

## **Alternative Single Winner Election Methods and the Law**

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## I. INTRODUCTION

There are inherent flaws in the plurality voting systems employed in most American elections with a single winner. Namely, plurality voting “can elect a candidate who receives the most first-place votes but is strongly *disfavored* by a majority of the electorate” *Dudum v. Arntz*, 640 F.3d 1098, 1100 (9th Cir. 2011), a result that does not comport with democratic ideals. It seems patently wrong that a candidate whom the majority voted against should nonetheless represent that majority – even to the point that a majority of voters would see this candidate as their *last* choice.

FairVote advocates consideration of alternative voting methods that protect majority rule and voter choice in elections with one winner. This paper will examine various voting methods and discuss their legality in turn, keeping in mind that the Constitution grants the states “broad power to prescribe the Times, Places, and Manner of holding Elections for Senators and Representatives.” U.S. CONST. art I, § 4, cl. 1. While we prefer certain alternative voting systems to others, we believe that courts should respect the political choices of jurisdictions as long as the alternative voting system does not violate any local, state or federal laws. Courts must interpret existing laws, of course and our paper reviews and anticipates potential concerns and challenges.

We start with instant runoff voting, the only alternative to traditional plurality voting and traditional runoff elections that is used for governmental elections and has faced recent legal challenges. We then address Bucklin voting, which was used by a number of states and cites the early twentieth century. Finally, we turn to other proposed alternatives that are theoretical in nature or only used in non-governmental elections: approval voting, range voting, the Borda count and Condorcet voting.

## II. INSTANT RUNOFF VOTING

Instant runoff voting (IRV) is a ranked choice voting system in which voters rank candidates in order of preferences. Those rankings are used to simulate a series of runoff elections in which the last-place candidate is eliminated after every round of counting. There are variations in how IRV is implemented, including in how many candidates are eliminated after the first round and how many rankings voters are allowed. Jurisdictions using forms of IRV include Ireland, Sri Lanka and India (in their presidential elections), Australia (in their parliamentary and mayoral elections), London (United Kingdom), Wellington (New Zealand), Portland (ME), Minneapolis and St. Paul in Minnesota, and San Francisco and Oakland in California.

In the most common form of IRV, voters rank as many candidates as they wish in order of choice: first choice, second choice and so on. In the first round, each voter’s first choice candidate receives one vote. If one candidate has received a majority of votes, that candidate is elected. If no candidate receives a majority, the candidate with the fewest votes is eliminated. Voters who ranked the eliminated candidate first will have their vote added to the totals for their second choice candidate. These rounds of tabulations continue until a candidate wins by receiving a majority of votes among the continuing candidates.

FairVote’s advocacy efforts involving single winner elections have focused on IRV. IRV is a significant improvement over plurality voting elections and often an improvement over two-

round runoff elections. At the same time, unlike most other alternative single winner systems, IRV creates no obvious ways for candidates and voters to game the system, thereby promoting voters sincerely ranking their preferences.

Various cities across the country have exercised their constitutional right to choose the manner of holding their elections by implementing IRV for state and local elections. However, the states' broad power to determine the manner of its elections is "not absolute, but is subject to the limitation that it may not be exercised in a way that violates...specific provisions of the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). There have been constitutional challenges to IRV, but both federal and state courts have found them to be without merit and ungrounded in the facts. See e.g., *Dudum v. Artanz*, 640 F.3d 1098 (9th Cir. 2011), *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009).

Although challenges to IRV can have nuances, these failed challenges have generally fallen into two broad categories: that IRV gives some votes more weight than others or dilutes some votes at the expense of others, and that some votes are not counted. We will first evaluate these claims and then discuss a separate question of whether IRV complies with state constitutions requiring that candidates who win a plurality or majority of votes be elected.

#### **A. Each vote has equal weight with IRV**

Arguments that IRV gives unequal weight to different votes or dilutes certain votes derives from misunderstanding the way in which votes are counted in IRV. Two key principles are that no voter in an IRV election ever has his or her vote count for more than one candidate at a time, and every voter will have one vote count in any round of counting in which one of their ranked candidates has not been eliminated.

