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ONE VOTE, TWO VOTES, THREE VOTES, FOUR: HOW RANKED CHOICE VOTING BURDENS VOTING RIGHTS AND MORE

Brandon Bryer*

I. INTRODUCTION

Without the sound and secure ability to vote, all other rights and liberties are defenseless.¹ The majority of Americans exercise that precious ballot box right by means of a plurality, winner-take-all election.² Also termed “first-past-the-post” elections, plurality systems require voters to cast a single vote for a single candidate.³ The candidate who simply receives the most votes is declared the winner.⁴ Although this system is familiar to the American electorate, a more unfamiliar system of voting is gaining popularity across the country.⁵ This system is known as ranked choice voting (“RCV”) and it is already a reality for millions of voters.⁶ In states such as Maine and Alaska and cities such as Minneapolis and San Francisco, millions of Americans exercise the right to vote differently than the rest of the nation.⁷ And the change is spreading.⁸

At its core, RCV permits a voter to select multiple candidates in order of preference.⁹ Instead of selecting only one candidate, as is done under a plurality system, RCV allows voters to express support for

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1. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”).

2. *Electoral Systems in the United States*, FAIRVOTE, https://www.fairvote.org/research_electoralsystemsus, (last visited April 27, 2021).

3. Charles King, *Electoral Systems*, GEORGETOWN UNIVERSITY, https://faculty.georgetown.edu/kingch/Electoral_Systems.htm, (last visited April 27, 2021).

4. *Id.*

5. Laura Tamman, *Ranked Choice Voting is Coming. Here's What Campaigns Need to Know*, CAMPAIGNS & ELECTIONS (Feb. 10, 2021), <https://www.campaignsandelections.com/campaign-insider/ranked-choice-voting-is-coming-here-s-what-campaigns-need-to-know>.

6. *Ranked-Choice Voting (RCV)*, BALLOTEDIA, [https://ballotpedia.org/Ranked-choice_voting_\(RCV\)](https://ballotpedia.org/Ranked-choice_voting_(RCV)), (last visited April 27, 2021).

7. *Id.*

8. Amanda Zoch, *The Rise of Ranked-Choice Voting*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Sept. 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-rise-of-ranked-choice-voting.aspx>.

9. *Details about RCV*, FAIRVOTE, https://www.fairvote.org/rcv#how_rcv_works, (last visited April 27, 2021).

their first-choice candidate, second-choice, third-choice, and so on.¹⁰ After the first round of tabulation, if any one candidate receives fifty percent or more of the first-choice votes, that candidate wins the election outright.¹¹ But if no candidate secures more than fifty percent of the vote, RCV elections proceed to subsequent rounds of vote counting.¹² First, the bottom candidates who cannot mathematically reach fifty percent are eliminated.¹³ Then, the votes for these now-eliminated candidates are reallocated to the voter's second-choice candidate.¹⁴ If a voter's first-choice candidate was not eliminated, that first-choice vote remains the same and is simply carried over into the next round.¹⁵ This vote reallocation process continues until one candidate receives over fifty percent of the vote and is thus declared the winner.¹⁶

When voting laws are altered, lawsuits often follow.¹⁷ RCV is no exception. RCV has been challenged in federal and state courts on both federal and state constitutional grounds.¹⁸ The most common legal challenge instituted against RCV is under the Equal Protection Clause of the Fourteenth Amendment, which dictates that "no State shall [...] deny to any person within its jurisdiction the equal protection of the laws."¹⁹ When RCV is contested for violating the equal protection guarantee, however, courts have uniformly upheld it as constitutional.²⁰

10. *Id.*

11. *Id.*

12. *Id.*

13. Some RCV elections use a process called "batch elimination" where all candidates who are mathematically unable to win are removed in one blanket elimination. *See, e.g.*, ME St T. 21-A section 723-A. Other RCV systems only eliminate one candidate at a time. This single elimination process proceeds candidate by candidate until one candidate receives fifty percent support. *See, e.g.*, San Francisco City Charter, § 13.102.

14. *See, e.g.*, ME St T. 21-A section 723-A. Note, too, that as this process continues, if a voter's second-choice candidate was also eliminated, the RCV tabulation moves on to the voter's third-choice candidate, fourth-choice, and so on.

15. *Id.*

16. *BALLOTEDIA supra* note 6.

17. *See Voting Rights Litigation*, BRENNAN CENTER FOR JUSTICE, (March 2, 2021), <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020>.

18. On federal grounds, RCV has been challenged under the due process and equal protection clauses of the Fourteenth Amendment, the First Amendment, the Elections Clause, and the Voting Rights Act. *See, e.g.*, *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011); *Baber v. Dunlap*, 376 F. Supp. 3d 125 (D. Maine 2018). On state grounds, *See, e.g.*, *Opinion of the Justices*, 162 A.3d 188, 211 (Me. 2017). For a more in-depth discussion of state constitutional challenges to RCV, *See Pildes, Richard H. and Parsons, G. Michael, The Legality of Ranked-Choice Voting*, CALIFORNIA L. REV., Forthcoming. This Comment focuses exclusively on the Equal Protection Clause issue.

19. U.S. Const. amend. XIV, § 1.

20. *See, e.g.*, *Dudum*, 640 F.3d at 1112; *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 689-98 (Minn. 2009).

This Comment argues that although unanimous, the decisions upholding RCV under the Federal Constitution are incorrect. These opinions are cursory and rest on incorrect premises about how RCV elections operate in practice and the true burdens that RCV systems impose on voting rights. First, Part I describes the logistics of RCV, the legal standard for evaluating election laws, and specific legal challenges to RCV. Part II details how RCV burdens voting rights and how courts have relied on incorrect grounds to uphold RCV systems. Ultimately, this Comment argues that going forward, once the faulty premises are corrected and the proper legal standard is applied, courts should hold that RCV violates the Equal Protection Clause of the Fourteenth Amendment.

II. BACKGROUND

Although RCV is unfamiliar to most Americans, it can have great impacts on the way in which they exercise the right to vote. Because it is imperative to better understand this obscure, yet rapidly expanding electoral system, this Part explores RCV's history, growth, and influence. First, Section A describes the facts of RCV—its historical development, the logistics of an RCV election, and the arguments for and against its use. Then, Section B shifts focus from facts to law and discusses the famous *Anderson-Burdick* framework used to evaluate the constitutionality of state election laws. Finally, Section C surveys the judicial opinions upholding RCV and the courts' justifications for doing so.

A. Ranked Choice Voting

1. The History and Growth of RCV

The general concept of ranked voting has existed in the United States since the 1870s.²¹ That general concept materialized into RCV in the early twentieth century, sparked by the rise of the Bull Moose Party and the 1912 presidential election.²² In the 1912 general election, Theodore Roosevelt ran as the Progressive Bull Moose Party candidate after narrowly losing the Republican nomination to William Howard Taft.²³ On election day, the conservative vote splintered between

21. *Dudum*, 640 F.3d at 1103. W.R. Ware, a professor at the Massachusetts Institute of Technology developed the first known “instant runoff” approach to elections in the late nineteenth century. *Id.*

22. Jacey Fortin, *Why Ranked-Choice Voting Is Having a Moment*, THE NEW YORK TIMES, (Feb. 10, 2020), <https://www.nytimes.com/2020/02/10/us/politics/ranked-choice-voting.html>.

