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Fall 2012

## Two Cheers For Instant Runoff Voting

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## TWO CHEERS FOR INSTANT RUNOFF VOTING

Michael Lewyn\*

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### I. INTRODUCTION

Imagine an election in which Candidate *A* gets 48% of the votes, Candidate *B* gets 47% of the votes, and Candidate *C* gets 5% of the votes. Nearly all of Candidate *C*'s supporters would prefer Candidate *B* to Candidate *A*. Nevertheless, Candidate *A* wins the election because he has a plurality of the votes.<sup>1</sup>

Or imagine another election with four candidates: *A*, *B*, *C*, and *D*. Candidate *D* is an extremist of some sort, and thus disliked by everyone but his core supporters, who comprise 30% of the electorate. Out of the total votes cast, Candidate *A* gets 25%, Candidate *B* gets 23%, and Candidate *C* gets 22%. As a result, Candidate *D* wins even though in a one-on-one runoff election, he would lose 70% to 30% against Candidates *A*, *B*, or *C*.

These results seem inconsistent with the principle of majority rule. Consequently, some commentators have proposed a voting system that avoids such outcomes: "instant runoff voting" ("IRV"). Under IRV, voters rank their choices, and the choices in favor of weaker candidates are distributed among

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<sup>1</sup> This scenario is, of course, loosely based on the 2000 U.S. presidential election.

the leading candidates.<sup>2</sup> As a result, a candidate opposed by the majority of the electorate would be less likely to prevail. For example, in the above “Candidate A vs. Candidate B vs. Candidate C” hypothetical, Candidate C’s votes are redistributed to Candidate B, causing Candidate B, the real majority choice, to win by 52% to 48%. In the “Everyone vs. Candidate D” hypothetical, one of the other candidates would receive enough second—and third—choice votes to prevail with 70% of the vote over Candidate D.

The purpose of this Article is to discuss (and in some cases debunk) the arguments for and against IRV. Part II of this Article describes IRV and its history, Part III addresses the arguments in favor of IRV, and Part IV addresses the arguments against IRV. This Article concludes that IRV would be, on balance, an improvement over the “plurality voting” system that dominates American elections, but suggests that it has been somewhat oversold. In particular, IRV would prevent the election of some unpopular candidates but might not, as some pro-IRV commentators have suggested, significantly increase public satisfaction with politics or significantly reduce the problem of negative campaigning.

## II. WHAT IS INSTANT RUNOFF VOTING?

In most American elections, voters vote for just one candidate. By contrast, under IRV (also known as “preferential voting,” “alternative voting,” and “ranked choice voting”),<sup>3</sup> each voter ranks candidates in order of his or her individual preference: the favorite candidate receives a first-choice vote, the

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<sup>2</sup> See *infra* Part II.

<sup>3</sup> Michael S. Kang, *Voting as Veto*, 108 MICH. L. REV. 1221, 1261 n.112 (2010); Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?*, 29 U. ARK. LITTLE ROCK L. REV. 679, 700 (2007); Robert Richie, *Instant Runoff Voting: What Mexico (and Others) Could Learn*, 3 ELEC. L.J. 501, 502 (2004).

second choice candidate receives a second-choice vote, and so on.<sup>4</sup> So from a voter's perspective, IRV can be "as simple as 1-2-3."<sup>5</sup>

If one candidate receives a majority of first-choice votes, that candidate wins, and the counting of votes need not continue.<sup>6</sup> However, if one candidate does not receive a majority of first-choice votes, the candidate finishing in last place is eliminated, and the second choice votes of that candidate's supporters are allocated among the surviving candidates.<sup>7</sup> If there is still no majority-winning candidate in the second round, the candidate finishing last place among the remaining candidates is eliminated, and the second choice votes of each of the eliminated candidate's supporters (or third choice votes, if the second choice candidate has already been eliminated) are allocated among the remaining candidates.<sup>8</sup>

One commentator discusses a hypothetical election with five candidates: *A*, *B*, *C*, *D*, and *E*. The voters' first choices among candidates are as follows: *D* 37%, *B* 33%, *C* 15%, *E* 10%, and *A* 5%. After the first round, Candidate *A* (the candidate finishing in last place) is eliminated, and Candidate *A*'s votes are allocated among the remaining candidates based on the second choice votes of each of Candidate *A*'s supporters. In the second round, the results among candidates are as follows: *D* 37%, *B* 36%, *C* 17%, and *E* 10%.

After the second round, Candidate *E* (now the least popular candidate) is eliminated, and Candidate *E*'s votes are similarly reallocated. If any of Candi-

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<sup>4</sup> Richie, *supra* note 3, at 506. The same is true for a variation of IRV known as the "Coombs rule," which eliminates candidates with the most last-choice votes rather than eliminate candidates with the fewest first-choice votes. See Bernard Grofman and Scott L. Feld, *If You Like the Alternative Vote (a.k.a. the Instant Runoff) then You Ought to Know About the Coombs Rule*, 23 ELECTORAL STUDIES 641, 641 (2003). Because the Coombs rule is so similar to traditional IRV, its merits are not discussed separately in this Article's main body. The major advantage of the Coombs rule is that because it focuses on last-choice votes, it is more likely to eliminate highly unpopular candidates than traditional IRV. See *id.* at 651. On the other hand, the Coombs rule is completely untried. See *id.* at 645 (Coombs rule "virtually unknown" in most circles). Moreover, the Coombs rule seems to be more complex than IRV; as a matter of common sense, it seems that a rule focused on eliminating "losers" might be more difficult for the public to comprehend than a rule focused on electing "winners."

<sup>5</sup> Roberta A. Yard, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Processes to Ensure "One Person, One Vote"*, 42 SANTA CLARA L. REV. 185, 217 (2001-2002).

<sup>6</sup> Richie, *supra* note 3, at 506.

<sup>7</sup> See *id.*

<sup>8</sup> Brian P. Marron, *One Person, One Vote, Several Elections? Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343, 344 (2004). Marron's article focuses on the constitutionality of IRV—an issue beyond the scope of this Article. *Id.* at 366-72 (noting that the weight of authority supports the legality of IRV). But cf. James P. Langan, *Instant Runoff Voting: A Cure That is Likely Worse Than the Disease*, 46 WM. & MARY L. REV. 1569, 1573-78 (2005) (noting that IRV is illegal in some states). Langan opposes IRV; however, his focus on state law suggests that there are no federal Constitutional barriers to IRV. See *id.*

date *A*'s voters picked as a second choice Candidate *E*, the vote goes to whomever that voter picked as a third choice. In the third round, the results among candidates are as follows: *D* 45%, *B* 36%, and *C* 18%.

After the third round, Candidate *C* is eliminated, and Candidate *C*'s votes are reallocated to whomever Candidate *C*'s supporters preferred between Candidate *B* and Candidate *D* (whether that candidate was a second choice or a lower choice). So if Candidate *C*'s votes are split evenly between Candidate *D* and Candidate *B*, Candidate *D* wins. If nearly all of those votes go to Candidate *B*, Candidate *B* wins.<sup>9</sup>

IRV is not an untried voting method: Australia has used IRV in national elections since 1908.<sup>10</sup> More recently, Fiji and Papua New Guinea adopted IRV for parliamentary elections.<sup>11</sup> In the United Kingdom, London elects its mayor through IRV.<sup>12</sup> In Canada, party leadership contests have used IRV.<sup>13</sup> In the United States, San Francisco, Minneapolis, and several other cities have used IRV.<sup>14</sup> In addition, the Academy Awards recently used IRV.<sup>15</sup>

### III. THE UNEASY CASE FOR INSTANT RUNOFF VOTING

Pro-IRV commentators have argued that IRV: (1) increases the likelihood that a winning candidate will have a majority support; (2) increases voter satisfaction; and (3) reduces negative campaigning.<sup>16</sup> The first of these arguments is compelling, at least when compared to the plurality-voting status quo. The second and third arguments are more speculative.

