

Commentary about Vote Equality and the Electoral College

by Mark Fihn

Based on the author's research conducted first in November 1976, then again in March 1981, then again in November 2008, and now again in November 2016

Forty years ago, I was a 17-year-old high school senior and wrote a paper for my American Government class in which I recommended the abolition of the Electoral College. Again in 1981 for a Political Science class in my senior year in college, I wrote a much more detailed research paper that similarly concluded our nation needed to eliminate the Electoral College. In 2012, when it appeared that Mitt Romney would win the popular vote, but lose the Electoral vote, and my Republican friends argued strongly in favor of abolishing the Electoral College, I again studied extensively about the Electoral College. In this process, I've read through the Constitution multiple times, the Federalist Papers multiple times, and numerous books and scholarly articles on the topic.

Now, with the 2016 general election likely to result in a popular vote win by Hillary Clinton of more than 2 million votes, but an Electoral vote translating to a victory by Donald Trump, and a HUGE number of my Republican friends completely shifting their views from the 2012 election when they argued the Electoral College unfairly elected Barack Obama, and a HUGE amount of misinformation being published on popular social media forums, I decided to write this paper – a summary of my 40-year investigation into the topic of the Electoral College.

Caveat: I freely admit to a major bias in my opinions --I believe that when choosing the President of the United States, every eligible voter should have an equivalent opportunity to vote and that every vote should be valued the same. Even if you believe that some Americans should have a greater role in selecting our President than others, I encourage you to read with an open mind. I can pretty much guarantee that you will learn a few things about American history that you didn't know before. And while you might not agree with my conclusions, I believe you will at least pause to think a bit more about this topic than you probably ever have before...

This article is mostly about the Electoral College – but also discusses numerous factors that create inequity in the U.S. voting system. No voting process is perfect – but the current US process is not even close to the principles upon which the nation was founded.

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What our Founding Fathers established: It's often frustrating for me to hear people defend our nation's electoral process based on claims that "it's worked for 225 years so why change it"? Actually – the system of electing our leaders has changed dramatically since the Constitution was created. A few of the major changes, (there are many more):

- **The election of Senators:** The Constitution stipulates that Senators were to be chosen by State Legislatures – not based on a direct vote by the general population. But over time, politics frequently resulted in intimidation and bribery tactics in some of the states' selection of senators. Nine bribery cases were brought before the Senate between 1866 and 1906. In addition, forty-five deadlocks occurred in twenty states between 1891 and 1905, resulting in numerous delays in seating senators. In 1899, problems in electing a senator in Delaware were so acute that the state legislature did not send a senator to

Washington for four years. As a consequence, the 17th Amendment was passed in 1913 to change the system so that Senators were elected by a popular vote.

- **The election of the Vice-President:** Our Founding Fathers created a system whereby the general population has no direct say in the selection of the Vice-President. The selection of the Vice-President was actually one of the main reasons the Electoral College was created. When the Electoral College voted – each Elector was given two votes; the candidate who received the most popular votes became President, (so long as it was a majority); the candidate who got the 2nd most votes became Vice-President. No voters from the general population ever voted the Vice-President – that was a role of the Electoral College. The Vice President, unlike the President, was not required to receive a majority of votes from the Electors. Problems developed almost immediately.
 - In the 1796 election, John Adams, the Federalist Party presidential candidate, received a majority of the electoral votes. However, the Federalist electors scattered their second votes, resulting in the Democratic-Republican Party presidential candidate, Thomas Jefferson, receiving the second highest number of electoral votes and thus being elected Vice President. In other words, the President and Vice-President were politically opposed on most issues of the day.
 - The 1800 election was even worse – as the Electoral vote ended in a tie – which meant the final decision went to the House of Representatives. Remember each Elector had two votes – with the winner gaining the Presidency and the 2nd-place finisher becoming Vice-President. Well, the dominant Democratic-Republican Party had planned for one of its electors to abstain from casting his second vote for Aaron Burr, which would have led to Jefferson receiving one electoral vote more than Burr, making Jefferson President and Burr Vice President. The plan, however, was mishandled. Each elector who voted for Jefferson also voted for Burr, resulting in a tied Electoral vote. The election was then put into the hands of the outgoing House of Representatives, which, after 35 votes in which neither Jefferson nor Burr obtained a majority, elected Jefferson on the 36th ballot. (For those of you familiar with the play *Hamilton*, Alexander Hamilton was probably the deciding factor because he expressed concerns about the character of Aaron Burr). The result was that the incumbent President (John Adams) became Thomas Jefferson’s Vice-President. Jefferson and Adams represented opposing political views – resulting in the 12th Amendment to the Constitution which was ratified in time for the 1804 election, and created a President/VP ticket.

Compromise: The word “compromise” is one that is not often heard in modern-day political negotiations. But for our Founding Fathers, compromise was the basic method by which political decisions were made. I’m amazed when a modern-day apologist for the Electoral College suggests simplistically that if the States didn’t like the Electoral College, then they had the right to NOT to ratify the Constitution. Oh – is this a Ted Cruz attitude, or what? In actuality, the Constitution was enabled by many compromises – that generally were not popularly accepted by any State or any political alliance – but that were a middle-ground that a majority of the Founders could accept.

By the way, Rhode Island is often held up as an example of not ratifying the Constitution – the last of the original States to ratify the Constitution. And indeed, Rhode Island held off ratifying

the Constitution for three years because they believed there should be more protections for the individual written into the Constitution – and they – along with New York – demanded (successfully) that a Bill of Rights be added to the Constitution. Rhode Island ratified the Constitution shortly after the Bill of Rights was proposed. Note that none of Rhode Islands stated objections to the Constitution were related to the topic at hand – the Electoral College.

- **The BIG reason the Electoral College was created:** In recent days, I've read many commentaries, pro and con, to explain why our Founding Fathers created the Electoral College in the first place. Virtually all of these commentaries seem to ignore the primary reason the Electoral College was created. Which is – the Electoral College was created as a compromise to settle two other much bigger arguments facing the Founders.

- The first of these two issues, not surprisingly, had to do with money. At the time of the creation of the Constitution, the Federal government did not have a mechanism to raise funds directly. They had to get money from the States – with each State providing its “fair share” to support the Federal needs. This was a particularly challenging effort because the new nation had huge debts from the Revolutionary War – both to foreign countries, and to citizens in the U.S. that had provided funding – not to mention back-pay to soldiers, who for the most part had been pad with promissory notes.

Not surprisingly there was considerable debate about how to determine each State's “fair share”. At the time, the share was determined based on the value of property within each State. But then, as now, determining property values was not a simple process and was filled with argument. The discussion was complicated when some northern politicians began insisting that the southern States needed to include the value of slaves when determining property value. The Southern States would have nothing to do with that... But most everyone agreed that a different method of determining each State's financial responsibilities to the Federal government was needed.

The most obvious candidate was to base the State's financial contribution to the Federal government on population. The Southern States liked this idea – since the Northern States were more populous. And predictably, the Northern States immediately insisted that slaves needed to be counted in the population, (resulting in the Southern States trying to argue that slaves should not be counted as either property or population). Although population was agreed to be a better way to handle the State's obligations to the government, how to count slaves kept the proposal from being implemented.

- But then the second issue related to the creation of the Constitution came up – related to what is known as “The Great Compromise”. Our Founders determined that rather than a single Legislative body, that our nation would be based on a bicameral legislature – with elected officials in one branch (the House of Representatives) based on each State's population, and a second branch (the Senate) comprised of 2 elected officials from each State. The purpose of the “Great Compromise” was to assure that the more populous States (generally in the North) could not gain overt control over the less-populated States in the South.

