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The Man Who Saved the Electoral College

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Michael Uhlmann was a central figure in the conservative intellectual movement for 60 years, from his participation, as a Yale undergraduate, in William F. Buckley, Jr.'s "Sharon Statement" conference in 1960, through his distinguished tenure as professor of government at Claremont Graduate University from 2002 until his death in October 2019 at the age of 79. The many stirring tributes and eulogies following his death present a remarkably consistent portrait of his life and character. He combined exceptional personal modesty with continuous good spirits and good deeds. He was a witty raconteur and aphorist whose humor always carried a serious point. He was a strong-minded, full-spectrum political conservative who never gave in to handwringing and despair. He was a clubbable drinking buddy whose first loves were learning, teaching, and grooming others for success. He combined these disparate traits naturally, gracefully, for they were conscious embodiments of his Christian devotion. Mike's friends knew all or most of these things through personal experience; following the shock of his unexpected death, it has been gratifying to discover how many others knew precisely the same man.

Less documented are Mike's accomplishments in practical politics — as a young staffer to Senators Roman Hruska of Nebraska and James Buckley of New York, a senior legal official in the Gerald Ford administration, a pioneering "public-interest" litigator on behalf of limited government and economic liberty, and an astute policy analyst and pro-life champion in the Ronald Reagan White House (where I was a colleague). We do have some heartfelt testimonials to go on, especially

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from Senator Buckley. But political achievement is a sometime thing; politics is an opaque, contentious enterprise where defeats are commonplace and victories have many authors. The man who acts with principle and prudence amid confusion and intrigue may be overlooked, or disparaged, in the war stories of insiders.

But there is an episode in Mike Uhlmann's political career where his role was so singular and momentous that it could not possibly be gainsaid, although it could easily be forgotten (characteristically, he himself did nothing to memorialize it). Finding himself at a constitutional barricade in the summer of 1970, he successfully defended the Electoral College at a moment of maximum peril.

THE UHLMANN ESSAY

Under the Electoral College, Americans choose their president by state, voting for slates of local electors pledged to one or another presidential candidate. The number of a state's electors is the sum of its senators (two per state) and representatives (varying from one for small states such as Delaware and Montana to dozens for populous states such as California and Texas). Almost all states (currently all but two) choose their electors by a winner-take-all popular vote — so the candidate with the most votes, even a plurality or small majority, receives all of the state's electoral votes. There are further wrinkles, and it is an altogether subtle, complicated scheme. In modern times, it has been the subject of recurring criticisms that it is antiquated and undemocratic, and proposals that it be replaced by a direct national popular election.

The criticisms gained currency following the 1968 election. Richard Nixon won a firm majority of the Electoral College — 301 votes, or 56% of the total 538 electoral votes. But he got there with only a slight plurality of the popular vote — 43.4%, to Hubert Humphrey's 42.7% and George Wallace's 13.5%. As in most close elections, it was possible to artfully redistribute a number of popular votes in a few selected states, while leaving the votes everywhere else unchanged, to produce an Electoral College majority for the loser of the popular vote. Another fun hypothetical was to note that if Wallace had done better than he did in certain selected states, neither major candidate would have won an Electoral College majority — throwing the contest to the House of Representatives, where Wallace might have played power broker. And there had been a "faithless elector" — a member of North Carolina's victorious Nixon slate who cast

his electoral vote for Wallace (a strictly symbolic act which Congress, presiding over the vote, could have rejected and almost did).

One might have said that the Electoral College proved its worth in 1968 by delivering a clear, incontrovertible national decision from a messy and angry (and violent) campaign year. Instead, two leading proponents of direct national election — Representative Emanuel Celler of New York, chairman of the House Judiciary Committee, and Senator Birch Bayh of Indiana, a member of the Senate Committee on the Judiciary — used the occasion to advance a constitutional amendment for direct election. (Their amendment included a run-off election if no candidate received 40% of the vote, so it would not have changed the outcome of the 1968 election — but would have left the victor with a razor-thin plurality rather than a solid majority of the determining vote.) Many prestigious organizations supported the amendment, including the American Bar Association, NAACP, U.S. Chamber of Commerce, League of Women Voters, and AFL-CIO. In the fall of 1969, the amendment passed the House on a vote of 338-70, with stronger support from Republicans than Democrats. Soon afterwards, President Nixon endorsed the amendment and called on the Senate to follow the House's lead, and the *New York Times* reported that 30 of the necessary 38 state legislatures had already indicated they would ratify it.

