

THE INAUGURAL ABRAHAM LINCOLN LECTURE ON CONSTITUTIONAL LAW: ELECTORAL COLLEGE REFORM, LINCOLN-STYLE

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OUR STORY BEGINS with a Republican president taking office even though, pretty clearly, more Americans had voted against him than had voted for him.

No, we are not talking about Donald Trump. (But since he does love being talked about, we will talk about him soon enough.) And no, we are not talking about George W. Bush in 2001, although he too will enter our story, stage right, later on. Nor are we talking about Benjamin Harrison in 1889 or about Rutherford B. Hayes in 1877. Rather in this, the Inaugural Abraham Lincoln Lecture on Constitutional Law, it is altogether fitting and proper that we begin with the Inaugural of Abraham Lincoln himself on March 4, 1861.

On that Inaugural Day everyone understood that Lincoln had won a clear majority of duly cast and lawfully counted electoral votes, 180 out of a total of 303. Everyone understood that Lincoln was thus undeniably entitled to give his speech and take his oath and wield all presidential power for the next four years under the Constitution. Yet participants and onlookers that day also understood that the recent November election had been an odd one. Lincoln's democratic mandate, to use a modern term, was shaky.

Running as a Republican against a fractured field—with Stephen Douglas bearing the official standard of the Democratic Party, and John Bell and John C. Breckinridge leading sizable splinter groups—Lincoln had captured less than 40% of the national popular vote in November: 39.65% to be precise. Although this was a substantial plurality—Douglas placed second, ten points behind—it was not exactly resounding. Most of the voters who had supported Douglas, Bell, or Breckinridge did not view

Lincoln as a close second choice. Most in fact were voting not just for their man, but against Abe. Though no one can be sure today or could be sure back then, it is quite possible that in a head-to-head competition between Lincoln and Douglas—a clean rematch of the 1858 contest between these two for the Illinois Senate seat—Douglas would have won more popular votes nationwide.

Even if so, Lincoln's Inaugural was poetic justice. Proverbially, turnabout is fair play. And in at least two ways, Lincoln's victory counterbalanced earlier episodes in which the shoe had been on the other foot.

First, in 1858 more Illinois voters had backed Lincoln's fledgling Republican Party than Douglas's Democrats. The Republicans that year won roughly 50% of the statewide popular vote for state legislature, compared to only 48% for the Democrats. But thanks to the usual electoral imprecisions and idiosyncrasies (the sizes and the shapes of districts, uneven ratios of voters to inhabitants in different places, varying victory margins in diverse local contests, and so on), the Democrats managed to win a majority of the legislative seats at stake that year—forty-six compared to forty-one for the Republicans. Also, thirteen seats were not on the ballot that round; and most of these holdover seats—eight to be precise—were held by Dems. Thus, when the new Illinois General Assembly convened after the election, Democrats controlled fifty-four of the one hundred seats and naturally picked Douglas over Lincoln to represent the state in the U.S. Senate.¹

Here, then, is the first turnabout and piece of poetic justice: In 1858 Lincoln lost even though he arguably won the popular vote; but in 1860 Lincoln won even though he arguably lost the popular vote.

Now for the second piece of political poetry: The Electoral College had been intentionally engineered in 1787–88 and purposefully redesigned in 1803–04 to bolster the slaveholding South, but in 1860–61 this elaborate electoral contraption ended up working to the advantage of a *northwestern opponent of slavery*.² Lincoln was America's first openly antislavery president, and he became so precisely, if ironically, because of the Electoral College system itself.

I shall soon say more about the slavocratic roots of the Founding generation's Electoral College; for now, let me simply show you that Lincoln's victory flowed from the basic structure of the system, and not

¹ The facts and figures in this paragraph derive from the analysis offered by DON E. FEHRENBACHER, *PRELUDE TO GREATNESS: LINCOLN IN THE 1850'S* 118–20 (1962).

² I italicize and stress this final phrase for reasons I shall explain in my concluding section. See *infra* text accompanying note 27.

from any unique quirk created by the unusually crowded field. Even if Lincoln had faced a single opponent, Douglas; and even if Douglas in this hypothetical contest had also received every single vote that in fact went to Bell or Breckinridge that year; and thus, even if Douglas had trounced Lincoln in the national popular vote by a whopping margin of 60% to 40%—even then, Lincoln would have still won a clear electoral-vote victory, 169 to 134. Lincoln received outright popular majorities—that is, he beat the entire anti-Abe field—in every free state except New Jersey (which he in fact split with Douglas) and the west coast jurisdictions of Oregon and California (which he would have lost to Douglas in our hypothetical).

In other words, thanks to the Electoral College system itself, which allowed states to adopt state-winner-take-all rules in apportioning electors—and thanks to the enormous population of the antislavery North in 1860—the Founders’ proslavery Electoral College system was now starting to tip decisively against slavery. This shift was occurring in part because countless millions of voters had voted with their feet between 1787 and 1860—voted, that is, to remain in or move to vibrant free-soil states rather than staying in or relocating to the backwards and oppressive states of the slaveholding South.