Thus, if a voter's first choice candidate is eliminated, then his or her ballot could potentially be added to the totals for other candidates in subsequent rounds of tabulation. Conversely, if another voter's first choice candidate remains in the race, his or her ballot would count towards that same candidate's total in each round of tabulations. Read loosely, that process can contribute to the belief that votes are being counted differently, with some voters having the opportunity for their votes to be counted more than once. But every voter has only one vote counted at a time. For Voter A to have her ballot count for a second choice candidate does not give her an advantage over Voter B whose first choice remains in contention. Rather, it preserves Voter A's chance to elect a representative even though her first choice was eliminated.

This understanding helps explain the unanimous ruling by the Minnesota Supreme Court in *Minnesota Voters Alliance*, in which the Court specifically rejected the mistaken perception about inequality of voting power. (*Minn. Voters Alliance*, 766 N.W.2d 683.) The court held:

We reject the central premise of appellants' unequal weighting argument: that the vote for a continuing candidate is exhausted in the first round in which is exercised and then is not counted and is of no effect in subsequent rounds. The vote for a continuing candidate is carried forward and counted again in the next round. Just because the vote is not counted for a *different* candidate in the new round (as is the vote originally cast for an eliminated candidate), does not mean that the ballot was exhausted, that the vote for the

continuing candidate is not counted in subsequent rounds, or that the voter has lost the ability to affect the outcome of the election.

The Ninth Circuit Court of Appeals in *Dudum v. Arntz* also stated this argument clearly. The unanimous opinion explained why RCV is a one-person, one-vote system:

At its core, Dudum's argument is that some voters are literally allowed more than one vote (i.e., they may cast votes for their first-, second-, and third-choice candidates), while others are not. Once again, Dudum's contention mischaracterizes the actual operation of San Francisco's restricted IRV system and so cannot prevail. In fact, the option to rank multiple *preferences* is not the same as providing additional *votes*, or more heavily-weighted votes, relative to other votes cast. Each ballot is counted as no more than one vote at each tabulation step, whether representing the voters' first-choice candidate or the voters' second- or third-choice candidate, and each vote attributed to a candidate, whether a first-, second- or third-rank choice, is afforded the same mathematical weight in the election. The ability to rank multiple candidates simply provides a chance to have several preferences recorded and counted *sequentially*, not at once. *Id.* (emphasis in original).

Ultimately, therefore, each vote is only counted once, and every voter has the same opportunity to affect the outcome of the election as any other voter. That fact also speaks to any challenge based on the Equal Protection Clause of the Fourteenth Amendment. IRV is entirely consistent with the Supreme Court's one-person, one-vote jurisprudence. *Id.* at 698.

### **B. Every vote is counted in an IRV election**

Confusion about each vote's ability to affect the outcome of the election seems to stem from the concept of "exhausted" ballots. Exhausted ballots can occur if a voter does not rank every candidate and if all the candidates ranked by the voter have been eliminated during the count. In other words, if at a certain point in the tabulations, each candidate ranked by a voter on his or her ballot has been eliminated, that ballot is "exhausted", and is no longer counted in the later stages of tabulations.

However, just because the vote is not counted in later rounds, does not mean it does not count. In *Dudum*, plaintiffs challenged how San Francisco restricts voters to three rankings, which means that in elections with a large number of candidates, it is possible for a voter to rank three candidates who have been eliminated by the final round of the count. The Ninth Circuit explained, however, that "exhausted ballots are counted in the election, they are simply counted as votes for losing candidates, just as if a voter had selected a losing candidate in a plurality or runoff election." *Dudum* 640 F.3d at 1110.

Therefore, asserting that exhausted ballots are not counted would be similar to saying, for example, that votes for John McCain did not count in the 2008 presidential election because he lost. People who voted for McCain may not have been happy with the result, but their votes were certainly counted.

### **C. Laws requiring plurality outcomes IRV winners have a plurality of votes even when they have a majority**

Some state constitutions or local charters may require that winners receive a plurality of votes. IRV is legal under such conditions.

