EVERYTHING THAT CAN BE COUNTED DOES NOT NECESSARILY COUNT: THE RIGHT TO VOTE AND THE CHOICE OF A VOTING SYSTEM

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2006 MICH. ST. L. REV. 327

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INTRODUCTION

The presidential elections of 2000 and 2004 demonstrated the importance of the integrity of voting procedures. In 2000, the Supreme Court resolved the dispute over counting votes in Florida,[1] and, in 2004, the dispute over counting votes in Ohio sparked members of Congress to formally challenge Ohio's electoral votes.[2] The relevant issues included whether long lines at polling places prevented people from voting, whether a hanging chad represented the will of the voter, and whether a voter was entitled to have her provisional ballot counted.[3] The disputes involved defining the *set of ballots to be counted* to determine the winner of the election. For a hanging chad, the state needs to determine whether the ballot sufficiently represents the will of the voter for it to be counted. Voters who left the polls without voting after waiting hours may have been wrongly denied the right to have their votes counted.

The integrity of the vote-counting process does not end when the state has determined the set of ballots to be counted; the ballots themselves must also *count*. The 2000 presidential election illustrates two aspects of the vote-counting process where, although votes were counted, they arguably did not count.[4] First, because of the Electoral College, George W. Bush won the election even though Al Gore won the popular vote. Second, Al

1. Bush v. Gore, 531 U.S. 98 (2000).

2. Sheryl Gay Stolberg & James Dao, *Congress Ratifies Bush Victory After a Rare Challenge*, N.Y. TIMES, Jan. 7, 2005, at A19.

3. James Dao, Ford Fessenden & Tom Zeller Jr., *Voting Problems in Ohio Spur Call for Overhaul*, N.Y. TIMES, Dec. 24, 2004, at A1.

4. *See* Helen Thomas, *Like Reagan, Bush Got a Free Ride*, SEATTLE POST-INTELLIGENCER, Dec. 19, 2000, at B4.

Gore probably would have won Florida and the election had Ralph Nader not "spoiled" the election by taking votes away from Al Gore.[5] Under the established rules for electing the President, George W. Bush won the election, but because of these two aspects of the vote-counting process just mentioned, supporters of Al Gore may have felt that their votes, although counted, did not count. This Article investigates how the choice of a voting system impacts whether votes count.

In electing public officials in the United States, state and local governments use a variety of different voting systems. Voting systems currently in use include plurality voting, runoff voting, instant runoff voting, at-large voting, limited voting, cumulative voting, and the single transferable vote.[6] A voting system consists of specifying the manner in which a voter casts his or her vote and the method by which such votes are counted to determine the winner or winners of an election.[7] *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."[8] This definition is general enough to include different manners of casting a vote: A voter could select one candidate, select several candidates, or rank candidates in order of preference. For a given manner of casting a vote, multiple methods exist for counting the votes to determine the winner or winners. This Article will consider voting systems that have been used in the United States or that have strong advocates[9] and will address two specific ways in which a vote may be counted but not count.

First, for a vote to count, all voters must cast an equally effective vote. The Supreme Court has stated that the Constitution requires "complete equality for each voter,"[10] and that "each citizen have an equally effective voice."[11] The Court has applied this principle to require equal apportion-

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5. A spoiler candidate is one who cannot win the election himself, but who can change the outcome of the election. *See* Paul West, *Election Too Close to Call with Fla. in the Balance Republican Bush Wins Tenn., Ark., Deep South and Mountain West*, BALT. SUN, Nov. 8, 2000, at 1A.

6. For a detailed description of these voting systems and others, see DOUGLAS J. AMY, BEHIND THE BALLOT BOX (2000); DAVID M. FARRELL, ELECTORAL SYSTEMS (2001); SAMUEL MERRILL III, MAKING MULTICANDIDATE ELECTIONS MORE DEMOCRATIC (1988); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM (1982).

7. The term "voting system" is also used to describe the equipment voters use to cast their votes. *See, e.g.*, CAL. ELEC. CODE § 362 (West 2003) ("'Voting system' means any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast or tabulate votes, or both.").

8. BLACK'S LAW DICTIONARY 1571 (7th ed. 1999).

9. Although the Electoral College and gerrymandering are part of voting systems in the broad sense, this Article will focus more narrowly on the method for counting votes.

10. Wesberry v. Sanders, 376 U.S. 1, 14 (1964).

11. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

ment of state and congressional districts.[12] This Article argues that at-large voting denies voters the right to cast an equally effective vote. This proposition is not new, but this Article presents new arguments and reconsiders old arguments in light of the Court's more recent voting rights jurisprudence.

Second, for a vote to count, the outcome of the election must reliably represent the will of the voters. For example, consider plurality voting. When the winner receives a majority of the vote, the outcome is beyond dispute. This Article argues that when the winner receives far less than a majority of the vote, the outcome does not necessarily represent the will of the electorate. Since American politics is dominated by a two-party system, most general elections will not have more than two strong candidates and the winner will generally receive a majority. Primary elections can have multiple strong candidates, and the winner of the primary is more likely to receive less than a majority. For example, in the 1969 Democratic primary for Mayor of New York City, the winning candidate received only 33 percent of the vote.[13] In response to this unreliable election result, New York City adopted runoff elections.[14]

In order to ensure that votes count, state and local governments are considering changes to their voting systems. A variety of organizations and webpages advocate the use of particular voting systems.[15] In 2002, San Francisco adopted instant runoff voting and held its first election with it in 2004.[16] In 2004, three cities passed ballot initiatives in favor of instant runoff voting: Ferndale, Michigan; Burlington, Vermont; and Berkeley, California.[17] Many states are currently considering legislation to enact instant runoff voting.[18] In May 2005, the Province of British Columbia voted on whether to change its voting system to the single transferable vote. Although 57 percent of the electorate voted in favor of the change, 60 percent

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12. *See id.* at 559, 568.

13. CHARLES S. BULLOCK III & LOCH K. JOHNSON, RUNOFF ELECTIONS IN THE UNITED STATES 80 (1992).

14. *Id.* at 81–82.

15. *See, e.g.*, The Center for Voting and Democracy, FairVote, http://www.fairvote.org (last visited Mar. 17, 2006) (advocating instant runoff voting and the single transferable vote); Russ Paiellie, GVI: The Graphical Voter Interface, http://www.electionmethods.org (last visited Mar. 17, 2006) (advocating Condorcet voting and approval voting); Americans for Approval Voting, http://www.approvalvoting.com (last visited Mar. 17, 2006) (advocating approval voting); DeBorda Institute, Home, http://www.deborda.org (last visited Mar. 17, 2006) (advocating the Borda Count).

16. Jesse L. Jackson Jr. & James D. Henderson, *Making Elections Better, and Stopping Divisiveness, Too*, BOSTON GLOBE, Dec. 25, 2004, at A23.

17. Steven Hill & Rob Richie, *San Francisco's Innovation in Democracy—Instant Runoffs*, CHRISTIAN SCI. MONITOR, Feb. 24, 2005, at 9.

18. *See* Center for Voting and Democracy, *IRV in the States*, http://www.fairvote.org/irv/states.htm (last visited Jan. 23, 2005).

was required.[19] This Article will help governments understand how the choice of a voting system can make sure that votes are not only counted, but also count.

This Article proceeds as follows. Part I presents a glossary of the eleven voting systems considered in this Article, including a history of their use in the United States. Although this history is presented succinctly, it is the first comprehensive history of voting systems in the United States, and the collected references allow interested readers to do further research. Part II summarizes the theory of voting known as public choice theory.[20] Kenneth Arrow won the 1972 Nobel Prize in economic sciences for his contributions to the theory of voting. This theory is necessary for understanding the legal implications of voting systems. Part III gives a comprehensive summary of state and federal case law on voting systems dating back to 1890. This is the first comprehensive collection of case law in this area. Part IV briefly discusses the current debate regarding the role of federal courts in policing the electoral process and calls for federal courts to take an active role. Part V develops the right to an equally effective vote and considers several ways in which a voting system may violate this right. This Part concludes that at-large voting denies voters an equally effective vote. Part VI develops the right to a reliable electoral outcome and considers the circumstances under which the eleven voting systems may produce an unreliable outcome. This Part concludes that plurality voting will sometimes produce unacceptably unreliable outcomes and that, in these circumstances, a runoff election is necessary to protect the right to vote.

This Article makes three important contributions. First, this Article presents the first comprehensive summary of the history of voting systems in the United States and the first comprehensive examination of the case law on voting systems. Only one academic article has considered the constitutional requirements of a voting system, and it addressed only whether one particular voting system (instant runoff voting) violated the Equal Protec-

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19. *STV Referendum Falling Short*, CBC NEWS, May 18, 2005, *available at* http://www.cbc.ca/bc/story/bcv_referendumresult170505.html.

20. The field of study is also known as social choice theory. *See generally* DENNIS C. MUELLER, PUBLIC CHOICE III (2003) (covering many aspects of public choice theory, including the analysis of voting systems). Many authors have considered the legal implications of social choice theory. *See, e.g.*, Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996) (applying public choice theory to analyzing a voucher system for campaign finance reform); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991) (considering applications of public choice theory to constitutional law and statutory interpretation); Richard H. Pildes, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990) (criticizing public choice theory as an inappropriate tool for analyzing democratic institutions).

tion Clause.[21] Second, this Article revives the question of the constitutionality of at-large voting, a discriminatory voting practice from the era of poll taxes, white primaries, and separate-but-equal accommodations. The Court last considered at-large voting in 1982[22] and, in light of its more recent jurisprudence, the Court needs to take a second look at at-large voting. Further, the academic literature has not addressed the constitutionality of at-large voting in the last twenty years.[23] Finally, this Article argues for creating a new constitutional requirement for the right to vote: An election must produce an outcome that reliably represents the will of the people. This requirement has not been heretofore proposed, but is eminently reasonable and fundamental to the democratic process.

I. GLOSSARY OF VOTING SYSTEMS

Voting systems can be separated into two categories. The first category comprises voting systems that use single-member districts and elect one candidate to an office. The second category comprises voting systems that use multi-member districts and elect a group of candidates. Elections for executive offices—such as President, governor, or mayor—are, by definition, from single-member districts. Legislative elections may be from either single-member or multi-member districts. Single-member districts are the norm in the United States and engender the two-party system.[24] This system is called "winner take all" because one party will represent the entire district. Most elections in the United States with multi-member districts use at-large voting.[25] All elections for the U.S. Senate and House are from single-member districts.[26] Most states use only single-member districts for their state legislatures and others use a mix of single-member and multi-

21. Brian P. Marron, *One Person, One Vote, Several Elections?: Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343 (2004).

22. *See* Rogers v. Lodge, 458 U.S. 613 (1982).

23. *See* James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982).

24. *See* MUELLER, *supra* note 20, at 271–72.

25. *See infra* note 54.

26. Senators are currently elected by the voters of the entire state. *See* Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 2 (1996) (arguing that senators could be elected from districts). The Constitution does not explicitly prevent structuring the Senate so that a state could elect both of its senators in the same election. *See* U.S. CONST. art. I, § 3, cl. 2. However, no state elects both of its senators in the same year. *See* SENATORS OF THE 109TH CONGRESS, *available at* http://www.senate.gov/general/contact_information/senators_cfm.cfm (last visited Mar. 17, 2006). Congress has mandated that representatives be elected from single-member districts. *See* 2 U.S.C. § 2(c) (2001).

member districts.[27] Local elections may be any combination of single-member and multi-member districts.[28] Most other democracies use multi-member districts with proportional representation and have more than two strong political parties.[29] With proportional representation systems, multiple parties will represent the district according to their support among the voters.

This Part presents eleven different voting systems:[30] seven for single-member districts and four for multi-member districts. Three voting systems are commonly used in the United States: plurality voting, runoff voting, and at-large voting. The other eight voting systems will be referred to collectively as alternative voting systems.

A. Single-Member Districts

Plurality Voting. Each voter selects one candidate, and the candidate receiving the largest number of votes is the winner. Plurality voting is the most commonly used voting system for single-member districts in the United States.[31]

Runoff Voting. Runoff voting starts with a plurality election. If a candidate receives a majority of the vote, then she is declared the winner.[32] Otherwise, a second plurality election is held between the two candidates receiving the largest numbers of votes in the first election. As of 1992, twelve states and hundreds of local governments used runoff voting.[33] Runoff voting would probably be used more frequently if not for the time and expense of holding a second election.[34]

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27. *See* AMY, *supra* note 6, at 55 (stating that ten states use some multi-member districts for their legislatures).

28. *See* Richard A. Walawender, Note, *At-Large Elections and Vote Dilution: An Empirical Study*, 19 U. MICH. J.L. REFORM 1221, 1232 (1986).

29. *See* AMY, *supra* note 6, at 65.

30. Open-source software, written by the author, for implementing many of these voting systems is available for download at http://stv.sourceforge.net/.

31. *See* AMY, *supra* note 6, at 142.

32. Some jurisdictions have a lower threshold and do not require an actual majority. *See, e.g.*, N.C. GEN. STAT. § 163-111(a), (b) (2004) (requiring a second primary election if the winner of the first primary receives less than 40 percent of the vote).

33. BULLOCK & JOHNSON, *supra* note 13, at 2–4.

34. *See* AMY, *supra* note 6, at 149.

Instant Runoff Voting.[35] Instant runoff voting provides the benefits of runoff voting but with only one election. Each voter ranks the candidates in order of preference. The votes are first distributed to the candidates according to their first choices. If no candidate has a majority of the votes, then the candidate with the fewest number of votes is eliminated and those ballots are transferred to their next choices. This step is repeated until either a candidate has a majority or only two candidates remain.[36] San Francisco used instant runoff voting for the first time in 2004.[37] Ann Arbor, Michigan, used instant runoff voting in 1975.[38] Florida,[39] Indiana,[40] Maryland,[41] Minnesota,[42] and Wisconsin[43] used instant runoff voting in the early twentieth century.

