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INSTANT RUNOFF VOTING: A CURE THAT IS LIKELY WORSE THAN THE DISEASE¹

INTRODUCTION

Majority rule is a basic principle of democratic elections in the United States.² Candidates who win with majority support possess a clear mandate from the electorate and increase their own legitimacy as leaders of the people.³ Yet, majority winners have become less common during the last decade, as the number of plurality winners increased in both federal and state elections.⁴ The winners of three of the last four presidential elections, as well as thirteen currently serving governors, have failed to receive a majority of the votes cast.⁵ Compounding this problem is the fact

1. This title, in part, quotes *The Problem with Instant Runoff Voting*, at <http://www.electionmethods.org/IRVproblems.html> (last visited Sept. 21, 2004).

2. U.S. Dep't of State, Bureau of Int'l Info. Programs, *Defining Democracy*, at <http://usinfo.state.gov/products/pubs/whatsdem/whatdm2.htm> (last visited Sept. 6, 2004) (listing "[m]ajority rule" as one of the "pillars of democracy" and stating that "[a]ll democracies are systems in which citizens freely make political decisions by majority rule"). *But see* ROBERT RICHIE & STEVEN HILL, REFLECTING ALL OF US 3 (1999) (stating that majority rule is unjust because it leaves the minority unrepresented); Robert Richie, *Full Representation: The Future of Proportional Election Systems*, 87 NAT'L CIVIC REV. 85, 85 (1998) (arguing that a proportional representation is more democratic than majority rule).

3. CHARLES S. BULLOCK III & LOCH K. JOHNSON, RUNOFF ELECTIONS IN THE UNITED STATES 6 (1992) (observing that "the tallying of a majority vote ... adds legitimacy Moreover, the impression of a strong, broadly supported candidate emerging from the pack with majority support enhances the image of the nominee as a popular figure").

4. Roberta A. Yard, Note, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure "One Person, One Vote"*, 42 SANTA CLARA L. REV. 185, 201 (2001).

5. Only George W. Bush, in 2004, won a majority, 50.7%, of the vote. The current governors of Alabama, Arizona, California, Maine, Massachusetts, Minnesota, New York, Oklahoma, Washington, Wisconsin, and Wyoming were elected by a plurality. The current governors of Colorado and Vermont were initially elected by a plurality, but have since been reelected by a majority. Ctr. for Voting & Democracy, *Overview: Plurality Wins in Major American Elections, 1992-2003*, at <http://www.fairvote.org/plurality/overview.htm> (last modified Apr. 2, 2004); CNN, *Election Results*, at <http://www.cnn.com/ELECTION/2004/pages/results/governor/full.list/> (last visited Jan. 24, 2004).

that usually less than half of the eligible electorate participates in elections.⁶ As a result, the current electoral system in the United States often results in minority rule, with many elected officials winning their jobs with the support of merely a plurality of the minority of citizens. It comes as no surprise that many citizens have become cynical about the electoral process.⁷

Instant runoff voting⁸ is an electoral reform gaining momentum in state legislatures⁹ that aims to ensure majority rule.¹⁰ The recent increase in interest in adopting instant runoff voting in national, state, and local elections is a response to problems in the current electoral system that need to be remedied. Instant runoff voting initiatives, however, will face difficulties in complying with many state electoral statutes because they do not result in "majority winners," as that phrase is traditionally defined. Even if instant runoff voting can clear this substantial statutory hurdle, the potential benefits of this reform do not outweigh its potential side effects. Therefore, state and local governments should refrain from passing instant runoff voting legislation until these problems are addressed.

Part I of this Note explains instant runoff voting and describes recent instant runoff voting legislation passed across the United States. Part II discusses instant runoff voting's compatibility, or lack thereof, with state election statutes and state constitutions. Parts III and IV delve into the policy implications of enacting instant runoff voting. Part III analyzes the potential benefits of instant runoff voting put forth by its supporters, including increasing the legitimacy of elected officials, eliminating the "spoiler problem," saving money, and increasing voter turnout. Part IV considers the arguments of the detractors of instant runoff voting: voter confusion and election security. As a result of each of these discussions, this Note concludes that legislatures should refrain

6. See MARK LAWRENCE KORNBLUH, *WHY AMERICA STOPPED VOTING* xi (2000).

7. See, e.g., Press Release, Deborah Markowitz, Secretary of State, Vermont, Majority Role in Vermont's Elections (Mar. 2001), available at <http://www.sec.state.vt.us/secdesk/pressreleases/2001/mar01.htm>.

8. For a complete description of instant runoff voting, see *infra* Part I.

9. See *infra* notes 16-21 and accompanying text.

10. See *infra* Part III (noting that instant runoff voting proponents also claim that instant runoff elections will improve other aspects of voting in the United States).

from implementing instant runoff voting because of the confusion, uncertainty, and instability it would likely create.

I. BACKGROUND

Plurality voting, a voting system in which the person who receives the most votes wins, is currently the predominate form of voting in the United States.¹¹ In contrast to this traditional electoral system, in an instant runoff voting system, voters rank candidates—as first, second, third and so on—according to their preferences. Initially, only the first place votes are counted. If one candidate receives a majority of the first place votes cast, that candidate is declared the winner of the election.¹² Up to this point, votes are counted in the exact same fashion as a traditional plurality/majority election. If no candidate receives a majority of first place votes, however, an instant runoff voting system requires that there be a second round of vote counting. In this second round, the candidate with the fewest first place votes is eliminated. The second place votes of the voters who chose the last place candidate as their first choice are then redistributed among the remaining candidates. If one of the remaining candidates has still not received a majority of the votes,¹³ the next lowest vote getter from the previous round is newly eliminated, and the second place votes of the voters who chose the eliminated candidate are then redistributed among the remaining candidates.¹⁴ This process continues until one candidate receives a preferential majority.¹⁵

Many legislatures have recently considered implementing instant runoff voting. In 2003 alone, eighteen state legislatures considered

11. Ctr. for Voting & Democracy, *The Case for IRV*, at <http://www.fairvote.org/irv/talking.htm> (last modified Oct. 8, 2004). Some states require that candidates receive a majority of votes, rather than a mere plurality, for certain offices. See VT. CONST. ch. II, § 47; Office of Elections, Hawaii, Factsheet: Majority Elections and Plurality Elections (Sept. 3, 1999), available at <http://www.hawaii.gov/elections/facts/fsbo131a.pdf>.

12. ElectionMethods.org, *Instant Runoff Voting Explained*, at <http://www.electionmethods.org/IRVexample.htm> (last visited Sept. 6, 2004).

13. Hereinafter this type of “majority” shall be referred to as a “preferential majority.”

14. If a ballot lists an already eliminated candidate as the second choice, the next available choice will be the one redistributed.

