BOOK REVIEWS


Ernest J. Brown †

October, 1969.

Dear Senator:

Permit me to commend to you Alexander Bickel's small but valuable book, The New Age of Political Reform. Professor Bickel is concerned, as I have been concerned, about the effects of S.J. Res. 1, should it be approved and ratified.¹ That resolution is, as I am sure you know, the resolution for a constitutional amendment on electoral change proposed and supported by Senator Birch Bayh, of Indiana, and by the American Bar Association.² I respect the purposes of those who support S.J. Res. 1. Indeed, we are, almost all of us, so deeply imbued with respect for the democratic process that any proposal for direct popular election carries an appreciable momentum for acceptance. Nevertheless, the expression of an ideal is not enough, or should not be; we should at least be careful to examine the probable workings of any proposal. This is the great merit of Professor Bickel's book. He is not halted, or satisfied, simply by a call for what is termed "electoral reform." He insists on looking to find and appraising the practical differences, political and institutional, that the proposed "reform" will make. And he insists on considering and appraising alternatives where some change seems called for. If these seem attributes that are to be expected in the consideration of any important public issue, their presence has not been markedly notable in other discussions of the proposed twenty-sixth amendment.

I think that our electoral experience, including particularly several recent campaigns and elections, warns us of some of the things we should not do at least as clearly as it indicates some of the changes that are needed in the method of electing the President and Vice President. I hope that you will find the following comments worthy of your con-

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¹ See also H.J. Res. 681, a resolution similar in purpose, that was approved by the House of Representatives, 91st Cong., 1st Sess., 115 Cong. Rec. 8142 (1969), on September 18, 1969 (339 in favor, 70 opposed, 21 not voting).

² ABA COMM’N ON ELECTORAL COLLEGE REFORM. REPORT ON ELECTING THE PRESIDENT (1967) [hereinafter cited as ABA REPORT].

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sideration in reaching a decision on S.J. Res. 1. Many of them reflect Professor Bickel's ideas, but the emphasis, or order, is somewhat different. He gives emphasis and priority in discussion to the political costs of the proposed twenty-sixth amendment. I have varied his order and emphasis to suggest greater importance for the institutional costs. We agree that some change is desirable, and would eliminate the individual electors and make some change in the method of choice should no candidate receive a majority of the electoral vote. But before going into that alternative, let me indicate the considerations that appear to bear heavily in an evaluation of S.J. Res. 1.

I. THE RUN-OFF

In my opinion, the most unfortunate feature of S.J. Res. 1 is the provision for a run-off election should no candidate attain forty per cent of the popular vote. I know that Senator Bayh and the ABA Commission justify this provision by suggesting that a figure less than forty per cent would not furnish a sufficient mandate for election to the Presidency, and could weaken the two-party system by encouraging the formation of splinter parties.

The evidence, I suggest, supports the conclusion that the run-off provision would make the very results that Senator Bayh and the ABA Commission seek to avoid more probable. We are not without experience in that area. In the southern states, the run-off is a feature of many primary elections. One sees that in those states it is regularly accompanied by multiple candidacies in the first primary, by the prevalence of personal factions or followings, and by party structures that are at best very loose, even by American standards, and at worst shadowy to nonexistent. The ABA Commission seems oblivious of the effect of a run-off system upon party structure, even in the face of evidence that its own report cites, but appears to misunderstand. In connection with assertions concerning the basis of the two-party system, its report refers to works of Key, Schattschneider, and Sindler. Yet if one checks those references, particularly the first two, they point strongly to the conclusion that a plurality system of election tends to bring into being and support a two-party organization, whereas the requirement for a run-off encourages the formation of multiple parties, and multiple candidacies. Perhaps even more instructive, though not referred to by the ABA Commission, is the late V. O. Key's notable study, Southern Politics; references to the operation and effects of a run-off system appear throughout the book. On more broadly based

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3 V. O. Key, Politics, Parties, & Pressure Groups (5th ed. 1964).
5 A. Sindler, Political Parties in the United States (1966).
6 See V. O. Key, Southern Politics in State and Nation 406-23 (1949).
See generally id.
evidence, Duverger’s *Political Parties* reaches even firmer conclusions on the effects of a run-off, or second-election, system.\(^7\)

Cause and effect are, of course, difficult to establish beyond doubt or argument when one considers the structure of political organization or government. But it is not fundamentally difficult to see why the evidence is at least consistent with, and appears rather strongly to support, the conclusion that a run-off system is destructive of two-party organization. A plurality, one-shot election encourages coalition to reach maximum strength. In pure abstraction, a high degree of fragmentation is a mathematical possibility. But the evidence indicates, as one might expect, that in practice a plurality election tends to reduce the serious contenders to two, and to give the winner either an absolute majority or a plurality very close to an absolute majority. Most of our governors and senators are elected in plurality elections. Any appreciable fragmentation of the field is rare, and the winner usually achieves an absolute majority.

But a run-off system offers attractive possibilities for a great many candidacies. First, there is the chance that the electorate might be so split among numerous candidates that one might achieve the run-off with the support of only a minor fraction of the electorate. But the more plausible goal is that even if one does not achieve first or second place in the original contest, any substantial nucleus of support gives great bargaining power should there be a run-off.

The objective of every candidate under a run-off system is thus, at the minimum, to cause a run-off if he himself cannot win. How is this best achieved? In a large and varied electorate, fractionating the electorate along doctrinaire lines is perhaps the most effective method of preventing any candidate’s receiving the vote required to win without a run-off. A one-issue doctrinaire candidate thus stands to profit if other one-issue doctrinaire candidates split off enough segments of the electorate to prevent the formation of a majority coalition. Even though their doctrine may squarely oppose his, he is confident that he can amass a nucleus of support sufficient to give him bargaining power in a run-off.

