Empowering Shareholders, or Overburdening Companies? Analyzing the Potential Use of Instant Runoff Voting in Corporate Elections

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NOTES

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I. INTRODUCTION

Although hotly debated today, one of the prevailing theories in the mind of the public as to why the shareholders of a corporation possess the right to vote in corporate elections is the fact that shareholders "own" the corporation.[1] Even though one academic has written that this theory is the "worst" argument for shareholder primacy, the notion that shareholders should vote in corporations because the corporation "belongs" to them is strongly entrenched in the minds of the general public; in fact, this theory of shareholder primacy often creeps into judicial opinions, showing that even judges are influenced by the theory.[2] Although more sophisticated theories have attracted attention in recent years, the shareholder empowerment movement today can be viewed as rooted in the innate idea that shareholders deserve the right to effective control as the true owners of the corporation.[3]

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 1. *See* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190–91 (2002) ("A classic example can be found in Milton Friedman's famed 1970 essay in the New York Times, in which he argued that, because the shareholders of the corporation are 'the owners of the business,' the only 'social responsibility of business is to increase its profits.' ") (quoting Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32–33, 122–26).

 2. *See id.* at 1190 ("Although shareholder 'ownership' language appears most often as a rhetorical device in the popular press, the assertion that shareholders own the firm also crops up even in contemporary corporate cases and commentary.").

 3. *See* Henry Hansmann, *Ownership of the* Firm, J. L. ECON. & ORG. 267 (1988) (reasoning that the corporate vote should be given to whichever party would minimize the costs—i.e., the shareholders); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (theorizing that shareholders get the right to vote to solve the agency problem present in modern corporate structure); *see also* J.W. Verret, *Pandora's Ballot Box, or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Re-Examined*, 62 BUS. LAW 1007 (2007) (summarizing the shareholder empowerment movement).

One of the results of the shareholder empowerment movement has been the adoption by various states of majority voting laws that prohibit a corporation from changing to a plurality voting scheme[4] without shareholder approval after shareholders have voted to enact a majority voting[5] scheme.[6] Majority voting provisions ensure that the directors who are elected to the board have the approval of a majority of the shareholders rather than just approval of a plurality, which is easy to obtain when there are no other legitimate candidates.[7] Therefore, requiring a majority vote for directors may improve the ability of shareholders to remove ineffective, underperforming, or lackluster directors.[8] In proxy seasons of the mid-2000s, majority voting for directors was one of the most important corporate governance initiatives sought by shareholders.[9] The push for majority voting by shareholders, spearheaded by activist investors seeking corporate governance improvements, successfully put pressure on boards to adopt such measures.[10]

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4.   A plurality voting scheme is a voting scheme in which the directors who receive the greatest number of votes are elected, regardless of whether or not those directors receive a majority of the votes cast. *See* David C. McBride & Rolin P. Bissell, *Delaware's Flexible Approach to Majority Voting for Directors*, 10 WALL STREET LAWYER 6, (2006), at 1, http://www.youngconaway.com/files/Publication/327c8402-237c-495e-b3d8-25fd7f017d7f/Presentation/PublicationAttachment/bb838b69-f845-4192-97f2-2f82c41e193d/WallStreetLawyer.pdf [http://perma.cc/3ZLE-66CB].

5.   A "majority voting scheme" requires that a director must receive a majority of the votes cast in order to be elected. Thus, if a director receives 40% of the votes cast and no other director receives that many votes, that director would not be elected because a majority voting scheme requires an elected director to receive greater than 50% of the vote. *See id.* at 1.

6.   *See* Verret, *supra* note 3, at 1034–35 (explaining the history of Delaware's majority voting law). An example of a majority voting provision can be found in Delaware's corporate code: "A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors." DEL. CODE ANN. tit. 8, § 216 (2011).

7.   For example, if only the incumbent directors are on a corporation's proxy ballot, then their election is basically guaranteed in a plurality voting system. If only a small percentage of shareholders vote for the incumbents—say, 10%—and the other 90% of shareholders do not vote for any directors, then those directors would win the election. However, it is clear in this example that it is possible that the majority of shareholders do not approve of the performance of the board. In a majority voting system, these directors would not be elected to the board.

8.   *See* McBride & Bissel, *supra* note 4, at 1 ("Proponents argue that majority voting would give stockholders greater power to unseat directors on underperforming boards, and thus may help cure a variety of corporate governance ailments, such as excessive executive compensation, entrenchment, and board indifference to lackluster management performance.").

