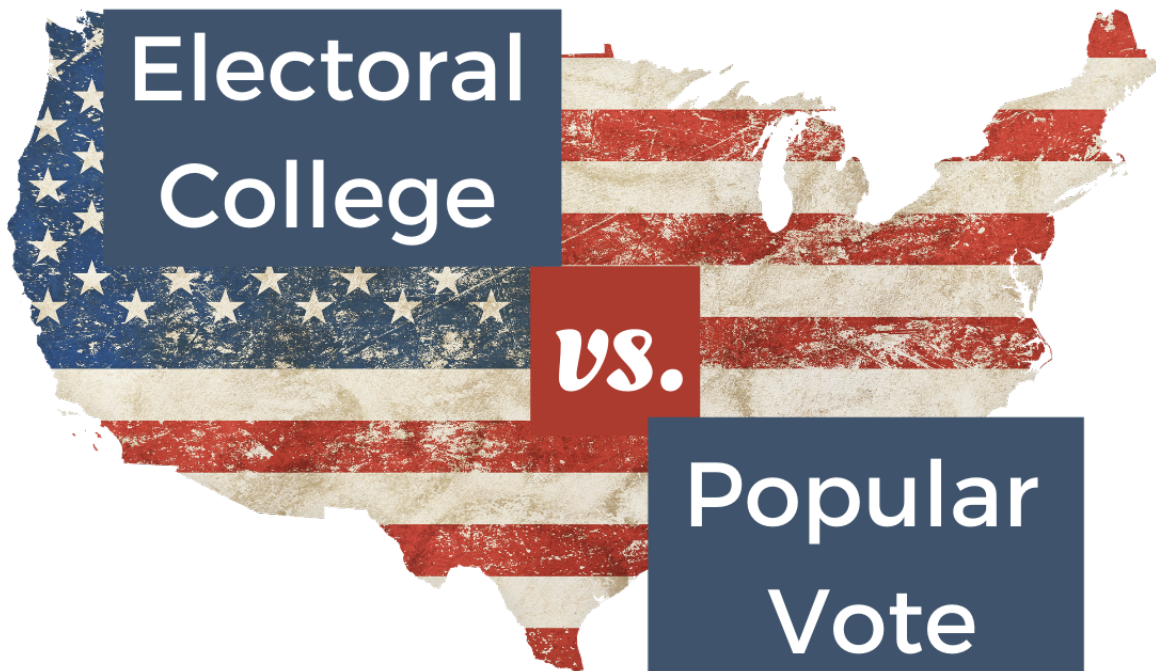


The Electoral College:

**What is It?
Why Do We Have It?
How Has it Worked?
Can it be Changed?**



By Sherwin Markman

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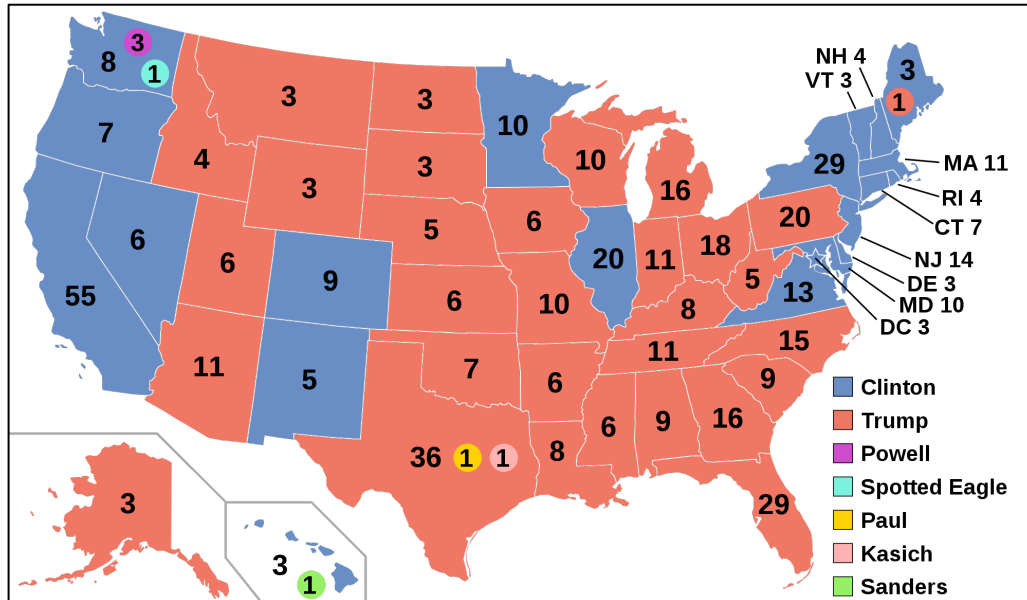
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Part 1: What Is It?