15. See ElectionMethods.org, *supra* note 12.

bills proposing the implementation of instant runoff voting.¹⁶ Two additional states considered bills in 2001¹⁷ and Alaska held the first statewide vote on whether to implement instant runoff voting in August of 2002.¹⁸ Although most of these state bills failed, many were carried over to the next legislative session and are still pending.¹⁹ The Maine legislature passed a law directing the Secretary of State to perform a study on the feasibility of establishing instant runoff voting.²⁰ In addition, the Louisiana legislature implemented instant runoff voting for military and overseas ballots.²¹ On the municipal level, voters in many cities and towns have passed charter amendments permitting the use of instant runoff voting.²² The U.S. Congress has recently considered instant runoff voting as well. In January 2003, Congress introduced a bill that called for the creation of a commission to analyze "alternative methods of electing House Members," including instant runoff voting.²³ Two other instant runoff voting bills were introduced in 2001.²⁴

16. Ctr. for Voting & Democracy, *Pending Legislation and Ballot Measures*, at <http://www.fairvote.org/action/index.html> (last modified Oct. 13, 2004) (listing Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Texas, Vermont, Virginia, and Washington as states that considered instant runoff voting in 2003).

17. Nat'l Conference of State Legislatures, *Election Reform Legislation*, available at http://www.ncsl.org/programs/legman/elect/elections_search.cfm (last visited Nov. 3, 2004) (listing Maryland and Oregon).

18. Ballot Initiative Strategy Ctr., *UPDATE: Instant Runoff Voting Falls Short in Alaska*, at <http://www.ballot.org/resources/irv.html> (Aug. 28, 2002) (noting that the measure was unsuccessful, by a measure of 64% to 36%).

19. Nat'l Conference of State Legislatures, *supra* note 17 (noting that bills failed in Arkansas, California, Connecticut, Florida, Hawaii, Iowa, Minnesota, New Hampshire, New Mexico, Texas, Vermont, and Virginia; were pending in Illinois, Massachusetts, New Jersey, and New York; and were carried over in Washington municipalities).

20. 2004 Me. Laws 117.

21. LA. REV. STAT. ANN. § 18:1306(4) (2004). This was done mostly out of administrative convenience, as Louisiana's unique primary system results in two elections being held within one month's time. *Reform the Runoff: Instant Runoff Voting for Louisiana*, at <http://www.mattg.org/runoff/learnmore.html> (last visited Nov. 17, 2003).

22. See, e.g., Ctr. for Voting & Democracy, *IRV in the States*, at <http://www.fairvote.org/irv/states.htm> (last modified June 3, 2004) (listing San Francisco and Berkeley, California and dozens of towns in Vermont as municipalities that recently supported instant runoff voting).

23. Congress 2006 Commission Act, H.R. 415, 108th Cong. (2003).

24. Voting Equipment Compatibility with Instant Runoff Voting Act of 2001, H.R. 3232, 107th Cong. (2001); Federal Elections Review Commission Act, H.R. 57, 107th Cong. (2001).

II. THE LEGALITY OF INSTANT RUNOFF VOTING

A. State Election Laws

Instant runoff voting must be consistent with a state's electoral laws in order for it to be implemented. Ironically, instant runoff voting's greatest apparent strength, its proclaimed ability to create majority winners in an election, may actually be the biggest impediment to its implementation. Many state constitutions and election laws require candidates to receive a majority of the votes cast in order to win an election.²⁵ A preferential majority in an instant runoff voting election, however, is not the same as a majority in a traditional election because preferential majorities combine first-place and non-first-place votes to obtain a "majority." "Majority in the 'classic' sense ... consists of more than half of the original votes ... cast and not re-assigned by the voter's secondary or tertiary intent."²⁶ As a result, how the term "majority" is interpreted in the context of state laws and constitutions will determine the legality of instant runoff voting in various jurisdictions.

1. State Election Laws Inconsistent with Instant Runoff Voting

In some states, such as Washington, instant runoff voting is clearly inconsistent with state electoral law.²⁷ Washington law requires cities to hold primary elections to decide which two candidates will compete in a November general election.²⁸ The city of Vancouver, Washington, approved instant runoff voting in 1999,²⁹ an action that would have eliminated primary elections in violation of Washington election law. As a result, the city was unable to proceed with instant runoff elections without a change to state

25. See, e.g., TEX. CONST. art. XI, § 11; TEX. ELEC. CODE ANN. § 275.002 (Vernon 1993).

26. Letter from Henry Cueller, Secretary of State, Texas, to John Steiner, City of Austin Law Department (July 23, 2001) [hereinafter Letter from Texas Secretary of State] (on file with author).

27. See John Deweese, *'Instant Runoff' Idea Proposed Again*, NEWS TRIB. (Tacoma, Wash.), Feb. 25, 2003, at B1; *In Our View: A Better Ballot?*, COLUMBIAN (Vancouver, Wash.), Mar. 22, 2003, at C8.

28. WASH. REV. CODE § 29.21.010 (1992).

29. See *In Our View: A Better Ballot?*, *supra* note 27.

electoral laws. Attempts to change Washington election laws to bring them into compliance with instant runoff voting have thus far been unsuccessful.³⁰

Efforts to implement instant runoff voting in Texas have also been stymied by legal concerns. The Texas Secretary of State determined that the city of Austin may not implement instant runoff voting because it does not provide for majority winners as required by section 275.002 of the Texas Election Code.³¹ This statute states that "[t]o be elected to a city office, a candidate must receive a majority of the total number of votes received by all candidates for the office."³² Although the Texas Secretary of State's Office conceded that the term "majority" could theoretically include a preferential majority, it determined that the Texas Election Code requires "traditional" majorities.³³

In making its determination, the Secretary of State's Office looked at how the word "majority" is used in other parts of the Texas Code and how the term has been interpreted by courts.³⁴ In effect, the Secretary of State's Office followed section 311.023 of the Texas Government Code, which directs courts on the proper interpretation of statutes. This statute states that "[i]n construing a statute ... a court may consider among other matters the ... legislative history [and] common law or former statutory provisions, including laws on the same or similar subjects"³⁵

Under its state election laws, Texas requires a traditional runoff election if there is no majority winner,³⁶ which indicates that the Texas legislature did not intend for a mere preferential majority to suffice for a candidate to win office. In addition, the Secretary of State looked to legislative history to determine the meaning of "majority." The Texas Election Code at one time included a

30. See Ctr. for Voting & Democracy, *supra* note 16. However, the Washington House of Representatives has passed a bill that does allow certain municipalities to use instant runoff elections. *Id.*

31. Letter from Texas Secretary of State, *supra* note 26.

32. TEX. ELEC. CODE ANN. § 275.002 (Vernon 1993); Letter from Texas Secretary of State, *supra* note 26.

33. Letter from Texas Secretary of State, *supra* note 26.

34. See *id.*

35. TEX. GOV'T CODE ANN. § 311.023 (Vernon 1993); Letter from Texas Secretary of State, *supra* note 26.

36. TEX. ELEC. CODE ANN. § 2.021.

"preferential vote alternative," but the Legislature deleted that language from the Code in 1985.³⁷ As a result, the Texas Secretary of State's Office declared that it was "reluctant to read preferential voting back into the Code by administrative interpretation when the legislative context does not otherwise support that conclusion."³⁸ As such, the Secretary of State determined that the term "majority" is consistently used in the Texas Election Code to mean "traditional," rather than "preferential," majorities.³⁹

2. State Election Laws More Favorable to Instant Runoff Voting

In contrast to Texas and Washington, the election laws of some states expressly authorize the use of preferential voting systems such as instant runoff voting. In Michigan, for example, preferential voting is expressly authorized by law.⁴⁰ Specifically, the law states that "[e]lections may be by a partisan, nonpartisan, or preferential ballot, or by any other legal method of voting."⁴¹ In accordance with this statute, Michigan courts have upheld voting systems involving "preferential" majorities.⁴²

The election laws of some other states, although not explicitly authorizing preferential voting systems, grant broad authority for municipalities to implement alternative voting systems such as instant runoff voting. For example, California law allows a city to amend its charter to provide for the election of officers by whatever "proportion" the city chooses.⁴³ California law also explicitly allows cities to create their own voting methods.⁴⁴ Similar statutory

37. Letter from Texas Secretary of State, *supra* note 26.

38. *Id.*

39. *See id.*

40. MICH. COMP. LAWS § 117.3 (2001).

41. *Id.*

42. *Stephenson v. Ann Arbor Bd. of Canvassers*, No. 75-10166 AW (Mich. Cir. Ct. Nov. 1975) (rejecting an equal protection challenge to a preferential voting system in Ann Arbor, Michigan, brought by a candidate who received a plurality of first place votes but lost an election when second place votes were used; plaintiff did not dispute the legality of the preferential voting system under Michigan election law), available at <http://www.fairvote.org/library/statutes/legal/irv.htm>.