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<sup>9</sup> See Marron, *supra* note 8, at 345-47 (almost identical hypothetical). See generally *How the House of Representatives Votes are Counted*, AUSTL. ELECTORAL COMM'N, [http://www.aec.gov.au/Voting/counting/hor\\_count.htm](http://www.aec.gov.au/Voting/counting/hor_count.htm) (last updated Oct. 11, 2011) (showing how the system works in Australia).

<sup>10</sup> See Yard, *supra* note 5, at 217-18 (2001).

<sup>11</sup> See Richie, *supra* note 3, at 502, 507.

<sup>12</sup> See Marron, *supra* note 8, at 343.

<sup>13</sup> See Rob Strang, *Give Preferential Voting a Chance*, ORANGEVILLE BANNER, Dec. 29, 2008, at 6, available at 2008 WLNR 25262802 (Progressive Conservative party uses preferential voting system in leadership contest). See also Dawn Walton & Katherine Harding, *Can Alberta's Moderate Tories Take to —Premier Ted Morton?*, GLOBE AND MAIL, Nov. 27, 2006, at A1, available at 2006 WLNR 20472214 (discussing Alberta Conservatives' use of a similar method to choose party leader).

<sup>14</sup> See Marron, *supra* note 8, at 343. See also Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 2009 (2010-2011) (North Carolina recently authorized the use of IRV for local elections).

<sup>15</sup> See Linda Barnard, *Bluffers' Guide to Oscar the Vote Bluffing the Ballot*, TORONTO STAR, March 1, 2010, at E01, 2010, available at 2010 WLNR 4246693.

<sup>16</sup> Richie, *supra* note 3, at 507.

A. *Instant Runoff Voting and Majority Rule*

In America, a “first past the post” system—in which any candidate having a plurality of the vote wins—typically governs elections. As noted above, this system can lead to an unpopular candidate’s winning with a small percentage of the vote. Such plurality-rule elections may also be manipulated by “spoiler” candidates (i.e., candidates who have no chance of being elected, but who earn enough reallocated votes to swing the race to one candidate or the other). For example, a left-wing Democrat dissatisfied with the Democratic nominee can run as an Independent, draining enough votes from the Democrat candidate to elect the Republican candidate.<sup>17</sup>

IRV reduces the risk of an unpopular candidate’s being elected with a minority of the vote because if the supporters of the least successful candidates reject the candidate having a plurality of first-choice voters, this “plurality-winning candidate” would lose the election. For example, the hypothetical in the Introduction posits that Candidate A has more first-choice votes than does Candidate B (48% to 47%), but that all of Candidate C’s supporters prefer Candidate B, so Candidate B is the true choice of the majority. Candidate B would lose under plurality voting, but would win by 52% to 48% under IRV.

It logically follows that if majority rule—ensuring that the candidate preferred by a majority of voters prevails—is an important value, IRV is preferable to plurality voting. Majority rule increases the likelihood that a candidate with majority support—a candidate that the majority of voters prefer to other leading candidates—will win even in a multi-candidate election. Note, however, that IRV is not flawless in this regard. Undeniably, IRV ensures that the most widely disliked candidate (i.e., one who would lose a one-on-one runoff election against every alternative candidate) will never win an election—unlike the result in plurality voting. And in a race with only two major candidates and several minor candidates, IRV typically ensures that the more popular of the two leading candidates wins.<sup>18</sup>

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<sup>17</sup> See *id.* at 503 for a description of the “spoiler” scenario.

<sup>18</sup> The same is true of conventional two-round runoff elections. See Richie, *supra* note 3, at 504 (noting that a dozen states use two-round runoff elections in primaries and that runoffs also are frequently used in municipal non-partisan elections). See also Alex Hays, *Charter Amendment 3: Let’s Go With What Works*, NEWS TRIB., Oct. 25, 2009, available at 2009 WLNR 21161045 (describing the movement in Washington state to return to the “top-two” primary which allowed the two leading candidates, regardless of party, to compete in the November general election after the failure of IRV). Under this system, the two top finishers oppose each other in a runoff election. *Id.* This system, like IRV, ensures that the more popular of the two leading candidates wins. *Id.* But runoff elections have advantages and disadvantages that IRV lacks. See *id.* On the negative side, two-round runoff elections force election authorities to pay for a second election, and force candidates to raise funds for that election. Richie, *supra* note 3, at 504-05. Moreover, voter turnout may be lower for the runoff election (unless it is held as part of a Novem-

But even under IRV, the true “majority-choice candidate”—the candidate who prevails over every other candidate in an imaginary one-on-one runoff election—may lose if that candidate fails to make it into the final “instant runoff.” For example, imagine that in the previously introduced Candidates *A/B/C* hypothetical, third place Candidate *C* is a centrist who is in fact the second choice of Candidate *A*’s left-wing supporters and Candidate *B*’s right-wing supporters. In such a situation, Candidate *C* would prevail over both Candidates *A* (by adding Candidate *B*’s 47% to Candidate *C*’s own 5%) and *B* (by adding Candidate *A*’s 48% to Candidate *C*’s own 5%) in a one-on-one runoff election. Yet, Candidate *C* would not prevail under IRV because he or she finished third and thus would be the first candidate eliminated by the “instant runoff.”<sup>19</sup>

However, this risk is not an argument favoring the status quo over IRV. Under a plurality system, Candidate *C* also loses. And under a “two-round runoff” system in which the two leading candidates face off in a second election, Candidate *C* loses for lack of being one of the two top finishing candidates.

Only a system even more untried than IRV would ensure that Candidate *C* prevails. One such option is “Condorcet voting.”<sup>20</sup> Under this system, as in IRV, each voter ranks every candidate in order of individual preference.<sup>21</sup> By tallying up a voter’s second and third choice candidates, election officials determine whom each voter would support between Candidates *A* and *B*, between

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ber general election that features numerous other contests). See *infra* note 42. Furthermore, runoff elections are not always as effective as IRV in ensuring that the true majority-choice candidate wins because that candidate might not be one of the top two finishing candidates in a multi-candidate election, and would thus be eliminated even in circumstances where he or she would receive enough support from less successful candidates to win under IRV. See Richie, *supra* note 3, at 507. On the other hand, two-round runoff elections are more familiar to American voters and election officials and thus may be easier to administer. Hays, *supra*. Also, a two-round runoff election gives voters more time to scrutinize the leading candidates. E.g. Editorial, *A Third Public Judgment on Ranked-Choice Voting*, NEWS TRIB., (Feb. 5, 2009), <http://www.thenewstribune.com/2009/02/05/617085/a-third-public-judgment-on-ranked.html> (suggesting a candidate elected under IRV might not have been elected in a two-round runoff election, and would have been more closely scrutinized in the latter situation) [hereinafter Editorial].

