

**PROMOTING DEMOCRACY WHILE
PRESERVING FEDERALISM: THE
ELECTORAL COLLEGE, THE NATIONAL
POPULAR VOTE, AND THE FEDERAL
DISTRICT POPULAR VOTE ALLOCATION
ALTERNATIVE**

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INTRODUCTION

Every four years the United States of America elects a new President. That person will serve as the President for all 308 million Americans. He or she will occupy 1600 Pennsylvania Avenue making decisions ranging from the mundane to matters of life and death. Ostensibly, a presidential candidate seeks the support and considers the views of every U.S. citizen—from the largest cities to the smallest towns, from the wealthiest suburbs to the poorest inner cities, from the east coast to the west coast, and every place in between. Unfortunately, the reality is very different.

In our current system for electing the President, if you live in vast stretches of the country, the presidential candidates will never campaign in your state, he or she will not allocate campaign resources to your state, and he or she will not run television ads, radio ads, or any other forms of campaigning in your state. In fact, if you are not interested in politics, it would be possible to be oblivious to an ongoing presidential campaign.

However, if you live in Ohio, Florida, Colorado, Virginia, North Carolina, New Hampshire, Wisconsin, Iowa, or Nevada, the candidates for president are ubiquitous. They are in your state seemingly weekly, constantly asking for your vote in television ads, direct mail advertising, internet advertising, and even in face-to-face contact at campaign events.

This is the state of American presidential campaigns today: a bifurcated system in which your vote matters to the candidates in direct proportion to the competitiveness of your state. The cause of this situation is the winner-take-all Electoral College allocation system, which all but two states have adopted to award their Electoral College votes.

Most critics of the current winner-take-all allocation system believe that the way to correct the problems caused by the current system is to scrap the Electoral College completely, and replace it with a National Popular Vote (NPV) for the President. The

advocates of this method reject the Framers' federalist-republican views reflected in the design of the Constitution in favor of simple, populist majority rule. However, this break with our constitutional traditions would create more problems than it would solve.

There is a better solution to problems created by use of the winner-take-all system under the Electoral College: the Federal District Popular Vote (FDPV) allocation method. Currently employed by Nebraska and Maine, this system allocates each state's Electoral College votes in two ways. First, the presidential candidate who wins the state's popular vote is awarded two electoral votes for winning the popular vote. Second, the rest of the state's electoral votes are awarded to the winner of each congressional district's popular vote. The two electoral votes awarded to the winner of the state's popular vote represent the two votes allocated to each state under our federalist system, while the rest represent the population of each state.

Under the constitutional framework, the current allocation system may be changed to the FDPV allocation method through individual state legislative enactments, a federal constitutional amendment, or a compact of states. In addition, the constitutionality of this allocation model cannot be questioned. Under Article II of the United States Constitution, state legislatures may determine the manner in which electoral votes are awarded.¹

Part I of this Comment outlines the history of the Electoral College. Part II describes how the current winner-take-all system used by forty-eight states is harmful to American Democracy. Part III discusses the other principal reform proposal, the NPV, and explains why it is not the best way to ameliorate the problems caused by the current system. Finally, Part IV sets forth the proposal that the states, through legislative enactments, should change the current winner-take-all Electoral College allocation plan to the FDPV allocation system, because it will preserve the Constitution, produce more electorally competitive areas, and increase voter participation.

¹ U.S. CONST. art. II, § 1, cl. 2.

I. BACKGROUND

A. Origin of the Electoral College System

The Constitution of the United States of America was created by a series of compromises, including the compromise that led to the creation of the Electoral College. The Electoral College system settled a fierce debate among three sets of opposing factions: (1) between delegates who supported the direct election of the president and those that supported the congressional election of the president, (2) those that supported the interests of large and small states, and (3) delegates from free and slave states.²

The Framers debated two main proposals: (1) a popular vote, in which the president would be elected based on the total popular votes throughout the country, and (2) a congressional vote, in which Congress would be allowed to elect the president.³ Dismayed by the proposal of a congressionally elected president, James Madison argued that this method would make the president “beholden to the Congress that selected him.”⁴

The delegates reached a compromise that is still used as the method by which we elect a president.⁵ The method, outlined by the Framers, reduced the chances of “cabal, intrigue and corruption,”⁶ since the electors were limited to citizens of the individual state, “but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States.”⁷

² Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2527 (2001).

³ *Id.* at 2527-28.

⁴ Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 944 (1996).

⁵ Note, *supra* note 2, at 2528.

To effectuate this compromise, the Framers divided the presidential election process into two stages: a “nomination” stage, in which an electoral college of elders would express a filtered version of the popular will, and a “selection” stage, in which the House of Representatives would ultimately choose the winner from among the top several candidates. In the event that any candidate received a majority of electoral votes, a situation that the Framers envisioned occurring rarely, that candidate would be elected President.

Id.

⁶ THE FEDERALIST NO. 68 (Alexander Hamilton).

⁷ U.S. CONST. art. II, § 1, cl. 2.

This compromise, which was incorporated into the Constitution, ensures that the president and vice president are not elected by the direct votes of the citizens of each state, but by presidential electors chosen by means determined by the respective state legislatures.⁸ According to Article II, Section 1, Clause 2 of the U.S. Constitution: “Each State shall appoint, in such a 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.”⁹ The Committee of Eleven’s Electoral College proposal favored smaller states,¹⁰ but also preserved larger population states’ importance in whom was elected president.¹¹

The current winner-take-all allocation method and the congressional district allocation method, the method on which the FDPV is modeled, were quite common in early presidential elections.¹² However, by 1832 only two states awarded their electoral votes by a method different from the winner-take-all method to which we are accustomed.¹³ The move toward the winner-take-all method was driven by the undemocratic will of the majority party in each state to consolidate power, thus denying the minority party any of the state’s electoral votes in presidential elections.¹⁴

Despite court challenges, both the winner-take-all and congressional district methods have been upheld as constitutional. In the recent case, *New v. Ashcroft*,¹⁵ a voter who advocated the

⁸ Elizabeth D. Lauzon, Annotation, *Challenges to Presidential Electoral College and Electors*, 20 A.L.R. Fed. 2d 183 (2007).

⁹ U.S. CONST. art. II, § 1, cl. 2.

¹⁰ William C. Kimberling, *The Electoral College*, DAVE LEIP’S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, http://uselectionatlas.org/INFORMATION/INFORMATION/electcollege_history.php (last visited Apr. 2, 2013).

¹¹ *Concerns with the Electoral College*, FAIRVOTE, http://archive.fairvote.org/e_college/problems.htm (last updated Dec. 10, 2009, 9:27 PM) (last visited Apr. 2, 2013).

¹² Hoffman, *supra* note 4, at 946.

¹³ *Id.* South Carolina and Maryland. Maryland continued to use the congressional-district system. *Id.*

¹⁴ *Id.* at 947.

¹⁵ 293 F. Supp. 2d 256 (E.D.N.Y. 2003). The plaintiff criticized the Electoral College, asserting that it allows the popular vote winner to lose the presidential election and therefore made his vote and the other 49,500,000 votes for Al Gore worthless. *Id.* at

NPV sought to invalidate the Electoral College. The district court “held that the Electoral College cannot be held unconstitutional as violative of the 14th Amendment’s one-person, one-vote equal protection principle, because the Electoral College is itself established by the Constitution.”¹⁶

Michigan’s use of a method similar to the FDPV allocation was upheld by the Court in the 1892 decision of *McPherson v. Blacker*.¹⁷ The Court held that the allocation of a state’s Electoral College votes by congressional district does not violate the Constitution, which declares “each state shall appoint, in such manner as the legislature 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.”¹⁸ The Court added that while the Constitution gave the state legislatures plenary power to prescribe the method of choosing electors, it did not obligate a state to act as a unit in allocating its Electoral College votes.¹⁹

B. Current Problems

To advocates of preserving the original meaning and intent of the Constitution and the foundation for Federalism, the Electoral College is a highly-regarded institution that gives a more equal voice to all states, regardless of their population.

To advocates of the NPV, the Electoral College is an archaic institution that should be abolished. They question the wisdom of the Electoral College and point to 1824, 1876, 1888, and 2000; years in which the Electoral College led to the election of the second place popular vote winner.²⁰ However, it is the contention of this author that in all four of those elections, the Electoral College performed as intended: it balanced the will of the voters in the larger population states with the will of the voters in the smaller population states. In all three elections in which the

257. The plaintiff sought to invalidate the Electoral College and to institute a popular vote for the election of the President. *Id.*

¹⁶ Lauzon, *supra* note 8.

¹⁷ 146 U.S. 1, 13 (1892).

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 7.

²⁰ *Controversial Elections*, FAIRVOTE, http://archive.fairvote.org/e_college/controversial.htm#2000 (last updated Dec. 10, 2009, 10:27 PM) (last visited Apr. 2, 2013).

popular vote was split primarily between two candidates—1876, 1888, and 2000—the candidate that received the most electoral votes and the second most popular votes nationwide won the majority of states.²¹ In 1876 and 2000, the change of any single state's popular vote would have led to a different result in the Electoral College and, therefore, a different president.²² This illustrates the importance of the individual state under the Electoral College system: even a state with the minimum three electoral votes has the potential power to sway a presidential election, while in an NPV system their significance would be virtually non-existent.

It is also clear that the nature and structure of American politics has changed. In his farewell address, President George Washington warned the country to avoid sectionalism.²³ At least with regard to our politics, we have failed to avoid this pitfall. The Civil War, for example, was principally caused by sectionalism when Republican Abraham Lincoln claimed the White House without a single electoral vote in the South.²⁴

While the Civil War preserved the union, political sectionalism remains an ever-present attribute of American politics. For example, the solid-South delivered its Electoral College votes to the Democratic nominee like clockwork from the 1880s to the 1950s.²⁵ However, beginning in the 1960s, a change

²¹ *United States Presidential Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/> (last visited Apr. 2, 2013) [hereinafter DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS]. In the 1876 presidential election, Republican Rutherford B. Hayes received 4,034,142 votes, 47.92% of the national popular vote, won twenty states, and received 185 electoral votes; Democrat Samuel Tilden received 4,286,803 votes, 50.92% of the national popular vote, won seventeen states, and received 184 electoral votes. *Id.* In the 1888 presidential election, Republican Benjamin Harrison received 5,443,633 votes, 47.80% of the national popular vote, won twenty states, and received 233 electoral votes; Democrat Grover Cleveland received 5,538,163 votes, 48.63% of the national popular vote, won eighteen states, and received 168 electoral votes. *Id.* In the 2000 presidential election, Republican George W. Bush received 50,460,110 votes, 47.87% of the national popular vote, won thirty states, and 271 electoral votes; Democrat Al Gore received 51,003,926 votes, 48.38% of the national popular vote, won twenty states and the District of Columbia, and 266 electoral votes. *Id.*

²² *Id.*

²³ *Washington's Farewell Address 1796*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/washing.asp (last visited Apr. 2, 2013).