43. CAL. ELEC. CODE § 15,450 (West 1996 & Supp. 2001).

44. *Id.* § 15,452 (indicating that "[t]he person who receives a plurality of the votes cast for any office is elected ... except ... an election for which different provision is made by any city or county charter").

language in Texas would likely have led the Texas Secretary of State to approve preferential voting in Austin and other Texas cities.⁴⁵ The experiences of Austin, Texas, and Vancouver, Washington, should serve as warnings for state and municipal officials considering instant runoff voting. Although alternative voting methods are explicitly allowed in some states, state electoral laws mandating primaries and majorities could derail efforts to implement instant runoff voting.

State election laws are not the only legal hurdle facing implementation of instant runoff voting at the state level. Instant runoff voting is variably compatible with state constitutions in the same way that it is variably compatible with state election laws. As the following discussion illustrates, several state constitutional provisions could block an instant runoff voting initiative from being enacted, unless it was implemented through the difficult constitutional amendment process.

*B. State Constitutions*⁴⁶

State constitutions present an obstacle to instant runoff voting in many states. Most state constitutions mandate that the winner of an election for governor, and often other state executive branch offices, is the candidate who receives the most votes.⁴⁷ Thus, these states do not require a gubernatorial candidate to receive a *majority* of the votes cast in order to win an election.⁴⁸ If an instant runoff voting statute for such offices was enacted, a state constitutional challenge would likely ensue. A candidate who received a plurality

45. Letter from Texas Secretary of State, *supra* note 26.

46. Some critics also claim that instant runoff voting violates the Equal Protection Clause of the U.S. Constitution. The Equal Protection Clause's "one person, one vote" requirement demands that every citizen have an equally weighted vote. See *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Arguably, instant runoff voting would allow some voters to have their ballot "counted" multiple times in one election—allowing their votes to be valued more than others. See *Bringing Choice Back into Politics: Alaska Ballot Initiative for Instant Run-Off Voting*, at <http://www.ballot.org/resources/irv.html> (Aug. 20, 2002) (citing the opinion of Cheryl Jebe, President of the League of Women Voters of Alaska). However, federal constitutional analysis is beyond the scope of this Note.

47. See, e.g., ARK. CONST. art. VI, § 3; N.Y. CONST. art. IV, § 1.

48. States with a constitutionally mandated majority requirement, see, e.g., MISS. CONST. art. V, § 140 (stating that to win an election, a candidate must receive a majority of both the electoral and popular vote), would face similar legal concerns as those described in Part II.A.1.

of first-place votes, but then lost the election after second- and third-place votes were counted, would probably challenge the instant runoff voting statute.⁴⁹ Such a candidate would claim that he or she did receive the most votes, by earning the plurality of first-place votes, as was intended by the drafters of the state constitution, and that the instant runoff voting statute inserted a majority requirement although none exists in the state constitution.

A hypothetical is useful to explain how instant runoff voting could violate state constitutions that provide that the winning candidate is the candidate who receives the most votes. Suppose that there are four candidates for governor: D from the Democratic Party, G from the Green Party, L from the Libertarian Party, and R from the Republican Party. After counting the number of first-place votes in an election, no candidate has a majority, and the results are as follows: D has the most votes, R the second most, G the third most, and L the least. If instant runoff voting procedures are followed, L would be eliminated and the ballots cast for L would be redistributed to the remaining three candidates according to the second-place votes indicated on the L ballots. Suppose that virtually all of the L ballots ranked R as their second choice, giving R a preferential majority. R would be declared the winner according to the instant runoff voting system. Consequently, the candidate with the most first-place votes, D, would not win and would likely challenge the instant runoff voting statute as violative of the state constitution.

In a few other states, instant runoff voting would prompt another constitutional challenge by depriving candidates of a constitutionally mandated process whereby the state legislature must make the final determination as to the winner of an election. Currently, Vermont's constitution requires the state legislature, by secret ballot, to decide state-wide elections if no candidate receives a traditional majority in the general election.⁵⁰ There is currently disagreement among Vermont's elected officials as to how instant runoff voting would comport with this provision. Vermont's

49. Although it may appear unlikely that the plurality winner would not also be the preferential majority winner, this scenario is likely to occur in a three-way race in which two of the candidates are ideologically similar.

50. VT. CONST. ch. II, § 47. Arizona and Massachusetts have similar constitutional provisions. See ARIZ. CONST. art. V, § 1; MASS. CONST. pt. 2, ch. 2, § I, art. III.

Secretary of State has issued a press releases urging the legislature to pass a bill implementing instant runoff voting in state-wide elections.⁵¹ Vermont's Attorney General, however, believes that an instant runoff voting bill would be unconstitutional.⁵² This argument stems from the fact that instant runoff voting would deny a candidate who finished in second or third place in the general election from being considered by the state legislature, as the Vermont Constitution instructs, because instant runoff voting procedures would supplant any need for such a vote by the legislature. Consequently, it is likely that a losing candidate under an instant runoff system would challenge the constitutionality of a law that denies that person his or her right to consideration by the state legislature.

III. POLICY IMPLICATIONS OF ENACTING INSTANT RUNOFF VOTING

A. *"Preferential" Majority Winners: A Clearer Mandate and Increased Legitimacy?*

Virtually all elections in the United States are single-member district contests in which the candidate who receives the most votes wins.⁵³ It is logical to infer that the greater the percentage of votes a candidate receives, the clearer the mandate he or she has from the electorate and the more legitimacy he or she has to lead and represent his or her constituents.⁵⁴ A candidate's failure to achieve a majority, however, can have detrimental effects: "When people see our highest officials being elected to office with not even a bare majority of support from the voters it is not surprising that voters get cynical."⁵⁵ Therefore, majority winners are preferable to plurality winners, because they are better able to claim a mandate

51. See, e.g., Press Release, Majority Role in Vermont's Elections, *supra* note 7.

52. David Mace, *Instant Runoff Backers Differ with Sorrell*, TIMES ARGUS (Montpelier, Vt.), Feb. 27, 2003.

53. STEPHEN J. WAYNE, *IS THIS ANY WAY TO RUN A DEMOCRATIC ELECTION?: DEBATING AMERICAN ELECTORAL POLITICS* 50 (2d ed. 2003).

