ONE PERSON, ONE VOTE, SEVERAL ELECTIONS?: INSTANT RUNOFF VOTING AND THE CONSTITUTION

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On March 5, 2002, voters in San Francisco approved a referendum that requires the city to adopt an instant runoff voting (IRV) system for city elections.[1] The instant runoff system is designed to better ensure that the winning candidate has the support of a majority—not just a plurality—of the voters. Various forms of instant runoff (or preferential voting) systems are currently used to elect the mayor of London, the President of Ireland, and the entire national legislature of Australia.[2] Many states have considered legislation that would implement some form of instant runoff voting on at least a limited basis.[3]

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1. *As Easy as 1, 2, 3? San Franciscans Will Rank Candidates for 'Instant Runoffs,'* N.Y. TIMES, Mar. 19, 2002, at A19.

2. *Id. See also* Joseph H. Brown, *An Instant Way to Make Your Vote Count,* TAMPA TRIBUNE, Mar. 23, 2003, at 6 (explaining instant runoff voting and the potential benefits to Florida), *available at* 2003 WL 4587295; *Rethinking Runoff Elections and a Possible New Alternative,* TAMPA TRIBUNE, Sept. 27, 2002, at 14 [hereinafter *Rethinking Runoff Elections*] (weighing the advantages and disadvantages of runoff elections and instant runoff voting), *available at* 2002 WL 26174481; *Understanding the Instant Runoff,* ST. PETERSBURG TIMES, Jun. 8, 2003, at 2D (suggesting that Florida adopt instant runoff voting), *available at* 2003 WL 56452461; Akhil Reed Amar & Vikram David Amar, *The Fatal Flaw in France's – and America's – Voting System, and How an "Instant Runoff" System Might Remedy It,* FindLaw's Writ *at* http://writ.news.findlaw.com/amar/20020503.html (May 3, 2002) (speculating on how instant runoff voting might have affected presidential elections in France and the United States).

3. The following state legislatures have considered bills concerning instant runoff voting in 2003. The full text of each bill may be found on their respective state legislature websites: H.B. 2485, 84th Gen. Assem., Reg. Sess. (Ark. 2003); A.B. 1039, 2003–2004 Gen. Assem., Reg. Sess. (Cal. 2003); S.B. 1544, 2003 Leg., 2003 Sess. (Fla. 2003); H.B. 143, 2003 Leg., 2003 Sess. (Haw. 2003); S.B. 1230, 2003 Leg., 2003 Sess. (Haw. 2003); H.B 677, 2003 Leg., 2003 Sess. (Haw. 2003); S.B. 1045, 2003 Leg., 2003 Sess. (Haw. 2003); H.B. 395, 93rd Gen. Assem., Reg. Sess. (Ill. 2003); H.B. 3301, 93rd Gen. Assem., Reg. Sess. (Ill. 2003); L.D. 212, 2003 Leg., 121st Sess. (Me. 2003); H.B. 2784, 2003 Leg., 183rd Sess. (Mass. 2003); H.B. 2785, 2003 Leg., 183rd Sess. (Mass. 2003); H.B. 2952, 2003 Leg., 183rd Sess. (Mass. 2003); H.F. 66, 2003–2004 Leg., Reg. Sess. (Minn. 2003); S.F. 158, 2003–2004 Leg., Reg. Sess. (Minn. 2003); S.F. 629, 2003–2004 Leg., Reg. Sess. (Minn. 2003); A. 3418, 2002–2003 Leg., Reg. Sess. (N.J. 2003); A. 4481, 2003 Assem., Reg. Sess. (N.Y. 2003); A. 4482, 2003 Assem., Reg. Sess. (N.Y. 2003); S.B. 135, 78th Leg., Reg. Sess. (Tex. 2003); H.B. 1362, 78th Leg., Reg. Sess. (Tex. 2003); H. 82 (2003 Vt. Bien. Sess.); S.22, (2003 Vt. Bien. Sess.); H.B. 2739, 2003 Gen. Assem., Reg. Sess. (Va. 2003); S.B. 872, 2003 Gen. Assem., Reg. Sess. (Va. 2003); H.B.1390, 2003 Leg., Reg. Sess. (Wash. 2003); H.B. 1925, 2003 Leg., Reg. Sess. (Wash. 2003); S.B. 5444, 2003 Leg., Reg. Sess. (Wash. 2003); S.B. 5556, 2003 Leg., Reg. Sess. (Wash. 2003).

Proposals to alter traditional American voting methods are usually a source of controversy.[4] One of the central issues surrounding many controversial reforms, including election reforms, is whether they are constitutional. Because instant runoff voting—sometimes referred to as preferential voting—has rarely been used throughout American history, its constitutionality remains a novel question that very few courts have approached.[5] This article examines the constitutionality of instant runoff voting.

I. INTRODUCING IRV

Under an instant runoff voting system, a voter may designate a second (or third, or fourth, etc.) preferred candidate in addition to their favorite candidate for a given office. If, after the first count, no candidate receives a majority (50% plus one vote) of the "first choice" votes, the instant runoff(s) is triggered. The last place candidate is eliminated and that candidate's votes are allocated among the remaining candidates based on the voters' listed preferences. The votes are then counted again (hence the "runoff") and if there is still no candidate with a majority of the votes, the process is continued by another round of eliminating another last place candidate and reallocating the candidate's votes.[6]

This process can be described as having a second distinct—but not independent—election. The same ballots are used to aggregate the voters' preferences, but now one less candidate is "running." *All* of the ballots are counted again in each subsequent round, and the votes are allocated among the remaining candidates according to the voters' preferences. Thirty years ago this process could hardly be called "instant," but modern computerized voting technology is easily able to calculate the successive tallies and declare a winner in mere seconds.[7]

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4. *See infra* Part II.B.2.

5. *See, e.g.*, People *ex rel.* Devine v. Elkus, 211 P. 34, 35, 39 (Cal. Ct. App. 1922) (addressing the constitutionality of proportional voting systems); Stephenson v. Ann Arbor Bd. of Canvassers, No. 75-10166 AW (Mich. Cir. Ct. 1975), *available at* http://www.fairvote.org/library/statutes/legal/irv.htm (last visited Dec. 3, 2003); Brown v. Smallwood, 153 N.W. 953, 955–57 (Minn. 1915); Johnson v. City of New York, 9 N.E.2d 30, 31–32 (N.Y. 1937); Reutener v. City of Cleveland, 141 N.E. 27, 29 (Ohio 1923).

6. *Rethinking Runoff Elections*, *supra* note 2.

7. Although computer technology is very fast, it is not error proof. Designers of computerized election systems should be advised to include printed ballots that would allow a hand recount to be conducted if there is a significant computer system failure. Printed ballots would also help reduce voter error. *See generally* Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 631, 635–40 (2002) (discussing the advantages and disadvantages of different types of voting technology). Schwartz writes: "[t]he critical technological advantage some voters received over others

This instant calculation would result in the winner having the registered support (albeit to varying degrees) of a majority of voters. Under the typical plurality system candidates often win with less than 50% of the vote—a situation where the majority of voters expressly rejected the winner. For instance, in 1998 Jesse Ventura was elected Governor of Minnesota with 37% of the vote.[8] Indeed, he got the most votes, but the majority (63%) voted against him.[9]

The instant runoff voting system's series of elections nearly eliminates this defect inherent in the typical plurality system.[10] A sample election is useful to explain the counting procedure. I will describe this hypothetical instant runoff election in prose form in addition to illustrating it in the table below.

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was greater feedback about whether or not a ballot would be read correctly by a vote-counting machine." *Id.* at 631. This would allow the voter the opportunity to find and correct voting errors. *Id.*

8. John H. Cushman Jr., et al, *The 1998 Elections: State by State—Midwest; Minnesota*, N.Y. TIMES, Nov. 4, 1998, at B8.

9. *Id.*

10. It is not accurate to say that IRV will *always* produce a winner having the support of the majority of persons who voted on Election Day. Under certain infrequent conditions, an IRV election can produce a winner that technically does not have the support of a majority of all votes cast. Under IRV, the majority threshold that produced the winner is 50% plus one of the total "continuing" votes in the last round. Ballots that did not list any candidates in the final round ("exhausted ballots") are not part of the total used to calculate the final round's majority. Therefore, the majority required in the final runoff round is less than the majority of total votes cast on Election Day, making it possible for a candidate to win the election by having a final round majority, yet still short of a total majority. However, this will only occur under certain relatively rare conditions. Generally there are two conditions: a very close election and a significant number of exhausted ballots—ballots that list none of the leading candidates who reach the final round. In contrast, under a plurality system, to produce a nonmajority winner, the conditions are a close election and more than two candidates—a very common occurrence.