23. *Id.*

Roosevelt and Taft, thus propelling the Democrat, Woodrow Wilson, to the presidency.²⁴ While RCV was not used in the 1912 election, the shock of a viable third party candidate thrust its underlying concept into the national spotlight.²⁵ Consequently, cities such as Ashtabula, Ohio and Kalamazoo, Michigan experimented with RCV to elect their local officials as early as 1915.²⁶

Despite its niche historical existence, RCV has only recently gained notoriety in the twenty-first century.²⁷ As of 2021, fourteen states have adopted RCV at the state or local level.²⁸ Maine uses RCV for all federal elections.²⁹ In 2020, Alaskans voted to adopt RCV for both federal and state elections.³⁰ Similarly, although California does not use RCV statewide, large cities such as San Francisco, Oakland, and Berkeley use RCV for mayoral and local elections.³¹ On its largest scale to date, RCV is now used by the more than eight million residents of New York City when electing its mayor.³² In addition to the seventeen states that already have some form of RCV, twenty-two other states have introduced legislation to adopt RCV.³³ In states where no legislation is pending, private organizations are actively working to implement RCV. One such group, Rank the Vote Ohio, advocates for the use of RCV for state and federal elections across the Buckeye State.³⁴ Many other crucial electoral battleground states have similar organizations.³⁵

24. *Id.*

25. *Id.* (“[the 1912 election] helped strengthen the case for electoral reform.”).

26. *The forgotten results & future promise of ranked choice voting in Ohio*, FAIRVOTE, https://www.fairvote.org/the_forgotten_results_future_promise_of_ranked_choice_voting_in_ohio, (last visited April 27, 2021).

27. Adam Eichen, *The Case for using Ranked Choice Voting in the 2020 Democratic Presidential Primaries*, IN THESE TIMES, (April 1, 2019), <https://inthesetimes.com/article/ranked-choice-voting-2020-democratic-presidential-primary-bernie-sanders>.

28. BALLOTEDIA *supra* note 6.

29. Maine does not use RCV for electing state officers. In an advisory opinion, the Maine Supreme Judicial Court held RCV unconstitutional under the Maine state constitution that requires state candidates be elected by a “plurality” of votes. *Opinion of the Justices*, 162 A.3d at 211.

30. Kelsey Piper, *Alaska voters adopt ranked-choice voting in ballot initiative*, VOX, (Nov. 19, 2020), <https://www.vox.com/2020/11/19/21537126/alaska-measure-2-ranked-choice-voting-results>.

31. BALLOTEDIA *supra* note 6.

32. Erin Durkin, *Ranked-choice voting adopted in New York City, along with other ballot measures*, POLITICO, (Nov. 5, 2019), <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>.

33. BALLOTEDIA *supra* note 6.

34. RANK THE VOTE OHIO, <https://www.rankthevoteohio.org>, (last visited April 27, 2021).

35. *Ranked Choice Voting in Pennsylvania*, THE ACTION NETWORK, <https://actionnetwork.org/petitions/ranked-choice-voting-in-pennsylvania>, (last visited April 27, 2021).

RCV has not been welcomed everywhere, however. In 2020, fifty-five percent of Massachusetts voters shot down a referendum to use RCV for state and federal elections.³⁶ Shortly after New York City citizens voted to adopt RCV, numerous Democratic members of the New York City Council sued to enjoin its implementation, citing voter education concerns.³⁷ The California legislature twice attempted to enact RCV statewide, but Democratic Governors Jerry Brown and Gavin Newsom vetoed the bill, in part because of the system's complex nature.³⁸ The citizens of Burlington, Vermont repealed their RCV system after a disfavored third-party mayoral candidate, who garnered only twenty-nine percent of votes in the first round of an election, nevertheless won after subsequent rounds of tabulation.³⁹

An interest in enacting RCV has also spread to the federal level. In 2019, U.S. Congressman Jamie Raskin of Maryland introduced the Ranked Choice Voting Act, which would enact RCV nationwide for all federal elections.⁴⁰ Also, in 2021, U.S. Congressman John Sarbanes introduced the For the People Act, which would require all states receiving federal election grants to replace voting systems with those capable of tabulating RCV ballots.⁴¹ In the 2020 Democratic Presidential Primary, candidates such as Elizabeth Warren and Andrew Yang made the nationwide enactment of RCV a central policy objective.⁴²

36. Craig LeMoult, *Why Did Massachusetts Reject Ranked-Choice Voting?*, GBH NEWS, (Nov. 4, 2020), <https://www.wgbh.org/news/politics/2020/11/04/why-did-massachusetts-reject-ranked-choice-voting>.

37. Rebecca C. Lewis, *New lawsuit could delay ranked-choice voting in NYC*, CITY & STATE NEW YORK, (Dec. 10, 2020), <https://www.cityandstateny.com/articles/politics/new-york-city/new-lawsUIT-could-delay-ranked-choice-voting-nyc.html>.

38. John Wildermuth, *Gavin Newsom vetoes bill to allow ranked choice voting throughout California*, SAN FRANCISCO CHRONICLE, (Oct. 15, 2019), <https://www.sfchronicle.com/politics/article/Gavin-Newsom-vetoes-bill-to-allow-ranked-choice-14535193.php>.

39. Philip Baruth, *Voting Paradoxes and Perverse Outcomes*, THE VERMONT DAILY BRIEFING, <https://web.archive.org/web/20110726125814/http://vermontdailybriefing.com/?p=1213>, (last visited April 27, 2021). The 2010 election in Burlington, Vermont is often cited by opponents of RCV to demonstrate the system's perverse results. After the first round of votes, fifty-four percent of Burlington citizens did not want the prevailing candidate to win. Nevertheless, RCV permitted that candidate to win. Moreover, even while using RCV, the prevailing candidate never surpassed fifty percent support. *Id.*

40. Ranked Choice Voting Act, H.R. 4464, 116th Cong. (2019-20). The bill was referred to the Committee on House Administration on September 24, 2019. The bill remains pending as of September 2021. *Id.*

41. For the People Act of 2021, H.R. 1, 117th Cong. § 298(e) (2021). The bill passed the House of Representatives on March 3, 2021. The bill is pending in the Senate as of September 2021. *Id.*

42. Warren and Raskin Publish Op-Ed in Support of Ranked-Choice Voting, (Sept. 18, 2020), <https://www.warren.senate.gov/newsroom/press-releases/icymi-warren-and-raskin-publish-op-ed-in-support-of-ranked-choice-voting>.

2. Logistics of RCV Elections

Although slight variations exist, RCV systems are relatively similar. First, although voters rank candidates on an RCV ballot, the voting reallocation process—that is subsequent rounds where second-choice candidates are considered—does not kick in unless no candidate receives fifty percent of the first round votes.⁴³ If a candidate does receive fifty percent, the election is over and rankings are not utilized. Second, RCV statutes share common terminology. If further tabulation is needed, candidates who cannot reach the fifty percent threshold after the first round are eliminated and deemed “non-continuing candidates;” those who do have a mathematical possibility of meeting the fifty-percent threshold are “continuing candidates.”⁴⁴ Third, RCV statutes limit the number of candidates a voter can rank. For example, if ten candidates qualify for ballot access, voters can only rank five,⁴⁵ or sometimes as low as three,⁴⁶ candidates.