And then along came Uhlmann, a 30-year-old staffer for Senator Hruska, ranking minority member of the Senate Judiciary Committee. He was intellectually prepared for the fray, having arrived from graduate studies at Claremont University under Harry Jaffa and Leo Strauss, but was new to legislative politics. Mike's rookie Capitol Hill project was writing the minority views on the committee's favorable report (by a vote of 11-6) of the direct-election amendment to the full Senate, issued on August 14, 1970.

The majority report, for six Democrats and five Republicans, mainly recounted the committee's deliberations and discussed possible variations in procedures for direct elections. Regarding the merits of abolishing the Electoral College in favor of a nationwide popular vote, it was strikingly superficial and bombastic (although Michigan Republican Robert Griffin and Maryland Democrat Joseph Tydings submitted more substantial "Separate Views").

The 1968 election, said the majority, had been a "near electoral mishap" that brought America "to the brink of constitutional crisis." That

an imaginary re-allocation of popular votes might have awarded the presidency to a candidate with fewer of those votes, or might have made Wallace a kingmaker, and that there had been one faithless elector, demonstrated that "[t]he prospect of unknown electors auctioning off the Presidency to the highest bidder . . . is all too real." The Electoral College, and the winner-take-all procedure in most states, distorted the value of individual votes depending on a voter's state of residence, and disenfranchised minority-party voters in states where the other party was dominant and likely to win all of its electoral votes. A modern electoral system, the report declared, must have the people choose their president by direct vote, must count every vote equally, and must guarantee that the candidate with the largest national vote total is elected president.

The minority report was signed by Democratic senators James Eastland of Mississippi (the committee chairman), John McClellan of Arkansas, and Sam Ervin, Jr., of North Carolina, along with Republicans Hruska, Hiram Fong of Hawaii, and Strom Thurmond of South Carolina. Formally captioned "Minority Views," it is better known to history as the Uhlmann Essay on the Electoral College. Legislative staffers are supposed to toil in anonymity and let their bosses take the credit, and Mike heartily supported that custom, but in this case the authorship was widely known and gratefully acknowledged by the senators themselves. It was more than twice the length of the majority report, and in style and substance could not have been more different; it stands apart from all other legislative reports I know of.

First of all, it is a rhetorical masterpiece. It is written in a clear, single voice, with none of the weasel words and internal contradictions that characterize many committee-written documents. It has classical structure: opening with a forthright itemization of arguments against direct election; then developing, extending, and combining those arguments; then diverting to a brief cadenza on "specious arguments" about the Electoral College; then drawing everything together in a ringing conclusion. Meticulous exposition is undergirded by a basso continuo — direct election would be "the most deeply radical amendment which has ever entered the Constitution of the United States." Eminent advocates of the Electoral College make pointed arguments in their own words — John F. Kennedy, Richard Goodwin, Theodore White, Harry Jaffa (of course), Alexander Bickel, and Charles Black (the source of the "deeply radical" line). The author's own formulations are frequently deep and aphoristic,

as in, "The genius of our present method of election may be said to consist precisely in its ability to reveal what men have in common and to conceal what they do not."

Boldly — given the minority's cornered circumstances — the report begins by placing the burden of proof on the proponents of direct election, which immediately highlights the thinness of the majority report. The Electoral College is imperfect, as are all electoral systems, but it has been with us for more than two centuries. It has adapted to changing circumstances, provided legitimacy and stability in tumultuous times, produced many distinguished presidents, and been part and parcel of the most successful and durable structure of government in history. In the face of this long and admirable experience, the majority proposed not to correct any particular defects but rather to throw away the entire apparatus, based on nothing more than abstract mathematical simulations, and to substitute a radically different one, without even pausing to consider what the practical consequences of the new system might be.

