

## RANKED CHOICE VOTING NOW: A SHIFT TOWARD A BETTER DEMOCRACY

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“Extend the sphere, and you take in a variety of parties and interests; you make it less probable that a majority [and under plurality, a minority] of the whole will have a common motive to invade the rights of other citizens; or, if such common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”<sup>1</sup>

“New candidacies and new coalitions serving as viable competition mean opportunity for substantive and public debate of ideas—the foundation of democracy—and help limit misuse of party power.”

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<sup>1</sup> *Barber v. Dunlap*, 376 F. Supp. 3d 125, 137 (D. Me. 2018) (quoting THE FEDERALIST No. 10) *appeal dismissed* No. 18-2250, 2018 WL 8583796 (1st Cir. Dec. 28, 2018).

TABLE OF CONTENTS

I. INTRODUCTION .....	38
II. RCV DEFINED.....	39
III. RCV HISTORY .....	41
<i>A. The Rise of Proportional Representation</i> .....	41
<i>B. Proportional Representation's Impact on Democracy</i> .....	44
<i>C. The Fall</i> .....	45
IV. IN THE FOOTSTEPS OF PR, RCV IMPROVES DEMOCRACY .....	48
<i>A. RCV creates opportunities for increased viability of candidacies.</i> .....	48
<i>B. RCV leads to broader diversity of candidates.</i> .....	50
<i>C. Voters have greater choice through the RCV system.</i> .....	51
<i>D. RCV produces a true majority candidate more often than the plurality system.</i> .....	51
<i>E. What does the impact of RCV look like in American cities?</i> .....	52
V. RCV OPPONENTS CHALLENGE ITS PROPOSED BENEFITS.....	55
<i>A. Is RCV Too Complex?</i> .....	56
<i>B. Does RCV Violate the One Person One Vote Requirement?</i> .....	58
<i>C. Will RCV Adversely Impact the Two-Party System?</i> .....	59
<i>D. Is RCV the best vehicle for expanding the political power of minority parties?</i> .....	59
VI. TIMELINESS OF RCV .....	60
<i>A. Support for RCV</i> .....	61
<i>B. Resistance to Establishment Politics</i> .....	61
<i>C. Growing Threats to Democracy</i> .....	63
VII. RCV & COMPANION ELECTORAL REFORM.....	66
<i>A. Campaign Finance Reform</i> .....	67
<i>B. Multi-member districts: What can we learn from history?</i> .....	69
<i>C. Ballot access reforms</i> .....	71
VIII. CONCLUSION.....	74

## I. INTRODUCTION

The health of democracy is on the minds of many Americans as they grow impatient with our current political system. So, it is no surprise that Ranked Choice Voting (RCV) is gaining more notice. The RCV election method contributes to the growth of our local, state, and national democracies by increasing the viability of candidacies, diversity of candidates, voter choice, and number of candidates winning with a true majority. RCV allows voters to vote based on their beliefs as opposed to making a choice based on the fear of “spoiling” or “wasting” their vote.

RCV is a timely issue. Voters have increasingly adopted RCV and supported first-time independent candidates in the face of numerous threats to our democracy. In just the last three years, voters made Maine the first state to adopt RCV and New York City, the most populous city in the country, the 20th municipality to adopt the method. That the electorate is energized by these changes and appears to hold wide-spread interest in stepping outside of our two-party system that is supported by the plurality, first-past-the-post method of election is evidenced by growing resistance to establishment candidates and the increasing number of people identifying as independent.<sup>2</sup> Voters are tired of candidates winning with a low percentage of the vote through the first-past-the-post system and of being forced to compromise their values in casting their vote. RCV is one way to address the national and state changes in election law and political processes and, therefore, more voters should have RCV as an option for expanding local and state democracies.

RCV exists interdependently with other election laws and reform efforts. As a result, RCV may be more effective in furthering the growth of our democracy if supplemented with additional reforms. Through an examination of the history of American use of RCV, coupled with a look at multiple election law reforms that impact the core areas of democracy, we consider opportunities for

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<sup>2</sup> For the purpose of this paper, “independent” should be interpreted as unaffiliated, not to be confused with members of the Independence Party.

further reform that will strengthen the value of RCV to our democracy. Specifically, we will assess campaign finance reform, multimember districts, and ballot access reforms as strong potential companion efforts to further the impact of RCV.

## II. RCV DEFINED

RCV, which is alternatively referred to as preferential or choice voting, is an election method aimed at ensuring a true majority winner (50%+) instead of the plurality system currently used in most American elections. Whereas RCV is the commonly used umbrella terminology, it has several variations depending on the structure of the district; in single member districts it is called Instant Run-Off Voting (IRV) and in multi-member districts it is called Single Transferable Vote (STV).<sup>3</sup>

The RCV process gives voters the opportunity to rank candidates on their individual ballots. Once the polls close, the ballot counting process begins with a review of all voters' first choice candidates. If a majority winner results from the first round, that candidate is the winner and use of the instant run-off process is not necessary. If there is no majority winner, the instant-runoff process ensues. The candidate with the least first choice votes is eliminated and the votes for that candidate are counted towards the

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<sup>3</sup> See *RCV Activist Toolkit*, FAIRVOTE.ORG, <https://www.fairvote.org/toolkit#educate> (last visited Dec. 16, 2019). These authors recognize that RCV has many different names depending on the point in time and location. For instance, internationally, it is common for RCV to be referred to as proportional representation with a single transferable vote (PR), which is a multi-member district that allows for the ranking of candidates. The idea of a single transferable vote (the operation of transferring one vote based pursuant to one's preference) has also been referred to as the "Hare system," a reference to the individual credited for its invention. See Clarence Gilbert, Hallett Hoag, & George Hervey Jr., PROPORTIONAL REPRESENTATION § 13 at 6 (1926). The RCV process for multi-member districts is slightly different, using a threshold to determine winners. See discussion *infra* Part VI.B.

second choice votes on all of those ballots.<sup>4</sup> The process continues like this until a winner is identified.<sup>56</sup>

RCV may be adopted through a variety of methods and may vary in terms of guidelines. RCV may be adopted by charter or legislation at any level of government. Laws adopting RCV establish guidelines, which vary by municipality. Some RCV laws set a maximum number of ranking slots on a ballot, as well as the type of elected offices that will be determined through RCV.

Currently, RCV is used in twenty municipalities within ten states, and one of the states (Maine) adopted the voting method statewide.<sup>7</sup> Most recently, in November 2019, New York City voters voted to amend the City Charter and adopt RCV as the method to be used in primary and special elections.<sup>8</sup> In 2016, Maine adopted RCV for all state and federal primary elections and implemented the process for the first time in the 2018 elections. Minneapolis has used RCV since 2009, and San Francisco, Oakland, and Berkley have been using RCV since 2010. This paper will briefly look at RCV data from each of these municipalities to illustrate outcomes of the RCV method, including the increased likelihood of true majority candidates.<sup>9</sup>

Across municipalities and states, RCV is intended to increase the likelihood of an election resulting in a true majority in

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<sup>4</sup> See *Ranked Choice Voting*, FAIRVOTE.ORG, [https://www.fairvote.org/rcv#how\\_rcv\\_works](https://www.fairvote.org/rcv#how_rcv_works) (last visited Dec. 16, 2019).

<sup>5</sup> See Jack Santucci, *Evidence of a Winning-Cohesion Tradeoff in Multi-Winner Ranked-Choice Voting*, 52 ELECTORAL STUDIES 128, 128-38 (2018).

<sup>6</sup> As part of this ballot counting process, ballot exhaustion may occur. This is the process by which a ballot is no longer usable because all choices/votes ranked on a given ballot have been reviewed, counted toward a subsequent round, and all candidates chosen and ranked by that voter lost the race.

<sup>7</sup> See *Where Ranked Choice Voting is Used*, FAIRVOTE.ORG, [https://www.fairvote.org/where\\_is\\_ranked\\_choice\\_voting\\_used](https://www.fairvote.org/where_is_ranked_choice_voting_used) (last visited Dec. 16, 2019).

<sup>8</sup> New York was one of two dozen municipalities who adopted a multi-member form RCV (PR) in the early twentieth century. See Kevin Reyes, *Redistricting or Rethinking? Why Proportional Representation May Be a Better Solution Than California's Independent Redistricting Commission*, 20 S. CAL. INTERDISC. L.J. 655, 674.(2011).

<sup>9</sup> See discussion *infra* Part III.E.

the first round or as a result of the ranking process, which allows voters to rank preferences based on their own ideological priorities. In doing so, RCV allows voters to vote based on their beliefs as opposed to making a choice based on the fear of “spoiling” or “wasting” their vote. Subsequent and related arguments for RCV will be discussed following a contextualization of RCV in American history.

### III. RCV HISTORY

To most effectively understand the purpose and current state of RCV, it is necessary to review its historical roots in American elections. For that, we look at the history of proportional representation (PR) here in the United States. In American history, district structure and ranking were intertwined to comprise the election method called PR. PR was paired with the single-transferable vote, allowing the voter to rank candidates, though not all proportional representation models do.<sup>10</sup> PR is a method of voting that aims to give equal representation to the district involved. As opposed to single-member districts, the area is split into larger districts or at-large districts, and instead of voting for one representative, many representatives are elected. The ideal result is for many viewpoints to be reflected in the district’s representatives.