²⁴ DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, *supra* note 21.

²⁵ *Id.*

came across American presidential politics as the solid-South broke, the Republican North became the Democratic North and the change in the country's demographics inaugurated an era of realignment in American politics.²⁶

As this realignment process took hold, presidential landslides occurred in 1964, 1972, 1980, 1984, and 1988.²⁷ During this period, states were not as wedded to one political party as they are now. States voting one way in one election and the other in the next were much more common.

Georgia is a perfect example of this phenomenon. In 1960, Democrat John F. Kennedy received a higher percentage of Georgia's popular vote than he received in his native Massachusetts.²⁸ In 1964, Georgia delivered its electoral votes to a Republican, Arizona Senator Barry Goldwater, who won the state despite losing the national election in a landslide.²⁹ The next presidential election saw Georgia award its electoral votes to Alabama Governor George Wallace, who won the state as an Independent.³⁰ In 1972, Republican Richard Nixon won every single county in the state, and, in 1976, Democrat Jimmy Carter won every single county in the state.³¹ As this example demonstrates, in five presidential elections from 1960 to 1976, Georgia voted twice for a Democrat, twice for a Republican, and once for an independent candidate. In comparison, in the five most recent presidential elections, Georgia voted solidly for the Republican nominee all five times.³²

As Georgia illustrates, the country's realignment has settled into a red state versus blue state map in the last five presidential

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* John F. Kennedy received 62.54% of the popular vote in Georgia and 60.22% in Massachusetts. *Id.* In fact, only Rhode Island delivered a higher percentage of its popular vote to John F. Kennedy. *Id.*

²⁹ *Id.* Republican Senator Barry Goldwater won a total of six states in 1964: Alabama, Arizona, Georgia, Louisiana, Mississippi, and South Carolina, while garnering only fifty-two electoral votes and 38% of the popular vote. *Id.* However, in Georgia, Senator Goldwater received 54% of the popular vote. *Id.*

³⁰ *Id.*

³¹ *Id.* Richard Nixon won all 159 counties in the state, while garnering 75% of the popular vote. *Id.* Four short years later, Jimmy Carter won all 159 counties in the state, while garnering 67% of the popular vote. *Id.*

³² *Id.* 1996, 2000, 2004, 2008, and 2012. *Id.*

cycles, with fewer than a dozen competitive states. The Cook Partisan Voting Index (Cook PVI),³³ which is a measurement of how strongly a state leans toward a political party, clearly demonstrates how the nation has lurched toward a bifurcated country of swing states and non-competitive states. In 1988, only Utah had a double digit Cook PVI; whereas today seventeen states have a double digit Cook PVI.³⁴ After the 2008 election, thirty-one states had a Cook PVI of five or more.³⁵ All of the 2012 swing states had a Cook PVI of two or less,³⁶ with the exception of North

³³ The Cook PVI (Partisan Voting Index) is a gauge of party strength in a congressional district or state compared to the United States as a whole. Developed by Charlie Cook, it is an index for each congressional district or state and is derived by averaging its results from the prior two presidential elections and comparing them to national results. The index indicates which party's candidate was more successful in that congressional district or state, as well as the number of percentage points by which its vote exceeded the national average. For example: in a congressional district or state with a Cook PVI score of R+2, a Republican presidential candidate would be expected to win two percentage points more votes than the national average. Similarly, in a congressional district or state with a Cook PVI of D+3, a Democratic presidential candidate would be expected to win three percentage points more votes than the national average.

³⁴ Sean Trende, *Romney Faces a "Blue Wall"—But Is It Solid?*, REAL CLEAR POLITICS (May 18, 2012), http://www.realclearpolitics.com/articles/2012/05/18/romney_faces_a_blue_wall_-_but_is_it_solid.html. The seventeen states that have a Cook PVI of ten or more are: Alabama R+13, Alaska R+13, Hawaii D+12, Idaho R+17, Kansas R+12, Kentucky R+10, Louisiana R+10, Massachusetts D+12, Mississippi R+10, Nebraska R+13, New York D+10, North Dakota R+10, Oklahoma R+17, Rhode Island D+11, Texas R+10, Utah R+20, Vermont D+13, and Wyoming R+20. THE COOK POLITICAL REPORT, <http://cookpolitical.com/> (last visited Apr. 2, 2013). (Author's note: The author of the Real Clear Politics article, *supra*, states that seventeen states have a Cook PVI of ten or greater. By this author's count, the number appears to be eighteen states as listed in this footnote).

³⁵ THE COOK POLITICAL REPORT, <http://cookpolitical.com/> (last visited Apr. 2, 2013). The states that have a Cook PVI of five or more include the eighteen states listed in *supra* note 34 plus the following sixteen states: Arizona R+6, Arkansas R+9, California D+7, Connecticut D+7, Delaware D+7, Georgia R+7, Illinois D+8, Indiana R+6, Maine D+5, Maryland D+9, Montana R+7, South Carolina R+8, South Dakota R+9, Tennessee R+9, Washington D+5, and West Virginia R+8. *Id.* (Author's note: The author of the Real Clear Politics article, *supra* note 34, states that thirty-one states have Cook PVI of five or greater. By this author's count, the number appears to be thirty-four states—eighteen listed in *supra* note 34 plus sixteen listed in this footnote).

³⁶ *Id.* The 2012 swing states' Cook PVI: Colorado EVEN, Florida R+2, Iowa D+1, Nevada D+1, New Hampshire D+2, Ohio R+1, Virginia R+2, and Wisconsin D+2. *Id.* In addition, late in the 2012 campaign Governor Romney expanded his efforts into three more states—Michigan D+4, Minnesota D+2, and Pennsylvania D+2 – believed to be competitive. Henry J. Reske, *Romney Campaign Has Eyes on Michigan, Minnesota,*

Carolina, which has a Cook PVI of four.³⁷ As states become more polarized, they become less likely to be seen as determinative in a presidential election, which leads to the problem this Comment has identified with the current winner-take-all system.

The current winner-take-all Electoral College system coupled with the red versus blue state divide has led to a bifurcated country, where the presidential candidates spend copious amounts of time and money in the swing states and very little to none in the remaining states.³⁸ In fact, on October 18, 2012, at the Al Smith Dinner in New York City, President Obama cracked a joke that demonstrated, in a light-hearted way, the great importance of the select few states and the total lack of importance in the candidates' minds about the vast majority of America: "In less than three weeks, voters in states like Ohio, Virginia and Florida will decide this incredibly important election. Which begs the question, what are we doing here?"³⁹

The focus on the swing states has become so overwhelming that Senator Lindsey Graham (R-S.C.) said, of Presidential Candidate Mitt Romney, "I think what Romney needs to do is get into Virginia and run for sheriff."⁴⁰ A recent *USA Today* article about the swing states in this election cycle led off with this line: "When it comes to campaign ads in the presidential race, there are two Americas."⁴¹ These statements encapsulate the primary deficiency in the winner-take-all system: the presidential election, which determines the leader of the entire country, comes down to only a few states. The fact that this occurs to such an extreme that the presidential campaigns focus so intensely on so few states that the campaigns become a series of quasi-sheriffs campaigns should

Pennsylvania, NEWSMAX (Nov. 1, 2012, 11:10 AM), <http://www.newsmax.com/US/romney-obama-swing-states/2012/11/01/id/462394/>.

³⁷ THE COOK POLITICAL REPORT, *supra* note 35.

³⁸ Justin Sink, *Romney Intensifies Swing-State Campaign Schedule, Attacks on Obama*, THE HILL (Sept. 20, 2012, 5:57 PM), <http://thehill.com/blogs/blog-briefing-room/news/250869-romney-intensifies-campaign-schedule-attacks-on-obama>.

³⁹ Bobby Cerventes, *Barack Obama, Mitt Romney best Al Smith Jokes*, POLITICO (Oct. 19, 2012, 9:28 AM), <http://www.politico.com/news/stories/1012/82621.html>.

⁴⁰ Sink, *supra* note 38.

⁴¹ Susan Page, *Swing States Poll: Amid barrage of ads, Obama has edge*, USA TODAY (July 8, 2012, 7:04 PM), <http://usatoday30.usatoday.com/news/politics/story/2012-07-08/swing-states-poll/56097052/1>.

be troubling to the rest of the country. As political scientist Darrell West, author of the book *Ad Wars*, put it: “In a swing state, you’re part of the presidential campaign, everywhere else, you’re outside.”⁴²

II. THE PROBLEM WITH THE CURRENT WINNER-TAKE-ALL SYSTEM

The current state of American presidential elections illustrates the reality of the statement by *USA Today*: “[T]here are two Americas.”⁴³ There are “two Americas” because of the campaign methods employed to attract swing voters.

The two main ways that campaigns seek to reach voters are campaign ads and campaign visits. This Comment proceeds to discuss each and shows how the winner-take-all allocation method has led to a great disparity in ad spending and campaign visits between swing states and non-swing states.

A. Campaign Ad Spending

The main method campaigns employ to reach voters is through campaign ads on local and cable television. It is also the first place to look to see the great inequity that has developed in our country between swing and non-swing states.

From May 1, 2012 until Election Day 2012, the presidential campaigns and their surrogates, unaffiliated groups, and other entities spent: \$173 million in Florida, \$151 million in Virginia, \$150 million in Ohio, \$97 million in North Carolina, \$73 million in Colorado, \$57 million in Iowa, \$55 million in Nevada, \$39 million in New Hampshire, and \$33 million in Wisconsin on campaign ads.⁴⁴ In comparison, the Obama and Romney campaigns and allied groups spent nothing at all in Mississippi and only \$6,020 in Georgia.⁴⁵ In fact, California, the nation’s most populous state,⁴⁶

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Mad Money: TV ads in the 2012 presidential campaign*, WASH. POST, http://www.washingtonpost.com/wp-srv/special/politics/track-presidential-campaign-ads-2012/?tid=rr_mod.

