

ELECTORAL COLLEGE REFORM: DÉJÀ VU

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Book Reviews:

Déjà vu: Reform and Continuity; The Electoral College, the Convention, and the Party System;
By Alexander M. Bickel. Harper & Row, 1971.¹

The Case Against Direct Election of the President: A Defense of the Electoral College;
By Judith Best. Cornell University Press, 1971.

The Politics of Electoral College Reform;
By Lawrence D. Longley & Alan G. Braun. Yale University Press, 1972.

The 2000 presidential election has stirred up a great deal of concern about the evils of the electoral college.² Before deciding to plunge into a new effort to abolish that seeming relic of an eighteenth-century compromise, one would do well to revisit a more recent era, the period from 1960 to 1971, when the proposal to amend the Constitution to provide for the direct *994 election of the President came as close as it has ever come to success. This Review considers three books from that era that recount the story of how the idea of the direct election of the President gained currency and eventually met defeat. What can the story of the 1960s era effort tell us about the newly stimulated move to amend the Constitution? Does the 2000 election any more than the 1960 and the 1968 elections demonstrate the folly of the electoral college? If the legal and political climate has changed since then, is it a change more favorable to amending the Constitution, or less?

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¹ This book is a revision and expansion of *THE NEW AGE OF POLITICAL REFORM: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* (1968). This earlier date of publication is important to the sequence of events described in this Review: Professor Bickel's thoughts on the subject of electoral college reform greatly influenced the political debate in the late 1960s and early 1970s. His views on the electoral college also appeared, "in somewhat different form," in articles in *The New Republic* under the titles *Wait a Minute!* (May 10, 1969) and *Misreading Democracy* (Sept. 27, 1969). On the influence of these articles, see Lawrence D. Longley & Alan G. Braun, *THE POLITICS OF ELECTORAL COLLEGE REFORM* 141 (1972).

² Currently pending in Congress are a joint resolution to amend the Constitution to provide for a popular vote for President, with a runoff election, 21 days after the general election, between the top two vote winners if the frontrunner fails to receive 40% of the popular vote. See H.R.J. Res. 113, 106th Cong. (2000); S.J. Res. 56, 106th Cong. (2000). A second resolution would amend the Constitution to elect as President the winner of a plurality of the popular vote without regard to the percentage of the total vote. H.R.J. Res. 132, 106th Cong. (2000); see also H.R.J. Res. 23, 106th Cong. (2000). There is also a pending resolution to reaffirm the electoral college. H.R.J. Res. 443, 106th Cong. (2000); see also Akhil Reed Amar, *The Electoral College, Unfair From Day One*, N.Y. TIMES, Nov. 9, 2000, at A23.

I. ELECTORAL COLLEGE REFORM CIRCA 1970

In *The Politics of Electoral College Reform*, Lawrence Longley and Alan Braun tell the story from the point of view of the direct vote proponents. In particular, they recount the activities of the Constitutional Amendment Subcommittee of the Senate Judiciary Committee under the leadership of Senator Birch Bayh from 1969 to 1971. Bayh, who wrote the foreword to the book, took the position that direct popular election of the President is “the only real reform” and worked to defeat the bewildering array of alternate plans.³ His efforts left the pristine direct vote solution as **995* the only alternative to the existing electoral college system, which many at the time assumed had reached its end.⁴

Ridding the constitutional structure of its electoral college component has long occupied reformers. The constitutional framers attended to the question of selecting the chief executive late in the summer of 1787 when they were weary of decision making yet secure in the knowledge that George Washington would serve as the first President.⁵ The

³ There have been four basic types of plans:

1. The “automatic plan” keeps the existing allocation of electoral votes but eliminates the elector. Thomas Jefferson first suggested this approach in 1801. Longley & Braun, *supra* note 1, at 44. Even those who generally approve of the electoral college, such as Bickel and Best, accept this reform, though Best takes the position that the faithless elector problem is not serious enough to justify the profound step of amending the Constitution. Judith Best, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* 190 (1971). Though there is little if any support for the general idea that the elector should exercise independent judgment, having electors could serve a useful purpose. For example, on one occasion a candidate died before the electoral college voted, and the electors were able to vote for the new candidate offered by their party. *Id.* at 188.
2. The “proportional plan” also preserves the existing allocation of electoral votes, but eliminates the winner-take-all award of all the state’s electoral votes to the winner of the plurality in that state (the so-called “unit rule”). Longley & Braun, *supra* note 1, at 49. This plan has been offered since 1848. *Id.* at 50. Analysis of voting patterns quickly reveals the bias in favor of the small states, arising out of the “constant two” votes that all states are given regardless of their population, which the unit rule has been shown to outbalance. *Id.* at 54; see also Best, *supra* at 136.
3. The “district plan” awards only the constant two votes to the winner of a plurality of the state’s votes. The rest of the electoral votes go individually to the winner of each congressional district. Today, Maine and Nebraska use this approach. This plan would increase the importance of congressional districting. Best, *supra* at 43; Longley & Braun, *supra* note 1, at 57-58.
4. The “direct vote plan” appears simple on its face, but see *infra* Part II (noting the need for a runoff procedure under a direct vote plan).

Reformers have concocted various hybrids of these four types, which invite rejection based on their complexity alone. See Alexander M. Bickel, *REFORM AND CONTINUITY; ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* 29 (1971) (arguing that an impenetrably complicated plan cannot win public confidence). For example, the events of 1970 produced these three following proposals:

1. The “Tydings-Griffin plan,” which required a candidate to amass *either* 40% of the popular vote *or* a plurality of the popular vote plus a majority of the electoral vote.
2. The “Spong plan,” which required a majority of the electoral votes *plus* a plurality of the popular vote. If that fails, a joint session of Congress (with each member of Congress having one vote) would decide.
3. The “Eagleton-Dole plan” (known as “the federal system plan”), which provided for a winner who could win a plurality of the popular vote *plus either* pluralities of the votes in a majority of the states or pluralities of the votes in a group of states that together represent a majority of the voters. If no one performs that feat, then the winner would be calculated according to the old electoral vote allocation. If there is still no winner, the electoral votes received by any third party candidates would be divided up between the two frontrunners in proportion to the percentage of the popular vote won by each. Imagine trying to develop a campaign strategy facing those rules! The complexity of this plan is testimony to the multiple interests and arguments that must be attended to in the reform process. Note that this plan manages to eliminate the need for either a runoff or a congressional contingency and to balance the importance of the overall popular vote and the demand that the winner have geographically dispersed support.

Longley & Braun, *supra* note 1, at 70-73.

⁴ Unfortunately, though somewhat amusingly, Longley and Braun fawn over Senator Bayh, praising his courage and political acumen in a manner that undercuts their attempt at neutrality as they analyze the pros and cons of the different reforms.