Approval Voting. Each voter selects one or more candidates of whom the voter approves. The candidate approved of by the largest number of voters is the winner. No state or local government has used approval voting.[44]

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35. Instant runoff voting is also known as majority preferential voting, the alternative vote, English preferential voting, and the Hare-Ware system. EDWIN M. BACON & MORRILL WYMAN, DIRECT ELECTIONS AND LAW-MAKING BY POPULAR VOTE 114–18 (1912); CLARENCE GILBERT HOAG & GEORGE HERVEY HALLETT, PROPORTIONAL REPRESENTATION 480–85 (1926). San Francisco coined the term "ranked choice voting." S.F., CAL., CITY CHARTER, art. XIII, § 13.102 (2004). Instant runoff voting is a special case of the single transferable vote, discussed in Part I.B. *See* BACON & WYMAN, *supra*, at 118. Sir Thomas Hare proposed the single transferable vote in 1857. *Id.* at 118. Professor William R. Ware led one of the earliest adoptions of the single transferable vote for Harvard alumni elections in 1871. *See* HOAG & HALLETT, *supra*, at 186.

36. Since voters may choose not to rank all of the candidates, the winning candidate could receive less than a majority of the vote. Runoff voting and instant runoff voting are not identical: Runoff voting simultaneously eliminates all but the top two candidates after the first election, and instant runoff voting eliminates candidates one-by-one.

37. *See* S.F., CAL., CITY CHARTER, art. XIII, § 13.102 (2004) (specifying instant runoff voting for city elections); Suzanne Herel, *Supervisors Sworn In*, S.F. CHRON., Jan. 9, 2005, at A17.

38. *See* Stephenson v. Ann Arbor Bd. of City Canvassers, No. 75-10166 AW (Mich. Cir. Ct. 1975) (finding that instant runoff voting did not violate the Equal Protection Clause), *available at* http://www.fairvote.org/index.php?page=397 (last visited Mar. 17, 2006).

39. *See* State *ex rel.* Farris v. Simpson, 155 So. 831, 833 (Fla. 1934) (describing the instant runoff voting statute that was enacted in 1913 and repealed in 1929).

40. CHARLES EDWARD MERRIAM & LOUISE OVERACKER, PRIMARY ELECTIONS 53 (1928).

41. *Id.* at 52.

42. HOAG & HALLETT, *supra* note 35, at 484.

43. *Id.*

44. *See* AMY, *supra* note 6, at 183 ("Currently, approval voting is not used to elect a legislature in any democracy."); STEVEN J. BRAMS & PETER C. FISHBURN, APPROVAL VOTING xi (1983).

Bucklin System.[45] Each voter ranks the candidates in order of preference. If a candidate receives a majority of first choices, then she is declared the winner. Otherwise, if a candidate is first or second on a majority of ballots, then she is declared the winner.[46] This process is repeated for higher choices as necessary. Some states[47] and many cities[48] used the Bucklin system in the early twentieth century.

Borda Count. Each voter ranks the candidates in order of preference. If three candidates are running for office, then each candidate receives two points for every first choice, one point for every second choice, and no points for every third choice. The candidate with the greatest number of points is the winner. Oklahoma considered a variation of the Borda count in the 1920s.[49]

Condorcet Voting. Each voter ranks the candidates in order of preference. The winner is determined by considering all pairwise contests between candidates. For example, for three candidates (A, B, and C), there are three pairwise contests (A-B, A-C, and B-C). The winner is the candidate who wins all of her pairwise contests. If a majority of voters prefer A to B and a majority of voters prefer A to C, then A is the winner. However, such a winner does not always exist.[50] Condorcet voting was used for elections in Marquette, Michigan, in the 1920s and 1930s.[51]

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45. The Bucklin system is also known as the Grand Junction system and American preferential voting. *See* BACON & WYMAN, *supra* note 35, at 120–29.

46. Two candidates could be listed first or second on a majority of ballots. If this occurs, then the candidate listed first or second on the greatest number of ballots is the winner.

47. *See* MERRIAM & OVERACKER, *supra* note 40, at 82–85.

48. *See* HOAG & HALLETT, *supra* note 35, at 486.

49. The voting system was a combination of the Bucklin system and the Borda count. The votes were counted as in the Bucklin system, except that second choices counted as one-half votes, and third choices counted as one-third votes. *See* MERRIAM & OVERACKER, *supra* note 40, at 84–85. The statute required voters to rank more than one candidate, and, for this reason, the Oklahoma Supreme Court found the statute unconstitutional. Dove v. Oglesby, 244 P. 798 (Okla. 1926).

50. *See infra* Part II.A.

51. HOAG & HALLETT, *supra* note 35, at 491; *Unofficial Election Returns*, THE DAILY MINING J. (Marquette, Mich.), Dec. 6, 1932, at 1.

B. Multi-Member Districts[52]

At-Large Voting.[53] Each voter selects as many candidates as there are seats to be filled. The candidates receiving the greatest number of votes are elected. At-large voting is the most commonly used voting system with multi-member districts in the United States.[54]

Limited Voting. Each voter selects fewer candidates than there are seats to be filled. Alternatively, parties may be limited to nominating fewer candidates than there are seats to be filled. The candidates receiving the greatest number of votes are elected. Limited voting provides the greatest degree of proportional representation when voters are limited to selecting one candidate.[55] As of 1998, Alabama, Connecticut, North Carolina, and Pennsylvania used limited voting for local elections.[56]

Cumulative Voting. Each voter selects as many candidates as there are seats to be filled, but the voter may choose to select a candidate more than once. A voter could use all her selections for the same candidate, use all her selections for different candidates, or use a combination of the two. As of 1998, Alabama, Illinois, and Texas used cumulative voting in local elections.[57]

Single Transferable Vote.[58] The single transferable vote combines limited voting with ranked ballots. Each voter ranks the candidates in order of preference, but the vote will count toward only one candidate. As with

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52. A notable exclusion from this list is party-list systems. *See* DAVID M. FARRELL, ELECTORAL SYSTEMS: A COMPARATIVE INTRODUCTION 68–96 (2001) (describing party-list systems used in several different countries). Party-list systems are used by many democracies in Europe and Central and South America. *Id.* at 68. Party-list systems are not considered in this Article because, with party-list systems, voters generally select a party rather than a candidate. *Id.*

53. The term "at large" literally describes any voting system where the electorate is not divided into districts and could be applied to any voting system using multi-member districts. Since this specific type of at-large voting is by far the most commonly used in the United States, it is simply called "at-large voting."

54. A study using 1982 data found that "[n]early 60% of all U.S. cities with populations over 25,000 utilize an at-large system for electing council members." Walawender, *supra* note 28, at 1232; *see also* Richard L. Engstrom & Michael D. McDonald, *The Effect of At-Large Versus District Elections on Racial Representation in U.S. Municipalities*, *in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 203 (Bernard Grofman & Arend Lijphart eds., 1986) (finding similar results using data from the early 1970s).

55. Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 339–40 (1998). When the voter is allowed to select only one candidate, limited voting is also known as the single non-transferable vote. *See* AMY, *supra* note 6, at 203.

56. Mulroy, *supra* note 55, at 339–40.

57. *Id.* at 340–41.

58. The single transferable vote is also known as the Hare-Clark system and choice voting. *See* AMY, *supra* note 6, at 95.

instant runoff voting, when a candidate is eliminated, votes for that candidate are transferred to the subsequent choice on the ballot. Additionally, candidates who have more votes than necessary to win will have some of their votes transferred to subsequent choices.[59] Although the process is somewhat complicated, it provides more accurate proportional representation than with limited or cumulative voting.[60] The City of Cambridge, Massachusetts, has been using the single transferable vote since 1941.[61] Twenty-one other cities have used the single transferable vote.[62]

II. THEORY OF VOTING

This Part briefly summarizes several topics related to the theory of voting that are helpful in understanding the legal implications of a voting system. The study of the theory of voting is known as public choice theory and is related to game theory. The study of public choice theory has blossomed in the twentieth century, and Kenneth Arrow won the 1972 Nobel Prize in economic sciences for his contributions.

A. The Paradox of Voting

When only two candidates compete for an office, the concept of majority rule dictates that the candidate preferred by a majority of the voters should be the winner.[63] When more than two candidates compete, the Bucklin system, instant runoff voting, and Condorcet voting each determine winners based on a generalization of majority rule to more than two candidates. Condorcet voting is widely accepted as the best generalization of majority rule to more than two candidates.[64]

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59. With a district consisting of *N* seats, any candidate receiving at least *1/(N+1)* of the vote is guaranteed to win one of the seats, and a candidate with more votes has more votes than is necessary to win. HOAG & HALLETT, *supra* note 35, at 486. For a detailed presentation of the single transferable vote, see *id.* at 378–411.

60. *See* AMY, *supra* note 6, at 95–103.

61. Leon Weaver, *The Rise, Decline, and Resurrection of Proportional Representation in Local Governments in the United States*, *in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 141 (Bernard Grofman & Arend Lijphart eds., 1986).

62. The twenty-one cities are Sacramento, California; Boulder, Colorado; West Hartford, Connecticut; Lowell, Medford, Quincy, Revere, Saugus, and Worcester, Massachusetts; Kalamazoo, Michigan; Hopkins, Minnesota; Long Beach, New York, and Yonkers, New York; Ashtabula, Cincinnati, Cleveland, Hamilton, and Toledo, Ohio; Coos Bay, Oregon; and Wheeling, West Virginia. *Id.*

63. *See* RIKER, *supra* note 6, at 58–59.

64. *See* MERRILL, *supra* note 6, at 6, 15; RIKER, *supra* note 6, at 100; BRAMS & FISHBURN, *supra* note 44, at 35–36. Critics of Condorcet voting point out that it allows a candidate with very few first-place votes to win the election. *See* Philip Macklin et al., *Bring Out the Vote*, SCI. AM., July 2004, at 12.

The paradox of voting is that Condorcet voting does not always produce a winner.[65] Assume that voters are capable of creating a transitive ordering of candidates,[66] and three voters rank three candidates as follows:

Voter #1: (1) A, (2) B, (3) C
Voter #2: (1) B, (2) C, (3) A
Voter #3: (1) C, (2) A, (3) B

Examining the pairwise comparisons, no one candidate beats the other two: A beats B, but not C; B beats C, but not A; and C beats A, but not B. Thus, even though voters are capable of creating a transitive ordering of the candidates, the amalgamation of the voters' preferences is not a transitive ordering. Such a result is called a "cycle" since A beats B, B beats C, and C beats A. This cycle is like a tie among the three candidates, and a tie-breaking rule must be applied in order to choose a winner.[67] No matter which candidate is chosen as the winner, there will always be another candidate whom a majority of voters preferred over the winner.

The fact that cycles exist should not necessarily be considered a flaw in Condorcet voting. Rather, the cycle could represent society's conflicting desires in choosing a candidate or "coherent man and incoherent society."[68] Conversely, other voting systems could be flawed because they choose a winner even when a cycle exists.

B. Normative Criteria and Arrow's Theorem

Given the myriad voting systems to choose from, one method for winnowing the possibilities is to impose normative criteria and exclude voting systems from consideration that do not meet the criteria. For example, two normative criteria from the public choice literature are the principles of anonymity and neutrality.[69] Anonymity and neutrality require that the method for counting the votes be independent of the identity of the voters and the candidates, respectively.[70] All of the voting systems considered in this Article clearly satisfy these two criteria.

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65. *See* RIKER, *supra* note 6, at 17–18, 67–69.

66. A transitive ordering requires that if a voter prefers A over B and prefers B over C, then the voter necessarily prefers A over C. *See* RIKER, *supra* note 6, at 17.

67. For example, the Borda count or instant runoff voting could be used to break a cycle. Other methods for breaking cycles are more complicated. *See* RIKER, *supra* note 6, at 76–77. The City of Marquette, Michigan, used the Nanson system for breaking cycles. *See* HOAG & HALLETT, *supra* note 35, at 491.

68. RIKER, *supra* note 6, at 18.

69. *See* MUELLER, *supra* note 20, at 134.

70. *See id.*

Even relatively modest normative criteria can cause a contradiction such that no voting system satisfies them all. Arrow put forth five simple, normative criteria for voting systems:[71]

(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 his ballot by raising the ranking of a candidate, then it must help that candidate.
(5) Independence from Irrelevant Alternatives (Independence): If a losing candidate is taken out of an election (or added to an election) and the ballots recounted, then the winner of the election must not change.[72]

Arrow's General Possibility Theorem (or Arrow's Theorem) states that no voting system can satisfy the five normative criteria and produce a transitive ordering of the candidates.[73] Since these normative properties are intuitively reasonable requirements of a voting system, one could argue that all voting systems are flawed. Arrow formulated his Theorem in terms of voting systems[74] based on rankings of candidates,[75] and it does not directly apply to voting systems not based on rankings.[76] All of the ranked voting systems clearly satisfy universal admissibility, nonimposition, and nondictatorship. Plurality voting, the Borda count, and the Bucklin system violate independence.[77] Runoff voting, instant runoff voting, and the single transferable vote violate monotonicity.[78] Condorcet voting does not always produce a transi-

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71. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 59 (2d ed. 1963). Arrow rigorously defined the five criteria, but I give just the general idea of each.

72. Suppose a waiter offers a customer a choice of vanilla or chocolate ice cream, and the customer chooses vanilla. If the waiter returns and informs the customer that strawberry ice cream is also available, then it would be strange for the customer to change his order from vanilla to chocolate.

73. ARROW, *supra* note 71, at 59; RIKER, *supra* note 6, at 115–19. Note that these two formulations of Arrow's Theorem have slightly different normative criteria.

74. Arrow's Theorem is formulated in terms of a social welfare function, which is essentially equivalent to a ranking of candidates. *See* ARROW, *supra* note 71, at 22–25.

75. All of the voting systems described above are based on candidate rankings, except for approval voting, at-large voting, cumulative voting, and limited voting. Plurality voting is a ranked system where only the first choices are used. Limited voting is a ranked system if each voter selects one candidate, but not if each voter selects more than one candidate.

76. One should not conclude that voting systems not based on rankings are theoretically superior to voting systems based on rankings. *See infra* note 80.

77. Plurality voting and the Bucklin system clearly violate independence. How the Borda count violates independence is less obvious. *See* RIKER, *supra* note 6, at 105.

78. *See infra* note 84 and accompanying text for an example.

tive ordering.[79] Approval voting, at-large voting, cumulative voting, and limited voting are not ranked systems.[80]

C. Strategic Voting

In addition to Arrow's Theorem, another troubling aspect of voting systems is that voters can manipulate the election to their advantage by voting dishonestly. Such behavior is called "strategic voting." For example, with plurality voting, a supporter of a third-party candidate may sometimes vote for a Democratic or Republican candidate. The vote is dishonest because she does not vote for her favorite candidate, and the vote is strategic because she can help elect her second-favorite candidate. All ranked voting systems can theoretically be manipulated through strategic voting when there are more than two candidates.[81] This Part will briefly explain how voters can vote strategically with each of the voting systems presented above.