In 1800, Thomas Jefferson had clearly bested John Adams in the Electoral College, seventy-three to sixty-five. But roughly a dozen of Jefferson’s seventy-three electoral votes existed only because the Electoral College apportionment formula counted slaves (albeit at a discount—three-fifths rather than five-fifths for free folk). Slaves of course did not vote and were not protected by those who did. Without this electoral dirty dozen, Monticello’s slave-master would have lost to the gentleman farmer from Braintree by four electoral votes rather than winning by eight. Proverbially, Jefferson had ridden into the Executive Mansion on the backs of his slaves. And then, adding insult to injury, Jefferson’s allies worked to lock in slave states’ unfair Electoral College advantage via a constitutional amendment (the Twelfth Amendment, to be precise) adopted on his watch. Over the ensuing decades, this Electoral College system operated time and again to give Southern states extra electoral votes.³ Grotesquely, the more slaves a state held in bondage, the more votes that state got in the Electoral College. But in 1860, finally—and poetically—this stinky Electoral College system managed to advantage an antislavery candidate and his antislavery regional coalition. Turnabout indeed.

³ For elaboration and defense of my mathematical and political-theory baselines in this analysis, see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 91–95 (2005).

LET US NOW return to the claim I bracketed earlier—that the Founders’ Electoral College system was studiously designed in 1787–88 and then knowingly revised in 1803–04 in a manner that gave slave states the inside track. Let’s first dispense with the false just-so stories many of us were fed in high school civics.

The Electoral College was not primarily designed to balance big states against small states. True, this balance can be seen in the basic structure of Congress and in today’s beautifully symmetric Capitol building: The House favors populous states while the Senate counterbalances by giving each state two seats regardless of population. But the deepest cleavages in post-Founding American history have never run between big and small states. The big states have typically not acted as a bloc. (Today, California, Texas, Florida, and New York rarely vote together.) Ditto for small states. (Rhode Island is northeastern and urban whereas Wyoming and Montana are anything but. Alaska is a land of totem poles and tundra; Delaware, of tolls and turnpikes.) The main divisions in America are today and since the Founding have always been between North and South, between coasts and the interior, and between cities and backcountry.

More to the point, if the Framers designed the Electoral College to boost small states, they did an astonishingly poor job of it. Virginia started out as the most populous state in the Union, and in the first nine presidential elections Virginians won eight times, with four different two-termers (George Washington, Thomas Jefferson, James Madison, and James Monroe). The only non-Virginian victor between 1788 and 1823 was another big-state candidate—John Adams from Massachusetts, whose big-state son, John Quincy Adams, would later succeed Monroe. All the early runners-up were also big-state men. Early tickets balanced Northerners and Southerners, not big-state and small-state partners. In all of American history, only three men have won the presidency from small states: Zachary Taylor, Franklin Pierce, and Bill Clinton.⁴

In short, the Philadelphia Framers’ Electoral College was emphatically not about giving small-state men a leg up. After the first four presidential races, the big-state biases of the system were on full display for all to see, and in response Americans proceeded to amend the Electoral College system to *strengthen* the big-state advantage. Enacted in 1803–04, the Twelfth Amendment aimed to facilitate an emerging two-party system in which each party would openly run an executive ticket, with one candidate slated for the presidency and the other for the vice presidency.

⁴ For more details, see *id.* at 149, 158, 344–45.

This two-party system would in most instances generate a winner on Election Day, thereby giving the edge to big states with winner-take-all rules. (By contrast, had no strong two-party system emerged, Election Day votes might have scattered more widely; fewer candidates might have won outright electoral-vote majorities on Election Day; and more races might have been thrown into Congress under rules giving each state, however small, an equal vote in picking the winner.)

If the Electoral College system was not designed and redesigned to boost small states (and it was not) neither was it crafted and revised to enable wise philosopher-king “electors” to substitute their superior wisdom for the ignorant preferences of the unwashed masses. Electors were obliged to meet on a single day, with no real time for genuine deliberation.⁵ Many of the best political minds within each state—its federal representatives and senators—were constitutionally precluded from serving as electors.⁶ From the first election in 1788 to the present day, most electors have simply carried out the will of those who chose them. As a rule, electors have been potted plants, nobodies from nowhere, instructed or even pledged to vote for a particular candidate.

If you doubt this, I have a simple challenge for you. Surely you could name, if given a minute to collect your thoughts, three notable presidents in American history; or three governors; or three senators; or three cabinet members; or three justices; or even three notable House members, living or dead. But even if given an hour or a day or a week or a month or a year (sans Internet or library access), could you name three notable presidential electors, dead or alive?

Contrary to some high-school civics textbooks, the Framers did not generally despise or disdain democracy—either the word or the thing itself. According to a leading Framers, James Wilson—the man responsible for the Constitution’s opening three words and one of the document’s most influential defenders during the great ratification debate of 1787–88—the Constitution was “purely democratical” and “the DEMOCRATIC principle is carried into every part of the government.”⁷

In 1787–88, the Constitution itself was put to a series of votes of unprecedented democratic inclusivity up and down the continent. In these

⁵ U.S. CONST. art. II, § 1, cl. 3–4.

