Elect the Person or Elect the Party; a Comparative Analysis of the Differing Electoral Procedures of the United States, Germany, and the United Kingdom.

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I. Introduction

Different countries design their legislative branches to serve different goals. The variations in legislative design, which stem from differing constitutional goals, result in diverse electoral processes in each country. Some have chosen direct election for all representatives in the legislative branch, while others use appointment to fill those positions. Ultimately, the history of each country has led to an electoral system that achieves that country’s goals.

However, the United States system of election leads to more strife within the Legislative branch, greater difficulty in passing legislation, and constant shifts in power because of changes in popular opinion. The American system, direct election for all legislative representatives, also has resulted in much discussion regarding the level of representation within Congress – whether elected officials truly represent the ideals of their constituents. The inherent difficulties and inadequacy of representation has led to the following conclusion: the United States should consider the benefits of the two-vote electoral process utilized by Germany to determine if such a system could ease political strain and benefit the country as a whole.

This paper will compare three different electoral processes and analyze the effect that the choice of the electoral process has on the representation of the people within the legislative body. In order to fully discuss the process for selection of legislative representatives there must necessarily be some discussion regarding why a particular system was selected in each country. For ease of discussion, this paper will first describe the three, basic types of electoral systems. While there are more than three systems in use worldwide, most are some variation of the three
discussed below. The next section will discuss the American system for selection of legislative representatives, beginning with a brief historical perspective. Next, this paper will discuss the German mixed-system of election and appointment, including the historical background and reasoning behind the country’s choice in electoral process. Finally, this paper will discuss the United Kingdom’s two-house system, which will include a discussion of the recent changes to the process used in the House of Lords, and why those changes were effectuated.

II. Electoral Processes – differing voting systems discussed within this article

While there are variations throughout the world in application, in general, there are three main systems for election, all of which will be discussed within this article. The first voting system to be discussed is First-Past-the-Post, which is also called plurality voting. Plurality voting is the most commonly used system.\(^1\) The second system discussed below is the simple-majority voting system. The third system is Proportional Representation. Proportional Representation is gaining in popularity, particularly in Europe. Each voting system has its own positive and negative aspects, which are discussed briefly below, and in more detail within the section of the country that utilizes that system.

A. First Past the Post

The First Past the Post voting system is simple to use, but has certain problems unavoidably engrained within it. Functionally, after the polls close, the candidate with the most votes wins.\(^2\) First Past the Post is sometimes called a plurality, or a “winter-take-all” system.\(^3\) Under this system there is no requirement that the winning candidate actually have received a

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\(^1\) Table of Electoral Systems Worldwide, International Institute for Democracy and Electoral Assistance, http://www.idea.int/esd/world.cfm (last visited Nov. 6, 2011) (Of the 199 countries included on the website, 48 use First Past the Post, but 87 use a different form of plurality or majority voting; 72 use some form of Proportional Representation).


\(^3\) Id. at 439-40.
majority of the popular vote, i.e. greater than 50%. To demonstrate how this system works in practical terms, consider the primary elections for presidential candidates in the United States. There are usually several candidates that run for the opportunity to represent their party. Often, one candidate does receive the majority, but sometimes no single candidate receives greater than 50% of the popular vote. As an illustration, suppose there are three candidates, A, B, and C. Candidate A receives 33%, B receives 32%, and C receives 35%. Under the First Past the Post system, candidate C wins the election. Not only is this system simple to understand, but deciding a winner is fast and requires no run-off election.

The problem with this process stems from the ideal that Americans have for our elected officials. Ideally, those we elect are supposed to represent the “will of the majority.” Note, however, that in the example given above, 65% of voters actually voted against the declared winner. Candidate C is no more a representative of the “will of the majority” than either A or B would be. This problem, lack of appropriate representation, only increases relative to the number of candidates available for election. Assume four candidates are running for the same seat and each receives a nearly equal share of the popular vote. Each would receive the support of roughly 25% of the voters. The candidate with 25% plus one vote would be the winner despite the fact that nearly 75% of the voters were against him. With five candidates, potentially, 80% of the vote is against the winner, and so on. The ultimate result here is that the representative does not adequately reflect the voting habits and preferences of those he purports to represent. Essentially, as some have noted, the votes of the rest of the district, those that

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4 Mary A. Inman, *C.P.R. (Change Through Proportional Representation): Resuscitating A Federal Electoral System*, 141 U. Pa. L. Rev. 1991, 1993 (1993) (citing See Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 38 (1968) (claiming that “[t]he essence of all government is the creation of a set of power relationships whereby a part may conclude the whole”); Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 719 (1985) (pointing out that the principle of minority acquiescence, i.e., that minorities are supposed to lose in a democratic system, is entirely consistent with democratic theory)).