#### *A. The Rise of Proportional Representation*

In 1910, before a Conservative Group in Glasgow, Scotland, Arthur J. Balfour (afterward Earl Balfour) called for reform of a seemingly age-old problem:

“[W]hile a small handful of interested people can turn an election one way or the other on their own personal issue, huge minorities, like the minority of the Unionists in Scotland, are utterly and grossly unrepresented. We give every little privilege to the

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<sup>10</sup> See generally *How Proportional Representation Elections Work*, FAIRVOTE.ORG, [https://www.fairvote.org/how\\_proportional\\_representation\\_elections\\_work](https://www.fairvote.org/how_proportional_representation_elections_work) (Dec. 16, 2019).

little knot of people in the individual constituencies; we ignore the great mass who under our existing system find no representation at all comparable either to their numerical strength or to their public spirit, or to any other quality, which makes them useful, able, and independent citizens.”<sup>11</sup>

The call for reform was not limited to Scotland. Accordingly, some of the greatest thinkers of our time called for the adoption of PR as a solution. John Stuart Mill wrote at length of the need for reform and true representation in the United Kingdom.<sup>12</sup> Mill strongly believed that PR was a tool to create greater engagement and increased diversity of thought:

“[i]ndependent opinions will force their way into the council of the nation and make themselves heard there, a thing which cannot often happen in the current forms of representative democracy; and the legislature, instead of being weeded of individual peculiarities and entirely made up of men who simply represent the creed of great political or religious parties, will comprise a large proportion of the most eminent minds of the country, placed there, without reference to party, by the voters who appreciated their individual eminence . . . [A]ny one who does not feel the want which the scheme is intended to supply; any one who throws it over as mere theoretical subtlety or crotchet, tending to no valuable purpose, and unworthy of the attention of practical men, may be pronounced an incompetent statesman, unequal to the politics of the future.”<sup>13</sup>

Leaders were skeptical of Mill’s perspective of PR; but, some, such as Leonard H. Courtney, came to embrace the approach.

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<sup>11</sup> See Gilbert et. al., *supra* note 3, §173 at 299.

<sup>12</sup> *Id.* at 293 (“My complaint is that the electors are not represented... Of all modes in which a national representation can possibly be constituted, this one affords the best security for the qualifications desirable in the representatives...”).

<sup>13</sup> *Id.* at 296 (quoting John Stuart Mill, AUTOBIOGRAPHY (1875)).

In a letter to the Prime Minister advocating for PR's adoption, Courtney admitted his apprehension, but, on Mill's recommendation, believed it could provide hope in the fight against political corruption of the day:

“I was . . . strongly convinced of the injury done to our national life by the deleterious training more or less undergone by every man who is drawn into the political world, and by the loss of men who are shut out of it as refusing to submit to this training . . . Mr. Mill hailed with enthusiasm the revelation of the true principle of representation. It gave him, he said, a new hope.”<sup>14</sup>

These same problems abroad were mirrored in American municipalities. One of the focal concerns was voter disenfranchisement. In Cincinnati, for example, critics of American politics at the time believed that this disenfranchisement was a result of disproportionate party power (the Democratic party was “weak,” and a “Republican nomination amounted to an election”).<sup>15</sup> “Candidates were trained to feel they were representatives not of the public, but of the party.”<sup>16</sup> The parties had a stronghold on the entire system. The effectiveness or ineffectiveness of the elected individual was irrelevant; what mattered was whether the party leaders were willing to re-nominate or not.<sup>17</sup>

In response, community leaders formed a committee to implement reforms, including the adoption of PR. Of the committee organizers involved, women from both the League of Women Voters and the Woman's City Club were critical to the movement.<sup>18</sup> The committee organized a speaking tour and

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<sup>14</sup> *Id.* at 298 (quoting Letter from Leonard Courtney to W.E. Gladstone, Prime Minister (Nov. 8, 1884) [hereinafter Lord Courtney of Penwith] in support of the adoption of proportional representation and its incorporation in the Redistribution Bill).

<sup>15</sup> See Henry Bently, *Why Cincinnati Voted for P.R. and a City Manager*, 14 NAT'L MUN. REV. 69, 69 (1925).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 70.

<sup>18</sup> *Id.* at 72.



gathered media support. In the end, Cincinnati was successful and PR was adopted with a vote of 92,510 to 41,105.<sup>19</sup>

*B. Proportional Representation's Impact on Democracy*

PR successfully diluted party monopolies while setting the stage for more ethnic and racial minorities to be elected in districts where they had not:

“Many [who advocated for PR] were concerned [aside from issues of child labor laws and woman’s suffrage] about the corruption in urban governments. Large cities often were dominated by party “machines” of which Tammany Hall . . . was the most infamous . . . . [PR] also encouraged fairer racial and ethnic representation . . . . It produced the first Irish Catholics elected in Ashtabula, and the first Polish Americans elected in Toledo. In Cincinnati, Hamilton, and Toledo African Americans had never been able to win city office until the coming of PR. *Significantly, after these cities abandoned PR, African Americans again found it almost impossible to get elected.*”<sup>20</sup>

Another example of this regarded success is illustrated by Mr. Samuael Seabury’s response to the unsuccessful attempt to dissuade the New York public from repealing PR. To relay PR’s impact of diluting party monopolies, Seabury recounted the days when the powerful New York City political organization, Tammany Hall, “steam rolled” over everyone in its path and the positive changes witnessed in the city’s government afterward. Seabury shared these contemporaneous observations:

“The Tammany steam roller has stopped and the quality of Council action has steadily improved . . . .

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<sup>19</sup> *Id.*

<sup>20</sup> Douglas Amy, REAL CHOICES/NEW VOICES 267, 269 (2d ed. 2002) (emphasis added).

From the first, with the cooperation of members on both sides of the aisle, it has passed all the important measures before it . . . that were obviously needed for the welfare of the city . . . . After the Democrats got over their first outraged shock at finding a substantial and vocal opposition, its procedure has become on the whole orderly and constructive . . . . Hearings are held on important measures at which the public is given courteous attention and many of its suggestions adopted, and debate on the floor brings out all important issues of controversial questions. Most bills are passed in a form approved by virtually the whole council, often because suggestions of the minority members have been accepted by the majority.<sup>21</sup>

Of all the democratic improvements attributed to PR's success, a significant increase in voter turnout was not one of them. Instead, the data indicated the "emergence and disappearance of local issues and candidates appear to have had more to do with the act of voting than did the form of the ballot."<sup>22</sup> History shows that companion reforms to the PR (and ranking) process were necessary then as well.

### *C. The Fall*

PR was not supported by all. On the heels of the widely regarded success of PR came a series of well-funded attacks in each

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<sup>21</sup> Samuel Seabury, *Letter to the Editor: In Favor of PR*, N.Y. TIMES, Oct. 31, 1947.

<sup>22</sup> See Amy, REAL CHOICES/NEW VOICES, *supra* note 20, at 271. Though, for some this may seem like an argument against adopting some form of choice voting, the authors believe it is quite the contrary. In a district where RCV is employed and is successful in driving more exciting candidates and issues, it is quite possible that voter turnout, especially over time, will be favorably affected. However, if in the same district, RCV is employed, but existing ballot access issues prevent viable candidacies of these would-be candidates, one could imagine that voter turnout will not be favorably affected. See discussion *infra* Part VI.

municipality that had adopted it.<sup>23</sup> Anti-PR leaders and coalitions led forty-nine attempts to repeal PR.<sup>24</sup> The strategy for repeal involved a propaganda campaign that sought to scare voters into repealing the relatively new reforms. Ultimately, the strategy was an overwhelming success and PR was repealed in every jurisdiction except Cambridge, Massachusetts.

The anti-PR propaganda and repeal campaign took shape differently depending on the municipality. In New York City, the repeal campaign took on the form of anti-communist sentiment, which was reflected in an editorial by The New York Times editorial board.<sup>25</sup> The editorial board used its considerable

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<sup>23</sup> See Editorial, N.Y. TIMES, Oct. 27, 1947 (an appeal to voters to repeal PR, while acknowledging that it had “endorsed” PR and “defended it against its critics.”). In Cleveland, both the Republicans and Democrats sought to repeal PR, yet the success of Cleveland’s new government was “almost universally acclaimed,” and “everyone admitted the Council was the best Cleveland had ever had.” As a result, the reason for the repeal was largely seen as an effort by the parties to regain power. Norman Shaw, *Cleveland’s Proportional Representation Election*, 14 NAT’L MUN. REV. 589, 589-90 (1925).

<sup>24</sup> See Leon Weaver, *The Rise, Decline, and Resurrection of Proportional Representation in Local Governments in the United States*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 149 (Bernard Grofman & Arend Liphart eds., 1986). These forty-nine attempts occurred over multiple election cycles.