⁶ *Id.* cl. 2.

⁷ AMAR, *supra* note 3, at 16–17; *The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 434, 482, 523 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1891).

epic elections, ordinary property qualifications were lowered or waived altogether in eight states (and nowhere were they raised); in this epic year, more persons were allowed to vote than had ever been allowed to vote on any previous measure in human history.⁸ (Before this year, only two states, Massachusetts and New Hampshire, had ever put proposed constitutions to a popular vote.) The new federal Constitution prominently provided for direct election of House members—a dramatic and undeniably democratic break with the Articles of Confederation. In sharp contrast to almost all contemporaneous state constitutions, the federal Constitution eschewed property qualifications for public servants, and even promised that federal lawmakers would be paid for their time, thus making it easier for middling men of modest means to serve in government. In yet another great democratic leap forward compared to state constitutions, the new Constitution opened federal service to all religious sects. Plus, anyone eligible to vote for his state assembly was likewise eligible to vote for his federal representative; and unlike the great majority of state constitutions, the federal document committed itself to a regular census and reapportionment process.⁹ Most important for our purposes, the new federal

⁸ AMAR, *supra* note 3, at 5–7, 503–05 nn.1–2.

⁹ For much more on the broadly democratic nature of the federal Constitution compared to the Articles of Confederation and contemporaneous state constitutions, see *id. passim*. My claims in this book stand opposed to central themes of an important but flawed new book, MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016). In one passage that sums up much of the attitude and affect of his book, Klarman says the following: “Only a ratifying process that was less participatory than the governance norms employed in many states could have secured endorsement of a constitution that was less democratic in its substance than were all state constitutions of the era.” *Id.* at 618. This is wrong on virtually every count. The Constitution’s popular ratification process was far more inclusive than that of almost every state’s popular ratification process (nonexistent in most states); and also more inclusive than the ordinary state election process, which typically featured higher property qualifications. See *supra* note 8 and accompanying text. As for the day-to-day substance of federal norms, the federal Constitution’s rejection of property rules for public service, its commitment to a regular census and reapportionment, its generous suffrage rules, its ban on religious tests, its promises of federal salaries to lawmakers, its antidynastic age rules, and much more made it on balance more democratic than most state counterparts. Also, the document of course created a directly elected House of Representatives that was surely more democratic than the old Congress under the Confederation. Klarman’s complaints are based on a slew of analytically undefended claims and dubious implicit assumptions—for example, that annual elections are always better, democratically, than biannual ones (really? and on this logic would monthly elections be better still?); that binding instruction of legislators is a democratic virtue (it isn’t); that term limits are likewise a democratic leap forward (not necessarily—and they do limit voters’ choices on election day); and that a robust executive is intrinsically undemocratic (wrong again). It bears noting (as my work in fact notes, and Klarman’s does not) that over the course of American history, beginning as early as 1790, many state constitutions have migrated toward the federal model on many of these issues—electoral timing, instruction, executive power, and so on—and that states have done so in genuinely democratic fashion. And on the issue of term limits and legislative rotation, only one state constitution on the books in 1787 (Pennsylvania’s) limited legislative re-eligibility. Serious readers should treat Klarman’s sweeping claims about democracy with skepticism and should compare his account to the detailed analysis

Constitution allowed states to let ordinary voters pick pledged or instructed presidential electors. Leading Founders in the ratification process proudly predicted that states would in fact opt for popular election, and many states did so from the beginning.¹⁰

Even more important, the Twelfth Amendment was designed precisely to encourage popular elections in the several states, by facilitating a fledgling two-party system that would predictably mobilize ordinary citizens and give them the necessary information about the major presidential candidates. In the first election after the Amendment's ratification, roughly two-thirds of the states allowed voters to pick electors directly. By 1828, voters were directly choosing electors in twenty-one of the twenty-four states.¹¹ By then, the party that Jefferson had founded had become the dominant political party in America, a party that would generally enjoy a substantial edge in congressional and presidential contests until Lincoln came along in 1860. That party proudly called itself the Democratic party—a moniker that would have made no sense were the word “democracy” a Founding Era bugaboo, as so many have been erroneously taught by mistaken high school teachers and misleading high school textbooks.

