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WHY NEW JERSEY SHOULD ABANDON WINNER-TAKE-ALL ELECTORAL ALLOCATION

Joseph Isola*

* The author would like to thank his colleagues for their support and hard work on this publication. This note is dedicated to the memory of Melissa Nicole Ricciardi, the author's cousin, who passed while he was writing this piece.

I. Introduction

In the fight for American independence and for the birth of democracy, New Jersey served as the “Crossroad of the Revolution”.¹ Countless Americans died in the over one hundred revolutionary battles that took place in New Jersey.² After serving as the heartland of the battle for American independence, New Jersey proudly played a major role in the creation of the American democracy.³ Yet, today, when it comes to one of the most fundamental democratic values – voting – New Jersey is not the leader that it once strived to be. New Jersey, through the usage of the winner-take-all method of electoral allocation, does not promote representative results, participation in election, or electoral choice.⁴ New Jersey has become an unattractive campaign destination for presidential candidates and has left the State unable to influence the presidential selection process.⁵ Additionally, this has placed New Jersey in a difficult position to influence national policy in a favorable way

¹ See generally History.com Editors, *New Jersey*, HISTORY.COM (Nov. 9, 2009), <https://www.history.com/topics/us-states/new-jersey>.

² *Id.*

³ See generally Matthew J. Festa, Note, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2107-08 (2001).

⁴ See *infra* Part III C.

⁵ See *infra* Part II E.

for the people of New Jersey.⁶ “Presidential candidates spend relatively little time in New Jersey, except to fly in for fundraisers and leave the same day. They really know nothing about [the] state’s issues.”⁷ However, by abandoning the winner-take-all method, in favor of the congressional district method, New Jersey can reclaim its position as a leader in promoting democracy and influencing the national political stage.⁸

In order for each state to serve the needs of its people, the Founders created a federalist system that encourages innovative local solutions to local problems.⁹ States regularly rely on the deference granted by federalism, which is evident when comparing various state laws and regulations on topics such as education, tax policy, healthcare and election law and policy.¹⁰ This constitutional encouragement to attempt

⁶ *Id.*

⁷ Press Release, Insider NJ, DeCroce Offers Legislation to Change the Way New Jersey Apportions Electoral College Votes (Dec. 1, 2017) (on file with author) [hereinafter DeCroce].

⁸ See *infra* Part III C, D.

⁹ Ross Thomas, Note, *Ungating Suburbia: Property Rights, Political Participation, And Common Interest Communities*, 22 CORNELL J. L. & PUB. POL’Y 205, 231 (2012). Federalism is a system that balances the power of national and local governments and gives distinct rights and responsibilities to each based on the Constitution. See generally M.S., *What is federalism?*, THE ECONOMIST (Jun. 13, 2017), <https://www.economist.com/the-economist-explains/2017/06/13/what-is-federalism>.

¹⁰ For example, the Affordable Care Act, also known as “Obamacare”, was based off the innovation concept Governor Romney previously instituted in Massachusetts. See Jessica Taylor, *Mitt Romney Finally Takes Credit For Obamacare*, NPR (Oct. 23, 2015, 3:47 PM), <https://www.npr.org/sections/itsallpolitics/2015/10/23/451200436/mitt-romney-finally-takes-credit->

innovative solutions to local problems recognizes that each state is different, and that each state has a different set of needs. In this manner, states have the opportunity to act as a laboratory of democracy.¹¹ The concept of states acting as the laboratories of democracies is well-defined in Justice Brandeis' dissent in *New State Ice Co. v. Liebmann*.¹² In that opinion, Justice Brandeis declared that a "[s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹³ Here, Justice Brandeis is celebrating the state's ability to innovate in ways to best serve its citizenry.

States, as laboratories of democracy, have the unique opportunity to innovate the electoral process in a way to best serve the people of the state. However, as political parties have grown in power, some innovations have worked against political participation. These include things such as winner-take-all electoral allocation, closed primaries, and burdensome registration requirements.¹⁴ There have also been many positive innovations that have been created from the laboratories of democracy such as, automatic and same-day voter registration, and different methods of voting which are intended to be make elections fairer

for-obamacare. See also *Learning from the Laboratories of Democracy*, NATIONAL COUNCIL OF NON-PROFITS (last visited Mar. 15, 2019), <https://www.councilofnonprofits.org/trends-policy-issues/learning-the-laboratories-of-democracy>.

¹¹ See Thomas, *supra* note 9, at 231.

¹² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280-311 (1932) (Brandeis, J., dissenting); see also Thomas, *supra* note 9, at 231.

¹³ *New State Ice Co.*, 285 U.S. at 311; see also Thomas, *supra* note 9, at 231.

¹⁴ See generally *Laboratories of Democracy Database*, NEW AMERICA, <https://www.newamerica.org/in-depth/laboratories-of-democracy/> (last visited Oct. 11, 2019)

and more democratic.¹⁵ By becoming a laboratory of democracy, New Jersey could innovatively adopt a method of electoral allocation that would allow the State to once again become a leader in democracy and national influence.

II. Historical Background

A. The Creation of the Electoral College

The Electoral College was established by the Founding Fathers as a way to allow for both the large and small states to contribute to the election of the President.¹⁶ Under the Electoral College system, each state is granted the number of electoral votes equal to the number of Congressional representatives in the given state.¹⁷ New Jersey currently has fourteen electoral votes, which makes up about five percent of the

¹⁵ *Id.* These innovations include things such as ranked voting methodology, multi-round congressional primaries, and techniques to keep districting fairer such as through the use of advisory committees.

¹⁶ Michael J. O'Sullivan, Note, *Artificial Unit Voting and the Electoral College*, 65 S. CAL. L. REV. 2421, 2424-25 (1992).

¹⁷ See generally *Distribution of Electoral Votes*, OFFICE OF THE FEDERAL REGISTRAR, <https://www.archives.gov/federal-register/electoral-college/allocation.html> (last visited Mar. 14, 2019) [hereinafter *Electoral Vote Distribution*].

votes needed to win the presidency.¹⁸ It is the duty and obligation of each individual state to decide how these electoral votes are allocated.¹⁹

Throughout American electoral history states have used three main methods of allocation, which will be discussed in greater detail below: (i) voting within the state legislature; (ii) winner-take-all method;²⁰ and (iii) district method.²¹ In order for the electoral system

¹⁸ *Id.* 270 electoral votes are needed to win the presidential election. $14/270 = \sim 5.2\%$. The 14 votes equal also equal a little less than 3% of the total 538 electoral votes available. *Id.* Congressional representation is based on the U.S. Census, which is taken every ten years. In the 2012 and 2016 president elections, New Jersey had 14 electoral votes that were allocated on a winner-take-all method. In the previous two decades (which included the 1992, 1996, 2000, 2004, and 2008 presidential elections) New Jersey had 15 electoral votes to allocate. In the 1980s, which is also the last time New Jersey allocated any electoral votes to someone other than the candidate endorsed by the Democratic National Committee, New Jersey had 16 electoral votes. In that decade. *New Jersey Presidential Elections, 270TOWIN*, https://www.270towin.com/states/New_Jersey (last visited Mar. 8, 2019) [hereinafter NJ270].

¹⁹ See *infra* Part III B.

²⁰ This method of allocation is also known as the “unit method.” Katherine Florey, Article, *Losing Bargain: Why Winner-Take-All Vote Assignment is the Electoral College’s Least Defensible Feature*, 68 CASE W. RES. 317, 336 (2017); See generally O’Sullivan, *supra* note 16, at 2425-26.

²¹ See O’Sullivan, *supra* note 16, at 2425-26. There have also been plans, proposals and theories surrounding a proportional method of allocation. *Id.* at 2430; NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY & THE DIRECT VOTE* 10 (rev. ed. 1981). Under this type of method states would allocate a percentage of its electoral votes in accordance with the proportion of votes that candidate receives in that state. See O’Sullivan, *supra* note 16, at 2425-26.

to be a success, the individual states had to compromise to balance the interest of the state with the interest of the nation.

The Great Compromise of the 1787 Constitutional Convention created a system of government that balanced the competing interest of the individual states that would soon become the United States of America.²² This compromise, which was the creation of the bicameral legislation,²³ balances federal interest with the competing interest of the individual states.²⁴ As the debate over the selection of the national

However, this type of method has not been used and therefore is outside the scope of this Note.

²² See Festa, *supra* note 3, at 2107-08. New Jersey was a major influencer and participant during the Founding. *Id.* at 2109.

²³ The bicameral legislature creates a system where two separate legislative branches coexist in Congress to create national law. The compromise also included a difference in goals for the two national legislative branches. In the upper house, called the Senate, two Senators represent each state, regardless of size and population. However, in the lower house, called the House of Representatives, the number of Representatives per state varies based on the population of that state in relation to the rest of the state's populations. See generally Amanda Onion, *How the Great Compromise Affects Politics Today*, HISTORY.COM (Apr. 17, 2018), <https://www.history.com/news/how-the-great-compromise-affects-politics-today>. See also Festa, *supra* note 3, at 2108.

²⁴ See Festa, *supra* note 3, at 2111-12. One of the more prominent interests at hand during the convention was the interest of the slave states. *Id.* at 2112. The degree in which slaves would count in the representation of a state's population had major implications on governmental representation and taxation. See Earl M. Maltz, *Symposium: The Constitution and the Selection Conflict: The Presidency, the Electoral College, and the Three-Fifths Clause*, 43 RUTGERS L. J. 439, 441-53 (2013). To address this interest the Founders compromised by adopting the three-fifths rule, which counted three-fifths of a state's slave population to count towards that state's total population. *Id.* at 450. This rule has origins from the Continental Congress' debate over how to count a

executive grew, this Great Compromise was utilized in the creation of the Electoral College.²⁵ Even before the decision to create the Congress was finalized, some delegates wanted to create a system where the members of Congress selected the Executive.²⁶ Many opponents feared that if the legislative branch was to select the executive, the president could become dependent on the legislature and the process “would inevitably be[come] ‘the work of intrigue, of cabal, and of faction.’”²⁷ Subsequently, and after several months of elaborate debate, the Constitutional Committee proposed a plan that developed into the Electoral College.²⁸

After a long debate, the Electoral College was finally adopted as the method to select the Executive leader of the national government.²⁹

slave for the purposes of determining taxation policy. *Id.* at 441-42. By considering three-fifths of a state’s slave population as part of the state’s population, southern states were granted additional representation in Congress and in terms of electoral representation. During the era of American slavery, the three-fifths compromise played a major role in presidential selection, as it significantly changed the amount of representations that a state had in the Electoral College. *Id.* at 467. This advantaged is a major reason for many of the nation’s early Presidents come from a southern state. *Id.*

²⁵ See Festa, *supra* note 3, at 2108–13.

²⁶ *Id.* at 2110.

²⁷ *Id.* (quoting a statement from Gouverneur Morris in opposition of the selection of the executive by the legislature).

²⁸ See Festa, *supra* note 3, at 2116–17. One of the other systems the Founders considered was one in which each state voted for both one person from that state and one person from another state, in order to balance state biases. *Id.*

²⁹ See Festa, *supra* note 3, at 2110-19. The term “Electoral College” is not in the Constitution. However, the system is embedded into the “Electoral Appointments Clause” of the Constitution. It reads:

Gouverneur Morris, and other Founders who supported the plan that became the Electoral College, favored it because it was a compromise that created an independent executive leader and because it endorsed state sovereignty.³⁰ The Electoral College incorporates elements from the Great Compromise by assigning each state the number of electoral votes equivalent to amount of representation that state has in Congress.³¹ The plan was a compromise that allowed for state sovereignty by including electors for each state's Senate seats and by preserving states' rights to have absolute deference on deciding electoral allocation methodology.³² The Founders, with the foresight of a developing country in mind, purposely designed the Electoral College to be able to evolve and to give

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.

U.S. CONST. art. II, §1, cl. 2,

³⁰ *Id.* at 2116-17.

³¹ See generally History.com Editors, *Electoral College*, HISTORY.COM (Jan. 12, 2010), <https://www.history.com/topics/us-presidents/electoral-college>. States are actually assigned "electors" not "electoral votes." It is technically these electors that voters vote for, rather than the actual candidates themselves. These electors then, in turn, vote for the candidate on the behalf of the citizens of that district in accordance with that state's electoral allocation method. *Id.* For purposes of this Note, we will just discuss the concept as electoral votes.

³² See Festa, *supra* note 3, at 2116-18. It is also important to keep in mind that at that point of American history different states allowed different people to vote.

the states the ability to allow for their citizenry to be better represented.³³ One of the ways the Founders cemented this purpose is through the electoral procedure. This includes by granting the states a constitutional obligation to choose what method to use to allocate its electoral votes.³⁴

The deliberate choice to allow states to be the ultimate decision-makers on how to allocate electoral votes is a fundamental component to the electoral system drafted by the Founders.³⁵ By doing so, the Founders recognized that states may opt to utilize different allocation methods, and importantly, that the states should have the discretion to change methodologies in order to best meet its needs.³⁶

³³ Jean Tanis, *The Evolution of the Electoral College*, BEHIND THE SCENE: NEW YORK HISTORICAL SOCIETY (March 7, 2017), <http://behindthescenes.nyhistory.org/the-evolution-of-the-electoral-college/>. The original model only lasted for 17 years. FAIRVOTE, *Why James Madison Wanted to Change the Way We Vote for President*, VOICES & CHOICES: FAIRVOTE (updated June 19, 2012), <https://www.fairvote.org/why-james-madison-wanted-to-change-the-way-we-vote-for-president> [hereinafter FAIRVOTE - Madison]. The main reason for this initial change was needed because of controversies over the Vice Presidency. *Id.* Another example of Electoral College evolution is also the 23rd Amendment, which, in 1961, enfranchised the voters of Washington D.C. by granting the nation's capital three electoral votes. U.S. CONST. amend. XXIII, §1.

