COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2023-2024 #188

MOTION FOR REHEARING – INITIATIVE #188

On behalf of Jason Bertolacci and Owen Alexander Clough (collectively, "Proponents"), registered electors of the State of Colorado and designated representatives of resubmitted Proposed Ballot Initiative 2023-2024 #188 ("Initiative #188"), undersigned counsel hereby submit this Motion for Rehearing pursuant to C.R.S. § 1-40-107, and as grounds therefore states as follows:

I. Introduction

Initiative #188 is a nonpartisan measure brought by the Proponents, who are the designated representatives of a bipartisan group of civic and political leaders. They bring this measure to modernize Colorado's election process so that voters, including unaffiliated voters, have greater participation in electing Colorado's federal and state elected officials. Initiative #188's central purpose is to expand voter choice to elect candidates for certain federal and state offices who better represent the will of a majority of the voters.

The Title Board heard the original version of Initiative #188 at an initial hearing on March 7, 2024, where it found 2-1 that the measure contains a single subject and set title. After various objectors filed motions for rehearing, and a rehearing on March 20, 2024, the Title Board reversed and determined that it lacked jurisdiction to set a title because the measure contains multiple subjects. Specifically, Title Board Chair Theresa Conley reasoned that allowing any voter to sign any candidate's petition to get on the all-candidate primary election ballot, regardless of the party affiliation or non-affiliation for either, constitutes an impermissible second subject.

The Proponents resubmitted Initiative #188 to Title Board on March 29, 2024, pursuant to Article V, Section 1(5.5) of the Colorado Constitution. The resubmitted version struck the language that would allow any voter to sign any candidate's petition. On April 4, 2024, the Title Board determined that it possessed jurisdiction to consider the resubmitted measure, and voted 2-1 vote that the measure has a single subject and set title. The title set is as follows:

> A change to the Colorado Revised Statutes creating new election processes for U.S. Senate, U.S. House of Representatives, Colorado state legislature, and certain state offices, and, in connection therewith, reducing the number of signatures required to petition onto a new all-candidate primary ballot for these offices; creating an all-candidate primary election for these offices, allowing voters to vote for any one candidate per office, regardless of political party affiliation, and specifying that the four candidates who receive the most votes advance to the general election; and in the general election, allowing voters to rank candidates and adopting a ranked voting process for how the votes are tallied and a winner is determined.

II. Argument

a. Initiative #188's title must be amended to comply with the clear title requirements.

The clear title standard requires that the title "allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal." *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565, 568 (Colo. 2016). Colorado law requires that the Title Board consider the confusion that may arise from a misleading title and to set a title that "correctly and fairly express the true intent and meaning" of a measure. *Id.* (quoting C.R.S. § 1-40-106(3)(b)).

Title Board must set a title that is "sufficiently clear and brief for the voters to understand the principal features of what is being proposed." *In re Title, Ballot and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). "Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes." *Id*. at 1099.

In order to set a clear title, the following four changes must be made to the title adopted by the Title Board at the April 4, 2024 hearing:

1. <u>Move the clause concerning reducing the number of signatures required to petition onto the all-candidate primary election ballot to a different location.</u>

There was considerable debate at the April 4th hearing concerning where to place in the title language about reducing the number of signatures required to petition onto the all-candidate primary ballot (the "Signature Reduction Clause"). Three options were assessed: (1) placing it at the end of the title after the lines about the general election; (2) placing it directly after the clause about creating an all-candidate primary election; or (3) placing it directly after the "in connection therewith" phrase. While certain Title Board members, as well as the Proponents, advocated at different points in time for one or several of the options depending on the location and wording of other language in the title, the Title Board ultimately landed on option #3. Upon further review, the Proponents believe that the better placement of option #2, which Chair Conley initially advocated for, got lost as part of other argumentation. For the following reasons, option #2, and not option #3, ensures that the measure has a clear title.

Placing the Signature Reduction Clause pursuant to option #3 not only creates an unnecessary redundancy, but impermissibly risks voter confusion. Both the Signature Reduction Clause and the clause that currently follows it in the title discuss the creation of a new all-candidate primary election. The mention of creating a new all-candidate primary in the Signature Reduction Clause is necessary only because of the order of clauses in the title because otherwise voters would not read that the reduced signature requirements for petitions applies to the primary election. While the redundancy is beneficial to avoid one confusion, it creates another one. As a consequence of the Signature Reduction Clause mentioning the all-candidate primary election before introducing it, voters will be confused as to whether the measure creates ***two*** different new primary elections—one with reduced signature requirements for petitions and another that would allow voters to vote for any candidate. This is especially true because for the two clauses to be ordered this way, they must be separated by a semi-colon.

Moving the Signature Reduction Clause as proposed under option #2 removes this likely confusion by first introducing the new all-candidate primary election and then listing out the features of that primary election. Ordering the clauses in this fashion also allows the title to flow both logically and consistently. *See Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 62*, 961 P.2d 1077, 1083 (Colo. 1998) ("The aim is to capture, in short form, the proposal in plain, understandable, accurate language . . . ."). Under option #2, the title would first state that Initiative #188 creates an all-candidate primary election before listing the major features of that new primary election, including signature requirements to petition onto the primary election ballot. This construction also mirrors the language after the discussion of the all-candidate primary election, which first introduces the new general election before describing how the general election would be conducted. Therefore, the risk of voter confusion is eliminated.

2. Specify that the changes to the general election apply only for "covered offices."

The title adopted at the April 4, 2024 hearing specifies that the all-candidate primary election pertains to the offices listed in the single-subject clause but does not do so for the general election. As drafted, voters may be confused whether instant runoff voting for the general election applies to all offices or just those in single-subject clause. Adding "for these offices" when the general election is introduced in the title would remove this potential confusion. *See In re Title, Submission Clause, Summary for 1999-2000 No. 29*, 972 P.2d 257, 267–68 (Colo. 1999) (ballot title for statewide initiative proposing term limits on judicial officers was ambiguous and potentially misleading when it did not adequately specify to which judicial officers it applied).

3. Clarify that the measure would adopt instant runoff voting in the general election.

The title utilizes a generic term—"a ranked voting process"—that risks misleading voters as to how votes are tabulated. While the term is followed by "for how votes are tallied and a winner is determined," "a ranked voting process" fails to provide any details as to ***how*** votes are tallied or a winner is determined. Voters are left guessing as to those important details. Moreover, this generic term does not enhance voter understanding because immediately preceding it is language specifying that voters would rank candidates. Because "a ranked voting process" is an empty term, voters are left to their imagination as to all the relevant specifics as to a "principal features of what is being proposed." *See In re 1999-2000 No. 258(A)*, 4 P.3d at 1098.

To provide the necessary clarification, the title should replace "a ranked voting process" with "an instant-runoff voting process." As has been discussed during Title Board hearings, there are different types of ranked choice voting methods, including "instant runoff voting and choice voting or proportional voting" as defined in C.R.S. § 1-1-104(34.4). Instant runoff voting is further defined in statute as "a ranked voting method used to select a single winner in a race." *See* C.R.S. § 1-1-104(19.7). Instant runoff voting is the specific type of ranked voting that is used, and named, in Initiative #188.[1] This specific voting method is not only distinct in the election code, but it also differs from the ranked voting methods used in other measures under review by the Title Board,

[1] The Proponents chose instant runoff voting for the general election because they believe that this voting method would best curb vote splitting and spoilers, and also to prevent the undesired potential outcome of electing a candidate who received a small plurality, such as 26% of the vote, in the general election after four candidates advance from the measure's all-candidate primary election.

including Initiative #267.[2] The distinction between instant runoff voting and other types of ranked choice voting is essential to accurately informing voters how votes will be tallied and a winner determined. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 #256*, 12 P.3d 246, 257 (Colo. 2000) (upholding the use of a phrase which is "descriptive of the proposal"). Additionally, voters may already be familiar with "instant runoff voting" because that term is used in existing statute, *see* C.R.S. §§ 1-1-104(34.4), 1-7-1003, or may have voted in a municipal election in Colorado utilizing instant runoff voting. If not, voters can easily research the term through a simple internet search. Therefore, using "an instant-runoff voting process" provides the necessary information to voters that "ranked voting process" lacks.

4. Utilize the concept of "majority of votes" to differentiate instant runoff voting from single choice voting.

Finally, the title must include the concept of "majority of votes" to distinguish for voters instant runoff voting from single choice voting. Single choice voting ensures that the winning candidate only have a plurality of votes. In contrast, instant runoff voting requires that a winning candidate receive a majority of the votes at the end of the ranked voting tally. If, for example, there are 100 active ballots in the last round of the ranked voting tally, then the winning candidate must be marked as the highest-ranked remaining candidate on at least 51 of those ballots. This requirement for a candidate to win with a "majority of votes" is the ***key feature*** of instant runoff voting.

The Proponents understand that Title Board has some concerns about including the word "majority" in the title to describe instant runoff voting. Several commentators at prior Title Board hearings have raised that instant runoff voting does not always elect candidates with a true majority. But these concerns are addressed in the attached law review article, Exhibit A, which illustrates why the term "majority of votes" accurately describes what portion of the vote a candidate must garner to be elected under instant runoff voting. Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 Calif. L. Rev. 1773, 1801, 1818–25 (2021). The article explains that the relevant denominator for determining the majority is the number of votes that are active in the final round. If a voter's rank does not reach the final round, the voter's vote is for no candidate and that voter has essentially delegated decision to other voters.[3]

The concept of a majority of votes is the key feature of instant runoff voting and must be in the title so that voters can assess how instant runoff voting differs from single choice voting. Otherwise, the failure to mention this "key feature of the initiative [in] the title[] is a fatal defect"

[2] Initiative #267 has different proponents and is not connected to the measures put forward by the Proponents.

[3] For example, in Maine's 2018 Second Congressional District race—a race Jared Golden won—voters cast a total of 289,624 valid ballots. After the initial round, Bruce Poliquin had a slight lead with 45.6% of votes cast over Golden's 46.3%. Two third-party candidates, Tiffany Bond and Will Hoar, received 5.7% and 2.4% of the vote, respectively. With no candidate breaking the 50% threshold, the tallying proceeded through rounds of counting voter preferences. On 7,820 ballots, voters ranked a third-party candidate first and declined to indicate a secondary preference; and on 335 ballots, voters ranked third-party candidates first and second, but left their remaining rankings blank. Therefore, when both Bond and Hoar were eliminated by the fourth round, these 8,155 ballots became inactive and did not transfer to either Golden or Poliquin. In effect, these voters abstained from choosing between the two remaining candidates. Ultimately, counting voters' lower-ranked preferences, Golden won the seat, receiving 50.6% of the total number of ballots on which voters had expressed a preference of at least one of the remaining candidates: either Golden or Poliquin. *See* Pildes & Parsons, *The Legality of Ranked-Choice Voting*, 109 Calif. L. Rev. at 1819–20.

because "that omission may cause confusion and mislead voters about what the initiative actually proposes." *In re 1999-2000 No. 258(A)*, 4 P.3d at 1099.

b. The Proponents' updated proposed title for Initiative #188.

The title below illustrates the necessary changes to Initiative #188's title in order to comply with the clear title requirements:

> A change to the Colorado Revised Statutes creating new election processes for U.S. Senate, U.S. House of Representatives, Colorado state legislature, and certain state offices, and, in connection therewith, ~~reducing the number of signatures required to petition onto a new all-candidate primary ballot for these offices;~~ creating a new all-candidate primary election for these offices, reducing the number of signatures required to petition onto the all-candidate primary election ballot, allowing voters to vote for any one candidate per office, regardless of political party affiliation, and specifying that the four candidates who receive the most votes advance to the general election; and in the general election for these offices, allowing voters to rank candidates and adopting an instant-runoff ~~ranked~~ voting process ~~for how the votes are tallied and a winner is determined~~where a winner is determined by a majority of votes.

III. Conclusion

For the reasons stated above, the Proponents respectfully request that Title Board grant this Motion for Rehearing and amend the title accordingly.

Respectfully submitted this 11th day of April, 2024.

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The Legality of Ranked-Choice Voting

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With the rise of extreme polarization, intense political divisiveness, and gridlocked government, many Americans are turning to reforms of the democratic processes that create incentives for candidates and officeholders to appeal to broader coalitions. A centerpiece of these efforts is ranked-choice voting (RCV). RCV allows voters to rank candidates in order of preference: first, second, third, and so on. To determine the winner, the candidate with the fewest "first choices" is eliminated and those ballots are then counted for the voter's second-choice candidate. This process continues until a candidate either has a majority of the votes or until only two candidates remain.

Voters in Maine and Alaska have endorsed RCV for federal and state elections in recent years, and RCV continues to gain traction in a variety of large cities throughout the country, including New York, Minneapolis, San Francisco, and Oakland. Some reformers have also proposed that states move to RCV in presidential elections, as Maine recently did.

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Yet RCV now faces an existential legal threat. In 2017, the Maine Supreme Judicial Court, the State's highest tribunal, advised that RCV violates the state constitution. Were that interpretation correct, it would imperil RCV nationwide. Nearly 40 state constitutions include provisions similar to that in Maine's constitution. These provisions declare that candidates are to be elected to office if they receive "a plurality of the votes" or the "highest," "largest," or "greatest" number of votes. Maine's highest court concluded that RCV's multi-round tabulation process violates this type of provision. Even in states without such a constitutional provision, state statutes often include the same requirement. In short, if the Maine decision is correct and adopted more broadly, it could prevent state and local governments throughout the country from adopting RCV.

This Article is the first to examine the history, context, and meaning of these widespread plurality-vote provisions. After doing so, this Article concludes that RCV does not violate these provisions. The history of these provisions reveals that many states initially required winning candidates to receive a "majority of the votes" and that plurality provisions eventually came to replace these majority thresholds. The purpose of these plurality-vote provisions was to ensure that a winner could be identified through a single popular election, rather than requiring multiple separate elections to determine a winner or leaving the choice to the legislature. RCV offers precisely that: voters cast a single ballot in a single election and the candidate with the most votes, once the counting is complete, wins the election.

Instead of plurality-vote provisions, a "majority of votes" is required to win in two state constitutions, some state statutes, and certain proposed reforms to the voting rules for presidential elections. These provisions pose a different challenge for RCV: whether the winner in an RCV election has received a "majority" of the relevant votes. The winner in RCV receives a majority in the final round of tabulation, but that might not be a majority of all the ballots (some voters might not have ranked either of the two candidates left in the final round of tabulation). This Article concludes that RCV is also best interpreted as consistent with most of these "majority-vote" provisions.

Thus, if Americans choose to adopt RCV for presidential, national, state, or local elections, these plurality- and majority-provisions in state constitutions and state law should pose no legal obstacle to properly drafted RCV legislation.

INTRODUCTION

In our era of hyperpolarized and toxic politics, political reformers are searching for changes to our electoral processes that would encourage a less divisive style of elections and governance. Reformers argue that among the most promising would be a shift to RCV. In RCV elections, voters rank the candidates from most to least favorite on their ballots. First-choice preferences are tallied and the candidate at the bottom is eliminated. If a voter's first-choice preference is eliminated, their ballot is then allocated to their second choice, and the preferences are tallied again, sequentially eliminating the least popular candidates. In a single-office contest, this process usually continues until one candidate receives a majority of the votes or until only two candidates remain. Because RCV creates strong incentives for candidates to appeal beyond their base of "first-choice" support to voters who might still rank them second or third, RCV is believed to encourage greater coalition-building, less divisive campaigning, and a larger number of elected officials that appeal to a broader array of voters.

When given an opportunity to vote on RCV, voters increasingly choose to adopt it. In recent years, voters in several local governments (including major cities such as New York, Minneapolis, San Francisco, and Oakland) have

enacted RCV into law,[1] with five more cities adopting RCV in 2020.[2] And in 2016, Maine became the first state in the nation to adopt RCV, by popular initiative, for statewide and federal elections, with Alaska following soon after in 2020.[3]

But RCV now faces an existential threat. In 2017, the Justices of Maine's Supreme Judicial Court concluded in an advisory opinion that RCV could not be used to elect the governor or state representatives and senators.[4] Maine's constitution requires those state offices to be elected "by a plurality of the votes."[5] According to the Justices, RCV violated this provision by preventing a candidate "who receive[d] a plurality of the votes" at the first stage of the RCV process from being "declared the winner in that election."[6]

Nearly 40 state constitutions have similar provisions requiring candidates to be elected with the "highest," "greatest," or "largest number of votes."[7] These provisions govern a range of different local, state, and federal offices. Thus, if other states adopt the reasoning from the Maine Supreme Judicial Court, RCV could be held unconstitutional for thousands of offices nationwide unless voters can overcome the high hurdles that face constitutional amendment. The desire of voters and legislators in many states to respond to the dysfunctional state of American democracy with RCV will be stopped dead in its tracks.

This Article is the first to examine the history and purposes of these constitutional "plurality vote" provisions and analyze RCV under them.[8] Based on the text, historical context, and purposes of these provisions, we conclude that the Justices of Maine's high court were wrong and that state courts should not

1. *See, e.g.*, *Ranked Choice Voting*, NYC VOTES, https://www.nyccfb.info/nyc-votes/ranked-choice-voting/ [https://perma.cc/6WKN-CTKT]; Amanda Zoch, *The Rise of Ranked-Choice Voting*, NAT'L CONF. STATE LEGISLATURES LEGISBRIEF (Nov. 2020), https://www.ncsl.org/Portals/1/Documents/legisbriefs/2020/SeptemberLBs/Ranked-Choice-Voting_34.pdf [https://perma.cc/3KR2-72ET].

2. Matthew Oberstaedt, *Voters Approve Ranked Choice Voting in Five Cities*, FAIRVOTE (Nov. 4, 2020), https://www.fairvote.org/voters_approve_ranked_choice_voting_in_five_cities [https://perma.cc/P25G-5B3A].

3. *Alaska Ballot Measure 2, Top-Four Ranked-Choice Voting and Campaign Finance Laws Initiative* (2020), BALLOTPEDIA, https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_(2020) [https://perma.cc/LJZ6-FWZL].

4. Op. of the Justs., 2017 ME 100, ¶ 70, 162 A.3d 188, 212. Although we refer herein to this opinion as a "decision" by Maine's highest court, the opinion was technically advisory. This means the opinion only "represent[s] the advice of the individual Justices," is "not binding on the Justices individually or together in any subsequent case," and has "no precedential value or conclusive effect." *Id.* ¶ 9, 162 A.3d at 198.

5. *Id.* at 194.

6. *Id.* ¶ 65, 162 A.3d at 211.

7. *See* Appendix (collecting all applicable state constitutional provisions).

8. Jeffrey O'Neill appears to be the first commentator to question whether plurality provisions encompass preferential voting systems. *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, 344 (2006). This Article provides the first general analysis of this issue, examining the text, history, and meaning of these provisions and majority-threshold provisions.

construe these provisions to prohibit voters or legislators from adopting RCV for their elections.

Since the nation's beginning, Americans have experimented with the best ways of structuring the democratic process to meet the values and concerns of their era. Whether those experiments have meant requiring parties to use primary elections to choose their nominees, or the best way to finance campaigns, or what policies are appropriate for determining how candidates become eligible to get on the ballot, we have chosen to structure our elections in a variety of ways as our conception of democracy has evolved. Those choices cannot, of course, violate constitutional rights, but absent that, states, local governments, and voters have had wide latitude to choose how they want to structure their election process in response to the changing needs and contexts of the times.

Whether one likes RCV as a matter of policy or not, legislatures and voters should be permitted to experiment with RCV should they choose to do so unless the unambiguous text of a constitutional provision stands in their way. This Article explains why the Maine Supreme Judicial Court decision is wrong, and why state constitutional plurality provisions should pose no obstacle to RCV.

Part I provides a brief background on single-choice voting (SCV) and RCV, both of which are balloting methods for measuring public support. Like all balloting methods—and election systems more generally—SCV and RCV each offer unique benefits and limitations. Just as we have experimented in the past with at-large or single-member district elections for Congress, state legislatures, and local governments, the trade-offs between SCV and RCV present a policy question for voters and legislators concerning how best to realize various democratic values and aims through the choice of election systems.

Part II introduces the two main types of state-level constitutional and statutory provisions that may present legal difficulties for RCV. Part II first explores the history, function, and purpose of "majority-threshold" requirements, which were incorporated into many early state constitutions. These majority thresholds provided that any popular election that did not identify a majority winner would be a nullity. In some states, this meant that runoff or new elections would have to be held repeatedly, *ad infinitum*, until a majority winner was identified. In other states, an election that failed to generate a majority-vote winner meant that the legislature would choose the officeholder.

Part II then describes the widespread move away from such requirements and towards "plurality" provisions during the populist democratic reform movement of the mid-nineteenth century. Plurality provisions were adopted to prevent such "no choice" elections from occurring and to ensure that a winner would always be identified by the voters through a single popular election. The purpose of these provisions was to end the need for repeat elections and to ensure that voters, rather than politicians, would decide every race.

Part III analyzes the legality and operation of RCV under both these plurality provisions and majority thresholds. Given that state and federal courts

have uniformly upheld RCV against federal constitutional challenges thus far,[9] state constitutional challenges of this type pose the most significant legal threat to RCV's continued expansion.

Our analysis concludes no legal conflict exists between these plurality vote provisions and RCV or between majority threshold provisions and RCV. A ranked-choice vote—like a single-choice vote—is simply a method for measuring popular support. Just as SCV is used to measure public support in states with plurality provisions and states with majority thresholds alike, so too can RCV be used in states that do or do not impose either threshold provision.

Part II.A takes a closer look at how state courts have analyzed RCV under state constitutional plurality provisions. We compare the conflicting decisions of two state high courts that have considered the issue thus far, Maine[10] and Massachusetts[11], and we conclude that the Massachusetts Supreme Judicial Court provides the more persuasive analysis.

Part II.B then examines the distinct and surprisingly intricate legal issues that arise for RCV under majority thresholds. Only two states, Vermont and Mississippi, have majority thresholds in their state constitutions today; each stemming from a different era and enacted to fulfill very different purposes.[12] Because RCV sequentially eliminates candidates, voters who do not rank all available candidates might see all of their preferences "exhausted" before the tabulation process is complete. In other words, the number of total votes cast in a race might be higher than the number of total votes received by the two candidates remaining in the final round of tabulation.

This poses an important question: in states that have majority-threshold requirements, does the candidate need to receive a majority of the total votes *cast in the race* to win or only a majority of the total votes *received by the final two*

9. *See* Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011) (rejecting equal protection and *Anderson-Burdick* challenges); Minn. Voters All. v. City of Minneapolis, 766 N.W.2d 683, 689–98 (Minn. 2009) (rejecting *Anderson-Burdick*, right to association, and equal protection claims); McSweeney v. City of Cambridge, 665 N.E.2d 11, 13–15 (Mass. 1996) (rejecting equal protection claims); Stephenson v. Ann Arbor Bd. of Canvassers, No. 75-10166 AW (Mich. Cir. Ct. 1975) (rejecting equal protection claims); Hagopian v. Dunlap, 480 F. Supp. 3d 288 (D. Me. 2020) (rejecting equal protection, *Anderson-Burdick*, due process, First Amendment, and Twenty-Sixth Amendment claims); Baber v. Dunlap, 376 F. Supp. 3d 125 (D. Me. 2018) (rejecting equal protection, *Anderson-Burdick*, due process, Elections Clause, and First Amendment claims); Hile v. City of Cleveland, 141 N.E. 35, 37 (Ohio 1923) (rejecting claims that a challenged form of RCV violates the Guarantee Clause); *see also* O'Neill, *supra* note 8, at 353–76 (outlining various challenges to these voting systems that failed in court).

10. Op. of the Justs., 2017 ME 100, 162 A.3d 188.

11. Moore v. Election Comm'rs, 35 N.E.2d 222 (Mass. 1941), *abrogated by* McSweeney v. City of Cambridge, 665 N.E.2d 11, 14–15 (Mass. 1996) (applying a higher level of scrutiny than *Moore*, but holding that the plan survives that scrutiny based on the reasoning in *Moore*).

12. *See infra* Part II.A.

candidates? If the relevant denominator is "final votes received,"[13] the winner of an RCV race will always surpass the majority threshold as a matter of simple math. If, however, the relevant denominator is "total votes cast," the winner of an RCV race might fall short of the majority threshold. Deciding what a "majority" threshold requires—and which denominator to apply—involves a close question of legal interpretation that can turn on fine distinctions in the text of the provisions at issue or their perceived purpose.

This issue has broad implications at the local, state, and national levels. In addition to the constitutional provisions in Mississippi and Vermont, many states impose majority thresholds by statute, which come into play when local governments adopt RCV. The issue is also increasingly relevant for presidential elections where commentators advocate for the use of RCV in selecting presidential electors.[14] Thus, the question of determining how RCV fits with legal provisions requiring the winner to receive a majority of votes cast, as well as with provisions requiring the winner receive only a "plurality of votes," is an urgent matter.

This Article argues that RCV provides a constitutional method for identifying a "plurality" winner. RCV is also permissible under majority-threshold requirements. Although candidates can fall short of a majority threshold in an RCV election, that is also true in an SCV election. That result does not automatically render either method illegal or unconstitutional.

I.
BACKGROUND

Every step in the voting process is shaped by state regulation. From registration, to the design of the ballot, to the processes for recounts, choices must be made about the structure and form of the election and voting process. Most commonly, these choices are made through legislation, but they can also be reflected in state constitutions and in direct democratic processes, such as referenda or initiatives in the states that permit them.