So if the Electoral College was designed neither to upgrade small states nor to displace democracy, what was its Founding Era *raison d'être*? Not to boost small states, but to bolster slave states. At the Philadelphia Convention, the visionary Pennsylvanian James Wilson proposed direct national election of the president. But in a key speech on July 19, 1787, Virginia's James Madison threw cold water on this proposal: “The right of suffrage was much more diffusive in the Northern than the Southern States;

contained in AMAR, *supra* note 3—a work that Klarman oddly fails to engage. For example, Klarman emphasizes at some length that many Antifederalists deemed the House of Representatives too small, but he races too quickly past the key fact that, in response to this compelling criticism, the issue of congressional size was in effect democratically renegotiated during the ratification process, with Federalists promising a dramatically larger House as soon as a census could be done and then keeping their promise. Compare KLARMAN, *supra*, at 172–73, 355–61, with AMAR, *supra* note 3, at 76–82. More generally, Klarman spends too much time on the secret drafting process and not enough time on the wide-open ratification process, which was far more democratic than he admits, in both the breadth of eligible participation and the scope of democratic deliberation and subtle renegotiation of the Philadelphia plan. Nor does Klarman have a satisfying answer to the following objection: If the Constitution was as undemocratic as he claims, why did Americans not merely vote for it in the great (and democratically inclusive) national ratification contest of 1787–88, but then continue to vote immediately (and repeatedly thereafter) for the men who had famously drafted and backed the document—George Washington, James Madison, and many others? Klarman's own evidence shows that criticism “quickly dissipated” and “rapid[ly] decline[d]” and did so in various places even before the document went into effect. Cf. KLARMAN, *supra*, at 619–20.

¹⁰ AMAR, *supra* note 3, at 152–55, 342.

¹¹ *Id.* at 342.

and the latter could have no influence in the election on the score of Negroes.”¹² In other words, a direct election system would be a deal-breaker for the South, which would get no credit for its half million slaves, who of course could not vote. But the Electoral College—a prototype of which Madison proposed in this same speech—would eventually enable each Southern state to count its slaves, albeit with a two-fifths discount, in computing its share of the overall number of presidential electors.

As the Electoral College system unfolded in early America, Madison’s Virginia—a big state with a big slave population—unsurprisingly emerged as the big winner of the scheme that Madison himself had sketched out in his key speech. Prior to the first census, the Old Dominion would command 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.¹³ Under the 1800 census, although Virginia had ten percent *fewer* free persons than Pennsylvania, Madison’s homeland received twenty percent *more* electoral votes thanks to its many slaves.¹⁴ 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.

After Washington’s resignation in 1796, America witnessed its first two genuinely contested presidential elections. Unsurprisingly, these elections pitted a Southerner (Jefferson) against a Northerner (Adams). Unsurprisingly, each region generally backed its favorite son both times. The key swing state was thus New York, which was at that time a middle jurisdiction where North met South—a slave state with a nontrivial number of slaves, but a state that was in the process of gradually eliminating slavery. (To put my point a different way: Note that these elections did not pit big states on one side against small states on the other. In these presidential elections as in so many others, including the one that brought Lincoln to office, the electoral fault lines were latitude lines.)

When the Twelfth Amendment tinkered with rather than tossing the Electoral College system in the aftermath of Jefferson’s 1800 triumph, the system’s proslavery bias was visible to all—an open and festering wound in the American body politic. In the floor debate over the Amendment in late 1803, Massachusetts Congressman Samuel Thatcher complained that “[t]he representation of slaves adds thirteen members to this House in the present Congress, and eighteen Electors of President and Vice President at

¹² *Id.* at 156–57; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 56–57 (Max Farrand ed., 1966).

¹³ U.S. CONST. art. I, § 2, cl. 3.

¹⁴ AMAR, *supra* note 3, at 158.

the next election.”¹⁵ But Thatcher’s complaint went unredressed. As they had at Philadelphia, Northerners caved to Southerners by refusing to insist on direct national election.

The Electoral College system that remains in place to this day is thus not the Electoral College 1.0 that emerged from Philadelphia, but rather the Electoral College 2.0, aka the Twelfth Amendment, knowingly designed to facilitate popular participation, and a two-party system, and presidential tickets—and slavery. This Amendment was drafted by and for Thomas Jefferson’s and James Madison’s proslavery party, in the wake of an election that had made clear to anyone with eyeballs that extra slaves meant extra Electoral College clout. Yet the Amendment typically—shockingly—goes unmentioned in standard civics accounts of America’s Electoral College system.

Also unmentioned in most standard civics books is the remarkable fact that until Lincoln’s election, every single president was either a Southerner or a Northern man of Southern sympathies. By this I mean that no president, *as president*, ever said, prior to Lincoln’s Inaugural, that slavery was wrong and should eventually be abolished. True, Washington nobly provided for the freeing of his slaves in his will; but he did so as a purely private citizen who had long since retired from public life. And manumission of individual slaves, however admirable, is not the same thing as ending slavery as a system, everywhere and forever. True, John Adams was not himself a strong slavocrat, but he did choose South Carolina slavocrats, Thomas Pinckney and Charles Cotesworth Pinckney, as his running mates in 1796 and 1800. And Adams chose these mates because of the obvious need to offer a balanced ticket that took account of Southern electoral votes—electoral votes that were, to repeat, artificially inflated by the three-fifths compromise baked into the Electoral College. True, John Quincy Adams was “Old Man Eloquent” against slavery at the end of his life—but that was when he was a mere congressman from Massachusetts who no longer needed to woo Southern electors. As president, he did need to worry about the South, and his vice president was yet another South Carolinian, John C. Calhoun.