³⁴ See Festa, *supra* note 3, at 2101-02.

³⁵ *Id.* at 2117-18.

³⁶ *Id.* at 2118. The last major compromise of the Electoral College is the built-in contingency plan that is triggered if no Presidential candidate receives the requisite electoral votes needed. *Id.* at 2119. When deciding that the final decision of who won the Presidency would go to the House of Representatives multiple factors of compromise were in mind. *Id.* This favored larger states, which have more influence in the House of Representatives than the smaller states. *Id.*

B. Original Allocation Methods

When the Electoral College was created, states quickly decided upon respective methodologies to allocate electoral votes.³⁷ The three main methods which were used were: (i) selection by state legislature, (2) district method,³⁸ and (3) the winner-take-all method.³⁹ The most common allocation method chosen by states, at the time of the Founding, was through selection by the state legislature.⁴⁰ This method took the decision away from citizens, and vested it with the legislatures, not the citizenry.⁴¹ During the time of the Founding, multiple states including New York, Rhode Island, and South Carolina used this method.⁴² New Jersey used this system until 1812 when it changed to the winner-take-all method of allocation.⁴³

³⁷ See FAIRVOTE - Madison, *supra* note 33.

³⁸ See O'Sullivan, *supra* note 16, at 2426-27.

³⁹ See generally Florey, *supra* note 20.

⁴⁰ See FAIRVOTE - Madison, *supra* note 33. Under this system, the state legislature decided who should be allocated the state's electoral votes. *Id.* James Madison was not a fan of this system as it excluded the people and granted state legislatures power over the President. *Id.* Under this system the state traditionally allocated all of its votes to one candidate, but in theory the state legislature could devise a way to allocate its electoral votes to multiple candidates.

⁴¹ *Id.*

⁴² William Logan Martin, *Presidential Electors: Let the State Legislatures Choose Them*, 44 A.B.A.J. 1182, 1187 (1958).

⁴³ *Id.* at 1186. New Jersey used a winner-take-all method in the 1804 and 1808 elections before reverting back to selection by state legislature for the 1812 election. *Id.*

Secondly, several states including North Carolina, Tennessee, and Virginia employed a district allocation method.⁴⁴ Under this method, a state is divided into districts, which individually vote on which candidate to allocate that respective electoral vote.⁴⁵ Thus, in effect, the district allocation method allows states to allocate electoral votes to multiple candidates.⁴⁶ This method is more commonly known as the Congressional District Method.⁴⁷ Presently, Maine and Nebraska are the only two states to not use the winner-take-all method of allocation.⁴⁸ Both states use the Congressional District Method.⁴⁹ The remaining 48 states use the statewide winner-take-all electoral allocation method.⁵⁰ Under this system, whoever wins the most votes on the state

⁴⁴ See FAIRVOTE - Madison, *supra* note 33.

⁴⁵ *Id.*; see also Martin, *supra* note 42, at 1185-87. Different states installed this system different, some using the congressional districts, and some creating new districts. See FAIRVOTE - Madison, *supra* note 33. However, the method utilizing the congressional districts has become the dominant district method. *Id.* Using the congressional districts states avoid the issues that may come from creating new districts (e.g. gerrymandering and discrimination) and preserves the essence of the Great Compromise.

⁴⁶ See FAIRVOTE - Madison, *supra* note 33.

⁴⁷ *Maine & Nebraska*, THE ELECTORAL COLLEGE: FAIRVOTE (Aug. 15, 2007), https://www.fairvote.org/maine_nebraska [hereinafter FAIRVOTE - Maine-Nebraska]. It is also known as other titles such as Fair Vote Method or Spilt Vote Method.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See FAIRVOTE - Madison, *supra* note 33; see also Festa, *supra* note 3, at 2010.

level is awarded all of that State's electoral votes.⁵¹ Over time, political ploys and partisanism has driven almost every state in the nation to adopt this method.⁵² As discussed below, the winner-take-all method is popular, but also the result of dangerous political pull that has weakened New Jersey's ability to be a national influencer.

C. Why States Started to Move to Winner-Take-All

Winner-take-all methodology of electoral allocation is the product of the ambitions of political parties – not a mechanism of democracy. After Thomas Jefferson, who was leader of the Democratic-Republican Party,⁵³ lost the 1796 election to Massachusetts' John Adams by two votes, he led the charge to change Virginia's allocation method to the winner-take-all method.⁵⁴ Thomas Jefferson could have beaten John Adams⁵⁵, leadership of the Federalist Party, in the election had the

⁵¹ See FAIRVOTE - Madison, *supra* note 33.

⁵² See O'Sullivan, *supra* note 16, at 2427-28.

⁵³ See generally History.com Editors, *Democratic Party*, HISTORY.COM (Oct. 11, 2019), <https://www.history.com/topics/us-politics/democratic-party> Jefferson, and his fellow Democratic-Republicans such as James Madison, believed in a limited central government, and opposed the Federalists, who supported a strong national government and less control by the states. *Id.*; See generally History.com Editors, *Federalist Party*, HISTORY.COM (Sept. 13, 2019), <https://www.history.com/topics/early-us/federalist-party> [hereinafter Federalist Party].

⁵⁴ Devin McCarthy, *How the Electoral College Became Winner-Take-All*, VOICE & CHOICES: FAIRVOTE (Aug. 21, 2012), <https://www.fairvote.org/how-the-electoral-college-became-winner-take-all>.

⁵⁵ John Adams was a leader of the Federalist Party, one of the two original political parties in America. See generally Federalist Party, *supra* note 53. Founders such as John Adams, Alexander Hamilton, and John Jay created the

winner-take-all method been previously implemented in his home state of Virginia, and neighboring state of North Carolina, both of which allocated one vote to the winner of the 1796 presidential election.⁵⁶ Until the 1800 election, Virginia, which had the most amount of electoral votes at this point,⁵⁷ used the congressional district method.⁵⁸ Historically, Jefferson, and many other founders felt that a district method of electoral allocation would be best.⁵⁹ However, Jefferson's desire to have a political victory outweighed the benefits of using the more representative district method.⁶⁰ Jefferson felt that since all states did not currently

party in opposition of the Democratic-Republicans. *Id.* The Federalist believed in a strong national government and supported ideas such a national bank. *Id.* By the 1820s the Federalist Party essentially no longer existed. *Id.*

⁵⁶ See McCarthy, *supra* note 54. North Carolina was also considered a "Jefferson stronghold" at the time. *Id.*; see also 270TOWIN, *Election of 1796*, https://www.270towin.com/1796_Election/ (last visited Mar. 7, 2019). Thomas Jefferson and John Adams had a complicated relationship of friendship and rivalry. Sarah Pruitt, *Jefferson & Adams: Founding Frenemies*, HISTORY.COM (Nov. 1, 2016), <https://www.history.com/news/jefferson-adams-founding-frenemies>. The two "frenemies," as some call them, were once very close friends before driven apart by politics. *Id.* Even though Jefferson was invited to serve on Adams cabinet, he refused. *Id.*

⁵⁷ See McCarthy, *supra* note 54.

⁵⁸ See Martin, *supra* note 42, at 1187.

⁵⁹ Jefferson said, "[we] all agree that an election by districts would be best." McCarthy *supra* note 54. Other founders, and early leaders of the democracy, such as James Madison, Gouverneur Morris, and Andrew Jackson also supported the district method. See also Festa *supra* note 3, at 2110.

⁶⁰ See McCarthy, *supra* note 54. Thomas Jefferson wanted to beat John Adams and become President in 1800, which he did. *The Election of 1800*, USHISTORY.COM, <http://www.ushistory.org/us/20a.asp> (last visited Nov. 4, 2019).

use a district method, that states with winner-take-all allocation could have a political advantage.⁶¹ As a consequence to Virginia's methodology change, Massachusetts,⁶² led by John Adams, also changed its law in order to give Adams a better chance at retaining the presidency.⁶³

By 1820 political parties were fully entrenched in the presidential selection process and decisions were being made to favor party politics – not the citizens who resided in the state.⁶⁴ What began with Virginia and Massachusetts soon spread across the nation, resulting in the consolidation of power by political party leaders. At this point in American history an equal number of states that allocated based on the state

The transition of power between Adams and Jefferson was an essential and important moment in American history, as it became known as the first peaceful transition of power between opposing parties. *Id.*

⁶¹ See McCarthy, *supra* note 54. In this point in American history politics were largely regional and there were often concerns with states favoring their own candidates and interest. This was evident during the debates in the Constitutional convention. See also THE NEW ENCYCLOPEDIA BRITANICA *Electoral College* 423-24 (15th ed. 1988); see also Geoffery Calderaro, *Article: Promoting Democracy While Preserving Federalism: The Electoral College, The National Popular Vote, & The Federal District Popular Vote Allocation Alternative*, 82 MISS. L. J. 287, 308 n.110 (2013). Many states at this point also allocated based on the decision of state legislatures. See also Martin, *supra* note 42, at 1187. This system, like the winner-take-all method, traditionally allocated all votes to one candidate.

⁶² Massachusetts switched to a state legislature model for the 1800 election. See Martin, *supra* note 42, at 1186. This allowed the state to allocate all of its votes to its local candidate without too much concern and keep up with the advantage that Jefferson was trying to build for himself. See McCarthy, *supra* note 54.

⁶³ McCarthy, *supra* note 54.

⁶⁴ *Id.*

legislator method and the winner-take-all methodology.⁶⁵ The 1820 election was essentially a farce, with Democratic-Republican James Monroe running essentially unopposed and winning all but one symbolic electoral vote.⁶⁶

After the 1820 election, former President James Madison proposed a constitutional amendment to require each state to use a district method of allocation.⁶⁷ He wrote that “the district mode was mostly, if not exclusively in view when the Constitution was framed and adopted; and was exchanged for the general ticket and the legislative election, as the only expedient for baffling the policy of the particular States which had set the example.”⁶⁸ In other words, the Founders envisioned a system where states allocated electoral votes in a manner that represented the political diversity of that state’s population, and not based on what benefited the political parties. They envisioned a system where allocating electoral votes to multiple candidates demonstrated to the nation the diversity of ideas and thoughts that exists in each independent portion of the nation. Madison’s fears about the growing use of winner-take-all became real when, by 1824, twice as many states used a winner-take-all methodology than any other method.⁶⁹ At this point, future president Andrew Jackson and others joined Madison in lobbying for a

⁶⁵ *Id.*

⁶⁶ *1820 Election, 270TOWIN*, https://www.270towin.com/1820_Election/ (last visited Mar. 8, 2019) [hereinafter *1820Election*]. One vote went to John Quincy Adams just so James Monroe would not be unanimous. *Id.* In 1816 James Monroe beat Rufus King, the last actual Federalist candidate for president. *1816 Election, 270TOWIN*, https://www.270towin.com/1816_Election/index.html. (last visited Mar. 8, 2019) [hereinafter *1816Election*].

⁶⁷ See McCarthy, *supra* note 54.

⁶⁸ *Id.*

⁶⁹ *Id.*

constitutional amendment requiring a district system.⁷⁰ Senator Thomas Hart Benton of Missouri argued in opposition of the winner-take-all trend that was sweeping the nation, stating that the method was “adopted by the leading men of those states, to enable them to consolidate the vote of the State.”⁷¹ It was 1872 when every state finally held statewide elections,⁷² to decide whom to allocate its electoral votes.⁷³ Every single state used a winner-take-all methodology of allocation.⁷⁴

Despite the forewarning of the Founders, the political parties consolidated power through the mass implementation of the winner-take-all method throughout the nation.⁷⁵

D. Resurgence of Congressional District Method

⁷⁰ *Id.*

⁷¹ Rachel Alexander, *Surprisingly, Republicans and Conservatives Shouldn't Fear a National Popular Vote*, THE CHRISTIAN POST: VOICES (Dec. 13, 2017), <https://www.christianpost.com/voice/surprisingly-republicans-and-conservatives-shouldnt-fear-a-national-popular-vote.html>.

⁷² See McCarthy, *supra* note 54. Colorado was the last state to stop allocating electoral votes based on the state legislature when the state adopted the winner-take-all method of allocation in 1872. *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ By 1830 only five states still used a district method. See Martin, *supra* note 42, at 1185-87. North Carolina was the last state to regularly utilize the congressional district method until its small, but important, resurgence in the twentieth century. *Id.* Michigan however reverted back to the congressional district method for the 1892 presidential election. *Id.* See also McPherson v. Blacker, 146 U.S. 1, 22 (1892). In 1830, no state regularly used state legislatures to allocate electoral votes, but it was used a few times due to unusual circumstances. See Martin, *supra* note 42, at 1185-87.

After a long drought of usage, the congressional district method made a small resurgence in the modern era. Today, two states use the congressional district method.⁷⁶ In 1972, Maine started the revolution by abandoning the winner-take-all method in favor of the congressional district method for the first time in the modern era.⁷⁷ For Maine, this was a return to the original method of electoral allocation used when Maine gained statehood.⁷⁸ Maine re-adopted the congressional district method after a three-way tie that occurred in the 1968 presidential election.⁷⁹ The congressional district method was passed, in-part, due to the belief that the “winner-takes-all method [is] unfair and distanced the outcome from what the people really indicated in the popular vote.”⁸⁰ When the bill was proposed in the Maine legislature, supporters and political pundits “considered [it] to be closer to the ideal democracy of one person, one vote.”⁸¹ Maine’s re-implementation of the congressional

⁷⁶ See FAIRVOTE – Maine-Nebraska, *supra* note 47.