<sup>19</sup> Something like this scenario has apparently happened at least once. See Anthony Gierzynski et al., *Burlington Vermont, 2009 IRV Mayor Election*, THE CENTER FOR RANGE VOTING (March 2009), <http://rangevoting.org/Burlington.html> (discussing election where Democratic candidate for mayor was Condorcet winner but finished third behind Republican and “Progressive,” who faced each other in final “instant runoff”) [hereinafter Gierzynski]. Cf. D.J. Tice, *Still Confused? Consider These Scenarios*, STAR TRIB., Mar. 4, 2010, at 11A, available at 2010 WLNR 4935074 (describing other bizarre scenarios that could arise under IRV).

<sup>20</sup> See Jeffrey C. O’Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 335 (2006).

<sup>21</sup> *Id.*



Candidates *B* and *C*, and between Candidates *A* and *C*. The candidate who won every such contest would be the winning candidate.<sup>22</sup>

Condorcet voting has two disadvantages. First, Arrow's Impossibility Theorem<sup>23</sup> shows that not every multi-candidate election yields a true majority choice. This theory, originated by Nobel Prize-winning economist Kenneth Arrow,<sup>24</sup> shows that in a three-candidate election, it is possible that no outcome will satisfy the majority of voters in every "cycle" (i.e., the choice between two candidates).<sup>25</sup> For example, when ranking choices among candidates—from first to third, respectively—if one-third of voters ranked their choices in the order of Candidates *A*, *B*, and *C*; one-third of voters ranked their choices in the order of Candidates *B*, *C*, and *A*; and one-third of voters ranked their choices in the order of Candidates *C*, *A*, and *B*; Candidate *C* would prevail over Candidate *A* by two-thirds to one-third; Candidate *B* would prevail over Candidate *C* by two-thirds to one-third; and Candidate *A* would prevail over Candidate *B* by two-thirds to one-third. Thus, each candidate would prevail against one candidate and lose to another: Candidate *A* wins over Candidate *B*, but loses to Candidate *C*; Candidate *B* wins over Candidate *C*, but loses to Candidate *A*; and Candidate *C* wins over Candidate *A*, but loses to Candidate *B*.<sup>26</sup>

Second, Condorcet voting has a very short history, having been used only in one American city (Marquette, Michigan), and only during the 1920s and 1930s.<sup>27</sup> Thus, it is not clear what pitfalls Condorcet voting might cause in practice, or whether adoption of Condorcet voting is politically feasible anywhere.

Voting systems that completely avoid ranking might prevent unpopular candidates from winning. However, these systems do not always elect the true majority-choice candidate. For example, in "range voting," voters score each candidate (ranging, for example, from 1 to 5) and the candidate receiving the

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<sup>22</sup> *Id.*

<sup>23</sup> Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1731 (2008-2009).

<sup>24</sup> O'Neill, *supra* note 20, at 331 (Arrow won a 1972 Nobel Prize for his contributions to theory of voting).

<sup>25</sup> Calabresi & Terrell, *supra* note 23, at 1731.

<sup>26</sup> See generally Adrian Vermeule, *Forward: System Effects and the Constitution*, 123 HARV. L. REV. 4, 11 (2009-2010) (describing the Condorcet Voting Paradox); see also Allan Ides, *Approximating Democracy: A Proposal for Proportional Representation in the California Legislature*, 44 LOY. L.A. L. REV. 437, 448 (2011) (discussing possible methods of determining winner when a Condorcet Voting Paradox occurs and describing the methods as "somewhat complicated").

<sup>27</sup> See O'Neill, *supra* note 20, at 335; see also Ides, *supra* note 26, at 448 (defining Condorcet system as "a relatively esoteric system with no current usages in the public sphere"). No information has been found explaining why Marquette ceased using this system.



highest average score wins.<sup>28</sup> Because range voting rewards candidates with intense support, there is no way to know whether the true majority-choice candidate would in fact prevail.<sup>29</sup> For example, imagine an election with three candidates: *A*, *B*, and *C*. Candidate *A* receives a score of 5 from each of his supporters (comprising 48% of the electorate). The other 52% of voters gives Candidate *A* an average score of 1.5, with no non-Candidate *A* voter giving him greater than a 2.5 score. Thus, Candidate *A*'s average score is a 3.18. Candidate *B*'s supporters (comprising 47% of the electorate) give Candidate *B* a score of 5, while the other 53% of voters gives him a score of 2.5. So Candidate *B*'s average score is a 3.67. Candidate *C* gets a score of 3 from supporters and opponents alike and is the true majority choice: Candidate *C* would prevail over either Candidates *A* or *B* in a runoff election because his or her score of 3 means that all of Candidate *B*'s supporters would prefer his or her to Candidate *A*, and that all of Candidate *A*'s supporters would prefer his or her to Candidate *B*. But Candidate *C*'s average score is lower than the score of both Candidates *A* and *B* because his or her supporters are notably less intense than those of Candidates *A* and *B*. Moreover, range voting has never been used in a political election<sup>30</sup> and thus may have additional unintended consequences.

Another alternative system is "approval voting." Under approval voting, voters simply vote "yes" or "no" on each candidate.<sup>31</sup> Thus, the fate of Candidate *C*, the true majority-choice candidate in the hypothetical election described in the previous paragraph, would depend on whether each supporter of Candidate *A* and Candidate *B* was willing to vote "yes" on both Candidate *C* and the supporter's first choice candidate. It follows that there is no way to know whether Candidate *C* would prevail under approval voting. Approval voting is also untried—apparently having never been used in the United States or

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<sup>28</sup> Renée Steinhagen, *Giving New Jersey's Minor Political Parties a Chance: Permitting Alternative Voting Systems in Local Elections*, 253 N.J. LAW. Aug. 2008, at 15, 17.

<sup>29</sup> See *id.* The same objection applies to a related system known as "Borda voting." *Id.* In Borda voting, voters rank candidates as they would under IRV, but the candidates' results are averaged as under range voting. See *id.* at 18-19. So, if a candidate is the first choice of ten voters and the third choice of ten more voters, the candidate's "score" is 2.0. *Id.* at 18. There is no reason to believe that the Borda vote winner will be the majority-choice candidate; for example, if a candidate is the first choice of two-thirds of voters and the fifth choice of one-third of voters, he or she will lose to a candidate who, on average, is everyone's second choice. *Id.* See generally Mathias Risse, *Why the Count de Borda Cannot Beat the Marquis de Condorcet*, 25 SOC. CHOICE WELFARE, Nov. 2005, at 95, 105-113 (2005) (discussing the theoretical arguments for and against Borda voting). However, of course, this discussion assumes that majority rule is in fact a decisive value.

<sup>30</sup> Steinhagen, *supra* note 28.

<sup>31</sup> *Id.* at 18.

Canada—and currently is used for no political election other than for the Secretary-General of the United Nations.<sup>32</sup>

In sum, IRV does not always elect the true majority-choice candidate (i.e., the candidate who would prevail over every other candidate in a runoff election), but it is more likely to achieve this result than would a plurality election. IRV is arguably more successful in this regard than any system other than the Condorcet system.