Election Round	Candidate A	Candidate B	Candidate C	Candidate D	Candidate E	Majority Threshold	Total Votes
1	50 (5.0%)	330 (33.0%)	150 (15.0%)	370 (37.0%)	100 (10.0%)	501 (50.1%)	1000 (100%)
transfer	*- 50*	*+ 25*	*+ 20*				*- 5*
2	*defeated*	355 (35.7%)	170 (17.1%)	370 (37.2%)	100 (10.1%)	498 (50.1%)	995 (100%)
transfer	*defeated*	*+ 9*	*+ 11*	*+ 80*	*- 100*		
3	*defeated*	364 (36.6%)	181 (18.2%)	450 (45.2%)	*defeated*	498 (50.1%)	995 (100%)
transfer	*defeated*	*+ 141*	*-181*	*+ 40*	*defeated*		
4	*defeated*	505 (50.8%)	*defeated*	490 (49.2%)	*defeated*	498 (50.1%)	995 (100%)
Result		Winner					

In this hypothetical election there are five candidates named A, B, C, D, and E. On Election Day, 1,000 citizens showed up to the polls and voted. The polls closed and the counting began. After the initial count, A received 50 votes, B received 330 votes, C received 150 votes, D received 370 votes, and E received 100 votes. At this point, no candidate has the 501 votes to constitute a majority and end the election.[11]

Since no one got a majority of the votes, the last place candidate, A, is eliminated and his 50 votes will be allocated according to the voters' preferences among the remaining candidates. On those 50 ballots, twenty voters listed C as their second choice, twenty-five listed B, and five did not list a second choice.

In this first runoff round there are 995 total votes among the four eligible candidates, so 498 votes are needed for a candidate to earn a majority and end the election. After allocating the votes listed for A, B has 355 votes, C has 170 votes, D has 370 votes, and E has 100 votes.[12]

After the first runoff round, no one has the majority. Therefore, the last place candidate, E, is eliminated and her 100 votes will be allocated

11. Initial count: A=50 (5.0%); B=330 (33.0%); C=150 (15.0%); D=370 (37.0%); E=100 (10.0%).

12. The first "runoff round" count: B=355 (35.7%); C=170 (17.1%); D=370 (37.2%); E=100 (10.1%); with 995 (100%) continuing votes.

according to the voters' preferences. On those 100 ballots, 80 voters listed D as their second choice, ten listed C, and nine listed B. One listed A as a second choice, but since A has been defeated, the vote counts for the voter's third choice, C.

In the second runoff round, there are 995 total votes among the three eligible candidates, so that 498 are needed for a candidate to earn a majority and end the election. After allocating the votes listed in the prior round for E, B has 364 votes, C has 181 votes, and D has 450 votes.[13]

After the second runoff round, no one has the majority. Therefore, the last place candidate, C, is eliminated and her 181 votes will be allocated according to the voters' preferences. Of the 181 ballots counted for C in the prior round, 141 listed B as their next preference and forty listed D as their next preference.[14]

In the third runoff round, there are 995 total votes among the three eligible candidates, so that 498 are needed for a candidate to earn a majority and end the election. After allocating the votes listed in the prior round for C, B has 505 votes and D has 490 votes.[15] Because B has passed the majority threshold of 498 votes, she is the winner.

II. VOTING SYSTEMS AND THE EQUAL PROTECTION CLAUSE

The Constitution permits states to establish their own systems for elections.[16] Given this deference, the most likely challenge to the constitutionality of an instant runoff voting system will be brought under the Equal Protection Clause.

The Fourteenth Amendment declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[17] An equal protection analysis is applied when a state action discriminates among

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13. The second "runoff round" count: B=364 (36.6%); C=181 (18.2%); D=450 (45.2%); with 995 (100%) continuing votes.

14. I use the term "next preference" because some ballots were previously transferred to C from other candidates who were eliminated; therefore, there would be a mix of ballots in the pile for C indicating B or D as a second, third, and fourth preference. "Next" is used hereafter as shorthand to avoid having to define each of the six categories of C votes.

15. After the third runoff round: B=505 (50.8%); D=490 (49.2%); with 995 (100%) continuing votes.

16. The Constitution provides that States may establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1. Additionally, the Supreme Court has recognized that states retain the power to regulate their own elections. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (recognizing the power of the states to define a political community permitted to participate in state government); Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217 (1986) (acknowledging state "control over the election process for state offices").

17. U.S. CONST. amend. XIV, § 1.

classes of citizens (treating some differently than others). When a law makes such distinctions between citizens based on a suspect classification (i.e., race) or impairs a fundamental right, courts will usually apply a strict scrutiny standard of review and will almost always find the law unconstitutional.[18] To determine whether instant runoff voting is constitutional we must consider whether it treats some voters differently than others under either a suspect classification or fundamental right analysis.

A. Does IRV Discriminate Against a Suspect Class?

One major branch of equal protection doctrine concerns classification of people based on certain characteristics. The Court has recognized certain categories as suspect or quasi-suspect classifications that require a heightened justification—"strict scrutiny" review applying to the former and "heightened" or "intermediate scrutiny" review applying to the latter—in order to be held constitutional. Non-suspect categories are subjected to rational basis review and will usually be upheld.[19] Currently recognized suspect classifications include race and national origin.[20] Sex is the more common classification deemed "quasi-suspect."[21] When a state action, regardless of its subject matter, treats people differently based on the categories of race, national origin, or sex it will usually be found unconstitutional under the Equal Protection Clause.

The presence of a suspect or quasi-suspect classification can be proved by: 1) a law that creates classifications (discriminates) on its face;[22] 2) a facially-neutral law that is administered in a discriminatory manner;[23] or 3)

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18. Washington v. Davis, 426 U.S. 229, 242 (1967).

19. *See* McDonald v. Bd. of Election, 394 U.S. 802, 809 (1969) ("The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal.").

20. Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

21. *See* Reed v. Reed, 404 U.S. 71, 75–76 (1971) (holding that the Equal Protection Clause demands that classifications based on sex must bear a "fair and substantial relationship to the object of the legislation"); United States v. Virginia, 518 U.S. 515, 534 (1996) (applying intermediate scrutiny to strike down the exclusion of women from a military institution). Legitimacy—whether the person is born to married parents—is also recognized as a quasi-suspect classification. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (identifying intermediate scrutiny as the standard of review in between rational basis and strict scrutiny pertaining to discriminatory classifications based on the legitimacy of children).

22. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (holding unconstitutional a West Virginia statute that precluded African Americans from serving on juries).

23. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (invalidating a facially-neutral law as applied because the government agency granted exceptions only to non-Chinese persons).

a facially-neutral law that was proven to be enacted for a discriminatory purpose.[24]

A court should first examine the statute creating the instant runoff voting system to determine whether it explicitly classifies voters.[25] An instant runoff system probably would not classify voters on its face. For example, consider San Francisco's system enacted in 2002:

> The Mayor, Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, Public Defender, and members of the Board of Supervisors shall be elected using a ranked-choice, or "instant runoff," ballot. The ballot shall allow voters to rank a number of choices in order of preference equal to the total number of candidates for each office; . . . .[26]

The instant runoff provision then describes the ballot counting process.[27] The sorting process is based on the voter's choices marked on the ballot.

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24. *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264–65 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

25. Because states are responsible for administering elections, an election obviously meets the state action required in order to trigger the equal protection guarantee. *See* U.S. Const. art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

26. San Francisco, Cal., City Charter, art. XIII, Elections, §13.102(b) (effective July 1, 1996), *available at* http://www.amlegal.com/sfcharter_nxt/gateway.dll?f=templates&fn=default.htm&vid=alp:sf_charter (last visited Feb. 2, 2004).

27. In addition to describing the process of converting to this new system the San Francisco City Charter describes the counting process in §13.102:

> (c) If a candidate receives a majority of the first choices, that candidate shall be declared elected. If no candidate receives a majority, the candidate who received the fewest first choices shall be eliminated and each vote cast for that candidate shall be transferred to the next ranked candidate on that voter's ballot. If, after this transfer of votes, any candidate has a majority of the votes from the continuing ballots, that candidate shall be declared elected.
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> (d) If no candidate receives a majority of votes from the continuing ballots after a candidate has been eliminated and his or her votes have been transferred to the next-ranked candidate, the continuing candidate with the fewest votes from the continuing ballots shall be eliminated. All votes cast for that candidate shall be transferred to the next-ranked continuing candidate on each voter's ballot. This process of eliminating candidates and transferring their votes to the next-ranked continuing candidates shall be repeated until a candidate receives a majority of the votes from the continuing ballots.
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> (e) If the total number of votes of the two or more candidates credited with the lowest number of votes is less than the number of votes credited to the candidate with the next highest number of votes, those candidates with the lowest number of votes shall be eliminated simultaneously and their votes transferred to

Each voter has equal opportunity to register the preferences that constitute his or her vote and is in no way segregated on the basis of a suspect classification. The San Francisco City Charter, on its face, does not create suspect or quasi-suspect classifications.

