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# How To Make the Electoral College Constitutionally Representative

by Howard S. Spering

GROSS DISTORTIONS that exist in the present operation of the electoral college would be eliminated if "constitutionally representative" electors were required to be elected. No amendment of the United States Constitution would be necessary to accomplish this. The state-wide general ticket system of electing Presidential electors imposed by state election laws is the chief cause of the distortions. That system should be ruled unconstitutional and enjoined by the courts.

Prior to 1836 many Presidential electors were elected by popular vote from and by districts within a number of the states in many national elections.<sup>1</sup> Each district elected its own elector, whose party affiliation and vote might be different from those of electors in some other districts within the same state. District electors represented the choice of the people within their respective districts, who had an effective independent voice "as citizens of the United States". The people were not regimented, as they are today under the general ticket system, into voting solely in their capacity "as citizens of their state", having their votes counted on a state-wide basis only and having only one voice expressed uniformly by all of the electors from the state.

Under the Constitution it is population, or people, that determines the whole number of Presidential electors to be elected in each state. Article II, Section 1, provides:

... Each State shall appoint, in such Manner as the Legislature thereof may

The gross distortions produced by the present operation of the electoral college can be cured by state legislation establishing a system for the selection of approximately four fifths of the electors from the Congressional districts, Mr. Spering urges. The district system would eliminate the winner-take-all procedure under which all the electors from a state go to the state-wide winner regardless of the fact that the state-wide loser might have won some Congressional districts. It would, Mr. Spering declares, follow the scheme for the electoral college envisioned by the founding fathers. He opposes a direct, nationwide, popular election of the President as advocated by the American Bar Association.

direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; . . .

Thus, each state is entitled to the two (but only the two) electors who are the counterparts of the two United States Senators to which it is entitled as a state.<sup>2</sup> The number of additional electors from a state is the number of Representatives in Congress to which the people of the state are entitled. The national apportionment of Representatives among the states is based on the proportion of the total population of the nation in each state, calculated from the latest national census, with 435 now being the total number of Representatives. Each Representative is elected by the people of his Congressional district. The only exceptions to this system are the five states (Alaska, Delaware, Nevada, Vermont and Wyoming) whose population entitles them to only one Representative, and the two states (Hawaii and New Mexico) whose two Representatives are elected at large. It is, of course, possible to have a state-wide at-large election of Representatives if there has been a fail-

ure to provide for properly constituted districts.

Congressional districts are now required to be essentially equal, or as nearly equal as is practicable, under the rule in *Wesberry v. Sanders*, 376 U. S. 1 (1964).

When the proportion of the national population residing in one state increases or decreases substantially enough, that state correspondingly gains or loses one or more Representatives. As a result, California's number of Representatives in Congress grew from twenty-three in 1948 to thirty-eight in 1964. On the other hand, New York's Representatives in Congress diminished from forty-five in 1948 to forty-one in 1964. The number of Pres-

1. Maryland, for example, elected its electors by districts in all Presidential elections prior to 1836, except the first two, for a total of ten of the first twelve Presidential elections. See PAULLIN, *THE ATLAS OF THE HISTORICAL GEOGRAPHY OF THE UNITED STATES* 89 (1932). See also the extended historical discussion in *McPherson v. Blacker*, 146 U. S. 1 (1892).

2. Each state is also entitled as a minimum to one additional elector, since each state is entitled to one Representative in Congress, even though the state's entire population may be less than the number otherwise represented by each Representative in Congress under the national apportionment system.

idential electors to which a state is entitled fluctuates with these figures.

It is, therefore, clear that the right to elect one elector, who is the counterpart of a Representative in Congress, lies in the people of each Congressional district. No contention to the contrary can reasonably overcome the effect of all the words in context in the above quoted portion of Article II, Section 1, of the Constitution.<sup>3</sup>

The dual character of persons as "citizens of the United States" and as "citizens of a state" is clearly established in our Constitution. The great compromise established dual representation in a bicameral Congress, providing: (1) for equal representation of states as states, regardless of population or any other measure of size, in the Senate and (2) for representation of the people by Representatives in the House of Representatives elected directly by the people and apportioned among the several states according to population.

This difference in the character of the representation in the two houses of Congress is sharply drawn in the provisions of Article I relating to qualifications, which specify that a Representative shall be "an Inhabitant of the State *in* which he shall be chosen" and that a Senator shall be "an Inhabitant of that State *for* which he shall be chosen" (emphasis added).