IRV requires that the winning candidate receive a majority of the votes in the final round of tabulations. Even though it always elects the candidate backed by a majority of voters who have chosen to indicate a preference for one of the final round candidates, it is legally a form of plurality voting, meaning the candidate with the most votes in the final count is the winner. Although one can explain IRV as analogous to runoff elections, and although the final round of an IRV election elects the candidate with a majority of votes in that round, runoff elections and IRV are distinct from one another, with votes being both cast and counted in different ways.

In a two-round runoff, there is more than one round of election. Different voters can and usually do participate, including runoff round voters who did not vote in the first round. A voter can also change his or her mind between rounds in a runoff election. If a voter's preferred candidate wins enough votes in the first round to move to advance to the runoff, that same voter is free to vote for the opposing candidate in the runoff.

As the ninth circuit held in its opinion in the *Dudum* case, IRV does not involve more than one round of election. Instead, it has more than one round of *counting the votes already cast*. "The series of calculations required by the algorithm to produce the winning candidate are simply steps of a single tabulation, not separate rounds of voting." *Dudum*, 640 F.3d at 1107. Unlike runoffs, a voter cannot change his or her order of preference between rounds of count, and no voter can be added into the count who was not part of the initial count.

While IRV will not elect a candidate based on earning a plurality of first-choice rankings, IRV will still elect a candidate with the plurality of votes. Black's Law Dictionary defines "vote" as "the expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." (9<sup>th</sup> ed. 2009). If voters' ballots include ranked preferences, it would be too limiting to say that their first-ranked candidates alone reflect a complete expression of their preferences. Rather, the expression of their preference is reflected by the entire ballot.

The foremost advantage of IRV is that ensures that the candidate with the most widespread support among those able to do well in earning first choice support will be elected. As the Ninth Circuit explained in the *Dudum* case:

[R]estricted IRV advances the City's legitimate interests in providing voters an opportunity to express nuanced voting preferences and electing candidates with strong plurality support. . . . Unlike a two-round runoff election, redistricted IRV will not always produce a candidate with majority support, But restricted IRV also does not limit voters' choice to only two candidates, and so it allows voters to express a wider range of preferences [than runoffs]. Moreover, in practice, the ability to express more nuanced preferences means that candidates with greater plurality support (although not necessarily majority support) tend to be elected, as compared to a traditional plurality system. *Id.* at 1116.

Voters go to the polls conscious of the fact that though their first choice candidate may lose, they have the opportunity to support alternative candidates, thereby giving a voice to the full range of their preferences. Therefore, a more accurate and comprehensive definition of “vote” encompasses the entire ballot, not merely one ranking.

#### **D. Laws requiring majority winners: Winners in most forms of IRV may not have a final round vote total that is a majority of first round votes cast**

Some state constitutions or local charters may require that winners receive a majority of votes. Only certain forms of IRV are legal under such conditions.

Legally, most common forms of IRV do not “necessarily produce a majority result.” *Dudum*, 640 F.3d at 1110. The winner in an IRV election will have a majority of votes in the final round of tabulations, but the final round only includes non-exhausted ballots - meaning ballots that do not rank any final round candidate are not part of the final tally. Although it is common for systems requiring majority winners not to treat voters who abstain from that contest as part of the definition of the majority, courts rightly see IRV as a single election, which means that the first round tally is the basis for the definition of “total votes cast.” As candidates are eliminated in successive rounds of tabulations, the number of exhausted ballots (essentially votes for losing candidates) may reach a point where the final round winner will not have a majority of the total votes that were cast in the initial round.

A jurisdiction with a majority requirement, however, could use one of two forms of IRV. Australia’s form of IRV meets this legal definition of majority voting. The only valid ballots are those where a voter has ranked all the candidates or all but one candidate. If write-in votes are not allowed (a prohibition often applied in the second round of traditional runoff elections as well), then the final round winner is guaranteed to have a vote total that is also majority of valid votes in the first round.