With plurality, at-large, cumulative, and limited voting, strategic voting is obvious and not necessarily harmful. With these methods, voters should vote for their favorite candidates who have a realistic chance of winning a seat in the election.[82] This tactic is simple, effective, and also alleviates the primary fault inherent in these systems—that many candidates could split the vote resulting in winners with a relatively small percentage of the vote.

With instant runoff voting (and also runoff voting and the single transferable vote), strategic voting is possible but more difficult to accomplish. Suppose three candidates—a liberal, a centrist, and a conservative—vie in an election, and their support among the electorate is 30 percent, 30 percent, and 40 percent, respectively. Further suppose that the centrist candidate's supporters are evenly split in preferring the liberal or conservative candidate as their second choice.[83] If the liberal candidate is eliminated, then the centrist wins the election. If the centrist candidate is eliminated, then the conservative candidate wins the election. The strategy for the liberal voter is the same as for plurality voting: Her favorite candidate cannot win, so she casts her vote for her favorite candidate with a realistic chance of winning—

79. When a tie-breaking method is used to break the cycle, the resulting voting system will violate one of the five normative properties. *See* RIKER, *supra* note 6, at 76–77.

80. At-large voting, cumulative voting, and limited voting all clearly violate independence. Approval voting also violates independence. *See* Yohsuke Ohtsubo & Yoriko Watanabe, *Contrast Effects and Approval Voting: An Illustration of a Systematic Violation of the Independence of Irrelevant Alternatives Condition*, 24 POL. PSYCHOL. 549, 551 (2003).

81. *See* RIKER, *supra* note 6, at 141.

82. *See id.* at 145.

83. The second choices of the liberal and conservative voters would be the centrist candidate.

the centrist candidate. The conservative candidate has a perverse strategy available. If a small number of conservative voters cast their first vote for the liberal candidate, they can help ensure that the centrist will be the first candidate eliminated, and that the conservative candidate will win the election.[84] This strategy requires precise polling information and strict control over the conservative voters. If too many conservative voters employ this strategy, the liberal candidate will win the election.

With approval voting, the Borda count,[85] and the Bucklin system, voters can help their favorite candidate by voting only for that candidate. Approving of other candidates or ranking other candidates could help those other candidates defeat the favorite. With such tactics, these voting systems degenerate into plurality voting. This tactic does not apply to runoff voting, instant runoff voting, and the single transferable vote because, with those systems, later choices cannot harm earlier choices.

With Condorcet voting, the voter can attempt to punish the strongest opponent by ranking him last. Such a tactic tends to create a Condorcet cycle.[86] With this strategy, if the favorite is not the winner, he could then have a second chance of winning, depending on the method chosen to break the cycle. If many voters apply this strategy, an unpopular candidate could become a Condorcet winner.[87]

D. Condorcet Efficiency

Because of Arrow's Theorem, no voting system has a clear claim to the title of "best" voting system. A further consequence of having no best voting system is the difficulty of stating whether any one voting system is theoretically superior to another. Nevertheless, at least from a theoretical perspective, it is generally agreed that if a Condorcet winner exists, the Condorcet winner should be elected.[88] Of course, real world practicalities could outweigh the theoretical advantages.

Once the Condorcet winner is set as the standard by which to judge other voting systems, one could argue that a voting system should, as often as possible, elect the Condorcet winner. The Condorcet efficiency is defined as the percentage of elections for which a voting system will elect the

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84. This example shows that these methods violate monotonicity. The conservative voters help their candidate win by ranking him second instead of first. *See* RIKER, *supra* note 6, at 101; Steven J. Brams & Peter C. Fishburn, *Some Logical Defects of the Single Transferable Vote*, *in* CHOOSING AN ELECTORAL SYSTEM 147, 151 (Arend Lijphart & Bernard Grofman eds., 1984).

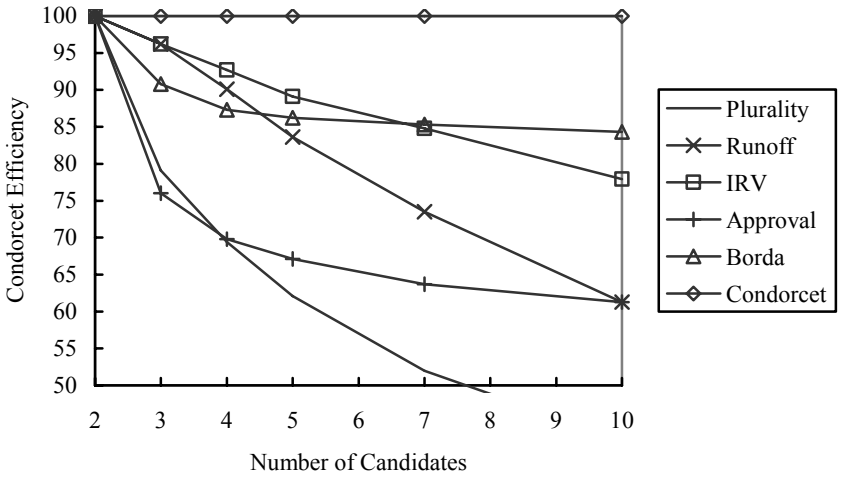
85. Jean-Charles de Borda has been quoted as saying "My scheme is intended only for honest men." RIKER, *supra* note 6, at 168.

86. *See* MERRILL, *supra* note 6, at 66–67.

87. *Id.*

88. *See supra* note 64 and accompanying text.

Condorcet winner.[89] If sufficient election data were available, the Condorcet efficiencies could be directly estimated. Since such data is not available, Professor Merrill has used models of voter behavior to create computer simulations of elections.[90] From his simulation results, he estimated the Condorcet efficiencies of several voting systems.[91] The following figure presents the results of one simulation:[92]



The figure shows, as expected, that Condorcet voting always has an efficiency of 100 percent. Other voting systems have lower efficiencies, and the efficiencies decrease as the number of candidates increases. Plurality voting generally has the lowest Condorcet efficiency.[93] As expected, runoff of voting is better than plurality, and instant runoff voting is better than runoff voting. The relative efficiencies of instant runoff voting, approval voting, and the Borda count varied significantly with the parameters of the model,[94] so the poorer performance of approval voting in this example isn't significant.

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89. *See* MERRILL, *supra* note 6, at 15.
90. *Id.* at 16–19.
91. *Id.* at 19–25.
92. *Id.* at 20 tbl.2.1.
93. *Id.* at 25–29.
94. With other parameters, approval voting had significantly higher efficiencies, while runoff voting and instant runoff voting had significantly lower efficiencies. *Id.* at 26 fig.2.6.

III. CASE LAW ON VOTING SYSTEMS

State and federal courts have upheld a variety of voting systems against constitutional challenges.[95] This Part will show several examples of courts striking down particular voting systems for violating state constitutions. Courts have struck down voting systems when enacted with discriminatory intent, but no court has ever found a voting system to facially violate the U.S. Constitution.[96]

A. Definition of "a Vote"

One limitation that state constitutions pose on voting systems is through the definition of "a vote." Some state constitutions specify the win-

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95. *See generally* Harper v. City of Chicago Heights, 223 F.3d 593 (7th Cir. 2000) (stating that cumulative voting is a lawful election method); Dillard v. Town of Cuba, 708 F. Supp. 1244 (M.D. Ala. 1988) (upholding limited voting); Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870 (M.D. Ala. 1988) (upholding cumulative voting); Orloski v. Davis, 564 F. Supp. 526 (M.D. Pa. 1983) (upholding limited voting), *overruled by* Mezvinsky v. Davis, 459 A.2d 307 (Pa. 1983) (finding that limited voting for judicial elections violated the state constitution); Hechinger v. Martin, 411 F. Supp. 650 (D.D.C. 1976) (upholding limited voting); LoFrisco v. Schaffer, 341 F. Supp. 743 (D. Conn. 1972) (upholding limited voting); Kaelin v. Warden, 334 F. Supp. 602 (E.D. Pa. 1971) (upholding limited voting); Campbell v. Bd. of Educ., 310 F. Supp. 94 (E.D.N.Y. 1970) (upholding the single transferable vote); Skolnick v. Illinois State Electoral Bd., 307 F. Supp. 691 (N.D. Ill. 1969) (per curiam) (upholding cumulative voting); McSweeney v. City of Cambridge, 665 N.E.2d 11 (Mass. 1996) (upholding the single transferable vote); Stephenson v. Ann Arbor Bd. of Canvassers, No. 75-10166 AW (Mich. Cir. Ct. 1975) (upholding instant runoff voting), *available at* http://www.fairvote.org/index.php?page=397 (last visited Feb. 5, 2006); Blaikie v. Power, 193 N.E.2d 55 (N.Y. 1963) (upholding limited voting); State *ex rel.* Sherrill v. Brown, 99 N.E.2d 779 (Ohio 1951) (upholding the single transferable vote); Moore v. Election Comm'rs of Cambridge, 35 N.E.2d 222 (Mass. 1941) (upholding the single transferable vote); Johnson v. New York, 9 N.E.2d 30 (N.Y. 1937) (upholding the single transferable vote); Reutener v. Cleveland, 141 N.E. 27 (Ohio 1923) (upholding the single transferable vote); Hile v. Cleveland, 141 N.E. 35 (Ohio 1923) (upholding the single transferable vote); Orpen v. Watson, 93 A. 853 (N.J. 1915) (upholding the Bucklin system); Fitzgerald v. Cleveland, 103 N.E. 512 (Ohio 1913) (upholding the Bucklin system); Adams v. Lansdon, 110 P. 280 (Idaho 1910) (upholding the Bucklin system); State *ex rel.* Zent v. Nichols, 97 P. 728 (Wash. 1908) (upholding the Bucklin system); Commonwealth v. Reeder, 33 A. 67 (Pa. 1895) (upholding limited voting).

96. *See* Holder v. Hall, 512 U.S. 874, 910 (1994) (Thomas, J., dissenting) ("[N]othing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2, or [a system] . . . based on transferable votes."); Williams v. Rhodes, 393 U.S. 23, 46 n.8 (1968) (Harlan, J., concurring in the judgment) ("A runoff election may be mandated if no party gains a majority. . . . Alternatively, the voter could be given the right . . . to indicate both his first and his second choice . . . if no candidate received a majority of first-choice votes, the second-choice votes could then be considered.").

ner of an election as the person having the greatest number of votes.[97] Other state constitutions state that the winner shall be determined by a plurality of the vote.[98] States enacted these provisions into their state constitutions to prohibit runoff elections and require that elections be concluded in one day.[99] One interpretation of these provisions is that the constitution requires plurality voting as the voting system. However, one could argue that with all of the voting systems considered in this Article, the winner is the candidate receiving the greatest number of votes after counting the votes in a particular manner. This argument is most persuasive for voting systems similar to plurality voting—such as limited voting and approval voting—but courts have made this argument for more complicated systems, such as the single transferable vote.[100]

In other states, the constitution does not explicitly restrict the definition of a vote, but state courts inferred a narrow definition that prohibited some voting systems. In striking down cumulative voting in 1890, the Michigan Supreme Court stated that "[t]he Constitution does not contemplate, but by implication forbids, any elector to cast more than one vote for any candidate for any office. This prohibition is implied from the system of representative government provided for in that instrument."[101] Similarly, in striking down the Bucklin system in 1915, the Minnesota Supreme Court stated that "[w]hen the Constitution was framed . . . the word 'vote' meant a choice for a candidate by one constitutionally qualified to exercise a choice. Since then it has meant nothing else."[102] In contrast, in upholding the single transferable vote, the Ohio Supreme Court defined a vote as "the formal expression of a wish, will, or choice"[103] and found that "[a]n indication by a preference number is clearly a formal expression of a preference and thus is

97. *See, e.g.*, R.I. CONST. art. IV, § 2 (2003) ("In all elections . . . the person or candidate receiving the largest number of votes cast shall be declared elected."); S.C. CONST. art. IV, § 5 ("In the general election for Governor, the person having the highest number of votes shall be Governor."); N.M. CONST. art. VII, § 5 (amended 2004) ("[T]he person who receives the highest number of votes for any office . . . shall be declared elected thereto.").

98. *See, e.g.*, FLA. CONST. art. VI, § 1 ("General elections shall be determined by a plurality of votes cast."); ME. CONST. art. V, pt. 1, § 3 (stating that elections for Governor are determined by a plurality of the votes cast).

99. *See, e.g.*, Opinion to the Governor, 6 A.2d 147, 154 (R.I. 1939) (Moss, J., dissenting).

100. Moore v. Election Comm'rs of Cambridge, 35 N.E.2d 222, 238 (Mass. 1941) (arguing in dicta that the single transferable vote does not violate the plurality requirement in the Massachusetts Constitution); Opinion to the Governor, 6 A.2d at 155 (Moss, J., dissenting) (arguing that the single transferable vote does not violate the plurality requirement in the Rhode Island Constitution).

101. Maynard v. Bd. of Dist. Canvassers, 47 N.W. 756, 759 (Mich. 1890).

102. Brown v. Smallwood, 153 N.W. 953, 956 (Minn. 1915).

103. State *ex rel.* Sherrill v. Brown, 99 N.E.2d 779, 781 (Ohio 1951) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1942)).

an indication of a vote."[104] In addition to using ranked ballots, several states have required the voter to rank more than one candidate for the ballot to be valid. This requirement can prevent some forms of strategic voting.[105] Oklahoma found that the requirement interfered with the right to vote and stated that "the effect is just the same whether such interference comes from a provision of statute or from the point of the bayonet."[106] Idaho,[107] Minnesota,[108] New Jersey,[109] and Washington[110] upheld such requirements, finding that they did not interfere with the right to vote.