I will attempt to set down on paper here in four short (relatively) articles, an overview that will cover, in turn: What is this Electoral College of ours? How did it happen to come about? What has it done to us? Ought it to be changed and, if so, how?

So, then, what is this Electoral College?

Well, first of all, it is no “college” at all. It is, instead, a group of people appointed state by state in whatever manner each state legislature directs, who, in turn, determine, by majority vote, the person who shall be the president of the United States.

Specifically, what has become known as the Electoral College, was created by Article II, Section I of our Constitution, as modified and changed by Amendment XII (ratified on June 15, 1804), Amendment XX (ratified on January 23, 1933), and Amendment XXIII (ratified on March 29, 1961). Putting this all together, this is what we have now:

1. Each state shall "appoint";
2. In such manner as its state legislature directs;
3. A number of "electors";
4. Equal to the whole number of its representatives in Congress plus its two senators (Thus, Maryland, for example, now has 10 electoral votes — eight members of the House plus its two senators). In addition, the District of Columbia has been granted the electoral votes of the least populous state (three);
5. And the electors shall meet in their own states at a uniform time as set by Congress;
6. Where they shall cast their ballots separately for president and vice president; and
7. The candidates who receive a majority of those votes shall become president and vice president, respectively.

There are now 538 Electors, a number reached by adding 435 voting members of the House, plus the 100 senators, plus the three votes granted to the District of Columbia. Thus, it takes at least a 270 electoral vote majority to elect a president.

Even though there is no requirement to do so, every state provides that its electors are to be selected by popular vote, and, except for Maine and Nebraska (which apportion their votes), every state has decreed that all of its electors shall vote as the winner of its popular vote decides; i.e., winner takes all.

And so it is that under our electoral system, the idea that all American citizens have the same voting power utterly disappears. Thus, California, with its 55 electoral votes, has 60 times the population of Vermont, with its three electoral votes. Therefore, each Vermont voter's presidential vote is worth three and a half times that of each California voter. The inescapable truth is that all citizens living in large population states are severely penalized in the selection of our president.

The disparity in voting equality is far worse if an election results in no candidate winning a majority of the electoral votes. In that eventuality (which could — and has on occasion — come about when more than two viable candidates are in the race), our Constitution provides that the presidential selection is sent to the House of Representatives, which is to vote among the top three electoral vote candidates. But the voting in the House is unique: It is not congressman by congressman, but, instead, it is state by state. Each of our 50 states gets one vote, and that vote is determined by a

majority of its congressman. If the state's congressional delegation vote ends up in a tie, that state does not vote. The winner is the candidate who wins the votes of 26 states.