This balanced and symmetrical structure of dual citizenship and dual representation in Congress applies consistently in the parallel structure of dual representation established for the electoral college. Thus, the election of two electors on a state-wide basis is an election *for* the state by persons acting in their capacity as "citizens of the state", and the election of additional electors by each Congressional district would provide separate elections *in* each state by persons acting in their capacity as "citizens of the United States".

Under the state-wide general ticket system, however, all Presidential electors, whether they are counterparts of Senators or of Representatives, are elected by the same state-wide count of votes by which the two electors who are counterparts of the state's two Sen-

ators are elected. Many objectionable results flow from this system:

1. All those who vote for the nominee, party or block of electors that receives less than the highest number of votes in the individual state are deprived of representation in the electoral college (a) even if their votes aggregate as much as 49 per cent of all votes cast in the state, and (b) even if their votes constitute a majority, or the highest number, of the votes cast in one or more of the Congressional districts in the state.

2. The weight of each voter's vote will inevitably either (a) be magnified or distorted, when on the winning side, from a plurality, however narrow the margin, to 100 per cent of the total electoral votes of the state, or (b) be completely ignored and destroyed, when on the losing side, and be invidiously misrepresented as if supporting the winning plurality.

3. Different weight is given to the votes of residents of one state from the weight given to the votes of residents of another state. For example, a citizen in New York votes for the election of forty-three electors, while a citizen in Virginia votes for the election of only twelve electors.

4. Many times as many citizens must vote for a particular nominee in large states as in single-Representative states before their voting can have any effect or weight whatsoever in the election of the President.

5. A substantial premium is placed on fraud in the larger states because the small margin that achieves a plur-

ality carries 100 per cent of the large electoral vote of the state.

6. Small splinter parties also can affect the whole electoral vote of a state by controlling the small margin that achieves a plurality in the state. For example, in 1948 Henry A. Wallace drew 509,000 votes from President Truman, thereby throwing the forty-seven electoral votes from New York to Thomas E. Dewey, who had a plurality of only 61,000 votes out of the total of about 6,100,000 votes cast in the state.

7. The "one-man, one-vote" principle<sup>4</sup> of the equal protection clause of the Fourteenth Amendment is breached in almost every conceivable way.

### ***Constitutionally Representative Electors***

When two electors equivalent to a state's two United States Senators are elected on a state-wide basis, the people are acting in their capacity as "citizens of the state". To this extent, the electoral college system cannot be made to conform to the "one-man, one-vote" principle. The 102 electors so elected, however, constitute only approximately 19 per cent of the total of 538 electoral votes.<sup>5</sup>

The other 436 electors, 81 per cent of the total, if elected one in and by each Congressional district,<sup>6</sup> would be "constitutionally representative" of the people acting in their capacity as "citizens of the United States" in essentially equal districts. Each voter in the United States, without regard to the state of his residence, ordinarily would

3. It may be noted that the words "in such Manner as the Legislature thereof may direct" relate to procedure, and it is believed that the acts of the state legislatures under such procedural provisions should be limited to conform with, and not to defeat, the substantive rights inherently created by and actually operative in the full context of the provisions of Article II, Section 1.

4. A fair statement of this principle is: Whenever and wherever voting by any of the people is provided for in state or federal elections, citizens of the United States are entitled to be fairly and equitably represented and effectively weighted, by district units fairly related to their numbers, in the outcome of such election. They are entitled to have their right to vote protected against being abridged, debased, diluted, cancelled, destroyed, discriminated against because of place of residence, or otherwise made ineffective or unrepresentative, by or under any laws or practices of any state, or by any acts of any officials of the state or of any other persons. See *Reynolds v. Sims*, 377 U. S. 533, 554-568

(1964).

5. The District of Columbia now has three electoral votes, two of which I have regarded as equivalent to two United States Senators, although the District does not have any Senators, and the other one I have regarded as equivalent to a Representative in Congress, although the District does not have a Representative. This explains my reference to 436 electors elected by districts, although there are only 435 Representatives. It also explains my reference to 102 electors as equivalent to Senators, although there are only one hundred Senators from the fifty states.

