

# Repairing Presidential Elections: 2018 – 2020

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The 2000 election of George W. Bush on the basis of an electoral college majority, despite his having lost the national popular vote, exposed deep faults in the current system for electing the president. It also gave rise to a renewed movement for election of the president on the basis of the national popular vote—the NPV Movement.

This paper begins with a sketch of the flaws in our current system. It then (i) traces the current movement for a national popular vote from its inception in 2001 to 2018 and (ii) discusses the opportunities created by the election of 2018 for moving to a system under which the president will be elected on the basis of who gets the most votes. It concludes by identifying some objections to a proposed interstate compact, suggesting some practical steps that resolve those objections and offering some thoughts for the future. References and citations are in the Endnotes.

## I. The Current System for Electing the President of the United States is Deeply Flawed.

As demonstrated in 2000, and confirmed decisively in 2016, the current system for electing the president allows a candidate who lost the popular vote to ascend to the most powerful and consequential elective office in the world. A system under which one who loses the vote of the people can nonetheless be installed in office is unlike any of the thousands of other elections that are held in this country.

In addition to violating the bedrock principle of treating all votes and all voters with equal dignity, the current system severely distorts the process for conducting presidential elections.

First, most voters are ignored. Because of the winner-take-all system used in 48 states and the District of Columbia, the presidential campaigns focus only on states where the result is uncertain—approximately ten so-called

battleground states. Presidential candidates make no effort to reach out to undecided or opposite-party voters in the other states. and some 80% of voters are ignored.

Second, fewer people vote. In one of the red or blue states, a potential voter of either party, or of no party, finds that no one is actively campaigning for her vote. In addition, the voter knows that the partisan makeup of her state essentially predetermines the winner of the state's electoral votes. As one might expect, voter turnout in the reliably red and blue states in presidential elections is lower than in states where elections are contested.

Third, campaigning in the battleground states has become intensely partisan and negative. With seemingly unlimited amounts of money to spend, campaigns (and their dark money counterparts) deluge voters in battleground states with partisan messaging aimed at turning out the base. Meanwhile, vicious attacks on opponents are designed to elicit disgust with the election process and suppress turnout. This messaging is particularly insidious when delivered through social media, whose business model thrives on eliciting negative emotional reactions, and whose messages can be tailor-made for individual recipients.

Fourth, the privileged status of battleground states unduly influences national policy. For example, small government conservatives were dismayed when President George W. Bush supported a massive new federal government entitlement, Medicare Part D. Opponents attribute this in part to President Bush's need to secure votes in Florida for the 2004 election.. Similarly, those who are concerned with the risks that climate change poses for a livable planet are dismayed by a whole range of the current administration's climate policies. Opponents of these policies attribute them in part to the peculiarities of the Electoral College, which allowed an election strategy that cobbled together the fossil fuel interests of Pennsylvania and Ohio and that completely ignored states such as California, which is a leader in efforts to tame global warming.

Fifth, the current system—in which a great deal is determined by actions in only a few jurisdictions—is inherently fragile and vastly magnifies the impact of error, manipulation and abuse. With elections in only a few swing states deciding the winner of the Electoral College vote, and with modern voting technology able to identify counties or even groups of precincts that can decide state-wide elections, malign actions or untoward events involving

just a few thousands or tens of thousands of voters have an outsized and unwarranted effect. The system invites foreign intervention, nefarious domestic actors, and voter suppression. Even an innocent error, such as a poorly designed butterfly ballot in one county, can throw a national election into chaos.

## II. The NPV Movement: 2001—2018.

### A. 2001-2006.

Repairing the system for electing the president does not require elimination of the Electoral College, and it does not require a constitutional amendment. Under Article II of the US Constitution, each state has plenary power to allocate its Electoral College votes in any manner it chooses. If enough states, acting individually or in concert, decide to award all of their Electoral College votes to the winner of the national popular vote, either that person will be elected president as a matter of mathematical certainty, or the odds that the winner will be based on the national popular vote will increase dramatically.

The modern NPV Movement, which began in early 2001, explored various ways that states can act to repair the current system. The original thought leaders were Robert W. Bennett, former Dean of the Northwestern University Law School (now professor emeritus), Vikram David Amar, now Dean of the University of Illinois College of Law, and Akhil Reed Amar, Professor, Yale University Law School.

The initial thinking is summed up in Prof. Bennett's book, *Taming the Electoral College*, Stanford University Press, 2006, Chapter 10, "Popular Election of the President Without a Constitutional Convention."

A frame of reference for the initial thinking was the movement that led to the adoption of the Seventeenth Amendment. That movement corrected an anti-democratic defect in the constitution by substituting popular election of US Senators for appointment by state legislatures. (Likewise, the NPV Movement seeks to substitute direct election of the president for indirect election by electors.) The movement that led to the Seventeenth Amendment spanned several decades and was centered on the idea (the "Oregon Plan") of holding non-binding elections that would become *de facto* popular elections. The movement encompassed a considerable amount of variety and

experimentation (“states experimented with nonbinding senatorial primary, or even general, elections and various forms of pressure on state legislatures to accede to the popular vote.” *Id.*, 164).