In short, the three-fifths compromise at the wormy, rotten core of the antebellum Electoral College had real and ignoble consequences for the antebellum American presidency. Time and again vicious and viciously proslavery folk served as presidents, vice presidents, and cabinet officers—Franklin Pierce, James Buchanan, John C. Breckinridge, and John C. Calhoun, to name just a few of the most obvious members of this historical

¹⁵ 13 ANNALS OF CONG. 538 (1803).

Hall of Shame. Not only did no president, as president, call for slavery's ultimate extinction prior to March 4, 1861—even a slow extinction with full compensation to slave masters—but also no *cabinet officer* prior to Lincoln's administration ever did so.¹⁶ And so March 4, 1861, the Inaugural of Abraham Lincoln, was truly a day for us all to remember, and not just because today marks the Inaugural Abraham Lincoln Lecture.

I WAS NOT TAUGHT about the proslavery tilt of the antebellum Electoral College in high school; almost no one in my generation was. Nor was I taught the truth in college or in law school. But as a fledgling law professor in the 1990s I began to study the historical and structural connections between America's rather peculiar Electoral College system and America's other infamously peculiar institution.

Enter, stage right, George W. Bush and the election of 2000. For the first time in over a century, a man who clearly lost the national popular vote—and Bush lost it to Al Gore by an undeniable margin, half a million votes—managed to eke out an Electoral College majority. This odd turn of events provided an opportunity for me to share with my fellow citizens the real truth about the origins of the Electoral College. Shortly after the election, I published an op-ed in *The New York Times* highlighting the original Electoral College's proslavery roots and drawing particular attention to slavery's role in the 1800 election.¹⁷

This op-ed ended with a call for a constitutional amendment to vindicate James Wilson at long last by providing for direct national presidential election. But it is not easy to amend the Constitution, and as time passed, I began to wonder whether there might be better pathways for modern reformers. Might there be informal non-amendment workarounds and adaptations that could approximate direct presidential election while formally operating within the existing constitutional framework? In particular, might the history of U.S. Senate elections provide possible models for emulation?

Recall that at the Founding, state legislatures chose U.S. senators pursuant to the clear rules of Article I. The Seventeenth Amendment, proposed in 1912 and ratified the following year, formally changed these Article I rules, mandating the modern system of direct popular election of senators.

¹⁶ DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 54 (1989).

¹⁷ Akhil Reed Amar, *The Electoral College: Unfair from Day One*, N.Y. TIMES (Nov. 9, 2000), <http://www.nytimes.com/2000/11/09/opinion/the-electoral-college-unfair-from-day-one.html> [<https://perma.cc/KZR4-KVS3>].

But long before the 1910s, Americans had begun to move informally toward direct senatorial elections, via informal, non-amendment workarounds and adaptations. By 1912 most senators were already or were about to become, *de facto*, directly elected, and most state legislatures were already or were in the process of becoming rubber stamps. On reflection, this makes sense. Why would the great mass of senators who voted to propose the Seventeenth Amendment change the basic ground rules that got them elected? In fact, they wouldn't and didn't: Many were already being directly elected in one way or another. Why would the lion's share of state legislatures who opted to ratify the Amendment vote to disempower themselves? Once again, they wouldn't and didn't: Their power to pick senators had already drained away in many places.

To understand how all this started, we must return to Abraham Lincoln. But this time, not to the election when he bested Douglas, but rather to the election when Douglas bested him.

Sometimes, one part of our brain does not talk to another part of our brain, and so it is with the Lincoln–Douglas debates. One part of our high-school-civics brain knows that Lincoln and Douglas were running for the U.S. Senate, and seeking to woo ordinary voters. But another part of our high-school-civics brain knows that senators in that era were not directly elected. So what exactly was happening in 1858?

What was happening was that Illinois was improvising a new way of moving toward direct senatorial elections, *de facto*. In an unprecedented maneuver, each of the two political parties in Illinois decided to announce *before* the 1858 state legislative election the man whom the party would name to the U.S. Senate *after* the election if the party controlled the next session of the General Assembly. These paired announcements had the effect of turning the 1858 state legislative election into a referendum of sorts on the U.S. Senate race. If a voter liked Douglas, that voter should cast a ballot for the local Democrat. If the voter instead preferred Lincoln, he should vote to send a Republican to Springfield.¹⁸

This improvisation was, as we have seen, imperfect. More voters likely backed Lincoln; but the popular vote was close and Douglas ended up winning the prize. Moreover, some voters may have cared more about local issues and local political personalities. That is, they may have preferred Lincoln over Douglas (or vice versa) while also preferring the local Democrat (or Republican) for General Assembly, for any number of reasons.

¹⁸ AMAR, *supra* note 3, at 410–11; FEHRENBACHER, *supra* note 16, at 48–49.

However imperfect this early improvisation may have been, the memory and legend of the 1858 Lincoln–Douglas Senate race lived on, and may well have inspired the next generation of reformers to craft the next generation of improvisations and workarounds to approximate the direct election of senators.