9.   *See* LATHAM & WATKINS, M&A DEAL COMMENTARY: MAJORITY VOTING FOR DIRECTORS: THE LATEST CORPORATE GOVERNANCE INITIATIVE, (2005), http://www.lw.com/upload/pubContent/_pdf/pub1437_1.pdf [http://perma.cc/KA83-LNNF].

10.   *See id.* ("Majority voting for directors will be one of the 'hottest' corporate governance initiatives in the 2006 proxy season . . . . Boards are being forced [by activist investors] to decide

In the noncorporate context of political elections, a similar voter empowerment movement has given rise to the popularity of Instant Runoff Voting ("IRV").[11] Proponents of IRV believe that plurality voting schemes suppress new ideas and new candidates, devalue the vote of each voter, and encourage negative campaign tactics.[12] However, when more than two legitimate candidates run in a majority vote election, often no single candidate will receive a majority of the votes, leading to a costly and inefficient return of voters to the polls. IRV has been touted as a clean solution to this problem, allowing for a majority vote while preventing the need for voters to return to the polls for a runoff.[13]

However, IRV has not yet caught on in the corporate shareholder empowerment movement.[14] This Note addresses how IRV can be used in corporate elections and whether corporations and shareholders should support IRV. First, in Sections I.A–I.D, this Note lays out the mechanics and history of IRV and analyzes the history of IRV in political elections. Part II offers a possible IRV scheme that corporations could utilize for their director elections that combines short-slate elections with IRV. Part III explains the benefits that IRV may provide to a corporate election. Conversely, Part IV lays out the disadvantages of using IRV in the corporate context. Finally, Part V explains that, while IRV may prove to be a useful option for smaller companies looking to increase shareholder empowerment, it likely presents too great a financial burden and logistical challenge for larger companies to implement.

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whether to fight majority voting shareholder proposals or to adopt either modified, and arguably less radical versions, of majority voting or full-fledged majority voting for directors.").

11.   *See* Brian P. Marron, *One Person, One Vote, Several Elections? Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343, 352 (2004) ("The major way instant runoff voting can increase the political empowerment of racial minorities is that it may eliminate the phenomenon of electoral capture."); *see also* Robert Richie, *Instant Runoff Voting: What Mexico (and Others) Could Learn*, 3 ELECTION L.J. 501, 502 (2004) ("[IRV] promotes good government values of boosting voter turnout in the decisive election and reducing personal attacks in campaigns.").

12.   FAIR VOTE, WHAT IS IRV?, http://www.fairvote.org/what-is-irv/#.Us3Fl_RXk4A [http://perma.cc/DV6Y-GHZR].

13.   *See id.* ("Compared to traditional runoff elections, IRV saves tax dollars, reduces money in politics and elects winners when turnout is highest.").

14.   *See* Verret, *supra* note 3, at 1054–55 ("[T]he concept of runoffs [and Instant Runoff Voting] in contested corporate elections has been wrongfully left off the table of alternatives discussed in the shareholder democracy debate and is deserving of further study.").

A.   Mechanics of IRV

In an IRV scheme, voters are asked to rank candidates on their ballots instead of casting a single vote for one candidate.[15] Every IRV scheme employs a majority voting threshold, meaning that a winner must receive greater than 50% of the vote in order to win.[16] If no candidate has a majority from the initial vote, the candidate receiving the fewest first-place votes is excluded from ballots and the first-place votes are recalculated. To illustrate how IRV would work in a three-candidate pool, let's imagine that 100 Vanderbilt Law students are given the right to vote for Vanderbilt's football coach next year. The candidates are Franklin ("F"), Cutcliffe ("C"), and Kiffin ("K"). Every voter can cast his vote for 1, 2, or 3 candidates, and the voter ranks the candidates on the ballot in order of preference. Imagine that the ballots are voted as follows (diagramed below): 25 voters cast a ballot that ranked F first, C second, and K third (the first column); 25 ranked C first, F second, and K third (the second column); and so on. The last column represents 8 voters that cast ballots ranking C first, and no candidate second or third.