The NPV Movement also focuses on a core idea—that a state can award its electoral votes to the winner of the nationwide popular vote. Using this approach, there are various ways to arrive at an actual or *de facto* election of the president on the basis of the national popular vote. At one extreme, if states with 270 electoral votes adopt this rule, then “the popular vote winner would perforce win the presidency.” *Id.*, 165. Combinations of states with far fewer than 270 electoral votes, however, could result in a *de facto* election or would tilt the system decidedly toward election on the basis of popular vote. *Id.*, 165-67.

When these ideas were first voiced in 2001, there was considerable skepticism, not over their merits, but over whether they are politically practicable. *Id.*, 169. Some considered it highly unlikely that a state’s politicians would commit to cast a state’s electoral votes on the basis of the national popular vote when other states were not doing so. Professor Bennett offered three answers to this point.

First, the initiative process that is available in many states permits ordinary, concerned citizens to propose and enact reforms that self-interested politicians themselves would reject. A prime example is term-limits requirements for federal offices, which (prior to being ruled out-of-bounds by the Supreme Court) had been adopted in several states. In all cases, these electoral reforms had been adopted through initiatives or under pressure generated by an initiative. *Id.*, 169.

Second, an interstate compact could be entered into by states or sub-groups of states to cast their electoral votes on the basis of the national popular vote under conditions agreed to in the compact. Third, a state could pass less formal, contingent legislation, under which it would commit to follow the national popular vote approach if another state or states did the same. *Id.* 169-174.

## B. 2006-2016.

Between the initial airing in 2001 of ideas for the NPV Movement through the end of 2005, no action was taken in any state to advance the ideas. In

2006, however, a new book was published, *Every Vote Equal (EVE)*, and a new organization was launched, National Popular Vote Organization (NPV). *EVE* and NPV took up Professor Bennett's idea of an interstate compact (Compact). The proposed Compact would go into effect at the point at which states with 270 electoral votes (a majority) had entered into to the Compact. Until then, the Compact would have no effect whatsoever; the current system for electing the president, with all its flaws, would remain in place.

*EVE*, at over 1,000 pages, provides a comprehensive and detailed treatment of how the Electoral College works, of previous attempts to amend the constitution and previous proposals for state-level action, and of how interstate compacts work. *EVE* lays out the Compact and a strategy for enacting the Compact, which includes the initiative process in states where that is allowed. Indeed, *EVE* devotes a full chapter to explaining the initiative process. The Fourth Edition (2013) also devotes over 400 pages responding to—and in most cases thoroughly debunking—objections to the Compact (so-called “myths”).

From 2006 to 2012, NPV had considerable success advancing the NPV Movement. By mid-2012, the Compact had been adopted by 9 jurisdictions (8 states plus the District of Columbia) with a total of 132 Electoral Votes. 3 of the jurisdictions were large states, 3 were medium sized, 3 were small.

From 2012 to 2016, however, only two additional states (New York and Rhode Island) adopted the Compact, which in 2016 represented a total of 165 electoral votes. The loss of momentum can be attributed at least in part to the Republican Party's success at the state level in the 2010 midterm elections. Although NPV has advocated for the Compact on a

bipartisan basis, and though several Republican-majority legislative bodies have passed bills to adopt the Compact, in the end only Democratic controlled legislatures in states with Democratic governors have actually joined. It cannot have helped that in the summer of 2011 the Republican National Committee adopted a resolution opposing the Compact. Ralph Z. Hallow, “RNC Stomps Electoral College Switch,” *Washington Times*, August 5, 2011.

C. 2016-2018.

From 2016 to 2018, only one additional state, Connecticut, entered into the Compact. This occurred in 2018 after a new organization, Making Every Vote Count (MEVC), arrived on the scene. MEVC's original mission included advocating for adoption of the Compact, and it did so quite effectively in Connecticut. It helped, no doubt, that both houses of Connecticut's legislature and the executive were controlled by the Democratic Party. As of December 31, 2018, the electoral vote tally for Compact members is 172, with four large states, four medium sized states, and four small states.

During this period, NPV made concerted efforts to win approval in New Mexico, Nevada and Oregon. In New Mexico, a bill almost passed in 2017, and groundwork was laid throughout 2018 for eventual passage. In Nevada, well-publicized hearings were held. The state Republican Party passed a resolution opposing the Compact, some conservative groups vehemently opposed it, and the effort died.

In Oregon (which had a Democratic governor and Democratic majorities in both houses), the Compact was passed by the State House of Representatives but stalled in the Senate, whose president (a Democrat) has been a long-time opponent. The Senate president did accede to a proposal to allow the voters to decide the issue in a referendum election, but this was opposed by NPV and by other groups that support national popular vote—the League of Women Voters, Common Cause, and the American Civil Liberties Union—on the grounds that a referendum was unnecessary and would be unduly expensive.

During this two year period, the author of this paper sought to gain support for a broader strategy for advancing national popular vote. He argued that, in addition to supporting the Compact, proponents should support stand-alone laws that would take effect for the next presidential election, regardless whether the Compact was in force. He suggested adoption of state constitutional amendments to the same effect. He also urged that national popular vote for president be added to election reform initiative campaigns that were under way in Michigan, Ohio, Missouri, Colorado and Florida.