54. BULLOCK & JOHNSON, *supra* note 3, at 7.

55. Press Release, Majority Role in Vermont's Elections, *supra* note 7.

and appear legitimate.⁵⁶ As a result, a majority winner's party platform will be more powerful and the policymaking process will have a clearer direction during that person's administration.

1. An Increasing Number of Plurality Winners

Although some states require that candidates receive a majority of votes to be elected,⁵⁷ most states allow plurality winners.⁵⁸ The number of plurality winners in both federal and state elections increased throughout the 1990s.⁵⁹ Only one of the previous four presidential election winners received majority support from the nation as a whole.⁶⁰ Furthermore, in 1992, Bill Clinton received only a plurality of the vote in most of the states that he won.⁶¹ Thirteen currently serving governors have also failed to receive a majority of the votes cast in their respective elections.⁶² Not surprisingly, lower state office elections also frequently result in plurality winners.⁶³ The increasing number of plurality-winner elections could serve to decrease public confidence in government by justifiably creating the sense that a minority is governing the majority.

A plurality-winner system, operating within a system of low voter turnout, further decreases the mandate and legitimacy of elected officials. Less than half of the eligible electorate voted in a recent presidential election, and the turnout has been even lower in non-

56. This Note does not analyze the relative merits and disadvantages of majority or plurality rule in single member districts versus a plurality representation system. Instant runoff voting, as it is currently being proposed in state legislatures, would fit into the majority or plurality rule in the single member districts system that is currently the norm across the United States.

57. See *supra* note 48; *infra* Part III.C.1 (discussing "traditional" runoff elections).

58. See *supra* note 47 and accompanying text.

59. Yard, *supra* note 4, at 201.

60. See Dave Leip, *Dave Leip's Atlas of U.S. Presidential Elections*, at <http://www.uselectionatlas.org/USPRESIDENT/> (last visited Sept. 7, 2004). George W. Bush won the 2004 presidential election with 50.7% of the popular vote. *Id.*

61. See *id.*

62. Ctr. for Voting & Democracy, *supra* note 5.

63. See, e.g., Office of the Vt. Sec'y of State, Vermont State Archives: General Election Results—State Officers, 1789-2002, available at <http://vermont-archives.org/govinfo/elect/genelect.htm> (last visited Sept. 11, 2004) (stating that the Lieutenant Governor of Vermont has been elected by a plurality on twenty-one occasions; the State Treasurer on thirteen occasions; the Secretary of State on four occasions; and the Auditor of Accounts on four occasions).

presidential years.⁶⁴ Therefore, the current electoral system actually results in minority rule, as many officials are elected with the support of only a plurality of the minority of citizens who actually voted. Even in President Clinton's landslide victory in 1996, he received votes from only twenty-four percent of eligible voters—which was approximately forty-nine percent of the forty-nine percent of eligible voters who actually voted.⁶⁵ Instant runoff voting offers some hope of increasing public confidence in government by electing officials with at least preferential majorities. However, as the following section indicates, any improvement would only be at the margins.

2. A Marginally Clearer Mandate

An instant runoff voting system will come closer to electing officials with the support of a majority of voters than a plurality system, but it will still not create true majority winners. In an instant runoff election system, it is still likely that a majority of voters will not have voted for the winning candidate as their first choice. In addition, obtaining a majority with second- or third-place votes is not the same as winning a majority with all first-place votes in a traditional runoff election. A majority created with the help of second-, third- or even fourth-place votes creates a less powerful mandate and less legitimacy than traditional majorities do.

Clearly, there is a difference between traditional majorities and preferential majorities under an instant runoff system. Even supporters of instant runoff voting recognize that preferential majorities are only "something like" majority rule.⁶⁶ Being the first choice of a majority of the voters creates greater legitimacy than receiving a preferential majority made up of votes from an enthusiastic plurality combined with "the grudging acceptance" of a minority who is merely "settling" for a candidate.⁶⁷ A preferential

64. KORNBLUH, *supra* note 6, at xi. For a further discussion of low voter turnout see *infra* Part III.D.

65. See KORNBLUH, *supra* note 6, at xi; Leip, *supra* note 60.

66. Transcript, *Perspectives of Political Parties: Hearing Before the Nat'l Comm'n on Fed. Election Reform* (May 24, 2001) (statement of Hendrik Hertzberg, Ctr. for Voting and Democracy), available at http://www.reformelections.org/data/transcripts/h3/hearing3_p4.php.

67. *Id.*

majority winner cannot claim that most voters believe his or her platform should be implemented, and therefore the legitimacy of an official elected under an instant runoff system will be only marginally increased over that of an official elected by a plurality.

B. Instant Runoff Voting and the "Spoiler Problem"

Perhaps the clearest justification for adopting an instant runoff voting system is its ability to eliminate what many view as the "spoiler problem." In political contests with multiple candidates, aspiring office holders who draw their support from similar constituencies may in effect cancel each other out, and thus allow a candidate with less overall support to win.⁶⁸ The decline of the power of political parties during the last century has increased the likelihood of this scenario.⁶⁹ Although an instant runoff voting system would alleviate the "spoiler problem," it is not at all clear that it is a problem that needs to be fixed.

Ralph Nader's Green Party candidacy in the 2000 presidential election is an often cited instance of the "spoiler problem."⁷⁰ "Spoiler problems" are common at the state level as well. For example, a strong Green Party showing in the 1998 race for the U.S. House of Representatives in New Mexico's First District contributed to a Republican victory there.⁷¹ In Alaska, support for Libertarian and Alaskan Independence Party candidates has led to plurality Democratic Party victories.⁷² In Vermont, strong support for Progressive Party and Independent candidates led to plurality Republican Party victories in the 2002 elections for governor and lieutenant governor.⁷³

68. See Ctr. for Voting & Democracy, *Instant Runoff Voting (IRV)*, at <http://www.fairvote.org/irv> (last modified Oct. 21, 2004).

69. KORNBLUH, *supra* note 6, at 112-13.

70. See, e.g., *Nader Shrugs Off "Spoiler" Label*, ATLANTA J. CONST., Dec. 30, 2000, at A11.

71. See U.S. House of Representatives, Statistics of the Congressional Election of November 3, 1998 (Jan. 3, 1999), available at <http://clerk.house.gov/members/electionInfo/1998/98Stat.htm>.

72. Timothy Inklebarger, *Measure Likely to Change Voting System*, JUNEAU EMPIRE, Aug. 25, 2002.

73. See Vt. Sec'y of State, Primary and General Statewide Election Results, at <http://www.sec.state.vt.us/results/rbycnty.html> (last visited Jan. 24, 2005).

Not surprisingly, the Democratic Party in Alaska and the Republican Party in New Mexico and Vermont have opposed efforts to implement instant runoff voting.⁷⁴ These parties recognize that if recent voting trends remain constant, their candidates would be less likely than their opponents' candidates to be the first or second choice of a majority of the voters. Accordingly, under an instant runoff voting system, candidates from these parties would be at a disadvantage as compared to their current political situation.