For example, while the government-printed, secret ballot is a common feature of our election process today, voting was a rowdy and public affair up to and through the mid-nineteenth century. Candidates would ply voters with free whiskey,[15] and many voters took part in elections by voice vote: declaring their

13. Under ranked-choice systems, votes that still have a preference ranking "in play" in any given round are referred to as "active" (or "continuing") votes, whereas votes that have run through all rankings and do not transfer over to a new candidate in the next round are referred to as "inactive" (or "exhausted") votes. Similarly, candidates who have not yet been eliminated are often referred to as "active" (or "continuing") candidates. This Article uses the more modern (and easily understandable) active/inactive nomenclature rather than the more traditional continuing/exhausted language.

14. *See infra* Part III.B.3.

15. *See* Paul Wasley, *Back When Everyone Knew How You Voted*, HUMANS., Fall 2016, https://www.neh.gov/humanities/2016/fall/feature/back-when-everyone-knew-how-you-voted [https://perma.cc/67QF-WSXV].

choice before all gathered or having no say at all.[16] Eventually, as political parties began to dominate, the parties themselves took on the task of handing out their own ballots, printed on colored paper—which made it easy for voters to choose the ballot they wanted but also enabled party figures to keep "tabs on who voted and how."[17] Over time, however, the state-printed and regulated secret ballot emerged, which led to the system we use today: an official state ballot designed and regulated by state officials, according to state law, and cast in the privacy of the voting booth.

Particularly in light of this long history of constant reform and changing views about how best to structure the voting process, the Supreme Court has recognized the danger in over-constitutionalizing every electoral design choice. As the Court has rightly noted, if elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes,"[18] then "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections."[19] This "respect for governmental choices in running elections" that courts owe to legislators "has particular force where . . . the challenge is to an electoral *system*."[20] As views about fair, accessible, and appropriate democratic processes have shifted over time, courts have generally given the political process wide latitude to adopt different approaches to structuring the election process. Although the Constitution puts boundaries on those choices, such as the prohibition on malapportioned legislative districts, policymakers have a great deal of discretion to decide how best to structure the electoral and voting process within those constraints.

The single-choice vote is one particularly longstanding feature of American elections. SCV widely used in the United States, Canada, and a number of other countries that inherited it from the United Kingdom.[21] Also known as plurality voting, the simple plurality system, or first-past-the-post,[22] SCV permits the

16. *Id.*
17. *Id.*
18. Storer v. Brown, 415 U.S. 724, 730 (1974).
19. Burdick v. Takushi, 504 U.S. 428, 433 (1992).
20. Dudum v. Arntz, 640 F.3d 1098, 1114 (9th Cir. 2011).
21. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1213 (5th ed. 2016) [hereinafter LAW OF DEMOCRACY]; DAVID M. FARRELL, ELECTORAL SYSTEMS 19 (2001).
22. *See* LAW OF DEMOCRACY, *supra* note 21, at 1213 ("'First Past the Post' . . . [is] the plurality-vote system"); FARRELL, *supra* note 21, at 13 ("single-member simple plurality"); *Dudum*, 640 F.3d at 1103 ("simple plurality system, sometimes called 'first-past-the-post'"); *see also* Belin v. Sec'y of the Commonwealth, 288 N.E.2d 287, 288 (Mass. 1972) ("Shall the elective officers of this city be . . . elected by ordinary plurality voting?"); O'Neill, *supra* note 8, at 327, 333 (listing "Plurality Voting" as a type of electoral model); Stephenson v. Ann Arbor Bd. of Canvassers, No. 75-10166 AW (Mich. Cir. Ct. 1975) (comparing election of councilpersons via "plurality system of voting, i.e., the candidate with the most votes was declared the winner" with the election of the mayor via a "preferential voting system").

voter to select a single candidate for an office.[23] These votes are tabulated by adding up all the votes for each candidate, and the candidate who receives the largest number of single-choice votes wins.[24]

Like every electoral system, SCV has positive and negative qualities. Among its merits is its simplicity: the system is easy for voters to use, and the tabulation process is easy for voters to understand.[25] SCV also offers finality: voters cast their ballots and the candidate with the most votes wins. Occasionally, there might be recounts or even election-contest litigation, but even so, the winner is identified in a single election.

But with these benefits come a number of constraints. First, in any election with more than two candidates, an SCV system can end up electing a candidate that a majority of voters *oppose*—an arguably perverse outcome for a democratic election system.[26] This can result from "splitting" or "spoiling."

"Splitting" (or "vote-splitting") refers to situations in which two candidates with significant support from voters divide that support, allowing a third candidate to prevail.[27] For example, two conservative candidates might receive 30 percent each, allowing a liberal candidate to prevail with 40 percent of the vote. The liberal candidate might have lost in a head-to-head race against either of the two conservative candidates, but because those two candidates "split" the vote, the liberal candidate can win despite being opposed by 60 percent of the electorate.

"Spoiling" involves a similar dynamic but occurs when a minor-party candidate siphons enough votes away from a major-party candidate to throw the race to the other major-party candidate.[28] Take the 2016 presidential election, for example. In three states, Jill Stein (the Green Party candidate) received a vote share larger than Donald Trump's margin of victory over Hillary Clinton.[29] In six other states, Gary Johnson (the Libertarian candidate) received a vote share larger than Clinton's margin of victory over Trump.[30] In still other states, the combined third-party vote shares were larger than the margin between the major-

23. *See* O'Neill, *supra* note 8, at 333; Peter C. Fishburn, *Social Choice and Pluralitylike Electoral Systems*, *in* BERNARD GROFMAN, ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 193, 195 (Bernard Grofman & Arend Lijphart eds., 1986).

24. *See* O'Neill, *supra* note 8, at 333.

25. *See Dudum*, 640 F.3d at 1103.

26. *See id.* at 1100, 1103.

27. *See* O'Neill, *supra* note 8, at 346.

28. *Id.* at 326.

29. *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 112, tbl.6.2 (2020) (Michigan, Pennsylvania, Wisconsin).

30. *Id.* at 115, tbl.6.3 (New Mexico, Colorado, Nevada, Minnesota, New Hampshire, Maine (at-large electors)).

party candidates.[31] All of this raises a question: if Clinton and Trump faced off in head-to-head matchups in these states, who would have prevailed? In the 2020 presidential election, the share of the vote earned by third-party candidates in pivotal swing states (such as Georgia, Wisconsin, and Arizona) similarly eclipsed the difference in vote share between Biden and Trump.[32] In races where third-party and fourth-party candidates receive such a small vote share, these candidates are referred to as "spoilers"—though third-party candidates understandably resist this terminology.[33]

This brings us to SCV's second weakness: in an attempt to avoid vote-splitting or spoilers, voters using SCV might need to vote strategically rather than voting their true preference.[34] If a voter's favorite candidate does not have a realistic chance of prevailing, that voter will need to vote for a less preferred candidate to avoid "wasting" their vote.[35] In fact, voters are often forced to vote for the candidate they perceive as having the best odds of defeating their *least* favorite candidate. For this strategy to be successful, voters must correctly anticipate how other voters are likely to vote. Needless to say, this does not always work. Any SCV election with more than two candidates can fail to identify the candidate with majority support—and SCV elections are a particularly poor way of measuring which candidate has the most support when several candidates crowd the field. Primary elections often involve several candidates. And as ballot-access laws have made it easier for candidates to get on the general election ballot, the general election field can also easily involve more than two candidates.

One potential response to these constraints that has been adopted historically and remains in some states today is to pair the SCV election with a majority-threshold requirement: if no candidate receives an "absolute majority" (50%+1) of single-choice votes at the initial election, no winner is named and a new process is triggered.[36] For example, a "runoff"—a second, separate SCV

31. *Id.* at 112, tbl.6.2 (Florida, Arizona, Utah). Utah presents a unique situation. Trump prevailed in Utah with 45.5% of the vote, Clinton earned 27.5% of the vote, and Independent candidate Evan McMullin earned 21.5% of the vote. *Presidential Election in Utah, 2016*, BALLOTPEDIA, https://ballotpedia.org/Presidential_election_in_Utah,_2016 [https://perma.cc/AX4W-FEGE].

32. David Wasserman, Sophie Andrews, Leo Saenger, Lev Cohen, Ally Flinn & Griff Tatarsky, *2020 National Popular Vote Tracker*, COOK POL. REP., https://cookpolitical.com/2020-national-popular-vote-tracker [https://perma.cc/KWR2-GD97]. To be sure, one cannot assume these third-party voters would have voted for one of the major candidates if the choice were solely between those two options because many third-party voters are alienated from both parties. *See, e.g.*, *infra* text accompanying notes 249–250.

33. *See* O'Neill, *supra* note 8, at 329 n.5.

34. *See id.* at 340–41.

35. *See* Dudum v. Arntz, 640 F.3d 1098, 1111 (9th Cir. 2011).

36. As we discuss below, the terms "majority," "simple majority," and "absolute majority" have been used inconsistently in the literature and in practice. *See infra* note 142. Here, we use "absolute majority" in its most commonly used sense to refer to a number of votes greater than the number of votes received by all other candidates combined. Others use "absolute majority" to refer to a majority of all electors rather than a majority of all voters who have cast ballots in the race.

election after the general election—may occur between the top two vote-getters from the first election.[37] However, this strategy introduces its own trade-offs: the winner remains unknown for a longer period of time (undermining the benefits of finality), the voters and the jurisdiction must incur all the costs and inconvenience that a second election entails, and voter turnout will likely decrease substantially between the first and second election (undercutting the democratic imprimatur of the eventual winner's "majority" victory).[38]

All of these trade-offs bring us to a well-known but deeply uncomfortable fact: no perfect electoral system exists.[39] As William Riker once observed, "social choice depends not simply on the wills of individuals, but also on the method used to summarize these wills."[40] Every system for aggregating votes involves normative judgments. In what is now known as "Arrow's Theorem," Kenneth Arrow proved mathematically that no election system can satisfy even a handful of basic criteria that one would expect any democratic system to have.[41]

Because no election system can serve all democratic values and interests, the choice among different approaches, rules, and conceptions of "representation" and "fairness" is inherently political.[42] A polity can choose one method over another, or different methods over time, depending on how the various democratic and policy goals behind the design of an election system are

37. *See infra* Part II.A.

38. *See infra* Part II; O'Neill, *supra* note 8, at 346–47; Peter J. Brann, *Ranked-Choice Voting: Maine's Experience*, *in* AMERICA VOTES! CHALLENGES TO MODERN ELECTION LAW AND VOTING RIGHTS 155, 157 (Benjamin E. Griffith & John Hardin Young eds., 4th ed. 2020).

39. An "election system" can be defined as a "[method] for translating preferences, or votes, into winners of elections." *Dudum*, 640 F.3d at 1100; *see also* O'Neill, *supra* note 8, at 329 (giving examples of "plurality voting, runoff voting, instant runoff voting, at-large voting, limited voting, cumulative voting, and the single transferable vote").

40. WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 31 (1988).

41. *See generally* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990) (critiquing the view that the Theorem undermines democracy or democratic legitimacy); O'Neill, *supra* note 8, at 339; Minn. Voters All. v. Minneapolis, 766 N.W.2d 683, 695 (Minn. 2009). These normative criteria are (1) Universal Admissibility (all possible rankings of candidates must be admissible); (2) Nonimposition (the winner must be determined from the voters' preferences); (3) Nondictatorship (one voter cannot always determine the winner of the election); (4) Monotonicity (if a voter changes their ballot by raising the ranking of a candidate, then it must help that candidate); and (5) Independence (if a losing candidate is taken out of an election and the ballots recounted, then the winner of the election must not change). O'Neill, *supra* note 8, at 339 (citing Arrow); *see also* RIKER, *supra* note 40, at 117–18.

42. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2489 (2019) ("Deciding among . . . different visions of fairness . . . poses basic questions that are political, not legal."). *But see* G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After* Rucho v. Common Cause, 95 IND. L.J. 1295, 1331, 1340 (2020) (suggesting the *Rucho* Court was "correct to observe that [legislators] are free to decide among 'different visions of fairness' when redistricting," but that the Court was wrong to hold that "partisan advantage" constituted a legitimate and nondiscriminatory theory of representation).

evaluated. And increasingly, many voters appear to be dissatisfied with the way that our elections function in the United States today.[43]

One alternative to the single-choice system is RCV.[44] Developed in the mid-1800s,[45] RCV—also known as "instant-runoff voting," "preferential voting," or the "alternative vote"[46]—allows voters to rank the candidates running for office in order of preference rather than limiting voters to a single choice.[47] Unlike the SCV tabulation process (which aggregates and assigns ballots according to the single candidate selected on the ballot), the RCV tabulation proceeds in rounds (though with computer technology today, these "rounds" can occur almost instantaneously). Ballots are initially counted based on voters' first preferences.[48] The candidate with the least number of first-choice rankings is eliminated, and the vote on those ballots is then assigned to the candidate ranked second on those ballots.[49] This process is repeated until a candidate either has a majority of votes or until only two candidates remain.[50]

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43. *See, e.g.*, JONATHAN M. LADD, JOSHUA A. TUCKER & SEAN KATES, BAKER CTR. FOR LEADERSHIP & GOVERNANCE, GEO. UNIV. & JOHN S. & JAMES L. KNIGHT FOUNDATION, 2018 AMERICAN INSTITUTIONAL CONFIDENCE POLL: THE HEALTH OF AMERICAN DEMOCRACY IN AN ERA OF HYPER POLARIZATION (2018), http://bakercenter.wideeyeclient.com/aicpoll/ [https://perma.cc/T5XX-6PQ6].

44. *See Details about Ranked Choice Voting*, FAIRVOTE, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used [https://perma.cc/BM3A-44EK] ("Where is Ranked Choice Voting Used?" map).

45. Thomas Hare—a British political scientist and lawyer—put forward and developed a ranked-choice voting system in England in the 1850s and 1860s. *See* Nicolaus Tideman, *The Single Transferable Vote*, 9 J. ECON. PERSPS. 27, 29 (1995). The "Hare System" can be used in both single-member and multi-member elections. *See* SAMUEL MERRILL, III, MAKING MULTICANDIDATE ELECTIONS MORE DEMOCRATIC 13 (1988). RCV, sometimes referred to as "instant run-off," was first developed in the United States in the 1870s by Professor W.R. Ware. *See* Dudum v. Arntz, 640 F.3d 1089, 1103 (9th Cir. 2011); LAW OF DEMOCRACY, *supra* note 21, at 1214; O'Neill, *supra* note 8, at 334 n.35.

46. We use the term "ranked-choice voting" to refer to a single-seat preferential system that reallocates in rounds, reducing down to two candidates (or until one candidate secures a majority). Some commentators use the term "RCV" to refer to single-transferrable voting (STV)—a system for electing candidates in multi-member districts or to multi-member bodies—and use Instant Runoff Voting (IRV) to refer to single-member districts/offices. *See, e.g.*, LAW OF DEMOCRACY, *supra* note 21, at 1238–40, 1250–51. Others have used RCV to refer to sequential elimination and IRV to refer to a preferential system in which all but the top two candidates in the first round are eliminated, with second choices then reassigned to one of these two candidates. The latter is now generally called the "supplementary" or "contingent vote." Still, others have used the term "preferential voting" to refer to a system in which second-choice are *added* to first choices, rather than preferences being reassigned in rounds. This method is nearly universally called "Bucklin voting." *Compare* Brown v. Smallwood, 153 N.W. 953, 955 (Minn. 1915) (holding unconstitutional a preferential method whereby, "if a count of the first choice votes brings no majority, the second choice votes are added to the first choice votes"), *with* Minn. Voters All. v. City of Minneapolis, 766 N.W.2d 683, 691 (Minn. 2009) (distinguishing the vote-counting method in *Brown* and holding RCV constitutional because "only one vote per voter can be counted in each round" and "each voter's vote counts only as a single vote").

47. O'Neill, *supra* note 8, at 334.

48. *See id.*

49. *See id.*

50. *See id.*; *see also infra* Part III.B (discussing distinction between a majority of total ballots cast in a race versus a majority of votes in the final round).

By allowing voters to convey a richer, more nuanced, and more complete articulation of who they would prefer, ranked-choice votes offer several benefits over single-choice votes. RCV reduces the dangers of vote-splitting and the impact of spoilers; increases the ability of voters to honestly convey their preferences; increases the likelihood that a candidate is elected with the support of a majority; and allows the candidate with the most widespread support to be identified in a single election.[51]

Supporters of RCV also claim that it exerts a greater moderating influence on the tenor and tone of campaigns because RCV incentivizes the building of broader coalitions than does SCV.[52] Just as a candidate in a primary election might avoid attacking their co-partisans too severely for fear of alienating voters that they will need in the general election, RCV is said to incentivize candidates to run more positive, broad-based general-election campaigns to earn the "second-choice" support of voters they might otherwise write off in an SCV election.[53]

This is not to say that RCV will always encourage or incentivize *ideological* moderation. Whether a progressive, moderate, or conservative candidate wins is a function of coalition-building, and "middle-of-the-road" policies will not always be the best way to create a majority coalition. In fact, in elections in which a spoiler, minor-party candidate would take enough votes away from an ideologically extreme major-party candidate to give the race to a moderate candidate from the other major party, the use of RCV might bolster the prospects of that more extreme candidate. RCV will eliminate the spoiler candidate and if the second choices on those ballots then go to the more extreme major-party candidate, that candidate would end up getting elected.

As with any electoral system, there are potential costs of RCV to consider along with its potential benefits.[54] For one, RCV ballots and the RCV tabulation

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51. *See Data on Ranked Choice Voting*, FAIRVOTE, https://www.fairvote.org/data_on_rcv [https://perma.cc/9QHG-PY3Y]; O'Neill, *supra* note 8, at 333, 375–76.

52. *See Ranked Choice Voting and Civil Campaigning*, FAIRVOTE, https://www.fairvote.org/data_on_rcv#research_rcvcampaigncivility [https://perma.cc/U4CE-WXS8]. *See generally* Benjamin Reilly, *Centripetalism and Electoral Moderation in Established Democracies*, 24 NATIONALISM & ETHNIC POL. 201 (2018) (examining whether and how RCV promotes electoral moderation by encouraging candidates to seek cross-community support).

53. Of course, one might view this dynamic negatively. Should a candidate who lacks fervent support from any particular constituency nonetheless be able to prevail because they are unobjectionable to the broader electorate and, therefore, earn an overwhelming number of second-choice preferences? *See, e.g.*, Zusha Elinson & Gerry Shih, *The Winning Strategy in Oakland: Concentrate on Being 2nd or 3rd Choice*, N.Y. TIMES (Nov. 11, 2010), https://www.nytimes.com/2010/11/12/us/politics/12bcvoting.html [https://perma.cc/HDJ9-VWHG].

54. For example, RCV can violate the principle of "monotonicity"—the principle that a candidate should never be harmed when a voter *raises* the ranking of that candidate. *See* O'Neill, *supra* note 8, at 340–41, n.84. This feature may sound disconcerting, but "any system that involves a process for narrowing a field of three or more candidates has that potential." Minn. Voters All. v. City of Minneapolis, 766 N.W.2d 683, 696 (Minn. 2009). For example, a two-round SCV runoff system raises

process are more complex than SCV ballots and the SCV tabulation process.[55] If voters do not understand how to complete a ranked-choice ballot, they may accidentally forfeit the ability for their vote to impact each round of the tabulation process or, worse, they may accidentally invalidate their ballot altogether by marking multiple candidates first. [56] And while the concept of rank-ordering one's preferences is undoubtedly intuitive, the greater the number of preferences one wishes to rank, the greater the information load on the voter.[57]

Related to this issue are concerns about "ballot exhaustion."[58] Ballot exhaustion refers to when all of the candidates ranked by a voter have been eliminated and the ballot becomes "inactive"; *i.e.*, it is no longer reassigned as tabulation continues.[59] Ballot exhaustion can occur in two ways.

First, a voter might simply decline to make use of all preference rankings available on the ballot. If a voter ranks their first-choice candidate and casts the ballot without filling in any other preference rankings, then the ballot will become inactive once the only candidate on that ballot is eliminated.

Second, the ballot itself may be designed to only permit the voter a certain number of rankings. If a ballot only allows voters to rank their top three preferences and there are seven candidates vying for the same office, then a ballot might still become inactive. For example, if a voter uses all three preference rankings available and all three of their selections are eliminated, their ballot may become inactive before all the rounds of tabulation are complete.

The notion of inactive ballots appearing to fall out of the tabulation process over successive rounds may strike some as concerning at first glance, but inactive ballots are perhaps most usefully analogized to casting a vote for a losing candidate in an SCV election.[60] In SCV elections, ballots cast for losing

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this risk. *See supra* text accompanying notes 36–38. Many primary- and general-election systems raise this possibility as well. *See Minn. Voters All.*, 766 N.W.2d at 695–96 ("[I]n some circumstances, a voter can increase her preferred candidate's chances to win office by voting in the primary for a nonpreferred candidate who would be a weaker opponent for her preferred candidate. . . . In that way, a vote in the primary for the preferred candidate could hurt her chances in the general election—a non-monotonic result.").

55. *See* Craig M. Burnett & Vladimir Kogan, *Ballot (and Voter) "Exhaustion" under Instant Runoff Voting: An Examination of Four Ranked-choice Elections*, 37 ELECTION STUD. 41, 42 (2015).

56. A recent study, however, suggests that RCV might actually yield a lower error rate than SCV. *See* Jason Maloy, Voting Error Across Multiple Ballot Types: Results from Super Tuesday (2020) Experiments in Four American States (Oct. 5, 2020) (unpublished manuscript), https://ssrn.com/abstract=3697637 [https://perma.cc/YXX6-MUFE].

57. *See* Burnett, *supra* note 55, at 48. Of course, this need not be viewed negatively: a ballot that allows an individual to transmit more information is only more valuable if the individual provides that information.

58. *Id.* at 43–49.

59. *See, e.g.*, Dudum v. Arntz, 640 F.3d 1098, 1101 (9th Cir. 2011).

60. *See id.* at 1110 ("'[E]xhausted' 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."); McSweeney v. City of Cambridge, 665 N.E.2d 11, 14 (Mass. 1996) ("[Exhausted ballots] too are read and counted; they just do not count toward the election of any of the . . . successful

candidates are considered "wasted votes."[61] These wasted votes—like RCV's inactive votes—are still *counted* in the tabulation process; they simply do not go towards electing a winning candidate.[62]

In fact, RCV produces fewer wasted votes than SCV. Because votes are transferrable, votes that might otherwise be cast for losing candidates are reassigned to candidates with a greater chance of winning.[63] Thus, more voters have a greater say in the ultimate outcome of the race in RCV elections. This ability to minimize "wasted" votes has earned transferrable voting systems—such as RCV—support from notable democratic theorists, such as John Stuart Mill.[64]

Like every election system, RCV offers "a menu of benefits and limitations."[65] In the absence of any specific constitutional restriction, the decision to adopt and implement one system over another belongs to policymakers.[66] Moreover, when changes to the mechanics of elections emerge from direct democracy means, such as voter initiatives, rather than through legislation, there is less concern that political insiders might be manipulating the ground-rules of election to serve their own political self-interests.

As the New York Court of Appeals once observed, "If the people . . . want to try [a new] system, make the experiment, and have voted to do so, [courts] should be very slow in determining that the act is unconstitutional, until we can put our finger upon the very provisions of the Constitution which prohibit it."[67]

But for RCV, one provision common to numerous state constitutions has started to raise questions: a provision requiring that certain offices be elected "by a plurality of the votes." In the next Section, we explore these constitutional provisions.

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candidates. Therefore, it is no more accurate to say that these ballots are not counted than to say that the ballots designating a losing candidate in a two-person, winner-take-all race are not counted.").

61. See *Dudum*, 640 F.3d at 1104 n.12 (citing DOUGLAS J. AMY, BEHIND THE BALLOT BOX 187–89 (2000)).

62. *But see infra* Part III.B.1.b (discussing the role of "protest" votes in ranked-choice voting systems in jurisdictions with majority-threshold provisions).

63. *See Dudum*, 640 F.3d at 1104, 1111 (citing DOUGLAS J. AMY, BEHIND THE BALLOT BOX 155 (2000)).

64. *See* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 258 n.58 (1995) (citing JENNIFER HART, PROPORTIONAL REPRESENTATION: CRITICS OF THE BRITISH ELECTORAL SYSTEM 1820–1945, at 13–14 (1992)).

65. *Dudum*, 640 F.3d at 1105.

66. *See id.* at 1115 ("[I]t is the job of democratically-elected representatives to weigh the pros and cons of various [election] systems." (quoting Weber v. Shelley, 347 F.3d 1101, 1107 (9th Cir. 2003)); Stephenson v. Ann Arbor Bd. of Canvassers, No. 75-10166 AW (Mich. Cir. Ct. 1975) ("Basic to all, is the right of self determination [sic] by the . . . voters. . . . The fact that [the] preferential voting system is 'different' from the system of voting we have come to know in this State, does not affect its validity.").

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

II.
THE HISTORY OF MAJORITY THRESHOLDS & PLURALITY PROVISIONS IN STATE CONSTITUTIONAL LAW

The constitutions of thirty-nine states and Puerto Rico include some form of a "plurality" provision.[68] Such provisions state that the candidate who receives "the highest number of votes,"[69] "the largest number of votes,"[70] "the greatest number of votes,"[71] or "a plurality of the votes"[72] at the general election shall be elected.