Professor Bickel suggests, and I think correctly, that had the election of 1968 been by direct popular vote, with a run-off provided, we would have had at least one, and possibly several, additional one-issue candidates. “Every consideration that brought forth antiwar candidates for the Democratic nomination would with equal—and greater—validity have propelled an antiwar candidate into the general election.”\(^8\) The leading candidates would, in all probability, have achieved not 43 per cent of the popular vote, but some figure much closer to 30 or 33 per cent. I think I need hardly stress the divisive effect upon the country of a campaign conducted under such conditions.

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\(^8\) A. BICKEL, *THE NEW AGE OF POLITICAL REFORM* 16 (1968) [hereinafter cited as BICKEL].
Moreover, the candidate who wins in a run-off hardly has a strong mandate. This is particularly true if, as has often been the case in run-off elections, he ran second in the first contest. The majority that supports him in the run-off is at best a reluctant majority, and he remains substantially in pledge to those who swung support to him in the run-off, since it has been demonstrated that he could not have won without them. In addition, recent evidence, including some from majority run-offs, suggests that run-off elections are likely to be particularly doctrinaire, strident, and divisive.

Because a run-off system does tend to produce multiple candidacies and thus to divide the electorate, it is rather meaningless to cite figures, as the ABA Commission Report does, to show that in the past the leading candidate for the Presidency has almost invariably received more than forty per cent of the popular vote. There is little reason to think that that would continue, once a run-off system was put in operation.

It is true that we have something of a rudimentary run-off system at present. I refer, of course, to the fact that the elections of the President and Vice President are transferred to the House and Senate, respectively, if no candidate receives a majority of electoral votes. But this type of run-off is most difficult to achieve, and has in fact not been utilized since 1824, when there was little or no party organization or identification. The reason for the difficulty is clear: it requires not popular votes at large, but a nucleus of electoral votes. Professor Bickel graphically illustrates the difference by reference to the 1948 election, when Senator Strom Thurmond and Mr. Henry Wallace achieved almost the same number of popular votes, but Senator Thurmond achieved thirty-nine electoral votes, and Mr. Wallace none.

But with a substantial regional base, and the prospect of an otherwise close election, our limited run-off system presents the occasional invitation to divisive minor candidacies that would be regularly and quadrennially presented by a run-off after a direct popular election. It is clear that Governor Wallace's strategy and objective in the 1968 campaign was to deny a majority of electors, or electoral votes, to either major candidate, and thereby to achieve great bargaining power. Whether he hoped to achieve this by influencing electoral votes committed to him or to his discretion, or by exerting influence on House delegations, or by both processes, does not alter the picture. By one device or another, if he could prevent a first-round verdict, he sought to be a President-maker. He did not succeed. I suggest that success might have been achieved more easily by Governor Wallace, or by some one or more other one-issue candidates, had the provisions of S.J. Res. 1 controlled the recent election. At a time when the country suffers from sharp divisions, we should be cautious lest, though with the best of intentions, we encourage further division and discourage coalition.

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9 ABA REPORT 8.
10 BICKEL 15.
The run-off system mandated by the proposed resolution appears to me to present a substantial threat to the stability of our political institutions—to the pattern that requires any presidential candidate to take a position somewhere near the center of the political spectrum, and to build out from there, if he is to have any chance of success. But even if one believes that a run-off system has the virtues that the ABA Commission attributes to it, would it not be adequate, and wiser, simply to give Congress authority to provide for a run-off, rather than making a rigid constitutional requirement that that system be adopted? If S.J. Res. 1 were adopted and the run-off system proved to be as unfortunate as some of us fear, then it would require a further constitutional amendment to eliminate it. But if Congress were simply given authority to provide for a run-off, we could adopt it, modify it, or abandon it, as experience might dictate. Even if a run-off system were desirable, it is difficult to believe that there is inevitable magic in the 40 per cent figure. Experience might indicate that it would be better if the figure were 45 per cent or 50 per cent, or perhaps even 35 per cent. One hears no justification for freezing the particular details of the resolution into the Constitution, even from staunch supporters of the proposal.

II. NATIONWIDE DIRECT POPULAR ELECTION

If the run-off provision were eliminated, or even modified to make it nonmandatory, the question of nationwide direct popular election of the President and Vice President, as opposed to an election with the popular vote segmented by states, would be much closer on the merits. However, it is both important and appropriate to see what we would gain and what we would lose by substituting a nationwide direct popular vote for a system of segmenting the vote by states under a modification of the present system. Not all of the arguments in support of the change are of equal weight, and there are opposing considerations that require appraisal.

A. The Myth of Minority Disenfranchisement

It is said that the present system of segmenting the popular vote by states, rather than providing for a nationwide direct popular vote “cancel[s] all minority votes cast in the state” \(^1\) or “suppresses at an intermediate stage all minority votes cast in a state.” \(^2\) This argument means slightly more, but only slightly more, than saying that the losers in an election have lost. In a statewide election for Governor or Senator, we do not regard the votes cast for the losing candidate as having no weight, or having been suppressed or cancelled, or those who cast them as having been disfranchised. Those votes and voters fully performed the function of any vote or voter in an election where a single candidate was to be chosen. There were simply not enough of them to elect the loser and defeat the winner. One is confident that

\(^{1}\)ABA Report 4.