Another approach involving IRV would allow for a separate runoff election. IRV could be used in the first round. If any candidate won a majority of first choices, that candidate would win without a runoff. If not, the IRV tally would reduce the field to two, and the top two candidates would go to a runoff. A variation of that system would be for the runoff to only take place if the final round leader’s vote total was not a majority of the first round votes. This approach would reduce the number of runoff. Either approach would ensure that the runoff candidates are more representative choices than might have advanced in a traditional runoff.

### **III. BUCKLIN VOTING**

Bucklin voting is another ranked choice system in which voters rank their preferences for candidates. There are variations of the system, but typically, the first choice rankings are tallied as one vote, and if one candidate has a majority of first round votes, that candidate wins. If not, no candidate is eliminated, and the second choice votes of all voters are added as one vote each to the candidates’ totals from the initial count. That process of adding votes from lower rankings continues until one candidate has a majority or wins in the final round with the most votes.

FairVote does not endorse Bucklin voting in governmental elections for a variety of reasons that relate generally to perverse impacts on campaigns and outcomes. First, it is possible for the winner to be the candidate with the fewest number of first choices, which is difficult to explain to voters and elected officials. More importantly, any voter who ranks more than one candidate will give votes to more than one candidate at the same time in the event that there is no first round winner.

Bucklin voting therefore violates the “later no harm criterion,” which means that voters have an obvious incentive not to indicate their sincere second choice out of fear that doing so will allow their second choice to defeat their first choice. As a result, many voters will choose not to indicate a second choice, thereby undermining the effectiveness of the system. Less informed voters who end up indicating a second choice will be at a disadvantage of more informed voters – they may not realize that following the instructions on the ballot and indicating a second choice may result in the defeat of their first choice.

Bucklin voting was used in a number of cities and some state primaries in the early twentieth century. Over time it resulted in many voters indeed not indicating a second choice – barely one in ten in contested statewide primaries in Alabama, for example. During this period, the question of the system’s constitutionality was brought before various state courts. Some courts found Bucklin to be constitutional, while other courts found it to be unconstitutional. One key determinant in whether or not a state court may find Bucklin voting constitutional seems to be whether the court believes that the system allows voters to cast more than one vote.

In *Brown v. Smallwood*, 130 Minn. 492 (1915), the Supreme Court of Minnesota found Bucklin voting to be unconstitutional for two different reasons. First, the court held that it gave some voters more than one vote. The court defined the word “vote” as “a choice for a candidate by one qualified to exercise a choice,” and went on to say that Bucklin voting corrupts that definition. *Id.* at 498. “It was never thought that with four candidates one elector could vote for the candidate of his choice, and another elector could vote for three candidates against him.” *Id.*

The court’s concern can be demonstrated by considering a hypothetical ballot in which a voter ranked 3 candidates, ranking Candidate X first, Candidate Y second, and Candidate Z third. In the first round of tabulations, that voter’s vote would be added to the total for Candidate X. However, if no candidate received a majority in the first round, that same voter would have another vote added to the total for Candidate Y. As a result, in the election at issue in *Smallwood*, 130 Minn. at 492, only 12,313 voters cast ballots, but 18,860 total votes were counted. Tony A. Solgard and Paul Landskroener, *Municipal Voting System Reform: Overcoming the Legal Obstacles*, Bench & Bar of Minn., Oct. 2002.

The second reason the Minnesota Supreme court found Bucklin unconstitutional was that if a voter’s first choice did not win, his or her second choice vote would necessarily undermine his first choice candidate, meaning that the system “directly diminishes the right of an elector to give an effective vote for the candidate of his choice.” *Smallwood* 130 Minn. at 498. Using the example from above, the voter would have wanted to elect Candidate X, but if Candidate X did not receive a majority in the first round of tabulations, the voter’s second choice vote going to

Candidate Y would hurt Candidate X. The *Smallwood* court therefore objected to the fact that Bucklin voting violates what is now known as the “later-no-harm criterion.”