These provisions stand for a very simple, fundamental, and unambiguous proposition: the candidate who receives the most votes in a popular balloting should win the relevant office.[73] Why explicitly announce such an obvious principle? Because for much of the early history of American democracy, in the eighteenth and nineteenth centuries, that principle was by no means obvious.

As Part II.A describes, several states had a decidedly strict conception of what the democratic principle of "majority rule" meant in our nation's early years. If no candidate received an absolute majority of votes at a popular balloting (50%+1), that election was considered a failure and no candidate was elected.[74] These were called "no-choice elections" or "non-elections."[75]

Such "majority threshold" requirements were a relatively common feature across early state constitutions. Failure of the popular balloting process triggered a contingency—some other method of candidate selection besides the initial popular election. For example, if a popular balloting for governor failed to

68. *See* Appendix.

69. Alabama, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming. *See* Appendix.

70. Maryland, Montana, Rhode Island. *See* Appendix.

71. Alaska, Connecticut, Maryland, New Jersey. *See* Appendix.

72. Florida, Maine, Maryland, Nevada, New Hampshire. *See* Appendix.

73. *See, e.g.*, Howes v. Perry, 17 S.W. 575, 576 (Ky. 1891) ("It is a principle of free elections by the people, firmly fixed and understood, that no person is or can be regarded duly elected to an office unless when only two persons are voted for he receives a majority of the votes cast for them, or receives a plurality in case there are more than two voted for. Any other rule would be subversive of the fundamental idea of elections by the people under our form of government, which is that only that person shall be entitled to hold an elective office who appears, from the record of votes cast, to have been the choice of a majority or plurality of those voting in such election.").

74. *See, e.g.*, CONN. CONST. art. 4, § 2 (1818) (requiring "a majority of the whole number of . . . votes"); ME. CONST. art. 5, § 3 (1820) ("And the Secretary of State [shall] lay the lists before the Senate and House of Representatives to be by them examined, and, in case of a choice by a majority of all the votes returned, they shall declare and publish the same."); MASS. CONST. pt. II, ch. I, § 2, art. IV (1780) ("The Senate shall . . . determine and declare who are elected by each district, to be Senators by a majority of votes . . . .").

75. *See infra* Part II.A.

produce "an election," the governor might be selected by the legislature instead.[76]

As Part II.B explains, plurality provisions were then enacted in many states as a response to replace strict majority-threshold requirements once the latter came to be viewed as excessively demanding. In addition, many other plurality provisions were adopted during the progressive movement of the mid-nineteenth century. These plurality provisions were implemented to ensure that a victor would be identified through a single popular election (or, in the parlance of the day, that every balloting would result in "an election").[77]

These provisions did not positively impose any particular kind of election *system*. Indeed, most voters and legislators at the time were likely unaware of alternative election systems.[78] Instead, the provisions prevented the legislature from imposing any kind of *threshold* that would preclude the candidate with the most votes at the conclusion of a single popular election from being elected. In other words, the plurality provision foreclosed the legislature from adopting any arrangement that could result in a complete non-election. Whatever system the state used, the candidate who received "the highest number of votes" or "a plurality of the votes" in a single popular balloting was to be the winner.

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76. *See, e.g.*, CONN. CONST. art. 4, § 2 (1818) ("If no person shall have a majority of the whole number of said votes . . . then said Assembly . . . [shall] choose a Governor from a list of the names of the two persons having the greatest number of votes . . . ."); GA. CONST. OF 1798 art. V, § 1 (amended 1824) ("[T]he person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes . . . the General Assembly shall immediately, elect a Governor."); ME. CONST. art. 5, § 3 (1820) ("But, if no person shall have a majority of votes [for Governor], the House of Representatives shall, by ballot, from the persons having the four highest numbers of votes on the lists, if so many there be, elect two persons, and make return of their names to the Senate, of whom the Senate shall, by ballot, elect one, who shall be declared the Governor."); MASS. CONST. pt. II, ch. 1, § 2, art. IV (1780) ("And in case there shall not appear to be the full number of Senators returned elected by a majority of votes for any district, the deficiency shall be supplied in the following manner, viz. The members of the House of Representatives, and such Senators as shall be declared elected, shall take the names of such persons as shall be found to have the highest number of votes in such district, and not elected, amounting to twice the number of Senators wanting, if there be so many voted for; and, out of these, shall elect by ballot a number of Senators sufficient to fill up the vacancies in such district."); *see also Majority*, 2 DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 69–70 (1879) ("The greater portion of a body of persons; more than half of those considered as joining in an election, or a vote. With reference to elections, majority is usually distinguished from plurality. A candidate has a plurality of votes when he has more than any other one person; he has a majority, only when he has more than all his competitors combined. . . . Whether a majority is necessary to an election, or a plurality will suffice, must be determined by the law governing the election."); 15 WILLIAM MACK, CYCLOPEDIA OF LAW AND PROCEDURE 388 n.32 (1905) ("[T]o require a majority to elect would frequently be to prevent a choice.").

77. *See infra* Part II.B.

78. The fact that many voters and legislators likely did not have RCV specifically in mind at the time of ratification does not preclude RCV from falling within the reasonable bounds of the provision's text and purposes. That is often the case when statutory text is applied to issues not foreseen or even foreseeable at the time of enactment. *See infra* note 157.

A. Majority Thresholds

When states adopted majority-threshold provisions in their early constitutions, these provisions reflected a belief that a bedrock principle of democratic government was that "the majority should rule."[79] But as experience with democracy developed, Americans learned that these "majorities" often existed more in theory than in practice.[80]

For some failed races, the contingency triggered was a new election—and officials continued to hold new elections until one candidate received an absolute majority.[81] For example, Maine's original 1820 constitution required the election of state representatives "by a majority of all the votes."[82] "[I]n case no person shall have a majority of votes," the constitution required officials to "notify another meeting, and the same proceedings shall be had at every future meeting until an election shall have been effected."[83]

The drawbacks of this approach soon became obvious. In Massachusetts, for example, one office took twelve ballotings before a candidate was elected.[84] This process sometimes turned democracy completely on its head: at least one of Massachusetts's congressional seats remained vacant for an entire two-year term because voters repeatedly failed to make "an election."[85] In Vermont,

79. MELBERT B. CAREY, THE CONNECTICUT CONSTITUTION 38 (1900); *see also* OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 236 (Bos., White & Porter 1853) [hereinafter MASS. CONST. CONVENTION] (statement of Del. Foster Hooper) ("It will be said, I suppose, that the democratic doctrine is, that the majority shall govern, and that it lies at the foundation of our government."); *see id.* at 238 (statement of Del. Foster Walker) (arguing that "the grand principle of the majority system [should] be preserved inviolate" despite its drawbacks).

80. *See* CAREY, *supra* note 79, at 38 (noting that the idea that majorities should govern is "[a] very plausible statement indeed, but one which will not stand the test of practical application" when more than two parties vie for the office); *see also infra* Part II.B.

81. Much as Israel is preparing to hold its fourth election in two years in an attempt to form a majority coalition government at the time this article is going to press. *See, e.g.*, Joshua Keating, *It's Always Election Season in Israel*, SLATE (Feb. 17, 2021), https://slate.com/news-and-politics/2021/02/israel-election-bibi-netanyahu.html [https://perma.cc/3AUJ-DR3V].

82. ME. CONST. art. IV, pt. 1, § 5 (1820).

83. *Id.*

84. *See* SAMUEL ELIOT MORISON, A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS 58 (1917).

85. *Id.* ("[O]ne Congressional district, for a failure to give one of these candidates a majority, remained unrepresented for the entire Congress."); MASS. CONST. CONVENTION, *supra* note 79, at 248 (statement of Del. Benjamin D. Hyde) ("The more trials there are to elect, the more divided they become, and the more firmly they adhere to their distinctive principles, and an election is almost entirely impossible. . . . I recollect, that where we have tried for a period of one whole congress, for two years, we failed to choose a representative."); *id.* at 253 (statement of Del. John C. Gray) ("Gentlemen may recollect that at one time three seats were vacant in our congressional delegation; and this state of things lasted during a whole congress, if I remember right.").

meanwhile, one congressional seat remained contested over the course of ten separate runoff elections—until one of the candidates died.[86]

Moreover, as detractors of the majority requirement were quick to point out, the candidate who received a "majority" of votes at the tenth or twelfth runoff election would often prevail with fewer votes than the candidate who had received a plurality of votes at the first election.[87] The process of repeatedly holding new elections did not increase the winning candidate's level of support in the electorate (by, say, convincing voters in the first contest to change their minds in the second one); instead, the process simply shrunk the electorate (with one candidate's voters eventually tiring out the others' as voter turnout dwindled over time).[88]

For other races—such as for governor—a failed contest might be sent to the legislative branch.[89] Over time, though, this came to be seen as inconsistent with the "grand principle" of majority rule. The relevant "majority" in such case was no longer of the official's own constituents, but of the legislature itself.[90] As those who opposed the majority-threshold requirement pointed out about this default policy, the question in such situations was no longer how a candidate

86. *See* D. Gregory Sanford & Paul Gillies, *And If There Be No Choice Made: A Meditation on Section 47 of the Vermont Constitution*, 27 VT. L. REV. 783, 792 (2003).

87. *See* MASS. CONST. CONVENTION, *supra* note 79, at 248 (statement of Del. Benjamin D. Hyde) ("After there have been various meetings on several days, and there has been no election, the people become disgusted with some of the proceedings and fall off in numbers; and the man who is finally elected by a majority, would not have received even a plurality on the first day of trial, if the plurality system had prevailed.").

88. *See id.* at 252 (statement of Del. Charles B. Hall) ("Thus, while you preserve the majority principle, the practical result is that a man is chosen who does not even have a plurality at the time when you have the fullest expression of the will of the people. It has been said that convenience should be thrown aside entirely; but here we see the result of that. The people become tired, and they stay home; does the majority then govern? No, Sir. A single handful of voters govern, who have had more patience and perseverance than the others; and they thus gain the ascendancy because they have tired out the majority of the voters of the Commonwealth. Gentlemen know very well that this is the practical result of this system."); *id.* at 262 (statement of Del. Marcus Morton) ("[T]his majority, about which so much has been said, when you can exercise it, is nothing but a plurality, and scarcely that. It is merely a majority of those who choose to exercise the influence, and not a majority of the whole, who are interested, because they seldom take the trouble to exercise their influence.").

89. Following independence, many legislatures selected the governor outright without *any* popular election. *See, e.g.*, Sanford & Gillies, *supra* note 86, at 796.

90. *See* MASS. CONST. CONVENTION, *supra* note 79, at 242 (statement of Del. William Schouler) ("I ask whether it would not be better to allow the people of the counties to elect their own senators under the plurality system, than it is to throw the question into the House of Representatives, and let us elect them."); *id.* at 254 (statement of Del. John C. Gray) ("[T]he effect of the operation of the majority principle is to take the power of election from the people, and give it to the legislature."); CAREY, *supra* note 79, at 37 ("If we are to retain popular government in Connecticut the constitution should be so changed the constitution should be so changed that the votes of the people, as cast on election day, should have their full effect.").

would gain the support of a majority of voters, but who should select the winner when a majority of voters did not coalesce around a single candidate.[91]

As soon became evident, leaving the decision up to the political branches also raised the risk of partisan intrigue.[92] In Rhode Island, voters endured four no-choice elections for governor in five years (1889–1893) due to the persistent presence of a third party (the Prohibition Party).[93] In the gubernatorial elections of 1889, 1890, and 1891, the Democratic candidate received more votes than the Republican candidate but was only selected over his Republican opponent by the legislature once (1890).[94] Then, following another no-choice election in 1893, the backup contingency failed as well, and *no* governor was selected after the Republican Senate and Democratic House reached an impasse.[95] Instead, the governor elected in 1892 simply held over in office for the 1893 term.[96] At the conclusion of this farcical string of non-elections, voters overwhelmingly adopted Rhode Island's plurality provision by a margin of 26,703 to 3,331—the

91. *See* MASS. CONST. CONVENTION, *supra* note 79, at 236 (statement of Del. Foster Hooper) ("It will be said, I suppose, that the democratic doctrine is, that the majority shall govern, and that it lies at the foundation of our government. But suppose that . . . you cannot get a majority to carry on the government. What then? . . . It is better for the constituents to elect their own representatives. If the majority principle results in the same end as the plurality, only under a far more cumbersome machinery, it is far better that we should save the unnecessary time, trouble, and expense, and at once make those who can agree elect the representative, if the majority cannot."); *id.* at 257–58 (statement of Del. John Sargent) ("Suppose you provide in your Constitution that your officers shall be elected by plurality, do you thereby provide that the people shall not elect by a majority? No, Sir, you simply declare that when the majority system fails, a different remedy shall be adopted from the one you now adopt. Instead of placing the power in the legislature of Massachusetts to select a man for the governor of Massachusetts, . . . you say you will retain that power in the hands of the people, where it, without doubt, properly belongs. You say if you cannot obtain the voice of the majority of the people in favor of any particular candidate, you will then adhere to the principle approximating the closest to that of the majority, and you declare that the candidate who receives the greatest number of votes, and who consequently represents most nearly the wishes, the views, and the feelings of the majority of the people, shall be taken and elected.").

92. CAREY, *supra* note 79, at 34–35 ("[T]ime and time again, a man has been chosen governor by the legislature, who at the popular election received less votes than his opponent, and in 1890 it was the direct cause of the disgraceful deadlock in the legislature, whereby the rightfully elected candidate for governor, who had received a clear majority of all the votes cast, was prevented from taking office."); *id.* at 36 ("From 1880 to 1898, only six of the elections resulted in a governor that won the plurality vote."); STATE OF NEW HAMPSHIRE JOURNAL OF THE CONVENTION TO REVISE THE CONSTITUTION (1912) [hereinafter N.H. CONST. CONVENTION] (statement of Del. John B. Cavanaugh) ("[T]he spectacle is presented to us once in a while . . . [of] officers being voted for by the people, a failure to give a majority vote to any one man, but pretty nearly a certainty that someone will receive more than anybody else, and the election is thrown into our legislature, with the chance of a partisan advantage being taken there."); LAWRENCE FRIEDMAN, THE NEW HAMPSHIRE STATE CONSTITUTION 156 (2015) (The New Hampshire legislature decided eight gubernatorial elections in the fifty years before the change to plurality in 1912.).

93. *See* PATRICK T. CONLEY & ROBERT G. FLANDERS JR., RHODE ISLAND STATE CONSTITUTION 154 (2011).

94. *See id.*

95. *See id.*

96. *See id.*; *see also* Sanford & Gillies, *supra* note 86 ("The only time [this] process has failed was in 1835 when the joint assembly could not agree on a majority candidate. 'After sixty-three ballots, the Joint Assembly gave up . . . ' and the Lieutenant-Governor served as Governor for the year.").

"most decisive ratification of an amendment in Rhode Island's constitutional history."[97]

As Rhode Island's experience reflects, many eventually came to believe that majority-threshold requirements frustrated the popular will more than they served it. Rather than simply repealing these threshold requirements, states often replaced them with explicit constitutional plurality provisions to ensure that future legislatures could not impose such thresholds by statute.[98]

Today, only two states still have a *constitutional* majority threshold for statewide political office:[99] Vermont[100] and Mississippi.[101] (Some states, such as Georgia, still employ majority thresholds as a matter of statutory law, even where the provision has been removed from the state constitution.)[102] The provenances of the two remaining constitutional provisions in Vermont and Mississippi, however, are quite distinct.

Vermont's original 1777 constitution contained the same majority threshold that is still in place today.[103] Indeed, that provision remains the only

97. CONLEY & FLANDERS, *supra* note 93, at 154. Ironically, Rhode Island's original Royal Charter, which governed until 1843, provided for the governor to be elected by a plurality of the votes. Sanford & Gillies, *supra* note 86, at 786. Rhode Island only adopted the majority-threshold provisions in 1843. *Id.*

98. See *infra* Part II.B.

99. Some state constitutions still impose a majority threshold for judicial office (*e.g.*, Arkansas) or other local offices (*e.g.*, charter commissions in Utah). *See* Appendix.

100. *See* VT. CONST. ch. II, § 47 (stating that the "person who has the major part of the votes" shall be declared governor, but "[i]f, at any time, there shall be no election, . . . the Senate and House of Representatives shall by a joint ballot, elect to fill the office . . . [with] one of the three candidates for such office (if there be so many) for whom the greatest number of votes shall have been returned").

101. *See* MISS. CONST. art. V, § 140 ("The person receiving a majority of the number of votes cast in the election . . . shall be declared elected. If no person receives a majority of the votes, then a runoff election shall be held under procedures prescribed by the Legislature in general law.").

102. Since 1824, Georgia's constitution authorized the General Assembly to select the Governor if no candidate surpassed the majority threshold. GA. CONST. of 1798, art. V, § 1, para. 4 (amended 1824). This provision was thrust into the spotlight during Georgia's 1966 gubernatorial election. In that election, the General Assembly selected Lester Maddox—the segregationist owner of the Pickrick Restaurant who refused to serve black patrons following the passage of the Civil Rights Act of 1964—to serve as governor after coming in second behind Howard H. Callaway in the general election's popular balloting. The constitutional provision was challenged soon thereafter under the Equal Protection Clause and upheld by a closely divided Court. *See* Fortson v. Morris, 385 U.S. 231, 236 (1966) ("Article V of Georgia's Constitution provides a method for selecting the Governor which is as old as the Nation itself. Georgia does not violate the Equal Protection Clause by following this article as it was written.").

In 1976, Georgia's majority threshold provision was retained but was paired with a runoff contingency. *See* GA. CONST. of 1976, art. V, § 1, para. 4. Finally, in 1983, the constitutional majority-threshold requirement was removed altogether and replaced by a statutory majority threshold. GA. CODE ANN. § 21-2-501.

Other states have also chosen to employ majority thresholds as a matter of statutory law, which may then become the subject of litigation if RCV is adopted by a locality. *See, e.g.*, LA. STAT. ANN. § 18:511 (2011); MISS. CODE ANN. § 23-15-191 (2017); OKLA. STAT ANN. tit. 26, § 1-103 (2019). *See also infra* Part III.B.2 (discussing the impact of statutory majority thresholds on local reform efforts).

103. *See* Sanford & Gillies, *supra* note 86, at 786; VT. CONST. ch. II, § 47.

holdover to endure the history described above. To be sure, candidates who receive the plurality (but not the majority) of votes in Vermont today are typically selected by the legislature as a matter of course.[104] But there have been rare occasions in recent history when that has not held true. For example, in 1976 the Democratic candidate for Vermont's Lieutenant Governor won the highest number of votes but failed to clear the 50 percent threshold.[105] Rather than selecting him for the office, the Republican-controlled legislature—"perhaps motivated by rumors that [the Democrat] would soon be indicted for insurance fraud"—selected the Republican candidate for office instead.[106]

Mississippi's original 1817 constitution, on the other hand, contained a plurality provision.[107] That provision remained in place following constitutional conventions in 1832 and 1868.[108] Contrary to the movement everywhere else, Mississippi in 1890 abandoned its plurality provision and adopted a majority-threshold requirement (along with an independent "electoral majority" requirement).[109] This majority threshold was adopted during the "Redemption" era, in an effort to undo Reconstruction, and was part of the State's new 1890 constitution, the primary purpose of which was to institutionalize the suppression of the Black vote.[110] Mississippi was the first state to call a constitutional convention to adopt measures aimed at circumventing the Fifteenth

104. Vermont's provision comes into play relatively frequently, such as for the governor's race in 2014. Taylor Dobbs, *Wait The Legislature Is Choosing The Governor?*, VPR (Nov. 6, 2014). The last time lawmakers did not choose the first-place gubernatorial candidate was 1853. *See id.*

105. *Id.*

106. *Id.*

107. MISS. CONST. of 1817, art. 4 § 2 ("The person having the highest number of votes shall be Governor.").

108. MISS. CONST. of 1832, art. 5 § 2; MISS. CONST. of 1868, art. 5 § 2.

109. *See* MISS. CONST. of 1890, art. 5 § 140 ("a majority of all the electoral votes, and also a majority of the popular vote"); MISS. CONST. of 1890, art. 5, § 141 ("If no person shall receive such majorities, then the house of representatives shall proceed to choose a governor from the two persons who shall have received the highest number of popular votes."). This unique electoral system required candidates for statewide office to win a majority of both the statewide popular vote *and* a majority of counties. These threshold provisions have only been triggered once—in 1999—but nearly came into play in the state's 2019 gubernatorial race. *See* Debbie Elliott, *Black Voters Sue Over Mississippi's Jim Crow-Era Election Law*, NPR (Sept. 24, 2019), https://www.npr.org/2019/09/24/763510668/black-voters-sue-over-mississippis-jim-crow-era-election-law [https://perma.cc/43GN-3E2H]; Miss. Sec'y of State, Official Tabulation of November 5, 2019 General Election Votes Cast for State Offices (Dec. 4, 2019) (indicating that the governor elect tallied only 51.91% of the vote); Miss. Sec'y of State, Electoral Vote Report (Jan. 7, 2020).

110. *See* ALBERT D. KIRWAN, REVOLT OF THE REDNECKS: MISSISSIPPI POLITICS 58 (1951) (citing Jackson, *Daily Clarion-Ledger*, Sept. 11 1890 ("It is no secret that there has not been a full vote and a fair count in Mississippi since 1875 – that we have been preserving the ascendency of the white people by revolutionary methods.")); William A. Mabry, *Disenfranchisement of the Negro in Mississippi*, 4 J. S. HIST. 318, 318–19 (1938); NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 43 (1990) ("Mississippi's constitutional convention was held for no other purpose than to eliminate the [Black voter] from politics; not the 'ignorant and vicious' . . . but the [Black voter]" (quoting James K. Vardaman, future Mississippi governor)); *id.* at 41 ("We came here to exclude [Black voters]. Nothing short of this will answer." (quoting S.S. Calhoon, president of the 1890 convention)).

Amendment's protection of Black voting rights—an approach that other southern states would soon follow.[111]

After Mississippi's electoral-vote provision was challenged under the Fourteenth Amendment to the U.S. Constitution,[112] a federal court stayed the case to give the legislature the opportunity "to address whether the challenged provisions of the Mississippi Constitution should be amended."[113] The legislature took up this opportunity, and voters ratified a constitutional amendment in November 2020.[114] The new provision abandons the electoral-vote requirement while retaining a majority threshold. And rather than triggering a decision by the legislature, the failure to achieve a majority now triggers a runoff election.

While such majority thresholds are not inherently racially invidious, many that were adopted in the late nineteenth century (including statutory thresholds) have their "roots in nineteenth century southern white racism."[115] When voting is extremely polarized by race in majority-white jurisdictions, majority thresholds can create "a considerable obstacle to black, but not white, office holding" by providing an opportunity for "fragmented white voters [to] regroup behind the highest white vote getter and elect that person to office."[116]

Outside of the South, however, the trend towards plurality provisions continued largely unabated, especially as the union expanded westward with the admission of new states.

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111. *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 301 (2000) (discussing the "avowed purpose" of constitutional conventions during this period "to restore white supremacy," starting with Mississippi in 1890 and ending with Georgia in 1908); *see also* DOROTHY OVERSTREET PRATT, SOWING THE WIND: THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1890 3 (2018).

112. *See* McLemore v. Hosemann, 414 F. Supp. 3d 876 (S.D. Miss. 2019).

113. McLemore v. Hosemann, No. 19-CV-383 (S.D. Miss. Dec. 13, 2019) (stay order).

114. *Mississippi Ballot Measure 2, Remove Electoral Vote Requirement and Establish Runoffs for Gubernatorial and State Office Elections Amendment (2020)*, BALLOTPEDIA, https://ballotpedia.org/Mississippi_Ballot_Measure_2,_Remove_Electoral_Vote_Requirement_and_Establish_Runoffs_for_Gubernatorial_and_State_Office_Elections_Amendment_(2020) [https://perma.cc/J6UW-5ACX].

115. Laughlin McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 URB. LAW. 429, 429 (1985). Some states impose statutory majority threshold provisions for primary elections alone. *See, e.g.*, ALA. CODE § 17-13-18; ARK. CODE ANN. § 7-7-102; S.C. CODE ANN. § 7-17-600; TEX. ELECTION CODE ANN. § 172.003.

116. McDonald, *supra* note 115, at 432–33; *see also* Jeffers v. Clinton, 740 F. Supp. 585, 586 (E.D. Ark. 1990) ("The State has systematically and deliberately enacted new majority-vote requirements for municipal offices, in an effort to frustrate black political success in elections traditionally requiring only a plurality to win.").

Although these provisions were challenged in modern times under the Voting Rights Act, courts rejected such challenges based on the so-called "single-member office" doctrine: the principle that the results test under Section 2 of the VRA does not apply to elections to fill single-member positions. Pam Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 3–4 (1991). Of course, if plaintiffs can prove such a provision was adopted or maintained for a racially discriminatory purpose, that provision would violate the Constitution.

B. Plurality Provisions

Following the election of Andrew Jackson in 1828 and continuing throughout the mid-nineteenth century, political populism and a uniquely direct, participatory vision of democratic reform swept the nation.[117] Not only did states with majority thresholds start abandoning these requirements in favor of plurality provisions (given the problems noted above),[118] but states also expanded the types of offices that became elective and the number of elected offices altogether; this era created the only elected judges and prosecutors in the world, a legacy still with us.[119] In addition, this era saw the widespread adoption of plurality provisions to ensure that popular balloting determined election outcomes. Across multiple conventions and across generations, the purpose behind these plurality provisions appears consistent and clear: the candidate with the most popular support should win and voters should select that candidate through a single election.