### B. *Happy Voters?*

Another argument favoring IRV is that voters “would be more likely to like at least one of their choices on Election Day.”<sup>33</sup> Under the status quo, voters in multi-candidate elections may face an unpleasant decision: to vote for their favorite candidate and risk taking away votes from their second-choice candidate, or to settle for a less desirable candidate who has a stronger chance of winning.<sup>34</sup> By contrast, under IRV, each voter could support both his or her preferred candidate as first choice, and his or her less preferred candidate as second choice. Thus, IRV facilitates voter interest in self-expression regardless of its impact upon majority rule.

One may question, however, whether this factor is particularly important. In an American general election, supporters of minor-party candidates—a tiny group in most elections—are the primary beneficiaries of the enhanced self-expression resulting from IRV.<sup>35</sup> Thus, the scope of this “self-expression” benefit is unclear.

On the other hand, the number of voters wishing to express themselves by voting for minor-party candidates would grow under IRV because would-be minor-party supporters would be far less afraid to waste their votes. However, the Australian example suggests that any minor-party gains might indeed be minor. In Australia’s 2007 federal election, the two national parties (the Liberal/National Coalition, a coalition of parties that generally governs as one party; and the Labour Party) collectively won 85.5% of the popular first-choice vote.<sup>36</sup> Similarly, in Australia’s 2010 election, these major national parties

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<sup>32</sup> *Id.* at 19 (system also used routinely in 19th Century Britain and in medieval Venice).

<sup>33</sup> Richie, *supra* note 3, at 507.

<sup>34</sup> *Id.* at 503.

<sup>35</sup> See, e.g., 2008 General Election Returns, ASSOCIATED PRESS, Nov. 21, 2008, available at [http://hosted.ap.org/specials/election\\_night\\_2008/election\\_map\\_premium/index.html?SITE=MASPDELN](http://hosted.ap.org/specials/election_night_2008/election_map_premium/index.html?SITE=MASPDELN) (in the 2008 presidential election, no minor candidate received over 0.5% of the national vote). In party primaries, this factor might be more important.

<sup>36</sup> SCOTT BENNETT & STEPHEN BARBER, COMMONWEALTH ELECTION 2007 –REISSUE, 50 (Parliament of Austl. 2009) [hereinafter COMMONWEALTH 2007]. See generally Ian Harris, *Australia’s Federal Election 2010: A “Hung” Parliament, Parliamentary Reform, and Possible Policy Atro-*

won 80.6% of the first-choice vote.<sup>37</sup> The strongest minor party, the Greens, won only 7.8% of first-choice votes and not a single parliamentary seat in 2007,<sup>38</sup> and won only 11.7% of first-choice votes and one parliamentary seat in 2010.<sup>39</sup> No other party won as much as 3% of the national vote in either election,<sup>40</sup> and no other organized party won a single seat.<sup>41</sup> If Australia's results are relevant, IRV is unlikely to significantly disrupt the American two-party system, although it might slightly increase the national minor-party vote.<sup>42</sup>

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phy, 5 J. PARLIAMENTARY AND POL. L. 165, 168 (2011) (describing Liberal/National Coalition).

<sup>37</sup> *Australian Politics and Elections Database*, UNIV. OF W. AUSTRALIA, <http://elections.uwa.edu.au/elecdetail.lasso?keyvalue=1577> (last visited Oct. 18, 2012) [hereinafter *Database*]. The table shows multiple Liberal Parties: the Liberal Party of Queensland, the Country Liberal Party, and the Liberal Party. *Id.* However, all three Liberal parties are allied with the National Party. *Id.* (describing coalition).

<sup>38</sup> COMMONWEALTH 2007, *supra* note 36, at 50.

<sup>39</sup> *Database*, *supra* note 37.

<sup>40</sup> *Id.* See also COMMONWEALTH 2007, *supra* note 36, at 50.

<sup>41</sup> *Database*, *supra* note 37. See also COMMONWEALTH 2007, *supra* note 36, at 49. In 2007, the Liberal/National Coalition and Labour Party won all but 2 of 150 seats eligible for election; those seats were apparently won by Independents rather than by members of the minor parties. *Id.* at 50. In 2010, Independents won four seats, and none of the minor parties other than the Greens won any seats. See *Database*, *supra* note 38.

<sup>42</sup> On a related note, one may argue that IRV would lead to increased voter turnout, because the possibility of increased support for minor candidates would cause more people to run for office, which in turn would bring more voters to the polls. See Langan, *supra* note 8, at 1587-88. But the weakness of minor parties in Australia suggests that IRV's effect on the two-party system would be too small to significantly affect voter turnout. In the United States, IRV has been tried in nonpartisan elections; there was no clear pattern of increased voter turnout. See Rachel Gordon, *Lee's Ring Of Strength*, S.F. CHRON., Nov. 13, 2011, at A1, available at 2011 WLNR 23591651 (voter turnout in San Francisco mayoral race held under IRV was "lowest in modern times for a competitive mayor's race in San Francisco"); Frederick Melo, *Pitfalls Few for Ranked Voting: But Election Quirks Could be Issue for Some Candidates*, ST. PAUL PIONEER PRESS, Nov. 10, 2011, at B1, available at 2011 WLNR 23375085 (in first St. Paul election held under IRV, "voter turnout didn't go up or down dramatically compared to four years ago"); Steve Brandt, *Low-Key Mayoral Contest Depressed Minneapolis Turnout, Officials Say*, STAR-TRIB., Nov. 12, 2009, at 5B, available at 2009 WLNR 23338446 (in the first Minneapolis election held under IRV, voter turnout declined primarily because mayoral election was not vigorously contested). On the other hand, IRV does allow the elimination of low-turnout runoff elections. See Christopher Jerdonek, *Bringing the Election to the Voters with Instant Runoff Voting*, NAT'L CIVIC REV., Winter 2006, at 48, available at 2006 WLNR 24725966 (where two-round elections are held, runoffs tend to have lower turnout than initial elections); *Council Rejects Runoff Elections Proposal*, THE LEAF-CHRON., Sept. 5, 2009, at A4, available at 2009 WLNR 17441858 ("runoff turnout in Nashville [Tennessee] hovers between 8 and 15 percent of all voters, compared to upwards of 40 percent in a general election."); Bill Herbkersman & Rob Richie, *It's Time for SC to Turn to Instant Runoff Voting*, ISLAND PACKET (May 26, 2009), <http://www.lowcountrynewspapers.net/archive/node/55015> (voter turnout in runoff elections is lower than initial primary voter turnout in 113 of 116 primaries for federal office since 1994, on average by 35%). Thus, IRV may increase voter turnout compared to two-round elections, even if it does not increase voter turnout compared

In this respect, IRV differs quite significantly from proportional representation systems. Under proportional representation, a party's share of legislative seats is proportionate to its share of the total popular vote.<sup>43</sup> Thus, a voter who supports a minor party will often be able to elect some representatives of that party. As a result, minor parties flourish in proportional representation systems. For example, in Israel's 2009 election, twelve parties received some parliamentary representation, and the two largest parties won only 55 of 120 parliamentary seats.<sup>44</sup> By contrast, under IRV the supporter of a weak party will rarely, if ever, succeed in getting that party's candidates elected; at most, the supporter will be able to influence the distribution of seats among more popular parties through second and third choice votes.<sup>45</sup>

Given that IRV is unlikely to significantly increase the number of viable candidates, it will probably have only a modest impact on voter satisfaction, even if increased minority party representation would in fact increase voter satisfaction.