Table 1: Round One of IRV Example

Column Number	1	2	3	4	5	6
Ranking/number of ballots	25	25	20	10	12	8
1st	F	C	K	K	F	C
2nd	C	F	C	F		
3rd	K	K	F			

In a simple plurality scheme, Franklin would have won, as 37% of students voted Franklin as their first choice (columns 1 and 5), compared to 33% for Cutcliffe (columns 2 and 6) and 30 percent for Kiffin (columns 3 and 4). With IRV, however, since no majority was reached in the first round because no candidate received greater than 50 percent of the vote, we disqualify the candidate with the fewest number of first-place votes (here, Kiffin).[17] Then, for those ballots that

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15.   Joseph Ornstein & Robert Z. Norman, *Frequency of Monotonicity Failure Under Instant Runoff Voting: Estimates Based on a Spatial Model of Elections*, 169 PUBLIC CHOICE 1, 1 (2013).

16.   *Id.*

17.   To see how IRV is explained in legislative materials, here is the text from San Francisco's municipal code:

> If a candidate receives a majority of the first choices, that candidate shall be declared elected. If no candidate receives a majority, the candidate who received the fewest first choices shall be eliminated and each vote cast for that candidate shall be transferred to the next ranked candidate on that voters ballot. If, after this transfer of votes, any

had Kiffin listed, we remove Kiffin from the ballot and move the other candidates up to fill his place (for example, the ballots represented by the third column are now read to vote C first and F second, since K, their first choice, has been eliminated). Thus, for the second round of IRV, the ballots look as follows:

Table 2: Round Two of IRV Example

Column Number	1	2	3	4	5	6
Ranking/number of ballots (after removing K)	25	25	20	10	12	8
1st	F	C	C	F	F	C
2nd	C	F	F			
3rd						

After two rounds, then, Franklin has received 47 first-place votes (columns 1, 4, and 5), compared to Cutcliffe's 53 first-place votes (columns 2, 3, and 6). Since 53/100 is a majority (53 percent), Cutcliffe is declared the winner of the election. In a more complex election with a greater number of candidates, we would continue to eliminate the candidate who receives the least number of first place votes every round until we have reached a point where a candidate has received a majority of the first-place votes for that round. That candidate is then declared the winner of the election.

B. History of IRV in the United States

Although the vast majority of IRV schemes currently in use in the United States have been implemented within the past fifteen years, the roots of IRV can be traced back to the early twentieth century.[18] In 1912, the state of Minnesota enacted a modified form of IRV for its primary elections, which included elections for city, county, district, and state offices.[19] However, due in part to difficulties faced by judges who were not familiar with the proper method of counting the votes, voters repealed the state's IRV scheme only three years later, in 1915.[20]

In 1974, voters in Ann Arbor, Michigan, approved the use of a modified IRV scheme for their mayoral elections.[21] Voters approved the

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candidate has a majority of the votes from the continuing ballots, that candidate shall be declared elected. S.F. CITY CHARTER, art. XIII, § 13.102(c).

18.   Tony Anderson Solgard & Paul Landskroener, *Municipal Voting Reform: Overcoming the Legal Obstacles*, 59 BENCH & B. OF MINN. 16, 16 (2002).

19.   *Id.* at 17–19.

20.   *Id.*

21.   Benjamin Walter, *Instant Runoff Voting (IRV), History of Use in Ann Arbor*, GREEN PARTY OF MICHIGAN, http://web.archive.org/web/20131110220942/http://migreens.org/hvgreens/aa-irv01.htm (last updated Aug. 26, 2001) [http://perma.cc/CVG2-XMM5].

measure by a 52% to 48% margin, with voting closely following party lines—Republicans against the measure, and Democrats for it.[22] In the following mayoral election, incumbent Republican James Stephenson sought reelection, having won the previous mayoral race by receiving 47% of the vote in a plurality voting system and benefitting from vote splitting among liberal voters.[23] The first round of voting saw 49% support for Stephenson, 40% support for Albert Wheeler, the Democratic candidate, and 11% support for the Human Rights Party candidate.[24] However, since there was no majority reached in the first round, the third-party candidate was eliminated from the election, and the second choice of all the ballots that ranked the third-party candidate first were counted as first-place votes.[25] Almost all of those ballots had Wheeler, the Democrat, ranked as their initial second choice and subsequent first choice.[26] This resulted in Wheeler winning the election by the slim margin of 121 votes, even though Stephenson had handily beaten Wheeler in first-place votes.[27]

The IRV voting system was short-lived, however, due in part to public skepticism toward it. This was prompted by election officials requiring weeks to certify the vote and a study after the election that showed that the paper ballots and unprepared election workers led to confusion among the voters as to how they were supposed to vote.[28] Although a Michigan circuit court held that the voting scheme was constitutional, Ann Arbor voters repealed IRV in a special election the following year.[29] After this voter rejection, IRV did not make a major impact again until the early 2000s.[30]