For an illustration of how RCV works in practice, consider Maine’s 2018 election for the U.S. House of Representatives. In Maine’s Second Congressional District, four candidates qualified to appear on the ballot: the incumbent Bruce Poliquin, Jared Golden, Tiffany Bond, and William Hoar.⁴⁷ The actual RCV ballot used in the election is produced below.⁴⁸

Rep. to Congress District 2	1st Choice	2nd Choice	3rd Choice	4th Choice	5th Choice
Bond, Tiffany L. Portland Independent	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Golden, Jared F. Lewiston Democratic	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Hoar, William R.S. Southwest Harbor Independent	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Poliquin, Bruce Oakland Republican	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Write-in	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

43. See, e.g., ME St T. 21-A section 723-A.

44. *Id.*

45. *What is Maine ranked-choice voting and how does ranked-choice voting work?*, (Sept. 22, 2020), <https://www.newscentermaine.com/article/news/politics/elections/what-is-and-how-does-maine-ranked-choice-voting-work/97-e7964e06-a087-4b79-97cc-7f053c294248>.

46. San Francisco City Charter, § 13.102(b).

47. BALLOTEDIA, https://ballotpedia.org/Maine%27s_2nd_Congressional_District_election_2018, (last visited April 27, 2021).

48. *Baber*, 376 F.Supp.3d at 129.

After the first round of voting, forty-six percent of voters ranked Poliquin as their first choice while forty-five percent chose Golden.⁴⁹ Under the standard plurality voting system, Poliquin would have won. Nevertheless, because no candidate received over fifty percent, the RCV election continued.⁵⁰ Because it was statistically impossible for Bond or Hoar to reach fifty percent, both were dubbed “non-continuing candidates” and were eliminated.⁵¹ Consequently, the twenty-four thousand voters who ranked either Bond or Hoar as their first choice had those votes eliminated⁵² and then reallocated to either Poliquin or Golden, depending on which candidate the voter ranked second-highest.⁵³ After the final tabulation, Golden prevailed by just over three thousand votes.⁵⁴ Poliquin, the two-term incumbent, lost despite winning the plurality vote.

3. Pros and Cons of RCV

RCV is both praised and vilified. Proponents of RCV highlight that the system elects candidates with broader, majority support.⁵⁵ In theory, by requiring majority support, a candidate is more representative of the population as a whole, and polarized candidates are discouraged from only “playing to their base.”⁵⁶ Further, proponents argue that RCV deters negative campaigning, grants voters more choice, and saves time, money, and resources by not requiring a separate runoff election.⁵⁷ In contrast, RCV is criticized for its complexity and confusion.⁵⁸ Some argue that is difficult enough to logically choose one candidate, let alone distinguish between two, three, or four.⁵⁹ And when voters are confused, they cast spoiled ballots or detach from the political process entirely, thus lowering

49. The actual vote tallies in the first round of the election were as follows: Poliquin: 134,184 votes; Golden: 132,013 votes; Bond: 16,552 votes; and Hoar: 6,875 votes. *Baber*, 376 F.Supp.3d at 130.

50. *Baber*, 376 F.Supp.3d at 131.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Betty Keller, *Pros and Cons of Instant Runoff (Ranked Choice) Voting*, LEAGUE OF WOMEN VOTERS OF VERMONT, <https://my.lwv.org/vermont/article/pros-and-cons-instant-runoff-ranked-choice-voting>, (last visited April 27, 2021).

56. *Id.*

57. *Id.*

58. Matthew Gagnon, *Ranked-choice voting makes elections unnecessarily complex and confusing*, BANGOR DAILY NEWS, (Aug. 5, 2020), <https://bangordailynews.com/2020/08/05/opinion/contributors/ranked-choice-voting-makes-elections-unnecessarily-complex-and-confusing-2>.

59. *Id.*

voter participation.⁶⁰ Opponents also contend that RCV elections increase costs.⁶¹ Moreover, opponents argue that while RCV theoretically encourages positive campaigning and produces candidates with broad support, in practice, RCV elections enable candidates with only marginal or little support to prevail.⁶²

B. The Legal Standard for Evaluating Election Laws

Having now understood the facts of RCV, this Section details the legal framework that courts often apply to assess the constitutionality of election laws. Because of the sanctity of the right to vote and the direct impact that elections have on the balance of political power, changes to voting laws are fervently litigated.⁶³ While numerous different legal standards exist for challenging electoral practices,⁶⁴ the U.S. Supreme Court has crafted the *Anderson-Burdick* framework—a popular test used to determine if an election law violates the Equal Protection Clause.⁶⁵ Under this framework, courts must first evaluate the extent to which a law burdens the right to vote.⁶⁶ Laws can impose non-severe burdens, intermediate burdens, or severe burdens.⁶⁷ If the law imposes a severe burden on voting rights, strict scrutiny applies and the law must be narrowly tailored to advance a compelling state interest.⁶⁸ If the law is not sufficiently tailored, it is unconstitutional. But when the burden is found to be non-severe and imposes only reasonable, nondiscriminatory restrictions, courts apply a deferential

60. Mary Kenny, *Ranked-choice voting linked to lower voter turnout*, SAN FRANCISCO STATE UNIVERSITY, (Oct. 23, 2015), <https://news.sfsu.edu/news-story/ranked-choice-voting-linked-lower-voter-turnout>.

61. In Maine, implementing RCV nearly doubled the state's election costs. Expenses include voter outreach and education initiatives, purchasing new voting machines to count RCV ballots, unique hard drives, and transportation costs. *See, e.g.*, Jack Dodson, *Ranked choice voting costs questioned*, THE ELLSWORTH AMERICAN, (Jan. 17, 2018), <https://www.ellsworthamerican.com/maine-news/political-news/ranked-choice-voting-costs-questioned>.

62. Hans von Spakovsky, *Ranked Choice Voting is a Bad Choice*, THE HERITAGE FOUNDATION, (Aug. 23, 2019), <https://www.heritage.org/election-integrity/report/ranked-choice-voting-bad-choice>.

63. *See* Hasen, Richard L., *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, WASHINGTON & LEE L. REV., Vol. 62 937, 939 (2005).

64. One other such doctrine is one person, one vote. *See, e.g.*, Gray v. Sanders, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”).

65. The test is named after the two seminal cases of *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). The test is used for evaluating all First and Fourteenth Amendment challenges to election laws, not just Equal Protection Clause violations.

66. *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020).

67. *Id.*

68. *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

rational basis standard.⁶⁹ Generally, the government's important regulatory interests are sufficient to survive rational basis review.⁷⁰

A more demanding *Anderson-Burdick* analysis is required when an election law falls between the two extremes. When a law imposes moderate burdens on voting rights, those burdens are closely weighed against the precise governmental interests offered in justification.⁷¹ The government must proffer legitimate interests that are "sufficiently weighty" to justify the burdens.⁷² Under this inquiry, the court must determine the legitimacy and strength of each interest and even evaluate alternative approaches to determine whether those governmental interests make it *necessary* to burden the right to vote.⁷³ If the governmental interests fail to outweigh the burdens on voting rights, the law is struck down as unconstitutional.

