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Kormendy Lecture

Some Thoughts on the Electoral College: Past, Present, and Future

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INTRODUCTION

Even now, six years after the very odd presidential election of 2000, it is hard to look back without fixating on Florida and the courts. But these absorbing soap operas should not obscure the other historic headline of that election: The national popular vote loser nonetheless won the electoral college vote. Is this a flaw in our Constitution? Should we scrap the electoral college in favor of direct popular vote? Practically speaking, can we do so?

My analysis proceeds in three parts. First, I shall critique standard historical accounts of, and justifications for, the electoral college. Next, I shall consider, and try to counter, prominent contemporary apologies for the current system. Finally, I shall show how Americans in the near future could, without amending the Constitution, implement a system of national popular election.

I. THE PAST

Let us begin by considering why the Philadelphia Framers invented an intricate electoral college contraption in the first place, and why, after its gears jammed in the Adams-Jefferson-Burr election of 1800-01, the Twelfth Amendment repaired the thing rather than junking it. Why did early

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Americans not simply opt for direct national election of the President? The typical answers taught in grade-school civics miss much of the real story, both by misreading the evidence from Philadelphia and ignoring the significance of later events, especially the Twelfth Amendment.¹

It is often said that the Founders chose the electoral college over direct election in order to balance the interests of big (high-population) and small (low-population) states. The key Philadelphia concession to small states was the Framers' back-up selection system: If no candidate emerged with a first-round electoral-vote majority, then the House of Representatives would choose among the top five finalists, with each state casting one vote, regardless of population. According to the standard story, although big states would predictably dominate the first round, small states could expect to loom large in the final selection.

But as James Madison made clear to his colleagues at Philadelphia,² the deepest political divisions in early America were not between big and small states as such; rather, the real fissures separated North from South, and East from West. Moreover, once the modern system of national presidential parties and winner-take-all state contests emerged—a system already visible, though not yet entrenched, at the time of the Twelfth Amendment—the big states obviously had the advantage.

With two national presidential parties, one candidate almost always had an electoral majority in the first round, rendering the Framers' pro-small-state back-up system irrelevant. (Three or four strong candidates, in contrast, might have split the vote so that no one garnered a majority.) And winner-take-all rules—under which a candidate who won a state got all of its electoral votes, not a number proportional to the extent of his win—compounded the advantage of big states.

Indeed, before the Civil War Amendments (which changed the electoral college yet again), only two of the sixteen presidents hailed from small states—Zachary Taylor ran as a Louisianan and Franklin Pierce was a New Hampshireman. Of the twenty-six men to hold the office since the Civil War, only Bill Clinton of Arkansas claimed residence in a small state.

In sum, if the Framers' true goal was to give small states a leg up, they did a rather poor job of it. (As I shall soon suggest, their chief goal was something rather different.)

1. For more discussion and documentation of the points summarized in Part I, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY*, 148-59, 336-47 (Random House 2005) and the sources cited therein.

2. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 486 (Max Farrand ed., rev. ed. 1937, 1966) (June 30, 1787: "the great division of interests in the U. States . . . did not lie between the large & small States: it lay between the Northern & Southern," in part because of their different climates but "principally from . . . their having or not having slaves.")

Another Founding-era argument for the electoral college stemmed from the following objection to direct election: Ordinary Americans across a vast continent would lack sufficient information to choose intelligently among leading presidential candidates. This objection is sometimes described today as reflecting a general Founding distrust of democracy. But that is not quite right. After all, the Framers required that the House be directly elected every two years, sharply breaking with the indirect election of Congressmen under the Articles of Confederation. Many leading Federalists also supported direct election of governors.

The key objection at Philadelphia was thus not to democracy per se, but to democracy based on inadequate voter information. The Founders believed that although voters in a given state would know enough to choose between leading state candidates for House races and for the governorship, these voters might well lack information about which out-of-state figure would be best for the presidency. This objection rang true in the 1780s, when life was far more local. The early emergence of national presidential parties rendered the objection obsolete, however, by linking presidential candidates to slates of local candidates and national platforms that explained to voters who stood for what.