He argued that this broader approach could decisively increase the odds that national popular vote will determine the outcome of presidential elections, well before the point at which the magic number of 270 votes is reached. He

did not cite to the original thought leaders (because he had not yet found their work). In retrospect, however, this broader strategy is very much in line with many of the points that Profs. Bennett, Azar and Azar had been making starting in 2001.

The effort had some, limited success. Minnesota State Representative (now Associate Supreme Court Justice) Paul Thissen drafted a bill to put the issue to the voters of Minnesota in 2018 as a constitutional amendment. The Board of Minnesota Citizens for Clean Elections endorsed the Thissen draft bill. Staff for Minnesota Fifth District Congressman and Vice Chair of the Democratic National Committee (now Attorney General) Keith Ellison confirmed that Congressman Ellison supported the broader strategy. Although in Michigan and Colorado there was some interest in the idea of launching initiative campaigns around national popular vote, such campaigns did not materialize.

### III. Prospects for Success after the 2018 Midterms.

Much as Republican Party victories at the state level in the 2010 midterm elections slowed the NPV Movement from 2012 to 2018, the Democratic Party gains in 2018, together with the success of electoral reform initiative campaigns, create significant opportunities to reinvigorate the movement and advance toward ultimate success.

#### A. Prospects for Legislation.

Among states that have not yet adopted the Compact, following the 2018 midterms there are now five, with 31 electoral votes, that have Democratic governors and Democratic majorities in both houses of the legislature: Oregon (7), Nevada (6), Maine (4), New Mexico (5) and Colorado (9). While the situation in Oregon remains a bit murky, there are reasonable prospects that the Compact could be adopted in all these states by 2020. This would bring the electoral vote total to 203.

Minnesota, with 10 electoral votes, is another possibility. Following the midterms, Minnesota now has a Democratic majority in the State House, a Democratic governor, and, pending a special election for a vacancy, a two seat Republican majority in the State Senate (which was not up for election

in 2018). The Compact has been introduced in Minnesota with bi-partisan support in the past, and there may be some Republican state senators who would join a bipartisan effort to pass the Compact in 2019-20. This could bring the total to 213.

NPV has identified “13 most promising states” for joining the Compact. The NPV list includes the group of five states listed in the first paragraph of this subsection. The NPV list includes another five states—Arizona (11), Michigan (16), Missouri (10), Oklahoma (7), and North Carolina (15)—whose combined electoral votes (59) would bring the Compact over the top, at 272 electoral votes. If these 10 promising states, plus Minnesota, join the Compact in the next two years, then the 2020 election will be decided on the basis of the national popular vote. Note that this calculation does not include three other states—Georgia (16), Arkansas (9) and Delaware (3)—that NPV also ranks “most promising.”

The question that was put to the thought leaders in 2001 naturally recurs: is the NPV strategy politically practicable? Is it wishful thinking? Bear in mind that the RNC rejected the Compact in 2011, and the Republican Party of Nevada rejected it within the last 2 years.

Furthermore, in the current decade some Republican Party operatives have promoted the district-by-district allocation of electoral votes plan (now used in Maine and Nebraska), but only in blue or battleground states. If adopted in the selected states, these measures would create:

. . . a wildly unfair structural bias toward Republican presidential candidates. Add to this the gerrymandering produced by party control of the redistricting process in those states, and it would amount to a breathtakingly misguided attempt to tilt the rules away from popular vote for president. *The Fight to Vote* (2016), Michael Waldman, at 248.

Indeed, in 1800 Thomas Jefferson called out the intended effect of such a scheme: “This is, in fact, ensuring to our minorities the appointment of the government.” Letter to James Monroe.

Certainly good-faith efforts to achieve bipartisan support for the Compact should proceed in both Democratic “trifecta” states and states that are split or under Republican control. This topic might serve as one of the longed-for salves for our partisan wounds. One hopeful sign is Michigan where, although a “district-by-district” bill had been introduced in 2015, in 2018 a bill to enact the Compact drew 15 Republican co-sponsors. Where good

faith efforts to enact bipartisan legislation fail, however, another path may be available.

#### B. Prospects for implementing national popular vote through initiative.

A second striking outcome of the 2018 midterms was the success of election reform measures put on the ballot through citizen initiative signature campaigns. Major reforms were enacted by the voters in Michigan, Missouri, Florida and Colorado. (An initiative signature campaign was also well underway in Ohio, but a compromise consensus proposal allowed a reform to be put on the ballot without the need to complete the campaign.)

These efforts have been thoroughly non-partisan. In Michigan, for example, a non-partisan group titled “Voters not Politicians” launched a truly grass roots effort. Support from either of the major political parties was avoided, and for good reason. Consider these “favorability” polling data for political parties for January 8, 2019: Republican Party, 25% favorable and 60% unfavorable; Democratic Party, 40% favorable and 51% unfavorable. On average, the major parties were disfavored by 55% of the people; 35% did not favor either party.

Dean Amar has stated that he always thought there were more Republican voters than Republican politicians who would favor national popular vote and that citizen involvement might be needed to put national popular vote over the top. The experience of 2018 and current polling data suggest that the gulf between politicians from either party and voters in general is vast. Enacting national popular vote measures through initiative campaigns may have become the politically practicable way to achieve the objective of having the president be the person who gets the most votes.

