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NOTE

Ranked Choice Voting: How Voters Have Responded to a Failing Political System

Audrey Brittingham

“In the end, the biggest obstacle to more Americans voting is their own sense of powerlessness. It’s true: voting is a profound act of faith, a belief that even if your voice can’t change policy on its own, it makes a difference.”¹

INTRODUCTION

Americans have a strong, thorough history of distrusting “politicians” and “politics.” The American Revolution was based largely on frustrations with our representation (or lack thereof). Not long after the revolution, politicians discovered an ever-successful campaign platform: I promise to fight the other, no-good, scoundrel politicians and support my constituents.² (“Drain the swamp,” anyone?)³ A long-standing colloquialism amongst politicians and people in the political world is “People love their congressmen but hate Congress.”⁴ While not a new sentiment, distrust of the political system has grown exponentially in recent decades. In the United States, evidence shows distrust keeps citizens from voting and remaining engaged in the political system.⁵

Negative perceptions of the political system take their toll at the voting booth and are often cited as a central cause to low voter turnout. In 2016, the U.S. Census Bureau reported that nearly forty percent of registered American voters did not vote in the election.⁶ The Pew Research Center surveyed registered non-voters asking why they did or could not vote in this election. The top two reasons for abstaining were that voters felt like their vote would not make a difference and that they did not like the two candidates or the issues they were running on.⁷ Meanwhile, the

¹ Editorial, *Vote. That’s Just What They Don’t Want You to Do*, N.Y. TIMES (Mar. 10, 2018), <https://www.nytimes.com/2018/03/10/opinion/sunday/go-vote.html>.

² Keith E. Whittington, *Hating on Congress: An American Tradition*, GALLUP (July 30, 2019), <https://news.gallup.com/opinion/gallup/262316/hating-congress-american-tradition.aspx>.

³ Adam Andrzejewski, *A Progress Report—Is President Donald Trump “Draining the Swamp?”*, FORBES (Aug. 28, 2019, 11:33 AM), <https://www.forbes.com/sites/adamandrzejewski/2019/08/28/a-progress-report-is-president-donald-trump-draining-the-swamp/?sh=6fb6ca07f570>.

⁴ Whittington, *supra* note 2.

⁵ See, e.g., Ryan J. Silver, Note, *Fixing United States Elections: Increasing Voter Turnout and Ensuring Representative Democracy*, 10 DREXEL L. REV. 239 (2017).

⁶ Thom File, *Voting in America: A Look at the 2016 Presidential Election*, U.S. CENSUS BUREAU (May 10, 2017), https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html.

⁷ Gustavo Lopez & Antonio Flores, *Dislike of Candidates or Campaign Issues was Most Common Reason for Not Voting in 2016*, PEW RES. CTR. (June 1, 2017), <https://www.pewresearch.org/fact-tank/2017/06/01/dislike-of-candidates-or-campaign-issues-was-most-common-reason-for-not-voting-in-2016/>.

2020 elections saw the largest voter turnout since the elections of 1900.⁸ Even so, the 66.7% voter turnout in the 2020 election was viewed as a triumph in United States electoral history,⁹ although many democratic countries (including our neighbors¹⁰) would consider such turnout average, if not low.¹¹

A recent Gallup poll shows a decline in feeling “proud to be an American,” with the largest barrier to national pride being our political system.¹² In 2019, The Wall Street Journal and NBC released a poll showing nearly 70% of Americans feel angry about the political system because they believe it supports insiders, not Americans.¹³ Several studies like this suggest Americans distrust their government now more than ever.¹⁴

As a response to low voter turnout and frustration with the political process, the citizens of Maine and several American cities have started organizing and advocating for an entirely new voting system: Ranked-Choice Voting (RCV).¹⁵ The implementation of RCV in Maine was not initiated by the legislature or executive action; rather, the voters collected signatures to put RCV on the ballot statewide.¹⁶ Similar ballot initiatives have also led to the adoption of RCV in several cities, like Oakland, San Francisco, New York, and Minneapolis.

⁸ See James M. Lindsay, *The 2020 Election by the Numbers*, COUNS. ON FOREIGN REL. (Dec. 15, 2020, 7:00 AM), <https://www.cfr.org/blog/2020-election-numbers>.

⁹ *Id.* (citing *2020 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2020g> (last updated Dec. 7, 2020)).

¹⁰ See *Voter Turnout at Federal Elections and Referendums*, ELECTIONS CAN., <https://www.elections.ca/content.aspx?section=ele&dir=turn&document=index&lang=e> (last visited Feb. 28, 2020); Drew Desilver, *In Past Elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RES. CTR. (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/>.

¹¹ See, e.g., *id.* Sixty-seven percent of Canada’s registered voters turned out for the 2019 national election. *Id.* In Mexico, 63% of registered voters turned out for the 2018 election. *Id.*

¹² Megan Brennan, *American Pride Hits New Low; Few Proud of Political System*, GALLUP (July 2, 2019), <https://news.gallup.com/poll/259841/american-pride-hits-new-low-few-proud-political-system.aspx>.

¹³ Carrie Dann, *‘A Deep and Boiling Anger’: NBC/WSJ Poll Finds a Pessimistic America Despite Current Economic Satisfaction*, NBC NEWS (Aug. 25, 2019, 09:00 AM), <https://www.nbcnews.com/politics/meet-the-press/deep-boiling-anger-nbc-wsj-poll-finds-pessimistic-america-despite-n1045916>.

¹⁴ See, e.g., *id.*; see also Lee Rainie & Andrew Perrin, *Key Findings About Americans’ Declining Trust in Government and Each Other*, PEW RES. CTR. (July 22, 2019), <https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/>.

¹⁵ See, e.g., *More About Ranked Choice Voting: Using Ranked Choice Voting*, FAIRVOTE, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used (last visited Dec. 19, 2019).

¹⁶ *Id.*; see also *Spotlight: Maine*, FAIRVOTE, https://www.fairvote.org/spotlight_maine#november_2018_maine_elections (last visited Dec. 19, 2019).

RCV, sometimes referred to as Instant-Runoff Voting,¹⁷ is a way to elect politicians by a majority of votes, rather than a plurality.¹⁸ The principal voting system used throughout the United States is a plurality system, wherein the person who receives the most votes wins after a single vote count.¹⁹ If more than two people run for a single position in a plurality system, the winner does not have to receive a majority of votes; in fact, the more people that run for that position, the fewer votes they must receive to win.²⁰

With RCV, when more than two people run for office, the voter ranks the candidates in order of preference by indicating their first choice, second choice, third choice, and so on.²¹ When electing someone for a single seat, all the first choices are tallied, and if no candidate has reached a simple majority, then the candidate with the fewest first choices is eliminated.²² All ballots indicating the eliminated candidate as their first choice are then reapplied to the remaining candidates based on the second choice.²³

For example, Willow, Mauricio, and Jocelyn are all candidates for a political seat. After the first round of voting, Willow has twenty-one votes, Mauricio has forty-five votes, and Jocelyn has thirty-four votes, for a total of one hundred votes. Because no one has yet to receive more than fifty percent of the votes, the person receiving the fewest first choice votes (Willow) is dropped and all twenty-one of those ballots are redistributed amongst the remaining candidates based on the voters' second choices. After the redistribution, Mauricio has forty-seven votes and Jocelyn has fifty-two votes. In a plurality voting system, Mauricio would have won after the first round. However, because the majority of Willow's voters preferred both Willow and Jocelyn to Mauricio, Jocelyn won in the runoff.

RCV is similar to traditional runoff voting but does not require multiple elections to determine the winner.²⁴ Traditional runoff voting occurs when a locality requires a candidate receive a minimum percentage of votes to win (this percentage is sometimes a majority but can be lower).²⁵ If no candidate running for that particular seat reaches the minimum required votes, candidates with the fewest

¹⁷ The name "Ranked Choice Voting" is preferred to "Instant Runoff Voting" for two reasons. First, it implies the process by which citizens vote (ranking their ballot); second, "instant" implies the speed at which results may be calculated. See, e.g., John Arntz, *Ranked-Choice Voting: A Guide for Candidates*, DEP'T ELECTIONS, CITY & COUNTY S.F., <http://fairvote.org/media/irv/sanfrancisco/RCVCandidateGuide04.pdf> [<https://web.archive.org/web/20081202040611/http://fairvote.org/media/irv/sanfrancisco/RCVCandidateGuide04.pdf>] (last updated Feb. 2, 2005).