Neither the populous States nor the smaller States was particularly happy with the compromise, but all agreed.

By the way, the only provision in the entire Constitution that is NOT eligible for amendment is the bi-cameral legislature – as determined by the “Great Compromise”.

Discussion by our Founders shifted to determine how to elect the President. There were many proposals. James Madison led a group that favored a popular vote. But Alexander Hamilton led a group that thought there should be an intermediary group – arguing that the general population couldn’t be trusted to make a good decision as the general population was susceptible to “charlatans” and “tyrants” that might too easily sway public opinion. This led to discussions about what we today call the “Electoral College” and a proposal developed so that each State would be represented in this “sage” group of Electors in determining the President – based on the combined number of each State’s Senators and Representatives. But now we come back to the question of how to determine the population with regard to slaves.

- **The Three-Fifths Compromise – the issue of Slavery:** After considerable debate, our Founders agreed to a compromise to solve these two issues. Slaves would be counted as 3/5 of a human being – both for purposes of funding the Federal Government and for determining population for purposes of identifying the number of each State’s representation in the House of Representatives, (and to the Electoral College). This meant that the Southern States agreed to pay a higher portion to the Federal Government than it would have otherwise – but it also meant that the Southern States had a stronger influence over the political make-up of the nation. Neither the Northern States nor the Southern States were happy with the compromise, but this is what was ratified at the Constitutional Convention.

In other words, the MAIN reason we have the Electoral College – rather than a popular vote favored by Madison – is due to a compromise, about two issues – funding and slaves – and neither reason still exists.

- The very first piece of major legislation passed by Congress after the ratification of the Constitution (which occurred on June 21, 1788) allowed for the Federal Government to collect revenues, (the Tariff Act was signed into Law on July 4, 1789). This allowed the Federal government to collect customs duties – which was the Federal government’s primary source of income until the Federal Income tax was legislated in 1913. The Southern States were undoubtedly overjoyed – as the Three-Fifths Compromise was not changed – such that the Southern States effectively did not have to bear any additional tax burden, while they retained the added power given to them.
- And after the Civil War – the Three-Fifths Compromise was completely obviated by the implementation of the 14th Amendment.
- **Protect the General Population from Demagogues:** With regard to any general election for the Presidency, but most specifically after the 2016 vote of the general

population, I must admit that I tire of people telling me “The election is over – stop whining – accept the results”. The reason such comments frustrate me is that in 2016, the election for the President and Vice President of the United States – as determined by our Constitution – is on December 19 – not on November 8. And the words by Alexander Hamilton do a great job of describing why this is: “Talents for low intrigue, and the little arts of popularity” from becoming President. The Electors were supposed to be “men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice.”

- **Nation-wide communications:** One additional valid explanation for why the Founders created the Electoral College was to assure that people in the far reaches of the country had a better opportunity to be represented in the Presidential election.
 - It’s hard to imagine these days, but in the late 1700s, communicating information across the nation (from New Hampshire in the north to Georgia in the South) was a very lengthy process. There was no such thing as electricity, no railroads, no telegraph, no telephones, no photography, no radio, no TV, no mobile phones, no Internet – not even a Pony Express. News and information traveled from one part of the country to another largely by word-of-mouth, by ship, or via newspapers delivered hand-to-hand. It might take up to a month for news of what happened in one part of the country to be available in remote areas of the country.
 - In this situation, it was impossible for candidates for the Presidency to communicate, much less travel, to the entire country. It was actually unusual for much of the country to even know what a candidate looked like – reliant only on sketches that might appear in various newspapers.
 - The news media, then as now, tended to be politically biased. And with news about distant parts of the country was difficult to come by – these media biases could be used to strongly influence electoral rationality.
 - With this technological backdrop – the Founders created the Electoral College – as a way to allow a local representative to represent your political views. In theory, this Elector would be more knowledgeable about current events and he would likely be engaged with the entire process – very probably having been directly involved in face-to-face discussions with the Presidential candidates. Likewise, each voter was likely to personally know the person they were voting for as an Elector – trusting the Elector to act in their best interests.
 - Voting for Electors – not candidates: It was the intention of the Founding Fathers that voters were fully aware that they were choosing Electors to represent their interests – which they were not voting for the Presidential candidate. As such, the name of the Elector actually appeared on the ballot.
 - Today, most American voters believe that they are voting directly for a President and Vice President on Election Day – which is not accurate – and which is NOT what was intended by our Founders.

Consider the words of both Alexander Hamilton and James Madison, primary authors of the *Federalist Papers*, which provide detailed insights into the intentions of our Founding Fathers regarding the purpose of Electors, along with the actual practice during the first century of our Nation -- in an age where fast and effective communications was limited :

- Alexander Hamilton described the framers' view of how electors would be chosen, “A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated tasks.” The Founders assumed this would take place district by district.
- That plan was carried out by many states until the 1880s. For example, in Massachusetts in 1820, the rule stated “the people shall vote by ballot, on which shall be designated who is voted for as an Elector for the district.” In other words, the people did not place the name of a candidate for a president on the ballot, instead they voted for their local elector, whom they trusted later to cast a responsible vote for president.
- Some states reasoned that the favorite presidential candidate among the people in their state would have a much better chance if all of the electors selected by their state were sure to vote the same way – a “general ticket” of electors pledged to a party candidate. So the slate of electors chosen by the state were no longer free agents, independent thinkers, or deliberative representatives. They became “voluntary party lackeys and intellectual non-entities”. (Words of Chief Supreme Court Justice Robert Jackson. But once one state took that strategy, the others felt compelled to follow suit in order to compete for the strongest influence on the election.
- When Madison and Hamilton saw this strategy being taken by some states, they protested strongly. Madison and Hamilton both made it clear this approach violated the spirit of the Constitution. According to Hamilton, the selection of the president should be “made by men most capable of analyzing the qualities adapted to the station of president.”
- According to Hamilton, the electors were to analyze the list of potential presidents and select the best one. Hamilton considered a pre-pledged elector to violate the spirit of Article II of the Constitution insofar as such electors could make no “analysis” or “deliberate” concerning the candidates.
- Madison agreed entirely, saying that when the Constitution was written, all of its authors assumed individual electors would be elected in their districts and it was inconceivable a “general ticket” of electors dictated by a state would supplant the concept. Madison wrote : “The district mode was mostly, if not exclusively in view when the Constitution was framed and adopted; & was exchanged for the general ticket”.
- Madison and Hamilton were so upset by what they saw as a distortion of the framers’ original intent that they advocated for a Constitutional Amendment to prevent anything other than the district plan: “the election of Presidential Electors by districts, is an amendment very proper to be brought forward,” wrote Madison.
- Hamilton actually drafted an amendment to the Constitution mandating the district plan -- <http://founders.archives.gov/documents/Hamilton/01-25-02-0289>

“That Congress shall from time to time divide each State into Districts equal to the whole number of Senators and Representatives from such state in the Congress of the United States, and shall direct the mode of choosing an Elector of President and Vice President in each of the said Districts, who shall be chosen by Citizens who have the qualifications requisite for Electors of the