In contrast, the Uhlmann Essay was practical, concrete, and pragmatic. Several of its arguments should have been sufficient in themselves to give direct-election proponents serious pause. For example, voting fraud, and the prospects of vote challenges and recounts, are ever-present risks in any large election system. The Electoral College system insulates those risks: Incentives for fraud are limited to close contests in a few large states, and challenges and recounts are limited to toss-up results in states that have turned out to be decisive to the national outcome. But under direct popular election, temptations for vote-stealing would exist in every precinct (there are more than 178,000 of them), and would grow dangerously throughout the west on election nights when eastern returns were close. And recounts would not be isolated — they could yield a few valuable votes even in districts where the raw vote was lopsided, so a recount anywhere would encourage tit-for-tat challenges across the country. Close presidential elections would be prone to extended post-election periods of political instability, with far-flung challenges and counter-challenges, litigation, rancor, and government paralysis.

Mike's fundamental concerns, however, were constitutional. The Constitution, and the political traditions that have grown up around it, promote *reasonable majoritarianism*. They respect and empower majorities, both popular and representative, but aim to build majorities that are moderate and stable, composed of broad cross-sections of the nation's

great diversity, and respectful of minority interests and values. The structure of Congress fosters such majorities through bicameralism, with one chamber organized by states and the other by populations within states, and by staggered terms of office and other devices. But the presidency is a special challenge, because it is necessarily a winner-take-all institution and its occupant is the nation's most powerful political figure.

The Electoral College addresses the challenge by organizing the presidential election by states, with state electoral votes combining the House's and Senate's weighting schemes. A victorious presidential candidate will almost always win a national popular majority or plurality, but must always win a concurrent majority of state electoral votes. As a result, every plausible campaign strategy will involve competing in a diversity of states and regions and engaging with differing and conflicting local concerns. The state custom of winner-take-all voting is an additional, powerful inducement to strategic diversification, which is why so many states have adopted it. In office, a president can identify with Congress's preoccupation with local interests and state-by-state coalition-building, because his political position involves similar constraints.

The gravamen of the Uhlmann Essay is that the Electoral College not only reflects the Constitution's larger purposes but is indispensable to those purposes. Abolishing it in favor of direct election would severely, and perhaps catastrophically, undermine America's commitment to government by reasonable, internally diversified national majorities. Mike provided three central illustrations of the dynamics of constitutional unraveling.

First, direct election would destroy our party system. Under the Electoral College system, winning the highest political prize requires a broad coalition with a large presence in numerous individual states. That is why our politics is dominated by two major parties, each one a joint venture of state parties that combines and mediates a diversity of interest groups and range of ideological commitments. And it is why distinct minorities work within one or both of the major parties (and make and receive compromises for that purpose) rather than striking off on their own. Direct election would suit the natural inclinations of political activists, conspicuous in numerous other democracies, to organize by regional, economic, and class interests, unadulterated ideologies, and sheer personalities.

In a direct-election system with several parties and a 40% threshold for a run-off between the top two vote-getters, narrow parties with,

say, 20% of the national vote could hope to make it to the run-off, or else to play an influential role in the run-off. The current system's pre-election coalition-building, and competition for the broad political center, would be replaced by a cacophony of first-round election campaigns, probably with extreme or idiosyncratic parties in the mix, followed by power-sharing negotiations and endorsements in advance of the run-off election. The dynamics of multi-party electioneering, and likely proliferation of splinter and spoiler parties, would threaten the integrity of both first-round and run-off elections. That would necessitate federal regulation of party qualifications, historically a state prerogative — another contentious, polarizing step, and one that direct-election proponents anticipated in the provisions of their amendment.

Second, direct election would eliminate the states from presidential politics. Presidential aspirants would be vote aggregators pure and simple, indifferent (except in the case of regional candidates) to where the votes came from. The familiar quadrennial political ritual of national party conventions, with their state-by-state nominating roll calls, would have no further place in this system. Whether campaigns were two-party or multi-party contests, leading candidates would focus on the large population centers along the coasts and a few in the hinterlands, and pay little or no heed to the interests of more dispersed citizens residing in vast areas of the nation. This would seriously undermine the federalist structure of our Constitution and government — the Senate would be the states' sole remaining bulwark. But its immediate effect would be to transform presidential campaigns into undistracted interest-group mobilization, without the moderating effects of having to accommodate the interests of states and the differing strengths of interest groups from state to state. Geographically diversified retail politics would give way to the techniques of mass communications; state committeemen would give way to professional marketers and financiers and media masters.