When Virginia first contemplated moving to an elected governorship during its constitutional convention of 1829 to 1830,[120] for example, questions quickly arose whether a candidate ought to receive a majority of votes to be validly elected or whether a plurality would suffice.[121] One state senator—ridiculing his neighbors to the north—observed: "I suppose we are to adopt the New England practice, and turn [candidates] back to the people till they shall give one the majority. But in the meanwhile, the period will have elapsed for which [they were] to have served."[122]

As more states changed their constitutions to substitute plurality provisions for majority requirements, many newly admitted states also decided from the outset to include plurality—rather than majority—provisions.[123] Indeed, in many

117. *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY 302, 309–455 (2005); SEAN WILENTZ, ANDREW JACKSON 156–59 (2005); ROBERT J. COOK, *Fanfare for The Common Man? Political Participation in Jacksonian America*, *in* A COMPANION TO THE ERA OF ANDREW JACKSON 532, 546 (Sean Patrick Adams ed., 2013); Foley, *supra* note 29 at 50–51; MORISON, *supra* note 84, at 64.

118. *See supra* Part II.A.

119. *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 810 (2014) (observing that "Jacksonian-era reforms have bequeathed us the world's *only* elected judges and prosecutors" and noting that "we elect more than 500,000 legislative and executive figures, vastly more than any other country per capita"); *see also* JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818–1970, at 28 (1972) (discussing a series of state constitutional conventions in the Progressive Era); FOLEY, *supra* note 29, at 62–69.

120. Until 1851, the Virginia Governor was selected by the General Assembly. *See* A.E. Dick Howard, *Commentaries on the Constitution of Virginia*, 10 U. RICH. L. REV. 459 (1976).

121. *See* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, at 581 (1830) (statement of Sen. Littleton W. Tazewell).

122. *Id.*

123. *See, e.g.*, COLO. CONST. of 1876 art. 4, § 3 (including a "highest number of votes" provision in Colorado's original 1876 constitution); NEBRASKA CONSTITUTIONS OF 1866, 1871, & 1875 AND PROPOSED AMENDMENTS SUBMITTED TO THE PEOPLE SEPTEMBER 21, 1920 68–69 (Addison E.

constitutional conventions, the decision to include (or move to) a plurality provision appears to have been uncontroversial and even unnoteworthy.[124] Numerous state constitutional commentaries fail to offer any exposition at all of these plurality provisions.[125]

By the time Alaska held its constitutional convention in 1956, the proposition that "the person with the most votes should win" appeared so obvious that at least one delegate considered the plurality-provision language to be "meaningless" at best and confusing at worst.[126] Objecting to the language that "[t]he person receiving the greatest number of votes shall be the governor," Delegate George Sundborg moved to strike it, worrying that, "if it means anything, [the provision] means that the person running at that election who gets the greatest number of votes, *no matter what he is running for*, shall be the governor. . . . It might be the candidate for the United States Senate or it might be one of the legislators."[127]

Sheldon ed., 1920) (Both Nebraska's 1866 territorial constitution and its 1875 state constitution contained plurality provisions); IDAHO CONST. of 1889, Art. IV, § 2 ("the persons, respectively, having the highest number of votes for the office voted for shall be elected"); WYO. CONST. of 1889, art. IV, § 3 ("The person having the highest number of votes for governor shall be declared elected"). Soon, even newer states were copying language from their recently admitted neighbors. *See, e.g.*, HENRY G. SNYDER, THE CONSTITUTION OF OKLAHOMA WITH COPIOUS NOTES REFERRING TO AND DIGESTING DECISIONS CONSTRUING AND APPLYING IDENTICAL AND SIMILAR PROVISIONS OF THE CONSTITUTIONS AND STATUTES OF OTHER STATES AND OF THE UNITED STATES 191 (1908) (copying section on tied votes "verbatim" from Nebraska Constitution art. 5, sec. 4); *see also* Appendix (reflecting similar language across western states).

124. *See, e.g.*, FLA. CONST. REVISION COMM'N, FLA. SUFFRAGE AND ELECTIONS COMM. MEETING 95–96 (1966) ("There was no further discussion on the motion, and it was adopted."); ROBERT ALLAN CARTER, NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT 35 nn.1, 6 (2d ed., 2001) ("Constitutional Convention of 1821, with some wording from the 1777 Constitution. No statement of legislative intent found."); ANDREW J. MARSH, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 614 ("Section 14 was read . . . No amendment being offered, the section as read was adopted."); JOURNALS OF THE CONVENTION ASSEMBLED AT THE CITY OF AUSTIN ON THE FOURTH OF JULY, 1845, FOR THE PURPOSE OF FRAMING A CONSTITUTION FOR THE STATE OF TEXAS 87–88 ("The substitute of the committee for the 3d section [was read] . . . Which substitute was adopted."); *id.* at 137 ("Mr. Jones moved to strike out . . . 'the highest number of votes,' and insert 'a majority of all the votes.' Rejected."); *but see id.* at 144 (Protest from Mr. Jones: "majorities ought to control.").

125. *See* MINUTES OF THE CONVENTION OF THE DELAWARE STATE 28 (Brynberg & Andrews, eds. 1792); RANDY HOLLAND, DELAWARE STATE CONSTITUTION 122–23 (2011); ANNE LEE, HAWAII STATE CONSTITUTION 116–17 (2011); DONALD W. CROWLEY & FLORENCE A. HEFFRON, IDAHO STATE CONSTITUTION 105 (2011); ROBERT M. IRELAND, KENTUCKY STATE CONSTITUTION 94 (2011); DAN FRIEDMAN, MARYLAND STATE CONSTITUTION 99–101 (2011); LARRY ELISON & FRITZ SNYDER, MONTANA STATE CONSTITUTION 112 (2011) ("Perhaps the rule is now so fundamental that it is unnecessary to include the provision in the constitution, but it seems appropriate to do so."); CHARLES E. SMITH, NEW MEXICO STATE CONSTITUTION 80–81 (2011); ROBERT D. MIEWALD & PETER J. LONGO, NEBRASKA STATE CONSTITUTION 88–89 (2011); STEVEN H. STEINGLASS & GINO J. SCARSELLI, OHIO STATE CONSTITUTION 177 (2011); PATRICK M. GARRY, SOUTH DAKOTA STATE CONSTITUTION 94 (2011); JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION 99 (2011).

126. PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 1955–1966 BEFORE THE ALASKA LEG. COUNCIL 2065 (1956) (statement of Del. George Sundborg).

127. *Id.*

Delegate Katherine Nordale responded, clarifying the reason such a provision was thought necessary: "[I]f you leave this to the legislature they could say that the candidate [must] receiv[e] a majority of the votes cast, and it is conceivable that there may be three tickets in the field for governor at some future time[.]"[128] Nordale then asked, "why allow the possibility of requiring a majority of the votes cast to elect the governor?"[129] Sundborg's proposal to strike the plurality provision failed.[130]

While such constitutional debates and historical commentaries are limited, those that exist point almost[131] uniformly to three justifications for plurality provisions, all of which relate to the problem of no-choice elections caused by the interplay of majority thresholds and single-choice voting:

- encouraging finality by determining the result in one election;[132]
- enhancing administrative efficiency, economy, and ease;[133] and
- reducing partisan control over outcomes by removing contingencies and ensuring that the popular election itself determines the result.[134]

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128. *Id.* at 2066 (statement of Del. Katherine Nordale).

129. *Id.*; *see also id.* (statement of Del. Lucien "Frank" Barr).

130. *Id.*; *see also* GERALD A. MCBEATH, ALASKA STATE CONSTITUTION 101 (2011).

131. *See* MASS. CONST. CONVENTION, *supra* note 79, at 267 (statement of Del. Whiting Griswold) (observing that repeated runoff elections "have a tendency to stir up party spirit, to divide families, neighborhoods, and sometimes churches" and that "adopt[ing] a plan which will produce a result upon the first trial" will "do away [with] this violent party spirit, and produce a wholesome effect upon the community").

132. *See* JOHN D. LESHY, ARIZONA STATE CONSTITUTION 170–71 (2013) (discussing how a 1988 amendment that implemented a majority threshold was repealed only four years later following a runoff election for governor that delayed the transition for several months); CAREY, *supra* note 79, at 37 ("If we are to retain popular government in Connecticut the constitution should be so changed that the votes of the people, as cast on election day, should have their full effect."); Sanford & Gillies, *supra* note 86, at 792–93 (Vermont retains a majority threshold for certain offices but moved to plurality for other offices to avoid repeat balloting and to ensure that the winner is determined by the first election.); *see also* O'Neill, *supra* note 8, at 343–44 ("States enacted these provisions into their state constitutions to prohibit runoff elections and require that elections be concluded in one day."); MASS. CONST. CONVENTION, *supra* note 79, at 267 (statement of Del. Whiting Griswold) (noting the need to "secure a full representation in the legislature, and in congress, and in every part of the government to which the principle will apply," stating that "there is a principle which lies deeper than the majority principle—and that is the right of representation").

133. *See* MARSHAL J. TINKLE, MAINE STATE CONSTITUTION 11 (2013) (noting "promoting efficiency and economy" as the "unassailable goals" of these amendments and listing the election of representatives by plurality as an exemplar); *see also* MORISON, *supra* note 84, at 57–58 ("For many years the constitutional requirements for a majority instead of a plurality to elect all officers had been a nuisance. . . .Repeated ballotings, causing unnecessary delay and expense, had often been necessary to secure a majority for other elective officials."); MASS. CONST. CONVENTION, *supra* note 79, at 266 (statement of Del. Whiting Griswold) (noting the "saving of time and expense").

134. *See* WESLEY W. HORTON, CONNECTICUT STATE CONSTITUTION 120–21 (2011) (Provision from 1818 provided that, if no person received a majority, the General Assembly would choose one of the top two vote-getters. This led "to the famous deadlocked election of 1890." In a conflict between the

Few judicial decisions directly address these plurality provisions because the provisions generate so little controversy.[135] Those decisions that do interpret these provisions confirm that these three purposes (and no others) drove their

Democratic Senate and the Republican House, "[n]either side budged for the entire term of office, from 1891 to 1893, so the outgoing Republican governor . . . remained in office for the entire term. . . . The embarrassment surrounding the 1890 election led to" the adoption of the provision stating that the person receiving the most votes would be elected.); CAREY, *supra* note 79, at 36–37 (In ten general elections, "the elections of governor by the people were only six."); LOUIS ADAMS FROTHINGHAM, A BRIEF HISTORY OF THE CONSTITUTION AND GOVERNMENT OF MASSACHUSETTS WITH A CHAPTER ON LEGISLATIVE PROCEDURE 86 (1925) ("In 1855 a plurality vote was provided for by amendment to the Constitution. So to-day the election of a Governor or Lieutenant-Governor is never thrown into the Legislature."); MASS. CONST. CONVENTION, *supra* note 79, at 252 (statement of Del. William Schouler) ("The gentleman who had a plurality was not made governor, while the gentleman who had twenty thousand less votes was made governor; and how was this effected? It was done by a party vote in this hall."); *id.* at 254 (statement of Del. John. C. Gray) ("[I]n contending for the plurality principle, we are contending for the voice of the people to be heard in the election of governor, and not for the voice of the legislature."); FRIEDMAN, *supra* note 92, at 156 ("A 1912 amendment changed the requirement that a candidate for governor, councilor, or senator be elected by a majority of the votes to a plurality. In the fifty years prior to that amendment, the legislature had resolved eight gubernatorial elections."); N.H. CONST. CONVENTION, *supra* note 92, at 445 ("[T]he spectacle is presented to us once in a while . . . someone will receive more than anybody else, and the election is thrown into our legislature, with the chance of a partisan advantage being taken there."); TINKLE, *supra* note 133, at 12–13 (noting that the decision to elect senators and the governor by a plurality of the vote was also adopted to reduce the potential for partisan maneuvering to trump the popular preferences of the people.); *see also supra* Part II.A (discussing Rhode Island).

135. *See* CROWLEY & HEFFRON, *supra* note 125, at 126–27 ("has not been litigated"); ELISON & SNYDER, *supra* note 125, at 112 ("There are no cases decided under the 1972 Montana constitutional provision and no significant cases decided under the 1889 Montana Constitution."); JAMES E. LEAHY, NORTH DAKOTA STATE CONSTITUTION 108 (2011) ("The Supreme Court has not considered any cases involving this section."); FRIEDMAN, *supra* note 92, at 170–71 ("Th[e] [plurality] provision [of Art. 42] has not been interpreted by the New Hampshire Supreme Court."); ROBERT B. KEITER & TIM NEWCOMB, WYOMING STATE CONSTITUTION 130–31 (2011) ("This section has not been subject to judicial interpretation."); ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 129 (G. Alan Tarr ed., 2d ed. 2012) ("This paragraph has not been subject to judicial interpretation.").

These provisions have been interpreted most often when courts have been required to decide what should occur when a candidate dies or is otherwise rendered ineligible but still receives the most votes on election day: should a new election be called, or is the living/eligible candidate who receives the most votes entitled to the office? Many state courts have held (pursuant to the "American Rule") that in such situations the election is rendered a nullity, the office remains vacant, and whatever provisions happen to govern vacancies are triggered. *See* State *ex rel.* Cleveland v. Stacy, 82 So. 2d 264, 265 (Ala. 1955); Tellez v. Superior Ct. In & For Pima Cnty., 450 P.2d 106, 108 (Ariz. 1969); Patton v. Haselton, 146 N.W. 477 (Iowa 1914); Davies v. Wilson, 294 N.W. 288 (Iowa 1940); Howes v. Perry, 17 S.W. 575 (Ky. 1891); McKinney v. Barker, 203 S.W. 303 (Ky. 1918); Stephenson v. Woodward, 182 S.W.3d 162, 173 (Ky. 2005); State *ex rel.* Herget v. Walsh, 7 Mo. App. 142, 143–46 (Mo. Ct. App. 1879); Sheridan v. City of St. Louis, 81 S.W. 1082 (Mo. 1904); Woll v. Jensen, 162 N.W. 403 (N.D. 1917); Casselton Reporter v. The Fargo Forum, 261 N.W. 549 (N.D. 1935); Ingersoll v. Lamb, 333 P.2d 982, 982–83 (Nev. 1959); Evans v. State Election Bd. of State of Okl. 804 P.2d 1125, 1129 (Okla. 1990); Batterton v. Fuller, 60 N.W. 1071 (S.D. 1894); State v. Kohler, 228 N.W. 895 (Wis. 1930). *But see* State *ex rel.* Wolff v. Geurkind, 109 P.2d 1094 (Mont. 1941) (knowing votes for deceased candidate void); Brown v. Lamprey, 206 A.2d 493, 494–96 (N.H. 1965) (legislature has the power to seat the only *qualified* candidate to receive a plurality of votes). One Attorney General opinion has interpreted the provisions to preclude retention elections, relying upon the broader context of the provision. *See* Op. Tenn. Att'y Gen. No. 09-74 (May 7, 2009) at 2 (noting that the language "clearly contemplates a popular election involving two or more persons").

enactment.[136] Distilling this history to its essence, the Indiana Supreme Court observed (with respect to an earlier version of its state constitution)[137] that the phrase "highest number of votes" reflected the framers' belief "that the public interest would be best served by limiting the popular balloting for the [office] to one election."[138]

III.
RANKED-CHOICE VOTING & THE PLURALITY/MAJORITY DEBATE

As Part II demonstrates, the debate over majority versus plurality provisions boils down to one key question: "What threshold level of support, a plurality or a majority, should a candidate have to receive before the election can be treated as having validly selected a winner?" Identifying this core question has important implications for emerging debates over the constitutionality of RCV—and reveals one part of this debate to be particularly misguided.

As RCV adoption spreads, a question often comes up: "Is RCV a 'plurality' system or a 'majority' system?"[139] The assumption is that if RCV is a "plurality" system, then it cannot be constitutional in "majority" states, whereas, if RCV is a "majority" system, then it cannot be constitutional in "plurality" states.

This framing fundamentally misunderstands the purpose and function of the plurality and majority provisions discussed above. Every election must have a threshold requirement at one level or another, but this debate sheds no light—

136. *In re* Todd, 193 N.E. 865, 870–71 (Ind. 1935) (interpreting "highest number of votes" from the 1851 constitution to show that "[t]he framers of our Constitution evidently believed that the public interest would be best served by limiting the popular balloting for the highest executive offices to one election"); Rockefeller v. Matthews, 459 S.W.2d 110, 111 (Ark. 1970) (stating that "[t]he use of the phrases 'highest number of votes' and 'equal and highest' number, along with the absence of the phrase 'majority of the votes' makes it clear to us that the framers of the constitution were dealing in terms of plurality," while holding that the statute at issue, "which provides for a special election in case no candidate receives a majority of the votes cast in a particular race, contravenes the plurality provision . . . and is therefore void."); Op. to the Gov., 6 A.2d 147, 154 (R.I. 1939) (Moss, J., dissenting) ("[T]he sole intent and purpose of the ["largest-number-of-votes-cast"] amendment was to do away with the requirement of election by a majority of all the votes cast by qualified voters, to substitute the more usual method of election by plurality, and to make sure that this latter method would apply to all elections of local officers, as well as to all elections of state officers. . . . [H]ow the votes are to be cast and how counted are all, in my judgment, questions as to the *manner of conducting* the election; and by section 6 of art. II of the constitution the general assembly is given full power to decide such questions."). *Cf.* State *ex rel.* Atty Gen. v. Anderson, 12 N.E. 656, 659 (Ohio 1887) (observing that a "plurality of the vote" standard is consistent with a purpose "to effectuate a prompt, if not an immediate, organization" in the absence of a tie). The opinions out of Massachusetts and Maine particular to RCV are discussed below. *See infra* Part III.A.

137. The "highest number of votes" provision was removed from the Indiana constitution in 1974. *See* WILLIAM P. MCLAUCHLAN, INDIANA STATE CONSTITUTION 102–103 (2011).

138. *In re* Todd, 193 N.E. at 870–71.

139. *Cf.* Op. Me. Att'y Gen. No. 2016-01 (Mar. 4, 2016) at 5 (opining that RCV is unconstitutional under the state plurality provision because RCV "requires additional rounds of counting if no candidate receives a *majority* in the first tally"); Op. Tex. Sec'y State No. HC-1 (July 23, 2001) at 6 (opining that the word "majority" in the state election code means "a majority vote . . . of more than half of the original votes, as cast and not re-assigned by the voter's secondary or tertiary intent").

and was not designed to—on the debate over what *balloting method* should be used. The former asks what precise level of popular support must be attained; the latter asks how the level of popular support should be measured.

This disconnect can be illustrated with a parallel question regarding our more familiar form of voting: "Is *single*-choice voting a 'plurality' system or a 'majority' system?" The answer is both—or, perhaps, neither.[140] SCV is a balloting method. It has been used in states that have majority-threshold requirements, *and* it has been used in states that have plurality provisions. Whether a state's constitution permits a plurality of votes to win an election or requires a majority of votes to win an election is a threshold question, the answer to which says nothing about how that level of support should be ascertained. That is, it says nothing about whether that state's electoral system is to be SCV, RCV, or another balloting method. A candidate who receives the most votes in an SCV race might receive 52 percent or 48 percent of the vote. The candidate who receives 52 percent would win in both a "plurality state" and a "majority state." The candidate who receives 48 percent would win in a "plurality state" but might have the contest tossed to the political branches in a "majority state." In all of these scenarios, however, the states still employ SCV as the method for measuring that candidate's support.

This distinction between the legal threshold for election and the balloting method requires careful attention because terminology in this area can be misleading. SCV is colloquially known as "plurality voting."[141] But as just explained, this "plurality-voting *system*" might allow a plurality of votes to elect a candidate or might require a majority of votes to elect a candidate, depending on the relevant constitutional *threshold*.[142]

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140. *See, e.g.*, *infra* note 144 (discussing a challenge to RCV in Santa Fe, New Mexico, in which one party argued that RCV satisfied *neither* the state's "runoff" provision nor its "most votes" provision and the other party argued that RCV satisfied *either* of the two provisions).

141. *See supra* note 22.

142. Even more confusingly, a majority threshold is often said to require a candidate to receive an "absolute majority," whereas a plurality provision is sometimes said to allow candidates to prevail with a "simple majority." *See* FARRELL, *supra* note 21, at 13 ("This electoral system has been given a range of different titles, such as 'relative majority,' 'simple majority,' 'single member simple plurality,' and the more colloquial 'first past the post.'").

These popular usages do little to help clarify the implications of constitutional "plurality" and "majority" provisions. *See* Orpen v. Watson, 93 A. 853, 855 (N.J. 1915) ("The manifest purpose of the act is to ascertain the preferences of a majority of all the voters . . . and to give effect to that preference rather than to determine the result by a plurality vote."); ELISON, *supra* note 125, at 112 (Montana's "largest number of votes" provision "provides for traditional majority rule"); ROBERT B. KEITER & TIM NEWCOMB, WYOMING STATE CONSTITUTION 130–31 (2011) (Wyoming's "highest number of votes" provision means "The gubernatorial candidate with the majority of votes from qualified electors in an election shall be the governor."); *Majority*, 2 ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 70 (1879) ("Mr. Cushing says that majority is sometimes used in the sense of plurality. But such use is not to be commended; the distinction is important, and should be preserved in the use of the terms.").

Below we examine the constitutionality and the application of RCV under plurality provisions and majority-threshold requirements. Under both types of provisions, RCV provides a constitutional balloting method.[143]

Part III.A explores whether a candidate who prevails under RCV should be understood to receive at least a "plurality of the votes," thereby complying with a state's constitutional plurality provision. Based on the text, history, and purpose of such provisions, we conclude the best answer is yes. Each voter ranks their choices on a single ballot, each ballot can only ultimately count towards the election of a single candidate, and the candidate who receives the most votes

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The terminology becomes even more treacherous if one considers the names for *categories* of electoral systems. A plurality system, a plurality system with majority threshold, and a single-district RCV system *all* fall within the broader category of "majoritarian" systems. *See* LAW OF DEMOCRACY, *supra* note 21, at 1213. "Majoritarian" systems are systems in which elections are based upon geographic constituencies (such as candidates elected from districts) and candidates are competing for a single seat or office. *See id.* at 1213–18. These systems can be distinguished from "proportional representation" systems, in which multiple seats in a body are to be filled and the electoral system is structured to ensure that parties receive a number of seats roughly proportional to the number of votes they receive. *See id.*

143. This Article considers the constitutionality of RCV under plurality and majority provisions for state-level, single-seat races alone. It does not analyze any other types of systems' compliance with any other provisions of state constitutional law. For example, some state cases discuss *additive* preferential voting systems (rather than *transferrable* preferential voting systems) and their compliance with other state constitutional provisions. *Compare* Brown v. Smallwood, 153 N.W. 953, 955–57 (Minn. 1915) (invalidating Bucklin voting system and holding that the right "to vote" in an election did not allow for electors to cast multiple votes), *and* Maynard v. Bd. of Canvassers, 47 N.W. 756 (Mich. 1890) (same), *with* Minn. Voters All. v. City of Minneapolis, 766 N.W.2d 683, 691–93 (Minn. 2009) (distinguishing *Brown v. Smallwood* on the basis of "the cumulative vote-counting method" employed, and upholding RCV's transferrable vote-counting method).

Other state cases have addressed *multi-member* transferrable voting systems under other state constitutional provisions. *Compare* Wattles v. Upjohn, 179 N.W. 335, 340 (Mich. 1920) (invalidating multi-member preferential system; holding that using single transferrable vote to fill multiple offices violates constitutional provision providing that an elector shall be entitled to vote in "all elections"), *and* Devine v. Elkus, 211 P. 34, 35–39 (Cal. Ct. App. 1922) (same), *and* Op. to the Gov., 6 A.2d 147, 149 (R.I. 1939) (same for provision entitling elector to vote "in the election of all civil officers"), *with* Johnson v. City of New York, 9 N.E.2d 30, 33 (N.Y. 1937) (upholding multi-member preferential system as compliant with the right to vote "for all officers"), *and* Reutener v. City of Cleveland, 141 N.E. 27, 32 (Ohio 1923) (same for provision entitling elector to vote "at all elections"). *See also* Brian P. Marron, *One Person, One Vote, Several Elections?: Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343, 365–69 (2004) (discussing state court treatment of various preferential systems under different constitutional provisions). These cases do not shed light on the questions discussed herein regarding state plurality and majority provisions.

Nor does this Article examine any other potential challenges to single-seat, transferrable preferential voting under state constitutional law. For example, in Maine—a state with plurality provisions—opponents of RCV raised challenges regarding other aspects of the state constitution. *See* Op. of the Justs., 2017 ME 100, ¶ 69, 162 A.3d 188, 196, 211 (declining to reach questions regarding "sort, count, [and] declare" provisions). And, in Vermont—a state with a majority threshold—the Attorney General once opined that RCV might be unconstitutional because the relevant provision requires voters to "bring in their votes for Governor, with the name fairly written [on them]." *See* Op. Vt. Att'y Gen. No. 2003-01 (Feb. 24, 2003) at 2. According to the Attorney General, this "directs voters to select a single candidate or 'name' for the office of governor [and] does not contemplate that voters will list multiple names and rank them in order of choice." *Id.* This Article addresses exclusively the constitutionality of RCV under plurality provisions and majority thresholds.

under the system wins in a single election. Plurality provisions demand nothing more.