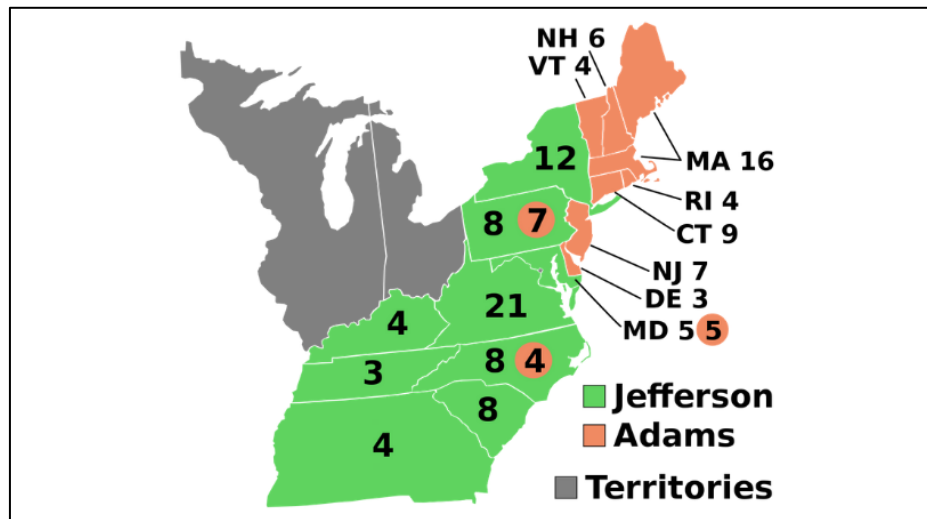
Under this system, again using Vermont and California as examples, each state has an equal one vote voice in the election, and thus the weight of a Vermont citizen's presidential vote becomes 60 times that of a citizen of California. To put all of it into perspective, 26 states representing less than 16 percent of our nation's population, could elect our president.

Under our current system, the failure of any presidential candidate to receive a majority of the electoral votes will also result in a similar electoral failure by any vice-presidential candidate. However, unlike the presidential selection, the Constitution provides that, in that case, the selection of the vice president will be made between the two top candidates by the Senate, voting as it normally does.

None other than Thomas Jefferson, when contemplating this system in 1823, stated:

"I have ever considered the constitutional mode of election ultimately by states as the most dangerous blot on our Constitution, and one which will someday hit."

And so we come to the question: How in the world did this all come about?



1800 Electoral College map.
Graphic: AndyHogan14, own work (CC0).

Part 2: What is its Genesis?

Understanding the genesis of the Electoral College requires understanding its historical context. The Articles of Confederation, ratified in 1781, purported to bind the 13 original states into a nation, but in truth, each state remained independent and sovereign. The so-called national government was denied such powers as the authority to levy taxes and regulate commerce.

By the spring of 1787, Revolutionary War heroes led by James Madison and Alexander Hamilton became so disgusted with their new nation's governance that they organized a "convention" in Philadelphia, ostensibly to amend the Articles of Confederation, but in reality to invent and agree to an entirely new form of government. However, arrayed against them was a not insignificant cadre including such revolutionary luminaries as Patrick Henry. The Hamilton group, known as "The Federalists," favored a strong central government with limited popular participation; the Henry group, known as the "The Anti-Federalists," were adamant in their opposition.

There was also the poisonous issue of slavery. Slaves accounted for 40 percent of the South's population, and North Carolina, South Carolina, and Georgia refused to join any union unless their "peculiar institution" was accommodated.

The convention opened on May 26, 1787 and continued until September 28. The overarching imperative was to obtain the consent of all 13 states. Compromises had to be found. Those they reached included the invention of the Electoral College.

The slavery issue was dealt with early in the convention. Its unique resolution was to permit slaves, who obviously could not vote, to be counted as three-fifths of a person for the purpose of counting population in apportioning how many members of the House of Representatives would be allowed for each state. This arrangement, of course, eventually affected the number of electors for each southern state, but it did not cause the invention of the Electoral College. To think otherwise commits the logical fallacy of "post hoc ergo propter hoc" (after this, therefore on account of this).

Not until late in the convention's deliberations did the delegates finally deal with the question of choosing the president. By that time, the three-fifths rule had long been embedded in the draft constitution.

