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NOTE

REDRAWING THE ELECTORAL MAP: REFORMING THE ELECTORAL COLLEGE WITH THE DISTRICT-POPULAR PLAN

I. INTRODUCTION

By mid-October in the 2012 presidential election, Barack Obama, Mitt Romney, and party supporters on both sides spent over \$500 million on political advertisements in twelve battleground states.¹ Fifty-five percent of the money spent was spent in Florida, Ohio, and Virginia, alone.² Spending such large sums of money in a few states is nothing new for presidential campaigns. Of the more than \$587 million spent on advertising in the 2008 presidential election, over \$417 million was spent in thirteen states, with Florida, Pennsylvania, and Ohio receiving over \$181 million of the total spending.³ Not only do campaigns spend more money in battleground states than non-battleground states, but the presidential candidates also visit the former more often than the latter.⁴ As a result of increased attention from presidential campaigns, citizens in battleground states have greater knowledge of the political issues, are more likely to be involved in presidential campaigns, and turn out to vote in higher levels than citizens in non-battleground states.⁵

Presidential campaigns are not required to focus their time and resources in battleground states, but the winner-take-all method that most states currently use in allocating their electoral votes encourages

1. Martha T. Moore, *Swing-State Ads Bill: \$575M – So Far*, USA TODAY (Sept. 14, 2012), <http://www.usatoday.com/news/politics/story/2012/09/11/swing-state-ads-bill-575m--so-far/57751750/1?csp=34news>.

2. *Id.*

3. *Id.*; *Election Tracker: Ad Spending*, CNN, <http://www.cnn.com/ELECTION/2008/map/ad.spending/> (last visited Feb. 7, 2013) [hereinafter *Ad Spending*]. These statistics cover the period of January 1, 2007 through November 4, 2008. *Id.* The thirteen states were Colorado, Florida, Indiana, Iowa, New Hampshire, Michigan, Missouri, Nevada, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin. *Id.*

4. *See Election Tracker: Candidate Visits*, CNN, <http://www.cnn.com/ELECTION/2008/map/candidate.visits/> [hereinafter *Candidate Visits*] (showing both Obama and McCain visited battleground states more than other states between June 8, 2008 and November 3, 2008).

5. *See infra* Part IV.C.

campaigns to do so.⁶ However, there is a way to expand campaign spending and candidate visits to more areas of the country.⁷ There is a way to have candidates focus not only on a select group of battleground states, but rather, more areas of the country. This approach would increase the amount of voters impacted and influenced by campaigns.⁸ This method is the District-Popular Plan.

The Electoral College is one of the most controversial aspects of the United States Constitution.⁹ There have been more proposed amendments to reform the Electoral College than any other type of proposed amendment.¹⁰ Approximately one out of every eleven of these proposed constitutional amendments has called for the reformation or elimination of the Electoral College.¹¹ Of the hundreds of proposed amendments, the only success has been the passage of the Twelfth Amendment in 1804.¹² Other than the Twelfth Amendment, the Electoral College has resisted constitutional change throughout America's history.¹³

Perhaps the biggest criticism of the Electoral College is that a candidate who loses the nationwide popular vote could win the electoral vote and become president.¹⁴ This has happened four times in our nation's history, most recently in 2000.¹⁵ Although the nationwide popular vote winner has only infrequently lost the election, this has almost been realized in several other elections.¹⁶ Another criticism of the Electoral College is that the current winner-take-all allocation of

6. See *infra* Part IV.C.

7. See *infra* Part VI.A.1.

8. See *infra* Part VI.

9. Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218, 218 (2008).

10. Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 175 (2011).

11. Stanley Chang, Recent Development, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 210 (2007).

12. Robert C. Turner, *The Contemporary Presidency: Do Nebraska and Maine Have the Right Idea? The Political and Partisan Implications of the District System*, 35 PRESIDENTIAL STUD. Q. 116, 134 (2005). The Twenty-Third Amendment gave the District of Columbia electoral votes, but it did not reform the way the Electoral College operated. U.S. CONST. amend. XXIII.

13. John C. Fortier & Timothy J. Ryan, *Swing States and Electoral College Strategy*, in FROM VOTES TO VICTORY: WINNING AND GOVERNING THE WHITE HOUSE IN THE TWENTY-FIRST CENTURY 156, 157 (Meena Bose ed., 2011).

14. See *infra* Part III.B.

15. Ky Fullerton, Comment, *Bush, Gore, and the 2000 Presidential Election*, 80 OR. L. REV. 717, 728 (2001).

16. For example, in 2004 if 60,000 votes in Ohio had swung for John Kerry instead of George W. Bush, Bush would have had three million more nationwide popular votes than Kerry, but Kerry would have won the electoral vote in the Electoral College. JAMES W. CEASER & ANDREW E. BUSCH, *RED OVER BLUE: THE 2004 ELECTIONS AND AMERICAN POLITICS* 171 (2005).

electoral votes used by almost every state results in large portions of the country being ignored in presidential elections.¹⁷ Currently, every state, except Nebraska and Maine, uses a winner-take-all approach to allocate all of its electoral votes to whichever presidential candidate receives a majority of popular votes in that state.¹⁸ This leads to presidential candidates ignoring states that are considered “safe” for their party or the opposing party, and only campaigning in competitive battleground states.¹⁹ Focusing campaign resources on battleground states results in a disparity between battleground states and non-battleground states, with the former having higher turnout rates, citizens with greater knowledge of the political issues, and citizens who are more likely to be involved in presidential campaigns.²⁰

Numerous reform proposals have been suggested to change or abolish the Electoral College. Some proposals would change little about the system as it currently operates.²¹ Others have been odd or complex.²² Currently, the three mainstream reform proposals are the popular vote, the district system, and the proportional plan.²³ Each of these proposals would abolish the winner-take-all allocation of electoral votes and would award the presidency to a candidate based on a different set of winning criteria.²⁴ Each of these reform proposals has advantages as well as disadvantages.²⁵

This Note suggests a novel reform, the District-Popular Plan. The District-Popular Plan would combine elements of the district system and the popular vote reform proposals.²⁶ The District-Popular Plan looks like the district system, in that each congressional district is allocated one

17. See *infra* Part IV.C.

18. ME. REV. STAT. ANN. tit. 21-A, § 805 (2008); NEB. REV. STAT. ANN. § 32-714 (LexisNexis 2008); e.g., OR. REV. STAT. ANN. §§ 248.355, 248.360 (West 2009).

19. See *infra* Part IV.C.

20. See *infra* Part IV.C.

21. For example, the automatic plan would abolish the office of elector and would automatically allocate a state’s electoral votes to the candidate who wins the statewide popular vote. Thomas M. Durbin, *The Anachronistic Electoral College: The Time for Reform*, 39 FED. B. NEWS & J. 510, 517 (1992).

22. One plan introduced in 1822 called for the United States to be divided into four geographical sections with a president to be elected from each on a rotational basis. NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 173 (rev. ed. 1981) [hereinafter PEIRCE & LONGLEY, *DIRECT VOTE ALTERNATIVE*]. The Federal System Plan is an example of a very complex reform, providing three different ways for the election of a president. See *id.* at 175 (describing the complex Federal System Plan).

23. See *infra* Part V.A–C.

24. See *infra* Part V.A–C.

25. See *infra* Part V.A–C; see also *infra* Part VI.A.3.

26. See *infra* Part VI.

electoral vote.²⁷ Whichever candidate receives more popular votes in a congressional district receives that district's electoral vote.²⁸ Thus, 436 electoral votes would be determined at the district level.²⁹ The District-Popular Plan differs from the district system in the way it allocates the remaining 102 "at-large" votes, the electoral votes apportioned on the basis of Senate seats (not to be confused with the term "at-large" which refers to the statewide district which exists in states with only one representative), in every state. Under the District-Popular Plan, each state would award one of its at-large electoral votes to the winner of its statewide popular vote, and the other at-large electoral vote to the winner of the *nationwide* popular vote. Thus, fifty-one electoral votes would be awarded to the winner of the nationwide popular vote, infusing the plan with a touch of the popular vote.³⁰ By combining elements of both reform proposals, the District-Popular Plan would expand the benefits of presidential campaigns to more areas of the country.³¹

Part II of this Note begins by presenting a historical overview of the creation of the Electoral College at the Constitutional Convention. It then goes on to discuss how the rise of political parties affected the Electoral College and caused the troubled election of 1800. Then it discusses how the Twelfth Amendment addressed the problems encountered in the election of 1800 by changing the constitutional structure of the Electoral College. Part II ends by explaining how the winner-take-all approach, currently used in all but two states, came to be the dominant approach in the allocation of electoral votes. Part III of this Note then discusses the Electoral College's institutional advantages and disadvantages.

Part IV highlights the advantages and disadvantages of the winner-take-all approach of allocating presidential electors. It then discusses how the winner-take-all approach has led to the creation of battleground states, and the advantages battleground states enjoy. Part V briefly

27. See *infra* Part V.B.

28. See *infra* Part V.B.

29. Although there are only 435 congressional districts, the number 436 is used because the District of Columbia currently receives three electoral votes in presidential elections. See U.S. CONST. amend. XXIII (providing the District of Columbia with a number of electoral votes equal to the least populous state). Under the District-Popular Plan, two of D.C.'s votes would count as its at-large votes, leaving the remaining vote to be decided as if D.C. was a Congressional District. It is recommended that if D.C. ever receives more than three electoral votes, that D.C. would draw districts specifically for presidential elections to determine how it would allocate its electoral votes.

30. Although there are only fifty states, the District of Columbia would also divide its electoral votes according to the District-Popular Plan's formula, thus there would be fifty-one nationwide votes, one for each state and D.C. Additionally, there would also be fifty-one electoral votes awarded based on the popular vote in each state and D.C.

31. See *infra* Part VI.A.1.

discusses the three mainstream reform proposals: the popular vote, the district system, and the proportional plan. It also discusses the lesser known National Bonus Plan.

Part VI details the District-Popular Plan and explains how it would expand the benefits of presidential elections to more areas of the country. It then discusses three potential ways that the plan could be implemented: through an interstate compact, popular initiative, or constitutional amendment. Part VII concludes by discussing potential arguments against the District-Popular Plan and counters those arguments.

II. ELECTORAL COLLEGE HISTORY AND MODERN OPERATION

Article II, Section 1 of the U.S. Constitution details the process of selecting a president.³² Article II, Section 1 was the result of a compromise between the Framers at the Constitutional Convention.³³ Both small states and large states received some benefit from its design.³⁴ Yet in designing the Electoral College, the Framers did not account for the influence that political parties would have on selecting a president and vice president.³⁵ Partisan politics quickly led to unwanted results in the selection of the president and vice president in the elections of 1796 and 1800.³⁶ Following the election of 1800, Congress amended the Constitution to prevent results like those that occurred in 1796 and 1800.³⁷ However, political parties continued to influence the selection of presidential electors, and heavily influenced the development of the winner-take-all method of allocating electoral votes.³⁸ Today, almost every state uses the winner-take-all method in allocating electoral votes.³⁹

A. *The Constitutional Convention*

Among the last items decided at the Constitutional Convention in 1787 was the method of electing the president and vice president.⁴⁰ At the Convention, three major proposals for the election of the president

32. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

33. *See infra* Part II.A.

34. *See infra* Part II.A.

35. *See infra* Part II.A–B.

36. *See infra* Part II.B.

37. *See infra* Part II.C.

38. *See infra* Part II.D.

39. *See infra* Parts II.D, IV.

40. William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 151 (1996).

were debated: the direct vote election, congressional election, and election by intermediate electors.⁴¹ The first two proposals were ultimately rejected.⁴² In regards to the direct vote, few delegates to the Constitutional Convention thought that election of the president could be entrusted directly to a popular vote of the people.⁴³ Additionally, there were fears that the voting populace, dispersed over thousands of miles, would not be knowledgeable about presidential candidates.⁴⁴ Both times that the direct vote proposal was voted on it was defeated.⁴⁵ The second proposal, congressional election of the president, was supported by delegates who favored a weak executive and a strong legislature.⁴⁶ The delegates ultimately rejected this proposal in favor of executive independence.⁴⁷ Deadlock on those two proposals led to the creation of the Electoral College and the election of the president through intermediate electors.⁴⁸

Large versus small state interests was a problem that also surfaced in determining how to elect the president.⁴⁹ Large states favored an election method based on population.⁵⁰ Small states feared that their concerns would be ignored because larger states would dominate the presidential selection process.⁵¹ The Electoral College was a compromise in which both large and small states received some benefit.⁵² Large states benefitted because a state's number of electors was primarily determined by the state's population, and small states benefitted because they were given equal voting rights if a majority of presidential electors could not agree on a president, which would require the House of Representatives to choose the president.⁵³

41. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 19.

42. *Id.* at 19, 21.

43. *Id.* at 21.

44. Joy McAfee, Comment, 2001: *Should the College Electors Finally Graduate? The Electoral College: An American Compromise from Its Inception to Election 2000*, 32 CUMB. L. REV. 643, 647 (2002).

45. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 21, 22.

46. *Id.* at 19.

47. *Id.*; McAfee, *supra* note 44, at 647.

48. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 22, 30.

49. *Id.* at 16.

50. Matthew J. Festa, Note, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2111 (2001).

51. Josephson & Ross, *supra* note 40, at 151; Festa, *supra* note 50, at 2111.

52. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 23.

53. *Id.*; McAfee, *supra* note 44, at 647-48. Perhaps, also, the disproportionate representation of small states in the Electoral College also influenced small states in accepting this compromise, as every state received two electoral votes regardless of population size. See Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 722 (2007) (noting that small states are disproportionately represented in the Electoral College because every state gets a minimum of three electoral votes regardless of size).

When it was drafted, the Constitution was drafted for a non-party republic rather than a two-party democracy.⁵⁴ The Framers did not intend for parties to select the presidential candidates; rather, they wanted a method of selecting presidential candidates that would overcome faction.⁵⁵ Against this backdrop, the Framers organized the Electoral College so that each presidential elector cast two votes for president.⁵⁶ Whichever candidate had more electoral votes became president, and whichever had less became vice president.⁵⁷ The Framers thought that this method of selection would ensure that presidential electors would choose the best individuals for the Executive branch, as it was assumed that the presidential electors would independently choose the best person as president.⁵⁸ Under the original procedure, presidential electors could not choose a vice president, and were not even permitted to distinguish which of their ballots was cast for president, and which was cast for vice president.⁵⁹ This led to some unexpected results when political parties emerged.⁶⁰

B. The Rise of Parties and Their Effects on the Electoral College

Although the Electoral College worked well in the nation's first two elections, unanimously selecting George Washington as president, the emergence of political parties soon affected the system.⁶¹ By 1796, political parties began to rise and influence national elections.⁶² Political parties changed the operation of the Electoral College.⁶³ Presidential electors, originally thought to be searchers of a presidential candidate of nationwide character, became political party instruments selected for party loyalty and voted on already decided presidential candidates.⁶⁴ The

54. Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 559 (2004).