Third, direct election would change the character of the presidency. Even a president who had assembled a popular-vote majority or 40% plurality in the first election, and even one who was not beholden to fringe parties, would be a different species of political leader than the ones we have known. He would typically be unfamiliar with the particulars of large parts of the nation, and his electoral base would have little in common with that of the Congress — his constitutional co-equal and

frequent obstacle to his policies. The Uhlmann Essay only intimates what Mike would say directly in later essays in his own name: that this new president could come to see himself as the nation's sole embodiment of the popular will, and to regard the Constitution's political structure and legal constraints as fussy impediments to the realization of that will.

There is much more in the Uhlmann Essay, and it is worth studying in its entirety (the Claremont Institute will soon be publishing a definitive text). Many books and essays have been written on the Electoral College in the subsequent 49 years, including at least three essays by Mike himself. But the Uhlmann Essay remains canonical — it has shaped the subsequent opposition to direct election, and it answers the subsequent arguments for direct election, many of which are more substantial than those in the 1970 Judiciary Committee Report. And it has the distinction of having been written in the heat of battle and helping to turn a seemingly inexorable political tide.

The Judiciary Committee's direct-election amendment died on the Senate floor a month after it was reported, the victim of a filibuster that two cloture votes failed to overcome (the votes were 54-36 on September 17 and 53-34 on September 29). Cloture in those days required the same two-thirds supermajority necessary for passing a constitutional amendment. But a vote to end debate presents, to many senators, different considerations than a vote on the merits, so we have no tally of the Senate's collective judgment on the merits of direct election at the dénouement of 1970. We do, however, have a wonderful contemporaneous illustration of the Uhlmann Essay's influence.

Shortly after the Senate Judiciary Report appeared in mid-August, Democratic senator Eugene McCarthy of Minnesota summoned Mike to his office. In their meeting, Senator McCarthy told Mike that he had always been a supporter of direct popular election of the president — until reading Mike's "minority views," which had altogether changed his mind and convinced him of the wisdom of the Electoral College. Shortly afterwards, Senator McCarthy joined with Senator Ervin in sending an extraordinary letter to their colleagues. It was not a conventional "Dear Colleague" mass mailing, but rather individual letters addressed to each of the other 98 senators. In it, McCarthy and Ervin announced their strong opposition to direct election, urged their colleagues to study the enclosed Judiciary Committee Report (and pointed exclusively to the

minority-views section), and embraced Professor Black's position that direct election could be "the most deeply radical amendment which has ever entered the Constitution of the United States." The letters were delivered on September 15, two days before the first cloture vote, occasioning great surprise and corridor buzz over Senator McCarthy's sudden epiphany.

Although Uhlmann never had the satisfaction of a definitive Senate vote, he did have something nearly as good: empirical evidence of intellectual argument moving a practicing politician of contrary disposition. It was the political equivalent of the astrophysical experiment, announced in 2016, that observed and measured gravitational waves for the first time. Like gravity among physicists, political influence — "moving the needle" of policy debate — is something that policy scholars and think tankers love to theorize and speculate about but can rarely document. Mike had the singular experience of observing a political gravitational wave as an actually existing phenomenon. Best of all, it was a force of intellectual attraction that he had generated himself.

the test of time

The 1970 failure of popular presidential election was regarded at the time as a heartbreaking (to proponents) near miss, but one that almost certainly presaged success in the foreseeable future. Public opinion favored direct election; proponents had mobilized bipartisan political majorities supported by leading civic, professional, and commercial groups; future elections would surely yield additional evidence of the risks and anomalies of the Electoral College sufficient to meet the high demands for amending the Constitution.

A half century later, 1970 looks instead like a turning point — a moment of peak direct-election momentum. We have since experienced two presidential elections that might have been *casus belli* for a revival but generated little more than polemics. In practical politics, direct election has regressed to a partisan talking point and a set of hopelessly impractical reform proposals. At a time when many of the institutions of American politics have come under severe stress, the Electoral College system has stood firm against the political gales and seems, for the time being, more entrenched than ever.