⁵ Longley & Braun, *supra* note 1, at 24-26.

electoral college presented itself as a solution: it was the second choice of those who preferred direct election of the President⁶ and those who wanted Congress to choose the President.⁷ It was argued that direct election might give the President too much power, while congressional selection would give Congress too much power.⁸ It was thought at the time that the electors would typically find themselves unable to reach a majority, thus invoking the contingency that the House of Representatives would make the final choice. Some imagined that *996 the electoral college would operate as little more than a nominating convention leading up to the House choice.⁹

Efforts to abolish the electoral college began at least as early as 1801.¹⁰ Some of the earliest proposals will strike the modern reader as outright bizarre. Under the Hillhouse plan of 1808, for instance, senators would serve single, staggered, three-year terms, and each year a new President would be chosen by the senators from the ranks of the retiring senators.¹¹ An 1822 plan provided for Presidents to be taken on a rotating basis from the various regions – South, Northeast, and so on. Similarly, in 1860, Andrew Johnson proposed alternating Presidents from the North and South.¹²

Over the years other plans have been suggested, including a 1956 effort cosponsored by fifty-two senators to abolish the position of elector, keep the same allocation of electoral votes to the states and to provide for the appointment of the “constant two” electors according to the statewide plurality vote and the rest of the electors in proportion to the vote received by each candidate.¹³ Senator John F. Kennedy opposed the plan, stating: “It is not only the unit vote for the Presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider the others.”¹⁴

In the 1960s, proponents of the direct vote method cited this history in an effort to characterize the electoral college as an unimportant component of the constitutional plan, an ill-considered afterthought that had never worked as anticipated.¹⁵ As these proponents argued, political parties had quickly developed and taken on the function of nominating candidates, the states had all eventually adopted popular voting as the method of choosing the electors,¹⁶ and the electors soon failed to operate as decision makers.¹⁷

⁶ Direct voting for the President was preferred by James Madison, Gouverneur Morris, and James Wilson (all representing large states). But it was opposed on the grounds that the people lacked the information needed to resolve upon a national candidate and would vote instead for many different regional candidates, that the small states would lose clout, that the President would have too much power, and that the slave states deserved power in proportion to population, despite the inability of the slaves to vote. *Id.* at 24.

⁷ Congress was the existing institution in a position to select a national leader, but many did not want to increase the power of Congress. *Id.*

⁸ *Id.*

⁹ *Id.* at 26-27 (noting that George Mason thought the House would end up deciding 95% of the time).

¹⁰ Such a course was proposed in a letter by Thomas Jefferson in 1801 and proposed in Congress in 1826. *Id.* at 44.

¹¹ *Id.* at 69.

¹² *Id.* at 70.

¹³ Best, *supra* note 3, at 18; Longley & Braun, *supra* note 1, at 70. This plan, called the Mundt-Daniel plan, was a hybrid of the district plan and the proportional plan. Best, *supra* note 3, at 18.

¹⁴ *Id.* at 18-19 (citing 102 Cong. Rec. 5156 (1956)).

¹⁵ *Id.* at 84.

¹⁶ In 1860, South Carolina became the last state to adopt popular voting for presidential electors. Best, *supra* note 3, at 16.

¹⁷ Longley & Braun, *supra* note 1, at 28-32.

Not only had the reasons for rejecting direct voting arguably evaporated, but problems with the electoral college had also emerged. Electoral college reformers of the 1960s identified the following five areas of concern, which will look familiar to those who followed the 2000 election events: (1) the “constant two” electoral votes that each state receives independently *997 of its population;¹⁸ (2) the so-called “unit rule,” adopted by virtually all of the states,¹⁹ that awards all of a state’s electoral votes to the winner of a plurality of the state’s votes; (3) the “faithless elector,” that is, an elector who votes for a candidate other than the one voters meant to select when they voted for that elector; (4) the “House contingency” providing for the House of Representatives to select the President in the absence of a majority vote from the electoral college;²⁰ and (5) the possibility that the winner of the popular vote would lose the electoral vote.²¹

The 1960 race between John F. Kennedy and Richard M. Nixon was extremely close and complicated by the selection of fourteen unpledged Democratic electors in Alabama and Mississippi. These unpledged electors aimed to deprive Kennedy of a majority of electoral votes and thereby send the election to the House of Representatives. Even though selection of the President by the House of Representatives is as much a part of the constitutional *998 plan as the electoral college itself, Longley and Braun regard the House contingency as an alarming breakdown in the process. That view makes sense in hindsight, considering the politics of the 1960s. In 1960, the unpledged Mississippi and Alabama electors all voted for conservative Democratic Senator Harry F. Byrd of Virginia.²² Joining them was a faithless elector who had been pledged to Nixon.²³ Had these electors succeeded in preventing a majority in the electoral college, Byrd and other

¹⁸ U.S. CONST. art. II, 2. In addition, Washington, D.C., receives different treatment: The Twenty-third Amendment gives it the number of electors equivalent to the number it would receive if it were a state, but then caps that number so that it cannot receive more than the number given to the least populous state. U.S. CONST. amend. XXIII. The population-proportioned votes are also distorted in that their number depends on a census that may be as much as ten years out of date. Steven A. Holmes, *After Standing Up to Be Counted, Americans Number 281,421,906*, N.Y. TIMES, Dec. 29, 2000 at 1, 18 (noting that the states won by George W. Bush in the 2000 election would receive seven more votes in the electoral vote allocation based on the 2000 census and that the states won by Al Gore lost seven votes). Each state, no matter how small its population, must receive at least one population-based vote. Because no fractional votes are permitted, the electoral votes represent varying population numbers. The number of votes afforded a state is based on the state’s population, not the actual number of persons who turn out to vote in a given election. Best, *supra* note 3, at 128-29. Note that this last point has traditionally favored the South. Not only did it receive credit for its nonvoting slave population, but also the South has a long history of low voter turnout.

¹⁹ Once the state legislatures turned to voting as the means of appointing the electors, the unit rule was the natural choice because it favored the majority party in the state. Best, *supra* note 3, at 22-23. When other states have the unit rule, each state should perceive a disadvantage in abandoning it. *Id.*

²⁰ If no candidate receives a majority of the electoral vote, the House, voting state-by-state, with one vote for each state, selects the President from the three candidates receiving the most electoral votes. U.S. CONST. art. II, cl. 2, amended by U.S. CONST. amend. XII.

²¹ Longley & Braun, *supra* note 1, at 18. This last problem lacks a uniform term. Best calls it the “runner-up Presidency,” but the new President would not have been the runner-up in the vote that counts. Best, *supra* note 3, at 46. Bickel uses the term “minority President,” which is confusing to today’s readers and fails to take account of the plurality winner who lacks a majority. Despite his half-million popular vote edge over electoral vote winner George W. Bush in the 2000 election, Al Gore, like Bush, received only a minority of the votes cast. Because Bush won a majority of the electoral votes, the term “majority” applies more accurately to him than to Gore. Only once has the winner of an actual majority of the popular vote lost the electoral vote: Democratic candidate Tilden received 50.93% in 1876. *Id.* at 52. But that popular vote deserves little regard, given the extreme level of intimidation of Black voters, who would have strongly tended to vote for the Republican Hayes, and fraud in counting the votes in the southern states. *Id.* at 52-53 (citing Paul L. Haworth, *THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876* (1906)). The 1824 election of John Quincy Adams is not an example either because not all states used popular voting to select their electors. The problems associated with that election occurred because of the lack of a national party nominating convention, which led to the emergence of four major candidates, all from the same party. *Id.* at 53-54.

²² Byrd, a noncandidate, had received no votes in the general election. Longley & Braun, *supra* note 1, at 4.

²³ *Id.*

conservative Democrats may have wielded a power to extract promises and concessions from the future President or his congressional supporters. Southern Democrats might thus have redirected the path that policy took in the 1960s.