Some improvisations operated with strong assistance from state political parties—much as both Illinois parties in 1858 had acted, in their timing of nominations, so to as to turn the state legislative election into a de facto federal senatorial contest. In the late nineteenth century, states began to experiment with direct primary elections for Senate candidates within each party.¹⁹ This system narrowed the U.S. Senate contest in the state legislature to two champions, each boasting popular support within his party. But this system could not ensure that the legislature would in fact crown the man whom most voters would have preferred in a head-to-head race between the top Democrat and the top Republican—a race that could not easily be accommodated within the partisan-primary-election framework. Nevertheless, the Senate-primary system, operational in twenty-eight of the forty-six states in 1910, did enhance the democratic character of the federal upper chamber and proved especially significant in the South and other places where one party was dominant and the primary election was thus the main event.

At the turn of the century, Oregon began to experiment with a different approach, which went through several iterations and refinements both in Oregon itself and in copycat states such as Nebraska, Oklahoma, Montana, and Nevada. Under the Oregon Plan, the state at its general election allowed voters to directly express their preferences among the candidates for the United States Senate. In an early version of the plan, individual state lawmakers could, if they chose, officially pledge to support the winner of the voters' preference-poll. Once this pledge was taken, even a Republican state legislator would be honor-bound to vote for a given Democratic senatorial candidate if that Democrat were to win the preference-poll (and so too a pledged Democratic state legislator would be honor-bound if a Republican won the preference-poll). In a later version, Oregon voters in 1908 enacted a state initiative purporting to “instruct” the state legislature to ratify the people's choice.

By early 1913, more than half the states had already committed themselves to a form of direct election—either the direct-primary approach in one-party states or some version of the Oregon Plan. Thus, when

¹⁹ My language and analysis here and in the next paragraph borrow heavily from AMAR, *supra* note 3, at 410–13.

senators and state legislatures from these states supported the Seventeenth Amendment, they were voting to constitutionalize rules that were already largely in place or about to be in place.

WHAT, YOU MAY ASK, does any of this pre-Seventeenth Amendment history—even if it is interesting in its own right, and even if it directly traces back to Abraham Lincoln’s first great moment in the national spotlight—have to do with modern-day Electoral College reform?

Here’s what. In the year after the wild election of 2000, I began to ponder the pre-1912 improvisations to *Article I* that had informally created direct *senatorial* elections. Might there be similar improvisations, I mused, that could today be made to *Article II* and the *Twelfth Amendment*, improvisations that might lead to informal direct *presidential* elections? And just as informal systems of direct senatorial election eventually laid the groundwork for a formal constitutional amendment codifying direct election, might the same pattern repeat itself for direct presidential elections, with informal adaptations eventually paving the way for a formal amendment at some later point?

In December 2001, on the first anniversary of *Bush v. Gore*, I unveiled on a quiet, law-centric website two possible improvisations that would formally preserve the current Electoral College system while approximating, *de facto*, direct national election.²⁰ One improvisation involved coordinated action among the states. I suggested that a group of states—states with at least 270 electoral votes among them, enough votes to carry the day in the Electoral College—could enact laws providing that each of these state’s electoral votes would go to the candidate who won the *national* popular vote, rather than the popular vote within the state. In this scenario, whoever won the national popular vote would get all the electoral votes from all these coordinating states—at least 270, which would guarantee that the national popular vote winner would also have an Electoral College majority.

Quite independently and doubtless more importantly, Northwestern Law’s former Dean, Robert W. Bennett, was floating a similar thought experiment in a pair of essays that reached a wide audience in a smart and

²⁰ Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW (Dec. 28, 2001), <http://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html> [https://perma.cc/E2P6-GTRU], reprinted in AKHIL REED AMAR, *THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA* 351–57 (2016).

stylish legal journal, *The Green Bag*.²¹ Dean Bennett's plan and mine diverged in certain respects, but both plans envisioned a series of interlocking state laws. No state would need to unilaterally disarm, electorally. Each state would abandon its current state-winner-take-all system of electoral-vote allocation only if enough other states followed suit.

Much to my surprise, this idea has begun to gain traction in, as they say, "the real world"—a world sharply distinct from the world that unfolds merely inside an academic's brain. As of today, a National Popular Vote Interstate Compact (NPVIC) plan following the broad outlines of Dean Bennett's essays and my 2001 musings has been formally adopted by ten state legislatures and the District of Columbia. Together, this group comprises 165 electoral votes, more than 60% of the 270 electoral votes needed for the plan to go into operation.

But there are real problems with this plan, wrinkles that have not been completely ironed out. Several of these problems were highlighted in my 2001 essay, and several others have surfaced in my more recent musings on the matter. What if states outside the coordinating group seek to sabotage the plan by refusing to hold proper recounts in the event that the national popular vote margin is razor thin? Can individual state election officials confidently certify a national popular vote winner given that they have very little control over, or even knowledge about, the electoral apparatus of other states? In a world in which the entire game becomes winning a national vote, might some states seek to increase their overall clout by reckless expansions of the franchise? (Suppose California seeks to loom larger in the overall count by letting sixteen-year-olds vote; and New York ups the ante by lowering the voting age to fourteen?)