5 Id. (citing Edward Still, *Alternatives to Single-Member Districts, in Minority Vote Dilution* 249, 252 (Chandler Davidson ed., 1984)).
didn’t vote for the winner, are “wasted,” because they serve no purpose and have no effect on the result of the election.\(^6\)

**B. Majoritarian system**

The majoritarian system is equally easy to understand and demonstrate; the candidate that receives 50% of the popular vote, plus one, is the winner of the election. This system is sometimes called a simple-majority. The problem with this process is not as marked as that of the First Past the Post system, though no less true for its obscure nature. Because the winning candidate must, at a minimum, truly receive a majority of the popular vote, that person does, at least technically, represent the “will of the majority.” However, simple-majority systems still leave, at most, 49% of the voters without actual representation.\(^7\) Those who voted for any of the losing candidates are stuck with the ideals of the winner. Arguably, both this system and First Past the Post lead to oppression of voters who are in the ideological minority within their district.\(^8\)

Another difficulty with this system is cost.\(^9\) If no single candidate wins a majority of the vote, a second election, or runoff, is required.\(^10\) Of course, the idea that the person elected actually does represent the majority, rather than simply being the person with the most votes, is more appealing than the plurality system of the First Past the Post.\(^11\) In both of the above systems, First Past the Post and majoritarian, the victor after an election “does not, in fact,


\(^7\) Inman, supra note 4 at 1993 (citing Edward Still, *Alternatives to Single-Member Districts, in Minority Vote Dilution* 249, 252 (Chandler Davidson ed., 1984) (criticizing the current majoritarian system for its potential to “leave 49 percent of the people in a district ... with nothing to show for having gone to the polls except a patriotic feeling”)).


\(^9\) Ides, supra note 2 at 444-45.

\(^10\) Id.

\(^11\) Id.
represent the entire constituency; rather, the victor represents only that part of the constituency that voted for him or (less likely) her. Winner-take-all does not mean that the winner share the power with the loser; it means loser-take-nothing.”

C. Proportional Representation

Proportional Representation (“PR”) is premised on the idea that “in a representative democracy the composition of the governing legislature should approximate the actual preferences of the electors.” The application of this system is described more fully below, but essentially, political parties appoint representatives to fill seats in the legislative body so that each party is represented within the legislative body by a proportion equal to the percentage of the popular vote that the party received. In this system, voters don’t vote for a particular person, but for the political party, or party-alliance, with which they share ideologically beliefs. One drawback to this process is that, generally, the popular vote has no effect on the particular people appointed. Appointment of representatives is determined from a list of candidates that the political party remains in control of. This leads, potentially, to representatives that view themselves as agents of their party rather than their constituents. Theoretically, however, those appointees will embody the ideological standards of the voters they are appointed to represent because the voters choose the political party whose policies they support. The ultimate result here is that the legislative body has representatives from varying political parties and that makeup accurately reflects the beliefs of the voters; the system creates a “working representative democracy.”

12 Id. at 449
13 Id. at 440.
15 Id. at 452.
16 Ides, supra note 2 at 451.
III. The Bicameral System of the United States

Before discussing the particular voting system utilized in the United States, a brief historical background, to provide perspective on why the drafters of the Constitution chose a particular system, is important. To begin with, Article I of the United States Constitution establishes the legislative branch of the federal government.\(^17\) Section one, of the same article, created the two-house system that Americans are so familiar with.\(^18\) As noted in the Federalist Papers, one reason for dividing the legislative branch into two houses rests on the idea of separation of powers.\(^19\) Application of the doctrine is reflected in the intent behind the bicameral system; to prevent the legislative branch from encroaching upon the power of another branch of government because the two houses would be in constant struggle with each other.\(^20\) The larger consideration faced by the framers of the Constitution, however, was a struggle between the states themselves.\(^21\) While discussing the difficulties faced by the Constitutional Convention, James Madison commented that “[w]e may well suppose that neither side would entirely yield to the other, and consequently that the struggle could be terminated only by compromise.”\(^22\) The termination of struggle through compromise that he spoke of resulted in the creation of two separate houses.\(^23\)

In the early days of the convention, there were two plans proposed for the organization of the federal legislative branch.\(^24\) In one, the Virginia plan, two houses would exist, but both

\(^{17}\) U.S. CONST. art. I.
\(^{18}\) U.S. CONST. art. I, § 1.
\(^{19}\) THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).
\(^{20}\) Id.
\(^{21}\) THE FEDERALIST No. 37 (James Madison).
\(^{22}\) Id.
\(^{23}\) Id.
\(^{24}\) Robert E. Dewhirst, Encyclopedia of the United States Congress, 13, apportionment and redistricting (John David Rausch, Jr., ed. 2007).
would have representation based on population. This plan was obviously intended to favor the larger, more populous states. In the other, the New Jersey plan, there would only be one federal legislative body, but it would have equal representation. This second plan favored smaller states. Finally, on June 11, 1787, delegate Roger Sherman of Connecticut proposed a plan that called for a bicameral, or two-house, legislature in which one house would have representation based on population, and the other equal representation; this plan was eventually adopted. Until the Convention reached this “Great Compromise,” dissolution of the convention was a serious possibility.

Additionally, creating two houses with separate representation and election procedures satisfied the interests of both large and small states. The larger states preferred representation based upon their population to allow them to exert greater force in the decision-making process, which led to the procedure for the House of Representatives. Not only did large states get representation based on population, but to assuage them, the House of Representatives was also granted some exclusive powers that particularly appealed to them. Smaller states urged equal representation for all, leading to the two-person per State representation within the Senate.

A. The United States House of Representatives

Having decided that a bicameral system would achieve the goals that our founding fathers sought, the Constitution was drafted to reflect not only the two-house legislative branch, but to embody the underlying aspirations as they relate to the purpose of each house. Section

25 Id.
26 Id.
29 THE FEDERALIST, supra note 21.
30 Id.
31 U.S. CONST. art. I, § 7, cl. 1; see also Festa, supra note 28.
32 THE FEDERALIST, supra note 21.
two of Article I provides the framework for election of Representatives to the House.\textsuperscript{33} Clause one begins by declaring that the “House of Representatives shall be composed of Members chosen every second Year by the People of the several States. . . .”\textsuperscript{34} Clause three provides for representation “apportioned among the several States. . . according to their respective Numbers. . . .”\textsuperscript{35} These constitutional requirements have resulted in Congressional districts within each State where a single direct representative is chosen based upon election by popular vote.