The concern that the winner of the popular vote might lose the election also arose in 1960. The six unpledged electors from Alabama, a state which also produced five electors pledged to Kennedy, clouded the question of how many popular votes should be credited to Kennedy.²⁴ Under what Longley and Braun call “seemingly the fairest” method of calculating the number of votes for Kennedy in Alabama, one that deprives him of credit for the votes cast for the unpledged electors, Nixon won the national popular vote by 58,181 votes.²⁵ Despite Kennedy's narrow – or nonexistent – victory in the popular vote and even the fifteen electoral votes that went to Byrd, Kennedy won the electoral college by a margin of thirty-four electoral votes.

Another issue at play in 1960 was voter fraud. There were relatively small margins of victory for Kennedy in Illinois and Texas, states with a history of fraud, and those small margins determined large blocs of votes. Direct vote proponents tied this problem to the distortion of the unit rule. Under direct voting, fraud would change only the votes implicated in the fraud. But under the unit rule, a few fraudulent votes could steal a large state's entire bloc of electoral votes.²⁶ The unit rule magnifies the effect of fraud, and, consequently, heightens the temptation to engage in it.²⁷

The Supreme Court also had its effect on the electoral college reform movement in the 1960s.²⁸ In 1962, *Baker v. Carr*²⁹ opened the courts to *999 litigation over malapportionment of voting districts, and in 1963, *Reynolds v. Sims*³⁰ read the one-person, one-vote principle in the Equal Protection Clause. The Supreme Court's new announcement of “what the law is”³¹ fostered a sense of righteousness in the direct vote proponents. If all voters have a constitutional right to have their votes count equally, and a diluted vote violates the Constitution, then how can the electoral college be tolerated?

²⁴ Id. at 5-6.

²⁵ Id. at 5.

²⁶ Best, supra note 3, at 191.

²⁷ Professor Best counters this argument by noting that the electoral college has the effect of making what would be a close election less close. Id. at 192. Moreover, the electoral college restricts the effects of fraud to individual states, in which the fraud may be too insignificant to matter, and with the direct vote plan, the temptation to commit fraud in a close race would blanket the entire country. Id. at 191-92.

²⁸ Longley & Braun, supra note 1, at 132.

²⁹ 369 U.S. 186 (1961). Previously apportionment questions, framed as violations of the Guaranty Clause, U.S. CONST. art. IV, had been barred by the political question doctrine. *Colegrove v. Green*, 328 U.S. 549 (1946). Relying on the Equal Protection Clause, *Baker v. Carr* swept aside the political question barrier. Baker also dismantled the obstacle of the standing doctrine, which had deflected earlier reapportionment lawsuits.

³⁰ 377 U.S. 533, 562 (1963). Chief Justice Warren wrote for the Court:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests... . The Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown v. Board of Education*, 347 U.S. 483

Id. at 562, 566. Note that Warren referred to *legislators*, not to elections generally, and to the Fourteenth Amendment, which implicates only the states. Moreover, he treated the electoral college (and the Senate) as a separate issue, subject to its own constitutional provisions and “conceived out of compromise and concession indispensable to the establishment of our federal republic.” Id. at 574.

³¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

After the 1964 presidential election in which the Democratic Party lost the southern states, the Executive Branch began to manifest some interest in electoral college reform. Longley and Braun speculate that Lyndon B. Johnson supported change because of the end of his party's dominance in the South.³² But the reform Johnson chose would have done nothing to restore his party's power. He endorsed the "automatic" plan, which would dispose of the electors but keep the state-by-state electoral vote. This presidential interest revived the attention of the Senate Constitutional Amendment Subcommittee, which had held hearings on the subject after the 1960 election and again after *Baker v. Carr*.³³

After first following Johnson's lead and embracing the automatic plan, in 1966 Subcommittee Chairman Bayh began to push for the direct vote plan.³⁴ In 1967, the ABA endorsed the direct vote plan.³⁵ Significantly, the ABA had played a key role during this period in assisting the Subcommittee as it worked to enact another constitutional amendment affecting the structure of the Presidency: the Twenty-Fifth Amendment, which provided methods for filling a vice-presidential vacancy and for addressing presidential disability.³⁶ The constitutional amendment process is difficult, but the recent success of another amendment on a seemingly similar matter generated a sense that further constitutional changes lay within reach.³⁷

One might surmise that the small states would present an inevitable roadblock, depriving a direct vote amendment of the needed supermajorities – two-thirds ***1000** from each house of Congress and a three-fourths majority of the state legislatures. But at this time, even the small states were chafing under the electoral college. A number of small states, challenging the unit rule, petitioned the Supreme Court to entertain a suit against various large states.³⁸ As the small states recognized, it was the unit rule that enabled the large states to draw all the attention of the presidential candidates. One might think it would take some nerve to cite *Baker v. Carr* on behalf of the small states, upon which the Constitution bestows votes beyond proportion to their population; but this is exactly what Delaware and other states sought (albeit unsuccessfully) from the Supreme Court.³⁹

Playing on this sore spot, Professor John I. Banzhaf III wrote an influential article that calculated the likelihood that a given person's vote would determine the outcome of a presidential election.⁴⁰ Banzhaf concluded that a voter in the state with the most electoral

³² Longley & Braun, *supra* note 1, at 203 n.11.

³³ *Id.* at 134-36.

³⁴ *Id.* at 135-36.

³⁵ *Id.* at 138. In 1966, the United States Chamber of Commerce had also endorsed the direct vote plan. *Id.* at 135.

³⁶ *Id.* at 135.

³⁷ *Id.*

³⁸ *Delaware v. New York*, 385 U.S. 895 (1966) (denying permission to file an original jurisdiction case); Longley & Braun, *supra* note 1, at 137.

³⁹ Best, *supra* note 3, at 23.

⁴⁰ John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304, 315-16 (1968). A second influential publication dating back to 1968 is Neal R. Peirce, *THE PEOPLE'S PRESIDENT* (1968). Peirce, a political editor for *Congressional Quarterly*, developed the argument in favor of the direct vote upon which Longley and Braun relied in their

votes had 3.312 times the chance of affecting the outcome in a presidential election as a voter in the “state”⁴¹ with the least electoral votes.⁴² Thus, small states should want the direct vote too, not in self-sacrifice to higher principle or to the authority of the Warren Court, but because they themselves were losing out. Of course, the small states would have preferred to keep the electoral college and eliminate the unit rule, but as long as the individual state legislatures retained the power to choose the manner in which their electors were appointed,⁴³ they would, out of self-interest, retain the unit rule to take advantage of what we might call “the Banzhaf effect.” A proposal to amend the Constitution to remove the unit rule while leaving the constant two intact would have to be rejected by the larger states.⁴⁴ The small states, thus boxed in, should logically ***1001** endorse a constitutional amendment, even one that requires them to sacrifice the long-treasured constant two. Or so the argument went at the time.

The 1968 presidential election lit a fire under the reform movement. The dreaded House contingency loomed as a real possibility once again, as the loss of traditional southern support for the Democratic Party gave rise to the American Independent Party candidacy of George A. Wallace, the former Democratic governor of Alabama and notorious segregationist.⁴⁵ Although the electoral college system generally works to disempower third parties, who emerge from the process with no electoral votes, a regionally based third party candidate can do well.⁴⁶ By appealing to geographically concentrated voters – the South – Wallace was able to win forty-five electoral votes. Once again, a faithless elector came forward: an elector pledged to Nixon switched to Wallace, raising Wallace's total to forty-six.⁴⁷ Though Wallace did not achieve his stated goal of invoking the House contingency, the mere threat that the electoral college could

history of electoral college reform in the 1960s and 1970s. The works by Banzhaf and Peirce are important theoretical texts for advocates of a direct vote plan. Longley and Braun provide good summaries of these authors and show how their scholarship influenced the reform process. Longley & Braun, *supra* note 1, at 138-39.