Next, we compare two conflicting opinions out of Massachusetts and Maine—the only two majority opinions thus far to meaningfully discuss the constitutionality of RCV under a state plurality provision.[144] The first suggests that preferential voting is "in accordance with the principle of plurality voting,"[145] whereas the second advises that preferential voting "is not simply another method of carrying out the Constitution's requirement of a plurality."[146] As we show, the latter opinion fails to provide any support for its interpretation and appears to be based on little more than an implicit, unexamined assumption that a rank-ordering of preferences does not qualify as a "vote," as that term is used in the constitution.

Part III.B turns to the other type of election threshold found in state constitutions and state law, which requires candidates to receive a majority of the votes to be elected. Here, too, we conclude that RCV is generally lawful under such provisions.

Majority thresholds do, however, pose a different interpretive question that presents a closer call: whether a candidate who prevails under RCV should always be understood to have received a "majority of the votes," thereby clearing the threshold necessary to avoid a "no-choice" election. Depending on the text of the provision and the method of implementation, RCV might fail to produce a constitutionally sufficient "majority." As under SCV, this failure will trigger whatever contingency is in place, be it a separate runoff election or a decision by the state legislature.

Next, we discuss how the interpretation of this standard affects local elections governed by state law. Many state election codes impose majority thresholds for local offices. Thus, the interpretation of these statutory thresholds

144. In 1939, the Supreme Court of Rhode Island concluded in an advisory opinion that a multi-member RCV system violated a state constitutional provision providing "a right to vote in the election of all civil officers" because the system would allow the voter "to vote for only one of such officers." Op. to the Gov., 6 A.2d at 150. The Court also observed that the system might raise "further serious questions" under the provision electing the candidate with "the largest number of votes cast" elected but stated that it "need not discuss these additional difficulties in detail" as it had already rendered its opinion on the other provision. *Id.* at 152.

More recently, in 2018, the Supreme Court of New Mexico denied a petition seeking to stay a lower court decision ordering the City of Santa Fe to implement RCV pursuant to the City's charter. *See* Order Granting Peremptory Writ of Mandamus and Denying Motion to Dismiss and Motion for Relief from Judgment, State of New Mexico v. City Council of Santa Fe, No. D-101-CV-2017-02778, at 7 (N.M. Cnty. of Santa Fe, 1st Judicial Dist. Nov. 30, 2017). The City argued that the charter provision was inconsistent with the state constitution, which states: "In a municipal election, the candidate that receives the most votes for an office shall be declared elected to that office, unless the municipality has provided for runoff elections." N.M. CONST. art. VII, § 5. Voter-plaintiffs contended that RCV was either a runoff or, in the alternative, a method for ascertaining which candidates had "receive[d] the most votes." Order, *State of New Mexico*, No. D-101-CV-2017-02778, at 18 (Nov. 30, 2017).

145. Moore v. Election Comm'rs, 35 N.E.2d 222, 238 (Mass. 1941).

146. *Op. of the Justs.*, 2017 ME 100, ¶ 65, 162 A.3d at 211.

has profound implications for balloting method experimentation at the local level.

Finally, we turn to the unique context of presidential elections and the possible use of RCV there. Some observers have proposed reforming the electoral college by pairing RCV with majority thresholds in each state to prevent a presidential candidate who garners only a plurality of votes within a state from winning all of that state's electoral votes.

Our analysis offers important insights for these reformers. While RCV may seem a natural complement to majority-threshold provisions, our analysis suggests that the particular phrasing of such provisions and the particular method for implementing RCV must be carefully drawn to avoid unintended but potentially dramatic consequences.

A. Plurality Provisions & Ranked-Choice Voting

Both the purpose and text of plurality provisions comfortably encompass RCV. To start, the central, consistent purpose behind these provisions was to ensure that the selection of a candidate would always be determined through a single, popular election.[147] As noted above, this commitment to selection through popular election was, itself, animated by several supporting justifications: encouraging finality, avoiding vacancies, and ensuring the seating of officeholders without delay; enhancing administrative efficiency, economy, and ease; and guaranteeing that voters—not politicians—held ultimate control over the outcome.[148]

RCV fully satisfies each of these purposes. The victor wins by popular selection, and a single election determines the result. Voters submit one ballot—one input—and the balloting identifies a winner. No triggering threshold renders the election a nullity, prevents the selection of a winner, or activates any contingency beyond the election itself. Voters need not take any further actions or "next steps" after the ballot-counting is complete.

Nor does RCV conflict with the plain language of state plurality provisions. The text of every such provision refers to a numerical concept ("plurality of votes") rather than a balloting method ("plurality voting").[149] Indeed, the most common phrasing of such provisions indicates that the candidate with "the highest number of votes" shall be elected.[150] And no historical evidence suggests that the phrase "a plurality of votes" was understood to mean anything other than "the highest number of votes."[151] Dictionaries from the nineteenth and twentieth

147. *See supra* Part II.

148. *See supra* Part II.B.

149. *See* Appendix; *see also supra* Part II.

150. *See* Appendix.

151. In Maine, for example, the current constitutional "plurality" language used for state representatives can be traced to a 1963 amendment proposed by the second constitutional commission.

centuries, when many of these provisions were adopted, likewise reflect that numerical concept.[152] Only one court—the Maine Supreme Judicial Court—appears to have confused this numerical concept with a type of election system or balloting method.[153]

In fact, the Maine Justices' advisory opinion reveals that the primary question to consider when interpreting a plurality provision is *not* the meaning of the word "plurality," "highest," "largest," or "greatest"—rather, it is the meaning of the word "vote." If one candidate has the highest numerator in the first round of tabulation and another candidate has the highest numerator in the final round of tabulation, which candidate has received the most "votes"?

As with any voting rule, the RCV system itself defines what constitutes the "vote" that the system counts. The system takes the preferences voters have expressed for candidates and translates them into the "votes" for the candidates once the tabulation process is completed. The candidate who has received the most votes then wins the seat. Both historically and today, the word "vote," especially when used in constitutional text, is easily understood to include a ranked-choice vote. In 1880, for example, Webster defined "vote" to mean "[w]ish, choice, or opinion, of a person or body of persons, expressed in some *received and authorized way*."[154] A later edition defined a vote as "the formal expression of a wish, will, or choice . . . in electing a person to office or in passing laws."[155] Black's Law Dictionary employs a similarly broad conception,

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See TINKLE, *supra* note 133, at 79; *see also* Enacted with Amendment H-488 as Resolves 1963, ch. 75, *reprinted in* 2 A LEGISLATIVE HISTORY OF THE AMENDMENTS TO THE STATE OF MAINE CONSTITUTION, 1820 TO THE PRESENT (2013). Although the commission's proposals elicited debate regarding districting and apportionment, there was no floor discussion about changing "the highest number" to "a plurality," which was likely understood as a semantic, rather than a substantive, alteration. *See* 2 Me. Legis. Rec., 101st Leg., Reg. Sess. S. Legislative Record—Senate, (June 21–22, 1963, *passim*, Legislative Record—House, June 2122, 1963, *passim*, *reprinted in id.*

152. *See, e.g.*, *Plurality*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (G. & C. Merriam 1880) ("1. The state of being plural, or consisting of more than one . . . 2. A greater number; a state of being or having a greater number . . . *Plurality of votes*, the excess of votes cast for one individual over those cast for any one of several competing candidates."); THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 935 (H.W. Fowler & F.G. Fowler eds., 5th ed. 1964) ("State of being plural; large number, multitude; . . . majority (of votes etc.)").

153. *Compare* Op. of the Justs., 2017 ME 100, ¶ 61, 162 A.3d 188, 210 n.36 ("A plurality refers to the 'highest number of votes.'"), *with* Me. Senate v. Sec'y of State, 2018 ME 52, ¶ 19, 183 A.3d 749, 756 (Me. 2018) ("[D]etermining the winner of an election through plurality voting is inconsistent with determining the winner through a ranked-choice voting process.").

154. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (emphasis added) ("2. Wish, choice, or opinion, of a person or body of persons, expressed in some received and authorized way; the expression of a wish, desire, will, preference, or choice, in regard to any measure proposed, in which the person voting has an interest in common with others, either in electing a man to office, or in passing laws, rules, regulations, and the like; suffrage; 3. That by which will or preference is expressed in elections, or in deciding propositions; a ballot, ticket, or the like . . .").

155. State *ex rel.* Sherrill v. Brown, 99 N.E.2d 779, 781 (1951) ("The word 'vote' has been defined as 'the formal expression of a wish, will, or choice, in regard to any measure proposed, esp. where the person voting has an interest in common with others, either in electing a person to office or in passing laws, rules, regulations, etc.'" (quoting Webster's New International Dictionary (2d. Ed.))).

defining a vote as "the expression of one's preference or opinion by ballot, show of hands, or other type of communication."[156] In other words, a "vote" is an official expression of public preference that is itself shaped and constructed by the governing law. And—as Part I discusses—that shape is contestable and develops over time based on the policy preferences of the era.[157]

To be sure, a ranked-choice vote conveys greater nuance and information than a single-choice vote, but it still reflects a *single input* that is then counted in an authorized manner to produce an aggregate measure of popular support.

This distinction—between multiple inputs and a single input reflecting multiple contingent choices—is critical. One might object that every ranking should be considered a separate vote,[158] but this interpretation is neither obvious nor necessary. In traditional runoff elections, each round of voting produces an aggregate result and voters are then faced with a new, separate decisional point where they must submit a new input based on (and with the knowledge of) the first election's aggregate result. This is, notably, *not* the case with RCV.

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156. Black's Law Dictionary defines a vote as the "expression of one's preference or opinion by ballot, show of hands, or other type of communication." BLACK'S LAW DICTIONARY (11th ed. 2019).

157. *See supra* Part I. *See also* O'Neill, *supra* note 8, at 329, 344 (discussing how the definition of a vote may be "general enough to include different manners of casting a vote" and citing examples of cases examining the meaning of "vote"); State *ex rel.* Cleveland v. Stacy, 82 So.2d 264, 265 (Ala. 1995) ("Electorate will is computed in tabulation of legal votes."). One impulse might be to suggest that because most people did not *specifically* contemplate ranked-choice voting at the time of ratification, the word "vote" should be interpreted to exclude a ranked-choice vote. But this instinct flips constitutional interpretive principles on their head. Plenty of laws that were not "specifically contemplated" when a provision was ratified nonetheless fit comfortably with the text and purposes of the provision, and most contemporary interpretive methods disclaim primary reliance upon the purported private intentions of political actors. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75–77 (2006).

Nor does a pivot from "original intent" to "original public meaning" provide a definitive answer. The concept of a "vote" was itself broad and capable of multiple plausible and contested forms across different communities historically just as it is today. *See supra* note 45 (discussing the development of RCV in the mid-to late-nineteenth century). And the very suggestion that text can be understood wholly apart from social meaning and context seems dubious at best, especially when one widens the scope beyond the meaning of the word "vote" to encompass the meaning of the broader plurality provision. *See generally* Rick Hills, Bostock*,* Cline*, and the SCOTUS's Repression of Textualism's Unresolvable Contradictions*, PRAWFSBLAWG (Sept. 10, 2020), https://prawfsblawg.blogs.com/prawfsblawg/2020/09/bostock-cline-and-the-scotuss-repression-of-textualisms-unresolvable-contradictions.html [https://perma.cc/CXA2-8ZS8].

Regardless, one does not need to subscribe to or reject "originalism" or to subscribe to or reject "textualism" (of one or another variety) to conclude that the word "vote"—standing alone—does not inevitably or plainly preclude one type of vote versus another. *Cf.* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (identifying and comparing differing approaches to textualism in statutory interpretation).

158. Many of the dictionary definitions of "vote" above, for example, use the singular, referring to the "wish," "choice," "preference," or "opinion" of the voter. *See supra* notes 156–157 and accompanying text. For this reason, a wooden interpretation of the constitutional text could be said to imply that a vote cannot encompass contingent choices. For the reasons set out herein, we think the better reading is that a ranked-choice ballot reflects a single vote insofar as it represents a single input at a single point in time and the ballot ultimately counts towards a single choice.

Under RCV, voters submit a single input at a single point in time and the tabulation process produces a final aggregate result. Thus, while some contend that RCV simulates runoff elections, it is a distinct system with unique benefits and limitations. Indeed, one common policy objection to RCV is that voters cannot technically know *ex ante* which candidate will ultimately receive their vote[159]—a consequence of voters only having a single input at a single point in time.

Only after the final stage in the tabulation process is completed does the voter's "vote" become determined and legally effective. Because a voter's *full ranking* is their "vote" (rather than any singular choice within that ranking) one cannot determine which candidate has received the most "votes" in an RCV election until the tabulation process concludes and all votes have been assigned. A candidate who has the most "first-choices" in the initial round of an RCV tabulation has not received the "most votes" any more than a candidate who leads in an SCV tabulation with only 27 percent of precincts reporting. If the process for counting the votes is not complete, one cannot ascertain who has "the most votes." A state RCV law could make this even clearer if that law simply said that voters should rank-order their "choices" or "preferences," and the voter's "vote" shall be determined only after the rank-choice process of tabulation is completed. Indeed, this phrasing is almost exactly how the Maine law was written, even though the Maine court did not pay close attention to the text of the law.[160]

Two opinions—one from Massachusetts and one from Maine—demonstrate how this key question of vote-definition can be determinative.

1. Massachusetts

In 1940, the City of Cambridge adopted a multimember preferential voting system for its municipal elections.[161] Under this system, "each voter, though entitled to have only a vote for one candidate counted, [was] entitled to express as many relative choices or preferences as he [saw] fit."[162] If his vote was not counted "for the candidate of his first choice," it would be "counted for another candidate for whom he has expressed a choice, in the order of preference shown by him upon his ballot."[163]

159. *See, e.g.*, Baber v. Dunlap, 376 F. Supp. 3d 125, 131–32 (D. Me. 2018) ("[According to Dr. Gimpel, the] primary flaw . . . in RCV is that, unlike ordinary elections and ordinary run-offs, voters are required to make predictions about who will be left standing following an initial tabulation of the votes.").

160. *See* ME. REV. STAT. tit. 21-A, § 1(35-A) (2019) ("'Ranked-choice voting' means the method of casting and tabulating votes in which voters rank candidates in order of preference, tabulation proceeds in sequential rounds in which last-place candidates are defeated and the candidate with the most votes in the final round is elected."). To be fair, one might argue that the statute's use of the phrase "most votes in the final round" could be read to imply that the choices themselves are votes. To the extent this phrasing is ambiguous, it could be clarified in the manner identified above.

161. *See* Moore v. Election Comm'rs, 35 N.E.2d 222, 226 (Mass. 1941).

162. *Id.* at 229.

163. *Id.*

In *Moore v. Election Commissioners of Cambridge*, a resident and voter of Cambridge challenged the election plan on a number of state and federal constitutional grounds.[164] Omitted from this list was a challenge under Article 14 of Massachusetts's constitution, which provides that in "all elections of civil officers by the people of this commonwealth, whose election is provided for by the constitution, the person having the highest number of votes shall be deemed and declared to be elected."[165] As the court noted, a municipal councilmember "is not an officer 'whose election is provided for by the constitution'"—as such, the state's "plurality provision" simply did not apply.[166]

Nonetheless, the court explained in extensive dicta why a preferential voting system "cannot be declared unconstitutional on the ground that it is in conflict with ordinary principles of plurality voting."[167] Writing for the court, the Chief Justice observed that the "candidates receiving the largest numbers of *effective votes counted in accordance with the plan* are elected, as would be true in ordinary plurality voting."[168]

The design and operation of the system itself were vital to this understanding. Under a preferential voting system, "no voter can cast more than one effective vote, even though he has the privilege of expressing *preferences as to the candidate for whom his vote shall be effective* when it is demonstrated that it will not be effective for a candidate for whom he has expressed a greater preference."[169]

As the court recognized, a ranked-choice "vote" provides a voter's preferences, and "[that] vote is counted in accordance with the will of the voter."[170] The candidate for whom that vote is ultimately "effective" cannot be determined until the round-by-round counting process has run its course. "The expression of preferences made by the voters upon the ballots shows the relative order in which they wish their choices to be given effect."[171] And while, "[o]bviously, it is reasonable to give effect where possible to the first choices of the voters,"[172] the voter's "vote" is not limited to their "first-choice preference" alone. In the court's view, that would defeat the purpose of a ranked-choice voting system and, in effect, revert to a single-choice voting system.

The court also took seriously the limited scope of the judicial role. As the court observed, "We must always be careful in approaching a constitutional question dealing with principles of government, not to be influenced by old and

164. *See id.* at 226.
165. *Id.* at 230–31 (quoting MASS. CONST. amend. XIV).
166. *Id.* at 231.
167. *Id.* at 238.
168. *Id.* (emphasis added).
169. *Id.* (emphasis added).
170. *Id.* at 239.
171. *Id.*
172. *Id.*

familiar habits, or permit custom to warp our judgment. We must not shudder every time a change is proposed."[173]

That ranked-choice ballots convey *more information* than single-choice ballots does not mean they represent multiple *votes*. The voter provides a single input rather than providing multiple inputs across multiple points in time (as in a traditional runoff). Thus, the fact that ranked-choice tabulation involves a *series of rounds* to ascertain how many votes each candidate ultimately receives does not mean that ranked-choice voting is the same as a *series of elections*.

As the Massachusetts Supreme Judicial Court would reiterate in a later decision, preferential voting "seeks more accurately to reflect voter sentiment [and] . . . 'to enlarge the possibility of a voter's being represented . . . by giving [the voter] an opportunity to express more than one preference among candidates.'"[174] Voters cast a single vote in a single election in a way that allows them to express a fuller picture of their candidate preferences.

Because the candidate who receives the most votes—whether a plurality or majority—at the end of ranked-choice balloting is elected, Massachusetts's highest court concluded that preferential voting is fully "in accordance with the principle of plurality voting."[175] Cambridge has been using RCV ever since.

2. Maine

In their recent advisory opinion regarding RCV and Maine's plurality provision, the Justices of the Maine Supreme Judicial Court arrived at the opposite conclusion.[176] In 2017, the Justices advised that RCV "is not simply another method of carrying out the Constitutional requirement of a plurality" because it would "prevent[] the recognition of the winning candidate when the first plurality is identified."[177] This decision not only failed on its own terms (as a purportedly formal exercise in constitutional interpretation based on the text and purposes of the provision), but it also failed to offer any broader normative account to situate or explain how the Justices arrived at their conclusion.

Before we examine the Justices' opinion, however, a bit of history sets the stage. In Maine's original 1820 constitution, state representatives, state senators, and the governor were all elected by "a majority of all the votes" cast.[178] If no candidate garnered a majority, the balloting failed, which triggered a contingency option.[179] For state representatives, this meant holding new

173. *Id.* at 230 (quoting Johnson v. City of New York, 9 N.E.2d 30, 38 (N.Y. 1937)).

174. McSweeney v. City of Cambridge, 665 N.E.2d 11, 15 (Mass. 1996) (quoting *Moore*, 35 N.E.2d at 239).

175. *Moore*, 35 N.E.2d at 238.

176. Op. of the Justs., 2017 ME 100, ¶ 67, 162 A.3d 188, 211.

177. *Id.* ¶ 65, 162 A.3d at 211.

178. *See* ME. CONST. art. IV, pt. 1, § 5; art. IV, pt. 2, §§ 4, 5; art. V, pt. 1, § 3 (1820).

179. *See supra* notes 176–177 and accompanying text.

elections until a candidate won by a majority.[180] For state senators and the governor, the contest was tossed to the political branches for resolution.[181]

As Part II discussed, such arrangements often led to frustration, discord, instability, and partisan intrigue—and Maine was no different. After a series of failed elections, the majority threshold for state representative was amended in 1847 to provide for the election of the candidate who received "the highest number of votes."[182] The threshold for state senators was changed from "majority" to "plurality" in 1875. But the majority threshold remained in place for governor. And that majority-vote requirement nearly caused the state to devolve into civil war.[183]

In 1878, the failure of any candidate for governor to win a majority of the votes triggered the state's default provision, under which the legislature then chose the governor.[184] The Democratic candidate was seated by the legislature despite the Republican earning more votes.[185] In the next election the following year (Maine held gubernatorial elections every year at the time), that same sitting Democratic governor then made the unusual and controversial decision to act as an election-returns board, throwing out numerous election returns on technicalities.[186] While initial returns from the 1879 election appeared to give Republicans legislative majorities in both the Senate and the House, the Democratic governor's "revised" returns gave Fusionist candidates (Democrats and Greenbacks) majorities in both chambers instead.[187]

With no majority winner for governor in 1879 and "rival legislatures" each forming and claiming the right to choose the new acting governor, the entire state government soon came to the brink of collapse.[188] With two days left in his term, the sitting governor appointed General Joshua Chamberlain as commander of the state militia and ordered him to "protect the public property and institutions of the State until my successor is duly qualified."[189] Chamberlain—a former four-term governor of Maine himself—was a widely known and respected icon of the

180. *See* ME. CONST. art. IV, pt. 1 § 5 (1820) ("[B]ut in case no person shall have a majority of votes, the selectmen and assessors shall, as soon as may be, notify another meeting, and the same proceedings shall be had at every future meeting until an election shall have been effected.").

181. *See* ME. CONST. art IV, pt. 2 § 5; art. V, pt. 1, § 3 (1820).

182. *Op. of the Justs.*, 2017 ME 100, ¶ 63, 162 A.3d at 210 n.37 ("In 1848, the 'majority' requirement as to Representatives was changed to 'the highest number.' . . . The 1864 amendment then changed 'the highest number,' in the context of the election of Representatives, to 'a plurality.'" (first citing Resolves 1848, ch. 84; then citing Resolves 1864, ch. 344)).

183. *See infra* notes 185–191 and accompanying text.

184. *See generally* LOUIS CLINTON HATCH, 2 MAINE: A HISTORY (1919).

185. *See id.* at 593–95.

186. *Id.* at 599–600.

187. *See id.* at 601–02.

188. *See id.* at 602–04.

189. *Id.* at 609.

Civil War.[190] Only through Chamberlain's steady leadership did the state avoid outright war and eventually return to order.[191]

In 1880, Maine amended its constitution to remove the majority-threshold requirement and allow its governor to be elected by a "plurality of all of the votes."[192] With the governor now also selected by a plurality of the votes, the same voting rule now applied to all three parts of Maine's government. For the next 135 years, these provisions remained largely unanalyzed and uninterpreted.[193]

In 2015, that changed. Mainers delivered more than 70,000 signatures to the Secretary of State to put RCV on the general-election ballot as a citizen-initiated state statute.[194] At the November 2016 election, Mainers passed the legislation with 52.12% of the vote, implementing RCV for general and primary elections for the offices of U.S. Senator, U.S. Representative, State Senator, State Representative, and Governor.[195]

The Act, however, faced challenges both before and after its success at the polls. Before the November 2016 election, Maine's Attorney General issued an opinion concluding that the proposal conflicted with the constitutional requirement that winners be determined by "a plurality" of the votes.[196] Because the Act "require[d] additional rounds of counting if no candidate receives a *majority* in the first tally," the Attorney General asserted that the Act improperly prevented the candidate who "receive[s] a *plurality* based on the initial tally" from being declared the winner.[197]

This objection did not fade after voters enacted RCV. In early 2017, the Maine Senate requested from the Maine Supreme Judicial Court an advisory opinion addressing whether the Act violated the state constitution, including the constitution's "plurality of the votes" provisions.[198] By their terms, these provisions applied to general elections for the offices of State Senator, State Representative, and Governor, but not to federal offices or primary elections.[199]

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190. *See Joshua Chamberlain*, NAT'L PARK SERV. (July 7, 2016), https://www.nps.gov/people/joshua-chamberlain.htm [https://perma.cc/GNK3-W27V].

191. HATCH, *supra* note 185, at 613–15.

192. ME. CONST. art. V, pt. 1, § 3. Maine had already amended its constitution to allow for plurality election of representatives and senators. *See* Op. of the Justices, 207 ME 100, ¶ 61, 162 A.3d 188, 210.

193. *See* TINKLE, *supra* note 133, at 115.

194. *Timeline of Ranked Choice Voting in Maine*, FAIRVOTE, https://www.fairvote.org/maine_ballot_initiative [https://perma.cc/MY7W-FNVQ].

195. *Maine Ranked Choice Voting Initiative, Question 5 (2016)*, BALLOTPEDIA, https://ballotpedia.org/Maine_Ranked_Choice_Voting_Initiative,_Question_5_(2016) [https://perma.cc/7V2P-44DZ].

196. Op. Me. Att'y Gen. No. 2016-01 (Mar. 4, 2016) at 5.

197. *Id.* (emphasis added).

198. S. Order, Requesting an Opinion of the Justices of the Supreme Judicial Court Regarding an Initiated Bill, 128th Leg., 1st Reg. Sess. (Me. 2017).

199. *See* ME. CONST. art. IV, pt. 1, § 5; art. IV, pt. 2, §§ 3–4; art. V, pt. 1, § 3.

On May 23, 2017, the Justices issued a unanimous advisory opinion, stating that the Act conflicted with the state constitution's "plurality of the votes" provisions.[200] Although the opinion was only advisory,[201] it set in motion a series of legislative decisions, legal challenges, and popular action that culminated in the patchwork statutory settlement currently in place: RCV is used for federal and state offices in *primary* elections, but for federal offices only in *general* elections.[202] That distinction reflects the scope of the constitution's plurality provision, which applies only to general elections for state offices.