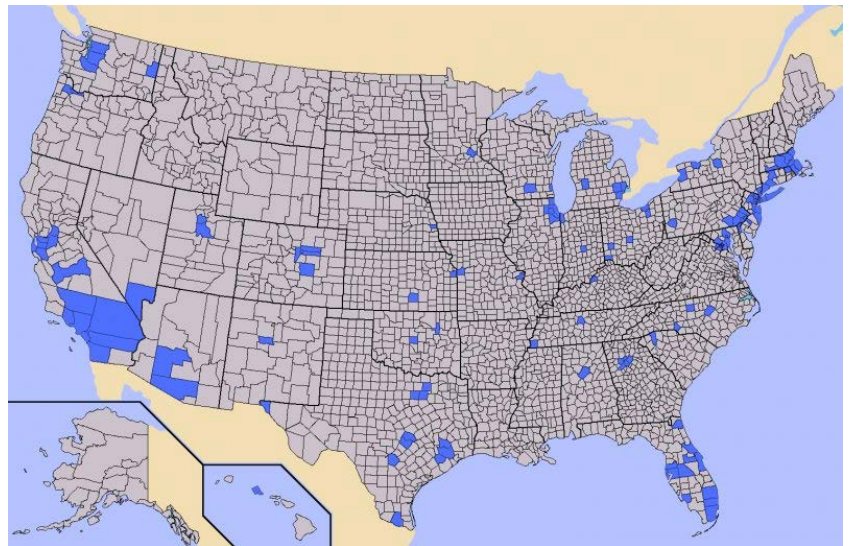
most numerous branch of the State Legislature, and that the districts shall be formed, as nearly as may be, with an equal proportion of population in each, and of Counties and, if necessary, parts of Counties contiguous to each other, except when there may be any detached portion of territory not sufficient of itself to form a District which then shall be annexed to some other part nearest thereto”.

But, after the Election of 1800, Party politics had entrenched itself, and Congress was more interested in avoiding the specific results of what occurred in 1800 than in addressing the root issue. The 12th Amendment was the result – not a shift back to the Founder’s intent of Electors chosen by local Districts.

Since 1836, the statewide, winner-take-all popular vote for electors has been the almost universal practice. Currently Maine from 1972 and Nebraska from 1996 use variations of Hamilton’s proposed Constitutional amendment, a district plan, with two at-large electors going for the statewide popular vote winner.

Some things about the Electoral College that our Founders did NOT intend: At least some of the discussions today about why we have the Electoral College were simply not even considered by our Fathers.

- **Urban vs. rural:** There is a common notion that Founders wanted to be sure that urban centers could not dominate rural areas in our Presidential elections – that the candidates might only campaign in big cities and ignore the interests of rural areas. The adjacent map, showing that 50% of the US population lives in the blue counties, (the gray counties represent the other 50% of the population) has been popularly distributed as an explanation as to why we have the Electoral College –



This map does NOTHING to explain why we have an Electoral College.

implying that it would be undesirable for the blue sections to have a disproportionate role in selecting the President. This perception is WRONG for several reasons:

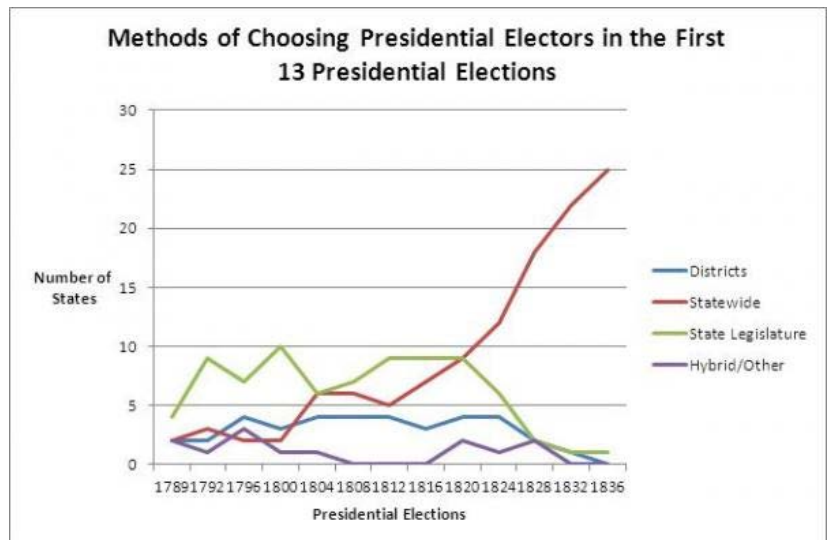
- When our Founders created the Constitution, the entire country was rural. The largest city in the country in 1790 was New York City – comprising 33,000 people. What is now Central Park was in downtown New York City – and was comprised of swampland and farmland, (mostly for pigs and sheep). Although New York City grew rapidly, the Founding Fathers, to the best of my knowledge never had a discussion about urban versus rural interests – simply because almost all interests at the time were rural in nature.

- The map shows counties – which is in no way related to how we elect anyone for a Federal position. Voting Districts for Representatives (and therefore Electors) are based on state-wide population, adjusted every decade, to assure a reasonable balance of people in each Congressional district. To put the map in better perspective – the largest county in the United States by population is LA County with a population of almost 10 million people. The smallest county by population in the country is Loving County in Texas – population of 82 people. No matter what system of selecting our President – LA County is going to get much more attention than Loving County.
- The Electoral College does effectively skew attention away from population centers to more rural areas. That said – unless there is some specific political advantage to be gained by visiting a truly rural community – the Presidential candidates are ALWAYS going to focus on the largest cities – even in relatively sparsely populated States. The Electoral College currently does NOTHING to change a candidate’s focus on urban centers versus rural centers. Nor should it – considering that almost 85% of Americans currently choose to live in “urban” areas. The Founding Fathers made exactly zero consideration related to this urbanization phenomenon in the United States.
- **Winner Take All:** In 49 of the 51 jurisdictions related to the Electoral College, the popular vote winner takes 100% of the representation in the Electoral College. Maine and Nebraska both use an alternative method of distributing their electoral votes, called the Congressional District Method. With the district method, a state divides itself into a number of districts, allocating one of its state-wide electoral votes to each district. The winner of each district is awarded that district’s electoral vote, and the winner of the state-wide vote is then awarded the state’s remaining two electoral votes. This method has been used in Maine since 1972 and Nebraska since 1996, and has been proposed as a nationwide reform for the way in which Electoral votes are distributed.

The winner-take-all system was never envisioned by the Founding Fathers, who although they left the method of choosing Electors up to each State, anticipated a system that would better represent the interests of the voters in each State.

Up until the Presidential Election of 1824, most States chose Electors in

various manners, but which largely represented the popular vote in their State. The election of 1824 changed that because the Electoral College simply failed to match the intent of the voting population. The election of 1824 is most famous for the “corrupt bargain,” a deal in the House of Representatives that gave John Quincy Adams the



presidency despite his winning fewer popular and electoral votes than Andrew Jackson. But 1824 was also significant for another reason: it was the first election in which the majority of states used a statewide winner-take-all voting method for choosing their presidential electors. Which is the “corrupt bargain” system we’ve used predominantly ever since.

- **The First Amendment:** Most Americans are not aware of the actual First Amendment proposed to the Constitution. It reads as follows:

“Article the first... After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons”.

This proposed Amendment, to the best of my understanding, is still on the books today, awaiting ratification from enough States. (Don’t think that to be strange – the most recently ratified Constitutional Amendment – the Twenty-Seventh Amendment – was first proposed in 1789 and wasn’t ratified for 202 years, in 1992).