Although three-way races in traditional plurality electoral systems create what many call "spoilers," this situation is not necessarily bad. Ralph Nader's success in winning nearly three percent of the national vote, and over five percent of the vote in eleven states,⁷⁵ may not show a weakness in the traditional electoral system, but rather weaknesses with Nader's major party opponents. Seen in this light, Al Gore did not lose the election because of Ralph Nader; he lost because of Al Gore.⁷⁶ In fact, had Nader not run, most Nader voters would have voted for someone other than Gore, or not voted at all.⁷⁷ From this, it can be inferred that it was not Nader's candidacy that lost the election for Gore, it was Gore's inability to satisfactorily address the needs of Nader voters. Nader's 2000 presidential campaign, as well as Ross Perot's 1992 and 1996 presidential campaigns,⁷⁸ show that so-called "spoiler candidates" inject new issues into campaigns and bring new voters into the political process⁷⁹ even without an instant runoff system. This reality casts doubt on whether the "spoiler problem" is enough of a justification to change the traditional electoral system.

74. See, e.g., Inklebarger, *supra* note 72.

75. Leip, *supra* note 60. Nader received over ten percent of the vote in Alaska. *Id.*

76. See Robert W. McChesney, *Gore Should Drop Out, Get on Nader Bandwagon*, MADISON CAP. TIMES, Oct. 26, 2000, at 13A.

77. *Id.*

78. Ross Perot captured 18.9% of the vote in 1992 and 8.4% in 1996. Leip, *supra* note 60.

79. See McChesney, *supra* note 76.

C. The Economics of Instant Runoff Voting

1. Reducing Costs by Eliminating Traditional Runoff Elections

There are currently twelve states, mostly in the South, that are authorized to conduct runoff primary elections for state offices instead of plurality- or majority-winner systems.⁸⁰ In these runoff states, each party holds a primary election to determine its candidate.⁸¹ If no candidate receives a majority of the primary votes, the top two vote-getters compete in a runoff election to determine who proceeds to the general election.⁸²

Instant runoff voting would eliminate the need for traditional runoff elections in these states,⁸³ as well as in the many municipalities that also hold traditional runoff elections. Theoretically, instant runoff voting would cut election administration costs in half in those states, because only one election would be held instead of two. To be sure, the administrative costs of conducting an election are not small. San Francisco recently spent two million dollars on *each* election under its traditional primary runoff system.⁸⁴ Alabama taxpayers paid three million dollars to administer their runoff primaries in 2002,⁸⁵ and a statewide runoff in North Carolina cost taxpayers nearly four million dollars in 1998.⁸⁶

Instant runoff voting would likely reduce administrative costs in the ten states and various municipalities that currently utilize traditional runoff elections. If instant runoff voting were adopted in these jurisdictions, these states and municipalities would have to

80. BULLOCK & JOHNSON, *supra* note 3, at 3 tbl.1.1 (listing Alabama, Arizona, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas as states having runoff primary elections).

81. *Id.* at 1. *But see id.* at 4-5 (noting the exception of Louisiana's unique runoff system in which all parties are involved in the first "primary," so that two candidates from the same party can run against each other in the "general election").

82. *See id.* at 1.

83. It should be noted that some states do not use runoff elections, although they are authorized to by statute. *See id.* at 3 tbl.1.1 n.* (listing Arizona and South Dakota as two such states).

84. Ctr. for Voting & Democracy, *supra* note 68.

85. *Election Day Replay Poses Avoidable Problems*, USA TODAY, Nov. 29, 2002, at 10A.

86. Rob Richie & Caleb Kleppner, Ctr. for Voting & Democracy, *Impact of U.S. Runoff Elections on Racial Minorities and Women: An Analysis and Comparison with Instant Runoff Voting*, at <http://www.fairvote.org/irv/bullock.htm> (Aug. 2000).

provide resources for only one election instead of two. State and local governments could then use this savings to make their voting systems more compatible with instant runoff voting by purchasing modern voting machinery or providing voter education. The following discussion addresses whether instant runoff voting would reduce campaign spending if, instead of concentrating on two elections, candidates need focus only on one.

2. *The Cost of Campaigning*

Commentators have argued that if states with traditional runoff elections adopt an instant runoff system, then a candidate's reliance on wealthy contributors would decrease.⁸⁷ In addition, some have argued that instant runoff voting would reduce the impact of special interest groups on candidates, "because [candidates would] only have to campaign and raise money for one election rather than two."⁸⁸ Although it is clear that the occurrence of a traditional runoff election "sends candidates and their backers into a renewed frenzy of fundraising,"⁸⁹ it is unclear whether candidates in states with traditional runoff elections spend more money campaigning than candidates in the states who use plurality-winner primary systems. Plurality-winner primary systems often have contested party primaries that cause candidates to spend heavily before the general election campaign even begins.

Supporters of instant runoff voting believe it could reduce the costs of political campaigning because logically, it would seem likely to reduce negative campaigning, at least in closely contested political races. A candidate who knows that he or she must rely on another candidate's supporters for his or her second-, third-, or fourth-place votes is less likely to alienate these same supporters by running negative attack advertisements.⁹⁰ Suppose that candidates D, R, G, and L are running for governor. Pre-election polls show that D and R are the front-runners but that G and L are each garnering

87. *Id.* Currently, in states with traditional runoff elections, wealthy contributors are a vital component of a candidate's campaign, as candidates often need to raise large sums of money quickly to successfully campaign in the runoff election. *See id.*

88. *Ctr. for Voting & Democracy, supra* note 68.

89. *Election Day Replay Poses Avoidable Problems, supra* note 85.

90. *Ctr. for Voting & Democracy, supra* note 68.

support from almost ten percent of the electorate. In an instant runoff system, supporters of G and L become important, because their second-place votes will likely be counted as first-place votes once G and L have been eliminated. As such, D and R will be hesitant to alienate supporters of G and L by barraging the air waves with negative attack advertisements.

Despite the apparent logic of instant runoff voting supporters, negative campaigning is unlikely to disappear regardless of which voting system is employed. Even though most voters claim to dislike negative political advertising, politicians use it because it is effective.⁹¹ If D launched effective negative attacks against R, many supporters of G and L would lower their ranking of R, not D. Even if instant runoff voting would reduce negative campaigning, this does not necessarily mean that campaign spending would be reduced. Less negative campaigning could theoretically translate into more campaigning on substantive issues. Candidates could merely reallocate their expenditures, not spend less. So, although instant runoff voting may arguably improve the tone of closely contested elections, it will not necessarily reduce the cost of campaigning.

3. *Expensive Voting Machinery*

The feasibility of instant runoff voting largely depends on the type of voting equipment employed. Newer technologies, such as optical scanners and computer touch screens, can accommodate instant runoff voting with little additional cost.⁹² Older technologies, however, require an expensive and time-consuming hand count.⁹³ Even instant runoff voting advocates admit "it doesn't make sense to adopt [instant runoff voting] until new equipment is purchased."⁹⁴ Voting equipment that contains new technology is expensive,⁹⁵ and

91. Scott Smith, *Psychology of Politics*, CAPITAL (Annapolis, Md.), Oct. 14, 2004, at B1.

92. Ctr. for Voting & Democracy, *supra* note 68.

93. *Id.*

94. *Id.*

95. Karen Peterson, *'Instant-Runoff' Proposal Moves Ahead in Senate*, SANTA FE NEW MEXICAN, Feb. 26, 1999, at A8 (noting that in 1999, New Mexico's Secretary of State's Office estimated that it would cost as much as ten million dollars to purchase new voting machines compatible with instant runoff voting).

counties have been hesitant to invest in it because of budgetary, administrative, and security concerns.