⁴¹ The District of Columbia was the base level “state,” setting the 1.0 value from which 3.312 was calculated. Longley & Braun, *supra* note 1, at 115. Because the Twenty-third Amendment restricts D.C. to no more than the number of electoral votes given to the least populous state, it provided what should be considered an artificially low basis for calculating the other numbers. A fair test of the distorting effect of the electoral college with the unit rule should perhaps begin with the state with the lowest population, which in Banzhaf's analysis had a voting power set at 1.25.

⁴² *Id.* at 105-28.

⁴³ U.S. Const. art. II, 2.

⁴⁴ This proposal, called the “proportional plan,” was one of the various alternative reforms offered during the 1960s. Mathematical analysis shows that it produces an extreme distortion in favor of the small states. Longley & Braun, *supra* note 1, at 115-16. The proposal has nevertheless been revived in the wake of the 2000 election, presumably because of its abstract appeal and because of a perception that it would moderate the distortions of the electoral college, when in fact it is quite clear that it is the most extreme plan. See Banzhaf, *supra* note 43, at 318-19 (calculating that the plan would leave 95% of the American population with less than average voting power and that a vote in Alaska would have five times the weight of a vote in New York).

⁴⁵ Longley & Braun, *supra* note 1, at 5-17.

⁴⁶ Electoral college proponents embrace the stabilizing effect of excluding third parties, but it is important to take note of the disparate effect on third party candidates with regional constituencies as opposed to those with a national constituency. The presidential election of 1948 provides the most striking illustration of this phenomenon. Strom Thurmond, running as the candidate of the States Rights Party, received 2.4% of the popular vote; Henry A. Wallace, running as the Progressive Party candidate, received nearly the same number of votes, 2.38%. Because of the concentration of States Rights Party votes in the southern states, Thurmond came away with 39 electoral votes. The more geographically dispersed Progressive Party delivered no electoral votes at all to Henry A. Wallace. Best, *supra* note 3, at 92.

⁴⁷ This time, the faithless elector vote was challenged in Congress pursuant to the 1887 statute that played such a prominent role in the 2000 election. Under this statute, 3 U.S.C. 5 (1887), after a challenge, the two houses of Congress separate and deliberate about the challenged vote. The 1968 faithless elector's vote was duly deplored but ultimately accepted. Longley & Braun, *supra* note 1, at 139-40. Looking at the faithless elector “problem” from another angle, consider the plan of novelist James A. Michener, who was a Pennsylvania elector pledged to Democratic candidate Hubert H. Humphrey, to switch to Nixon if that were necessary to deprive Wallace of a majority. James A. Michener, *PRESIDENTIAL LOTTERY: THE RECKLESS GAMBLE IN OUR ELECTORAL SYSTEM* 16, 56 (1969).

put such a man in a position to wring concessions from Congress or the candidates or in any way control or affect the decision was perceived as a “brush with catastrophe.”⁴⁸

This time Congress responded with a joint resolution to amend the Constitution and to replace the electoral college with the direct vote plan. Although a direct vote could always produce a winner, thus obviating the House contingency, the problem of a direct vote plurality winner with a low percentage of the vote required a solution. The joint resolution thus provided for a runoff election between the two frontrunners if the plurality *1002 winner failed to receive at least forty percent of the vote. It was here that the direct vote plan lost its appealing abstract simplicity; indeed, the runoff provision was the plan's downfall.⁴⁹

By September 1969, the House had passed the resolution, meeting the two-thirds requirement with sixty-six votes to spare; but, in the Senate, the resolution foundered. Longley and Braun blame – who else? – Richard Nixon. Soon after assuming the Presidency, Nixon had proposed abolishing the electors, keeping the electoral votes, and, significantly, eliminating the unit rule. Instead of the House contingency, Nixon proposed a runoff election between the two frontrunners if no one “received forty percent of the electoral vote.”⁵⁰ Abandoning the unit rule would have diminished the power of the larger states, presumably to the benefit of the Republican Party, particularly because the Southern states had abandoned the Democrats.⁵¹ After the resolution for the direct vote passed in the House, however, President Nixon proclaimed his support for the direct vote plan.⁵² His lack of “sincere effort” to help in the arduous task of steering an amendment through the Senate processes, according to Longley and Braun, said more about his real preference than his public statements did.⁵³ Indeed, they go on to speculate that Nixon withheld his assistance in a deliberate act of revenge against Senator Bayh, who had led the attack against Nixon’s Supreme Court nominees Clement F. Haynsworth, Jr. and G. Harold Carswell.⁵⁴

Ah, Haynsworth and Carswell! That they should make an appearance in the electoral college political intrigue! Just when the direct vote proponents needed to move the resolution through the Senate Judiciary Committee⁵⁵ and hoped to use the momentum created by the vote in the House, the Committee had to turn its attention to the nominations of first Haynsworth and then, Carswell. The extended Supreme Court nomination battles kept the Committee away from the electoral college reform until April

⁴⁸ Longley & Braun, *supra* note 1, at 150 (quoting Editorial, N.Y. Times, June 2, 1969) (inner quotations omitted).

⁴⁹ *Id.* at 90-94, 138.

⁵⁰ *Id.* at 142.

⁵¹ See Best, *supra* note 3, at 136 (demonstrating how the proportional plan diminishes the power of the large states); Longley & Braun, *supra* note 1, at 54.

⁵² Longley & Braun, *supra* note 1, at 156.

⁵³ *Id.* at 163.

⁵⁴ *Id.* at 163-64. These nominees were President Nixon's first two attempts to fill the vacancy left by Abe Fortas. See Henry J. Abraham, *JUSTICES, PRESIDENTS, AND SENATORS* 258 (rev. ed. 1999). The seat was ultimately filled by Harry A. Blackmun. *Id.* Senator Bayh later led the filibuster against Nixon nominee William H. Rehnquist. *Id.* at 269-70.

⁵⁵ The Judiciary Committee was the “parent” of the Amendment Subcommittee, which had, despite Bayh's support of the direct vote plan, narrowly voted in favor of the district vote plan. Longley & Braun, *supra* note 1, at 149-50. Direct vote proponents hoped to convince the Senate Judiciary Committee to revive their plan.

1970. The Committee only turned its attention back to the electoral college as the result of a deal between Senator Bayh and the Committee's chairman, Senator James O. Eastland, who supported Nixon's nominations. The deal *1003 linked the vote on electoral college reform to the vote on Carswell.⁵⁶ Longley and Braun do not go so far as to suggest that Nixon deliberately nominated an embarrassingly unqualified person (Carswell)⁵⁷ to create discord on the Judiciary Committee and to dispel the direct vote plan's favorable momentum,⁵⁸ but the Haynsworth-Carswell battle had that effect.