Although the Philadelphia Framers did not anticipate the rise of national presidential parties, the Twelfth Amendment, proposed in 1803 and ratified a year later, *was* framed with such parties in mind in the aftermath of the election of 1800-01. In that election, two rudimentary presidential parties—Federalists led by John Adams and Republicans led by Thomas Jefferson—took shape and squared off. Jefferson ultimately prevailed, but only after an extended crisis triggered by several glitches in the Framers' electoral machinery. In particular, Republican electors had no formal way to designate that they wanted Jefferson for President and Aaron Burr for Vice President rather than vice versa. Some politicians then tried to exploit the resulting confusion.

Enter the Twelfth Amendment, which allowed each party to designate one candidate for president and a separate candidate for vice president. The Amendment transformed the Framers' framework, enabling future presidential elections to be openly populist and partisan affairs featuring two competing tickets. It is the Twelfth Amendment's electoral college system, not the Philadelphia Framers', that remains in place today. Yet the Amendment typically goes unmentioned in standard civics accounts of the Constitution.

The election of 1800-01 also helped allay another early anxiety about a popularly elected President. At the Founding, some saw a populist Presidency as uniquely dangerous—inviting demagoguery and possibly dictatorship with one man claiming to embody the Voice of the American People. The dictator/demagogue concern was greater for a president than a governor, given the President's broader electoral mandate and status as continental

Commander-In-Chief. Beginning with Jefferson's election however, Americans began to embrace a system in which presidential aspirants ran national campaigns, sought direct voter approval, and claimed popular mandates upon election.

The biggest flaw in standard civics accounts of the electoral college is that they never mention the real demon dooming direct national election in 1787 and 1803: Slavery. At the Philadelphia convention, the visionary Pennsylvanian, James Wilson, proposed direct national election of the President.³ But in a key speech on July 19, the savvy Virginian James Madison suggested that such a system would prove unacceptable to the South: "The right of suffrage was much more diffusive [i.e., extensive] in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes."⁴

In other words, in a direct election system, the North would outnumber the South, whose many slaves (more than half a million in all) could not vote. The electoral college—a prototype of which Madison proposed in this same speech—instead let each southern state count its slaves, albeit with a two-fifths discount, in computing its share of the overall electoral college.

Virginia emerged as the big winner—the California of the Founding era—with twelve out of a total of ninety-one electoral votes allocated by the Philadelphia Constitution, more than a quarter of the forty-six needed to win in the first round. After the 1800 census, Wilson's free state of Pennsylvania had ten percent more free persons than Virginia, but got twenty percent fewer electoral votes. Perversely, the more slaves Virginia (or any other slave state) bought or bred, the more electoral votes it would receive. Were a slave state to free any blacks who then moved North, the state could actually lose electoral votes.

If the system's pro-slavery tilt was not overwhelmingly obvious when the Constitution was ratified, it quickly became so. For thirty-two of the Constitution's first thirty-six years, a white slaveholding Virginian occupied the Presidency. Southerner Thomas Jefferson, for example, won the election of 1800-01 against Northerner John Adams in a race where the slavery-skew of the electoral college was the decisive margin of victory. Without the extra electoral college votes generated by slavery, the (mostly Southern) states that supported Jefferson would not have sufficed to give him a majority. As pointed observers remarked at the time, Thomas Jefferson metaphorically rode into the executive mansion on the backs of slaves.

3. *Id.* at 68 (June 1, 1787).

4. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 57 (Max Farrand ed., rev. ed. 1937, 1966) (July 19, 1787).

The 1796 contest between Adams and Jefferson had featured an even sharper division between Northern states and Southern states. Thus, when the Twelfth Amendment tinkered with the electoral college system rather than tossing it, the system's pro-slavery bias was hardly a secret. Indeed, in the floor debate over the amendment in late 1803, Massachusetts' Congressman Samuel Thatcher complained that "The representation of slaves adds thirteen members to this House in the present Congress, and eighteen Electors of President and Vice President at the next election."⁵ But Thatcher's complaint went unredressed. Once again, the North caved to the South by refusing to insist on direct national election.