<sup>25</sup> However, the anti-communism sentiment could have been “dog whistle” language for racism as well. See, e.g., IMANI PERRY, LOOKING FOR LORRAINE 43-59 (2018) (describing Lorraine’s involvement in the Communist Party, its funding of Freedom [a progressive newspaper], and the U.S. government’s targeting of prominent Black, communist activists including Lorraine herself, W.E.B. Dubois, and Paul Robeson). The Communist Party was also affiliated with the National Negro Congress, a group that advocated against Jim Crow and was instrumental in finding solid working-class jobs for African Americans. See *National Negro Congress*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/national-negro-congress> (last visited Dec. 16, 2019). Additionally, Pete Cacchione, one of the communists elected to the New York City Council in 1941, whom the Times editorial board found objectionable, was known to advocate for “an end to all practices of discrimination whether directed against the Negro people, the Italian people, the Jewish people, or the foreign born.” See Amy, *supra* note 20, at 208.

reputation to urge voters to repeal PR.<sup>26</sup> One of several reasons listed for this anti-PR advocacy was that PR was a tool for radical groups that threatened American elections:

“Communists and other radicals who could not, by normal majority and district voting methods, have hoped to become members and giving them an official sounding-board for views shared only by a mere fraction in the electorate.”<sup>27</sup>

The editorial board went on to chastise the PR elected council for failing to take the important work of public transportation fare reform in favor, rather, of “such trivialities” as the name of Sixth Avenue. Samuel Seabury countered this attack in a letter submitted to the council.<sup>28</sup> Seabury argued that the council had actually taken up many important issues that term, including “evictions, rent control, abuses in garages and parking spaces, and fire hazards in apartment hotels and dormitories,”<sup>29</sup> suggesting the editorial board was twisting the facts for its own ends, namely the repeal of PR.

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<sup>26</sup> Editorial, N.Y. TIMES, Oct. 27, 1947. The editorial board made a similar appeal in April 1947.

<sup>27</sup> This statement proved to be inaccurate and misleading. At least two sources debunk the idea that these “radicals” were not widely supported by those outside their party. In the case of Pete Cacchione, only 1/10 of the voters that elected him were of the communist party. Because of his ideas, he was able to gain the support of many working-class New Yorkers, and he received the most first-place votes out of ALL council members in the 1943 election cycle. *See* Amy, *supra* note 20, at 208; *See also* George H. Hallett, Jr., *Importance of PR: Abolishing Proportional Representation Believed Against Civic Good*, N.Y. TIMES, Apr. 6, 1947 (“What bothers [the editorial board] obviously is that there are two Communists on the council, 8.7 percent of the whole body...The fact remains that these particular Communists amassed 138,498 votes, which is 8.2 percent of total valid vote cast...You couldn’t get any closer to accuracy with cutting Councilmen into fractions.”); Seabury, *supra* note 21.

<sup>28</sup> It is assumed this is Judge Samuel Seabury, a direct relation of Bishop Samuel Seabury. Judge Seabury served on the Court of Appeals and was instrumental in investigating and uncovering corruption within the infamous Tammany Hall. *See* Samuel Seabury Playground, NYCGOV PARKS.ORG, <https://www.nycgovparks.org/parks/samuel-seabury-playground/history> (last visited Dec. 9, 2019).

<sup>29</sup> *See* Seabury, *supra* note 21.

In Cincinnati, the repeal campaign used a different angle. Elections of African American council members influenced what was a race-based repeal campaign. Repeal proponents took advantage of this and the growing tensions around the civil rights movement and “warned whites that PR was helping to increase” power in the African American community while raising the specter of a future “Negro mayor.”<sup>30</sup> Like those in New York City, repeal proponents argued that minority and “fringe” perspectives uplifted by PR were a threat to American democracy. By 1960, New York City, Cincinnati, and every other municipality (with the exception of Cambridge) had renounced the PR voting system that had offered so much promise.<sup>31</sup> The widely supported rise of PR for purposes of increased equity and ideological diversity quickly led to fear based attacks and the demise of the system.

The history of PR makes clear that its only true “fault” was that it worked too well to be popular among entrenched interests.<sup>32</sup>

#### IV. IN THE FOOTSTEPS OF PR, RCV IMPROVES DEMOCRACY

RCV improves democratic processes and engagement by promoting: (1) increased viability of candidacies; (2) broader diversity of candidates; (3) increased voter choice; and (4) greater likelihood of achieving a true majority winner. These are benefits to voters, interested candidates, coalitions and parties, as well as our greater democracy. RCV’s positive impact on democracy in these four areas is evident through a preliminary review of RCV data from three of the American cities that have implemented RCV for the longest period of time: San Francisco, Berkeley, and Minneapolis.

##### *A. RCV creates opportunities for increased viability of candidacies.*

When voters can rank candidates and there is a run-off process, more candidates are viable and the pool of candidates is more diverse. Viability of a candidacy commonly refers to the ability of candidates and coalitions to competitively run races and

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<sup>30</sup> See Amy, REAL CHOICES/NEW VOICES, *supra* note 20, at 273.

<sup>31</sup> See Weaver, *supra* note 24, at 140.

<sup>32</sup> See Amy, *supra* note 20, at 274.

for voters to perceive those candidates as actual options, not spoilers. RCV establishes greater viability through factors such as the likelihood of increased media coverage, the diminished impact of majority party names over all others, and the increase in healthy competition in campaigning, all of which stem from the increased competition because of ranking and run-offs.

The increased viability of candidacies impacts individual candidacies and the creation and/or strengthening of minor parties and independent candidacies within major parties. RCV limits one dominant party's influence in primary and general elections and creates space for more viable candidates. This means more variety of ideological perspectives and more debate over nuances in perspective. By creating more space for multiple candidates (and parties) to viably take part, the conversation shifts, providing the opportunity for dominant parties or candidates to adopt others ideas in an effort to earn higher ranking with potential voters.<sup>33</sup>

Increased viability impacts voter engagement, tone of campaigning, and turn-out for two reasons. First, candidates have incentive to engage broader groups of people beyond their traditional base, and conduct more positive campaigning when multiple candidates run. Regarding engagement, a 2013-2014 study conducted by Fair Vote comparing RCV and non-RCV cities in California and Minnesota, showed that candidates in RCV cities increased interpersonal interaction with voters through in-person outreach, whereas in non-RCV cities candidates relied heavily on outreach by phone.<sup>34</sup> In-person outreach has the greatest impact on social deliberative engagement—the reflective and interactive processes of confirming, exploring, and/or changing individual thoughts—which contributes to building in-person trust and political knowledge.<sup>35</sup> RCV incentivizes broad engagement because candidates may have a chance of being 1st, 2nd, or 3rd choice, whereas candidates in a plurality system will likely only reach out

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<sup>33</sup> See Katherine Q. Seelye, *As Australia and the Oscars Go, So Goes Maine?* N.Y. TIMES (June 11, 2018)

<https://www.nytimes.com/2018/06/11/us/maine-ranked-choice-voting.html>.

<sup>34</sup> See, HALEY SMITH, *Ranked Choice Voting and Participation: Impacts on Deliberative Engagement*, FAIR VOTE 9-10 (June 2016)

<https://fairvote.app.box.com/v/DeliberativeEngagement>.

<sup>35</sup> *Id.* at 10.

to the voters who are already most likely to support them.<sup>36</sup> Second, RCV incentivizes more positive campaigning by candidates and parties. Several media-content studies indicate that coverage and tone of campaigns was more positive and cooperative in RCV cities.<sup>37</sup> Additionally, opportunity to rank, and the increased viability of candidacies, has led to a third factor impacted by RCV: increased voter turnout in primaries in RCV.<sup>38</sup> As a result of broadened engagement and more positive campaigning, RCV contributes to a shift in political culture. In turn, viability is likely further impacted by these factors.

*B. RCV leads to broader diversity of candidates.*

With greater viability comes greater opportunity for more racial, religious, gender, ethnic, and ideological diversity in candidates. In a plurality system, the major parties pick the two viable candidates. In doing so, the current system limits ideological diversity and narrows the opportunity for other types of diversity simply because there are (typically) only two viable candidates to choose from. By contrast, RCV incentivizes more first-time candidates and more candidates challenging incumbents. This, in turn, enriches diversity in ideology as voters have the opportunity through ranking to distinguish perspectives from major party candidates. RCV, naturally, then creates more opportunity for candidate diversity by broadening the field of candidates from which the voter is free to rank according to preference.<sup>39</sup>

Greater viability of candidacies, representation from more coalitions, and greater diversity of candidates, also provides opportunities for major parties. New candidacies and new coalitions serving as viable competition mean opportunity for substantive and public debate of ideas—the foundation of democracy—and help limit misuse of party power. This is good for voters, candidates, parties, and democracy. Instead of a party

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<sup>36</sup> *Id.* at 11.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> See, FAIRVOTE.ORG, *The Adoption of Ranked Choice Voting Raised Turnout 10 Points*, <https://fairvote.app.box.com/v/kimball-anthony-turnout> (last visited Dec. 16, 2019). Note: While primary voter turnout increased, there was no change in general election voter turnout. *Id.*

<sup>39</sup> See *supra* text accompanying note 5.

hoarding power for the benefit of individual leaders, the focus should be on building coalitions based on shared values and strategies. Through competition and debate, parties are pushed to improve messages and strategies and expand perspectives. In this regard, RCV creates greater accountability of candidates and parties to the public and contributes to minimizing party leaders' use of power to limit competition. Through RCV, voters and communities have greater power to guide the political climate and election results. This increased voter and community power would be further impacted when intersecting election reforms are accomplished, which will be further discussed.