¹⁸ See, e.g., *More About Ranked Choice Voting: Benefits of Ranked Choice Voting*, FAIRVOTE, <https://www.fairvote.org/rcv#rcvbenefits> (last visited Mar. 25, 2021).

¹⁹ See, e.g., *Plurality-Majority Systems*, FAIRVOTE, https://www.fairvote.org/plurality_majority_systems (last visited Dec. 19, 2019).

²⁰ Isabel Giovannetti, *Ranked-Choice Voting: How Does it Work?*, COMMON CAUSE (Aug. 2, 2019), <https://www.commoncause.org/democracy-wire/ranked-choice-voting-how-does-it-work/>.

²¹ See, e.g., *More About Ranked Choice Voting: How RCV Works*, FAIRVOTE, https://www.fairvote.org/rcv#how_rcv_works (last visited Mar. 25, 2021).

²² See, e.g., *id.*

²³ See, e.g., *id.*

²⁴ *More About Ranked Choice Voting: Using Ranked Choice Voting*, *supra* note 15.

²⁵ *Plurality-Majority Systems*, *supra* note 19.

votes are eliminated from the ballot and the locality must stage a second election to determine the winner among the remaining candidates.²⁶ RCV is often preferred to traditional runoff voting because this process occurs all at once, making RCV more efficient and economical for many governments.²⁷

Maine citizens and other supporters of RCV are proponents because this style of voting could potentially address the aforementioned frustrations with poor representation and feelings of powerlessness. It eliminates “vote splitting” or the idea of “throwing your vote away” in order to vote your conscience.²⁸ This makes third-party options more viable than they currently are in our plurality system.²⁹ RCV also requires that a majority of voters support the winning candidate, even if by second or third option.³⁰ While not perfect, those elected via RCV are preferable to those elected via a plurality system, wherein those elected win because their dissenters were split among several other candidates.³¹

Clear preference for this system in Maine and many American cities is evident from its implementation through citizen-driven ballot initiatives. This means that citizens organized, collected signatures supporting RCV, and requested it be put on the ballot for the following election.³² Afterward, a majority of voters then voted to adopt RCV. This process is difficult; it requires hard work and motivation, indicating strong support for these citizen initiatives. The reasons cited by citizens that voted for or fought to implement RCV often relate to alleviating frustrations with the current political system.³³

This Note first argues that distaste for the current political system amounts to a kind of “cost” in the traditional academic cost-benefit analysis for voting. Next, the Note explores how Maine responded to this “cost” in its fight to implement RCV statewide. Afterward, this Note similarly explores methods of, and reasons for, various citywide implementation of RCV.

Recognizing that RCV is not perfect and may not be the best route for all elections or locations, this Note will also look at common criticisms of RCV, particularly those that discuss why RCV may not effectively address frustrations

²⁶ See, e.g., *Primary Runoffs*, NAT'L CONF. OF ST. LEGISLATURES (May 8, 2017), <http://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx>.

²⁷ Gwen Craig, Rich DeLeon & Paul Melbostad, *Fulfill the Will of the Voters*, S.F. CHRON. (June 13, 2003), <http://www.sfrev.org/articles/fulfillthewill.htm>, [<https://web.archive.org/web/20041027065038/http://www.sfrev.org/articles/fulfillthewill.htm>].

²⁸ See *infra* text accompanying note 38.

²⁹ See *infra* text accompanying note 42.

³⁰ See *More About Ranked Choice Voting: How RCV Works*, *supra* note 21.

³¹ See *supra* text accompanying notes 3–7.

³² See *Ranked Choice Voting in Maine*, ME. ST. LEGISLATURE, <http://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509> (last updated Oct. 7, 2020) (providing a timeline for the ballot initiatives for and eventual adoption of Ranked Choice Voting in Maine); see also *Initiative Process 101*, NAT'L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/initiative-process-101.aspx> (last visited May 18, 2021) (describing the process for bypassing the legislature through ballot initiatives).

³³ See Diane Russell, *Maine Deserves Elections About Competing Ideas, Not Strategic Voting*, BANGOR DAILY NEWS (Oct. 19, 2014), <https://bangordailynews.com/2014/10/19/opinion/maine-deserves-elections-about-competing-ideas-not-strategic-voting/>.

with the current political system. Finally, this Note will discuss ways to “normalize” RCV to allow Americans to become familiar with the process and recognize it for its benefits.

I. COSTS AND BENEFITS TO VOTING

A. *Will They Vote? Traditional Cost-Benefit Analysis*

Traditional voting theory tells us that people will get out to vote when the benefits of doing so outweigh the costs.³⁴ In analyzing when benefits outweigh costs, scholars still follow work laid out by Anthony Downs, who created a mathematical equation to determine the likelihood of a person voting.³⁵ Ultimately, the equation states that if all of the benefits gained from voting outweigh the various costs, the individual will vote.³⁶

The different benefits and burdens that affect voter turnout are wide ranging and, often, surprising. One study shows that voter turnout is greater when a female is on the ballot because voters often have a hard time distinguishing between candidates on the issues and “look for ways to ‘save’ on the cost of information by using short-cuts or heuristics.”³⁷ Even the weather can be a cost, particularly to specific candidates. A study done in 2016 found that rainfall has little effect on turnout for major party candidates in non-competitive states, but there is a huge effect on the turnout in competitive election states for third-party candidates.³⁸ For every inch of rain on election days during a presidential election, there was a full percent decrease in turnout for “other” or third-party candidates.³⁹

While there are many other unintentional costs to voting, implementation of costs intended to keep specific groups of people from voting are much more successful at burdening voters.

B. *Traditional Cost of Voter Suppression*

Intentional burdens, or costs, placed on potential voters are considered either direct or indirect costs.⁴⁰ Direct costs are payments made to the government in

³⁴ Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1033–34 (2009).

³⁵ Down’s economic theory of democracy states $R=(PB)-C+D$, where R is the reward received from the act of voting, P is the probability that someone’s vote will be decisive, B are the benefits the voter receives related to the voting outcome, C are various costs to voting, and D are other benefits unrelated to the voting outcome. William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 25 (1968).

³⁶ *Id.*

³⁷ Heather L. Ondercin & Sarah A. Fulton, *Bargain Shopping: How Candidate Sex Lowers the Cost of Voting*, AM. POL. SCI. ASS’N 711, 712 (2020).

³⁸ ERIK P. DUHAIME & TAYLOR A. MOULTON, SWINGIN’ IN THE RAIN: IMPACT OF INCLEMENT WEATHER ON VOTING BEHAVIOR IN U.S. PRESIDENTIAL ELECTIONS 15 (2017).

³⁹ *Id.* at 12.

⁴⁰ Ellis, *supra* note 34, at 1034–35.

order to be able to vote, while indirect costs are those that must be expended by voters to become eligible to vote.⁴¹ A classic example of a cost that straddles the line between “direct” and “indirect” is voter identification laws. These laws require people to acquire specific identification, often a government-issued photo ID, which cost money to obtain (a direct cost to voting).⁴² Additional costs associated with obtaining proper identification include needing to access to transportation to purchase the required ID, taking time off of work, and acquiring documentation needed to access the required identification.⁴³ The more costs that are placed on individuals to vote, the less likely it is that the benefits will be strong enough to encourage the individual to vote.

The extreme increase in costs to voters and subsequent decrease in regulation over those costs indicate a current era of voter suppression. In 2007, only three states in the United States required a valid, government issued, non-expired photo ID to cast a ballot.⁴⁴ Today, thirty-five states require some form of voter identification, and among them, eighteen states have photo identification requirements to vote.⁴⁵ Voter identification laws are usually enacted under the guise of being a “preventative measure” against voter fraud, but evidence of actual voter fraud is incredibly low and remains largely unsubstantiated.⁴⁶ Ultimately, however, the United States Supreme Court decided in *Crawford v. Marion County Board of Elections* that states may implement voter identification requirements because stopping voter fraud is a legitimate state interest, despite its acknowledgement that no evidence of fraud in the state of Indiana was admitted into the record.⁴⁷

Other increasingly popular suppression tactics include shortening the amount of time allowed for early voting⁴⁸ and closing polling locations in poor

⁴¹ *Id.*

⁴² *Id.* at 1035.

⁴³ *Id.*

⁴⁴ See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 633 (2007).

⁴⁵ *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

⁴⁶ See Overton, *supra* note 44, at 644 (discussing examples of how anecdotes used to show voter fraud are often misleading, like those due to clerical errors or different people voting with the same name); see also *Kris Kobach's Voting Sham Gets Exposed in Court*, N.Y. TIMES, Mar. 17, 2018, at SR10.

