



WORKING TO STRENGTHEN
THE VOICE OF THE PEOPLE

Litigation Backgrounder

Challenging Instant Runoff Voting

"No member of this state shall be disfranchised." Minnesota Constitution¹

"The preferential system (of voting) directly diminishes the right of an elector to give an effective vote for the candidate of his choice. The mathematical possibilities...are infinite."

Minnesota Supreme Court in *Brown v. Smallwood*²

▶ Introduction:

The Minnesota Voters Alliance is a citizen's group formed in 2003 in the interest of liberty, self-government, and a well-informed electorate.

Our current emphasis is to educate the public on the dangers of Instant Runoff Voting (IRV) and to strive to prevent its implementation. We believe strongly that IRV is unconstitutional and is not in the best interest of the voters.

▶ Issue overview:

The City of Minneapolis recently approved a little understood and poorly described preferential voting system called Single Transferable Vote (STV), also known as Instant Runoff Voting (IRV). The offices affected include the Mayor, the City Council, and (the multi-seat offices of) Park and Recreation Board, the Library Board, and the Board of Estimate and Taxation.

Its proponents now want to foist the same scheme on the unsuspecting voters of Saint Paul and across the State, despite the questionable constitutionality in Minnesota.

It should be noted that prior to IRV being placed on the 2006 Minneapolis ballot, Assistant City Attorney Burt Osborne advised (in a January 2006 letter)³ against it citing the 1915 Minnesota Supreme Court decision *Brown v. Smallwood*. The Council and Mayor ignored this warning and pushed it onto the ballot anyway.

Currently, IRV is being used in several U.S. cities including San Francisco, California and

Burlington, Vermont. Cary, North Carolina has recently tested IRV under a pilot program and a few others have adopted it awaiting implementation.

▶ **What is it?**

“Preferential voting” systems, where voters rank candidates in order of preference rather than vote for only one, have been around for years in various forms. The Hare System of Single Transferable Vote method was first proposed by Thomas Hare in England and Carl George Andrae in Denmark in the 1850s.

“Instant Runoff Voting” (IRV) is a name that was coined quite recently and has been often used by its lead proponents, FairVote, formerly the Center for Voting and Democracy, to help sell the method based on its superficial resemblance to a traditional runoff.

The name IRV is misleading because it implies that it achieves the same results as a real runoff. Instead, IRV is a method that changes how votes are cast, counted and valued, and it leaves voters in the dark as to the effect their votes might ultimately have on the final result.

IRV, using just one election with no primary, requires voters to rank candidates in order of preference rather than vote for only one. If no candidate receives a majority of first-choice votes, the candidate with the least number of first-choice votes is eliminated and the second-choice votes on those ballots are transferred to the remaining candidates. This process is repeated until a majority is achieved and a winner declared.

NOTE: The important difference between the **Bucklin method** proposed in Duluth in 1915 and the **IRV method** is that in Bucklin, everyone’s secondary votes are counted in the event of a runoff, whereas, in IRV, the only secondary votes (choices) that are counted are from those ballots cast for defeated candidates.

▶ **Established precedent:**

In 1915, in the Minnesota Supreme Court case of *Brown v. Smallwood* established the unconstitutionality of preferential voting. The following is a summary of that decision:

“We reached the conclusion that a (preferential) system of voting...was contrary to the intent of the Constitution... It is a matter for deliberate consideration when it is seriously asserted that a piece of legislation impairs the constitutional right of suffrage of a citizen.”

▶ **IRV has three constitutional flaws:**

1st flaw: The IRV preferential voting method violates the one person, one vote (constitutional) principle.

Proponents argue that IRV does not share this flaw because, in IRV, only one of each voter's rankings ends up counting - the one applied to the highest preferred candidate eligible to receive it.

This is pure rhetorical trickery. The real issue here is NOT how votes are counted, (or not counted), discarded, transferred or otherwise manipulated, but rather **how many votes** each voter is allowed to cast!

The Minnesota Supreme Court in *Brown v. Smallwood* emphasized that the Constitution, by implication, forbids any elector from casting more than a “**single expression of opinion or choice.**” Since IRV, like Bucklin, allows voters to cast multiple votes (choices), it too shares this “fatal” flaw!