### C. *Less Negative Campaigning?*

Another pro-IRV argument is that plurality-based elections promote negative attacks that drive voters away from politics (i.e., in a two-person contest, each candidate hopes to be widely regarded as the "lesser evil").<sup>46</sup> Under IRV, by contrast, "a winning candidate often will need to be the second-choice of supporters of other candidates."<sup>47</sup> As a result, a candidate under IRV may try

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to plurality voting. See *Ranked Choice Voting vs. Runoff Elections*, BETTER ELECTIONS IN SAN FRANCISCO, <http://www.sfbetterelections.com/rcv-vs-runoffs.html> (last visited Oct. 18, 2012) (in San Francisco, voter turnout is higher in elections using IRV than in pre-IRV runoff elections).

<sup>43</sup> Richard A. Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 OR. L. REV. 1061, 1096 (2008).

<sup>44</sup> See also Stewart Ain, *Let The Coalition Dance Begin*, N.Y. JEWISH WEEK, Feb. 13, 2009, at 1, available at 2009 WLNR 3831930 (Likud Party won 27 of 120 parliamentary seats, and Kadima Party won 28 parliamentary seats.). In Israel, a party that receives as little as 1.5% of the nationwide popular vote will receive parliamentary representation in proportion to its vote. Jack Kelly, Editorial, *A Blight Unto Themselves Israel's Fractious Political System Hurts Peace Process*, PITTSBURGH POST-GAZETTE, Feb. 2, 2003, at F7, available at 2003 WLNR 5328803.

<sup>45</sup> See Richie, *supra* note 3, at 503. However, IRV still gives the minor-party supporter more influence than does the "first-past-the-post" system governing most U.S. elections. See *id.* In the latter system, votes cast for minor parties are effectively wasted. See Clucas, *supra* note 43, at 1095-96.

<sup>46</sup> See *id.* at 503-04 (plurality elections induce "negative attacks that . . . drive far more voters away from politics than bring them to it").

<sup>47</sup> *Id.* ("Knowing that most voters will ignore minor candidates because they can't win, the leading candidates in plurality elections can focus their attention on each other in what usually amounts to a zero-sum game. Turning a voter away from an opponent is just as effective—and often considerably easier and cheaper—as persuading an undecided voter to support you or a new

not to antagonize the other candidates' supporters, and thus, may run a more positive campaign to achieve this goal.<sup>48</sup>

But even under plurality voting, negative campaigning can be counter-productive in a multi-candidate election. Robert Richie (in a pro-IRV article) discussed an example: in the 2004 Iowa Democratic presidential caucus, the original frontrunners, Richard Gephardt and Howard Dean, aggressively attacked each other.<sup>49</sup> Both candidates lost support, and ultimately John Kerry and John Edwards finished ahead of Gephardt and Dean.<sup>50</sup>

Richie suggests that the Iowa caucuses were similar to instant runoff voting because at Iowa precinct caucuses, supporters of the weaker candidates (presumably Gephardt and Dean) could switch to stronger candidates, and thus were able to switch their allegiance to Kerry or Edwards.<sup>51</sup> But even in the absence of this feature, Kerry and Edwards would have been the leading candidates in Iowa; otherwise, Gephardt and Dean supporters would not have wished to transfer support to them. Thus, the Iowa results suggest that candidates not tainted by negativity (Kerry and Edwards) were able to prevail even under plurality voting. It logically follows that whether plurality voting or IRV is involved, negative campaigning harms its user when other candidates who are not targets of such attacks are viable enough to draw support away from the "negative" candidates.

Moreover, it is unclear whether IRV would reduce negative campaigning in an election dominated by two parties or two candidates. Richie suggests that major candidates would tone down negative appeals to attract weaker candidates' supporters.<sup>52</sup> But this argument assumes that negative appeals will be less successful in shifting second-choice votes than they currently are in shifting first-choice votes—an argument that seems quite speculative. For example, if Democrats and Republicans wish to get the second-choice votes of Libertarian Party supporters, why would Democratic and Republican candidates not successfully use negative campaigning against each other in order to obtain those second-choice votes?

In Australia, IRV has not prevented negative campaigning.<sup>53</sup> A parliamentary report on the 2007 Australian elections stated that the incumbent parties

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voter to participate. Given these incentives, candidates generally will only eschew negative campaigning if they think they can win without it.”).

<sup>48</sup> *Id.* at 507 (“With the need for winners to appeal to other candidates’ supporters, there would likely be more acknowledgment of other people’s concerns, more coalition-building and more positive, issue-oriented campaigns.”).

<sup>49</sup> *Id.* at 504.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 504.

<sup>53</sup> COMMONWEALTH 2007, *supra* note 36 at 10.

(the Liberal/National Coalition) ran a campaign in which “the dominant impression was a message of fear rather than one of hope.”<sup>54</sup> The government’s Minister for Employment and Workplace Relations did not deny this, but asserted that the party’s “fear campaign was based on fact.”<sup>55</sup> One candidate asserted that because the opposition Labour Party was supported by labor unions, “the union bosses [would] dictate similar to the way Hitler did during the world war about how we should live our life.”<sup>56</sup> A deputy prime minister likened the opposition’s education policies to “something you’d hear in a communist country.”<sup>57</sup> Incumbent party supporters also directly criticized Labour Party leader Kevin Rudd: one Cabinet minister called him “mad,”<sup>58</sup> while another called him “vicious and Machiavellian.”<sup>59</sup> The incumbent parties also ran numerous anti-Labour Party television advertisements, describing the Labour Party as “anti-business.”<sup>60</sup>

Labour Party advertisements featured incumbent Prime Minister John Howard as Pinocchio.<sup>61</sup> After quoting Howard’s question from an earlier election (“Who do you trust to keep interest rates low?”), the commercial showed Howard’s nose gradually expanding while the commercial simultaneously listed increases in interest rates that occurred during Howard’s tenure as Prime Minister.<sup>62</sup>

The 2010 Australian election also involved vigorous negative campaigning.<sup>63</sup> For example, one Labour Party advertisement stated of opposition leader Tony Abbott, “Next time Mr. Abbott says anything, ask yourself: Is he really telling the truth? Because by his own admission, he’s probably lying.”<sup>64</sup>

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<sup>54</sup> *Id.* at 13.

<sup>55</sup> *Id.* at 14.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 15.

<sup>58</sup> *Id.* at 17.

<sup>59</sup> *Id.*

<sup>60</sup> Landeryou, *Liberal Party Attack Ad*, YouTube (Oct.15, 2007), [http://www.youtube.com/watch?v=s\\_xspyOQHvs&feature=related](http://www.youtube.com/watch?v=s_xspyOQHvs&feature=related) [hereinafter *Liberal Party Attack Ad*].

<sup>61</sup> Matrix23, *Trust*, YouTube (Dec. 16, 2006), [http://www.youtube.com/watch?v=flHleu\\_xMvg&feature=related](http://www.youtube.com/watch?v=flHleu_xMvg&feature=related) [hereinafter *Trust*]. Pinocchio is a character, in a movie by the same name, whose nose grew when he lied. See Gordon Schiff, *Voices From the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037, 2062 (2009-2010) (“I think you all know the story of Pinocchio . . . His nose always grew when he was lying.”); Niccol D. Kording, *Little White Lies that Destroy Children’s Lives-Recreating Paternity Fraud Laws to Protect Children’s Interests*, 6 J.L. & FAM. STUD. 237, 237 & n.1 (2004) (Pinocchio is a 1940 animated Disney film; describing plot).