⁴⁷ 553 U.S. 181, 194–96 (2008). It is important to note that Voter ID laws tend to affect minority groups disproportionately; older people tend to not have driver's licenses, renters move addresses more frequently, and Native Americans have government-issued identification at a lower rate. See Overton, *supra* note 44, at 659–61. One study conducted in 2011 by the NAACP showed twenty-five percent of African Americans and sixteen percent of Latinos did not possess a valid photo identification. NAACP LEGAL DEF. & EDUC. FUND, DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA 5 (2011), https://www.naacpldf.org/wp-content/uploads/Defending%20Democracy%202012-16-11_Political_Participation_.pdf.

⁴⁸ Phoenix Rice-Johnson, *A Step in the Wrong Direction: Cutting Early Voting Hurts Voters*, BRENNAN CTR. FOR JUST. (Nov. 5, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/step-wrong-direction-cutting-early-voting-hurts-voters> (discussing the effects of cutting early voting for the 2016 U.S. Presidential elections); see also *Cutting Early Voting is Voter Suppression*, ACLU, <https://www.aclu.org/issues/voting-rights/cutting-early-voting-voter-suppression> (last visited Mar. 6, 2021).

neighborhoods.⁴⁹ Several states have even started purging their voter registration lists when individuals have not recently voted, forcing many already registered voters to go through the cost of re-registering.⁵⁰

Leading up to the 2018 midterms, the New York Times released a series titled “Tune In, Turn Out,” exploring why turnout is so low in the United States.⁵¹ One reason cited for this low turnout was voter suppression efforts; another was disillusionment.⁵² The newest cost to voting is the problems (or perceived problems) with the political establishment itself.

C. *The Newest Cost to Voting*

Increasing disillusionment and feelings of powerlessness about our political system are keeping people from being politically involved and voting. This section addresses the belief that polarized, binary parties that do not adequately represent most Americans and decreased choices amongst candidates are discouraging political participation. These problems, causing faltering allegiance to the current political system, fuel apathy toward being involved in the political process.

For example, extreme views on the left and right are pulling major parties and the county to extremely partisan ends, leaving many moderate Americans feeling unrepresented. Recent presidential terms have shown the largest partisan split regarding approval since 1945.⁵³ Extreme polarization of parties and lack of bipartisanship affect people on deeply personal and emotional levels. First, it gets in the way of national identity. Recent research shows that Americans believe members of the opposite political party are their “enemies.”⁵⁴ Americans have

(discussing possible effects of cutting early voting, particularly the disparate impact it would likely have on black voters).

⁴⁹ See Mark Nichols, *Closed Voting Sites Hit Minority Counties Harder for Busy Midterm Elections*, USA TODAY (Oct. 30, 2018, 7:06 AM), <https://www.usatoday.com/story/news/2018/10/30/midterm-elections-closed-voting-sites-impact-minority-voter-turnout/1774221002/> (discussing that polling locations chosen for closure prior to the 2018 midterms were primarily in minority neighborhoods); see also John Whitesides, *Polling Places Become Battleground in U.S. Voting Rights Fight*, REUTERS (Sept. 16, 2016, 6:12 AM), <https://www.reuters.com/article/us-usa-election-vote-precincts-insight/polling-places-become-battleground-in-u-s-voting-rights-fight-idUSKCN11M0WY> (discussing the experience of Upson County, Georgia residents where poll locations were closed shortly before 2016 election).

⁵⁰ See, e.g., Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 1, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds> (analyzing a recent study that shows counties with history of racial discrimination are practicing high rates of voter purging).

⁵¹ See *Vote. That’s Just What They Don’t Want You to Do*, *supra* note 1.

⁵² *Id.*

⁵³ See Jeffrey M. Jones, *Obama Job Approval Ratings Most Politically Polarized by Far*, GALLUP (Jan. 25, 2017), <https://news.gallup.com/poll/203006/obama-job-approval-ratings-politically-polarized-far.aspx>; *Presidential Approval Ratings | Gallup Historical Statistics and Trends*, GALLUP, <https://news.gallup.com/poll/116677/Presidential-Approval-Ratings-Gallup-Historical-Statistics-Trends.aspx> (last visited June 6, 2021).

⁵⁴ See, e.g., Emma Green, *Americans Hate One Another. Impeachment Isn’t Helping.*, ATLANTIC (Nov. 2, 2019), <https://www.theatlantic.com/politics/archive/2019/11/impeachment-democrats-republicans-polarization/601264/>.

started dividing themselves into politically homogeneous communities,⁵⁵ and, ultimately, find interacting with members of the opposite political party extremely stressful.⁵⁶ Second, while particularly partisan views on the left or right get much of the attention from media and political parties, over a third of registered voters identify as moderate or “independent”⁵⁷ and feel left out or completely unrepresented by both major parties when it comes time to vote. Gallup polls indicate that sixty-one percent of the country currently believes viable third-party options are needed because neither the Democratic nor Republican parties adequately represent them.⁵⁸

Disenchantment has also developed from an increased belief that one’s vote does not matter.⁵⁹ While one person’s vote will affect turnout percentages, a 2012 study by Nate Silver and Andrew Gelman shows that, at best, if you live in a swing state, there is about a one in ten million chance that your vote makes a difference.⁶⁰ If you live in a “safe state” where one party is much stronger than the other (like California, New York, or Texas), significance ranges from one in sixty million to one in a billion.⁶¹ This affects whether a person will turn out to vote. In 2012, the top twelve swing states showed an average turnout of sixty-six percent, while the average among the remaining thirty-nine states (including the District of Columbia) was fifty-seven percent.⁶² When combining voters’ beliefs that neither major party represents their views in this two-party system with the fact their vote is unlikely to have an effect, feelings of powerlessness and underrepresentation seem completely justified.

Negative campaigning may also be affecting general opinions of the American political system. While studies have reached different conclusions regarding the effect of negative campaigning on turnout,⁶³ there is a consensus that negative campaigning has damaged “the political system itself, as it tends to reduce feelings

⁵⁵ *Political Polarization and Personal Life*, PEW RES. CTR. (June 12, 2014), <https://www.people-press.org/2014/06/12/section-3-political-polarization-and-personal-life/>.

⁵⁶ *Partisan Environments, Views of Political Conversations and Disagreements*, PEW RES. CTR. (June 22, 2016), <https://www.people-press.org/2016/06/22/3-partisan-environments-views-of-political-conversations-and-disagreements/#partisan-environments-friends-spouses-and-family-ties>.

⁵⁷ See Lydia Saad, *U.S. Still Leans Conservative, but Liberals Keep Recent Gains*, GALLUP (Jan. 8, 2019), <https://news.gallup.com/poll/245813/leans-conservative-liberals-keep-recent-gains.aspx>.

⁵⁸ See RJ Reinhart, *Majority in U.S. Still Say a Third Party is Needed*, GALLUP (Oct. 26, 2018), <https://news.gallup.com/poll/244094/majority-say-third-party-needed.aspx>.

⁵⁹ Kimberly C. Delk, Comment, *What Will It Take to Produce Greater American Voter Participation? Does Anyone Really Know?*, 2 LOY. J. PUB. INT. L. 133, 135 (2001).

⁶⁰ Andrew Gelman, Nate Silver & Aaron Edlin, *What is the Probability Your Vote Will Make a Difference?*, 50 ECON. INQUIRY 321, 324 (2009).

⁶¹ *Id.* at 325.

⁶² *Voter Turnout: What Affects Voter Turnout Rates?*, FAIRVOTE https://www.fairvote.org/voter_turnout#what_affects_voter_turnout_rates (last visited Dec. 19, 2019).

⁶³ See Stephen Ansolabehere, Shanto Iyengar, Adam Simon & Nicholas Valentino, *Does Attack Advertising Demobilize the Electorate?*, 88 AM. POL. SCI. REV. 829 (1994). *But see* Steven E. Finkle & John G. Geer, *A Spot Check: Casting Doubt on the Demobilizing Effect of Attack Advertising*, 42 AM. J. POL. SCI. 573 (1998).

of political efficacy, trust in government, and perhaps even satisfaction with government itself.”⁶⁴

These costs have reduced trust in the political system. They have also created a movement of support for Ranked Choice Voting, and nowhere is that movement more evident than in the state of Maine.