55. *Id.*

56. U.S. CONST. art. II, § 1, amended by U.S. CONST. amend. XII.

57. *Id.*

58. STEPHEN J. WAYNE, *THE ROAD TO THE WHITE HOUSE 1996: THE POLITICS OF PRESIDENTIAL ELECTIONS* 6 (1996).

59. PEIRCE & LONGLEY, *DIRECT VOTE ALTERNATIVE*, *supra* note 22, at 33.

60. *See infra* Part II.B.

61. WALLACE S. SAYRE & JUDITH H. PARRIS, *VOTING FOR PRESIDENT: THE ELECTORAL COLLEGE AND THE AMERICAN POLITICAL SYSTEM* 25-26 (1970).

62. JOHN F. HOADLEY, *ORIGINS OF AMERICAN POLITICAL PARTIES 1789-1803*, at 42, 54, 141 (1986).

63. WAYNE, *supra* note 58, at 15.

64. PEIRCE & LONGLEY, *DIRECT VOTE ALTERNATIVE*, *supra* note 22, at 35. The rise of political parties may also have had another impact on the Electoral College. The Framers may have intended that only infrequently would there be a majority of electoral votes outright to produce presidents and that the House, under the contingent procedure, would select the president most of the time. LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 22-24

selection of nominees for president and vice president by political parties quickly resulted in a quirk in the Electoral College.

Although the political parties had their preferences for president and vice president, because each elector cast two votes for president, and could not choose a vice president, strategic voting was necessary to implement the political parties' choices.⁶⁵ In 1796, the Federalists chose John Adams as the party's presidential nominee, and Thomas Pinckney as the vice presidential nominee.⁶⁶ The Democratic-Republicans selected Thomas Jefferson as their party's presidential nominee, and Aaron Burr as the vice presidential nominee.⁶⁷ As it was not possible to differentiate between a vote for president and a vote for vice president, some Federalist electors withheld votes from Pinckney so that Adams would receive the most votes in the Electoral College and become president.⁶⁸ However, too many votes were withheld and the electoral vote resulted in seventy-one votes for Adams, sixty-eight for Jefferson, and fifty-nine for Pinckney.⁶⁹ As a result, the nation had a president and vice president from two different parties.⁷⁰

The election of 1800 produced another odd outcome. The Democratic-Republicans again nominated Jefferson for president and Burr for vice president.⁷¹ The Federalists nominated Adams for president and Charles Pinckney, Thomas Pinckney's brother, as vice president.⁷² With the outcome of the election of 1796 fresh in mind, Republican presidential electors in 1800 were afraid, or unwilling, to have a split party president and vice president.⁷³ As a result, both Jefferson and Burr received more electoral votes than Adams and Pinckney, but were tied at seventy-three votes each.⁷⁴ A tie in electoral votes meant that for the first time in the nation's history, the House of Representatives would determine which candidate would become president.⁷⁵ After six days,

(1996) [hereinafter LONGLEY & PEIRCE, ELECTORAL COLLEGE PRIMER]; John. P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 810-11 (1961). If a desire for the contingent procedure was also an intention of the Framers when they designed the Electoral College, political parties, who aggregated national support for candidates, also undermined this intention. LONGLEY & PEIRCE, ELECTORAL COLLEGE PRIMER, *supra*, at 22-24.

65. LUCIUS WILMERDING, JR., THE ELECTORAL COLLEGE 34-35 (1958).

66. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 35.

67. *Id.*

68. WAYNE, *supra* note 58, at 7.

69. PAUL F. BOLLER, JR., PRESIDENTIAL CAMPAIGNS 9 (rev. ed. 1996).

70. Josephson & Ross, *supra* note 40, at 154.

71. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 37.

72. *Id.*

73. Josephson & Ross, *supra* note 40, at 155.

74. *Id.*

75. Rami Fakhouri, Comment, *The Most Dangerous Blot in Our Constitution: Retiring the Flawed Electoral College "Contingent Procedure"*, 104 NW. U. L. REV. 705, 716 (2010).

thirty-six ballots, and the prodding of Alexander Hamilton, the House elected Jefferson as president.⁷⁶

C. *The Aftermath of the Election of 1800 and the Twelfth Amendment*

The elections of 1796 and 1800 showed the impracticality and danger of having electors cast two votes for president in a party system.⁷⁷ The election of 1800 led to the passage of the Twelfth Amendment.⁷⁸ In 1803, Congress proposed an Amendment to reform the way electors voted for president and vice president, which was ratified by three-fourths of the states in 1804 and became the Twelfth Amendment to the Constitution.⁷⁹ The Amendment changed the voting procedure for presidential electors by having each elector cast distinct votes for president and vice president.⁸⁰ This would prevent the outcomes seen in 1796 and 1800, as electors could now differentiate their votes for president and vice president.⁸¹ The Twelfth Amendment remains the only major constitutional reform to the operation of the Electoral College.⁸²

D. *The Rise of Winner-Take-All*

Under the Constitution, states are free to choose the method by which they allocate their electoral votes. Article II, Section 1 of the Constitution provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”⁸³ Initially, the states had varying methods of

76. SAYRE & PARRIS, *supra* note 61, at 26-27.

77. See PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 41 (stating that the dangers of the system as designed could result in a tie vote, that the system could bring an inferior candidate close to the presidency through intrigue and cabal, that opposing parties could become president and vice president, and that a party's vice presidential candidate could become president).

78. TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 17 (2004).

79. WAYNE, *supra* note 58, at 15.

80. U.S. CONST. amend. XII.

81. Fullerton, *supra* note 15, at 727.

82. Andrew E. Busch, *The Development and Democratization of the Electoral College*, in SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE 27, 35 (Gary L. Gregg II ed., 1st ed. 2001). The Twenty-Third Amendment provided the District of Columbia with electors, but did not change the operation of the Electoral College. See U.S. CONST. amend. XXIII (providing D.C. with a number of electoral votes equal to the number of electoral votes in the least populous state).

83. U.S. CONST. art. II, § 1, amended by U.S. CONST. amend. XII.

selecting their presidential electors.⁸⁴ However, the party system influenced the method, which many states chose to employ.⁸⁵

As the party system emerged the Electoral College started changing.⁸⁶ As the election of 1800 approached, politicians in both parties created methods of choosing electors in states to maximize their own party's electoral vote totals.⁸⁷ For example, Virginia changed from a district voting method of selecting electors to a winner-take-all method to ensure Thomas Jefferson would receive all of Virginia's electoral votes.⁸⁸ Jefferson's subsequent victory in 1800 signaled that allocating a state's electoral votes in a winner-take-all fashion could politically benefit a state.⁸⁹

Over time, as party politics became increasingly entrenched in the nation, more states allocated their electoral votes on a winner-take-all basis.⁹⁰ The winner-take-all method allowed states to maximize their influence in selecting a president, as a candidate who carried more popular votes in a state would receive that state's entire slate of electoral votes.⁹¹ The method appealed to political parties because if a party received more popular votes in a state than the opposing party, the opposing party received no electoral votes.⁹² However, even if the winner-take-all method did not appeal to a state, state legislatures felt pressured to adopt the winner-take-all method rather than be at a competitive disadvantage in electoral power vis-à-vis other states with a winner-take-all system.⁹³ By 1836, every state used the winner-take-all method in selecting presidential electors.⁹⁴ Since the mid-nineteenth

84. For example, in the first presidential elections states employed various procedures for the selection of electors, such as legislative appointment, election through a general ticket, and through district systems. See *McPherson v. Blacker*, 146 U.S. 1, 29-32 (1892).

85. See Brandon H. Robb, Comment, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President by National Popular Vote*, 54 LOY. L. REV. 419, 439 (2008) (stating that as the party system grew, state legislators favored the winner-take-all approach).

86. SAYRE & PARRIS, *supra* note 61, at 25.

87. PEIRCE & LONGLEY, *DIRECT VOTE ALTERNATIVE*, *supra* note 22, at 37.

88. Josephson & Ross, *supra* note 40, at 154.

89. Festa, *supra* note 50, at 2124.

90. Robb, *supra* note 85, at 439.

91. See *id.* (stating that concentrating influence on one slate of electors, as opposed to dividing electors by district, would ensure a state's maximum influence in selecting a president).

92. Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 947 (1996).

93. *Id.*; Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 4-5 (1968).

94. Robb, *supra* note 85, at 439.

century, the winner-take-all approach has been the common method used by states to allocate electoral votes.⁹⁵

III. THE ELECTORAL COLLEGE

The Electoral College enjoys weak support amongst both scholars and the public.⁹⁶ Supporters and critics debate the advantages and disadvantages emanating from the Electoral College. Among its benefits is that it encourages national campaigns, promotes federalism, and is known to work.⁹⁷ Its drawbacks include its potential to produce presidents who fail to win the nationwide popular vote, and it inaccurately apportions electoral votes due to aging census data.⁹⁸ Part III discusses the benefits and drawbacks that the Electoral College poses as an institution, absent any method of allocating electoral votes. While doing so, it notes that often the Electoral College's benefits and drawbacks go hand in hand with the winner-take-all system. Part IV discusses the winner-take-all method of allocating electoral votes. Parts III and IV separate the benefits and drawbacks of the Electoral College and the winner-take-all system in all but one respect: overrepresentation of small states in the Electoral College. Structurally, it made sense to discuss this along with the benefits that large states receive under the winner-take-all approach. As such, it is discussed in Part IV.

A. *Benefits of the Electoral College*

The Electoral College encourages national campaigns.⁹⁹ A presidential candidate cannot win the presidential election without forming a broad national coalition to rise above narrow economic, geographic, and social interests.¹⁰⁰ Presidential candidates build coalitions across geographic and ideological lines in order to win the presidency.¹⁰¹ Thus, the Electoral College incentivizes a presidential candidate to build a broad, moderate, national coalition in order to win

95. Randall E. Adkins & Kent A. Kirwan, *What Role Does the "Federalism Bonus" Play in Presidential Selection?*, PUBLIUS, Fall 2002, at 71, 76.

96. See Lydia Saad, *Americans Would Swap Electoral College for Popular Vote*, GALLUP (Oct. 24, 2011), <http://www.gallup.com/poll/150245/Americans-Swap-Electoral-College-Popular-Vote.aspx> (showing poll data indicating that sixty-two percent of Americans support a popular vote election of the president while thirty-five percent prefer the Electoral College); see, e.g., scholars in the notes *infra* Part III.A–B.

97. See *infra* Part III.A.

98. See *infra* Part III.B.

99. ROSS, *supra* note 78, at 141.

100. Michael M. Uhlmann, *The Electoral College Strengthens Federalism*, in THE PRESIDENTIAL ELECTION PROCESS 185, 187 (Tom Lansford ed., 2008).

101. Editorial, *The Case for the Electoral College*, N.Y. TIMES, Dec. 19, 2000, at A34.

the presidency.¹⁰² The need for national campaigns influences America's two-party system.¹⁰³ As our elections are dominated by two major parties, candidates compete for many of the same voters.¹⁰⁴ Building a national coalition helps candidates moderate their viewpoints and form compromises with factional interests.¹⁰⁵ The candidate who has strength spread across the country rather than concentrated in one part wins the presidency because that candidate met the Electoral College's objective of being the best overall national candidate.¹⁰⁶

Another advantage of the Electoral College is that it promotes federalism.¹⁰⁷ Under Article II of the Constitution, each state appoints electors to vote for president.¹⁰⁸ A presidential candidate must win a majority of electoral votes from the states to become president, which means that the candidate must win states.¹⁰⁹ This forces candidates to be sensitive to state interests, and in turn preserves a federal system.¹¹⁰ If states did not have a role in the election of the president, it could weaken the influence of state issues in presidential campaigns.¹¹¹ Thus, voters participate as citizens of the United States as well as members of their individual state.¹¹²

A third advantage is that the Electoral College is known to work.¹¹³ For over two centuries the Electoral College has produced stable national leadership.¹¹⁴ Time has proven that this method of electing a president works.¹¹⁵ A danger in changing the method of electing the president is

102. JUDITH A. BEST, *THE CHOICE OF THE PEOPLE?: DEBATING THE ELECTORAL COLLEGE* 27, 67 (1996) [hereinafter BEST, *THE CHOICE OF THE PEOPLE?*].

103. THOMAS H. NEALE, CONG. RESEARCH SERV., RL 30844, *THE ELECTORAL COLLEGE: REFORM PROPOSALS IN THE 107TH CONGRESS* 4 (2003) [hereinafter NEALE, 2003].

104. Uhlmann, *supra* note 100, at 189.

105. *Id.*

106. ROSS, *supra* note 78, at 141-42.

107. Uhlmann, *supra* note 100, at 187-88.

108. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

109. BEST, *THE CHOICE OF THE PEOPLE?*, *supra* note 102, at 35.

110. *Id.* at 41.

111. WILLIAM R. KEECH, *WINNER TAKE ALL: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON REFORM OF THE PRESIDENTIAL ELECTION PROCESS* 11 (1978).

112. *See* NEALE, 2003, *supra* note 103, at 4.

113. *See Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2543 (2001) (noting that for 200 years the Electoral College has allowed orderly and peaceful transfers of power, and its effects are known).

114. *Amending the Constitution Relating to Electoral College Reform: Hearings Before the S. Comm. on the Judiciary*, 91st Cong. 2 (1970) (statement of Sen. Sam J. Ervin, Jr.); *see also supra*, note 113 and accompanying text.

115. CONG. RESEARCH SERV., JK 516 CL, *PROPOSALS TO REFORM OUR PRESIDENTIAL ELECTORAL SYSTEM: A SURVEY OF THE HISTORICAL BACKGROUND AND DEVELOPMENT OF THE ELECTORAL COLLEGE AND A COMPILATION OF PROPOSALS TO REFORM IT WITH PRO AND CON ANALYSES AND A SELECTED BIBLIOGRAPHY* 26 (1970) [hereinafter CONG. RESEARCH SERV.,

that when the rules change, the game changes.¹¹⁶ Getting rid of the Electoral College would mean trading in an electoral method whose positives and negatives we know of, for a method whose drawbacks are not yet known.¹¹⁷

B. Disadvantages of the Electoral College

The biggest drawback of the Electoral College is that it produces “minority presidents” who fail to capture the nationwide popular vote, but receive a majority of the electoral votes needed to win the election.¹¹⁸ This occurs because the winning presidential candidate may have won a narrow set of popular votes in enough states to give that candidate a majority of electoral votes, but the opposing candidate may have won a landslide of votes in the remaining states which make up a minority of electoral votes in the Electoral College.¹¹⁹ In that scenario, the candidate who amassed more nationwide popular votes loses because that candidate did not win enough electoral votes to constitute an electoral vote majority. Through the 2012 election, this has happened four times in our nation’s history in the elections of 1824, 1876, 1888, and 2000.¹²⁰

An additional disadvantage of the Electoral College is that it fails to take into account population shifts which occur between censuses.¹²¹ The number of presidential electors a state has is based on the state’s total number of representatives and senators.¹²² Every ten years the government collects census data to determine the number of representatives each state will have.¹²³ The number of representatives a state has will increase or decrease depending on the census data, resulting in a gain or loss of electoral votes every ten years.¹²⁴ Any state that has a population increase between censuses does not have the proper

PROPOSALS TO REFORM OUR PRESIDENTIAL ELECTORAL SYSTEM].