In 2004, San Francisco enacted an IRV scheme, resulting in a resurgence of IRV among American municipalities.[31] San Francisco

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Elise Helgesen, *All States (IRV): The Courts Got it Right: Recognizing that Instant Runoff Voting Makes Every Vote Count*, STATE OF ELECTIONS: WILLIAM & MARY ELECTION LAW SOCIETY (Oct. 21, 2011), http://electls.blogs.wm.edu/2011/10/31/the-courts-got-it-right-recognizing-that-instant-runoff-voting-makes-every-vote-count [http://perma.cc/WHR6-GWHP]; Walter, *supra* note 21.

30. Jeffrey C. O'Neill, *Everything That Can be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 334 (2006).

31. Dean E. Murphy, *New Runoff System in San Francisco Has the Rival Candidates Cooperating*, N.Y. TIMES, (Sep. 30, 2004), http://www.nytimes.com/2004/09/30/national/30runoff.html?_r=0 [http://perma.cc/ SV7K-2YEN]; *San Francisco Successfully Uses Ranked*

enacted IRV to elect its mayor, sheriff, district and city attorney, and other public officials.[32] The first IRV election was a success: winners in the elections for the city attorney and treasurer did not require a runoff, as the front-runners won a majority in the first round, and the assessor-recorder won a majority in the second round, after the third-place candidate was eliminated.[33] Having an instant runoff for the assessor-recorder saved the city millions of dollars by eliminating the need to have a runoff election, a process that usually results in low voter turnout.[34] Proponents of IRV were quick to celebrate San Francisco's successful implementation of the first IRV scheme in a major U.S. city since the 1970s.[35] Unlike Ann Arbor and Minnesota, San Francisco found continued success using IRV, saving the city time and money with each election, according to proponents of the system.[36] However, critics have continued to point out that IRV can lead to voter confusion, invalid ballots,[37] and overly conciliatory candidates.[38]

After San Francisco brought IRV back to the forefront of the election reform movement, other municipalities and states soon followed. In 2010, North Carolina held three IRV elections for superior

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Choice Voting for Citywide Elections, SAN FRANCISCO RESOURCES ON RANKED CHOICE VOTING (Nov. 2005), http://www.sfrcv.com/ [http://perma.cc/P53L-XF2A].

    32.   S.F. CITY CHARTER art. XIII, § 13.102(b):

    The Mayor, Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, Public Defender, and members of the Board of Supervisors shall be elected using a ranked-choice, or 'instant runoff,' ballot. The ballot shall allow voters to rank a number of choices in order of preference equal to the total number of candidates for each office; provided, however, if the voting system, vote tabulation system or similar or related equipment used by the City and County cannot feasibly accommodate choices equal to the total number of candidates running for each office, then the Director of Elections may limit the number of choices a voter may rank to no fewer than three. The ballot shall in no way interfere with a voter's ability to cast a vote for a write-in candidate.

    33.   *San Francisco Successfully Uses Ranked Choice Voting, supra* note 31.

    34.   *Id.; see* Murphy, *supra* note 31 ("The system removes the need for a separate runoff election, saving money and, if the recent past is a guide, increasing the number of voters who have a say in choosing the winner. Under the old system, turnout usually dropped significantly in runoffs.").

    35.   Murphy, *supra* note 31.

    36.   Vauhini Vara, *'Instant Runoff' Faces Test: San Francisco Election Showcases Voting Method Aimed at Encouraging Civility*, WALL. ST. J. (Oct. 21, 2011), http://online.wsj.com/news/articles/SB10001424052970204774604576631212229446284 [http://perma.cc/T32Z-93J9] ("Proponents of ranked-choice voting say it leads to more civility in races, as candidates seek to avoid alienating people who prefer another candidate but might list them as an alternate. It also helps cities avoid the expense and hassle of holding a runoff election if no one wins half of overall votes—a ballot that would cost San Francisco $2.5 million to $3 million, according to Director of Elections John Arntz.").