⁷⁷ See McCarthy, *supra* note 54.

⁷⁸ See Martin, *supra* note 42, at 1185-87. Before joining the Union in 1820, Maine was part of Massachusetts, which adopted the congressional district method for the 1820 election. *Maine’s Path to Statehood*, PR51ST <http://www.pr51st.com/maines-path-to-statehood/> (last visited Mar. 8, 2019). Maine joined the Union as part of the Missouri Compromise. *Id.* As previously mentioned, James Monroe ran virtually unopposed in the 1820 election. See Election1820, *supra* note 66. Maine switched to the winner-take-all method in 1832, which it used until reverting back to the congressional district method for the 1972 election. See Martin, *supra* note 42, at 1185-87.

⁷⁹ Julie Harris, *Why Maine Splits its Electoral Votes*, BANGOR DAILY NEWS (Nov. 8, 2010), <https://bangordailynews.com/2008/10/26/politics/why-maine-splits-its-electoral-votes/>.

⁸⁰ *Id.*

⁸¹ *Id.* (summarizing the comments of Glenn Starbird Jr., a state legislator from Maine and a supporter of the congressional district method).

district method opened the door for other states to break away from the winner-take-all method.

Nebraska followed suit by adopting the congressional district method in 1992.⁸² Nebraska prides itself as a state that puts its citizens before politics. Nebraskans endorse the congressional district method, as it “fits the state’s political ethos, where party affiliation is supposed to take a back seat to Great Plains pragmatism.”⁸³ At times, since the adoption of the congressional district method, the political parties have attempted to consolidate power in Nebraska by reinstating winner-take-all allocation.⁸⁴ All attempts have been defeated.⁸⁵ The most recent attempt to consolidate power this way was in 2016.⁸⁶ When Nebraskan Republicans introduced a bill to abandon the congressional district method in favor of a winner-take-all method of allocation.⁸⁷ This effort was defeated largely due to the support of political independents that

⁸² *History of Congressional District Method for Presidential Elections Fraught with Partisan Intrigue*, VOICE & CHOICES: FAIRVOTE (Aug. 15, 2007), https://www.fairvote.org/history_of_congressional_district_method_for_presidential_elections_fraught_with_partisan_intrigue_c-zluex0h0rtncyp4xis0g [hereinafter FAIRVOTE - CDM History].

⁸³ Mitch Smith, *Nebraska Legislature Rejects Winner-Take-All Electoral Vote System*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/13/us/nebraska-legislature-rejects-winner-take-all-electoral-vote-system.html>. Nebraska is the only state with a unicameral house and the only state in which lawmakers do not caucus by party. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

passionately embrace the congressional district method as a symbol of Nebraskan democracy.⁸⁸

Even though Maine and Nebraska are currently the only states that utilize the congressional district method of electoral allocation, other states have flirted with abandoning the winner-take-all method in favor of a district method. Attempts to reform electoral allocation on a state level have been made many times by individual states. Unfortunately, reform efforts are often defeated due to the desire of political parties to use winner-take-all to consolidate power.⁸⁹ These attempts have, however, become more common over the past decade than in the past.⁹⁰ Prior to the 2008 presidential election, Republicans in California attempted to abandon the winner-take-all method in favor of the congressional district method so that the state's electoral allocation would be more representative than in the past.⁹¹ If the initiative passed, it was projected that the Republican nominee would have been allocated an impactful amount of California's 55 electoral votes.⁹² However, this initiative failed to gain ballot access due to the Democrats' efforts to

⁸⁸ See generally *id.*

⁸⁹ A. C. Thomas, Andrew Gelman, Gary King & Jonathan N. Katz, *Estimating Partisan Bias of the Electoral College Under Proposed Changes in Elector Apportionment*, 4 STAT., POL., & POL'Y, 1, 2-3 (2013), <https://doi.org/10.1515/spp-2012-0001> [hereinafter Gelman].

⁹⁰ *Id.* at 2.

⁹¹ *Id.*; see also Thomas H. Neale, *Electoral College Reform: Contemporary Issues For Congress*, Cong. Res. Serv., R438244, 2, 33 (2017), <https://fas.org/sgp/crs/misc/R43824.pdf> [hereinafter Neale-EC].

⁹² J. Gordon Hylton, *A Different Way to Run The Electoral College*, MARQ. U. L. SCH. FAC. BLOG (Feb. 28, 2010), <https://law.marquette.edu/facultyblog/2010/02/28/a-different-way-to-run-the-electoral-college/>.

stop the measure.⁹³ Furthermore, in 2011, Pennsylvania, also considered adopting the congressional district method.⁹⁴ This proposal was supported by some Republicans who, after narrowly losing in the 2008 election, advocated that the district method would be a “fairer system” to represent the people of Pennsylvania.⁹⁵ This proposal was never able to establish enough support to gain momentum for reform.⁹⁶ Part of this reason was because of disagreements on the issue between Pennsylvania Republicans.⁹⁷ In both these cases the ambitions of the leaders of the political parties overcame the ambition to be more representative of the states’ citizenry. Today, states such as New Jersey have proposals in its state legislature to adopt the congressional district method and “give more people a reason to come out and vote.”⁹⁸ As more and more movements to adopt the congressional district method are born, the general

⁹³ See Neale-EC, *supra* note 91, at 22. A similar initiative gained momentum in 2012 before also being defeated by Californian Democrats in order to ensure that more electoral votes went to the Democratic nominee. *Id.*

⁹⁴ Wayne Baker, *Electoral College: Is it Time to Shake Up the System*, ANN ARBOR NEWS (Oct. 5, 2011, 4:31 PM), <http://www.annarbor.com/passions-pursuits/electoral-college-is-it-time-to-shake-up-the-system/>.

⁹⁵ *Id.* If applied to the 2008 election, Pennsylvania claimed eleven votes would have gone to Senator McCain and ten would have gone to Senator Obama. *Id.*

⁹⁶ See Gelman, *supra* note 89, at 2.

⁹⁷ See generally *id.*

⁹⁸ See DeCroke, *supra* note 7 (quoting Assemblywomen DeCroke). Assemblywomen DeCroke has proposed a piece of legislation that would chance New Jersey’s electoral allocation method to the congressional district method. There have also recently been proposals in Colorado, Michigan, Virginia, and Wisconsin to abandoned winner-take-all allocation in favor of a district method. See Neale-EC, *supra* note 91, at 21-23.

American citizenry becomes more educated on its ability to impact the way states allocates its electoral votes.

With the resurgence of the congressional district method, New Jersey is in prime position to once again be a leader in promoting democracy.

E. New Jersey Methods

New Jersey is one of the original thirteen states that formed the Union, and has participated in every presidential election the nation has ever held.⁹⁹ In the beginning, New Jersey allocated its electoral votes, like many states, through the decision of the state legislature.¹⁰⁰ Interestingly, New Jersey differed from many other states and allowed certain women and African-Americans to vote, as long as they met all other requirements.¹⁰¹ This, however, did not last long and women and African-Americans were stripped of their voting rights in 1807 when the Democratic-Republicans passed a law restricting the right to vote to white, tax-paying men.¹⁰² Ironically enough, the Democratic-Republicans passed this bill to consolidate political power, as women often

⁹⁹ See NJ270, *supra* note 18.

¹⁰⁰ See Martin, *supra* note 42, at 1186.

¹⁰¹ National Park Services, *Did You Know: Women & African Americans Could Vote in New Jersey Before the 15th and 19th Amendments*, NATIONAL PARK SERVICES (July 3, 2018), <https://www.nps.gov/articles/voting-rights-in-nj-before-the-15th-and-19th.htm>. These other requirements included residency and property requirements, which did allow for some women and African-Americans to vote for the presidency in New Jersey. *Id.*

¹⁰² *Id.*

voted for Federalists during this period.¹⁰³ The will of political parties to consolidate power disenfranchised women and racial minorities in New Jersey until the Fifteenth and Nineteenth Amendment granted those groups an explicit constitutional right to vote.¹⁰⁴

In February 1804, prior to the 1804 presidential election occurring that fall, New Jersey changed its electoral allocation method to the winner-take-all method.¹⁰⁵ That fall, New Jersey allocated all of its electoral votes to Thomas Jefferson, who won the election in a landslide.¹⁰⁶ Since then, with the exception of an error in 1860,¹⁰⁷ New Jersey has allocated all of its electoral votes to a single candidate, regardless of how many people voted for any other candidate.¹⁰⁸ Oddly enough, the error in 1860, spilt the electoral votes 4 to 3, was more

¹⁰³ *Id.* This attempt to consolidate power aligns perfectly with the political parties implementation of the winner-take-all method for the same reason.

¹⁰⁴ *Id.*

¹⁰⁵ See Martin, *supra* note 42, at 1186.

¹⁰⁶ *1804 Election, 270TOWIN*, https://www.270towin.com/1804_Election/ (last visited Mar. 8, 2019) [hereinafter 1804Election].

¹⁰⁷ N.J. State Archives, *Lincoln & New Jersey: A Bicentennial Tribute By the New Jersey State Archives*, N.J. Dep't of State (2011), <https://www.nj.gov/state/archives/lincoln.html> [hereinafter NJ Archives]. Even though Stephen Douglas, through a fusion-ticket, received about 4,000 more votes than Abraham Lincoln, Lincoln was able to secure four of New Jersey's seven electoral votes. *Id.* This was because of an error by the Democrats when trying to create the fusion-ticket in the state. *Id.* A fusion-ticket is a collection of candidates, in this case it was Democratic nominee Stephen Douglas and John Breckinridge.

¹⁰⁸ See NJ270, *supra* note 18.

representative to the results,¹⁰⁹ instead of a 7 to 0 allocation that should have occurred under the winner-take-all method.¹¹⁰ Generally speaking, New Jersey has allocated on a winner-take-all basis for every single presidential election, yet stands as a non-competitive state that does not attract presidential candidates to visit.¹¹¹

F. A New Hope for New Jersey

Currently, Assemblywoman BettyLou DeCroce has a bill on the floor of the New Jersey State Legislature.¹¹² NJ-A913 calls for New Jersey to abandon its current winner-take-all allocation method in favor of the congressional district method.¹¹³ If New Jersey were to adopt the

¹⁰⁹ See NJ Archives, *supra* note 108. The results were ~58,000 to ~62,000.

¹¹⁰ *Id.*

¹¹¹ See DeCroce, *supra* note 7.

¹¹² NJ-A913, BILL TRACK 50, <https://www.billtrack50.com/BillDetail/919549> (last visited Mar. 15, 2019) [hereinafter *Bill Track*]. The bill is currently in the committee stage and has a counterpart bill in the Senate. *Id.*

¹¹³ See generally H.B. NJ-A913, 218TH (2018-18), available at https://www.njleg.state.nj.us/2018/Bills/A1000/913_I1.HTM (last visited Mar. 15, 2019). The bill would also remove New Jersey from the National Popular Vote (NPV) Interstate Compact. *Id.* The NPV Initiative, as its been called, essentially creates a direct popular election by acting as a pledge from each member state to allocate its electoral votes to whichever candidate receives the most votes across the nation. See THOMAS H. NEALE, *The National Popular Vote (NPV) Initiative: Direct Election of the President by Interstate Compact*, CONG. RES. SERV., 1, 1 (Oct. 25, 2018) <https://fas.org/sgp/crs/misc/R43823.pdf> [hereinafter *Neale-NPV*]. This initiative has a whole host of additional problems that are outside of the scope of this Note. *Id.* at 17-27. These issues mostly revolve around the question of the constitutionality of the initiative, as well as the fact that it may not be

congressional district method under Assemblywoman DeCroce proposal,¹¹⁴ each of New Jersey's twelve congressional districts would allocate an electoral vote to the candidate that receives the most votes in that district, regardless of how the rest of the state votes.¹¹⁵ The remaining two electoral votes, which represent New Jersey's two federal Senators, are allocated to the candidate that receives the most votes across the entire state.¹¹⁶ However, this proposed legislation is at a standstill, as the change in allocation methods threatens the political parties stronghold on New Jersey politics. This is the first call for electoral allocation reform in New Jersey in over a decade. The last time New Jersey considered electoral allocation reform was at the turn of the millennium, when State Senator Joseph Kyrillos of Monmouth County lead the charge to abandon the winner-take-all method in favor of the

representative of those who live in that state. *Id.* For example, if every single person in New Jersey voted for Candidate Z, and Candidate W wins the national popular vote by a single vote, New Jersey would allocate all 14 of its electoral votes to Candidate W, even though nobody in New Jersey casted a vote for that candidate. The NPV initiative would also act as another consolidation of power by the political parties, as it would continue to ensure that only the candidates supported by the powerful political parties could compete, and as discussed below, even if a minority candidate had a center of support, people would continue to be discouraged to vote for that candidate.

¹¹⁴ Assemblywoman DeCroce's proposal is not unique in the sense how the system would operate. While wording between DeCroce's proposal and another proposal may differ, it would operate in the same way, granting each congressional district control over its own electoral vote, while allocating the remaining two electoral votes to the general winner of the state.

¹¹⁵ See Bill Track, *supra* note 112.

¹¹⁶ *Id.*

congressional district method.¹¹⁷ This reform effort extended past the 2004 presidential election, when Senator Kyrillos, again, attempted to bring the congressional district method to New Jersey in the winter of 2004.¹¹⁸ Now, New Jersey finds itself considering whether or not it wants to seize the moment and abandoned the winner-take-all allocation method in favor of a method that will be more representative of the people of New Jersey.

