the Presidency in our total political life, it is not the only significant force. In 1956, when a freshman Senator named John F. Kennedy scored brilliantly in opposing suggested constitutional amendments to substitute the proportionate or the district systems for the present electoral college method, he was able to point to the many countervailing disadvantages imposed upon the voters in the large cities and the large States.¹¹ As Mr. Peirce points out, some of these factors have been removed;¹² the Supreme Court has since outlawed malapportionment in State legislatures¹³ and unfair districting of congressional delegations.¹⁴ He concludes that one can no longer justify favoring one group of voters in the election of the President in order

5. *Id.* at 318-19, 330.

6. *Id.* at 320-21, 331.

7. Sparkman, *Reflections on the Electoral College — Comment*, 13 VILL. L. REV. 338 (1968).

8. Mundt, *Reflections on the Electoral College — Comment*, 13 VILL. L. REV. 336 (1968).

9. Bayh, *Reflections on the Electoral College — Comment*, 13 VILL. L. REV. 333 (1968).

10. Peirce, *Reflections on the Electoral College — Comment*, 13 VILL. L. REV. 342 (1968). See also N. PEIRCE, *supra* note 1, *passim*.

11. 102 CONG. REC. 5150 (1956).

12. Peirce, *supra* note 10, at 344 n.4.

13. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

14. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

to balance its disadvantages in electing other officials.¹⁵ But even if some of these inequalities have been removed, many others remain.

First of all, it is not yet clear that the legislative reapportionment decisions are going to stick. Powerful political forces have come within a hair's breadth of getting the Senate to propose an amendment overturning *Reynolds v. Sims*,¹⁶ at least in part. Despite the defeat, thus far, of this effort in the Senate the same goal is now being attempted through an effort to convoke a new constitutional convention.¹⁷ Similarly, the Supreme Court's decision in *Wesberry v. Sanders*¹⁸ requiring approximately equal congressional districts within a State has been sought to be stalled through congressional action.¹⁹ Certainly, if urban interests are to surrender their advantages in exchange for the release by rural districts of the edge they have had for so many years, they may rightly insist that the other half of the bargain be honored.

Moreover, even if we assume that these changes are permanent, there remains a number of other political handicaps imposed upon the large States. Most obvious is the rule of "one state, two votes" in the Senate, which is frozen into the Constitution beyond the reach even of the amendment process.²⁰ There is no need to append to this Comment a table comparable to those of Mr. Banzhaf, illustrating the fact that a voter in Alaska has 74 times as much influence in the Senate as a voter in New York — a degree of inequality many times as great as the advantage conferred upon the New Yorker in the election of the President.²¹

Often overlooked is the further discrimination against the larger States in the very process of amending the Constitution. Under the normal method, three agencies participate — the House of Representatives, the Senate, and the State legislatures.²² As to the last two of these, New York and Alaska have precisely the same influence.

15. Peirce, *supra* note 10, at 344-45.

16. 377 U.S. 533 (1964).

17. See Swisher & Nelson, *In Convention Assembled*, 13 VILL. L. REV. 711 (1968); *Symposium on the Article V Convention Process*, 66 MICH. L. REV. 837 (1968).

18. 376 U.S. 1 (1964).

19. See H.R. 5505, 89th Cong., 1st Sess. (1965); H.R. 2508, 90th Cong., 1st Sess. (1967); N.Y. Times, Apr. 28, 1967, at 27, col. 4.

20. Article V of the United States Constitution provides in part: "[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

21. While issues in American politics rarely are polarized along large-State versus small-State lines, the disproportionate strength accorded in the Senate to the interests of the small States may on occasion be reflected in an ultimate decision of that body. For example, support for the fair housing provision of the Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601-19, 3631 (Supp. 1968), was somewhat, if not dramatically, stronger in the larger States than in the nation as a whole. As a consequence, in the first three attempts to secure cloture in the Senate, fewer than two-thirds of the Senators voting supported cloture; yet cloture was supported by Senators representing over two-thirds of the population.