B. Plurality Voting

Plurality voting has been challenged on at least one occasion. In the 1970 election for U.S. Senator of New York, the winning candidate received 39 percent of the vote, the second candidate received 37 percent of the vote, and the third candidate received 24 percent of the vote.[111] Plaintiffs claimed that the Seventeenth Amendment, providing that United States Senators be "elected by the people," required that the winning candidate receive a majority of the vote.[112] The court easily dismissed the plaintiffs' claim as "devoid of merit," finding that the history and intent of the Seventeenth Amendment clearly indicated that a majority was not required for election.[113]

C. Runoff Voting

Runoff voting has the laudatory goal of enhancing the reliability of an election. Congress recognized this principle when it passed a statute in 1866 requiring that U.S. senators, then elected by state legislatures and not by the people, be elected by a majority of the state legislators.[114] State and local governments have enacted runoff voting in response to candidates winning elections with less than a majority of the vote. For example, Arkansas enacted runoff voting in 1937 after the winner of the Democratic primary for Governor received only 32 percent of the vote, and New York

104. *Id.*
105. *See supra* Part II.C.
106. Dove v. Oglesby, 244 P. 798, 800 (Okla. 1926).
107. Adams v. Lansdon, 110 P. 280, 282 (Idaho 1910).
108. Farrell v. Hicken, 147 N.W. 815, 816 (Minn. 1914). The following year, the Minnesota Supreme Court found the Bucklin system unconstitutional. *See supra* note 102 and accompanying text.
109. Orpen v. Watson, 93 A. 853, 855 (N.J. 1915).
110. State *ex rel.* Zent v. Nichols, 97 P. 728, 733 (Wash. 1908).
111. Phillips v. Rockefeller, 435 F.2d 976, 976 (2d Cir. 1970).
112. *Id.*
113. *Id.* at 979.
114. *See id.*

City adopted runoff voting in 1972 after the winner of the Democratic primary received only 33 percent of the vote.[115] In upholding Arkansas's runoff voting statute from constitutional challenge, the court described runoff voting as a "bedrock ingredient of . . . political philosophy."[116] Runoff voting also has clear disadvantages that must be weighed against the benefits: holding a second election doubles the cost of the election, some voters may have difficulty leaving work to vote a second time, and candidates must raise more money for the longer campaign season.

Another criticism of runoff voting is that it makes it more difficult for minority voters to elect a minority candidate. With plurality voting, a black candidate could have a better chance of winning if candidates favored by the white majority split the white vote. In Arkansas in the early 1970s, several black candidates won elections with a plurality when white candidates split the majority vote.[117] In response, the governments enacted runoff voting.[118] A court held that the runoff statute was unconstitutional after finding discriminatory intent and discriminatory effects.[119] Where plaintiffs have failed to show discriminatory intent and discriminatory results, courts have upheld runoff voting against equal protection challenges[120] and to challenges under the Voting Rights Act.[121] Courts have not found discriminatory intent without discriminatory results, and vice versa.[122]

Of course, runoff voting can also help black candidates by preventing black candidates from splitting the black vote or by allowing coalitions with other minority groups. Thus, no clear principle exists for determining when runoff voting causes discriminatory results. One court has held that runoff voting never causes discriminatory results.[123] *The New York Times* ex-

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115. BULLOCK & JOHNSON, *supra* note 13, at 2, 80.

116. Whitfield v. Democratic Party of Ark., 686 F. Supp. 1365, 1370 (E.D. Ark. 1988), *aff'd*, 902 F.2d 15 (8th Cir. 1990) (en banc) (5-5 decision).

117. *See* Jeffers v. Clinton, 740 F. Supp. 585, 594 (E.D. Ark. 1990).

118. *See id.* at 594–95.

119. *See id.* at 595.

120. *See* Brooks v. Miller, 158 F.3d 1230, 1241 (11th Cir. 1998); Butts v. New York, 779 F.2d 141, 150 (2d Cir. 1985); *Whitfield*, 686 F. Supp. at 1370; Procaccino v. Bd. of Elections, 341 N.Y.S.2d 810, 819 (N.Y. Special Term 1973) (the equal protection challenge was based on disparate treatment of cities and not on race).

121. To show a violation of § 2, plaintiffs must show discriminatory results, but need not show discriminatory intent. *See* 42 U.S.C. § 1973(b) (2001). Courts upholding runoff voting against § 2 challenges have found neither discriminatory intent nor discriminatory effect. *See Brooks*, 158 F.3d at 1237–41; *Butts*, 779 F.2d at 147–48; *Whitfield*, 686 F. Supp at 1370, 1387.

122. *See Brooks*, 158 F.3d at 1243.

123. Circuits have come to different conclusions as to whether runoff voting could ever cause discriminatory results. The Second Circuit found that elections for single-member offices will never violate § 2, because "[t]here can be no equal opportunity for representation within an office filled by one person." *Butts*, 779 F.2d at 148. Other courts have declined to follow *Butts*. *See Brooks*, 158 F.3d at 1241; *Whitfield*, 686 F. Supp. at 1378.

pressed the conflict well: "No theory or value of government should require a party to create a free-for-all lottery election just to satisfy the long-shot hopes of some of its members. And no candidate should want the burden of having to govern with a lesser mandate."[124]

D. At-Large Voting

At-large voting clearly operates to suppress the representation of minority groups, whether racial, economic, political, or otherwise. Consider the hypothetical City of Discord, which will be referred to throughout this Article. Discord has a nine-member city council and a polarized electorate consisting of 55 percent rural voters and 45 percent urban voters. Since each voter may select nine candidates and the rural voters constitute majority of the population, the rural voters can elect all rural candidates to the city council. If instead elections were from single-member districts, urban voters would likely constitute a majority in some of the districts and elect urban representatives. While this effect is undeniable, the virtues of at-large voting have been hotly debated.

The conversion of municipal voting systems from single-member districts to at-large voting was the goal of a so-called progressive-reform movement in the early twentieth century.[125] The reformers touted the advantages of at-large voting. They argued that at-large voting would create a more cohesive city government, would decrease localism and corrupt ward politics, and would elect a "better class of council members."[126] The supposed advantages of at-large voting are not easily quantified and are thus difficult to verify empirically.[127] The reformers were successful, and, as of 1982, a survey found that 87.6 percent of cities with a population of over 25,000 elected at least some of their council members at large.[128] While some of the reformers may have had nondiscriminatory intentions, for others, the touted advantages of at-large voting appear to have been euphemisms for "purify[ing] the ballot"[129] and keeping people of "inferior moral fiber of foreign-born and lower class electorates"[130] off of the ballot.

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124. Editorial, *Runoffs Need No Fixing*, N.Y. TIMES, Mar. 28, 1985, at A30.

125. Chandler Davidson, *Minority Vote Dilution: An Overview*, *in* MINORITY VOTE DILUTION 1, 11 (Chandler Davidson ed., 1984).

126. Engstrom & McDonald, *supra* note 54, at 203–04 (internal quotation marks omitted).

127. *See* Paul H. Edelman, *Making Votes Count in Local Elections: A Mathematical Appraisal of At-Large Representation*, 4 ELECT. L.J. 258, 262–63 (2005).

128. Walawender, *supra* note 28, at 1239 tbl.A.

129. Davidson, *supra* note 125, at 11 (internal quotation marks omitted).

130. Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation*, *in* MINORITY VOTE DILUTION 65, 67 (Chandler Davidson ed., 1984) (quoting Melvin G. Holli, *Urban Reform*, *in* THE PROGRESSIVE ERA 137 (Lewis L. Gould ed., 1974)).

History shows that some governments adopted at-large voting to prevent the election of black candidates at the time of the adoption of the Fifteenth Amendment in 1870.[131] In 1870 in Atlanta, two of the ten members of the city council were black.[132] Atlanta adopted at-large voting in 1871, and not a single black candidate was elected until 1953.[133] A "prime purpose[] [was] the strengthening of upper-class influence and the corresponding weakening of lower-class influence in politics."[134] While Atlanta appears to have adopted at-large voting for discriminatory reasons, other cities may have adopted at-large voting purely for legitimate good-government reasons.

Empirical evidence confirms that at-large voting discriminates in practice. Minority candidates are less likely to be elected under at-large voting than with single-member districts.[135] One study found that "the ratio of a city's percentage of black city council members to the percentage of the city's black population" was 0.40 for at-large voting and 0.77 for single-member districts.[136] Thus, according to this study, at-large voting decreases black representation by a factor of two when compared with single-member districts.

The discrimination inherent in at-large voting is widely recognized. Academics criticize at-large voting for suppressing minority representation,[137] and "few generalizations in political science appear to be as well verified as the proposition that at-large elections tend to be discriminatory towards black Americans."[138] Congress recognized the dangers of at-large voting and required states to use single-member districts for congressional elections.[139] Courts have also recognized the discrimination inherent in at-

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131. *See* J. Morgan Kousser, *The Undermining of the First Reconstruction*, *in* MINORITY VOTE DILUTION 27, 32–33 (Chandler Davidson ed., 1984); Bolden v. City of Mobile, 542 F. Supp. 1050, 1056–68 (S.D. Ala. 1982).

132. Kousser, *supra* note 131, at 32.

133. *Id.*

134. *Id.* at 37.

135. *See* Walawender, *supra* note 28, at 1238; Engstrom & McDonald, *supra* note 54, at 203–04; Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982, 992–98 (1981).

136. Walawender, *supra* note 28, at 1233.

137. *See* Davidson, *supra* note 125 (prefacing eleven academic articles in a collection, each criticizing at-large voting); Thornburg v. Gingles, 478 U.S. 30, 47–48 (1986) (listing other commentators critical of at-large voting).

138. Engstrom & McDonald, *supra* note 54, at 207.

139. *See* 2 U.S.C. § 2(c) (2001); Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 251–52 n.43 (1995) (noting that Congress's motivation in passing § 2(c) was to prevent minority vote dilution). By requiring single-member districts, Congress prohibited at-large voting and proportional representation. A better solution would have been to prohibit only at-large voting, which would have allowed states to use voting systems that provide proportional representation.

large voting, noting that at-large voting will "tend to submerge electoral minorities and overrepresent electoral majorities."[140] For this reason, the Supreme Court "has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a singular combination of unique factors that justifies a different result."[141]

Despite wide recognition of the discrimination inherent in at-large voting, at-large voting is not per se unconstitutional.[142] Particular instances of at-large voting may be unconstitutional, and the standards for challenges under the Equal Protection Clause and under the Voting Rights Act appear to be different. To succeed on an equal protection claim, plaintiffs must show that the government acted with discriminatory intent.[143] In 1982, Congress amended § 2 of the Voting Rights Act[144] so that a discriminatory intent was not required to establish a vote dilution claim. Although application of the amended § 2 was summarily affirmed by the Supreme Court,[145] commentators have questioned the constitutionality of the amended § 2.[146] Thus, to succeed on a claim under the Voting Rights Act, plaintiffs need

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140. Connor v. Finch, 431 U.S. 407, 415 (1977).

> This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population. The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.

Thornburg v. Gingles, 478 U.S. 30, 47–48 (1986) (internal quotation marks and citations omitted).

> At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts.

Rogers v. Lodge, 458 U.S. 613, 616 (1982); *see also id.* at 632 (Stevens, J., dissenting) ("It might indeed be wise policy to accelerate the transition of minority groups to a position of political power commensurate with their voting strength by amending the Act to prohibit the use of multimember districts in all covered jurisdictions.").

141. Connor v. Finch, 431 U.S. 407, 415 (1977) (internal quotation marks and citations omitted).

142. *See* Fortson v. Dorsey, 379 U.S. 433, 438–39 (1965); City of Mobile v. Bolden, 446 U.S. 55, 66 (1980).

143. *See Bolden*, 446 U.S. at 66 ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment.").

144. 42 U.S.C. § 1973 (2004).

145. *See* Miss. Republican Executive Comm. v. Brooks, 469 U.S. 1002 (1984).

146. *See* Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 749–52 (1998).

only show discriminatory results.[147] Courts apply the test from *Thornburg v. Gingles*[148] to determine whether a particular application of at-large voting causes discriminatory results.

Plaintiffs have challenged at least three types of discrimination inherent in at-large voting. First, at-large voting submerges the voting power of minority voters. The example at the beginning of this Part explains how minority voters are less likely to elect representatives with at-large voting than with single-member districts. Second, at-large voting in combination with residency districts can impose a representative upon a district against the will of the district.[149] Under this scheme, the city is broken into single-member districts solely for the purpose of establishing residency requirements. A separate election is held for each district, and the candidates must reside in the district, but the voters of the entire city vote in each election. A candidate could win in a residency district even though no voter residing in the district voted for that candidate. Third, a legislative districting scheme containing a combination of single-member districts and multi-member districts with at-large voting gives greater power to voters in multi-member districts because they can influence the election of a larger number of members of the legislature.[150] The Supreme Courts of Iowa and North Carolina have found that these mixed districting schemes violate the equal protection rights of voters under their state constitutions.[151] The Iowa Supreme Court stated: "If the Equal Protection Clause is violated when certain representatives are given an unequal number of constituents, the converse is also true. The Equal Protection Clause is violated if certain constituents are given an unequal number of representatives."[152] Other states use mixed systems for their state legislatures.[153]

E. Limited Voting

Several state courts have found that limited voting violates their state constitutions.[154] In each case, the court construed a constitutional provision

147. *See* United States v. Blaine County, 363 F.3d 897, 907 (9th Cir. 2004), *cert. denied*, 2005 U.S. Lexis 3215 (Apr. 18, 2005).

148. 478 U.S. 30, 48–52 (1986).

149. *See* Fortson v. Dorsey, 379 U.S. 433, 436–37 (1965).

150. *See* John F. Banzhaf III, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle?*, 75 YALE L.J. 1309 (1966) (arguing that voters in multi-member districts have greater voting power than voters in single-member districts).

151. *See* Stephenson v. Bartlett, 562 S.E.2d 377, 395 (N.C. 2002); Kruidenier v. McCulloch, 142 N.W.2d 355, 371 (Iowa 1966).

152. *Kruidenier*, 142 N.W.2d at 375.

153. *See* AMY, *supra* note 6, at 55.

154. *See* Mezvinsky v. Davis, 459 A.2d 307 (Pa. 1983) (finding that limited voting for judicial elections violated the state constitution); Opinion to the Governor, 6 A.2d 147 (R.I. 1939) (finding that the limited voting aspect of the single transferable vote violated the

guaranteeing each voter "the right to vote in all elections" to require that each voter be able to cast a separate vote for each office to be filled.[155] Other courts have commented on the fallacy of this reasoning:

> Assuming that the borough of Brooklyn is entitled to twelve councilmen, it is conceded by everybody that the borough could be divided into twelve districts, and one councilman elected from each district. This would give Brooklyn twelve representatives in the council, and yet the people of Brooklyn had only voted for one out of the twelve. This is said to be legal . . . . Remove the artificial lines creating the districts, and give Brooklyn the same twelve men in the council, it is said to be illegal if the people can only vote for one of the twelve.[156]

A more cogent explanation for the state courts' striking down of limited voting is that they interpreted the definition of a vote under their constitutions to preclude voting systems that provide proportional representation.