III. Discussion

"However [political parties] may now and then answer popular ends, they are likely in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion."¹¹⁹
-George Washington, Farewell Address

¹¹⁷ *State Senator Proposes Scrapping New Jersey's "Winner-Take-All" Electoral System*, THE ASSOCIATED PRESS, Nov. 20, 2000, at 1.

¹¹⁸ ANDREA ALEXANDER, *Kyrillos Wants to End 'Winner-Take-All' Electoral Vote in N.J.*, ASBURY PARK PRESS, Oct. 1, 2004, at 1.

¹¹⁹ *Farewell Address*, FRED W. SMITH NATIONAL LIBRARY FOR THE STUDY OF GEORGE WASHINGTON, <https://www.mountvernon.org/library/digitalhistory/quotes/article/however-political-parties-may-now-and-then-answer-popular-ends-they-are-likely-in-the-course-of-time-and-things-to-become-potent-engines-by-which-cunning-ambitious-and-unprincipled-men-will-be-enabled-to-subvert-the-power-of-the-people-and-to-usurp-for-th/> (last visited Mar. 15, 2019).

A. Presidential Selection Process Empowers The States To Decide

The Founders purposely created a system to select the president that inherently embraces federalism in order to allow the states to act as laboratories of democracies to best serve the needs and interest of each individual state. This collective responsibility by each individual state to independently decide which method is best for that state is often ignored in favor of the political parties' desire to consolidate power to a candidate that they favor.¹²⁰ For example, in 1890, Democrats gained control of the state legislature of Michigan and adopted the congressional district method – a first for Michigan.¹²¹ Fearing that the Democrats would win some of Michigan's electoral votes, Republicans challenged the usage of the congressional district method, which was upheld and declared constitutional by the Supreme Court.¹²² In the election of 1892, the Republican's fear materialized, as Michigan used the congressional district method to better represent its citizens.¹²³ This was because Michigan allocated five of its fourteen delegates to democratic

¹²⁰ See FAIRVOTE – CDM History, *supra* note 82. This extends past electoral allocation methodology to include things such as the administration of elections, and voter eligibility regulations. Derek T. Muller, ARTICLE: INVISIBLE FEDERALISM HISTORY AND THE ELECTORAL COLLEGE, 44 ARIZ. ST. L.J. 1237, 1239 (2012). This theory, which says that states individually protect the Electoral College through these state policies and laws, is called “invisible federalism.” *Id.*

¹²¹ *Id.* Republicans traditionally controlled the state at this point in American history. *Id.*

¹²² *McPherson*, 146 U.S. at 25 (holding that each sovereign state has the right and the obligation to decide how to allocate its electoral votes).

¹²³ See FAIRVOTE – CDM History, *supra* note 82.

nominee, and winner of the election, Grover Cleveland.¹²⁴ After the election, Republicans regained control of the state legislature and re-implemented the winner-take-all method in order to consolidate political power.¹²⁵

Unless the people of New Jersey stand up and demand electoral allocation reform, they will continue to fall victim to the interest of the big political parties. Thus, it is vital that citizens are informed about electoral allocation methodology and the benefits and dangers of each method.

B. Constitutional Protection

It is a well-established principle that the Constitution protects the states' right and duty to determine which method of electoral allocation to use.¹²⁶ While forty-eight of the fifty states currently use the winner-take-all method, there is nothing that constitutionally mandates or endorses the usage of this method. In fact, the winner-take-all method

¹²⁴ *Id.* The remaining nine electoral votes went to Republican, Benjamin Harris. *Id.* When Republicans recaptured the state legislature, they consolidated power and reinstated winner-take-all allocation. *Id.* California, Ohio, Oregon, and North Dakota also split votes in the Presidential election that year. David Leip, *1892 General Election Results*, (2016) <https://uselectionatlas.org/RESULTS/national.php?year=1892&f=0&off=0&elect=0>.

¹²⁵ See FAIRVOTE – CDM History, *supra* note 82.

¹²⁶ See *McPherson*, 146 U.S. at 25 (holding that each sovereign state is the decider of what electoral allocation method it uses); See also Christopher Duquette & David Schultz, *Article: One Person, One Vote and the Constitutionality of the Winner-Take-All Allocation of Electoral College Votes*, 2 TENN. J. L. & POL'Y 453, 469-70 (2006).

was not the electoral allocation method imagined by the Founders.¹²⁷ As previously mentioned, the Founders imagined an electoral allocation method that mirrors the congressional district method.¹²⁸ This right to choose is an established constitutional obligation endorsed by the Supreme Court and embedded into the Constitution.¹²⁹ New Jersey is completely within its right to reform its electoral allocation method and abandoned the winner-take-all system in favor of the more democratic congressional district method.

In *McPherson v. Blacker*, the Supreme Court established that the States had complete discretion over their electoral allocation methodology.¹³⁰ The Court heard *McPherson* to resolve the issue of the constitutionality of Michigan's use of the congressional district method of electoral allocation in the 1892 presidential election.¹³¹ It is an especially noteworthy challenge as it arose as an attempt by the political party traditionally in power to re-capture power in favor of their candidate.¹³² The Court found that the Constitution grants states plenary

¹²⁷ Florey, *supra* note 20, at 322; *See also* FAIRVOTE - Madison, *supra* note 33.

¹²⁸ *See* McCartney, *supra* note 54.

¹²⁹ *See* *McPherson*, 146 U.S. at 35.

¹³⁰ *Id.* (holding that “the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States . . .,” as long as the method is constitutional and does not violate anybody’s constitutional rights).

¹³¹ *Id.* at 24-25.

¹³² *Id.* at 36; *see also* Festa, *supra* note 3 at 2127.

power to determine the state's electoral allocation methodology.¹³³ This judicial deference would allow New Jersey to change its allocation method without concerns of issues from the courts.¹³⁴

The right to choose an electoral allocation method is also embedded into the constitutional federalism that the American system is founded upon. While the federal government is enumerated various powers, the States contain "a residuary of inviolable sovereignty,"¹³⁵ which limits Congressional authority based on the principle of the anti-commandeering doctrine,¹³⁶ and expressly reserves these rights to the States in the Tenth Amendment.¹³⁷ This inviolable sovereignty was protected by the Founders as an essential component of the foundation of

¹³³ See *McPherson*, 146 U.S. at 25. Traditionally through the state's legislative branch. For example, in New Jersey reform is available through legislative proposals such as Assemblywomen DeCroce's proposal.

¹³⁴ See *McPherson*, 146 U.S. at 29-33 (holding that the congressional district method was a constitutional method of allocation). The Court discussed how Madison and other framers felt that the congressional district method was the most equitable and preferred method. *Id.* at 29.

¹³⁵ THE FEDERALIST NOS. 39 (James Madison).

¹³⁶ The anti-commandeering principle involves separation of powers, checks and balances, and federalism to declare that Congress does not have the authority to coerce, require, or prohibit state action. *Murphy v. NCAA*, 138 S. Ct. 1461, 1471-72 (2018); see also *Reno v. Condon*, 528 U.S. 141, 151 (2000) (holding that Congress had legitimate authority to pass the Driver's Privacy Protection Act (DPPA) under Congress' Commerce Clause power, but noted that Congress' authority is limited by federalism and Tenth Amendment principles).

¹³⁷ U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

American government,¹³⁸ and protected by the Courts.¹³⁹ The Court has also held that the Eleventh Amendment, which explicitly references State immunity from certain suits,¹⁴⁰ is a “fundamental aspect of the sovereignty in which the States enjoy,” and that Congress could not force States to consent to suit.¹⁴¹

¹³⁸ See generally THE FEDERALIST NOS. 39, *supra* note 138.

¹³⁹ See *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that an act by Congress which required States to act by taking actions to dispose of all radioactive waste within its border violated the Tenth Amendment); *Printz v. United States*, 521 U.S. 898, 932 (1997) (holding that a provision of the Brady Act which required state and local law enforcement agents to conduct background checks on potential gun purchasers violated the Tenth Amendment and “compromise[d] the structural framework of dual sovereignty”); *Murphy*, 138 S. Ct. at 1484-85 (2018) (holding that a congressional act prohibiting States from authorizing and licensing sports gambling violated the Tenth Amendment because it acted to commandeer the state's regulatory power and that there was no real different it mandating States to act and prohibiting States ability to act). See generally David G. Trager, *Public Policy Symposium: Our New Federalism? National Authority & Local Autonomy In the War on Terror: The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOKLYN L. REV. 1277-80 (2004) (providing a more detailed discussion on the anti-commandeering doctrine and the influence of federalism and the Federalist Papers).

¹⁴⁰ U.S. CONST. amend. XI. (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

¹⁴¹ *Alden v. Maine*, 527 U.S. 706, 713, 759-60 (1999) (holding that Congress could not commandeer the States’ Constitutional right to sovereign immunity by forcing states to consent to private action in state court).

This deference that allows the states to choose an electoral allocation method that works for its citizenry enables and encourages greater political participation in the election of the President.¹⁴² For the sake of democracy, the encouragement of heightened involvement in the election of the leader of the free world rings true to the ultimate goal to maintain a “government of the people, by the people, for the people.”¹⁴³

C. Why Winner-Take-All Allocation Isn’t Democratic

The winner-take-all methodology of electoral allocation has become the most widely used method, but that does not automatically mean it is the most democratic method. New Jersey uses this methodology of allocation and currently allocates all fourteen of its electoral votes to whichever Presidential candidate receives the most votes, even if it is just one more vote than another candidate.¹⁴⁴ This archaic method was the tool that political parties used to consolidate power in the early years of the Union, and it is still used in that manner today.¹⁴⁵

¹⁴² See generally, Phil Parvin & Ben Saunders, *The Ethics of Political Participation: Engagement and Democracy in the 21st Century*, 24 RES PUBLICA 3, 4-5 (2018).

¹⁴³ President Abraham Lincoln, Address at Gettysburg (Nov. 19, 1863) (transcript available at Cornell University), http://rmc.library.cornell.edu/gettysburg/good_cause/transcript.html.

¹⁴⁴ Kevin Werner, *The Winner-Take-All Problem in Fort Lee, New Jersey*, VOICES & CHOICES: FAIRVOTE (Jan. 21, 2014), <https://www.fairvote.org/the-winner-take-all-problem-in-fort-lee-new-jersey>. See also NJ270, *supra* note 18. That candidate does not even need to win a majority of total votes, just one more than the next candidate.

¹⁴⁵ See McCarthy, *supra* note 54.

I. Incentives for the Disenfranchisement of Political Minorities

Winner-take-all allocation methodology is a system that incentivizes the disenfranchisement of political minorities by ignoring their votes and by contributing to the distortion of the results, which helps create false mandates. In an election for the President, the winner-take-all system allows for up to 49.9% of a state's population to be ignored.¹⁴⁶ For example, if the result of the presidential election, in New Jersey, was 50.1% of the population for Candidate A and 49.9% of the population for Candidate B, New Jersey would allocate all of its electoral votes to Candidate A while Candidate B would receive none.¹⁴⁷ Even in

¹⁴⁶ O'Sullivan, *supra* note 16, at 2431.

¹⁴⁷ In theory, under the congressional district method a single candidate could still win all of a state's electoral votes even in a close election because said candidate could still win the majority vote in each individual district. However, in a larger state like New Jersey that is less likely as there are more opportunities to win districts than in a state like Nebraska, which currently does use the congressional district method of allocation but only has three districts and five total electoral votes. In the past, when a candidate in Nebraska won at least 40% of the popular vote in a state they were rewarded with at least one electoral vote. *Nebraska Presidential Elections*, 270TOWIN, <https://www.270towin.com/states/Nebraska> (last visited Mar. 8, 2019) [hereinafter 270Nebraska]. In 2008 President Obama was allocated the electoral votes of one-third of Nebraska's districts with only ~42% of the popular vote. *Id.* Even though Senator McCain was allocated the majority of electoral votes Democrats in Nebraska were still represented. *Id.* In contrast, Senator McCain who won ~42% of the vote in Nevada, which also has five electoral votes, but allocates on a winner-take-all method, was as not allocated any votes. *Nevada Presidential Elections*, 270TOWIN, <https://www.270towin.com/states/Nevada> (last visited Mar. 8, 2019). Republicans in Nevada, unlike the Democrats of

elections where the results are not as close, political minorities in winner-take-all states, such as New Jersey, have almost no opportunity to be represented because the allocation method ignores communities that differ from their neighbors. For example, Texas is commonly considered a red state; yet, in the last three Presidential elections the Democratic nominee received over 40% of the popular vote.¹⁴⁸ However, the Democratic nominee did not receive any of Texas' thirty-eight electoral votes.¹⁴⁹ Through further examination of Texas' political landscape, it is easy to identify a few "liberal hubs" in this conservative state. These areas are predominantly centered in the urban areas such as Austin and Houston, and along the southern border with Mexico.¹⁵⁰ However, these areas have almost no opportunity of being represented because of the way Texas, like New Jersey, allocates electoral votes. In effect, winner-take-all allocation forces political minorities to be unrepresented and "allow[s] State majorities to speak for them."¹⁵¹ This creates a notion that the votes of political minorities do not count.

Nebraska, were not represented in the 2008 election even though the results of the two states were almost identical.

¹⁴⁸ *Texas Presidential Elections*, 270TOWIN, <https://www.270towin.com/states/Texas> (last visited Mar. 8, 2019). A "Red State" is a state that typically supports and votes for Republicans. A "Blue State" is the same but with Democrats.