116. BEST, *THE CHOICE OF THE PEOPLE?*, *supra* note 102, at 24.

117. Bernard Grofman & Scott L. Feld, *Thinking About the Political Impacts of the Electoral College*, 123 PUB. CHOICE 1, 12 (2005).

118. McAfee, *supra* note 44, at 649-50.

119. CONG. RESEARCH SERV., PROPOSALS TO REFORM OUR PRESIDENTIAL ELECTORAL SYSTEM, *supra* note 115, at 91. Of course, this problem is amplified under the current winner-take-all method of allocating electoral votes, as a candidate who amasses one more popular vote in a state than their opponent captures that state’s entire electoral votes. *See infra* Part IV.B.

120. Fullerton, *supra* note 15, at 728-29.

121. Durbin, *supra* note 21, at 513; L. Darnell Weeden, *Response to Professor Amar: Some Thoughts on the Electoral College’s Past, Present, and Future*, 34 OHIO N.U. L. REV. 393, 397 (2008).

122. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

123. U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amend. XIV, § 2.

124. Margo Anderson & Stephen E. Fienberg, *To Sample or Not to Sample? The 2000 Census Controversy*, 30 J. INTERDISC. HIST. 1, 4 (1999).

amount of electoral votes corresponding to its population during presidential elections that take place between those censuses.¹²⁵ Conversely, states with declining population numbers are overrepresented in electoral votes in the elections occurring between censuses.¹²⁶ Any census taken during a presidential election year that ends in a zero will not be reflected until the following election.¹²⁷ Thus, any presidential election year that ends in a zero allocates electoral votes based on population statistics taken a decade earlier.¹²⁸

IV. WINNER-TAKE-ALL

Forty-eight states currently employ a winner-take-all method of allocating electoral votes, each state giving its entire slate of electoral votes to the winner of its statewide popular vote.¹²⁹ Since 1836, the winner-take-all method has been the dominant method in selecting presidential electors.¹³⁰ Two claimed advantages of the winner-take-all method are that it maximizes a state's power in presidential elections, and it gives a winning presidential candidate a large margin of victory, which translates into legitimacy and political capital.¹³¹ Among its disadvantages are that it ignores votes for the "minority" candidate who loses the statewide popular vote, and small states or large states enjoy an advantage that the other size state does not enjoy.¹³² Moreover, the winner-take-all system creates battleground states where candidates focus a majority of their time and resources, which disadvantages non-battleground states.¹³³

125. DAVID W. ABBOTT & JAMES P. LEVINE, *WRONG WINNER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE* 82 (1991).

126. *Id.* at 82-83.

127. LONGLEY & PEIRCE, *ELECTORAL COLLEGE PRIMER*, *supra* note 64, at 94. This is because a new apportionment does not take effect until at least a few years after a census is taken. *Id.*

128. *Id.* For example, after the 1990 census, any shift in a state's population was not reflected in the Electoral College until 2004, allowing three presidential elections (1992, 1996, and 2000) to be based on 1990 census figures. *Id.*

129. David Gringer, *Why the National Popular Vote Plan Is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 184-85 (2008).

130. David S. Wagner, Note, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect that Change*, 25 REV. LITIG. 575, 578 (2006).

131. *See infra* Part IV.A.

132. *See infra* Part IV.B.

133. *See infra* Part IV.C.

A. Advantages of Winner-Take-All

States like the winner-take-all approach because they perceive it as maximizing the state's power in presidential elections.¹³⁴ States using a winner-take-all method increase the voting power of their citizens.¹³⁵ This occurs because when a presidential candidate knows that a state has a high number of electoral votes, that candidate will target his or her promises and platforms to the citizens of that state.¹³⁶ A state that does not adopt the winner-take-all method is at risk of being at a competitive disadvantage with other states that have a winner-take-all method.¹³⁷

Another advantage associated with the winner-take-all approach is the magnifier effect.¹³⁸ The magnifier effect takes popular vote pluralities and converts them into electoral vote majorities.¹³⁹ For example, in 1992, the magnifier effect turned Bill Clinton's popular vote plurality of 43% of the nationwide popular vote into a 69% electoral vote majority.¹⁴⁰ Distorting a candidate's margin of victory may give the winning presidential candidate legitimacy as well as political capital.¹⁴¹ It is argued that the magnifier effect assures stability by giving the winning candidate an appearance of national backing in close elections, and may help presidents achieve general acceptance.¹⁴² Although some scholars argue that the winner-take-all approach has advantages, others argue that it has severe disadvantages.¹⁴³

B. Disadvantages of Winner-Take-All

A major critique of the winner-take-all method is that it ignores the votes of those who voted for the candidate who did not carry a statewide majority of votes.¹⁴⁴ If a candidate only has one more vote than the opposing candidate in a state, the candidate with more votes will receive

134. See Akhil Reed Amar & Vik Amar, Essay, *President Quayle?*, 78 VA. L. REV. 913, 927-28 (1992) (noting that if one takes as a premise that each state has a desire to maximize its importance in presidential elections, the winner-take-all approach appears reasonable).

135. Hoffman, *supra* note 92, at 947.

136. Amar & Amar, *supra* note 134, at 927-28.

137. Hoffman, *supra* note 92, at 947.

138. See BEST, THE CHOICE OF THE PEOPLE?, *supra* note 102, at 14 (arguing that the magnifier effect ensures an efficient election).

139. Judith A. Best, *Presidential Selection: Complex Problems and Simple Solutions*, 119 POL. SCI. Q. 39, 45-46 (2004).

140. *Id.* at 46.

141. Wagner, *supra* note 130, at 581.

142. CONG. RESEARCH SERV., PROPOSALS TO REFORM OUR PRESIDENTIAL ELECTORAL SYSTEM, *supra* note 115, at 26.

143. See *infra* Part IV.B.

144. Wagner, *supra* note 130, at 579.

that state's entire slate of electoral votes.¹⁴⁵ Some scholars have noted that votes for the losing candidate are "wasted" or essentially "thrown away" because they do not translate into electoral votes.¹⁴⁶ One scholar has argued that under a winner-take-all system, voters who vote for the losing candidate in their state "actually cast" a vote for the opposing candidate because the electoral votes representing that voter are cast for the opposing candidate.¹⁴⁷

Small states may have a favorable bias in the Electoral College.¹⁴⁸ The Constitution guarantees that every state will have two senators and one representative.¹⁴⁹ As every state's electoral votes are tied to its number of senators and representatives, each state is guaranteed a minimum of three electoral votes.¹⁵⁰ Some scholars argue that the two at-large votes tied to the two Senate seats that all states have, grants small states an advantage over large states.¹⁵¹ This occurs because a small state's population per electoral vote ratio is enhanced, giving it a boost in voting power.¹⁵² For example, in 1964 and 1968, Alaska had 75,389 people represented per electoral vote, whereas the national average had 333,314 people represented per electoral vote.¹⁵³ As a result, a candidate would receive all three of Alaska's electoral votes by having less voters vote for them than in other states. This small state bonus may become crucial when elections are close.¹⁵⁴ As a result of this enhanced power, it

145. CONG. RESEARCH SERV., PROPOSALS TO REFORM OUR PRESIDENTIAL ELECTORAL SYSTEM, *supra* note 115, at 28.

146. ABBOTT & LEVINE, *supra* note 125, at 24 (internal quotation marks omitted).

147. Neal R. Peirce, Comment, *Reflections on the Electoral College*, 13 VILL. L. REV. 342, 344 (1968). More recently, another scholar has echoed this statement, writing that the winner-take-all system used in states "[i]n effect . . . gives the votes of the people who voted against the winner to the winner." GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 36 (2004).

148. ABBOTT & LEVINE, *supra* note 125, at 77.

149. U.S. CONST. art. I, §§ 2-3.

150. See U.S. CONST. art. II, § 1 (stating that the total number of representatives and senators a state receives equals the number of electoral votes a state receives).

151. E.g., Bonnie Johnson, *Identities of Competitive States in U.S. Presidential Elections: Electoral College Bias or Candidate-Centered Politics?*, 35 PUBLIUS 337, 342 (2005); see also Carleton W. Sterling, *The Electoral College Biases Revealed: The Conventional Wisdom and Game Theory Models Notwithstanding*, 31 W. POL. Q. 159, 161 (1978) (arguing that the block voting bias by large states "does not come close to offsetting the small state bias of the constant two votes apportioned each state regardless of size"). However, Carleton W. Sterling does note that the constant two electoral votes that every state receives is not the most important bias in the system. *Id.* at 170.

152. Johnson, *supra* note 151, at 342.

153. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 113 tbl.1.

154. Sterling, *supra* note 151, at 170.

can be argued that the winner-take-all approach benefits small states which help determine elections with less people represented per electoral vote.

Conversely, some scholars argue that large states are favored under a winner-take-all approach.¹⁵⁵ Under a winner-take-all system, citizens in large states have more “vote power” because the citizens of a state vote as a bloc.¹⁵⁶ By having electors vote as a bloc, citizens in a large state have much more of an impact in selecting a president and affecting the election.¹⁵⁷ These scholars argue that bloc voting helps outweigh the federalism bonus enjoyed by small states because a voter in a large state has an ability to affect more electoral votes than does a voter in a smaller state.¹⁵⁸ For example, a presidential candidate who captures California’s electoral votes would essentially cancel out the electoral votes of the opposing candidate in fourteen smaller states.¹⁵⁹ Thus, presidential candidates target large states with a large number of electoral votes rather than small states with a smaller number of electoral votes because they will gain more electoral votes in the larger states.¹⁶⁰ Regardless of whether large or small states benefit in the Electoral College, the winner-take-all method of allocating electoral votes has led to a focus on battleground states.

C. Battleground States Versus Safe States

The winner-take-all method of allocating electoral votes has caused presidential candidates to focus their attention on battleground states.¹⁶¹ Presidential campaigns divide states into five categories: Base Republican, Lean Republican, Battleground, Lean Democratic, and Base

155. E.g., John F. Banzhaf III, *One Man, 3,312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304, 313 (1968); Joseph E. Kallenbach, *Our Electoral College Gerrymander*, 4 MIDWEST J. POL. SCI. 162, 175-76 (1960). One scholar has argued that the advantages and disadvantages of large and small states in the Electoral College cancel one another out. McAfee, *supra* note 44, at 657-58. Two others have argued that there are countervailing biases in the Electoral College, one favoring small states, and one favoring large states, but that the large states have a great advantage because of the winner-take-all method of allocating electoral votes. LONGLEY & PEIRCE, *ELECTORAL COLLEGE PRIMER*, *supra* note 64, at 145.

156. Banzhaf III, *supra* note 155, at 314. Two scholars define “vote power” as “the chance that any voter has of affecting the election of the president through the medium of his or her state’s electoral votes.” ABBOTT & LEVINE, *supra* note 125, at 79.

157. ABBOTT & LEVINE, *supra* note 125, at 78-79.

158. See Banzhaf III, *supra* note 155, at 317; Kallenbach, *supra* note 155, at 175-76.

159. McAfee, *supra* note 44, at 658.

160. NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: CONTEMPORARY STRATEGIES OF AMERICAN ELECTORAL POLITICS* 42 (7th ed. 1988).

161. John B. Anderson, *The Electoral College Should Be Abolished*, in *THE PRESIDENTIAL ELECTION PROCESS* 170, 175 (Tom Lansford ed., 2008); Fortier & Ryan, *supra* note 13, at 158.

Democratic.¹⁶² The campaigns then allocate the greatest share of their resources to battleground states, followed by states that lean slightly Republican or Democratic, and lastly to states that are considered safely Republican or Democratic.¹⁶³ As a result, candidates tend to ignore current “safe” states like California, New York, Texas, and others, and focus their campaigns on current competitive swing states like Florida, Michigan, Ohio, Pennsylvania, and Wisconsin.¹⁶⁴ This means that a safe state like California is largely irrelevant to presidential campaigns, and receives little attention from the campaigns.¹⁶⁵ Many states do not enjoy the same advantages that battleground states enjoy in presidential elections due to this campaign strategy.

Candidates visit battleground states more than they visit non-battleground states.¹⁶⁶ This was seen in 2008, when both presidential candidates visited battleground states more than non-battleground states.¹⁶⁷ The discrepancy in visits becomes more pronounced as the campaign wears on. For example, in the last few months of the 2000 and 2004 elections, battleground states Florida and Pennsylvania each received a visit from a presidential or vice-presidential candidate approximately once every two days.¹⁶⁸ Other battleground states also enjoyed many candidate visits during that time.¹⁶⁹ In comparison, during that same time span, presidential and vice-presidential candidates made no appearances in twenty-four states in 2000, and no appearances in twenty-one states in 2004.¹⁷⁰

Additionally, presidential campaigns spend more on campaign advertising in battleground states than safe states.¹⁷¹ Presidential

162. DARON R. SHAW, *THE RACE TO 270: THE ELECTORAL COLLEGE AND THE CAMPAIGN STRATEGIES OF 2000 AND 2004*, at 46 (2006) [hereinafter SHAW, *THE RACE TO 270*].

163. *Id.*

164. Schleifer, *supra* note 53, at 723.

165. Thomas W. Hiltachk, Commentary, *Reforming the Electoral College One State at a Time*, 106 MICH. L. REV. FIRST IMPRESSIONS 90, 91 (2008), <http://www.michiganlawreview.org/assets/fi/106/hiltachk.pdf>.

166. David Hill & Seth C. McKee, *The Electoral College, Mobilization, and Turnout in the 2000 Presidential Election*, 33 AM. POL. RES. 700, 711 (2005); see *Candidate Visits*, *supra* note 4 (showing that both Obama and McCain visited battleground states more than other states between June 8, 2008 and November 3, 2008). Drs. David Hill and Seth C. McKee note that candidate visits are a function of battleground status and the number of electoral votes. Hill & McKee, *supra*, at 711-13.

167. See *Candidate Visits*, *supra* note 4 (showing that both Obama and McCain visited battleground states more than other states between June 8, 2008 and November 3, 2008).