6. Of course, among these 436 electors would be (1) five elected in at-large state-wide elections in the five states that are entitled to only one Representative, (2) four elected in at-large state-wide elections in the two states that are entitled to only two Representatives and that have not established districts for their election and (3) any electors who might be counterparts of Representatives elected at-large because proper Congressional districts were not established.

vote for three electors: one "Representative" elector elected in his Congressional district and two "Senator" electors elected on a state-wide basis. The inequalities of voting in the national elections that now exist between citizens of different states and the gross distortions and misrepresentations of the votes of citizens within the same state would be eliminated with respect to the election of 81 per cent of the electors.

The "one-man, one-vote" principle would be met fully with respect to these electors. The substantive right of the people as citizens of the United States to elect one elector in and by each Congressional district, based on their numbers, would also be satisfied.

The Twelfth Amendment clearly contemplates that the electors of a state may be divided as to the persons voted for as President and Vice President.<sup>7</sup> The district election of "Representative" electors would be fully compatible with this amendment. The general ticket system, on the other hand, precludes any possibility of division of the electoral votes of the state and, therefore, is contrary to the divisibility principle of the Twelfth Amendment.

### **Advantages of Representative Electors**

It is a mathematical fact that the greater the number of units in which elective pluralities are determined and are effective to elect an elector, the smaller will be the population of each unit, the greater will be the citizen's opportunity to have an effective voice in the national election, the smaller will be the number of voters in each unit who are adversely affected by being on the losing side, and the more limited in ultimate effect will be any local election fraud, any splinter party or group, any severe weather condition or other occurrence affecting voter turnout, or any local misinformation that misleads citizens. Thus, election of one elector in each of 436 Congressional districts is more desirable in all of these respects than the present system.

By the same token, one nationwide direct popular vote for the election of the President, without the use of elec-

tors, creates the greatest possible premium for election fraud in any area, the greatest potential effect of any splinter party or group, the greatest potential effect of any severe weather condition or other occurrence affecting voter turnout in any area and the most serious consequence of any local misinformation that misleads citizens.

The single nation-wide direct popular vote is somewhat like fungible goods. All the materials put into the large bin or tank from many areas lose their identity completely. There is no pattern of recognizable elements of the people articulated on the basis of local districts in which the voters have an awareness of their problems and interests with respect to national issues and have an effective voice through a district elector.

James Wilson of Pennsylvania, the highly respected lawyer-framer of the Constitution at the Federal Convention in 1787, did not propose the direct election of the President by the people without electors, as has been stated.<sup>8</sup> Wilson's first motion on the mode of appointing the President proposed an electoral college system for the naming of electors by districts. *Madison's Notes* reported on Saturday, June 2, 1787, the following:

Mr. Wilson made the following motion, to be substituted for the mode proposed by Mr. Randolph's resolution, "that the Executive Magistracy shall be elected in the following manner: That the States be divided into districts; & that the persons qualified to vote in each district for members of the first branch of the national Legislature elect members for their respective districts to be electors



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of the Executive magistracy, that the said Electors of the Executive magistracy meet at and they or any of them so met shall proceed to elect by ballot, but not out of their own body person in whom the Executive authority of the national Government shall be vested."

Mr. Wilson repeated his arguments in favor of an election without the intervention of the States. He supposed too that this mode would produce more confidence among the people in the first magistrate, than an election by the national Legislature.<sup>9</sup>

There is another important element

7. The amendment provides that the Presidential electors "shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, . . ." (emphasis added).

8. Gossett, *Electing the President*, 53 A.B.A.J. 1103 (1967), cites James Wilson as authority for stating that "direct election by the people" was the ideal of the framers of the Constitution for electing the President. The original source materials, *Madison's Notes*, are contained in *Documents, Formation of the Union*, published by the Government Printing Office in 1927. The two partial quotations of Wilson's remarks set forth on the first page of that article appear to be derived from Wil-

son's first comments on June 1, 1787, in opposition to Mr. Randolph's proposal that the executive magistracy "be chosen by the National Legislature". See pages 134 and 135 of *Documents*. Read in this context, his remarks did not advocate that the President be elected by "direct" election by the people without electors. Wilson's motion the next day, June 2, makes this clear, for it contained the first proposal of an electoral college to be made at the convention. See page 136 of *Documents*. When the subject was reached later, on August 24, Gouverneur Morris of Pennsylvania also opposed election of the President by the national legislature and moved that he "shall be chosen by Electors to be chosen by the People of the several States". This was seconded and supported with four "ayes" (Pennsylvania, Virginia, Delaware and New Jersey) and opposed by six "noes". See pages 611 and 612 of *Documents*.