RCV has only been analyzed under *Anderson-Burdick* twice: by one federal court and one state court. At the federal level, in *Dudum v. Arntz*, the U.S. Court of Appeals for the Ninth Circuit concluded that RCV imposed little if any burden on voting rights and struck the balance in favor of the government's interests.⁷⁴ The other *Anderson-Burdick* analysis was conducted by the Minnesota Supreme Court in *Minnesota Voters Alliance v. Minneapolis*.⁷⁵ The court tacitly found that the governmental interests served by RCV outweighed the burden that RCV imposed on voting rights.⁷⁶ However, because the case was a procedural, not substantive, challenge to RCV, the *Minnesota Voters Alliance* court did not engage in a standard *Anderson-Burdick* analysis.

C. RCV Survives Legal Challenges

When challenged on its constitutional merits, RCV has been uniformly upheld. The most thorough substantive challenge to date is *Baber v. Dunlap*,⁷⁷ a litigation battle arising out of the aforementioned 2018 election in Maine's Second Congressional District. In *Baber*,

69. *Mays*, 951 F.3d at 784.

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

71. *Mays*, 951 F.3d at 784.

72. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman*, 502 U.S. at 288-89).

73. *Anderson*, 460 U.S. at 789.

74. *Dudum*, 640 F.3d. at 1112.

75. 766 N.W.2d 683 (Minn. 2009).

76. *Id.* at 689. Because Minneapolis had not yet enacted its RCV system, the voters only initiated a facial challenge and sought a declaratory judgment. Thus, much of the *Anderson-Burdick* analysis was rooted in mere hypotheticals, and due to the procedural posture of the case, the government benefitted from an overly deferential standard of review. *Id.*

77. 376 F.Supp.3d 125 (D. Me. 2018).

four Maine voters filed suit challenging the RCV election system as unconstitutional.⁷⁸ Among other arguments, the voters contended that RCV elections violate the Equal Protection Clause of the Fourteenth Amendment.⁷⁹ The voters argued that the ballot instructions were too confusing and their votes were diluted by the numerous rounds of vote counting.⁸⁰ Under RCV, those who voted for either Bond or Hoar as their first-choice candidate were able to express their vote more than once.⁸¹ Meanwhile, the clear plurality of Mainers who voted for Bruce Poliquin had their votes counted less and were left disenfranchised.⁸²

The district court disagreed. In doing so, the court held that Maine could constitutionally use RCV in electing candidates for federal office.⁸³ The court concluded that the voters failed to demonstrate how their votes actually received less weight.⁸⁴ During round one of the election, votes for Poliquin counted with the same weight as every other vote.⁸⁵ Poliquin simply failed to achieve a majority after the first round.⁸⁶ The votes for Poliquin did not become irrelevant or diluted during round two.⁸⁷ In sum, because each ballot was counted no more than once at each tabulation step, each vote received equal weight in every round of balloting.⁸⁸

The other notable substantive challenge to RCV is *Dudum v. Arntz*.⁸⁹ In *Dudum*, San Francisco voters argued that the city's use of "restricted" RCV violated the Equal Protection Clause.⁹⁰ As is common, under San Francisco's RCV system, voters were limited to ranking only three candidates.⁹¹ The city argued that the limit was necessary because the voting machines were not equipped to tabulate unlimited rankings.⁹² As a result, allowing voters to rank more than three candidates would have increased costs, posed logistical issues, confused voters, and led to inaccurate vote calculations.⁹³ The *Dudum*

78. *Baber*, 376 F.Supp.3d at 129.

79. *Id.* at 138. In addition to the Equal Protection violation, plaintiffs alleged RCV violates the Due Process Clause of the Fourteenth Amendment, the First Amendment, and the Voting Rights Act. *Id.*

80. *Id.* at 129.

81. *Id.* at 130-31.

82. *Id.* at 129.

83. *Baber*, 376 F.Supp.3d at 146-47.

84. *Id.* at 140-41.

85. *Id.* at 141.

86. *Id.*

87. *Id.*

88. *Id.* at n 21.

89. 640 F.3d. 1098 (9th Cir. 2011).

90. *Dudum*, 640 F.3d. at 1101.

91. *Id.*

92. *Id.*

93. *Id.*

voters also contended that RCV is not one election but rather a series of elections where a small class of voters—who have their second or third choice votes counted—are impermissibly allowed more than one vote.⁹⁴

The *Dudum* court also rejected these arguments. The court found that RCV does not operate as multiple elections because “each ballot is counted as no more than one vote at each tabulation step.”⁹⁵ The court argued that whether representing a voter’s first, second, or third-choice candidate, each vote is “afforded the same mathematical weight in the election.”⁹⁶ Unlike in *Baber*, the *Dudum* court did apply the *Anderson-Burdick* framework. As to the burdens, the court concluded that RCV imposes a “minimal—and perhaps nonexistent” burden on voters’ equal protection rights.⁹⁷ As to the governmental interests, the restriction avoided increased costs, maintained an orderly election, and limited voter confusion.⁹⁸ Because the governmental interests easily outweighed the “nonexistent” burden on voting rights, the court concluded that RCV was constitutional.⁹⁹

III. DISCUSSION

Although a few courts have upheld RCV against substantive Equal Protection challenges, these decisions are misguided. The first error is that some courts fail to analyze RCV under the *Anderson-Burdick* framework, as in *Baber*. Even if a court avoids the first error, like the Ninth Circuit in *Dudum*, they incorrectly operate from a faulty premise. As courts have understood it, RCV operates as just one election where voters are treated alike.¹⁰⁰ From that core premise, courts conclude that RCV imposes little to no burden on voting rights.¹⁰¹ Although such a conclusion flows logically from that core premise, the premise itself is deeply flawed. A faulty premise results in faulty conclusions.

This Part challenges the notion that voters in RCV elections cast just one vote, for one candidate, in one election. First, Section A argues

94. *Id.* at 1112.

95. *Dudum*, 640 F.3d. at 1112.

96. *Id.*

97. *Id.* at 1113.

98. *Id.* at 1115-16.

99. *Id.* at 1117.

100. *See, e.g. Minnesota Voters Alliance*, 766 N.W.2d at 686 (“[RCV] eliminates the process of separate primary and general elections in favor of a *single election* in which voters may rank all candidates for a particular office in order of the voters’ preference.” (emphasis added)).

101. *See, e.g. Dudum*, 640 F.3d. at 1112 (noting that RCV imposes “at most minimal—and perhaps nonexistent—burden on voters’ constitutional rights.”).

that RCV operates as multiple elections and permits some voters a greater ability to influence the outcome of an election than others. Granting some voters a disproportionate ability to change the outcome of an election is a serious issue, one that our Federal Constitution views as dangerous.¹⁰² But infinitely more dangerous than a single court mistaking how RCV operates is the judicial uniformity in committing that error. Section B challenges that uniformity. By considering the burdens, benefits, and alternatives to RCV, Section B holds RCV to scrutiny under *Anderson-Burdick*. Ultimately, this Part argues that in future legal challenges, courts should apply the *Anderson-Burdick* framework and conclude that RCV violates the Equal Protection Clause.