*C. Voters have greater choice through the RCV system.*

Closely related to increased viability and diversity is increased voter choice. Voters in RCV jurisdictions can vote for their most preferred candidate(s) instead of weighing votes strategically.<sup>40</sup> This allows voters to vote, by rank, in alignment with their ideological perspectives. By contrast, the plurality system acts as disincentive to choosing the candidate you favor; if a preferred candidate is not a favorite, you are forced to vote strategically or not at all.<sup>41</sup>

*D. RCV produces a true majority candidate more often than the plurality system.*

Lastly, RCV's ranking approach increases the chance of a true majority winner, meaning the candidate who wins with over 50% of the vote in the first round.<sup>42</sup> Comparatively, when the instant-runoff process is used for races in which the first round does not produce a true majority candidate, the instant-runoff process

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<sup>40</sup> See, Michael Lewyn, *Two Cheers for Instant Runoff Voting*, 6 PHOENIX L. REV. 117, 125 (2012).

<sup>41</sup> See, David Cobb, Patrick Barrett & Caleb Kleppner, *Preserving and Expanding the Right to Vote: Ranked Choice Voting*, ADVANCE: THE JOURNAL OF THE ACS ISSUE GROUPS 107, 110 (2007).

<sup>42</sup> See, FAIRVOTE.ORG *Data On Ranked Choice Voting*, [https://www.fairvote.org/data\\_on\\_rcv#research\\_rcvsocialchoice](https://www.fairvote.org/data_on_rcv#research_rcvsocialchoice) (last visited Dec. 16, 2019).



allows for finding “agreement through ranking,”<sup>43</sup> which occurs as a result of ranking and counting based on common ideology to find a majority perspective.

*E. What does the impact of RCV look like in American cities?*

These four benefits of RCV are reflected in the data from three cities that have implemented it for the lengthiest period of time: San Francisco, Berkeley, and Minneapolis. Since these cities implemented RCV, there appears to be a favorable, increasingly democratic shift in the result of the elections and their processes. In particular, all three of the cities’ data suggests greater viability and diversity of candidates, increased voter choice, and high true majority results in RCV elections.

*San Francisco:*<sup>44</sup> San Francisco implemented RCV in municipal elections for eight elected offices in 2004 and allows voters to choose up to three candidates per race. The local Board of Elections is scheduled to offer ballots and equipment that will increase the number of ranking lines to ten starting in 2019, thus giving voters even greater choice. Based on a preliminary review of the RCV data from fifty-eight San Francisco elections, there are high numbers of candidates running for office, increased viability and diversity, and high numbers of true majority winners. In 75.8% of races (44 races) three or more candidates ran and only 12% (7) had no contender. Though San Francisco had more than three candidates in most races prior to RCV implementation (unlike other cities), and therefore the number of candidates alone wasn’t the major impact of RCV, reports have shown that voters have a greater opportunity to voice their choice(s) and relay their layered perspectives through the ranking process. In the most recent San Francisco race for mayor 85% of voters ranked at least two

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<sup>43</sup> See, Lee Drutman, *If We’re Abolishing the Electoral College, Let’s Also Have Ranked Choice Voting for President*, VOX, Mar. 21, 2019, <https://www.vox.com/polyarchy/2019/3/21/18275785/electoral-college-ranked-choice-voting-president-democracy>.

<sup>44</sup> See *Generally*, CITY OF S.F. DEPT. OF ELECTIONS, *past election results*, <https://sfelections.sfgov.org/past-election-results>.

candidates and almost 70% ranked three.<sup>45</sup> The large majority of voters take the opportunity to rank. This suggests that voters are exercising choice, but also implies that there are strong perceptions of viability of the candidates they are ranking and that there may be more candidates running who represent the perspectives of more voters.<sup>46</sup>

In addition to numerous candidates, viability of candidacies, and increased voter choice, there is both an increase in candidate diversity, and a very large majority of races won with a true majority. California counties that adopted RCV saw a 38% increase in the numbers of non-white candidates running.<sup>47</sup> Though it is not clear if there is a direct link between the high numbers of candidates running, viability, and diversity with those factors being represented in who actually wins elections, it is safe to say that the “agreement through ranking” concept that is core to RCV has played out in some form, as evident in the data on true majority wins. Ninety-six percent of the races evaluated resulted in a true majority (56 of 58 races) and 56.8% (33 of those 58) won that true majority in the 1st round. The benefits of RCV voting evidenced in San Francisco’s elections also appears in the two other cities examined.

*Berkeley:*<sup>48</sup> Berkeley implemented RCV in 2010 for the Mayoral, Council, and Auditor general election races, and gives

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<sup>45</sup> See, FAIRVOTE.ORG, *San Francisco Democratic Party Backs Ranked Choice Voting*, (Sept. 4, 2018) [https://www.fairvoteca.org/san\\_francisco\\_democratic\\_party\\_backs\\_ranked\\_choice\\_voting](https://www.fairvoteca.org/san_francisco_democratic_party_backs_ranked_choice_voting); Charlotte Hill, Christopher Jerdonek & Viva Mogi, *SF Elections are Working and Getting Even Better*, S.F. EXAMINER, June 28, 2018, <https://www.sfexaminer.com/opinion/sf-elections-are-working-and-getting-even-better/>.

<sup>46</sup> Research on San Francisco races has shown that use of the ranking option varies depending on factors such as number of candidates running and competitiveness. Pedro Hernandez, *San Francisco Report: RCV is Working as Intended with Positive Voter Experience and Increase in Voter Turnout and Use of Rankings*, FAIRVOTE.ORG, May 23, 2018, [https://www.fairvoteca.org/san\\_francisco\\_report](https://www.fairvoteca.org/san_francisco_report).

<sup>47</sup> See FAIRVOTE.ORG, *San Francisco Democratic Party Backs Ranked Choice Voting*, *supra* note 45.

<sup>48</sup> ALAMEDA CNTY. REG. OF VOTERS, *Archived Elections*, <https://www.acvote.org/election-information/archived-elections>.

voters the option to rank up to three candidates per race.<sup>49</sup> Since implementation, Berkeley has seen an increase in the number of candidates running, more diverse candidates, and a large majority of races winning with a true majority. Since implementation, RCV was used in twenty-five races for these seats. Eighty-four percent of these races (21 of 25) had contenders, and 60% (15) had more than two candidates running. Following the implementation of RCV, there was a clear increase in voter choice—and, to at least some degree, viability of candidacies—as more than two candidates ran in most races compared to pre-RCV elections. In the 2004, 2006, and 2008 races for Mayor, City Council, and Auditor, only 33% (3 of 9) of races had more than two candidates running. As noted above, Berkeley has also seen an increase in diversity of candidates running since the inception of RCV, and 100% of races resulted in a true majority—76% resulted in a true majority in the 1st round.

*Minneapolis:*<sup>50</sup> Minneapolis has experienced similar improvements to democratic functioning as San Francisco and Berkeley. The city combines the primary and general elections into one election through the use of RCV, and allows voters to rank up to three candidates on their ballot. The city uses RCV for the election of Mayor, City Council, Board of Estimation and Taxation, and Parks and Recreation. Out of forty-two RCV races for Mayor and City Council since implementation in 2009, only 7% of these races had no contenders, whereas 83.3% had more than two candidates running, and 61.9% had more than three candidates. In 2001 and 2005, the two election cycles for mayor and city council preceding the implementation of RCV, no races for Mayor or City Council had more than two candidates running. Like Berkeley, there was a clear increase in viable candidacies and, thereby, voter choice. Additionally, a review of the 2017 election in Minneapolis showed an increase in the diversity of candidates

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

<sup>50</sup> MINNEAPOLIS MINN. ELECTIONS & VOTER SERV., *Election Results*, <http://vote.minneapolismn.gov/results/index.htm>.

and winners.<sup>51</sup> In eighteen of twenty-two races across the city, a woman and/or person of color ran, and a woman and/or person of color won in twelve of these races.<sup>52</sup>

As noted previously though, there is not yet a clear direct link between number of candidates running, greater viability, and the majority winner. The Minneapolis RCV data similarly suggests that the “agreement through ranking” concept was evident as 85.7% of these races resulted in a true majority and 69% resulted in a true majority in the 1st round.

#### V. RCV OPPONENTS CHALLENGE ITS PROPOSED BENEFITS

Opponents to RCV put forth a number of arguments to dissuade municipalities from adopting the process.<sup>53</sup> The most common anti-RCV arguments are (1) RCV is too complex for voters to understand; (2) RCV does not necessarily “give voters a greater voice;” (3) RCV will disrupt important coalition building that happens around our current two-party system; and (4) RCV is not the best vehicle for expanding the political presence of minor parties.<sup>54</sup>

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<sup>51</sup> FAIRVOTE MINNESOTA, *Ranked Choice Voting 2017 Election Report*, <https://www.fairvotemn.org/ranked-choice-voting-2017-elections-report>.

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

<sup>53</sup> In its early form RCV was attacked as the voting system that helped bring Hitler to power. *See*, Elsie S. Parker, *Books in Review*, 30 Nat'l Mun. Rev. 313-14 (1941) (Reviewing Ferdinand A. Hermens, *DEMOCRACY OR ANARCHY*, (1940)). *But cf.*, Amy, *supra* note 20 at 207 (Arguing Hitler and the Nazi party were the most popular party in Germany at the time and would have handily won in a FPTP election).

<sup>54</sup> Other arguments could be and have been made. Some have argued against RCV for cost reasons. These authors do not address that argument in full here, but will note, however, up to this point, over a dozen municipalities have implemented RCV and none have found it cost prohibitive, nor is it documented as a reason for repeal by the early adopters in the twentieth century. Furthermore, the status quo generates other costs that are equally, if not more, important to consider, including the cost of what a disenfranchised society can mean for neighborhoods and the reduction of generational poverty.