While violation of the later-no-harm criterion is an important consideration for policymakers, it may not be a legal obstacle. For example, a common method of voting in the United States is “bloc voting”, or traditional multi-seat or at-large elections in which all candidates run against one another for two or more seats, with voters having as many votes as seats. In such an election, a voter is allowed to cast equal votes for two or more candidates. In doing so, it is possible that the decision to cast a second vote for a less-preferred candidate will help that candidate win at the expense of the more preferred candidate. It is also possible that they both could win, of course, while it is never possible for more than one candidate to win a single-winner race. For courts addressing this concern, the key point will be to assess whether a single-winner system is inherently different because indicating support for a second choice will *always* have the potential to harm one’s first choice, while in a multi-seat election it would be possible for them both to win.

Furthermore, not all courts have shared the *Smallwood* court’s view of Bucklin voting. In the same year as *Smallwood*, the Supreme Court of New Jersey found Bucklin voting constitutional on facial grounds in *Orpen v. Watson*, specifically saying that it did not *always* result in voters having more than one vote count. *Orpen v. Watson*, 87 N.J.L. 69 (N.J. 1915). The court reasoned, “If the person for whom [the elector] votes as his first choice has a majority of that class of votes, and recourse is not had to the second choice votes, no second choice vote of his has any effect, and so if his second choice vote enters into the majority, all of his first choice votes are void, so far as they affect any result. It is perfectly clear that, under this method of canvassing votes to ascertain where the majority rests, the ballot of any voter can only be counted once for any one candidate.” *Id.* at 73.

Other courts took a broader view that was deferential to political decisions. These courts upheld Bucklin voting, stressing that the method of electing officials is a decision that should be left to the legislative branch, not the judiciary. See e.g. *Fitzgerald v. City of Cleveland*, 88 Ohio St. 338, 352 (Ohio 1913) (“The method of electing officers is a governmental function or power, and, when the officer to be elected is chosen solely for the performance of a municipal duty, it is a municipal affair”), *Orpen* 87 N.J.L. at 73 (holding the court cannot rule on the soundness of election policy, only on its constitutionality), *Adams v. Landon*, 110 P. 280, 281 (Idaho 1910) (“It has been well settled by a long line of decisions that the Legislature has the power to make at least reasonable regulations in regard to the conduct of elections and the exercise of the right of suffrage.”). Therefore, it could be asserted that as long as Bucklin does not blatantly violate a state’s constitution, a court should defer to the political judgment of policymakers.

#### **IV. APPROVAL VOTING, RANGE VOTING AND BORDA COUNT**

We now turn to three voting methods that have some passionate advocates, but are not used for any governmental election for a single winner anywhere in the world and have never been used in governmental elections in the United States. Renee Steinhagen, *Giving New Jersey’s Minor Political Parties a Chance: Permitting Alternative Voting Systems in Local Elections*, New Jersey Lawyer, the Magazine, (Aug. 2008). For that reason there is no case law available to shed light on whether or not the courts would be receptive to these methods. However, decisions in

IRV and Bucklin voting cases may provide guidance. Part IV will evaluate the legality of each method by applying the reasoning of the IRV and Bucklin decisions to these three voting methods.

### **A. Approval Voting**

Approval voting is a system in which voters rate candidates by either giving them a 1 or a 0. They do so by voting for the candidates of which they approve and casting no vote for the remaining candidate. The votes are then added up and the candidate with the most number of votes wins.

FairVote does not advocate for approval voting in governmental elections for both practical and theoretical reasons. One problem is that a candidate who is the first choice of more than half of the voters can lose if some of those voters choose to back other candidates. This fact relates to the second key problem, which is a practical one: a voter cannot indicate support for a “compromise” choice without having that indication of support count equally with the vote given to the voter’s first choice. As with Bucklin voting, violating ‘later no harm’ creates tactical dilemmas, which in meaningfully contested elections could easily result in approval voting largely operating like a plurality voting systems.

Turning to legal considerations, approval voting could be implemented in jurisdictions requiring that the candidate with the most votes wins, and should not encounter any legal problems with regard to that specific constitutional provision.