Turning to specific opportunities, in the second group of five “most promising” states discussed in Subsection A, the first four—Arizona, Michigan, Missouri and Oklahoma—all utilize citizen initiative, and two of those hosted highly successful initiative campaigns in 2018. If only these four mounted successful initiative campaigns, national popular vote would be almost over the finish line. In addition, based on the success of their election reform campaigns in 2018, Florida (29) and Ohio (18) are also very promising; adding either of these would put national popular vote well past the finish line.

In some states, initiatives could be included in elections that occur prior to the 2020 general election—either in primary elections or in 2019 general elections—and these measures would go into effect for the 2020 election. In other states, initiative proposals would be on the 2020 general election ballot, and these measures probably would not go into effect until the next presidential election in 2024. In these states, the 2020 ballot measures would put before voters the fundamental question of how the nation should go about electing the president, along with the narrow question of who should be elected president. There is value in asking voters to think seriously about the nature of the presidency at the same time that they are electing a president.

One facet of this issue has gone unremarked: what exactly should be proposed in the initiative campaign? Under the broader strategy suggested in 2017, three different types of measures might be the subject of ballot measures: (i) the Compact, as a state statute; (ii) a simpler state statute that adopts national popular vote without reference to the Compact; and (iii) a state constitutional amendment along the lines of (ii). There are advantages and disadvantages to each.

Placing the Compact itself before the voters has the advantage of hastening the day when the Compact will be in force. There are, however, a number of significant disadvantages. One, most voters have never heard of the Compact or of the idea of interstate compacts in general. Two, opponents will seize on the issue of Congressional consent, which clouds the waters, and they might even raise the meritless argument that the compact is an “end run” around the Constitution’s provisions for amendments. Three, it is almost certain that the initiative in a single state will not put the Compact over the finish line of 270 electoral votes, and whether a series of initiatives together would reach this goal would be unknowable. As a result, the effect of the initiative on the next presidential election would be ambiguous at best. Four, given these three disadvantages, it may be difficult to generate the volunteer enthusiasm and financial support that would be necessary to mount a successful volunteer-led signature campaign and to succeed in a follow-on election campaign.

Placing a simple state statute before the voters has the disadvantage of not directly hastening the day when the Compact will be in force, but it might help indirectly. Legislators whose voters had enacted the simple state statute through initiative might see the wisdom of going the next step and adopting

the Compact as well. Furthermore, this approach has a number of distinct advantages when compared to placing the Compact before voters. First, the simple state statute is straightforward; the voters do not need a mini-lesson in constitutional law to understand what they are being asked to approve. Second, Congressional consent is irrelevant. Third, the statute will be effective as of the next presidential election; there is no ambiguity about this. Fourth, as a result of these three distinct advantages, there is every reason to believe that the initiative campaign would benefit from the extraordinary level of citizen engagement that marked voting rights initiatives in 2018, such as the anti-gerrymander campaign led by Voters not Politicians in Michigan and supported by the non-partisan Michigan Election Reform Alliance, among others.

Placing a constitutional amendment before the voters has the same slight disadvantage and the same decided advantages noted in the preceding paragraph. In addition, proceeding by way of constitutional amendment bespeaks an admirable commitment to a fundamental principle with which most people strongly agree. It also puts the issue to rest for at least several years, assuring voters that this will not be the subject of tit-for-tat, back-and-forth partisan bickering.

The best strategy for a given state will of course depend on the provisions of that state's citizen-initiative laws. For example, there might be a higher bar to cross for approval of constitutional amendments. One strategy might be to propose both a statute and a constitutional amendment in the same election. Another might be to propose the simple state statute in a primary election and a constitutional amendment in the general election. As with the movement that gave rise to the Seventeenth Amendment, there are many opportunities for experimentation among the states.

Finally, initiative campaigns may benefit if the question of whether presidents should be elected on the basis of the national popular vote becomes a broader issue in the election. As the Compact approaches 270 electoral votes, Congress enters the picture, for it is possible that the Compact needs congressional approval. In 2020, an important question in elections for the House of Representatives and the Senate across the nation might be: will you vote to approve the Compact, under which the person who is elected president will be the person who wins the most votes? In addition, candidates for president might make the Electoral College an issue in their campaigns.

#### IV. Answering some Objections.

“Tara Ross and other conservatives have written severe critiques of the [Compact] proposal. . . “ Johnson, 2018. *The Electoral College*, at 138. Ms. Ross appears to be the foremost intellectual critic of the Compact. Her objections, along with those of others, have been addressed in detail in *EVE*. Most have been effectively debunked (see the End Notes for some examples). A few warrant additional discussion.

##### A. The Compact violates the Compacts Clause of the US Constitution.

This criticism is prompted by NPV’s unyielding position that the Compact does not require approval from Congress under Article I, Section 10 of the US Constitution:

No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State.