Strikingly, election of the president by the people was an early and, seemingly, desirable choice. It was backed by some influential delegates. For example, Gouverneur Morris of Pennsylvania stated, "If the president is to be the guardian of the people, let him be appointed by the people."

However, opponents of the popular vote were relentless, led by Elbridge Gerry of Massachusetts (of "gerrymandering" fame) who argued that "the people are uninformed and would be misled by a few designing men." In the end, Gerry and his followers prevailed and the popular vote for president was defeated, with only Pennsylvania and Delaware dissenting.

Having disposed of that matter, the convention moved on, and, for a while, electing the president by the Congress gained ascendancy; after all, the legislatures of most states then elected their governors. But, ultimately, its defeat was led by Pennsylvania's Gouverneur Morris who successfully argued that such a plan would make the president subservient to Congress and thus pervert the Constitution's fundamental concept of separation of powers.

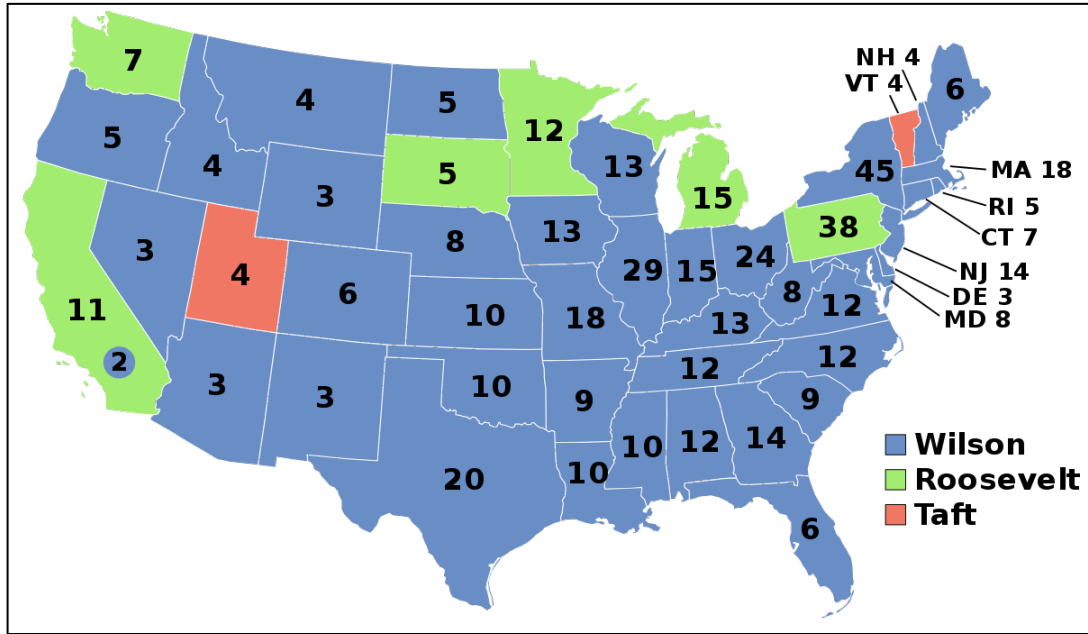
Now deadlocked, the convention appointed a committee of 11 delegates. They were directed to find a compromise that would achieve the convention's imperative of unanimity. They achieved that goal. They invented, proposed, and ultimately secured the adoption of

the Electoral College. It and the Constitution of which it is a part preserved the power of smaller states, and popular voting was limited to the House of Representatives because state legislatures would elect senators as well as control the selection of presidential electors.

The Electoral College thus exacerbated the fundamental differences between the Federalists and the Anti-Federalists. Federalist paper 68 argues that a president should be chosen by "men most capable of analyzing (his) qualities" rather than elevating a man with "talents for low intrigue and the little acts of popularity."