II. WHAT’S SO SPECIAL ABOUT MAINE?

A. *The Fight for Ranked Choice Voting*

For the better part of the early 21st century, state legislators in Maine attempted to pass Ranked Choice Voting (RCV) through bills in the general assembly. Although these bills did not make it off the floor, a bill was introduced every year starting in 2001.⁶⁵ Exhausted with the many failed attempts to pass RCV, Maine citizens took matters into their own hands and pursued a ballot initiative.⁶⁶

Maine’s 2014 gubernatorial election featured Republican incumbent Paul LePage, Democratic candidate Mike Michaud, and Independent candidate Eliot Cutler.⁶⁷ Cutler ran for Governor previously against LePage in 2010 and nearly won.⁶⁸ While he considers himself an independent, Cutler’s ideology more closely aligned with Democratic candidate Michaud’s during the 2014 election, creating the concern that Cutler would be a “spoiler candidate” in a race Democrats believed they could win if Cutler was not running.⁶⁹ This belief became more evident when prominent independent Senator Angus King switched his endorsement from Cutler to Michaud⁷⁰ and Maine’s Republican Party began funding advertisements for Cutler in heavily Democratic areas.⁷¹ In the end, LePage won with forty-eight percent of the vote, while Michaud and Cutler lost with forty-three percent and eight percent, respectively.⁷²

⁶⁴ Richard R. Lau, Lee Sigelman & Ivy Brown Rovner, *The Effects of Negative Political Campaigns: A Meta-Analytic Reassessment*, 69 J. POL. 1176, 1184 (2007).

⁶⁵ *Ranked Choice Voting in Maine*, *supra* note 32.

⁶⁶ *See id.*

⁶⁷ *See* Henry Fountain, *Maine*, in *Election 2010*, N.Y. TIMES, <https://www.nytimes.com/elections/2010/results/maine.html> (last visited Dec. 19, 2019).

⁶⁸ *See id.*

⁶⁹ *See* Nathaniel Rakich, *Democrats to Blame for Paul LePage*, BOS. GLOBE (Jan. 15, 2016, 12:00 AM), <https://www.bostonglobe.com/opinion/2016/01/15/democrats-can-blame-themselves-for-paul-lepage-success/BcROMFc6DK1w4Ciz9nsFTP/story.html>.

⁷⁰ Alex Rogers, *Maine’s Independent Senator Switches Endorsement for Governor*, TIME (Oct. 29, 2014, 5:40 PM), <https://time.com/3546871/maine-governor-senator-angus-king-mike-michaud-eliot-cutler/>.

⁷¹ Mike Tipping, *Republican Party Begins Spending to Boost Cutler*, BANGOR DAILY NEWS (Oct. 18, 2014), <http://thetippingpoint.bangordailynews.com/2014/10/18/state-politics/republican-party-begins-spending-to-boost-cutler/>.

⁷² *Maine Governor - LePage vs. Michaud vs. Cutler*, REALCLEARPOLITICS, https://www.realclearpolitics.com/epolls/2014/governor/me/maine_governor_lepage_vs_michaud_vs_cutler-3558.html (last visited Dec. 12, 2019).

During the campaign, Cutler's finance director, Kyle Bailey, was deeply troubled by the campaign's inability to talk about policy issues. Instead, "[t]he campaign was defined entirely by questions of spoilers and vote splitting and people saying, 'Well, I don't want to waste my vote [on Cutler].'"⁷³ This focus on the "spoiler candidate" aspect eventually led Bailey to the position of director for the Committee for Ranked Choice Voting, an organization formed by Independent Maine State Senator Dick Woodbury and political strategist Cara Brown McCormick.⁷⁴ Their first task was to gather enough signatures of citizens supporting RCV to put the measure on the ballot. In 2016, the Committee for Rank Choice Voting, along with the League of Women Voters of Maine,⁷⁵ collected 73,000 signatures, 12,000 more than were necessary to place an initiative on the ballot.⁷⁶

During the November 2016 elections, Maine's citizens voted on Question 5, which stated: "Do you want to allow voters to rank their choices of candidates in elections for U.S. Senate, Congress, Governor, State Senator, and State Representative, and to have ballots counted at the state level in multiple rounds in which last-place candidates are eliminated until a candidate wins by majority?"⁷⁷ The measure passed 52% to 48%, a difference of less than 30,000 votes.⁷⁸

After the election, Maine's legislature was concerned about the provision's constitutionality and requested that the Maine Supreme Court review it and issue an advisory opinion, which the court agreed to do.⁷⁹ The constitutional issues discussed in the State Supreme Court's advisory opinion were regarding plurality requirements in Maine's State Constitution.⁸⁰ Maine's Constitution requires state representatives, state senators, and the Governor be elected by a plurality of voters in the general election.⁸¹ This plurality requirement did not occur by accident; originally, Maine required candidates for these seats to obtain a majority of votes in order to succeed in an election.⁸² However, between 1830 and 1880, there were many candidates running, and several election cycles produced no winner by a majority.⁸³ In fact, in 1879, an insurrection started over the "expense and delay of

⁷³ Jessie Scanlon, *Could Maine's New Ranked-Choice Voting Change American Elections?*, BOS. GLOBE (Oct. 17, 2018, 1:46 PM), <https://www.bostonglobe.com/magazine/2018/10/17/could-maine-new-ranked-choice-voting-change-american-elections/6VqNC73bQzMrPd0RsepA8L/story.html>.

⁷⁴ *Id.*

⁷⁵ See *Instant Runoff Voting*, LEAGUE WOMEN VOTERS ME., <https://www.lwvme.org/IRV.html> (last visited Dec. 19, 2019) (explaining that after three years of study, the League of Women Voters of Maine adopted RCV as one of its main platforms in 2011 and were instrumental in the ballot measure initiatives).

⁷⁶ See Rice-Johnson, *supra* note 48. In Maine, the total number of signatures needed for a ballot initiative is ten percent of the total votes cast for governor in the last election. ME. CONST. art. IV, pt. 3, § 18, para. 2.

⁷⁷ Office of the Sec'y of State of Me., *Maine Citizen's Guide to the Referendum Election*, MAINE.GOV (Nov. 8, 2016), <https://www.maine.gov/sos/cec/elec/upcoming/citizensguide2016.pdf>.

⁷⁸ *Maine Question 5 — Allow Ranked-Choice Voting — Results: Approved*, N.Y. TIMES, (Aug. 1, 2017, 11:25 AM), <https://www.nytimes.com/elections/2016/results/maine-ballot-measure-5-allow-ranked-choice-voting>.

⁷⁹ Advisory opinions are permitted under certain circumstances. See ME. CONST. art. VI, § 3.

⁸⁰ *Op. of the Justices*, 162 A.3d 188, 209–10 (Me. 2017).

⁸¹ ME. CONST. art. V, pt. 1, § 3; *id.* art. IV, pt.1, § 5; *id.* art. IV, pt. 2, § 4.

⁸² *Op. of the Justices*, *supra* note 80.

⁸³ *Id.* at 210.

holding repeat elections, by the election of candidates through legislative action rather than based on the will of the people, and by the claims of manipulation and allegations of self-dealing levied by opponents of the eventually-declared winners.”⁸⁴ In response to this discontent, Maine changed the “majority” standard set in the constitution to read “plurality.”⁸⁵

Because the historical and legislative intent is clear that these offices only need a plurality to win and because RCV does not permit a candidate to win by mere plurality, the Maine Supreme Court’s advisory opinion stated that implementation of Ranked Choice Voting for the general election of state senators, state representatives, and the Governor is currently unconstitutional.⁸⁶

Based on the opinion of the Maine Supreme Court, the legislature proceeded to repeal the people’s law implementing Ranked Choice Voting for the 2018 election cycle and replaced it with Public Law 2017, which would have implemented RCV for only primary elections by 2021 and for the general elections of these offices only if the citizens of Maine amended the constitution.⁸⁷ However, Cara Brown McCormick was committed to not letting the Maine legislature “get away” with repealing the people’s referendum.⁸⁸ As soon as Public Law 2017 was in place, McCormick’s committee and other proponents of RCV hit the streets again and, in the middle of Maine’s winter, collected over eighty thousand signatures in eighty-eight days to implement another ballot referendum, this time enacting a people’s veto of Public Law 2017 and offering an option to keep RCV in use for the upcoming elections.⁸⁹

After the signatures were gathered and verified, the ballot question for the June 2018 primaries to address the veto read:

Do you want to reject the parts of a new law that would delay the use of ranked-choice voting in the election of candidates for any state or federal office until 2022, and then retain the method only if the constitution is amended by December 1, 2021, to allow ranked-choice voting for candidates in state elections?⁹⁰

Basically, the question asks if voters would like to reject the legislature’s delay of RCV in favor of implementing it for the upcoming general and primary elections for federal offices and primary elections for all state offices. This bypassed the plurality issue by maintaining standard election processes for general elections of the state legislature candidates (Governor, state senators, and state

⁸⁴ *Id.*; see also Michael Shepherd, *How an 1880 Maine Insurrection Could Sink Ranked-Choice Voting*, BANGOR DAILY NEWS (Jan. 20, 2016), <https://bangordailynews.com/2016/01/20/the-point/how-an-1880-maine-insurrection-could-sink-ranked-choice-voting/>.