A. The Incorrect Premises and RCV's True Burdens

The constitutionality of RCV turns on whether some voters are afforded “an increased opportunity to affect the outcome of an election” than other voters.¹⁰³ Among similarly situated voters, the Equal Protection Clause does not permit some votes to carry a greater weight than others.¹⁰⁴ At the heart of this inquiry is whether RCV’s rounds of tabulation function as one election or multiple elections. This Article submits that RCV is the latter. In total, this Article identifies four primary burdens that RCV inflicts on voting rights. Each is assessed in turn.

1. RCV Operates as Multiple Elections

RCV operates as more than one election and in doing so, affords some voters a weightier and unequal opportunity to influence electoral outcomes. Strong evidence that RCV systems produce more than one election exists in the text of RCV statutes, interest groups that support RCV, and state officials who have defended RCV in court. Statutes that enact RCV direct election officials to engage in multiple “*rounds*” of vote disbursement.¹⁰⁵ FairVote, an organization dedicated to implementing RCV, describes the process as a multitude of runoff *elections* (yes, plural) where candidates are sequentially eliminated in *each* (yes, separate) election.¹⁰⁶ In defending RCV from legal

102. See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”).

103. Dimino, Smith & Solimine, *VOTING RIGHTS AND ELECTION LAW*, 1115 (3rd ed. 2021).

104. *Dunn*, 405 U.S. at 336.

105. ME St T. 21-A section 723-A.

106. *Details about Ranked Choice Voting*, FAIRVOTE, <https://www.fairvote.org>

challenges, courts and government officials have argued that RCV simulates a *series* of runoff elections.¹⁰⁷ For example, San Francisco's system is not called RCV but rather by its closely-related title, "Instant Runoff Voting."¹⁰⁸ To achieve a true instant runoff, as proponents argue it does, RCV systems must count votes as if there were indeed multiple, separate runoff elections.

Moreover, election scholars confirm that RCV is more than one election. According to leading political science professor and voting systems expert, Dr. Jonathan D. Katz,¹⁰⁹ an election is defined as a given set of voters choosing amongst a given set of candidates.¹¹⁰ Each time the voters and candidates change, there is a distinct and separate election.¹¹¹ In practice, RCV does precisely that. If no candidate receives a majority of votes, the lowest candidates are removed from contention and eliminated from the pool of viable candidates. But not only do the candidates change in subsequent rounds of an RCV election, so do the voters. For example, in one San Francisco RCV election, by the final round of tabulation, twenty-seven percent of voters had their ranked ballots exhausted and were no longer actively participating with the other seventy-three percent of voters.¹¹² Because both candidates and voters change in every subsequent round, RCV is properly considered not one, but multiple elections.

Some may argue that RCV's practical consequence of producing multiple elections is inconsequential.¹¹³ However, this commonly-deployed argument ignores the more serious threat lurking in the background. Although passed off as "subsequent rounds" of a single election, properly understood, RCV's multiple elections treat some voters more favorably than others. Voters who rank a non-continuing candidate first, and thus have their second or third choice considered, get to morph their ballots into outcome determinative votes. In contrast, voters who rank a continuing candidate are stuck with a single choice and that single vote. Moreover, while some voters have their

/rcv#how_rcv_works, (last visited April 27, 2021) (emphasis added).

107. In fact, San Francisco offered this reason as justification for its RCV system. *Dudum*, 640 F.3d at 1107.

108. San Francisco City Charter, § 13.102.

109. See *An Audit of Political Behavior Research*, SAGE OPEN, 2018:1–14 (2018); *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution*, NEW YORK: CAMBRIDGE UNIVERSITY PRESS (2002).

110. *Dudum* Appellant's Brief, No. 10-17198 at 17.

111. *Id.* at 33.

112. *Official Ranked-Choice Results Report*, CONSOLIDATED MUNICIPAL ELECTION MAYOR, (Nov. 8, 2011), <https://sfelections.org/results/20111108/data/mayor.html>. In San Francisco's 2011 mayoral election, 197,242 voters participated in the election. By the final round of tabulation, 52,524 votes, or twenty-seven percent, had been exhausted. *Id.*

113. See, e.g., *Minnesota Voters Alliance*, 766 N.W.2d at 690-91.

votes counted again and again, others have their ballots eliminated in RCV's subsequent rounds. For an example, consider the election data from a San Francisco RCV election. It is illogical to suggest that the twenty-seven percent of voters who had their ballots exhausted by the last round were afforded an "equal chance" to impact the outcome of the election—they did not even have a vote to exercise in the later elections.¹¹⁴ Thus, contrary to the Ninth Circuit's reasoning in *Dudum*, votes are not afforded the "same mathematical weight" in RCV elections.¹¹⁵ Rather, RCV operates as multiple, unequal elections where some votes are elevated to outcome-determinative status, some are locked in place, while others are exhausted entirely.

2. RCV Forces Voters to Participate in Hypothetical Elections

The legislative purpose and historical justifications for adopting RCV uncover another burden imposed on voting rights. RCV elections are often construed as efficient replacements of a two-election system.¹¹⁶ In a two-election system, the general election is held in November, and if one candidate does not receive a majority of the votes, a runoff election is held between the top two candidates.¹¹⁷ Before this runoff election, voters are able to reassess policy platforms, hear further debate, and ultimately cast a single vote for one of the two candidates. While RCV mimics this system, it severely distorts it. In practice, RCV operates as separate runoff elections conducted in secrecy behind closed doors. In these closed-door runoffs, no consideration is given to the fact that the pool of candidates and voters are everchanging. Thus, RCV insists that a voter do what common sense says is impossible: predict the future and cast a vote in an uncertain, hypothetical election.

Election experts and political scientists have long observed voting behavior as a product of numerous factors.¹¹⁸ While a voter's party affiliation is most salient, the core bloc of undecided voters heavily consider a candidate's approachability, family, religious affiliation, or

114. *Id.*

115. *Dudum*, 640 F.3d at 1112.

116. *See, e.g., Baber*, 376 F.Supp.3d at 141.

117. Wendy Underhill, *Primary Runoff Elections*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Aug. 2017), <https://www.ncsl.org/research/elections-and-campaigns/primary-runoff-elections.aspx>. Two-election systems are extremely popular in other countries such as France, Brazil, and Ukraine. *Id.* In the United States, Georgia is the only state that uses a two-election system for general elections. *Id.* Many other states use the system for federal primaries and state gubernatorial elections. *Id.*

118. *How Voters Decide*, LUMEN, <https://courses.lumenlearning.com/boundless-politicalscience/chapter/how-voters-decide>, (last visited April 27, 2021).

upbringing.¹¹⁹ Because there are numerous candidates in an election, however, voters do not consider these factors in a vacuum but rather in relation to other candidates.¹²⁰ Logically, in order to weigh a candidate's platform, qualifications, and characteristics relative to other candidates, a voter must know the full array of candidates. When the candidates change, so do voter decisions.

In practice, RCV precludes voters from deciding which candidates are worthy of their votes—a concept central to elections.¹²¹ To illustrate this point, consider if RCV had been used in the 2016 presidential election and the all-too common predicament of hypothetical Voter A. As to substantive political issues, Voter A was strongly in favor of Gary Johnson's political platform, namely on maintaining a small national government and drug reform policy. While Voter A also agreed with the policies of Donald Trump, she found him to be too irreverent and unpresidential.¹²² Voter A disagreed with most of Hillary Clinton's political positions, but her extensive career in government made her far more poised and professional than Trump. Voter A also found Clinton more approachable and trustworthy than Trump. In light of these considerations, Voter A ranked her ballot as follows: (1) Johnson (Libertarian); (2) Clinton (Democrat); (3) Trump (Republican). As was the reality in numerous 2016 battleground states, suppose that neither Clinton nor Trump reached the fifty-percent threshold and thus, as the lowest vote-getter, Johnson was eliminated in the first round of RCV.