9. All quotations are from *Madison's Notes*, see footnote 8 *supra*.



inherent in the principle of representative government that the founding fathers uniformly adopted throughout the Constitution. With Congressional districts of essentially equal population, a Representative or a Presidential elector from that district represents all of the people residing in the district. His effective weight within the particular framework of government should be, and is, measured by the essentially equal number of persons residing in each such district.<sup>10</sup> He stands on a par with each other Representative or elector, as the case may be. His effective weight is not, and should not be, measured by the number of people who voted for him as against the number of people who voted for a Representative or elector from another district. Neither should his effective weight be, nor is it, measured by the total number of people who voted in his district (whether for or against him) as against the total number of people who voted in another district in the election of a Representative or elector.

### **District System Provides Fairness**

In any district there are under-voting-age children, resident aliens not permitted to vote and many persons confined to institutions or homes because of illness or other disability. Under our representative system of government, those people are entitled to representation on a basis of equality with all other persons residing in districts of essentially equal population. Because of their large numbers across the nation and the failure or inability for other causes (such as weather, business or whatever) of other qualified persons to vote, only about 37 per cent of the nation's total population voted in the 1964 Presidential election, and only about 38 per cent voted in 1960.

Under the polling concept, it is generally accepted that if only 25 per cent of the population in any district vote in an election, the plurality established by their votes will reach the same elective result that would have been reached by the plurality of the voters if any other percentage of the population had voted.<sup>11</sup> This concept, of

course, depends for its validity on the complete freedom of opportunity of all qualified and qualifiable persons in the district to vote and to have their votes properly counted. We take strong measures to secure and protect that complete freedom of opportunity for all citizens to vote by secret ballot and to have their votes properly counted.

Thus, given a fair and representative system of election, it is not so important or meaningful that a President shall have a majority or a plurality of all of the popular votes cast. If the President is elected by a majority (as required under the Twelfth Amendment) of the whole number of the electors, 81 per cent of whom shall have been elected by a plurality of the votes in their Congressional districts, each of essentially equal population, his election will more accurately reflect, and more assuredly represent, the choice of the majority of all of the "people", even if, by chance, it does not also reflect the choice of the majority or plurality of those who actually voted in the election.

It is important that the new President shall enter office with a broad base of support demonstrated in the election. The representation of states in the electoral college by the inclusion of 102 electors elected on a state-wide basis adds significant support for the elected President, since the states are important and effective political entities on the national scene. These electors, along with district-elected "Representative" electors, form the President's constituency to which he is responsible—the same as the basic constituency of the national government established by the Constitution.

The present state-wide general ticket system and the proposed direct popular vote on a nation-wide basis each create different effective constituencies for the President, and both are in conflict with the basic constituency grounded in dual citizenship and dual representation.

### **To Accomplish Change**

To provide for election of "Representative" electors by each Congressional district does not require an amendment of the Constitution. Each

state could amend its election laws to provide for "Representative" electors, and the new election laws would clearly be constitutional. The United States Supreme Court so ruled with respect to a Michigan statute in 1892.<sup>12</sup>

The practical obstacle has been that political leaders in some of the larger states have felt that they can carry more effective weight in the election of the President if all of the electoral votes of their states are cast for one person for President. In fact, it was this practice by dominant political forces in the larger states that forced other states, which had initially used the district system, eventually to adopt the state-wide general ticket system in order not to be placed at a disadvantage by a possible division of their strength.

Many attempts have been made to amend the Constitution to require election of Presidential electors by districts.<sup>13</sup> On occasion a majority of one house or the other of Congress has supported these proposed amendments, but not the two thirds of both houses at the same time that is required to submit an amendment to the states. A number of other amendments to the Constitution have been proposed over the years, including those for election of the President by direct nationwide popular vote without intervening electors. But none of these appear to have made any significant progress in either house of Congress. It seems almost impossible to obtain the necessary two-thirds vote of both houses on this sub-

10. James Wilson is reported in *Madison's Notes for Saturday, June 9, 1787*, as follows:

"He [Mr. Wilson] entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal numbers of people ought to have an equal number of representatives, and different numbers of people different numbers of representatives. . . . Representatives of different districts ought clearly to hold the same proportion to each other, as their respective Constituents hold to each other."