In the end, the direct vote plan prevailed in the Committee. The strategy followed by the direct vote proponents, which Longley and Braun recommend to future reformers, was a sequential vote on each alternate reform, so that when the direct vote plan finally came up, the only choice was between the direct vote plan and no reform at all.⁵⁹ But electoral reform momentum further waned as the Committee delayed preparing its reports until mid-August.⁶⁰ By the time the Senate debate began, it was September, and the date for adjournment had already been set at October 15.⁶¹ The southern Senators would filibuster, and the direct vote proponents could not muster the two-thirds vote needed to end the debate.⁶² Consider the absurdity of the predicament: the one-person, one-vote principle needing a supermajority of Senators (with their equal power despite unequally-sized constituencies) to end a filibuster set up to prevent a vote that would itself have required a supermajority. But the fact is that the votes were not there anyway. In Longley and Braun's analysis, the Southerners took their "states' rights" position, the Northern conservatives resisted changing the Constitution on general principle,⁶³ and the runoff provision disrupted the simplicity of the direct vote principle.⁶⁴ There were perhaps fifty-eight, but not the needed sixty-six votes.⁶⁵

II. PROBLEMS WITH THE DIRECT VOTE PLAN AS SEEN CIRCA 1970

Is the electoral college a basic component of American federalism? Longley and Braun contend that the states' separate existence and their representation in Congress, especially in the Senate, form the basic structure of *1004 the American political system.⁶⁶ The electoral college resembles those important aspects of federalism – perhaps

⁵⁶ Id. at 156-58.

⁵⁷ Carswell had once proclaimed his "vigorous belief in the principles of White Supremacy." Abraham, *supra* note 57, at 11.

⁵⁸ The usual explanation for the Carswell nomination involves Nixon taking revenge for the Haynsworth defeat. See *id.* at 10-13.

⁵⁹ Longley & Braun, *supra* note 1, at 130. The Senate Judiciary Committee rejected the automatic plan, 7 votes to 9; the district plan, 6 votes to 10; and the proportional plan, 8 votes to 9. *Id.* at 159. At that point, the direct vote was able to win the Committee, 11 votes to 6.

⁶⁰ *Id.* at 160.

⁶¹ *Id.* at 164.

⁶² *Id.* at 169-73.

⁶³ It was not only conservatives who resisted amending the Constitution; prominent northern liberal Senator Eugene McCarthy said eliminating the electoral college would be the "most deeply radical amendment" in the Constitution. *Id.* at 167 n.100.

⁶⁴ *Id.* at 167.

⁶⁵ *Id.* at 165.

⁶⁶ *Id.* at 84 (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), reprinted in *Federalism: Mature & Emergent* 99 (Arthur W.

only by “accidental coincidence”⁶⁷ – but that should not mislead us into thinking that it serves a similar purpose. The President represents the people as a whole, not on a state-by-state basis.⁶⁸ On the level of theoretical federalism, this argument makes a lot of sense. The President cannot channel the preferences and interests of any individual state, unlike a senator, who, once elected, operates as a separate decision maker through whom one state’s people can find political expression.⁶⁹ Support for the direct vote plan that arises out of this theoretical simplicity may give way to doubt, however, upon study of how the electoral college actually operates and speculation about what might happen under the direct vote plan. It is profitable to study the debate that took place *circa* 1970, because it smoked out several key problems that will emerge again if electoral college reform moves forward.

Is the electoral college the reason for the two-party system? Naturally, during the debates of 1970 all of the political actors whose votes would be needed to obtain the supermajorities required to amend the Constitution cared deeply about preserving the two-party system. Whatever criticisms non-officeholders might have had, those in a position to affect the amendment process expressed great admiration for the stability and moderation produced by the two-party system.⁷⁰ Thus, reformers needed to overcome the belief that the electoral college was a cause or an important support for the system. Purportedly “haunted” by the fear of undermining the two-party system, the ABA identified six causes for the American two-party system in an effort to exclude the electoral college as a factor.⁷¹ Yet, those unwilling to risk losing something regarded as profoundly valuable were loath to trust things like “a general tendency toward dualism”⁷² to preserve something that, after all, evolved under conditions that included the electoral college.⁷³ *1005

Although the electoral college does not eliminate third parties, it suppresses them. Only the geographically concentrated third party can gain electoral votes.⁷⁴ If third parties have a role to play, one should argue that it is the third party that transcends state borders that is more likely to infuse the political debate with worthy new ideas; better a Henry Wallace⁷⁵ than a George Wallace. Despite the disturbing ability of a third party candidate like George Wallace to make headway in the electoral college system by appealing to regional prejudice, that candidate did not succeed. The threat he posed

McMahon ed., 1955)).

⁶⁷ Id. (quoting interview with Birch Bayh, *Electing a President: The Case for Direct Popular Election*, 6 HARV. J. ON LEGIS. 138 (1969)).

⁶⁸ Id.

⁶⁹ But see Best, *supra* note 3, at 211-12 (expressing concern that a “plebiscitary leader” might use the unique claim of representing the whole people in an oppressive way and that such a position would attract “demagogues, self-nominated, individualist leaders,” rather than the moderates she credits the electoral college with producing).

⁷⁰ Bickel, *supra* note 3, at 21-22.

⁷¹ The six causes were: (1) the tendency of an existing form to persist; (2) the use of plurality votes to determine the winners of single member districts; (3) public consensus; (4) a supposed American cultural homogeneity; (5) political maturity; and (6) the natural tendency toward dualism. Longley & Braun, *supra* note 1, at 88.

⁷² Id. at 88.

⁷³ Best, *supra* note 3, at 110-11; Bickel, *supra* note 3, at 27.

⁷⁴ Bickel, *supra* note 3, at 23.

⁷⁵ See *supra* note 49 (comparing the effects of the electoral college system on the campaigns of Strom Thurmond and Henry Wallace in the 1948 presidential election).

within the electoral college system was overshadowed, at least for some observers, by the potential under the direct vote system for multiple candidates to jockey for position in a runoff or to seek to provoke a runoff and then bargain with candidates who might need to make deals or concessions to win in the runoff. Withdrawing the need to win a plurality in a state to acquire votes would energize third parties who tapped national popular issues. More candidates would enter the field, creating a greater likelihood of a runoff election and lowering the percentage necessary to qualify for the runoff. What if moderate candidates cancelled each other out, resulting in a runoff between two ideologues or extremists?⁷⁶ What would stop major party candidates who failed to win their party's nomination from routinely joining the race?⁷⁷ Instead of opening the democratic process to greater participation, one might end up with a small crowd of “demagogues, quick-cure medicine men, and ... fascists of left and right” who would collude among themselves.⁷⁸

A concern that should resonate after the 2000 election is the time constraint implicit in the current system: suppose recounts (nationwide!) are needed to be sure that the frontrunner has reached the forty percent mark or to determine who qualified as the second place finisher?⁷⁹ As long as a runoff is a possibility, all candidates who think they might be one of the two frontrunners would need to begin a new campaign immediately. Meanwhile, the search for the votes to determine whether a runoff is required and who belongs in the runoff could break out anywhere and everywhere, as **1006* multiple candidates pursued their hopes of producing a runoff, becoming a candidate in the runoff, or gaining bargaining power with the candidates who do qualify for the runoff. The alternative of having no runoff, also proposed in Congress recently, has no safeguard against the scenario in which a crowded field of candidates yields a plurality winner with perhaps ten percent of the popular vote.⁸⁰

The complexity of these permutations and the fears they easily provoke should give pause to anyone contemplating jumping through the supermajoritarian hoops of the constitutional amendment process. One cannot adequately respond to these fears and uncertainties without the evidence of actual experience. Direct vote proponents *circa* 1970 liked to speculate about the dysfunctions that the electoral college is capable of producing, but experience using the electoral college over a long period had reduced those fears. Switching to the direct vote plan, by contrast, looked like “a long leap in the dark.”⁸¹

⁷⁶ Best, *supra* note 3, at 112; Bickel, *supra* note 3, at 25.