In the 2000 elections, approximately thirty-eight percent of counties nationwide used optical scan or electronic touch-screen voting equipment that would have been compatible with instant runoff voting.⁹⁶ The punch card system, made infamous by the 2000 Florida presidential recount, is incompatible with instant runoff voting. In 2000, punch cards were used by approximately thirty-four percent of counties, a figure that has remained steady for decades.⁹⁷ A punch card system is easier for large counties to use than optical scanning because, with a punch card system, voters need only a blank card, whereas with an optical scanning system, each voter needs a separate ballot. In large counties, optically scanned ballots can be very long and need to be printed in several languages.⁹⁸ The security of touch-screen systems has also been questioned.⁹⁹

These voting equipment and election administration concerns make the implementation of instant runoff voting systems infeasible for many jurisdictions in the near future. Similar concerns were key factors in the defeat of instant runoff voting legislation in Cincinnati, Ohio, in 1991, in New Mexico in 1998, and in Eugene, Oregon, in 2001.¹⁰⁰ Some municipalities that have been successful in passing instant runoff voting legislation have made implementation contingent upon the availability of modern vote-counting equipment.¹⁰¹ Implementing instant runoff voting at the state level may be a long way off in many places because of these voting equipment concerns. Unless all counties within a state have modern

96. NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 51 (2001) (stating that 27.5% of counties used optical scan equipment and 10.7% used electronic touch-screens).

97. See *id.* This figure may be decreasing. The Help America Vote Act, passed in 2002, established a program that provides grants to states for election improvements, including "acquiring, leasing, modifying, or replacing voting systems and technology and methods for casting and counting votes." 42 U.S.C. § 15,301 (2004).

98. NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 96, at 53.

99. See, e.g., Media Release, Electronic Frontier Foundation, Security Researchers Discover Huge Flaws in E-Voting System (July 24, 2003) (describing a Johns Hopkins University and Rice University study concerning security flaws in leading e-voting systems), available at http://www.eff.org/Activism/E-voting/20030723_eff_pr.php; *infra* Part IV.B.

100. Ctr. for Voting & Democracy, *Modernizing Voting Equipment: Guidelines for Ensuring Security and Reliability*, at <http://www.fairvote.org/administration/modernize.htm> (Feb. 2003).

101. *Id.*

equipment capable of processing instant runoff voting at a reasonable cost, it would not be practical to implement such a system at the state level. Until the administrative and security concerns of modern optical scan and touch-screen systems are remedied, instant runoff voting beyond the county level is unduly expensive and simply not feasible.

D. Voter Turnout

Instant runoff voting is seen by some as a potential remedy to low voter participation. In general, “[v]oter participation in all elections has fallen to its lowest levels since the mass electorate was first incorporated into the political system in the nineteenth century.”¹⁰² Turnout was only forty-nine percent in the 1996 presidential election¹⁰³ and the turnout for midterm congressional elections is even worse. Since the 1970s, voter participation in midterm congressional elections has averaged thirty-seven percent.¹⁰⁴ This figure is down from an average of nearly fifty percent during the 1960s.¹⁰⁵ Worse still is voter participation in local elections, where turnout ranges from “[ten to twenty] percent for state and local elections concerning schools, safety, quality of services, and taxes.”¹⁰⁶

It is important to identify which eligible voters are not participating in elections. Turnout has been particularly low among nonpartisan, younger, and less educated voters.¹⁰⁷ As Thomas E. Patterson noted, “[a]s the electorate has shrunk, it has come to include proportionally more citizens who are older, who have higher incomes, or who hold intense opinions”¹⁰⁸ Although some view this decline in voter turnout as a sign of a relatively content

102. KORNBLUH, *supra* note 6, at xi. Voter participation did increase slightly in 2004. However, the 56.2% eligible voter participation rate, although the highest in recent decades, was significantly below the over sixty percent rate that characterized presidential elections in the 1960s. See Leip, *supra* note 60.

103. THOMAS E. PATTERSON, *THE VANISHING VOTER* 3 (2002).

104. *Id.* at 4.

105. *Id.*

106. KORNBLUH, *supra* note 6, at xi.

107. MARTIN P. WATTENBERG, *WHERE HAVE ALL THE VOTERS GONE?* 80-81 (2002).

108. PATTERSON, *supra* note 103, at 13.

electorate,¹⁰⁹ most believe that this dwindling civic participation is a dangerous phenomenon for democracy.¹¹⁰

There are strong arguments that instant runoff voting could lead to higher voter turnout. First, it might encourage participation by those who support long-shot candidates by giving "every voter incentive to participate because your vote still counts even if your first choice candidate is defeated."¹¹¹ Second, instant runoff voting could alleviate the potential "spoiler problem"¹¹² and reduce the possibility that by voting for one's favorite candidate, a voter might actually help to elect the candidate they like the least. Currently, some voters choose to stay home rather than cast a vote that will actually work against their intentions.¹¹³ Instant runoff voting would encourage participation from people who, in disproportionate numbers, are not voting now,¹¹⁴ as the "spoiler problem" may disproportionately affect younger citizens who are more likely to vote for a third party candidate.¹¹⁵

Australia and Malta, two countries who use preference voting systems in which voters rank candidates in single member

109. See, e.g., Chris L. Jenkins, *Reading the Meaning of Low Voter Turnout*, WASH. POST, May 12, 2002, at C1 (reporting on a local election with low turnout in which voters stated that dissatisfaction was a cause of low voter participation).

110. See, e.g., KORNBLUH, *supra* note 6, at 159-60 (commenting that the decline in participation has created an electorate that no longer accurately represents the public); PATTERSON, *supra* note 103, at 11-14 (arguing that low turnout leads to an electorate unable to respond to changing needs, less citizen attachment to the system, and less representative election choices and results); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON'T VOTE* 12-17 (2000) (asserting that declining turnout has led to an unrepresentative voting populace that has resulted in a harmful ideological tilt in policy); WATTENBERG, *supra* note 107, at 1 (stating that low voter turnout harms the United States' democratic system by creating an unrepresentative minority voting populace and provides a poor example for emerging democracies); *id.* at 98-99, 104 (arguing that low turnout among certain demographic groups causes politicians to neglect issues important to those groups).

111. Ctr. for Voting & Democracy, *supra* note 68.

112. See *supra* Part III.B; see also Ctr. for Voting & Democracy, *supra* note 68.

113. Press Release, Majority Role in Vermont's Elections, *supra* note 7.

114. See Transcript, *The Federal Election System: Historical Perspectives: Hearing Before the Nat'l Comm'n on Fed. Election Reform* (Mar. 26, 2001) [hereinafter *Historical Perspectives Hearing*] (statement of Alexander Keyssar, Professor, Duke University), available at <http://www.reformelections.org/data/transcripts/h1/hearing1%5Fpr.php>.

115. See Press Release, Majority Role in Vermont's Elections, *supra* note 7 (noting that Vermont's voter turnout in 2000 was sixty-four percent, but that just over one quarter of eighteen- to twenty-four-year-olds voted).

districts,¹¹⁶ had more than ninety-five percent voter turnout in 1996—the highest voter turnout in the world that year.¹¹⁷ Although it is clear that places that use preference voting systems have high levels of voter turnout, it is not clear that preference voting is a significant cause of this high voter turnout or that the lack of such a system is a reason for low turnout in the United States.