¹⁴⁹ *Id.* Texas allocates on the winner-take-all method, and has not allocated any electoral votes to a non-Republican candidate since 1976. *Id.*

¹⁵⁰ Ross Ramsey, *Analysis: In Texas Elections, Size Matters*, THE TEX. TRIB. (Jan. 29, 2018 12:00 AM), <https://www.texastribune.org/2018/01/29/analysis-texas-politics-size-matters/>.

¹⁵¹ *Williams v. Virginia State Bd. of Elections*, 288 F. Supp. 622, 627 (1968) (quoting *Memorandum of Subcomm. on Constitutional Amendment of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 23 (1961)).

Political minorities are further disenfranchised throughout the nation by the winner-take-all method due to the distortion of the outcome of presidential elections.¹⁵² This distortion reveals itself by making a president-elect, who won by a close vote-count, appear more widely popular.¹⁵³ This distortion may grant the victor a “false mandate” based on a perception that the winner had more support than he or she actually had.¹⁵⁴ By ensuring that small margin victories at the state

¹⁵² Florey, *supra* note 20, at 356.

¹⁵³ O’Sullivan, *supra* note 16, at 2432. For example, in the 1960 election President John F. Kennedy narrowly defeated Richard Nixon by a final result of 49.72% to 49.55%. *Id.* However, President Kennedy was declared a decisive winner, taking 58% of the Electoral College, in part due to the wide spread usage of the winner-take-all allocation. *Id.* Twelve years later, Richard Nixon, loser of that closer-than-it-appeared 1960 election, won an incredible 97% of the Electoral College. *Id.* Even though Nixon did have a decisive victory, with 61% of the popular vote total, his 97% number made it seem as if the entire nation supported him. *Id.* At the time, that electoral allocation percentage was the second highest, excluding the time of the founding when George Washington won 100% and James Monroe won 98%. Jugal K. Patel & Wilson Andrews, *Trump’s Electoral College Victory Ranks 46th in 58 Elections*, ELECTION: N.Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/interactive/2016/12/18/us/elections/donald-trump-electoral-college-popular-vote.html>.

¹⁵⁴ See Florey, *supra* note 20, at 356. The concept of the false mandate is cited from created by David Abbott and James Levine. *Id.*; see also DAVID W. ABBOTT & JAMES P. LEVINE, *WRONG NUMBER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE* 1, at 5 (1991). When the president is being represented by a higher ratio of voter support than actually had, a president can have a wider berth of reign for the administration. Meredith Canady, *Redistribution of Electoral Votes: Following the Constitution, Nebraska, and Maine to More*

level become symbols of total endorsement on a national stage,¹⁵⁵ the winner-take-all method contributes to the creation of this false mandate.¹⁵⁶ This false mandate allows for the existence of “a disconnect between the realities of popular sentiment” which could have negative effects.¹⁵⁷ One of these negative effects is the possibility that the President could “misread the will of the electorate and support unpopular or even autocratic policies.”¹⁵⁸ It could also “contribute to a bitter political climate, making defeat harder on the losers.”¹⁵⁹ This was the case the 2016 presidential election when Donald J. Trump defeated Hilary Clinton with a devise electoral victory but without the majority of the total votes casts.¹⁶⁰ President Trump often claims popularity as the result of

Equal Representation in Presidential Elections, 19 ADELPHIA L.J. 63, 81 (2014-2015).

¹⁵⁵ These small swings can sometimes determine the outcome of a presidential election. See Duquette & Schultz, *supra* note 126, at 469-70. In the 2000 presidential election, George Bush defeated Al Gore after being allocated all 25 of Florida’s electoral votes despite a narrow 537 vote win. *Id.*

¹⁵⁶ *Id.* at 469.

¹⁵⁷ Florey, *supra* note 20, at 357-58.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Presidential Election Results: Donald J. Trump Wins*, ELECTION 2016: N.Y. TIMES (Aug. 9, 2017 9:00 AM), <https://www.nytimes.com/elections/2016/results/president>. President Trump only won ~46% of the national vote, compared to Hilary Clinton’s ~48%. *Id.* However, President Trump won ~57% of the electoral votes with a score of 306 – 232. *Id.*

elections.¹⁶¹ Due to the winner-take-all method, false mandates are common for modern presidents.¹⁶²

The winner-take-all method encourages the disenfranchisement of political minorities for the benefit of the political parties.

II. Disincentivizing Political Participation

Winner-take-all allocation is also less democratic because it encourages disincentivizing political participation.¹⁶³ This method encourages disincentivizing political participation because it (1) rewards presidential campaigns to promote voter depression, (2) incentivizes voter fraud, and (3) increases the probability of a candidate winning without the majority of the national vote.¹⁶⁴

The winner-take-all allocation method creates incentives for political parties and campaigns to launch efforts to depress voters of

¹⁶¹ Ed Mazza, *Trump Brags He's The Most Popular Person In GOP History: 'I Beat Our Honest Abe'*, POLITICS: HUFFINGTON POST (July 13, 2018 1:56 AM), https://www.huffingtonpost.com/entry/trump-lincoln-popular-poll_us_5b4823b8e4b0e7c958f9cc28_

¹⁶² See Florey, *supra* note 20, at 356-58.

¹⁶³ Political participation may be defined as “activities that attempt to change society by direct engagement with the formal structures of the political system.” University Community Services Center, *Political Participation*, UNIVERSITY OF CHICAGO, <https://ucsc.uchicago.edu/page/political-participation> (last visited Mar. 15, 2019). There are many ways for citizens to be participants to politics, including, especially for purposes of this piece, voting, voter turnout, and access of ideas. *Id.*

¹⁶⁴ Florey, *supra* note 20, at 349-55.

certain groups for political benefit and strategy.¹⁶⁵ The political parties use these voter depression campaigns, and other similar systematic tactics to create further distortion.¹⁶⁶ Voter depression campaigns work to encourage those who may vote for one's opponent to not vote at all.¹⁶⁷ This, in effect, rewards candidates and campaigns that discourage voting and promote voter depression strategies.¹⁶⁸ By discouraging groups whom are at political odds with the preferred candidate, campaigns can capitalize on slim margins to claim a bigger victory.¹⁶⁹ As a result, the winning candidate can claim more support than he or she actually received, since the opponent's support was suppressed.¹⁷⁰ This strengthens a winning candidate's false mandate. In solid states,¹⁷¹ political parties benefit even more so by disincentivizing voter turnout and political participation. Winner-take-all allocations incentivizes campaigns to commit voter fraud in tight elections by targeting vulnerabilities in

¹⁶⁵ *Id.* at 351. This includes groups such as African-Americans and students. *Id.*

¹⁶⁶ *Id.* at 351. Depression attempts have often come in terms restrictive voting measures. *Id.* at 351-52. A recent example of this is the measures passed by North Carolinian Republicans for the 2016 election, which made it more difficult for the African-American community. *Id.*

¹⁶⁷ *Id.* at 351-52.

¹⁶⁸ *Id.*

¹⁶⁹ Florey, *supra* note 20, at 351-52. In 2016, the Trump campaign had multiple operations to discourage potential Clinton voters from going to the polls through things such as negative advertising. *Id.*

¹⁷⁰ *Id.* at 349-52; *see also* Duquette & Schultz, *supra* note 126, at 469-70.

¹⁷¹ A solid state is a state that can be historically relied on to deliver its electoral vote to a single political party. This concept works hand in hand with blue and red states.

voting systems, such as tampering and designing ineffective auditing systems.¹⁷² Winner-take-all has given birth to a new campaign strategy of discouraging voter turnout altogether.¹⁷³

Furthermore, the usage of this methodology “dramatically increases the probability” of someone becoming president by winning the Electoral College while receiving less total votes than another candidate.¹⁷⁴ Under this system the president-elect could successfully become president by targeting only 25% of the national electorate.¹⁷⁵ While some candidates and political parties can reap the benefits of less-democratic strategies, states should not promote these negative social behaviors through the usage of winner-take-all allocation.¹⁷⁶

The winner-take-all method’s disenfranchisement of political minorities and disincentivization of political participation leads to less overall choice in New Jersey.

III. Promotes Less Choice

¹⁷² Florey, *supra* note 20, at 349-50. The overall incentive to suppress voters contributes to the campaigns efforts to commit fraud. *Id.*

¹⁷³ *Id.* at 351-52.

¹⁷⁴ Sandra Storey, *Want a Better President, Better Elections? States Need to Stop Winner Take All*, JAMAICA PLAIN GAZETTE, (Sept. 28, 2018) (quoting Equal Citizens). <http://jamaicaplainingazette.com/2018/09/28/jp-observer-want-a-better-president-better-elections-states-need-to-stop-winner-take-all/>. This is what happened in the 2016 election when President Trump won without the national popular vote.

¹⁷⁵ Florey, *supra* note 20, at 353. They can do this by targeting “50% of the voters of in states with 50% of the electoral vote.” *Id.*

¹⁷⁶ *Id.*

Allocation of electoral votes through a winner-take-all method is less democratic as it promotes less choice for the American people.¹⁷⁷ Since political parties have been able to take control of state's voting procedures, through the adoption of the winner-take-all method, there exists no mechanism to ensure that the citizenry is exposed to a free market of political ideas.¹⁷⁸ Instead, through mechanisms such as winner-take-all allocation, political parties have been able to limit citizens' access to the political market.¹⁷⁹

The monopolistic dominance of the two major parties in American politics have left Americans in an undesirable position where the "two parties speak in a commercially sponsored unison and half of the citizens do not vote even in presidential elections."¹⁸⁰ Simply put, this monopoly has created a non-competitive, commercial funded political environment that encourages people to stay home instead of voting. However, there is no constitutional support or endorsement of a two-party system, which survives off of the consolidation of power by the dominant political parties.¹⁸¹ The two-party monopoly on American politics has worked to suppress third-party candidates from being competitive on a national scale, in part through the winner-take-all method

¹⁷⁷ *Id.* at 358-61.

¹⁷⁸ See O'Sullivan, *supra* note 16, at 2426-27.

¹⁷⁹ Florey, *supra* note 20, at 358-61.

¹⁸⁰ Adam Przeworski, *Freedom to Choose and Democracy*, 19 *ECON. & PHIL.* 265, 277 (2003).

¹⁸¹ See generally Mark Horger, *Breaking Up Is Hard To Do: America's Love Affair With The Two-Party System*, 6 *ORIGINS* 10, 1-2 (July 2013) (discussing the Founder's opposition to factionalism and political parties). The winner-take-all method, as previously discussed, is one of the ways that the major parties consolidate their power. *Id.*

of electoral allocation.¹⁸² It does so by making it difficult for the third party candidate to attain the plurality required to receive any amount of allocated votes.¹⁸³ In effect, the winner-take-all method's two-party bias created the notion that an individual's vote does not matter if it is cast for a third party candidate.¹⁸⁴ In essence, the winner-take-all allocation is telling communities that have political ideals and goals that differ from other areas in the state, that their votes do not count. When a voting procedure systematically discourages voters from considering and voting for candidates who are political minorities, it is working against the notion of freedom of choice, which is a pillar of democracy.¹⁸⁵ Furthermore, due to the unhealthy notion that the votes of political minorities do not count if it is cast for a third party candidate,

¹⁸² Florey, *supra* note 20, at 358-59.

¹⁸³ *Id.* at 358-59. Under the congressional district method a community who wish to be represented by said third party candidate could do so by allocating that district's electoral vote to it preferred candidate, regardless of who the rest of the state vote. This is not possible under a winner-take-all allocation. For example, if New Jersey District X, a predominantly beach-centric community, wanted to be represented by Candidate C, a third party candidate who is more friendly to beach-related issues than the candidates of the two-party system, they can not under winner-take-all allocation. Because Candidate C only won District X, and did not do well in the rest of the state, District X's voice will not be represented in the Electoral College. Due to this effect it is less likely the voters of District X will vote for Candidate C, or any candidate that is not endorsed by one of the two major parties.

¹⁸⁴ *Id.*

¹⁸⁵ The freedom to make choice is a fundamental pillar of democracy. Rachael Odusanya, *The Four Pillars of Democracy*, LEGIT (May 31, 2018), <https://www.legit.ng/1172490-the-pillars-democracy.html>.

these voters often face voter shaming.¹⁸⁶ In fact, proponents of a strong two-party system argue that by moving away from a winner-take-all based Electoral College in favor of another system will allow for the growth of third parties.¹⁸⁷ However, more choice – through the addition of candidates – is not a threat to democracy or a negative trait of an election. Less choice, and less opportunities for political minorities to be represented, leads to overall less-competitive elections.¹⁸⁸ This non-competitiveness has negative side effects, such as lower voter turnout, which disproportionately affects racial minorities.¹⁸⁹ For states like New Jersey, becoming a non-competitive state has led it to not be able

¹⁸⁶ Sophia A. McClenmen, *The System Really Is Rigged: Why “Winner-Take-All” Voting Is Killing Our Democracy*, SALON (July 2, 2016 5:30 PM), https://www.salon.com/2016/07/02/the_system_really_is_rigged_why_winner_take_all_voting_is_killing_our_democracy/. Voter shaming is when people try to shame others into not voting for the candidate that they want to vote for because that person is not endorsed by one of the two major parties. *Id.* Shaming traditionally takes the form of instating that a person’s vote will not “count” if it is not cast for one of the two major candidates. *Id.* Another shaming method is when people blame those third-party voters for their candidate [potentially] losing the election. *Id.* Voting shaming often continues after Election Day. *Id.* This happened in the 2016 presidential election when supporters of Hilary Clinton and Donald Trump shamed supporters of other candidates, such as Gary Johnson, Jill Stein, and Bernie Sanders. *Id.*

¹⁸⁷ Brandon H. Robb, Comment, *Making The Electoral College Work Today: The Agreement Among The States To Elect The President By National Popular Vote*, 54 LOY. L. REV. 419, 450-51 (2008).