⁷⁷ Bickel, noting this prospect, speculates that in the 1968 election, Senator Eugene McCarthy, after losing the Democratic nomination, would have been tempted to continue as a peace candidate in the general election and that Republicans Ronald Reagan and Nelson Rockefeller would come forward to flank Nixon on his left and right. Bickel, *supra* note 3, at 21-24. So many candidates cutting into the percentage of the frontrunner would probably trigger the runoff contingency. It would be disturbingly close to George Wallace's goal of deadlock; what the electoral college put beyond reach would become a simple feat. *Id.* at 24.

⁷⁸ *Id.* at 25.

⁷⁹ Best, *supra* note 3, at 104-05. A joint resolution recently introduced in Congress provides for a runoff to take place 21 days after election day. H.R.J. Res. 113, 106th Cong. (2000); S.J. Res. 56, 106th Cong. (2000).

⁸⁰ See H.R.J. Res. 132, 106th Cong. (2000). Another proposed solution is to provide for so-called “instant runoff voting” in which voters rank their choices of candidates. The winner of a majority of first-place votes wins; failing that, weaker candidates are eliminated and their votes are redistributed to the stronger candidates in succeeding rounds until a majority winner emerges. See Lani Guinier, *Making Every Vote Count*, NATION, Dec. 4, 2000, at 5.

⁸¹ Bickel, *supra* note 3, at 27.

Finally, consider the shift of power that accompanies electoral change. Direct vote proponents disparaged as “parochial” the criticisms based on which groups would win and which would lose.⁸² But concerns of this kind may surely defeat reform. Newcomers to the electoral college question may assume that only the small states, with their constant two electoral votes, will lose in the shift to the popularly elected President. If it were plainly and demonstrably true that the direct vote plan would hurt only the small states, of course, reformers might as well abandon all hope of obtaining the ratification by three-quarters of the states. Knowing that, direct vote proponents circa 1970 struggled to demonstrate that it was actually the large states that held the advantage, but in the end the small states were not convinced.⁸³

To the extent that the argument pitched at the small states does succeed, on the other hand, it backfires: the large states should object. Most likely to object are well-defined subgroups within closely contested states, who can draw special attention from candidates hoping to swing the state in their favor.⁸⁴ Electoral college proponents thought this attention was justified. *1007 Professor Judith Best noted that the urban interests given clout by the electoral college – she named pollution, race, welfare, public strikes, and crime – were issues that *deserve* national attention.⁸⁵ The largest cities lay within the largest states, and voters concentrated in densely populated areas were also the easiest for candidates to visit. Local groups that have definable goals and interests thus benefit from the electoral college system. The evidence direct vote proponents of the time developed to convince the small states to support their plan provided the foundation for the argument that their reform would undercut the political power of Black voters. Black voters, by reason of their concentration in large cities, fell into the group that the electoral college system happened to benefit the most.

Legal minds tend to respond to a statement of clear and compelling principle: “one-person, one-vote” rings true. Upon identifying a principle, they crave consistency. To stop and think who will win and who will lose is to sacrifice legitimacy. The one-person, one-vote principle developed in the case law in response to malapportionment that hurt urban areas and, in particular, the Black vote. Ironically, the same principle became the “purist point of view” used to justify taking away the benefit of increased voting power.⁸⁶ Catching the direct vote proponents in this trap was prominent law professor Alexander M. Bickel, on whose brilliantly written little book the next section of this Review focuses.

⁸² Longley & Braun, *supra* note 1, at 98.

⁸³ Longley and Braun do attempt to minimize the impact of the defeat in the Senate by showing the correlation between votes against the direct vote plan and the degree of conservatism of the senator. *Id.* at 174-77.

⁸⁴ Best, *supra* note 3, at 30-31, 146. The House debate in 1969 quoted a spokesman for the American Jewish Congress who stated that the Jewish “vote is maximized under the present system because our people concentrate in the bigger cities of America.” *Id.* at 31 (quoting 115 CONG. REC. 25149 (1969) (statement of Rep. Clark MacGregor)).

⁸⁵ *Id.* at 150-51.

⁸⁶ Longley & Braun, *supra* note 1, at 128. Conceivably, the interests of Black voters would be better served if they were organized at a national level, transcending state borders; this would give more weight to the nonurban Black vote. Best, *supra* note 3, at 154. But mathematically, the power to control the bloc of electoral votes allocated to large states like New York and California is worth more than this national level aggregation of power, according to Professor Best. *Id.*

Before going on to Professor Bickel's *Reform and Continuity*, let me stop to say that Professor Best's book, *The Case Against Direct Election of the President*, on which I have drawn throughout this Review, is the more comprehensive and useful of the two books arguing in favor of the electoral college system. Readers who want to challenge their instinctive belief that the direct vote system is best or who want to understand in depth the reasons for supporting the electoral college should look first to her work.

III. ALEXANDER BICKEL AND THE ELECTORAL COLLEGE: NO COUNTER-MAJORITARIAN DIFFICULTY

The direct vote proponents had developed an argument to win over the conservatives and representatives of small states whose attachment to the electoral college supposedly merely lacked sophistication. Similarly, Bickel developed an argument tailored to the liberals and representatives of large states,⁸⁷ whom he painted as insufficiently sophisticated. To Bickel, **1008* they were devotees of a crude majoritarianism, bamboozled by the Supreme Court's decisions in the reapportionment cases, dazzled by the populist belief in majority rule as a panacea. In doggedly pursuing their one-person, one-vote principle, the direct vote proponents had lost sight of the interests of urban minorities - the very group that the reapportionment litigation was meant to help.

Those who imagine that democracy is a simple thing (one-person, one-vote!) are mistaken; democracy, according to Bickel, is a "mystery."⁸⁸ The electoral college is not "readily understandable," but it has proven itself marvelously effective and adaptable. Bickel perceived Congress as biased toward the "rural, nativist, and Protestant," and therefore warranting the counterbalance by a President whom the electoral college has compelled to appeal to urban minorities.⁸⁹ Despite its favoritism for the large state and its well-defined urban subgroups, the electoral college serendipitously satisfies the rural and small-town residents of the small states: they feed on the "symbolic value" created by the electoral college's recognition of the individual states.⁹⁰ "It happens that the electoral college can satisfy, at once, the symbolic aspirations of the small states, and the present, practical needs of the large ones. Not many institutions work out as artistically as that."⁹¹ Presumably, the citizens of large states do not suffer from the negative symbolism of the constant two; perhaps their urban savvy enables them to see real advantage, while the rubes are placated by symbolism.

Is this mysterious, beneficent, unforeseen functioning of the electoral college only a temporary effect of transient demography? Longley and Braun noted that any advantage to Black voters occurs only because of their presence in large states (which contain most of the largest cities), and only if those states are closely contested. Demographic change

⁸⁷ Note the strategic placement of his essays in magazines read by political liberals. See supra note 1 (noting the publication of two of Bickel's essays in *The New Republic*).

⁸⁸ Bickel, supra note 3, at 2.