168. SHAW, *THE RACE TO 270*, *supra* note 162, at 85, 86 tbl.4.3, 88. The campaign visit data from Shaw is based on visits between August 20 and November 6, 2000, and September 3 and November 1, 2004. *Id.* at 85, 86 tbl.4.3. These figures include D.C. *Id.*

169. *Id.* at 85, 88.

170. *Id.* at 85, 87 tbl.4.3, 88.

171. Hill & McKee, *supra* note 166, at 711-12, 715; see *Ad Spending*, *supra* note 3 (showing

campaigns overwhelm voters in battleground states with advertisements, while voters in non-battleground states see little, if any, campaign advertisements.¹⁷² By mid-October in the 2012 election, \$746 million dollars had been spent by campaigns on television advertisements.¹⁷³ Ninety-three percent, or \$697 million of that money, had been spent in nine battleground states.¹⁷⁴ Only 7% of that money was spent in other states.

Similar to the discrepancy in candidate visits as the election wears on, the discrepancy in campaign spending in battleground states and non-battleground states becomes more pronounced as the election wears on. For example, in the last few months of the 2000 and 2004 elections, battleground states received an average of \$8.6 million and \$12.9 million, respectively, in television advertising spending.¹⁷⁵ During that same time span, twenty-four states received no spending on television advertisements from the campaigns in 2000, and thirty states received no spending on television advertisements from the campaigns in 2004.¹⁷⁶ In fact, between September and November in the 2004 election, three battleground states received 62% of presidential campaign spending on television ads, while a combined thirty-nine other states received less than 10% of this spending.¹⁷⁷ Increased candidate visits to, and campaign spending in, battleground states, result in significant benefits for battleground states, while non-battleground states do not enjoy these same benefits.

both presidential candidates Obama and McCain spent most of their money in advertising in battleground states).

172. Keena Lipsitz, *The Consequences of Battleground and "Spectator" State Residency for Political Participation*, 31 POL. BEHAV. 187, 192 (2009).

173. Thomas Beaumont, *Fewer Contested States than in Past Presidential Elections*, DENVER POST (Oct. 10, 2012), http://www.denverpost.com/nationworld/ci_21736256/fewer-contested-states-than-past-presidential-elections.

174. *Id.*

175. SHAW, *THE RACE TO 270*, *supra* note 162, at 78. The campaign television advertising spending from Professor Daron R. Shaw is based on purchases between August 20 and November 6, 2000, and September 3 and November 1, 2004. *Id.* at 78, 79 tbl.4.1. Although Shaw states that twenty-four battleground states received \$8.6 million and \$12.9 million respectively in those elections, he notes that the spending was much higher in some of these states, such as Florida receiving \$27.2 million in 2000 and \$57.5 million in 2004. *Id.* at 78, 81. These figures include D.C. *Id.* at 79 tbl.4.1.

176. *Id.* at 79 tbl.4.1. When looking at only the spending by the Republican and Democratic National Committees, twenty-six states received no money on televised advertising in 2000, and thirty-one states received none in 2004. *Id.* These figures include D.C. *Id.*

177. Fortier & Ryan, *supra* note 13, at 158. These states were Florida, Ohio, and Pennsylvania. *Id.* The same three states received 45% of visits by George W. Bush and John Kerry during that same period of time. *Id.*

Increased candidate visits to, and spending in, battleground states lead to higher turnout levels in these states.¹⁷⁸ In 2000, there was an average voter turnout rate of 57.3% of voters in battleground states as compared to 52% of voters in non-battleground states.¹⁷⁹ In 2004, there was an average voter turnout rate of 66.7% of voters in battleground states as compared to 56.8% of voters in non-battleground states.¹⁸⁰ Thus, the campaigns' increased attention on voters in these states raises turnout levels in these states.

Increased spending on advertisements in battleground states also leads to further benefits for voters in those states. Media campaigns educate voters.¹⁸¹ Voters who remember an advertisement are more likely to vote, and are more informed on political issues.¹⁸² Voters in battleground states have greater issue knowledge and salience than voters in non-battleground states.¹⁸³ In 2000, residents in heavily contested states were 13% more likely to know the candidates' positions on issues than residents in non-heavily contested states.¹⁸⁴ As voters in battleground states get more exposure to campaign advertisements, they have an increased chance of obtaining these benefits. In contrast, areas that do not get targeted with political advertising are left with the feeling that their votes do not count as much as voters in swing states.¹⁸⁵

Battleground states also enjoy other benefits. Campaign issues are shaped to the interests of citizens in the battleground states.¹⁸⁶ For example, as of August 2012, President Barack Obama was poised to release a set of radio advertisements addressing particular local concerns of voters in battleground states.¹⁸⁷ Residence in a battleground state also

178. Hill & McKee, *supra* note 166, at 714-15. Of course, increased voter turnout in battleground states may also be a result of campaigns and interest groups focusing voter mobilization strategies on competitive battleground states. Darshan J. Goux & David A. Hopkins, *The Empirical Implications of Electoral College Reform*, 36 AM. POL. RES. 857, 866 (2008). However, this again shows that increased attention on battleground states has positive results in those states, as this is where campaigns and interest groups focus voter mobilization strategies.

179. Goux & Hopkins, *supra* note 178, at 865 tbl.3.

180. *Id.*

181. Shanto Iyengar & Adam F. Simon, *New Perspectives and Evidence on Political Communication and Campaign Effects*, 51 ANN. REV. PSYCHOL. 149, 156 (2000).

182. *Id.* at 152, 155.

183. William L. Benoit, Glenn J. Hansen & R. Lance Holbert, *Presidential Campaigns and Democracy*, 7 MASS COMM. & SOC'Y 177, 184 (2004).

184. THOMAS E. PATTERSON, *THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY* 144 (2002).

185. Peter Marks, *Dearth of Ads Makes Race in Kansas a Snooze*, N.Y. TIMES, Oct. 27, 2000, at A26.

186. PATTERSON, *supra* note 184, at 141.

187. *Obama Radio Ads to Hit Battleground States*, CNN (Aug. 20, 2012, 11:00 AM), <http://politicalticker.blogs.cnn.com/2012/08/20/obama-radio-ads-to-hit-battleground-states/>. In 2000, Vice President and Democratic presidential candidate Al Gore practically ignored gun control

has positive effects on low-income voters.¹⁸⁸ Low-income citizens in battleground states have more political interest than low-income citizens in safe states.¹⁸⁹ Additionally, low-income citizens in battleground states have a greater chance of being contacted by political parties, which in turn leads to increased involvement with a presidential campaign, than do low-income citizens in safe states.¹⁹⁰ These discrepancies between battleground and non-battleground states show that the winner-take-all method of allocating electoral votes benefits a few battleground states, while disadvantaging the rest of the country.

V. PROPOSALS TO REFORM THE ELECTORAL COLLEGE

Proposed reforms of the Electoral College generally take one of three forms; the popular vote, the district system, and the proportional plan. Part V briefly summarizes what each of these proposals would change about the Electoral College. In addition to these three reform proposals, Part V will also discuss the National Bonus Plan, whose structure is similar to, but different than, the District-Popular Plan. Background on these proposals is needed because Part VI will address why the District-Popular Plan is a better alternative than these plans.

A. Popular Vote

The most popular reform proposal is the popular vote.¹⁹¹ Calls for a popular election of the president trace back to the Constitutional Convention.¹⁹² A national popular vote would award the presidency to the presidential candidate who receives the most nationwide popular votes.¹⁹³ Some popular vote reform proposals stipulate that if no presidential candidate receives at least 40% of the nationwide popular

issues, assuming it would hurt his image with rural residents in Florida and Pennsylvania, two battleground states. PATTERSON, *supra* note 184, at 141.

188. James G. Gimpel, Karen M. Kaufmann & Shanna Pearson-Merkowitz, *Battleground States Versus Blackout States: The Behavioral Implications of Modern Presidential Campaigns*, 69 J. POL. 786, 792-93 (2007).

189. *Id.* at 791, 795.

190. *Id.* at 791-92, 795. However, even absent being contacted by a political party, low-income voters in battleground states are more engaged in political campaigns than low-income voters in safe states. *Id.* at 792. Nonetheless, party contacting does increase these benefits in battleground states. *Id.*

191. Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, the Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. S. U. L. REV. 879, 892-93 (2001).

192. ROGER LEA MACBRIDE, *THE AMERICAN ELECTORAL COLLEGE* 40 (1963). The first time that the direct popular vote was introduced in Congress was in 1816. PEIRCE & LONGLEY, *DIRECT VOTE ALTERNATIVE*, *supra* note 22, at 161. For a detailed history of the direct-popular vote, see generally *id.* at 161-72.

193. *E.g.*, H.R.J. Res. 36, 112th Cong. (2011).

vote, that there would be a run-off election between the top two candidates.¹⁹⁴ The primary advantage of the popular vote is that it ensures that the winner of the nationwide popular vote wins the presidential election.¹⁹⁵

B. District System

A second major reform proposal is the district system. A proposal for the district system was first made in Congress in 1800 and the district system was extensively debated in the early nineteenth century.¹⁹⁶ The district system allocates electoral votes according to the congressional districts of a state.¹⁹⁷ Whichever presidential candidate wins more popular votes in a district receives an electoral vote from that district.¹⁹⁸ Whichever presidential candidate has more statewide popular votes in a state receives that state's two at-large votes.¹⁹⁹ Under this method of allocating electoral votes, both candidates can win electoral votes in a state that employs the district system. Currently, two states, Maine and Nebraska, use the district system in allocating electoral votes.²⁰⁰

C. Proportional System

A third major reform proposal is the proportional plan. The proportional plan was first introduced in Congress in 1848.²⁰¹ Under the proportional plan, a state's electoral votes would be allocated proportionally according to results of the statewide popular vote.²⁰² For example, if Wisconsin has ten electoral votes, and the Democratic

194. *E.g.*, H.R.J. Res. 28, 103rd Cong. (1993).

195. *See* H.R.J. Res. 36, 112th Cong. (2011) (providing that the winner of the nationwide popular vote is elected president).

196. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 132. For a history of the district system, see generally *id.* at 132-43.

197. HARVEY ZEIDENSTEIN, DIRECT ELECTION OF THE PRESIDENT 17 (1973). Under some district system arrangements, a state may be able to draw separate districts for electors and its representatives. *See* *McPherson v. Blacker*, 146 U.S. 1, 29 (1892) (noting that Virginia at one point had established twelve districts with one electoral vote each for presidential elections, and ten separate districts that elected congresspeople).

198. ZEIDENSTEIN, *supra* note 197, at 17.

199. *Id.* For an example of what a constitutional amendment containing the district system would look like, see H.R.J. Res. 18, 107th Cong. (2001), proposing that each state appoint two electors to vote for the candidate who receives the most statewide popular votes in that state, and that each individual congressional district grants its electoral vote to whichever candidate wins more popular votes in that district.

200. ME. REV. STAT. ANN. tit. 21-A, § 805 (2008); NEB. REV. STAT. ANN. § 32-714 (LexisNexis 2008).

201. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 144.

202. H.R.J. Res. 17, 107th Cong. (2001).

candidate receives 60% of the popular vote in Wisconsin, and the Republican candidate receives 40% of the popular vote in Wisconsin, then the Democratic candidate would receive six electoral votes, and the Republican candidate would receive four electoral votes from the state.

D. *National Bonus Plan*

A lesser known reform proposal, dismissed soon after its creation, is the National Bonus Plan.²⁰³ Under the National Bonus Plan, the Electoral College would be increased by 102 electors who would cast their vote for the presidential candidate who won the nationwide popular vote.²⁰⁴ These 102 electoral votes are added to the 538 electoral votes currently in the Electoral College, and whichever candidate wins a majority of electoral votes wins the presidency.²⁰⁵ The National Bonus Plan represents a compromise of sorts. It appeals to popular vote supporters because it infuses a popular vote into the current system.²⁰⁶ It also appeals to defenders of the Electoral College because it preserves federalism and much of the institution.²⁰⁷

VI. THE DISTRICT-POPULAR PLAN

This Note creates a new plan to reform the Electoral College—the District-Popular Plan. The District-Popular Plan is a blend of the district system and the direct-popular vote. Every congressional district would receive one electoral vote. However, the plan differs from the district system in that it does not tie the two at-large votes (the two votes allocated on the basis of a state's Senate seats) to the winner of statewide popular votes. Instead, it infuses a touch of the popular vote reform proposal. Each state would award one of these at-large electoral votes to the winner of its statewide popular vote. The other at-large electoral vote would be awarded to the winner of the *nationwide* popular vote. Thus, under this structure, fifty-one electoral votes would be determined at the national level, fifty-one electoral votes would be determined at the state

203. See Arthur Schlesinger, Jr., *How to Reform the Electoral College*, 18 NEW PERSP. Q., no. 1, 2001 at 61, 61 (stating that the National Bonus Plan was “dismissed as an academic exercise”).

204. KEECH, *supra* note 111, at 5. For an example of a proposed amendment containing the National Bonus Plan, see H.R.J. Res. 25, 107th Cong. § 8 (2001), providing in section eight that whichever presidential candidate receives the most amount of nationwide popular votes would gain additional electoral votes equivalent to twice the number of States and the District of Columbia.

205. KEECH, *supra* note 111, at 5.

206. PEIRCE & LONGLEY, *DIRECT VOTE ALTERNATIVE*, *supra* note 22, at 176-77.

207. KEECH, *supra* note 111, at 5; Thomas E. Cronin, *The Direct Vote and the Electoral College: The Case for Meshing Things Up!*, 9 PRESIDENTIAL STUD. Q. 144, 154-55 (1979); Schlesinger, *supra* note 203, at 61.

level, and 436 electoral votes would be determined at the district level. These totals account for the electoral votes that the District of Columbia receives under the Constitution.

The District-Popular Plan would broaden presidential campaigns and spread the positive effects associated with presidential campaigns to more areas of the country.²⁰⁸ The District-Popular Plan is a better way of allocating electoral votes than other methods because it has more positive effects than those other methods.²⁰⁹ Though there are several ways to implement the plan, the best strategy is to have an interstate compact and simultaneously try to push for a constitutional amendment.²¹⁰ Although critics may argue that the District-Popular Plan has its drawbacks, these arguments are not as strong as they seem at first glance.²¹¹ The District-Popular Plan should be implemented to spread the benefits of presidential campaigns.

A. Advantages of the District-Popular Plan

The District-Popular Plan would expand presidential campaigns to more areas of the country.²¹² This, in turn, would expand the benefits of presidential campaigns that battleground states enjoy to more areas of the country.²¹³ At the same time, its structure helps to accentuate the positives of the district system and popular vote reform proposals, while diminishing many of the negative aspects of each of those proposals.²¹⁴ The District-Popular Plan's advantages outweigh its disadvantages, and it should be implemented in order to spread the positive effects of presidential campaigns throughout the country.