Finally, Article I section 4 grants the states the authority to decide the “Time, Place and Manner” for electing both Representatives and Senators, subject to Congress’ authority to alter those regulations.\textsuperscript{36} Individual states, under this express grant, have the authority to determine the size and number of the electoral districts. However, in 1964, the United States Supreme Court stepped in and required that the districts had to be roughly equal in population.\textsuperscript{37} Currently, Representatives for the House are elected using the First Past the Post system in every state except Georgia.\textsuperscript{38} Although the States have the authority to make this decision and choose their election method, theoretically, Congress could alter the electoral process itself under its authority to alter the regulations chosen by the states.\textsuperscript{39} The only limitation on this Congressional power would have no effect on the ability to change the electoral system currently utilized.\textsuperscript{40} As originally written, Congress did not have constitutional authority to alter the place of choosing Senators, but after ratification of the seventeenth amendment, discussed below, the

\begin{thebibliography}{99}
\item U.S. CONST. art I, § 2, cl. 1.\textsuperscript{33}
\item Id.\textsuperscript{34}
\item Id. at cl. 3.\textsuperscript{35}
\item U.S. CONST. art. I, § 4.\textsuperscript{36}
\item Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding “that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.”).\textsuperscript{37}
\item Inter Parliamentary Union, \texttt{http://www.ipu.org/parline-e/reports/2339\_B.htm} (last visited Nov. 6, 2011). (Describing the electoral system and noting that Georgia holds a runoff if no candidate receives a supermajority.).\textsuperscript{38}
\item See U.S. CONST. art. I, § 4\textsuperscript{39}
\item See Id.\textsuperscript{40}
\end{thebibliography}
States themselves no longer select Senators. Additionally, under the guise of the Equal Protection clause, the Supreme Court could force a change as well based on the idea of “wasted votes.”

As discussed above, the purpose of the bicameral system may be the separation of powers, but in order to appease the larger states, the House has certain powers exclusive to it. Among the powers exclusive to the house are “the power to impeach federal officers, to select the President in the event of an indecisive Electoral College count, to conduct investigations, and to originate all revenue bills.” In addition, because all Representatives in the House are constitutionally required to be elected every two years the House is, and was intended to be, especially responsive to popular will. Unlike the original intent behind Senatorial selection by state legislatures, Representatives were not protected from political pressure by the populace, nor were they expected to be. Additionally, because Representatives are so responsive to the whims of their constituents, negotiation between Representatives for different states, or even districts is often difficult. This responsiveness essentially means that Representatives are less likely to compromise on issues that directly affect their constituents for fear of not being reelected.

B. The United States Senate

The second Congressional house created by Article I is the Senate. Section three of that Article provides for the electoral procedure of the Senate. Clause one states that the “Senate of
the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.” 48 When the Constitution was originally drafted, Senators were to be “chosen by the Legislature thereof.” 49 One reason the drafters provided that state legislatures would appoint Senators was because the purpose of the Senate was to offset the House, which was thought to be impetuous because Representatives were elected by popular vote. 50 James Madison observed during the convention that “[t]he use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.” 51 In Federalist Paper 62 Mr. Madison also noted:

“[a]nother advantage accruing from this ingredient in the constitution of the Senate is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the states.” 52

Essentially, not only was the Senate to be a check against usurpation of power by the “popular branch,” but also to provide the states themselves with representation in the federal legislative branch. 53 Additionally, the drafters thought that by allowing the State government to appoint their Senators rather than require selection by popular vote, the ties between the States and the newly formed Federal Government would be cemented. 54 Another consideration was the sheltering of the Senators from political pressure that appointment by the state provided. 55

49 Id.
51 See Dewhirst, supra note 24 at 44, bicameralism.
52 Id. (quoting The Federalist No. 62 (James Madison)).
53 See id.
54 Direct Election of Senators, United States Senate, http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm (last visited Nov. 6, 2011).
55 Id.
Because of the nature of their selection, Senators are considered representatives of the State rather than of the people at large.\(^{56}\)

Up until the mid-1850s, the state appointment of Senators worked well.\(^{57}\) The problems began when intra-state tensions started to rise.\(^{58}\) Growing tensions within the states, however, were just the beginning.\(^{59}\) Ultimately, the difficulties led to many vacant Senate seats.\(^{60}\) In fact, between 1891 and 1905, forty-five deadlocks in twenty states left seats open.\(^{61}\) Additionally, nine bribery cases were brought before the Senate between 1866 and 1906.\(^{62}\) After the civil war, the appointment process presented more and more problems.\(^{63}\) As an offer of solution, Congress passed some regulations regarding the electoral process within state legislatures to govern selection of Senators.\(^{64}\) Despite the attempt by Congress to ease the strain, as early as 1826 the citizens began to push for election of Senators by popular vote.\(^{65}\) The movement for change became so strong that by 1907 one state, Oregon, had already changed to direct election.\(^{66}\) Nebraska followed suit, and by 1912, twenty-nine states, of their own accord, selected Senators through nominees for their party’s primary or a general election.\(^{67}\) The concept continued to gain momentum until finally, in 1911, Senator Joseph Bristow proposed a constitutional amendment.\(^{68}\) The Senate passed the measure and then the House passed it in 1912.\(^{69}\) The

\(^{56}\) See id.
\(^{57}\) Direct Election of Senators, supra note 54.
\(^{58}\) Id.
\(^{59}\) Id.
\(^{60}\) Id.
\(^{61}\) Id.
\(^{62}\) Id.
\(^{63}\) Direct Election of Senators, supra note 54.
\(^{64}\) Id.
\(^{65}\) Id.
\(^{66}\) Id.
\(^{67}\) Id.
\(^{68}\) Id.
\(^{69}\) Direct Election of Senators, supra note 54.
States ratified the measure as the Seventeenth Amendment in 1913.\textsuperscript{70} Since that time, congressmembers for both houses have been elected by popular vote.