⁴⁵ *Id.*

⁴⁶ *Los Angeles County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06037.html> (last visited Apr. 2, 2013).

with roughly one-eighth the country's population, accounted for \$320 in campaign ad spending and the country's largest city, New York City, received exactly one ad.⁴⁷

Some states did not receive even a dime in campaign spending.⁴⁸ Their president was decided by the time and money the candidates dumped into the nine battleground states.⁴⁹ All the money the candidates, party committees, and unaffiliated third-party groups spend in the battleground states translates to exposure to the American people. The campaigns clearly believe some of the American people's votes are more important than others. This is made clear when you look at the sheer volume of campaign ads in Florida during the 2012 presidential campaign. The parties ran 202,913 campaign ads in the state of Florida from May 1, 2012 until Election Day, which amounts to roughly 1,068 campaign ads every day.⁵⁰ The voters in the Miami metro area, with a population roughly equal to the population of the Atlanta metro area,⁵¹ received 6,169 times the attention from the campaigns; 24,676 campaign ads were run in the Miami area,⁵² whereas only four campaign ads were run in the Atlanta metro.⁵³

The 2012 presidential campaigns spent enormous amounts of money on campaign television ads in swing states. The average television viewer saw eighty-seven campaign spots a week in Cleveland, Ohio and seventy campaign spots per week in Orlando, Florida, "while the rest of the country is virtually ad-free."⁵⁴ In

⁴⁷ *Mad Money: TV ads in the 2012 presidential campaign*, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ *2012 Swing States*, POLITICO (Dec. 24, 2012, 12:04 AM), <http://www.politico.com/2012-election/swing-state/>. The most commonly referred to battleground states are: Florida, North Carolina, Virginia, New Hampshire, Ohio, Wisconsin, Iowa, Colorado, and Nevada. *Id.*

⁵⁰ *Mad Money: TV ads in the 2012 presidential campaign*, *supra* note 44.

⁵¹ *Top Metropolitan Areas*, NORTH TEXAS COMM'N (Apr. 2013), <http://www.ntc-dfw.org/northtexas/poplargestmetro.html>. The Miami-Fort Lauderdale-Pompano Beach metropolitan area is the eighth most populous metropolitan area in the United States with a population of 5,762,717. *Id.* The Atlanta-Sandy Springs-Roswell metropolitan area is the ninth most populated metropolitan area in the United States with a population of 5,459,7831. *Id.*

⁵² *Mad Money: TV ads in the 2012 presidential campaign*, *supra* note 44.

⁵³ *Id.*

⁵⁴ *Presidential campaign ad spending focused on 9 states*, FOX NEWS (Aug. 6, 2012), <http://www.foxnews.com/politics/2012/08/06/presidential-campaign-ad-spending-focused-on-states/>.

addition, at the halfway point of the 2012 campaign, voters in only sixty-seven of the country's 210 media markets had the opportunity to see television campaign ads.⁵⁵ According to Elizabeth Wilner of Kantar/Campaign Media Analysis Group, an organization which tracks campaign advertising, "People are seeing more spots in fewer states than they were four or eight years ago—more advertisers, and a lot more money is being squeezed into a smaller number of markets."⁵⁶

In August of 2012, President Obama's campaign planned to spend \$125 million that month and the rest of the campaign.⁵⁷ Of that amount, \$7.5 million was slated to be on cable, which would reach a national audience, but that figure paled in comparison to what was spent in Florida alone.⁵⁸ Virtually, every cent remaining was slated to be spent in the nine battleground states.⁵⁹

B. Campaign Visits: Swing States Matter

Campaign ads are only half the story; the second principal way presidential campaigns and candidates seek to win over voters in swing states is through campaign visits. These visits have a tendency to blanket swing states and leave non-swing states largely, if not totally, ignored.

From the time Governor Romney unofficially clinched the 2012 Republican presidential nomination in late April through late September, roughly forty states failed to host a single campaign event.⁶⁰ President Obama, Governor Romney, Vice President Joe Biden, Congressman Paul Ryan, and their spouses had campaigned in as few as ten states and had visited only a handful of non-competitive states to host fundraisers.⁶¹ As the second most senior Democrat in the New Jersey Senate, Richard

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Mad Money: TV ads in the 2012 presidential campaign*, *supra* note 44.

⁵⁹ *Presidential campaign ad spending focused on 9 states*, *supra* note 54. Altogether the two campaigns spent \$173 million in Florida on campaign ads. *Mad Money: TV ads in the 2012 presidential campaign*, *supra* note 44.

⁶⁰ Jeff Glor & Phil Hirschorn, *Debate over the Electoral College revived again*, CBS EVENING NEWS (Sept. 23, 2012, 9:31 PM), http://www.cbsnews.com/8301-18563_162-57518599/debate-over-the-electoral-college-revived-again/.

⁶¹ *Id.*

Codey said, “They only come to New York and New Jersey for our money and nothing else.”⁶² Senator Codey is correct: his state of New Jersey was visited six times after June of 2012—once by First Lady Michelle Obama and five times by Governor Romney—all six visits are classified by the Washington Post as fundraisers.⁶³

The number of visits to swing states compared to non-swing state neighbors is overwhelming. The nine battleground states⁶⁴ had 644 campaign visits after June 2012,⁶⁵ with roughly half of those visits to just three states: Virginia, Ohio, and Florida.⁶⁶ In comparison, large states like Georgia had not rated a single visit.⁶⁷

During the last thirty days of the Washington Post study, the difference is even starker. The nine battleground states⁶⁸ had been visited 152 times, or roughly five times a day, while roughly half the states did not even rate a fundraiser during those thirty days.⁶⁹

This problem is not unique to the 2012 presidential campaign. Similar trends existed in earlier presidential campaigns and have only become more pronounced. During the last six weeks leading up to the 2004 election, President George W. Bush and Senator John Kerry held 92% of their campaign events in only eleven states.⁷⁰ Those eleven states accounted for

⁶² *Id.* Richard Codey is an outspoken advocate of scraping the Electoral College in its entirety and replacing it with a National Popular Vote. In this article he is quoted as saying, “Overwhelmingly, the citizens of this country want a popular vote.” *Id.*

⁶³ *Presidential Campaign Stops: Who’s Going Where*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/2012-presidential-campaign-visits/> (last visited Apr. 2, 2013).

⁶⁴ Florida, North Carolina, Virginia, New Hampshire, Ohio, Wisconsin, Iowa, Colorado, and Nevada. *See 2012 Swing States*, *supra* note 49.

⁶⁵ *Presidential Campaign Stops: Who’s Going Where*, *supra* note 62.

⁶⁶ *Id.* Ohio 148, Florida 115, Virginia 98, Iowa 68, Colorado 56, New Hampshire 48, North Carolina 33, Nevada 34, and Wisconsin 44—for a total of 328. *Id.* Over half of the 644,361 were to just Florida, Ohio, and Virginia. *Id.*

⁶⁷ *Id.* President Obama has fundraised in Georgia twice and Governor Romney three times. *Id.*

⁶⁸ Florida, North Carolina, Virginia, New Hampshire, Ohio, Wisconsin, Iowa, Colorado, and Nevada. *See 2012 Swing States*, *supra* note 49.

⁶⁹ *Presidential Campaign Stops: Who’s Going Where*, *supra* note 62.

⁷⁰ Andrea Levien, *FairVote’s Presidential Campaign Tracker: Past, Present, and Future*, FAIRVOTE (Sept. 18, 2012), <http://www.fairvote.org/fairvote-s-presidential-campaign-tracker-past-present-and-future-2>. Wisconsin, Iowa, New Mexico, New Hampshire, Ohio, Pennsylvania, Nevada, Michigan, Oregon, Colorado, and Florida. *Id.*

only 27% of the national population,⁷¹ meaning 73% of the population received only 8% of the candidates' time.⁷² But the numbers become even more troubling when you dive into them further. Accounting for 51% of the nation's population, the twenty-five least visited states hosted only three campaign events and all three of those events were held in either California or Texas.⁷³ Thus, twenty-three states did not receive a single campaign visit.⁷⁴

The concentration of campaign visits in the swing states became even more pronounced in the final six weeks leading up to the 2008 presidential election. Then-Senator Obama and Senator McCain held 99% of all campaign events in just fourteen states, which accounted for just 31% of the national population.⁷⁵ In fact, the four most contested states⁷⁶ received more than half of all campaign stops for the entire country.⁷⁷ In addition, neither campaign visited thirty-two states at all.⁷⁸

This Comment contends that if American presidential campaigns continue to be decided in a handful of states, where the campaigns spend hundreds of millions of dollars focused on fewer than ten states, and virtually nothing in the rest of the country, American democracy will be damaged by candidates focusing disproportionate attention on competitive states, thus engendering voter apathy in the vast majority of the country.

III. NATIONAL POPULAR VOTE: THE PATH TO MORE PROBLEMS

Most critics of the current winner-take-all Electoral College allocation system advocate a change to the National Popular Vote (NPV). By a nearly two-to-one margin, the American people support amending the Constitution to eliminate the Electoral

Of those eleven, seven are still considered the most sought after states, only North Carolina and Virginia have been added since. *See 2012 Swing States, supra* note 49.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Pennsylvania, Florida, Ohio, and Virginia. *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

College and replace it with the NPV method.⁷⁹ In fact, nearly ten percent of all proposed constitutional amendments have targeted the Electoral College, seeking to change the system.⁸⁰ The demand for change intensified after the contested 2000 election, in which the winner of the Electoral College lost the popular vote.⁸¹ Most supporters of a change favor the NPV, which would determine the winner of the presidency simply by which candidate garnered the most votes nationwide.

However, the NPV has many weaknesses that render it an undesirable alternative to the current system. First, it may lead to campaigns geared toward densely populated, geographically compact areas, which would serve to disenfranchise voters in more sparsely populated areas. Second, it may lead to base centered campaigns that would compel candidates to focus their limited campaign resources on maximizing turnout amongst their most likely voters at the expense of independents, moderates, and first-time voters. Third, an NPV would completely change the constitutional structure the Framers envisioned as the best way to elect a President; this would adversely affect the interests of less populous states.

A. The NPV Would Lead Candidates to Focus on Major Metropolitan Areas

An NPV system would require candidates to concentrate campaign efforts and resources in heavily populated areas where the majority of Americans live in order to maximize the turnout of their voters. As New Jersey State Senator Allison McHose said, “[L]arge urban areas like Los Angeles and Chicago” will determine “the outcome of the elections.”⁸² This opinion is supported by former Delaware Governor Pete du Pont, who observed:

First, the direct election of presidents would lead to geographically narrower campaigns, for election efforts would be largely urban. In 2000, Al Gore won 677 counties and

⁷⁹ 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>.