\(^{2}\)ABA Report 4-5.
Senator Bayh does not regard the votes cast for Mr. Ruckelshaus for Senator from Indiana in November, 1968, as having been cancelled or suppressed, or the Indiana voters who supported Mr. Ruckelshaus as having been disfranchised.

The slight base of meaning in such statements is that it is possible, but barely possible in any practical and nonabstract sense, that a nationwide majority or plurality of popular votes may produce only the second highest number of electoral votes. Except as a matter of remote mathematical chance having little relation to reality or probability, this result can only come about in the event of an extremely close popular vote. It has happened once in our history, in the very close election of 1888. Otherwise, our history of 180 years of presidential elections—many of them with very close popular votes, as in 1960 and 1968—indicates that an electoral majority follows a popular majority or plurality, except that in percentage terms the electoral majority tends almost invariably to be much larger than the popular. Schattschneider has demonstrated why this is usually the case in a districted or segmented representative election system, but the ABA Report does not mention this aspect of his book.

While it may be unfortunate that there is any chance, however slight, that the winning candidate or party in a presidential election may have received slightly fewer popular votes than the losing candidate or party, the presidential election is not the only area under our constitution where such a result is possible. The House of Representatives may have a Democratic majority though the Republican candidates received a larger total of popular votes, or vice versa. And, of course, the majority of the members of the House will elect a Speaker, one of the most powerful officers of our government, even though that majority of the membership may, in the aggregate, have been chosen by a slight minority of the popular vote. The same may be the case with that third of the Senate chosen in any given election year, or with the Senate as a whole. The only way to eliminate this possibility is to have the House and Senate chosen by proportional representation and a nationwide electorate. Few would believe that the slight risk warrants the radical remedy.

Therefore, though S.J. Res. 1 would guarantee that the candidate who receives the largest number of popular votes becomes President (though, with the run-off system retained, that candidate might well not be the first choice of the majority or plurality), it accomplishes on this

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13 The same type of remote mathematical chance will demonstrate that it is possible to obtain a majority in a perfectly apportioned legislature with approximately 26% of the popular vote, if the vote is distributed in just the one way that will produce this result. For example, if a legislature has 100 seats, to obtain a majority, one party must secure 51 seats. If that party receives no votes whatsoever for the 49 seats in the minority, and only 51% of the vote for the seats it wins, its majority is the product of 26% of the vote.

14 See BICKEL 17.

15 E. SCHATTSCHNEIDER, PARTY GOVERNMENT 74-80 (1942).
score (its principal function) only slightly more than is for all practical purposes completely assured by the present system.

On those occasions where the election is so close that there is some possibility that a result similar to 1888's may come about, we must recognize that in terms of a popular mandate, the election is, as Professor Bickel puts it, a "stand-off, and the question is merely of a convenient device—any convenient device previously agreed upon—for letting one of two men govern." Remembering the large number of persons who because of illness, travel, business, weather, or similar factors may be disabled from voting on a particular day, one must have almost a mystical belief in the arithmetic of simple numbers to believe that under those circumstances the result in 1888 frustrated the national will, and was not an acceptable method of disposing of what was, in terms of political strength, effectively a tie vote.

B. Uncertainty and Delay

Two of the three most recent presidential elections have been extremely close in terms of the popular vote. If either election had been conducted under the terms of S.J. Res. 1, we should not have known the result for days or even weeks. The resultant uncertainty and its consequences are perhaps enough to warrant some caution before deciding in favor of a nationwide direct popular vote. But the stage beyond presents even more distressing prospects. I refer to the probability of a nationwide contest following a close presidential election conducted by direct popular vote.

Under our present system of segmentation by states, each segment is insulated from the others. If a question of irregularity arises, it is limited to a particular state. A significant contest is rendered less likely. In 1960, some question was raised concerning the vote count in Illinois. But even if the result had been reversed in that state, it would have left the national electoral result unchanged, and there still would have been no contest. We have had only one contested presidential election, in 1876, but its history strongly suggests that repetitions are to be avoided if possible. If one does occur, under our segmented system, it is at least localized in a few states.

On the other hand, a close and contested presidential election under a nationwide direct popular vote would invite opening every ballot box and every voting machine in the nation to re-examination and challenge. The process of contest might not stop there, considering the magnitude of the prize. It might well require the further step of examining, subject to contest, registration records in every precinct in the country. I think it unnecessary to depict the state of the nation—and of the world—while such a process was in progress. We have, in recent years, seen several state governments paralyzed during gubernatorial election

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16 Bickel. 17.
contests. The nation could hardly afford a similar misfortune, magnified to a vastly larger scale.

Consideration of the possibility of contested elections brings to light an added disadvantage of the proposed run-off system. With forty per cent of the vote required to avoid a run-off, the possibility of a nationwide recount and contest to determine whether a run-off was required, is not a remote one. The result might turn upon a few tens or hundreds of votes, even though one candidate had an obvious and substantial plurality. At this stage we would meet a complicating factor not present even in the normal election contest. We would have to determine accurately not only the votes received by the leading candidate or candidates, but also determine with accuracy the total number of votes cast. For example, if it were determined, perhaps after a recount, that the leading candidate had received exactly 32,000,000 votes, then a run-off would be required if the total vote were 80,000,001, but not if it were 79,999,999. This would require the determination of the validity of write-in votes, possibly illegible, possibly for unknown persons who might be fictitious or historical characters. The total number of votes would be as significant a number, and equally subject to contest, as the votes for a given candidate. The grounds of question and contest would be innumerable.