Approval voting may, however, engender the same two legal problems the *Smallwood* court found with Bucklin voting. First, one elector may cast more votes than another elector, thereby giving unequal weight to different ballots. For example, consider a situation in which one elector chooses to vote for, or approve of, four different candidates, while another elector chooses to only vote for one candidate. That raises the concern of the *Smallwood* court that “with four candidates one elector could vote for the candidate of his choice, and another elector could vote for three candidates against him.” *Smallwood*, 130 Minn. at 498.

As with Bucklin voting, however, this should not be grounds for rejection on facial grounds – it would be possible that no voter decided to approve of more than one candidate. Furthermore, as with Bucklin, a court could decide that given that every voter had the same options available as every other voter, it was the voter’s decision not to cast as many votes as another voter.

A second potential legal obstacle to approval voting, the fact that it violates the later-no-harm criterion, may be more difficult to overcome. Some might argue that the later-no-harm criterion does apply to approval voting, since voters do not rank candidates and therefore do not have ranked preferences if they vote for more than one candidate.

But in practical terms, it is likely that a court would understand that voters in fact may have preferences, and the system would not allow them to vote for more than one candidate without those votes counting equally. To illustrate the way in which approval voting violates the later-no-harm criterion, consider a primary with one hundred voters and four candidates: Candidates A, B and C, all of whom the one hundred voters could tolerate to varying degrees as nominees, along

with Candidate D, whom most voters passionately dislike. Suppose ninety-nine voters decide to approve of all three candidates A, B and C even though all of them slightly preferred Candidate A to Candidate B and preferred both of those candidates to Candidate C. Suppose the 100th voter was Candidate D, who decided to cast approval votes for Candidates C and D.

As a result, Candidate C would win this election by one vote, even though in a plurality voting election, Candidate A would have won with 99% of the vote and even though Candidate C would have been rated third out of four by ninety-nine voters and second by the 100<sup>th</sup> voter. So if the first 99 voters had chosen not to cast a second vote for Candidate C, instead only voting for Candidates B or C, Candidate A would have easily prevailed. Therefore, their votes for their third choice, Candidate C, harmed their first choice candidate and in fact caused their first choice to lose the election.

Even if they had made this decision not to support Candidate C, however, they still might have hurt their interests by voting for both Candidates A and B. Even if only a handful of voters preferred B to A, those voters might have helped elect B if they cast tactical votes, while A voters were not tactical.

These examples implicate the *Smallwood* court's concern about a voting system that "directly diminishes the right of an elector to give an effective vote for the candidate of his choice." *Smallwood* 130 Minn. at 498. As mentioned above, however, not all courts have shared the *Smallwood* court's view, so that is not necessarily an insurmountable legal barrier. Furthermore, it could be argued that voters are making an informed decision to cast a vote for a lesser choice. They are not forced to do so, and can always choose not to vote for a lesser choice.

Our example also raises a question about approval voting's compliance with any legal language about how elections must protect majority rule. With IRV and Bucklin voting, for example, any candidate who wins more than 50% of first choices will always win. With approval voting, a candidate with the first choice support of more than 50% of voters may still lose.

## **B. Range Voting**

Approval voting is one form of range voting (also known as "score voting"), which is a voting method in which voters give ratings to the candidates within a specified range, such as 1-10 or 0-99, with each candidate receiving a score from that voter. Based on those ratings, the scores are then totaled, and the candidate with the highest score wins. Some range voting systems will allow voters not to rate a candidate, in which case candidates' scores are calculated by finding the average score from those voters who did rank a given candidate.

FairVote's concerns about using range voting in governmental elections are similar to its concerns about approval voting: violation of Americans' common understanding of majority rule and violation of the later-no-harm criterion. While providing voters with more nuanced ability to indicate ranges of support for candidates, that same nuance also creates a problem of whether voters are giving appropriate amounts of support to their favorite candidates. One way to think about the latter problem is that one teacher's grade of "A" is another teacher's "B." In other words, voters with the exact same views of a candidate might give them quite different totals of votes without realizing that their scores affected those candidates differently.