11. Computer predictions of election results from very early returns are based on this polling principle.

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

13. See the review of these efforts in *McPherson v. Blacker*, *supra*. See also Ames, "Choice of President and Vice President", in *Proposed Amendments to the Constitution of the United States During the First One Hundred Years of Its History, Hearings on Senate Joint Resolutions 3, 9, 10, 27, 30, 31 and 53 Before a Subcomm. of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 227-252 (1955).

ject in view of the factional strength in Congress of some of the political leaders from some of the larger states.

What, then, can be done to improve the system of electing the President? Class actions by citizens of the United States could be brought against the states of their residence to attack as unconstitutional the state election laws that provide for the state-wide general ticket system and prevent the election

of one "Representative" elector by each Congressional district. These legal actions, brought in the federal district courts, should have a good chance for favorable rulings in view of the significant decisions of the United States Supreme Court on election laws in recent years.<sup>14</sup>

Fundamental principles of the Constitution are breached and defied by the state-wide general ticket system for

the election of electors. These state election laws cannot find authority or justification under the Constitution when exposed to critical analysis.

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14. I am informed that class actions of this type are being encouraged by the American Good Government Society, a nonpartisan, nonprofit organization located in Washington, D.C. I wish to acknowledge the substantial assistance on background and source material provided to me by J. Harvie Williams, executive secretary of the society.

## Summaries of Informal Opinions of the Standing Committee on Professional Ethics

1009. The requirements of candor and fairness imposed upon lawyers would indicate that when it is desirable to make a verbatim record by mechanical or electronic means of a telephone conversation with another lawyer, the fact that a record is being made should be known to all concerned.

1010. A lawyer who practices in a jurisdiction having an "Unsatisfied claim and judgment fund" law and who fails to inform a client who was injured by an uninsured motorist of the availability of the fund prior to the expiration of the time during which a claim must be presented should withdraw from the case after making a full disclosure to the client of all of the facts. It would be ethical, after such full disclosure and withdrawal, to negotiate with the client for a release.

1011. When a statute provides that suit shall be filed in the county in which the defendant resides, it is unethical for an attorney systematically and as a matter of practice to file suit in counties other than that in which the defendant resides.

1012. It would be ethically improper for an attorney who represented an employer and its compensation carrier in defense of a compensation claim prosecuted by an employee to be retained by and represent a third party defendant or its insurer in the employee's independent action against a third party for causing the employee's injury or death.

1013. When an attorney has agreed to represent the wife in a contested divorce action for a fee of \$500, which is paid to him by the wife, and the court directs the husband to pay the attorney for the wife a fee of \$500, whether it is ethical for the attorney to retain the \$1,000 total would depend upon whether the court found the reasonable value of such services to be \$500 and whether the court knew of the prior payment of \$500 by the wife. If the facts are that the court by its order clearly determined that the total compensation of the wife's attorney should be only \$500, the attorney would be ethically obligated to refund that amount to the wife.

1014. Having a certificate from the Committee on Law Lists is satisfactory proof that a list is "reputable". Not having such a certificate does not necessarily mean that a particular list did not come within the requirements of the rules and standards covering a "reputable" list. The Ethics Committee will not pass directly on what is or is not a "reputable" list, this being the function of the Committee on Law Lists.

1015. It is improper for a retired United States Navy law specialist, who is engaged in private practice, to show his former military title or rank, branch of service or retired status on his firm or professional letterhead.

1016. When a lawyer to whom a personal injury case was forwarded

files a lawsuit on behalf of a passenger injured by the negligence of the driver of another car and also files a property damage claim on behalf of the driver of the first car, in which the passenger was riding, the lawyer who originally forwarded the case cannot subsequently have the complaint amended to assert a claim for injuries on behalf of the passenger against the driver of the first car, even though he has withdrawn as counsel for the driver of the first car.

1017. An attorney employed by two co-executors to represent an estate is not ethically disqualified to represent the executors in an application by them for compensation for extraordinary services over and above the statutory commissions.

1020. It would be unethical for a patent lawyer to work with an investment company and to accept remuneration from it for making it possible for the company to obtain contracts with the lawyer's inventor clients who are in need of capital or management in financing their inventions. This would apply even if the client consents after a full disclosure to him of the offer and terms of payment.

• The full text of any informal opinion may be obtained by writing to the American Bar Association, Committee Services, 1155 East 60th Street, Chicago, Illinois 60637.