### *A. Is RCV Too Complex?*

Since RCV was adopted, critics have argued that it is far too complex for the average voter. This critique suggests that the ranking process, number of lines, and array of choices make it too complex. Voter education is certainly a worthy consideration;<sup>55</sup> however, research and a review of the history suggest that complexity is not a barrier to RCV for voters. Additionally, even if it were a barrier, it would not be insurmountable; it can be overcome with education and refinement of the process.

Current research shows that the ranking process does not confuse voters, and that over time voters become increasingly engaged in the use of ranking to exercise choice. A review of the 2018 midterms in three RCV cities revealed low errors, and self-reports of satisfaction with the ranking process.<sup>56</sup> In Minneapolis,

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<sup>55</sup> The infamous “butterfly ballot” incident is an example of a new ballot system implemented in a FPTP race where more voter education was necessary. See, Don van Natta, Jr. & Dana Canedy, *The 2000 Elections: The Palm Beach Ballot; Florida Democrats Say Ballot’s Design Hurt Gore*, N.Y. TIMES, Nov. 9, 2000, <https://www.nytimes.com/2000/11/09/us/2000-elections-palm-beach-ballot-florida-democrats-say-ballot-s-design-hurt-gore.html> (recounting how one county in Florida, Palm Beach, had implemented a new ballot system that year that led to 29,000 invalidated ballots due to voter confusion on how to use the new ballots, which ostensibly had been redesigned to be more legible for seniors). With respect to voter education, other municipalities have implemented RCV giving us models to work from to ensure the public is not disenfranchised in the same as thousands of Palm Beach County voters; *But see*, Scott James, *A critical spotlight shines on Ranked Choice Voting*, N.Y. TIMES, Oct. 6, 2011, <https://www.nytimes.com/2011/10/07/us/a-critical-spotlight-shines-on-ranked-choice-voting.html>. (Expressing concern with San Francisco’s adoption of RCV, citing the potential for voter confusion). As discussed, however, San Francisco’s RCV process had been successful in increasing democracy. Therefore, instead of a deterrent, James’ article serves as a reminder that voter confusion concerns with respect to RCV, at this point, are largely unfounded.

<sup>56</sup> THEO LANDSMAN, DREW SPENCER PENROSE, & ROB RICHIE, *Ranked Choice Voting in 2018: A Mid-Year Report: Analysis of Turn Out, Voter Experience, and Election Administration*, 6 (July 2018) <https://www.fairvote.org/ranked-choice-voting-in-2018-a-mid-year-report>. (Noting that an exit poll of Santa Fe voters revealed a 96% satisfaction rate with the voting experience)

prior to rolling out RCV, the municipality took great pains to prioritize voter education.<sup>57</sup> The process included an early voting trial, voter outreach for feedback on the trial, and a rework of the system based on the trial results. Because of their diligence, Minnesota successfully implemented the process in time for their 2009 elections, and Minnesota voters have been enjoying its benefits since then.

Historically, anti-PR groups have contradicted themselves when they argued that the process was overly complex. For example, The New York Times editorial board argued that because people were failing to rank all available candidates, the system was too complex. In the same breath, however, the board contradicted itself, noting that the Democrats had managed to use the new system “adroitly” and that “Communists and others had become skilled in ‘bullet’ voting,” but the Republicans had failed to “make their voice felt to a degree commensurate with their numbers.”<sup>58</sup> These statements indicate the system could not have been prohibitively complex, because otherwise Democrats, Communists, and “others” would not have had such success using it.<sup>59</sup> The more likely explanation, is that the Republicans had failed to earn a ranked vote, and the Communists had managed to gain more votes than were commensurate with their numbers.<sup>60</sup> Given the successful navigation of the RCV process by voters both historically, and contemporaneously in places like Minneapolis, Berkley and San Francisco, there is no question that complexity is not a barrier to pursuing the benefits of RCV. Nevertheless, for RCV efforts to succeed, voter education on the process, and voter turnout, are key.

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<sup>57</sup> MINNEAPOLIS MINN. ELECTIONS & VOTER SERV., *Minneapolis Ranked Choice Voting History*, <http://vote.minneapolismn.gov/rcv/RCV-HISTORY>.

<sup>58</sup> See, Editorial, N.Y. TIMES, Oct. 27, 1947.

<sup>59</sup> Paling in comparison to placing a man on the moon, the advent and widespread use of computers and cell phones, and an economy that enables us to buy and sell goods across the globe, RCV seems all the more achievable by those standards.

<sup>60</sup> See discussion *supra* Part II.

*B. Does RCV Violate the One Person One Vote Requirement?*<sup>61</sup>

Opponents of RCV also argue the ranking system violates the one person one vote constitutional requirement because it seeks to eliminate “wasted votes.”<sup>62</sup> In *Baber v. Dunlap*,<sup>63</sup> Plaintiffs argued Maine’s RCV law was an unconstitutional violation of the one person one vote requirement. The court rejected this argument and found instead that RCV “actually encourages First Amendment expression.”<sup>64</sup> In coming to its conclusion, the court noted Maine citizens implemented RCV to espouse “third party and non-party candidates” by giving voters the option to vote for their candidate(s) of choice through the ranking process and thus dispense with the spoiler effect. The court further noted that votes cast for an unsuccessful first-choice candidate were not “rendered irrelevant or diluted” as they were counted and distributed to the remaining candidates based on the voter’s indicated preference, if any.<sup>65</sup> As stated by the court, an election methodology that seeks to increase access to democracy and increase voters’ ability to more fully voice an opinion with respect to candidates, can only be said to further our constitutional right, making RCV an ideal choice for improving our democracy.<sup>66</sup>

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<sup>61</sup>“Extend the sphere, and you take in a variety of parties and interests; you make it less probable that a majority [and under plurality, a minority] of the whole will have a common motive to invade the rights of other citizens; or, if such common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.” *Baber v. Dunlap*, 376 F. Supp. at 137 (quoting THE FEDERALIST NO. 10).

<sup>62</sup> In RCV, “wasted votes” can refer to two different problems. The first are a voter’s first choice votes cast for the last place candidate. The second are excess votes received by a candidate who receives more votes than are necessary to win. The latter occurs with respect to multi-member districts. See generally, *How Proportional Representation Works supra* note 10.

<sup>63</sup> *Baber*, 376 F.Supp.3d at 137.

<sup>64</sup> *Id.* at 145.

<sup>65</sup> *Id.* at 141.

<sup>66</sup> *Id.*

*C. Will RCV Adversely Impact the Two-Party System?*

If history is any indication,<sup>67</sup> then it is likely the two-party system would be adversely impacted. However, what opponents perceive as an adverse effect may simply be an evolution of the electoral process. Americans are increasingly identifying as independent. A 2018 Gallup Poll shows 42% of voters identify as independent, 30% identify as Democrat, and 26% identify as Republican.<sup>68</sup> With more people seeking to be truly represented by their party, RCV provides, in part, the catalyst needed to force political parties to more definitively define their values and make room for other parties that are willing to represent the values the major parties refuse to. As we saw in PR, the likely result is that major parties will hold a less powerful majority and incorporate minor party views.<sup>69</sup> Therefore, this departure may be welcome based on shifts in party affiliation and evidence of an electorate that is actively choosing to decidedly reject “business as usual” candidates, positions, and party politics. Both trends will be further discussed in Section V, Timeliness of RCV.

*D. Is RCV the best vehicle for expanding the political power of minority parties?*

The largest benefit to minority parties is the elimination of the spoiler effect, which occurs when voters cast their vote strategically, rather than according to preference, in order to avoid “wasting” their vote on a candidate that has little chance of winning. This causes a great problem for voters and for candidates.

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<sup>67</sup> It was the two major parties that targeted PR in the early 20<sup>th</sup> century. See Shaw, *supra* note 23, at 590 (“From the beginning, the campaign line-up showed partisan forces on the one side, and independents on the other.”).

<sup>68</sup> Jeffrey M. Jones, *Americans Continue to Embrace Political Independence*, GALLUP (Jan. 7, 2019), <https://news.gallup.com/poll/245801/americans-continue-embrace-political-independence.aspx>.

<sup>69</sup> Of course, this may not be desirable. Some already argue the breakdown in government we see today is due to major parties increasingly moving away from the center, where compromise is more likely. Yet, others still would wonder at the value of such compromise. Ultimately, however, this is a balance that must continue to be studied and debated.



Independent and minor party candidates are painted as non-viable and blamed by members of the major party if it's believed the candidate detracted votes from the major party candidate. Similarly, for voters who wish to vote in line with their values, they are also susceptible to blame for the loss of major party candidates. The most recent example of both instances, of course, is the 2016 election, in which Jill Stein's candidacy and anti-Hillary Clinton voters were demonized after Hillary Clinton lost the election to the current President, Donald Trump.<sup>70</sup>

RCV provides a solution to both independent candidates and independent voters because voters are given the option to rank and, therefore there is no threat of "wasting" their vote. The second or third place candidate can still win with a majority, and, as discussed, the once outlier candidate has a greater potential to establish a viable candidacy. This was borne out in PR, where a Communist candidate garnered more first- place votes than any of the other candidates running.<sup>71</sup> Therefore, RCV makes it possible for elections to be more about principles than power, and, as a result, makes our democracy stronger. However, as discussed in the companion reforms section of this paper, RCV is not the only reform required if minor parties are to be more successful.