⁸⁵ *Op. of the Justices*, 162 A.3d 188 at 210.

⁸⁶ *Id.* at 211.

⁸⁷ H.P. 1137, 128th Leg., 1st Reg. Sess. (Me. 2017).

⁸⁸ Scanlon, *supra* note 73.

⁸⁹ *Id.*; see also *Ranked-Choice Voting People’s Veto Effort Found Valid with 66,687 Signatures*, DEP’T SECRETARY ST. ME. (Mar. 5, 2018), <https://www.maine.gov/sos/news/2018/rankchoicesigs.html>.

⁹⁰ *Ranked Choice Voting in Maine*, *supra* note 32.

representatives) but implemented RCV for the primary elections of state legislature candidates and for the general elections for the United States Senate and House.

The admirable and fascinating part of this story is the perseverance and determination of Maine voters. They overcame the legislature by enacting *two* voter ballot initiatives in just a few short years. This determination reflects a deep-seated disenchantment with the current state of politics and voting.

B. Maine's Reasons for Implementing Ranked Choice Voting

Just before Maine's contentious 2014 gubernatorial election, Maine Representative Diane Russell wrote an op-ed about her attempts to push RCV bills through the Maine House.⁹¹ She advocated for RCV because “[p]olitics as usual has taken a dark, vicious tone as of late, leaving many of us looking for ‘a better way’” and she believed RCV would allow elections and politics to focus instead on ideas and visions rather than “polls and spoiler effects.”⁹² Major issues with the current state of politics cited by Maine voters and organizations supporting RCV include those mentioned previously: failures of the two-party system, vote splitting, and negative campaigning.⁹³

Perhaps the most cited reasons for supporting RCV are frustrations with the two-party system and how it leads to vote splitting (sometimes referred to as “spoiler effect” or “spoiler candidates”).⁹⁴ One possible reason Maine was the first state to adopt RCV is because it remains one of the most politically independent states in the United States.⁹⁵ In her op-ed, Maine Representative Russell said that Maine is fiercely proud of its “strong independent streak,” and the current system does not appropriately permit equal access for third-party candidates.⁹⁶ As stated in Part I, more and more Americans are pushing for viable third parties, and it does not look like this will change soon. Polls have shown that at least forty-four percent of millennials identify as Independent,⁹⁷ and seventy-one percent would like to see a

⁹¹ Russell, *supra* note 33.

⁹² *Id.*

⁹³ See *supra* Part I(C).

⁹⁴ See, e.g., Erica Frazier, *Plurality System of Voting Casts a Dark Shadow Over Candidates*, FAIRVOTE (Oct. 31, 2018), https://www.fairvote.org/plurality_system_of_voting_casts_a_dark_shadow_over_candidates.

⁹⁵ See, e.g., Micah Cohen, *In Maine, Independent Streak Complicates Political Landscape*, FIVETHIRTYEIGHT (Oct. 15, 2012, 1:37 PM), <https://fivethirtyeight.com/features/in-maine-independent-streak-complicates-political-landscape/>; Alexa Mikalaski, *9 States Where Registered Independents Outnumber Both Major Political Parties*, INDEP. VOTER NEWS (Aug. 8, 2018), <https://ivn.us/2018/08/08/9-states-registered-independents-outnumber-major-political-parties>.

⁹⁶ Russell, *supra* note 33.

⁹⁷ PEW RES. CTR., WIDE GENDER GAP, GROWING EDUCATIONAL DIVIDE IN VOTERS' PARTY IDENTIFICATION 13 (2018), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2018/03/03-20-18-Party-Identification-CORRECTED.pdf>.

viable third party,⁹⁸ making millennials the most Independent generation yet.⁹⁹ Although many citizens consider themselves to be Independent, they are constantly required to decide whether to vote their conscience, which could lead to a vote split for the major party candidate, or to vote for the major party candidate (often as the “lesser of two evils”). RCV eliminates this problem. When describing RCV, Cara Brown McCormick of the Maine Committee for Ranked Choice Voting says it allows people to “vote [their] hopes, and not [their] fears.”¹⁰⁰

Vote splitting is also one of the main reasons people believe their vote “doesn’t count.”¹⁰¹ This is because the voter is either voting for the “lesser of two evils,” which is not the candidate they truly believe best represents their interests, or they vote for their preferred candidate, whom the voter knows cannot win in a first-past-the-post plurality system. If faced with those two options, it is not terribly difficult to see why there is little motivation to vote, particularly considering that nearly half of millennials, a major voting bloc in the United States, is facing this dilemma.¹⁰² By forcing voters into this dilemma and asking them “to forgo their true choice, they become disillusioned with the electoral system . . . [which] may lead to a decline in voter participation in elections at all levels of government.”¹⁰³

RCV would not only remove vote splitting but could provide space for third parties to emerge, ultimately moving away from the strict two-party system. The League of Women Voters of Maine (“LOWV Maine”) is a strong advocate of RCV in Maine, and one of the main reasons cited by LOWV Maine is that it “[g]ives voters more meaningful choices: Ranked choice voting allows candidates from outside the

⁹⁸ Hannah Hartig & Stephanie Perry, *Millennial Poll: Strong Majority Want a Third Political Party*, NBC NEWS (Nov. 29, 2017, 4:43 AM), <https://www.nbcnews.com/politics/politics-news/millennial-poll-strong-majority-want-third-political-party-n824526>.

⁹⁹ See Hunter Schwarz, *How Millennials Could Kill Politics as We Know It if They Cared To*, CNN POLITICS: COVER/LINE (Oct. 8, 2018, 3:54 PM), <https://www.cnn.com/2018/10/07/politics/how-millennials-could-kill-politics-as-we-know-it/index.html>.

¹⁰⁰ Glenn Nye & James Kitfield, *Spirit of Political Reform is True Bipartisan Force in the Election*, HILL (Nov. 3, 2018, 12:00 PM), <https://thehill.com/opinion/campaign/414697-spirit-of-political-reform-is-true-bipartisan-force-in-the-election>; see also *Ranked Choice Voting Advisor: Cara McCormick*, INDEP. VOTER PROJECT, <https://independentvoterproject.org/our-people/cara-mccormick> (last visited May 20, 2021).

¹⁰¹ See Jonathan Denn, *The Second Most Important Electoral Reform*, INDEP. VOTER NEWS (May 7, 2013), <https://ivn.us/2013/05/07/will-banning-single-mark-ballots-make-greater-elections>; see also Letter from Judith Friedman, Member, Voter Choice CT, to Sen. Flexer, Rep. Fox, and Members of the Gov’t Admin. & Elections Comm. (2019), <https://www.cga.ct.gov/2019/GAEdat/Tmy/2019HB-05820-R000227-Friedman,%20Judith-TMY.PDF>; Letter from Ronald Friedman, Member, Voter Choice CT, to Sen. Slap, Rep. Verrengia, Rep. Gilchrest, Cong. Rep. Larson, and Members of the Gov’t Admin. & Elections Comm. (2019), <https://www.cga.ct.gov/2019/gaedata/tmy/2019SB-01050-R000313-Friedman,%20Ronald-Voter%20Choice%20CT-TMY.PDF>; *Hearing on S.B. 1050, H.J. 161, S.B. 25, and H.B. 5612 Before the Gov’t Admin. & Elections Comm.*, 2019 Leg., Jan. Sess. (testimony of Marta Daniels), <https://www.cga.ct.gov/2019/gaedata/tmy/2019SB-00025-R000313-Daniels,%20Marta-TMY.PDF>.

¹⁰² PEW RES. CTR., *supra* note 97.