¹⁸⁸ See generally Franita Tolson, *Increasing the Quantity and the Quality of the African-American Vote: Lessons for 2008 and Beyond*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 313, 321, 336-45 (2008).

¹⁸⁹ *Id.* at 344-45.

to influence presidential election or national policy to the degree that it could.

Through these aggregated effects of incentivizing the disenfranchisement of political minorities, disincentivizing political participation, and promoting less choice, the winner-take-all allocation is deemed an extremely unrepresentative method of electoral allocation.¹⁹⁰ The winner-take-all method of allocation has been considered “the most vivid example of anti-individualist corporativism in American politics, whereby all Californians or Texans are presumed to share an interest in maximizing the power of their respective state.”¹⁹¹ In short, the winner-take-all method treats everyone as if they thought the same and is at fundamental odds with one’s ability to express oneself.¹⁹²

D. Re-Enfranchising the People: A Chance For A More Democratic Elections

By adopting the congressional district method, New Jersey would be taking steps to make elections more democratic. The ways in which this Note explores how the congressional district method

¹⁹⁰ O’Sullivan, *supra* note 16, at 2430-31.

¹⁹¹ Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 280 (1985)

¹⁹² This fundamental right to express oneself is embodied in the First Amendment. U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.* See generally ACLU, *Your Right To Free Expression*, <https://www.aclu.org/other/your-right-free-expression> (last visited Mar. 9, 2019).

promotes democratic values are by (1) being more representative,¹⁹³ (2) promoting participation,¹⁹⁴ (3) promoting more choice,¹⁹⁵ and (4) promoting accountability for the voters of New Jersey. These four factors work together to re-enfranchise voters by allocating New Jersey's electoral votes in a more representative manner, encouraging more voters to participate in the voting process, and by promoting choice, options, and accountability. By doing so, the congressional district method would create more democratic elections in New Jersey than does the winner-take-all method.

I. A More Representative Result

By adopting the congressional district method, New Jersey would be taking a major step to allocate its electoral votes in a more representative manner than it currently does.¹⁹⁶ When analyzing the presidential elections between 1968 and 2012, it is evident that the results based on a congressional district allocation are more representative than the winner-take-all election results.¹⁹⁷ A classic example of this

¹⁹³ See *infra* Part D I.

¹⁹⁴ See *infra* Part D II.

¹⁹⁵ See *infra* Part D III.

¹⁹⁶ See generally Canady, *supra* note 154, at 87-9; O'Sullivan, *supra* note 16, at 2446.

¹⁹⁷ See Canady, *supra* note 154, at 88-89 (information displayed on table 1 of note). It is important to keep in mind that it would impossible to see what "would have happened" if all of the states applied the congressional district method as the entire election could theoretically be different. It is however a helpful tool for our purposes as it gives a representative sample of how the election could look like and demonstrates that point that the winner-take-all method can inflate the electoral count. See also *supra* notes 147-63 and accompanying text.

can be demonstrated through the 2008 Presidential Election when Senator Obama defeated Senator McCain.¹⁹⁸ Senator Obama defeated Senator McCain by very respectable and definitive 10 million votes.¹⁹⁹ In doing so, Senator Obama won 235 congressional districts, compared to Senator McCain's 205 districts.²⁰⁰ However, Senator Obama was allocated 365 electoral votes based on the winner-take-all method.²⁰¹ If the congressional district method was to apply throughout the nation, Senator Obama would still have become President-elect with an impressive 293-244 electoral count, but the count would have been much more representative of the how the people voted.²⁰² By creating more representative results, the congressional district method will contribute to fixing the issue of granting presidents false mandates because election results will be less inflated.²⁰³

The congressional district method inherently embodies the principles of representation by allowing the district to directly represent itself in the Electoral College.²⁰⁴ This method would allow the people of

¹⁹⁸ See Canady, *supra* note 154, at 87-9.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* Senator McCain was allocated the remaining 173 electoral votes. *Id.*

²⁰² *Id.*

²⁰³ On the national level this could also help prevent voter dilution in larger states and overweighing votes in smaller states. See Canady, *supra* note 154, at 89. However, since this note is advocating for a change in state policy and not national policy this concept will not be further discussed.

²⁰⁴ Dennis A. Lienhardt Jr., *Note: The Electoral College: An Analysis of Reform Proposals Through the Lens of Past Presidential Elections*, 61 WAYNE L. REV 439, 453 (2016).

one district to allocate to the candidate of its choosing, regardless of the decision of other districts.²⁰⁵ This ability to create a more representative election result could directly benefit the people of New Jersey, as it will better reflect the voters of New Jersey than does the current system. Due to its ability to create a more representative result, the congressional district method also promotes increased participation and more access to choice.

II. Promotes Participation

In order for the Government to be “of the people, by the people, [and] for the people,”²⁰⁶ the people must participate in that government.²⁰⁷ Voting serves as an essential and vital form of political participation.²⁰⁸ Unfortunately, while America thrives to act as a beacon of democracy, it fails to match the prominent voter turnout rates of other developed democracies.²⁰⁹ A recent study by the Pew Research Center,²¹⁰ comparing voter turnout among members of the Organization for

²⁰⁵ *Id.*

²⁰⁶ See Werner *supra* note 144.

²⁰⁷ See Canady, *supra* note 154, at 90.

²⁰⁸ See generally Kareem U. Crayton, *Symposium 2012: The Voting Rights Act of 1964: Where Do We Go From Here?: Article: Sword, Shield, and Compass: The Uses and Misuses of Racially Polarized Voting Studies in Voting Rights Enforcement*, 64 RUTGERS L. REV. 973, 986 (2012).

²⁰⁹ Drew DeSilver, *U.S. Trails Most Developed Countries In Voter Turnout*, PEW RESEARCH CENTER (May 21, 2018), <http://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/>.

²¹⁰ One of the issues in defining voter turnout rates is that not all citizens are eligible to vote, even if they are the proper age. *Id.* For example, in some states, felons may temporarily, or permanently, lose their right to vote. See

Economic Cooperation and Development (OECD),²¹¹ ranked the United States twenty-sixth out of the thirty-two member nations.²¹² In order to remedy this problem and compete with the international leaders in voter turnout and political participation, the States need to analyze why so few people vote and work to encourage increased turnout through innovative ways, such as adopting the congressional district method.

generally National Conference of State Legislatures, *Felon Voting Rights*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 21, 2018), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>. Additionally, a large portion of the eligible voting population does not register to vote for one reason or another, and therefore cannot vote in elections. *See generally* *Why Are Millions of Citizens Not Registered To Vote*, PEW CHARITABLE TRUSTS (June 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote>. To avoid this issue, it is common to use voter age population (VAP) to calculate voter turnout, as the Pew Research Center has done in this study. *See* DeSilver, *supra* note 210.

²¹¹ The Organization for Economic Cooperation and Development is an international organization consisting of highly democratic and developed member states. *See* DeSilver, *supra* note 209. The mission of the organization is to “improve the economic and social well-being of people around the world.” *Rapid action needed for people to meet challenges of changing world of work*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://www.oecd.org/health/tackling-obesity-would-boost-economic-and-social-well-being.htm> (last visited Dec. 5, 2019).

²¹² *See* DeSilver, *supra* note 209. The study uses election results from varying years in order to capture a fair assessment of the differing national elections. For example, even though the study was published in 2018, it used the 2016 presidential election numbers to represent the United States. *Id.* It is worth noting that the study is out of 32 nations because the information for three member nations were unavailable at the time of the study.

By adopting the congressional district method and allocating electoral votes in a more representative way, New Jersey can work to increase its voter turnout. In the 2016 election, New Jersey saw its residents cast a combine 3,957,303 ballots.²¹³ This number equaled only 68% of registered voters in the state.²¹⁴ However, the U.S. Census Bureau estimated that the voting age population (VAP) of New Jersey around that time was around seven million people.²¹⁵ This difference between VAP and registered voters brings the true voter turnout rate down closer to ~57%.²¹⁶ The adoption of the congressional district method encourages voter turnout by allowing political minorities to compete for representation and influence the way their state allocates its

²¹³ *Total Number of Registered Voters, Ballots Cast, Ballots Rejected, Percentage of Ballots Cast and the Total Number of Election Districts in New Jersey General Election November 8, 2018*, NEW JERSEY DIVISION OF ELECTIONS, <https://www.state.nj.us/state/elections/2016-results/2016-summary-registered-voters-general-election-0131.pdf> (last visited Mar. 15, 2019). It is important to remember that some ballots in that 68% were rejected and are not counted. Furthermore, some ballots did not include a vote for the office of President. In the 2018 mid-term election only 55% of registered voters participated. *Id.*

²¹⁴ *Id.*

²¹⁵ *New Jersey Voting Age Population*, UNITED STATES CENSUS (June 1, 2016), https://www.census.gov/library/visualizations/2016/comm/voting_age_population/cb16-tps60voting_nj-social.html.

²¹⁶ The ~57% is calculated by dividing the ~4 million votes casts by the ~7 million New Jerseyans of voting age. *Id.*

electoral votes.²¹⁷ When voters feel like their voice is being heard, they are more likely to participate.²¹⁸

By adopting the congressional district method of allocation, New Jersey would promote and encourage increased participation. This will allow New Jersey's citizens to be better represented and promote more participation in elections, which, as will be discussed below, will lead to more electoral choice and accountability.

III. Promotes More Choice

The congressional district method would promote democracy in New Jersey by promoting choice. The democratic value of choice is inherently upheld by the congressional district method. Unlike the winner-take-all method, which has outcomes that are dependent on the choices of other people, the congressional district method allows for communities to make decisions independently of the decisions of others.²¹⁹ This ability to make a real choice, without fear of being nullified by other communities is one of the ways in which the congressional

²¹⁷ See Canady, *supra* note 154, at 90.

²¹⁸ *Id.*

²¹⁹ The winner-take-all method allocates all of New Jersey's electoral votes to the candidate that wins the most votes across the whole state. This means that the decisions of individual communities are dependent on people from other areas of the state. If, for example, those in rural South Jersey want Candidate A to become president, they are dependent on others in the state to have the same desire. Conversely, a district method allows for voters across the state to make choices without factoring in what others want.

district method offers New Jersey a way to promote more choice than it currently does under the winner-take-all method.²²⁰

Another way in which the congressional district method promotes choice is by increasing the viability of a third-party candidate,²²¹ who typically does not get a fair opportunity to compete for electoral votes.²²² Opponents of the congressional district method argue that usage of the allocation method could allow for the weakening of the two-party system.²²³ This protection of the two-party system is, however,

²²⁰ This has been illustrated multiple times including in 2008 when those living in Nebraska's 2nd Congressional District, which is composed of Omaha and the surrounding suburbs. That election the 2nd Congressional District allocated its one electoral vote to Senator Obama, while the rest of the state allocated to Senator McCain. *See* FAIRVOTE – Maine-Nebraska, *supra* note 47. Since the winner-take-all method was not used, Nebraskan voters in the metropolitan community of Omaha did not have to factor in the thoughts of rural communities in western Nebraska, and vice-versa. Had those living on one side of the state had to consider how those living hundreds of miles away were going to vote they may not have voted the same, or at all. *See also* Canady, *supra* note 154, at 86-93.

²²¹ For purposes of this note “third party candidate(s)” will reference any candidate not representing one of the two dominant political parties. At the present time, and for a significant time, the Democratic and Republic parties have dominated American politics. A third-party candidate, for our purposes, can include people running under any other party (e.g. Libertarian Party, Green, Party, etc.) as well as candidates running as an “independent,” and is not representing any political party.

²²² *See* Canady, *supra* note 154, at 90; Florey, *supra* note 20, at 358-66.

²²³ *See* Canady, *supra* note 154, at 91. John Gale, Nebraska's secretary of state, and a Republican, argued that the state should adopt a winner-take-all method because the congressional district method that Nebraska uses allows

unnecessary and works to limit the democratic values of the free exchange and access to ideas. The Founders, including George Washington, John Adams, and James Madison, greatly warned the young nation of the dangers of a two-party system.²²⁴ Despite this warning from the Founders, the two-party system has dominated much of America's political history.²²⁵ As previously discussed, the monopolistic two-party system, which is propagated by the winner-take-all system,²²⁶ has caused many issues. By promoting choice through the adoption of the congressional district method, New Jersey could create more accountability of politicians.

IV. Promote Accountability

For political minorities, which often include racial and religious minorities, it is difficult to hold politicians accountable.²²⁷ This is

for third-party candidates to potentially complete for electoral votes. *See also* Smith, *supra* note 83.

²²⁴ Gary Johnson, *Our Two-Party System Has Failed, Just Like Our Founders Said It Would; It's Time To Try Something Different*, WASH. POST: OPINIONS (Sept. 9, 2016), https://www.washingtonpost.com/opinions/gary-johnson-our-two-party-system-has-failed-just-like-our-founders-said-it-would/2016/09/07/f82f9bf4-73aa-11e6-8149-b8d05321db62_story.html?utm_term=.2430929a8cdf.

²²⁵ *See generally* Joseph Postell, *The Rise And Fall of Political Parties in America*, THE HERITAGE FOUNDATION (2018). However, historical reviews of the history of political parties have shown the parties in charge have changed, and that the dividing issues over party identification have changed over time. *Id.*

²²⁶ Florey, *supra* note 20, at 378.