Finally, as noted above while discussing the House of Representatives, Article I section four grants the states the authority to dictate the “Times, Places and Manner of holding Elections for Senators and Representatives.”\textsuperscript{71} Other than the obvious public demand that Senators be selected by popular vote, which led to the Seventeenth Amendment, there have been no major changes to the electoral system used for Senators. Similar to the House, all states, except Georgia, use the First Past the Post voting system.\textsuperscript{72} Unlike the House of Representatives, because there is equal representation for all states, apportionment of districts has not been an issue. However, like the House, both the Supreme Court and Congress have the authority to effect such a change.\textsuperscript{73} The authority granted in Article I, § 4 to decide the “manner of holding elections” is subject to Congress’ ability to alter whatever regulations the states may choose.\textsuperscript{74}

C. Potential Vehicles for Change – Is a Constitutional Amendment Required?

As noted above, the United States Supreme Court has stepped in, under the guise of the Equal Protection Clause, to require certain changes to a State’s chosen electoral process.\textsuperscript{75} In that case, \textit{Reynolds v. Sims}, the Court noted that “one person's vote must be counted equally with those of all other voters in a State.”\textsuperscript{76} It is true that the Court in \textit{Reynolds} was faced with the discriminatory practice for apportionment of districts within a state for election to the state legislature, but the reasoning could apply to the electoral process for federal representatives.
itself. If one accepts this logic, then both systems could be seen as violative of the Equal Protection Clause of the Fourteenth Amendment, and under Reynolds, that could justify a shift to Proportional Representation.

Additionally, under Article I, § 4, Congress could pass legislation to “alter the Regulations,” that the states may individually adopt. Although Congress has not yet interfered to such a level with the ability of the states to choose their own electoral system, it is clearly within the power of the federal government to regulate the selection of federal congressional representatives. A constitutional Amendment, though it would achieve the same result, is not required if Congress exercises the authority it already has to “alter” the processes that the states currently use.

IV. The Federal Republic of Germany and its Two-House System

The current German Grundgesetz, or Basic Law, was adopted and amended by the unified Federal Republic of Germany on August 31, 1990. Originally, however, the Basic Law was drafted by the Parliamentary Council on May 23, 1949, and was not intended to be permanent. That 1949 Basic Law sought to include some of the successful aspects from the Weimar Constitution of 1919; namely, the drafters sought to disperse the power between the

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78 See e.g. Inman, supra note 4 at 1994-95; Ides, supra note 2 at 450; Graber, supra note 6.
79 See U.S. CONST. amend. XIV (no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.
82 GRUNDEGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (GRUNDEGESETZ), May 23, 1949, BGBI. I (Ger.).
83 Id.
federal government and the Länder, or German States.  

Though not explicitly based on the American system, both countries embodied their concern that one branch of government, or one particular person, would gain too much power by framing their constitutions in such a way as to prevent that likelihood.

In drafting the constitution, the framers of the German Basic law had two primary goals. The first, as previously mentioned, was to reestablish the system of proportional representation used during the Weimar Republic. As their second goal, the framers intended to construct a system of single-member districts, modeled after those in the United States. Direct representation by district is not the only similarity between the Basic Law and the United States Constitution. Both are premised on the protection of citizen’s rights by mandating a separation of power between three separate branches. Both the United States and the Federal Republic of Germany created three branches because “when legislative, executive, and judicial powers are divided, three distinct bodies must abuse their authority before the citizen’s rights can be infringed.”

Despite the similarities, there are differences in application of the separation of powers doctrine between Germany and the United States. Most notably, Germany has a parliamentary system rather than a presidential one. In other words, the “federal ministers serve at the pleasure of the legislature.” These differences, though the policies stem from the same doctrine, “reflect the varying crises that preceded adoption of a particular

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85 Id.  
86 Id.  
87 “A proportional representation system distributes legislative seats based on a party's percentage of the popular vote. For example, if a party wins 15 percent of the popular vote, it receives 15 percent of the seats in the Bundestag.”).  
88 Id.  
89 Id. at 2114-15.  
90 Id. at 2115.  
91 Id.
constitution.” 92 The United States chose “a strong and independent executive,” while the Federal Republic of Germany chose to “strengthen legislative prerogatives.” 93

Finally, the framers of the German Constitution believed that the combination of direct and proportional representation would “create an electoral system that would not fragment as the Weimar Republic had and would ensure greater accountability of representatives to their electoral districts.” 94 The result is a hybrid electoral system of personalized proportional representation. 95 As an overarching scheme, Article 20 of the German Basic Law, or constitution, declares that the “Federal Republic of Germany is a democratic and social federal state.” 96 It further declares that “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.” 97 Finally, “the legislature shall be bound by the constitutional order.” All of these passages reflect the same general ideals that the American Constitution embodies; the government is “of the people, for the people, by the people.” 98