## VI. TIMELINESS OF RCV

In the wake of growing threats to our democracy, the American electorate is both increasingly resistant to establishment politics and supportive of RCV. Several examples of current events show support for RCV, resistance to establishment politics, and threats to our democracy. These events make clear the timeliness of (re)consideration of RCV.

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<sup>70</sup> See, e.g., Anthony Zurcher, *What Happened: The Long List of Who Hillary Clinton Blames*, BBC NEWS (Sept. 13, 2017), <https://www.bbc.com/news/world-us-canada-41244474>; Tara Golshan, *Did Jill Stein Voters Deliver Trump Presidency?*, VOX (Nov. 11, 2016), <https://www.vox.com/policy-and-politics/2016/11/11/13576798/jill-stein-third-party-donald-trump-win>.

<sup>71</sup> See discussion *supra* Part II.

### *A. Support for RCV*

In just the last three years, voters have chosen to adopt RCV in three municipalities and one state. Maine became the first state to adopt RCV in 2016 and began implementation in 2018. Amherst, Massachusetts voted for RCV in 2018 and is pending implementation for 2021. Lastly, two cities voted in this most recent November 2019 election cycle to adopt the method as well: New York City and East Hampton, Massachusetts. These additions bring the count of RCV municipalities and regions to twenty-three.<sup>72</sup> In addition to increased support from the electorate, RCV was recently boosted by the previously noted *Baber* case, which upheld the constitutionality of the RCV method in Maine.<sup>73</sup>

In addition to these successes for RCV, legislation has been proposed at the federal level and state level in New York as well. The federal legislation, The Fair Representation Act, was proposed in 2017 and, as of this writing, is currently sitting in committee. The Act would establish the use of RCV to elect House representatives and establish a commission to redistrict House seats to have multiple members per district.<sup>74</sup> Relatedly, a bill was proposed in New York State in 2010 to establish a pilot study of RCV in eleven municipalities across the state.<sup>75</sup> The bill has been proposed every session since 2010 and is currently sitting in the Elections committee.<sup>76</sup> These political and legal developments contribute to the timeliness of the RCV method for expanding local and state democracies. The electorate is energized by changes such as these, as well as the number of first-time and independent candidates. The growing RCV movement suggests an interest in stepping outside of our current two-party system.

### *B. Resistance to Establishment Politics*

Both wide support for independent candidates and the increasing number of voters who identify as independent are

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<sup>72</sup>Where Ranked Choice Voting is Used, FAIRVOTEFAIRVOTE, [https://www.fairvote.org/where\\_is\\_ranked\\_choice\\_voting\\_used](https://www.fairvote.org/where_is_ranked_choice_voting_used) (last visited Dec. 17, 2019).

<sup>73</sup> See discussion *supra* nn. 61-63 and accompanying text.

<sup>74</sup> Fair Representation Act, H.R. 3057, 115th Congress Cong. §1(a) (2017),).

<sup>75</sup> A7492A, 2009-10 Leg., Reg. Sess. (N.Y. 2009)).

<sup>76</sup> S.2517, 2019-20 Leg., Reg. Sess. (N.Y. 2019).

evidence of the growing resistance to establishment politics. Voters are tired of candidates who have toed party lines, had too little engagement with the electorate, and engaged in backroom deals that supersede the voice of voters. Therefore, voters mistrust the two-party system and know that it limits (through laws and practice) viability of independent and third party choices.

First, the country has increasingly seen voters support anti-establishment candidates and coalitions. Though voters are often faced with tough choices due to the poor viability of independent and minor party candidates and the potential for spoiler votes, they want change. Examples span the course of the last decade: the rise of the Tea Party; Bernie Sanders' widely supported 2016 primary race; the elections of President Trump, Congresswoman Alexandria Ocasio-Cortez, and Congresswoman Ayana Presley; the increase in independent candidates running for office over the last several years that reached an unprecedented high in the 2018 midterms;<sup>77</sup> and wins by numerous, new, challengers to incumbents in seats throughout New York State.<sup>78</sup>

Though we have seen high profile wins, voters are still too often faced with voting strategically to limit risk and, as a result, vote for a major-party candidate despite preferences for an alternative or the desire to have other options at all.<sup>79</sup> The bulk of new candidates have been running in open seats (the majority of

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<sup>77</sup> *Independent Candidates & The 2018 Election: What We Learned*, UNITE AM. (2019).), <https://docsend.com/view/tdpge9n>.

<sup>78</sup> Grace Segers, *How Alexandria Cortez Won the Race That Shocked the Country*, CITY & ST. N.Y., (June 27, 2018), <https://www.cityandstateny.com/articles/politics/campaigns-elections/how-alexandria-ocasio-cortez-won-race-shocked-country.html>.

<sup>79</sup> Discrepancy in pre-election polling of voters desires for independent candidates in 2018 midterms did not match up with the resulting votes for major party backed candidates. According to researchers for Unite America, this may be attributed to several factors (social desirability bias, branding of major parties, and election day hyper-partisanship activation). These authors pose the possibility of these factors being philosophically intertwined with the question of strategic voting and trust in process in relation to (and contrast with) ideological perspectives. *See, What We Learned supra* note 75.

whom are women and people of color).<sup>80</sup> It is still very difficult for new candidates (party affiliated or not) to challenge major party-backed incumbents. This is a viability issue that RCV, in conjunction with companion reforms, can begin to address. As previously discussed, RCV increases the number of women, new candidates, and people of color in candidacies and elected office.<sup>81</sup>

A second major indicator of growing resistance to establishment politics is the increasing number of Americans who identify as independent and have moved away from association with the two major parties over the last decade. At 42%, the number of Americans who identify as independent has grown steadily over the last decade as Democrat and Republican party bases have diminished.<sup>82</sup> This suggests that voters have an array of perspectives that are not, and cannot be, encompassed by two major parties. Voters who identify as independent, however, are faced with barriers to voting in primary elections across the nation, and are forced to choose between refraining from voting in the general, voting for a “spoiler” candidate, or voting for a viable candidate (almost inevitably backed by a major party). As noted, independent voters often end up choosing to vote for the viable candidate. This phenomenon will only be exacerbated by the growing threats to democracy evident across the nation.

### *C. Growing Threats to Democracy*

Two current events (one national and one in New York State) have drawn attention to some of the growing threats to voters, candidates, and coalitions with non-binary political perspectives.

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<sup>80</sup> Jennifer Steinhauer, *Insurgent Democrats, Many of Them Women, Worry a New Party Policy Will Block Them*, THE N.Y. TIMES, June 5, 2018, <https://www.nytimes.com/2019/06/02/us/politics/dccc-blacklist-incumbent-policy.html>.

<sup>81</sup> Robert Boatright, *Here's what we've learned from the U.S. congressional primaries so far*, WASH. POST (June 5, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/05/heres-what-weve-learned-from-the-u-s-congressional-primaries-so-far>.

<sup>82</sup> Jones, *supra* note 66.

Both events are examples of the use of rule or policy changes that threaten the already shaky viability of third party opportunities, thus threatening to further limit democratic choice of voters. As a result, RCV is, again, a timely consideration in relation to the increasing affiliation of voters as independent who face existing and potential barriers to voting for viable candidates outside of the existing two-party domination.

First, the national Democratic Congressional Campaign Committee implemented a policy prohibiting contracts with firms that work with primary challengers to Democrat incumbents.<sup>83</sup> This is problematic for several reasons. It is another hindrance to non-major party backed candidates, as well as a symbolic action taken to wield and ensure party power. This is incongruent with the increasing desire of voters to vote independently. Relatedly, and finally, it is a hindrance to voters (consciously and not) who want to step out of strategic voting and away from the established brand and “safety” of the two major parties.

Second, New York State’s Public Campaign Financing Commission, created in 2019 to establish a public campaign financing option, released several rule changes that threaten the existence of minor parties and voter choice. The commission voted, on November 25, 2019, to make three major changes that will impact minor parties and independent candidates. First, the commission voted to increase the threshold of votes needed for third parties to have an ongoing line on a ballot from 50,000 in a gubernatorial election year to 130,000 biannually.<sup>84</sup> Second, the commission voted to restrict eligibility for public financing of Assembly and Senate seat races to donations from inside districts while simultaneously refraining from limiting party committee acquired donations to backed candidates.<sup>85</sup> Third, the commission

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<sup>83</sup> *Id.*

<sup>84</sup> Samar Khurshid, *State Commission Approves New Campaign Finance System, Raises Bar for Political Party Ballot Access*, GOTHAM GAZETTE (Nov. 25, 2019), <https://www.gothamgazette.com/state/8952-state-commission-approves-new-campaign-finance-system-and-raises-bar-for-political-party-ballot-access>.