1. Under the District-Popular Plan, Presidential Campaigns Would Expand to More Areas of the Country

The biggest advantage of the District-Popular Plan is that it will include more states in presidential campaigns. Presidential campaigns currently focus only on battleground states.²¹⁵ Regardless of whether a state is large or small, if it is not competitive it will receive little, if any, attention in a presidential election.²¹⁶ As a result, most of the nation's

208. See *infra* Part VI.A.1–2.

209. See *infra* Part VI.A.3.

210. See *infra* Part VI.B.

211. See *infra* Part VI.C.

212. See *infra* Part VI.A.1.

213. See *infra* Part VI.A.2.

214. See *infra* Part VI.A.3.

215. See *supra* Part IV.C.

216. Joan Indiana Rigdon, *Electoral College Reform?*, WASH. LAW., Oct. 2007, at 22, 26.

population receives little attention from presidential campaigns.²¹⁷ Awarding electoral votes under the District-Popular Plan would cause presidential campaigns to strategize new ways to allocate their resources to win the votes of new groups of voters.²¹⁸

Candidates campaigning under the District-Popular Plan would campaign in what are currently considered safe states that are traditionally ignored under the winner-take-all approach.²¹⁹ Rather than targeting states, however, candidates would target districts within the states to win district votes, and major population centers to win the nationwide and statewide popular votes. Many states have districts favoring different parties, and candidates from both parties would visit these states to receive support from these districts, especially if the districts are competitive.²²⁰ With electoral votes in districts up for grabs, more states would benefit from the District-Popular Plan than they do under the current structure. For example, if the district system alone were in place in 2000, then the presidential campaigns would have targeted districts in forty-two states as opposed to the fourteen battleground states they targeted under the winner-take-all system.²²¹

Under the District-Popular Plan, presidential candidates would decide where to invest campaign resources to receive a majority of votes in the Electoral College.²²² Under the winner-take-all approach, presidential campaigns rank states as Base Democratic, Marginal Democratic, Battleground, Marginal Republican, and Base Republican.²²³ Similarly, under the District-Popular Plan, campaigns would rank districts according to these five categories.²²⁴ Candidates

217. *Id.*

218. See Goux & Hopkins, *supra* note 178, at 869 (stating that presidential campaigns would still strategize how to devote resources towards certain populations even if there were no Electoral College).

219. See ZEIDENSTEIN, *supra* note 197, at 11 (stating that the winner-take all method prevents both political parties from competing in states traditionally dominated by one party); Robynn Tysver, *Should State Change Electoral Vote?*, OMAHA WORLD-HERALD (Feb. 9, 2011), <http://www.omaha.com/article/20110209/NEWS01/702099866> (indicating that Obama, a Democrat, visited Nebraska, a traditionally Republican state, because the district system in Nebraska gave Obama a chance to win one of its districts).

220. See NEALE, 2003, *supra* note 103, at 7 (stating that different districts in a state may award their electoral votes to different candidates).

221. Turner, *supra* note 12, at 124.

222. See *id.* at 122 (stating that under a district system candidates would decide where to invest campaign resources to receive a majority of votes in the Electoral College).

223. See generally Daron R. Shaw, *The Methods Behind the Madness: Presidential Electoral College Strategies, 1988–1996*, 61 J. POL. 893, 898–904 (1999) (discussing grouping of states into Base Democrat, Marginal Democrat, Battleground, Marginal Republican, and Base Republican by presidential campaigns in the elections of 1988, 1992, and 1996, and presenting tables grouping states into these categories).

224. See Turner, *supra* note 12, at 122.

would focus heavily on battleground districts, less on marginal districts, and even less on base districts.²²⁵ In trying to win electoral votes in the districts, presidential candidates would focus their time and resources on the districts they determine are most winnable.²²⁶ However, even if some districts are ignored by the campaigns, they will receive spillover effects from campaign activities targeted at competitive districts, especially those emanating from campaign advertisements.²²⁷

In order to win the fifty-one nationwide popular votes, candidates would target major population centers. The ten largest media markets in the United States are home to approximately one third of all Americans.²²⁸ Both candidates, and their supporters, would spend a significant portion of their advertising budgets in these ten markets in order to reach a third of the population, which would give them an opportunity to win the fifty-one nationwide popular votes. Additionally, a television market may reach several congressional districts.²²⁹ Thus, there is a double incentive to invest in these media markets to help the candidate win the fifty-one nationwide popular votes, as well as individual districts.

Campaigns would also target advertisements at the district level.²³⁰ Candidates would likely choose which districts to target with advertisements based on how many districts were competitive in certain markets.²³¹ A media market with many competitive districts would likely see the campaigns spend on advertising to win the electoral votes of those districts. Even though the candidates would be targeting battleground districts with media advertising at the district level, neighboring non-battleground districts would receive positive results from the spillover effects of these ads, as voters in those districts would also see the ads.²³²

225. *Id.*

226. *Id.* at 122.

227. *Id.* at 123. Under the District-Popular Plan, candidates would focus part of their spending in states with competitive districts. In targeting these districts, voters in surrounding districts would also likely see the advertisements. Also, when presidential candidates visit competitive districts, voters in surrounding districts would be able to come and see the candidates.

228. Goux & Hopkins, *supra* note 178, at 872.

229. See Dena Levy & Peverill Squire, *Television Markets and the Competitiveness of U.S. House Elections*, 25 LEGIS. STUD. Q. 313, 315 (2000) (noting that the New York City media market contains thirty-three congressional districts).

230. See Turner, *supra* note 12, at 122 (stating that under a district system candidates would decide where to invest campaign resources to receive a majority of votes in the Electoral College).

231. See Daron R. Shaw, *Erratum for "The Methods Behind the Madness: Presidential Electoral College Strategies, 1988–1996"* The Journal of Politics 61:4 (November 1999), 893–913, 66 J. POL. 611, 612 tbl.2, 613–14 (2004) (finding that the Electoral College strategy of presidential campaigns is influenced by several factors, including competitiveness and electoral votes).

232. Turner, *supra* note 12, at 123.

2. The District-Popular Plan Would Increase Voter Turnout and Have Other Positive Effects in More Areas of the Country

Expanding the campaign to more areas of the country would result in higher levels of turnout nationwide. As noted in Part VI.A.1, campaigns would have an incentive to expand to more areas of the nation in order to receive electoral votes. These areas would receive some of the attention that currently only battleground states receive.²³³ In current battleground states, presidential campaign efforts of reaching out to voters, whether through personal contact or indirect contact through media coverage, result in higher levels of voter turnout.²³⁴ Battleground states also enjoy increased media spending by, and visits from, presidential candidates.²³⁵ Increased media spending and visits from presidential candidates lead to increased voter turnout.²³⁶ Under the District-Popular Plan, contacting efforts, visits, and campaign spending would be spread to more areas of the country. Thus, many areas of the country would see increased turnout. Additionally, with candidates campaigning in more areas, there would be an increase in voter knowledge and salience.²³⁷ Additionally, the interests of more voters would be considered because campaigns would turn their attention to a broader electorate.²³⁸ Thus, the District-Popular Plan would lead to many positive effects in more areas of the country.

The District-Popular Plan would maintain the Electoral College's objective of seeking the best overall national candidate who has strength spread across the country.²³⁹ As the campaign map is expanded, candidates would need even broader campaigns to assemble the

233. See *supra* Part IV.C.

234. Hill & McKee, *supra* note 166, at 704.

235. *Id.* at 711-13, 715.

236. *Id.* at 714-15.

237. See Benoit, Hansen & Holbert, *supra* note 183, at 184 (noting that voters "in battleground states had greater issue salience and knowledge than voters in states where advertisements were not broadcast"). Of course, one may argue that the increased turnout, knowledge, and salience in battleground states results from how much campaigning is actually conducted there. However, while the amount of campaigning would have an impact on increasing these levels, there comes a point of diminishing returns where candidates receive less benefit from investment after a certain amount of campaigning. See Thomas A. Evans, *An Empirical Test of Why Incumbents Adopt Campaign Spending Limits*, 132 PUB. CHOICE 437, 453 (2007) (noting that the excess campaign spending is unlikely to impact elections because of the rate of diminishing returns). Spreading the campaign to many more areas of the country would allow other areas to receive spending and advertisements and have a rise in turnout. Even if these levels dipped in battleground states, levels nationwide would likely go up.

238. See PATTERSON, *supra* note 184, at 141 (noting that campaign issues are shaped to suit the interests of residents in battleground states during close elections).

239. See ROSS, *supra* note 78, at 141-42 (stating that the purpose of the Electoral College is to find the best overall national candidate and the system favors candidates who have support spread across the country).

necessary majority of electoral votes, and would have to create national coalitions to do so.²⁴⁰ Presidential candidates would have to broaden their appeal to accommodate this diverse voting base. Under the District-Popular Plan, individual congressional districts make up the bulk of electoral votes. Many concerns of neglected areas of a state under a winner-take-all approach would not be neglected under the District-Popular Plan.²⁴¹ For example, if a state is part urban and part rural, it is likely that the urban voters outnumber the rural voters and the former would be the target of presidential campaign promises under a winner-take-all approach. However, when candidates compete for districts, an electoral vote from a rural district is the equivalent of an electoral vote from an urban district, and the concerns of both would be addressed.²⁴² Thus, areas traditionally ignored by the parties would be incorporated into campaign considerations.

Under the District-Popular Plan, voter turnout will rise not only because candidates will expand their campaigns to more areas, but also because the structure of the plan encourages voters to vote on their own initiative. Allocating electoral votes by district would provide an incentive for more voter involvement because it is possible for a minority party in a state to gain electoral votes from districts.²⁴³ The ability for a minority party's candidate to receive electoral votes from districts which favor the minority party in a state will energize voters in these districts to vote because their votes will not be ignored as they are under a winner-take-all system.

Along with allocating electoral votes at the district level, the fifty-one nationwide popular votes and fifty-one statewide popular votes would also help ensure that voters in a state that traditionally favored one party were included in presidential elections.²⁴⁴ The presence of these

240. See NEALE, 2003, *supra* note 103, at 4 (stating that under the Electoral College, candidates must conduct broad nationwide campaigns to garner a majority of electoral votes and forge national coalitions with wide appeal to do so).

241. See THOMAS H. NEALE, CONG. RESEARCH SERV., RS 20273a, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 4 (2001) (noting that a claimed advantage of the district system is that differences in support in different areas of a state are more accurately reflected).

242. See NEALE, 2003, *supra* note 103, at 7 (stating that under a district system the interests of both urban and rural voters in different districts would be recognized because each would have an electoral vote to give a presidential candidate who won the district).

243. THOMAS H. NEALE, CONG. RESEARCH SERV., RL 32831, THE ELECTORAL COLLEGE: REFORM PROPOSALS IN THE 109TH CONGRESS 5-6 (2007) [hereinafter NEALE, 2007].

244. See CONG. RESEARCH SERV., PROPOSALS TO REFORM OUR PRESIDENTIAL ELECTORAL SYSTEM, *supra* note 115, at 94 (stating that if a nationwide popular vote was implemented for election of the president that would invigorate the two-party system in areas of the country where one party has traditionally dominated the electoral vote because votes everywhere would be added to the national total for the candidates).

electoral votes would also lead to higher turnout nationwide. The Electoral College in its current form depresses voter turnout in many areas of the nation.²⁴⁵ This occurs because the election has been primarily narrowed to battleground states.²⁴⁶ However, a voter's knowledge that votes will be calculated at the national level, as well as at the district level, would give that voter a double incentive to vote.²⁴⁷

For example, under the current winner-take-all system, the vote of any Republican voter in a state that votes heavily Democratic is silenced at the state level because the Democratic candidate receives all of the state's electoral votes.²⁴⁸ However, under the District-Popular Plan the winner of the nationwide popular vote receives fifty-one electoral votes, so that Republican's vote would play a role at the national level for the fifty-one electoral votes tied to the nationwide popular vote. Thus, if the Republican voter's district votes Democrat, the Republican voter may help the Republican candidate win the nationwide popular vote and the ensuing fifty-one popular votes. The Republican voter can also help the Republican Party win the state's at-large vote tied to the statewide popular vote, giving the voter another incentive to vote. Knowing that their vote will be counted in a nationwide and statewide tally, voters in districts that are considered safe, or in areas of the country that may not be visited by presidential candidates, would be encouraged to vote in the election, as their vote can still help their candidate win electoral votes. Personal knowledge that one's vote may help a candidate win electoral votes would increase voter turnout nationwide, even where campaigns spent little time or resources.

245. Jamin B. Raskin, *Neither the Red Nor the Blue States but the United States: The National Popular Vote and American Political Democracy*, 7 ELECTION L.J. 188, 190 (2008); see PATTERSON, *supra* note 184, at 137 (stating that citizens may have less reason to vote in states which are not part of the Electoral College strategies of presidential candidates).

246. See PATTERSON, *supra* note 184, at 137 (stating that citizens may have less reason to vote in states which are not part of the Electoral College strategies of presidential candidates).

247. See NEALE, 2007, *supra* note 243, at 5-6 (noting that proponents of the district plan suggest that it may encourage more voter involvement because it is possible for each party to win districts, even in states traditionally dominated by one party); CONG. RESEARCH SERV., PROPOSALS TO REFORM OUR PRESIDENTIAL ELECTORAL SYSTEM, *supra* note 115, at 94 (stating that if a nationwide popular vote was implemented for election of the president, that would invigorate the two-party system in areas of the country where one party has traditionally dominated the electoral vote because votes everywhere would be added to the national total for the candidates).

248. See CONG. RESEARCH SERV., PROPOSALS TO REFORM OUR PRESIDENTIAL ELECTORAL SYSTEM, *supra* note 115, at 28, 94 (noting that under a winner-take-all system, a state's entire electoral vote goes to the candidate that receives the most votes in a state, and that a party's votes in a state traditionally dominated by one party do not help the party that much).

3. The District-Popular Plan Has More Advantages than Other Methods of Allocating Electoral Votes

The structure of the District-Popular Plan is what makes it a better way to allocate electoral votes than other reform proposals. Through its structure, it avoids drawbacks present in the other reform proposals, and with the current winner-take-all method of allocating electoral votes. An argument in favor of the winner-take-all method is that states which employ this method benefit politically because a candidate has a chance to win all of that state's electors.²⁴⁹ By providing a candidate with all of its electoral votes, a state perceives itself as maximizing its power in presidential elections.²⁵⁰ However, this justification breaks down when many states allocate their votes under the winner-take-all system.