C. National Primaries

One can hardly consider election procedures without giving some thought to nominating procedures as well. Very probably, our national party conventions, as now conducted, do not constitute an ideal nominating process, though the system undoubtedly has functions and merits that the television cameras do not disclose. One of Professor Bickel's most thoughtful and valuable chapters analyzes the functions of the convention system, appraises its performance, and makes suggestions for improving a process in which he has been personally involved. Happily, there is movement to bring a substantial number of these improvements into being.

If we are to adopt a system of nationwide direct popular vote for the election of the President and Vice President, it is beyond question that the nominating procedure must change radically. Our national parties are coalitions or amalgams of state party units. The present nominating system reflects that fact, and, indeed, it is based upon the current segmented system by which the President and Vice President are elected.

A markedly different system of election would inevitably produce a wholly different nominating system. The nominating system, if it is to have any meaning, must to a substantial degree reflect or be shaped by the system of election. What it would be is difficult to predict. But it is incumbent upon the proponents of a wholly changed election system to give thought as well to the nominating system that would accompany
it, and to make explicit to the public what they think that nominating system should be.

Some have suggested national nominating primaries. Possibly that would prove to be an acceptable system, but we can only speculate on what it would produce. It appears that the cost in money and energy would far exceed anything in our experience were we to have nationwide primaries and elections both possibly followed by run-offs. The continuing availability of very large amounts of funds would certainly be a pre-condition to any effective candidacy.

Such a system has one other inevitable cost. As I mentioned earlier, our nominating and election systems have made a position at or near the center of the political spectrum, as it may be defined at any given time, almost always the only position having any chance of success. A nationwide primary nominating system would bring new factors and followings into play. It is not entirely predictable that this would produce a political course veering sharply between left and right. But one can say with some certainty that many of the factors now leading toward stability and gradual adjustment would be removed.

In connection with the highly uncertain shape of political institutions that would follow the adoption of S.J. Res. 1, may I recommend a recent study by Nichols. He demonstrates how our political institutions, slowly and gropingly, over a period of almost sixty years, adjusted to become effective under our constitutional electoral machinery. He recounts the past, but the lesson is clear. Wholly different machinery will call into being wholly different institutions. Unless we are quite sure that we wish to junk our present political institutions in favor of whatever may develop under new election machinery, an appraisal more careful and more practical than the proponents of S.J. Res. 1 have thus far made is clearly required.

D. Limited Virtues of the Resolution

Let me sum up the balance, as I see it, between the institutional aspects of the nationwide direct popular election, on the one hand, and popular election segmented by states, subject to some changes to be noted below, on the other.

The nationwide direct popular election would eliminate the remote possibility that in a very close election the candidate receiving the largest number of popular votes might trail in electoral votes, and thus not be elected. This is really the only item on the plus side contributed by S.J. Res. 1—the elimination of a possibility that has occurred once in 180 years of presidential elections. To weigh against that, we have (1) all the unfortunate aspects of a run-off system, (2) the enhanced risk of uncertainty in results and of damaging election contests, and (3) a wholly unpredictable change in our nominating procedures and in the political institutions shaped by the nominating and electing process.

17 See id. 21-23 & app. VIII, at 74.
Perhaps it is not inevitable how this balance should be struck. However, it is my judgment, as it is Professor Bickel’s, that the weightier considerations favor the retention of a vote segmented by states, subject to changes to be noted immediately below.

III.IMPROVEMENTS

Some changes in our system would undoubtedly constitute improvements, while causing no significant alterations in our political institutions; almost everyone concerned with our electoral process agrees that at least these changes should be made. The difficulty in effecting them arises because the proponents of direct election, of the district plan, and of the proportional plan wish to go even further in their separate directions. These changes are:

A. Elimination of the Individual Electors

The elimination of individual electors would remove many of the weaknesses in the present system stressed by the ABA Commission and by Senator Bayh. It would eliminate the problem of the “faithless elector” and the potentially more serious problem of unpledged electors. This latter device, you will recall, was supported by Mississippi and Alabama in 1960. In effect, it permits states having unpledged electors to withhold their effective vote until the result in other states is ascertained. If their electoral vote is then needed to make a majority, they gain tremendous bargaining power. It is, in effect, a variant on Governor Wallace’s 1968 strategy. No one has made a substantive argument of any weight in favor of retention of individual electors.

B. Change in the Procedure Existing Today Should No Candidate Receive a Majority of Electoral Votes

As you know, the present system, in that contingency, transfers choice of the President from among the top three candidates to the House, voting by states. The concept behind voting by states in the House, with each state having one vote, may have been appropriate for a loose confederation. Little can be said in favor of it today. Among other faults, it may disable the House from electing at all, because of evenly divided delegations. There is little reason why choice should be made from among the top three rather than the top two. This may be another factor that could disable the House from electing. Several alternatives are possible:

1. Election by the House, with each member casting one vote.

2. Election of both President and Vice President by a joint session of the House and Senate, with each member of either body casting one vote.

3. Election by a plurality of electoral votes, thus eliminating the quasi-run-off now in our system.
I think that the second of these three alternatives would gain the largest measure of support, and it should be entirely acceptable. It was proposed by President Johnson,\textsuperscript{19} was sponsored by Senator Bayh\textsuperscript{20} before he transferred his allegiance to S.J. Res. 1, and is the choice of Professor Bickel.\textsuperscript{21} However, I believe that the third alternative is preferable, for it would strengthen our two-party system by eliminating the incentive for any candidate primarily seeking post-election bargaining power. A majority of electors was required before we had any party structure, when communication was difficult, and when it was contemplated that individual electors would exercise personal choice. Provision for a plurality choice would, I believe, consolidate the electoral vote rather than fractionate it. While the third alternative seems the wisest to me, either the second or the first would be completely acceptable.