The Uhlmann Essay went to some lengths to counter the point that a presidential candidate could win a majority of the Electoral College

while losing the national popular vote. It emphasized the political naïvete of rearranging some votes in some states while leaving all other votes unchanged, and included an appendix discussing, and dismissing, the three standard examples of the popular-vote winner losing the presidency — Andrew Jackson to John Quincy Adams in 1824, Samuel Tilden to Rutherford Hayes in 1876, and Grover Cleveland to Benjamin Harrison in 1888. Only the election of 1888 was a plausible instance, and even here Cleveland's tabulated plurality was minuscule in an election with substantial allegations of ballot fraud on both sides. Mike did not regard these cases, much less the imaginary vote re-allocations, as suggesting any serious weakness in the Electoral College system, but he was clearly sensitive to their being used to defame the system as "undemocratic."

But we have since had two presidential elections where the winner of a popular plurality did lose the Electoral College. In 2000, Al Gore received 543,897 more popular votes than George W. Bush (a margin of 0.5% of the total vote), but Bush won the Electoral College 271-266. And in 2016, Hillary Clinton received 2,868,691 more popular votes than Donald Trump (a margin of 2.1%), but Trump won the Electoral College 304-227. These results did indeed prompt extensive media and scholarly commentary and several proposals for direct popular election. But, remarkably, there was no serious rekindling of the direct-election movement in Congress or in our broader politics — none of the new amendment proposals attracted much interest or more than a few sponsors, and neither the House nor Senate Judiciary Committee even held hearings on the subject. Why was this?

One reason is surely that both elections were excruciatingly close losses for the Democrats and victories for the Republicans at a time of sharp ideological division between the parties. Electoral College abolition became a highly partisan issue, with Democratic leaders reflexively in favor and Republican leaders reflexively opposed. But that, combined with the parties' close equivalence in national political strength, which the elections themselves had demonstrated, meant that a constitutional amendment, requiring a broad political consensus, was out of the question for the time being and not worth the investment of serious time and effort. In contrast, the debates of 1969–1970, when both parties still had liberal and conservative wings, had been thoroughly bipartisan; Democrats were not settling scores from their close 1968 defeat, and neither party saw a clear partisan advantage in direct election.

A separate, subtler reason is that both elections highlighted some of the advantages of the Electoral College system. The 2000 election produced a statistical tie in the popular vote in Florida, whose electoral vote would determine the national result. That prompted a succession of state and county recounts and challenges which dragged on for more than a month and were poised to continue when the Supreme Court called a halt to further maneuvering. Direct-election advocates noted that the few hundred votes at stake in Florida would not have been worth recounting in a national election decided by a half-million votes. Opponents countered that the slim 0.5% national vote margin could have prompted recounts throughout the nation that would have been much more time-consuming, procedurally confusing, and politically debilitating than Florida's had been. The numerical for-instances on both sides suffered from the fallacies of jiggering the popular-vote results of an Electoral College campaign — but they directed attention to the risks of coast-to-coast vote tampering, challenges, recounts, and general mayhem that a single national tally would introduce. That, in the aftermath of the traumatic Florida recount, was sufficient to quell enthusiasm for direct election.

The popular vote in 2016 was not nearly as close as in 2000, but the distribution of votes provided a dramatic illustration of the Electoral College's representation of regional and local concerns and aggrieved minorities that would be buried in a uniform national vote. Donald Trump's campaign promised to rescue working-class, rust-belt communities from the harms they had suffered (in his telling) from trade, immigration, environmental, and other "globalist" policies. Hillary Clinton was dismissive of those concerns (and occasionally contemptuous of the voters who shared them) and declined to campaign vigorously in battleground states such as Pennsylvania, Michigan, and Wisconsin, believing that their liberal urban centers would keep them in the Democratic column. It was Trump's close, hard-fought victories in those states that gave him his surprise Electoral College victory — exposing a serious but previously overlooked schism in American society and opening a new arena in national policy debate that both parties were then obliged to address.

At the same time, Clinton's 2.9 million popular-vote margin was radically skewed — she carried California by 4.3 million votes, New York by 1.7 million, and Illinois and Massachusetts by nearly 1 million apiece.

Permit me, then, one imaginary vote re-allocation of my own: If Clinton had won California by 55.3% rather than 61.3% — still a formidable landslide — she would have lost the national popular vote along with the electoral vote. It is such sharp concentrations of votes by region, interest, and viewpoint that the Electoral College system assiduously counterbalances and that direct election would reward.

