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AMERICAN DEMOCRACY AND MINORITY RULE: HOW THE UNITED STATES CAN REFORM ITS ELECTORAL PROCESS TO ENSURE "ONE PERSON, ONE VOTE."

Roberta A. Yard*

I. INTRODUCTION

"A basic principle of democracy is that a majority should rule."1 The United States' political system, however, is increasingly becoming one of minority rule, as a greater number of its elected officials win their elections by mere pluralities, rather than clear majorities.2 The 2000 Presidential election exemplifies some of the deficiencies of the current system for electing the chief executive.3 For the fourth time in the nation's history, the winner of the popular vote did not win a majority of electoral votes,4 resulting in the loser of the

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3. See Mike Downey, Is This Any Way to Pick a President?, L.A. TIMES (Dec. 15, 2000), available at http://www.cnn.com/2000.ALLPOLITICS/stories/12/15/latimes.voters/index.html (last visited Jan. 7, 2001) ("[W]e have one leader, even if the winner of the national election receives 337,576 fewer votes than the loser .... One vote per person is the notion we sell, but the majority doesn't win.")

4. See Bill Press, It's Over - Now, Let's Fix It (Dec. 15, 2000), at
popular vote winning the election.\(^5\) In addition to this anomaly, the rise in the number of independent and third party candidates compounds the problem of the electoral college system by creating election "spoilers,"\(^6\) which significantly increases the possibility of an election defaulting to the House of Representatives.\(^7\) Due to these possibilities and the events of the 2000 election, there has been increasing debate about whether the United States should reform or abolish its electoral college system.\(^8\)

This comment focuses on some of the problems created by the electoral college system and proposes various ways in which to change the current system. Part II provides an overview of how the electoral college system works\(^9\) and the reasons for its creation.\(^10\) It also examines a number of presidential elections to see how the electoral college and default systems have worked in the past.\(^11\) Part III identifies the problems created by this bipartite system for electing the President.\(^12\) Part IV examines these problems more closely\(^13\) and discusses three proposals for electoral reform, analyzing the pros and cons of each.\(^14\) Finally, Part V proposes a means

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5. See John Marelius, Nation Awaits Results of Florida Recount, COLEY NEWS SERVICE, Nov. 8, 2000, LEXIS, Nexis Library, News Group File ("Bush is the... first [man] in more than a century to win the presidency despite losing the national popular vote. The last time was in 1888 when Benjamin Harrison defeated Grover Cleveland.").

6. See Morin, supra note 2, at B5 ("[Plurality] victories often come at the expense of the candidate who would have been the choice of voters in a two-candidate race... [Al Gore told Nader supporters that] a vote for Nader is, in effect, a vote for... George W. Bush."); see also infra Part IV.A.2.

7. See infra Part II.A.2. "In theory, all [Ross] Perot had to do was win one state to prevent either major party candidate from winning the presidency. Thus, Perot stood in the summer of 1992 in a plausible position to create an electoral college deadlock." Christopher Anglim, A Selective, Annotated Bibliography on the Electoral College: Its Creation, History, and Prospects for Reform, 85 LAW LIBR. J. 297, 324 (1993).


10. See infra Part II.A.3.

11. See infra Part II.B.

12. See infra Part III.

13. See infra Part IV.A.

14. See infra Part IV.B.
for reform that can be accomplished without having to pass a Constitutional amendment.\(^{15}\)

**II. BACKGROUND**

**A. Overview of the Electoral College**

During the Constitutional Convention of 1787, one of the most heatedly debated topics was determining the procedure for electing the President and Vice President.\(^{16}\) The division occurred along the lines of state population\(^{17}\) and states' viewpoints on the issue of slavery.\(^{18}\) The more populous free states preferred a system that provided for the direct election of the President and Vice President by the people.\(^{19}\) Less populous slave states, however, believed they would not have a meaningful voice in a popular election and therefore proposed a system by which the members of Congress elected the President and Vice President.\(^{20}\) The Framers compromised, and ultimately decided upon a bipartite electoral system.\(^{21}\) This two-part process consists of the well-known electoral college system, and the more obscure "default" system.\(^{22}\)

1. *The Electoral College System*

When people vote in a presidential election, they are not actually voting for the candidate they select on their ballot. Instead, they are voting for a slate of electors who have

\(^{15}\) See infra Part V.


\(^{17}\) See id.


[The electoral college system was] a compromise between northern delegates, who advocated direct election of the President, and southern delegates, who demanded selection of the national executive by state legislatures or Congress. . . . [Southern states] sought an explicit ratification of the institution of slavery and an implicit guarantee of the South's dominance and control of the national government's political branches.

*Id.* at 206.

\(^{19}\) See Josephson & Ross, supra note 16, at 151.

\(^{20}\) See id.

\(^{21}\) See Williams & MacDonald, supra note 18, at 202.

\(^{22}\) See id. at 201-02.
pledged to vote for that particular candidate. In other words, voters actually elect a predetermined group of people to the office of elector, who in turn elect the President. Article II, Section I of the U.S. Constitution, along with the Twelfth Amendment, outline this electoral system. The Constitution allot each state a number of electors that is equal to the number of Senators plus Representatives that it has in Congress. Each state has the power to decide how to appoint its electors.

Currently, forty-eight of the fifty states appoint their electors on a winner-take-all basis, which is referred to as the unit-voting method. This means that the winner of the state popular vote gets all of that state’s electoral votes. This is so even if that particular candidate did not win a majority of that state’s votes, the slimmest of pluralities is sufficient. After each state holds its popular election and appoints a corresponding slate of electors, the electors meet in their respective states to cast their ballots for the President and Vice President.

24. See id.
25. U.S. CONST. art. II, § 1, cl. 2. This section reads in pertinent part: “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 . . . .” Id.
26. See U.S. CONST. amend. XII. This amendment reads in pertinent part: The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President . . . . The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President . . . .

Id.
27. See id.
28. See id.
29. See Williams & MacDonald, supra note 18, at 206, 207 n.33. The only two states that do not have a winner-take-all system of voting are Maine and Nebraska. See id.
30. See id. at 206.
31. See id. at 207.
32. See U.S. CONST. art. II, § 1, cl. 3. This section reads in pertinent part: “The Electors shall meet in their respective States, and vote by Ballot for two Persons . . . . The Person having the greatest Number of Votes shall be the
While Article II, Section 1 of the Constitution gives the state legislatures the power to appoint electors, the electors are not constitutionally bound to follow the popular vote and have discretion to vote for the candidate of their choice. States do have the power to bind their electors, however, either by legislation or a pledge to follow the popular vote. Only twenty-four states and the District of Columbia have chosen to bind their electors.

Theoretically, the electors for the remaining twenty-six states are free to cast their ballots for whomever they choose. In reality, though, the political parties who select the electors for their candidate expect electors to cast their votes in accordance with the popular vote of the state. An elector is called a "faithless elector" when they cast their ballot in contravention of the popular vote. In past presidential elections, votes cast by faithless electors have not had an impact on which candidate won the election. In an election as close as the 2000 Presidential election, however, faithless electors could have changed the outcome of the election.

To illustrate how the system works, imagine the following hypothetical 2004 Presidential election. Three candidates, Republican incumbent George W. Bush, Democrat Hillary Clinton, and Independent Jesse Ventura are running for President. Clinton and Ventura are competing for liberal voters, while Bush appeals to conservatives. In state X, Clinton gets thirty-eight percent of the popular vote, Ventura...
gets twenty-two percent, and Bush gets forty percent. State X awards its electoral votes on a winner-take-all basis. Since Bush received the most votes of any one candidate, he receives all of state X's electoral votes, even though sixty percent of the state's voters did not choose him.