¹⁰³ Ryan J. Silver, Note, *Fixing United States Elections: Increasing Voter Turnout and Ensuring Representative Democracy*, 10 DREXEL L. REV. 239, 263 (2017) (citing Roberta A. Yard, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure “One Person, One Vote.”*, 42 SANTA CLARA L. REV. 185, 200 (2001); Kristen S. Coy, In Re Nader: *Challenging the Duopoly of American Politics One Individual Signature at a Time*, 15 WIDENER L.J. 389, 389 (2006); Kevin R. Huguelet, *Death by a Thousand Cuts: How the Supreme Court Has Effectively Killed Campaign Finance Regulation by Its Limited Recognition of Compelling State Interests*, 70 U. MIAMI L. REV. 348, 385–86 (2015)).

two major parties to compete. It helps create a richer dialogue on the issues and increases the diversity of views available for voters to consider.”¹⁰⁴

Another reason cited by Maine’s supporters of RCV is the decrease in negative campaigning and political attacks. Portland, Maine, which has used RCV for citywide elections since 2010, had fifteen candidates run for Mayor in 2011, and most citizens felt there was less negative campaigning than usual.¹⁰⁵ Furthermore, people found that less “mudslinging” allowed for a more fruitful exchange of ideas and policies amongst the candidates.¹⁰⁶ Because RCV tends to eliminate negative campaigning as an effective strategy, many supporters believe it could even reduce money in politics, particularly money spent by special interest groups to drown airwaves in negative advertisements.¹⁰⁷

In large part, Maine has successfully implemented RCV with continuing voter support. In September of 2019, Maine’s legislature passed S.P. 315, “[a]n Act to Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine,”¹⁰⁸ even though the legislature failed to pass RCV statewide for fifteen years leading up to the citizen ballot initiative of 2016.¹⁰⁹ While many legislators were originally against RCV, some are now paying attention to the evidence that a majority of Maine voters wish to elect politicians by a majority,¹¹⁰ rather than a plurality.¹¹¹ Maine Representative Charlotte Warren said that while she did not originally support RCV, she currently supports the measures because in less than two years, Maine voters twice rejected plurality voting and replaced it with RCV.¹¹² She co-sponsored S.P. 315 because, as a Representative of Maine voters, she believed that “when voters tell us what they want, we should listen.”¹¹³

¹⁰⁴ *Ranked Choice Voting Basics*, LEAGUE WOMEN VOTERS ME. EDUC. FUND (June 2016), https://www.lwvme.org/sites/default/files/pdfs/RCV_Basics.pdf.

¹⁰⁵ *See FAQ: What Data Exists to Support the Argument that Ranked Choice Voting Has Reduced Negative Campaigning in Jurisdictions Where It Has Been Adopted?*, COMM. FOR RANKED CHOICE VOTING, http://www.rcvmaine.com/what_data_exists_to_support_the_argument_that_ranked_choice_voting_has_reduced_negative_campaigning_in_jurisdictions_where_it_has_been_adopted [https://web.archive.org/web/20191218222738/http://www.rcvmaine.com/what_data_exists_to_support_the_argument_that_ranked_choice_voting_has_reduced_negative_campaigning_in_jurisdictions_where_it_has_been_adopted] (last visited Dec. 18, 2019).

¹⁰⁶ Russell, *supra* note 33. One study conducted in seven cities across the United States that use RCV in municipal elections showed that voters thought candidates spent less time criticizing their opponents through negative campaign tactics than were reported in cities not using RCV. Sarah John & Andrew Douglas, *Candidate Civility and Voter Engagement in Seven Cities with Ranked Choice Voting*, 106 NAT’L CIVIC REV. 25, 26 (2017).

¹⁰⁷ *See Ranked Choice Voting Basics*, *supra* note 104.

¹⁰⁸ S.P. 315, 129th Legis., 1st Reg. Sess. (Me. 2019).

¹⁰⁹ *See Ranked Choice Voting in Maine*, *supra* note 32.

¹¹⁰ Charlotte Warren, *Mainers Have Made it Clear They Want Ranked-Choice Voting*, BANGOR DAILY NEWS (June 10, 2019), <https://bangordailynews.com/2019/06/10/opinion/contributors/mainers-have-made-it-clear-they-want-ranked-choice-voting/>.

¹¹¹ *See* Michael Shepherd, *What Exit Polling Reveals About Maine’s Experience with Ranked-Choice Voting*, BANGOR DAILY NEWS (Nov. 13, 2018), <https://bangordailynews.com/2018/11/12/politics/exit-polling-finds-narrow-majority-of-mainers-back-expansion-of-ranked-choice-voting%E2%80%8B/>.

¹¹² Warren, *supra* note 110.

¹¹³ *Id.*

Maine is not without dissenters to the adoption of RCV. The originally-adopted provision allowed for Maine citizens to use RCV to vote in the general presidential election in 2020 but was blocked by a veto initiative led primarily by the Republican Party of Maine.¹¹⁴ The Party managed to gather enough signatures to secure a veto referendum for the extension of RCV to the presidential primaries.¹¹⁵ Currently, it is unknown how this issue will be determined, so the status of Maine's use of RCV for the 2024 general presidential election is unknown.¹¹⁶

In the November 2021 elections, Maine will lose its status as the only state to have implemented RCV; Alaska, another staunchly "Independent" state, will begin using the system to elect legislators, statewide officials, and the president in the 2024 general elections.¹¹⁷ The measure passed by a narrow margin, with 50.49% of voters supporting.¹¹⁸ While Maine and Alaska are currently the only states using RCV to facilitate state-wide elections, many cities and municipalities have adopted the practice for their elections.¹¹⁹

III. CITIES AND MUNICIPALITIES USING RANKED CHOICE VOTING

Twenty-one United States cities currently use RCV in their municipal elections, with nine more major cities adopting RCV in the next two years.¹²⁰ Anecdotes and studies from these cities indicate that RCV has either addressed or is being adopted to address many of the same voter frustrations fueling the strong support of RCV in Maine.

San Francisco adopted RCV in 2002 by a voter-backed amendment to the city charter.¹²¹ One aspect clearly addressed is the decrease in mudslinging and increase in collegiality amongst candidates. Consider this exchange between opposing candidates for City Council in the Fog City Journal:

Chiu said, "I think [Instant Runoff Voting] . . . will give our residents multiple choices and I look forward to campaigning under ranked-

¹¹⁴ *Timeline of Ranked Choice Voting in Maine*, FAIRVOTE, https://www.fairvote.org/maine_ballot_initiative (last visited Mar. 1, 2020).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Paul Best, *Alaska Shows Independent Streak, Adopts Ranked-Choice Voting*, FOX NEWS (Nov. 18, 2020), <https://www.foxnews.com/politics/alaska-ranked-choice-voting>; see also Ashley Houghton, *Alaska Joins Maine as Second State in Union to Pass Ranked Choice Voting*, FAIRVOTE (Nov. 17, 2020), https://www.fairvote.org/alaska_joins_maine_as_second_state_in_union_to_pass_ranked_choice_voting; *Ranked Choice Voting*, ALASKANS FOR BETTER ELECTIONS, <https://alaskansforbetterelections.com/about/ranked-choice-voting/> (last visited May 20, 2021).

¹¹⁸ Best, *supra* note 117.

¹¹⁹ *Where Ranked Choice Voting is Used*, FAIRVOTE, https://www.fairvote.org/where_is_ranked_choice_voting_used (last visited Mar. 1, 2021).

¹²⁰ *Id.*

¹²¹ *Spotlight: Bay Area*, FAIRVOTE, https://www.fairvote.org/spotlight_bay_area#history_of_rcv_in_bay_area (last visited Dec. 19, 2019).

choice voting. I have reached out to candidates and we're all looking forward to, hopefully, a very positive campaign."

. . . By design, insiders believe, Chiu[s] candidac[y] will go some distance in peeling off first-place Asian-American votes from [Senator Leland] Yee.

"I welcome David into the race for Mayor," Yee said in statement. "His perspective will certainly be valuable in this discussion with the people of San Francisco. As I said when Phil Ting, Tony Hall, and Michela Alioto-Pier entered the race, my commitment is to run a different kind of campaign for Mayor – to work with other candidates to present real choices and options for voters. I shared that sentiment when I called David Chiu today to wish him well."¹²²

This exchange is hardly indicative of normal discourse amongst candidates in political races in the United States, which Americans have become increasingly critical of and disillusioned with.¹²³

Minneapolis, Minnesota, also reported improved discourse as one of the benefits brought by RCV. Minneapolis instituted RCV by voter referendum in 2006 and was implemented in 2009.¹²⁴ In 2017, Councilman Phillippe Cunningham unseated a twenty-year city council incumbent and became one of the few openly transgender men elected to public office in the United States.¹²⁵ Councilman Cunningham believes that RCV allowed him to build relationships with voters and other candidates and more openly exchange ideas, rather than resort to negative campaigning.¹²⁶ RCV also addressed vote splitting issues in his race, particularly within communities of color. At least two minorities were running in that city council race, and for voters who consider minority perspectives particularly important, those candidates did not have to worry about splitting those votes.¹²⁷ In fact, Councilman Cunningham stated he built power with another minority candidate, both of them advocating for the other as their "number two" pick.¹²⁸

In 2019, New York City residents voted to implement RCV for citywide elections by 2021, which passed with 73% support.¹²⁹ New York City voters supported RCV because it "forces candidates to reach out to more voters rather than

¹²² Luke Thomas, *Chiu Enters San Francisco Race for Mayor*, FOG CITY J. (Feb. 28, 2011), <http://www.fogcityjournal.com/wordpress/2667/chiu-enters-san-francisco-race-for-mayor/>.