To avoid chaos and catastrophic confusion, the uniform and interlocking state laws enacted under the NPVIC will need to be supplemented by a comprehensive congressional statute providing detailed federal oversight of the presidential election process in all states—not merely the states that enact the NPVIC law. Such a statute could be rooted in Congress's power to pass all laws "necessary and proper" to vindicate Congress's role in overseeing interstate compacts under Article I, Section 10, and also in Congress's power to regulate the "Manner" of congressional elections under Article I, Section 4. (One part of a standardized ballot that Congress could lawfully mandate for House and Senate elections could include a standardized section for each voter to register her presidential

²¹ 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).

preference; and this standardized section could be monitored and administered by federal election officials working alongside their state election-law counterparts.)²² But enactment of this comprehensive congressional law would require careful lawyering and broad political consensus. We should not underestimate the difficulties that flank this pathway.

Let us turn our attention, then, to a second possible reform pathway—the second thought experiment I tossed out in late 2001, mapping an altogether different and entirely distinct way of informally achieving direct national election while formally preserving the current Electoral College. This way is laughably simple. It does not require new laws in a host of states or a new and elaborate congressional statute. In principle, this alternative approach requires faithful buy-in from only four persons (!) each presidential election cycle, backed by a broad but informal normative consensus that these four are acting honorably and properly. As I look forward to the presidential election of 2020 and beyond, this second pathway seems perhaps more promising than the NPVIC. It is also more distinctly Lincolnian, in certain respects.

Recall that in 1858, the state-legislative election was turned into a federal-senatorial referendum of sorts not by formal laws, but by political operatives—by the political parties, who promised to back Lincoln and Douglas, and by these two men themselves who promised to publicly debate each other under agreed-upon ground rules. This system worked not via complicated state or federal laws, but via *parties, persons, and promises*, backed by considerations of honor and reputation. The next major round of Senate reforms also traveled through political parties, political persons, and political promises. State parties ran primaries and state lawmakers personally pledged to honor their parties' popular picks. Early versions of the Oregon Plan likewise operated less through law and more through personal pledges and personal promises that the people's Election Day verdict, howsoever informal and technically nonbinding, would be obeyed.

Here, then, is the second informal pathway to direct presidential election in 2020 and beyond: In any future presidential election, the two presidential candidates, backed by their respective running mates, can solemnly pledge to each other and to us all, on television and Twitter, that they will abide by the national popular vote. And once this happens in one particular presidential election cycle, there may develop strong pressure for

²² For more detailed thoughts, see Vikram David Amar, Response, *The Case for Reforming Presidential Elections by Sub-Constitutional Means: The Electoral College, the National Popular Vote Compact and Congressional Power*, 100 GEO. L.J. 237 (2011).

candidates in future presidential elections to follow suit. Thus are born quasi-constitutional customs and constitutional conventions. (Think for example of how a strong if admittedly informal and somewhat imprecise norm developed early on that presidents would not serve more than two terms—a norm followed, more or less, for a long period of time and then eventually codified in the Twenty-Second Amendment in 1951.)²³

The candidates themselves can make their pledges to abide by the national popular vote stick via the Twenty-Fifth Amendment, which allows a president to fill a vacant vice presidency.²⁴ Suppose for example that Smith somehow is inaugurated even though Jones won the national popular 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. (Though this scenario might seem odd, it is not so 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.)

WHICH BRINGS US, FINALLY, to President Trump. He believes in making deals. Would he be willing to make this one, solemnly and publicly, in the summer of 2020? But, you ask, even if he did shake hands with, say, Democratic presidential nominee Tim Kaine, how is the deal to be enforced? Suppose, for example that Trump and Kaine make the deal, with the entire nation and world watching; and suppose further that 2020 ends up as a virtual repeat of 2016, with Trump losing the popular vote by a healthy margin but nevertheless winning the same states he won in 2016, with a collective Electoral College count of about 300—far above the all-important 270. In such a scenario, what would stop him from renegeing?

We all would. His party would. His running mate would. His own electors would. Or at least we and they all would if the popular vote was indeed clear. If not, Trump might get the benefit of the doubt, because the key decisionmakers would be his own political allies. In this 2020 world that I am asking you to envision, it would still be an important formal advantage to win a formal state-by-state Electoral College majority; such a majority would enable Trump's own backers to be the umpires of who

²³ For more on the two-term convention and its interesting history, see AMAR, *supra* note 3, at 433–38.

²⁴ This paragraph borrows directly and liberally from AMAR, *supra* note 20, at 356.

really won the popular vote. Rather than being a defect of my proposed improvisation, this fact is arguably a virtue: This feature of the system would give both candidates a reason to pay attention to *both* the informal popular vote and to the formal electoral-vote map. The formal electoral map would be a tiebreaker if doubt truly exists about who won the informal national popular vote.