Assume further that Clinton won the electoral votes in twenty-five states and Bush won in twenty-four states and the District of Columbia, and that Bush's electoral vote lead is 268 to 267. Ventura, however, campaigned hard in state Y and won its three electoral votes by a narrow margin.

State Y does not require its electors to follow the popular vote. Both major political parties attempt to persuade the three state Y electors to cast their ballots for their candidate. A close election could result in the popular vote winner losing the election. Furthermore, faithless electors could cast their ballots in contravention of the popular vote of their state and affect the outcome of the election.

2. The Default System

In keeping with our hypothetical election, assume that Bush still maintains an electoral vote lead of 268 to 267, and that state Y's electors voted for Ventura in accordance with the popular vote. No candidate has won the required 270 electoral votes. So what happens next?

The Constitution provides that if no candidate receives a majority of the electoral votes, the election will default to the House of Representatives, who shall select the President.42 Representatives from each state collectively have one vote (i.e. only one vote per state).43 The candidate who receives a majority of the Representatives' votes becomes President. If

42. See U.S. CONST. amend. XII. This amendment reads in pertinent part:
The person having the greatest number of votes for President, shall be
the President, if such number be a majority of the whole number of
Electors appointed; and if no person have such majority, then from the
persons having the highest numbers not exceeding three on the list of
those voted for as President, the House of Representatives shall choose
immediately, by ballot, the President.

Id.

43. See id. The Twelfth Amendment further provides:
But in choosing the President, the votes shall be taken by states, the
representation from each state having one vote; a quorum for this pur-
pose shall consist of a member or members from two-thirds of the
states, and a majority of all the states shall be necessary to a choice.

Id.
necessary, the Senate chooses the Vice President in a like manner.  

If the House of Representatives fails to select a President by the fourth day of March of the following year, the Vice President, as selected by the Senate, shall act as President.  

In the hypothetical election, the House must choose the President. Each state is given only one vote. The Republican Representatives vote for Bush and the Democratic Representatives vote for Clinton. In other words, the Representatives vote along party lines, and not necessarily in accordance with the popular vote of their home state. Ventura, therefore, receives no votes from the Representatives. If the Representatives cannot agree on a winner, then the Vice President, as chosen by the Senate in a similar fashion, becomes President. Thus the election turns on which party holds a majority in the House and Senate, and not in accordance with which candidate the people may want as their President.

3. The Framers' Rationale for the Electoral College and Default Systems

As mentioned above, the states disagreed about whether to elect the President by a direct popular vote or to have Congress select the President. The less populous, southern slave states pushed for congressional selection of the President. They felt the people were too incompetent and uneducated to elect the President and therefore strongly opposed implementing a direct popular election. One delegate claimed that allowing for a direct election would be “unnatural” and that the people lacked “the requisite capacity to judge the respective pretensions of the Candidates.”

In contrast, the more populous states, typically northern free states, believed that congressional selection of the Presi-

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44. *Id.* ("The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President.").

45. *See id.* This could happen if the House vote is evenly split between the two major political parties and no candidate is able to secure a majority.

46. *See supra* note 44 and accompanying text.

47. *See supra* notes 16-20 and accompanying text.

48. *See Williams & MacDonald, supra* note 18, at 209.

49. *See id.*

50. *Id.*
dent was wrought with the opportunity for corruption. One delegate feared that such a system would make the President "a mere creature" of the legislature and would be like "the election of a pope by a conclave of cardinals." Thus, these states pushed for a direct election because they believed that such a system would make the chief executive independent of Congress and of the states and would be more representative of the population as a whole.

The delegates arrived at a compromise and created the electoral college and default systems for electing the President and Vice President. This compromise gave large states an advantage in selecting a President from the candidates because they had a greater number of electoral votes. However, small states had a disproportionate amount of power in the default system because each state, no matter what its size, had only one vote. The founders actually believed that most elections would default to the House of Representatives, and thus the small states approved of the compromise.

B. The Electoral College at Work

The compromise struck by the Framers of the Constitution has had unforeseen consequences. The Framers did not
intend for states to adopt unit-voting schemes.\textsuperscript{59} Currently, all states except for Nebraska and Maine have enacted statutes that appoint all of the state's electors from the slate that wins a majority or plurality of that state's popular vote.\textsuperscript{60} Because of this winner-take-all manner of allocating electoral votes, the winner of the national popular vote may not win a majority of electoral votes.\textsuperscript{61} Moreover, when a third, or fourth, candidate enters the race, the possibility is even greater that no candidate will receive a majority of the electoral college votes and that the election will default to the House of Representatives.\textsuperscript{62} There have been several past elections where the popular vote winner was the election loser,\textsuperscript{63} where the election either defaulted or came dangerously close to defaulting to the House of Representatives,\textsuperscript{64} or where the introduction of multiple candidates created an election "spoiler."\textsuperscript{65}

1. \textit{Popular Vote Winners That Were Electoral Vote Losers}

The elections of 1876 and 2000 provide good examples of how our electoral system can produce an electoral vote winner from a popular vote loser. This particular result is a byproduct of the winner-take-all scheme employed by a majority of the states.\textsuperscript{66}

a. \textit{The Election of 1876}

The election of 1876 was remarkably similar to the 2000 election.\textsuperscript{67} The Democratic candidate was Samuel J. Tilden,

\textsuperscript{59} See id. at 281.
\textsuperscript{60} See Josephson & Ross, supra note 16, at 160-61. Both Maine and Nebraska award their electoral votes on a district basis. See id. at 160. Each congressional district within the state has an equal number of electoral votes assigned to it. See id. at 161. The candidate who wins the popular vote in each district wins that district's electoral votes, and the popular vote winner in the state as a whole is awarded the state's two "bonus" electoral votes (i.e. the electoral votes that each state receives for its two Senators). See id.


\textsuperscript{62} See Josephson & Ross, supra note 16, at 148.

\textsuperscript{63} See infra Part II.B.1.

\textsuperscript{64} See infra Parts II.B.2.a-b.

\textsuperscript{65} See infra Part II.B.2.c.

\textsuperscript{66} See id.

and his Republican opponent was Rutherford B. Hayes.\textsuperscript{68} Tilden received approximately 250,000 more popular votes than Hayes, but neither candidate was able to secure a majority of the electoral votes.\textsuperscript{69} The media reported that Tilden had won the election, even though no final result was declared until several months after the election.\textsuperscript{70}

The election turned on contested electoral votes from three states: Louisiana, South Carolina, and Florida.\textsuperscript{71} These three states each sent the votes of two separate slates of electors, one Democratic, and one Republican.\textsuperscript{72} There was also one contested electoral vote from Oregon because the Governor had certified seven electors for Hayes and one for Tilden instead of all eight in favor of Hayes.\textsuperscript{73}

Before even counting the electoral votes, Congress created an Electoral Commission made up of Senators, Representatives, and Supreme Court justices to determine which slate of electoral votes should count in the three contested states.\textsuperscript{74} The Republicans were able to gain an 8-7 majority on the Commission by disqualifying the only "independent" and replacing him with a Republican.\textsuperscript{75} The Republican majority on the Commission subsequently awarded all of the contested electoral votes to the Republican Hayes, who was inaugurated as President just two days later.\textsuperscript{76}

b. \textit{The Election of 2000}

In the most recent election, Democrat Al Gore received approximately 338,000 more votes than Republican George W. Bush.\textsuperscript{77} Gore won the popular vote in 20 states and the District of Columbia, and in the nation as a whole, but won

\begin{thebibliography}{99}
\bibitem{68}{See Josephson \& Ross, \textit{supra} note 16, at 156.}
\bibitem{69}{See id.}
\bibitem{70}{See Card, \textit{supra} note 67.}
\bibitem{71}{See Josephson \& Ross, \textit{supra} note 16, at 156-57. Tilden won 184 uncontested electoral votes, just one short of the majority required for him to win the election. Hayes won only 166 uncontested electoral votes. Thus, if Tilden had won just one more electoral vote (i.e., the one electoral vote that Oregon's Governor certified for Tilden), he would have won the election. See id.}
\bibitem{72}{See id. at 156.}
\bibitem{73}{See Card, \textit{supra} note 67.}
\bibitem{74}{See id.}
\bibitem{75}{See id.}
\bibitem{76}{Id.}
\end{thebibliography}
only 267 electoral votes. Bush won the popular vote in 30 states and secured 271 electoral votes to win the election. For the fourth time in the nation's history, the winner of the popular vote was not the winner of the electoral vote.