<sup>85</sup> Those who oppose the requirement of in-district donations say this gives an advantage to incumbents and will make new-comer challenges all the more difficult. *See id.*

voted to raise the threshold of petition signatures for statewide races from 15,000 to 45,000.<sup>86</sup> The legislature failed to hold a special session and, therefore, the changes became law.<sup>87</sup>

These changes are widely debated. Opponents argue the changes are intended to restrict minor parties and ensure major party power and, specifically, to punish the Working Families Party, which endorsed Governor Cuomo's opponent in the last gubernatorial race.<sup>88</sup> Minor party candidates have only just been able to meet the 50,000 vote threshold because of fusion voting (another at-risk method in New York State), suggesting that it will be that much harder to meet the higher threshold and could easily threaten the viability of minor parties.<sup>89</sup> Additionally, opponents argue the sudden changes made by the commission toward more restrictive rules suggest backroom dealing with the two prominent leaders pushing for restrictions to minor parties (Governor Cuomo and the State Democratic Committee Chairman).<sup>90</sup> Though the commission has received praise for working to adopt a public financing system that will help fund additional campaigns, the commission has also been critiqued for stepping outside of the public financing mission to restrict ballot access to third parties.<sup>91</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> Vivian Wang, *Democrats' Secret Plan to Kill Third Parties in New York*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/nyregion/election-third-party-ny.html>.

<sup>88</sup> *See*, Khurshid, *supra* note 82.

<sup>89</sup> The new threshold is more than 4 times the state-wide enrollment of the Green Party; close to 3 times that of the Working Families Party, and more than 13 times the state-wide enrollment of the Libertarian Party. The Independence Party (widely regarded in WNY political circles as an arm of the Republican party) is well above the amount with over 400,000 voters, and the Conservative Party appears to be in safe territory as well, with around 160,000 voters state-wide. *See NYS Voter Enrollment by County, Party Affiliation and Status: Voters Registered as of Feb. 1, 2019*, N.Y. ST. BD. OF ELECTIONS at 9, [https://www.elections.ny.gov/NYSBOE/enrollment/county/county\\_feb19.pdf](https://www.elections.ny.gov/NYSBOE/enrollment/county/county_feb19.pdf).

<sup>90</sup> Karen DeWitt, *Abrupt Reversal by NY Campaign Finance Commission Leaves Supporters Wondering*, WAMC N.E. PUB. RADIO (Oct. 25, 2019), <https://www.wamc.org/post/abrupt-reversal-ny-campaign-finance-commission-leaves-supporters-wondering>.

<sup>91</sup> *Brennan Center Responds to New York State Public Financing Commission Vote and Draft Recommendations*, BRENNAN CENT. FOR JUST. (Nov. 25, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/brennan-center-responds-new-york-state-public-financing-commission-vote>.

Moreover, arguably, the public financing rules themselves do not truly level the playing field.

Proponents argue that the commission changes will make elections less costly for the public and ensure the legitimacy of third parties, which some argue are too often frivolous and create confusion on the ballot.<sup>92</sup> The Chair of the State Democratic Party went so far as to argue that a “credible” minor party should be able to produce the proposed numbers to get on the ballot.<sup>93</sup> However, these sweeping statements discount the history of voter choice (or lack thereof) in this country, as well as other current, intersecting election laws and rules that have ingrained the two-party system into every step of the election process and ensured major barriers to independent and minor party candidates (and their supporting voters).

The commission’s changes favor incumbents (who will most likely already have the backing of a major party, a fund base, and name recognition) and major parties (which have established resources and unrestricted additional donations), and, therefore, threaten the democratic process for voters and candidates. The growing number of independent voters already face an array of barriers to vote in our democratic elections as they desire. They want to support greater democracy through RCV, which would increase overall election turnout. We should ask how to make election processes more open, democratic, and easier for voters. RCV, in conjunction with related reforms, has the potential to address the challenge to minor parties and shift towards greater viability of more of a variety of candidacies.

## VII. RCV & COMPANION ELECTORAL REFORM

RCV exists interdependently within the context of other election laws and reform efforts. As a result, RCV may be more effective in furthering the growth of our democracy if supplemented

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<sup>92</sup> Wang, *supra* note 85.

<sup>93</sup> Karen DeWitt, *New York Public Finance Commission Plan Condemned By State’s Minor Political Parties*, WSKG NPR (Nov. 26, 2019), <https://wskg.org/news/ny-public-finance-commission-plan-condemned-by-states-minor-political-parties/>.

with additional reforms. Campaign finance, multimember districts, and ballot access make strong potential companion reforms to further the impact of RCV. They will be briefly examined here.

#### A. Campaign Finance Reform<sup>94</sup>

RCV alone cannot fix a flawed electoral system. Among the companion reforms, campaign finance is key for striving toward a more democratic system. From advertisements and literature to candy for parades and refreshments for volunteers (and a new development—childcare expenses), every campaign will cost some money. Without it, candidates often fail to be taken seriously by the media, potential donors, and the voters (who are forced to vote strategically). To ease this burden, public financing is meant to make it possible for lesser-known, or more independent candidates to run for office in an arena that has long favored more popular, well-funded candidates, who are better able to raise funds.

The need to ease this burden, in large part, stems from the United States Supreme Court decision, *Citizens United v. Federal Election Commission*, in which the court found that, just as individuals, corporations have a First Amendment right to contribute to campaigns, and, therefore, laws severely restricting that right are unconstitutional.<sup>95</sup> Since 2010 when it was decided, *Citizens United* has been synonymous with the concept of allowing “big money” into our elections,<sup>96</sup> and many have called for the

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<sup>94</sup> “There are two things that are important in politics. The first is money, and I can’t remember what the second one is.”—Marcus Alonzo Hanna quoted in Adam Winkler, *WE THE CORPORATIONS* 200 (2018); “A corporation will subscribe to a political party only because the corporation expects that party...to do something for the benefit of the corporation or to refrain from doing something to its injury. No other motive can be imagined.”—Alton Parker. *Id.* at 202.

<sup>95</sup> *Campaign Finance Reform*, ACLU, <https://www.aclu.org/issues/free-speech/campaign-finance-reform>.

<sup>96</sup> *Id.*; Though, corporate funds influencing elections has been an increasing problem since at least the late 1800s. In his book, *We the Corporations*, Adam Winkler notes a famous political cartoon, *The Bosses of the Senate*, that depicts the extent to which it was popularly believed (and for



decision to be overturned.<sup>97</sup> *Citizens United* is one area of focus in relation to campaign finance reform; however, an assessment of methods of public financing is an additional and necessary area for consideration.

Public financing can take many forms. Interestingly, since 1958, Germany has publicly financed political parties who act as a conduit for the funds to individual candidates.<sup>98</sup> Currently, the government allots up to 133 million Euros to each party, including minor parties.<sup>99</sup> In the United States, President Theodore Roosevelt, circa 1910, advocated for a similar system, calling for Congress to appropriate the sums needed to cover the “proper and legitimate expenses of each of the great national parties.”<sup>100</sup> But the major parties already have too much power; even if minor parties could stand to benefit from such an approach, we hesitate to recommend such a model here.

Other models do appear to lend themselves more to empowering individuals (as opposed to large money donors). One method, currently available in Arizona, Connecticut, and Maine, is

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good reason I’m sure) corporate funds were influencing elections; he goes on to explain how Marus Alonzo Hanna modernized the political campaign to rely more heavily on corporations, an effort which resulted in the most money raised for a presidential campaign at the time (\$7million); and, finally, how corporations were still very much a part of the politics at the beginning of the twentieth century when a scandal erupted as it was discovered 70% of Theodore Roosevelt’s campaign funds were attributed to corporate donations, a fact he had vehemently denied (to protect his image Theodore Roosevelt fought for laws to restrict corporate donations). See Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights 196-205* (2018). Winkler concludes, “[a]lthough Citizens United and Hobby Lobby brought new public attention and scrutiny to corporate rights, long before those controversial cases were decided corporations had already taken their place among *We the People*.” *Id.* at 395 (alteration in original).

<sup>97</sup> *Id.*

<sup>98</sup> *Campaign Finance: Germany*, LIBR. OF CONG., <https://www.loc.gov/law/help/campaign-finance/germany.php>.

<sup>99</sup> *Id.* The only requirement to receive funds as a party is to receive .5% of the vote. In New York, if 12 million people voted that would be 60,000 votes. Cf. New York’s new public financing rules, in which a party isn’t even eligible to appear on the ballot with less than 130,000 votes.

<sup>100</sup> See *Public Campaign Financing: Overview*, NAT’L CONF. OF ST. LEGISLATURES., <http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx> (last visited Jan. 20, 2020).

the Clean Elections Method. Under this method, candidates are encouraged to obtain small dollar donations (typically \$5 or less) and if a certain threshold is met, the state will give the candidate the maximum amount of dollars for the race.<sup>101</sup> In 2014, the maximum amount of money for Arizona's gubernatorial race was \$1.1 million.<sup>102</sup>

Another method is matching donations, which is available to candidates in New York City. Candidates for eligible positions agree to fund limits, spending limits, and financial disclosure reports, and in exchange they are awarded \$8 public for every \$1 donated.<sup>103</sup> In New York State's implementation of the matching funds program by the Public Finance Commission, however, we are reminded that laudable intentions may still fall prey to political gamesmanship.<sup>104</sup>

As of February 2019, fourteen states offer some form of public financing. The system is not perfect; however, if paired with the benefits of RCV, our findings lead us to believe that public financing campaign programs will become more valuable, offering greater opportunities to independent candidacies and greater opportunities for a new generation of leaders.