<sup>62</sup> See *Trust*, *supra* note 61.

<sup>63</sup> See, e.g., *id.*

<sup>64</sup> Australianlabor, *Tony Abbott -You Can’t Trust Anything He Says*, YouTube (May 17, 2010), <http://www.youtube.com/watch?v=uS2V7S7Iv-Y&feature=related> [hereinafter *Tony Abbott*].



Another commercial stated of Abbott, “He’s too big a risk.”<sup>65</sup> The opposition Liberal Party was somewhat gentler, running a musical jingle attacking Prime Minister Julia Gillard with the refrain, “Don’t Let Julia Fool Ya,”<sup>66</sup> and with signs in the background such as, “More Talk, No Action.”<sup>67</sup> Thus, the evidence from Australia suggests that IRV need not eliminate negative campaigning.<sup>68</sup>

More broadly, it appears that IRV has been somewhat oversold: it will sometimes prevent widely unpopular candidates from being elected in multi-candidate races—thus promoting the value of majority rule—but may be less likely to increase voter satisfaction or to significantly reduce negative campaigning.

#### IV. CRITIQUES OF INSTANT RUNOFF VOTING

IRV opponents argue that when compared to the status quo, IRV: (1) would reduce the number of elections won with a majority vote, thus reducing the perceived legitimacy of the political system; (2) would be too complicated for voters to understand; (3) would be impossible to implement without application of new and risky voting technologies; and (4) would continue to be unpopular, as it has been when tried in the United States.<sup>69</sup> This Part addresses each of these arguments.

##### A. *Too Many Pluralities?*

As noted above, IRV often will elect the candidate who is the majority choice in elections currently decided by pluralities. But if IRV increases the number of first-choice votes given to minor candidates or parties, it may be that fewer elections will lead to one candidate’s gaining a majority of first-choice votes. Because “[a] preferential majority winner cannot claim that most voters

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<sup>65</sup> Australianlabor, *Don’t Vote for Tony Abbott*, YOUTUBE (Aug. 19, 2010), <http://www.youtube.com/watch?v=IOTsxWXLmOY> [hereinafter *Don’t Vote*].

<sup>66</sup> LiberalPartyTV, *Gillard and Bligh*, YOUTUBE (Aug. 16, 2010), <http://www.youtube.com/watch?v=KKu1iHrXOYk> [hereinafter *Gillard and Bligh*].

<sup>67</sup> *Id.*

<sup>68</sup> On the other hand, the first American elections held under IRV have been fairly tame affairs. See Gerry Shih, *Candidates for Mayor Submerged in Crowd*, N.Y. TIMES, Sept. 9, 2011, at A23, available at 2011 WLNR 17858242 (San Francisco mayoral election held under IRV was “bland”; article claims that IRV “discourages negative campaigning”); Jason Singer, *Portland Mayoral Count Ends With Brennan on Top*, PORTLAND PRESS HERALD (Nov. 11, 2011), [http://www.pressherald.com/special/portland\\_mayor\\_election\\_2011/count-ends-with-brennan-on-top\\_2011-11-10.html?searchterm=instant+runoff+voting](http://www.pressherald.com/special/portland_mayor_election_2011/count-ends-with-brennan-on-top_2011-11-10.html?searchterm=instant+runoff+voting) (after first Portland, Maine election held under IRV, one candidate was quoted as suggesting that IRV reduced negative campaigning).

<sup>69</sup> Langan, *supra* note 8, at 1578-95.



believe his or her platform should be implemented,”<sup>70</sup> it could be argued that IRV reduces the perceived legitimacy of the victor.<sup>71</sup>

This argument rests on a mountain of speculation. First, it assumes that plurality winners are consistently perceived as less legitimate than are majority winners—a difficult-to-verify proposition. Plurality voting is a constant feature of multi-party systems and of most American party primaries, and the impact of plurality voting upon the perceived legitimacy of democratic government is at best unclear.

More importantly, winners of IRV elections may be perceived as majority winners. In Australia, official election statistics show not only the winners’ percentage of first-choice voters, but also their percentage of “two-party preferred votes,” (i.e., their vote percentage after all minor-candidate votes are allocated to the two top finishers).<sup>72</sup> To the extent that these statistics reflect popular perception, Australian elections yield a clear majority choice—the candidate(s) winning a majority of the two-party preferred vote.

A related problem is that if some voters fail to list a choice for every candidate, the ultimate winner will have only a minority of all votes cast. For example, suppose that in an election with 100 voters, the first-round results are as follows: Candidate *A* receives 40 votes; Candidate *B* receives 34 votes; and Candidate *C* receives 26 votes. If every voter lists a second choice, under IRV, presumably the winner will eventually have over 50 votes.

But suppose that half of Candidate *C*’s supporters do not list a second choice, and that the other half of supporters gives 10 votes to Candidate *B* and 3 votes to Candidate *A*. In that case, the result would be as follows: Candidate *B* receives 44 votes, and Candidate *A* receives 43 votes. Obviously, Candidate *B* lacks the support of a majority of all voters. This type of result is not merely hypothetical. In one San Francisco City Council election held under IRV, there were twenty-two candidates, and the ultimate IRV winner prevailed with only 37% of all votes cast.<sup>73</sup>

Nevertheless, the risk of plurality winners may be lower than under the leading alternative systems. Unlike plurality voting, IRV will at least yield a majority of all voters who make a choice between the two strongest candidates.

It could be argued that two-round runoff elections would be more successful at creating “majority winners” than would IRV. In such a system, if no

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<sup>70</sup> *Id.* 1580-81.

<sup>71</sup> Langan does not go quite this far; he states only that under IRV, the winner’s legitimacy will be “only marginally increased over that of an official elected by a plurality.” *Id.*

<sup>72</sup> See COMMONWEALTH 2007, *supra* note 36, at 101-06.

<sup>73</sup> Paul Eakins, *Instant Runoff Voting Could Streamline Long Beach Balloting Process*, LONG BEACH PRESS TELEGRAM (Oct. 3, 2009), <http://www.fairvote.org/instant-runoff-voting-could-streamline-long-beach-balloting-process#.UIC3JrT3B-U>.

candidate wins a majority of the votes in the first round of voting, the two leading candidates compete in a runoff election. Such elections, unlike plurality voting and IRV, by definition, create a winner supported by a majority of all persons voting—but at a price. Because turnout in runoff elections tends to be lower than in initial elections,<sup>74</sup> there is no reason to believe that runoff election winners are as likely as IRV winners to obtain a majority vote of the initial first-round electorate.