The Founding fathers' electoral college also did not do much for the Founding mothers. In a system of direct national election, any state that chose to enfranchise its women would have automatically doubled its clout in presidential elections. (New Jersey apparently did allow some women to vote in the Founding era, but later abandoned the practice.) Under the electoral college, however, a state had no special incentive to expand suffrage—each state got a fixed number of electoral votes based on population, regardless of how many or how few citizens were allowed to vote or actually voted. As with slaves, what mattered was simply how many women resided in a state, not how many could vote there.

II. THE PRESENT

In light of this more complete (if less flattering) account of the electoral college in the late eighteenth and early nineteenth century, Americans must ask ourselves whether we want to maintain this peculiar institution in the twenty-first century. After all, most millennial Americans no longer believe in slavery or sexism. We do not believe that voters lack proper information about national candidates. We do not believe that a national figure claiming a national mandate is unacceptably dangerous. What we do believe is that each American is an equal citizen. We celebrate the idea of one person, one vote—an idea undermined by the electoral college.

Of course, it remains possible that a system with dirty roots nevertheless makes sense today for rather different reasons than the ones present at the creation. But in a continental republic of equal citizens, why shouldn't every voter's ballot count equally in a single nationwide vote for President? If one person, one vote is the best way to pick a state governor, why isn't it also the best way to pick a national president?

What follows are the top ten modern arguments on behalf of the electoral college, and my proffered counterarguments. Many of the arguments on this

5. 13 *Annals of Cong.* 538 (Oct. 28, 1803).

top ten list are superficially clever, but ultimately makeweight. Often they sweep too broadly and prove too much, with unattractive logical implications. In general, most pro-electoral college arguments unwittingly, but unavoidably, condemn direct popular election of governors, a deeply established American practice. Granted, a few arguments for the electoral college do have the right logical shape, explaining why presidential elections should differ from gubernatorial ones, but these arguments are not weighty enough to outbalance the strong principle of one person, one vote.

Here, then, are the top ten modern apologies for the electoral college and the reasons they do not persuade.

A. Apology Number 1—The Argument From Political Interest

Some might prefer the electoral college because it advantages a given political interest—say rural voters or racial minorities. But does today's electoral college systematically favor any national demographic or ideological group? True, the electoral college was designed to and did in fact advantage Southern white male propertied slaveholders in the antebellum era. And in election 2000, it again ended up working against women, blacks, and the poor, who voted overwhelmingly for Gore. But it is just as easy to imagine an alternative election 2000 scenario in which Gore won the electoral vote but still lost the national popular vote. Indeed, most pundits going into election day thought this the more likely scenario.

Analytically, the electoral college privileges small states by giving every state three electoral votes at the start. This tends to help Republicans, who win among rural whites. However, the college also exaggerates the power of big states, via winner-take-all rules. This tends to help Democrats, who win among urban minorities.

In today's world, the two opposing skews largely cancel out. Republicans often win more states overall, but Democrats often win more big states. The net effect is to add to the political deck a pair of jokers—one red and one blue—who randomly surface to mock the equality idea by giving the prize to the candidate who lost the national popular vote.

In any event, even assuming it could be shown that the electoral college systemically helps some interest group—Ohioans, perhaps?—this is hardly a principled argument in its favor. Our Constitution should not rig elections to favor any particular faction or party. We should treat all presidential voters equally, just as we do gubernatorial voters within states.

B. Apology Number 2—The Tennis Analogy

Electoral college defenders point out that a tennis player can win more points overall, and even more games, yet still lose the match. So too with many other sports—for example, a baseball team might get more hits or win

more innings but still lose. So what is the problem if something similar happens with the electoral college?

The problem is that elections are not sporting events. It matters who wins, and the idea is not simply to make the thing exciting or random. All tennis points are not created equal; but all American citizens are. To talk of tennis is simply to sidestep rather than engage the moral principle favoring one person, one vote.