The US Supreme Court has interpreted this requirement narrowly, and NPV argues vigorously that, based on these precedents, consent is not necessary for the Compact. Arguments to the contrary are hardly frivolous; indeed, the Amar brothers agree with Ms. Ross that consent from Congress should be sought. <https://www.politifact.com/florida/article/2016/nov/17/electoral-college-vs-popular-vote-could-states-a/>

Seeking consent of Congress could be advantageous, particularly if the congressional elections of 2020 become a national referendum on the Compact and on the broader idea of national popular vote for president. Candidates for the House and Senate would be called on to address the fact that the vast majority (over 70%) of the American people support national popular vote for president.

Even if Congress does not approve the Compact, the states acting independently can achieve much the same result. The main difference between a Compact that covers 270 electoral votes and a series of independent state laws that add up to 270 electoral votes is this. Under the Compact, states cannot change their rules during the 6 months from July 20 in the year of the election and January 20 of the following year; however,

without a Compact, a state could change its law up to the day before the election. With or without a compact, however, the national popular vote would decide the election for president.

Another difference is that with independent state laws, each state could address unique concerns it might have regarding issues that the Compact does not address. For example, some states might prefer to set a minimum plurality to qualify a candidate as the winner, such as the 40% threshold that Richard Nixon specified for the proposal that passed the House in 1969. Some might want to set a minimum winning margin, such as 10,000 votes, to address “too-close-to-call” elections that, as a practical matter, probably could not be recounted.

As the Compact nears 270 electoral votes, it would behoove states to pass independent laws as precautionary measures—to guard against the remote possibility that Congress might not approve the Compact. (This step would also moot any litigation over whether the Compact itself is an “end run” around the amendment provisions of the US Constitution.) It should be politically feasible to pass such laws. The argument that it is politically impractical to adopt national popular vote independently does not hold when states with perhaps two hundred electoral votes—including some pivotal states such as Florida, Ohio and Michigan—are proposing to do the same thing.

Furthermore, as was suggested in 2001-2006 and again in 2017, if just a handful of battleground states independently adopt national popular vote for president, that will become the *de facto* basis on which presidential elections will be decided. Major parties would have no choice but to campaign across the nation as a whole. This fundamental change in campaign strategy would remove some of the most egregious flaws in our current system for electing the president. Thus, an independent reason for states to pass separate laws is to achieve *de facto* election of the president on the basis of the national popular vote and transform the nature of presidential campaigns.

B. The Compact is unstable—states are too free to leave.

The argument is made that because the Compact is not a constitutional amendment, states are free to leave, and the nature of presidential elections may change from election to election in unpredictable ways. In fact, as explained in the preceding subsection, the Compact adds stability when

compared to independent state laws that add up to 270 electoral votes. The Compact also adds stability when compared to the current system, which allows states to change the rules of the game right up to election eve.

For instance, consider the 2000 election. The state of North Carolina was a Democratic Party trifecta, but George Bush would carry it by over 373,000 votes. Presumably polling in September/October would have shown that Al Gore's campaign was in trouble. Under current law, it would have been perfectly legal for the governor to convene a special legislative session in October to change the state's Electoral College rule from winner-take-all to district-by-district. If this had happened, Al Gore would have won the 2000 election. While a move of this type might be controversial and could end up costing the favored candidate in other states, in today's bitterly partisan environment—in which the Republican Party has proposed essentially this same approach in multiple states—could it be ruled out?

Between elections, states are indeed free to make their own decisions about whether to remain in the Compact. This is called federalism. It is a federalism that provides each state government the flexibility to adapt to changing circumstances and deal with unexpected problems. Thus, if a problem is identified, states in the Compact can try to fix it with an amendment. If it proves impossible to gain consensus, a state or states could leave and address the problem among themselves. Departing states might form a new compact. Remaining states could consider amending the current Compact to reduce the number of electoral votes that are required for it to remain in force.

- C. The ballot initiative process is not available to enact national popular vote because the Constitution vests only “the Legislature” with authority to determine the manner of allocating a state's electoral votes.

*EVE* does not characterize this objection as a “Myth;” the discussion of initiative and its relationship to Article II comprises an entire chapter, Chapter 8. Indeed, *EVE* and Ms. Ross are in basic agreement on the contours of this issue.

Article II of the US Constitution provides in relevant part:

Each State shall appoint, in such Manner as the Legislature thereof may direct. . . Electors.”

If “Legislature” in Article II means the actions of a discrete political body, then citizen initiative would not be available to enact measures to implement national popular vote. If, on the other hand, “Legislature” is short-hand for the state’s lawmaking function as a whole, then initiative may well be available.

At some points, the Constitution uses the term “Legislature” to mean a distinct political body; at other points, the term means the state’s entire law-making process. *EVE* makes a very strong case that “Legislature” in Article II means the law-making function as a whole and that initiative campaigns are an available strategy. Furthermore, developments since publication of *EVE*’s Fourth Edition strengthen that already-strong case. The US Supreme Court has held that “Legislature” in Article I’s elections provision means the law-making function. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015). Both Ms. Ross and NPV agree, however, that the issue has not been definitively resolved under Article II and that it would likely give rise to litigation.

A state constitutional amendment would be the safest course of action. In the leading decision on the meaning of “Legislature” in Article II, the Supreme Court made it clear that legislative power is subject to the provisions of a state’s constitution.