²²⁷ *See generally* Tolson, *supra* note 188, at 317-22.

especially true when living in a winner-take-all state, such as New Jersey.²²⁸ In a representative democracy, such as the United States of America, one of the primary way citizens hold their politicians accountable is through periodic election.²²⁹ One way elections promote electoral accountability is by controlling incumbents from negative behavior, through the threat of being replaced at the next election.²³⁰ This accountability is needed because politicians and legislatures act out of self-interest.²³¹ This, however, does not work when the winner-take-all method limits political minorities' ability to be represented. For instance, if the state's political majority is aligned with the president, the president does not have to consider the concerns of the state's political minorities, since those votes could never impact reelection.²³² Political minorities, such as African Americans, already have obstacles, such as gerrymandering, that limit their ability to be politically represented, especially in the presidential election.²³³ This has directly limited this

²²⁸ *Id.* at 337-38.

²²⁹ Michael Smart & Daniel M. Sturm, *Term Limits & Electoral Accountability*, 107 J. OF PUB. ECON. 93 (2013).

²³⁰ *Id.* Elections also promote electoral accountability by allowing voters to re-elect productive incumbents. *Id.*

²³¹ *See generally* Tolson, *supra* note 188, at 319-20. Self-interest does not inherently imply something negative.

²³² This is especially true for solid states such as New Jersey.

²³³ *See generally* Tolson, *supra* note 188, at 322-27. Generally speaking, gerrymandering is when political districts with political basis in mind. In many situations, African-Americans and other political minorities are districted together. *Id.* While in theory this should allow minorities to gain voice by electing a representative that truly represents them, that does not always happen.

population's ability to influence presidential selection.²³⁴ Conversely, the congressional district method could empower political minorities, such as African Americans, to have a voice and allocate an electoral vote to the candidate that best represents their needs, regardless of how people in other areas of the state vote. When political minorities cannot hold politicians accountable through elections, the elections act in a less representative and less democratic way than intended.

By abandoning the winner-take-all method, New Jersey could become the leader in democracy, granting its citizenry a more representative way to allocate its electoral votes. An allocation method that, unlike the winner-take-all method, encourages political participation, choice, and the ability to better hold candidates accountable.

E. Paving a Path to National Influence Through the Congressional District Method

New Jersey is the eleventh most populous state in the Union,²³⁵ and with fourteen electoral votes, controls about five percent of the Electoral College.²³⁶ However, the state lacks the ability to act as national influencer. This lack of national influence can be demonstrated through New Jersey's inability to compete in the presidential selection process, which has put New Jersey in a position without influence on

Id. at 317-22. Furthermore, this does not grant representation in the presidential election under the winner-take-all format.

²³⁴ *Id.* at 314-15.

²³⁵ U.S. STATES RANKED BY POPULATION, <http://worldpopulationreview.com/states/> (last visited Mar. 15, 2019).

²³⁶ *See generally* Electoral Vote Distribution, *supra* note 18. New Jersey's fourteen electoral votes divided by 270, the majority needed to elect, is approximately 5.2%. *Id.* The fourteen votes equal a little less than 3% of the total electoral votes. *Id.*

national policy. As discussed above, the winner-take-all method allows for the state's dominant political party to consolidate power for its candidate. However, the winner-take-all method puts large solid states, like New Jersey, at a disadvantage in presidential election.²³⁷ By adopting the congressional district method, New Jersey can act as a laboratory of democracy by innovating a way to increase political participation, promote choice, and insert itself as national influencer in the selection of the president and in national policy.

I. Presidential Selection

As a large, solid, non-competitive state, New Jersey struggles to gain attention from presidential candidates.²³⁸ Generally speaking, the two main ways a state can influence the presidential selection process is through the primary process and through the general election held every four years. In order to win votes, candidates visit states in order to convince the state's population that they understand the needs of the people and to talk about relevant policy. This, in-effect, the presidential selection process allows for states to use campaign season as an opportunity to influence the federal government and the direction of the nation. However, when presidential candidates avoid New Jersey, it becomes very difficult to impact the presidential selection process or obtain any of the benefits that come with it.²³⁹

Prior to the 2012 presidential election, former acting Governor Richard Codey said that presidential candidates "only come to . . . New

²³⁷ Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 246-47 (2012).

²³⁸ *Id.* at 314.

²³⁹ *See infra* Part III E.

Jersey for our money and nothing else.”²⁴⁰ As Governor Codey forecasted, there was not a single public presidential campaign event held in New Jersey during the 2012 campaign season.²⁴¹ The only presidential campaign events held in New Jersey in 2012 were private fundraisers.²⁴²

In 2016, there were similar results, with no public campaign events by Secretary Clinton and Donald Trump.²⁴³ Secretary Clinton visited New Jersey just once during the general election, and it was for an appearance on MSNBC’s “Morning Joe.”²⁴⁴ Donald Trump’s only

²⁴⁰ See Calderaro, *supra* note 63, at 299-300 (quoting Governor Codey).

²⁴¹ *Id.* at 300. Public campaign events, which include rallies, speeches, and town hall meetings, attempt to convince voters to support them, while private fundraiser events have the sole purpose of raising funds for the campaign. *Two-Thirds of Presidential Campaign is in Just Six States*, NATIONAL POPULAR VOTE, <https://www.nationalpopularvote.com/campaign-events-2016> (last visited Mar. 13, 2019) [hereinafter NATIONAL POPULAR VOTE].

²⁴² See Calderaro, *supra* note 61, at 299-300. The Obama Campaign sent First Lady Michelle Obama to New Jersey for one fundraiser, and Governor Mitt Romney’s campaign visited New Jersey for five fundraisers. *Id.*

²⁴³ See NATIONAL POPULAR VOTE, *supra* note 241.

²⁴⁴ See *id.*; see generally Susan Milligan, *Clinton Tells 'Morning Joe' Trump has a 'Long History of*

Racial Discrimination', U.S. NEWS (Aug. 26, 2016, 9:58 AM),

<https://www.usnews.com/news/articles/2016-08-26/clinton-tells-morning-joe-trump-has-a-long-history-of-racial-discrimination>.

New Jersey appearance was for a private fundraiser in Central Jersey.²⁴⁵ When New Jersey loses out on an opportunity to bring candidates into New Jersey to campaign, it also loses out on de-facto economic benefits that campaigning brings with it.²⁴⁶ New Jersey lacks influence on the presidential selection process because it is traditionally a late primary state and because it is a solid winner-take-all state. Under New Jersey's current landscape as a winner-take-all state, the state has struggled to be the national influencer that it should thrive to be.

i. Late Might as Well Be Never for New Jersey

The primary process is an essential mechanism used by the political parties to prepare themselves to select their candidate at their national convention.²⁴⁷ While primaries do not determine who will become president, it serves as a significant opportunity for a state to impact the presidential race. However, New Jersey is traditionally one of

²⁴⁵ See NATIONAL POPULAR VOTE, *supra* note 241; see also Spencer Kent, *Trump Energizes Hindu Community at Charity Event in Edison*, MIDDLESEX: NJ.COM (Oct. 16, 2016), https://www.nj.com/middlesex/2016/10/trump_humanity_united_against_terror_event_edison.html.

²⁴⁶ This economic benefit is demonstrated through the additional jobs that would be created by additional campaigning in the state. Additionally, the local economy would be stimulated through the natural business transaction of the campaigns. For example, there would be natural additional benefits to the local restaurant, gas, and hospitality industries.

²⁴⁷ Michael S. Steinberg, Note, *A Critique of the Current Method of Scheduling Presidential Primary Elections and a Discussion of Potential Judicial Challenges*, 69 GEO. WASH. L. REV. 453, 455 (2001). Some states use primaries while others use caucuses, the difference is not important for purposes of this note. This note is not a commentary on the primary system, which has its own complex set of flaws and benefits. See generally *id.*

the final primaries of Presidential election season.²⁴⁸ By the time New Jersey hosts its primaries, the decision about whom will represent the parties in the upcoming presidential election is already made.

A brief examination of each of the presidential primary elections dating back to 2000 shows New Jersey's inability to influence presidential selection process. By the time New Jersey voted in the most recent 2016 presidential primaries, both Donald Trump and Hillary Clinton had mathematically had their respective nominations locked up.²⁴⁹ In 2012, President Obama, the sitting president, ran unopposed for the Democratic nomination.²⁵⁰ On the Republican side, Mitt Romney won the required amount of delegates before the New Jersey primary was even held.²⁵¹ The sole exception to this late primary trend was in 2008,

²⁴⁸ Geoffery Skelley, *We Re-Ordered the Entire Democratic Primary Calendar to Better Represent the Party's Voters*, FIVETHIRTYEIGHT: POLITICS (Mar. 7, 2019, 5:58 AM), <https://fivethirtyeight.com/features/what-if-early-democratic-primary-states-looked-more-like-the-party/>.

²⁴⁹ Both Donald Trump and Hillary Clinton mathematically clinched enough delegates to win their respective nominations before New Jersey held its primary in June of 2016. See M.J. Lee, *Donald Trump Has Delegates to Clinch GOP Nomination*, CNN: NATIONAL POLITICS (May 26, 2016, 9:15 PM), <https://www.cnn.com/2016/05/26/politics/donald-trump-has-delegates-to-clinch-gop-nomination/index.html>; Phillip Bump, *Why the Associated Press Called the Race for Hillary Clinton when Nobody was Looking*, WASHINGTON POST (June 7, 2016, 12:09 PM), https://www.washingtonpost.com/news/the-fix/wp/2016/06/07/why-the-associated-press-called-the-race-for-hillary-clinton-when-nobody-was-looking/?utm_term=.734be5c6b28b.

²⁵⁰ 2012 Presidential Election, 270TOWIN, https://www.270towin.com/2012_Election/ (last visited Dec. 5, 2019).

²⁵¹ Patrick O'Connor & Laura Meckler, *Romney Says Win Secures GOP Nod*, WALL ST. J. (May 30, 2012, 10:35 AM),

when New Jersey moved its primary earlier in the year as an attempt to influence the presidential selection process.²⁵² In 2004, New Jersey held the very last primary of the year, and the nominees had been long decided.²⁵³ That year, Senator John Kerry secured the Democratic nomination in March, months before New Jersey had its primary.²⁵⁴ The 2000 presidential election saw an open contest for both the Democrats and the Republicans. On the Democratic side Vice President Al Gore won every single state and wrapped up the nomination in March.²⁵⁵ Governor George Bush did almost as well and also forced his main challenger, Senator John McCain to concede the race in March.²⁵⁶ These quick victories meant that New Jersey, once again, did not get to impact the results, as the nominations were secured before the people of New Jersey got to participate. New Jersey's inability to impact the

<https://www.wsj.com/articles/SB10001424052702303395604577434770815292122>. New Jersey's primary was held on June 5th, after the late May primary that Romney secured the nomination on WALL STREET JOURNAL'S 2012 GOP DELEGATE TRACKER, <http://projects.wsj.com/campaign2012/delegates> (last visited Mar. 13, 2019).

²⁵² See Skelley, *supra* note 249.

²⁵³ NPR'S 2004 ELECTION CALENDAR, <https://www.npr.org/programs/specials/democrats2004/calendar.html> (last visited Mar. 13, 2019). President George Bush ran for re-election and there was no Republican primary that year.

²⁵⁴ Lauren Johnston, *Kerry Clinches Nomination*, CBS: NEWS (Mar. 10, 2004), <https://www.cbsnews.com/news/kerry-clinches-nomination-10-03-2004/>.

²⁵⁵ Edward B. Colby, *Bradley, McCain Drop Out of Race*, THE HARVARD CRIMSON, (Mar. 10, 2000), <https://www.thecrimson.com/article/2000/3/10/bradley-mccain-drop-out-of-race/>.

²⁵⁶ *Id.*

presidential selection process through the primaries put the state at a disadvantage to influence the presidential platform.²⁵⁷

Since most presidential candidates withdraw from the race between February and April, voters in late primary states, such as New Jersey, do not get to influence the primaries in the way that early voting states do, such as Iowa and New Hampshire.²⁵⁸ Being an early primary state inherently advantages voters in that state who can influence the presidential selection process by having the more choices, by impacting what policy issues are being discussed, and, by getting additional media coverage.²⁵⁹ The lack of choices and influence on the outcome of this contests render late primary voters disenfranchised and encourages non-participation by these voters.²⁶⁰ Being a late primary state also reduces the voice and influence of New Jersey voters because presidential candidates do not need to spend time campaigning here.²⁶¹ Candidates disproportionately visit early primary states and cater policy around those states.²⁶² This is how Iowa is able to create a national discussion about ethanol every four years.²⁶³ In 2008, Florida moved its primary up on

²⁵⁷ See generally Steinberg, *supra* note 247, at 456-57.

²⁵⁸ *Id.* Iowa and New Hampshire, which are typically the first primary of the year, acquired this precious primary spot through intense political negotiating. *Id.* at 459.

²⁵⁹ *Id.* at 457-59.

²⁶⁰ *Id.* at 457-60.

²⁶¹ *Id.* at 457.

²⁶² *Id.*

²⁶³ James Pindell, *Ethanol Loses Its Potency in the Iowa Caucuses*, THE BOSTON GLOBE (Mar. 9, 2015), <https://www.bostonglobe.com/news/nation/2015/03/08/ethanol-loses-its-potency-iowa-caucuses/pQd9R9I7znL5v1E65fqp4J/story.html>; see also Christopher Doering,

the schedule in order to influence the primaries and force Presidential candidates to take favorable positions to the state.²⁶⁴ For New Jersey, being a late primary state means not contributing in the primary process.