In fact, the reasons for declining voter participation in the United States go well beyond the frustration that supporters of long-shot candidates may feel and the potential “spoiler problem.” Political scientists have offered a myriad of reasons for declining voter participation in the United States.¹¹⁸ Most agree that the root of declining voter participation in the United States is electoral reforms made in the late nineteenth and early twentieth centuries that weakened political parties and decreased political competition in many regions of the country.¹¹⁹ Taking resources away from the political parties in effect increased “the costs of political participation” for voters, while dwindling political competition removed “the pressure for parties to maintain a highly active electorate.”¹²⁰ Indeed, data suggests that voter turnout declines when political parties get weaker. Weakening parties, as shown by declining party organization,¹²¹ have correlated with declining turnout in the United States and other democracies.¹²² This correlation also holds true in state comparisons. The states that have experienced the largest turnout declines are the ones “that once had strong traditional party organizations, which placed a high priority on getting out the vote and devoted substantial human resources to doing so.”¹²³

116. See generally ELECTIONS IN AUSTRALIA, IRELAND, AND MALTA UNDER THE SINGLE TRANSFERABLE VOTE (Shaun Bowler & Bernard Grofman eds., 2000).

117. Richie, *supra* note 2, at 87 (stating that voter turnout in these two countries can be attributed to their voting systems being straightforward).

118. See, e.g., PATTERSON, *supra* note 103, at 20-22 (blaming such diverse factors as lengthy presidential campaigns, special interests, generational replacement, and profit-driven journalism); WATTENBERG, *supra* note 107, at 56, 160 (citing a decline of social capital and negative campaign advertising as possible causes).

119. KORNBLUH, *supra* note 6, at 118-19, 135-36.

120. *Id.* at 118-19.

121. See WATTENBERG, *supra* note 107, at 162.

122. See *id.*

123. *Id.*

Political parties were weakened by many Progressive-era reforms that limited party control over elections.¹²⁴ These reforms included ballot changes that made voters choose between individual candidates rather than a political party's slate of candidates.¹²⁵ Moreover, the development of direct primaries, campaign finance reform,¹²⁶ initiatives, referenda, and recalls all helped to take power away from political parties and reduce their effectiveness at getting out the vote.¹²⁷ Such reforms increased the costs of elections, subsequently causing states to lengthen terms for political offices, thus creating more time between elections.¹²⁸ As a result, "Americans were [no longer] continually involved" in the political process.¹²⁹ Without the "team" feeling and mobilization efforts of strong political parties, turnout decreased dramatically.¹³⁰

Decreasing political competition between the two major political parties is another important factor that has resulted in lower voter turnout. As one author noted, "[w]ith the Republicans controlling most of the North and the Democrats the South, the early twentieth century experienced few closely fought elections. As competition waned, much of the vitality drained out of the electoral system."¹³¹ Today, the areas of geographic partisan control have changed, but the story is much the same. Currently, the number of "safe" seats for both parties in Congress far exceeds the number of contested seats.¹³² In these states and districts, parties, and voters themselves, have little incentive to get out the vote.

The only thing clear about declining voter turnout is that there is no easy way to remedy the situation. Efforts to ease voter registration and absentee voting in recent years have not resulted in the

124. KORNBLUH, *supra* note 6, at 122.

125. *Id.* at 125.

126. In addition to more "traditional" types of campaign finance reform, political parties were also no longer allowed to pay voters on election day. *Id.* at 128.

127. *Id.* at 127-29.

128. *Id.* at 126.

129. *See id.*

130. *Id.* at 136.

131. *Id.* at 138.

132. *See* PATTERSON, *supra* note 103, at 183 ("There are today more House districts where incumbents run unopposed than there are districts where both parties stand a realistic chance of victory.").

corresponding increase in participation that was anticipated.¹³³ Thus, it is unclear how an instant runoff voting system would affect the power of political parties, the competitiveness of electoral districts, or voter turnout. Indeed, an instant runoff voting system might actually *decrease* voter participation by further diminishing the power of political parties.¹³⁴ Illustrative of this point is the fact that third parties in many states and districts have advocated instant runoff voting, presumably because they believe that it will help their party at the expense of the two major parties. In addition, instant runoff voting cannot, by itself, change "safe" seats into competitive ones.¹³⁵

Instant runoff voting could be effective at increasing voter turnout in traditional primary runoff elections. There is generally a drastic decrease in voter turnout from the first election to the second in states holding traditional runoffs.¹³⁶ Instant runoff voting would ensure that "the decisive election occurs when turnout is highest."¹³⁷ For example, in Georgia's 1992 race for the U.S. Senate, turnout for the December runoff election was half that of the November general election.¹³⁸ Instant runoff voting would arguably prevent this decrease by eliminating the second election, hence the problem of supporters of eliminated candidates not bothering to show up for the runoff election would no longer exist. It remains unclear, however, whether an instant runoff voting system would actually remedy the problem of low voter turnout in the first primary election or in the general election.

133. WATTENBERG, *supra* note 107, at 56-57.

134. *Historical Perspectives Hearing*, *supra* note 114 (noting that "[t]he advantage of [instant runoff voting and other proportional representation models] is that they encourage new groupings, new candidates, and new parties").

135. Districts in which one party always wins large majorities under a majority-rule system will continue to elect the same party under an instant runoff system because this party will continue to receive a majority of first place votes.

136. See Richie & Kleppner, *supra* note 86.

137. *Id.*

138. *Id.*

IV. POTENTIAL SIDE-EFFECTS OF INSTANT RUNOFF VOTING

A. Voter Confusion

A common claim of instant runoff voting opponents is that the process is too complicated and will confuse voters.¹³⁹ In contrast, supporters claim that instant runoff voting is "as easy as 1-2-3" and that all voters need do is rank the candidates.¹⁴⁰ If for no other reason than its unfamiliarity, it seems obvious that instant runoff voting would not be as easy for most voters to understand as the traditional majority- or plurality-winner systems used in virtually all elections in the United States.¹⁴¹ In addition, instant runoff voting would make the job of election administrators more difficult.¹⁴²

Ballots are already complicated. The confusion over the "butterfly ballot" in Florida during the 2000 presidential election is evidence that voters can easily be confused by changes to voting methods.¹⁴³ Washington's Secretary of State opposes instant runoff voting because it would complicate a system in which voters are already "overwhelmed by a huge number of choices in some elections [sic] cycles."¹⁴⁴ It is also complicated to explain to voters how the winner is chosen, meaning that voters would inevitably attempt to strategically rank, or choose not to rank, candidates.¹⁴⁵ In addition, public confidence in the current electoral system would be reduced further

139. See, e.g., Frank Gallagher, *Instant Runoffs Don't Work*, S.F. EXAMINER, Apr. 26, 2002 (claiming that "instant runoff voting spawns a noxious atmosphere of confusion, fear and paranoia").

140. Ctr. for Voting of Democracy, *supra* note 68.

141. See, e.g., Gallagher, *supra* note 139.

142. See Richie, *supra* note 2, at 87-88 (describing the process of instant runoff voting ballot counting).

143. See, e.g., Jeff Kuerth & Jim Leusner, *Some Had 1 from 'Column A,' 1 from 'Column B'*, ORLANDO SENTINEL, Jan. 28, 2001, at A1 (describing various ballot designs in Florida, including the "butterfly ballot" that confused voters).