Anti-Federalists were equally concerned about electing a demagogue. Anti-Federalist paper 72 argued that it was terribly wrong that the sacred rights of mankind should "dwindle down to electors" because there is "but one source of right to government, or any branch of it, and that is THE PEOPLE" (emphasis in original). Otherwise, the Paper foresaw, the Constitution created a president with such vast powers that he might, one day, "perpetuate his own personal administration" and "give us law at the bayonet's point".

Was that all too predictive of what we almost had under Donald Trump?



*1912 Electoral College map.
Graphic: Gage ([CC BY-SA 4.0](#)).*

Part 3: What Has it Wrought?

Right off the bat, the Electoral College system, so carefully devised by the founders, failed. Their dream that a president would be carefully selected by a cadre of wise, thoughtful men (the “electors”) chosen by the legislatures of the several states, immediately foundered on the inescapable need of political leaders to form themselves into political parties. In the case of the new America, it was the Federalists, headed by the likes of John Adams, and the Democratic-Republicans, led by Thomas Jefferson.

It started with the perversely unique election of 1800, when Jefferson and Aaron Burr ran against Adams and Charles Pinckney. In that election, it was clearly understood by all that Jefferson was the presidential candidate and Burr the vice-presidential. When the electors met to decide, they voted 73 to 65 in favor of Jefferson and Burr, defeating Adams and Pinckney. It should be noted that they voted, not as the independent “wise men” envisioned by the drafters of the Constitution, but in lock step as demanded by their respective political parties (whether that is constitutionally required is the subject of two Supreme Court cases likely to be decided this month).

However, in one of the great political betrayals in American history, Burr announced that he had been, after all, secretly running for president all along. That created a constitutional catastrophe because the Constitution then provided that the electors shall cast two votes without distinguishing between president and vice president, and that the presidential winner would be the man receiving the most electoral votes, as long as it was a majority. Therefore, because they had run as a team, the electoral votes for Jefferson and Burr tied at 73, with neither receiving the required majority. So it was that the decision was thrown into the House of Representatives with each state to cast its single vote. For 35 ballots, the House was deadlocked between these two candidates, with the Federalists backing Burr. Finally, on the 36th ballot, Alexander Hamilton, himself a Federalist leader, threw his support to Jefferson, breaking the tie and enabling Jefferson to win the prize.

That debacle led, in 1804, to the adoption of the 12th Amendment requiring the electors to vote separately for president and vice president, which is the rule today. But that fix did nothing to cure the two critical failures of the Electoral College: the risk of a perverted election when more than two viable candidates sought the presidency; and the greater risk of elections that result in the defeat of the candidate who captures a majority of the popular vote.

Both corruptions came roaring forward in the election of 1824. By that time, 18 of the then 24 states had moved to the popular election of electors (all of the remaining states would eventually follow). There were four presidential candidates: Andrew Jackson, John Quincy Adams, Henry Clay, and William Crawford. Jackson clearly won the popular vote — 11 percent more than Adams — as well as a lead in the electoral vote. But Jackson did not have a majority of electoral votes, and so the contest was sent to the House of Representatives, with each state casting one vote. There Clay threw his support to Adams, giving him a majority of the states, thus electing him president. Jackson, livid beyond words, called it “barefaced corruption.” But the result stood. Jackson, of course, gained his revenge four years later when he decisively defeated Adams’ bid for re-election.

In 1876, our Electoral College system caused a debacle that had a chillingly destructive impact on African Americans. In that election, Samuel Tilden received a majority of both the electoral and popular votes for president, and thus should have been easily elected. But it was not to be. His opponent, Rutherford Hayes, challenged the