The next question is whether the instant runoff system is administered by the state in a way that discriminates against a suspect class. The seminal case on this issue is *Yick Wo v. Hopkins*.[28] There, the law in question was an ordinance prohibiting the operation of a laundry in a wooden building without a permit from the board of supervisors.[29] The board then used its discretion under this law to deny permits to all Chinese applicants.[30] Although the ordinance was facially neutral, the Court found it an unconstitutional violation of equal protection:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[31]

State actors exercise discretion in managing the voting system in two main ways: verifying voter eligibility (i.e., identity & registration verification) and counting ballots.[32] Instant runoff voting systems do not regulate the verification of voter eligibility—they are concerned with registering and tabulating voters' preferences.

This inquiry into invidious state classification does not seem to be applicable to voting system administration. In counting the votes, the state does not have an opportunity to discriminate based on a suspect classification. The traditional voting method and IRV systems use a secret, anonymous ballot. An election official counting the ballot will not know the race, gender, etc. of the voter who cast the ballot. Because of this

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> the next-ranked continuing candidate on each ballot in a single counting operation.
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> (f) A tie between two or more candidates shall be resolved in accordance with State law.

Id.

28. *Yick Wo*, 118 U.S. at 373–74.

29. *Id.* at 357.

30. *Id.* at 359, 361.

31. *Id.* at 373–74.

32. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665–66 (1966); Ferrell v. Hicken, 147 N.W. 815, 816–17 (Minn. 1914).

anonymity, it is impossible to violate equal protection through the discriminatory application of the facially neutral vote counting procedure.

A facially neutral law can also be found to violate the Equal Protection Clause by discriminating against a suspect class if the court finds that the law, though facially-neutral, was adopted for a discriminatory purpose. The Court explained that "determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"[33] Frequently, the asserted circumstances indicating discriminatory intent are that the law operated with discriminatory effects on a suspect class.[34]

It is unclear how one can sufficiently prove that a system of instant runoff voting creates a discriminatory effect. Some have already argued that a system of instant runoff voting is unfamiliar and confusing.[35] Thus, one might contend that a disproportionate number of the "confused" voters would be racial minorities. Under this logic, it is foreseeable that someone may assert an equal protection claim based on this disproportionate effect. The crux of this legal theory would be that the state adopted the facially neutral instant runoff voting system for the purpose of disenfranchising minority voters.

However, this claim will likely fail because courts continue to require more than disparate effects alone to prove discriminatory intent. "'Discriminatory purpose,' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[36] Discriminatory purpose is inferred not from the disparate impact alone, but from the totality of the circumstances.[37]

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33. Rogers v. Lodge, 458 U.S. 613, 618 (1982) (quoting *Arlington Heights*, 429 U.S. at 266).

34. *See* Washington v. Davis, 426 U.S. 229, 238–42 (1967) (maintaining that discriminatory effect alone is not sufficient to prove that a discriminatory purpose underlies a facially neutral law).

35. *See infra* Part II.B.3 for a more detailed discussion of the confusion concerning disenfranchisement.

36. Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 179 (1977)) (noting that the discriminatory effect of legislation is evidence of the discriminatory intent of the legislature).

37. *See Washington*, 426 U.S. at 242 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (citation omitted)); *see also Arlington Heights*, 429 U.S. at 265–66 ("[I]mpact alone is not determinative, and the Court must look to other evidence."); *Rogers*, 458 U.S. at 618 (discussing the relevance of discriminatory purpose); *Feeney*, 442 U.S. at 280 ("When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women." (citation omitted)).

Part of the "totality of the circumstances" that must be considered in determining whether an instant runoff law was enacted for a discriminatory purpose is the fact that an instant runoff system will enhance the effectiveness of political participation by racial minorities.[38] Courts will probably find that the positive effect of the increase in political empowerment of the total racial minority group will cancel out any alleged negative effect suffered by the few members of the racial minority group that may feel confused.

The major way instant runoff voting can increase the political empowerment of racial minorities is that it may eliminate the phenomenon of electoral capture. Under the current plurality system, many African Americans feel that they must vote, if at all, for the Democratic Party, otherwise their vote will be "wasted" and a Republican will be elected. Having no choice, the African American community is "captured" by the Democratic party. Author Randall Robinson explains the effect of electoral capture on the political empowerment of African Americans: "No segment of the national electorate has given more but demanded and received less

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38. Many have explained how instant runoff voting systems can benefit members of recognized suspect (and quasi-suspect) classes by enhancing their political efficacy. *See, e.g.*, Richard L. Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. REV. 781, 806 (1993) (arguing that the Single Transferable Voting systems maintain minority electoral opportunities); Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1923 (1999) (concluding that alternative voting systems avoid minority vote dilution) [hereinafter Mulroy, *Alternative Ways Out*]; Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 350 (1998) (arguing that preferential voting systems enhance minority representation); Alexander Athan Yanos, Note, *Reconciling the Right to Vote With the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1865–66 (1992) (arguing that Single Transferable Voting serves to preserve the individual's right to vote); Eric Mar, et al, *Instant Runoff Voting is Best for Minorities*, ASIANWEEK, June 20, 2003 (stating that IRV "will empower minority voters in San Francisco"), *available at* http://news.asianweek.com/news/view_article.html?article_id=258fd16ba04a94ca26399243e1bbe41b&this_category_id=172. The article also explains:

> Moreover, IRV's ranked ballots have helped communities of color in other places. New York City has used an at-large form of IRV for school board elections since 1969. Large percentages of non-English speaking voters have participated, including non-citizens. As the Asian American Legal Defense and Education Fund (AALDEF) has documented, APA candidates achieved greater electoral success in these elections than any other in New York. Latino and African American candidates also fared well. Margaret Fung, executive director of AALDEF wrote, "Despite a concern that this voting process may be confusing for language minority communities, we have found that Asian Pacific American voters whose primary language is Chinese or Korean have made very effective use of this voting system." Specifically, the ranked ballots encouraged coalition-building and teamwork, and helped minority communities prevent split votes among their own competing candidates. *Id.*

from the Democratic Party nationally than African Americans. . . . Our support can be won with gestures. *No* quid pro quo is required."[39]

In *Uneasy Alliances,* Paul Frymer develops the theory of electoral capture. He explains:

> [E]lectoral capture [occurs in] circumstances when the group has no choice but to remain in the party. The opposing party does not want the group's vote, so the group cannot threaten its own party's leaders with defection. The party leadership, then, can take the group for granted because it recognizes that, short of abstention or an independent (and usually electorally suicidal) third party, the group has nowhere else to go.[40]

A system of instant runoff voting helps to empower racial minorities (and other groups) by making them far less susceptible to electoral capture. For example, under such a system African Americans can help to prevent the election of their least favorite candidates (at this point in history, Republicans)[41] by listing a Democrat as their second choice. This system frees them to support the candidate presenting beliefs and policies that are the most favorable to the African American community. Largely because the benefits of instant runoff voting for racial minorities outweigh the potential for disproportionate voter confusion, a court would likely find that the totality of the circumstances surrounding the adoption of an instant runoff system does not support the notion that it was adopted for a discriminatory purpose in violation of the Equal Protection Clause.B. Does IRV Burden the Fundamental Right to Vote?

A system of instant runoff voting also might be challenged under a theory that it violates the Equal Protection Clause by impairing some citizens' right to vote. Although the Court has recently reemphasized that there is no federally protected right to vote,[42] the Court has recognized that the Equal Protection Clause demands that once a state has granted its

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39. RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 101 (2000). He continues, "[h]ow could President Clinton help but ruminate, *I can't understand the blacks. There is no apparent reason for their support of me, except that I am not a Republican, which for them appears to be reason enough.*" *Id.*

40. PAUL FRYMER, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA 8 (1999).

41. *See id. passim* (arguing that African American voters often vote for Democratic candidates because African Americans generally disagree with Republican ideologies).

42. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (noting that the right to vote for President becomes fundamental only after the state legislature vests this right in the people).

citizens the right to vote that it must grant each person an *equal* right to vote.[43] As Professor Richard Briffault recently wrote:

> Inclusion and equality are the twin hallmarks of the new jurisprudence of voting rights. Once a state or locality provides that an election is used to fill a public office or to answer a governmental question, then all adult citizens who are residents of the jurisdiction are presumptively entitled to vote in that election, and all voters must have equally weighted votes.[44]

Thus, under the current jurisprudence, citizens are guaranteed equal access to cast a vote and once cast, to have that vote equally counted. Courts have protected citizens' equal access to vote under the Equal Protection Clause in cases concerning poll taxes, residency, and property ownership requirements.[45]

The equal weight requirement is most frequently litigated in cases involving reapportionment of legislative districts. The number of residents must be approximately equal, otherwise a vote cast in the less populated district would have a greater value because it constitutes a greater percentage of the electorate, therefore having greater influence (hence "weight") on the outcome of the election. Thus, mathematically, the voter in the more populous neighboring district would have to cast several votes to have the identical influence in her own district. This is the reasoning behind the "one person, one vote" principle that the Court first applied in *Reynolds v. Sims*.[46] Now, not only can one not be disenfranchised, but one cannot be enfranchised unequally.

As the famous (or infamous) *Bush v. Gore* decision showed, the right to vote is protected beyond cases of disenfranchisement and

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43. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

44. Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 347 (2001).

45. *See* Hill v. Stone, 421 U.S. 289, 300 (1975) (striking down as unconstitutional a state law requiring payment of property tax in order to vote); Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (applying strict scrutiny to find a state's durational residency requirement unconstitutional); *Harper*, 383 U.S. at 666 (holding that the imposition of any fee or poll tax on a voter violates the Equal Protection Clause).

46. Reynolds v. Sims, 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)). The phrase was first used by the Court in *Gray v. Sanders*: "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray*, 372 U.S. at 381.

malapportionment.[47] The Equal Protection Clause applies to the methods used for counting the votes after they are cast. The main concern raised in the *Bush* opinion was that various Florida districts were using disparate standards to ascertain voter intent from ambiguously cast ballots.[48] This created unequal voting rights because a vote was more likely to be counted in some districts than others. Although the value of *Bush* as legal precedent is debatable, the case drew significant attention to the fact that vote counting procedures can present an important equal protection issue.[49]

A claim challenging an instant runoff system under the legal theory that it violates the Equal Protection Clause because it impairs the fundamental right of some people to vote must first describe exactly how some voters are treated unequally.

1. Does IRV Give Some People More Votes than Others?

Some allege that IRV violates the principle of "one person, one vote" because it allows voters to select more than one candidate.[50] This argument

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47. *See generally Bush*, 531 U.S. at 104 (holding that the Equal Protection Clause guarantees the right to vote by protecting both the franchise and the manner of its exercise).

48. *See id.* at 107 (noting the varying standards used by different Florida counties to determine what counted as a legal vote).

49. As Professor Hasen explains:

> [A]lthough some have heralded the opinion as the (perhaps unintended) dawn of a new era in the jurisprudence of equal protection in elections, there are good reasons for doubting that the Supreme Court majority intended anyone to take their equal protection holding seriously. Language in the per curiam opinion limits it to the facts of the case, or, at most, to cases where jurisdiction-wide recounts are ordered.

Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378 (2001).

50. Christopher L. Bowman, *No on Proposition A: Don't Throw Your Vote Away*, *at* http://www.smartvoter.org/2002/03/05/ca/sf/vote/bowman_c/paper2.html (last visited Dec. 4, 2003). The commentary asserts:

> A large segment of the electorate "bullet votes" or votes only for the candidate of the voter's first choice. Bullet voting is particularly dominant in sub-groups of voters—namely new citizens, Asian Americans, African Americans, homeowners, seniors, and progressives. If these voters continue to bullet vote should Proposition A pass, they could become effectively disenfranchised because only those voters who list their first, second, third, or more choices would influence the final outcome of the election.

Id. *See also Instant Chaos*, SAN FRANCISCO CHRONICLE, Feb. 27, 2002, at A18 ("Most pointedly, it's easily conceivable that only some—not all—of the voters who show up on election day will actually have a vote counted in an automated runoff, particularly in races with crowded fields."); Iain Murray, *Consider Democratic Ideals*, USA TODAY, Nov. 29, 2002, at 10A ("[I]nstant-runoff voting essentially allows supporters of the least-popular candidates to cast their vote again once it becomes apparent they are not going to win. Why should one voter be allowed a second bite at the cherry, just because his candidate is unpopular, when another is not?"); Hal Spence, *Ballot Measure Aims to Change Elections*,

relies on an inappropriately literal reading of "one person, one vote."[51] The principle does not add a numerical requirement that every voter should have exactly one vote. "One person, one vote" is a metaphorical expression of the court's insistence on equal voting rights. It is not violated when every person is given, for instance, seven votes each. For example, courts have upheld cumulative voting systems that are typically designed to give voters many votes to spread among the listed candidates.[52] "One person, one vote" is a statement of political equality not a numerical limitation. It does not mean that people can only have one vote. It means that each person must be granted an equal number of votes. It does not demand that all elections must be conducted by voters casting one, and only one vote for one candidate for one office.

A related argument is that the Equal Protection Clause is violated because one set of voters has their second (and third, and fourth, and so on) choice votes counted while another set of voters does not. Thus, the argument goes, some voters are treated unequally because they are denied a chance to have their vote counted for their second choice. This view indicates a misunderstanding of the preferential voting process. The only reason many voters will not have their second listed choice counted is because they do not need (or intend) it to be counted. If a voter's first choice is still viable in any "runoff" round, their ballot will be counted as a

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HOMER NEWS (Homer, AK), Aug. 22, 2002 ("[W]hile the second-choice votes remaining on ballots cast for an eliminated candidate would be counted, the second-place votes cast by all other voters would not be counted—at least until subsequent counts, and only if that were necessary."), *available at* http://www.homernews.com/stories/082202/ele_082202ele0080001.shtml; Cheryl Jebe, *Measure 1 Addresses Nonexistent Problem*, ANCHORAGE DAILY NEWS, Aug. 9, 2002, at B6 ("League of Women Voters of Alaska believes Alaskans should vote 'NO' on this ballot measure because: Preferential voting (also called instant run-off voting) allows voters to cast a vote for more than one candidate and appears to compromise the well-established principle of 'one person, one vote' established by the U.S. Supreme Court."). While researching this article I contacted Ms. Jebe, the president of the Alaska LWV, and asked her what cases they were relying on when they reached that conclusion. She responded, "No, there was no attorney participating in the 2002 discussion. Also, no time was devoted to legal research, i.e. court decisions." Email from Cheryl Jebe, President, League of Women Voters of Alaska, to author (July 17, 2003) (on file with author). This is quite disturbing, given the impact that the Alaska LWV had on that ballot issue campaign.

51. *See* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 282 (1995) ("[A]s long as each person has equal voting power, the formal number of votes cast is irrelevant to the equal-protection concerns embodied in the one person, one vote doctrine.") (citing Cane v. Worcester County, Md., 35 F.3d 921, 927–28 (4th Cir. 1994) (quoting Holder v. Hall, 512 U.S. 874, 910 (1994) (Thomas, J., concurring))).

52. *See, e.g.*, Harper v. City of Chicago Heights, 223 F.3d 593, 602 (7th Cir. 2000) ("We emphasize that our decision should not be understood as a condemnation of cumulative voting. Cumulative voting is, as the Illinois Municipal Code makes clear, a lawful election method that may be implemented under circumstances demonstrating suitable deference to the legislative body.").

vote for their first choice candidate.[53] That is the point of having a preference—if you can still count your vote for your first choice, you obviously do not want it to count for your second choice.

Another argument contends that a voter whose first choice advances to a subsequent round has only one vote counted, while another voter whose first choice is eliminated in a prior round gets his ballot counted for his second choice candidate, thereby giving him two votes in the election.[54] Are some voters' votes counted twice while others only once? No; the proponents of this argument misunderstand the instant runoff system. Under the instant runoff system the voters' ballots are counted as votes in a series of distinct runoff elections. The candidates eligible for each runoff election are determined by the results of the previous round. Every voter has one and only one vote in each runoff round.[55] A person whose first choice does not survive the first round has her subsequent choices counted as a new vote in following rounds. Similarly, a person whose first choice survives several rounds also has additional votes because his ballot preference is counted anew as one vote in every round. Therefore, he would have no less votes than a person whose vote counts for a different candidate in a different round.