22. U.S. CONSR. art. V.

There seems, therefore, no need for those whose influence in the election of the President may be slightly augmented by the present system to apologize for their reluctance to surrender this advantage, in the light of the overwhelming disadvantages the same voters have in so many other facets of the political process.

More important than considerations of theoretical allocation of political power are the practical aspects of what is proposed. Mr. Peirce rightly points out that apologists for the present system are desirous of preserving such political strength as urban and Negro interests may be able to exert in the selection of the President.²³ But surely these are influences which ought to be strengthened, rather than weakened, in the present critical period. In theory, of course, big cities need not necessarily be in big States, and Negroes need not necessarily be concentrated in either. But seven of our eight largest cities²⁴ are in the seven States which have the largest electoral vote and which have the largest percentage of "excess voting power" in Mr. Banzhaf's analysis.²⁵ And the large and increasing concentration of Negroes in urban centers is common knowledge.²⁶ We should not deceive ourselves into ignoring the fact that a reduction of the voting strength of the large States will mean a loss of political strength of urban and Negro voters.

There is some reason to believe that the present plight of the cities may be traced to the long-continued dominance of State legislatures and Congress by rural interests. What is more important, however, is that the cities need help now, financial help above all, but other kinds of assistance as well, and that the federal government is far and away the most effective possible source of such help. Similarly, the partly related matter of improving the plight of the Negro — economically, educationally, socially, psychologically — cries out for massive federal action.²⁷ Together, these twin and intertwined problems represent by far the most serious domestic threat to the nation today, probably the most serious in a century. To the extent that presidential leadership

23. Peirce, *supra* note 10, at 344.

24. 1960 census figures rank New York, Chicago, Los Angeles, Philadelphia, Detroit, Baltimore, Houston and Cleveland, in that order. STATISTICAL ABSTRACT OF THE UNITED STATES 12-13 (86th ed. 1965). All but Baltimore are in the seven largest States. *Id.* at 19-20.

25. Banzhaf, *supra* note 4, at 329.

26. Over two-thirds of the Nation's Negroes outside of the South are concentrated in our 12 largest cities. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 118 (1968).

27. The principal burden for funding the programs we have proposed will fall upon the Federal Government. Caught between an inadequate and shrinking tax base and accelerating demands for public expenditures, the cities are not able to generate sufficient financing. Although there is much more that state government can and should do, the taxing resources available at this level are far from adequate.

Id., at 251.

can influence the speed and dimensions of the response of the federal government to these problems, can we afford to diminish the likelihood that our Presidents will be committed to those objectives? Is the federal government even now doing a fraction of what it should? Should the balance of power be altered in a direction likely to cause it to do even less?

A change in the method of electing the President involves much more than the possibility of turning the losing candidate into the winner and vice versa. The mathematics of the election process must inevitably be highly influential in the selection of nominees. If it is true that urban interests may cast the decisive vote under the present method, consideration of their preferences may affect the choice of the party conventions.

Moreover, once elected, a President who hopes for reelection (or who, if not running, hopes that his successor will be a member of his own party) is likely to be influenced in a myriad of decisions by the political strength of those forces likely to carry decisive weight in the next election. That which reduces the power of the urban interests — and, presumably with it the influence of Negroes — will to that extent decrease the likelihood of the nomination of candidates sympathetic to those interests, and may diminish the concern for those interests shown by any incumbent President.

Changing problems, changing regional attitudes, may neutralize or even reverse the factors I have mentioned. Urban and suburban “backlash” might weaken the pro-civil rights influence of the metropolitan areas, while a new generation of liberals in the less populous parts of the Midwest or even the South might someday assume the leadership of the civil rights movement. The time may come when the proposed change will seem more acceptable. But as of now, the best hope of the Negroes still rests in the maximizing of the political influence of the urban areas. And certainly, it is the cities themselves which must be in the forefront of the drive to get help to solve the cities’ problems. This would seem to be the worst possible time to reduce their influence.