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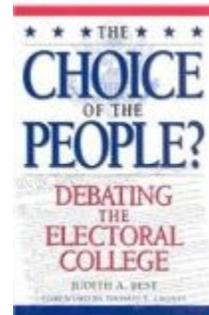
in the Humanities & Social Sciences



Judith A. Best. *The Choice of the People?: Debating the Electoral College*. Enduring Questions in American Political Life Series; Foreword by Thomas E. Cronin. Lanham, Maryland: Rowman & Littlefield Publishers, 1996. xxv + 163 pp. \$57.00 (cloth), ISBN 978-0-8476-8217-1.

Lawrence D. Longley, Neal R. Peirce. *The Electoral College Primer 2000*. New Haven: Yale University Press, 1999. viii + 253 pp. \$27.00 (cloth), ISBN 978-0-300-08036-0.

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## THE FUTURE OF THE ELECTORAL COLLEGE

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At last, the Presidential election of 2000 is no longer the election that would not leave. What began as a political embarrassment and metastasized into a political crisis did not quite end as a constitutional crisis. Swirling around the central events of this political melodrama – recounts, candidate and advocate press conferences, judicial arguments and decisions – is a public discussion that has generated far more heat than light. Few pundits and constitutional theorists who have rushed confidently before the news media have more than a scatter-shot knowledge of the history of voting rights disputes, or the origins and history of the Electoral College. The resulting storm of words and opinions served neither the public nor the Constitution.

Now that the “main event” has come to an end, it has spawned two arguments. One (over *Bush v. Gore* and the role of the U.S. Supreme Court in the 2000 election) is likely to burn itself out, save among historians and constitutional theorists. The other argument – which flared, then subsided, but will burst into flames anew with the beginning of the 107th Congress – has to do with the future of the Electoral College.

In November and December 2000, many Americans assumed that the Electoral College was the source of the electoral train-wreck, and that the prevailing mood of na-

tional uncertainty was the Electoral College’s fault. The proposed solution of choice was to get rid of the Electoral College, and replace it with a system of direct popular vote for the President and the Vice President. Defenders of the Electoral College instead dusted off a series of less sweeping proposals, ranging from abolishing electors (to dispose of the “faithless elector” problem) to proportional assignment of electoral votes (the so-called Maine rule) to the National Vote model, under which a package of 102 electoral votes would be created and awarded to the winner of the popular vote.

The problem is that the Electoral College was not directly at fault in 2000, except that it performed one of its central tasks – reflecting the will of the people of the several states, determined state by state – too well. That one state’s electoral laws and procedures may be flawed is an issue distinct from the real or supposed flaws of the Electoral College. However, a strong argument can be made that the Electoral College makes it more likely that irregularities (whether the products of deliberate action or ineptitude) in one state’s voting mechanisms can have national consequences. In any event, it is likely that the 107th Congress will be inundated with demands to scrap the Electoral College and replace it with a system of direct popular vote, and that in response the Electoral College’s defenders will propose an array of lesser adjustments, revisions, and reforms.

Amendments to reform or abolish the Electoral College may be the most common type of proposed amendment in the history of the United States Constitution. Most recently, beginning with the aftermath of the 1968 election and continuing in a desultory way through the 1970s, constitutional experts – historians, political scientists, legal scholars, and Senators known for their interest in constitutional issues (such as Birch Bayh [D-IN] and the late Sam J. Ervin Jr. [D-NC]) – offered a host of proposals and ruminations on this question. The arguments spawned by these proposals were notable for their intellectual seriousness and mutual respect – great desiderata for any occasion when the American people consider activating the amending process codified in Article V of the Constitution. Can we hope that the 2001 renewal of that great debate will go forward in that same spirit?

Two recent books are especially valuable as calm, reasoned presentations of the cases for and against the Electoral College. Both should be required reading as we brace ourselves for another argument about amending the Constitution to alter or abolish the Electoral College.