Further evidence of the decline of the direct-election movement is in the peculiar design of the post-2000 reform proposals. In Congress, the major direct-election amendments dropped the run-off election that featured so prominently in the 1970 amendment, providing simply that the candidate with the most national votes, no matter how small a plurality, is elected president. This is a fatal defect, exposing the proposals as political symbolism rather than serious constitutional thinking. The run-off election was contentious among direct-election proponents in 1970, and the Uhlmann Essay criticized it to devastating effect, but it was essential to ensuring that the president would have received at least a strong plurality (40% or more) or an absolute majority in a run-off. (Under the Electoral College, only one president has received less than 40% of the popular vote — Abraham Lincoln's 39.8% in the four-candidate, nation-rending election of 1860, and thank heaven for the Electoral College on that terrible occasion.) Without the run-off, presidents emerging from multi-party elections would almost always be minority presidents with historically small popular-vote pluralities as their only basis for national leadership. Add a few regional and single-issue parties to the mix, and presidents could take office with votes in the 20% to 30% range. These easily foreseeable results make a mockery of the cause of a popularly elected president.

The other post-2000 initiative for direct election — the National Popular Vote Interstate Compact — doubles down on this problem. Operating within the Electoral College system without constitutional amendment, the legislatures of states with at least 270 total electoral votes would pledge to vote as a block for the candidate who received the most popular votes nationally. But that would put some legislatures, and perhaps many, in the position of voting for a candidate who had lost, perhaps handily, among their states' voters (in my Clinton-Trump counter-factual, California, having delivered a landslide for Clinton, would cast all its electoral votes for Trump). In a multi-party election where a regional or iconoclastic candidate had eked out a small national

plurality but was reviled locally, this procedure would be riotously unjust and unpopular.

To date, 15 states and the District of Columbia, with a total of 196 electoral votes, have signed onto the National Popular Vote initiative, but almost all of them are strongly Democratic, and there are not enough such states remaining to get to 270. That may be the end of it, but if additional states do sign on, and the initiative moves from political theatre to a live prospect for quasi-constitutional transformation, partisan considerations will be the least of its difficulties.

Finally, and paradoxically, several of the untoward consequences of direct election that the Uhlmann Essay (and others) warned against have come to pass on their own, despite the Electoral College's continuing reign. The major political parties have become much weaker institutions than they were, and interest groups and ideological causes much more influential — the Tea Party in the Republican Party, the Trump resistance and public-employee unions in the Democratic Party. The internet, social media, and other innovations have made it possible to assemble national political networks that transcend state and local interests and even local broadcast markets. Self-financing billionaire candidates, politicking with staffs of communications specialists and big-data technologists, have become familiar characters on the national stage. Our two most recent presidents, unlike all of their 43 predecessors, came to office with scant (Obama) or no (Trump) experience in government or public affairs and succeeded through their skills as media personalities.

It may be that these developments have absorbed some of the energies that would otherwise have been devoted to institutionalizing direct national elections. More likely, they have served to impress a sufficient number of practitioners in both parties with the advantages of the Electoral College in their new circumstances. Party and congressional leaders, confronted with the power and assertiveness of parochial and extremist elements within their parties, cannot help but imagine what their positions would be if those elements acquired their own autonomous electoral bases. Donald Trump, our purest example to date of an unbridled national political entrepreneur, succeeded precisely by identifying and giving voice to causes that were distinctively local and invisible to the national establishment (and in the process, he became another late convert to the Electoral College).

PRACTICE AND PRINCIPLE

Modern culture and technology want to organize politics around abstract messaging and universalist enthusiasms, but many traditional forms are still with us. Our two parties retain powerful brand names and powerful instincts for electoral success; our states retain particular histories, identities, and loyalties; and the lives of many citizens remain grounded in local communities and civic institutions. We will continue to debate the merits of the Electoral College, but as a practical matter, its future in the modern age depends on the continuing vitality of national parties, state allegiances, and home-team commitments. The College has protected them — now they must protect the College.

For now, Mike Uhlmann's inspired scholarly intervention has given us a half century of relative electoral peace and constitutional stability and seems likely to keep on giving. As he would have predicted, and for reasons he explained, the imperfections of the Electoral College system still pale in comparison with the imperfections of every direct-election system its critics have managed to come up with. Americans, through their own sound instincts, have followed Mike's admonition in the closing words of the Uhlmann Essay — we will not abandon our political system "because we are angry that the world is not perfect."