A. The Bundesrat

Like the United States, the Germans have set up a two-house system. The Basic Law sets out the legislative branch in chapters three and four. 99 The Bundesrat, or upper house, is controlled by chapter four of the Basic Law. 100 This house allows the individual German

92 Currie, supra note 88 at 2177.
93 Id.
94 Electoral System of Germany, supra note 85.
95 Id.
96 Grundgesetz [Constitution], May 23, 1949.
97 Id.
98 Abraham Lincoln, U.S. President, Gettysburg Address, (Nov. 19, 1863). See also U.S. Const. Preamble (Note that the preamble purports that “We the People of the United States,” created the Constitution).
99 Grundgesetz.
100 Id.
states\textsuperscript{101} to participate in Federal legislation.\textsuperscript{102} Although, at first blush, the Bundesrat looks more like the Senate because its members are considered representatives of the state, there are some stark differences. First, representation within the Bundesrat is based upon the population of each German State, much like the American House of Representatives.\textsuperscript{103} Indeed, the Basic Law does not provide that the states have a particular number of “Representatives” or “Members,” as the U.S. Constitution does, but with a particular number of “votes.”\textsuperscript{104} Additionally, although allowed, even if a German State chooses to appoint an individual for each vote that it is allotted, all of the votes must be cast in a block.\textsuperscript{105}

The votes allotted to each State “can be approximated as 2.01 + the square root of the Land’s population in millions with the additional limit of a maximum of six votes.”\textsuperscript{106} This calculation is “consistent with something called the Penrose method based on game theory.”\textsuperscript{107} The Penrose method was proposed in 1946 as a theory of weighting the votes of delegates based on the square root of the population that they represent.\textsuperscript{108} It is based on the theory that the weighted votes would provide equal power to all the individual groups regardless of the size of

\textsuperscript{101} There are sixteen German States: Schleswig-Holstein, Hamburg (city-state), Bremen (city-state), Mecklenburg-Vorpommern, Berlin (city-state), Brandenburg, Niedersachsen, Sachsen-Anhalt, Nordrhein-Westfalen, Hessen, Thüringen, Sachsen, Rheinland-Pfalz, Saarland, Bayern, and Baden-Württemberg.

\textsuperscript{102} Article 50 [Functions]
The Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union.

Article 51 [Composition]
(1) The Bundesrat shall consist of members of the Land governments, which appoint and recall them. Other members of those governments may serve as alternates.
(2) Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.
(3) Each Land may appoint as many members as it has votes. The votes of each Land may be cast only as a unit and only by Members present or their alternates.

\textsuperscript{103} Grundgesetz, art. 51 (3).

\textsuperscript{104} Id.; see also U.S. Const. art. I, § 2.

\textsuperscript{105} Darlington, supra note 84.


\textsuperscript{108} Id.
their constituency. As a prerequisite for the proper functioning of this system, block voting must be instituted. As applied here, this means that the 16 states have between three and six delegates, for a total of 69 votes in the Bundesrat.

Second, representatives are state cabinet members selected by the states and are appointed or recalled by the state government. As such, unlike American Senators, appointees to the Bundesrat are neither elected by popular vote, run for any type of election, nor are answerable to the people in any fashion.

B. The Bundestag

The second house within the German Parliamentary system is the Bundestag. Elections for this house, which are governed by Chapter three, Article thirty-eight, are general elections in which those elected are considered representatives of the people. In this sense, that they are representatives of the people rather than the state, the members of the Bundestag are like the American Representatives in the House. These members, unlike those in the Bundesrat, are “elected in general, direct, free, equal, and secret elections,” and “not bound by orders or instructions, and responsible only to their conscience.” The passages mentioned above do not, however, accurately reflect the election process for members of the Bundestag. A reader of the Basic Law is left with the impression that members of the Bundestag are all directly elected by

109 Id.
110 See id.
112 Grundgesetz, art. 51.
113 Article 38 [Elections]
(1) Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.
(2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.
(3) Details shall be regulated by a federal law.
114 Id.
the populace; this is not true. Instead, every citizen that is eligible to vote casts two votes. The first vote is to elect a district representative, similar to the American system. Germany is divided into 328 electoral districts, each containing approximately 180,000 citizens. One half of the Bundestag members are directly elected from the districts. The second vote, however, is the more interesting vote. It is cast for a particular political party or party alliance and determines the proportion of the popular vote that each party receives. While “[t]he first ballot is designed to decrease the anonymity of a strict proportional representation system—thus the description ‘personalized’—. . . it is the second ballot that determines how many Bundestag seats each party will receive.” This method of election is known as “mixed member proportional representation (MMPR).”

After determining the percentage vote that a party received nationally, each party is assigned extra seats to insure the percentage of representation matches that of the popular vote. Those members that are directly elected— that win the election by a plurality in their district— are guaranteed a seat and called “direct mandates.” The remaining seats, approximately half, of the Bundestag constitute these additional seats that insure political proportionality. In reaching the correct proportion, the winners from the first vote are counted towards the number of seats that their party is entitled to in order to achieve the correct percentage of representation. Any party with greater than 5% of the popular vote is entitled to

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115 Darlington, supra note 84.
116 Id.
117 Electoral System of Germany, supra note 85.
118 Darlington, supra note 84.
119 Electoral System of Germany, supra note 85
120 Id.
121 Darlington, supra note 84.
122 Electoral System of Germany, supra note 85.
123 Id.; Darlington, supra note 84.
124 Id.
125 Id.
a proportional number of seats, less any direct mandate winners, to ensure the correct proportion of representation is achieved; similarly, any party that does not achieve that threshold 5% requirement of the second vote, is entitled to no seats other than any direct mandate winners.\textsuperscript{126} In order to achieve the correct percentage, while still guaranteeing seats to those members who directly won in their district, there are sometimes extra seats called “overhang seats.”\textsuperscript{127} This happens when a particular party wins more direct mandates in the first vote than it won the percentage of the second vote.\textsuperscript{128} For example, assume party A wins three of the ten seats available in the first vote, and party B wins the remaining seven. During the second vote, however, party A only receives 10\% of the popular vote. That means that Party A is guaranteed 30\% of the seats because of the first vote, but only proportionally entitled to 10\% of the total seats. To make up for the difference, Party B would be granted additional seats, twenty in this case, until it has 90\% of the total available, equaling its proportional share of the popular vote.\textsuperscript{129} These additional seats are the “overhang” seats.