*The Electoral College Primer 2000* is the handiwork of two veteran critics of the Electoral College. Lawrence D. Longley is professor of government at Lawrence University; Neal R. Peirce is a noted journalist who has published a series of acclaimed studies of state and local government and one previous book on the Electoral College. This volume, a revision and expansion of one they first published in the mid-1990s, presents a lucid, coherent, and supremely empirical examination of the Electoral College's history and workings.

In their fictional Chapter One, "The Election of 2000 Is Not Quite Decided: A Fantasy" (pp. 1-16), Longley and Peirce tell a disturbing tale of a three-way electoral contest among Republican George W. Bush, Democrat Al Gore, and independent Colin Powell that results in a deadlock, with no candidate receiving an electoral majority. The spiraling process of confusion and uncertainty results in deadlocks in both the House of Representatives and the Senate, leading to the prospect of the Speaker of the House, J. Dennis Hastert (R-IL), becoming acting president of the United States on 20 January 2001. In some ways, this chapter is oddly prescient, and in other ways it offers a paradoxically less alarming course of possible events than the one the nation actually experienced for thirty-six days in November and December 2000. Longley and Peirce did not contemplate such problems as electoral mishaps, nor did they foresee a plethora of lawsuits that embroiled the Florida and federal court

systems.

Chapter Two (pp. 17-38) examines the origins of the Electoral College. Sketching its creation by the Federal Convention (but oddly skipping ratification) (pp. 17-22), the chapter then catalogues five major changes in the system devised by the Convention (pp. 22-27): (a) the rise of national political parties, which doomed the concept of the "free elector" and assumed the task of choosing Presidential nominees; (b) the shift of ultimate Presidential choice from the House of Representatives to the electoral college itself; (c) the popular election of electors; (d) the rise of the unit or winner-take-all rule in assigning states' electoral votes; and (e) the Twelfth Amendment's separation of the choice of President and Vice President. It then lists a series of problematic presidential elections, tracing the source of those problems to "The Electoral College System Misbehaving" (p. 27, and see generally pp. 27-38).

Chapter Three (pp. 39-95) examines crisis elections in which the Electoral College cast doubt on the ultimate outcome of a Presidential election. In particular, its discussion of the 1960 Presidential election (pp. 46-59) makes illuminating reading, for (contrary to some journalists' and politicians' assertions last year) Republicans did mount an array of challenges to the legitimacy of state electoral returns, most notably in Illinois, all of which ended inconclusively (pp. 52-53). These disputes faded from public memory, leaving behind a tidy, usable-past version of the agonizingly close but legitimate 1960 election.

Chapter Four (pp. 96-133) describes the workings of the Electoral College, presenting an excellent account of the various stages of the process by which Americans choose their President. Making a sharp distinction between the popular campaign and the constitutional system, Longley and Peirce focus on the workings of the latter, addressing such questions as how electors are chosen and whether they are or can be bound by the results of the popular vote in their state. They suggest that statutes binding electors may be unenforceable or even unconstitutional, on the argument that the Constitution requires electors to cast votes, implying that electors have the authority to choose whom to vote for (pp. 109-116). Chapter Five (pp. 134-161) addresses the relationship between popular votes and electoral votes, noting the ways that the assignment of electoral votes state by state tilts the Electoral College in favor of some groups (urban and ethnic interests) and against others (contrary to the conventional wisdom, African-American voters).

Chapter Six (pp. 162-175) recapitulates the authors' arguments. In vigorous prose, Longley and Peirce insist that, even at its best, the Electoral College distorts the outcome of the popular vote; skews candidates' electoral strategies in line with those distortions; magnifies individual state peculiarities in a national contest; discriminates among candidates – particularly in favor of sectionally-based third-party candidates and against nationally-organized third-party movements; and poses the risk of faithless electors flouting the popular will. At its worst, they conclude, the Electoral College system's defects pose a host of dangers to the legitimacy of the results of Presidential elections and the Presidency itself: electors' bargaining; a divided electoral verdict (often called the "wrong winner" problem); uncertain popular-vote outcomes thrusting the responsibility for choosing the President on an institution long unused to that responsibility; the dangers of the House's efforts to choose a President; and, finally, the prospect of an acting President if the House should deadlock. The only solution, Longley and Peirce conclude, is to abolish the Electoral College and instead adopt a system of direct popular vote. They prophesy: "It is all too likely that the election of 2000, or one in the future, will finally provide the American public with indisputable evidence of the failings of the electoral college as a means of electing the people's president" (p. 175). They round out their study with a useful documentary appendix.[1]