The tennis trope is a silly analogy, not a serious argument. It also proves too much, calling into question our standard mode of picking state governors. Ditto for a variant of the tennis analogy, which casually dismisses direct popular election as “simpleminded majoritarianism.”

C. Apology Number 3—The Media Argument

Electoral college defenders say that without the electoral college, candidates will spend all their time trying to rack up big victories in big cities with big media, ignoring the rest of the voters.

This objection also proves too much. The very same thing might be said of the California governor’s election. In fact, the electoral college itself often focuses candidates narrowly on a few swing locations to the detriment of most other regions.

D. Apology Number 4—The Geographic Concentration Argument

Defenders also contend that the electoral college prevents purely regional candidates from winning by requiring the winner to put together a continental coalition popular in many different regions.

Really? Then how did Lincoln win the electoral college without winning a single Southern state, or even being on the ballot south of Virginia? Didn’t the elections of 1796 and 1800 also feature sharp sectional divisions between North and South?

Moreover, if geographic spread is a good argument for a continental electoral college, why is it not an equally good argument for an intrastate electoral college for vast and populous states like California and Texas?

Finally, under direct election, presidential candidates would continue to wage broad national campaigns appealing to voters in different states and regions: One simply cannot reach fifty percent without getting a lot of votes in a lot of places.

E. Apology Number 5—The Argument From Inertia

Other electoral college defenders have argued that a change in presidential selection rules would radically change the election game: Because

candidates would no longer care about winning states—only votes—campaign strategies would change dramatically and for the worse.

It is hard to see why. Historically, the electoral college leader has also tended to be the popular vote leader. Thus, the strategy for winning should not change dramatically if we switch from one measure to the other. Granted, had direct election been in place in 2000, the candidates might have run slightly different campaigns. For example, Bush might have tried to rack up even more votes in his home state, while Gore might have avoided badmouthing the state (a.k.a. “messing with Texas”). Nevertheless, these likely changes of strategy are neither big nor bad.

Again, why would a system that works so well for state governors fail for the presidency?

F. Apology Number 6—The Senate Anxiety

Others have claimed that the principle of one person, one vote would likewise doom the equal representation of states in the United States Senate.

This argument at least raises a fair point. The equality idea that favors the abolition of the electoral college does raise a question about Senate malapportionment: Why should the thirty-five million people living in California get no more Senators than the half million living in Wyoming?

But the electoral college issue is nevertheless distinguishable. On election day, Americans vote in thirty-three (or thirty-four) separate Senate races, each featuring a different candidate match-up. These votes cannot simply be added together. To try to add them up— $x\%$ for “the Democrat” and $y\%$ for “the Republican” is artificial in the extreme, given that thirty-three different Democrats are running against thirty-three different Republicans in thirty-three different races.

In contrast, presidential votes can be aggregated across America—indeed, it is artificial *not* to add them together, and the violation of equality is much more flagrant when a person who plainly got fewer votes is nevertheless named the winner.

G. Apology Number 7—The Third Party and Plurality Winner Problem

Another argument often raised is this one: Direct election could either lead to a low plurality winner (say, thirty-five percent) in a three- or four-way race, or would require a high cutoff (say, forty-five percent) that would require a runoff. Allowing runoffs would encourage third party spoilers.

The very same thing is true, however, for states, which manage to elect governors just fine. Moreover, a low plurality winner in a three- or four-way race is possible even with the electoral college (which has also attracted its fair

share of spoilers, such as George Wallace, John Anderson, Ross Perot, and Ralph Nader—to pick just four recent examples).

Finally, the problem could easily be solved in a direct national election by a system called single transferable voting, in which voters list their second and third choices on the ballot—in effect combining the first heat and runoff elections into a single “instant runoff” transaction.

H. Apology Number 8—The Recount Nightmare

Other electoral college fans are haunted by the specter of recounts: “If you thought the recount in Florida was a disaster, can you imagine the nightmare of a national recount?”