Since approval voting is merely a form of range voting, range voting would encounter some of the same legal problems as approval voting. Range voting also violates the later-no-harm criterion, and it can give some electors more votes than other electors. However, that legal obstacle could be overcome by employing the same argument used to define IRV as a plurality voting system. Limiting the definition of a “vote” to a voter’s first ranking is far too limiting, and in fact incorrect. A voter’s preferences are represented by his or her entire ballot, not merely the first-ranked candidate on the ballot. The *total* scores given on each ballot would reflect a voter’s vote. Therefore, the winner of a range voting election would have won a plurality of votes.

### **C. The Borda Count**

In the Borda Count, voters rank candidates in order of preferences, as with instant runoff voting and Bucklin Voting. With Borda, however, each ranking is then assigned a point value. For example, if there were three candidates, a candidate ranked first might receive three points, a candidate ranked second might receive two points and a candidate ranked third might receive one point. The points are then totaled and the candidate with the highest number of points wins.

As with range voting and approval voting, Borda voting violates the later-no-harm criterion, can allow a candidate with a majority of first choices to lose, and can give some voters more votes than others. For these reasons, FairVote does not support using it in governmental elections. Arguments defending it on legal grounds would be similar to those used to defend approval voting, range voting and Bucklin voting.

### **V. CONDORCET VOTING**

The Condorcet Method is another ranked choice voting system in which voters rank their preferences, but the method for finding a winner is different from the previously discussed ranked choice methods. There are variations of Condorcet voting, but in all of them the votes are tabulated by pairing each candidate with every other candidate, as in a round-robin tournament. A candidate who defeats another candidate in a one-on-one pairing earns a point. The candidate with the most points – in other words, the best round-robin “record” – wins the election.

If there is a candidate who defeats all other candidates when matched against them one-on-one, that candidate will always win with a Condorcet system – and indeed is called “the Condorcet winner.” But not all Condorcet voting elections will have a Condorcet winner. The result can be what is called a “circular tie”: for example, if three candidates are running, it is possible for each candidate to win one pairing and lose the other pairing when matched against the other candidates – e.g. they all end up with a record of one win, one loss. There are several variations of Condorcet voting, all with different approaches for dealing with the potential of a circular tie.

Given the unique way in which votes are tallied with Condorcet voting, there could be legal challenges to implementing it in states with constitutions that require that the candidate with the most votes wins (plurality systems). Part of the question is what counts as a vote. One could argue each voter is able to cast one vote for each pairing on his or her ballot. In other words, a voter ranking four candidates A, B, C and D in that order would be casting the six separate votes:

one vote each for A over B, C and D, one vote each for B over C and D and one vote for C over D. Another voter ranking nine candidates in that same race would be casting far more votes.

In this scenario, then, some voters clearly would be casting more votes than others, although all of them started off with the same opportunity. Furthermore, it is not clear what “most votes” would mean. One particular pairing – B over D, for example – might have the most votes, but that Candidate B might have lost when matched against another candidate that defeated every candidate one-on-one. That would suggest “most votes” should be grounded in each candidate earning a vote for winning a pairing with another candidate, but that would mean far fewer “votes were cast -- and actual voters’ votes were not being considered directly when evaluating whether the candidate with the most votes was elected.

Another concern – both political and potentially legal when considering constitutional provisions dictating that the candidate with the most votes wins - is that, as with other alternatives like approval voting and range voting, the Condorcet winner could be everyone’s second choice and no one’s first choice. Condorcet winners are not found by looking at the aggregate number of votes, but rather by which candidate has won the most pair-wise comparisons with every other candidate. Therefore, the winner could potentially have done very poorly in earning first-choice votes.

Consider the following hypothetical election results among four candidates: A, B, C, and D:

49% A-D-B-C  
49% B-D-A-C  
2% C-D-A-B

In this example, Candidate D would not have won any first choice support, but would nonetheless be the Condorcet winner by being everyone’s second choice and defeating each other candidate by a 51% to 49% margin.