Florida's 25 electoral votes were the deciding factor in the election. The election procedures in Florida were the subject of numerous lawsuits filed by, and on behalf of, both candidates. The main theme underlying much of the litigation was that thousands of punch card ballots that could not be read by the counting machines should be recounted by hand because the intent of the voter was still evident on many of the ballots.

The U.S. Supreme Court agreed to hear the case to determine whether the Florida Supreme Court properly ordered the manual recount of the ballots. In a 5 to 4 decision, the Court held that the Florida Supreme Court's judgment violated the Equal Protection clause of the Fourteenth Amendment. The Court reasoned that a manual recount was un-
constitutional because there was no established recount procedure, and also because allowing election results to be turned in after the passing of the statutory deadline would violate Florida’s own election code. The decision ultimately put an end to the ongoing litigation, which paved the way for Florida to certify its electors in favor of George W. Bush, securing him the Presidency more than a month after the election.

2. Multiple-Candidate Races

In addition to the possibility that the popular vote winner can be the electoral loser, multiple-candidate races also have the potential to cause the election to default to the House of Representatives. This can be done by splintering the electoral votes and keeping any one candidate from obtaining the necessary majority.

a. The Election of 1824

The election of 1824 was the first presidential election to rely primarily on the popular vote. Prior to the election, the established political parties were in a state of decline, and there were many independent candidates running for President. The four candidates that were left at the time of the general election were John Quincy Adams, William H. Crawford, Andrew Jackson, and Henry Clay. Jackson received a plurality of both the popular and electoral votes but did not receive the required majority of the electoral votes, and the election defaulted to the House of Representatives. Clay, the Speaker of the House, was the fourth place candidate and therefore out of the race. Clay, however, agreed to support
Adams for President in exchange for being appointed Secretary of State. Adams agreed and Clay exerted significant political pressure on the members of the House, and Adams became the next President. As promised, Adams later appointed Clay as his Secretary of State.

b. The Election of 1992

The "un-candidacy" of Texas billionaire H. Ross Perot marked the election of 1992. Perot declared that if he could gain enough support to place his name on the ballot in each of the fifty states, he would run for President. After withdrawing from, and then later re-entering the race, Perot managed to win nineteen percent of the popular vote. The remainder of the popular vote was split between Democrat Bill Clinton and the Republican incumbent George Bush. Although Perot won a fair percentage of the popular vote, he did not win a single electoral vote. Bill Clinton won a "landslide" electoral victory, claiming 370 electoral votes with only forty-three percent of the popular vote.

c. The Election of 2000

Four notable candidates ran in the 2000 election: Democrat Al Gore, Republican George W. Bush, Green Party candidate Ralph Nader, and Independent Pat Buchanan. The presence of two additional candidates was a factor that may have cost Al Gore the election. The election boiled down to

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94. See Williams & MacDonald, supra note 18, at 218.
95. See id.
96. See id.
97. See id. at 220. H. Ross Perot is a Texas billionaire who had never before run for political office. Perot insisted that he was not running for office, but conducted a grassroots "campaign" to get his name on the ballot in all fifty states. See id. at 220-25.
98. See id. at 220 n.120.
99. See Williams & MacDonald, supra note 18, at 222-23.
100. See id. at 225.
101. See id. It is helpful to mention that the George Bush who was President from 1988-1992 and ran against Ross Perot and Bill Clinton in 1992 is the father of George W. Bush, who ran against Al Gore and ultimately won the 2000 presidential election.
102. See id.
103. See id.
105. See id.
one state for the two front-runners, Bush and Gore: whoever won Florida’s general election would win its twenty-five electoral votes and the Presidency.\(^{106}\) Democrats claimed that a confusing ballot design in Palm Beach County caused more than 3,000 voters to cast their ballots for Pat Buchanan by accident instead of Al Gore.\(^{107}\) Ralph Nader also lured away Democratic voters that would have most likely voted for Gore, giving him enough votes to win Florida’s electoral votes and the Presidency.\(^{108}\) Due to these “lost votes,” Gore lost the Florida general election and the Presidency by a mere 388 votes.\(^{109}\) In fact, the race between Bush and Gore was so close, if Ralph Nader or Pat Buchanan had received just two electoral votes, no candidate would have received the required majority of electoral votes, and the election would have defaulted to the House of Representatives.\(^{110}\)

The current electoral system creates the possibility that

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Democratic Party officials and politicians said Wednesday that because of the ballot design, thousands of voters mistakenly voted for [Independent Candidate Pat] Buchanan, when they meant to support Democratic candidate Al Gore. And because Republican nominee George W. Bush unofficially defeated Gore in Florida by a 1,121-vote margin, protesters said Palm Beach County could have incorrectly decided the 43rd President of the United States.

Id.\(^{106}\)


The recount in all 67 counties was triggered by state law because Republican George W. Bush led Democrat Al Gore by less than one-half of 1 percent . . . . The scrutiny was intense because Florida, with its 25 electoral votes, will decide the winner of the presidential cliff-hanger . . . . The latest Florida totals, including all absentee ballots received so far, showed Bush with 2,909,135 votes and Gore with 2,907,351 - a difference of 1,784 in a state with 8.75 million registered voters.

Id.\(^{107}\)

107. See id.

Some Gore supporters said they feared they mistakenly voted for Reform Party candidate Pat Buchanan. Gore carried the county by more than 110,000 votes, but the 3,407 votes for Buchanan were by far the most of any Florida county, and almost 20 percent of his total vote in the state.

Id.\(^{108}\)

108. See Broder, supra note 8, at A1; see also Florida Recount Under Way, supra note 106.


110. See Election 2000 Results, supra note 77.
the popular vote winner may lose the election, that the election may default to the House of Representatives, and that multiple candidates may become election "spoilers" and impact the outcome of the election. All of these possibilities lead to the conclusion that there must be a better system available to the United States to elect its highest officials.

III. IDENTIFICATION OF THE PROBLEM

The electoral college was a compromise that may have been appropriate in 1787, but it no longer suits American democracy. The examples of election glitches discussed above are indicative of the serious problems inherent in the electoral college and default systems. Two such by-products of the electoral system are the possibility that the winner of the popular vote will lose the election, and that a multiple-candidate race has the potential to take the election out of the hands of the voters altogether. The default system is especially vulnerable to corruption. Furthermore, the current winner-take-all system effectively disenfranchises a great number, and sometimes even a majority, of the voting population. This happens because their votes only count in their state's particular election, and if their candidate does not win in that state, they do not receive a single electoral vote from that state, nullifying the votes for that candidate.