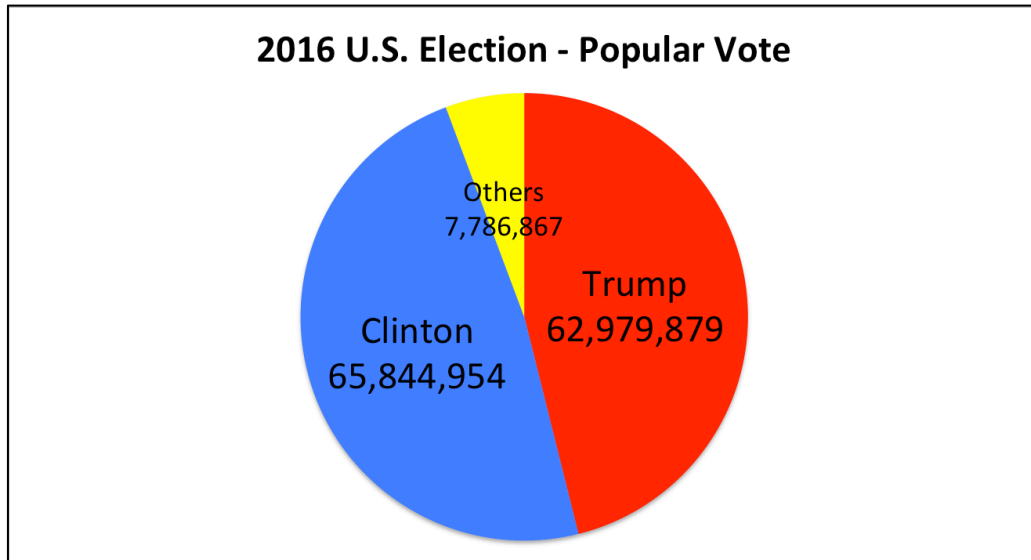
legitimacy of Tilden electors from three southern states — Florida, Louisiana, and South Carolina — and then promised that, if elected, he would end Reconstruction by removing federal troops from the South. The legislatures from those states immediately acquiesced and changed their electors, thus electing Hayes and, more importantly, beginning the death knell of free African American voting in the South.

As we moved on to the 20th Century, the Electoral College system continued to do its destructive work. In 1912, Theodore Roosevelt, then the former Republican president, ran against the incumbent Republican president, William Taft, and Woodrow Wilson, the Democrat. With these three well known candidates, the election could have been thrown into the House of Representatives, but, happenstantially, it was not when Wilson received an overwhelming 82 percent of the electoral votes despite achieving only 42 percent of the popular vote.

Throughout the recent century, the nation continued to skirt close to a House election when viable third-party candidates gained large numbers of electoral votes. So it was in the 1968 contest among Richard Nixon, Hubert Humphrey, and George Wallace, and again in 1992 among Bill Clinton, George H.W. Bush, and Ross Perot. Such luck is not necessarily ours forever, especially in an era where it is increasingly likely that one or both of our current political parties might divide and germinate, just as the Republicans came out of the Whigs in 1856.

And then, here in the 21st Century, we continue to see the specter of the election of presidential candidates who lose the popular vote: Al Gore over George W. Bush in 2000, and, of course, Hillary Clinton over Donald Trump in 2016.

There is absolutely no reason to believe that either of these abominations — elections by the House of Representatives or elections of candidates who lose the popular vote — will not continue to happen. What, if anything, can and should be done about it?



*Revised and certified final election results from all 50 states and D.C.
Graphic: CSES Images ([CC BY-NC-SA 4.0](#)).*

Part 4: How Can it be Changed?

On Monday, July 6, 2020, the Supreme Court, in a unanimous decision written by Justice Kagan, decided that a state may require Electors to vote as that state's popular vote determines; i.e., the Electors may be stripped of all individual discretion — no "unfaithful Electors" are allowed. But, although Justice Kagan concludes her opinion with the battle cry phrase "We the people rule," the people, of course, do not rule equally, and that is why the Electoral College must be changed.

It was Voltaire who wrote, "The perfect is the enemy of the good." This wisdom must be borne in mind when considering what we should advocate as the solution to our defective Electoral College system.