But if California, Texas, New York, and other large states can handle recounts for governors’ races, a national recount should likewise be manageable, especially with new technology that will make counting and recounting easier in the future. Moreover, the electoral college does not avoid, and at times can worsen, the recount nightmare: a razor-thin electoral college margin may require recounts in a number of closely contested states even if there is a clear national popular winner.

The recount issue does remind us that direct national election would ideally involve uniform national standards for counting and recounting votes. Elections are crucial events in a democracy, and they deserve to be done right. If counting every valid vote properly and preventing fraud will require more money and more vigilance than heretofore, so be it. This is simply the price of having a sound democracy.

I. Apology Number 9—The Modern Federalism Argument

Many supporters of the electoral college parade under the banners of “federalism” and “states’ rights.” But direct national election would give state governments a better role than they now enjoy. Under direct election, each state government would have some incentive to make it easier for its citizens to vote—say, by making election day a holiday or by providing paid time off—because the more state voters that turn out, the bigger the states’ overall share in the national tally. Direct national election would thus encourage states to innovate and compete to increase turnout and improve democracy.

Of course, national oversight would be appropriate to keep the innovation and competition within proper bounds: No deceased or infant voters, please! Presidential elections would thus continue to reflect a mix of federal and state laws, and respect proper state innovation within a federal framework—in short, federalism at its best.

J. Apology Number 10—The Futility Argument

A final argument against reform sounds in real politick: Adopting direct popular election would require a constitutional amendment, and no such amendment is likely given the high hurdles set out in Article V—two-thirds of the Congress and three-quarters of the states.

But in fact, direct national election could be operationalized without a cumbersome Article V amendment. How so, you ask? Let me answer by inviting you to join me in an exercise of legal imagination.

PART III. THE FUTURE

Imagine this: Americans could pick the President by direct national election, in 2008 and beyond, without formally amending our Constitution.

A small number of key states—eleven, to be precise—would suffice to put a direct election system into effect. Alternatively, an even smaller number of key persons—four, to be exact—could approximate the same result, with a little help from their friends.

Begin with the key-state scenario. Article II of the Constitution says that “each state shall appoint, *in such manner as the Legislature thereof may direct*” its allotted share of presidential electors. Each state’s legislature thus has discretion to direct how state electors are appointed. The legislature is free simply to name these electors itself. It is likewise free to direct by law that electors be chosen by direct popular state vote, winner-take-all. This is what almost all states do today.

So too, each state legislature is free to direct that its state electors be chosen by direct popular national vote. Each state could pass the following statute:

This state shall choose a slate of electors loyal to the Presidential candidate who wins the national popular vote.⁶

The eleven most populous states together now have 271 electoral votes, one more than the 270 votes needed to win (out of a total of 538). Thus, if all eleven passed this statute, the presidency would go to the candidate who won the national popular vote.

For those who are counting, the eleven states are California (with fifty-five electoral votes after the 2000 census), Texas (thirty-four), New York (thirty-one), Florida (twenty-seve), Pennsylvania (twenty-one), Illinois

6. Technically, the legislature does not award electoral votes as such, but rather picks from competing slates of electors who have announced in advance their loyalty to particular candidates.

(twenty-one), Ohio (twenty), Michigan (seventeen), New Jersey (fifteen), Georgia (fifteen), and North Carolina (fifteen).

There is nothing magical about these eleven states; advocates of direct national election need not draw the poker equivalent of a royal flush. If some of the big eleven were to opt out, their places could be filled by any combination of smaller states with as many total electoral votes. I highlight the number eleven merely to illustrate how few states would be needed, in theory, to effectuate direct national election.

It is worth pausing to let this soak in. Under the Constitution's Article V, a constitutional amendment providing for direct national election would, as a practical matter, require two-thirds support in the House of Representatives, a two-thirds vote in the Senate, and the further support of thirty-eight state legislatures. Thus, under the Constitution, any thirteen states—perhaps the thirteen tiniest—could block an Article V amendment. In contrast, our hypothetical plan could succeed even if as many as thirty-nine states and Congress (which directs how the District of Columbia's three electors are to be chosen) opted out.