The legislative power is the supreme authority, except as limited by the constitution of the state. . . . What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist. *McPherson v. Blacker*, 146 U.S. 1 (1892) (*EVE* at 854)(emphasis supplied).

There is no colorable argument that Article II bars a state from amending its constitution in any manner permitted under that constitution. A reasonable belt-and-suspenders strategy would be to present both a statute and a state constitutional amendment in the same initiative campaign.

## V. Belief in the Future.

The NPV Movement is primed to take major steps forward in the next two years. The League of Women Voters has identified national popular vote for president as a national priority. Environmental and faith groups—the Sierra Club and Minnesota Interfaith Power and Light—support the NPV Movement. The National Democratic Training Committee has begun a national campaign to “demand” that all state legislatures enact the Compact.

The Compact is not the only way forward. MEVC, for example, is working to foster a deep understanding of the alternative methods by which states can bring about national popular vote. The type of experimentation that the NPV Movement’s original leaders discussed 18 years ago can increase the prospects for success. If hopes for bipartisan legislative progress prove illusory, there are tens of thousands of concerned citizens across the country who would gladly volunteer their time to put the issue on the ballot in states where that is an option. As the Michigan redistricting commission campaign proved, such petition campaigns can be completed at relatively low cost, and they truly energize the citizenry. Michigan also proves that when dark money opponents mount expensive negative campaigns to defeat electoral reform proposals, those who believe in repairing the flaws in our republic show up with the resources needed to fight back effectively.

As we approach the 2020 election, and as the Compact approaches 270 electoral votes, some states may see the wisdom of taking the courageous step of committing to cast their electoral votes in 2020 on the basis of the national popular vote. If Minnesota, Colorado and Nevada—all of which are or recently were considered battleground states—were to join the Compact and also pass free-standing laws that take effect in 2020, and if California or Illinois were to take a leadership role by passing a free-standing law, the NPV Movement’s momentum would grow exponentially. In states such as Michigan, Florida, Arizona, Missouri and Oklahoma, where state constitutional amendments might be on the ballot, the argument that a “go it alone” approach is politically impracticable would be seen as nonsense. And Congress, which had been tested on this issue in the 2020 election, might both approve the Compact when it is presented and take up the question of amending the constitution. Congress might even take up Alan E. Johnson’s proposal for ranked choice/instant runoff voting for president. Johnson. 2018. *The Electoral College*, at 139-160.

## VI. Breaking News.

As this paper was being sent out with requests for final review and comment, news arrived that a Joint Resolution has been introduced in the U.S. House of Representatives for a constitutional amendment to abolish the Electoral College and elect the president on the basis of the winner of the national popular vote. 116<sup>th</sup> Cong., H.Jt.Res. 7, January 3, 2019. The prognostication in the preceding paragraph that Congress might take up the question of amending the constitution in 2021 was off by two years.

The Joint Resolution makes it all the more likely that the question of how the president should be elected will be an issue in the 2020 elections for Congress. If a Joint Resolution is adopted by two-thirds of each house of Congress prior to the 2020 election, the question will be presented in the 2020 state elections.

Should the state-based NPV Movement continue? Absolutely yes; efforts should be re-doubled. Because a constitutional amendment requires a 2/3 vote in each house of Congress and approval by ¾ of the state legislatures, it is likely to be many years before an amendment is adopted. In the meantime, as was the case with the Seventeenth Amendment, action at the state level can help lead the way to a constitutional amendment that resolves the matter permanently.

What about Alan Johnson's proposal for ranked choice voting? House Joint Resolution 7 provides simply that the presidential slate that receives the most votes will be elected; this means that the winner of a plurality would be elected. The following addition would authorize Congress to implement ranked choice voting for president and assure the president is elected by the majority of votes counted. Congress would not be required to adopt ranked choice voting; however, it would be empowered to act—without the necessity of another constitutional amendment—if a national consensus forms around the practicality and advantages of ranked choice voting.

Insert between Sections 5 and 6 the following:

The Congress may by law provide that each elector may rank each slate in order of preference and that if a slate of candidates does not receive a majority of the whole number of votes cast, principles of

ranked choice voting will be applied until one slate of candidates has a majority of the votes counted.

This is preferable to H.Jt.Res. 7, which, in its current form, would necessitate another constitutional amendment to adopt ranked choice voting for president.

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### End Notes/References

There are three essential references.

National Popular Vote Org web site: <https://www.nationalpopularvote.com/>  
Comprehensive resource, including links to each state showing the history and current status of efforts to pass the Compact.

Making Every Vote Count Foundation web site and blog: <https://www.makeeveryvotecount.com/>  
MEVC's mission includes educating the public on the presidential election process and the harms to voters, states, and democracy that follow from our current presidential election system, as well as researching alternative methods of choosing the president.

Koza, John R., *et al.*, 2013, *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*, Los Altos, CA: National Popular Vote Press, Fourth edition. [EVE]

### Section I: The Current System is Deeply Flawed.

In addition to the essential references:

Edwards, George C., III, 2011, *Why the Electoral College is Bad for America*. New Haven, CT: Yale University Press, Second edition.

Regarding social media business models:

Lanier, Jaron. 2018. *Ten Arguments for Deleting Your Social Media Accounts Right Now*, New York, NY: Henry Holt and Company.