F. Challenges Under the U.S. Constitution

Plaintiffs have facially challenged alternative voting systems on equal protection, due process, and freedom of association arguments, but none have succeeded. In considering equal protection challenges, courts address whether each voter has "the right to have his or her vote counted equally."[157] Some courts have found that all voters were treated equally and thus no violation of equal protection,[158] while other courts have found that the vot-

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state constitution); People *ex rel*. Devine v. Elkus, 211 P. 34 (Cal. 1922) (finding that the limited voting aspect of the single transferable vote violated the state constitution); Wattles v. Upjohn, 179 N.W. 335 (Mich. 1920) (finding that the limited voting aspect of the single transferable vote violated the state constitution); State v. Constantine, 42 Ohio St. 437 (1884) (finding that limited voting violated the state constitution), *overruled by* Reutener v. Cleveland, 141 N.E. 27 (Ohio 1923) (finding that the single transferable vote did not violate the state constitution).

155. *Mezvinsky*, 459 A.2d at 309 ("[J]udges . . . shall be elected . . . by the electors of the Commonwealth . . . .") (internal quotation marks omitted); Opinion to the Governor, 6 A.2d at 150 (Each qualified voter "*shall have a right* to vote in the *election* of *all* civil officers.") (internal quotation marks omitted); *Elkus*, 211 P. at 35 ("[Every qualified elector] shall be entitled to vote at all elections."); *Wattles*, 179 N.W. at 336 ("In all elections every [qualified voter] shall be an elector and entitled to vote."); *Constantine*, 42 Ohio St. at 442 (Each elector "shall be entitled to vote at all elections.").

156. Johnson v. City of New York, 9 N.E.2d 30, 32 (N.Y. 1937).

157. McSweeney v. City of Cambridge, 665 N.E.2d 11, 15 (Mass. 1996); *see also* Bush v. Gore, 531 U.S. 98, 104–05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

158. *See* LoFrisco v. Schaffer, 341 F. Supp. 743, 748 (D. Conn. 1972) (finding no equal protection violation with limited voting); Skolnick v. State Electoral Bd., 307 F. Supp. 691, 698 (N.D. Ill. 1969) (finding no equal protection violation from cumulative voting); Campbell v. Bd. of Educ., 310 F. Supp. 94, 103–04 (E.D.N.Y. 1970) (finding no equal protection violation from the single transferable vote).

ing system survived strict scrutiny.[159] Although alternative voting systems may allow voters to select or rank multiple candidates, these voting systems do not violate one person, one vote requirements since each person's vote has the same weight.[160] In considering due process challenges, courts have found alternative voting systems to be a reasonable or rational method for conducting elections.[161] In a First Amendment challenge to limited voting, one court found the voting system to be "entirely consistent with First Amendment principles of freedom of expression and association."[162] More recently, federal courts have broadly approved alternative voting systems under the U.S. Constitution.[163]

IV. THE ROLE OF THE COURTS IN POLICING THE RIGHT TO VOTE

The Supreme Court has not provided a clear standard for protecting the right to vote.[164] One commentator has stated that "[i]n a contradiction unparalleled in constitutional law, the Court has said both that the Constitution '[u]ndeniably' protects the right to vote in state and federal elections and that the right to vote 'is not a constitutionally protected right.'"[165] Courts must apply strict scrutiny in some instances but "to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[166]

Both the Court and commentators are divided as to how active a role federal courts should take in policing the electoral process. Some commentators argue that the courts should take a limited role and that "the sole pur-

159. *See* Orloski v. Davis, 564 F. Supp. 526, 531 (M.D. Pa. 1983) (finding no equal protection violation with limited voting), *overruled on alternative grounds by* Mezvinsky v. Davis, 459 A.2d 307 (Pa. 1983).

160. *See* Pildes & Donoghue, *supra* note 139, at 282 ("[C]umulative voting does *not* violate the principle of one person, one vote; as long as each person has equal voting power, the formal number of votes cast is irrelevant to the equal-protection concerns embodied in the one person, one vote doctrine."); Marron, *supra* note 21, at 355–57.

161. *See Orloski*, 564 F. Supp. at 532 (finding limited voting to be a reasonable method for obtaining minority representation in judicial elections); *LoFrisco*, 341 F. Supp. at 748 (finding that limited voting is a rational means for obtaining minority representation); *Campbell*, 310 F. Supp. at 105 (finding that the single transferable vote was not an arbitrary method for conducting elections).

162. Hechinger v. Martin, 411 F. Supp. 650, 653 (D.D.C. 1976) (finding minority representation through limited voting to be consistent with the First Amendment).

163. *See* Dillard v. Town of Cuba, 708 F. Supp. 1244 (M.D. Ala. 1988) (upholding limited voting); Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870 (M.D. Ala. 1988) (upholding cumulative voting).

164. *See* James A. Gardner, *Liberty, Community and the Constitutional Structure of the Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893 (1997).

165. *Id.* at 894 (citations omitted).

166. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

pose of judicial review is to protect individual rights."[167] Meanwhile, others argue that courts should take a more expansive role and that "the purpose of judicial review is to assure that democratic institutions behave in ways that are respectful of democratic principles."[168] The recent Supreme Court decision in *Vieth v. Jubelirer*[169] exemplifies the division among the current Court. Four Justices argued that courts should not intervene in claims of political gerrymandering and four argued that they should. Justice Kennedy agreed that the Court should not intervene in this particular case but did not foreclose the possibility that the Court could intervene in future political gerrymandering cases.[170] With two new Justices on the Supreme Court, it is unclear in which direction the Court will go. This Article sides with the expansive view and argues that the Court should recognize the right to cast an equally effective vote and the right to a reliable electoral outcome.

V. THE RIGHT TO AN EQUALLY EFFECTIVE VOTE

This Part, first, defines the right to an equally effective vote. This right evolves naturally from the Court's other voting-rights jurisprudence. Next, this Part considers whether any of the voting systems considered in this Article violate this right to an equally effective vote. Because none of the voting systems discussed in this Article explicitly classify voters,[171] there is no obvious violation. Voting systems, however, may implicitly classify voters and could surreptitiously violate this right.

A. Defining the Right to an Equally Effective Vote

At a minimum, the right to vote clearly guarantees each voter the equal right to cast a ballot and have it counted.[172] To protect the right to cast a ballot, courts have prohibited poll taxes,[173] limited durational residence requirements,[174] and required uniform standards for counting ballots.[175] At a maximum, the right to vote does not include the right to actual proportional

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167. Gay-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1101 (2005) (reviewing RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* (2003)).

168. *Id.*

169. 541 U.S. 267 (2004).

170. *See id.* at 316–17.

171. The public choice criterion of anonymity is analogous to prohibiting explicit classifications of voters.

172. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

173. *See id.* at 670.

174. Dunn v. Blumstein, 405 U.S. 330, 359–60 (1972).

175. Bush v. Gore, 531 U.S. 98, 105–06 (2000). The precedential value of this holding is not clear. *Id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

representation or even the right to any actual representation at all.[176] Such a requirement would be clearly unmanageable in a pluralistic community. No standard exists for deciding which groups require representation (groups could be based on ethnicity, class, religion, political ideology, or other criteria) or what is fair representation among the different groups in the community.[177] In every election, there must be voters who vote for losing candidates and thus go unrepresented. Between these two endpoints lies the right to cast an equally effective vote.

This right is first approached as a unification of other specific instances of the right to vote. Next, the right is specifically formulated as an *a priori* or procedural right to distinguish it from the nonexistent right to representation. Finally, the justiciability of this right is considered in light of the Court's recent jurisprudence.

1. *Unification of Disparate Rights*

The Court first announced a right to an equally effective vote in requiring equal apportionment of congressional and state legislative districts.[178] The Court stated that the Constitution requires "complete equality for each voter"[179] and that "each citizen have an equally effective voice."[180] With unequally apportioned legislative districts, each voter clearly has the right to cast a vote, but voters from smaller legislative districts will have a more effective vote than voters from larger districts. Thus, equal apportionments protect the right of voters to cast an equally effective vote.

In considering political gerrymandering claims, the Court further elaborated on the right to an equally effective vote. The Court in *Davis v. Bandemer* stated that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's . . . influence on the political process" and that voters must be able to "effectively influence the political process."[181] Thus, preventing political gerrymandering also protects the right of voters to cast an equally effective

176. Vieth v. Jubelirer, 541 U.S. 267, 288 (2004) ("[The Constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups.").

> [T]he right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation. And the Court's decisions hold squarely that they do not.

City of Mobile v. Bolden, 446 U.S. 55, 78–79 (1980) (citation omitted).

177. *See Bolden*, 446 U.S. at 79 n.26.

178. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964).

179. Wesberry v. Sanders, 376 U.S. 1, 14 (1964).

180. *Reynolds*, 377 U.S. at 565.

181. 478 U.S. 109, 110, 133 (1986).

vote. More recently, in *Vieth v. Jubelirer*,[182] the Court has called into serious question whether a judicially manageable standard exists for policing political gerrymandering claims, but this does not negate the existence of the underlying right.

Although the peculiar circumstances of the Supreme Court's opinion in *Bush v. Gore* lend it uncertain precedential value, it also extends the idea of an equally effective vote to a new subject area, that of hand-counting ballots. The Court said that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[183] Quoting its equal apportionment jurisprudence, it also stated that "[i]t must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'"[184] If the principles underlying equal apportionment can extend to the hand counting of ballots, they can surely extend to other areas as well.

These three cases exemplify the underlying principle of the right to an equally effective vote. However, they are not meaningful in isolation and thus must be part of a broader scheme. The three cases achieve certain ends but do not recognize a common means to get to that end. Recognizing a common means would unify these three disparate rights and could potentially protect the right to vote in other situations.

2. *An* A Priori *or Procedural Right*

The right to an equally effective vote must be expressed as an *a priori* right in order to clearly distinguish it from a right to actual representation. Alternatively, the right to an equally effective vote can also be viewed as a procedural right or an equal opportunity to compete in the political process.[185] Voters are competing with one another to put a desired candidate into office. The right to an equally effective vote is determined by the voting procedures and not by any particular outcome. The inability of a group to obtain representation in a particular election is not relevant to the analysis. However, the repeated failure of a group to obtain representation over many elections may be evidence that voting procedures prevent the members of the group from having an equally effective vote.

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182. 541 U.S. 267 (2004).

183. Bush v. Gore, 531 U.S. 98, 104–05 (2000).

184. *Id.* at 105 (quoting *Reynolds*, 377 U.S. at 555).

185. The Supreme Court has recognized that the inability to "compete on an equal footing" is a cognizable harm under the Equal Protection Clause when seeking admission to a state university or when applying for a contract with the state. Gratz v. Bollinger, 539 U.S. 244, 261–62 (2003) (quoting Ne. Fla. Chapter of Assoc'd Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993)).

The Supreme Court has had difficulty distinguishing the right to an equally effective vote with the right to representation. In *Whitcomb v. Chavis*, the district court found that at-large voting deprived minority voters from having an equally effective vote, but the Supreme Court reversed, stating that the minority group merely failed to obtain representation.[186] Similarly, Justice Marshall's dissenting opinion in *City of Mobile v. Bolden* claimed that at-large voting denied voters an equally effective vote,[187] but the plurality opinion unexplainably transformed this claim into a right to actual representation.[188] Emphasizing this distinction should prevent the Court from confusing these two rights in the future.

The procedural definition of the right to an equally effective vote comports well with Professor Ely's procedural view of constitutional rights. With reference to footnote four of *United States v. Carolene Products*,[189] he stated that "it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open."[190] Further, "the Court should also concern itself with what majorities do to minorities."[191] The majority can always outvote the minority, but guaranteeing the right to an equally effective vote provides an important check to the majority's power. The Constitution prohibits the majority from disenfranchising the minority; it should also prohibit the majority from granting the minority less effective votes.

The effectiveness of a person's vote can be measured by its expected value. As an example, reconsider the hypothetical City of Discord, with a polarized electorate consisting of 55 percent rural voters and 45 percent urban voters, and its nine-member city council. If the council were to be elected by single-member districts, then the likelihood of the election of members of any particular group would depend heavily on how the districts are drawn. Under one set of districts, the rural voters could control the entire council, while under another set of districts, urban voters could control

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186. *See infra* notes 213–16 and accompanying text.

187. *See* City of Mobile v. Bolden, 446 U.S. 35, 122 (1980) (Marshall, J., dissenting) ("To prove unconstitutional vote dilution, the group is also required to carry the far more onerous burden of demonstrating that it has been effectively fenced out of the political process.").

188. *See id.* at 75–76 ("The theory of this dissenting opinion—a theory much more extreme than that espoused by the District Court or the Court of Appeals—appears to be that every 'political group,' or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers.").

189. 304 U.S. 144, 152–53 n.4 (1938).

190. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 76 (1980).

191. *Id.*

eight of the nine seats.[192] Considering the universe of possible districts (ignoring any restraints on bizarrely drawn districts and assuming a fair process for drawing districts), on average, rural voters will control 55 percent of the council (about five seats) and urban voters will control about 45 percent of the council (about four seats). Thus, the urban and rural voters have an equal opportunity to influence the election, and the expected value of an urban person's vote is the same as that of a rural person's vote. Although certain sets of districts will produce outcomes that unjustly favor one group over another, on average, districting provides for equally effective votes.