2nd flaw: All ballots are not counted equally! In IRV, the only ballots counted for second choices are those cast for defeated candidates. This means some voters' have their first choice votes counted while others have their first and additional choice votes counted.

Consider an IRV election with three candidates, A, B, and C. Assume candidate A receives 40 first-choice votes, candidate B receives 35 and candidate C receives 25.

Since no candidate received 51% of first-choice votes, candidate C is eliminated and those 25 ballots are re-counted for second choice votes and a new total is then tallied.

If 16 of those votes go to candidate B, and 9 go to candidate A, then candidate B is declared the winner with 51 votes.

In this example, those voters who preferred candidate A had only their first choice votes counted and those who preferred candidate C had both their first and second choice votes counted.

Brown vs. Smallwood concludes;

*"We do right in upholding the **right of the citizen** to cast a vote for the candidate of his choice unimpaired by the second and additional choice votes cast by others.*

Note: Governed by its Home Rule charter, the city of Minneapolis has the authority to adopt a new voting method, but it does NOT have the right to adopt one that violates this franchise right.

3rd flaw: IRV places voters in the precarious position of not knowing whether or not they are helping or hurting the cause of their favored candidate. In fact, IRV is worse than Bucklin because voters may cause harm to their favored candidate simply by ranking them as their first choice!

This is called the nonmonotonicity paradox. Nonmonotonicity is a voting characteristic in which voting for one's favorite candidate can actually hurt that candidate's chance of winning.⁴

Consider the following **EXAMPLE** of the nonmonotonicity paradox from Approval Voting by Steven Brams, PhD, NYU Dept of Politics).⁵

Assume there are four classes of voters (total: 17 voters) ranking three candidates:

1. 6: abc
2. 5: cab
3. 4: bca
4. 2: bac

Because nobody has a majority of 9 votes on the 1st round, c, the candidate with the fewest first-place votes (5), is eliminated. His 5 votes go to a, who wins with 11 (6 + 5) votes.

Now assume the 2 class (4) voters change their preference ranking to the following:

1. 6: abc
2. 5: cab
3. 4: bca
- 4. 2: abc**

Again, nobody has a majority of 9 votes on the 1st round. Because b gets the fewest first-place votes (4), he is eliminated, and his 4 votes go to c, who wins with 9 (5 + 4) votes.

In summary, candidate (a) wins when he is ranked second by the class (4) voters, but he loses (to c) when he is ranked first by these voters.

Thus, (a) wins when fewer voters favor him, and he loses when more voters favor him. This is indeed perverse. In this example, if a voter favored candidate (a), he should rank (b) first and (2) second.

Voters shouldn't need a calculator to determine who to rank first or second in order to help their own cause. This is disenfranchisement in its truest form!

Attorneys General Report:

The Minnesota Attorneys General recently stated in an August 2007 08/07 letter⁶ to Secretary of State Mark Ritchie that IRV is “probably” unconstitutional, despite failing to accurately identify the primary concern of the court and the possibility that a voter could actually harm their favored candidate simply by ranking them as their first choice.

The letter erroneously stated that the Court's primary concern was an election format that placed voters in a position where THEY could ultimately **cause harm** to their favored candidate, and that IRV appears not to share this fatal flaw, even though it clearly does.

However, the Court's primary concern, as their conclusion shows, was with an election format (such as IRV) that placed voters in a position where they could ultimately BE HARMED by second and additional choice votes cast by others.

These are very significant distinctions that were inexplicably missed by the former and current Attorneys General, which if made, may have greatly strengthened their opinions.

▶ **Additional arguments and responses:**

1. *IRV advocates say the current primary system is flawed because: "it undermines the 50% +1 majority-winner requirement."*

Our response - The objection to a plurality system is misguided. The Founding Founders gave us a Constitutional Republic, not a majority-rule Democracy, because they knew pure majority rule often leads to tyranny.

Second, IRV doesn't solve this imagined "flaw", it merely creates the illusion of a majority (and a false mandate). Once 2nd & 3rd choices are tallied (**because nobody got 50% + 1 of first choices**) the winner has only an artificially fabricated majority.