⁸⁹ Id. at 7.

⁹⁰ Id. at 9.

⁹¹ Id. at 10.

could undo that advantage.⁹² Bickel conceded that demographic change will inevitably take place, but trusted the system to “digest” any change and turn it once again to the good.⁹³ Bickel’s constitutional system is a living organism, growing, adapting to change, and, apparently, possessed of a digestive tract.⁹⁴ How much easier it is to trust the continued evolution of a living system that has adapted in the past than to look toward an untried reform, designed according to the reformers’ naïve reliance on abstract principle!

***1009** Why is it not the case, one might ask, that the large states and the urban minority groups, whom Bickel wanted to empower, would benefit at least as much from the direct vote plan?⁹⁵ One imagines candidates motivated to pursue as many votes as they can get, regardless of geographic distribution, as efficiently as possible. Would they not gravitate to the densely populated urban areas and make proposals aimed at the well-organized and well-defined demographic groups? As Bickel asserted, the direct vote system would lead candidates to run national campaigns, ignoring the local urban concerns that are so important in the electoral college system.⁹⁶ Bickel did not credit the direct vote proponents with practical sense: to him, they are fools, “mesmerized” by the one-person, one-vote slogan.⁹⁷ Liberals at the time pictured Congress becoming more liberal over time under the force of the post-*Baker* reapportionment litigation. For this reason, they undervalued the important counterweight to Congress supplied by the President, who embodies urban interests. Instead of valuing the counterbalancing presidential role the electoral college promotes, reformers dreamed up the absurd idea that they ought to “amend the Constitution to make it mean what the Supreme Court has said it means.”⁹⁸

It would make more sense, Bickel writes, to look at the good the electoral college has done and to infer the incorrectness of the one-person, one-vote principle.⁹⁹ Indeed, the principle defies many of the structural components of constitutional law: the role of the Supreme Court, the two-senator allotment, the provision of at least one House member for each state, and the various requirements of supermajority. If *Baker v. Carr* is telling us to look with suspicion on all of those things, we ought instead to look with suspicion on *Baker v. Carr*.¹⁰⁰ Democracy is not a matter of one-person, one-vote but of building “widespread assent” though the aggregation of a collection of minorities; “minorities

⁹² Longley & Braun, *supra* note 1, at 102.

⁹³ Bickel, *supra* note 3, at 9.

⁹⁴ One is reminded of Justice Holmes’ fabulous prose depicting the living Constitution. *Missouri v. Holland*, 252 U.S. 416 (1920) (“[The constitutional framers] have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism ...”).

⁹⁵ Longley and Braun contended that the Black vote would be important in a national contest as well, and that the Black vote outside of the big cities would become important once aggregated with the urban Black population. Longley & Braun, *supra* note 1, at 103; see also Alexis Simendinger, James A. Barnes & Carl M. Cannon, *Pondering a Popular Vote*, NATL L.J., Nov. 18, 2000, at 3650 (citing “senior analyst with the nation’s pre-eminent black think tank” for the position that Black voters would gain power in a direct vote election because of the current large Black population within southern states that have not been closely contested in recent elections).

⁹⁶ Bickel, *supra* note 3, at 13.

⁹⁷ *Id.* at 14.

⁹⁸ *Id.*

⁹⁹ *Id.* at 15.

¹⁰⁰ *Id.* at 16.

rule” in a pluralistic country.¹⁰¹ Somehow, mysteriously, the electoral college achieves that real, complicated majority.¹⁰² Or so goes the Bickelian argument. *1010

It is hard to know whom to believe in all of this: the congressional liberals who pushed for the direct vote plan, knew the Banzhaf research, and heard – and were irked by – Bickel’s testimony; or Bickel, with his brilliantly seductive explication of the democratic mystery. One suspects the reformers saw an advantage for their side in the change to direct vote and the impossibility of success without the agreement of the conservatives and the small state representatives: they desperately needed the Banzhaf effect. But if their theory were really reliable, why did it not convince their opponents and why would the liberals and the large states not jump ship? The answer, Bickel claims, is that they were utterly unpragmatic, starry-eyed believers in an abstract principle propounded by the Supreme Court.¹⁰³

Was Bickel the feet-on-the-ground realist, though, or was he too smitten by an *idée fixe*? Again and again, he relies on the general proposition that the Constitution should not be changed. One sees throughout his writing about the electoral college the conservative’s reflexive belief that whatever we already have is probably best. If the reformers exaggerated the flaws of the existing system and saw every potential hitch as a disaster waiting to happen, Bickel, contemplating change, foresees “nightmares.”¹⁰⁴

For all Bickel’s assertion of interest in the political fate of urban minorities, reading his book, one senses a writer with a deeply conservative instinct. When a society is “young and pliant, relatively small, containable, and readily understandable,” he writes, “men can see the scenery shift without losing their sense of direction.”¹⁰⁵ But we – a mature society – would do better to leave in place even institutions that fail to meet the terms of abstract principle (like one-person, one-vote) and that have long disappointed the original intent of the framers; these structures “challenge our resilience and inventiveness in bending old arrangements to our present purposes with no outward change.”¹⁰⁶ As for the notion that democracy is a “mystery,” Bickel adapted it from James I’s assertion that the king’s power is a mystery.¹⁰⁷ To use the old structure, even one little more than an accident, for whatever new needs may arise is far better than to reform the structure. “Bending old arrangements to present purposes with no outward change” is a wonderful “secret,” taught by the English, that “has lent stability to our society and has built strength and confidence in our people.”¹⁰⁸ *1011

¹⁰¹ Id. at 17.

¹⁰² Id.

¹⁰³ Cf. Alexander M. Bickel, *The Morality of Consent* 8-19 (1975) (critiquing the “true believer” in constitutional rights).

¹⁰⁴ Bickel, *supra* note 3, at 32.

¹⁰⁵ Id. at 3.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id. Bickel, as this discussion suggests, was an admirer of Edmund Burke. In his later book *The Morality of Consent*, Bickel quoted a passage from Burke’s *Reflections on the Revolution in France* (1790): “[It is] with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society.” Bickel, *supra* note 103, at 23. That passage clearly resembles the argument Bickel himself made about the electoral college. Bickel goes on to defend Burke: “This is conservatism, no doubt, but what is behind it is not wish, or tired old age, or romantic delusion, or moral obtuseness, or class interest, but good practical wisdom.” Id. Perhaps Bickel meant implicitly to defend himself. For further discussion of Bickel’s conservatism, see Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985) (arguing

Indeed, Bickel's book works best as an elegant argument for the general policy of preserving the original structures designed by the Constitution's framers.