3. *Justiciability*

The Court's decisions considering claims of political gerrymandering in *Davis v. Bandemer*[193] and *Vieth v. Jubelirer*[194] provide further support that the Court should protect the right of voters to cast an effective vote. The issue in these two cases was whether political gerrymandering is a "justiciable controversy or a nonjusticiable political question."[195] An issue is a nonjusticiable political question if there is:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] . . . a lack of judicially discoverable and manageable standards for resolving it; [3] . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] . . . an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[196]

In *Davis v. Bandemer*, the Court found that political gerrymandering claims were not political questions and thus suitable for the courts.[197] In finding justiciability, the Court found that the issue of political gerrymandering passed all six of the requirements.[198] The Court, however, could not agree as to just what the judicially manageable standards were.[199]

Eighteen years later in *Vieth*, the Court reconsidered the issue of whether political gerrymandering is justiciable. The Court only addressed one of the six requirements: whether a judicially manageable standard ex-

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192. The power of urban voters will be maximized if one district contains all rural voters. Urban voters could then constitute a slight majority in each of the eight other districts.

193. 478 U.S. 109 (1986).

194. 541 U.S. 267 (2004).

195. *Bandemer*, 478 U.S. at 118; *see also Vieth*, 541 U.S. at 272.

196. *Bandemer*, 478 U.S. at 121 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

197. *See id.* at 127.

198. *See id.* at 123.

199. *See Vieth*, 541 U.S. at 279.

isted.[200] Four Justices thought there was a manageable standard but could not agree upon it,[201] four found no manageable standard,[202] and one was undecided.[203] Because the Justices in *Vieth* could have disposed of the justiciability issue on any of the six requirements but only addressed one, it could be presumed that the Court was unanimous that political gerrymandering satisfied the other five requirements. Since there was no majority opinion in *Vieth*, *Bandemer*'s holding that political gerrymandering is justiciable still stands.

The issue of political gerrymandering at issue in *Bandemer* and *Vieth* is one example of the Court adjudicating the political process to protect the right of voters to cast effective votes. Because of the complexities in drawing districts, absolute equality is not a feasible criterion, but the Court agreed that protecting the right to cast an effective vote passed at least five of the justiciability requirements.

In considering a more general right to cast an equally effective vote, the Court would have to again consider justiciability. Given the holdings in *Bandemer* and *Vieth*, five of the six justiciability requirements would likely be satisfied. Thus, in considering any particular incarnation of the right to cast an effective vote, the Court would need to determine only whether a judicially manageable standard existed.

B. At-Large Voting

Commentators have argued for greater voting equality in the specific context of at-large voting. This argument has lain dormant for the last twenty years,[204] and this Article takes a fresh look in light of the Court's more recent jurisprudence.

1. *The Court's Jurisprudence*

The Court's standard for at-large voting arose at the same time as its standard for one person, one vote challenges, and the former should be considered in light of the latter. The Court's decision in *Reynolds v. Sims*,[205] requiring that both houses of state legislatures be apportioned equally, caused much controversy, and commentators harshly criticized the deci-

200. *Id.* at 27–72 (plurality opinion).

201. *Id.* at 317–43 (Stevens, J., dissenting); *id.* at 343–55 (Souter, J., dissenting (joined by Ginsberg, J.)); *id.* at 355–68 (Breyer, J., dissenting).

202. *Id.* at 305 (plurality opinion).

203. *Id.* at 317 (Kennedy, J., concurring in the judgment).

204. *See* Blacksher & Menefee, *supra* note 23; Walter L. Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666 (1972).

205. 377 U.S. 533 (1964).

sion.[206] Although at-large voting (or multi-member districts) was not in issue in *Reynolds*, the Court's standard for at-large voting begins there. The majority opinion in *Reynolds* noted multi-member districts solely for justifying its intrusion into state legislative apportionments:

> Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ.[207]

The Court then felt the need to qualify its own intimation that states can use multi-member districts, by noting that there are "practical problems inherent in the use of multimember districts."[208]

The *Reynolds* Court's askance comments on at-large voting do not even rise to the level of dicta. Despite this, just one term later the Court in *Fortson v. Dorsey* cited *Reynolds* in stating "we rejected the notion that equal protection necessarily requires the formation of single-member districts."[209] The *Fortson* Court summarily rejected the complaint that at-large voting always caused vote dilution, describing it as a "highly hypothetical assertion."[210] The Court did recognize that at-large voting would be unconstitutional in particular situations if it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population,"[211] but that question was not before the Court. Thus, without serious inquiry, the Court rejected the per se unconstitutionality of at-large voting.

The Court later took a more serious look at at-large voting in *Whitcomb v. Chavis*,[212] where the Court addressed multi-member districts for both houses of Indiana's legislature. The district court found that at-large voting "operate[d] to minimize and cancel out the voting strength of a minority racial group . . . and . . . deprive[d] them of the equal protection of the laws."[213] After the State failed to redistrict, the district court drafted an apportionment plan based on single-member districts.[214] The Court over-

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206. *See* ELY, *supra* note 190, at 120–21.

207. *Reynolds*, 377 U.S. at 576–77 (1964); *see also id.* at 579 ("Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts.") (citations omitted).

208. *Id.* at 579 n.58.

209. Fortson v. Dorsey, 379 U.S. 433, 436 (1965).

210. *Id.* at 437.

211. *Id.* at 439.

212. 403 U.S. 124 (1971).

213. *Id.* at 136.

214. *See id.* at 139.

turned the decision, finding no evidence that multi-member districts "were conceived or operated as purposeful devices to further racial or economic discrimination."[215] The Court confounded the right to an equally effective vote with the right to representation:

> [T]he failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.[216]

While there is clearly no right to actual representation, the Court did not acknowledge the possibility that the ghetto did not have an equal opportunity to vote. The Court concluded that "experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment."[217]

The Court's current authority on at-large voting is expressed in a plurality opinion in *Mobile v. Bolden*,[218] which a majority of the Court largely followed in *Rogers v. Lodge*.[219] The *Mobile* opinion does not comport well with previous Court opinions, and the Court seems unconcerned with—if not openly hostile to—protecting the voting rights of black voters in the City of Mobile. First, the Court grounded the equal protection claim in a suspect class analysis instead of a fundamental rights analysis.[220] The former apparently requires a difficult showing of discriminatory intent while the latter does not.[221] In contrast, one person, one vote challenges are grounded in a fundamental rights analysis and do not require discriminatory intent.[222] Second, the Court sanctioned the use of a clearly discriminatory voting system, requiring the city to merely express any nondiscriminatory purpose, whether pretextual or not, for choosing at-large voting.[223] In doing so, the Court essentially applied a rational basis test to the choice of a voting system. To justify at-large voting, the Court erroneously—if not invidi-

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215. *Id.* at 149.
216. *Id.* at 153.
217. *Id.* at 159–60.
218. City of Mobile v. Bolden, 446 U.S. 55 (1980).
219. Rogers v. Lodge, 458 U.S. 613 (1982).
220. *See Bolden*, 446 U.S. at 67–68. In contrast, the *Bandemer* Court explicitly revived a political challenge to at-large voting: "In the multimember district cases, we have also repeatedly stated that districting that would 'operate to minimize or cancel out the voting strength of racial *or political* elements of the voting population' would raise a constitutional question." Davis v. Bandemer, 478 U.S. 109, 119 (1986). The emphasis on "political" was added by the *Bandemer* Court and contrasts sharply with *Bolden*'s exclusive focus on race.
221. *See Bolden*, 466 U.S. at 67–68; *id.* at 112–21 (Marshall, J., dissenting).
222. *See id.* at 116 (Marshall, J., dissenting).
223. *See id.* at 71 n.17 (Stewart, J.).

ously—stated that it "was *universally* heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government."[224]

> In support of this view, Justice Stewart cited only one pertinent source, Banfield and Wilson's *City Politics*, blatantly misread the relevant sentence on the page he cited, and failed to note that Banfield and Wilson elsewhere in the book devoted a full page to the deleterious effect of at-large systems on black representation.[225]

Third, the plurality ignored Justice Marshall's argument that vote dilution denied voters an equally effective vote,[226] and instead transformed this claim into a right to actual representation.[227] Finally, the Court trivialized discrimination against blacks in Mobile. In the face of strong evidence of racism and discrimination[228] the Court stated that "evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of [at-large voting]."[229] In dissent, Justice Marshall described the Court's opinion as "an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious."[230] On remand, the district court made highly detailed findings of racism and discrimination against blacks in Mobile, found that at-large voting was adopted with discriminatory intent, and invalidated the system.[231]

In two cases, *White v. Regester* and *Rogers v. Lodge*, the Court upheld lower courts' decisions that at-large voting diluted the voting power of minority groups in violation of the Equal Protection Clause.[232] The Court upheld these decisions because the plaintiffs had successfully made the difficult showing of discriminatory intent on the part of the defendants. In contrast, to show vote dilution through unequal apportionments, plaintiffs do not need to make this difficult showing. The Court has yet to squarely address whether at-large voting violates the right to an equally effective vote, choosing instead to sidestep the issue.[233]

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224. *Id.* at 70 n.15 (emphasis added).

225. *See* Kousser, *supra* note 131, at 37.

226. *See Bolden*, 446 U.S. at 122 (Marshall, J., dissenting).

227. *See id.* at 75–76.

228. *Id*. at 71 ("The trial court also found that city officials had not been as responsive to the interests of Negroes as to those of white persons."); *id.* at 73 ("[N]o Negro had been elected to the Mobile City Commission."); *id.* at 73 ("[P]ersons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services."); *id.* at 74 ("[T]he District Court and the Court of Appeals supported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama.").

229. *Id.* at 74.

230. *Id.* at 141 (Marshall, J., dissenting).

231. *See* Bolden v. City of Mobile, 542 F. Supp. 1050, 1056–68 (S.D. Ala. 1982).

232. White v. Regester, 412 U.S. 755, 767, 769–70 (1973); Rogers v. Lodge, 458 U.S. 613, 627 (1982).

233. *See supra* notes 216, 226, 227 and accompanying text.

2. *Unequally Effective Votes*

The justification for at-large voting is that it provides for representation of city-wide interests rather than local interests, but city-wide interests specifically means majority interests, which will be favored at the expense of minority (local) representation. This justification for at-large voting suggests that minority voters will have less effective votes than majority voters. The hypothetical City of Discord exemplifies this.

In Discord, if the rural voters can prevent the splitting of the rural vote among more than nine rural candidates, then the rural voters will control the entire city council. Each rural voter will help elect nine candidates. Even if the urban voters single-shot their vote and only one urban candidate enters the race, the urban voters will not elect a single member of the city council. Under this scenario, an urban vote is worth nothing. If the rural majority loses discipline and more than nine rural candidates compete for the nine seats, then the value of the urban vote increases, but its value is still far less than that of a rural vote.

One response to this argument is the tradeoff of descriptive representation versus substantive representation.[234] With descriptive representation, minority voters will be able to elect a member of their group to represent them in the legislative body. In contrast, with substantive representation, minority voters may not be able to elect a member of their group, but they may be able to influence the winning candidate enough that the winning candidate is responsive to their needs. This is a viable tradeoff when drawing voting districts since substantive representation could maximize a minority group's influence at the expense of their descriptive representation.[235] But there is no such tradeoff with at-large voting. In the City of Discord, the entire city council represents the views of the city as a whole. The winning candidates need only curry favor with the majority in order to be elected. The winning candidates have no incentive to pursue the needs of the minority population because they maximize their chances of being elected by serving the needs of the majority. The underlying purpose of at-large voting appears contrary to the notion of substantive representation itself.

The only instance where at-large voting would give equal weight to the votes of all voters is where the community consists of no minority groups or opinions, and all voters have identical values. Although the Court has espoused a vision where political ideology will be independent of

234. *See* Georgia v. Ashcroft, 539 U.S. 461, 480–83 (2003); Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1562 (2002).

235. *See Ashcroft*, 539 U.S. at 483.

race,[236] at-large voting provides equally effective votes only where political ideology is independent of the individual and the voters are clones of one another. Thus, at-large voting always provides voters in the majority with a more effective vote than voters in the minority.

The harm to the right to cast an equally effective vote is much greater with at-large voting than with unequal apportionment. First, at-large voting is a sneak attack on the right to vote. While unequal apportionments clearly treat voters differently, at-large voting deceptively appears to treat all voters equally. Second, at-large voting subjugates the minority voters. Unequally apportioned districts favor one geographic region relative to another, but the disadvantaged region still elects a representative. Under at-large voting, the minority voters are second-class citizens dominated by the majority. Finally, at-large voting renders the minority votes completely ineffective, whereas with unequal apportionments the weight of the vote is merely diminished.

3. *Revisiting the Court's Standard for At-Large Voting*

There are four reasons that the Court should reconsider the constitutionality of at-large voting. First, at-large voting *always* operates to "minimize or cancel out the voting strength of racial or political elements of the voting population."[237] The identity of the group being discriminated against—racial, religious, economic, political, etc.—will vary with the circumstances, but all communities have majority and minority opinions, and at-large voting will hinder those minority opinions in obtaining representation. Even though the right to vote is a fundamental right, the current doctrine allows a government to use at-large voting, a discriminatory voting system, as long it does not explicitly declare that the voting system is being used for discriminatory purposes.

Second, by requiring equally apportioned districts, the Court caused a major upheaval in state and local governments—so much so that commentators questioned whether the one person, one vote decision would harm the prestige of the Court.[238] By allowing at-large voting, the Court ameliorated this upheaval by giving states greater flexibility in drawing their districts. Prohibiting at-large voting would not only have exacerbated the equal apportionment requirement but also created another independent requirement. Even if members of the Court would have supported prohibiting at-large voting, they may have been reluctant to do so under the circumstances. Fifteen years later, in considering a challenge to at-large voting, the Court in *Mobile v. Bolden* expressed a reluctance to consider challenges where an

236. *See* Miller v. Johnson, 515 U.S. 900, 914 (1995).
237. Fortson v. Dorsey, 379 U.S. 433, 439 (1965).
238. *See, e.g.*, ELY, *supra* note 190, at 121.

"entire system of local governance is brought into question."[239] Now that the equal apportionment dust has settled and the phrase "one person, one vote" is in the layperson's vocabulary, the Court should reconsider its holding on at-large voting.

Third, the Court's current standard for considering constitutional challenges to at-large voting, expressed by a plurality in *Bolden*, cannot easily be reconciled with the standard for one person, one vote challenges. Given the nearly identical harm to the right to vote caused by at-large voting and unequal apportionments—voters have the right to cast their votes, but some votes are more effective than others—the standards should be similar. The plurality, in essence, held that the Equal Protection Clause requires equal apportionment of voting districts but does not require voters to have an equally effective vote.[240] Equal apportionment of voting districts cannot be an end in itself, and the specific right protected by the one person, one vote rule must be identified. Further, the Court has also recognized the harms arising from political gerrymandering even though a judicially manageable standard is elusive.[241] This harm is also one of unequally effective votes, and if the Court will consider this harm in the context of political gerrymandering, it should also consider it in the context of at-large voting.