¹²³ See *Public Highly Critical of State of Political Discourse in the U.S.*, PEW RES. CTR. (June 19, 2019), <https://www.pewresearch.org/politics/2019/06/19/public-highly-critical-of-state-of-political-discourse-in-the-u-s/>.

¹²⁴ See Steve Brandt, *Ranked Choice Voting This Fall in Minneapolis - Almost for Sure*, STAR TRIBUNE (Feb. 5, 2009), <https://archive3.fairvote.org/articles/ranked-choice-voting-this-fall-in-minneapolis-almost-for-sure/>.

¹²⁵ *How Ranked-Choice Voting is Changing Politics*, WAMU: 1A, 35:59–37:11 (May 29, 2018), <https://the1a.org/shows/2018-05-29/how-ranked-choice-voting-could-change-politics>.

¹²⁶ *Id.* at 37:12–39:30.

¹²⁷ *Id.* at 38:00–38:30.

¹²⁸ *Id.*

¹²⁹ Vivian Wang, *N.Y. Election Results: Voters Approve All 5 Ballot Measures*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/05/nyregion/ny-nj-election-results.html>.

relying on a narrow base” to become elected.¹³⁰ This means candidates must rely on appealing to a majority of voters, rather than a plurality of those on the far ends of a binary spectrum.¹³¹ New York voters also cited concerns about vote splitting as a top reason for implementing RCV.¹³²

While this Note has focused on implementation of RCV in Maine’s elections and some cities, RCV is being used in many different contexts. The Democratic parties of six states used RCV to determine their 2020 presidential nominee.¹³³ RCV is also used by many overseas voters in runoff elections, campus student organizations, and various public and private organizations.¹³⁴

IV. CRITICISMS AND COUNTERARGUMENTS

While voters in Maine and various cities have worked hard to implement RCV to address persistent problems with political and electoral systems, valid criticisms remain regarding whether it can effectively address these problems or will create new problems in the future.

The first major criticism of RCV is that ballot exhaustion allows candidates to win without reaching a majority. Ballot exhaustion can occur when a voter does not rank all options on a ballot.¹³⁵ If this happens enough times, candidates might not win by a true majority.

For example, Mauricio, Jocelyn, and Willow are candidates for a single seat. After the first round of voting, Willow has twenty-one votes, Mauricio has forty-five votes, and Jocelyn has thirty-four votes, for a total of one hundred votes. Of Willow’s twenty-one votes, three indicate Mauricio as their second choice, and ten indicate Jocelyn as their second choice, leaving Mauricio with forty-eight votes and Jocelyn with forty-four votes. Eight of the votes cast for Willow did not indicate a second choice. Therefore, when Willow is eliminated after the first round, neither Mauricio nor Jocelyn have attained a majority.

¹³⁰ See Erin Durkin, *Ranked-Choice Voting Adopted in New York City, Along with Other Ballot Measures*, POLITICO: N.Y. (Nov. 5, 2019, 10:04 PM), <https://www.politico.com/states/new-york/albany/story/2019/11/05/ranked-choice-voting-adopted-in-new-york-city-along-with-other-ballot-measures-1226390>.

¹³¹ *Id.*

¹³² *See id.*

¹³³ Emily Risch, *How Democrats Will Use Ranked Choice Voting in 2020 Presidential Contests*, FAIRVOTE (June 14, 2019, 11:45 AM), https://www.fairvote.org/how_ranked_choice_voting_will_affect_democratic_presidential_primary. Most of these states have a 15% threshold for assigning delegates, so any candidate with less than 15% of the vote will be eliminated, their votes redistributed, while those with at least 15% will stand and have delegates distributed amongst them. *Id.*

¹³⁴ *See, e.g., Where Ranked Choice Voting is Used*, *supra* note 119; *see also RCV in Private Organizations and Corporations*, FAIRVOTE, https://www.fairvote.org/rcv_in_private_organizations_and_corporations#single_winner_rcv (last visited May 20, 2021).

¹³⁵ Theodore Landsman, *RCV Elections and Runoffs: Exhausted Votes vs. Exhausted Voters in the Bay Area*, FAIRVOTE (Oct. 19, 2016), https://www.fairvote.org/rcv_elections_and_runoffs_exhausted_votes_vs_exhausted_voters_in_the_bay_area

This problem has occurred already in Maine. During the second congressional race of 2018, two rounds of tabulation with RCV were necessary to declare Representative Jared Golden the winner of the district.¹³⁶ Representative Golden needed 144,813 votes to reach a majority in the 2nd district, but he received only 142,440 votes.¹³⁷ This was because over 8,000 ballots were exhausted.¹³⁸ Exhausted ballots indicate the winning candidate has not received a majority of all votes cast in an election, only a “majority of all valid votes in the final round of tallying.”¹³⁹

Ballot exhaustion plays into another criticism: RCV violates “one person, one vote” because not all votes are counted the same numbers of times. If one person voted for (1) Willow and (2) Mauricio, and Willow is dropped after the first round, that person has had their vote counted twice. However, if that same person only voted for (1) Willow and left the rest of their ballot blank, their vote never applies to the final tabulation. Counterarguments to the “one person, one vote” criticism are that each vote carries the same weight, and, ultimately, a voter’s ballot is only weighted toward the results in the final round of tabulation.¹⁴⁰ The Equal Protection Clause merely requires that each vote be equally weighted.¹⁴¹

Critics also argue that people will not be able to adequately rank their ballots because it requires too much prior research or because the ballot will be confusing. To the first assertion, critics of RCV state that ranking choices for several positions is cognitively laborious, which increases costs on the voter.¹⁴² In average runoff elections, voters go to the polls having determined who they like most for each position and then conduct a second round of research based on the runoff election’s results.¹⁴³ In an instant runoff election, the voter must have conducted all of this research, often for multiple seats and many candidates, prior to the first and only

¹³⁶ Jacob Posik, *Ranked-Choice Voting Fails to Deliver on Promises*, BANGOR DAILY NEWS (Aug. 30, 2019), <https://bangordailynews.com/2019/08/30/opinion/contributors/ranked-choice-voting-fails-to-deliver-on-promises/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Craig M. Burnett & Vladimir Kogan, *Ballot (and Voter) “Exhaustion” Under Instant Runoff Voting: An Examination of Four Ranked-Choice Elections*, 37 ELECTORAL STUD. 41, 42 (2015) (emphasis omitted) (the author never defines what they mean by “valid vote,” though it is used here to refer to the remaining ballots after all other ballots have been eliminated or “exhausted” in the RCV process.)

¹⁴⁰ Shawn Griffiths, *How Ranked Choice Voting Survives the ‘One Person, One Vote’ Challenge*, FAIRVOTE (Dec. 05, 2018), https://www.fairvote.org/how_ranked_choice_voting_survives_the_one_person_one_vote_challenge. A voter’s vote is referred to as a “single transferable vote” because this style shows how the votes would runoff if a traditional runoff election was held. *Id.*

¹⁴¹ See *Bush v. Gore*, 531 U.S. 98, 104–05 (2000). While RCV or Instant Runoff Voting has never gone before the United States Supreme Court regarding the Equal Protection Clause’s “one person, one vote,” that particular constitutional analysis is beyond the scope of this Note.

¹⁴² See Burnett & Kogan, *supra* note 139, at 42.