This inability to impact presidential selection during the primary process makes it even more important that New Jersey can draw presidential attention during the general election, which it currently does not, due to a winner-take-all allocation.

ii. New Jersey Is An Unattractive Destination For Presidential Candidates

There is nothing wrong with a being a “solid state” that has a population that favors one end of the political spectrum more than another. The issue arises when a state’s system puts political minorities at a disadvantaged opportunity to be represented. The winner-take-all method infringes on New Jersey’s ability to be a competitive state, because as a solid state who allocates all of its electoral votes on a winner-take-all basis, it disincentivizes candidates from campaigning in New Jersey.²⁶⁵ This is because the candidate who represents the political minority has a much better chance at winning electoral votes in a competitive state rather than in a non-competitive state like New Jersey.²⁶⁶ This, in turn, means that the candidate who traditionally is supported by

Clinton Campaign Defends Position on Ethanol Mandate, ELECTIONS: USA TODAY (Aug. 4, 2016, 6:04 PM), <https://www.usatoday.com/story/news/politics/elections/2016/08/04/clinton-campaign-defends-position-ethanol-mandate/88268530/>.

²⁶⁴ Andrew J. Taylor, *Does Presidential Primary and Caucus Order Affect Policy? Evidence from Federal Procurement Spending*, 63 POL. RES. Q. 398, 398-99 (2010), <https://www.jstor.org/stable/20721499>.

²⁶⁵ See Calderaro, *supra* note 61, at 297-312.

²⁶⁶ *Id.*

the state's majority population can also spend less time in New Jersey, since their opponent is also not campaigning in New Jersey. For New Jersey, the winner-take-all method has served as an obstruction to presidential candidates' desires to spend valuable campaign time and resources on New Jersey's population and issues.²⁶⁷

New Jersey is currently an unattractive place for presidential candidates to campaign, but it does not have to be. By adopting the congressional district method, New Jersey can become more competitive and could be more incentivizing for candidates to campaign in; even though a majority of New Jersey's population tends to favor one side of the political spectrum more than another, it is home to some competitive districts.²⁶⁸ By abandoning the winner-take-all method in favor of the congressional district, New Jersey would not only become a leader in promoting democracy, it would put itself in a position to become an attractive place to campaign.

In 2016, both Maine and Nebraska benefited from the usage of the congressional district method. Both states were visited by presidential campaigns, unlike New Jersey, which was not visited at all.²⁶⁹ The two current users of the congressional district method were able to serve as a presidential campaign destination since candidates can compete for some electoral votes.²⁷⁰ This is especially true in Nebraska's second congressional district, which was won by Presidential Obama even

²⁶⁷ As discussed above, presidential candidates have not traditionally spent time in New Jersey hosting campaign events. When candidates do come to New Jersey it is often from fundraising and/or media reasons.

²⁶⁸ See Calderaro, *supra* note 61, at 313-14, n.125-26.

²⁶⁹ See NATIONAL POPULAR VOTE, *supra* note 241.

²⁷⁰ *Id.*

though Nebraska is typically considered a red state.²⁷¹ Hillary Clinton, in hopes of also winning at least one electoral vote, brought her campaign to Nebraska and talked to the people of Nebraska about the issues that affect them directly.²⁷² This put pressure on the Trump campaign to also appear in Nebraska, which it did that fall.²⁷³ There is no doubt that the congressional district method helped Maine and Nebraska, two non-competitive states, become attractive campaign destinations.²⁷⁴

This effect would also apply in New Jersey, but arguably on a greater scale. The difference between New Jersey and both Maine and Nebraska, is that it is a large electoral state.²⁷⁵ Similarly to Maine and Nebraska, New Jersey, if it adopts the congressional district method will automatically become a more attractive campaign destination. Additionally, due to the fact that New Jersey is a large state, this effect may be even greater. New Jersey often has more competitive districts than

²⁷¹ Jeffery Robb, *When, Where and How to See Hillary Clinton in Omaha Today*, OMAHA (Aug. 1, 2016), https://www.omaha.com/news/politics/when-where-and-how-to-see-hillary-clinton-in-omaha/article_b673e074-30c4-5f5c-a6eb-35adf6d91e24.html.

²⁷² *Id.*

²⁷³ Robynn Tysver, *Mike Pence Campaigns for Trump in Omaha, Attacks Hillary Clinton, Declares: 'Don't be fooled — This race is on!'*, OMAHA (Oct. 28, 2016), https://www.omaha.com/news/politics/mike-pence-campaigns-for-trump-in-omaha-attacks-hillary-clinton/article_2bfb6e22-9b10-11e6-a3f2-3f7a3d3fb580.html.

²⁷⁴ *See* Calderaro, *supra* note 61, at 322.

²⁷⁵ New Jersey has fourteen electoral votes, which is the most. Maine only has four electoral votes, while Nebraska only has five electoral votes. *See generally* Electoral Vote Distribution *supra* note 17.

some states have electoral votes.²⁷⁶ For example, if a candidate is competing for even four of New Jersey's competitive districts; it is competing for as many, or more, electoral votes as eleven states and the District of Columbia.²⁷⁷ If a candidate who represents the state's political minority is campaigning in New Jersey, then, like in Nebraska in 2016, the majoritarian candidate will also campaign in New Jersey. If New Jersey can position itself as a more competitive state, presidential candidates will have to, and want to, campaign in New Jersey.

By abandoning winner-take-all method of electoral allocation, in favor of the congressional district method, New Jersey could finally influence the presidential selection process.

II. National Policy

As previously discussed, New Jersey lacks influence on both presidential campaigning, as candidates spend essentially no time in New Jersey, and influencing national policy. When a state does not influence the presidential selection process, it is difficult to influence national policy. Since New Jersey is a non-competitive state, the party aligned with the political majority knows it can rely on the state without catering to its needs. On the other hand, the party aligned with the political minority, knows that the political minority will not help win the presidency because New Jersey is a solid, late primary state, that uses the winner-take-all allocation method. New Jersey's inability to influence national policy can be demonstrated in many ways, in particular through tax policy and infrastructure.

²⁷⁶ In a study analyzing the of electoral competitiveness of individual districts from 2000 – 2008, New Jersey had around four steady competitive districts. See Calderaro *supra* note 61, at 313-14, nn.125-26.

²⁷⁷ See National Popular Vote *supra* note 241.

New Jersey taxpayers pay some of the highest rates of federal taxes in the Union.²⁷⁸ Additionally, the State has regularly been ranked last in return, if not one of the last, in return on federal taxes.²⁷⁹ Only citizens from a few other states contribute to the federal government as much as citizens from New Jersey.²⁸⁰ However, only a few states get as little of a return on their investment - in terms of federal taxes - as New Jersey.²⁸¹ This means that for the amount of money New Jersey contributes in taxes it receives the least amount back in return on its tax investment. New Jersey's lack of political influence during the election is an indicating factor of its low return of investment.

When it comes to presidential elections, New Jersey is a solid blue state that does not demand campaigning or favorable policy promises.²⁸² In 2017, the Trump Administration passed and sponsored major tax reform, which harmed New Jersey citizens by, among other things, capping deductions of state and local taxes to \$10,000.²⁸³ This cap

²⁷⁸ *States' Federal Spending & Spending*, HUFFINGTON POST (Dec. 11, 2017), https://www.huffingtonpost.com/entry/states-federal-spending-and-taxes_us_5a2e78d3e4b04e0bc8f3b699.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See NJ270 *supra* note 18. The last time New Jersey allocated its electoral votes to a candidate who was not a Democrat was in 1988 when popular Republican George Bush became president. David Leip, *1988 General Election Results*, (2016) <https://uselectionatlas.org/RESULTS/national.php?year=1988>. Bush won NJ with ~56% of the vote in NJ and received 426 electoral votes. *Id.* This equates to ~72% of the total electoral votes allocated. *Id.*

²⁸³ Joseph Spector, *New York, New Jersey, and Connecticut to Sue Over Federal Tax Law*, USA TODAY (Jan. 26, 2018, 11:04 AM), <https://www.usatoday.com/story/money/nation-now/2018/01/26/ny-nj-conn->

disproportionately affected states like New Jersey, which has a lot of high-income high-taxed districts.²⁸⁴ New Jersey's politicians were so unable to influence this national tax policy that even the Republicans who represent New Jersey voted against the Republican tax plan.²⁸⁵ Democratic Governor of New Jersey Phil Murphy, alongside fellow Democratic Governors Andrew Cuomo of New York, and Daniel Malloy of Connecticut, has threatened to sue the federal government over the law, which they consider "illegal" and an "assault on high tax states."²⁸⁶ This inability to influence the national tax policy harms New Jersey citizens and demonstrates the State's lack of influence.²⁸⁷

Another way New Jersey's inability to influence national policy is evident is through the state's inability to get national funding for the

sue-over-federal-tax-law/1068862001/ [hereinafter Spector]; *see also* Jacob Parmuk, *The GOP Tax Plan is Squeezing House Republicans in Suburban New Jersey as They Fight to Keep Their Majority Ahead of Midterm Elections*, POLITICS: CNBC (Oct. 2, 2018, 11:39 AM), <https://www.cnbc.com/2018/10/02/gop-tax-plan-hurts-republicans-in-new-jersey-midterm-house-elections.html>.

²⁸⁴ *See* Spector, *supra* note 283.

²⁸⁵ All Republican house members, with the exception of Congressman Tom McArthur, voted against the Trump tax reform. *See* Parmuk, *supra* note 283. At the time, New Jersey had no Republican Senators.

²⁸⁶ *See* Spector, *supra* note 283.

²⁸⁷ Had New Jersey had more national influence, its Congressional representation may have been able to negotiate a better agreement which may have included a higher SALT cap or some other way to ease the burden that the policy implements on New Jersey citizens. Since New Jersey does not influence the Presidential election, in part due to its winner-take-all method of electoral allocation, there is little reason for the Executive branch to cater to New Jersey's needs. *See also* DeCroce, *supra* note 7.

approved infrastructure plans, such as The Gateway Project.²⁸⁸ The Gateway Project is a massive infrastructure development plan to improve transportation between New Jersey and New York that was introduced to the nation in 2011.²⁸⁹ The project calls for the creation of new train tunnels, and the improvement of other tunnels, especially those damaged during Hurricane Sandy.²⁹⁰ Under President Obama the federal government initially pledged to pay for half of this massive project.²⁹¹ However, New Jersey's congressional representation has been unable to secure funding for this project.²⁹² New Jersey's inability to secure funding extended into the Trump presidency.²⁹³ This inability to secure funding for the Gateway Project became a major issue in the 2018 New Jersey Senate Race.²⁹⁴ Bob Hugin, Republican challenger to long-term Democratic Senator Bob Mendez, pointed out that,

²⁸⁸ Mike Frassinelli, *N.J. Senators, Amtrak Official to Announce New Commuter Train Tunnel Project Across the Hudson*, STAR LEDGER (Feb. 7, 2011), https://www.nj.com/news/2011/02/nj_senators_to_announce_new_co.html.

²⁸⁹ *Id.*

²⁹⁰ Jonathan D. Salant, *Gateway Tunnel is a Huge Issue for New Jersey. Now that House Dems have Power, They're Making it a Top Priority*, NJ.COM (Jan. 5, 2019), <https://www.nj.com/politics/2019/01/gateway-tunnel-is-a-huge-issue-for-new-jersey-now-that-house-dems-have-power-theyre-making-it-a-top-priority.html>.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Eugene Mulero, *New Jersey's Sen. Robert Menendez, Bob Hugin Disagree on Infrastructure Funding*, TRANSPORT TOPICS (Oct. 25, 2018, 3:15 PM), <https://www.ttnews.com/articles/new-jerseys-sen-robert-menendez-bob-hugin-disagree-infrastructure-funding>.

“Washington has failed us on infrastructure in both Democratic and Republican administrations.”²⁹⁵ After the 2018 midterm election the Democrats took the House and planned to focus on funding infrastructure.²⁹⁶ New Jersey, with the sixth largest Democratic delegation in the House, was still unable to secure funding for the Gateway Project.²⁹⁷ The State’s inability to influence national policy has left New Jersey without the Gateway Project, even with a favorable Congress that was trying to address the problem that New Jersey had at the time.

New Jersey’s lack of national influence, which is directly related to New Jersey’s inability to influence presidential selection has cost the citizens of New Jersey the opportunity to gain economic, social, and political benefits. By abandoning the winner-take-all method of electoral allocation in favor of the congressional district method, New Jersey can pave a path to national influence by becoming an attractive campaign designation, promoting participation in presidential selection process, and by affecting national policy.

III. Conclusion

New Jersey is a proud state that unfortunately has fallen victim to the winner-take-all electoral allocation method. Through the winner-take-all system, New Jersey has become a non-competitive state that does not represent its political minorities and cannot attract presidential candidates to come visit during campaign season. By abandoning the winner-take-all method, and adopting the congressional district method New Jersey could promote democracy and increase its ability to influence national politics. Using the congressional district method, New

²⁹⁵ *Id.* (quoting Bob Hugin).

²⁹⁶ *See* Salant, *supra* note 290.

²⁹⁷ *Id.*

Jersey can be representative and promote participation. Furthermore, the usage of the congressional district method would allow New Jersey to influence national policy in a way it currently cannot. New Jersey can no longer afford to suffer the consequences of the winner-take-all method and should adopt Assemblywomen DeCroce's proposal to act as a laboratory of democracy and create an innovative pathway to better presidential elections in New Jersey.