Where Longley and Peirce stress the empirical case against the Electoral College, Judith A. Best, distinguished teaching professor of political science at the State University of New York at Cortland, makes a case for the Electoral College grounded on constitutional principle – specifically, the principle of federalism. She has written two books on the subject – her landmark study, *The Case Against Direct Election of the President*,<sup>[1]</sup> and the one now under review, *The Choice of the People? Debating the Electoral College*. Her case for the Electoral College is grounded on her embrace of the federal principle; indeed, her book can be read as a general defense of the federal principle through the lens of the Electoral College. Best argues that the Electoral College epitomizes what is best about the federal principle – that it is both democratic and federal, that simple majoritarianism is paradoxically less democratic than governance according to the federal principle, because the federal principle requires not just majority rule but majority rule according to a consensus that can bind both majority and minority in agreement on the process, and maybe even on the ultimate result.

Best's book is actually a long essay (pp. 1-72) fol-

lowed by a useful selection of appendixes (pp. 73-77), a bibliography (pp. 79-80), and a set of readings on both sides of the Electoral College debate (pp. 85-159).[2] Her introduction (pp. 1-7) sketches her argument for the federal principle and its embodiment in the Electoral College. Her first chapter (pp. 9-15) dismisses the empirical arguments posed by Longley and Peirce; she concludes, "The electoral vote system, *in practice*, is a direct, federal, plurality system that magnifies the plurality winner's margin of victory over the runner-up, effectively providing us with a single election – no need for a contingency election" (p. 15 [emphasis in original]).

Her second chapter (pp. 17-30) revisits this argument by challenging the "wrong-winner" problem; her case is that the right winner is not merely a matter of arithmetic but of politics as well, and that the right winner cannot be defined merely by numbers alone. Her third chapter (pp. 31-41) explores the general workings of the federal principle, offering a frame for her close-focus argument about the relationship between the federal principle and the Presidency. A surprisingly cursory fourth chapter (pp. 43-49) surveys the origins of the electoral college, the issue of the electors' rights and duties (particularly their duty to follow the will of the voters in their state), and actually concedes that the continued existence of individual electors may be a flaw in the Electoral College system (but cheerily concludes that it is a flaw too small to require repair). By contrast, her fifth chapter (pp. 51-64) is a cogent and illuminating survey, shot through with skepticism, of the alternatives to the Electoral College system. Her final chapter (pp. 65-72) returns to her contention that "the electoral vote system is a model of our federal Constitution – a novel system, 'a great discovery,' that creates one society out of many societies" (p. 72).

In juxtaposing these books, we find that, in many ways, they talk past each other. Longley and Peirce have little or no interest in the federal principle; they prefer to stake their claim on the hard ground of empirical fact and historical experience. By contrast, Best seems uninterested in history and experience except as they illuminate her exploration of the federal principle, and occasionally a waspish and dismissive tone creeps into her consideration of critics of the Electoral College. It is all too likely that any debate in Congress and the news media about the Electoral College will parallel the failure of these two competing positions to engage each other.

Two other problems are likely to plague the future debate on the Electoral College. First, the current debate

is the product of a crisis that resulted in turn from a collision between the Electoral College and the ways in which states and localities conduct elections and count and report votes. Most Americans do not realize that we still entrust our elections at all levels to state and local governments.

