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 state's 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.

Number 10: The Futility Argument

A final argument against reform sounds in realpolitik: 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 the premise of this argument is wrong. In fact, as few as eleven large states acting together could operationalize direct national election. So could as few as four—yes, four—key persons acting in concert. More on all that soon.

HOW TO ACHIEVE DIRECT NATIONAL ELECTION OF THE PRESIDENT WITHOUT AMENDING THE CONSTITUTION[22]

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(with Vikram David Amar)

Imagine this: Americans could pick the president by direct national election, in 2004 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." (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.)

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 55 electoral votes after the 2000 census), Texas (34), New York (31), Florida (27), Pennsylvania (21), Illinois (21), Ohio (20), Michigan (17), New Jersey (15), Georgia (15), and North Carolina (15).

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. The number eleven is used merely to illustrate how few states would be needed, in theory, to effectuate direct national election.*

It's 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,

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* [The 2010 census reshuffled things. The eleven most populous states currently add up to precisely 270 electoral votes, as follows: California (55), Texas (38), New York (29), Florida (29), Pennsylvania (20), Illinois (20), Ohio (18), Michigan (16), Georgia (16), North Carolina (15), and New Jersey (14).]

a two-thirds vote in the Senate, and the further support of thirty-eight state legislatures.

Thus, under the Constitution, any thirteen states—theoretically, even 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 influence, by awarding all of its electoral votes to the candidate who wins the state, rather than dividing its electoral votes proportionately among candidates. Take New Jersey, with its 15 electoral votes. A proportional-voting New Jersey would have only 3 electoral votes truly at stake—the difference between a 9–6 blowout victory and a 6–9 blowout defeat. This would make New Jersey no more important than a tiny winner-take-all state like Wyoming (offering either a 3–0 win or a 0–3 defeat). A winner-take-all New Jersey means not 3, but 15 electoral votes are at stake, so candidates must pay more attention to the state.

For New Jersey to abandon winner-take-all when Wyoming and almost all other states are retaining it would be the electoral equivalent of unilateral disarmament. A similar concern might discourage New Jersey 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 New Jersey. Indeed, a candidate could lose New Jersey's popular vote badly and still get all its electoral votes by winning nationwide. Even worse, New Jersey would be unilaterally disarming with no assurance that the presidency would in fact go to the national popular vote winner; acting alone, New Jersey cannot guarantee that its fifteen would be enough to put the national vote winner over the 270 mark.

But New Jersey 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, New Jersey and every other like-minded state could continue to follow current (self-aggrandizing) methods of choosing

electors. Thus, our new 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 lots of voters in these states. As a practical matter, one can't 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. 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 non-cooperating state was not, and that state might refuse to allow a state recount. Indeed, a non-cooperating 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

non-cooperating states at all! Let these non-cooperating states hold their own elections, but 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."
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> 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 (not unlike the newspaper consortium that recently announced its tallies of the Florida vote). 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, the legendary presidential debate moderator 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. (In an article in the Spring 2001 issue of the *Green Bag*, Northwestern professor Robert Bennett pursues a similar thought experiment.)

Here is a final daydream. What if the two leading presidential contenders in 2004 were asked about their views of the electoral college? After the 2000 election, this seems a perfectly sensible question: It is not purely theoretical to worry about electoral college misfires of various sorts. A question about

the legitimacy of the electoral college is one of many questions the candidates should be asked by Lehrer on the *News Hour* or at a presidential 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. And 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 easily have 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 the next presidential election. Imagine that.