144. Brad Shannon, *New Voting Method Gains Popularity*, OLYMPIAN (Olympia, Wash.), June 16, 2002, at C1.

145. See Neal G. Jesse, *A Sophisticated Model of Preferential Electoral Systems*, in ELECTIONS IN AUSTRALIA, IRELAND, AND MALTA UNDER THE SINGLE TRANSFERABLE VOTE, *supra* note 116, at 59 (explaining that preferential voting systems provide incentive and motivation for sophisticated voters to alter their vote ranking based on their desired outcome rather than their true preferences).

if many voters did not understand how to vote, how their votes were counted, or felt as if the strategic voting of other citizens had somehow undermined their vote. It is quite likely that “the average voter ... is apt to be skeptical of mathematically complicated methods designed to overcome Condorcet paradoxes and other arcane maladies that may afflict the best of democratic aspirations.”¹⁴⁶ Traditional runoff elections may be preferable to instant runoff elections, as they result in true majoritarianism “without resorting to convoluted procedures that—however more virtuous they may be—might baffle and alienate voters.”¹⁴⁷

*B. Security and Unintended Consequences*¹⁴⁸

Even supporters of instant runoff voting admit that counting ballots in such a system is more complicated than in a traditional plurality- or majority-winner system.¹⁴⁹ Opponents of instant runoff voting believe it is not merely complicated, but a “deceptive and potentially dangerous” system.¹⁵⁰ Further support for this argument is that the complicated counting scheme involved in instant runoff voting can result in unintended consequences, “because ranking a

146. BULLOCK & JOHNSON, *supra* note 3, at 175. The Condorcet Paradox is defined as the possibility for a candidate to be eliminated in a runoff primary system even when he or she would have been able to defeat any of the other candidates in a head-to-head, one-on-one competition. *See id.* at xiv.

147. *Id.* at 175.

148. Some of the concern over confusion, *see supra* Part IV.A, and unintended consequences might be overblown, as there are several nations that currently use some version of ranked voting similar to instant runoff voting. Ireland, to elect its president, and Malta, to elect its national legislature, use the single transferable vote system and Australia uses the alternative vote to elect the upper house of its legislature. *See* ANDREW REEVE & ALAN WARE, *ELECTORAL SYSTEMS: A COMPARATIVE AND THEORETICAL INTRODUCTION* 44 (1992). *See generally id.* at 149-51 (describing the single transferable vote and alternative vote systems). Nevertheless, all electoral systems possess negative aspects that must be acknowledged and assessed before implementation. There are no municipalities in the United States with a tradition of instant runoff voting except for Cambridge, Massachusetts. *See* Press Release, Center for Voting & Democracy, Ranked Ballots in the United States: Proven Electoral Reform Gaining Support (Nov. 6, 2001), available at <http://www.fairvote.org/irv/nov0601.htm>. Cambridge, however, uses instant runoff voting in a proportional representation system. *Id.* Therefore, the Cambridge example offers little assistance for determining the workability of instant runoff voting in a plurality-winner, single-member district system.

149. Richie, *supra* note 2, at 87.

150. *The Problem with Instant Runoff Voting*, *supra* note 1.

candidate *higher* can actually cause the candidate to *lose*, and ranking a candidate *lower* can cause the candidate to *win*.”¹⁵¹ In addition, it is possible for a candidate to lose even if he or she is preferred over each of the other candidates by a majority of the voters.¹⁵² Instant runoff voting, therefore, may not always function as intended.

Beyond strategic voting and complicated vote counting scenarios, a potential security problem also exists with the use of instant runoff voting. Because an instant runoff voting system requires newer voting technologies to be cost-effective,¹⁵³ it could be more susceptible to vote tampering. Specifically, recent studies and tests have shown that touch-screen voting technology is insecure and error-prone.¹⁵⁴ A Massachusetts Institute of Technology/California Institute of Technology study of touch-screen voting during the 1998 and 2000 Senate elections showed that 8.2% of touch-screen votes were lost. This was greater than all other methods, except for the now rarely used punch card lever machine.¹⁵⁵ After the 2004 election, the Election Verification Project investigated nearly nine hundred reports of touch-screen voting irregularities and found that “[e]lectronic voting machines lost votes in North Carolina, miscounted votes in Ohio, and broke down in New Orleans.”¹⁵⁶ The most frequent criticism of touch-screen voting machines is that most do not produce a paper record of votes cast,¹⁵⁷ making manual recount-

151. *Id.* For a detailed description of how this scenario could occur, see Jesse, *supra* note 145, at 75-76.

152. *The Problem with Instant Runoff Voting*, *supra* note 1.

153. See *supra* Part III.C.3.

154. See, e.g., Associated Press, *California Lawsuit Challenges E-Voting* (Feb. 18, 2004) (alleging security problems with voting machines), available at <http://www.cnn.com/2004/ALLPOLITICS/02/18/elec04.voting.machines.ap/index.html>; Associated Press, *Site of Electronic Voting Firm Hacked* (Dec. 29, 2003) (discussing a hacker break-in of an electronic voting firm), available at <http://www.cnn.com/2003/TECH/biztech/12/29/voting.hack.ap/index.html>.

155. Associated Press, *E-vote Goes Smoothly, But Experts Skeptical* (Nov. 4, 2004), available at <http://www.cnn.com/2004/TECH/biztech/11/04/e.votingtested.ap/index.html>.

156. Will Doherty, *Statement of the Election Verification Project* (Nov. 18, 2004), available at <http://www.verifiedvoting.org/article.php?id=5302>.

157. Although touch-screen voting machines can produce a paper record, Nevada is the only state that provides a paper record to all voters using these machines. Daniel Sieberg, *Jury's Still Out on E-voting* (Nov. 5, 2004), available at <http://www.cnn.com/2004/ALLPOLITICS/11/05/evoting.evaluation.index.html>.

ing and verification impossible. But even a paper record would not alleviate problems that cannot be seen, such as software errors or outright tampering. “[S]omeone [c]ould program a machine to give a wrong answer.... If that were to happen, the machine would still work fine—we just wouldn’t know it [was recording the wrong answer].”¹⁵⁸ Clearly, a potential security breach could cause havoc by creating indefiniteness regarding who has been elected or by allowing foreigners to dictate who wins U.S. elections. These potential pitfalls need to be avoided and consequently it is too early to implement a voting system that requires these potentially unreliable technologies.

CONCLUSION

Elected officials should refrain from passing instant runoff voting legislation. Despite its theoretical promise to improve elections, instant runoff voting is a potentially illegal reform with unclear benefits, probable negative side effects, and possible unintended consequences. Courts and administrative officials will likely determine that instant runoff voting is inconsistent with election laws in the many states that require majority winners. Additionally, instant runoff voting statutes may violate state constitutions that require the election winner to be the candidate who receives the most votes. Even if instant runoff voting can clear these legal hurdles, it is not at all clear that it will be able to provide the unambiguous mandates, cheaper elections, and increased voter turnout that its supporters claim. Instead, instant runoff voting will likely result in confusion, uncertainty, and instability, making “the cure [likely] worse than the disease.”¹⁵⁹

James P. Langan

158. Associated Press, *supra* note 155 (quoting Avi Rubin, computer scientist at Johns Hopkins University).

159. *The Problem with Instant Runoff Voting*, *supra* note 1.