#### Section II.A. The NPV Movement: 2001-2006

There have been many other NPV movements; indeed, there have been more proposals for constitutional amendments on this topic than on any other. One effort was mounted in 1969, following George Wallace's pro-segregationist third party bid that carried five states with 45 electoral votes. Wallace hoped he would gain leverage to bargain his electors for a commitment to block progress on civil rights. Like the Compact, the 1969 proposal left the states in control of their elections and used the sum of their separate popular vote results to determine the winner. Then-Congressman George H. W. Bush cited state control of elections as a strength of the proposal. If no candidate received a 40% plurality, there would be a national run-off between the top two. A joint resolution passed the House with strong bipartisan support, 338-70; the Senate blocked the measure with a filibuster. *EVE*, 127-128; 408-409.

Bennett, Robert W. 2006. *Taming the Electoral College*. Stanford, CA: Stanford University Press.

Bennett, Robert W. Popular Election of the President without a Constitutional Amendment. 4 *Green Bag*. Spring 2001.

Amar, Vikram David. 2004. The 2004 Presidential Election and the Electoral College: How the Results Debunk Some Defenses of the Current System, *Findlaw blog*. <https://supreme.findlaw.com/legal-commentary/the-2004-presidential-election-and-the-electoral-college.html>

#### Section II.B. The NPV Movement: 2006-2016.

Details of the state-by-state progress of the Compact from 2006-2016 are linked on the NPV web site: <https://www.nationalpopularvote.com/>

The 2011 resolution of the Republican National Committee rejecting the Compact is referenced in:

Johnson, Alan E. 2018. *The Electoral College: Failures of Original Intent and a Proposed Constitutional Amendment for Direct Popular Vote*.

Pittsburgh, PA: Philosophia Publications. 138 and n. 52,p.267. The cited Washington Times article is no longer accessible online.

### Section II.C. The NPV Movement: 2016-2018.

Details of the enactment of the Compact in Connecticut in 2018 and of efforts to enact the Compact in New Mexico, Nevada and Oregon are linked on the NPV web site: <https://www.nationalpopularvote.com/>

Re: draft bill authored by Rep. Paul Thissen, endorsement by Minnesota Citizens for Clean Elections, support for broader strategy from Rep. Keith Ellison, and interest from Michigan and Colorado in initiative campaigns: email communications on file with the author.

### Section III.A. Prospects for Legislation.

Details relating to states that may pass legislation from 2019-2020; of NPV designation of most promising states; and Republican sponsors/suporters of NPV Compact in Minnesota (including former speaker Kurt Zeller, current representative Pat Garofalo, and former candidate for governor and Congressman Tom Emmer) are from the NPV web site: <https://www.nationalpopularvote.com/>

Waldman, Michael. 2016. *The Fight to Vote*. New York, NY: Simon & Schuster.

Weigel, David. *Slate*. September 14, 2011. Why Pennsylvania's plan to reform the Electoral College is doomed. [http://www.slate.com/articles/news\\_and\\_politics/politics/2011/09/college\\_prank.html](http://www.slate.com/articles/news_and_politics/politics/2011/09/college_prank.html) (Thomas Jefferson quotation)

Weigel, David. *The Washington Post*. January 25, 2017. Republicans in Minnesota, Virginia propose changes to their electoral college rules. [https://www.washingtonpost.com/news/post-politics/wp/2017/01/25/republicans-in-minnesota-virginia-propose-changes-to-their-electoral-college-rules/?utm\\_term=.cfa2b7d3895f](https://www.washingtonpost.com/news/post-politics/wp/2017/01/25/republicans-in-minnesota-virginia-propose-changes-to-their-electoral-college-rules/?utm_term=.cfa2b7d3895f)

Weigel, David. *Bloomberg News*. March 10, 2015. Electoral College-Rigging Bill Makes Comeback in Michigan. <https://www.bloomberg.com/news/articles/2015-03-10/electoral-college-rigging-bill-makes-comeback-in-michigan>

### Section III.B. Prospects for Initiative.

Voters not Politicians web site, <https://www.votersnotpoliticians.com/>

Amar, Vikram David. June 1, 2017. *Justia Verdict*. Oregon may Become the First State to use Direct Democracy to Join the Presidential National Popular Vote Agreement Plan,. *Justia Verdict*. <https://verdict.justia.com/2017/06/01/oregon-may-become-first-state-use-direct-democracy-join-presidential-national-popular-vote-agreement-plan>

Favorability polling data: CIVIQS on-line survey research, from *Daily Kos*, masthead data feed, January 8, 2019.

### Section IV. Objections.

Alan E. Johnson. 2018. *The Electoral College, supra*, at 138.

Ross, Tara. 2012. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Second edition.

Ross, Tara, 2017. *The Indispensable Electoral College: How the Founders' Plan Saves Our Country from Mob Rule*. Washington, DC: Regnery Gateway.

Koza, 2013, *Every Vote Equal*, pp. 343-774 (dispelling “myths”).