Many large states are politically disadvantaged under the winner-take-all system and receive no benefits from presidential campaigns.²⁵¹ For example, presidential campaigns have ignored Texas since 1980.²⁵² If a district system had been in place in Texas in 2000, half of its districts would have been battleground or marginal districts and it would have been highly likely that both presidential campaigns would have campaigned in Texas for some of these votes.²⁵³ Dividing a state's electoral votes increases the chances that it will receive attention from presidential campaigns. This was seen in 2008 when presidential candidate Barack Obama visited Nebraska, which employs the district system, in order to attract one electoral vote.²⁵⁴ Obama was rewarded for his efforts, winning Nebraska's Second Congressional District.²⁵⁵ Even small states are politically disadvantaged by the current winner-take all rule, and would attract more attention from candidates, as did Nebraska in 2008, if candidates could gain electoral votes in those states.²⁵⁶ Every

249. See Amar & Amar, *supra* note 134, at 927-28 (noting that, if one takes as a premise a state's desire to maximize its importance in presidential elections, a state which provides a candidate with all of its electoral votes candidate may have candidates tailor their platform to that state's residents).

250. See *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622, 628 (E.D. Va. 1968), *aff'd*, 393 U.S. 320 (1969) (noting that Virginia's legislature chose to maximize its impact in the Electoral College by allocating its electoral votes under a winner-take-all basis); Festa, *supra* note 50, at 2129 n.225 (noting that a state maximizes its electoral influence under a winner-take-all system).

251. Schleifer, *supra* note 53, at 723; see *supra* Part IV.C.

252. Turner, *supra* note 12, at 123.

253. See *id.* (stating that if Texas had a district system in 2000, then there would have been strong incentive for both presidential campaigns to have campaigned in some of Texas's districts).

254. Scott Conroy, *Palin Says Omaha Visit Was Not Campaign's Call, It Was Hers*, CBS NEWS (Oct. 5, 2008), http://www.cbsnews.com/8301-502443_162-4502743-502443.html.

255. Adam S. Morfeld, Comment, *Addressing Constitutional Concerns and Strengthening Nebraska's Election Administration: A Roadmap to Substantive Reform*, 90 NEB. L. REV. 786, 800 (2012).

256. See Banzhaf III, *supra* note 151, at 313 (finding that the winner-take-all system deprives

state needs to reevaluate what it perceives itself as maximizing by adhering to a winner-take-all method of allocating electoral votes.

A majority of states are disadvantaged by the current winner-take-all system because candidates focus on battleground states.²⁵⁷ Non-battleground states receive far less visits, advertising spending, and attention from the candidates.²⁵⁸ As they are not receiving visits and advertising spending, their citizens are less knowledgeable on political issues and turn out to vote in lower levels than citizens in battleground states.²⁵⁹ Additionally, campaign issues are shaped to the interests of voters in battleground states.²⁶⁰ These effects illustrate that many states who allocate their electors on a winner-take-all basis disadvantage their citizens. In contrast, as discussed above, the District-Popular Plan would expand elections and their benefits.

The direct-popular vote would focus candidate attention on major population centers.²⁶¹ Many other areas of the country could be ignored and not have their interests considered by the candidates.²⁶² The District-Popular Plan would allow candidates to focus attention not only on major population centers, but also on other areas as well. The reason other areas would be given attention is because the nationwide popular vote only represents fifty-one electoral votes. Campaigns would need to remain broad to meet the needs of individuals in districts, who may have different needs than those in major population centers.²⁶³

citizens in small states of voting power in comparison to citizens in large states). As of September 2012, Obama had devoted considerably less resources to campaigning in Nebraska's Second Congressional District than he did in 2008. Robynn Tysver, *Fewer Obama Resources in Omaha This Time Around*, OMAHA WORLD-HERALD (Sept. 5, 2012), <http://www.omaha.com/article/2012/0904/NEWS/709059933/1685#fewer-obama-resources-in-omaha-this-time-around>. However, this is likely due to redistricting after the 2010 census which made the district more Republican. Micah Cohen, *Nebraska G.O.P. Draws a Tougher Map for Obama*, N.Y. TIMES: FIFTYTHREE (Sept. 23, 2012), <http://fivethirtyeight.blogs.nytimes.com/2012/09/23/nebraska-g-o-p-draws-a-tougher-map-for-obama/>.

257. See *supra* Part IV.C.

258. See *supra* Part IV.C.

259. See *supra* Part IV.C.

260. See *supra* Part IV.C.

261. ROSS, *supra* note 78, at 80-81; see Sarah M. Wheeler, *Policy Point-Counterpoint: Electoral College Reform*, 82 INT'L SOC. SCI. REV. 176, 177 (2007) (observing that some opponents of a popular vote argue that candidates will not have much incentive to visit sparsely populated states and will instead concentrate on large urban areas with many voters if a popular vote is instituted).

262. See ROSS, *supra* note 78, at 80-81.

263. See *id.* at 87-88 (stating that the Electoral College forces presidential candidates to build a national support base). As the District-Popular Plan retains the structure of the Electoral College and distributes votes according to the districts and the popular vote, campaigns would need to remain broad to win many electoral votes.

A pure district system would have candidates focus on individual districts, but does not appeal to advocates of the popular vote because the electoral vote winner could be the popular vote loser.²⁶⁴ Under the District-Popular Plan, candidates are encouraged to seek the popular vote, while still competing for districts. Although it may still be possible to elect a “minority president” under the District-Popular Vote, the popular vote would play a more prominent role under the District-Popular Plan than a pure district system. Thus, because the popular vote plays a role in the District-Popular Plan, both in awarding fifty-one votes to the winner of the nationwide popular vote, and encouraging candidates to build a popular vote lead, it reduces the likelihood of a “minority president.”

In comparison to the proportional plan, the District-Popular Plan does not have to worry about dividing votes into percentages because whole votes are awarded under the District-Popular Plan.²⁶⁵ Moreover, the proportional plan would still have candidates campaign to major population centers, because candidates receive a percentage of the popular vote in each state.²⁶⁶ Although candidates would campaign in more states than in a popular vote system, it would not have candidates campaign in as many diverse places as the District-Popular Plan would. Under the District-Popular Plan, candidates would be campaigning in districts as well as for the popular vote lead.

The National Bonus Plan does not fix the winner-take-all problem, and, as a result, battleground states would still play a role in the election.²⁶⁷ Under the District-Popular Plan, candidates would campaign in many more areas of the country.²⁶⁸ Additionally, the National Bonus Plan would have to be implemented by a constitutional amendment.²⁶⁹ The District-Popular Plan does not necessarily require a constitutional amendment.²⁷⁰

264. PEIRCE & LONGLEY, DIRECT VOTE ALTERNATIVE, *supra* note 22, at 141.

265. See Wagner, *supra* note 130, at 586 (stating that a problem with the proportional plan is how to convert uneven percentages of a state’s popular vote).

266. See *supra* Part V.C (discussing the structure of the proportional plan).

267. See KEECH, *supra* note 111, at 5 (describing the National Bonus Plan as adding two electoral votes for every state and D.C., to be awarded to the winner of the nationwide popular vote, but not addressing how states allocate electoral votes).

268. See *supra* Part VI.A.

269. Schlesinger, *supra* note 203, at 61.

270. See *infra* Part VI.B.

B. *Ways to Implement the District-Popular Plan*

There are three primary ways to implement the District-Popular Plan. One way is through an interstate compact similar to the National Popular Vote (“NPV”). Another is through a voter initiative. A third way would be through a constitutional amendment. Part VI.B.2 concludes that a ballot initiative would not be a good way to implement the District-Popular Plan. Parts VI.B.1 and VI.B.3 recommend that an interstate compact or constitutional amendment would be the best methods to implement the District-Popular Plan. Parts VI.B.1 and VI.B.3 show that implementing the District Popular Plan through an interstate compact or constitutional Amendment has advantages and disadvantages, depending on which route is chosen, and concludes that the two be pursued simultaneously to try to cancel out the disadvantages that each has.

1. Interstate Compact

The most straightforward and least cumbersome way to implement the District-Popular Plan would be through an interstate compact. The process would be similar to that which states use to implement the NPV.²⁷¹ Every state would pass legislation for the District-Popular Plan with language that says that it will only take effect if a certain number of other states also pass the same or similar legislation.²⁷² By delaying the implementation until its effects can be felt, states do not have to worry about losing electoral power by switching now and waiting for other states to switch.²⁷³ The Constitution likely grants states the power to institute the District-Popular Plan through an interstate compact.

The Constitution provides that no state shall enter into an agreement or compact with another state unless Congress gives its consent.²⁷⁴ However, not all interstate agreements need congressional consent.²⁷⁵

271. See *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE (Jan. 7, 2012), <http://www.nationalpopularvote.com/resources/1-Pager-NPV-V108-2012-1-7.pdf> (providing that when enough state legislatures constituting a majority of electoral votes passed the NPV legislation, that each state that passed the legislation would award its state's electoral votes to the winner of the nationwide popular vote).

272. See, e.g., CAL. ELEC. CODE § 6921 (West 2012) (providing that legislation that would award the state's electoral votes to the winner of the nationwide popular vote would only take effect if enough states to constitute a majority of the electoral votes also passed the legislation).

273. Akil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW (Dec. 28, 2001), <http://writ.news.findlaw.com/amar/20011228.html>.

274. U.S. CONST. art. I, § 10.

275. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978); Robb, *supra* note 85, at 454.

The test for determining whether an interstate agreement needs congressional consent is whether the agreement would increase the power of the states at the expense of the federal government.²⁷⁶ The test focuses on potential, not actual, impact on federal supremacy.²⁷⁷ The Supreme Court has held that an agreement that does not increase the powers of the agreeing states, that does not delegate the sovereign authority of the state to another body, and that allows states to withdraw at any time, is a valid agreement that does not require congressional approval.²⁷⁸ Implementing the District-Popular Plan through an interstate agreement would pass this test.

The Constitution grants states broad latitude in determining how to allocate presidential electors.²⁷⁹ The U.S. Supreme Court held in *McPherson v. Blacker*²⁸⁰ that “the appointment and mode of appointment of electors belong *exclusively* to the States under the Constitution.”²⁸¹ More recently, the Supreme Court reaffirmed this authority in *Bush v. Gore*,²⁸² holding that “the state legislature’s power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself.”²⁸³ Thus, because states have the exclusive power to determine the appointment of electors, an interstate agreement for the District-Popular Plan would not increase the power of states at the expense of the federal government, and would not require congressional approval.²⁸⁴ Additionally, the District-Popular Plan does not delegate a state’s sovereignty to another body, and would allow states to withdraw at any time, which provides further support for the conclusion that it does not need congressional approval.²⁸⁵

276. *U.S. Steel Corp.*, 434 U.S. at 471, 473; *New Hampshire v. Maine*, 426 U.S. 363, 369-70 (1976); see Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 522-26 (2009) (reviewing the current state of the law regarding the interstate Compact Clause).

277. *U.S. Steel Corp.*, 434 U.S. at 472.

278. *Id.* at 473.

279. See U.S. CONST. art. II, § 1 (stating that each state appoints electors “in such Manner as the Legislature thereof may direct”).

280. 146 U.S. 1 (1892).

281. *Id.* at 35 (emphasis added).

282. 531 U.S. 98 (2000) (per curiam).

283. *Id.* at 104.

284. See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 471, 473 (1978) (holding that congressional approval is not needed for an agreement between states that does not increase the power of the states at the expense of the federal government); Hendricks, *supra* note 9, at 224-25 (stating that the NPV agreement among the states should pass the Supreme Court’s test on the Compact Clause).

285. See *U.S. Steel Corp.*, 434 U.S. at 473 (holding an agreement between states valid that did not delegate a state’s sovereignty to another body and that allowed states to withdraw from it at any time). Although states that do not join an interstate agreement for the District-Popular Plan may be affected by the plan, it is irrelevant to count the number of states to an agreement if the agreement

A major problem with implementing the District-Popular Plan through an interstate compact is that states are not bound by this type of compact and may withdraw.²⁸⁶ Another problem is determining the requisite number of states needed to pass the legislation in order to make the plan effective. The NPV provides that when enough states that constitute a majority of electoral votes pass NPV legislation, that it will go into effect.²⁸⁷ Unlike the NPV which ties electoral votes to the nationwide popular vote, the District-Popular Plan ties electoral votes to the nationwide popular vote, the statewide popular vote, and the popular vote in individual districts.²⁸⁸ Under the District-Popular Plan, it will be more difficult to determine the number of states needed before the plan takes effect because of the fractured way of allocating electoral votes. Although these drawbacks exist, the interstate compact is still an effective way of implementing the District-Popular Plan, as states can change the operation of the Electoral College without amending the Constitution.

2. Voter-Initiative

Another way to implement the District-Popular Plan would be through a voter initiative.²⁸⁹ In recent years, voter-initiatives have been used in several states to try to reform a state's method of allocating electoral votes.²⁹⁰ In 2004, Colorado used a ballot initiative to try to allocate its electoral votes proportionally to the state popular vote.²⁹¹ A state's citizens would start this process by petitioning a suggested law on a ballot.²⁹² If approved by the voters, it would become law.²⁹³ However, there are two major problems in using a voter initiative to implement the

does not enhance state power at the expense of the federal government's supremacy. *Id.* at 472.

286. See Chang, *supra* note 11, at 212-13 (stating that states may withdraw from the NPV legislation at any time, unless this withdrawal takes place in the last six months of a president's term).

287. See *Agreement Among the States to Elect the President by National Popular Vote*, *supra* note 271 (providing that the NPV would only take effect when enough states that constituted a majority of electoral votes in the Electoral College passed the legislation).

288. See *id.* (providing that each state legislature would award its state's electoral votes to the winner of the nationwide popular vote).

289. See John C. Armor, *Electoral College Reform: By the Numbers*, CONTINGENCIES, Sept./Oct. 2001, at 38, 44, <http://www.contingencies.org/sep/oct01/electoral.pdf> (stating that citizens in some states can use an initiative process to pass a District System without having to wait for legislative action).

290. Michael McLaughlin, Note, *Direct Democracy and the Electoral College: Can a Popular Initiative Change How a State Appoints Its Electors?*, 76 FORDHAM L. REV. 2943, 2947-49 (2008); Wagner, *supra* note 130, at 589-92.

291. CEASER & BUSCH, *supra* note 16, at 170.

292. Armor, *supra* note 289, at 44.

293. *Id.*

District-Popular Plan. First, not every state utilizes voter initiatives.²⁹⁴ Additionally, in some states that do use it, the initiative is not binding.²⁹⁵ As such, the popular initiative is probably not the best method of implementing the District-Popular Plan.

3. Constitutional Amendment

A third way to implement the District-Popular Plan would be through a constitutional amendment.²⁹⁶ Passing a constitutional Amendment is a two-step process that includes a proposition phase, and a ratification phase. Each phase can be undertaken by two different methods. Article V of the Constitution provides two methods to begin the proposition phase “Congress, [(1)] whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, [(2)] on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.”²⁹⁷ After this proposition phase, an Amendment enters the ratification phase. Article V provides that Amendments are valid “when ratified [(1)] by the Legislatures of three fourths of the several States, or [(2)] by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.”²⁹⁸ Either method in the proposition and ratification phases of the Amendment process would be a viable way to implement the District-Popular Plan.