    37.   For an explanation of how IRV can lead to voter confusion and invalid ballots, see *infra* Section IV.C.

    38.   Vara, *supra* note 36. According to one proponent-turned critic of IRV, "[IRV] sounded really good—it was all unicorns and rainbows—but it hasn't lived up to any of its promises." *Id.*

court judges and a statewide IRV election for a seat on the Fourth Circuit Court of Appeals, making North Carolina the first state to use IRV in a statewide race.[39] However, in August 2013, North Carolina repealed IRV for appellate court seats that became vacant within two months of the election, due in part to widespread voter confusion concerning the IRV scheme.[40] Other municipalities that have passed referendums to implement IRV include Memphis, Tennessee;[41] Saint Paul, Minnesota;[42] Portland, Maine;[43] Cary, North Carolina;[44] Santa Fe, New Mexico;[45] and many others.[46]

Moreover, many professional and educational organizations have implemented some form of IRV to elect their boards of directors, presidents, and other officers.[47] In fact, Robert's Rules of Order recommends using IRV in organizational elections conducted by mail, as a traditional majority voting scheme could lead to greater costs in

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39.   DEMOCRACY NORTH CAROLINA BLOG (Aug. 10, 2010), http://www.democracy-nc.org/news/blog/2010/08/10/tuesday-august-10-2010/ [http://perma.cc/XN7R-WRSZ]; Rob Richie, *North Carolina Uses Instant Runoff Voting for State, County-Wide Elections*, FAIR VOTE (Nov. 3, 2010), http://www.fairvote.org/research-and-analysis/blog/north-carolina/,[http://perma.cc/YES8-G47E].

40.   Mark Binker, *Q&A: Changes to NC Election Laws*, WRAL.COM (Aug. 12, 2013), http://www.wral.com/election-changes-coming-in-2014-2016/12750290/   [http://perma.cc/98LB-QFQT]:

> North Carolina had created an instant runoff system to fill appellate court seats that become vacant less than two months before an election. The system requires voters to mark their first, second and third choices for an office, rather than returning to the polls when a candidate obtains only a plurality of the vote. When it was used in 2010, that system met with mixed reviews from voters. House Bill 589 eliminates the instant runoff system for judicial races."

41.   *Campaigns for IRV*, INSTANTRUNOFF.COM, http://instantrunoff.com/instant-runoff-home/in-action/campaigns-for-irv/ (last visited Sept. 10, 2015) [http://perma.cc/892Y-UYQH].

42.   Rochelle Olson, *Ranked Voting Gets First Runoff Test*, STARTRIBUNE, (Nov. 9, 2011), http://www.startribune.com/local/stpaul/133581068.html [http://perma.cc/3PMY-7YLP].

43.   Seth Koenig, *Brennan to Become Portland's First Popularly Elected Mayor in 88 Years*, BANGOR DAILY NEWS, (Nov. 9, 2011), http://bangordailynews.com/2011/11/09/news/portland/brennan-to-become-portland%E2%80%99s-first-popularly-elected-mayor-in-88-years/ [http://perma.cc/F2EX-AQKF].

44.   *Cary NC Tries IRV, Then Says 'No More,'* VOTING MATTERS BLOG (May 17, 2009), http://votingmatters.wordpress.com/2009/05/17/cary-nc-tries-irv-then-says-no-more/ [http://perma.cc/YG5B-7L7Y].

45.   Rick Lass, *Ranked Choice Voting Approved by Santa Fe Voters*, GREEN PAGES (July 11, 2008), http://gp.org/greenpages-blog/?p=145 [http://perma.cc/PHF9-AJWL].

46.   *Where Instant Runoff is Used*, FAIRVOTE, http://www.fairvote.org/where-instant-runoff-is-used#.Us7hivRXk4A (last visited Feb. 20, 2015) [http://perma.cc/JZJ9-6LNQ].

47.   *Organizations and Corporations Using Ranked Choice Voting*, FAIRVOTE, http://www.fairvote.org/organizations-and-corporations-using-ranked-choice-voting#.Us72zfRXk4A (last visited Feb. 20, 2015) [http://perma.cc/6GQ8-ZGYQ]. Such organizations include the American Bar Association Law Student Division, the American Chemical Society, the American Psychiatric Association, the National Organization for Women, the Society of Actuaries, and the Professional Risk Managers' International Association. *Id.*

the case that a runoff were necessary.[48] However, few for-profit corporations have implemented an IRV scheme to elect their boards of directors, and it is likely that no publically traded company has implemented IRV.[49]

C. Legal Challenges to IRV in Political Elections

A number of court cases have dealt with the validity of IRV in political elections. Opponents of IRV have claimed that IRV violates constitutional notions of due process and equal protection. Several equal protection challenges have argued that IRV gives more weight to the ballots of some voters than others, thus creating inequities in the voting process. However, courts have not been sympathetic to these claims, and no IRV voting system has been invalidated to date.

