state got an assigned allotment 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.

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 themselves whether we want to maintain this peculiar institution in the twenty-first century.

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. Stay tuned.

COUNTERING THE TOP TEN ARGUMENTS FOR THE ELECTORAL COLLEGE

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(with Vikram David Amar)

A year ago, Americans watched the loser of the national popular vote win the electoral vote (with a little help from his friends on and off the Court). 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?

Many of the modern arguments on behalf of the electoral college 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 (both those listed below, and other, more minor 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 guber-

natorial ones—and thus do not have the flaw of proving too much. But these arguments are not weighty enough to outbalance the strong principle of one person, one vote.

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

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 strongly and systematically favor any given faction? Not likely.

True, the electoral college was designed to and did in fact advantage southern white male propertied slaveholders in the antebellum era. And in the 2000 election, it again ended up working against women, blacks, and the poor, who voted overwhelmingly for Gore. But it's easy to imagine an alternative 2000 election scenario in which Gore won the electoral vote while losing the national popular vote. Indeed, most pundits going into Election Day thought this the more likely possibility.

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. But the college also exaggerates the power of big states, via winner-take-all rules. That 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, 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.

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* [In the decade and a half since I wrote these words in 2001, I have come to think that the electoral college may be beginning to tip slightly in the Democrats' favor, making it a bit more likely in the immediately foreseeable future that if a joker pops up, his color will be blue. For details, see supra pp. 336–337.]

Number 2: The Tennis Analogy

Electoral college defenders also make the following argument: "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's 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."

Number 3: The Media Argument

Electoral college defenders argue 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.

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

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? And if geographic spread is a good argument for a continental electoral college, why isn't it 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: Anyone aiming for a national majority needs to win many votes in many places.

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's hard to see why. Given that, historically, the electoral-college leader has also tended to be the popular vote leader, the strategy for winning shouldn't 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 (aka "messing with Texas"). But 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?

That said, the inertia argument has some weight. Reforms often have unforeseen consequences; and it is always possible that we are better off sticking with the devil we know.[21]

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 questions about Senate malapportionment: Why should the 30-something million citizens living in California get no more senators than the half million citizens 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 matchup. These votes cannot simply be added together. To try to add them up—X percent for "the

Democrat" and Y percent for "the Republican" is artificial, 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.

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, 35 percent) in a three- or four-way race, or would require a high cutoff (say, 45 percent) that would require a runoff. Allowing runoffs would encourage third-party spoilers."

But the very same thing is true 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—just ask Ross Perot or Ralph Nader.

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.

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: As we saw last year, a paper-thin electoral-college margin may require recounts in a number of closely contested states even if there is a clear national popular winner. But the recount issue does remind us that direct national election would ideally involve uniform national standards for counting and recounting votes.

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