Additionally, the default system puts third party and in-

111. See Matthew Dennis, Commentary: Electoral College No Longer Suits Our Best Interests, REGISTER-GUARD (Eugene, Or.), Nov. 20, 2000, available at http://www.registerguard.com/news/20001120/ed.col.dennis.1120.html (last visited Jan. 9, 2001) ("The Electoral College is an anachronism that no longer serves the best interests of the country. It is a political dinosaur that deserves extinction.").
112. See supra Part II.B.
113. See Josephson & Ross, supra note 16, at 147. Of . . . substantial concern is that the electors' votes might be indecisive and throw the President's election to the House of Representatives (and/or the Vice President's election to the Senate). . . . Such contingency elections occurred in 1801, 1825 and 1877 . . . [and the Senate elected the Vice President] only once, in 1837.

114. See supra Part II.B.1.a.
116. See id.
dependent candidates in the role of "spoiler," which may discourage people from voting for the candidate they really prefer.\textsuperscript{117} This occurs because voters realize that in a three way race, if they "take away" votes from one of the major party candidates by voting for a third party candidate, the other major party candidate has a better chance of winning their state's electoral votes.\textsuperscript{118} If voters continue to feel disillusioned with the electoral system, the decline in voter participation in elections will most likely continue at both the federal and state levels.\textsuperscript{119} This possibly creates a genuine state interest in reforming the current system to try to solve these problems. The question then becomes, which approach would best facilitate these changes?

IV. ANALYSIS

There is widespread dissatisfaction with the electoral system, and over the years there have been numerous attempts to either abolish or reform it.\textsuperscript{120} In order to explore the various approaches the United States could implement to effect change in its electoral systems, it becomes necessary to more closely examine some of the "side effects" of the electoral college system.

A. Side Effects of the Electoral College System

1. Disenfranchisement of Voters

"Millions of Americans who participate in a general presidential election by voting, supporting, and even cam-


\textsuperscript{118} See DeFazio, supra note 115.

\textsuperscript{119} See Broder, supra note 8, at A1. "Curtis Gans, director of the Committee for the Study of the American Electorate, said preliminary calculations showed that 50.7 percent of the eligible voters cast ballots - barely higher than the historic low recorded in 1996." Id. at A32. See also Robert Kerstein, Unlocking the Doors to Democracy: Election Process Reform, 15 FLA. ST. U. L. REV. 687, 707 (1987) ("According to statistics for national elections in twenty-one Western democracies, the United States, with a 52.6% turnout, ranks twentieth in the number of votes cast as a percentage of the voting age population.").

\textsuperscript{120} See Williams & MacDonald, supra note 18, at 202. See also Tim Hames, Election Hangover; Electoral College is Antiquated But Change Unlikely, S.D. UNION-TRIBUNE, Dec. 31, 2000, at G1 ("There have been some 700 past attempts at removing or adjusting the Electoral College.").
paigning for a candidate of their choice may well be participating in a futile, meaningless act.  

Forty-eight states and the District of Columbia currently appoint their presidential electors on a winner-take-all basis. The result of this unit voting scheme has been that the candidate who has “won” the Presidency in the past three elections received less than half of the votes cast nationwide in each election. Furthermore, in the most recent election, the “winner” was in fact the loser of the nationwide popular vote. The United States’ democracy has effectively transformed into a minority-rule form of government.  

The 1992 election provides a good example of the concept of minority-rule. In that election, Ross Perot won twenty-two percent of the popular vote in the state of Texas, and Bill Clinton won thirty-seven percent of the popular vote. As a result, the winner-take-all manner of awarding Texas’ electoral votes effectively disenfranchised fifty-nine percent of the state’s voters.  

Plurality winners in both federal and state elections have become much more common in the past ten years. “In many states today, it’s possible to win a multi-candidate election or

121. See Williams & MacDonald, supra note 18, at 233-34.  
123. See id.  
124. See Press, supra note 4.  
125. See Center for Voting and Democracy, Electing the President by Instant Runoff Voting, at http://www.igc.apc.org/cvd/op_eds/pres_irv.htm (last visited Jan. 9, 2001). See also Morin, supra note 2.  
127. See id.  
128. See id.  
129. See Morin, supra note 2, at B5.  

Since 1992, 16 U.S. Senate races were won by a candidate who captured less than a majority of the vote, or one out of every eight contested seats in the past four federal elections. Since 1908, a total of 130 Senate seats have been won by plurality. . . . Also in the past eight years, 76 seats in the House of Representatives were won by a plurality, or 4 percent. More governors were elected by plurality as well. . . . Of 50 sitting governors, 15 (30 percent) won one of their general elections in the 1990s by plurality, including two governors who won while running outside the major parties.

Id.
party primary with 25% of the vote or less."130 This suggests that in future elections, the United States is more likely to have a situation where a relatively small percentage of the overall population will elect the President.131

To illustrate, assume that fifty percent of the total population registers to vote, and that fifty percent of the registered voters actually vote on election day. The overall percentage of voters is thus only twenty five percent of the population as a whole. Assume that a candidate wins the election with a thirty-five percent plurality. The result is that a mere eight percent of the population elects the President. Even worse, it is very that the U.S. will experience another situation in which the popular vote winner loses the election because he or she did not receive a majority of the electoral votes.132

The Supreme Court upheld the use of the “one person, one vote” standard in voting rights cases,133 except for in presidential elections.134 Why should this standard be any less important when electing the chief executive? The “one person, one vote” standard has been characterized by the Supreme Court to mean an equally weighted vote: “[S]imply stated, an individual’s right to vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of other citizens . . . .”135

The disproportionate nature of the electoral system weighs some votes more heavily than others.136 For example, the District of Columbia has the same number of electoral votes as seven states.137 Furthermore, because of the all-or-

131. See id.
134. See Williams v. Va. State Bd. of Electors, 288 F. Supp. 622, 627 (1968). “Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters . . . .” Id.
135. Levinson, Gerrymandering, supra note 58, at 264 (citing Reynolds v. Sims, 377 U.S. 533, 568 (1964)).
136. See Williams & MacDonald, supra note 18, at 236.
137. See Bennett Roth, Nation Waits on Florida; Bush Says He Will Win Presidency in Recount, HOUSTON CHRON., Nov. 9, 2000, at A1. Washington, D.C. has three electoral votes, the same number as Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. See id.
nothing manner in which electoral votes are awarded in forty-eight states, the votes for that state’s “loser” do not even count. The problem is further compounded if an election should default to the House of Representatives. In the default system, each state has only one vote. This significantly dilutes the votes of citizens living in larger states. For example, “one House member from Wyoming, who represents under 500,000 citizens, has the same one vote as the fifty-two house members from California, who represent a population of over 30 million citizens.” It has been said that fair representation requires “that an electoral system be structured so as to allow all voters a ‘fair chance’ to influence the choice of representatives. Providing for such a ‘fair chance’ is the only way to ensure full and effective voter participation.” The unit voting method of allocating electoral votes does not provide this fair chance and thus should be changed.

2. Spoiler candidates

In multiple-candidate elections, candidates who are not affiliated with one of the two major political parties are often referred to as spoiler candidates. These candidates can distort the outcome of the election by “taking” votes that most likely would have been cast for a major party candidate, giving the effect of more votes for the opposing major party candidate. Furthermore, it does not take a strong third party

138. See Williams & MacDonald, supra note 18, at 254. Maine and Nebraska are the only two states that do not award their electoral votes on a winner-take-all basis. See id.
139. See id. (“In a two person election, a state’s winner-take-all system always disenfranchises a minority of the voters - sometimes a large minority of voters. In a three-person election, ... a winner-take-all system often disenfranchises even a majority of the voters.”).
140. See id. at 236.
141. See supra notes 42-46 and accompanying text.
142. See Williams & MacDonald, supra note 18, at 236.
143. Id.
144. Levinson, Gerrymandering, supra note 58, at 265 (citations omitted).
146. See Morin, supra note 2, at B5.
candidate to have such an effect. As noted above, Green Party candidate Ralph Nader, who won a mere three percent of the nationwide popular vote, may have taken just enough votes from Democrat Al Gore in Florida to cost Gore the elec-

1. See id.
2. See supra notes 105-10 and accompanying text.
3. See Williams & MacDonald, supra note 18, at 236.
4. See supra Part II.A.2.
6. See supra notes 105-10 and accompanying text.
7. See Williams & MacDonald, supra note 18, at 236.