In the heated 1975 Ann Arbor mayoral race, described above in Section B, the eventual second-place candidate, Stephenson, brought suit in a Michigan circuit court challenging the constitutionality of the Preferential Voting (i.e., instant runoff) system.[50] Stephenson claimed that the voting scheme violated the Equal Protection Clause of the Fourteenth Amendment as well as the Michigan Constitution.[51] The court wrestled with the question of whether the voting system "afford[ed] equal protection to each voter" or instead created "inequities and inequalities," as the constitutionality of the system depended on this determination.[52] Stephenson's main contention was that some voters had their voice heard twice: namely, those whose first choice was eliminated, thus giving them a vote for their second choice in the next round.[53] Thus, the plaintiff asserted that the voting system "create[d] separate classes of voters and afford[ed] the vote of some more weight than others."[54]

However, the court held that all voters possessed the same rights—the right to, or right not to, "select and list their preferences in

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48. *Roberts Rules of Order*, FAIRVOTE, http://www.fairvote.org/reforms/instant-runoff-voting/where-instant-runoff-is-used/roberts-rules-of-order/ (last visited Feb. 20, 2015) [http://perma.cc/XH6S-RV2L].

49. *Organizations and Corporations Using Ranked Choice Voting, supra* note 47.

50. Stephenson v. Ann Arbor Board of Canvassers, No. 75-10l66 AW (Mich. Cir. Ct. Nov. 1975), http://www.fairvote.org/reforms/instant-runoff-voting/irv-resources/model-legislation-2/ann-arbor-michigan-charter-amendment/stephenson-v-ann-arbor-board-of-canvassers/ [http://perma.cc/2TND-BUJM].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

numerical order."[55] Moreover, all voters had the same rights to decide who their second or third choices would be.[56] Lastly, the court held that no voters were restricted in their rights, as each voter "voted with this same understanding that his second and third choice preferences could be counted if his or her first choice was the candidate with the least number of votes."[57] Thus, the IRV system did not create any "classification" of voters, and the court held that the system was a permissible voting scheme.[58]

Over forty years later, the Minnesota Supreme Court rejected a similar claim that IRV facially violated voters' equal protection rights.[59] The appellants argued that IRV burdens a citizen's right to vote in multiple ways, including giving some votes more weight than others, by allowing a voter's second choice to harm their first choice candidate, and by "creating the possibility that casting a vote for a preferred candidate may harm the chances for that candidate to win office."[60]

First, the court rejected the contention that votes cast for a candidate who is not eliminated in the first round are unequally weighted, as opposed to votes cast for an eliminated candidate, and violative of the one-person, one-vote principle.[61] Appellants contended that a vote cast for a continuing candidate counted less than those votes for an eliminated candidate, since voters who voted for the eliminated candidate received the chance to vote for a different candidate in the next round.[62] The court reasoned that a vote for a continuing candidate equally influences the next round, as that vote for the continuing

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Minn. Voters Alliance v. City of Minneapolis, 766 N.W.2d 683, 685, 688 (Minn. 2009). ("Because IRV has not yet been implemented, appellants challenge the municipal law on its face, rather than as applied.").

60. *Id.* at 689.

61. *Id.* at 690; *see also* Reynolds v. Sims, 377 U.S. 533, 558–60 (1964) (recognizing the "one-person, one-vote" principle).

62. *Minn. Voters Alliance*, 766 N.W.2d at 690:

   The central premise of appellants' unequal weighting argument is that in the second round, first-choice votes cast for continuing candidates were exhausted in the first round and have no further opportunity to affect the election. Appellants claim that, in contrast, voters who cast their first-choice vote for the eliminated candidate get a second chance to influence the election by having their second-choice votes, for a different candidate, counted in the second round.

candidate is counted again in the following round.[63] Thus, each ballot is able to influence the next round equally.[64]

To explain its reasoning, the court compared IRV to a simple plurality vote with a primary election.[65] In this hypothetical primary election, voters would choose between several candidates, and the top two candidates would move on to the general election.[66] Then, voters would choose between those two candidates: if one citizen voted for one of the top two in the primary, then that citizen would vote for that candidate again; but, if a different citizen voted for one of the eliminated candidates, then that voter would cast the vote for his preference between the two remaining candidates.[67] Since these two votes counted equally in this round, the court reasoned that there was no unequal weighting of votes in an IRV scheme.[68]