This calculation leads to fluctuations in the number of members within the Bundestag after every election.\textsuperscript{130} One of the more memorable, and recent, times this has happened was in 1994.\textsuperscript{131} Then, the Christian Democratic Union (CDU), one of the largest political groups in Germany, was entitled to twelve of the sixteen overhang seats.\textsuperscript{132} These additional seats resulted in the narrow victory of Helmut Kohl for the seat of chancellor, which the Bundestag elects.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{126} Id.  
\item \textsuperscript{127} Darlington, supra note 84.  
\item \textsuperscript{128} Id.  
\item \textsuperscript{129} Ten seats were decided by direct mandate, plus twenty additional seats, making the total seats thirty. The three seats won by party A are 10\% of the new total of thirty.  
\item \textsuperscript{130} Id.  
\item \textsuperscript{131} Electoral System of Germany, supra note 85.  
\item \textsuperscript{132} Id.  
\item \textsuperscript{133} Id.  
\end{itemize}
Kohl won by only ten votes, meaning he would likely not have prevailed were it not for the overhang seats.\textsuperscript{134}

The first vote was intended to create a close relationship between the citizens and their directly-elected representative, similar to the relationship that American citizens share with their Representatives in the House.\textsuperscript{135} In reality, this ideal goal has not come to fruition.\textsuperscript{136} Generally, both the first and second vote are based on party preferences and not because the citizens have an interest in a particular person.\textsuperscript{137} On the other hand, there is some bond between those directly elected by this first vote and their constituents that does not normally exist in countries that use the pure proportional representation electoral system, which suggests that some aspect of this goal has been achieved.\textsuperscript{138}

The real benefit of Germany’s two-vote system is more directly derived from the second vote.\textsuperscript{139} Because eligible voters cast their ballots twice, the votes can be split between two different parties.\textsuperscript{140} Normally, small political parties are not able to win a direct election within a single-member district, and so would go without any representation of their political ideologies within the legislative branch.\textsuperscript{141} In Germany, the second vote, which is tallied nationally to determine a political party’s proportional representation in the Bundestag, lets these minor parties gain at least some representation federally.\textsuperscript{142} As long as the parties receive 5% of the second vote nationally, or a win a direct election seat on the first vote, they are ensured to be

\textsuperscript{134} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
represented.\textsuperscript{143} This leads, theoretically, to a legislative body whose ideology reflects that of the German citizens better than any other electoral system.\textsuperscript{144} One surprising, yet beneficial, outcome to the two-vote system is that in the past five decades, no single party has maintained a majority on its own within the Bundestag.\textsuperscript{145} There are, however, coalitions that have gained a majority vote.\textsuperscript{146} Coalition governments are considered stable and legitimate by the constituents, leading to less political strain.\textsuperscript{147}

\textbf{C. The Future of Germany’s Electoral Process}

Although Germany’s electoral process appears to be an improvement over the current process utilized in the United States, it has not existed for very long. Having been established barely over sixty years ago, the German system has not yet been tested to the same extent as the American system. The two-vote system will probably not fail because it provides Germany with ideological representation in the legislative branch that is proportional to the beliefs of its citizens. However, it will be interesting to see whether the state appointment of representatives to the Bundesrat will remain, or whether it will suffer the same fate as our abandoned state-appointment for Senators and eventually become a direct-election system as well.

\textbf{V. The United Kingdom and the Two Houses of Parliament}

The United Kingdom does not have a written constitution in the same sense that the United States and Germany do. Instead, it has developed its processes over centuries and relies on common law, statute, and convention.\textsuperscript{148} Although there is not one single document that encompasses the legislative structure of the United Kingdom, there are several important

\begin{itemize}
\item \textsuperscript{143} \textit{Id.}\n\item \textsuperscript{144} \textit{See id.}\n\item \textsuperscript{145} Krennerich, \textit{supra} note 135.\n\item \textsuperscript{146} \textit{Id.}\n\item \textsuperscript{147} \textit{Id.} (noting that because the coalition wins the majority, as opposed to a single political party, there are built-in incentives to work together, and this outcome is preferred by most Germans).\n\item \textsuperscript{148} \textit{UK Government}, UK in the USA, \url{http://ukinusa.fco.gov.uk/en/about-us/faqs/uk-government/written-constitution}.\n\end{itemize}
constitutional documents.\textsuperscript{149} “These include the Magna Carta (1215), which protects the rights of the community against the Crown; the Bill of Rights (1689), which extended the powers of Parliament; and the Reform Act (1832), which reformed the system of parliamentary representation.”\textsuperscript{150}