Thus, the demand of Senator Charles Schumer (D-NY) for federal re-examination of the ways that state and local governments conduct elections, and exploration of how to reform those procedures and methods, should be welcomed and pursued energetically by Congress and the states alike. Indeed, it would be useful to engage the aid of the National Council of Commissioners on Uniform State Laws to prepare a Uniform Electoral Procedures Law that would be submitted to the several states, and that would go far to bringing some reliable uniformity that in turn would be the act of the states themselves.[4]

Second, as Longley and Peirce suggest, today's debate fails to recognize the profound differences between the Electoral College of 1787 and the way it works today. Historically the Electoral College may well have worked because most voters have understood its presence and function in the election of Presidents. (However, the five differences between the Electoral College as envisioned in 1787 and its evolution between 1789 and 2000 itemized by Longley and Peirce cast some doubt on this view.) Indeed, until some time in the twentieth century, the names of Presidential electors appeared on ballots, making it clear what voters were doing when they voted in Presidential elections. Today, the Electoral College works best when it is almost unnoticed by the American people. Only when (as in 2000) a disconnect develops between the popular vote and the electoral vote, and electoral mishaps in one or more states threaten to destabilize a national Presidential election, do the American people recall that the Electoral College exists.

Further, today's discussion of the Electoral College shows most Americans' lack of familiarity with either the reasons for the creation of the electoral vote system or with its workings. If, as some scholars have argued,[5] the Constitution works because it enshrines central principles and processes on which Americans have agreed to agree in governing themselves, then today's popular incomprehension of the Electoral College and its fit with state and local election procedures bodes ill for American faith in the smooth and reliable operation of their political system, and suggests the need at least to subject the Electoral College to a searching review and debate.

The ultimate question posed by this debate is whether

to engage the amending process codified in Article V of the Constitution. That process requires a serious and responsible effort to answer three questions:

\* First, is there a problem the solution to which lies beyond the reach of the ordinary political process and can be achieved only by a constitutional amendment?

\* Second, is there a proposed amendment that presents a fit with the problem and a minimum possibility of unintended consequences? [6]

\* Third, do the proponents of a proposed amendment have the political will and resources to steer it through the complex supermajority requirements of Article V?

In answering these questions, we will have to reconsider, yet again, in light of both our recent experience and the history of American Presidential elections, what it means when the electorate goes to the polls every four years to choose the President of the United States. And, in the process, we ought both to benefit from these useful and illuminating books and to do what they have failed to do – to bridge the gap between the empirical and principled levels of our constitutional discourse, so that we may live up to the challenges of making the Constitution work as a system of government in a new millennium.

#### Notes

[1]. Their appendixes include tabulations of the national vote for President between 1789 and 1996; the shifting state allocations of electors from 1789 through 2000 with estimates for 2004 and 2008; a table comparing popular and electoral vote percentages from 1824 to 1996; the texts of the relevant provisions of the Constitution and federal statutes; and the 1825 House rules for electing a President in case of a contingent election.

[2]. Judith A. Best, *The Case Against Direct Election of the President: A Defense of the Electoral College* (Ithaca, N.Y.: Cornell University Press, 1975).

[3]. These appendixes include the text of the relevant provisions of the Constitution; a statement against the Electoral College by Longley; arguments for the Electoral College by Gouverneur Morris in the Federal Convention and James Madison and Alexander Hamilton in *The Federalist Nos. 39, 51, and 68* (excerpted); a Senate Judiciary Committee report on the 1979 attempt to substitute direct popular vote for the Electoral College; and a statement defending the Electoral College by Senator Daniel Patrick Moynihan.

[4]. This last suggestion has also been made by Pro-

fessor Ronald Dworkin of New York University School of Law. See Ronald Dworkin, "A Badly Flawed Election," *The New York Review of Books*, January 11, 2001.

[5]. See, e.g., Richard B. Bernstein, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (New York: Times Books/Random House, 1993; Lawrence: University Press of Kansas, 1995).

[6]. See generally David E. Kyvig, ed., *Unintended Consequences of Constitutional Amendment* (Athens: University Press of Georgia, 2000), and the review by R. B. Bernstein for H-LAW (September, 2000).

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