Of the two ways to begin the proposition phase, the first method (the “Congressional Initiative”), may be easier to accomplish than the second method (the “State Initiative”).²⁹⁹ The Congressional Initiative amendment process begins when two-thirds of both Houses “deem it necessary” to propose constitutional amendments.³⁰⁰ All that is needed to show that Congress deemed an amendment necessary is an adoption in both houses, each with a two-thirds vote, of a joint resolution proposing a constitutional amendment.³⁰¹ This is logistically easier to accomplish than the State Initiative, as everything would occur in one place—

294. See Chang, *supra* note 11, at 214-15.

295. See *id.*

296. See U.S. CONST. art. V (providing for amendments to the Constitution).

297. *Id.*

298. *Id.*

299. See Richard L. Hasen, *When “Legislature” May Mean More Than “Legislature”*: Initiated Electoral College Reform and the Ghost of Bush v. Gore, 35 HASTINGS CONST. L.Q., 599, 602-03 (2008) (stating that using Article V conventions as a route for amending the Constitution is a more difficult route than congressionally proposed amendments).

300. U.S. CONST. art. V.

301. Nat’l Prohibition Cases, 253 U.S. 350, 386 (1919). An express declaration that Congress deemed the Amendment necessary is not required. *Id.*

Congress. Historically, however, a large percentage of proposed amendments have failed to receive two-thirds of votes in each house of Congress, and have not been sent for ratification.³⁰² Thus, although this route is efficient logistically, the chance that it passes both houses with a two-thirds vote is unlikely.

The State Initiative may be more burdensome in trying to achieve Electoral College reform. This method requires many steps and actors. To begin this process, the legislatures of two-thirds of the states would submit to Congress an application for amending the Constitution.³⁰³ Once this step is completed, Congress would then call a convention to propose amendments.³⁰⁴ The Convention would then propose amendments.³⁰⁵ After this proposition phase is complete, the proposed amendments would go back to the states for ratification.³⁰⁶ The State Initiative requires more steps than the Congressional Initiative, which requires only a two-thirds passage in both Houses, then submission to the states for ratification.³⁰⁷ It also requires more actors, as many state legislatures would need to agree on an application, and then Congress would have to act. Additionally, the State Initiative is riddled with question marks because a Convention has never been used before.³⁰⁸

However, if the State Initiative route is used, states can simultaneously submit applications for amending the Constitution while passing an interstate compact agreeing to allocate electoral votes under the District-Popular Plan. The applications for amending the Constitution and the legislation for an interstate compact can be passed back to back in a state's legislature. Although a two-thirds majority of the legislatures needed to complete the State Initiative may be hard to reach, at least this would give the District-Popular Plan a chance at becoming an amendment.³⁰⁹ If the two-thirds of states requirement is not

302. Ruth Bader Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. ARK. LITTLE ROCK L.J. 677, 690 (1989–1990).

303. U.S. CONST. art. V.

304. *Id.*

305. Bill Gaughush, *Principles Governing the Interpretation and Exercise of Article V Powers*, 35 W. POL. Q. 212, 217 (1982).

306. U.S. CONST. art. V.

307. *Id.*

308. Charles McC. Mathias, Jr., *What's the Constitution Among Friends?*, 67 A.B.A. J. 861, 861 (1981); Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1512, 1532 (2010). The Framers are of little help regarding the convention method, as no evidence exists as to the Framers' specific intent concerning amendment conventions. Gaughush, *supra* note 305, at 217.

309. States may be reluctant to call a convention because of its uncertainties and the possibility that it may propose amendments the states did not intend. Rappaport, *supra* note 308, at 1512–13, 1532. However, although it is uncertain, states may be able to limit the convention to certain Amendments. See generally *id.* at 1517–23. Thus, the states calling a convention for the District-

reached, at least there may be enough states necessary for an interstate compact to take effect. In using the State Initiative, even if the two-thirds requirement cannot be met, when enough states call for a Convention, Congress has started its own Amendment process.³¹⁰ Thus, calling for a Convention can give Congress the initiative to start its own amendment process for the District-Popular Plan.

Once proposed, the amendment must be ratified.³¹¹ Of the two ways to achieve ratification, ratification by the legislatures of three-fourths of the states is recommended. However, the ratification process represents another roadblock for using a constitutional amendment to implement the District-Popular Plan. It is incredibly difficult to pass an amendment.³¹² Thirty-eight states are needed to ratify an amendment, so it only takes thirteen states to defeat it.³¹³ Some states may oppose amendments which would diminish their electoral voting power. For example, a potential problem of implementing the National Bonus Plan is that the 102 added electoral votes are more votes than many of the smaller states.³¹⁴ As a result, it would be unlikely that enough states would support an amendment for the National Bonus Plan.³¹⁵ As tying the allocation of a large amount of electoral votes to the national popular vote is similar under the District-Popular Plan, it may be difficult to get small states to support this Amendment.³¹⁶ Additionally, current battleground states may also try to prevent the plan's adoption through a constitutional Amendment, as they risk losing their current level of attention from the candidates.³¹⁷ Thus, it may be difficult to get enough legislators from states to support an Amendment, as they may perceive their states as losing power under the District-Popular Plan.

Moreover, unless an amendment is noncontroversial, many amendments come in clusters and address long term stresses which are relieved through a string of amendments.³¹⁸ There is likely not enough built up stress in the populace to address Electoral College reform through an amendment. If there was a stressful point, it would have been

Popular Plan may be able to limit the convention to that purpose.

310. Mathias, *supra* note 308, at 861.

311. U.S. CONST. art. V.

312. Hasen, *supra* note 299, at 602.

313. BEST, THE CHOICE OF THE PEOPLE?, *supra* note 102, at 63.

314. *Id.*

315. *Id.*

316. *See id.* (noting that because the bonus votes awarded to the national popular vote winner under the National Bonus Plan are more than the electoral votes of many small states, small states may not ratify the plan).

317. *See infra* Part VI.C.

318. Ginsburg, *supra* note 302, at 685-86.

after the 2000 Election, but even after that election there was no serious challenge to the Electoral College.³¹⁹ As a result of these obstacles, Electoral College reform is unlikely in the near future, and judging by history, has little chance of success unless a major turning point is reached.

Although a constitutional amendment would implement the District-Popular Plan permanently, it would be very difficult to achieve. As such, it is recommended that an amendment be proposed simultaneously with an interstate compact implementing the plan. At the same time, Congress should also start the amendment process by itself, as that is a logistically easier route than getting enough states to start the process. A movement to try to implement the District-Popular Plan through an Amendment would be beneficial because an amendment would require all states to use the plan, and states could not back out of it as they could under an interstate compact.³²⁰ Additionally, an amendment may give the plan some legitimacy, as it does not seem like an end-run around the Constitution.³²¹

C. Addressing Potential Problems with the District-Popular Plan

Critics of the District-Popular Plan may point to potential problems that would render it ineffective or stop its implementation. When examined in greater depth, these critiques are not as strong as they seem. One potential argument against the District-Popular Plan could be that gerrymandered congressional districts would make the districts uncompetitive for presidential elections.³²² For example, in 2004, only twenty-two House races nationwide were decided by a margin of less than ten percentage points.³²³ House seats are particularly easy for incumbents to win. For example, the reelection rate of incumbent House

319. CEASER & BUSCH, *supra* note 16, at 170-72. Even if many citizens wanted to change the Electoral College after an election like the one in 2000, there may be some political pushback from the party that won the election. See Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 70 n.6 (2010) (noting that a party that was favored by the system that produced a president would not want to delegitimize the system that produced the president). However, a couple of elections close in time where the nationwide popular vote winner did not become president due to the Electoral College outcome, may provide the incentive for a change to the system. CEASER & BUSCH, *supra* note 16, at 172.

320. See U.S. CONST. art. V (allowing Amendments to the Constitution).

321. Gringer, *supra* note 129, at 223-24 (stating that the NPV has legitimacy problems because it is essentially an "end run" around the Constitution).

322. See John N. Friedman & Richard T. Holden, *The Rising Incumbent Reelection Rate: What's Gerrymandering Got to Do With It?*, 71 J. POL. 593, 595 (2009) (explaining that gerrymandering is the redrawing of district lines to favor a political party or an incumbent).

323. Alan Abramowitz, Brad Alexander & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75, 75 (2006).

members has increased since World War II, with 97% of incumbents being reelected between 1982 and 2000, and 99% between 2002 and 2004.³²⁴ These statistics show that districts are often safely Democrat or safely Republican, and critics may draw an inference that this would carry over into presidential elections as well. However, it is only an assumption that the traits of “safe” congressional districts for Congressmen would spill over into presidential races at the district level.³²⁵

Gerrymandered congressional districts may not play the same role in presidential races at the district level as they do at the congressional level. Voters in a congressional district may support candidates from different parties for different offices.³²⁶ With split-ticket voting, voters vote for a candidate from one party for president, and a candidate from the other party for Congress.³²⁷ In recent elections, roughly fifteen to 20% of Americans split their tickets when voting for the president and members of the House.³²⁸ Split-ticket voting plays a role in a district’s fractured support for candidates for different offices.³²⁹

Fractured support in a district with candidates running for different offices can take place in one of two ways. The first is voters in the district support the *same* party for different offices, but with different levels of support. The second is voters in the district support candidates from *different* parties for different offices. Many districts fall under the first scenario, where voters in the district vote for candidates from the same party for different offices, but give different levels of support.³³⁰

324. *Id.*

325. Armor, *supra* note 289, at 44-45.

326. See Barry C. Burden & David C. Kimball, *A New Approach to the Study of Ticket Splitting*, 92 AM. POL. SCI. REV. 533, 535 (1998) (noting an increase in the number of congressional districts that have split results in House and presidential contests); Christopher G. Healey, *2012 U.S. Election Visualizations*, N.C. ST. U.: DEP’T COMPUTER SCI., http://www.csc.ncsu.edu/faculty/healey/US_election/ [hereinafter Healey, *2012 Election*] (showing some districts support different parties for the presidency and the House); see also Christopher G. Healey, *2008–2009 U.S. Election Visualizations*, N.C. ST. U.: DEP’T COMPUTER SCI., http://www.csc.ncsu.edu/faculty/healey/US_election/2009/ [hereinafter Healey, *2008 Election*].

327. Kenneth Mulligan, *Partisan Ambivalence, Split-Ticket Voting, and Divided Government*, 32 POL. PSYCHOL. 505, 505 (2011).

328. *Id.* at 513 fig.1.

329. See Healey, *2012 Election*, *supra* note 326 (showing a map of the United States district by district and indicating what party each candidate supported as its representative, senator, president, and governor); see also Healey, *2008 Election*, *supra* note 326.

330. See generally CONGRESSIONAL QUARTERLY, *POLITICS IN AMERICA 2010* (Chuck McCutcheon & Christina L. Lyons eds., 2011) [hereinafter C.Q., 2010] (providing the amount of the popular vote presidential and house candidates received in individual districts); Healey, *2012 Election*, *supra* note 326 (showing a district by district breakdown of the 2012 presidential election and each district’s varying support for candidates running for the presidency, the House, the Senate, and for governor); see also, Healey, *2008 Election*, *supra* note 326 (showing a district by district

For example, in 2008, a higher percentage of voters in Maine's First Congressional District voted for the Democratic presidential candidate, Barack Obama, than they did for the Democratic House candidate.³³¹ In Maine's Second Congressional District, a lower percentage of voters voted for Obama than they did for the Democratic House candidate.³³² Interestingly, both of Maine's districts supported a Republican candidate for the Senate.³³³ Thus, at the district level, voter support for the same party may be different for different offices.

In the second scenario, voters in a district support candidates from different parties for different offices.³³⁴ For example, in 2008, Iowa's Fourth Congressional District supported Democratic presidential candidate Barack Obama, but elected a Republican House member.³³⁵ Conversely, South Dakota supported Republican presidential candidate John McCain, but elected a Democratic House member as its statewide representative.³³⁶ Although this happens less frequently than the first scenario, this shows that at the district level, voters may not even support the same party.

Candidate traits may also affect which candidate voters support.³³⁷ Candidates who take on traits that resemble the opposing party may be able to receive more support from voters.³³⁸ Additionally, different background traits of the candidate, such as military service or experience as a governor, may affect voter approval of a candidate.³³⁹ Personal character traits such as honesty, integrity, and other character values also play a role in qualities that the public looks for in a presidential

breakdown of the 2008 presidential election and each district's varying support for candidates running for the presidency, the House, the Senate, and for governor).

331. C.Q., 2010, *supra* note 330, at 450, 456; Healey, 2008 *Election*, *supra* note 326.

332. C.Q., 2010, *supra* note 330 at 450, 457; Healey, 2008 *Election*, *supra* note 326.

333. Healey, 2008 *Election*, *supra* note 326. Healey's results show the district support for candidates for different offices in the most recent election for that office. *Id.* Thus, support for senators and governors may not be reflective of the 2008 election. *See id.* However, in 2008, Maine did have a Senate seat up for election. C.Q., 2010, *supra* note 330, at 454.

334. *E.g.*, C.Q., 2010, *supra* note 330, at 506, 530 (showing that in 2008 Michigan's Eleventh Congressional District supported a Democratic presidential candidate and elected a Republican candidate into the House); *see* Healey, 2012 *Election*, *supra* note 326 (showing a map of the United States district by district and that some districts supported a candidate from a different party for the presidency and the House); *see also* Healey, 2008 *Election*, *supra* note 326.

335. C.Q., 2010, *supra* note 330, at 386, 398; Healey, 2008 *Election*, *supra* note 326.

336. C.Q., 2010, *supra* note 330, at 917, 923; Healey, 2008 *Election*, *supra* note 326.

337. Danny Hayes, *Candidate Qualities Through a Partisan Lens: A Theory of Trait Ownership*, 49 J. POL. SCI. 908, 909 (2005).

338. *Id.* at 919-20.

339. THE PEW RESEARCH CTR., CANDIDATE TRAITS: D.C. EXPERIENCE VIEWED LESS POSITIVE AT 10, available at <http://www.people-press.org/files/legacy-pdf/06-02-11%202012%20Campaign%20Release.pdf>.

candidate.³⁴⁰ This shows that who the candidate is may affect the level of support the candidate will receive in different districts. A candidate that has positive traits may be able to receive votes even in heavily gerrymandered districts. Thus, split-ticket voting, fractured support for candidates, and candidate traits and qualities all mitigate the effects of gerrymandering.