Among the more common objections are the following:

The “small states would be disadvantaged” argument. *EVE*, 457-476. In fact, small states are severely disadvantaged by the current system, which

systematically ignores small states just as it ignores most middle-sized and large states. Under the national popular vote, candidates would need to pay some attention to all voters in all states. since each vote will count and will count equally. Moreover, small states are evenly divided politically. Among the 13 jurisdictions with 3 or 4 electoral votes, in 2016 seven voted for Clinton and 6 voted for Trump. Among the 16 states with 3, 4 or 5 electoral votes, the breakdown was 8:8.

The “differing state election laws would create a logistical nightmare” argument. *EVE*, 503-510. In fact, the Compact operates exactly the way the current system operates. Like the current system, the Compact is based on federalism, in which each state has its own electorate that votes according to its own rules. This would not change. The popular vote total for each state is a public record. States that join the Compact are entitled to—indeed are required to—respect the official results from every other state: “Full Faith and Credit shall be given in each State to the public. . . Records. . . of every other State.” US Constitution, Article IV, Section 1. Adding up 51 independent results to derive a single over-all result is simple arithmetic; it is not a logistical nightmare.

The “differing state election laws would create inequities” argument. *EVE*, 401-408. The argument that the Compact creates inequities starts with the assertion that the Compact tries to “jam” all the voters into a single, national electorate, but then allows states to treat this single electorate in different ways. The assertion on which this argument depends is false. Just like the current system, the Compact involves 51 individual elections involving 51 different electorates, each of which is presumptively treated equally by the state that is running the election for that electorate.

The “popular vote will give rise to a proliferation of third party candidates and a breakdown of the two party system” argument. *EVE*, 488-496, 770-772. Proponents of this argument look to foreign elections (France in particular) that involve unique political histories (e.g., history of parliamentary government with a marked tendency to produce multiple parties) and unique election rules. They ignore the best analogy—elections of governors in the US—which, with rare exceptions, are contests between the two leading political parties. Objectors also ignore the very serious problems that third parties have created and can create under the Electoral College, in which elections can be thrown one way or another based on a small number of votes in one or a few key states. In elections in which the

author has voted, in 1968 George Wallace attempted to manipulate the electoral college system to blackmail one of the major parties to block progress on civil rights, Ross Perot may have cost George H.W. Bush the 1992 election, and Ralph Nader did cost Al Gore the 2000 election. For the future, consider a 2020 election in which dark money interests fund a third party candidate with the goal of splitting the vote for one of the major parties. The ideal solution to the third party issue is ranked choice voting, but that would require a constitutional amendment. Unless and until an amendment is adopted, the Compact (or a series of state laws that achieves the same result) offers the best prospects both for assuring that the person elected president is the person who receives the most votes and for assuring that political parties run national campaigns that are directed to all of the voters and all of the most pressing issues of our time.

The “nightmare of a national popular vote recount” argument. *EVE*, 586-624. The problem of recounts creating crises in the election of presidents is far worse under the current system—which has given rise to 5 litigated state recounts in only 57 presidential elections—than it would be with a system that counted the individual votes of over 130,000,000 voters. The likelihood that the margin of victory involving such a large body of voters would be so close as to justify a recount is vanishingly small. It may be correct that if the highly improbable did occur—if the vote were so close as to warrant a recount—then a recount would be unobtainable. If that ever happened, *Bush v. Gore* provides the solution. The Supreme Court held in that case that if there is not enough time to complete a full recount, then the results as originally certified must be used.

The “end run around the provisions for amending the Constitution” argument. *EVE*, 421-427, 433-434. There is no basis for this argument. The Constitution sets out stringent requirements for amendment; once the constitution is amended, it can only be changed by another amendment, approved through the same, rigorous process. The Compact is obviously not a constitutional amendment; it does not create a system that becomes set in stone. Equally obviously, the Compact is not an “end run” around the Constitution. States are free to leave the Compact; they are free to amend the terms of the Compact. If they wanted, states could enter into two smaller compacts (each with less than 270 electoral votes) with somewhat different terms, which together met or exceeded 270 electoral votes. Would two, separate compacts be an “end run”? Individual states can adopt national popular vote for president without entering into a Compact, or in addition to

entering into a Compact. The truth is that the NPV Movement is a prime example of the genius of federalism in its best aspects. In Article II, the Constitution specifically vested in the states the power and responsibility to determine how presidents should be elected; that is the precise, federalism-based constitutional authority on which the NPV Movement is grounded.

Sherman, Amy. *Politifact*. November 17, 2016. The electoral college vs. the popular vote: Could states do an end-run around the current system? <https://www.politifact.com/florida/article/2016/nov/17/electoral-college-vs-popular-vote-could-states-a/>

NPV Web site (70% favor national popular vote): : <https://www.nationalpopularvote.com/>

Koza, 2013, *Every Vote Equal*, pp. 297-341, The Initiative Process and the National Popular Vote Compact.

*Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015).

#### Section V. Belief in the Future

Alan E. Johnson. 2018. *The Electoral College, supra*, at 139-160.

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Mr. Bohnhorst served for 24 years in the Office of the General Counsel, University of Minnesota, as both a litigator and a transactional lawyer. His principal client was the Office of the Vice President for Research. He was a leading advocate for the position that state universities are not subject to liability under the federal False Claims Act, and he wrote the higher education amicus curiae brief in the seminal US Supreme Court case that held that states are not "persons" subject to liability.