Third, IRV fails to ensure an accurate measure of voter intent because some voters have secondary choices counted while others do not, AND, voters cast votes NOT knowing who the runoff candidates will be or how their votes will be affected by other voters. Thus, any claims of a true majority victory have to be considered false and misleading.

We believe a plurality system better reflects the will of the voters than the "fabricated" majority likely created by IRV. This is NOT to say we prefer representatives who agree with only a minority of voters; merely that a plurality winner is perfectly acceptable in a three-way (or more) election, especially in a representative republican form of government.

Food for thought - Ironically, IRV doesn't even guarantee a majority will be elected! If no majority is produced after all rankings are tallied, the one with the most votes is declared the winner!

2. *"...the primary can weed out candidates who could win in a high-turnout general election."*

Our response - The purpose of primaries is not merely to find someone who can win, but to allow voters to nominate candidates who will represent their views in the general election, to make candidates prove they are worthy to serve, and to reduce the field of candidates to a more practical number.

Primaries are where key issues are identified and examined. They provide an organized environment for debate and have proven to be essential to Democracy. Eliminating them will further weaken the electoral process.

3. *“...empower (voters) to vote sincerely without being concerned about wasting their vote.”*

Our response - Our Constitution guarantees the right to vote, but it does not guarantee the right to cast a bunch of **“just in case my candidate loses”** votes.

Whether voting for a favorite candidate that best represents their views or casting a legitimate vote of protest, voters have a right to 'vote sincerely' for any candidate as they see fit, or none at all, if they choose to protest.

Therefore, the objection to the so-called “3rd Party spoiler effect” is completely unfounded and dubious, and the idea of “wasting one's vote” is a false concern that IRV will not solve anyway!

4. *“...invigorate campaigns and reduce polarization by bringing multiple viewpoints into the debate, and promote positive, issue based campaigns.”*

Our response - IRV does not "invigorate campaigns", it suppresses them. The phrase “reduces polarization by bringing in multiple viewpoints” sounds good, but it's actually meaningless rhetoric.

AND, why is it such a good idea to reduce polarization anyway? It's NOT! As Jefferson said, “In every **free and deliberating society**, there must, from the nature of man, be opposite parties, and violent dissensions and discords.”

IRV does no more to ensure that candidates will run on the issues than any other election format. Once candidates see that the way to get elected is simply to appeal to as many voters as possible, they will be more inclined to pander rather than to persuade which will lead to popularity contests, rather than strong and open, issue-based elections.

5. *“IRV will lead to speedier determination of elections.”*

Our response – Simple observation of actual implementations of IRV reveals that this is untrue; In San Francisco, where IRV was recently implemented, the winner was not determined until a month later.

A Nov 8, 2007 article on www.electionline.org by Kat Zambon titled **“Ranked-Choice Voting and Flawed Ballots Tax San Francisco's Election”** outlined some of the problems associated with such a confusing system of voting. She says that rules requiring hand-inspection, **confusion over ranking** could delay results for week, which it did. Here are a couple quotes from this article:

“Voters questioned the value of ranked-choice voting.”

“There are a lot of people who only mark one candidate or the same person three times,”

“I don't want to vote for a second one, I want this one.”

The city was fraught with election problems and confusion. The election officials had to print one ballot page just for the mayoral contest. A second ballot paper was needed to allow voters to rank three choices for the District Attorney race that had only one candidate, and the Sheriffs race that only had two candidates.

In Scotland, the version they used was so confusing that 100,000 voters had their ballots rejected in the May election. It was called “A National Humiliation” by the London Times, May 2007⁷. In Cary, North Carolina, some of the votes were mistakenly counted twice. An audit turned up the error and officials ended up recounting all the ballots again.

6. “IRV will increase voter turnout.”