It is apparent that the democratic ideal for election of the American president would be by a straight vote of the American people — all of them, regardless of where they reside, each of them voting equally. That, of course, is the "perfect." But we must consider whether achieving that ever would be possible in our federal system. I submit that it would not, and therefore we must broaden our search for a solution.

We must start with our Constitution. Amending it is required if the popular election of presidents is to come about, and, as our founders intended, amendments are extraordinarily difficult to achieve. The

Constitution directs that any amendment must have the favorable votes of two-thirds of both the House and the Senate, followed by the concurrence of three-fourths (38) of the states, a result that, on this issue, in this day and age, is difficult to imagine.

Thus it is that Sen. Lindsey Graham (R-S.C.) has stated that doing away with the Electoral College is “driven by the idea the Democrats want rural America to go away politically”; Sen. Marco Rubio (R-Fla.) has opined that the Electoral College is a “work of genius”; and, of course, President Trump has not been quiet, stating that “with the popular vote...the cities would end up running the country.” Sadly, in recent years Republican support for the popular vote has fallen from 54 percent to 19 percent. Therefore, in my opinion, we must look elsewhere for an achievable solution.

There have been more than 752 attempts to change our presidential electoral process, and none of them have managed to solve our system’s fundamental failures.

Of course, there was the 12th Amendment which separated the presidential and vice presidential electoral voting; the 13th, 14th, and 15th Amendments which abolished slavery and granted all Americans the right to vote; the 19th Amendment which gave the vote to women; the 20th Amendment which provided that electoral disputes are to be resolved by the incoming rather than the outgoing Congress; and, finally, the 23rd Amendment that gave three electoral votes to the District of Columbia. But these amendments failed to resolve the original sins of potential elections of presidents who lose the popular vote; or, when there is no electoral majority, the entirely undemocratic manner of choosing a president by a state-by-state vote in the House.

There is one proposed solution that is currently popular among “blue” states, but which, I think, is of doubtful constitutionality, and, like the popular vote alternative, stands little chance of ultimate viability.

It is called “The National Vote Interstate Compact,” an agreement among a group of states whose combined total of electoral votes must exceed the 270 required for victory, and binds those states to cast their electoral votes for the national popular vote presidential winner, regardless of how each of those states may have voted. As of now, this compact has been agreed to by 15 states, including Maryland. Together, the electoral votes of these states total 190 electoral votes, well short of the 270 votes needed to effectuate the compact. What is notable is that all 15 states are “blue” states. Not a single “red” state

has signed on, and, in my opinion, none will. Thus, this compact idea probably will fail for the same reasons that would defeat the popular vote alternative. There is also a serious question of constitutionality inasmuch as Article I, Section 10 of the Constitution prohibits any state from entering into "any Agreement or Compact with another state" without the "consent of Congress".

There is one solution which, although not perfect, moves us well down the road toward the one person-one vote ideal, and which, in my judgment, is achievable, and that is a constitutional amendment that requires each state, while retaining the electoral votes it now possesses, to cast those votes in direct proportion to its popular vote, and not "winner take all" which is now the case in all states except Maine and Nebraska. Although this solution does not entirely eliminate the big state-small state disparity, it severely diminishes it, as would be seen when future campaigns would be hard fought even in the now ignored states such as California. If it had been in place in 2016, Donald Trump probably would have been defeated.

As for what should happen if there is no electoral majority, in my mind the solution is self-apparent: Allow the House, whose membership broadly reflects our population, to vote not state by state but member by member, as it does on any other issue, with a majority choosing the president; and let the Senate continue to elect the vice president, as it does now when there is no such majority.

I am not suggesting that this solution should be the initial bargaining position, which perhaps should be for outright popular voting. But it should be the ultimate compromise, which I think is possible. I would point out that one hallmark of Lyndon Johnson's presidency in which I served was our willingness to compromise, a willingness that was matched by a significant number of Republicans. As Senate Minority Leader Everett Dirksen (R-Ill.) said in regard to civil rights legislation, "Nothing is as powerful as an idea whose time has come."