The first known use of the term “parliament” was in 1236.\textsuperscript{151} It was used to describe the meetings that the English Monarch had with his nobles and prelates.\textsuperscript{152} Originally, parliament was an occurrence and not a legislative body.\textsuperscript{153} The term referred to the meetings that were called on a whim by the king and included only those he chose to invite.\textsuperscript{154} After a war between the barons, who were demanding regular meetings of a parliament, and the king, who refused, Simon de Montfort called the first parliament to meet and discuss peace terms in 1265.\textsuperscript{155} This first meeting is considered a precursor to the modern institution of parliament.\textsuperscript{156} The meeting included nobles and representatives from each county.\textsuperscript{157} Over time, the two houses of modern parliament grew from these two groups.\textsuperscript{158}

\textbf{A. The House of Commons}

The United Kingdom Parliament, like both the American and German systems, is a combination of two houses: the House of Lords and the House of Commons.\textsuperscript{159} Members of the House of Lords are often simply called Lords, and members of the House of Commons are often
referred to as Members of Parliament or MPs. For years after Edward I began having regular meetings with the nobles, calling local representatives as well was sporadic. Since 1327, however, parliament has never met without inclusion of the commons. Since that time, the House of Commons has continued to grow in power. In fact, after a dispute with the king, the Commons were granted the right to initiate all grants of money, which it still exercises today.

Like the so called “lower house” in both the United States and Germany, the House of Commons was intended to be responsive to the public, and thus is elected in its entirety by popular vote. Every five years the parliament is dissolved and every member for the House of Commons has to be re-elected. There are 650 constituencies, each with a single representative, in the United Kingdom, and thus 650 seats in the House of Commons. To fill those seats, the United Kingdom uses the First Past the Post system, or simple majority, for parliamentary elections. The First Past the Post system, which was used until very recently in the House of Commons, tended to yield large majorities that are disproportionate to the proportion of votes cast. As such, electoral reform is a popular topic in the United

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162 Id.
167 Feikert-Ahalt, supra note 166.
168 Id.
In fact, forty-four percent of British citizens are in favor of Proportional Representation. Notably, in 2010, the popular vote resulted in a “hung parliament,” which means that no political party had an outright majority. Those election results left the Conservative Party with a plurality of 307 seats, the Labour Party received 258, and the Liberal Democrats received 57. The Conservatives and Democrats formed a coalition, much like those that occur in Germany, which included some legislative goals. Most notably, the coalition vowed to “bring forward a Referendum Bill on electoral reform, which includes provision for the introduction of the Alternative Vote . . . as well as for the creation of fewer and more equal sized parliamentary constituencies.”

Interestingly, even though a high percentage of British citizens favor Proportional Representation, as of February 14, 2011, both the House of Commons and the House of Lords passed the Parliamentary Voting Systems and Constituencies Act to require use of a system called the “alternative vote” for elections in the Commons. One possible reason for suggesting this system as a means of reform, as opposed to proportional representation, is that the alternative vote was already used within the Commons for selection of chairmen for select committees. Alternative voting is also called an instant-runoff system. When using this

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170 Dakolias, supra note 165.
171 Id. (citing Catherine Bromley, John Curtice, & Ben Seyd, Is Britain Facing a Crisis of Democracy? 11 (Centre for Research into Elections and Social Trends 2004).
173 Id.
175 Id. at 1229-30.
system, voters rank all of the candidates that they wish to express a preference regarding.\textsuperscript{178} Basically, if there are ten candidates, a voter can rank them all one through ten.\textsuperscript{179} The voter can also choose to rank only nine, or eight; however many candidates that the voter has an opinion on, the voter would rank.\textsuperscript{180} Any candidate that receives more than half of the first preference votes – is ranked number one by more than half of the voter – is elected outright.\textsuperscript{181} If no single candidate receives more than half of that preference, the system gets very complicated.\textsuperscript{182} Probably because of the complicated nature of the system, in a United Kingdom-wide referendum vote, the public definitively voted against changing from First Past the Post to Alternative Vote.\textsuperscript{183} The defeat of the Alternative Vote, however, has not ended the push for abandoning the First Past the Post system.\textsuperscript{184}

\textbf{B. The House of Lords}

The upper house in the United Kingdom is the House of Lords, which contains approximately 830 members.\textsuperscript{185} Like the upper house in the United States and Germany, the House of Lords is intended to balance the lower house, which is responsive to the public.\textsuperscript{186} Unlike Members of the House of Commons, Lords, in general, are not elected.\textsuperscript{187} The majority are appointed by the queen after recommendation by either the Prime Minister or the newly

\begin{itemize}
\item \textsuperscript{178} Id.
\item \textsuperscript{179} See id.
\item \textsuperscript{180} See id.
\item \textsuperscript{181} Alternative Vote, supra note 177.
\item \textsuperscript{182} Id. The candidate who lost (the one with least first preferences) is eliminated and their votes are redistributed according to the second (or next available) preference marked on the ballot paper. This process continues until one candidate has half of the votes and is elected.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Alternative Vote, supra note 177.
\item \textsuperscript{185} Members of the House of Lords, www.parliament.uk, \url{http://www.parliament.uk/about/mps-and-lords/about-lords/} (last visited Nov. 6, 2011).
\item \textsuperscript{186} Dakolias, supra note 165.
\item \textsuperscript{187} Different types of Lords, www.parliament.uk, \url{http://www.parliament.uk/about/mps-and-lords/about-lords/lords-types/} (last visited Nov. 6, 2011).
\end{itemize}
created House of Lords Commission. Traditionally, membership in the House of Lords was an inherited position that belonged only to titled peers of the realm. Recently, the inheritability of the position has been removed. The House of Lords Act of 1999, passed after heated debate, was intended to remove all hereditary peers. In order to affect passage, however, a compromise had to be struck. Certain hereditary members were allowed to remain on the based on the argument that no set guidelines were set to discern the composition of the house after removal of the hereditary peers. Now, new members of that house are appointed to their seats in the House of Lords.