⁸⁰ Note, *supra* note 2.

⁸¹ *Id.*

⁸² Glor & Hirschhorn, *supra* note 59.

George Bush 2,434, but Mr. Gore received more total votes. Circumvent the Electoral College and move to a direct national vote, and those 677 largely urban counties would become the focus of presidential campaigns.⁸³

This is all too clear when you look at specific examples. An excellent example would be Los Angeles County, California. According to the 2010 U.S. Census, Los Angeles County was home to 9,818,605 residents,⁸⁴ meaning more people live in that single county than in forty-two whole states.⁸⁵ More people live in Los Angeles County than in the nine least populated states combined.⁸⁶ It stands to reason that under an NPV system, the candidates would focus their campaign efforts and resources exclusively on major metropolitan areas to maximize the turnout of their respective voters.

In 2012, President Obama received 2,189,990 votes in Los Angeles County,⁸⁷ compared to 2,083,640 total votes received in Wyoming, South Dakota, North Dakota, Alaska, Idaho, Montana, Delaware, Rhode Island, Vermont, West Virginia, and Utah, combined.⁸⁸ Even more striking, President Obama received more votes in Los Angeles County than in each of forty-two states.⁸⁹

Another example is Atlanta, Georgia. In 2008, the two candidates received 1,421,288 total votes in the five core counties of the Atlanta metro area⁹⁰ compared to 1,279,259 votes in the

⁸³ Pete Du Pont, *Trash the 'Compact': An attempt to circumvent the Electoral College is really an urban power grab*, WALL ST. J. (Aug. 28, 2006, 12:01 AM), <http://web.archive.org/web/20060831152451/http://www.opinionjournal.com/columnists/pdupont/?id=110008855>.

⁸⁴ *Los Angeles County, California*, *supra* note 46.

⁸⁵ *Id.* The only states that have a larger population than Los Angeles County, California are: California, Texas, Florida, New York, Illinois, Pennsylvania, Ohio, and Michigan. *State & County Quick Facts*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/index.html> (last visited Apr. 2, 2013).

⁸⁶ *Id.* The nine least populous states that combined have a smaller population than Los Angeles County, California are: Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Montana, Rhode Island, and New Hampshire. *Id.*

⁸⁷ DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, *supra* note 21.

⁸⁸ *Id.*

⁸⁹ *Id.* Only eight states—California, Florida, New York, Illinois, Pennsylvania, Ohio, Michigan, and Texas—gave Obama more votes than Los Angeles County in 2012. *Id.*

⁹⁰ Fulton, DeKalb, Clayton, Gwinnett, and Cobb counties.

entire state of Mississippi.⁹¹ That means 142,029 more votes were cast in just five counties in the Atlanta metropolitan area than in the entire state of Mississippi. In addition, in 2008, President Obama received 324,700 more votes in the five core Atlanta counties than in all of Mississippi.⁹² Since there is not a single population center that would justify great amounts of the candidates' time, it becomes clear that logical candidates would bypass the more rural states, like Mississippi, altogether.

This trend continued in the 2012 campaign. President Obama and Governor Romney combined for 1,388,063 total popular votes in the five core counties of Metro Atlanta, while only 1,273,695 total votes were cast for the two candidates in the entire state of Mississippi. This means that 114,368 more popular votes were cast in a much smaller land area.⁹³

A further study of population patterns in the country shows that great swaths of the country are very sparsely populated, while some areas are very heavily populated.⁹⁴ With such concentrated numbers of voters in major metropolitan areas such as Los Angeles, Phoenix, New York, Houston, Dallas, Miami, Atlanta, and Chicago, the swing state focused campaigns would most likely become metropolitan-centered campaigns in which candidates would focus only on densely populated areas where great numbers of voters reside.

The NPV system does not correct the principal problem of the bifurcated nature of American presidential politics; it merely switches emphasis from swing states to major metropolitan areas. Therefore, a campaign focused on large metropolitan areas would lead candidates to focus only on issues that are important to metropolitan voters. Issues pertaining to farming, manufacturing, mining, ranching, forestry, oil and gas, and other rural activities may be omitted from candidates' platforms or simply be given a passing mention, while issues paramount in the minds of voters in densely populated areas such as crime, transportation, and the

⁹¹ DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, *supra* note 21.

⁹² *Id.*

⁹³ *Election 2012: President Map*, N.Y. TIMES, <http://elections.nytimes.com/2012/results/president> (last visited Apr. 2, 2013).

⁹⁴ *Population Estimates*, U.S. CENSUS, <http://www.census.gov/popest/data/maps/2011/County-Density-11.html> (last visited Apr. 2, 2013).

cost of living would receive disproportionately greater attention from presidential campaigns.

The NPV would be a step in the wrong direction compared to the status quo. The current winner-take-all allocation method, which leads to swing state centered campaigning, requires presidential candidates to focus on a broad cross-section of issues, since many of the swing states are very economically, culturally, and demographically diverse. For example, Ohio has three major metropolitan areas⁹⁵—Cleveland, Columbus, and Cincinnati—which require candidates to seek their votes by tailoring their campaign messages to issues important to those voters. However, Ohio also has vast rural areas that have different economic activities such as the coal industry in eastern and southeastern Ohio, farming in the rural western part of the state, and manufacturing in the northwestern area of the state.⁹⁶ It is clear that the status quo is better than the proposed NPV in addressing a diverse country's issues and needs.

B. The NPV Would Lead to Base Centered Campaigning

A second negative effect of the NPV is it may radically shift campaign strategies to win elections. If the NPV method replaced the Electoral College, campaigns might respond by changing their focus from swing, independent and first time voters in the swing states, to efforts designed to energize their respective party bases, in order to drive up turnout among their most ardent supporters, thereby ignoring millions of independent and swing voters.

Currently, campaigns focus on undecided voters in swing states. So, in reality, even though the campaigns spend copious amounts of time and money in the swing states, they are primarily trying to reach a small fraction of the voters in those states, not the vast majority that have already decided to vote for one candidate or the other.

Consider Florida, the nation's most electoral vote lucrative swing state; in 2000, George W. Bush defeated Al Gore in the state by the narrowest of margins: 537 votes out of more than six

⁹⁵ 29 THE NEW ENCYCLOPEDIA BRITANNICA *Ohio* 391-95 (15th ed. 1988).

⁹⁶ *Id.*

million total votes cast.⁹⁷ Each candidate garnered 48.8% of the popular vote.⁹⁸ Four years later, during the 2004 presidential campaign, Florida once again awarded its electoral votes to George W. Bush, this time by a margin of roughly 380,000 votes.⁹⁹ President Bush also captured 52% of the vote to Senator John Kerry's 47%.¹⁰⁰ In 2008, then-Senator Barack Obama captured Florida's all important electoral votes by garnering 4,282,074 votes (51% of the popular vote) compared to Senator John McCain's 4,045,624 votes (48% of the popular vote).¹⁰¹ In 2012 Obama won 4,237,756 (50%) against Romney's 4,163,447 (49%).¹⁰² All four races were decided by less than 5%, no one candidate received less than 47%, and no candidate received more than 52%.¹⁰³

From this limited sample, we can see a justification for the massive spending by President Obama and Governor Romney in Florida. In the four Presidential elections from 2000 to 2012, the Republican candidate was backed by between 48% and 52% of the popular vote in the state. The Democratic candidate was backed by between 47% and 51% of the state's popular vote. The difference between the highs and lows of each side is clearly indicative of the swing voters that are so crucial to winning the state.

Currently, the candidates compete for the 4-5% of voters that determine the election outcome in each state, by directing campaign resources, especially advertising, at them. This Comment contends that if the country adopts the NPV, the

⁹⁷ *Official Results: President of the United States*, FLORIDA ELECTION WATCH, <http://enight.elections.myflorida.com/Index.asp?ElectionDate=11/7/2000&DATAMODE> = (last visited Apr. 2, 2013). Governor Bush received 2,912,790 votes to Vice President Gore's 2,912,253. *Id.*

⁹⁸ *Id.*

⁹⁹ *Official Results: President of the United States*, FLORIDA ELECTION WATCH, <http://enight.elections.myflorida.com/Index.asp?ElectionDate=11/2/2004&DATAMODE> = (last visited Apr. 2, 2013). Bush 3,964,522; Kerry 3,583,544. *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Official Results: President of the United States*, FLORIDA ELECTION WATCH, <http://enight.elections.myflorida.com/Index.asp?ElectionDate=11/2/2008&DATAMODE> = (last visited Apr. 2, 2013).

¹⁰² *Official Results: President of the United States*, FLORIDA ELECTION WATCH, <http://enight.elections.myflorida.com/Index.asp?ElectionDate=11/2/2012&DATAMODE> = (last visited Apr. 2, 2013).

¹⁰³ *Id.*

current swing voter tactics will be replaced by campaigns that will focus on motivating party loyalists to get to the polls. This will have several deleterious effects including ignoring lukewarm voters who need some encouragement to vote and causing the parties to pander more intensively to their respective bases, leading to an even more polarized electorate.

If the Electoral College is replaced by an NPV, campaigns will find it more economically sound to use ads to drive turnout of likely Republican or likely Democratic voters, instead of reaching out to independents, moderates, and first-time voters.

C. Damaging the Integrity of the Constitution's Federal Design

A constitutional amendment making the NPV the law of the land would change more than the manner in which we elect presidents; it would weaken the constitutional framework the Framers envisioned for the country. The Framers debated how best to put together a country comprised of both large and small population states. Large states wanted greater representation based on population, while small states feared they would not have a voice in the new government.¹⁰⁴ What came about was the Great Compromise, with the House of Representatives apportioned based on population, giving large states proportional, and thus greater representation, and with small states awarded equal representation in the Senate.¹⁰⁵

The Electoral College was another compromise between factions that wanted a direct popular vote election of the president and those that wanted the president elected by Congress.¹⁰⁶ The Electoral College grants smaller states a greater say in who is elected president. To eliminate the two electoral votes allocated to each state to equalize their importance would stand to create a bifurcated country based on large states and small states, which would not ameliorate the underlying problem that our current system has created of greatly diminishing the electoral significance of hundreds of millions of Americans.

¹⁰⁴ Note, *supra* note 2 at 2528.

¹⁰⁵ *Id.* at 2528-29.

¹⁰⁶ *Id.* at 2527-28.