The *Opinion of the Justices* is as concise as it is cryptic. Of its seventy-two paragraphs, most are spent analyzing whether it would be appropriate for the Justices to provide an advisory opinion at all.[203] The merits of the "plurality" question occupy only nine paragraphs,[204] and the Justices' substantive interpretation occurs in only two.[205]

First, the Justices articulate the relevant standard that should guide their interpretation. As they observe, Maine's "[c]onstitutional provisions are accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend."[206]

Next, the Justices recite the relevant constitutional text (old and new),[207] acknowledging that the word "plurality" refers to a numerical concept (*i.e.*, the "highest number of votes") rather than any particular electoral system.[208]

Finally, the Justices recount the troubled history of the State's majority-threshold provisions. The opinion notes that a number of elections between 1830 and 1880 "yielded no candidate who achieved a majority," and that "the alternative means for election provided by the 1820 Constitution had to be utilized."[209] With brevity and clarity, the opinion sets out the justifications for abandoning a majority threshold and moving to a plurality standard:

> The result [of the majority requirements] was widespread discontent—and, in 1879, threats of violence, which were quelled by the efforts of Joshua Chamberlain—caused by the expense and delay of holding repeat elections, by the election of candidates through legislative action rather than based on the will of the people, and by the claims of manipulation and allegations of self-dealing levied by opponents of the

200. *See* Op. of the Justs., 2017 ME 100, 162 A.3d 188.
201. *See id.* ¶ 9, 162 A.3d at 198.
202. *See* ME. REV. STAT. tit. 21-A § 1(27-C) (2019).
203. *Op. of the Justs.*, 2017 ME 100, ¶¶ 6–55, 162 A.3d at 198–208.
204. *Id.* ¶¶ 60–69, 162 A.3d at 209–12.
205. *Id.* ¶¶ 61, 64, 162 A.3d at 209, 211.
206. *Id.* ¶ 58, 162 A.3d at 209 (quoting Op. of the Justs., 673 A.2d 1291, 1297 (Me. 1996)).
207. *See id.* ¶¶ 60–64, 162 A.3d at 209–10.
208. *See id.* ¶ 61, 162 A.3d at 210 n.36 ("A plurality refers to the 'highest number of votes.'"). Unfortunately, the Justices themselves—in later reflecting upon their advisory opinion—muddle this distinction. *See supra* note 153.
209. *Op. of the Justs.*, 2017 ME 100, ¶ 62, 162 A.3d at 210.

eventually-declared winners.[210]

By 1880, the opinion notes, all three offices had been amended to replace "majority" with "plurality."[211]

The entirety of the Justices' substantive analysis of the provision then follows:

> [T]he language of the Maine Constitution today is clear. . . . [A]n election is won by the candidate that first obtains 'a plurality of' all votes returned. The Act, in contrast, provides for the tabulation of votes in rounds. Thus, the Act prevents the recognition of the winning candidate when the first plurality is identified.[212]

The Justices then provide an "illustrat[ion]" of the problem in which a candidate who receives a plurality of first-choice preferences is passed by a candidate in later rounds of tabulation who earns additional votes as less popular candidates are eliminated.[213] According to the Justices, this shows that "the Act is not simply another method of carrying out the Constitution's requirement of a plurality," but rather it prevents "a candidate [who has] obtained a plurality of the votes [from being] declared the winner."[214]

The most fundamental defect in this remarkably brief analysis is that the Justices simply treat, without any analysis or justification, an elector's first-preference ranking as that elector's constitutional "vote." As a formal doctrinal matter, that is at odds with the ranked-choice voting statute.[215] Surprisingly, the decision does not discuss the contrary conclusion of Massachusetts's highest court, which had found RCV not to violate similar provisions in that state's constitution, despite the briefs bringing that decision to the attention of the Maine court.[216]

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210. *Id.* (citing S. REP. NO. 24-38 (Me. 1844); *see also* 10TH LEG. OF ME., REP. OF THE COMM. OF ELECTIONS, IN THE CASE OF JOSEPH C. SMALL, CLAIMING TO HOLD A SEAT IN THE HOUSE OF. REPRESENTATIVES AS A MEMBER FROM THE DIST. COMPOSED OF THE TOWNS OF UNITY, BURNHAM & TROY (1830); TINKLE, *supra* note 133, at 12.

211. *Op. of the Justs.*, 2017 ME 100, ¶ 63, 162 A.3d at 210.

212. *Id.* ¶¶ 64–65, 162 A.3d at 211.

213. *See id.*; *see also* Jeff Goldman, *The Law Court's Troubling Opinion of the Justices*, 32 ME. B.J. 19, 20 (2017) ("[T]he entire 'Analysis' section of Opinion of the Justices is three paragraphs of undisputed history and three paragraphs of belabored mathematical logic sandwiching a single paragraph containing a pivotal constitutional holding for which the Law Court offers no support.").

214. *Op. of the Justs.*, 2017 ME 100, ¶ 65, 162 A.3d at 211.

215. ME. REV. STAT. tit. 21-A, § 1(35-A) ("'Ranked-choice voting' means the method of casting and tabulating votes in which voters rank candidates in order of preference, tabulation proceeds in sequential rounds in which last-place candidates are defeated and the candidate with the most votes in the final round is elected."). As discussed in note 160, one might argue that the phrase "most votes in the final round" could be read to imply that the choices themselves are votes rather than the votes becoming *effective* in the final round. We do not believe this to be the best or even most natural reading of the law. *See supra* text accompanying notes 158–160. Nor was such a justification provided by the Maine Supreme Judicial Court.

216. *See* Brief of Amicus Curiae Dmitry Bam at 11, Op. of the Justs., 2017 ME 100,162 A.3d 188 (No. OJ-17-1); Brief of Me. House Republican Caucus & Me. Heritage Pol'y Ctr. at 12, Op. of the

Unlike the *Moore* opinion, which correctly recognized that a voter's preference ranking cannot be translated into an "effective vote" until it has been "counted in accordance with" the ranked-choice tabulation process,[217] the Maine advisory opinion treated the voters' first-choice rankings as their "vote,"[218] even though the legislation made it clear that this was not so.[219] In effect, the Justices sever the ranked-choice tabulation into pieces, treat the first step in that tabulation as a freestanding election, and regard RCV ballots as if they are SCV ballots with superfluous marginalia.

But there is, simply put, no such thing as a "first plurality" under a ranked-choice system.[220] The "first round" in an RCV election is only one part of a comprehensive and indivisible process, and the person with the largest number of first-preference rankings is nothing more than the person who holds the lead in those initial rankings. There is no inherent reason under an RCV statute to accord the first round any special constitutional significance. As other courts have recognized, "[t]he series of calculations required by the [ranked-choice voting tabulation process] to produce the winning candidate are simply *steps of a single tabulation, not separate rounds of voting*."[221]

This distinction is central because it sits at the juncture between the legitimate justifications the Justices teed up and the unrelated decision they rendered. The "broad purpose[s]" of the plurality provisions—as the Justices recognized—were to prohibit "repeat elections" and the selection of candidates "through legislative action rather than based on the will of the people."[222] In short, to identify a winner through a single popular election.[223] RCV does precisely that. Under Maine's constitution—as under many constitutions—that should have been the end of the inquiry.[224]

Justs., 2017 ME 100, 162 A.3d 188 (No. OJ-17-1); Brief of FairVote at 11, Op. of the Justs., 2017 ME 100, 162 A.3d 188 (No. OJ-17-1); Responsive Brief of Me. House Republican Caucus & Me. Heritage Pol'y Ctr. at 8, Op. of the Justs., 2017 ME 100, 162 A.3d 188 (No. OJ-17-1); Responsive Brief of Marshall J. Tinkle at 8, Op. of the Justs., 2017 ME 100, 162 A.3d 188 (No. OJ-17-1).

217. Moore v. Election Comm'rs, 35 N.E.2d 222, 238 (1941) (emphasis added).

218. *Op. of the Justs.*, 2017 ME 100, ¶ 66, 162 A.3d at 211 (stating that RCV prevents "a candidate [who has] obtained a plurality of *the votes* [from being] declared the winner" (emphasis added)).

219. H.R. 1557, 127th Leg., 2d Reg. Sess. (Me. 2016).

220. *Op. of the Justs.*, 2017 ME 100, ¶ 65, 162 A.3d at 211 ("first plurality").

221. Dudum v. Arntz, 640 F.3d 1098, 1107 (9th Cir. 2011) (emphasis added); *see also id.* ("[O]nce the polls close and calculations begin, no new *votes* are cast. . . . The ballots . . . are the initial inputs; the sequence of calculations mandated by [RCV] is used to arrive at a single output—one winning candidate.); Fishburn, *supra* note 23, at 195 (pointing out the "obvious differences" between a preferential voting system and a traditional runoff—"preferential voting requires voters to order the candidates and never needs a second ballot").

222. *Op. of the Justs.*, 2017 ME 100, ¶¶ 58, 63–64, 162 A.3d at 209–10.

223. *See id.* ¶ 60, 162 A.3d at 209.

224. *See id.* ¶ 58, 162 A.3d at 209 ("Constitutional provisions are accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend." (quoting Op. of the Justs., 673 A.2d 1291, 1297 (Me. 1996)); *see also* Zaner v. City of

Perhaps the Justices mistook RCV as imposing some kind of "majority-threshold requirement" of its own. But to conflate RCV's sequential tabulation process with the kind of constitutional majority-threshold requirements in place in Maine's 1820 constitution would be wrong four times over.

First (and most importantly), RCV does not impose any kind of threshold that would render the election a *nullity* if that threshold were not met. Whichever candidate has the most votes at the end of an RCV election is declared the winner. RCV—like SCV—is merely a balloting method for measuring popular support. At the end of the balloting, one candidate has the most votes. Nothing about RCV runs the risk of leading to a "non-election"—the core mischief that plurality provisions were adopted to avoid.[225]

Second, RCV—like SCV—does not even necessarily result in a majority outcome.[226] As the Justices acknowledged in a footnote, "[i]t is possible that . . . the prevailing candidate could win by a plurality of votes" due to ballot exhaustion.[227] For example, if every voter decided to make use of only one ranking, the RCV system would produce the same result as the SCV system—and the candidate with the most votes would win. Because many voters will make use of multiple rankings, RCV *tends* to result in majority outcomes *more frequently* than SCV, but a majority outcome is not guaranteed.[228]

Third, the fact that an RCV tabulation process might *stop* when a candidate obtains a majority is not because RCV *requires* a majority. Rather, no further tabulation is necessary to identify which candidate will ultimately receive the most votes and be declared the winner. Imagine an election with five candidates. In the first round, no candidate receives a majority and so the least popular candidate is eliminated. In the second round, a candidate receives a majority, so tabulation stops. That is not because a majority "threshold" has been imposed, but because further rounds of tabulation would serve no practical purpose. Once a candidate receives a majority, it is mathematically impossible for that candidate to lose. The candidate that has the "most votes" in round two will continue to

Brighton, 917 P.2d 280, 283 (Colo. 1996) ("If the intent of the electorate is not clear from the language of an amendment, courts should construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment."); Commonwealth v. Blackington, 41 Mass. 352, 356 (1837) ("In construing this constitution, it must never be forgotten, that it was not intended to contain a detailed system of practical rules, for the regulation of the government or people in after times; but that it was rather intended, after an organization of the government, and distributing the executive, legislative and judicial powers, amongst its several departments, to declare a few broad, general, fundamental principles, for their guidance and general direction."); Johnson v. Wells Cnty. Water Res. Bd., 410 N.W.2d 525, 528 (N.D. 1987) ("Our overriding objective in construing a constitutional provision is to give effect to the intention and purpose of the people adopting it.").

225. *See* Op. of the Justs., 2017 ME 100, ¶ 62, 162 A.3d 188, 210; *see also supra* Part II.B; Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021) (discussing the role and function of "the mischief rule" in the interpretive exercise).

226. *See infra* Part III.B.

227. *Op. of the Justs.*, 2017 ME 100, ¶ 65, 162 A.3d at 211 n.38.

228. *See infra* Part III.B.

have the "most votes" in rounds three and four. The election is over because the winner has been identified.

For strictly informational purposes, the tabulation *could* continue into the fourth round, reducing the field from four candidates to two candidates. But doing so would never change the outcome of the election. In San Francisco, for example, the tabulation process continues until only two candidates remain *even if* a candidate receives a majority in an earlier round.[229] Doing so provides the voting public with more information about the winning candidate's base of public support, as well as that of the runner-up.[230]

San Francisco's 2016 Board of Supervisors election under RCV offers an illustration. The District 9 election included four candidates: Hillary Ronen, Joshua Arce, Melissa San Miguel, and Iswari España. Based on first choices alone, Ronen already commanded 57 percent support.[231] No further rounds were necessary to identify the winner of the election. Nonetheless, the San Francisco Department of Elections ran the round-by-round tabulation process to completion. By the final round—with only Ronen and Arce remaining—Ronen's base of support swelled to 65 percent.[232]

In short, the fact that some jurisdictions may stop the round-by-round elimination process when a winner emerges does not mean that RCV imposes a majority threshold for election. It simply means that a candidate who has received a majority of preferences has already clinched that election and no further tabulation will change the result.

Finally, the Justices misattribute their reasoning to the constitution's plurality provision when, in fact, the existence of a majority or a plurality provision is irrelevant to the outcome of the case. The Justices' opinion invalidated separate tabulation rounds by treating them as separate elections.[233] They reasoned that the second round of tabulation was invalid because a candidate would have won by receiving a plurality of votes in the first round. However, if the first round of the tabulation process is when the constitutionally salient count of "votes" is ascertained (as the Justices suggest), then even in a state with a majority provision a candidate with the greatest first-round plurality could challenge the second-round results. For example, imagine running the Justices' "illustration" from above again, but this time under the 1820 constitution's majority-threshold requirement. Assume Candidate A receives 47

229. *See* Kimberly Veklerov, *East Bay Officials Push for More Transparency in Ranked-choice Vote Counting*, S.F. CHRON. (Oct. 19, 2018), https://www.sfchronicle.com/bayarea/article/East-Bay-officials-push-for-more-transparency-in-13321986.php [https://perma.cc/WU5H-TVDJ].

230. *See id.* Indeed, Maine *also* does this for the races where RCV is still used. *Id.*

231. *November 8, 2016 Official Election Results*, S.F. DEP'T OF ELECTIONS (Dec. 6, 2016), https://sfelections.org/results/20161108/ [https://perma.cc/F7Y8-WJPJ].

232. Veklerov, *supra* note 229.

233. *See* Op. of the Justs., 2017 ME 100, ¶¶ 35, 62, 162 A.3d 188, 204–05, 210 (likening the "successive rounds" of RCV to the "series of new elections" required under the state's old majority-threshold provision).

percent, Candidate B receives 45 percent, and Candidate C receives 8 percent in the first-round tabulation. In the second and final round, however, Candidate B prevails with 52 percent, while Candidate A loses with 48 percent. Using the Justices' reasoning that the first round of the tabulation is what constitutionally "counts," Candidate A presumably would be able to challenge the result. According to the Justices' logic, the lack of a majority in the first round (or a "first majority") would activate the relevant constitutional contingency, forcing a new election (for state representatives) or passing the contest off to the political branches (for state senators and the governor).

By relying on the plurality provision to hold RCV unconstitutional, the Maine Justices got it wrong. The first round of an RCV tabulation process either has constitutional significance or it does not—the fact that the constitution contains a "plurality" provision rather than a "majority" threshold is irrelevant. This makes the entire opinion—from the discussion of the meaning of "plurality" to the dramatic recital of the state's history—extraneous.

In short, the decision fails on its formal terms as a doctrinal matter. After establishing that their duty was to give the plurality provision "a liberal interpretation in order to carry out [its] broad purpose,"[234] the Justices undertook no meaningful textualist or purposive analysis into whether ranked-choice voting—on its own terms—could reasonably be construed to comply with the state's plurality provision. Instead, the decision seems to be driven by the Justices' preexisting (and non-constitutional) assumption that only one type of vote is legitimate: a single-choice vote.

Nor did the Justices offer any broader structural account to justify their decision. For example, one might imagine a state supreme court reading certain democratic background principles into its state constitution.[235] Such principles could view electoral laws as suspect when they restrict competition[236] or reduce alignment[237] or reduce opportunities for contestation.[238] Whatever might be said for the use of structural constitutional principles in election law decisions, the Justices neither offered such a principle nor sought to evaluate how the ranked-choice voting law might contravene such a principle.

Instead, the opinion seems to suggest (at most) a kind of reflexive resistance to the novelty of RCV. In concluding, the Justices wrote: "For the first time in Maine's history, the method by which the people of Maine vote for Governor,

234. *Id.* ¶ 58, 162 A.3d at 209.

235. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021). And, of course, different states might adopt different background principles against which electoral laws should be tested. *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

236. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646–52 (1998).

237. *See* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 284–91 (2014).

238. *See* Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 738 (2008).

their chosen Senators, and their chosen Representatives has been substantially altered through the enactment of a statute rather than through a constitutional amendment."[239] The legal significance of this observation is not discussed, and from a formal perspective it is difficult to understand its relevance: the Justices cite no constitutional provision or principle imposing any kind of "substantialness" limitation on statutory changes to the state's electoral machinery. And for good reason: our democratic structures *should* remain generally flexible to adapt to changing times and needs.[240]

If RCV is novel, the circumstances to which it is a response are exceptional as well. At the start of the twentieth century, voters rebelled against corrupt backroom deals and demanded direct primaries be used to choose the parties' nominees. Similarly, the recent increased interest in RCV is a response to the highest levels of political polarization this country has experienced since the late nineteenth century and the desire of voters to elect candidates who can forge a more effective government in the midst of profound dissatisfaction with our gridlocked and dysfunctional politics.[241] RCV might or might not succeed in that aim, but voters are entitled to try this approach and evaluate it. Nothing in Maine's—or any other state's—"plurality vote" provision stands in the way of that choice.

B. Majority Thresholds & Ranked-Choice Voting

Majority-threshold provisions present more complex interpretive questions, but the core takeaway is the same: RCV is constitutional. This does not, however, mean the winner of an RCV election will always *clear* the constitution's threshold. Just as SCV elections can fail to produce a majority, so too can RCV elections fail to produce the constitutionally relevant majority.

Plurality provisions focus on the numerator at the end of the vote-tabulation process—that is, who receives the most votes—and so courts need only construe the word "vote." Majority provisions, on the other hand, ask a different question: what is the relevant *denominator* for measuring a constitutional "majority"? Put differently, candidates need to win a majority—but a majority of what?

In single-choice candidate elections, questions about the relevant denominator for measuring a "majority" rarely arise. Generally speaking, election authorities proceed on the assumption that the relevant denominator is the number of ballots cast for the applicable office.[242] Thus, the number of votes

239. *Op. of the Justs.*, 2017 ME 100, ¶ 70, 162 A.3d at 211–12.

240. *See generally supra* Part I.

241. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276 (2011).

242. For example, Arkansas requires that judges are elected by a "majority of qualified electors voting for such office." ARK. CONST. amend. 80, §§ 17–18. In 2016, Clint McGue, the winner of the judicial race for Lonoke County District Court North, won with 10,375 votes (54.95 percent of the votes

cast for candidates in a single-choice election will necessarily equal the number of votes *received by* candidates in that election.

In a ranked-choice election, however, the total number of votes cast for all the candidates in the election can be higher than the total number of votes received by the subset of those candidates who survive until the final round of tabulation. As discussed in Part I, if the ballot limits the number of choices a voter can make or any voter chooses not to rank all candidates, then some degree of ballot exhaustion becomes possible during the tabulation process.[243]

For example, in Maine's 2018 Second Congressional District race, voters cast a total of 289,624 valid ballots.[244] First-round results showed Bruce Poliquin (R) narrowly leading Jared Golden (D), 46.3 percent to 45.6 percent.[245] Two independent candidates, Tiffany Bond and Will Hoar, had 5.7 percent and 2.4 percent.[246] After all of the voters' "first choices" had been tallied, the two least popular candidates—Bond and Hoar—were eliminated.[247] Most voters who ranked Bond or Hoar first ranked Jared Golden second.[248] This allowed Golden to prevail over Poliquin in the final round.

On 7,820 ballots, however, voters ranked a third-party candidate first—and then declined to fill in any second-, third-, or fourth-preference ranking.[249] On 335 ballots, voters ranked a third-party candidate first, another third-party candidate second, and then left the remaining rankings blank.[250] These might be voters who are so alienated from both major parties that they show up to vote, but do not want to indicate a preference for any candidate from either of those two parties—even as a second, third, fourth, or lower option. Thus, when both of the third-party candidates were eliminated, these preferences became inactive and did not transfer to *either* of the two remaining major-party candidates. These voters might be thought of as abstaining from any choice as between the two major-party candidates.

In the end, this meant that while Jared Golden won with a majority (50.6 percent) of the *final votes*, he won with a plurality (49.2 percent) of the *total*

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for that office). *2016 General Election and Nonpartisan Runoff Election: Official County Results*, ARK. SEC'Y OF STATE (Feb. 8, 2017), https://results.enr.clarityelections.com/AR/63912/184685/Web01/en/summary.html [https://perma.cc/7DYR-7WJF]. The total turnout in Lonoke County, however, was 27,306, giving McGue only 38 percent of the votes in the election. *Id.* (Voter Turnout tab).

243. *See supra* Part I.

244. *Tabulations for Elections held in 2018*, DEP'T OF THE SEC'Y OF STATE BUREAU OF CORPS., ELECTIONS & COMM'NS, STATE OF ME. (2018), https://www.maine.gov/sos/cec/elec/results/results18.html [https://perma.cc/48GQ-2QRH] (data drawn from Excel document link under "Tabulation of Votes" / "Representative to Congress – District 2 – Results Certified to the Governor 11/26/18").

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

number of ballots on which voters had expressed a preference for at least one candidate in the race.[251]

If the sequence above unfolded in a majority-threshold state, a legal challenge might arise regarding the meaning of the term "majority": is the relevant denominator the number of "ballots returned" in an election or the number of "votes received" by the candidates who remain (the final vote totals) at the end of the tabulation?[252]

The legal question in such a situation is not whether RCV is constitutional; rather, the question is whether the outcome produced by RCV in a particular election satisfies the state's majority-threshold trigger. Consider, for example, an SCV election: sometimes it produces a majority and sometimes it does not. When the latter occurs, the constitutional threshold is not met and the constitutional contingency is triggered. But no one asks whether this makes SCV *unconstitutional*. And for good reason: the relevant question is simply whether the electoral process set out in the statute cleared the necessary constitutional threshold.

The text, history, and purposes in such an analysis are more cross-cutting and ambiguous. As with SCV, an RCV election might fail to reach the majority-threshold requirement, with the result being a no-choice election that would then go to a separate runoff or to the political branches (depending on how a particular state defines who makes the choice when the election fails to return a "majority vote" winner).

While only two state constitutions retain a majority-threshold requirement for statewide political office (Vermont and Mississippi),[253] the underlying question of which denominator is used to measure a "majority" can also have consequences for local governments seeking to adopt ranked-choice voting reforms. Many states with plurality provisions for statewide elections (or no constitutional rule for statewide elections) impose *statutory* majority-threshold requirements for local elections.[254] Navigating these provisions—as well as the constitutions of Vermont and Mississippi—requires careful attention to the text and purposes of the specific majority-threshold requirement at issue.

This question also has implications for reformers seeking to implement RCV in presidential elections. As the final part of this Section shows, state-by-state efforts to introduce ranked-choice voting for presidential elector races must anticipate potential legal challenges that might arise from any kind of majority

251. *Id.* Golden's victory illustrates that RCV "does *not* necessarily produce a majority result; a plurality of the total votes cast can prevail, as the majority is only of the last stage of calculation, when many candidates have been mathematically eliminated." Dudum v. Arntz, 640 F.3d 1098, 1111 (9th Cir. 2011).

252. This interpretive question only arises in "majority threshold" states because those are the only states with a contingency in place and, therefore, the only states in which the relevant denominator matters.

253. *See supra* Part II.A.

254. *See supra* note 99.

threshold that this reform effort introduces into state constitutional law. To prevent such challenges, these reform efforts must avoid any ambiguities around the relevant denominator for measuring compliance with that majority-threshold requirement.

1. Identifying the Relevant "Majority"

In evaluating ranked-choice voting under a majority-threshold requirement, we must consider both the text and purposes of the provision.

a. Text

To start, the particular phrasing of the relevant language matters. If a provision requires a candidate to prevail with a "majority of all the votes cast in the race," for example, the threshold might be thought to prevent a candidate from winning based on receiving a majority of the final votes alone. On this view, a candidate who receives a majority of these final votes but only a plurality of total ballots cast in the race would not satisfy the threshold, and the relevant contingency would come into play.

If, on the other hand, a provision states that the "person receiving a majority of votes shall be elected," this language might be sufficiently ambiguous that courts would readily turn to the purposes animating the text. Such a popular majority-vote threshold could be interpreted such that the winner of an RCV election would necessarily satisfy the majority-threshold requirement.[255]

Yet, even if a court interpreted the constitution to require a majority of all the ballots on which voters had expressed a preference for at least one candidate, that interpretation would not render RCV unconstitutional. Under this reading, RCV would be subject to the same conditions as SCV. If the candidate who received the most votes by the end of tabulation did not receive a majority of the

255. The fact that RCV *always* renders an eventual majority-vote winner might raise a separate interpretive question: whether reading the word "majority" to refer to the final-round count would violate the rule against surplusage. If the constitution's contingency provision is never activated so long as the RCV statute remains in force, does that deny the provision any operative effect? This position would seem to generate the odd conclusion that the state cannot ever adopt a voting-rule that ensures that the popular election will select a majority-vote winner. *See, e.g.*, Op. Vt. Att'y Gen. No. 2003-01 (2003) at 2 (suggesting that RCV conflicts with the Vermont Constitution because the constitution sets out a procedure for when no candidate receives "the major part of the vote," and RCV "would establish a different procedure").