### B. Voter Confusion

It has been argued that because IRV is unfamiliar to American voters, it will breed voter confusion.<sup>75</sup> After Minneapolis's 2009 IRV election, Minneapolis voters were surveyed about their attitudes towards IRV.<sup>76</sup> In particular, the survey asked voters whether they understood IRV "perfectly well," "fairly well," "not entirely," or "not at all." Survey results indicated that 90% of voters stated they understood IRV "perfectly well" or "fairly well."<sup>77</sup> Results also indicated that 65% of voters favored using IRV in future municipal elections.<sup>78</sup>

Similarly, a 2004 poll of San Francisco voters showed that about 85% understood IRV "very" or "fairly" well.<sup>79</sup> Only 12% of voters preferred the city's traditional two-round runoff election system to IRV.<sup>80</sup> Thus, it appears that IRV does not confuse the overwhelming majority of voters.

Another risk is that even if most voters understand IRV, a small minority of voters will mismark their ballots in ways that invalidate their votes. Some elections held under IRV have yielded almost no spoiled ballots, while other elections apparently have yielded more voter error than would have resulted under a plurality-based election system.<sup>81</sup>

In 2009, Aspen, Colorado held local elections under IRV.<sup>82</sup> Not one of the votes cast for mayor was invalid and only 0.9% of votes cast for city council

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<sup>74</sup> See Richie, *supra* note 3, at 505.

<sup>75</sup> Langan, *supra* note 8, at 1592 (IRV may create confusion "[i]f for no other reason than its unfamiliarity").

<sup>76</sup> See ST. CLOUD STATE UNIVERSITY SURVEY, RANKED CHOICE VOTING: 2009 CITY OF MINNEAPOLIS MUNICIPAL ELECTIONS (2009), available at [http://www.fairvotemn.org/sites/fairvotemn.org/files/SCSU\\_Survey\\_Report\\_Mpls\\_2009.PDF](http://www.fairvotemn.org/sites/fairvotemn.org/files/SCSU_Survey_Report_Mpls_2009.PDF).

<sup>77</sup> *Id.* at 24.

<sup>78</sup> *Id.* at 43.

<sup>79</sup> See FRANCIS NEELY, ET AL., AN ASSESSMENT OF RANKED-CHOICE VOTING IN THE SAN FRANCISCO 2004 ELECTION 16 (Public Research Institute, 2005), available at <http://www.sfcv.com/>.

<sup>80</sup> *Id.* at 59.

<sup>81</sup> See, e.g., *City of Aspen Holds Instant Runoff Election*, US FED. NEWS, May 15, 2009, available at 2009 WLNR 9289679.

<sup>82</sup> *Id.*

was invalid.<sup>83</sup> Similarly, in San Francisco’s most recent IRV election, the total number of “over votes”—ballots in which a “voter marks more names than there are persons who can be elected to the office”<sup>84</sup>—and “under votes”—ballots in which a voter fails to vote for one or more races on a ballot<sup>85</sup>—for district attorney comprised 1.6% of the total votes (3031 out of 197,242).<sup>86</sup> This is only slightly more than in the 2008 presidential election.<sup>87</sup>

In Minneapolis’s first IRV election, by contrast, 2958 votes for mayor involved some sort of voter error,<sup>88</sup> equaling roughly 6% of all votes cast.<sup>89</sup> But the example of Burlington, Vermont suggests that any increase (or apparent increase) in voter error may be a one-time problem. In Burlington’s 2006 mayoral election, .76% of ballots were under votes.<sup>90</sup> Yet, in the 2009 election, voter error was almost nonexistent.<sup>91</sup> Perhaps voter error declines when voters become more familiar with IRV.

### C. Ballot Security

Another argument against IRV is that IRV is “susceptible to vote-tampering”<sup>92</sup> because it “requires newer voting technologies to be cost-effective.”<sup>93</sup>

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<sup>83</sup> *See id.*

<sup>84</sup> *See* David Odegard, *One Person, No Vote? How State Courts After Bush v. Gore Ensure Uniform Interpretation of Voter Intent Statutes Without “Unnecessary” Voter Disenfranchisement*, 41 N.M. L. REV. 571, 585 n.108 (2011).

<sup>85</sup> *Id.* at 575 n.31.

<sup>86</sup> *See Election Results 1995: November 7, 1995 Statement of Votes*, CITY AND COUNTY OF SAN FRANCISCO, DEPT. OF ELECTIONS, <http://sfgov2.org/index.aspx?page=1673> (last visited Oct. 19, 2012).

<sup>87</sup> *See* THE CITY AND COUNTY OF SAN FRANCISCO: STATEMENT OF VOTE (Dec. 2, 2008), [http://www.sfgov2.org/ftp/uploadedfiles/elections/ElectionsArchives/2008/november/SOV\\_081104.pdf](http://www.sfgov2.org/ftp/uploadedfiles/elections/ElectionsArchives/2008/november/SOV_081104.pdf) (21 (3522 under votes), 42 (794 over votes, and 388,112 overall votes cast)). In 2008, about 1.1% of all presidential votes were under votes or over votes. *See id.* On the other hand, in San Francisco’s first IRV election (in 2007) about 4% of all votes cast were under votes or over votes. *See* SAN FRANCISCO MUNICIPAL ELECTION OFFICIAL RESULTS: NOVEMBER 6, 2007, <http://www.sfgov2.org/ftp/uploadedfiles/elections/ElectionsArchives/2007/november/SOV071106.txt> (149,465 votes cast: 479 over votes, 5627 under votes).

<sup>88</sup> NOVEMBER 3, 2009 ELECTION STATISTICS, *available at* [http://www.ci.minneapolis.mn.us/www/groups/public/@clerk/documents/webcontent/convert\\_266675.pdf](http://www.ci.minneapolis.mn.us/www/groups/public/@clerk/documents/webcontent/convert_266675.pdf) (providing election statistics for the City of Minneapolis November 3, 2009 election). These errors included “repeat ranking of the same candidate, skipped ranking before or between ranked candidates, and over votes within a column.” *Id.*

<sup>89</sup> *Id.* (45,968 total votes cast).

<sup>90</sup> *See Burlington Vermont*, FAIRELECT.ORG, <http://www.fairelect.org/Arguments/IRV%20World/Burlington%20Vt.htm> (last visited Oct. 19, 2012) [hereinafter *Burlington*] (77 ballots out of 9783 were under votes).

<sup>91</sup> *Burlington*, *supra* note 90 (only four ballots invalid).

<sup>92</sup> Langan, *supra* note 8, at 1594.

<sup>93</sup> *Id.*

According to this argument, IRV is so complex that it requires touch-screen voting, which is allegedly more likely than other technologies to produce lost votes or security breaches.<sup>94</sup>

This argument is meritless for the simple reason that the not-so-new technology of hand counting ballots is perfectly compatible with IRV. Australia (which has had IRV for decades) still hand counts its ballots,<sup>95</sup> and has avoided significant delay—the results of most elections are known on election night.<sup>96</sup>

It is possible that Minneapolis's first IRV election presents a counterexample. In that election, city employees spent fifteen days counting ballots.<sup>97</sup> However, Minneapolis's election involved unique circumstances: in addition to voting for single-seat offices, such as mayor, Minneapolis voters also used IRV in an at-large election for three park board seats.<sup>98</sup> Applying IRV to a multi-seat election requires election officials to redistribute votes by fractions,<sup>99</sup> possibly a more time-consuming process than other forms of ballot counting. So at most, the Minneapolis example suggests that IRV may be more time-consuming (and thus, arguably less desirable) in elections where voters must choose more than one candidate for the same post, such as in an at-large municipal election.