147. See id.
148. See supra notes 105-10 and accompanying text.
149. See Williams & MacDonald, supra note 18, at 236.
150. See id. at 234 "The electoral college has a dangerous shortcoming... The danger is that deadlock will be resolved in a way that seems to rob Americans of their perceived right to select the president." (quoting Elizabeth McCaughey, Democracy at Risk: The Dangerous Flaws in the Electoral College, 63 POL'Y REV. 79 (1993)).
151. See id. at 227.

From the beginning of his involvement in the 1992 presidential cam-

a. Triggering the Default System

An even more serious side effect occurs when no candidate is able to win the required majority of electoral votes, thereby triggering the default system for electing the President. Multiple-candidate races increase the chance that an election will default to the House of Representatives. This may have the effect of discouraging third party and independent candidates from running for office. Also, as discussed above, the default system is grossly malapportioned, meaning that there is significant dilution of votes from heavily populated states, while simultaneously over-inflating votes from sparsely populated states. This could have the effect of a President being elected in contravention of a large majority of the national popular vote.

b. Wasted Votes

Another side effect of the winner-take-all system is the notion of wasted votes. A vote is "wasted" when states allocate the losing candidate's popular votes to the winning candidate (i.e. the winner receives all of the state's electoral

1.47. See id.
1.48. See supra notes 105-10 and accompanying text.
1.49. See Williams & MacDonald, supra note 18, at 236.
1.50. See id. at 234 "The electoral college has a dangerous shortcoming... The danger is that deadlock will be resolved in a way that seems to rob Americans of their perceived right to select the president." (quoting Elizabeth McCaughey, Democracy at Risk: The Dangerous Flaws in the Electoral College, 63 POL'Y REV. 79 (1993)).
1.51. See id. at 227.

From the beginning of his involvement in the 1992 presidential cam-

1.52. See supra Part II.A.2.
1.53. See Williams & MacDonald, supra note 18, at 236.
votes), which means that the losing candidate’s votes are “worth nothing and being counted only to be discarded.”\textsuperscript{155} This reality causes many voters not to vote for the candidate that they would really like to vote for (such as Ross Perot or Ralph Nader).\textsuperscript{156} This occurs because third party and independent candidates usually have a slim-to-none chance that they will be able to win any electoral votes, even if they are able to win a fair percentage of the overall popular vote.\textsuperscript{157} Moreover, voters do not want to inadvertently vote for a candidate they do not want.\textsuperscript{158} For example, in the 2000 presidential election, a vote for Ralph Nader was, in effect, a vote for George W. Bush.\textsuperscript{159} To illustrate, assume that both Ralph Nader and Al Gore are liberals, and George W. Bush is a conservative. Given a choice between the three candidates, liberals will most likely choose either Nader or Gore, and will \textit{not} want Bush to be elected. Assume that fifty percent of the population will vote for a liberal candidate and the other fifty percent will vote for a conservative candidate. If liberals vote for Nader, that is one less vote that Gore will receive, tipping the balance by that one vote in Bush’s favor. This may discourage people from voting for the candidate they really prefer, and may even keep people from voting at all.\textsuperscript{160}

Defenders of the electoral college praise the system and

\begin{footnotes}
\item[155] See id.
\item[156] See Sturdevant, supra note 113.
\item[157] See supra notes 97-103 and accompanying text. See also Williams & MacDonald, supra note 18, at 225 (“[In the 1992 presidential election,] Perot received nineteen percent of the popular vote compared with forty-three percent received by Clinton and thirty-eight percent by President Bush. Perot’s showing in the electoral college was nonexistent.”).
\item[159] See Broder, supra note 8, at A1.
\item[160] See Robert Richie, Testimony before the Vermont House of Representatives (Feb. 1, 2000), at http://www.igc.apc.org/cvd/library/geog/states/vt_testimony.htm (last visited Jan. 9, 2001). See also Rauber, supra note 145 (stating that many Nader supporters were “anguished by the political cost of their votes of conscience. . . . [But] with a simple change to our electoral process, Nader could have easily doubled his numbers and made a powerful statement about the environment, trade issues, and corporate influence without sabotaging fellow environmentalist Al Gore.”).
\end{footnotes}
claim that it serves its intended purpose.\textsuperscript{161} They claim that it “promotes majority rule while protecting minority interests.”\textsuperscript{162} They argue that it guarantees small states a voice in the electoral system, which makes each and every state a prize worth competing for because of the pooling of electoral votes.\textsuperscript{163} However, the electoral college often results in minority rule, particularly when the popular vote winner loses the election,\textsuperscript{164} and also when the winner is only able to secure a plurality of the votes.\textsuperscript{165}

The electoral system is a product of a vastly different era than that which exists today. It is a malapportioned and unfair system that results in minority rule and disenfranchisement of voters.\textsuperscript{166} The ideals of democracy are majority rule and equality.\textsuperscript{167} The electoral system directly contradicts these ideals and should be changed.

B. Proposals for Change

On November 15, 2000, a bipartisan pair of Representatives introduced a bill into Congress to study various reforms to the United States’ voting systems.\textsuperscript{168} The bill, called the Federal Elections Review Commission Act, would “establish a commission to study and make recommendations with respect to the Federal electoral process.”\textsuperscript{169} Some of the issues that

\begin{flushright}
161. See Peter G. Fitzgerald, 
\textit{Electoral College Doesn’t Need Fixing,} CHI. SUN-TIMES, Jan. 6, 2001, at 17.

162. Id.

163. See id.

164. See supra Part II.B.1.

165. See supra Part II.B.2.

166. See Williams & MacDonald, supra note 18, at 264.

167. See generally Levinson, 
\textit{Gerrymandering, supra note 58.}

168. See H.R. 5631, 106th Cong. (2000). The bill’s sponsors are U.S. Representatives Peter DeFazio (D-Or.) and Jim Leach (R-Iowa). See also Center for Voting and Democracy, 

169. H.R. 5631.
\end{flushright}
the Commission would address as solutions are abolishing the electoral college, implementing proportional representation, and adopting instant runoff voting. These proposed solutions will be discussed in turn below.

1. Abolish the Electoral College System and Adopt Direct Vote

In recent polls, approximately sixty percent of Americans said that the Constitution should be amended to abolish the electoral college in favor of electing the President by a direct popular vote. There has been a great deal of debate among politicians, scholars, and the nation as a whole about the prospects for getting rid of this "dinosaur." The Electoral College... has been the subject of more proposed amendments than any other part of our Constitution, yet it still remains intact. Several Congressmen recently announced that they will give "top priority" to push for a Constitutional Amendment that would abolish the electoral college and adopt a direct voting system to elect the President.

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early voting; and other issues. Membership on the commission would include a broad cross section of regional political perspectives, and would include experts in the fields of federal election law, the U.S. Constitution, and United States history.


170. See DeFazio, supra note 115.

171. See Dave Saltonstall, Take Your Time, Do It Right, Says Poll, DAILY NEWS (N.Y.), Nov. 12, 2000, at 4 (stating that in a Newsweek poll taken on November 9th and 10th, 2000, fifty-seven percent of Americans believed that the electoral college should be abolished in favor of a direct popular vote). See also Rob Richie & Steven Hill, Change Elections to Instant Runoff Voting, BALTIMORE SUN, Jan. 2, 2001, available at http://www.fairvote.org/op_eds/baltimoresunjan2.htm (last visited July 11, 2001) (stating that in a recent Washington Post - ABC News poll, approximately sixty percent of Americans want to abolish the electoral college in favor of a direct vote).