But it should be noted that the intent of the Founders was to link assure that representation would reasonably mirror population. Today – that is NOT the case, in terms of the Electoral College. Today – the State of Texas has 38 Electoral votes – which when divided into the total population means that each Elector represents about 736,000 citizens. The State of Wyoming has 3 Electoral votes – which when divided into its total population means that each Elector represents about 196,000 citizens. Our Founders NEVER intended for voters in one State to have 3.8 times more voting power than the voters in another State. But that’s the situation our Electoral College provides today.

- **Two-party system:** Our Founding Fathers absolutely did NOT anticipate the rise of political parties – certainly not a system dominated by just two parties. Many Americans believe that the two-party system is actually part of the Constitution – but it definitely is not. The entire system of Primaries and Caucuses representing the two major parties is entirely invented independently from the Constitution. And recent developments regarding Super-Delegates entirely avoid an election process entirely.

The Founders anticipated a system whereby any potential Presidential Candidates would be included on ballots at the State level – with different States having local favorites who might not even be listed on a ballot of a distant State. Moreover, it was anticipated that multiple candidates from the same Party would be on the ballot – with a possibility more than one candidate from the same Party would get to the Electoral College. The Founders believed that this system would almost always result in a situation where the Electoral College would not find a majority winner – and that the House of Representatives would make the final decision. As such, the Electoral College would only really serve as a preliminary way to screen out the minor candidates.

For example, here are the candidates that ran for President in Virginia in 1800:

Thomas Jefferson	Democratic-Republican
Aaron Burr	Democratic-Republican
John Adams	Federalist
Charles Pinckney	Federalist
John Jay	Federalist

While candidates from only two parties were considered, the Founders simply did not anticipate the emergence of a primary system that would reduce the list of candidates from each political affiliation to just one.

As the winner-take-all system took hold after the election of 1824, the Parties recognized a need to assure that only a single name appeared on the ballot – otherwise creating a situation that would split the vote.

- **Small state vs. large state:** Perhaps the most popular modern-day explanation to validate the existence of the Electoral College is to protect the interests of small States, to keep larger States from dominating the Electoral process. While this was part of the discussions by our Founding Fathers, it was actually a minor consideration. The assurance that large states would not dominate large states was mandated by “The Great Compromise” which gave equal representation in the Senate to each State. It was agreed as part of the Electoral College only because of the no-longer applicable “Three-Fifths Compromise”.

More importantly in this discussion is that the Electoral College only serves to accentuate the importance of “Swing States” – which generally is unrelated to small States.

- For example, in the 2016 general election, of the 10 largest States, Trump won 7 of them. Of the 10 smallest States, Trump and Clinton each won 5 – if the Electoral College was to protect smaller States from the more populated States, it’s arguable that the result favored Trump, not the other way around as most Trump apologists suggest.
- The so-called Swing States were all well-known in advance – and both candidates focused their energy in that handful of States where they knew the outcome was up for grabs. In the largest States in the country, (California, New York, and Texas), the outcome was well-understood, such that neither candidate spent much time campaigning in those States.
- In other words – rather than campaigns focusing on States with large populations, the candidates tended to focus their campaigns in the Swing States. In my opinion, this focus has two deleterious effects:
 - First, the Presidential candidates should be campaigning to the entire nation – not to specific populations. For the Presidential candidate to be making campaign promises to people in one State in order to gain Electoral votes is inappropriate.
 - Second, voter turn-out in non-Swing States is likely to be depressed. In the Swing States, there is a huge pressure to turn out the vote – with all potential voters recognizing clearly that their vote could make a

difference. In non-Swing States, potential voters recognize that their vote is unlikely to make a difference in the national outcome.

- **Democracy versus Republic:** In recent days, I've read several commentaries that suggest the reason we have the Electoral College is because our Founders desired for our Nation to be a Republic and not a Democracy. Hooey! A Republic simply provides a Constitution that protects the rights of the minority. In no way does Democracy demand a majority rule. If the Electoral College were abolished tomorrow – the United States would still be a Republic, protecting the rights of the Minority. The Electoral College simply was not created so as to give a minority interest primacy in selecting the President of the United States.

That said, our Founding Fathers were NOT in favor of enabling widespread voting. Although voting rights differed somewhat state-by-state, in general, the only people eligible to vote were white, land-owning, men. This meant that voter participation was quite small – only about 5% of the total population. So, there is some truth to the claim that our Founding Fathers were very wary of broad popular voting system.

- **What happens if a Presidential candidate dies or is incapacitated prior to being inaugurated?** An additional area of concern that the Founders did not anticipate and over which the Constitution is mostly silent is on the topic a Presidential candidate not being able to serve as President between the time of his/her nomination and inauguration:
 - **If a candidate for the Presidency has been selected by his/her party's National Convention and dies or is incapacitated prior to the General Election.** The Constitution is silent on this topic – since the Founders did not anticipate the rise of political partisanship. At the moment, each of the National Party Committees has different rules. It's unclear if Congress would delay a General Election in order to reprint ballots, etc., what would happen to Party rules mandating votes by delegates for a specific candidate.

This situation has happened numerous times – most recently in the election of 1972 when Democrat Thomas Eagleton was George McGovern's vice-presidential running mate. Eagleton dropped out of the race and was replaced by McGovern's selection Sargent Shriver, but to actually place Shriver on the ticket, the Democratic National Committee took several weeks to meet and formally approve Shriver.

- **If a candidate dies or is incapacitated after the General Election, but before the Electoral College vote, again, the Constitution is silent.** This happened in the Election of 1872. Horace Greeley – who was the only candidate in history to be selected to win the nomination at two different National Conventions, (for both the Liberal Republican Party and the Democratic Party – running against Ulysses S. Grant from the Republican Party). Grant won the general election in a landslide, but Greeley died prior to the vote of the Electoral College. Since the Electoral vote favoring Grant was unchallenged, there was not an issue – although there were questions about what to do with Greeley's Electoral votes. The electors who were slated to vote for Greeley voted for various candidates, including Greeley. The votes cast for Greeley were not counted due to a House

resolution passed regarding the matter. Had the election been close, this entire scenario might have caused a contested election.

- **If a candidate dies or is incapacitated after the Electoral College vote but prior to its confirmation in the Senate.** Again, the Constitution is silent. This situation has never happened in U.S. history.
- **If a candidate dies or is incapacitated after confirmation in the Senate but prior to Inauguration.** In this case, the Constitution stipulates that the newly elected Vice-President will become President.

There's actually one additional step in the Electoral College process: In 2016, each State's Electors must cast their ballots to select the incoming President and Vice President on December 19. There is also a deadline by which the results of each State's Electoral vote must be submitted to President of the Senate (who in 2016 is Joe Biden), which is December 28. So there is potentially an additional situation where a Presidential candidate dies or is incapacitated between December 19 (when some States will have submitted results) and December 28. The Constitution is silent about this situation.

While unlikely, the interim electoral steps related to the Electoral College are not anticipated in the Constitution and could create a contested election – without a clear way of resolving.