Another potential critique of the District-Popular Plan is that it may turn into a *de facto* nationwide popular vote reform.³⁴¹ The fifty-one electoral votes awarded to the winner of the nationwide popular vote is the largest electoral prize under the plan. One may argue that candidates may focus on major population centers to win this large share of electoral votes, and rely on safe districts to make up the rest of their electoral vote total. Additionally, one may argue that targeting population centers will help candidates win some of the fifty-one electoral votes awarded to the winner of each statewide popular vote, adding extra incentive to target population centers at the expense of districts. Critics may conclude that this would compromise the goal of the District-Popular Plan to extend the benefits of presidential elections to more areas of the country.³⁴² However, the structure of the District-Popular Plan makes this outcome unlikely. In fact, as originally designed, the District-Popular Plan had awarded all of the 102 at-large votes tied to the Senate seats to the winner of the nationwide popular vote. It was redesigned to its current structure to make it less likely that it would turn into a *de facto* popular vote.

The structure of the District-Popular Plan prevents it from turning into a *de facto* popular vote for two reasons. First, there are likely not enough safe electoral votes at the district level for a candidate to ignore campaigning at the district level. A candidate needs to receive 270 electoral votes to win the election, and if the candidate focuses only on the nationwide popular vote, they may not get enough electoral votes from districts to win the presidency. Second, if one candidate is trailing in the nationwide polling or has less safe districts, that candidate may turn the campaign's attention to competitive districts or districts that lean towards the opposing candidate, forcing the opponent to campaign in those districts.

340. Ron Fournier & Trevor Tompson, *Voters Say Honesty, Integrity Trump Policies in Presidential Candidates*, USA TODAY (Mar. 12, 2007), http://usatoday30.usatoday.com/news/washington/2007-03-11-candidate-traits_N.htm.

341. See ROSS, *supra* note 78, at 150-51 (stating that under the National Bonus Plan, which gives 102 electoral votes to candidates who win the nationwide popular vote, presidential candidates would put their primary focus on popular vote totals).

342. See *supra* Part VI.A.1.

Short of a landslide election, there will likely not be enough safe electoral votes from the districts for a presidential candidate to ignore campaigning at the district level. For example, when looking at Table 3, *infra*, in 2008 there were 135 districts where Obama had a favorable vote margin of over 20%, 23 districts between 16 and 20%, and 29 districts between 11 and 15%.³⁴³ This represents 187 total districts that can be labeled safe.³⁴⁴ At one point in the 2008 election, there were thirteen states that leaned Democratic, twenty-two that leaned Republican, and sixteen battleground states.³⁴⁵ If, under the District-Popular Plan, the statewide at-large votes tied to one of the Senate seats from the thirteen states that leaned Democratic were added to Obama's 187 safe district total, Obama would have had 200 safe electoral votes. If Obama wanted to campaign only for the 51 electoral votes tied to the winner of the nationwide popular vote, that would only total 251 electoral votes. Obama could also count on some electoral votes from winning the statewide popular vote in some of the battleground states, but he would still need to campaign in the remaining competitive districts in order to achieve the 270 electoral vote majority needed to become president. One may argue that the states in the 6 to 10% category should be added in, and this would put Obama over the 270 mark. However, these districts can be considered competitive or leaning districts, as a swing of 3 to 5% of voters would make them even races. Of course, all of these numbers are based on retrospective data, and the numbers may have been different if the candidates campaigned under the District-Popular Plan because they would have had different strategies to win electoral votes.

The second factor, a trailing candidate campaigning in competing or leaning districts, also plays a key role. In 2008, if the district and statewide numbers are added for McCain in the same way they were added for Obama in the preceding paragraph, then McCain would have had 142 safe districts and statewide votes.³⁴⁶ Even if McCain won the nationwide popular vote, capturing those fifty-one electoral votes, he would only be at 193 electoral votes. McCain would have still had to compete at the district level to gain enough electoral votes to capture the 270-vote majority. In campaigning at the district level, he would have likely targeted the districts that were competitive, and leaned

343. *Infra* Appendix Table 2.

344. See SHAW, *THE RACE TO 270*, *supra* note 162, at 46 (noting that presidential campaigns group states into different competitive levels ranging from battleground to base).

345. Dan Balz & Alec Macgillis, *Battleground States*, WASH. POST, Jun. 8, 2008, at A10.

346. See *id.* (noting the number of safe states for McCain); *infra* Appendix Table 2 (noting the number of districts that favored McCain grouped by favorable voting percentage).

Democratic.³⁴⁷ This would likely induce the Democratic Party to campaign at the district level as well to prevent the Republican Party from gaining those electoral votes.³⁴⁸ Even if Democrats did not campaign for those electoral votes, at least one of the candidates would have been visiting and pouring resources into those areas. Thus, because of the structure of the District-Popular Plan, it is unlikely to turn into a *de facto* popular vote.

Another argument that may be put forth against the District-Popular Plan is that it could increase the chance of “minority presidents” if enough districts are carried by small margins by the party that wins the nationwide popular vote. Mathematical formulas are beyond the scope of this Note and would be needed to test the probability of increased chances of a “minority president” winning the presidency under the District-Popular Plan. Although there is a chance that this could happen, the fifty-one electoral votes awarded to the candidate that wins the nationwide popular vote would mitigate this risk. For example, if the District-Popular Plan was in effect nationwide during the 2000 Election, Vice President and Democratic presidential candidate Al Gore, the nationwide popular vote winner, would have been elected president with 280 electoral votes.³⁴⁹ In comparison, if a pure district system was in effect nationwide in the 2000 election, President George W. Bush would

347. See SHAW, *THE RACE TO 270*, *supra* note 162, at 46 (discussing grouping of states into Base Democrat, Lean Democrat, Battleground, Lean Republican, and Base Republican by presidential campaigns as part of Electoral College strategies); Turner, *supra* note 12, at 122 (noting that under a district system, candidates would focus heavily on battleground districts, less on marginal districts, and even less on base districts).

348. See SHAW, *THE RACE TO 270*, *supra* note 162, at 46 (noting that if a candidate trailing by five percentage points buys advertising in a state, the opposing candidate may feel compelled to respond); Conroy, *supra* note 254 (noting that in 2008 many pundits saw a quickly scheduled Republican visit to Nebraska, where the Obama campaign was seriously campaigning for an electoral vote from the Second Congressional District, as a defensive move to secure the Second Congressional District).

349. Bush would have won 228 electoral votes from districts and thirty electoral votes from winning the statewide popular vote in thirty states, totaling 258 electoral votes. See CONGRESSIONAL QUARTERLY, *POLITICS IN AMERICA 2002* (Brian Nutting & H. Amy Stern eds., 2001) [hereinafter C.Q., 2002] (providing the winner of the statewide popular vote for every state); *infra* Appendix Table 1 (providing the amount of districts won by Bush in the 2000 election). Gore would have won 208 electoral votes from districts, 21 from winning the statewide popular vote in 20 states and the District of Columbia, and 51 electoral votes from winning the nationwide popular vote, totaling 280 electoral votes. See C.Q., 2002, *supra* (providing the winner of the statewide popular vote for every state); Fullerton, *supra* note 15, at 729 (noting that Gore won the nationwide popular vote); *infra* Appendix Table 1 (providing the amount of districts won by Gore in the 2000 election). Gore would have received more than the 270 electoral votes needed to be elected president. Of course, the numbers are based on retrospective data, and the numbers may have been different if the candidates campaigned under the District-Popular Plan because they would have had different strategies to win electoral votes.

have defeated Gore with 288 electoral votes.³⁵⁰ Thus, the chance of having a “minority president” is greatly mitigated under the District-Popular Plan.

There are two more potential arguments critiquing the District-Popular Plan. One may observe that the District-Popular Plan would adversely affect battleground states. Battleground states currently enjoy many benefits during presidential elections.³⁵¹ Under the District-Popular Plan, candidates would spread their campaigns to many other states.³⁵² By expanding their campaigns, fewer resources would be devoted to current battleground states. The benefits discussed in Part IV.C may then be reduced in battleground states. Thus, battleground states may not implement the District-Popular Plan to avoid a loss in the advantages attached with the attention of presidential campaigns. As such, this may block its passage. However, battleground states are not stable, and shift from election to election.³⁵³ For example, Indiana, Michigan, Missouri, and Pennsylvania were battleground states in 2008, but were not battleground states in 2012 and thus did not see much campaign advertising in 2012.³⁵⁴ Thus, it would be in the long-term interests of all states to adopt the District-Popular Plan, so they can remain competitive in future elections whether they are a battleground state or not.

Another argument may be that the benefits enjoyed in battleground states are a result of how much money is spent there. One may argue that the level of spending will likely not be able to be spread nationwide, and that by not spending this amount in other states, the benefits discussed in Part VI.A would not happen. However, the law of diminishing returns indicates that more spending does not necessarily result in higher results for the candidates.³⁵⁵ There comes a point where the investment of

350. See C.Q., 2002, *supra* note 349 (providing the winner of the statewide popular vote for every state); *infra* Appendix Table 1 (providing the amount of districts won by Bush in the 2000 election). This total assumes that every state and D.C. would have had a district system where electoral votes were tied to congressional districts, and the statewide popular vote winner received both of the state’s at-large electoral votes tied to Senate seats. Again, the numbers are based on retrospective data, and the numbers may have been different if the candidates campaigned under the district system because they would have had different strategies to win electoral votes.

351. See *supra* Part IV.C (discussing the advantages that battleground states receive in presidential elections).

352. *Supra* Part VI.A.

353. Moore, *supra* note 1. Some scholars have suggested that battleground status can change over the longer term, but other scholars argue recent elections suggest continuity in what is a battleground state and what is a safe state. Gimpel et al., *supra* note 188, at 788.

354. Moore, *supra* note 1.

355. See Evans, *supra* note 237, at 453-54 (noting that the excess campaign spending is unlikely to impact elections because of the rate of diminishing returns).

resources in swing states does not matter to the voters as much.³⁵⁶ Spreading this excess investment of resources that only makes a marginal impact in battleground states, to other areas, will help bring the benefits discussed in Part VI.A to those areas.

Thus, when looked at more closely, the arguments against the District-Popular Plan are not as powerful as they might seem at first glance. Of course, more research would be needed to fully explore some of the critiques addressed above, but overall, the District-Popular Plan would create a competitive nationwide election. The advantages of the District-Popular Plan discussed in Part VI.A outweigh its possible disadvantages. The District-Popular Plan would expand the benefits of presidential elections.³⁵⁷

VII. CONCLUSION

No matter what method is used to tabulate votes in a political system, there will be groups in the electorate that benefit at the expense of others.³⁵⁸ This occurs because presidential candidates will devise strategies aimed at winning the election under whatever rules are being used at the time.³⁵⁹ Under the District-Popular Plan, candidates would develop strategies to win the nationwide popular vote, statewide popular vote, and individual districts.³⁶⁰ Candidate visits and campaign spending would expand to more states than it does under the current winner-take all system.³⁶¹ Turnout levels would increase nationwide, as well as knowledge of political issues.³⁶² Additionally, more areas of the country would see their interests being addressed in presidential campaigns.³⁶³ Thus, more than any other reform proposal, the District-Popular Plan would expand the benefits of presidential elections to many groups of people, while reducing the amount of groups that are disadvantaged.³⁶⁴

356. Editorial, *The Cacophony of Money*, N.Y. TIMES, Oct. 7, 2012 at A22; see Evans, *supra* note 237, at 453-54 (noting the excess campaign spending is unlikely to impact elections because of the rate of diminishing returns).

357. See *supra* Part VI.A.1.

358. Adkins & Kirwan, *supra* note 95, at 82; Hill and McKee, *supra* note 166, at 702. Indeed, no electoral system is neutral, and there will always be individuals arguing for a change in the system. Adkins & Kirwan, *supra* note 95, at 82.

359. See Hill and McKee, *supra* note 166, at 702 (stating that different electoral systems produce different electoral strategies).

360. See *supra* Part VI.A.1.

361. See *supra* Parts IV.C, VI.A.1.

362. See *supra* Part VI.A.2.

363. See *supra* Part VI.A.2.

364. See *supra* Part VI.A.1-3.

The best way to implement the District-Popular Plan is through an interstate compact or a constitutional Amendment.³⁶⁵ A constitutional Amendment would be difficult because of how much support is needed to pass one, and there may be backlash from smaller and battleground states.³⁶⁶ An interstate compact may be easier to implement than a constitutional Amendment, but it would not necessarily include all states, and states would be free to withdraw.³⁶⁷ It is urged that both methods be pursued simultaneously.³⁶⁸ If the District-Popular Plan is implemented nationwide, the benefits of presidential campaigns would be expanded and more areas of the country would play a prominent role in electing the president.

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365. See *supra* Part VI.B.1, VI.B.3.

366. See *supra* Part VI.B.3.

367. See *supra* Part VI.B.1.

368. See *supra* Part VI.B.3.

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APPENDIX

Table 1: Total Number of Districts that Voted for Each Party in 2000 Arranged by Favorable Winning Percentage³⁶⁹

Favorable Winning %	Voting for Gore (D)	Voting for Bush (R)	Districts by Winning %
.01-5%	38	29	67
6-10%	28	42	70
11-15%	24	43	67
16-20%	22	29	51
Over 20%	96	85	181
Total Number of Districts	208	228	436

Table 2: Total Number of Districts that Voted for Each Party in 2004 Arranged by Favorable Winning Percentage³⁷⁰

Favorable Winning %	Voting for Kerry (D)	Voting for Bush (R)	Districts by Winning %
.01-5%	22	29	51
6-10%	19	33	52
11-15%	24	42	66
16-20%	22	34	56
Over 20%	93	118	211
Total Number of Districts	180	256	436

369. These totals are based on the statistics included in C.Q., 2002, *supra* note 349. They include the District of Columbia, whose statistics were based on information provided at *General Election*, D.C. BOARD ELECTIONS, http://www.dcboee.org/election_info/election_results/elec_2000/general_elec.asp (last visited Feb. 7, 2013).

370. These totals are based on the statistics included in CONGRESSIONAL QUARTERLY, *POLITICS IN AMERICA 2006* (Jackie Koszczuk & H. Amy Stern eds., 2005). They include the District of Columbia, whose statistics were based on information provided at *Summary Report*, D.C. BOARD ELECTIONS, http://www.dcboee.org/pdf_files/Summary_2.pdf (last visited Feb. 7, 2013).

Table 3: Total Number of Districts that Voted for Each Party in 2008 Arranged by Favorable Winning Percentage³⁷¹

Favorable Winning %	Voting for Obama (D)	Voting for McCain (R)	Districts by Winning %
0%	0	0	7
.01-5%	29	36	65
6-10%	25	32	57
11-15%	29	29	58
16-20%	23	21	44
Over 20%	135	70	205
Total Number of Districts	241	188	436

371. These totals are based on the statistics included in C.Q., 2010, *supra* note 330. They include the District of Columbia, whose statistics were based on information provided at *Certified Election Results*, D.C. BOARD ELECTIONS, http://www.dcboee.org/election_info/election_results/downloads/General_08_Certified_Results_Summary.pdf (last visited Feb. 7, 2013).