The equality of votes among voters is clear when one understands that every voter's ballot is counted as a vote once in each round for the preferred remaining candidate. However, it is possible and likely that sometime after the initial count all of the voter's preferred candidates have been eliminated. This is referred to as an exhausted ballot.[56]

2. Should IRV be Permitted to Discard Exhausted Ballots?

The allowance for exhausted ballots in the design of an IRV system raises another voter equality concern. Exhausted ballots are not counted. A voter with an exhausted ballot in effect will have zero votes in the present and any subsequent runoff rounds. Some will argue that this violates equal

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53. To count their preference as a vote for each of their first *and* second choices in the same round would in effect give them two votes.

54. *See* Murray, *supra* note 50.

55. This assumes, of course, that the voter listed a preference for one of the candidates eligible in the present round.

56. *See, e.g.*, San Francisco, Cal., City Charter, art. XIII, Elections, §13.102(a)(3) (effective July 1, 1996) ("[A] ballot shall be deemed 'exhausted,' and not counted in further stages of the tabulation, if all of the choices have been eliminated or there are no more choices indicated on the ballot."), *available at* http://www.amlegal.com/sfcharter_nxt/gateway.dll?f=templates&fn=default.htm&vid=alp:sf_charter (last visited Feb. 2, 2004).

protection because some voters will then have one vote, while the voters whose ballots have been exhausted have none—a clear inequality.

The seemingly obvious remedy would be to require voters to rank every candidate. This solution, however, overlooks the imbedded choice every voter makes in deciding whether to vote at all. If the state chooses a system that allows for exhausted ballots, it is honoring each voter's decision of whether to indicate a preference for certain candidates. Under such a system, each voter has the equal opportunity to list preferences for just one or every single candidate.

Furthermore, no identifiable group is singled out to have its ballots exhausted. Ballot exhaustion is a function of the individual voter's listed preferences and the outcome of the prior runoff rounds. The ballot is exhausted and not counted *only if* the voter's ballot does not indicate the voter's intent to vote for any of the remaining candidates.

When a voter's ballot becomes exhausted, and therefore not counted in subsequent runoff rounds, this result remains true to that voter's intent. One could say that exhausted ballots, by virtue of the voter's intent not to have her vote counted for one of the remaining candidates, functions not as zero votes, but as a vote for "none of the above." But since "none of the above" votes are not tallied either, an exhausted ballot can perhaps be more accurately described as the voter's intent to abstain from that runoff round, i.e. the voter intends her vote to numerically count as zero instead of one. The vote counts exactly as the voter intends it to count—as zero additional votes for the remaining candidates. Therefore, the Court will probably not find that exhausted ballots, although numerically counted as zero, constitute an unequal right to vote.

3. Does IRV Disenfranchise Some Voters by Confusing Them?

A commonly asserted argument against implementing instant runoff voting is that it will confuse some voters.[57] If some voters are confused, it

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57. *See, e.g., Instant Runoffs? Go Slow,* CHRISTIAN SCIENCE MONITOR, Apr. 17, 2002, at 8. ("[I]n this post-butterfly ballot world, voters may well find IRV confusing."); Bowman, *supra* note 50 (explaining that "Proposition A [San Francisco's Instant Runoff Ballot Measure] is a complex and confusing voting system which will make the problem of low voter turnout even worse"); Jebe, *supra* note 50 (noting the confusion of "preferential voting"). Jebe explains:

> Preferential voting can be a complicated and confusing process to the average voter without taking into consideration the elderly and other voters who need help with understanding the voting process and also need help with marking their choices on the ballot. Preferential voting could decrease the voter turnout due to the complexity of the process. Historically, statistics show that when the voting process is complicated, voter turnout decreases.

casts doubt on whether the system provides every person with an equal opportunity to vote. Whether this confusion rises to the level of actionable constitutional injury is debatable.

In America, we have tolerated ballots that pose a certain level of difficulty. Ballot questions (initiatives and referenda) are notorious for their length and ambiguity.[58] One study found that "the readability level of referenda in Massachusetts and Rhode Island was estimated at the fifteenth-grade (third year of college) level."[59] Yet courts have rejected claims that such confusing ballot features disenfranchise voters.[60] Given the proliferation of ballot questions in recent years,[61] courts have had ample

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Id. See also Joe Acinapura, *Some Thoughts on Instant Runoff Voting, at* http://www.vermontgop.org/joe_acinapura_3_03.shtml (last visited Dec. 4, 2003) ("I think IRV will add confusion and bewilderment to an understanding of the election process by the voters.") (on file with *Vermont Law Review*).

58. *See, e.g., Maine's Referendum Process*, ELLSWORTH AMERICAN (Ellsworth, ME), Aug. 24, 2000 ("Scarcely an election goes by in Maine that doesn't involve at least one publicly initiated referendum question; often there are several. In many cases, the wording is confusing or deceptive and seeks to reduce extremely complicated issues to one-line questions."), *available at* http://www.ellsworthamerican.com/archive/edit2000/08-00/ea_edit2_08-24-00.html; Ian Christopher McCaleb, *'Prop 22' Social Referendum Grips California Voters*, CNN.COM, Mar. 3, 2000 ("[T]he voters of the Golden State will find themselves alone in polling booths next Tuesday choosing their preferred candidates for the U.S. presidency, and pondering a series of difficult—and sometimes confusing—public referenda."), *available at* http://www.cnn.com/2000/ALLPOLITICS/stories/03/03/prop.22/.

59. Bill Whalen, *Who's Afraid of the Big Bad Initiative*, 5 LIMITS 4, 5 (Public Interest Institute, Sept. 2000), *available at* http://www.limitedgovernment.org/publications/pubs/limits/limsep00.pdf.

> Ballot language was a concern for some subjects who reported that Issues text was hard to understand or confusing. One expressed uncertainty about whether she was voting for or against an issue stating that the 'wording has a lot of negatives.' . . .
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> . . . The use of plain language on the ballot is especially important for voters with lower literacy levels or citizens for whom English is a second language.

Susan King Roth, *Disenfranchised By Design: Voting Systems and the Election Process*, 9 INFO. DESIGN J. 1, 5 (1998), *available at* http://informationdesign.org/downloads/doc_roth1998.pdf (last visited Mar. 22, 2004).

60. *See, e.g.*, Vorva v. Plymouth-Canton Community School Dist., 584 N.W.2d 743 (Mich. Ct. App. 1998) (finding that voters on referendum whose votes were disqualified due to allegedly confusing instructions were not denied equal protection of law). The court wrote, "plaintiff alleges that he and the unidentified 716 voters were denied the equal protection of the law. We disagree. . . . Because each voter was given an equal opportunity to cast his vote, and over eleven thousand electors were successful in this endeavor, no equal protection violation has occurred." *Id.* at 746–47.

61. The Initiative and Referendum Institute has found that

> [s]ince the first statewide initiative appeared on Oregon's ballot in 1904, citizens in the 24 states with the initiative process have placed approximately 2,021 statewide measures on the ballot. . . . The average number of initiatives on statewide ballots each election cycle since 1904 is 42. The average number of initiatives on the ballot each election cycle between 1981–1990 is 54 and between 1991–2000 the number is 73.

opportunity to develop a theory that some ballots are so unwieldy as to result in an infringement on the right to vote. However, there has been no such development. It is hard to believe that ranking your preferences in an instant runoff system is more difficult than trying to decipher some of these often complex ballot questions.

The 2000 presidential election shined a spotlight on ballot confusion issues.[62] In Florida, approximately 175,010 ballots were rejected largely as a result of voter error.[63] The confusion resulted from the design of the "butterfly" or punch card ballots. For example, voters erred with butterfly ballots by punching the second hole in the column of holes when they intended to vote for the second candidate in the adjacent list of candidates. However, the *St. Petersburg Times*' study found that ballot design may not have been able to prevent all errors:

> . . . 121 ballots were marked for both Gore and Libertarian Harry Browne, apparently because voters confused Browne with the local congresswoman, Rep. Corrine Brown. There were even 19 voters who inexplicably chose Bush and Gore.
>
> . . . .
>
> . . . Democratic organizers suggested an easy way to vote for Gore and running mate Joe Lieberman:
>
> Punch the second hole.
>
> . . . .
>
> But many voters followed the instructions too literally.
>
> They punched for Gore/Lieberman on the first page and then turned the page and again punched the second hole—a vote

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Initiative and Referendum Institute, *Is the Initiative Process Out of Control?*, *at* http://www.iandrinstitute.org/Usage.htm (last visited Oct. 10, 2003).