- **Implication related to the Electoral College on expanding the Union with new States:** One of the things the Founding Fathers absolutely failed to consider with regard to the future of our country was the implications that the Electoral College would have on the rights US citizens interested in new Statehood. Let me provide a few examples – there are many more:

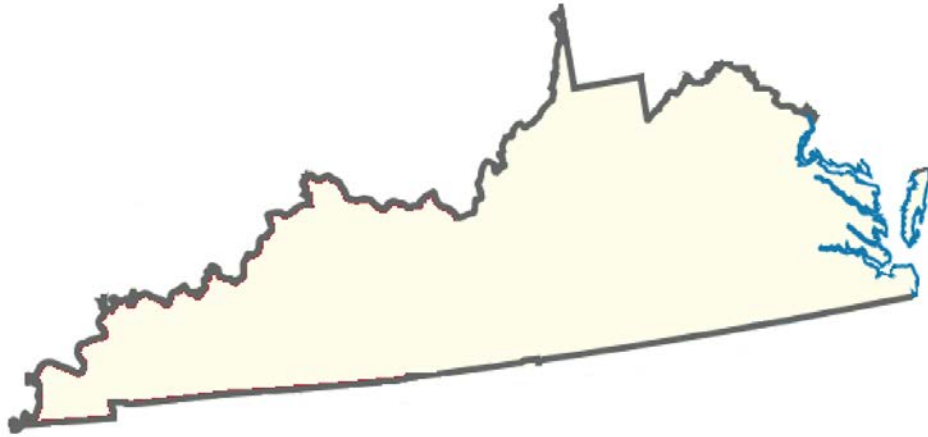
- **Kanahwa:** When the Constitution was created, Virginia was a sprawling State – by far the biggest State in the Union – including all of what is now both Kentucky and West Virginia, with legal claims for additional lands to the West.

After the Revolutionary War, and prior to ratification of the Constitution, the citizens of Kentucky petitioned to be named a separate State. In fact, both England and Spain recognized Kentucky as an independent State. It wasn't until after the Constitution was created that Virginia agreed to the desires of those in Kentucky to become a separate State – but it wasn't until Vermont was also ready for Statehood that the Kentucky was actually allowed by Congress to become a new State, (Vermont was our 14th State – followed shortly by Kentucky).

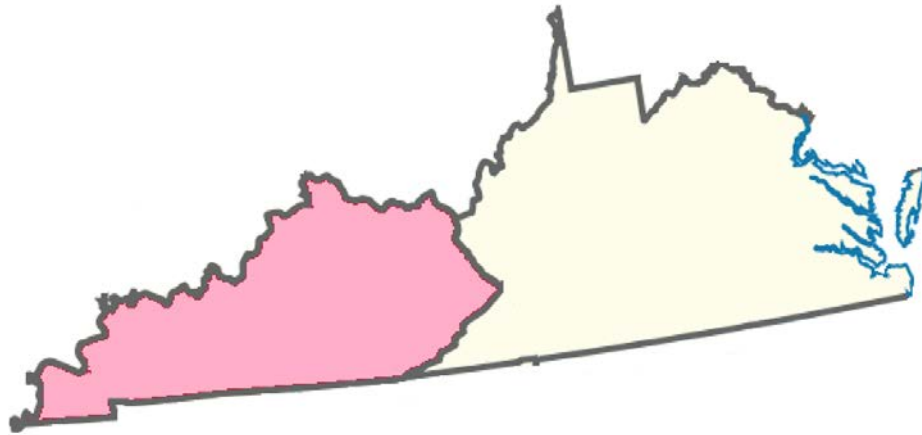
Vermont was a slave-free state; Kentucky allowed slaves, (although Kentucky did not secede from the Union during the Civil War). In other words – Statehood for both Kentucky and Vermont were dependent on balancing the voting interests of the two new States – including in the Electoral College.

Then the nation faced the Civil War – when Virginia seceded from the Union, but the population of north-west Virginia did not want to secede. As such, in 1863, the Northern States voted to accept what is now called West Virginia. Note: a popular choice for the name of the new State was “Kanahwa” – but “West Virginia” is what was finally chosen. Had West Virginia sought independence when the Southern States had a strong say in national politics, it's very unlikely

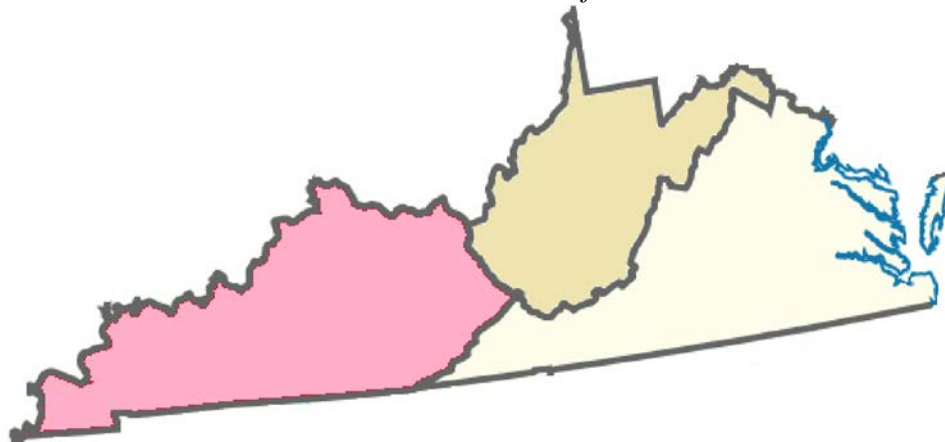
that West Virginia would have become a new State. Nevada was also admitted to the Union as a slave-free state during the Civil War, when the Southern States were not represented.



This is an image of the State of Virginia at the time the Constitution was ratified



This is an image of the States Virginia and the new State of Kentucky a couple of years after the Constitution was ratified.



This is an image showing the current map, created during the Civil War. West Virginia did not want to secede along with the rest of Virginia. The creation and timing of Statehood for both Kentucky and West Virginia were very much linked to political considerations related to the Electoral College

- **North Dakota/South Dakota example:** Perhaps the most blatant example of political maneuvering related to Statehood came in the late 1880s. The people in the Dakota Territory petitioned to become a new State – to be called “Dakota”. Astute politicians at the time realized that the Republican Party was dominant – controlling the House, the Senate, and the Presidency. So rather than bringing in the Dakota Territory as a single State, (with 2 Senators, 1 Representative, and 3 Electors), the Republican controlled political powers divided the Territory into two, (with 4 Senators, 2 Representatives, and 6 Electors). To this day – the addition of North Dakota and South Dakota as separate States has benefitted the Republican Party in terms of political power in the House, the Senate, and the Electoral College.
- **Montezuma:** For much of the latter half of the 19th century, citizens from the New Mexico Territory desired Statehood, but for 66 years, politicians wrangled about allowing New Mexico become a new State. Reading the historical records, most of the objections had to do with its large Hispanic population, (and additional concerns that a large portion of the population did not speak English and that the majority of the population professed faith the Roman Catholicism).

It should be noted that at the same time, the much smaller population representing the Arizona Territory was also petitioning for Statehood. But again, Congress refused to accept the vote – fearful about ceding power to the relatively small population living in the Arizona Territory. Interestingly, in an attempt to political recognition, Arizona sided with the Confederacy, declaring itself a slave State. After the Civil War, this factor made the Northern States even more reluctant to consider Arizona to be a new State.

One popular solution to these Statehood discussions was to combine the Arizona Territory and the New Mexico Territory to create a single State – to be called “Montezuma” – a process called “jointure”. New Mexico was much more populous and the State Capital was to be in Santa Fe – so New Mexico agreed to this proposal. The residents of Arizona, however, did not support, fearing too much control from Santa Fe. Finally in 1912 – Congress agreed to accept two new States – balancing one another in terms of perceived political alignment. To this day, New Mexico has tended to vote more liberally, while Arizona has tended to vote more conservatively. The population of Arizona, however, has leapfrogged that of New Mexico, giving Arizona a significantly larger influence in Congress and the Electoral College.