We do not need to confront the oddity of that conclusion because the adoption of the RCV statute does not permanently render that contingent provision irrelevant. After all, the RCV statute might be repealed. The contingency provision would, in effect, be read to apply whenever the legislature employs any electoral system (such as SCV) that runs the risk of failing to identify a popular majority of interested voters. In such situations, the constitution explains what alternative method of selection will apply to remedy the defect of that electoral system. The constitutional trigger identifies an ill, and the constitutional contingency provides a remedy to apply *if* the ill arises. A statute that prevents the ill from arising as a practical matter would not logically implicate the trigger or render the contingency *constitutionally* obsolete.

"total votes cast," the election would simply fail to identify a "majority" winner and the state's constitutional contingency would be triggered.[256]

It is important to recognize that questions about what belongs in the denominator of a "majority" are not unique to RCV. The meaning of the word "majority" (including who or what belongs in the denominator) was a hotly contested concept in the nineteenth and early twentieth centuries, even under the more traditional SCV system.

Questions about the relevant denominator arose most often in the context of constitutional amendments or special propositions submitted to the electorate that required a "majority" of votes or voters to pass.[257] Such provisions initially puzzled courts. Consider, for example, a hypothetical town with 10,000 registered voters that holds an election where 5,000 voters cast ballots for mayor. The ballot also includes a question about raising taxes: 1,000 voters are in favor, 900 are opposed, and 3,100 leave the ballot question blank.

Should the denominator for the ballot question include all registered voters in the jurisdiction (10,000)? All voters who voted (or all ballots cast) in the relevant election (5,000)? Or only those votes on the relevant question (1,900)? Under the first two interpretations, the ballot question would receive less than a "majority" and would fail. Under the third interpretation, the ballot question would clear the threshold and pass. Either way, the judicial construction of the relevant denominator would be outcome-determinative.[258]

The American Law Reports canvass the wide variety of approaches courts took to this question.[259] Two general lessons stand out that are relevant for courts approaching ranked-choice voting.

First, the "varying phraseology" of the applicable thresholds mattered greatly in these cases.[260] And the same might be true depending on the text of

256. One might ask: if an RCV election can fail to reach a majority threshold, why use RCV instead of SCV? There may still be *policy* benefits for deploying RCV rather than SCV in jurisdictions subject to majority thresholds. First, RCV tends to result in total-vote-count majorities more often than SCV, reducing the number of instances in which a trigger is activated or a runoff is necessary. Second, in a race with several candidates, RCV will better identify the candidates with the most electoral support by the end of the tabulation process. If the relevant contingency is a separate runoff election, *see, e.g.*, MISS. CONST. art. V, § 140, RCV will ensure that race is truly between the most-preferred candidates. If the relevant contingency allows for the political branches to choose from the three candidates who received the highest number of votes, *see, e.g.*, VT. CONST. ch. II, § 47, RCV can produce the three candidates with the most support more reliably than an SCV election.

257. *Basis for Computing Majority Essential to the Adoption of a Constitutional or Other Special Proposition Submitted to Voters*, 131 A.L.R. 1382 (1941) (compiling an extensive collection of cases addressing the legal question of how "majority" should be calculated).

258. *See, e.g.*, *In re* Todd, 193 N.E. 865, 865–66 (1935) (noting that the measure received 439,919 votes in favor and 236,613 votes against, *but* "the number of voters favoring its adoption was much less than half the number of voters who voted for political candidates at the general election").

259. *See* 131 A.L.R. 1382.

260. *Id.* (Common phrases include "at an election held for that purpose," "on the question," "voting thereon," "on such proposition," "on said amendment," "general or special election," and "at such election.").

different "majority vote provisions" in different states. The need to resolve these interpretive questions, though, does not render RCV anymore "unlawful" than do similar questions about constitutional and statutory provisions concerning SCV.[261]

Second, the purposes behind the threshold matter a great deal in resolving these interpretive questions.[262] We turn now to these purposes and the interpretive principles that courts might employ to fulfill these purposes.

b. Purpose

On balance, we believe the better legal conclusion is that the relevant denominator is the number of votes that remain active in the final round. Under such a rule, the winner of an RCV election would necessarily clear the majority threshold. This presumption fulfills the most common purposes behind majority-threshold provisions and builds on principles that were deployed by courts facing similar questions under SCV systems. Unless the text of a particular state's constitution or code clearly establishes the opposite rule, we believe this presumption should govern.

In initial candidate elections and runoff elections alike, for example, courts commonly presume that the denominator for measuring a "majority" is defined by those voters who have actually voted in that race—voters that courts describe as having a demonstrated and sustained interest in the result of a race. Courts viewed this approach as advancing the majority-rule principle because "voters who absent[ed] themselves from an election duly called [were] presumed to assent to the expressed will of the majority of those voting."[263]

Early treatises reflected this rule, stating that "in determining upon a majority or plurality, the blank votes, if any, are not to be counted."[264] If 1,000

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261. *Cf. In re* Todd, 193 N.E. 865, 867–68 (1935) (referencing an earlier decision, State v. Swift, 69 Ind. 505, 526–27 (1880), that required a majority of all votes cast at the same election to ratify a constitutional amendment).

262. *See, e.g.*, Eufala v. Gibson, 98 P. 565, 579 (Okla. 1908) ("The elector who casts a blank ballot manifests but one purpose and intention, which is to allow and permit those who do vote upon the proposition to determine it.").

263. Cass County v. Johnston, 95 U.S. 360, 369 (1877); *see also* People *ex rel.* Elder v. Sours, 74 P. 167 (Colo. 1903); Bell v. City of Ocala, 56 So. 683 (Fla. 1911); Black v. Cohen, 52 Ga. 621 (1874); Foy v. Gardiner Water Dist., 56 A. 201 (Me. 1903); Murdoch v. Strange, 57 A. 628 (Md. 1904); Cashman v. Salem, 100 N.E. 58 (Mass. 1912); Reiger v. Beaufort, 70 N.C. 319 (1874); Munce v. O'Hara, 16 A.2d 532 (Pa. 1940).

264. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 921–22 (7th ed. 1903); *see also* 9 RULING CASE L. 116–17 (William M. McKinney & Burdett A. Rich eds., 1915) ("Ordinarily . . . voters who do not choose to participate in an election are not to be taken into consideration in declaring the result. . . .Voters not attending the election *or not voting on the matter submitted* are presumed to assent to the expressed will of those attending and voting . . ."); *Majority*, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 70 (1879) ("[T]he will of the majority is inferred from the proportions of the vote. Those who are silent are supposed to assent that the question

ballots are cast for Candidate X and 900 ballots are cast for Candidate Y, Candidate X would win with a majority of the 1,900 ballots, even if 3,100 voters left that particular race blank. The denominator is itself a product of demonstrated interest in the race.[265] Those who skip over a race on their ballot effectively delegate the decision to those voters who decide to register their opinion on that specific race.

Although the debate over the relevant denominator for ballot questions generated considerable conflict,[266] this conflict does not appear to carry over to candidate races for political office. In fact, some courts use candidate races as an interpretive touchstone.

In *State ex rel. McCue v. Blaisdell*, for example, the North Dakota Supreme Court held that a constitutional provision requiring that all county-boundary changes "be adopted by a majority of all the legal votes cast" at a general election meant only a majority of the votes cast on the specific question.[267] The court pointed out that in the time of voice voting, each race or question presented to the electorate had to be submitted separately and "[t]he result of the submission of each proposition was announced when completed."[268] "[N]o one ever thought of delaying the announcement of the vote for one officer, or one question, until it was known whether on some other question a greater number of votes was cast."[269]

As to the relevant standard for candidate races, the court did not mince words: "[I]t would be absurd and ridiculous, and a false and un-American standard, to require a candidate for an office to have a majority—not of the votes cast for the office for which he was a candidate, but a majority of the total number cast to fill some other office."[270] Rather, "if an elector enters the booth and votes for some candidates and not for others . . . he delegates to those who do vote his rights as an elector and acquiesces in the result."[271]

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shall be determined by those who vote."). An early example of a court applying this idea is Town of Southington v. Southington Water Co., 69 A. 1023, 1028 (Conn. 1908) (referring to the "overwhelming . . . weight of authority" that "where a statute requires a question to be decided, or an officer to be elected, by the votes of a majority of the voters of an electorate, this does not require that a majority of all persons entitled to vote shall actually vote in the affirmative, but only that the result shall be decided by the majority of the votes cast.").

265. *See Majority Vote*, BLACK'S LAW DICTIONARY 955 (6th ed. 1990) ("Vote by more than half of voters for [the] candidate or other matter on [the] ballot. When there are only two candidates, he who receives the greater number of the votes cast is said to have a majority; when there are more than two competitors for the same office, the person who receives the greatest number of votes has a plurality, but he has not a majority unless he receives a greater number of votes than those cast for all his competitors combined."); *Majority*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1670 (1993) (defining "majority" as "[t]he number by which the votes cast for one party etc. exceed those for the next in rank").

266. *See* 131 A.L.R. 1382 (examining extensive decisional law regarding this issue).

267. 119 N.W. 360, 360 (1909).

268. *Id.* at 363.

269. *Id.*

270. *Id.*

271. *Id.* at 364.

Similarly, in states that required runoffs to identify a "majority" winner if none emerged in an election, it was known that fewer voters frequently showed up for the runoff than had shown up originally. Nonetheless, proponents of using repeated runoff elections to identify a "majority" acknowledged that "majority" meant in the actual vote at issue. Thus, these debates reveal that even strong proponents of the "majority" principle did not think it meant a majority of all those who had voted in the initial election. In Massachusetts, for example, those who supported retaining majority thresholds generally conceded that "the people get tired of going to the polls, and the election is made at last by a less number than the plurality at the first trial."[272] Nonetheless, the "grand principle of the majority system" was considered to be "preserved inviolate" by repeated runoff elections because "if the people do not see fit, in a given case, to avail themselves of [their rights], that is their own concern."[273] Those who did not demonstrate an interest in subsequent runoff elections were seen as "waiving [their] rights" rather than "being debarred from them."[274]

According to majority-threshold proponents, "[a] man expresses his opinion just as much by staying away from the polls as by going there."[275] If "the question at issue is not of sufficient importance, or, because the difference between the candidates is not of sufficient importance to bring him out," then "the majority principle is maintained precisely as much as if every man were at the polls."[276] In short, the majority principle was understood by its historical proponents to view those who demonstrate continued interest in a race as properly binding those who were said to forfeit interest in the race. To majority-provision advocates, this interpretation justified treating the denominator as those who voted in the actual runoff election itself, not those who had voted at earlier stages.[277]

For RCV, the purposes and principles behind the majority threshold suggest that unless the text of the relevant legal rule is clear otherwise, the relevant denominator should be the number of effective votes in the final round of tabulation, not the total number of ballots on which voters had expressed a first-choice preference. According to this principle, when voters rank a single preference and cast their ballots, they "expresses [their] opinion just as much"

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272. MASS. CONST. CONVENTION, *supra* note 79, at 238 (statement of Del. Foster Walker, May 24, 1853); *see also* Dudum v. Arntz, 640 F.3d 1098, 1104 (9th Cir. 2011) (observing that separate runoff elections "result in the election of candidates with majority support of those voters *who turn out for the second election*") (emphasis added); O'Neill, *supra* note 8, at 346 (listing the disadvantages of separate runoff elections and including that "some voters may have difficulty leaving work to vote a second time").

273. MASS. CONST. CONVENTION, *supra* note 79, at 238 (statement of Del. Foster Walker).

274. *Id.*

275. *Id.* at 246 (statement of Edward L. Keyes).

276. *Id.* at 246–47.

277. There is, of course, a reason why the majority-threshold provision was abandoned in so many states—most individuals would likely not view an inability to turn out to a separate election (let alone a *dozen* separate elections) as truly "forfeiting interest" in the race.

by leaving the additional preferences blank as they do by filling them in.[278] If they support only one candidate and "the difference in the [remaining] candidates is not of sufficient importance to bring [them to fill in further rankings]" then "the majority principle is maintained."[279] And just as skipping a race or question on the ballot altogether "absents" a voter from the denominator of that race, the voter who leaves further preference rankings blank is presumed under this interpretive principle "to assent to the expressed will of the majority of those voting" as the tabulation proceeds into further rounds.[280] Therefore, excluding the single-preference voter from the final denominator complies with the will of both the individual voter whose preference is recognized and also the majority.

To be sure, this presumption is not without its own normative trade-offs. For example, just a handful of third-party voters (or even "protest" voters) using SCV in a majority-threshold jurisdiction can force a runoff. This gives political minorities a strong source of leverage. But the question then becomes: leverage to what end? If the protest voter plans on voting for a different candidate in the runoff election, why not list that candidate as a second choice in an RCV race? If the protest voter *does not* plan on taking part in the runoff, then the failed election serves a symbolic purpose rather than a decisional purpose. One might believe this expressive value is worth the extra administrative burden (and the potential distortion in the deciding electorate), but that policy judgment is not a foregone conclusion simply because the jurisdiction employs a majority threshold *simpliciter*. And we believe that unless the text or context surrounding the adoption of the jurisdiction's majority threshold suggests otherwise, the best baseline rule is to assume that voters who decline to list additional preferences need not be included in the relevant denominator.

Whether one normatively accepts such "abstention," "consent by inaction," or "delegation" arguments, the fact remains that universal consensus came to exist (which we take for granted today) that a candidate in an SCV election needs only a majority of the vote in their particular race and that a candidate in a runoff needs only a majority of the vote in the runoff. The same logic—extended to an RCV election—means that a candidate in an RCV election who receives a majority of the votes in the final round of tabulation should be viewed as the majority winner under a majority-threshold provision. Indeed, while many of the justifications that provided for the presumption in traditional runoffs ring hollow (given how impractical and inequitable it can be to expect equal turnout for a separate runoff election), these justifications carry more weight in the context of a ranked-choice election.

For traditional runoffs, voters who participated in the first election may be genuinely unable (rather than simply unwilling) to participate in the second

278. MASS. CONST. CONVENTION, *supra* note 79, at 246 (statement of Edward L. Keyes).
279. *Id.*
280. Cass County v. Johnston, 95 U.S. 360, 369 (1877).

election. For ranked-choice voting, however, each voter has an equal opportunity on election day to list as many preference rankings as every other voter.

Even if one adopts the interpretive presumption above, however, a more difficult question emerges if a state or local government adopts an RCV system that limits the number of candidates a voter can rank to a number less than the total number of candidates running. A jurisdiction might do so if it thought asking voters to rank more than, say, five candidates imposed too great an informational burden.[281] In a race with five candidates in a state that allows voters to rank only three candidates on their ballot, for example, a voter might have all three of their choices eliminated during the tabulation process. In other words, the limitations of the electoral system itself would preclude the voter from having a say in the contest between the final two remaining candidates. This is not ballot exhaustion due to the voter deciding not to rank all the candidates, but a product of the design of the voting system itself.

Unlike in a traditional runoff, where voters are not technically foreclosed from participating in the second election, a voter in an RCV system that limits rankings *is* technically foreclosed from taking part in the final, determinative choice(s). For this reason, the presumption collapses.

In short, when the administrative limits of a system preclude the formation of a majority of *interested* voters (as may occur under SCV or restricted-RCV), the number of total votes cast in the race as a whole may provide a more appropriate denominator for determining whether the system has produced a legally relevant "majority." When the result falls short of this threshold, the relevant statutory or constitutional contingency provision would be triggered.

C. Implications for RCV and Local Elections

Our analysis of whether and when an electoral result produced by RCV satisfies a majority-threshold requirement has significance beyond the state level. State election codes also occasionally impose statutory majority thresholds on local elections, thus requiring municipal governments to comply if they choose to adopt RCV for local races. Depending on the text in specific state laws, this requirement might mean the relevant denominator should refer to the votes cast for candidates in the final round, but in other cases to the total votes cast in the race as a whole.

The Texas Election Code, for example, states that in cities with a population of 200,000 or more,[282] a candidate for city office "must receive a majority of the

281. New York City's Charter Commission, for example, allowed voters to rank five candidates—a position meant to balance concerns about the degree of exhaustion that might occur with only three rankings and concerns that allowing voters to rank as many preferences as there are candidates might impose too high an informational burden. Many localities in California, meanwhile, have traditionally limited voters to three rankings based on administrative constraints but are moving towards allowing voters to rank all candidates running.

282. TEX. ELECTION CODE ANN. § 275.001.

total number of votes received by all candidates for the office."[283] In 2001, the Secretary of State opined that the City of Austin could not adopt RCV because the term "majority" should be read to refer to a majority of votes in what the Secretary called the "'classic' or 'traditional' sense, i.e., a majority . . . of more than half of the original votes, as cast and not re-assigned by the voter's secondary or tertiary intent."[284] Two years later, the Attorney General weighed in, concluding that the Election Code "precludes a municipality from adopting [RCV because] in the event of a plurality vote . . . the appropriate official must order a runoff election."[285]

What neither official appeared to contemplate, however, was the possibility that the "majority" could be determined using "total votes cast" as the denominator—and that a city might choose to enact RCV under that definition anyway.[286] This definition is consistent with the text (requiring a majority of votes "received *by all candidates for the office*"), and it meets the statutory requirement that a separate runoff election occur "in the event of a plurality vote."[287] Under this reading, RCV is lawful—it just will not always produce a majority.

Examining how RCV provisions might be structured and drafted in any given locality, given the state's particular majority-threshold and runoff provisions, is beyond the scope of this Article. But our analysis provides a conceptual framework for reformers, litigants, legislators, and judges attempting to grapple with how RCV intersects with existing state election laws. And, where the text of the state law is ambiguous and subject to multiple interpretations, we believe for the reasons set out in Part III.B.1 above that the most appropriate "default" reading should use the number of active votes in the final round of tabulation to calculate the denominator.

D. Implications for RCV and the Electoral College

The history uncovered here regarding the role of "majority-vote provisions" sheds light on some of the most dangerous legal provisions that regulate presidential elections and provides guidance regarding certain current reform proposals for reforming presidential elections.

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283. *Id.* § 275.002.

284. Op. Tex. Sec'y State No. HC-1 (July 23, 2001) at 3.

285. Op. Tex. Att'y Gen. No. GA-0025 (Mar. 4, 2003) at 4 (citing the Texas Election Code); *see* TEX. ELECTION CODE ANN. § 2.021 ("If no candidate for a particular office receives the vote necessary to be elected in an election requiring a majority vote, a runoff election for that office is required.").

Both the Secretary of State and the Attorney General also observed that the pre-1985 Election Code excepted from the majority-vote requirement municipalities with charters that select officers "by means of a preferential type of ballot"—a provision that "disappeared without explanation," according to the Attorney General. *Id.* at 5; *see also* Op. Tex. Sec'y State No. HC-1 at 3.

286. *See, e.g.*, *supra* note 256 (discussing the benefits of adopting RCV even when the result requires a separate runoff election).

287. Op. Tex. Att'y Gen. No. GA-0025 (Mar. 4, 2003).

On the first point, one of the greatest dangers to the stability and legitimacy of the outcome in the 2020 presidential election was the possibility that certain state legislatures might attempt to directly appoint that state's electors long after voters had voted on November 3rd. Their purported legal basis for doing so is a provision in the Presidential Election Day Act.[288] This Act, which sets the uniform day for the presidential election across the nation, includes a provision that empowers state legislatures to appoint electors when the election has "failed" in their state: "Whenever any State has held an election for the purpose of choosing electors, *and has failed to make a choice on the day prescribed by law*, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."[289] President Trump's allies pressed Republican state legislatures in key states he had lost, such as Pennsylvania, Arizona, Michigan, and Wisconsin, to invoke this provision by claiming that various issues with the way the election had been conducted, such as the handling of absentee ballots, meant that the election had "failed" in that state—thus authorizing the state legislature to appoint electors.

That effort came to naught, but one of us has described this provision as a "loaded weapon" in our election system that could be used to overturn a state's popular vote.[290] Why does this provision exist in the first place? The history chronicled here reveals the reason. This provision was originally enacted as part of the Election Day Act in 1845, when it was added at the insistence of representatives from New Hampshire and Virginia.[291] Reflecting the history described here, New Hampshire (and Massachusetts) at that time required a candidate to receive a *majority* of all votes cast to be elected.[292] The failure to win a majority of the votes cast meant that one of the default mechanisms would kick in, either requiring a new election or a legislative appointment.[293] In other words, the popular election held on the federally determined election day might "fail" to produce a winner, which would mean the state would have no votes in the electoral college if the choice could be made only on the first Tuesday after the first Monday in November. Thus, federal election law includes this "failed election" provision in part as a way to deal with the majority-vote requirements in some state constitutions that still existed in the nineteenth century.

Knowing that this history played a major role in enactment of the now dangerous "failed election" provision provides an additional, compelling reason that Congress needs to amend this provision: one of its original purposes no

288. 3 U.S.C. § 2.

289. *Id.* (emphasis added).

290. Richard H. Pildes, *There's Still a Loaded Weapon Lying Around in Our Election System*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/opinion/state-legislatures-electors-results.html [https://perma.cc/AP9U-DJ69].

291. *See* CONG. GLOBE vol. 14, 28th Cong., 2d Sess. 14–15 (1844).

292. *See* FOLEY, *supra* note 29, at 73 & n.54.

293. *Cf.* Foster v. Love, 522 U.S. 67, 71 n.3 (1997) (making a similar observation with respect to the failure-to-elect provision governing elections for the U.S. House of Representatives).

longer has any relevance. Such a provision might still prove necessary for a much more limited circumstance, such as providing a back-up rule if a natural disaster or similar event makes it impossible for a state to hold elections at all on the federally prescribed election day. But the threat this provision of the Act poses, which was made vivid in 2020, needs to be defused and the Act needs to be amended to make clear that it applies only in such circumstances.[294]

In addition, certain reform proposals for presidential elections need to more carefully consider the potential implications of these "majority-vote" provisions. In the 2016 presidential election, for example, Donald Trump won the Electoral College by obtaining plurality victories in seven states: North Carolina, Florida, Pennsylvania, Arizona, Michigan, Wisconsin, and Utah.[295] Clinton, meanwhile, won plurality victories in seven others: New Mexico, Virginia, Colorado, Nevada, Minnesota, New Hampshire, and Maine's at-large delegates.[296] Because the vote share earned by third-party candidates in the race were often larger than Trump's or Clinton's margins of victory, it is difficult to know whether the outcome would have been the same if Trump and Clinton had faced each other in a head-to-head match-up alone.[297]

To avoid the impact minor-party or independent candidates can have in "spoiling" or "splitting" the vote in the presidential election process, some scholars have begun to argue that states should use RCV in presidential elections alongside a "majority-vote" requirement to win that state's electors. Professor Ned Foley, the most prominent advocate of this reform, calls it a "recommitment" to majority rule.[298] In saying this, Foley does not mean any kind of national popular vote.[299] Rather, Foley endorses state-by-state reforms that would ensure the winner of the Electoral College has received the support of a "majority of majorities"—a *majority* of voters in states with a majority of electoral-college votes—consistent, in his view, with the design of the 1803 Electoral College model still in use today.[300] This first "majority" is critical to the proposals of Foley and others to adopt RCV in presidential elections.

To implement this vision, Foley recommends that states adopt a "majority-rule requirement" that requires one candidate to receive a majority of the statewide vote in order to win all of that state's electors.[301] Although he acknowledges this requirement could be met through a separate runoff

294. In 1845, Virginia voted viva voce and inclement weather often made it difficult to complete the election on a single day, which was also part of the legislative debates concerning creation of the "failed elections" provision. *See* Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 188–91 (2020).

295. FOLEY, *supra* note 29, at 111 tbl.6.1.

296. *Id.* at 115 tbl.6.3.

297. *See supra* notes 29–31 and accompanying text.

298. *See* FOLEY, *supra* note 29, at 121–34.

299. *See id.*

300. *See id.* at 121–22.

301. *Id.*

election,[302] it is clear he envisions RCV as the most likely means states would use to meet the majority-vote requirement.[303]

If using RCV to vote for presidential electors is a good idea,[304] the constitutional provisions "recommitting" the state to "majority rule" must be written with care to avoid the possible confusions and uncertainties we describe above. For example, the model constitutional language that Foley provides to open the door to RCV might invite litigation instead:[305]

> The Legislature . . . shall have the authority to choose the manner of appointing the state's presidential electors, provided that the manner chosen . . . shall not cause all of the state's electors to vote for the same individual unless the individual wins a majority of popular votes cast by citizens of the state. . . .[306]

But as we have seen, an RCV winner could receive a majority of votes in the final round of tabulation yet only a plurality of the total number of ballots cast in the race as a whole. This model language would almost certainly spur litigation in a close election in which the losing candidate would argue that no one had won a "majority of popular votes cast" because the numerator in the final round was less than 50 percent of the denominator in the first round. Based on this reading, the winner of the RCV tabulation would not be entitled to all of the state's electoral votes. Whether courts would ultimately endorse that view or not, the last thing the country needs is litigation over that issue. And this is surely *not* the outcome Foley or other proponents of RCV in presidential elections have in mind.