After passage of this bill, there are three types of peers: Life Peers, bishops, and elected hereditary peers. Life Peers, as the name suggests, are appointed for their lifetime. Currently, the House of Lords has 575 life peers. There are also 26 Church of England archbishop and bishop seats in the house, which did not change because of the 1999 bill. Finally, there are ninety-two remaining hereditary peers. There are also twenty-eight law lords, both active and retired, that are listed among the members of the House of Lords, but not considered “peers.” In total, the bill removed 600 hereditary peers from their traditional seats in the House of Lords.

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188 Id.
189 See Lesley Dingle & Bradley Miller, A Summary of Recent Constitutional Reform in the United Kingdom, 33 Int'l J. Legal Info. 71, 80-82 (2005).
190 Id. Lesley Dingle & Bradley Miller, supra note 189.
191 Id.
192 Id.
193 Id.
194 Different types of Lords, supra note 187.
195 Different types of Lords, supra note 187.
196 Id.
197 Id. Lesley Dingle & Bradley Miller, supra note 189.
198 Different types of Lords, supra note 187.
199 Id.; Different types of Lords, supra note 187.
200 Lesley Dingle & Bradley Miller, supra note 189 (Law lords make up the Appellate Committee of the House of Lords).
201 Lesley Dingle & Bradley Miller, supra note 189.
In order to ease the change and reorganize the house, the Royal Commission was established.\textsuperscript{202} The Commission made several recommendations regarding the number of seats and election of members.\textsuperscript{203} While many of the recommendations were accepted, the government favored a larger house than was originally suggested.\textsuperscript{204} Additionally, the government wanted removal of the remaining ninety-two hereditary lords.\textsuperscript{205} Between recommendations by the Commission, the government’s subsequent rejection, and the outcry over the reforms, the House of Lords is still in the process of reform.\textsuperscript{206}

C. Electoral Reform in the Coming Years

It is apparent that the United Kingdom is on the verge of, and in fact is in the midst of, major electoral reform. The questions that remain to be seen are whether the United Kingdom will eventually morph into a society that elects both houses of Parliament, and if so, will it eventually turn to Proportional Representation. As discussed above, there is a high percentage of British citizens that are generally in favor of Proportional Representation and the public has already voted against the alternative vote.\textsuperscript{207}

VI. The United States Should Consider Proportional Representation Because it Has the Potential to Cure Many Difficulties Within Our Current System

Although it is theoretically possible for either the United States Congress or the United States Supreme Court to adopt a Proportional Representation electoral system, for the change to be truly accepted, Congress itself must reform the system.\textsuperscript{208} The consequences, in practice, of the system currently in use for election of federal Representatives and Senators leaves much to

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Dakolias, supra note 165; Alternative Vote, supra note 167.
\item See U.S. CONST. art. I, § 4.
\end{enumerate}
\end{footnotesize}
be desired.\textsuperscript{209} Of primary concern is the underrepresentation of minorities, both racial and political, in Congress.\textsuperscript{210} This unfortunate result arises directly from the difficulty of gaining the majority of voters in a district where only a single person can win.\textsuperscript{211} Adding to the difficulty is the dominance of the American two-party political scene.\textsuperscript{212} Voters are left with a hypothetical choice between two political ideologies.\textsuperscript{213} The choice is hypothetical, because generally the choice is immaterial.\textsuperscript{214} In most cases, the district is dominated by one political party meaning that any vote for the minority party is pointless; thus the problem of wasted votes discussed above in section II A.\textsuperscript{215} While new parties have formed in the United States at a comparable rate to those in European countries, their ability to win elections, and therefore representation in Congress, has been severely hampered by the current electoral system.\textsuperscript{216}

If a mixed-member proportional representation system, like the two-vote system used in Germany, were adopted in the United States, these smaller political parties and minority groups would have a chance at making their views apparent in Congress.\textsuperscript{217} The increase in healthy debate, which includes viewpoints from currently under and unrepresented groups, is alone enough to consider a proportional representation electoral system.\textsuperscript{218} Some may argue that adding more political parties into the mix will exacerbate the problems with deadlock already

\textsuperscript{210} Id.
\textsuperscript{211} See id.
\textsuperscript{212} See id.
\textsuperscript{213} Richie, \textit{supra} at note 209.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} See id.
\textsuperscript{218} Richie, \textit{supra} at note 209.
faced within Congress, but such an argument disregards the success that the German system has achieved.\textsuperscript{219}

Ultimately, the strongest point in favor of Proportional Representation lies in the ability of voters to be more accurately represented in Congress by representatives that reflect their ideological standards.\textsuperscript{220} Mixed-member Proportional Representation, as the Germans have noted, not only allows for more accurate representation, but lends an air of legitimacy to the electoral process itself.\textsuperscript{221} Americans could benefit from such an appearance of legitimacy and the increase in ideologically diverse discussion that accompanies it, and thus, should consider adopting the two-vote Proportional Representation system utilized in Germany.

\textsuperscript{219}Id.
\textsuperscript{220}Id.
\textsuperscript{221}Krennerich, \textit{supra} note 135.
I certify that the enclosed paper was written by me, with no outside help for either research or writing, and contains 6,928 words.

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