173. Anderson & Hill, supra note 172.

174. See Electoral College Virtues, supra note 1. Some of the Congresspersons who propose we change the electoral college system are Rep. Peter DeFazio
Supporters of the electoral college claim that abolishing it will have many negative repercussions. First, they claim that the current system is necessary to maintain the viability of the two-party system. They fear that abolishing the electoral system will give rise to many political parties and will result in a splintering of government and political deadlock. This concern, however, is without merit. This country has maintained a two-party system in every other facet of government without the benefit of the electoral college. Voters elect senators, representatives, governors, and scores of other political officers by a direct vote. If the two-party system is in jeopardy, it is because there is gridlock on Capitol Hill, and voters are frustrated with politics as usual and they are turning to new political parties and independent candidates as one possible solution. The two-party system should not be saved at the expense of the voters and their right to vote.

Supporters of the electoral college system also claim that the electoral college protects minority interests by giving minorities a voice. However, because of the winner-take-all


175. See Williams & MacDonald, supra note 18, at 238-43. See also Fitzgerald, supra note 161, at 17 ("The Electoral College functions exactly as our Constitution's framers intended and serves several important and ingenious purposes.").

176. See Williams & MacDonald, supra note 18, at 239.

177. See id. at 242 ("[A]polesists estimate that abolishment of the electoral college would spark a proliferation of radical splinter parties and eliminate the possibility of strong coalition governments built on moderate compromise. . . . [T]hey stress the electoral college's vital role and purpose in preventing 'ideological and charismatic fragmentation.'").

178. See id. at 247-53.

179. See id. at 241-43.

180. See id. at 225-26; Josephson & Ross, supra note 16, at 145 ("A growing number of voters have registered or described themselves as 'independent. They have expressed serious interest in voting or working for independent or third-party presidential candidates."); Hames, supra note 120, at G1. See also Jeff Pillets, Torricelli Expects More Gridlock on Capitol Hill, RECORD (Bergen County, N.J.), Nov. 10, 2000, at A20 ("[U.S. Senator Robert Torricelli] observed that choosing not to vote can be a legitimate political statement and said that, at times, a healthy mistrust of government can be a good thing.") (emphasis added).

181. See Fitzgerald, supra note 161, at 17.

The Electoral College also amplifies the voice of minorities within large states. African Americans and farmers, for example, are not majority populations in the United States. But under the Electoral College system, they can help determine the outcome in several large states. Arab Americans are a very small group nationally, but they have a voice be-
system, unless minorities are a majority within their state, they alone cannot elect candidates that are sensitive to their needs. Furthermore, if a large minority is spread over many states, their voices will never be heard over those of the controlling majority.

Finally, electoral college supporters claim that abolishing the system would create a negative effect on campaign practices. They fear that states with dense population centers would have much greater influence, and that candidates would spend a disproportionate amount of time in such areas and neglect more sparsely populated areas. This argument is also without merit because candidates already resort to such tactics, and the current system may even contribute to the problem. Candidates tend to focus on key "swing" states and those that have a large number of electoral votes, rather...
than on smaller states with few electoral votes.\textsuperscript{187} One newspaper reported that in the most recent election, "14 small states with an average electoral vote of less than 5 received no visit from any candidate between April 1 and Election Day."\textsuperscript{188} The current system encourages candidates to campaign heavily in large states and states that could go either way, ignoring all the rest.\textsuperscript{189}

If the United States were to abolish the electoral system in favor of a direct vote, the two major political parties would be forced to compete with new political parties and independent candidates because each candidate would have an equal chance at winning the election.\textsuperscript{190} Candidates would not be able to rely on a system that just barely elects them to office with a plurality, where a majority has actually voted against them.\textsuperscript{191} Furthermore, candidates would have to campaign in states that they previously neglected, because every citizen's vote would be just as important as the next.\textsuperscript{192} In addition, there would no longer exist the possibility of an election defaulting to the House of Representatives, or that a faithless elector could change the outcome of an election.\textsuperscript{193}

Abolishing the electoral college requires passing a Constitutional amendment.\textsuperscript{194} Article V of the Constitution requires that two-thirds of Congress pass the amendment, and that three-fourths of all of the state legislatures ratify it.\textsuperscript{195}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See id. See also Downey, supra note 3.
\item Can you imagine how many times over the past five weeks Gore must have regretted not spending an extra hour or two in, say, the Dakotas, where the three electoral votes of either of those neglected states could have given him the 270 he needed to win? Or how a single dog-sled mush under the midnight sun of Alaska might have gained Gore three votes there and the White House?
\item Id.
\item See Williams & MacDonald, supra note 18, at 239. See also Richie, supra note 160.
\item See supra notes 121-32 and accompanying text.
\item See Electoral Inequity, supra note 186, at A14.
\item See supra Parts II.A.2 and II.B.2.
\item See Electoral Inequity, supra note 186, at A14.
\item See U.S. CONST. art. V. This section reads in pertinent part: The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a
\end{enumerate}
\end{footnotesize}
This has proven to be a nearly impossible challenge. There have been over 700 attempts to either abolish or reform the electoral college system, and only one of these made it past the first hurdle, and died in committee. Therefore, it is highly unlikely that this solution will be successful.

In light of the reality that it is virtually impossible to pass a Constitutional amendment to abolish the electoral system, individual states can take the initiative and enact reforms at the state level to improve the electoral system.

2. Reform the Electoral College System at the State Level

There are many ways in which the electoral college system could be reformed without passing a Constitutional amendment. Congress gave the states freedom to decide how to appoint their electors. Furthermore, there is no Constitutional mandate for states to utilize the unit voting scheme for allocating their electoral votes. Therefore, individual states can adopt reforms to solve the problems associated with the current electoral scheme.

a. Adopt Proportional Representation Scheme

Forty-eight states currently award all of their electoral votes to the candidate receiving the popular vote in their state. This is known as the "winner-take-all" system. However, there are other systems that could be adopted, such as the proportional representation scheme. In this system, each party's share of the electoral votes is proportional to its share of the popular vote. This would give a better representation of the popular will and prevent a candidate from winning the presidency with a majority of the electoral votes but losing the popular vote.

Constitution for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States ....

Id.

196. See Hames, supra note 120, at G1.
197. See id.
198. See id.

The process of amending the U.S. Constitution is institutional torture. Any proposal must first be introduced into the House of Representatives and obtain the support of two-thirds of members present. It then travels to the Senate, where the same margin is required for further progress. If it emerges alive from Capitol Hill, the legislation heads for the state legislatures. Three-quarters of states must award their approval before an amendment can be considered ratified and valid.

Id.

199. See Anderson & Hill, supra note 172.
200. See U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors"). See also Williams & MacDonald, supra note 18, at 236 ("[T]he method of selecting electors, and the criteria by which they must vote, are left to the whim of the various state legislatures. Any state legislature, by a simple vote, could decide to cancel popular presidential elections and simply name the presidential electors.").
201. See O'Sullivan, supra note 154, at 2422; Williams & MacDonald, supra note 18, at 218.
202. See Williams & MacDonald, supra note 18, at 218.
votes to the candidate that wins the popular vote, either by a majority or plurality.\textsuperscript{203} As previously stated, this effectively disenfranchises those voters who did not vote for that candidate.\textsuperscript{204} States can fix the disproportionate nature of the electoral system if they consider adopting a proportional representation scheme.\textsuperscript{205} Two states, Maine and Nebraska, have already adopted similar election methods,\textsuperscript{206} and other states would be wise to follow their lead.