Similarly, Foley suggests that states might "simplify the ranking process in an election with many candidates" by limiting the ballot to "just a voter's top three choices from the entire field."[307] But unless the provision at issue clearly allows for a majority of votes in the *final* round of tabulation to be sufficient to

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302. *See id.* at 122–33.

303. *See id.* at 126–31.

304. In 2020, Maine became the first state to use RCV in a presidential election. *See* Deb Otis, *Election Day Roundup 2020*, FAIRVOTE (Nov. 13, 2020), https://www.fairvote.org/election_day_roundup_2020 [https://perma.cc/UY7D-L3A5].

305. As Foley anticipates, any attempt to bind the state Legislature's method of selecting presidential electors via state constitutional amendment may raise enforceability questions under the Independent State Legislature Doctrine (ISLD). *See* FOLEY, *supra* note 29, at 162–68 (first citing Bush v. Gore, 531 U.S. 98 (2000); then citing Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 567 U.S. 787 (2015)); *see also* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020) (providing a comprehensive analysis of the history of the ISLD). The ISLD appears to have substantial support among the Court's newest conservative members. *See* Democratic Nat'l Comm. v. Wisconsin State. Legislature, 141 S. Ct. 28 (2020) (mem.) (Gorsuch, J., concurring, joined by Kavanaugh, J.); Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020) (mem.) (Alito, J., statement on denial of motion, joined by Thomas, J. and Gorsuch, J.). Given these concerns about the ISLD, Foley advocates for a relatively high-level constraint that gives the Legislature some discretion in the method of compliance but not full discretion. *See* FOLEY, *supra* note 29, at 164–66.

306. FOLEY, *supra* note 29, at 164 (emphasis added).

307. *Id.* at 127.

claim all electors, Foley's implementation suggestion raises the risk of ballot exhaustion—and with it the risk that the winner may fall short of receiving a majority of votes cast in the race as a whole.

The consequences of getting this small textual point correct could be significant. Because SCV encourages voters to vote for one of the two major-party candidates, lest they feel they are wasting their vote, the odds of any state's presidential electors being assigned to a third-party candidate are currently low. Under RCV, however, many more voters might rank third-party candidates first, knowing that if those candidates did not get enough support in the initial or early rounds of the tabulation process and were eliminated, the voter's second-choice candidate would then receive their vote. RCV means that votes for candidates who might only get 15 percent of the vote are not wasted because if those candidates fail, the voter's second-ranked candidate then receives that voter's vote. But if a state statute or constitution implements RCV with a poorly worded "majority vote" requirement, the outcome would be unclear if no candidate managed to garner an outright majority of the total votes cast. Under the language of Foley's proposed "majority" vote provision, for example, would that mean that the state's electors would instead be awarded proportionally? That is not the intent, but it could be such a provision's unfortunate and unexpected effect. And, in that case, third-party candidates might receive a meaningful number of electoral-college votes.

In other words, the "majority-rule requirement" language set out above could drastically increase the risk that the electoral college itself fails to identify a "majority-of-majorities" winner. This would, ironically enough, activate the Twelfth Amendment's contingency provision and throw the presidential election to the House of Representatives to resolve.[308]

These concerns can easily be addressed in any reform proposal. An RCV provision for presidential elections can address preferential voting specifically or phrase the majority threshold in a way that more explicitly indicates this means a majority of votes *in the final round*.[309] As discussed above, this might be as simple as formulating the threshold to only require a majority of "votes received" rather than a majority of "votes cast."[310]

CONCLUSION

As reform advocates, voters, and political bodies press to put RCV on the agenda in more places, the policy debates must now contend with a legal debate as well: whether RCV violates state constitutional or statutory provisions that

308. *See* U.S. CONST. amend. XII.

309. To be sure, if states moved en masse to selecting presidential electors using RCV, this shift might still increase the odds of a third-party candidate winning some non-trivial number of electoral college votes (since the chances of a third-party candidate winning all of a state's delegates outright could increase).

310. *See supra* Part III.B.1.

specify the voting thresholds a candidate must surmount to be validly elected. But whether those thresholds are framed in terms of a "plurality of votes" requirement or a "majority vote" requirement, the winner in an RCV election meets those requirements. A thorough examination of the history, context, and purposes of these voting-threshold provisions demonstrates that they are best understood not to stand in the way of RCV. These provisions were not written with RCV in mind and were not intended to bar RCV; RCV is fully consistent with both the text of these provisions and their underlying purposes. Voters and legislators should be free to debate the merits of moving to RCV elections without the concern that RCV cannot legally be adopted.

APPENDIX

STATE	PROVISION(S)	OFFICES	SPECIAL ELECTIONS
Alabama	Art. V § 115 ("The person having the **highest number of votes** for any one of said offices shall be declared duly elected."). Amend. No. 749 ("Six of the members shall be elected by a **majority of the respective qualified electors** of six separate single-member districts… The seventh member shall be elected by a **majority of the qualified electors** of the county at-large.").	Art. V § 115 (governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, commissioner of agriculture and industries) Amend. No. 749 (Russell County School Board members)	N/A
Alaska	Art. III, § 3 ("The candidate receiving the **greatest number of votes** shall be governor."). Art. III, § 8 ("In the general election the votes cast for a candidate for governor shall be considered as cast also for the candidate for lieutenant governor running jointly with him.").	Art. III, § 3 (governor) Art. III, § 8 (lieutenant governor) Const. Ord. 2, § 12 (for first state election for U.S. senators and representatives)	N/A
Arizona	Art. V, § 1 ("The person having the **highest number of the votes** cast for the office voted for shall be elected."). Art. VII, § 7 ("In all elections held by the people in this state, the person, or persons, receiving the **highest number of legal votes** shall be declared elected.").	Art. V, § 1 (governor, secretary of state, state treasurer, attorney general, superintendent of public instruction) Art. VII, § 7 (all offices)	Art. VIII, pt. 1, § 4 ("The candidate who receives the **highest number of votes** shall be declared elected for the remainder of the term [for an office in the event of a recall and special election].").
Arkansas	Art. VI, § 3 ("The person having the **highest number of votes**, for each of the respective offices, shall be declared duly elected thereto."). Amend. 6, § 3 ("The persons respectively having the **highest number of votes** for Governor and Lieutenant Governor shall be elected.").	Art. VI, § 3 (governor, secretary of state, treasurer of state, auditor of state, attorney general) Amend. 6, § 3 (governor, lieutenant governor)	N/A

	Amend. 80, § 17 ("Circuit Judges and District Judges shall be elected on a nonpartisan basis by a **majority of qualified electors voting** for such office within the circuit or district which they serve."). Amend. 80, § 18 ("Supreme Court Justices and Court of Appeals Judges shall be elected on a nonpartisan basis by a **majority of qualified electors** voting for such office."). Amend. 29, § 5 ("Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a **majority of all the votes cast** for candidates for the office in a primary election, or by petition of electors as provided by law, shall be placed on the ballots in any election.").	Amend. 80, § 17 (circuit and district judges) Amend. 80, § 18 (supreme court justices and court of appeals judges) Amend. 29, § 5 (primary candidates who may be placed on the general election ballot)	
California	Art II, § 5 ("The candidates who are the **top two vote-getters** at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.").	Art. II, § 5 (all congressional and state offices)	Art. II, § 15 ("If the majority vote on the question is to recall, the officer is removed and, if there is a candidate, the candidate who receives a **plurality** is the successor.").
Colorado	Art. IV, § 3 ("The joint candidates having the **highest number of votes** cast for governor and lieutenant governor, and the person having the **highest number of votes** for any other office, shall be declared duly elected.").	Art. IV, § 1 (governor, lieutenant governor, secretary of state, state treasurer, attorney general)	Art. XXI, § 3 ("If the vote had in such recall elections shall recall the officer then the candidate who has received the **highest number of votes** for the office thereby vacated shall be declared elected for the remainder of the term… [for an office in the event of a recall election].").
Connecticut	Art. III § 7 ("The person in each senatorial district having the **greatest number of votes** for senator shall be declared to be duly elected for such district, and the person in each assembly district having the **greatest number of votes** for representative shall be declared to be duly elected for such district.").	Art. III § 7 (state senators, state representatives) Art. IV § 4 (governor, lieutenant-governor, secretary, treasurer, comptroller, attorney general)	N/A

	Art. IV § 4 ("[T]he person found upon the count…to have received the **greatest number of votes** for each of such offices, respectively, shall be elected thereto.").		
Delaware	Art. III, § 3 ("The person having the **highest number of votes** shall be Governor."). Art. III, § 19 ("A Lieutenant-Governor shall be chosen at the same time, in the same manner, for the same term, and subject to the same provisions as the Governor.").	Art. III, § 3 (governor) Art. III, § 19 (lieutenant governor)	N/A
District of Columbia	N/A	N/A	N/A
Florida	Art. VI, § 1 ("General elections shall be determined by a **plurality of votes** cast.").	Art. VI, § 1 (all offices in general elections)	N/A
Georgia	N/A	N/A	N/A
Hawaii	Art. V, § 1 ("The person receiving the **highest number of votes** shall be the governor."). Art. V, § 2 ("The lieutenant governor shall be elected at the same time, for the same term and in the same manner as the governor….").	Art. V, § 1 (governor) Art. V, § 2 (lieutenant governor)	N/A
Idaho	Art. IV, § 2 ("[T]he persons, respectively, having the **highest number of votes** for the office voted for shall be elected.").	Art. IV, § 1 (governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general, superintendent of public instruction)	N/A
Illinois	Art. V, § 5 ("The person having the **highest number of votes** for an office shall be declared elected.").	Art. V, § 1 (governor, lieutenant governor, attorney general, secretary of state, comptroller, treasure])	Art. III, § 7 ([T]the candidate who receives the **highest number of votes** in the special successor election is elected Governor for the balance of the term [in recall election, if governor is successfully recalled].").
Indiana	N/A	N/A	N/A

Iowa	Art. IV, § 4 ("The nominees for governor and lieutenant governor jointly having the **highest number of votes** cast for them shall be declared duly elected.").	Art. IV, § 4 (governor, lieutenant governor)	N/A
Kansas	N/A	N/A	N/A
Kentucky	§ 6 ("All elections shall be free and equal.").* § 70 ("The slate of candidates having the **highest number of votes** cast jointly for them for Governor and Lieutenant Governor shall be elected."). **McKinney v. Barber*, 203 S.W. 303, 306-07 (Ky. 1918) interpreted Section 6 to require that at least a plurality is needed to elect.	§ 6 (all general elections)* § 70 (governor, lieutenant governor)	N/A
Louisiana	N/A	N/A	N/A
Maine	Art. IV, pt. 1, § 5 (Representatives are "elected by a **plurality of all votes** returned."). Art. IV, pt. 2, § 4 ("The governor shall…issue a summons to such persons, as shall appear to be elected by a **plurality of the votes.**"). Art. IV, pt. 2, § 5 (Senators are "elected by a **plurality of votes.**"). Art. V, pt. 1, § 3 ([I]n case of a choice by **plurality of all of the votes** returned [the legislators] shall declare and publish the same."). Art. VI, § 6 ("Judges and registers of probate shall be elected by the people of their respective counties, by a **plurality of the votes** given in…."). Art. IX, § 10 ("Sheriffs shall be elected by the people of their respective counties, by a **plurality of the votes.**").	Art. IV, pt. 1, § 5 (state representatives) Art. IV, pt. 2, § 4 (state senators) Art. IV, pt. 2, § 5 (state senators) Art. V, pt. 1, § 3 (governor) Art. VI, § 6 (judges and registers of probate [note: this provision was conditionally repealed in 1967. If the state legislature makes probate judges full-time rather than part-time, this provision will no longer apply]). Art. IX § 10 (sheriffs)	N/A
Maryland	Art. II, § 3 ("[T]he persons having the **highest number of votes** for these offices, and being	Art. II, § 3 (governor, lieutenant governor)	N/A

	constitutionally eligible, shall be the Governor and Lieutenant Governor."). Art. IV, § 11 ("[T]he person having the **greatest number of votes**, shall be declared to be elected."). Art. IV, § 25 ("There shall be a Clerk of the Circuit Court for each County and Baltimore City, who shall be elected by a **plurality of the qualified voters** of said County or City."). Art. XI-A, § 1 ("[T]he eleven nominees of the City of Baltimore or five nominees in the County receiving **the largest number of votes** shall constitute the charter board.").	Art. IV, § 11 (select judges, Clerks of Court, Register of Wills, other officers within the judiciary department) Art. IV, § 25 (circuit court clerks for counties and Baltimore City) Art. XI-A, § 1 (charter board members [11 for Baltimore City and 5 for each county])	
Massachusetts	Amend. Art. XIV ("In all elections of civil officers by the people of this commonwealth, whose election is provided for by the constitution, the person having the **highest number of votes** shall be deemed and declared to be elected."). Amend. Art. II, § 3 ("[T]the nine candidates receiving the **highest number of votes** shall be declared elected.").	Amend. Art. XIV (all civil officers) Amend. Art. II, § 3 (city or town charter commissioners; top nine [but each voter may vote for nine])	N/A
Michigan	N/A	N/A	N/A
Minnesota	N/A	N/A	N/A
Mississippi	Art. V, § 140 ("The person receiving a majority of the number of votes cast in the election for these [statewide] offices shall be declared elected. If no person receives a majority of the votes, then a runoff election shall be held under procedures prescribed by the Legislature in general law.").	Art. V, § 140 (governor and all statewide elected officials)	N/A
Missouri	Art. IV, § 18 ("The persons having the **highest number of votes** for the respective offices shall be declared elected.").	Art. IV, § 18 (governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general)	N/A

	Art. VI, § 19 ("[T]he thirteen candidates receiving the **highest number of votes** shall constitute the commission."). Art. XII, § 3(a) ("[T]he two candidates receiving the **highest number of votes** in each senatorial district shall be elected… the fifteen receiving the **highest number of votes** shall be elected.").	Art. VI, § 19 (city charter commissioners; top thirteen) Art. XII, § 3(a) (for constitutional convention: top two district delegates; top fifteen delegates-at-large)	
Montana	Art. IV, § 5 ("In all elections held by the people, the person or persons receiving the **largest number of votes** shall be declared elected.").	Art. IV, § 5 (all elected offices)	N/A
Nebraska	Art. IV, § 4 ("The person having the **highest number of votes** for each of said offices shall be declared duly elected.").	Art. IV, § 1 (governor, lieutenant governor, secretary of state, Auditor of Public Accounts, State Treasurer, Attorney General, heads of other executive departments if established)	N/A
Nevada	Art. V, § 4 ("The persons having the **highest number of votes** for the respective offices shall be declared elected."**).** Art. XV, § 14 ("A **plurality of votes** given at an election by the people, shall constitute a choice, where not otherwise provided by this Constitution.").	Art. V § 4 (U.S. senators and members of Congress, district, and state officers) Art. XV, § 14 (officers for which a separate election procedure is unnamed)	N/A
New Hampshire	Pt. II, Art. 33 ("[H]e shall issue his summons to such persons as appear to be chosen senators and representatives, by a **plurality of votes**."). Pt. II, Art. 42 ("[I]n case of an election by a **plurality of votes** through the state, the choice shall be by them declared and published."). Pt. II, Art. 61 ("And the person having a **plurality of votes** in any county, shall be considered as duly elected a councilor.").	Pt. II, Art. 33 (senators and representatives) Pt. II, Art. 42 (governor) Pt. II, Art. 61 (Executive Council members)	N/A

New Jersey	Art. V, § 1, ¶ 4 ("The joint candidates receiving the **greatest number of votes** shall be elected.").	Art. V, § 1, ¶ 4 (governor, lieutenant governor)	N/A
New Mexico	Art. V, § 2 ("The joint candidates having the **highest number of votes** cast for governor and lieutenant governor and the person having the **highest number of votes** for any other office, as shown by said returns, shall be declared duly elected."). Art. VII, § 5 ("[T]he person who receives the **highest number of votes** for any office, except as provided in this section, and except in the cases of the offices of governor and lieutenant governor, shall be declared elected to that office. The joint candidates receiving the **highest number of votes** for the offices of governor and lieutenant governor shall be declared elected to those offices. . . In a municipal election, the candidate that receives the **most votes** for an office shall be declared elected to that office, unless the municipality has provided for runoff elections.").	Art. V, § 1 (governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, commissioner of public lands) Art. VII, § 5 (any office except for those offices for which the state legislature or municipality has decided to provide runoff elections)	N/A
New York	Art. IV, § 1 ("The respective persons having the **highest number of votes** cast jointly for them for governor and lieutenant-governor respectively shall be elected.").	Art. IV, § 1 (governor, lieutenant-governor)	N/A
North Carolina	N/A	N/A	N/A
North Dakota	Art. IV, § 12 ("If two or more candidates for the same office receive an equal and **highest number of votes**, the secretary of state shall choose one of them by the toss of a coin."). Art. V, § 3 ("The joint candidates having the **highest number of votes** must be declared elected."). Art. V, § 5 ("If two or more candidates for any executive office other than for governor and lieutenant governor receive an equal and **highest number of**	Art. IV, § 12 (state representatives and state senators) Art. V, § 3 (governor and lieutenant governor) Art. V, § 2 (agriculture commissioner, attorney general, auditor, insurance commissioner, three public	Art. III, § 10 ("When the election results have been officially declared, the candidate receiving the **highest number of votes** shall be deemed elected for the remainder of the term [for a recall election].").

	votes, the legislative assembly in joint session shall choose one of them for the office.").	service commissioners, secretary of state, superintendent of public instruction, tax commissioner, treasurer)	
Ohio	Art. III, § 3 ("The joint candidates having the **highest number of votes** cast for governor and lieutenant governor and the person having the highest number of votes for any other office shall be declared duly elected."). Art. X, § 4 ("Candidates shall be declared elected in the **order of the number of votes received**, beginning with the candidate receiving the largest number; but not more than seven candidates residing in the same city or village may be elected.").	Art. III, §§ 2, 3 (governor, lieutenant governor, secretary of state, attorney general, auditor of state) Art. X, § 4 (15 county charter commissioners)	N/A
Oklahoma	Art. VI, § 5 ("The persons respectively having the **highest number of votes** for either of the said offices shall be declared duly elected.").	Art. VI, § 1 (governor, lieutenant governor, state auditor and inspector, attorney general, state treasurer, superintendent of public instruction, commissioner of labor, commissioner of insurance, other executive offices created)	N/A
Oregon	Art. V, § 5 ("The person having the **highest number of votes** for Governor, shall be elected."). Art. II, § 16 ("In all elections authorized by this constitution until otherwise provided by law, the person or persons receiving the **highest number of votes** shall be declared elected, but **provision may be made by law for elections by equal proportional representation of all the voters for every office which is filled by the election of two or more persons whose official duties, rights and powers are**	Art. V, § 5 (governor) Art. II, § 16 (all offices; specific offices provided; nominations of political parties and organizations)	N/A

	equal and concurrent. Every qualified elector resident in his precinct and registered as may be required by law, may vote for one person under the title for each office. **Provision may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office**. For an office which is filled by the election of one person **it may be required by law that the person elected shall be the final choice of a majority of the electors voting for candidates for that office**.").		
Pennsylvania	Art. IV, § 2 ("The person having **the highest number of votes** shall be Governor…."). Art. IV, § 4 ("A Lieutenant Governor shall be chosen jointly with the Governor by the casting by each voter of a single vote applicable to both offices…."). Art. IX, § 4 ("In the election of these officers each qualified elector shall vote for no more than two persons, and the three persons receiving the **highest number of votes** shall be elected.").	Art. IV, § 2 (governor) Art. IV, § 4 (lieutenant governor) Art. IX, § 4 (three county commissioners)	N/A
Puerto Rico	Art. VI, § 4 ("[A]ny candidate who receives **more votes than any other candidate** for the same office shall be declared elected."). Art. III, § 7 ("In order to select additional members of the Legislative Assembly from a minority party in accordance with these provisions, its candidates at large who have not been elected shall be the first to be declared elected **in the order of the votes that they have obtained**, and thereafter its district candidates who, not having been elected, have obtained in their respective districts the **highest proportion of the total number of votes** cast as compared to the proportion of votes cast in favor of other candidates of the same party not elected to an equal office in the other districts.").	Art. VI, § 4 (all popularly elected officials) Art. III, § 7 (senators at large, representatives at large)	N/A

Rhode Island	Art. IV, § 2 ("In all elections held by the people for state, city, town, ward or district officers, the person or candidate receiving the **largest number of votes** cast shall be declared elected."). Art. XIII, § 6 ("Upon approval of the question submitted the nine candidates who individually receive the **greater number of votes** shall be declared elected and shall constitute the charter commission.").	Art. IV, § 2 (all state, city, town, ward, or district officers) Art. XIII, § 6 (9 city or town charter commissioners)	N/A
South Carolina	Art. IV, § 5 ("In the general election for Governor, the person having the **highest number of votes** shall be Governor."). Art. IV, § 8 ("A Lieutenant Governor must be chosen at the same time, in the same manner, … as the Governor.").	Art. IV, § 5 (governor) Art. IV, § 8 (lieutenant governor)	N/A
South Dakota	Art. IV, § 2 ("The candidates having the **highest number of votes** cast jointly for them shall be elected.").	Art. IV, § 2 (governor, lieutenant governor)	N/A
Tennessee	Art. III, § 2 ("The person having the **highest number of votes** shall be Governor….").	Art. III, § 2 (governor)	N/A
Texas	Art. IV, § 3 ("The person, voted for at said election, having the **highest number of votes** for each of said offices respectively, and being constitutionally eligible, shall be declared by the Speaker, under sanction of the Legislature, to be elected to said office."). Art. IV, § 16 ("There shall also be a Lieutenant Governor, who shall be chosen at every election for Governor by the same voters, in the same manner, continue in office for the same time, and possess the same qualifications."). Art. IV, § 3a ("If, at the time the Legislature shall canvass the election returns for the offices of Governor and Lieutenant Governor, the person receiving the **highest number of votes** for the office of Governor, as declared by the Speaker, has died, fails to qualify, or	Art. IV, § 1 (governor, lieutenant governor, comptroller of public accounts, commissioner of the general land office, attorney general) Art. IV, § 16 (lieutenant governor)	N/A

	for any other reason is unable to assume the office of Governor, then the person having the **highest number of votes** for the office of Lieutenant Governor shall become Governor for the full term to which the person was elected as Governor.").		
Utah	Art. VII, § 2 ("The candidates respectively having the **highest number of votes** cast for the office voted for shall be elected."). Art. XI, § 5 ("[T]he fifteen candidates receiving a **majority of the votes** cast at such election, shall constitute the charter commission, and shall proceed to frame a charter.").	Art. VII, § 1 (governor, lieutenant governor, state auditor, state treasurer, attorney general) Art. XI, § 5 (15 charter commissioners)	N/A
Vermont	Ch. II, § 47 ("[A]nd declare the person who has the **major part of the votes**, to be Governor for the two years ensuing. The Lieutenant-Governor and the Treasurer shall be chosen in the manner above directed.").	Ch. II, § 47 (governor, lieutenant governor, treasurer)	N/A
Virginia	Art. V, § 2 ("The person having the **highest number of votes** shall be declared elected [governor]."). Art. V, § 13 ("A Lieutenant Governor shall be elected at the same time . . . and the manner and ascertainment of his election, in all respects, shall be the same [as the Governor]."). Art. V, § 15 ("An Attorney General shall be elected . . . and the fact of his election shall be ascertained in the same manner [as the Governor].").	Art. V, § 2 (governor) Art. V, § 13 (lieutenant governor) Art. V, § 15 (attorney general)	N/A
Washington	Art. III, § 4 ("The person having the **highest number of votes** shall be declared duly elected….").	Art. III, § 1 (governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, commissioner of public lands)	N/A

West Virginia	Art. VII, § 3 ("The person having the **highest number of votes** for either of said offices, shall be declared duly elected thereto…."). Art. IX, § 10 ("If two or more persons residing in the same district shall receive the **greater number of votes** cast at any election, then only the one of such persons receiving the **highest number** shall be declared elected, and the person living in another district, who shall receive the **next highest number** of votes, shall be declared elected.").	Art. VII, § 1 (governor, secretary of state, auditor, treasurer, commissioner of agriculture, attorney general) Art. IX, § 9, 10 (county commissioners [three, no two from the same district])	N/A
Wisconsin	Art. V, § 3 ("The persons respectively having the **highest number of votes** cast jointly for them for governor and lieutenant governor shall be elected.").	Art. V, § 3 (governor, lieutenant governor)	Art. XIII, § 12(4)(a) ("The 2 persons receiving the **highest number of votes in the recall primary** shall be the 2 candidates in the recall election, except that if any candidate receives a **majority of the total number of votes cast** in the recall primary, that candidate shall assume the office for the remainder of the term and a recall election shall not be held" [nonpartisan primary nomination in a recall election]."). Art. XIII, § 12(4)(b) ("The person receiving the **highest number of votes** in the recall primary for each political party shall be that party's candidate in the recall election [partisan primary nomination in a recall election]."). Art. XIII, § 12(5) ("The person who receives the **highest number of votes** in the recall election shall be elected for the remainder of the term.").
Wyoming	Art. IV, § 3 ("The person having the **highest number of votes** for governor shall be declared elected….").	Art. IV, § 3 (governor)	N/A