62. *See* Paul S. Herrnson, *Improving Election Technology and Administration: Toward a Larger Federal Role in Elections?*, 13 STAN. L. & POL'Y. REV. 147 (2002) (discussing problems encountered during the 2000 presidential election); Brian K. LaFratta & Jamie Lake, *Inside the Voting Booth: Ensuring the Intent of the Elderly Voter*, 9 ELDER L.J. 1412, 141–43 (2001) (discussing the confusion amongst elderly voters due to the ambiguous design of Florida's election ballots); John R. Lott, Jr., *Nonvoted Ballots and Discrimination in Florida*, 32 J. LEGAL STUD. 181, 181–82 (2003) (evaluating empirical evidence of systematic discrimination against African-American voters in the election system); Steven J. Mulroy, *Substantial Noncompliance and Reasonable Doubt: How the Florida Courts Got it Wrong in the Butterfly Ballot Case*, 14 STAN. L. & POL'Y. REV. 203 (2003) (discussing the litigation arising out of Florida's election practices during the 2000 presidential election); Barry H. Weinberg & Lyn Utrecht, *Constructive Disenfranchisement: The Problems of Access & Ambiguity Facing the American Voter: Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 402, 427–28 (2002) (alleging that problematic election practices disenfranchised voters during the 2000 presidential election).

63. Bill Adair, *Confusion, Inexperience Led 2,500 Voters to Err*, ST. PETERSBURG TIMES, Nov. 12, 2001, *available at* http://www.sptimes.com/News/111201/Lostvotes/Confusion_inexperien.shtml.

> for Pat Buchanan. That created an overvote, which meant their ballot was disqualified.
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> . . . .
>
> Another odd combination that showed the strong Democratic leanings of the No. 10 precincts: 81 people voted for all candidates except Bush.[64]

Overall, approximately 2.9% of the almost 6 million Florida voters had their ballots disqualified.[65] This means that over 97% of Florida voters had their ballots counted.[66] This begs the question about what level of ballot system imperfection is constitutionally permitted.

It has often been stated that no voting system is perfect.[67] This was proven to be a mathematical fact by Kenneth Arrow in 1951.[68] Therefore the Constitution cannot be said to require perfection. Should a system be subject to the extreme sanction of being labeled unconstitutional if a minute percentage of voters lack the ability or will to make the effort to understand and use the system? In the wake of the 2000 election, some have emphasized that the voter maintains some responsibility for the effectiveness of her vote.[69] But how flawed must a voting system be to

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64. *Id.*

65. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 238 (2003) (reporting that 5,963,000 total voters cast ballots in Florida in 2000), *available at* http://www.census.gov/prod/2003pubs/02statab/election.pdf.; Adair, *supra* note 63 (reporting that 175,010 voter ballots were rejected in Florida in the 2000 presidential election).

66. Of course, some voters who made errors that did not result in ballot disqualification were counted as well.

67. *See* Mulroy, *Alternative Ways Out*, *supra* note 38, at 1916 ("[N]o electoral system is perfect: One can always point to a particular hypothetical in which an electoral system would perform 'better' than another."); Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. Rev. 625, 696 (2002) ("State election systems are never perfect and require ongoing attention to problem areas."). *See also* James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?*, 7 MICH. J. RACE & L. 357, 440 (2002) ("It also is important to recognize that any model for obtaining the consent of the governed will be imperfect."); Geraldine Sealey, *Broken System?*, ABCNEWS.COM (Nov. 10, 2000), *available at* http://abcnews.go.com/sections/politics/DailyNews/electionsystem001110.html. Sealy quotes Deborah Phillips, Executive Director of the Voter Integrity Project: "There is no perfect system . . . . Each system has strong points and weak points. Each community needs the ability to pick the system right for them." *Id.*

68. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES *passim* (2nd ed., Cowles Found. for Research in Econ. at Yale Univ. 1963) (1951) (using mathematical formulae to demonstrate the inconsistencies inherent in voting). *Accord* Grant M. Hayden, Note, *Some Implications of Arrow's Theorem for Voting Rights*, 47 STAN. L. REV. 295, 296 (1995) (examining Arrow's theorem that "no voting procedure can be both fair and logical." (citation omitted)).

69. *See* Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 163–64 (2001). Clegg writes:

> Indeed, it is not at all obvious that we should be adamant about doing everything we can to make sure that as many people as possible register and

convert a negligent or confused voter into an unconstitutionally disenfranchised citizen?

The Supreme Court's voting rights jurisprudence offers some guidance as to the level of voting system imperfection that the Constitution tolerates. The Court has stressed that the right to vote is not absolute—that some state interests can constitutionally justify some level of restriction on a person's right to an equal vote.[70]

A court will probably find that a ballot system that has the effect of classifying voters by their ability and/or will to understand it does not meet the standard for proving an equal protection violation. The Supreme Court has stated that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."[71]

4. Does IRV Pass the *Anderson* Test?

The current standard for judging the constitutionality of an infringement of voting rights was established in *Anderson v. Celebrezze.*[72] The test involves examining the weight of the burden on voting rights and

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> actually do vote or that we ought to make the voting process itself idiot-proof. After all, the easier it is to register to vote, the greater the possibility of voter fraud, so a balance must be struck. . . .
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> What is wrong with ensuring that voters take the process of casting a ballot seriously, or at least not worrying too much if those who take it less seriously are less likely to vote and have their votes counted? . . . Is it too much to demand that those who would vote take the trouble to register and cast a ballot properly?

Id.

Tom Fiedler, *Beyond Election 2000: Law & Policy in the New Millennium: Essay: Who's Responsible for a Tainted Ballot?*, 13 J. LAW. & PUB. POL'Y 63, 64 (2001). Fiedler writes:

> Was this a breakdown of the voting process, a distortion of constitutional law—or the simple failure by thousands of voters to carry out their responsibilities? In other words, voting is a human process and humans make mistakes. The question then becomes, what responsibility—if any—does government and the law have to prevent such mistakes? Should voting be idiot-proof? Or, as some will argue persuasively, do voters have the duty to learn how to cast ballots, just as they are expected to learn how to drive before taking the license test? I am not talking here about voters whose best efforts were thwarted by faulty equipment. The State clearly has an obligation to see that the balloting machinery is in proper order. But the innovative ways by which thousands of Floridians spoiled their votes should give one pause for the efficacy of popular democracy.

Id. at 64.

70. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (explaining that the right to vote "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed").

71. Bullock v. Carter, 405 U.S. 134, 143 (1972) (citing McDonald v. Bd. of Election, 394 U.S. 802, 809 (1969)).

72. Anderson v. Celebrezze, 460 U.S. 780 (1983).

then considering whether the state's regulatory interests justify the burden, given its magnitude. The Court outlined this test in greater detail:

> States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.
>
> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. . . . [A court] must first consider the character and magnitude of the asserted injury to the rights protected . . . . It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[73]

This standard was applied to Hawaii's voting system that limited the ability of some voters to cast a vote for the candidate of their choice. In *Burdick v. Takushi,* the plaintiffs challenged Hawaii's ban on write-in voting, arguing that it burdened their right to vote by making it impossible (not merely more difficult) to vote for their favorite candidate.[74] The Court began its analysis in *Burdick* by noting that "[p]etitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold. . . . Election laws will invariably impose some burden upon individual voters."[75]

The Court found that the burden on the right to vote—Hawaii's requirement that all candidates go through a primary nomination process—

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73. *Id.* at 788–89 (citation omitted) (citing Williams v. Rhodes, 393 U.S. 23, 30–31 (1968); *Bullock*, 405 U.S. at 142–43; American Party of Texas v. White, 415 U.S. 767, 780–81 (1974); Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 183 (1979)).

74. Burdick v. Takushi, 504 U.S. 428, 430 (1992).

75. *Id.* at 432–33 (citing *Anderson*, 460 U.S. at 788).

was a minor burden.[76] The Court then discussed the state's interests promoted by the write-in ban. Hawaii enacted the ban to prevent factionalism of sore-loser candidacies, whereby a candidate who lost in a party primary decides to run a write-in campaign.[77] The state also asserted the highly speculative interest in preventing "party raiding" during primary elections.[78]

Because the Court had already concluded that the burden on voting rights was minor, the state's legitimate interests, though far short of compelling, were sufficient to justify the burden under the *Anderson* standard. Therefore, the ban on write-in voting is not a violation of the Equal Protection Clause.

The burdens arguably imposed on voting rights by an instant runoff system are even less severe than the ones the Court found to be minor in *Burdick*. In *Burdick*, the plaintiffs were completely denied the right to vote for their preferred candidate.[79] Under instant runoff voting, the burden argument would likely be based on voter confusion—that a small number of voters would have difficulty registering their preferences on the ballot. In contrast, the voters in *Burdick* were completely denied the opportunity to list their preference. A court would likely consider the burden imposed by instant runoff voting to be at least as minor as the one in *Burdick*.