IV. LESSONS FROM CIRCA 1970 AND THE AFTERMATH OF THE 2000 ELECTION

While it may be hard to decide who has the better side of the urban minorities argument, it is easy to read the story of thirty years ago and predict doom for any present-day effort to abolish the electoral college. What the reformers of that time feared as catastrophic occurred in 2000: the winner of the popular vote lost the electoral vote. But the most striking thing about the “breakdown” is that there was no breakdown. People were outraged about the “butterfly ballot,” Vote-O-Matic punch cards, and the activities of quite a few governmental institutions – including the United States Supreme Court, the state courts, the state legislature, the state attorney general, and the county canvassing boards – but notably *not* the electoral college. There was concern about faithless electors, but the electors all admirably stood their ground, despite the temptingly narrow electoral vote margin of George W. Bush. No one yielded to the pressure to earn a place in American history by changing his or her vote, even though that pressure was applied with vigor and enhanced by an appeal to principle (that the popular vote winner should win, or that Al Gore really did win in Florida and thus deserved a majority of the electoral vote). The 2000 election reinforces Professor Best’s conclusion that the faithless elector problem alone is too “miniscule” to have its own constitutional amendment.¹⁰⁹

After the 2000 election, one heard surprisingly little expression of alarm or outrage that the electoral vote allocation caused the loser of the popular vote to win. Though Al Gore usually inserted the fact of his popular victory in his various public statements, he used it as a background justification for pursuing the Florida recount. Clearly, the foreground principle was counting every vote in *Florida*, not counting every vote in the nation *equally*. Longley and Braun asserted that people voting for a President *think* they are voting in a single national election and that the actual plan used should reflect what people believe they are doing. But the aftermath of the 2000 election demonstrated just how well people understood that ***1012** they were voting in fifty-one concurrent elections that would be aggregated according to an eighteenth-century scheme. The nation understood three hundred votes in Florida to be more significant than a half-million votes nationwide. Appeals to principle stressed not that existing rules of allocating voting power were wrong, but that the rules needed to be scrupulously followed. The two sides had plenty of disagreement over exactly what the specific rules for counting votes in Florida were, and everyone recognized that the machinery for casting votes needed fixing, but there was widespread acceptance of the structure of the electoral college and

that Bickel's "Burkean ending" reflects a consistent, lifelong political philosophy resting on the virtue of "prudence"); John Moeller, *Alexander M. Bickel: Toward a Theory of Politics*, 47 J. POL. 113 (1985) (noting Bickel's conflicting qualities of Burkean conservatism and Madisonian liberalism); Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 554 (1976) (noting Bickel's shift to conservatism over reform in his later career).

¹⁰⁹ Best, *supra* note 3, at 190.

even the House contingency, which people presumed would operate in a purely partisan manner.¹¹⁰

The writings that followed the 1960s elections, by contrast, imagined that people would find an electoral college loss by a popular vote winner deeply disturbing if not incomprehensible. A point ignored by the writers of that earlier period seemed obvious to observers of the 2000 election: the popular vote does not really embody the will of the people. Some unknown number of voters stayed home because they perceived their state as a safe plurality for one of the candidates. The candidates raised issues and set their campaign schedules with an eye toward the states that were in contention. The numbers that showed up in the popular vote tally were therefore arbitrary to some unknown degree. Thus, the moral sway of winning the popular vote was far less than those writings predicted.

Indeed, as Best argued, the loss of the electoral vote by a candidate who wins the popular vote is not a flaw in the electoral college that only luck has spared us in the past.¹¹¹ It is the result of the decision to campaign efficiently under the requirements of the electoral college plan. In the 2000 election, the candidates chose to forgo building up extra margins of popular votes in their safe states. (Who will not admit that George W. Bush could have stirred up another half million votes by campaigning hard in Texas, a state he knew he would win, and in southern California and upstate New York, states with large numbers of voters where he could not expect to achieve a plurality?¹¹²) Moreover, it is good to deny candidates the option of accumulating too many votes in one region while ignoring others. Winners of the popular vote who are denied the Presidency by the electoral college have themselves to blame, Best writes, for failing to obtain a sufficient **1013* geographic spread to their support.¹¹³ Although the electoral college system benefits the regional third party candidate and makes it very hard for a nationally based third party to get a foothold, a regional candidate cannot win the Presidency in the electoral college system.¹¹⁴ Both parties in the last election risked losing by appealing too much to limited geographic areas – Bush to the South and the Mountain states, and Gore to the Northeast and the West Coast. To remove the electoral college would be to *encourage* that strategy.¹¹⁵

Longley and Braun warned of “the potentially disastrous shortcomings” of the electoral college.¹¹⁶ But what disaster is there? Unless one perceives the failure to achieve the one-person, one-vote principle, standing alone, to be a disaster, all that happens is that

¹¹⁰ Bickel considered it rash to assume House members would simply vote along party lines. He pictured “patriotic men” who would do the right thing, such as pick the popular vote winner or, if the margin between two candidates was small, to establish a governing coalition, as happened in 1824. Bickel, *supra* note 3, at 30.

¹¹¹ Best, *supra* note 3, at 57-58.

¹¹² As Bush himself understated, “Had this been an election on who got the most popular votes, I suspect we might have had a little different strategy.” *Interview with George W. Bush, 60 Minutes II* (CBS television broadcast, Dec. 5, 2000), available at LEXIS, CBS News Transcripts.

¹¹³ Best, *supra* note 3, at 58. Popular vote winner Grover Cleveland lost the electoral vote to Benjamin Harrison in 1888 with a “wasteful” margin of victory in the southern states; he failed to win “properly distributed” votes. *Id.* at 67.

¹¹⁴ *Id.* at 66.

¹¹⁵ *Id.* at 70.

¹¹⁶ Longley & Braun, *supra* note 1, at 178.

in a very close race one reasonably strong competitor rather than another wins. In a close race, all one really needs is a device to determine an outcome.¹¹⁷ If so, the traditional method – the one “the regime has incorporated through time and proven in practice”¹¹⁸ – should have the most power to bring stability and legitimacy.¹¹⁹ As Bickel wrote:

Only an immensely dogmatic majoritarian would insist that the so-called winner [of a small popular plurality] has the sole legitimate claim to the office. In truth there is a standoff, and all that is needed is a convenient device – any device previously agreed upon – for letting one of the two men govern. That is all that is needed, and all that is possible.¹²⁰

We now have a President who has come into office without a popular-vote plurality through the operation of that “convenient device,” the electoral college.¹²¹ The public acceptance of the electoral college’s effect puts **1014* us today in a different position from the direct vote proponents *circa* 1970 who regarded such an occurrence as an intolerable breakdown. They had other fears out of proportion to any of ours: they were experiencing an upheaval as the South moved from the Democratic Party to the Republican Party, with the racist George A. Wallace actively exploiting the situation and seeking to destabilize the parties. Yet the electoral college survived. The story of that earlier reform effort and the arguments generated in the process strongly suggest that the reform effort will fail, and perhaps as well that it should.

¹¹⁷ Best, *supra* note 3, at 51-52. Best quotes Robert Dahl: “The closer a group approaches to an equal division, the more any rule seems to be a mere matter of convenience.” Best, *supra* note 3, at 52 (quoting Robert A. Dahl, PREFACE TO DEMOCRATIC THEORY 41 (1956)). The litigation over the 2000 presidential election vote-counting in Florida echoed Dahl’s observations. See *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000) (Wells, C.J., dissenting):

This case has reached the point where finality must take precedence over continued judicial process. I agree with the view attributed to John Allen Paulos, a professor of mathematics at Temple University, who was quoted as saying, “The margin of error in this election is far greater than the margin of victory, no matter who wins.”

¹¹⁸ Myron Rush, *POLITICAL SUCCESSION IN THE USSR* 8 (1965), quoted in Best, *supra* note 3, at 52.

¹¹⁹ Best, *supra* note 3, at 52.

¹²⁰ Bickel, *supra* note 3, at 31.

¹²¹ I will leave to the side for present purposes the role played in the last election by other “convenient devices” (such as the Supreme Court) as well as the role played by inconvenient devices (like the Vote-O-Matic machine).