These improvements, incorporated in an amendment such as that proposed by President Johnson and sponsored by Senator Bayh, would accomplish another purpose of some importance. They would make explicit in the Constitution the provision that the President was to be elected by popular vote. It is still constitutionally possible, if politically implausible, to have electors chosen, and the electoral vote determined, by state legislatures or otherwise by state government process. And such an amendment would give to Congress a regulatory power over presidential elections similar to that which it has over elections of Representatives and Senators. At present, the constitutional basis of its power over presidential elections is at best tenuous.\textsuperscript{22}

I have set forth above what I consider the institutional aspects of S.J. Res. 1, and Professor Bickel recognizes these as serious and important. But he gives initial emphasis to the great shift in political power that would be occasioned by the adoption of the proposed twenty-sixth amendment.

Under the present system of giving each state the number of electoral votes that it has members of the House and Senate, the least populous states gain some increment in power because of their two "senatorial" electors and by virtue of the fact that each state has at least one member of the House, even though its population is as small as Alaska's. On the other hand, the large blocks of electoral votes possessed by the most populous states are the great prizes in a contest for the Presidency. This is the result of the fact that the unit rule is almost universal\textsuperscript{23} in the choice of electors, and that these strategically

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\textsuperscript{19} See Bickel 20 & apps. V, VII, at 67, 72.

\textsuperscript{20} Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, Election of the President, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 18-24 (1968).

\textsuperscript{21} Bickel 20.

\textsuperscript{22} Cf. Burroughs v. United States, 290 U.S. 534 (1934).

\textsuperscript{23} It had been universal for many years until Maine provided that a presidential elector should be chosen from each congressional district, and two at large. Maine P.L., Chap. 131 (1969), amending Me. Rev. Stat. Ann. tit. 21, §§ 1181, 1184 (1964).
vital blocks of electoral votes go as units to the winners in the several states. How the balance between these increments of power should be struck is not subject to exact determination, but Professor Bickel and most observers believe that it swings substantially to the states of large and, as is most frequently the case, varied population. A President can hardly be elected without carrying at least some of the big and heterogeneous states, and if he carries most of them he is almost sure to be elected. Issues that will carry the large majority of the most populous states may, and often will, elect a President. Hence, candidates and Presidents are responsive to those states of large and varied population, and their political power is great.

It seems wholly clear that the adoption of S.J. Res. 1 would shift power very markedly away from states with large and diverse populations towards the states with more homogeneous populations, whether they be large, or only medium-sized—principally toward the agricultural states of the midwest. At an earlier time, the shift of power might also have been toward the south, but the homogeneous or heterogeneous character of the electorate of the south is now rather uncertain.

Close elections show with some clarity the distribution of power under one system or another, and I suggest that the election of 1960 demonstrates how different the distribution of power would be under S.J. Res. 1. If we look at the results of that election, we see that under direct popular election, the then Vice President Nixon’s plurality in Nebraska (6 electoral votes) alone (148,011) would have slightly more than offset the then Senator Kennedy’s aggregate plurality (147,275) in Pennsylvania (32 electoral votes), New Jersey (16 electoral votes), and Illinois (27 electoral votes). If we substitute Iowa (10 electoral votes; 171,816 plurality for Nixon) for Nebraska we get an even larger overbalancing of Pennsylvania, New Jersey and Illinois, and if we substitute Kansas (8 electoral votes; 198,261 plurality) we get a still larger overbalancing. In the same election the Indiana result (13 electoral votes; 222,762 plurality for Nixon) would have been more than six times as significant in the determination of the ultimate result as the California result (32 electoral votes; 35,623 plurality for Nixon). And the vote in Massachusetts (16 electoral votes; 510,424 plurality for Kennedy) would have outweighed in significance the result in New York (45 electoral votes; 383,666 plurality for Kennedy).

Such a shift in political power is not insignificant. A President may be President of all the people, but he is likely to be particularly sensitive and responsive to the needs and desires of the constituency that elected him, and that may re-elect him. If we look back to some of the significant legislation of the past eight years that required strong presidential leadership for enactment—the Civil Right Acts of 1964 and 1965, for example—can one think that that legislation would have been enacted if the electoral system that then prevailed had not awarded large blocks of electoral votes to New York, Pennsylvania, New Jersey, Ohio, Illinois, and Michigan?
These political considerations may equally well supply a reason why some should support S.J. Res. 1 as why others should oppose it. I suggest only that one should be aware of these potential shifts of power, whether that gives one ground for support, for opposition, or for disregarding them as immaterial. Professor Bickel writes, I believe, primarily to an audience that would be likely to oppose S.J. Res. 1 if it fully understood the implications for shifts of political power. I think that every voter and every member of Congress should be fully aware of those political implications, whatever the direction in which they might lead him. But I have stressed the institutional implications because, as I see the balance to be struck, those must more generally lead voters and members of Congress to doubt the wisdom of the resolution.

I shall be grateful if you will give these matters your consideration, and I shall be happy if you agree with the conclusions that Professor Bickel and I have reached, though with somewhat different emphasis on our reasons.