*B. Multi-member districts: What can we learn from history?*

A single representative can't possibly represent all the interests of a district, and from the history of PR (discussed in Section II: RCV History), there is already a vision of what multi-member districts would look like in the modern day. The vision offers the promise of greater, more effective representation of the electorate and a greater, more collegial democratic process. Therefore, these authors suggest it here as a companion reform.

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See *Join the Matching Funds Program*, N.Y. CITY CAMPAIGN FIN. BD., <https://www.nyccfb.info/candidate-services/join/> (last visited Dec. 16, 2019).

<sup>104</sup> See discussion *supra* Part V.C.

As for the mechanics of counting votes in a multi-member district, the RCV process in a multi-member district (PR or STV) operates similarly to that of a single-member district in that voters have the opportunity to rank candidates on their individual ballots. If a majority winner results from the first round, that candidate is the winner and use of the instant run-off process is not necessary. If there is no majority winner, the instant-runoff process ensues, with votes from the candidate with the least first choice votes being distributed in each subsequent round.<sup>105</sup> The difference in a multi-member district is that “excess votes” from candidates who have already met the threshold to win are also distributed.<sup>106</sup> This process is continued until winning candidates are identified for each available vacancy.

Though this paper recommends multi-member districts as a companion reform to RCV, non-RCV multi-member districts have had challenges that are worth recognizing and avoiding in moving forward. In *Thornburg v. Gingles*,<sup>107</sup> the United States Supreme Court heard arguments on whether five multi-member districts and one single-member district in North Carolina diluted the votes of African American voters, violating §2 of the Voting Rights Act. The court found the multi-member districts did indeed affect the ability of the minority community to elect their representative of choice.<sup>108</sup> In support of its finding, the lower court noted the multi-member district structure was problematic when combined with targeted race campaigns, the State’s history of voter suppression, and other troubling data such as the fact that white voters declined to vote for African-American voters at least two-thirds of the time.<sup>109</sup> Relying on these facts, the Court ultimately affirmed that the multimember district structure had, indeed, effectively disenfranchised African American voters.<sup>110</sup>

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<sup>105</sup> See discussion *supra* Part I.

<sup>106</sup> See *How Proportional Representation Elections Work*, *supra* note

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<sup>107</sup> 478 U.S. 30 (1985).

<sup>108</sup> *Id.* at 80.

<sup>109</sup> *Id.* at 59, 80.

<sup>110</sup> *Id.* at 80.

For two reasons, this, however, is no reason to reject multimember districts. First, there are many forms of multi-member districts. As we saw with the RCV multimember option adopted in the U.S. in the early twentieth century, minority communities had more success with that system than ever before prior to its enactment. Second, due to gerrymandering, it is possible for African American voters to just as easily be disenfranchised in single-member districts.<sup>111</sup> Therefore, while certain multi-member districts have been problematic for communities of color, PR's history suggests the potential of multi-member districts to increase political inclusion for minorities, and, as a result, should be explored as a further enhancement to the benefits RCV offers.

### *C. Ballot access reforms*

Ballot access is another necessary companion reform to support improved democratic functioning generally and to support the effectiveness of RCV. In order for RCV to effectively give voters greater choice through viable and diverse candidacies, a broad array of candidates need to get on the ballot. Currently, independent and minor party candidates face numerous challenges throughout the process of getting on the ballot. From acquiring signatures to disputing challenges to petitions, the process favors highly established and funded major parties and their candidates.

Unlike major party backed candidates, other candidates often face an uphill battle to get on the ballot when petitioning signatures are required as a prerequisite. Resources such as

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<sup>111</sup> In the City of Buffalo, one particular council district has been unable to elect an African American for decades, despite a significant amount of the district being made up of majority African American neighborhoods. The unusual horseshoe shape of the district is evidence of a district cobbled together in such a way as to dilute the votes of African Americans in the district. In 2019, again, the district was unable to elect an African American representative despite the candidacies of four African Americans in total. A quick analysis of the election numbers reveals even in a multi-member (PR) scenario with two seats available, the other white candidate in the race would have come in second place. In other words, because of the drawing of the district, Black representation would only have been possible if three seats were available, reinforcing, yet again, the idea that RCV is only one tool of many that must be examined in moving toward a more democratic system.

financial and human capital are often inadequate. Additionally, minor party candidates face the challenge of obtaining enough signatures from the smaller pool of eligible voters (who are affiliated with that minor party).<sup>112</sup>

Even if candidates are able to meet the threshold for signatures and then file, the challenging process is fraught with difficulties and, arguably, undemocratic as well.<sup>113</sup> Though the process was originally established to reduce and deter fraud, candidates and parties are able to use the process to knock candidates off the ballot simply to reduce competition. When candidates are challenging the system independently, there is increased room for error in minor and major technicalities that can weaken chances of successfully disputing a challenge.<sup>114</sup> Candidates (including major party candidates) are encouraged to get three times the requirement to account for errors (unclear signatures, missing zip code or city, etc.),<sup>115</sup> but this then brings us back to the challenge for independent and minor party candidates of getting even the threshold requirement. Additionally, because independent candidates often do not have the resources to challenge the major party endorsed candidate, there is not an equitable opportunity to “use” the process to knock those candidates off the ballot. Objections to a designating petition in New York State must be filed within three days.<sup>116</sup> That is not necessarily a feasible time frame for minor party or independent candidates who likely do not have access to adequate resources to review and file objections. Lastly, it is undemocratic to knock off competition before the electorate has even had an opportunity to weigh in through a full vote.<sup>117</sup> Though

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<sup>112</sup> DeNora Getachew, *Understanding the Labyrinth: New York’s Ballot Access Laws*, GOTHAM GAZETTE, <https://www.gothamgazette.com/index.php/advertise/252-understanding-the-labyrinth-new-yorks-ballot-access-laws>.

<sup>113</sup> Both authors are unfortunate enough to have been witness and subject to this process in the local political arena.

<sup>114</sup> Alan Bedenko, *Electoral Malpractice*, THE PUB., Apr. 18, 2019 (Reporting on five independent candidates [all women] whose ballots were challenged for technical deficiencies), <http://www.dailypublic.com/articles/04182019/electoral-malpractice>.

<sup>115</sup> DeNora Getachew, *Understanding the Labyrinth: New York’s Ballot Access Laws*, supra n.

<sup>116</sup> *Running for Office*, N.Y. ST. BD. OF ELECTIONS, <https://www.elections.ny.gov/RunningOffice.html>.

<sup>117</sup> As opposed to challenges to legitimately fraudulent petitions.

some may argue that petitioning is an opportunity for the electorate to weigh in on the legitimacy of a candidate to be considered for elected office, this argument does not take into account the full picture: lack of resources, knowledge of the process, and the fact that the petitioning process itself does not allow all voters (or all voters within that party) the opportunity to weigh in.

Some states have implemented alternatives to petitioning for signatures. One alternative is the submission of filing fees for certain political races; however, those states that allow this are constitutionally required to provide the option to file as indigent if the cost of the fee is too high for a candidate.<sup>118</sup> Depending on the state, the indigent candidate may be excused, given the alternative option of petitioning for signatures, or pay a reduced fee.<sup>119</sup> Some argue for the alternative of open ballot access entirely and others express concern about having chaotic and confusing ballots, illegitimate parties, or fraud without at least some ballot access requirements.

Ballot access is a necessary companion reform to support improved democratic functioning. With RCV, more minor party and independent candidates have greater opportunities to get on the ballot. If ballot access is going to be limited in some form, it should be considered contextually to allow for fair and equitable opportunities for democratic processes to proceed. To do this, more questions need to be asked. If filing fees are required, are they nominal across the board or are fees tiered depending on resources? If petitioning signatures are required, are the requirements across the board, dependent on party member numbers or geography, or dependent on the resources of coalition/ party affiliation?<sup>120</sup> Is it possible for voters to sign for more than one candidate?<sup>121</sup> Lastly,

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<sup>118</sup> *Filing Fees for Candidates for State Legislator*, NAT'L CONF. OF ST. LEGISLATURES (July 7, 2015), <http://www.ncsl.org/research/elections-and-campaigns/filing-fees-for-candidates-for-state-legislators.aspx>.

<sup>119</sup> *Id.*

<sup>120</sup> *Getting on the Ballot: What it Takes*, NAT'L CONF. OF ST. LEGISLATURES, 27 *The Canvass: State and Election Reform 1-3* (Feb. 2012), [http://www.ncsl.org/documents/legismgt/elect/Canvass\\_Feb\\_2012\\_No\\_27.pdf](http://www.ncsl.org/documents/legismgt/elect/Canvass_Feb_2012_No_27.pdf).

<sup>121</sup> In New York, a voter cannot sign more than one petition for an office unless there is more than one vacancy for the office. N.Y. Election Law §

what are the deadline requirements for new parties? We will move toward a better democracy if we ask such questions.

#### VIII. CONCLUSION

It is incumbent upon us as citizens to be proactive in responding to the growing threats to our democracy by considering the use of RCV and suggested companion reforms for the betterment of our democracy. As the health of democracy is on the minds of so many Americans, let us remember our history and look at our present in which we see more governments choosing the benefits of RCV that we once chose to forego as a result of prejudice and fear. Let us also look to our future and all we stand to gain in implementing RCV and its companion reforms. Finally, in our current political state Franklin D. Roosevelt's words ring truer than ever: "the only thing to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance."<sup>121</sup>

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6-134(3). As a result, it is a common strategy for major party candidates to "steal."