Finally, abolishing at-large voting would be an important check against partisan manipulation of the political process. Although the Court has not yet found a manageable standard for adjudicating bizarrely drawn districts,[242] courts have sought to restrain partisan manipulation through one person, one vote requirements. States may deviate from population equality in drawing their districts if "based on legitimate considerations incident to the effectuation of a rational state policy."[243] The Court has held that a state districting plan with a maximum population deviation of less than 10 percent is "insufficient to make out a prima facie case."[244] Most lower courts have interpreted the 10 percent rule as creating a rebuttable presumption of constitutionality.[245] In *Larios v. Cox*, a three-judge panel struck down a state apportionment scheme with a maximum deviation of less than 10 percent, finding the districting scheme to be "blatantly partisan and discriminatory,"[246] and that such partisan manipulation was not a legitimate justification for population deviation.[247] The Supreme Court summarily affirmed.[248]

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239. City of Mobile v. Bolden, 446 U.S. 55, 70 (1980).
240. *See id.* at 78.
241. *See* Vieth v. Jubelirer, 541 U.S. 267, 279 (2004).
242. *See id*. at 280–81.
243. Reynolds v. Sims, 377 U.S. 533, 579 (1964).
244. Brown v. Thomson, 462 U.S. 835, 842 (1983).
245. *See* Larios v. Cox, 300 F. Supp. 2d 1320, 1339–40 (N.D. Ga. 2004) (discussing and citing examples of lower court decisions).
246. *Id.* at 1347.
247. *See id.* at 1349.

By disallowing deviations from population equality for partisan reasons, the *Larios* court created an important check against partisan manipulation of the political process. Similarly, at-large voting can easily be used to manipulate the political process for partisan advantage. Using one at-large district, or even a mix of single-member and at-large districts, allows the majority party to increase the effectiveness of its members' votes. Prohibiting at-large voting would provide another important check against partisan manipulation.

The Court has set strict standards for protecting the principle of one person, one vote. For congressional districts, states must "make a good faith effort to achieve precise mathematical equality."[249] For state and local governments, the government has greater flexibility in designing districts, but governments must still "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."[250] Extending this strict standard to the case of at-large voting requires the complete abolition of at-large voting.[251] Unlike the problems with political gerrymandering, this is clearly a judicially manageable standard. Any form of at-large voting, regardless of the district size, gives voters in the majority a more effective vote than voters in the minority. Although this would require many state and local governments to change their voting systems from at-large voting to either a single-member district system or a proportional representation system, the Court's previous one person, one vote rulings also required major changes to state governments and even invalidated provisions of state constitutions.[252]

C. Strategic Voting and Knowledgeable Voters

A complicated system of vote casting or vote counting could favor more educated voters. Since literacy tests for voting are not unconstitutional,[253] the state is not obligated to use the simplest possible ballot in order to accommodate the largest number of voters. An excessively complicated procedure for casting a vote could prevent many voters from casting an ef-

248. *See* Cox v. Larrios, 542 U.S. 947, 947 (2004).

249. Kirkpatrick v. Preisler, 294 U.S. 526, 530–31 (1964).

250. *Reynolds*, 377 U.S. at 577.

251. With limited voting, voters select fewer candidates than the number to be elected. When voters are limited to selecting only one candidate, each voter's vote has the same weight. When voters are allowed to select more than one candidate, voters in the majority have a more powerful vote than voters in the minority, but the discrimination is less severe than with at-large voting. *See* Mulroy, *supra* note 55, at 339–40. By the same principles, the one person, one vote doctrine requires that limited voting systems limit each voter to selecting one candidate.

252. *See Reynolds*, 377 U.S. at 584.

253. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51–52 (1959).

fective vote. The two most complicated methods for casting votes are ranked ballots and cumulative voting. Ranked ballots have been used for more than sixty years in Cambridge, Massachusetts,[254] and are currently used for nationwide elections in Ireland[255] and Australia.[256] Fifty-seven local governments used cumulative voting as of 1997.[257] The continued use of these methods for casting ballots provides strong evidence that they are not too complicated for the electorate.

Another possible concern is whether voters must understand precisely how the votes are counted. Procedures for breaking cycles with Condorcet voting are complicated and counting votes with the single transferable vote is also complicated. Complicated vote-counting procedures could violate equal protection rights if it would enable knowledgeable voters to cast a more effective vote than other voters. Because the procedures for casting a vote are straightforward, this argument boils down to whether more knowledgeable voters would have a greater ability to cast their votes strategically.

With some voting systems, strategic voting is so obvious that all voters can vote strategically and cast an equally effective vote. This is the case for at-large voting, approval voting, the Borda count, the Bucklin system, cumulative voting, limited voting, plurality voting, and runoff voting. Voting strategies include voting for your favorite candidate with a reasonable chance of winning the election or punishing the most serious challenger to your favorite candidate.[258] In addition, candidates or organizations can educate voters as to how they can make the best use of their vote. For example, with at-large voting, a minority candidate could urge minority voters to "bullet" their vote in order to maximize their chances of electing the minority candidate.[259]

With other voting systems, strategic voting is not feasible because it would require precise polling numbers and control over a precisely-sized block of the electorate. This is the case for Condorcet voting, instant runoff voting, runoff voting, and the single transferable vote.[260] While this lack of feasibility does not preclude the possibility that a voter could gain advan-

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254. *See supra* note 61 and accompanying text.

255. *See* AMY, *supra* note 6, at 96, 152.

256. *See id*.

257. Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Texas Communities*, 78 SOC. SCI. Q. 973, 974 (1997).

258. *See supra* Part II.C.

259. With bullet voting, the voter selects only one candidate even though he is allowed to select more. *See* Rick Klein, *The Local Vote Dramatic Comebacks*, BOSTON GLOBE, Nov. 5, 2003, at A1.

260. *See supra* Part II.C. One study found no evidence of strategic voting in single transferable vote elections in Cambridge, Massachusetts. *See* Markus Schulze, *Free Riding*, 18 VOTING MATTERS 2, 4 (2004).

tage by superior knowledge of the voting system, this has yet to be demonstrated.

D. Majorities and Minorities in Single-Member Districts

Above, it was shown how at-large voting in multi-member districts decreases the effectiveness of minority voters' votes. Proportional representation voting systems also use multi-member districts, and they explicitly attempt to fairly represent minority voters. Now, I consider whether voting systems in single-member districts could unfairly advantage majority or minority voters.

A voting system could potentially favor voters who support strong candidates (e.g., Democrats or Republicans) or weak candidates (e.g., Greens or Libertarians). For example, with plurality voting, a Green party supporter is often compelled to vote for a Democrat to make the most effective use of her vote. The Green voter could argue that plurality voting favors major parties over minor parties. This argument is not convincing. The voter is always free to either make the most effective use of her vote by voting for a Democrat or to make a political statement and vote for a Green. Each voter is equally able to put her vote to its most effective use.

Conversely, supporters of major parties could argue that instant runoff voting favors supporters of minor parties.[261] A Green supporter can express her first choice for the Green candidate and her second choice for Democratic candidate. The Green candidate will likely have the fewest number of first choices and be eliminated. Votes for the Green candidate will then likely be transferred to the Democratic candidate. Thus, a Republican supporter could argue that the Green supporter gets two votes while supporters of major parties get just one vote. This argument is also not convincing. First, instant runoff voting simulates a runoff election. Thus, the apt analogy is that the major-party supporter gets to vote twice for their preferred candidate while the Green supporter votes for the Green candidate in the first election and the Democratic candidate in the second election. Second, each voter is again free to make the most effective use of her vote. If a major-party candidate had the fewest number of first choices and was eliminated, then those votes would transfer to the voters' second choices.

For elections with single-member districts, all the voting systems considered in this Article treat majority and minority voters equally.

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261. *See* Stephenson v. Ann Arbor Bd. of Canvassers, No. 75-10166 AW (Mich. Cir. Ct. 1975) (upholding instant runoff voting), *available at* http://www.fairvote.org/index.php?page=397 (last visited Mar. 7, 2006); *see also* Marron, *supra* note 21, at 355–56.

VI. THE RIGHT TO A RELIABLE ELECTORAL OUTCOME

If the right to vote is to be more than a symbolic gesture signifying full participation in society, then the right to vote must be concerned with the outcome of an election. This Part defines the right to a reliable electoral outcome. The right to a reliable electoral outcome is not coextensive with the right to an equally effective vote. For example, choosing the winner of an election by selecting one ballot at random would provide voters with equally effective votes, but would surely not guarantee a good result.

A. Defining a Reliable Electoral Outcome

The reliability of an electoral outcome is something that is intuitively reasonable but not easily quantified. In a numerical sense, for the outcome to be reliable, the ballots must be accurately collected and counted under the prescribed rules. In a representational sense, reliability is concerned with how well the outcome represents the will of the electorate. This Part will consider these two senses in turn, but the focus of this Article is representational reliability.

In the numerical sense of reliability, it is clear that votes should be accurately collected and counted. In many elections, the winner of the election will have a significant lead on the runner up. In this situation, the outcome will be reliable and the utmost care is not necessary when counting the ballots. In other elections, two candidates may be nearly tied, and extra care must be taken to determine which candidate is the winner. When an election is close, many factors will be relevant to determining the reliability of the outcome, from standards for the counting of ballots by hand to long lines at the polls from an insufficient supply of voting machines.

In the representational sense of reliability, even if the collection and counting of the ballots is perfect, the outcome of the election must reliably represent the will of the electorate. For example, consider an election by plurality voting where the winner receives 24 percent of the vote and four other candidates each receive 19 percent of the vote. Normally, a 5 percent lead would allay any concerns of numerical reliability, but given the small percentage of the vote received by the winner, one can hardly say with confidence that the winner represents the will of the electorate. For this very reason, some governments choose to have runoff elections to provide greater representational reliability.

One factor that can influence the representational reliability is ballot access requirements. If ballot access requirements are overly onerous, then a potentially victorious candidate could be prevented from gaining access to the ballot. In contrast, if ballot access requirements are overly lax, then there could be too many candidates on the ballot. In this situation, the votes could be split among many candidates as described in the preceding para-

graph, and the winner of the election may not reliably represent the will of the voters. Thus, tuning ballot access requirements can be used to provide greater representational reliability.

Similarly, the choice of a voting system can affect the representational reliability of an electoral outcome. An example was given above where plurality voting created a representationally unreliable outcome, but as will be shown below, other voting systems can generate reliable outcomes where plurality voting fails to do so. In this discussion, I will not be searching for the candidate who best represents the will of the voters, but will only be determining whether an outcome is sufficiently reliable. This is partly because of the theory of voting discussed above, including Arrow's Theorem, which states that no voting system is perfect. More important, given the wide variety of voting systems available and the particular concerns of different communities, it is not obvious that one voting system is the best in all circumstances. If legislatures and courts were composed entirely of social choice theorists, then Condorcet voting would likely be required for single-member district elections, but real-world legislatures and courts must weigh practical considerations against the theory.

B. The Reasonableness Standard

The most plausible constitutional hook for the right to a reliable electoral outcome is the Due Process Clause. Since "'[d]ue process' emphasizes fairness between the [s]tate and the individual dealing with the [s]tate,"[262] it is an appropriate source for a general requirement ensuring the integrity of the democratic process. The right to vote does not fit neatly into due process doctrine. Voting is a procedure by which all rights are protected,[263] but the right to vote is also a substantive right.[264] Procedural due process requires the government to follow sufficient procedures before depriving a person of life, liberty, or property,[265] but such requirements are not helpful in crafting voting procedures. Substantive due process requires strict scrutiny of laws affecting privacy or autonomy[266] and requires rational basis scrutiny of other rights,[267] although, as discussed below, the Court has not consistently applied the latter standard. We do know that the Court will

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262. Ross v. Moffitt, 417 U.S. 600, 609 (1974).

263. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

264. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966).

265. *See* Bd. of Regents v. Roth, 408 U.S. 564, 570 (1972).

266. *See* Lawrence v. Texas, 539 U.S. 558, 564–65, 574 (2003) (finding that privacy and autonomy are protected liberties under the Due Process Clause); Griswold v. Connecticut, 381 U.S. 479, 503–04 (1965) (applying strict scrutiny to protect liberties under the Due Process Clause).

267. *See Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring in the judgment).

not "subject every voting regulation to strict scrutiny,"[268] but since the right to vote is a fundamental right for equal protection analysis, courts should not apply a rational basis test under a due process analysis.

The closest the Court has come to imposing due process requirements on the right to vote is the balancing test in *Anderson v. Celebrezze*:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.[269]

In considering a challenge to Ohio's ballot access law for independent presidential candidates, the Court found that the law violated the Constitution but chose not to ground the decision in any particular constitutional provision. Instead, the Court created a penumbra of voting rights and stated that "we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis."[270] This smorgasbord protection of the right to vote can be viewed as a baseline procedural requirement grounded in the Due Process Clause. The issue in *Anderson* was the fairness of the ballot access law—whether the requirements were too onerous—and this is a question of due process. Lower courts have applied due process to voting rights. For example, the First Circuit found that a local government's refusal to hold an election "would work a total and complete disenfranchisement of the electorate, and therefore would constitute a violation of due process."[271]

In *Burdick v. Takushi*, the Court clarified the application of the *Anderson* balancing test. Courts must determine the appropriate level of scrutiny on a case-by-case basis: "[T]he rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."[272] Essentially, a court must first choose the level of scrutiny—presumably strict, middle-level, or rational basis—and then determine whether the statute survives that level of scrutiny. Such a standard is no standard at all: Nothing prevents

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268. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

269. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (citations omitted).

270. *Id.* at 786–87 n.7. In addition to creating this vague penumbra, the Court caused confusion as to whether the balancing test applies at all to equal protection challenges of voting rights. *See* Belitskus v. Pizzingrilli, 343 F.3d 632, 643 n.8 (3d Cir. 2003) (listing cases questioning whether the test in *Anderson* applies to equal protection challenges of ballot access laws).