The clearest example of how the NPV would hurt the interests of small states and their voters is a comparison between the most populous state, California, and the least populous state, Wyoming.¹⁰⁷ According to the 2010 U.S. Census, California has 37,253,956 residents, in excess of twelve million more than Texas, the second most populous state.¹⁰⁸ On the other hand, Wyoming has a population of only 563,626 residents.¹⁰⁹ California has sixty-six times the population of Wyoming. Therefore, under an NPV system, California would have roughly sixty-six times more power to elect the president than Wyoming.

Delegates representing small states at the Constitutional Convention feared an NPV, because their states would be overwhelmed by the voting strength of the larger states.¹¹⁰ The Electoral College significantly augments the relative voting power of smaller states vis-à-vis larger states. After the 2010 reapportionment, California had a total of fifty-five electoral votes and Wyoming had the minimum of three.¹¹¹ Therefore, in the Electoral College, California enjoys only eighteen times the voting power of Wyoming, rather than sixty-six times the strength of Wyoming under the NPV.

A further study of the interplay between population and electoral votes demonstrates the purpose of the Electoral College. According to the 2010 U.S. Census, 308,745,538 people live in the

¹⁰⁷ *State & County QuickFacts: California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Apr. 2, 2013); *State & County QuickFacts: Wyoming*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/56000.html> (last visited Apr. 2, 2013).

¹⁰⁸ The population of Texas, the second most populated state in the country is 25,145,561. *State & County QuickFacts: Texas*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Apr. 2, 2013).

¹⁰⁹ *State & County QuickFacts: Wyoming*, *supra* note 106.

¹¹⁰ 4 THE NEW ENCYCLOPEDIA BRITANNICA *Electoral College* 423-24 (15th ed. 1988). The original plan was to have the electors select the president. *Id.* at 423. The Framers believed this was a better way to elect the president than a direct popular vote. *Id.* The direct popular vote was disfavored since at the time travel was difficult and no national party organizations existed. *Id.* The Framers feared that regional candidates would split the vote. *Id.* The Framers viewed the requirement that a candidate for president obtain a majority of the Electoral College as a way to obtain a national consensus. *Id.* Today, supporters of the Electoral College argue that a direct popular vote would allow small states to be overwhelmed by large urban centers. *Id.* at 424.

¹¹¹ 270 TO WIN, <http://www.270towin.com/> (last visited Apr. 2, 2013).

United States.¹¹² If you divide the total population of the United States by the total number of electoral votes, you will find that there are 573,876 residents per electoral vote. If electoral votes were apportioned strictly on the basis of population, Wyoming would not rate a single electoral vote, California on the other hand would rate sixty-six. However, as a means of balancing the states, Article II, Section 1, Clause 2 of the U.S. Constitution mandates that each state would be awarded at least three electoral votes, two for each state's Senate delegation and one for each House member.¹¹³

This has had a great and beneficial effect on the voting power of smaller states and has decreased the relative voting power of the larger states. For example, for each electoral vote in Wyoming there are only 187,875 residents, while in California each electoral vote accounts for 677,345 residents.¹¹⁴ This means that the individual voter in Laramie, Wyoming has 3.6 times the voting power of a voter in San Francisco. That is the genius of the Framers. Even though California gets a presidential candidate one-fifth of the way to 1600 Pennsylvania Avenue, and the eleven largest states have the power to elect a president,¹¹⁵ the Electoral College makes it more likely that the rest of the thirty-nine states and their respective voters will have their say on who inhabits the White House.

¹¹² *State & County QuickFacts: USA*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Apr. 2, 2013).

¹¹³ U.S. CONST. art. II, § 1, cl. 2.

Each 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Id.

¹¹⁴ 677,345 divided by 187,875 = 3.6.

¹¹⁵ 270 TO WIN, *supra* note 109. The eleven largest states by electoral votes are California, Texas, Florida, New York, Illinois, Pennsylvania, Ohio, Michigan, Georgia, North Carolina, and New Jersey. *Id.*

IV. FEDERAL DISTRICT POPULAR VOTE: PRESERVING
FEDERALISM AND INCREASING VOTER PARTICIPATION

A. Advantages of the FDPV

The solution to our current electoral inequality is to modify the Electoral College, not to eliminate it. The Electoral College was a pragmatic solution to allay the fear that larger states would overshadow smaller states. However, problems have arisen that the Framers could not have foreseen. That is why the country as a whole needs to have a serious debate about revamping the Electoral College and adopting the Federal District Popular Vote (FDPV) allocation model.

Maine and Nebraska currently employ the FDPV: electoral votes are awarded to the popular vote winner in each of the state's congressional districts, with two at-large electoral votes awarded to the winner of the state's overall popular vote.¹¹⁶ A recent poll in Nebraska shows that the majority of the state's voters support the congressional district allocation plan.¹¹⁷

The FDPV allocation plan has several advantages. First, it would preserve the Electoral College's attempt to protect small states from being neglected in favor of large states, while correcting the disparity between swing and non-swing states. Second, it would do away with the swing state focused campaigns and encourage candidates to campaign and spend money in many more states, thereby reaching many more voters. Third, it may lead to more voter interest in safe congressional districts, thereby leading to higher voter turnout throughout the country.

¹¹⁶ *How the Electoral College Works*, CNN, <http://www.cnn.com/ELECTION/2004/special/president/electoral.college/more.html> (last visited Apr. 2, 2013).

¹¹⁷ Tom Jensen, *Nebraska Miscellany*, PUB. POL'Y POLLING (Mar. 29, 2012, 4:26 PM), <http://www.publicpolicypolling.com/main/2012/03/nebraska-miscellany.html>.

Finally 51% of voters support Nebraska's unusual practice of allocating electoral votes by Congressional district to 30% who think they should all go to the statewide winner. Democrats (66/18) and independents (60/23) both strongly favor the status quo while Republicans (42/38) narrowly support shifting to a winner take all system.

Id.

1. FDPV: Preserving the Constitution's Federal Framework

Changing the current winner-take-all Electoral College allocation method to the FDPV allocation method does not change the intent of the Framers. The FDPV preserves the Framers' intent in three principal ways: (1) it is within the states' legislative power to allocate electoral votes, staying faithful to Article II of the U.S. Constitution, (2) each state would still receive the representation that protects the interests of smaller population states, and (3) in the early days of our republic the FDPV was used by many states.

First, the FDPV allocation method would stay true to the compromise that formed the Electoral College and the Framers' intent for Federalism. The Electoral College would be preserved, with the only change being the manner in which each state's slate of electors is chosen. Under the Constitution, state legislatures have plenary power when it comes to allocating their states' Electoral College votes.¹¹⁸ The FDPV would preserve each state's right to allocate electors in the manner they choose, since it would be up to the state to enact legislation to either unilaterally change from a winner-take-all allocation method to the FDPV, or to enact legislation to join the proposed FDPV Compact.

Second, each state would still receive the same number of electoral votes: two at-large electoral votes awarded to each state, and an additional number of electoral votes based on the number of congressional districts allocated to the state. This additional number of electoral votes is based on the population of the state, and it ranges from fifty-three (California) to one (Montana, Wyoming, Alaska, North Dakota, South Dakota, Vermont and Delaware).¹¹⁹

Finally, from the Presidential Election in 1789 until 1832, the states that made up the United States employed various methods of allocating their electoral votes.¹²⁰ During that period ten states employed a districting approach for allocating their

¹¹⁸ U.S. CONST. art. II, § 1, cl. 2.

¹¹⁹ See *Directory of Representatives*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/representatives/> (last visited Apr. 2, 2013).

¹²⁰ CONG. QUARTERLY, INC., CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 254-56 (2d ed. 1985).

electoral votes.¹²¹ These states included Virginia (home state of Washington, Jefferson, Madison, and Monroe),¹²² Massachusetts (home state of John Adams),¹²³ and New York (home state of Alexander Hamilton).¹²⁴

2. FDPV: Many Swing Districts Instead of a Few Swing States

The principal reason for the FDPV allocation method is to encourage candidates to campaign in more than the nine battleground states, so that a greater number of Americans will have an opportunity to be asked for their vote. In the last few campaigns the candidates focused their time and resources on certain states, because those states were seen as determinative in the election. For the most part, candidates ignored non-swing states. However, under the FDPV plan this would be less likely to occur.

According to data compiled by Swing State Project of congressional district votes for president in the 2000, 2004, and 2008 presidential elections, the shift to the FDPV would serve to diffuse time and effort of the candidates to more states, thus allowing more voters to become directly involved in the campaign. From the 2000, 2004 and 2008 presidential elections, this Comment identifies two groups of swing districts. The first group

¹²¹ *Id.*

¹²² George Washington was born in Westmoreland County, Virginia in 1732. 29 THE NEW ENCYCLOPEDIA BRITANNICA *George Washington* 716 (15th ed. 1988). He was a Virginia delegate to the Constitutional Convention and elected presiding officer of the Constitutional Convention. *Id.* at 723. George Washington died at his Virginia home, Mt. Vernon in 1799 *Id.*

Thomas Jefferson was born in Virginia in 1743. 22 THE NEW ENCYCLOPEDIA BRITANNICA *Thomas Jefferson* 349 (15th ed. 1988). He served as Governor of Virginia, as served as the third President. *Id.* at 350. He died at his Virginia home, Monticello in 1826 *Id.* at 351.

James Madison was born in 1751 in Port Conway, Virginia and was elected the fourth President of the United States. 7 THE NEW ENCYCLOPEDIA BRITANNICA *James Madison* 656 (15th ed. 1988). Madison is considered “The Father of the Constitution.” *Id.* at 657. Madison died in Montpelier, Virginia in 1836. *Id.* at 656.

¹²³ 1 THE NEW ENCYCLOPEDIA BRITANNICA *John Adams* 83-84 (15th ed. 1988). John Adams was born in Braintree, Massachusetts in 1735, served as Vice President and as the second President. *Id.* at 83. He died in Quincy, Massachusetts in 1826. *Id.* at 83.