If the eleven biggest states were to pass our law, an odd theoretical possibility would arise: A candidate could win the presidency, by winning the national popular vote, even if he or she lost in every one of these big states! (Imagine a scenario where the candidate narrowly loses in each of these states, but wins big most other places.) Should this theoretical possibility deter big states from passing our law? After all, the current electoral college landscape reflects an effort by virtually every state to maximize its own clout, by awarding all of its electoral votes to the candidate that wins the state, rather than dividing its electoral votes proportionately among candidates. Take Ohio, for example, with its twenty electoral votes. A proportional-voting Ohio would have only four electoral votes truly at stake—the difference between a 12-8 blowout victory and an 8-12 blowout defeat. This would make Ohio no more important than a tiny winner-take-all state like Rhode Island (offering either a 4-0 win or a 0-4 defeat). A winner-take-all Ohio means not four, but twenty electoral votes are at stake, so candidates must pay more attention to the state.

For Ohio to abandon winner-take-all when Rhode Island and almost all other states are retaining it would be the electoral equivalent of unilateral disarmament. A similar concern might discourage Ohio from unilaterally embracing our proposed national popular vote law—this too, is a form of unilateral disarmament, telling a candidate not to worry about winning votes in Ohio. Indeed, a candidate could lose Ohio's popular vote badly and still get all its electoral votes by winning nationwide. Even worse, Ohio would be unilaterally disarming with no assurance that the presidency would in fact go to the national popular vote winner; acting alone, Ohio cannot guarantee that

its twenty would be enough to put the national vote winner at or over the 270 mark.

But Ohio need not act unilaterally. Its law could provide that its electors will go to the national vote winner if and only if enough other states follow suit. Until that happens, Ohio and every other likeminded state could continue to follow current (self-aggrandizing) methods of choosing electors. Thus, our revised model state law would look something like this:

This state shall choose a slate of electors loyal to the Presidential candidate who wins the national popular vote, if and only if other states, whose electors taken together with this state's electors total at least 270, also enact laws guaranteeing that they will choose electors loyal to the Presidential candidate who wins the national popular vote.

Acting in this coordinated way, a group of largish states adding up to 270 would not really be disarming themselves. Although it is theoretically possible for a candidate to win a national vote while losing in all (or almost all) of the big states, this is an unrealistic scenario. In general, candidates would tend to lavish attention on most big states because there are a lot of voters in these states. As a practical matter, one can not win nationally without winning, or at least coming very close, in various populous states.

Should expressly coordinated state laws of the sort we are imagining be deemed an implicit interstate agreement requiring congressional blessing under Article I, section 10 of the Constitution? Probably not. After all, each state would retain complete unilateral freedom to switch back to its older system for any future election, and the coordinated law creates no new interstate governmental apparatus. Indeed, the cooperating states acting together would be exercising no more power than they are entitled to wield individually. (The matter might be different if the coordinating states had sought to freeze other states out—say, by agreeing to back the candidate winning the most total votes within the coordinating states as a collective bloc, as opposed to the most total votes nationwide.)

Of course, any coordinated state-law effort would require specifying key issues: Majority rule or plurality rule? Runoff or no? How should recounts and challenges be handled?

It would be hard to rely completely on the laws and courts of each state, many of which might not be part of the cooperating 270 group. For example, the national vote might be close even though the state vote in some noncooperating state was not, and that state might refuse to allow a state recount. Indeed, a noncooperating state might theoretically try to sabotage the system by refusing to allow its citizens to vote for president! What if some state let seventeen year-olds vote in an effort to count for more than its fair share of the national total? And what about Americans who live abroad or in the federal territories?