Applying the *Anderson* test, a court would next examine the state interests pursued by the measure in question.[80] Instant runoff voting serves a minimum of two state interests that are at least legitimate, if not compelling. First, a state would likely adopt a system of instant runoff voting because it serves to better ensure that the winning candidate has the support of the electorate. This pursues the basic democratic principle of majority rule much better than the traditional plurality method of voting.

Second, a state would likely adopt instant runoff voting because it will significantly improve the integrity of the electoral process by eliminating the so-called "spoiler effect." Under the traditional plurality method, the presence of a minor party candidate can have a decisive impact on the outcome of an election by drawing a number of votes that would have otherwise gone to one of the major parties' candidates. The spoiler effect was clearly present in 2000 as Green Party candidate, Ralph Nader, drew

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76. *Id.* at 437.

77. *Id.* at 439.

78. *Id.* "Party raiding is generally defined as 'the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election.'" *Id.* (citing *Anderson*, 460 U.S. at 789 n.9).

79. *Id.* at 430, 441–42.

80. *Anderson*, 460 U.S. at 789.

enough votes (that arguably would otherwise have been cast for Gore) to change the outcome of the very close presidential election. The margin between Bush and Gore in Florida was around 500 votes.[81] Nader earned over 97,000 votes, clearly meeting the definition of a spoiler.[82] In fact, the election was so close in Florida that it could be argued that the Socialist Workers Party's candidate, James Harris, also served as a spoiler because he received 562 votes.[83] This example shows how the asserted state interest in eliminating the spoiler effect could even meet the standard of a compelling interest because it serves to significantly protect the integrity of the electoral process—much more so than Hawaii's asserted interest in preventing a highly unlikely "party raiding" scenario.

Given these clearly legitimate, if not compelling, state interests served by an instant runoff system, a court applying the *Anderson* test would likely find that the minor burden of isolated voter confusion is clearly outweighed by legitimate state interests. Therefore, under the *Anderson* test, a system of instant runoff voting does not unconstitutionally infringe on voting rights under the Equal Protection Clause.

III. HOW SIMILAR ALTERNATIVE VOTING SYSTEMS HAVE FARED IN COURTS

In examining the constitutionality of instant runoff voting, it is useful to consider whether other similar voting systems have been found constitutional. In the early twentieth century, several American cities experimented with forms of preferential voting. Many were challenged in court and were often found to be constitutional.

In *Brown v. Smallwood*, the plaintiffs challenged the preferential voting system in Duluth, Minnesota under the state constitution.[84] The court described the system as follows:

> The ballot provides for first choice, second choice and additional choice votes. If the result of the first choice is a majority for a candidate, he is elected. If a count of the first choice votes brings no majority, the second choice votes are added to the first choice votes, and if a candidate then has a majority of the first and second choice votes, he is elected. If there is not a majority, the first and second choice votes are added to the additional choice

81. DIVISION OF ELECTIONS, FLORIDA DEPARTMENT OF STATE, ELECTION RESULTS: 2000 GENERAL ELECTION (Nov. 7, 2000), *at* http://election.dos.state.fl.us/elections/resultsarchive/Index.asp.

82. *Id.*

83. *Id.*

84. Brown v. Smallwood, 153 N.W. 953, 954–55 (Minn. 1915).

> votes, and the candidate having a plurality is elected. Each voter may vote as many additional choice votes as he chooses, less the first and second choice votes; that is, he may vote as many additional choice votes as there are candidates, less two. In this case, there were four candidates, each voter had two additional votes, or a total of four votes. No voter can vote more than one vote for any one candidate. He is not required to vote a second choice or additional choices.[85]

The court found that this system violated the state constitution because it essentially denied equal voting strength to voters who listed only a first preference.[86] Other voters, in effect, would be able to counter this vote with three of their own.[87] It gave the voters the option of having more than one vote in the election.

The typical instant runoff system significantly differs from the Duluth preferential voting system. First, the Duluth system aggregates all of the preferences into one election or one round. It specifically permits voters to have several votes in one round. In contrast, by dividing the election into a series of runoff rounds, instant runoff systems avoid this problem. In each round, every voter has one and only one vote. Therefore, *Brown v. Smallwood* should not be very persuasive to a court considering the constitutionality of an instant runoff voting system.

In *Wattles v. Upjohn*, the plaintiffs challenged Kalamazoo, Michigan's use of a type of preferential voting system known as the "Hare system" to elect its city council.[88] The aggregation of the voters' preferences is used to select all and not just one seat on the council.[89] Every candidate who reaches a certain threshold of votes—calculated as the total number of votes divided by the number of seats at stake—is elected.[90] Under Kalamazoo's

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85. *Id.* at 955.

86. *Id.* at 956–57.

> [W]hen a voter votes for the candidate of his choice, his vote must be counted one, and it cannot be defeated or its effect lessened, except by the vote of another elector voting for one. A qualified voter has the constitutional right to record one vote for the candidate of his choice, and have it counted one. This right is not infringed by giving the same right to another qualified voter opposed to him. It is infringed if such other voter is permitted to vote for three opposing candidates.

Id. at 957.

87. *Id.* at 956. If an elector votes for the candidate of his choice once, "his power to help him is exhausted. If he votes for other candidates he may harm his choice, but cannot help him. Another elector may vote for three candidates opposed to him." *Id.*

88. Wattles v. Upjohn, 179 N.W. 335, 336 (Mich. 1920).

89. *Id.* at 337.

90. *Id.* ("The whole number of valid ballots shall then be divided by a number greater by one than the number of seats to be filled. The next whole number larger than the resulting quotient is the

Hare system, a voter ranks his preferences by placing a number next to the candidate's name on the ballot, ranking as many as he pleases.[91] Any votes a candidate receives in excess of the threshold number are considered surplus and transferred to the voter's subsequent listed choice.[92] This transfer of the surplus votes is considered the second count.

At this point, any candidate with zero votes is defeated. Therefore, regardless of the voter's intent, no votes will be subsequently transferred to that candidate's total. Additionally, the candidate with the least number of votes is defeated and his votes are transferred to other remaining candidates based on the voters' preferences.[93] This transfer may result in another candidate passing the threshold number and creating more surplus votes which are then transferred and so on. The election ends when either enough candidates meet the threshold number to fill all of the seats or the number of candidates remaining is equal to the number of seats remaining.[94]

The court framed the issue challenging the system as "whether this system . . . invades the constitutional right of every voter to vote for every officer to be elected and to have his vote so counted as to have equal value and potentiality with the vote of every other elector who votes."[95] The court found that the Hare system violated Michigan's constitution because, as a result of the method used to transfer surplus votes, it was possible that one person's vote would be "of greater weight or count[] for more candidates than that of another."[96] The court was also disturbed by the rules governing the order in which surplus ballots are redistributed: "An examination of rule (h) discloses a method of transfer of surplus votes involving an element of chance by which the result can readily vary according to the shuffle, or chance position of ballots."[97] This distribution abridges the franchise because the voter is largely unable to predict the use of his vote.

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quota of constituency that suffices to elect a member." (quoting Kalamazoo, Mich., City Charter §183(d)).

91. *Id.* at 336 (quoting Kalamazoo, Mich., City Charter §182).

92. *Id.* at 337 (quoting Kalamazoo, Mich., City Charter §183(f), (g)).

93. *Id.* at 337 (quoting Kalamazoo, Mich., City Charter §183(l)).

> After the tabulation of the second count (or after that of the first count if no candidate received a surplus on the first) every candidate who has no votes to his credit shall be declared defeated. Thereupon the candidate lowest on the poll as it then stands shall be declared defeated, and all of his ballots capable of transfer shall be transferred successively to continuing candidates, each ballot being transferred to the credit of that continuing candidate next preferred by the voter.

Id.

94. *Id.* at 337 (quoting Kalamazoo, Mich., City Charter §183(o)).

95. *Id.* at 341.

96. *Id.* at 342.

97. *Id.*

An instant runoff voting system appears to avoid many of the pitfalls of the Hare system struck down in *Wattles*. The major distinction is that under an instant runoff system there is only one seat available and a majority of votes serves as the threshold that ends the election. No surplus votes are transferred. IRV avoids the chance problem under the Hare system, whereby the surplus votes of several candidates are redistributed at the same time, and it is almost left to chance to determine which of the ballots (with their various combinations of subsequent preferences) count toward the threshold, and which ones are transferred as surplus.