271. Bonas v. Town of N. Smithfield, 265 F.3d 69, 75 (1st Cir. 2001).

272. *Burdick*, 504 U.S. at 434.

courts from first deciding the constitutionality of the statute and then deciding the level of review that achieves the desired result.

For three reasons, this Part argues that courts should apply a middle-level review or reasonableness approach in applying the right to a reliable electoral outcome. First, reasonableness is an intuitively workable approach. Strict scrutiny would be too severe because "subject[ing] every voting regulation to strict scrutiny . . . would tie the hands of [s]tates seeking to assure that elections are operated equitably and efficiently."[273] On the other hand, a rational basis test is not sufficient for protecting the fundamental right to vote. Long before *Anderson*, in considering challenges to voting systems, both federal[274] and state[275] courts invoked notions of reasonableness. The courts did not specifically apply a reasonableness requirement, but these cases demonstrate the intuitive appeal of such an approach.

Second, substantive due process doctrine has an emerging middle-level standard of review. Although the Court purports to apply two levels of scrutiny—rational basis and strict—to substantive due process challenges, the Court's lower standard appears to be bifurcating into two distinct standards. Justice Thomas observed:

> [The Court has] not been entirely precise as to the appropriate standard of review [for substantive due process claims]. . . . Some of our cases have used the language of rationality review; others have used the language of 'reasonableness,' which may imply a somewhat heightened standard; still others have used the language of both rationality and reasonableness.[276]

In one case, a plurality of the Court explicitly eschewed the rational basis test in favor of a reasonableness test.[277] Lower courts have followed suit

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273. *Id.* at 433.

274. *See* Orloski v. Davis, 564 F. Supp. 526, 532 (M.D. Pa. 1983) ("[T]he state's articulated goal in passing [the cumulative voting law] is legitimate and . . . is a reasonable way of achieving the goal."); Hechinger v. Martin, 411 F. Supp. 650, 652 (D.D.C. 1976) ("[T]he means [(limited voting)] adopted to promote [minority representation] are reasonable. . . ."); LoFrisco v. Schaffer, 341 F. Supp. 743, 748 (D. Conn. 1972) ("The [voting system] . . . is not arbitrary if the state's interest in minority representation is legitimate and if this is a reasonable way of attaining that end."); Campbell v. Bd. of Educ., 310 F. Supp. 94, 104 (E.D.N.Y. 1970) ("The state plan [for the single transferable vote] that has been adopted is reasonable. . . .").

275. *See* Moore v. Election Comm'rs of Cambridge, 35 N.E.2d 222, 239 (Mass. 1941) (stating that the single transferable vote "does not impair" equality and is not unreasonable); Adams v. Lansdon, 110 P. 280, 282 (Idaho 1910) ("[T]he Legislature has the power to make at least reasonable regulations in regard to the conduct of elections and the exercise of the right of suffrage."); State *ex rel.* Zent v. Nichols, 97 P. 728, 733 (Wash. 1908) ("[A]ny reasonable [voting system] prescribed by the lawmaking power . . . must be sustained by the judicial department of government.").

276. Foucha v. Louisiana, 504 U.S. 71, 121 n.15 (1992) (Thomas, J., dissenting) (citations omitted).

277. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 456–58 (1993) (plurality opinion).

and applied a reasonableness test to substantive due process challenges.[278] Although the Court has not defined the contours of a reasonableness standard vis-à-vis the rational basis standard, the former clearly implies a higher standard and could be construed as a middle-level review.

Third, the *Anderson* balancing test is often applied as a reasonableness test or middle-level standard of review.[279] In *Anderson*, the Court stated that a "[s]tate's important regulatory interests are generally sufficient to justify *reasonable*, nondiscriminatory restrictions,"[280] and considered the reasonableness of the ballot access restrictions.[281] The Court concluded that "[u]nder any realistic appraisal, the 'extent and nature' of the burdens Ohio has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline."[282] This standard is certainly more exacting than rational basis and less demanding than strict scrutiny.

C. Plurality Voting

By the definition of majority rule, the outcome of a plurality election will reliably represent the electorate when the winner receives a majority of the vote. As discussed above, the outcome of a plurality voting election is representationally unreliable when the winner's share of the vote is far less than a majority.[283] For example, 137 candidates competed in the 2003 special election for Governor of California.[284] If these candidates had roughly

278. *See, e.g.*, Gonzales v. City of Castle Rock, 366 F.3d 1093, 1100 (10th Cir. 2004); SeaAir NY, Inc. v. City of New York, 250 F.3d 183, 187 (2d Cir. 2001); Gruenke v. Seip, 225 F.3d 290, 303 (3d Cir. 2000); Mansfield Apartment Owners Ass'n v. City of Mansfield, 988 F.2d 1469, 1477 (6th Cir. 1993).

279. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363–64 (1997) (illustrating fusion voting); Burdick v. Takushi, 504 U.S. 428, 439 (1992) (discussing write-in votes); Munro v. Socialist Workers Party, 479 U.S. 189, 199 (1986) (discussing ballot access law); Griffin v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004) (discussing absentee ballots). *But see* Belitskus v. Pizzingrilli, 343 F.3d 632, 645 (3d Cir. 2003) (applying strict scrutiny under *Anderson v. Celebrezze* to a candidate filing fee); Werme v. Merrill, 84 F.3d 479, 485 (1st Cir. 1996) (applying rational basis scrutiny under *Anderson* to the appointment of election officials).

280. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (emphasis added).

281. *Id.* at 796, 800, 802, 804 n.31.

282. *Id.* at 806.

283. Another statistic that indicates the reliability of an outcome is the differential in votes between the plurality winner and the runner up. The larger the differential, the more reliable the outcome. I have investigated this in more detail elsewhere. *See* Jeffrey C. O'Neill, *When a Plurality is Good Enough*, Feb. 17, 2006, *available at* http://ssrn.com/abstract=883104.

284. *See* Official Declaration of the Result of the Statewide Special Election Held on Tuesday, October 7, 2003, Throughout the State of California on Statewide Measures Sub-

split the vote, then the winning candidate could have garnered less than 1 percent of the vote. In this situation, the election would have been analogous to selecting a candidate at random, which would have been a completely unreliable outcome. In actuality, Arnold Schwarzenegger won the election with 48.6 percent of the vote, an intuitively reliable outcome.[285] All other factors being equal, the greater the share of the vote received by the plurality winner, the more reliable the election is. This potential unreliability of plurality voting is related to its low Condorcet efficiency as described in Part II.D.

One possible remedy for an unreliable outcome is to hold a runoff election. The obvious benefit of a runoff election is that it will elect the better of the top two candidates from the plurality election. The runoff election also increases the Condorcet efficiency. This advantage must be weighed against the costs: doubling the cost of the election, delaying the election result by several weeks, and requiring voters to vote a second time. Governments have varied in their responses to balancing the benefits and costs of a runoff election. Most governments in the United States either never have a runoff or have a runoff if the plurality winner receives less than a majority.[286] A few jurisdictions have an in-between rule. For example, North Carolina holds a runoff election if the plurality winner receives less than 40 percent of the vote.[287]

The first question is whether the outcome of a plurality election could be sufficiently unreliable that it would violate the right to a reliable electoral outcome. When the share of the vote received by the plurality winner is sufficiently low, the outcome is akin to selecting a candidate at random and the election is completely meaningless. At a minimum, the right to a reliable outcome must prevent a meaningless election.

The next question is when the outcome of a plurality election could be sufficiently unreliable that it would violate the right to a reliable electoral outcome. The least intrusive remedy for an unreliable outcome would be to hold a runoff election. Applying the standard defined above, a court considering such a challenge would apply a middle-level or reasonableness review. In doing so, the court would balance the harm of an unreliable election result against the costs of imposing a runoff election.

The magnitude of the harm of an unreliable outcome varies with the degree of unreliability. If the winner receives a majority, then there is no harm at all. If the winner receives slightly less than a majority, then the harm is slight, as the candidate would almost surely win a runoff election

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mitted to a Vote of Electors, *available at* http://www.ss.ca.gov/elections/sov/2003_special/sum.pdf.

285. *Id.*

286. *See supra* Part III.C.

287. BULLOCK & JOHNSON, *supra* note 13, at 119.

regardless. If, however, the winner receives such a small percentage of the vote that the outcome is meaningless, then the magnitude of the harm is great. In contrast, the costs of holding a runoff election are fixed.

Because the costs of holding a runoff election are fixed and the magnitude of the harm increases as the winner's share decreases, at some point the harm of an unreliable result will outweigh the cost of holding a runoff election. The balancing necessarily entails the arbitrary drawing of a line. Statistical techniques and an analysis of runoff election data could be used as a guideline to draw this line.[288] Such line drawing is not foreign to election law jurisprudence, as the Court has done so in establishing one person, one vote requirements for state legislatures.[289] Even if imposing a runoff election would violate a state constitution, the right to vote enforced by the U.S. Constitution supersedes conflicting provisions in state constitutions.[290]

D. Runoff Voting

Although runoff voting increases the reliability of a plurality election, it is not itself immune from reliability issues. Consider the first round of the French 2002 presidential election. With sixteen candidates competing, the leading conservative candidate received 20 percent of the vote, the leading liberal candidate received 16 percent of the vote, and an extreme-right candidate received 17 percent of the vote.[291] In the runoff, the conservative candidate beat the extreme-right candidate by 82 percent to 18 percent.[292] The extreme-right candidate made it to the runoff election despite his massive unpopularity with the voters.[293] Presumably, had the runoff been between the leading conservative and liberal candidates, the runoff election would have been a tighter race. Thus, a runoff election will be reliable only if sufficiently popular candidates make it to the runoff election.

There is no simple remedy to an unreliable election with a runoff. To ensure that all sufficiently popular candidates make it to the runoff, the runoff could include more than two candidates, possibly with a successive runoff. For example, in the French election described above, adding a third candidate to the runoff would have greatly increased the reliability of the final outcome.

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288. *See* O'Neill, *supra* note 283.

289. *See supra* note 244 and accompanying text.

290. Reynolds v. Sims, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.").

291. *See Results at a Glance*, BBC NEWS, Apr. 23, 2002, http://news.bbc.co.uk/1/hi/world/europe/1946937.stm.

292. *Id.*

293. *See French Protests Gather Pace*, BBC NEWS, Apr. 25, 2002, http://news.bbc.co.uk/1/hi/world/europe/1951579.stm.

E. At-Large Voting, Cumulative Voting, and Limited Voting

At-large voting, cumulative voting, and limited voting can also produce unreliable outcomes. They will do so if one or more of the winners is elected with a sufficiently small percentage of the vote. Since these voting systems use multi-member districts, the criteria for determining reliability must be adapted.

At-large voting is a majoritarian system in that the candidates elected represent the city as a whole. If there are *N* seats to be filled, then each voter votes for *N* candidates. The necessary criterion again is a majority, but it is receiving votes from a majority of voters—not receiving a majority of votes. If a winning candidate receives votes from far less than a majority of the voters, then that candidate may not reliably represent the voters.

In contrast, cumulative voting and limited voting are proportional representation systems. Each elected candidate represents a subset of the electorate that is less than a majority. If there are *N* seats to be filled, then each candidate represents approximately $1/N^{th}$ of the city. Here, a candidate reliably represents a portion of the electorate if she receives at least $1/N^{th}$ of the vote.

With all three of these systems, a runoff election could be used to increase the reliability of the outcome. An additional parameter is the number of candidates that should participate in the runoff election. Governments that use runoffs with at-large elections typically allow twice as many candidates as there are seats to be filled,[294] but there is no inherent justification for this. Governments could instead allow a different number into the runoff. Allowing a larger number of candidates into the runoff increases the likelihood that all the good candidates enter the runoff, but allowing a smaller number of candidates into the runoff decreases vote splitting and increases the reliability of the outcome among those candidates.

F. Approval Voting and Ranked Voting Systems

Approval voting and ranked voting systems—instant runoff voting, Condorcet voting, the single transferable vote, and the Borda count—give the voters greater flexibility to express their preferences. With these systems, the voters have the opportunity essentially to express their opinion on each candidate in the race. As a result, they are much less susceptible to the reliability issues discussed above.

With approval voting, voters can approve of as many candidates they like, and thus the winner could receive approvals from many voters. With

294. *See, e.g.*, LA. REV. STAT. ANN. § 18:482 (2004) ("Except in the case of a tie vote, the number of candidates for an office who may qualify for the general election is twice the number of persons remaining to be elected to the office.").

instant runoff voting and the single transferable vote, candidates are eliminated one-by-one. Thus, even if there are many candidates in the race, the successive eliminations will gradually winnow down the field, leaving the most popular candidates to compete against each other. With Condorcet voting and the Borda count, there are no successive eliminations, but the aggregation of the voters' preferences produces a meaningful result even with a large number of candidates.

In one instance, these voting systems could generate unreliable outcomes. This will occur if the voters fail to take advantage of the opportunity to rank or approve multiple candidates.[295] In this situation, these voting systems will behave like plurality voting and have the same potential for unreliable outcomes. Jurisdictions could ameliorate this problem through voter education or by requiring voters to rank several candidates.[296]

CONCLUSION

This Article investigates how the choice of a voting system impacts the right to vote. To begin the discussion, the Article presents the first comprehensive summary of the usage of alternative voting systems in the United States and also the first comprehensive summary of the case law on voting systems. Two aspects of the right to vote are considered: the right to an equally effective vote and the right to a reliable electoral outcome.

The right to an equally effective of vote is considered as a generalization and unification of disparate but related rights. The only voting system that clearly violates this right is at-large voting. Commentators have previously criticized the discriminatory effects of at-large voting, but not in the last twenty years. This Article takes a fresh look at the legal viability of at-large voting in light of the Supreme Court's more recent jurisprudence and concludes that at-large voting always violates the right to an equally effective vote.

The right to a reliable electoral outcome is a heretofore undefined but eminently reasonable right. If nothing else, the outcome of an election must be meaningful in some sense. From a survey of the Supreme Court's election law jurisprudence, notably the *Anderson* balancing test, a middle-level review or reasonableness test is proposed to regulate the right to a reliable outcome. This Article then applies this right to several voting systems, shows when they would violate this right, and suggests possible remedies.

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295. Strategic voting with approval voting, the Borda count, and the Bucklin system encourages this type of voting. *See supra* Part II.C.

296. For instant runoff elections in Australia, voters are required to rank all of the candidates. *See* FARRELL, *supra* note 52, at 56.