These questions suggest an even more mind-boggling prospect: our national-vote system need not piggyback on the laws and machinery of noncooperating states at all! Let these noncooperating states hold their own elections; so long as they amount to less than 270 electors, these elections would be sideshows. The cooperating states could define their own rules for a uniform “National Presidential Vote” system. In that case, our law would read something like this:

Section 1. This state shall choose a slate of electors loyal to the Presidential candidate who wins the “National Presidential Vote,” if and only if other states, whose electors taken together with this state’s electors total at least 270, also enact laws guaranteeing that they will choose electors loyal to the Presidential candidate who wins the “National Presidential Vote.”

Section 2. The “National Presidential Vote” shall be administered as follows. . . .

Section 2 of this model law would proceed to specify the precise rules of this “National Presidential Vote.” For example, Section 2 could provide that Americans everywhere who want to be counted must register in a system to be administered by a nongovernmental election commission—made up, say, of a panel of respected political scientists and journalists. Section 2 could also specify uniform rules of voting eligibility, uniform presidential ballots, and an election dispute procedure (with the final appeals decided by, say, Jim Lehrer). Alternatively, Section 2 might contemplate that the “National Presidential Vote” should be administered by a new interstate election council or directly by the federal government; and Congress could then pass a statute blessing this more elaborate interstate agreement.

Some will doubtless dismiss all this as mere academic daydreaming, but the daydreams are useful in illustrating how much constitutional creativity is possible within the existing constitutional framework, short of formal amendment.⁷

Here is a final daydream. What if the two leading presidential contenders in 2008 were asked about their views of the electoral college? After election 2000, this seems a perfectly sensible question: It is not purely theoretical to worry about electoral college misfires of various sorts. A question about the

7. For similar daydreams, see Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2d 241 (2001); Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 GREEN BAG 2d 141 (2002). It is also worth noting that in August, 2006, the California legislature enacted a version of the reform plan that I have summarized today. On September 30, this enactment was vetoed by Governor Schwarzenegger. See *Veto in California on Electoral College*, N.Y. TIMES, Oct. 3, 2006 at A17.

legitimacy of the electoral college is one of many questions the candidates should be asked by Jim Lehrer on the News Hour or at a debate.

If candidates believe in the college, they should be prepared to give their reasons. If they seek to duck the question as overly hypothetical, they should be pressed. If they express disapproval of the system, and pledge allegiance to the principle of one person, one vote, then they should be asked if they are willing to put their principles into action. *For the two major presidential candidates and their two running mates have it within their power to move us to direct national election.*

A candidate could pledge that, if he loses the national popular vote, he will ask his electors to vote for the national popular vote winner. Having taken this pledge, the candidate could then challenge his rival to take a similar pledge. Each candidate could likewise insist that his Vice Presidential running mate take the pledge. Presumably, the candidates' handpicked electors would honor their respective candidates' solemn pledges when the electoral college met; but if not, each candidate and running mate could further pledge to resign immediately after Inauguration in favor of the national popular vote winner.

The candidates themselves can make their pledges stick via the Twenty-fifth Amendment, which allows a President to fill a vacant vice presidency. Suppose for example that Smith somehow is inaugurated even though Jones won the national vote. On Inauguration Day, Smith's Vice Presidential running mate would resign immediately. Smith would then name Jones the new Vice President under the Twenty-fifth Amendment, and upon Jones's pro-forma confirmation by Congress—he is, after all, the man with the mandate in our hypothetical—Smith would step down in favor of Jones. If this scenario seems odd, it is useful to recall that it is not that different from the one that made Gerald Ford President in 1974: Vice President Spiro Agnew resigned, and then was replaced by Ford, who in turn became President upon Richard Nixon's resignation.

Another analogy: Beginning with George Washington, who resigned after eight years even though he would have easily won a third term, early Presidents gave America a strong tradition of a two-term limit on the presidency. Likewise, presidential candidates today could, via pre-election pledges and (if necessary) post-Inauguration resignations, establish a strong tradition that the presidency should go to the person who actually won the national election. Just as the informal two-term limit ultimately became specified in constitutional text, in the Twenty-second Amendment, so too a series of candidate pledges could eventually pave the way for a formal direct election amendment.

And all it would take to get the ball rolling is for four persons to take the pledge in 2008. Imagine that.