In *People v. Elkus*, the plaintiffs challenged Sacramento, California's use of the Hare system to elect its city council.[98] The court adopted the description of the Hare system set forth in the *Wattles* opinion.[99] The court found that the Hare system, as applied to the at-large election of the city council, violated California's constitution.[100] The constitution gives every U.S. citizen who is eighteen years of age and a resident of the State of California the right to vote in all elections.[101] The court's understanding was that each seat to be filled constituted an "election." Sacramento's Hare system gave each citizen one transferable vote (based on listing preferences on the ballot) to be used in the single at large election of the entire city council. The court reasoned:

> The right to vote "at all elections" includes the right to vote for a candidate for every office to be filled and on every proposition submitted. The election of nine members of the city council is the election of persons to nine offices as fully as if the offices were distinct in name and in the duties to be discharged, and it is as far beyond the legislative power to limit the elector to the right of voting for one candidate therefor . . . .[102]

The court contrasted Sacramento's Hare system with other cities' uses of preferential voting systems in multi-member, at-large elections that let each voter list as many first choice (and second, and so on) preferences as seats available.[103] The court found Sacramento's system unconstitutional

98. People *ex rel.* Devine v. Elkus, 211 P. 34, 35 (Cal. Ct. App. 1922).

99. *Id.*

100. *Id.* at 39.

101. *Id.* at 35 (quoting CAL. CONST. § 1, art. 2).

102. *Id.* at 35–36.

103. *Id.* at 36–37 (citing Adams v. Lansdon, 110 P. 280 (Idaho 1910); State *ex rel.* Zent v. Nichols, 97 P. 728 (Wash. 1908); Ferrell v. Hicken, 147 N.W. 815 (Minn. 1914); Orpen v. Watson, 93 A. 853 (N.J. 1915)).

because it gave voters only one vote to elect several council members at once, thus violating California voters' right to vote at all elections.[104]

In contrast, the Supreme Court of Ohio was faced with an almost identical issue in *Reutener v. City of Cleveland* and found that the system did not violate the Ohio Constitution.[105] The plaintiffs challenged the use of the Hare system in multi-member elections claiming it denied the voters' right to vote in all elections.[106] The court rejected this claim, reasoning:

> On the face meaning of this section the Hare system . . . does not violate the Ohio Constitution, for the elector is not prevented from voting *at any election.* He is entitled to vote at every municipal election, even though his vote may be effective in the election of fewer than the full number of candidates, and he has exactly the same voting power and right as every other elector.[107]

Several years later, the Hare system was upheld again, this time under New York's constitution in *Johnson v. City of New York.*[108]

When used to elect one official at a time, an instant runoff voting system can avoid the issue raised in *People v. Elkus.*[109] Multi-office elections are unlikely to be a problem since multi-member districts are now rather rare in America. The norm is that a given slate of candidates is competing for one office. Therefore, each voter in an instant runoff system would have one vote in every round contributing to the election of one official. If, however, an instant runoff system were to be used in a multi-member district election, it would have to allow voters to indicate multiple first (and second, and so on) choices for each seat *if* the state constitution or applicable election statute requires every person to have a vote for every seat. This resolves the issues raised by the system struck down by the court in *Elkus.*

In *Stephenson v. Ann Arbor Bd. of Canvassers*, the plaintiff challenged Ann Arbor, Michigan's preferential voting system as unconstitutional under the equal protection provisions of the United States and Michigan Constitutions.[110] In 1975, the voters of Ann Arbor adopted an Amendment to the city charter providing for the adoption of the "Ware System" or

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104. *Elkus*, 211 P. at 35, 39.

105. Reutener v. City of Cleveland, 141 N.E. 27, 33 (Ohio 1923).

106. *Id.* at 29, 32.

107. *Id.* at 33.

108. Johnson v. City of New York, 9 N.E.2d 30, 38 (N.Y. 1937).

109. *Elkus*, 211 P. at 39.

110. Stephenson v. Ann Arbor Bd. of Canvassers, No. 75-10166 AW (Mich. Cir. Ct. 1975), *available at* http://www.fairvote.org/library/statutes/legal/irv.htm (last visited Dec. 4, 2003).

"Majority Preferential Vote" (MPV) system for electing the city's mayor.[111] Under the MPV system, the voter is allowed to rank candidates by preference. If no candidate wins a majority of the first choice votes, the last place and write-in candidates are eliminated and their votes are reallocated among the remaining candidates pursuant to the voters' listed preferences.[112] This process continues until a candidate reaches a majority of the total countable vote.[113]

The plaintiff claimed that the MPV system violated equal protection because it created a classification of voters. As the court explains:

> This claimed classification results from certain voters having their second choice ballots counted while the second choice of other voters whose candidate remains in the race, are not so counted. This creates separate classes of voters and affords the vote of some, more weight than others, Plaintiff asserts.[114]

First, the court found that the system does not classify voters.[115] Second, the court found that the MPV system does not treat voters unequally by counting the second choice of some voters and not counting the second choice of others. The court reasoned:

> That voter in substance still has only one vote that is counted, his or her first choice having been eliminated. His second preference vote is counted the same as the votes for the first two candidates. Such a voter does not have his vote counted twice—it counts only once and if that first preference no longer remains and is eliminated from consideration, his or her second preference is the "counted" vote. Voters for the top two candidates still have their vote counted for their first choice.[116]

Therefore, the court concludes that Ann Arbor's MPV system is constitutional because it gives every person an equal right to vote.[117] The

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* "Whatever classification that could be said to have existed, created itself, when a voter had his or her first choice candidate eliminated from the race for having the lowest number of votes . . . ." *Id.*

116. *Id.*

117. *Id.* The court writes:

> Examined from every angle and tested against the standards of Hill v. Stone, this Court finds no classification or suspect classification of voters or their rights that would violate the equal protection clauses of either the United States or Michigan

system examined in *Stephenson* is nearly identical to the instant runoff voting system adopted recently in San Francisco. The *Stephenson* decision may be useful to courts presented with challenges to modern uses of instant runoff voting. The *Stephenson* court found that the MPV system did not place any burden on the right to vote.[118] However, if a court today were to find a burden on voting rights, it would have to apply the *Anderson* test to determine whether the magnitude of the burden is sufficient to outweigh the state's interests pursued by instituting the voting system, thereby rendering it unconstitutional.[119]

The few cases that have considered forms of preferential voting indicate that their constitutionality depends on the extent to which the system maintains the constitutional norm of voting equality. These cases show that some features of instant runoff voting have already been found to meet this standard.

IV. CONCLUSION

The dominant principle that drives voting rights jurisprudence is voter equality. Voters have an equal right to cast a vote and a right to have that vote counted (or weighed) equally. This Article has explained how instant runoff voting systems meet this voter equality standard.[120]

Faced with a challenge to an instant runoff voting system, or any other election reform, courts should keep in mind that their duty is limited to evaluating whether the system comports with the Constitution. A court's role is not to judge the wisdom of the policy at issue. This point was skillfully expressed by Judge Crane in *Johnson v. City of New York*:

> Constitutions. Nor can there be found any infringement of a fundamental right of any voter of the City of Ann Arbor in the exercise or operation of this voting system. All voters possess the same right to vote, to list numerical preferences and are subject to the same possibility of having their first preference eliminated and second or third etc., preference then counted in order to achieve the election of their Mayor by a majority of the total countable votes cast in the election.

Id. (citation omitted).

118. *Id.*

119. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (establishing a balancing test to weigh the state's interest in a voting rule against the burden placed on voters' rights).

120. In fact, it has been argued that instant runoff voting meets the voter equality norm *much better* than the typical first-past-the-post plurality voting system to which Americans are accustomed. *See* STEVEN HILL, FIXING ELECTIONS: THE FAILURE OF AMERICA'S WINNER TAKE ALL POLITICS 22–24 (2002) (speculating that instant runoff voting would have produced a different outcome in the 2000 presidential election and averted international ridicule for the United States); JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE, 64–66 (2003) (attesting to the uniquely egalitarian merits the instant runoff voting system).

> We must always be careful in approaching a constitutional question dealing with principles of government, not to be influenced by old and familiar habits, or permit custom to warp our judgment. . . . This proposed system may be unworkable; it may be so cumbersome or so intricate as to be impracticable; the results desired may not be obtained; the remedy may be worse than the disease, but what have all these to do with the Constitution? If the people . . . want to try the system, make the experiment, and have voted to do so, we as a court should be very slow in determining that the act is unconstitutional, until we can put our finger upon the very provisions of the Constitution which prohibit it.[121]

If a court properly adheres to its role and applies the current constitutional standards, it should easily find that instant runoff voting is constitutional under the Equal Protection Clause.

121. *Johnson*, 9 N.E.2d at 38.