¹²⁴ 5 THE NEW ENCYCLOPEDIA BRITANNICA *Alexander Hamilton* 659-61 (15th ed. 1988). Alexander Hamilton served as a New York delegate at the Constitutional Convention. *Id.* at 660.

encompasses congressional districts that voted for one party's candidate and within that time frame switched and supported another party's candidate.¹²⁵ The second group contains congressional districts in which the major party candidates finished within five percent of each other at least once among the 2000, 2004, and 2008 elections.¹²⁶

The data from Swing State Project shows that there are seventy-three congressional districts in twenty-four states that have voted for both parties in the past three presidential elections.¹²⁷ These seventy-three congressional districts are spread out all over the country, from California in the West, to Illinois in the Midwest, to New York in the East, and to Georgia in the South.¹²⁸

However, if we apply a broader look at what constitutes a competitive district, the number of competitive districts increases to 141 spread among thirty-four states. This broader category includes the seventy-three districts that swung at least once in those three presidential elections and those that were decided by five or less points in at least one of those three presidential elections.¹²⁹ This category greatly expands the map to include a district in very red Alabama to a district in very blue

¹²⁵ DavidNYC, *Presidential Results by Congressional District, 2000-2008*, SWING STATE PROJECT (Dec. 15, 2008, 4:01 PM), <http://www.swingstateproject.com/diary/4161/>. There are twenty-five states with a total of seventy-five congressional districts that swung between parties at least once in the three presidential elections during the 2000-2008 period: Arkansas (2), California (11), Florida (3), Georgia (2), Iowa (2), Illinois (6), Indiana (1), Kansas (1), Michigan (7), Minnesota (2), Nevada (1), North Carolina (3), Nebraska (1), New Hampshire (1), New Jersey (4), New York (7), Ohio (3), Oregon (2), Pennsylvania (1), Tennessee (1), Texas (5), Virginia (4), Washington (1), Wisconsin (3), and West Virginia (1). *Id.*

¹²⁶ *Id.* There are thirty-four states with a total of 141 congressional districts in which the margin was within five percent in at least one presidential election during the 2000-2008 period or the state swung from supporting one political party to another in the same timeframe: Alabama (1), Arkansas (3), Arizona (3), California (14), Colorado (3), Connecticut (1), Florida (12), Georgia (2), Iowa (2), Illinois (11), Indiana (3), Kansas (1), Kentucky (1), Maine (1), Michigan (10), Minnesota (5), Montana (1), North Carolina (5), Nebraska (1), New Hampshire (2), New Jersey (4), New Mexico (2), Nevada (2), New York (9), Ohio (7), Oklahoma (1), Oregon (1), Pennsylvania (9), Tennessee (4), Texas (5), Virginia (6), Washington (3), and Wisconsin (5), and West Virginia (1). *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

Connecticut.¹³⁰ The sheer number of competitive districts in some of the large, non-competitive states is astounding. California has fourteen competitive congressional districts, New York has nine, Illinois eleven, Michigan ten, New Jersey four, Minnesota three, and Georgia and Texas five each.¹³¹

Consider California. Though a solidly blue state rated “Strong Democratic” by *The New York Times*,¹³² California is a large and very diverse state with millions of Republican voters and large swaths of the state that are politically competitive. In fact, eleven congressional districts won by President Bush in 2004 swung to the Democrats and were won by President Obama in 2008.¹³³ Even when comparing the ultra-competitive 2000 and 2004 campaigns, two districts that voted for Vice President Al Gore, switched and voted for President Bush four years later.¹³⁴ But since candidates see the state as a solidly blue state, neither party invested any considerable campaign resources in the country’s most populous state. Under the FDPV plan, that would not have been the case. Instead of writing off California, the candidates would have contested the state’s fourteen competitive districts in order to reach the 270 electoral votes necessary to win the presidency.

Georgia is an excellent counter-example. Though a solidly red state rated “Strong Republican” by *The New York Times*,¹³⁵ under the FDPV method Georgia’s two competitive districts would encourage candidates to invest campaign resources in the state, thereby giving the state’s voters a greater opportunity to understand the issues and candidates.

It is important to point out that the FDPV will not extinguish the importance of the swing states in electing the president, but they will no longer be the only states that will decide the results of presidential elections. Neither an attack on swing states nor an attempt to render them politically meaningless, the FDPV is

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Election 2012: The Electoral Map: Building a Path to Victory*, N.Y. TIMES, <http://elections.nytimes.com/2012/electoral-map> (last visited Apr. 2, 2013).

¹³³ DavidNYC, *supra* note 123.

¹³⁴ *Id.*

¹³⁵ *Election 2012: The Electoral Map: Building a Path to Victory*, *supra* note 130.

intended to actively involve more Americans in the election of their president.

Under the FDPV, the swing states will still enjoy a prominent position in the election of the president, even though it will be diminished compared to the virtual monopoly of the candidates' time and money the swing states currently enjoy. Under the FDPV, the swing states would still host about one-third of the country's competitive districts. In fact, forty-four of the country's 141 competitive congressional districts are in the nine 2012 swing states.¹³⁶ Florida leads with twelve competitive districts, followed by Ohio with seven, Virginia with six, North Carolina and Wisconsin with five, Colorado with three, and Nevada, Iowa and New Hampshire with two each.¹³⁷ Assuming that each district is equal and will receive an equal amount of time and money, the current swing states would still receive roughly a third of the campaigns' resources, but the other forty-one states would receive the other two-thirds. This would lead to more favorable results in voter interest and turnout in the rest of the country.

3. FDPV: Increasing Turnout, Participation and Representation in States Without Competitive Districts

The FDPV would also benefit the seventeen states that do not contain a competitive congressional district by encouraging voters in congressional districts dominated by the minority party in a state to vote so that they may ensure their favored candidate gets one electoral vote closer to 270.

Mississippi offers a prime example of this incentive. A solidly Republican state rated "Strong Republican" by *The New York Times*,¹³⁸ Mississippi has four congressional districts,¹³⁹ three solidly Republican and one, the second congressional district, solidly Democratic.¹⁴⁰ This Comment contends that the FDPV would benefit the voters of Mississippi in two principal ways: first,

¹³⁶ DavidNYC, *supra* note 123.

¹³⁷ *Id.*

¹³⁸ *Election 2012: The Electoral Map: Building a Path to Victory*, *supra* note 130.

¹³⁹ *Find a Senator or Representative: Mississippi*, GOVTRACK.US, <http://www.govtrack.us/congress/members/MS> (last visited Apr. 2, 2013).

¹⁴⁰ DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, *supra* note 21.

it would encourage the voters of the second congressional district to vote. Instead of being wasted in a failed effort to win the state, their votes would deliver their congressional district's electoral vote to the Democratic candidate; and second, awarding an electoral vote to the Democratic candidate better represents the will of the voters in the state. In the last four presidential elections the Democratic candidate has received 41%, 40%, 43%, and 44% of the popular vote in Mississippi; however, because of the winner-take-all method, the Democratic candidate received 0% of the state's electoral votes.¹⁴¹

The same is true for solidly Democratic Maryland. Though rated "Strong Democratic," by *The New York Times*,¹⁴² two of Maryland's eight congressional districts are dependably Republican. Even though the Democratic candidate will win the state's popular vote, Republican voters in western Maryland's sixth congressional district and in the Delmarva Peninsula's first congressional district will be more motivated to vote because their votes will not be meaningless, but instead would add two electoral votes to the Republican candidate's total.¹⁴³

4. Concerns Regarding the FDPV's Effects on the State of Politics

There are two main concerns regarding the FDPV proposal. First, some argue that the FDPV would increase the likelihood of a president winning the majority of the electoral votes while losing the popular vote. This would have occurred in the 2012 presidential election if the actual voting patterns were counted under the FDPV model.¹⁴⁴ Second, some observers view it as simply a partisan power grab.¹⁴⁵

¹⁴¹ *Id.*

¹⁴² *Election 2012: The Electoral Map: Building a Path to Victory*, *supra* note 130.

¹⁴³ DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, *supra* note 21.

¹⁴⁴ Aaron Bycoffe & Andrei Scheinkman, *What The 2012 Election Would Look Like Under The Republicans' Vote-Rigging Plan*, HUFFINGTON POST (Feb. 2, 2013), http://www.huffingtonpost.com/2013/01/24/republican-vote-rigging-electoral-college_n_2546010.html. President Obama received 332 electoral votes, while Republican Nominee Romney received 206 electoral votes. *Id.* However, if the entire country had allocated its electoral votes under the FDPV allocation method, Mitt Romney would have received 273 electoral votes to the President's 262 electoral votes.

First, some argue that the FDPV would lead to an increased likelihood of “an Electoral College misfire” which occurs when the candidate receiving the minority of the popular vote wins the majority in the Electoral College.¹⁴⁶ Some will point out that the presidential election of 2012 would have been just such a misfire. In the 2012, President Obama received 65,899,625 votes, 51.02% of the popular vote and 332 electoral votes, compared to 60,928,981 votes, 47.18% of the popular vote and 206 electoral votes received by Governor Romney.¹⁴⁷ However, some will argue that had the FDPV been in effect for the 2012 presidential election, then Governor Romney would have won the election with 273 electoral votes to President Obama’s 262.¹⁴⁸ Therefore, the candidate receiving roughly five million fewer popular votes would have been elected President.

However, this is a static analysis, since it is simply unknowable whether that result would have occurred. To come to the conclusion that Mitt Romney would have won the 2012 presidential election one would have to assume that the candidates would not have changed campaign tactics at all, running swing-state campaigns under a swing-district model. In order to demonstrate how unlikely this result is, consider two states: California and New Hampshire. Under the current winner-take-all allocation method, one was a hotly contested tossup state¹⁴⁹ and the other was a non-competitive uncontested state.¹⁵⁰

There are three congressional districts that have not finalized 2012 election results and are therefore not incorporated in the total. *Id.*

¹⁴⁵ Greg Sargent, *DNC Slams GOP’s Electoral Vote Rigging Scheme*, WASH. POST (Jan. 25, 2013, 1:42 PM), <http://www.washingtonpost.com/blogs/plum-line/wp/2013/01/25/dnc-slams-gops-electoral-vote-rigging-scheme/>.

As you may have heard, Republicans are pushing for changes in the electoral vote system in states like Virginia, Michigan, Ohio, Pennsylvania, Florida, and Wisconsin—to maximize their advantage in future presidential elections in the face of demographic shifts that may be inexorably undermining their chances at winning national elections.

Id.

¹⁴⁶ Doug Mataconis, *Allocating Electoral Votes by Congressional District is a Bad Idea*, OUTSIDE THE BELTWAY (Jan. 24, 2013, 1:29 PM), <http://www.outsidethebeltway.com/allocating-electoral-votes-by-congressional-district-is-a-bad-idea/>.

¹⁴⁷ DAVE LEIP’S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, *supra* note 21.

¹⁴⁸ Bycoffe & Scheinkman, *supra* note 142.

¹⁴⁹ *The Electoral Map: Building a Path to Victory*, *supra* note 130.