¹⁴³ Hans von Spakovsky, *Ranked-Choice Voting Should Be Slotted Dead Last As Election Reform*, WASH. TIMES (Oct. 14, 2019), <https://www.washingtontimes.com/news/2019/oct/14/ranked-choice-voting-should-be-slotted-dead-last-a/>.

election.¹⁴⁴ Therefore, the concern is that in a regular runoff election, voters have more time to research and make more informed choices.¹⁴⁵

Critics also claim that ranked choice voting is, overall, confusing to the average voter.¹⁴⁶ After the adoption of RCV in Maine, the Maine Republican Party sued the state and challenged its implementation of RCV.¹⁴⁷ One of its chief claims was that forcing the party to adopt RCV for its primary elections would alter the character of the party because the confusion would reduce participation among older voters and poor voters.¹⁴⁸

Some critics claim that RCV will disenfranchise minority voters. While New York City most recently implemented RCV, the Black, Latino and Asian Caucus ultimately did not support the measure, claiming it would hurt them by “dilut[ing] the electoral power of communities of color.”¹⁴⁹ In fact, RCV’s use in New York City has been likened to voter suppression by Democratic councilmembers, stating that “rank choice voting will deprive New York City’s voters, including and especially the documented and known limited-English proficiently [sic] voter population of the right to vote for and elect candidates.”¹⁵⁰ However, not all Democratic councilmembers or members of the caucus agreed with this assertion. Councilman Antonio Reynoso claimed those opposing the measure were just “concerned about losing their seats.”¹⁵¹ Other studies have shown that RCV may help more women and minorities win elections.¹⁵²

Finally, some cities and states will have to address the plurality problem, as Maine did in 2018 when its supreme court found that RCV violates plurality provisions in their constitution.¹⁵³ If other city charters or state constitutions require that officials only need to be elected by a plurality, those provisions will need to be amended or accounted for (as was done in Maine).¹⁵⁴

RCV is not an all-encompassing solution to Americans’ frustrations with its political and electoral system, and it is not a perfect way to ensure great

¹⁴⁴ *See id.*

¹⁴⁵ *Id.*

¹⁴⁶ *How Ranked-Choice Voting is Changing Politics*, *supra* note 125.

¹⁴⁷ *Id.* at 19:10–19:20.

¹⁴⁸ *Id.* at 20:18–20:40; *see also* Esme Murphy, *The Confusion Around Ranked Choice Voting*, CBS MINN. (Nov. 5, 2017, 3:42 PM), <https://minnesota.cbslocal.com/2017/11/05/ranked-choice-voting/>.

¹⁴⁹ Durkin, *supra* note 130.

¹⁵⁰ Priscilla DeGregory, *Judge Rejects Delaying Rollout of Rank-Choice Voting in NYC*, N.Y. POST (Dec. 17, 2020, 11:53 AM), <https://nypost.com/2020/12/17/judge-rejects-delaying-roll-out-of-rank-choice-voting-in-nyc/>.

¹⁵¹ Shant Shahrigian, *NYC Council’s Black, Latino and Asian Caucus Divided Over ‘Ranked-Choice’ Voting*, N.Y. DAILY NEWS (Nov. 4, 2019), <https://www.nydailynews.com/news/politics/ny-ranked-choice-voting-black-latino-asian-caucus-divided-20191104-whwu73h6zffolnuasbhd3fw7ti-story.html>.

¹⁵² *See, e.g., Ranked Choice Voting and Representation*, FAIRVOTE, https://www.fairvote.org/research_rcvrepresentation (last visited May 21, 2021). In cities with larger communities of color, more minority candidates run, and RCV may help eliminate vote splitting among them. Bertha Lewis, *Ranked Choice Voting is Not the So Called ‘Spoiler Effect,’* N.Y. AMSTERDAM NEWS (Oct. 31, 2019, 12:38 PM), <http://amsterdamnews.com/news/2019/oct/31/ranked-choice-voting-not-so-called-spoiler-effect/>.

¹⁵³ *See supra* text accompanying notes 85–86; *supra* Part III.

¹⁵⁴ *See id.*

representation in a democracy. However, RCV does address some issues better than plurality systems, like vote splitting and negative discourse, and one way to combat some of the negative perceptions of RCV is to fight for its implementation in all levels of voting.

V. WHAT TO DO NEXT?

Combating entrenched political systems and parties is daunting, and clearly not something any one person should take on alone. However, normalizing RCV is best done by fighting to implement it in any situation where voting occurs, from statewide elections to decisions among colleagues in an office.

A. Large-Scale Implementation

The fight to implement RCV nationwide is challenging. Much like in Maine, RCV is difficult to pass by legislative action because major parties usually oppose RCV.¹⁵⁵ In Maine, the Republican Party is the largest opponent to RCV; it claims RCV is a *liberal* measure.¹⁵⁶ Research indicates that registered Independents in Maine more closely align with Democrats if forced to choose between the two major parties.¹⁵⁷ In states (or cities like New York) where the Democratic party holds a supermajority, however, it is similarly unlikely that RCV will be passed by the legislature.¹⁵⁸

This means organizations and voters will have to fight for a ballot referendum, much like Maine voters. Each state has its own process for ballot initiatives, but they usually require collecting a certain number of signatures supporting the ballot measure in order for it to appear on the ballot the following election cycle.¹⁵⁹ Then, enough people have to vote on the initiative at the ballot.¹⁶⁰ While this process is worthwhile yet arduous, it is equally important to start implementing RCV on a local and even personal level.

¹⁵⁵ See, e.g., Jack Santucci, *Maine's Citizens Passed 'Ranked-Choice Voting.' Why Did Republicans Shoot It Down?*, WASH. POST (May 31, 2017, 7:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/31/maines-citizens-passed-ranked-choice-voting-why-did-republicans-shoot-it-down/>.

¹⁵⁶ See, e.g., *id.*

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., S.B. 0780, 100th Gen. Assemb., Reg. Sess. (Ill. 2017) (RCV bill was introduced in Illinois but assigned by the Democratic majority to a special subcommittee, where it died without being voted on); Billy Kobin, *Biss Introduces Ranked-Choice Voting Bill*, DAILY NW. (Feb. 16, 2017), <https://dailynorthwestern.com/2017/02/16/city/biss-introduces-ranked-choice-voting-bill/>.

¹⁵⁹ See, e.g., *Initiative Process 101*, *supra* note 32.

¹⁶⁰ See, e.g., *id.*

B. Small-Scale Implementation

Many criticisms about RCV stem from the claim that it is currently too confusing, and that the general electorate will not understand the process.¹⁶¹ A great way to combat this criticism is to implement RCV at work, at school, and in local organizations. Currently, over eighty-five United States universities use RCV for student body elections.¹⁶² RCV is becoming increasingly popular in various organizations and corporations.¹⁶³

Many corporations and organizations have implemented RCV or some other form of single transferable voting method by mail¹⁶⁴ or using online systems, like OpaVote.¹⁶⁵

CONCLUSION

When using the traditional cost-benefit analysis to determine when people will vote, it is clear that disillusionment with the political system is a significant cost that keeps people from voting. Voters are frustrated that they cannot vote for parties or politicians that adequately represent them in the current two-party system, and that leaves voters feeling like their voice does not matter and their vote does not count.

Due in part to its strong identity as an Independent state, Maine eventually had enough of these costs. The 2014 Maine gubernatorial election marked over forty-five years of Governors being elected without the support of a majority of voters.¹⁶⁶ This likely played a part in Maine voters' determination to fight against the problems responsible for collective disillusionment with the system. Maine implemented RCV by a voter referendum, only to have it taken away by the state legislature.¹⁶⁷ After repealing the people's law, Maine's citizens implemented a veto of the legislature's action.¹⁶⁸ By implementing RCV through referenda, Maine voters told their legislature they wanted a better way to be heard.

Some of the biggest criticisms with RCV are about voters' inability to understand how it works. The best way to combat this is through advocacy, either fighting to implement it in various political systems or even locally. Using RCV in

¹⁶¹ See *supra* text accompanying notes 142–48.

¹⁶² *RCV in Campus Elections*, FAIRVOTE, https://www.fairvote.org/rcv_in_campus_elections (last updated Mar. 1, 2021). For those involved in student government, FairVote provides a sample motion to establish RCV. *RCV on Campus*, FAIRVOTE, https://www.fairvote.org/rcv_on_campus#sample_ranked_choice_voting_motion (last visited Dec. 20, 2019).

¹⁶³ See *RCV in Private Organizations and Corporations*, *supra* note 134.

¹⁶⁴ Many private organization and corporations follow “Robert’s Rules of Order” for conducting elections by mail. See *id.*

¹⁶⁵ *About OpaVote Online Voting*, OPAVOTE, <https://www.opavote.com/about> (last visited Dec. 20, 2019) (OpaVote was designed to make implementing single, transferable voting easier for organizations and workplaces.)

¹⁶⁶ See Russell, *supra* note 33.

¹⁶⁷ See *supra* text accompanying note 87.

¹⁶⁸ See *supra* text accompanying note 89.

colleges, corporations, organizations, and workplaces would acclimate people to how RCV works and quickly address the problems surrounding this system.