Sincerely yours,

Ernest J. Brown


Paul W. Bruton

With the publication of these two volumes, Professor Schwartz completes his five-volume Commentary on the Constitution of the United States, the most ambitious work of its kind since the appearance of the second edition of Willoughby on the Constitution forty years ago. In his 1962 preface to the first two volumes, Professor Schwartz wrote:

These volumes have been written upon the assumption that the working of the Constitution is more than the private preserve of the legal profession. As such, they have sought to deal with all of the important areas appropriate to a constitutional commentary—while at the same time seeking to avoid the arid pedantry all too often characteristic of a legal treatise. It is, to be sure, true that much of the discussion concerns subjects that can hardly be presented with all the fluency of popular fiction. Yet even such matters need not be obscured in the technical vacuum of legal language. Even they can be presented in readable fashion and in a manner that makes

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1 B. SCHWARTZ, RIGHTS OF THE PERSON (1968) [hereinafter cited as SCHWARTZ].

2 The three volumes published earlier are: The Powers of Government (1963), consisting of two volumes (Federal and State Powers and The Powers of the President); and one volume on Rights of Property (1965).
clear their significance to those interested in the operation of what Gladstone once termed "the most wonderful work ever struck off at a given time by the brain and purpose of man." That, at any rate, is the faith upon which these volumes are based.

These latest volumes amply attest to the fact that the author has maintained his faith to the end. While his style may not have quite the fluency of popular fiction, it has more of the flavor of the popular lecture than the close-knit legal treatise. Professor Schwartz writes well, very well, and with apparent ease—too much ease perhaps, for there are places where the discussion becomes prolix to the point of being repetitious, and where the content does not justify the number of pages used. He has a flair for apt quotation and he draws his material from a wide range of literature, nonlegal as well as legal, but the text is sometimes so lardered with quotations from judicial opinions that the reader gets the impression he is perusing an anthology of judicial rhetoric rather than an analytical commentary.

So far as coverage is concerned, the author has achieved his objective; these volumes on the civil and political rights of the individual "deal with all the important areas appropriate to a constitutional commentary." Rights of the Person is divided into six categories which are characterized as protections of the individual's sanctity, privacy, expression, equality, belief, and dignity. The chapter on Sanctity of the Person is devoted to the rights of the accused in criminal cases, such as freedom from unreasonable arrest, rights to fair accusatory procedure, counsel, jury trial, and protection against double jeopardy, ex post facto laws and bills of attainder. Freedom from unreasonable search and

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3 E.g., 2 SCHWARTZ 766-67, where the following paragraphs appear consecutively in the section on freedom of movement:

That Crandall rests on the broader ground of a right of national citizenship [rather than on the commerce clause] is shown by the comment of Justice Miller (himself the author of the Crandall opinion) some two decades after that case was decided: "in the case of Crandall v. Nevada, ..., the principle was declared that every man in this broad country had a right to travel all over it, for purposes of business or pleasure, regardless of State lines, and that no state could levy a tax upon him for that privilege."

The right declared in Crandall v. Nevada as one implied from the very nature of the constitutional system was soon elevated to one of the privileges and immunities of national citizenship protected by the Fourteenth Amendment against state interference. The result is that once stated by Chief Justice Taney: "We are all citizens of the United States, and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

What the right under discussion comes down to is a right to move freely throughout the country. "All the citizens of the United States, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in their own states."

The right of freedom of movement is, as just seen, one of the basic attributes of national citizenship and, as such, protected by the Privileges-and-Immunities Clause of the Fourteenth Amendment.

4 See, e.g., 2 SCHWARTZ 496-507. What is said there regarding the general standards for classification under the equal protection clause could have been well expressed in much briefer compass.
seizure is the subject of the chapter on *Privacy of the Person*. The general content of the chapters on *Expression of the Person* and *Equality of the Person* is indicated by the titles; the chapter on *Belief of the Person* is concerned with religious freedom and problems of the separation of church and state.

Although the principal theme of the first two chapters is criminal justice and fair procedure, discussion of the basic privilege against self-incrimination is reserved for the last chapter on *Dignity of the Person* where consideration is also given to the law of confessions and cruel and unusual punishments. The utility of this division of such closely related material between the first and last chapters is not apparent.

A general appraisal of these volumes, like those which preceded them, depends, however, not so much upon the topics covered and their arrangement, as upon the depth and character of the discussion. On this score the volumes do not measure up, in my opinion, to the standards set by the style and rhetoric with which Professor Schwartz writes.

Apparently this commentary was written for both a lay and a professional audience. Perhaps it could not have been written to satisfy entirely the needs of both, but there could have been more recognition of the difficult problems frequently lying below the surface of judicial rhetoric. Most notable among the omissions were the absences of any elucidation of the judicial process in constitutional cases and of leads to the excellent periodical literature of the last decade or two.

One of the most interesting and instructive cases in the interpretation of the Bill of Rights is *Griswold v. Connecticut* holding unconstitutional the Connecticut law prohibiting the use of contraceptive devices and the giving of medical advice in their use. Schwartz's treatment of that case is typical of his inadequate handling of other cases. The case is referred to at the beginning and the end of the chapter on *Privacy of the Person*; it is recognized as providing important support for the right of privacy. Yet nothing about the judicial process by which this "penumbral" right is said to emanate from the particular provisions of the bill of rights is said; no mention is made of the ground-breaking discussion of the ninth amendment by Justice Goldberg (Warren, C.J., and Brennan, J., concurring); and no reference is made to the legal periodical literature on the subject. *In re Gault*, the recent Supreme Court case in which the Court struggled with constitutional requirements in juvenile court procedure is neither discussed nor cited in the Commentary.