New Hampshire has four electoral votes, while California has fifty-five electoral votes.¹⁵¹ New Hampshire contains two swing districts, while California contains twelve.¹⁵² Under the current winner-take-all allocation method, the candidates spent \$39 million on campaign ads in New Hampshire, but only \$320 in California.¹⁵³

However, if the FDPV had been in place, it is logical to assume that the two Presidential campaigns would have spent less than \$19.5 million per swing district in New Hampshire and more than \$22.86 per swing district in California, since the candidates would have been focused on winning swing districts and not swing states.

Second, this Comment does not advocate change for partisan political reasons, but only in an attempt to make the presidential election truly national again. The FDPV will engage more Americans in the important task of electing the president and reverse an ominous trend in state level voter participation. Voter turnout data collected after the 2012 election illustrates a troubling trend. Turnout was highest in battleground states, such as Wisconsin, Iowa, and New Hampshire, while lowest in non-competitive states like Hawaii, West Virginia, Texas, New York, and Oklahoma.¹⁵⁴

In addition, by advocating the nationwide implementation of the FDPV, instead of merely in selected blue states, as is currently discussed in Republican circles, the change on a national level would not necessarily favor either political party. Since red states and blue states would be implementing this allocation method, gains for a particular political party in some states would be offset by losses in other states, thus reducing partisan considerations.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² DavidNYC, *supra* note 123.

¹⁵³ *Mad Money: TV ads in the 2012 presidential campaign*, *supra* note 44.

¹⁵⁴ Kevin Liptak, *Report shows turnout lower than 2008 and 2004*, CNN POLITICS (Nov. 8, 2012, 4:39 PM), <http://politicalticker.blogs.cnn.com/2012/11/08/report-shows-turnout-lower-than-2008-and-2004/>. Nationwide turnout was the lowest since the 2000 Presidential election. *Id.* In 2012, 57.5% of eligible voters turned out, down from 62.3% in 2008 and 60.4% in 2004. *Id.*

That the conventional wisdom that the FDPV would automatically and always favor the Republican Party¹⁵⁵ is an overly simplistic understanding of politics in general and the FDPV in particular. Voting patterns change over time—often quite rapidly—and therefore the partisan consequences of any particular system of awarding votes are unstable and impossible to predict with confidence. This point can be demonstrated by looking at how the current winner-take-all allocation method was viewed in the recent past. After President Obama’s election triumphs in 2008 and 2012, many political commentators now believe that the Electoral College favors the Democratic Presidential candidate.¹⁵⁶ Nate Silver,¹⁵⁷ of the *New York Times*, points out that had Mitt Romney increased his popular vote percentage by roughly 2.5% nationally, he would have won the popular vote.¹⁵⁸ Assuming Romney’s popular vote percentage increased proportionately in all fifty states, he would have moved only Ohio and Florida into his column, thus failing to gain an Electoral College majority.¹⁵⁹ If this occurred, Obama would have won the Electoral College but a minority of the popular vote, thus reversing the situation that led many to believe that the Electoral College favored the Republican candidate as demonstrated by

¹⁵⁵ Anthony Salvanto & Mark Gersh, *Who would benefit if Electoral College is changed?* CBS NEWS (Jan. 30 2013, 3:24 PM), http://www.cbsnews.com/8301-250_162-57566684/who-would-benefit-if-electoral-college-is-changed/.

Democratic congressional districts tend to be overwhelmingly Democratic, while Republican-held seats are not as lopsided for Republicans. This spreads Republican voting power over more districts, even if they’re outnumbered statewide. Statewide, Democrats run up big margins in a few CDs, much as they do in a handful of counties, that carry them to a statewide win. This tends to be true nationwide.

Id.

¹⁵⁶ Nate Silver, *As Nation and Parties Change, Republicans Are at an Electoral College Disadvantage*, N.Y. TIMES (Nov. 8, 2012, 4:15 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/11/08/as-nation-and-parties-change-republicans-are-at-an-electoral-college-disadvantage/>.

¹⁵⁷ Joe Weisenthal, *EPIC Victory for Nate Silver*, BUS. INSIDER (Nov. 6, 2012, 11:25 PM), <http://www.businessinsider.com/nate-silver-gets-it-right-2012-11>. Nate Silver predicted all fifty states election results correctly in the 2012 presidential election. *Id.*

¹⁵⁸ Silver, *supra* note 155.

¹⁵⁹ *Id.*

George W. Bush's victory in the Electoral College, but loss of the popular vote.¹⁶⁰

Clearly the perceived advantage that some argue the Republican Party would enjoy under the FDPV could easily develop into an advantage for the Democratic Party. The recent election demonstrated that the Republican vote is more spread out in congressional districts that are less lopsidedly Republican than many lopsidedly Democratic districts.¹⁶¹ Pennsylvania is an excellent illustration of this point. President Obama won five of Pennsylvania's eighteen congressional districts; however, he averaged an impressive 72.46% in the districts he carried. On the other side, Governor Romney averaged just 55.07% in the districts he carried.¹⁶²

However, the surface appearance of a clear advantage to the Republican candidate based on the larger number of Republican majority districts, relies on a false assumption: that campaign strategies and tactics would remain static. Of course, no one actually believes that. If the model changes, the campaigns will change.

Further, a more detailed investigation of the congressional district data shows how this perceived advantage for the Republican candidate is just that—perceived. Of the thirteen Pennsylvania districts carried by Governor Romney, four were

¹⁶⁰ *Id.*

¹⁶¹ Salvanto & Gersh, *supra* note 154.

Democratic congressional districts tend to be overwhelmingly Democratic, while Republican-held seats are not as lopsided for Republicans. This spreads Republican voting power over more districts, even if they're outnumbered statewide. Statewide, Democrats run up big margins in a few CDs, much as they do in a handful of counties, that carry them to a statewide win. This tends to be true nationwide.

Id.

¹⁶² David Nir, *Daily Kos Elections' presidential results by congressional district for the 2012 and 2008 elections*, DAILY KOS (Nov. 19, 2012, 9:30 AM), <http://www.dailykos.com/story/2012/11/19/1163009/-Daily-Kos-Elections-presidential-results-by-congressional-district-for-the-2012-2008-elections>. President Obama carried five congressional districts as follows: PA-1, 82.3%; PA-2, 90.4%; PA-13, 66.2%; PA-14, 68.0%; PA-17, 55.4%. *Id.* Governor Romney carried thirteen congressional districts as follows: PA-3, 55.6%, PA-4, 57.1%; PA-5, 57.1%; PA-6, 50.6%; PA-7, 50.4%; PA-8, 49.4%; PA-9, 62.8%; PA-10, 60.1%; PA-11, 53.9%; PA-12, 57.8%; PA-15, 50.8%; PA-16, 52.4%; PA-18, 57.9%. *Id.*

carried with less than fifty-one percent of the popular vote.¹⁶³ Had the FDPV been in effect, President Obama's campaign would have invested fewer resources into running up huge margins in the districts he won, and invested more time and resources into these four ultra-competitive districts, possibly swinging all four into his column.

From this example, it is easy to see how the FDPV is not a system that automatically favors Republicans. From the Pennsylvania example, we see that Republican support in many of the congressional districts is softer than Democratic support in the districts Democrats win. This means that once the campaigns adjust to the new allocation system, it will be more difficult for Republican candidates to swing Democratic districts into their column than it will be for the Democratic candidates to swing Republican districts into their column.

As the California and New Hampshire example clearly demonstrates, campaign strategies and tactics would change under the FDPV. Presidential campaigns would have to react to the changes the FDPV would usher in. Therefore, it is impossible to say with any certainty whether the FDPV would favor a particular political party, whether the 2012 election would have resulted in a misfire, or what the partisan implications would be in the distant future. What is certain is that the FDPV would lead to a more national campaign involving more Americans in the incredibly important process of electing their president.

B. Implementation

There are essentially three ways to implement the FDPV allocation method: (1) a state-by-state method, (2) a constitutional amendment, or (3) a multi-state compact that would allow states to move to the FDPV allocation plan as a group, in the same manner as the proposed National Popular Vote Interstate Compact. All three are constitutional, since according to Article II, Section 1, Clause 2 of the U.S. Constitution, a state may allocate its electoral votes in any manner the state legislature may decide.¹⁶⁴

¹⁶³ *Id.*

¹⁶⁴ U.S. CONST. art. II, § 1, cl. 2.

1. State-by-State Adoption: Stopped at a Partisan Roadblock

The easiest method is to simply advocate that states at their own initiative decide to move to the FDPV allocation approach. Two states have already done so. This method has been used to allocate the Electoral College votes in Maine since the 1972 presidential election and in Nebraska since the 1996 presidential election.¹⁶⁵

The method has been well received in Nebraska and is supported by a majority of voters.¹⁶⁶ One reason for its popular support may be that the state's allocation method was a primary reason why both the Republican and Democratic 2008 presidential campaigns committed resources to the second congressional district of this very red state. The state split its five electoral votes for the first time when it awarded an electoral vote to Senator Obama for his 2008 victory in the popular vote in Nebraska's second congressional district.¹⁶⁷ In doing so, Nebraska awarded its first electoral vote to a Democratic candidate since Lyndon Baines Johnson in 1964.¹⁶⁸ Although Nebraska is a solidly Republican state,¹⁶⁹ its adoption of the congressional district method for allocating electoral votes caused both campaigns to compete actively for a single electoral vote in a state which was previously unaccustomed to candidate visits and campaign ads.¹⁷⁰

¹⁶⁵ *Maine and Nebraska*, FAIRVOTE, http://archive.fairvote.org/e_college/me_ne.htm (last visited Apr. 2, 2013).

¹⁶⁶ Jensen, *supra* note 115.

Finally 51% of voters support Nebraska's unusual practice of allocating electoral votes by Congressional district to 30% who think they should all go to the statewide winner. Democrats (66/18) and independents (60/23) both strongly favor the status quo while Republicans (42/38) narrowly support shifting to a winner take all system.

Id.

¹⁶⁷ DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, *supra* note 21.

¹⁶⁸ Garance Franke-Ruta, *Make That 365: Obama on Track to Pick Up Nebraska Electoral Vote*, WASH. POST (Nov. 7, 2008, 7:02 PM), <http://voices.washingtonpost.com/44/2008/11/make-that-365-obama-on-track-t.html>.

¹⁶⁹ Since World War II it supported only Lyndon Baines Johnson in 1964. DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, *supra* note 21.