Our response - This is also unsupported by facts. These are the actual numbers from the 2003 San Francisco runoff: http://www.sfgov.org/site/election_index.asp?id=19802

PRECINCTS COUNTED (OF 562). 562 (100%)
REGISTERED VOTERS - TOTAL **466,127**
BALLOTS CAST - TOTAL. 253,872
VOTER TURNOUT - TOTAL **54.46%**

2007-under Ranked Choice /IRV system:
http://www.sfgov.org/site/elections_index.asp?id=68841

PRECINCTS COUNTED (OF 580). 580 (100%)
REGISTERED VOTERS - TOTAL **419,598**
BALLOTS CAST – TOTAL 149,424
BALLOTS CAST - TOTAL CARD 1 149,424
BALLOTS CAST - TOTAL CARD 2 150,098

VOTER TURNOUT - TOTAL **35.61%**
VOTER TURNOUT - TOTAL CARD 1 35.61%
VOTER TURNOUT - TOTAL CARD 2 35.77%

This shows a reduction in turnout from 54% to 35% - 100,000 fewer voters in 2007 than in 2003.

7. “IRV will save money being spent on elections”

Our response - Proponents of IRV claim that it will save money by eliminating primaries and second runoff elections. The reality is that IRV is more like to cost more than a tradition election when you consider the cost of special voting equipment (and all the problems associated with that equipment), the cost of ballot printing, postage, and voter education.

San Francisco recently announced plans to enter into a \$12.65 million, four-year contract for new voting machines that are supposed to be compatible with IRV ballots.

Currently most states, including Minnesota, are not ready to implement IRV because neither the hardware nor software on their voting machines can accommodate IRV. Joseph Mansky, Ramsey County elections manager, stated that “The upfront costs of IRV would be significant and the administration costs of running it would most likely offset any savings from eliminating the primary.”

IRV advocates make many arguments supporting their scheme, but an in-depth examination will reveal that none of them hold water.

Summary

Fair and accurate elections are essential to representative government. Election methods should clearly and accurately reflect the will of the voters, should be easily understood and should uphold the “one person, one vote” principle. IRV fails on all accounts.

IRV is confusing, undemocratic and unconstitutional and should be opposed by anyone who values true democracy. If we want to improve our election process, we should support measures that empower citizens, NOT the professional politicians and the bureaucracies they seek to control.

Litigation Team

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Mr. Kaardal is a lawyer with a passion for the neo-populism, the rule of law, and common-sense government. Since 1992, Mr. Kaardal has sued governmental authorities — federal, state, and local — in courts of law to remind them that the rule of law is for the people, by the people, and of the people. In these David and Goliath contests, Mr. Kaardal asserts that when the government violates its authority, the rule of law and common sense should apply. And, in Mr. Kaardal’s view, too few lawyers take the people’s side in litigation against the government – Mr. Kaardal does.

Endnotes

¹ Minnesota Constitution; Art. I, Sec. 2

² *Brown v. Smallwood*, 153 N.W. 953, 956 (Minn. 1915)

³ January 3rd, 2006: letter from, Burt T. Osborne Assistant City Attorney; to, Jim Bernstein, Chair
Minneapolis Charter Commission & Minneapolis Charter Commissioners:

http://www.ci.minneapolis.mn.us/council/charter-commission/docs/IRV_Task_Force_Final_Rep.pdf (pages 19 and 20).

⁴ *nonmonotonicity* (Smith, 1973; Doron and Kronick, 1977; Fishburn, 1982; Bolger, 1985)

⁵ “**ALTERNATIVE VOTING SYSTEMS**” Steven J. Brams

Department of Politics, New York University, New York, NY 10003 (and) Peter C. Fishburn, AT&T Bell Laboratories Murray Hill, NJ 07974. In L. Sandy Maisel (ed.), *Political Parties and Elections in the United States: An Encyclopedia*, vol. 1. New York: Garland, 1991, pp. 23-31.

⁶ August 23rd, 2007; from Assistant Attorney General, Christie B. Elle manager, Public Finance/Opinions Division: to, The Honorable Mark Ritchie, Secretary of State <http://mnvoters.org/images/agltrf11.pdf>

⁷ The article “**Not so much an election as a national humiliation Scotland’s voters were treated with arrogance and contempt**” (MNVA note: Scotland uses IRV)

Melanie Reid, London TimesOnline, May 7, 2007 <http://mnvoters.org/Scotlandart.htm>