5 The disadvantage of such a division is shown by the discussion of the importance of preliminary examination in Volume 1, 1 Schwartz 69-74, while the effect of unlawful detention under the Escobedo-Miranda line of authority is not explored until the reader reaches Volume 2, 2 Schwartz 864-71.

6 381 U.S. 479 (1965).

7 1 Schwartz 172, 255-57.

8 387 U.S. 1 (1967). The case was decided May 15, 1967, apparently in ample time to be included in the manuscript.
The author's tendency to lay down blanket rules that smother and hide the problems that exist in almost all areas of the law is illustrated by his treatment of the criminal syndicalism cases. Having accurately described the *Dennis* case, the author expresses his view that because of the conspiratorial character of the Communist Party (described by Justice Jackson), "it is hard to see how the highest Court can be condemned for" sustaining the conviction of Dennis for conspiring to advocate the violent overthrow of the government in violation of the Smith Act. Whether one agrees or disagrees with this conclusion, it is surprising to find no discussion of the *Yates* case. While *Yates* did not overrule *Dennis*, it certainly drew most of its teeth.

There are other examples of the author's superficial treatment of judicially announced doctrine. For instance, he restates, at face value, the so-called "no-evidence rule" as enunciated in the "shufflin-Sam" case (*Thompson v. Louisville*) and the sit-in cases without any indication of its relation to the doctrine of void for vagueness or overbreadness. The no-evidence rule, simply stated, is that a conviction with no evidence to support it is a violation of due process. This implies that the invalid conviction rested on findings of basic fact for which there was no support in the record. This was not the situation in *Thompson* or in the sit-in cases in which the Court purported to use the rule. There the dispute was not over the basic facts, i.e., what the defendants did, but rather concerned whether defendant's conduct could be characterized as "disorderly" or as a "breach of the peace" and could be constitutionally punished as such. Thus the problem becomes one of the interpretation and scope of the applicable statute rather than an evidentiary question in the usual sense. Perhaps this is all too heavy to be included in the text of the *Commentary*, but if so, the no-evidence rule discussion should be omitted or at least warning flags thrown up in the footnotes to indicate that all may not be as it seems.

Throughout both volumes the footnotes simply contain citations to the cases and quotations appearing in the text; very little reference is made to the rich volume of literature, periodicals and otherwise, which has appeared in recent years on the work of the Court in the area of civil rights. No provocative questions are asked; no alluring leads are offered. The usefulness of the notes is further impaired by their being

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9 Dennis v. United States, 341 U.S. 494 (1951) (holding portions of the Smith Act constitutional as applied to Dennis, a leader of the Communist Party). See 1 Schwartz 350-56.

10 1 Schwartz 355.

11 In *Yates* v. United States, 354 U.S. 298 (1957), the Court reversed convictions of communist leaders under the same provisions of the Smith Act which were involved in *Dennis*. The Court distinguished *Dennis* on a narrow ground of instructions to the jury. *Yates* is merely cited in a footnote appended to the discussion of loyalty oaths. 1 Schwartz 364 n.544.


14 1 Schwartz 128-29.
placed at the end of each volume rather than at the foot of the page. The table of cases causes further difficulty by referring to the page of the text only when the case is named there; for cases cited in the notes, the reader is referred to a footnote number which he must then find in the text.

An author is entitled to have his work judged from the viewpoint of the readers he intended to reach. I assume that the Commentary was written for the professional audience as well as the general reader. My difficulty with these volumes is that they seem to fall between two stools, being too weak a dose for the first group and too heavy a one for the second.


Harrell Rodgers†

Public Controls for Nonpublic Schools is a compilation of nine papers presented at a conference on "State Regulation of Nonpublic Schools," held at the University of Chicago early in 1967. The primary stimulus for the conference was the Amish controversy then boiling in the State of Iowa. Delegates were a diversified group consisting of three college professors, one governor, one college president, one attorney, one state commissioner of education, and one student. Other participants included religious leaders, scholars, and political officials.

Drawn together to discuss the problems of regulation of nonpublic schools, the participants grappled with a central issue:

How can nonpublic education be both responsible and free? Responsible to serve the public interest; free to experiment and disagree. Without regulation, some schools may victimize patrons and endanger the general welfare. With regulation, dissent is jeopardized. Where should the balance be struck?¹

Governor (now Senator) Harold Hughes of Iowa opened the discussion by relating his role in, and attitudes toward, the Amish dispute (then current and unsettled) in his state. This controversy raged around the refusal of a handful of Amish families to hire certified teachers for two private schools which they operated in eastern Iowa. Following a description of his role in the delicate negotiations between the Amish and local officials, Hughes concluded that in such contro-

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¹Public Controls for Nonpublic Schools 2 (D. Erickson ed. 1969) (hereinafter cited as Erickson).
versies, there may be no adequate solution. Torn between the duty to enforce the law and a sympathy for those unwilling persons upon whom it must be imposed, officials, acting in good conscience, can only seek accommodation. Compromise may not be logical in terms of the law, but it protects the conscience of those who would be different, without irreparably damaging any state interest. In such a case, Hughes explained: "Personally, I am more willing to bend laws than human beings." 2