#### D. *Have the People Spoken?*

As previously noted, IRV has been popular in Minneapolis and San Francisco, but a few smaller municipalities have abolished IRV after trying it in an election or two.<sup>100</sup> It is possible that the unpopularity of IRV in these locations

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<sup>94</sup> *Id.*

<sup>95</sup> See Richie, *supra* note 3, at 507-08.

<sup>96</sup> See David Bamford, *Current Issues In Australian Election Law*, 1 ELECTION L.J. 253, 254 (2002) ("The results of House of Representatives elections are usually known within hours of the close of polling unless the margin is so small that the result could be affected by postal votes."); Ching-Ching Ni, *Australia Election Ousts Howard*, L.A. TIMES, Nov. 25, 2007, at 14, available at 2007 WLNR 23299672 (newspaper story from day after election announcing that Labour Party won at least 86 out of 150 seats in Parliament). See generally COMMONWEALTH 2007, *supra* note 36, at 5 (election on November 24).

<sup>97</sup> *City Completes its First Ranked Choice Voting Election*, U.S. FED. NEWS, Dec. 8, 2009, available at 2009 WLNR 24747253 (count completed in fifteen days, and results officially certified on December 7).

<sup>98</sup> Chris Steller, *Candidates, Like City, Slow to Grasp Instant-Runoff Voting*, THE MINN. INDEP. (Oct. 26, 2009), <http://minnesotaindependent.com/47990/candidates-like-city-slow-to-grasp-instant-runoff-voting>.

<sup>99</sup> *Id.* For a complete description of how IRV works in multi-seat elections, see MPRdotOrg., *How Instant Runoff Voting Works 2.0: Multiple winners*, YOUTUBE (Oct. 21, 2009), <http://www.youtube.com/watch?v=INxwMdi8OWw>.

<sup>100</sup> See, e.g., Eric Fried, Guest Commentary, *A Better Way to Hold an Election*, DENVER POST, May 13, 2011, at B13, available at 2011 WLNR 9585322. In addition to the examples below, a third municipality, Aspen, Colorado, repealed an IRV-like system after one election. *Id.* How-

suggests that IRV has been a failure. But a closer look at each example suggests otherwise.

Burlington, Vermont adopted IRV in 2005 and repealed it in 2010.<sup>101</sup> The current mayor, Bob Kiss, won as a third-party candidate<sup>102</sup> through IRV.<sup>103</sup> Kiss's party lost council seats in the 2010 election<sup>104</sup> after Kiss subsidized a local cable television provider in violation of the Burlington City Charter,<sup>105</sup> and according to the City Council President, the repeal "was an anti-Bob Kiss issue."<sup>106</sup> Presumably, if Mayor Kiss had been more popular, IRV would have been more popular.

Also in 2009, the voters of Pierce County, Washington voted to repeal IRV after trying it for a year.<sup>107</sup> Again, the unpopularity of one successful candidate may have tainted the community's view of IRV. County employees later accused Dale Washam—a perennial candidate who was elected through IRV to the position of County Assessor—of violating state labor laws.<sup>108</sup>

Thus, it might be that "buyers' remorse" over one or two unsuccessful officeholders has made IRV less popular in some municipalities. These events

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ever, Aspen's system was not traditional IRV, but rather was a hybrid system in which "two candidates [were elected] simultaneously to two council seats, eliminating all but the top four candidates in the first round." *Id.* As noted above, IRV is more confusing in multi-seat elections. See discussion *supra* notes 97-99 and accompanying text; Aaron Hedge, *Unlocking IRV in Aspen*, ASPEN TIMES WEEKLY (Oct. 3, 2012), <http://www.aspentimes.com/article/20101003/ASPENWEEKLY/101009972> (Rob Richie, a leading supporter of IRV, criticized Aspen system).

<sup>101</sup> *Burlington Rejects Instant Runoff Voting*, BURLINGTON FREE PRESS, Mar. 4, 2010, at A1, available at 2010 WLNR 4491155 [hereinafter *Rejects*].

<sup>102</sup> See John Briggs, *Mayor Kiss Optimistic*, BURLINGTON FREE PRESS, Mar. 4, 2010, at B1, available at 2010 WLNR 4664042 (Kiss belongs to Progressive Party, which lost council seats in a 2010 election).

<sup>103</sup> *Rejects*, *supra* note 101.

<sup>104</sup> Briggs, *supra* note 102.

<sup>105</sup> See *Citibank Suit Against Burlington Raises Questions*, BURLINGTON FREE PRESS, Sept. 30, 2011, at C6, available at 2011 WLNR 20444665 (describing scandal in detail).

<sup>106</sup> See *Rejects*, *supra* note 101.

<sup>107</sup> *Voters Changing Their Minds on Ranked-Choice Voting, Charter Amendments*, THE NEWS TRIB., Nov. 4, 2009, available at 2009 WLNR 22002014.

<sup>108</sup> David Wickert, *County to Decide Fate of Ranked Choice Voting*, THE NEWS TRIB., Oct. 26, 2009, available at 2009 WLNR 21210956; Editorial, *supra* note 18 (describing Washam as a "perennial and arguably unqualified candidate"). In addition, Pierce County voters had an unusually palatable alternative to IRV: Washington's "top two" primary. See Hays, *supra* note 18. Washington state law provides that absent a deliberate municipal choice to the contrary, elections begin with a primary featuring candidates from all parties, and the top two voted-for candidates in that primary, regardless of party affiliation, advance to the general election. See *id.* (describing concept in more detail). A "top two" primary, like IRV, prevents the least popular candidate from winning due to divided opposition. *Id.* Thus, voters who did not support plurality voting might still have supported the top two primary. But see *supra* note 18 (describing disadvantages of "top two" primary compared to IRV).

do not suggest that IRV is a failure—only that IRV, like any election method, will not assure that every candidate succeeds once in office.

It could be argued that attempts to abolish IRV in situations where winning candidates perform badly in office prove that IRV winners are regarded as less legitimate than are plurality-voting winners. To the extent that this is true, it may reflect more on the novelty of IRV in the United States rather than on any feature inherent to the system: once a system is part of a city's or nation's political tradition, it is less likely to be blamed for an individual officeholder's mistakes.

## V. CONCLUSION

In sum, IRV, where implemented, is likely to achieve at least some of its goals. Because IRV requires a candidate to win a runoff election in order to prevail, it prevents the election of candidates rejected by a majority of the electorate. However, IRV does not ensure that the true majority-choice candidate (i.e., the candidate who would win every conceivable runoff election) prevails. But IRV is still preferable to plurality voting in this regard, because the plurality system may enable the least popular candidate (i.e., the one who would lose every conceivable runoff election) to prevail.

However, proponents of IRV may have oversold it. It is not clear, based on the evidence from Australia, that IRV increases voter satisfaction in any verifiable respect. Nor is it clear that IRV reduces negative campaigning.

On the other hand, the arguments against IRV are weak—at least when compared to the plurality-voting status quo. IRV critics claim that IRV will lead to voter confusion and to ballot security problems. But in at least some American cities using IRV, the number of spoiled ballots has been quite low. This fact suggests that even in American cities where IRV is new, voter confusion is a minor problem. The success of IRV in Australia suggests that ballot security is not a major problem under IRV. And more broadly, the Australian system provides little evidence that IRV will create significant political upheaval.