In any case, once again, at least in part because of the Electoral College, US citizens desirous of gaining Statehood, were disappointed because of national partisan political concerns.

- **District of Columbia:** Lest you think all discussions related to Statehood are historical, there are several modern-day discussions. Perhaps the most interesting is related to the District of Columbia. From the time that Washington D.C. was established, there have been discussions of Statehood – based mostly on the fact that residents of the District were denied any voice in the Federal Government.
 - When the District of Columbia was created, two States, Maryland and Virginia, ceded a portion of their lands to form the District. The largest portion of the new District was in Maryland, (home to the city of Washington). About a third of the City was in the State of Virginia, (including the city of Alexandria).

- In the late 1840s, as tensions between slave States and Northern States were intensifying, (Maryland was aligned with the Northern States, Virginia was a slave State), Virginia successfully lobbied Congress to return the portion of DC to Virginia, (a process called “retrocession”. This served to increase the population of Virginia in a way that actually increased their representation to the House by one Representative. Congress, which was controlled by the Southern States, agreed to this – but would not similarly retrocede the portion of DC that was in Maryland – a Northern State.
- The question of voting rights for the remaining US citizens living in the District of Columbia remained an issue – at least until 1961 when the Twenty-third Amendment was ratified, granting the District a number of votes in the Electoral College in measure to their population, but no more than the smallest state. This right has been exercised by DC residents since the presidential election of 1964.
- Still, US citizens living in the District of Columbia have no representation in the House of Representatives or the Senate. Many argue that because they pay Federal Income taxes, are subject to a call for military service and are subject to Federal laws, that these citizens should have a voice in the Federal government. And these U.S. citizens are not happy about their situation – the motto on DC license plates expresses the concern:



- In 1980, District voters approved the call of a constitutional convention to draft a proposed state constitution. The proposed constitution was ratified by District voters in 1982 for a new state to be called “New Columbia”, but for these past 34 years, Congress has not granted statehood to the District. The reason for Congress’s inaction is largely political – since the District votes dominantly Democratic, the Republican-controlled Congress has been unwilling to give any Congressional power to these U.S. citizens. When Barack Obama became President, he indicated a willingness to support DC Statehood and during that first Congress, which was controlled by Democrats, the question passed in the Senate. But Republicans in the House were able to add an unrelated amendment that would strip DC residents of right provided to all other States related to self-determination regarding gun control laws. The Democratic Speaker of the House could not find a way to get the votes necessary to give Statehood to the District of Columbia.
- Some Republican leaders have suggested that their opposition to DC becoming a State is because it’s too small. Tough argument, since the population of the District of Columbia currently exceeds that of both Vermont and Wyoming.
- Other Republican leaders have suggested that DC Statehood would create Constitutional issues – but virtually all Constitutional scholars believe any such issues can be eliminated through legislative action at the time of Statehood, although some think a Constitutional Amendment would be required. To address such concerns, a Constitutional Amendment was proposed in 1978 to give voting

rights to the District. Only 16 States ratified within the 7 years provided in the legislation for passage.

- Note: The question of voting rights for the District of Columbia is currently not an issue related to the Electoral College. Although if a Constitutional Amendment is proposed to abolish the Electoral College – not only would the US Citizens living in the District be stripped of their only voting rights related to the Federal government, but they would not have any input into that vote.
- Some have argued that the sitting President and Vice President should not be allowed to vote for Senators/Representatives. Officially, their residency is considered to be in Washington D.C. Nevertheless, it's thought that all Presidents in recent history have voted in their home state.
- **Puerto Rico:** Another current debate about granting new Statehood is related to Puerto Rico. 3.7 million U.S. citizens live in Puerto Rico -- but have no voting power whatsoever in the Federal government, (including no representation in the Electoral College). Note: if Puerto Rico were to become a new State, it would enter the Union ranked #30 in terms of population – with 6 or 7 Electoral votes (not exactly sure how the new apportionment would work out)...



- In 2012, the population of Puerto Rico voted to choose Statehood and formally requested the President and the Congress to end Puerto Rico's current political status and to begin the transition of Puerto Rico to become a State.
- In 2014, resolutions were introduced in both houses of the United States Congress, (both Houses controlled by Republicans), for Puerto Rican statehood. Both resolutions died in committee. Arguments made by Republicans against admitting Puerto Rico as a State include the failure of the Puerto Rican people to express unequivocally the desire to become a state, (the 2012 vote was supported by 61% of the voters), concerns about language and cultural differences, and "economic concerns".
- Most political analysts concur that the Republican opposition to Puerto Rico Statehood is purely political – not wanting 3.7 million U.S. citizens who might vote for a Democrat to newly enter the electoral process.
- **Guam, US Virgin Islands, American Samoa, and the Northern Mariana Islands:** These territories all have U.S. citizens (relatively small populations) that do not have representation in Congress or the Electoral College. It's entirely possible that a political party in power, if they saw a political advantage, might support/deny Statehood for political purposes.
- **Texas:** There are frequent discussions in the State of Texas about secession. Being a Texas resident myself, I am often asked by residents from other States if the discussions are real. I just shrug my shoulders... Note: had Texas seceded prior to the 2016 Presidential election, Trump would not have had enough Electoral votes to win the election...

More likely than Texas seceding, given the State's expertise with gerrymandering for political gain, is the possibility of Texas dividing into two or more States:

- Under the joint resolution of Congress by which the Republic of Texas was admitted to the Union, Texas retained the right to divide itself into as many as five different states. There were a significant number of Texans who supported dividing the state in its early decades. The Texas Constitution and the Texas Annexation Act both provide for the possibility of Texas voting to divide into up to five sovereign States of the Union.

There are numerous other voting rights factors that differ from State-to-State. Many of these directly impact the results of the General election. As advised from the start of this essay, I firmly believe that when selecting the President of the United States – all eligible voters should have exactly the same opportunity to vote and their votes should count the same as anyone else's vote. In all of these areas, I am generally ambivalent about the rules implemented, I just think that the rules should be identical nation-wide for Presidential elections:

- **Age:** The 26th Amendment, ratified in July 1971, assures the right to vote of 18-year olds, lowering the minimum age for voting from 21. At the time of the Constitutional Amendment, 4 states had already lowered the voting age from 21 to 18.

Currently, all States have a minimum voting age of 18 pursuant to the 26th Amendment – but there is nothing within the Amendment that denies States the right to lower the voting age. Discussions are currently underway in multiple U.S. jurisdictions, most particularly the District of Columbia, about lowering the minimum voting age from 18 to 16. The argument favoring the lower age combines the fact that high-school students are generally more knowledgeable about current events than a large portion of older populations and that 16 year-olds have a large number of rights and responsibilities that are already – including driving, paying taxes, and the potential to be charged as an adult in court, that might justify a lowered age. The legal “age of consent” is 16 in 31 States. Numerous countries around the world have already lowered the voting age to 16.

It's predictable that if one party identifies an advantage to have younger voters and that state has control of the state legislator, that we'll start seeing a move to allowing 16- and 17-year-olds vote.