Here's how the system would unfold. Suppose Trump claimed that he really did win the popular vote after all, and that the mainstream media's tallies (backed in many instances by formal totals from state election officials) are all fake or fraudulent. Would his running mate, Mike Pence, back this claim? After all, in our imagined 2020 hypothetical Pence, too, was part of the summer handshake agreement. Thus on the day after the election and every day thereafter he would be pressed (by the press) at every turn to clarify his own position on the matter. Would the Cabinet back Trump, or would members feel the need to resign as a matter of personal reputation and personal honor? Would congressional Republicans back Trump? If not, a portion of them could combine with (presumably united) congressional Democrats to impeach and remove Trump for the high misconduct of lying to the American people on a matter of the gravest moment. Which is as it should be: No president should be ousted from office unless major blocs of his own party and his own electoral coalition deem him unworthy.

Most immediately, would all of Trump's handpicked electors back Trump? Ordinarily, these obscure men and women are indeed potted plants and should not think that they have any proper mandate to violate their own explicit and implicit promises to the voters to back the candidate whom the voters did in fact vote for. But in certain unusual situations when momentous new developments arise after Election Day, constitutionally conscientious electors do have a key role to play, and the fact that these electors are formal actors in the system becomes a useful feature rather than an unfortunate bug.

Suppose a presidential candidate suffers a debilitating stroke hours after Election Day. In this scenario, sensible electors must act not as instructed agents but as independent actors. They must improvise, and act as the voters who picked them would themselves wish to act given the new facts. Presumably many Trump voters in our 2020 hypothetical are voting for him because they consider him a man of his word, and would not have voted for him if they believed otherwise. If Trump's post-Election Day behavior disproves this basic assumption about Trump, a conscientious Trump elector could indeed properly vote for Kaine in our hypothetical—where Kaine *clearly* won the popular vote, and Trump had *clearly*

promised to abide by that popular vote and then *clearly* reneged. Even so, many Trump electors might still opt to stand by their man. Perhaps these electors are post-Truth cynics, or true believers in Trump no matter what the facts might be. But in our hypothetical, Kaine would not need most Trump electors to cross over; a small minority—a mere 10% or so of Trump’s electors—might suffice to give Kaine the needed 270 electoral votes. But once again, it is key to note that these crossovers would be members of Trump’s own party, his own coalition—in keeping with earlier pre-Seventeenth Amendment reforms that achieved informal direct election of senators thanks to a combination of *parties*, *persons*, and *promises*.

IT MIGHT SEEM utterly naïve and ridiculously optimistic to place such heavy reliance on things like truth, facts, good faith, and political honor. But as this lecture now draws to close I ask you to join me in my naiveté and optimism. On March 4, 1861, slavery was a deeply entrenched feature of American life and America’s Constitution. And yet Abraham Lincoln envisioned a time when the nation would no longer exist half slave and half free. In the long run, Lincoln believed that “the better angels of our nature” would prevail, and on the slavery issue at least, he was right.²⁵

Lincoln always opposed slavery. He once said, “if slavery is not wrong, nothing is wrong. I cannot remember when I did not so think, and feel.”²⁶ But even though his moral clarity on slavery came from a very deep place, early in life, it surely did not hurt that he came of political age in the Old Northwest—the territory from which this great University takes its name. You will all recall of course that the Northwest Ordinance of 1787 banned slavery in this territory. And it did so in language that would eventually find its way, word for word, into the Thirteenth Amendment to the United States Constitution—an Amendment strongly backed by Lincoln himself and an Amendment that he in fact signed, although strictly speaking his signature was legally unnecessary.²⁷

Many of the issues that now confront us lack the blinding moral clarity of the slavery question in Lincoln’s day. I freely confess that Electoral College reform—my topic today—is hardly black and white. True, the Electoral College system has tainted roots, but today the system

²⁵ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), http://avalon.law.yale.edu/19th_century/lincoln1.asp [https://perma.cc/KL3Q-RBP8].

²⁶ Letter from President Abraham Lincoln to Albert G. Hodges, Editor of the *Frankfort Commonwealth* (Apr. 4, 1864), <https://memory.loc.gov/ammem/alhtml/alms/in001.html> [https://perma.cc/65G5-QWCY].

²⁷ On the link between the ordinance and the Amendment, see AMAR, *supra* note 3, at 359. On Lincoln’s signature, see *id.* at 594–95 n.7.

can be justified on grounds entirely unconnected to slavery. Simple inertia is perhaps the best argument. The modern version of the Electoral College is the devil we know; even well-intentioned reform might have unforeseen and unfortunate consequences. Some reforms might create more problems than they would solve. And here is another thing to be said for the Electoral College system: For all its flaws, it did give us President Abraham Lincoln.

So whatever side you fall on—reform or no reform; formal amendment, informal improvisation, or the known knowns of the status quo—please remember that there are persons of intelligence and good faith on a different side. To quote a great man one last time. “We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection.”²⁸

²⁸ Lincoln, *supra* note 25.