To make the argument that the Condorcet winner has won a “majority of the votes,” one would have to argue that winning a pair-wise comparison with just one of the other two candidates qualifies as a “vote”, and that winning both pair-wise comparisons qualifies as a majority of the “votes”. One way to craft that argument would be to assert that the collective will of the electorate regarding a pair of candidates reflects their “vote”, but by that logic, nearly any voting system could be considered a plurality voting system. As a result, there may not be a viable argument that Condorcet voting is a plurality voting system.

Like Bucklin voting, approval voting, range voting, and Borda count voting, Condorcet voting also could face a legal challenge because violates the later-no-harm criterion. Its violation of later-no-harm is far less obvious (it relates to tie-breaking procedures) and therefore far less politically problematic than with those four systems, however.

Nevertheless, not all courts took issue with that aspect of Bucklin voting, and instead found it constitutional in spite of that possibility. Additionally, the Supreme Court has recognized that any election scheme, “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.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1963). Through this lens, the key question is whether or not a modest burden on the right to vote is outweighed by state regulatory interests. Accordingly, the Supreme Court has “repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.” *Wash. State Grange*, 552 U.S. at 442. The overarching goal of channeling expressive activity at the polls provides a strong argument that courts should look kindly on Condorcet voting.

Those seeking to defend Condorcet voting could also argue that the system attempts to best reflect the will of the voters and arguably does so better than other systems. See “The Greatest Overall Satisfaction to an Absolute Majority of the Voters,” Jeff Gill and Jason Gainous, *Why Does Voting Get So Complicated? A Review of Theories for Analyzing Democratic Participation*, *Statistical Science*, Nov. 2002, at 390. “From a theoretical perspective, it is generally agreed that if a Condorcet winner exists, the Condorcet winner should be elected.” 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, 341 (2006).

In fact, because of the perceived fairness of the Condorcet method, the particular criteria of winning all pairwise comparisons is often used to measure the fairness of other election methods, sometimes called the *Condorcet Efficiency* or the *Condorcet Criterion*. Although the Condorcet winner can be a candidate without any first choice support, “the Condorcet Criterion is a widely accepted normative standard for judging the fairness of a majority rule process to select a single alternative.” Michael Regenwetter and Bernard Grofman, *Approval Voting, Borda Winners, and Condorcet Winners: Evidence From Seven Elections*, *Management Science*, April 1998, at 521. As the standard for judging the fairness of voting processes, when courts employ the Supreme Court’s balancing test, that a voting method may put modest burdens on the right to vote so long as it is “reasonable,” “politically neutral,” and “channels expressive activity at the polls,” *Wash. State Grange*, 552 U.S. at 442, they may find that the Condorcet method passes that test.

For these reasons, FairVote would support Condorcet voting for governmental elections over plurality voting, but sees it as difficult to win and sustain and potentially open to legal challenges.

## **VI. CONCLUSION**

There would be varying degrees of difficulty in winning and implementing the other single winner voting systems outlined above. The system that might encounter the toughest obstacles to overcome is Bucklin voting, simply because of current legal precedents working against it. That being said, as mentioned above there is also not a dearth of precedent in its favor, so those obstacles would certainly not be insurmountable.

Though there is no legal precedent working against range voting, approval voting, or Borda count voting, the same legal obstacles that stood in the way of Bucklin voting could be a hindrance to their use. They violate the later-no-harm criterion, and courts may find that they

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give voters more than one vote. Courts may also be concerned that candidates with the first choice support of 51% of voters could lose if those voters were less tactical than other voters.

There is also no case law working against Condorcet voting, although it also violates the later-no-harm criterion and, depending on state constitutional language, courts may be skeptical about measuring who has “the most votes.”

Of all the alternative voting methods, FairVote believes that IRV is the one most likely to be effective and well-received. It has faced the most vigorous tests in courts, not only in the United States but also in other nations. There are cases specifically addressing and dispelling any myths about IRV and upholding it as a constitutional voting system. It has also been employed for public elections in the past, so there is empirical proof of its benefits.



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FairVote is a non-partisan electoral reform organization seeking fair elections with meaningful choices. Our vision of “the way democracy will be” includes an equally protected right to vote, instant runoff voting for executive elections and proportional voting for legislative elections.

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