At this point, the RCV process seems facially harmless. Remember, however, that Voter A's selections were based both on the relative weight of the candidates' substantive political positions as well as temperament, approachability, and character traits. As studies of voter behavior suggests, it is possible—perhaps even likely—that, in a separate election between only Clinton and Trump, Voter A's preference for Trump's substantive policy positions would now outweigh her favor of Clinton's personality.¹²³ But the RCV ballot entirely fails to consider that reality. In practice, RCV forces voters to gaze into the crystal ball and forecast their preferences should the pool of candidates change, and in real time, cast votes based on hypothetical, future elections. This is the functional equivalent of

119. *Id.*

120. *Id.*

121. *Id.*

122. See Hannah Hartig, *Poll: Clinton Maintains Big Lead as Voters Doubt Trump's Temperament*, CBS NEWS, (Aug. 16, 2016), <https://www.nbcnews.com/storyline/data-points/poll-clinton-maintains-big-lead-voters-doubt-trump-s-temperament-n631351>.

123. *Id.*

requiring voters to select a party nominee in a spring primary election, while also casting their vote for the general election without knowing who the other candidates will be or hearing any further debate from those candidates. This feature of RCV not only burdens voting rights and leads to wasted ballots, it is fundamentally illogical.

3. RCV Defies Electoral Common Sense

RCV elections also violate a commonsense notion of electoral behavior known as monotonicity.¹²⁴ The principle is straightforward: ranking a candidate first should never cause that candidate to lose, and ranking a candidate lower than first should never cause that candidate to win.¹²⁵ RCV, however, suffers from the problem of non-monotonicity—where a candidate can *lose* after receiving an *increase* in support.¹²⁶ Likewise, a disfavored candidate can *win* by experiencing a *decrease* in support.¹²⁷ Thus, RCV's ranking structure can reward candidates who receive no increase in support during subsequent rounds and disadvantage candidates who garner more voter support. In forty percent of RCV elections where the plurality winner ultimately lost, non-monotonicity was the culprit.¹²⁸ Thus, RCV's non-monotonicity tempts voters to engage in electoral chicanery by ranking their favorite candidate second or third to avoid harming her in subsequent rounds of vote tabulation. Yet again, RCV produces a result devoid of logic.

4. RCV Generates Voter Confusion

While exercising the right to vote should be a straightforward practice, RCV is unduly complex. RCV is not only confusing to understand initially but that confusion follows voters into the ballot box.¹²⁹ In fact, RCV ballots increase the rate of voter error through a phenomenon called overvoting.¹³⁰ An overvote occurs if a voter selects more than one candidate in a single round of an RCV election or votes

124. *Monotonicity*, THE CENTER FOR ELECTION SCIENCE, <https://electionscience.org/library/monotonicity>, (last visited April 27, 2021).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Anthony Brooks, *A Greater Choice or Confusing: Arguments For and Against Ranked Choice Voting*, WBUR NEWS, (Oct. 14, 2020), <https://www.wbur.org/news/2020/10/14/wbur-debate-question-2-ranked-choice-voting>. ("It's confusing to me, and I'm a pretty sophisticated voter with a Harvard Law degree," Bracer said.)

130. BALLOTEDIA *supra* note 6.

for the same candidate more than once.¹³¹ Although this seems like a quick educational fix, many voters cast an overvote in earnest.¹³² For example, some voters believe that to express support for their favorite candidate in an RCV election, they need to fill in the box next to that candidate's name for each round.¹³³ When overvotes occur, the voter's entire ballot is "exhausted" and rendered null and void for the entire election.¹³⁴ In other words, a simple voter mistake leads to a disenfranchised voice.

To be certain, the argument that RCV elections increase vote exhaustion is not a hypothesis; it actually happens. For example, during the initial round of an RCV election in San Francisco, 820 ballots were exhausted due to an overvote.¹³⁵ Additionally, in Maine's Second Congressional District election, 6,453 votes were exhausted in the first round alone.¹³⁶ By the final round of tabulation, over 15,000 votes had been thrown out.¹³⁷ Of these, 533 voters had overvoted and another 335 votes were not counted for failure to select a continuing candidate.¹³⁸ In closely-contested elections decided by a few thousand votes, these numbers are significant.

The electoral confusion and disenfranchisement created by RCV also impacts voters disproportionately along lines of race, age, and gender. Following San Francisco's implementation of RCV, election scholars conducted studies to better understand RCV's impact on overvoting and general voter confusion.¹³⁹ The results are cause for concern. After RCV was implemented, the rate of exhausted ballots and overvoting increased in minority precincts primarily comprised of African American, Latino, and foreign-born voters.¹⁴⁰ Precincts with higher elderly and low-income populations saw similar increases.¹⁴¹ Further, studies find that women are more likely than men to have ballots exhausted because of RCV errors.¹⁴²

Taken together, RCV imposes four primary burdens on voting rights

131. *Overvote*, BALLOTPEDIA, <https://ballotpedia.org/Overvote>, (last visited April 27, 2021).

132. Gagnon, *supra* note 58.

133. *Id.*

134. *See, e.g.*, ME St T. 21-A section 723-A.

135. *Official Ranked-Choice Results Report*, CONSOLIDATED MUNICIPAL ELECTION MAYOR, (Nov. 8, 2011), <https://sfelections.org/results/20111108/data/mayor.html>.

136. *Tabulations for Elections held in 2018*, DEPARTMENT OF THE SECRETARY OF STATE, <https://www.maine.gov/sos/cec/elec/results/results18.html#Nov6>, (last visited April 27, 2021).

137. *Id.*

138. *Id.*

139. Neely, F., & McDaniel, J., *Overvoting and the Equality of Voice under Instant-Runoff Voting in San Francisco*, CALIFORNIA JOURNAL OF POLITICS AND POLICY (2015).

140. *Id.*

141. *Id.*

142. *Id.*

and voter efficacy. First, RCV functions as numerous, closed-door runoff elections, where some voters are afforded a greater weight and ability to influence the outcome of an election. Second, RCV deprives voters of an educated and meaningful vote in those subsequent elections. Third, RCV defies the core tenets and common sense nature of elections. Fourth, RCV is confusing, both in theory and in practice, such that an increased number of voters commit error resulting in disenfranchisement. The standard counterargument is that votes are simply counted the same at each round of the RCV election,¹⁴³ but cloaked behind that simplistic justification lies the reality that, while numerically counted the same, these votes are fraught with voter confusion, uncertainty, and inequity.

B. Reanalyzing the Constitutionality of RCV

Contrary to what courts have concluded, Section A explained how RCV is far from burden free.¹⁴⁴ Rather, RCV imposes considerable burdens on voting rights.¹⁴⁵ Thus, because its burdens have been ignored or wholly miscategorized by courts, RCV has eluded an appropriate Equal Protection analysis. For the benefit of future litigants and courts, this Section contends that RCV should be analyzed using the *Anderson-Burdick* framework, under which, courts should conclude that RCV is unconstitutional.