In the second paper presented to the conference, the editor of Public Controls, Donald Erickson, offers a lucid, if somewhat polemic, account of the more dramatic episodes in the Amish dispute. His point is obviously to demonstrate the degree of oppression that state regulation of nonpublic schools can impose, and the insensitivity of local officials that can magnify the oppression. Inclined to see the dispute almost entirely from the Amish point of view, he disagreed with Governor Hughes's conclusion that local officials acted in good faith. To combat any notion of good faith on their part, he even managed to invent a small conspiracy on the part of local officials against the Amish. One must infer from both his zealous attack on officialdom and his absolute defense of the Amish that he would view the case for more enlightened regulation of nonpublic schools as strengthened if the Amish emerged completely vindicated and local administrators were severely restricted in their authority. But his enthusiasm in establishing his case causes Erickson to make many questionable judgments and some grossly inaccurate statements. For example, he refers at one point to Amish society as "one of the most tranquil known to man." 3 Yet, there is considerable evidence that this description is inaccurate. In his book Amish Society, John Hofstetler (professor of sociology, former Mennonite, and delegate to the conference) reports that "among the Amish the rate of suicide is just as high, if not higher, than for the nation." 4 He adds that certain physical disorders, such as obesity, chronic bedwetting, digestive disturbances, and mental disorders tend to occur more often among the Amish than non-Amish. 5 Erickson's rhapsodizing is not only suspect, but unnecessary and ill-advised. Although the need for more enlightened regulation of nonpublic schools is crucial, one's personal attitudes toward the groups to be regulated is not relevant to resolutions of the problems.

Franklin Littell, President of Iowa Wesleyan College, offers a more useful contribution to an understanding of the Amish position. He examines their religion, traditions, and cultural orientation in order to show how the Amish approach to education differs from the more traditional approach of their non-Amish neighbors. Emerging clearly
from his paper is the concept that minority groups may have serious, legitimate educational goals that differ from those of the larger society, and that imposition of standard educational procedures on them will only result in resistance.

Although the conference was precipitated by the Amish crisis, the problems with which it dealt were not confined to any one group. Therefore, as the conference progressed, the contributions became more general and more intriguing. For example, John Elson, the only student member, examined the reasons underlying regulation of non-public schools. Having first considered the rationale for regulation, he proceeded to review the legal framework provided by decisions of the Supreme Court of the United States and various state courts. Most judicial policy, he concludes, is weighted in favor of state regulation:

Federal and most state courts profess extreme reluctance to hold statutes governing educational matters unconstitutional unless they directly conflict with significant First Amendment interests.6

Norman Dorsen, a well known civil liberties scholar, continued this general analysis by examining racial discrimination in private schools. He dealt with such problems as the use of private schools in southern states to avoid the dictates of Brown v. Board of Education,7 the legal problems that some nonpublic schools face in accepting black students, and the relation of church-related schools to the difficulties of integration. His conclusion is that sufficient "law" exists to enable an enterprising court to hold that private schools are also subject to the constitutional command to desegregate.

While Littell and Dorsen deal with the more specific instances of regulation, Erickson, in his second contribution, assumes the enormous task of prescribing how laws might be written to contend with the totality of complex problems involved in regulating nonpublic schools. If public control is to be beneficial, but freedom to differ is still to be retained, more flexible statutes are needed to temper the present imperative status of compulsory education legislation. Erickson offers a hypothetical statute as a resolution of the competing considerations of freedom and control:

Nonpublic schools shall be permitted to function within the meaning of the compulsory attendance law, primarily to prepare children to participate in dissenting communities whose cultures have proven viable in the modern world, provided that these communities are not characterized by indigence, crime, anarchy, or subversive doctrines and are not seriously burdening the state with defectors who have difficulty adjusting to life in more complex settings.8

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6 Erickson 133.  
8 Erickson 171-72.
In his attempt to ease all of the difficulties of minority groups by one statute, the editor creates more problems than he solves. The ambiguity of the statute, for example, would allow state officials to close any school without cause. It is questionable whether the Amish could survive the implementation of such a statute, since it is not clear that their culture is "viable in the modern world." Another crucial defect in the statute is that it is designed to protect only established minorities; new minority groups are left with no safeguard. If we seriously intend to allow pluralistic goals and divergent attempts at achieving those goals in nonpublic schools, the standards used to regulate such schools will have to be drawn very cautiously, perhaps as cautiously as those standards used to regulate first amendment rights.

The remaining contributors to the conference offer a variety of ideas, some useful, and others of little substance. Falling into the latter category is the paranoid attack on nonpublic schools by Jules Henry. His thesis is that the motivation for regulation is purely economic. Since the austere life of the Amish would threaten the gross national product, he believes that public officials fear their ideas and therefore desire to regulate them. More constructive commentary is offered by William Ball, who admonishes some of his Catholic brethren for their willingness to accept public aid for their schools. He argues that even when these schools do accept public aid, they should only be subject to state or federal standards in those areas supported by the funds.

Perhaps the only point agreed upon by the members of the conference was that future regulation of nonpublic schools must be better planned and more sensitive to the rights of those regulated. This point is well taken. If state regulation is complicated now, it will be doubly so in the future. Consider, for example, the increasing number of communes springing up across the country. Many of these communities will want to educate their members in their own manner. Black nationalist groups are also considering educating black children in private schools run by their members. Regulating these schools will be difficult. Considerable courage will be required on the part of political officials to allow these groups as much freedom as possible to experiment and question the basic premises of our society.

Public Controls for Nonpublic Schools is useful in one respect; the very fact that it is published shows some concern for the perplexing problems which the book so poorly treats. Unfortunately, as is often true in a conference in which participants submit position papers, the contributors are unresponsive to each other's arguments. If there is any continuity in the book, it is the product of happenstance. Yet during the course of the disjointed presentations, crucial questions are asked, and at times, albeit rarely, useful answers are suggested. Hopefully, this work will produce more cogent arguments in the future and encourage many of those who contentedly form the "majority" to question whether they truly desire a uniform system of education.