Proportional representation is a simple concept, and is the easiest way to achieve the effect of a direct vote without having to pass a Constitutional amendment.\textsuperscript{207} Proportional representation means that if a candidate were to win forty percent of the popular vote in a given state, then that candidate receives forty percent of that state’s electoral votes.\textsuperscript{208} This would make the electoral vote map more closely resemble the popular vote across the country, and would more accurately reflect the will of the voters.\textsuperscript{209} It would also mean that everyone’s vote actually counts in the national, as well as the state, election.\textsuperscript{210}

Supporters of the current scheme fear that enacting such a reform would take power away from smaller states because as a block of votes, they are more “valuable” to a candidate than as individual votes, and thus will be neglected in campaigns.\textsuperscript{211} However, proportional representation would actually encourage more campaigning because candidates would only receive the proportion of electoral votes that they actually won in the popular vote of each state.\textsuperscript{212} Therefore, in order to win a majority of the electoral votes nationwide, candidates could no longer ignore certain geographic areas.\textsuperscript{213} This would alleviate the problem of a popular vote winner losing

\textsuperscript{203} See id.
\textsuperscript{204} See id.
\textsuperscript{206} See Williams & MacDonald, supra note 18, at 218.
\textsuperscript{207} See id.
\textsuperscript{208} See id.
\textsuperscript{210} See id.
\textsuperscript{211} See Fitzgerald, supra note 161, at 17.
\textsuperscript{212} See Guinier, The Ballot, supra note 209.
\textsuperscript{213} See id.
the election, as well as the possibility of an electoral college "landslide" when, in fact, the "winning" candidate only received a plurality of the popular vote.

b. Enact Legislation to Bind Electors

A reform that should go hand in hand with proportional representation is for states to enact legislation to bind their electors to vote according to the popular vote. All reform efforts would be for naught if electors can completely disregard the popular vote and cast their vote for any candidate they choose. Currently, twenty-three states do not place any restrictions on how electors cast their ballots. Even though the incidents of faithless electors are minimal, that does not mean states should rely on electors' moral obligation to follow the popular vote. States should enact legislation to mandate electors to follow the popular vote. This would ensure that the popular vote, and not an elector's whim, would determine the outcome of the election.

There is only one strong argument in favor of allowing elector discretion. If the candidate that the electors are slated to vote for becomes seriously ill or dies after the election but before the electoral votes are cast, the state's electoral votes would not count at all if electors are not allowed to change their vote to a viable candidate. In order to alleviate this problem, however, states can include in their legislation provisions for what to do if such an event occurs. States can

215. See id. at 667.
During hearings on a proposed constitutional amendment which would have abolished the electoral college . . . several experts adverted to the issues raised by unbound presidential electors. At that time, out of approximately 20,000 electors who had served in more than 45 presidential elections, only thirteen electors had cast their votes for President other than in accordance with the popular vote.
Id.
216. See id. at 683-84 ("It is only by force of a moral obligation, not a legal one, that the presidential electors pledged to certain candidacies fulfill their pledges after election.") (quoting State ex rel. Beck v. Hummel, 80 N.E.2d 899, 909 (Ohio 1948)).
217. See id. at 669-70.
218. See id. at 690-701.
either allow elector discretion in those few, highly unusual situations, and bind them in "normal" elections, or they could simply bind them no matter what the circumstances happen to be at the time.\textsuperscript{219} In either case, democracy is best served by requiring electors to follow the popular vote.\textsuperscript{220}

c. \textit{Adopt Instant Runoff Voting}

The President should command the support of a majority of the people to avoid minority rule.\textsuperscript{221} Instant runoff voting is a means by which this can be achieved, and has received increased attention in the United States over the past several years.\textsuperscript{222} Most people advocate using instant runoff voting in a direct election for the presidency, but states can use it in conjunction with the current electoral system or along with such reforms as proportional representation.\textsuperscript{223} If states choose the latter route, instant runoff voting could be enacted without having to pass a Constitutional amendment.

Instant runoff voting is a “well-established voting system for electing a single winner from a field of candidates for a particular office.”\textsuperscript{224} It is a voting system designed to eliminate plurality winners and arrive at a candidate who has received a majority of votes, promoting majority rule and increased voter participation.\textsuperscript{225} With instant runoff voting,

\begin{itemize}
  \item \textsuperscript{219} See id.
  \item \textsuperscript{220} See Williams & MacDonald, supra note 18, at 237-43.
  \item \textsuperscript{221} See Anderson & Hill, supra note 172.
  \item \textsuperscript{222} See Center for Voting and Democracy, \textit{E lecting the President by Instant Runoff Voting}, at \url{http://www.igc.apc.org/cvd/op_ed s/pres_irv.htm} (last visited Jan. 9, 2001); Hertzberg, supra note 187; Anderson & Hill, supra note 172; \textit{Electoral College Virtues}, supra note 1; \textit{What if the Winner Isn’t the Winner?}, USA TODAY, Nov. 7, 2000, available at \url{http://www.igc.apc.org/cvd/op_ed s/pres_irv.htm}; Joel Deane, \textit{Time to Upgrade Crusty Electoral System}, ZDNET NEWS, Nov. 8, 2000, at \url{http://www.zdnet.com/zdnn/stories/comment/0,5859,2651581,00.html}; Andrew Chang, \textit{To Each His Own: Much of the World Sees the U.S. Electoral System as an Anachronism}, ABCNEWS.COM, Nov. 10, 2000, at \url{http://www.igc.apc.org/cvd/op_ed s/pres_irv.htm}.
  \item \textsuperscript{223} See Center for Voting and Democracy, supra note 222.
  \item \textsuperscript{224} See Richie, supra note 160. States considering instant runoff voting are New Mexico, Vermont, Alaska, Utah, North Carolina, Massachusetts, Oregon, Pennsylvania, and Texas. \textit{Id.} Jurisdictions in California that recently passed instant runoff voting initiatives are San Leandro, Oakland, and Santa Clara County. \textit{Instant Runoff Voting Campaign for San Francisco}, \url{http://www.irv4sf.org} (last visited July 11, 2001) [hereinafter \textit{IRV4SF}].
  \item \textsuperscript{225} See Richie, supra note 160 (“[V]oters like the opportunity to rank candidates and can quickly learn the new rules. Voters in Australia and the Republic of Ireland, where turnout is far higher than in the United States, have used the
each voter still has only one vote, but the voter is able to rank candidates in the order of choice.226 In the first round, states count all of the number one choices, which is the same as the current system.227 If a candidate succeeds in getting a majority of the vote (i.e. more than fifty percent), then the election is over and that candidate wins.228 If no candidate receives a majority of votes in the first round, counters proceed to the second round in which they eliminate the weakest candidate (the one with the fewest first choice votes).229 Instead of those votes being “wasted,” those voters’ second choice is counted in the next round instead.230 This continues until a candidate receives a majority of the vote.231

For example, in the 2000 election, assume that a voter ranked Ralph Nader their number one choice, and Al Gore their second choice. Since none of the candidates received a majority of votes, counters proceed to the second round of counting where the candidate with the fewest first choice votes, presumably Ralph Nader, is eliminated. The counters recount the ballots that were eliminated (i.e. those that listed Nader as the number one choice), this time counting the second choice candidate instead of the first choice candidate. Assume that everyone who voted for Ralph Nader chose Al Gore as his or her second choice. Since Bush and Gore each received approximately forty-eight percent of the popular vote and Nader received approximately three percent,232 Nader’s three percent would be recounted for the second choice votes and added to Gore’s forty-eight percent, for a grand total of
fifty-one percent of the popular vote. Thus, instant runoff voting mandates that one candidate receive a majority of votes in order to be elected to office, and therefore eliminates the problem of minority rule.