1. The Burdens and Governmental Interests

As outlined above, RCV elections impose four primary burdens on voting rights.¹⁴⁶ Those burdens, however, are better understood in light of the governmental interests put forth as justification for instituting RCV. In defending their use of RCV, state governments have proffered numerous interests.¹⁴⁷ At its core, the government contends that RCV realizes the benefits of a two-election system without the downsides of a two-election system. First, by requiring majority support, RCV ensures that the victorious candidate better represents the entire

143. *Minnesota Voters Alliance*, 766 N.W.2d at 690.

144. *Dudum*, 640 F.3d. at 1112.

145. This Comment concedes that RCV does not impose severe burdens on voting rights and thus, is not subject to strict scrutiny. But RCV is not burden-free, as courts have concluded. Thus, the highly deferential rational basis standard is also inappropriate. Thus, RCV is more appropriately analyzed under the standard for election laws that impose intermediate burdens on voting rights. *See, e.g., Mays*, 951 F.3d at 784.

146. *Supra*, Part II, Section A.

147. *See, e.g., Dudum*, 640 F.3d at 1114-1116.

electorate.¹⁴⁸ Second, RCV incentivizes candidates to run more civilized campaigns.¹⁴⁹ By rewarding candidates who achieve majority support, RCV enriches candidate debate beyond hyper-partisan concerns. Third, by not requiring a separate runoff election, RCV saves time, money, and resources.¹⁵⁰ Fourth, RCV results in higher voter participation and permits more voters to express their beliefs.¹⁵¹ According to the government, these interests not only justify but greatly outweigh the fact that RCV operates as multiple closed-door runoff elections, confuses some voters, and suffers from irregularities.

2. Striking the Balance

The most meaningful part of the *Anderson-Burdick* analysis occurs when balancing a law's burden on voting rights against the government's interest in achieving the law's objectives. To survive a constitutional challenge, the government's precise interests must be "sufficiently weighty" to overcome the burdens imposed on voting rights.¹⁵² It is insufficient that the government simply assert these interests; the government must detail *why* those interests are furthered by the specific election law.¹⁵³ In doing so, courts consider both the legitimacy and strength of each interest.¹⁵⁴ Because the *Baber* and *Dudum* courts began with the incorrect notion that RCV poses little, if any, burden on voting rights, they did not properly conduct this analysis.¹⁵⁵ In fact, no court has conducted this analysis on the substantive merits of an RCV challenge.

First, courts should quickly dismiss the government's argument that RCV improves political civility and produces elected officials who better represent the electorate. Courts should not be diverted in their analyses by the facial appeal of these interests. In a time of heightened political divisiveness in the U.S., these are admittedly attractive objectives. But they are nothing more than speculative and devoid of factual support. Notably, there is little to no evidence that RCV improves civility in politics or encourages candidates to campaign to a broader base of voters.¹⁵⁶ What is more, RCV does not always result

148. Keller, *supra* note 55.

149. *Id.*

150. *Dudum*, 640 F.3d at 1115-16.

151. *Id.*

152. *Crawford*, 553 U.S. at 191.

153. *Id.* at 191-92.

154. *Id.* at 191.

155. *See, e.g. Dudum*, 640 F.3d at 1112.

156. Daniel DiSalvo, *The Promise and Peril of Ranked-Choice Voting*, CITY JOURNAL, (Apr. 12, 2021), <https://www.city-journal.org/promise-and-peril-of-ranked-choice-voting>. Some studies show RCV

in the election of a candidate who received majority support. In fact, in the past, RCV elections have failed to elect a candidate with majority support.¹⁵⁷ Because the government has no factual basis to demonstrate how RCV furthers these two interests, they fail to rise above mere conjecture and pale in comparison to the burdens RCV imposes on voting rights.

Even assuming there is data to support the notion that politics is more civil and candidates campaign more broadly under RCV systems, the U.S. Supreme Court has rejected them outright.¹⁵⁸ Notably, these two “interests” are illegitimate because they are nothing more than deliberate admissions that the government would prefer different representatives or political platforms than those currently selected by voters.¹⁵⁹ Simply put, the government is not permitted to justify an election law through its mere desire to produce candidates and policy platforms that are “more acceptable” or viewed as more palatable to a majority of the electorate.¹⁶⁰ When the government does so, it runs afoul of the freedom of political association—a right protected by the First Amendment.¹⁶¹ Selecting candidates and policy platforms acceptable to voters is precisely the goal of the democratic process, not an objective for the government to control through an electoral system.

Second, no one doubts that the government has a legitimate interest in saving time, money, and resources.¹⁶² The government also has an interest in alleviating the administrative burdens imposed by conducting multiple elections.¹⁶³ And at its core, RCV is purposed to accomplish the benefits of a two-round election without actually conducting the second runoff election. It is argued that a one-time RCV ballot avoids the hassle of requiring voters to return to the polls, saves money in printing ballots, and preserves electoral resources.

These interests, however, are insufficient when balanced directly against the burdens imposed by RCV. Concrete numbers illuminate the inadequacy of this governmental interest. For example, in *Dudum*, the government argued that by avoiding a second runoff between the top two candidates, approximately \$1.5 million in various costs were saved.¹⁶⁴ While that is a considerable amount of money when viewed

decreases political civility. *Id.*

157. The 2010 Burlington, Vermont mayoral election is one example. Baruth, *supra* note 39.

158. *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000). *Jones* did not involve RCV. Rather, it involved a legal challenge to California’s open-primary process.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 507 (1999).

163. *See, e.g., Bullock v. Carter*, 405 U.S. 134, 145 (1972).

164. *Dudum*, 640 F.3d at 1116.

in isolation, the weight of that number shrinks dramatically when one considers the heart of the argument. In the mayoral election during the year that *Dudum* was litigated, 197,242 San Francisco voters took to the polls.¹⁶⁵ Dividing the total cost of a second run-off election with the voter turnout in San Francisco equates to just ten dollars *per voter*. Thus, at its core, the government is really arguing that saving ten dollars per voter justifies an electoral system that engenders confusion and results in disenfranchisement. Saving ten dollars per voter justifies forcing voters to predict the outcome of hypothetical elections. Saving ten dollars per voter justifies a system that permits some voters an ability to cast outcome determinative votes, while others are eliminated entirely.

One should be immediately skeptical that saving ten dollars per voter is sufficiently weighty to justify the burdens imposed by RCV. Although it is difficult to envision the magic dollar amount that could justify an electoral system that prioritizes some votes over others, defies electoral common sense, and confuses voters into disenfranchisement, ten dollars per voter is grossly inadequate. Moreover, although the government argues that RCV saves money, it ignores a gaping hole in that argument—the considerable financial costs of RCV itself. To implement and maintain RCV, the government must conduct detailed voter education campaigns, print new RCV ballots, and purchase expensive ballot machines.¹⁶⁶ In Maine, implementing RCV increased the state's electoral budget two-fold.¹⁶⁷ In the same vein, RCV does not alleviate administrative burdens but rather increases the toll on election personnel and resources. In fact, if the government had a sincere interest in preserving money and resources, it should avoid implementing RCV entirely.