¹⁷⁰ Scott Conroy, *Palin Says Omaha Visit Was Not Campaign's Call, It Was Hers*, CBS NEWS (Oct. 5, 2008, 9:43 PM), http://www.cbsnews.com/8301-502443_162-4502743-502443.html.

However, the state-by-state change has been difficult to achieve in other states, most notably in Pennsylvania. In 2011, Pennsylvania was gripped by a debate whether to adopt the congressional district allocation method instead of the current winner-take-all allocation method; ultimately, the proposed change was defeated.¹⁷¹ Pennsylvania Democrats accused the Republican Governor and the Republican leaders in the legislature of playing partisan politics.¹⁷² Another reason cited to defeat the change to the congressional district method was that Pennsylvania would lose its position as a perennial swing state, therefore greatly reducing campaign time and ad money spent in the state.¹⁷³

Pennsylvania's 2011 experience is instructive. It illustrates the difficulty that a state-by-state approach to replacing the current winner-take-all method with the FDPV method would encounter. Swing states and swing states from the recent past, like Pennsylvania,¹⁷⁴ would be the most difficult to move to the FDPV because they would not want to give up their enormous electoral significance. Even non-competitive states, like Mississippi or Georgia, also would be hesitant to move to the FDPV since the majority party in each state would be reluctant to relinquish electoral votes to the minority party.

2. Amending the Constitution: A Bridge Too Far

The second way to change the current winner-take-all Electoral College allocation method is to amend the Constitution to mandate that all states adopt the FDPV allocation method. Article V of the U.S. Constitution prescribes the means that may be utilized to amend the Constitution in order to make the FDPV the law of the land.

In order to amend the Constitution, the FDPV would need “two thirds of both Houses” or “the Legislatures of two thirds of

¹⁷¹ Aaron Blake, *Could Pennsylvania Republicans end the electoral college as we know it?*, WASH. POST (Sept. 14, 2011, 3:45 PM), http://www.washingtonpost.com/blogs/the-fix/post/could-pennsylvania-republicans-end-the-electoral-college-as-we-know-it/2011/09/14/gIQAQUzUSK_blog.html.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Pennsylvania was a hotly contested swing state in the 2000, 2004, and 2008 Presidential Elections.

the several States” to “call a Convention for proposing” the amendment to the U.S. Constitution.¹⁷⁵ Then the amendment would need to be “ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.”¹⁷⁶

This method has the advantage of assuaging partisan fears that their state would be giving away electoral votes to the other party, because all states would be doing so. However, this method of implementing this change is the least likely. It would not be in the swing states’ best interests to change to this model. In addition, the states with at-large congressional districts would not be in a rush to support the change since they would not be affected one way or the other.

3. FDPV Compact: Throughway to Change

The most effective and likely way to secure real, positive change in this area is to form a compact between states much like the current NPV Compact (NPVC) that is in the process of adding states until the member states collectively possess 270 electoral votes. The NPVC is an agreement between states that would ensure that the popular vote winner would receive the majority of the electoral votes.¹⁷⁷

Specifically, the proposed compact would require that each member state award its electoral votes to the presidential candidate who received the largest number of popular votes in all 50 states and the District of Columbia. Because the compact would become effective only when it encompasses states collectively possessing a majority of the electoral votes, the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would be

¹⁷⁵ U.S. CONST. art. V. Borys Krawczeniuk, *Lack of presidential ads signals Pa. less of a swing state*, CITIZENVOICE.COM (Sept. 17, 2012), <http://citizensvoice.com/news/lack-of-presidential-ads-signals-pa-less-of-a-swing-state-1.1374086>.

¹⁷⁶ *Id.*

¹⁷⁷ John R. Koza, et. al, *The Agreement Among the States to Elect the President by National Popular Vote*, in EVERY VOTE EQUAL 243-274 (4th ed. 2013), available at <http://www.every-vote-equal.com/pdf/EVE-CH-6.pdf>.

guaranteed enough electoral votes in the Electoral College to be elected to the Presidency.¹⁷⁸

Any state may become a member of the NPVC by enacting the agreement through their state legislature.¹⁷⁹ So far, the agreement has been enacted in eight states and the District of Columbia, totaling 132 electoral votes.¹⁸⁰

I propose that the FDPV method be enacted in the same manner as the NPVC. This manner of enactment will assuage partisan fears of the majority party of the respective state that they would be giving away electoral votes to the other party's candidate. One of the main reasons that virtually the entire country adopted the current winner-take-all system was that the majority party feared that they would help the other candidate win, by giving away electoral votes to the other party.¹⁸¹ For example, a Republican state like Georgia, with a Republican legislature would not unilaterally adopt the FDPV method, since of Georgia's fourteen congressional districts, three are solidly Democratic and two more could vote for a Democratic presidential nominee.¹⁸² However, if a Democratic state like Illinois agreed to join the FDPV Compact (FDPVC), then the disadvantages to the dominant political party in each state would be lessened and would make it more likely for this method to take hold.

However, there are potential constitutional obstacles to the implementation of the NPV by means of the NPVC.¹⁸³ The most likely constitutional roadblock to implementation of the NPVC

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *The National Popular Vote Bill is Now at Half-Way Point*, THE NATIONAL POPULAR VOTE!, <http://www.nationalpopularvote.com/> (last visited Apr. 2, 2013). The states that have enacted the National Popular Vote Compact include Vermont (3), Maryland (10), Washington (12), Illinois (20), New Jersey (14), Massachusetts (11), California (55), Hawaii (4), and the District of Columbia (3). *Id.* Having amassed 132 Electoral Votes, the NPVC is nearly halfway to the 270 Electoral Votes required to reach its goal. *Id.*

¹⁸¹ Hoffman, *supra* note 4, at 947.

¹⁸² *Georgia Election Results: Official Results of the Tuesday, November 04, 2008 General Election*, GEORGIA SECRETARY OF STATE, http://sos.georgia.gov/elections/election_results/2008_1104/Default.htm (last visited Apr. 2, 2013).

¹⁸³ William G. Ross, *Popular Vote Compact: Fraught With Constitutional Perils*, JURIST (Feb. 28, 2012), <http://jurist.org/forum/2012/02/william-ross-vote-compact.php>.

resides in Article I, Section 10, Clause 3 of the U.S. Constitution, which mandates that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”¹⁸⁴

The U.S. Supreme Court defined the Compact Clause in two cases, which suggest that the Court might strike down the NPVC if it is implemented in the future.

In *U.S. Steel Corp. v. Multistate Tax Comm’n*,¹⁸⁵ the U.S. Supreme Court held that the Compact Clause requires congressional approval of an interstate compact that “would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States,” or “impairs the sovereign rights of nonmember States.”¹⁸⁶ Certainly, the NPVC would interfere with the function of the Electoral College as established by the Constitution by potentially requiring every compact member state to cast its electoral votes, not in accordance with the will of its own citizens, but instead in accordance with the will of the voters of all states, taken collectively.

In *U.S. Term Limits, Inc. v. Thornton*,¹⁸⁷ the Court held that state imposed congressional term limits were unconstitutional because such limits would permit states to circumvent the constitutional provisions that empower Congress to establish the qualifications of its members.¹⁸⁸ Again, the Supreme Court held that the states are not empowered to interfere with the constitutional functions of the federal government.¹⁸⁹

Additional objections, both constitutional and practical, have been raised in opposition to the NPVC.

While the NPVC is simply an effort to effectively abolish the Electoral College without amending the Constitution, an FDPVC would represent an effort to extend the electoral vote allocation method currently used in Maine and Nebraska to the other forty-eight states.

¹⁸⁴ U.S. CONST. art. I, § 10, cl. 3.

¹⁸⁵ 434 U.S. 452 (1978).

¹⁸⁶ *Id.* at 472, 477.

¹⁸⁷ 514 U.S. 779 (1995).

¹⁸⁸ *Id.* at 837-38. *See also* Ross, *supra* note 181.

¹⁸⁹ Ross, *supra* note 181.

I advocate that the FDPVC should be an agreement similar to the NPVC in that it would take effect when a certain number of states pass the proper legislation through their state legislatures. I believe that in order for the FDPVC to become law, it needs to assuage fears by partisans in both parties that if certain states enact this legislation it may swing an election one way or another. For this reason, I propose a two-step initiative.

The first step would be focused on getting the legislation passed in the most populous states, since that is where the majority of the swing districts are located. I propose that eight of the ten most populous states must pass the FDPVC so that opponents to the FDPVC could not argue that either party would be placed at a disadvantage. The second step would focus on passing the FDPVC in the remaining forty states. In addition, to being enacted in eight of the ten most populous states, the FDPVC would need roughly two thirds of the remaining forty states to sign on, for a total of roughly thirty-five states. In this manner states would have a legitimate way to switch to a method that would better serve their citizens, but would not be precluded by partisan fears.

Of course states in smaller groups of two or three may and would be encouraged to make compacts between themselves and pass legislation to adopt the FDPV at any time prior to the necessary number of states to enact the larger compact.

CONCLUSION

Every four years the United States of America is divided into two countries: one gets to see the presidential candidates, whose votes are actively sought, and whose electoral votes are seen as determinative in electing the president; the other country is completely forgotten, simply flyover country that the candidates bypass as they travel to events in the other country. This is the state of American presidential campaigns. The culprit is the Electoral College's winner-take-all allocation method.

Many who seek to change the Electoral College believe that an NPV is the way to repair the problems caused by the Electoral College. However, the NPV would cause new, possibly greater problems than the current system. It would lead to major metropolitan area centered campaigns, which would significantly

diminish the importance of rural-area voters and issues. Also, it would possibly lead to base-centered campaigns, which could increase the partisan deadlock in our country's politics. Finally, the NPV would completely change the constitutional framework of our Federalist system, meant to protect the interests of the smaller population states.

The best way to preserve our constitutional framework and increase the time and effort that candidates spend in non-swing states is to change the way the states allocate their Electoral College votes to the FDPV allocation method. This method would follow the lead of Nebraska and Maine that enacted legislation that changed the way those states allocated their electoral votes from a winner-take-all method to a congressional district allocation method. This method could be implemented by: (1) a state-by-state change that would seek to change the allocation method one state at a time, (2) a constitutional amendment that would mandate that all states make the switch at once, or (3) a national compact that would act as a method to allow a number of states to pass legislation that would agree to begin allocating their electoral votes along congressional district lines, once the requisite number of states join the compact.

*Geoffrey Calderaro**

* The author is a second-year law student at the University of Mississippi School of Law. He would like to thank Professor Nowlin, his classmates, and everyone else for their help and encouragement.