There are numerous benefits to this type of voting scheme. First, it creates a clearer mandate from the people for the winner of the election because the winning candidate actually receives a majority of the votes. It also eliminates the “spoiler” role for third party and independent candidates. Voters can select such candidates as their first choice without having to worry about their votes being wasted. If their candidate of choice is the weak candidate, their second choice vote still counts. Furthermore, the results of the election do not contradict the popular vote, which will lead to increased voter satisfaction. Finally, this type of voting scheme discourages the “negative campaigning” that is so common in elections under the current voting scheme. This is because candidates still have to gain support of the voters as a second choice candidate, especially in a three-way race. These factors combined will likely lead to an increase in voter turnout come election day.

One additional advantage to this system is that it simulates a two-round runoff election, but does so in the first round of voting. In traditional run-off elections, which are held days or weeks after the general election, candidates

233. See Richie, supra note 160. See also IRV4SF, supra note 225; Donohue & Tollenaar, supra note 225; Richie, Hill & Kleppner, supra note 225.
234. See Richie, supra note 160.
235. Id.
236. Id.
237. Id. (“A ballot only counts for a lower choice if higher choices have lost and failed to advance to the ‘runoff.’”).
238. See id.
239. See id.
240. See Richie, supra note 160. (“[Instant runoff voting] reduces excessive negative campaigning by creating incentives for candidates to be the second choices of supporters of other candidates.”).
241. See id.
242. See IRV4SF, supra note 225.

Delayed run-offs require the voters to show up all over again six weeks later. . . . [If your favorite candidate was eliminated in the general election, you may be less interested in the outcome of the run-off – while you may care, you may not care enough to come out again. Using Instant Run-offs will ensure that the final decision is made by the maximum number of voters, the voters who turn out at the general election.
must continue to campaign for votes, which is very expensive.\textsuperscript{243} It also forces the taxpayers to pay to conduct a second election.\textsuperscript{244} Furthermore, voter turnout at runoff elections is traditionally much lower than in the first round of voting.\textsuperscript{245} Instant runoff voting eliminates these problems because voters cast their “runoff” ballots by ranking their choices on their ballot the first time around.\textsuperscript{246}

Opponents to instant runoff voting believe that instant runoff voting is too confusing for the voters.\textsuperscript{247} However, voting is really “as simple as 1-2-3.”\textsuperscript{248} Voters simply mark either the number “1”, “2”, or “3”, and so on, on their ballots next to the respective candidates.\textsuperscript{249}

A final argument against this voting method is that instant runoff voting undermines the two-party system by encouraging additional political parties.\textsuperscript{250} While instant runoff voting does make it easier for third party and independent candidates to get votes, a candidate must actually win a majority of the popular vote to win an election.\textsuperscript{251} If the third party or independent candidate is the weakest candidate and none of the other candidates have won a majority of the votes, election officials eliminate that candidate and count the second choice votes on those ballots.\textsuperscript{252} Australia has a democratic two-party system of government, and has been using

\textit{Id.}

\textsuperscript{243} See \textit{id.}

\textsuperscript{244} See \textit{id.}

\textsuperscript{245} See \textit{id.}

\textsuperscript{246} See \textit{id.}

\textsuperscript{247} See \textit{id.}

\textsuperscript{248} See \textit{Richie, supra} note 160.

\textsuperscript{249} See \textit{id.}

\textsuperscript{250} See \textit{id.}

\textsuperscript{251} See \textit{id.}

Australia has used instant runoff voting for decades and has a definite two-party system. Observers note that the system is important because it resolves problems when a minor party threatens to fracture the vote of a majority, thus defeating the wishes of a majority of the voters. Instant runoff voting actually serves to stabilize a two-party system.

\textit{Id.}

\textsuperscript{252} See \textit{id.}

IRV has no ideological bias . . . . Its virtue for all sides is that it gives all voters incentive to vote for their favorite candidate, allows candidates to challenge the front runners (which forces debate on important issues), and ensures that, at the end of the day, the true majority rules.
instant runoff voting since 1908. Nonetheless, most elections in Australia end after only one round of counting. However, they have found instant runoff voting to be invaluable when a third party succeeds in splintering the vote. In those situations, instant runoff voting provides for majority rule. Instant runoff voting strengthens democracy because the winner will always have a clear mandate from the people.

Many states and cities have either adopted instant runoff voting or are considering it. New Mexico recently adopted instant runoff voting, as well as two California cities, Oakland and Dublin. Santa Clara County, California, and Vancouver, Washington have been using instant runoff voting for the past several years. The list of states that are considering adopting instant runoff voting is growing larger every day, and instant runoff voting has gained the support of the Democratic, Republican, and Reform parties.

V. PROPOSAL

If the United States wishes to return to the democratic ideals of majority rule and equality, then the electoral college system of electing the President and Vice President must be changed. Since it is highly unlikely that the United States will pass a Constitutional amendment to abolish the electoral college and adopt a direct vote, this comment proposes that the states adopt proportional representation and elector-binding legislation. These reforms would eliminate the problem of faithless electors and ensure that the popular vote de-

253. See id.
254. See Richie, supra note 160.
255. See id.
256. See id.
257. See id.
258. Alabama, Alaska, California, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Vermont and Washington have had legislation introduced to enact instant runoff voting in their states. In addition, the cities of San Leandro and Oakland, California and Vancouver, Washington, and Santa Clara County, California have recently adopted instant runoff voting. Berkeley, California is also considering adopting instant runoff voting. See Center for Voting and Democracy, Pending Legislation and Ballot Measures, at http://www.igc.apc.org/cvd/action/index.html (last visited Jan. 9, 2001).
259. See id.
260. See id.
261. See Richie, supra note 160.
262. See U.S. CONST. art. V. See also supra Part IV.B.1.
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termines the winner of the election. Further, states should consider implementing an instant runoff voting system, which would eliminate the role of spoiler for third party and independent candidates, as well as the need for additional campaigning for runoff elections. Implementing these changes will likely increase voter turnout and satisfaction. Each vote would count toward a majority, and voters would be able to vote for the candidate of their choice without feeling that they have wasted their vote, or worse yet, that they in effect voted for the candidate they favor the least. These suggested reforms are the best available means to achieve meaningful change within the current electoral system.

VI. CONCLUSION

The United States' democracy has increasingly become a system of minority rule. Forty-eight states award their electoral votes on a winner-take-all basis. This effectively disenfranchises a large portion of the population. This problem only worsens with the prospects of a presidential election defaulting to the House of Representative, or if faithless electors select the President against the will of the voters. It is clear that the electoral system needs to be changed.

This comment analyzes three methods of accomplishing this much-needed change. Although abolishing the electoral college in favor of a direct vote is the preferred method of change, this can only be accomplished by passing a Constitutional amendment, which has proven to be a nearly impossible task. States, however, are free to adopt local reforms such as proportional representation, binding legislation for electors, and instant runoff voting. This comment encourages states to adopt these reforms before the United States experiences another election in which the will of the people is not carried out in the election results. In the world's most notable democracy, the notion of "one person, one vote" should not be taken lightly, and the right to cast a meaningful vote

263. See supra notes 118-29 and accompanying text.
264. See Cossolotto, supra note 119 and accompanying text.
265. See supra notes 118-29 and accompanying text.
266. See supra Parts II.A.2; II.B.2.a.; see also supra notes 33-41 and accompanying text.
267. See supra Part IV.B.1.
268. See supra Part IV.B.2.
should be jealously protected.