Only one governmental interest remains. And it is a legitimate one: the state's interest in achieving higher voter participation so that more voters impact the outcome of an election.¹⁶⁸ The government would be correct in noting that on the whole, more voters participate in general elections than in a separate runoff election.¹⁶⁹ Thus, it is argued that RCV permits more voters to have an active say in the outcome of an election all while incorporating the benefits of a two-election system.

The persuasiveness of this state interest, however, diminishes when balanced against the burdens imposed by RCV. In fact, the burdens

165. Official Ranked-Choice Results Report, *supra* note 135.

166. *See, e.g.*, Dodson, *supra* note 61.

167. *Id.*

168. *See, e.g.*, *Bullock*, 405 U.S. at 145.

169. Underhill, *supra* note 117. Research shows that separate runoff elections attract 20 to 30 percent fewer voters. *Id.*

that RCV imposes can themselves be said to decrease voter participation and undermine voter efficacy. Overvoting and higher rates of ballot exhaustion in RCV elections do not just decrease voter participation, they eliminate participation entirely. The burden imposed by RCV's non-monotonicity is relevant too. It not only confuses voters but may produce obscure results—ranking one's favorite candidate higher may actually harm that candidate's chances of success. Voters must question whether ranking their preferred candidate first might ultimately help elect a disfavored candidate. One voter's guess is as uncertain as any other's. So, although more voters might participate in an RCV election as compared to a second runoff election, there is serious doubt as to the efficacy of those votes. Thus, the government rests on unstable logical grounds when it attempts to justify a notoriously confusing system, which results in higher voter disenfranchisement, as somehow *increasing* voter participation.

The state's interest in higher voter participation is further undermined by RCV's closed-door runoff and hypothetical election burdens. RCV prevents those who voted for continuing candidates from re-considering or re-casting a separate, unique vote in subsequent rounds. To the contrary, those who voted for non-continuing candidates can have their second or third-choice vote freely transferred. Those transferred votes then become outcome determinative. Thus, if the government argues that RCV permits more voters to impact the outcome of an election than in a separate runoff, the correct number of voters for comparison purposes is those who voted for non-continuing candidates. In actuality, it is only those voters who have a unique ability to participate in subsequent rounds of RCV elections.

Therefore, RCV's use of subsequent, closed-door runoff elections actually reduces, rather than increases, voter participation. By definition, a small number of voters rank non-continuing candidates first—usually between six and ten percent of the electorate.¹⁷⁰ Thus, the government's voter participation argument is unavailing, unless it can demonstrate that less than ten percent of general election voters would return to the polls in a separate runoff election. But election data reveals that the government cannot do so.¹⁷¹ In fact, some states have higher voter turnout in runoff elections than in general elections.¹⁷² Consequently, the burdens imposed by RCV not only outweigh this

170. As one example, in the first round of Maine's Second Congressional District election just over eight percent of the electorate cast votes for non-continuing candidates. Tabulations for Elections held in 2018, *supra* note 136.

171. Underhill, *supra* note 117.

172. *Id.*

justification but expose precisely why the government's interest in increased voter participation is hollow.

Even assuming that a court would find the government's interests *equal* to the burdens imposed by RCV, alternative approaches to effectuate those interests tilt the balance further against RCV. For election laws that impose moderate burdens, such as RCV, considering alternative methods highlights whether the burdens are truly *necessary* to achieve the governmental interests.¹⁷³ If the governmental interest can be accomplished by alternative means, thus making it unnecessary to burden voting rights, the balance shifts in favor of striking down the law.¹⁷⁴ As to the interest in saving money and resources, the government can simply decrease spending or raise funds through familiar revenue-generating tactics. And if these alternatives prove insufficient, state and local governments could rely on increased election spending from the federal government. In fact, Congress proposed this solution in the For the People Act.¹⁷⁵ As to the interest of increasing voter participation, the government could promote "get out the vote" campaigns or support voter awareness initiatives.

More importantly, governments could simply do what they have always done—operate a single plurality election. Conducting a plurality election avoids *every* unique burden that RCV imposes on voting rights. Voters are less likely to mistakenly cast overvotes. If voters want to elect their favorite candidate, they know to simply fill in the box next to that candidate's name. Voters are not forced to hypothesize how they would vote in a future election among an unknown field of candidates. In a plurality election, voters are not afforded a second or third opportunity to alter the outcome of an election. Rather, each voter gets one vote in one election. In sum, the government could better achieve all of its legitimate interests without introducing the unique burdens that RCV inflicts upon voting rights.

The governmental interests in support of RCV cannot prevail when balanced against its burdens. The state interests are either illegitimate, supported by mere conjecture, or entirely hollow. Thus, when the burdens are properly understood, RCV fails to survive the *Anderson-Burdick* framework. Some may object that it is judicial overreach for courts to invalidate duly enacted electoral systems. But when the rights of citizens are violated, especially the right to vote, "the Constitution

173. See, e.g., *Mays*, 951 F.3d at 784.

174. *Dudum*, 640 F.3d at 1115, n. 27.

175. For the People Act of 2019, H.R. 1, 116th Cong. § 298(e) ("To the greatest extent practicable, an eligible State which receives a grant to replace a voting system under this section shall ensure that the replacement system is capable of administering a system of ranked choice voting under which each voter shall rank the candidates for the office in the order of the voter's preference.").

requires redress by the courts,” notwithstanding the general value of democratic decision making.¹⁷⁶ Voters, state legislatures, and Congress can—and should—debate whether to reject or adopt RCV. But if adopted and implemented, courts unquestionably play a role in assessing whether an electoral system comports with the Constitution. This Part has detailed how RCV does not and should be struck down.

IV. CONCLUSION

The bedrock electoral principle undergirding the Fourteenth Amendment’s equal protection guarantee is that any one citizen has a constitutionally protected right to participate in an election on an equal basis with others.¹⁷⁷ RCV affronts that principle. While courts have uniformly found RCV free of any voting burdens or inequities, this Comment challenges that notion. RCV is not just one election, it is multiple. RCV does not give equal opportunity to every voter but rather enhances the efficacy of some votes to the detriment of others. RCV is not easy to understand and infects the democratic process with unique complexities. And when it does burden voting rights, RCV does so unequally by inflicting harsher burdens on voters of certain demographics. When RCV is challenged in the future, courts should utilize *Anderson-Burdick*’s flexible standard to properly account for each of these burdens and conclude that they are not outweighed by any governmental interests.

Because RCV is spreading rapidly throughout the United States, it is paramount to understand the true burdens the system inflicts on voting rights now, not later. Consider the serious implications if RCV elections spread nationwide for use in all federal elections, including for President of the United States. With Maine’s Second Congressional District as a warning, RCV can and will alter the outcome of elections—not because of a change in *substance* but simply because the *method* for electing officials changed. Some of those outcomes will favor Democrats, and some will favor Republicans. Others might fall in favor of third-party candidates. But one’s partisan preference must not outweigh the importance of preserving the constitutional principle that voters should cast votes of equal weight. If RCV continues to expand, that principle will continue to erode. Legislatures, courts, and the voting public alike must understand the negative effects that RCV tolls on voting rights. A failure to make this realization soon might be too little, too late.

176. *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) (quoting *Schuette v. BAMN*, 134 S.Ct. 1623, 1637 (2014)).

177. *Dunn*, 405 U.S. at 336.