By the way – we already have different rules between States. In 22 States, (I think), 17-year-olds can vote in primaries and caucuses – if they will be 18-years-old by the date of the General election. But these are frequently State Party rules – not State Laws. For example, in Alaska, Hawaii, Washington, and Wyoming 17-year-old Democrats may caucus, but are barred from participating in the Republican caucus – creating confusion that can potentially disenfranchise eligible voters.

Incidentally, one reason for lowering the voting age is that it's been demonstrated that voting when young forms a lifetime habit.

Fact of interest: Donald Trump is the oldest person ever selected to be President of the United States. Past-Presidents Bill Clinton, George W. Bush, and Barack Obama are all younger than Donald Trump.

- **Gerrymandering:** Although gerrymandering doesn't have a direct impact on the Electoral College, there are indirect consequences. For example, if a District has been

gerrymandered in a way that makes it difficult for one segment of the voting population to get to the polls – that creates a bias. Different States have different rules about defining the borders of Congressional Districts.

In some States a process known as bi-partisan gerrymandering is allowed. This process allows incumbent Representatives to participate directly in the Redistricting. When Representatives from opposing parties get together and agree upon District outlines, this creates a big advantage for the incumbents –subverting the electoral process, in my opinion. The US Supreme Court has ruled that bi-partisan gerrymandering is acceptable under the Constitution.

- **Mental Health:** Different States have different rules regarding the extent to which mentally disabled people can vote. In some States, even severely mentally challenged people can vote – in other States – voting eligibility is questioned for even relatively minor mental treatments.
- **Felons:** In some States, convicted felons can vote while in prison. In some States, felons on probation or on parole are allowed to vote. In some States, convicted felons can only vote after a certain period of time after their release from prison (or their parole/probation). In two States, a once-convicted felon can never vote again. The rules from State to State are very confusing, and even within a State are uncertain – used to suppress some eligible felons from voting, or used by unknowing felons to vote when they shouldn't.

Florida is one of the two States that does not allow felons to ever be eligible to vote again. Many political analysts suggest that if felons who had served their prison debt to society (as in most States) had been allowed to vote in the 2000 Bush vs. Gore election, that Gore would almost certainly have won the election nationally.

- **Voter Registration requirements, deadline dates for voter registration, Voter ID requirements, voter registration based on party affiliation, absentee ballots, early voting, vote by mail, straight-ticket voting:** These are all factors that differ from State-to-State – sometimes significant differences. All of these factors can and do impact voter turn-out – which lead directly to encouraging/restricting the popular vote – based on political manipulation, not on voter preferences.
- **Election results:** I do not think east-coast election results should be released until the polls close on the West Coast. The current process can easily influence voters on the West Coast to vote – or not to vote – based on early “calls” by the media. There are many ways by which this could be accomplished – and it would avoid the complete disruption of regularly scheduled TV shows...
- **Length of election process:** One of the things the Electoral College process does is to contribute to the duration of the entire election process. In general, by the time the general population gets together to vote, they are sick and tired of the entire process and vote based on which candidate did the least to offend them through the campaign process – not based on the merits of the candidate's platform. Today, most Americans just want the election to be over immediately after the November general election – without understanding that the actual election for the Presidency doesn't occur until mid-December when the Electoral College votes.

Conclusions

In light of all factors that I've studied, (which may not be all factors, but which is pretty exhaustive); I have consistently concluded over the past 40 years, that our nation should abolish the Electoral College.

I am hardly alone in my opinion that the Electoral College should be abolished. In fact, over the past 200 years, more than 700 proposals have been introduced in Congress to reform or eliminate the Electoral College. There have been more proposals for Constitutional amendments on changing the Electoral College than on any other subject. The American Bar Association has criticized the Electoral College as "archaic" and "ambiguous" and its polling showed 69 percent of lawyers favored abolishing it in 1987. Public opinion polls have shown Americans favored abolishing it by majorities of 58 percent in 1967; 81 percent in 1968; and 75 percent in 1981.

The direct election plan of choosing the President, considered at the Constitutional Convention in 1787, was first introduced in Congress as a constitutional amendment by Rep. William McManus (N.Y.) in 1826. Many other proposals for changing the existing system were introduced in Congress. Hardly a session passed without the introduction of one or more proposals.

For most Americans, I've learned that considerations about the Electoral College only come up when the Presidential election is very close – particularly when the national popular vote chooses one candidate, but the Electoral vote chooses the other, which happened in both 2000 and in 2016.

- In the 2000 election, Democrat Al Gore won the popular vote by more than 500,000 votes over George W. Bush – losing in the Electoral College because of 500-vote gap in Florida, (which was subject to a very controversial recount, with the final result having to be decided by the Supreme Court).
- In the 2016 election, it appears that Democrat Hillary Clinton will win the popular vote by more than 2,000,000 votes – based on unexpected and very narrow losses to Republican Donald Trump in three States.

Such situations create national questions about the viability of the Electoral College – but it should be noted that these questions also have been raised by Republicans. In recent years:

- In the 1968 election between Richard Nixon and Hubert Humphrey, a controversial candidate by the name of George Wallace, (who was Governor of Alabama at the time), was popular enough in anti-Civil Rights States to win some Electoral votes.

Presidential candidate	Party	Home state	Popular vote		Electoral vote
			Count	Pct	
Richard Milhous Nixon	Republican	New York ^[2]	31,783,783	43.42%	301
Hubert Horatio Humphrey	Democratic	Minnesota	31,271,839	42.72%	191
George Corley Wallace	American Independent	Alabama	9,901,118	13.53%	46

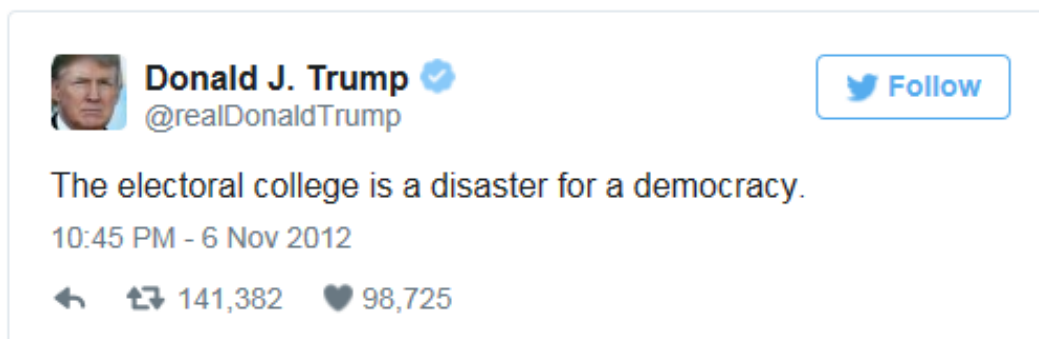
During the 1968 election, George Wallace exacted promises from Electors that he won to either vote for him – or to the candidate he supported. Had Nixon failed to win 270 Electoral votes, Wallace was almost certainly going to instruct his Electors to vote for Humphrey – swinging the election. Republicans were worried that future Electoral Votes might similarly shift to third parties and coalition votes in the Electoral College – and so in 1969, the 91st Congress came very close to passing a Constitutional Amendment that would have enabled the direct election of the President and Vice President.

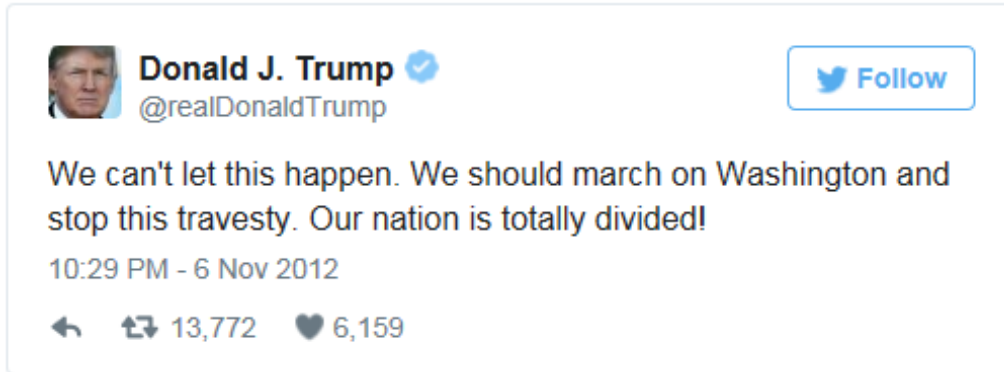
Post-election Republican support culminated in a bi-partisan 338-70 roll-call vote in the House of Representatives for a proposed Constitutional amendment to abolish the 185-year-old Electoral College system and to provide instead for direct popular election of the President and Vice President, requiring a run-off when no candidate received more than 40 percent of the vote. House passage of the resolution, was by a vote which was well over the required two-thirds majority. Additionally, President Nixon indicated his willingness to support the legislation and it appeared that enough State legislatures would also support, (although that was uncertain).

But in the Senate, discussions bogged down. A coalition of Southern and some small-State Senators were able to prevent the resolution from coming to a vote by filibustering.

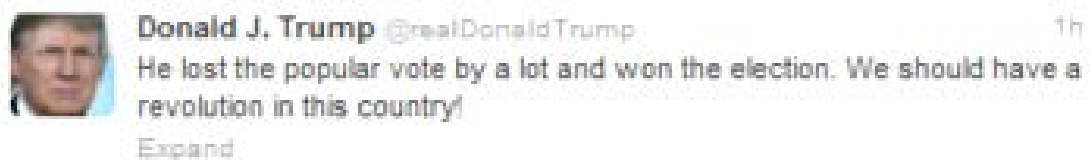
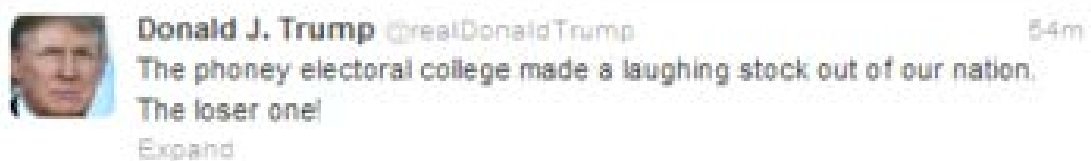
Basically, the southern Senators saw national voting requirements, at the expense of state laws, as a natural outgrowth of direct elections. Additionally some Senators from small states feared the influence of their voting populations in a direct election would be less than the influence of their electoral votes under the existing system. Carl T. Curtis (R Neb.), a leading opponent of direct elections, explained that his state had 92/100ths of 1 percent of the total electoral vote. But based on the 1968 election, it would have had only 73/100ths of 1 percent of the popular vote. “I’m not authorized to reduce the voting power of my state by 20 percent,” he said. Cloture Attempts. The filibuster, led by Sam J. Ervin Jr. (D N.C.), lasted intermittently from Sept. 8 to Oct. 5. Attempts to invoke cloture (end debate) under Rule 22 failed on two occasions. As such, the resolution passed the House in 1969, but failed to pass the Senate.

- Again, in the immediate aftermath of the general election in 2012, Republicans called for the abolition of the Electoral College. Early results from the election indicated that Mitt Romney had won the popular vote, but lost the Electoral vote. Ironically, given the current 2016 election, one of the most vocal critics of the Electoral College was none other than Donald Trump, who now thinks the Electoral College is “genius”:





Also Tweeted by Trump in early November 2012:



In other words, people's attitudes about the Electoral College seem to depend more on circumstances not actual convictions...

I believe that anyone who knows me will recognize that I have consistently favored the abolition of the Electoral College for 40 years now... And I believe my reasons for wanting to see it abolished are compelling.

So, I must admit to currently finding myself in a strange situation. I strongly believe that our nation has popularly chosen a con-man to be President – and so I am supportive of now using the Electoral College – the institution I want to see abolished – for one of the few remaining reasons that it was created by our Founders in the first place – to displace a demagogue. The Constitution does not required Electors to vote for the candidate that won the popular vote in their State. In fact – the Constitution implemented the Electoral College precisely for the reason that Electors could wisely over-rule the popular vote of a gullible electorate. Alexander Hamilton wrote that Electors were to “possess the information and discernment requisite to such complicated investigations” as the selection of the President, and they were supposed to “afford as little opportunity as possible to tumult and disorder.” They were even supposed to prevent “the desire in foreign powers to gain an improper ascendant in our councils.”

There is no federal law or constitutional provision requiring electors to vote for the party that nominated them, and over the years a number of electors have voted against the instructions of the voters. In recent years the phenomenon of the “faithless elector” has been rare. The last time an elector crossed party lines was in 1972, when an elector nominated by the Republican Party cast his ballot for the Libertarian ticket.

Some states have passed laws that require their electors to vote as pledged. These laws may either impose a fine on an Elector that fails to vote according to the statewide or district popular vote, or may disqualify an elector who violates his or her pledge and provide a replacement elector. No elector has ever been penalized or replaced -- nor have these laws been fully vetted by the courts.

“Faithless Electors” have never decided a Presidency. Although it’s unlikely in 2016, given tremendous partisan pressures on the Electors, it is possible that enough Electors will shift their vote from Donald Trump to another candidate (or simply not vote at all) such that Donald Trump does not get the requisite 270 Electoral votes.

I consider it very unlikely that Republican Electors will shift their vote from Donald Trump to Hillary Clinton, but I think it is imaginable that they might change their vote to another Republican – someone less controversial. Doing so would send the vote to the House of Representatives – which is controlled by Republicans – where the vote is not based on each Representative, but rather on each State. Republicans currently “control” 24 States – and the remaining 26 States are “controlled” by Democrats or have an equal number of Republican and Democratic Representatives.

Overall – a long-shot scenario – particularly to put Hillary Clinton, the winner of the popular vote in office, but it is entirely possible that Electors will do their job and assure that our nation is not presided over by a demagogue.

The Electoral College is a broken and archaic system – which really has no reason to exist today. Imagine a possible result of the system we have in place. Donald Trump might not get the requisite 270 Electoral votes on December 19 for the Presidency – but Mike Pence is still likely to get the needed 270 Electoral votes to be selected Vice-President. The vote for the Presidency would go the House of Representatives, where against all odds, Hillary Clinton would be elected President. A Hillary/Pence “team”... Actually, that might be interesting...

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A couple of final thoughts:

- Although I am strongly in favor of abolishing the Electoral College in its current form, that does not necessarily mean I am convinced that a direct popular vote is the best alternative. I can imagine some proportional plans or voting plans that might enable voters to rank-order their preferences.
- Perhaps the most compelling argument I’ve considered recently is that maybe the “United States of America” should be changed to “America” – whereby we eliminate States altogether and have a system that relies only on local governments and a single national government, “one nation, under God”... Not going into details on this idea here, but I think maybe it’s time for us to consider abandoning the notion that we really need States at all. Plus, it would solve the problems related to our current Electoral College...