The appellants also challenged the IRV scheme as unconstitutional based on the potential for nonmonotonicity.[69] Briefly, a nonmonotonic voting scheme is susceptible to two types of monotonic failure: one occurs when a winner of an election would have lost the election if the candidate was ranked higher by a certain subset of voters, and the other occurs when a losing candidate would have won if a certain subset of voters had voted that candidate lower.[70] Both parties agreed with the district court that the Minneapolis IRV system is

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63.   *Id.*:

>   Just because the vote is not counted for a *different* candidate in the new round (as is the vote originally cast for an eliminated candidate), does not mean that the ballot was exhausted, that the vote for the continuing candidate is not counted in the subsequent rounds, or that the voter has lost the ability to affect the outcome of the election.

64.   *Id.*

65.   *Id.* at 690–91.

66.   *Id.*

67.   *Id.*

68.   *Id.* at 691:

>   A vote in the general election still counts and affects the election, even though it is for the same candidate selected in the primary. Appellants attempt to distinguish the primary/general election system on the basis that those elections are separate, independent events, but the effect in terms of the counting of votes is the same.

The court also differentiated between voting schemes that count more than one vote per round, unlike the IRV scheme at issue. *Id.* at 692:

>   Because votes were cumulated in the Duluth system, after the first round a voter could have more than one vote counted at the same time. Under IRV, only one vote per voter can be counted in each round, just as in serial primary/general elections a voter may vote only once per election. . . . In IRV, a voter's subsequent choices are not counted unless the voter's higher-choice candidate has been eliminated (or elected, in a multiple-seat race), so a voter's subsequent choices cannot count against his first-choice candidate.

69.   *Id.* at 695. For a more in-depth discussion of IRV's potential for monotonicity failure, see *infra* Section IV.B.

70.   Ornstein & Norman, *supra* note 15, at 2.

nonmonotonic.[71] However, respondents disagreed with the appellant's claim that nonmonotonicity can affect the constitutionality of a voting system.[72] The appellants were fighting an uphill battle here, since they could not cite any case authority that applied monotonicity as a legal standard for determining the validity of a voting scheme.[73] Instead, they merely asserted that the possibility of a voter hurting his preferred candidate's chances to win by ranking that candidate higher "necessarily burdens the right to vote and is unconstitutional."[74] Respondents countered by explaining that monotonicity is only one of several desirable characteristics of voting schemes described by economist Kenneth Arrow and thus not a constitutional requirement for a voting system.[75] The court also pointed out that it has been proven mathematically that it is impossible for a voting scheme to satisfy all of Arrow's desirable characteristics of voting schemes.[76] Thus, respondents contended that since no voting scheme can satisfy all of these desirable characteristics, it would be illogical to make any of them a constitutional requirement.[77] The court concluded by admitting that it is "disconcerting" to acknowledge that a vote for a candidate may indeed hurt, rather than help, that candidate, but reasoned that any system that involves a process for narrowing a field of several candidates will have the potential for nonmonotonicity.[78] The court

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71. *Minn. Voters Alliance*, 766 N.W.2d at 695. Interestingly, the district court also concluded that Minneapolis nonpartisan primaries, the election that the IRV scheme was destined to replace, was nonmonotonic. *Id.*:

> It is at that stage that the primary/general election system is non-monotonic [sic]. This is illustrated by the fact that in some circumstances, a voter can increase her preferred candidate's chances to win office by voting in the primary for a non-preferred candidate who would be a weaker opponent for her preferred candidate. By helping the non-preferred, but weaker, candidate succeed in the primary, the voter can help her preferred candidate win the general election. Conversely, voting for the preferred candidate and denying the weaker, non-preferred candidate that primary vote, could allow a stronger opponent to advance—and the stronger opponent could defeat the preferred candidate in the general election.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* These desirable characteristics are explained by economist Kenneth Arrow in his book, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

76. *Minn. Voters Alliance*, 766 N.W.2d at 695. This proof is known as Arrow's Theorem. Every voting scheme violates some aspect of Arrow's Theorem. For example, a simple plurality scheme violates the requirement of independence from irrelevant alternatives. For a more in-depth explanation of Arrow's Theorem in an accessible article in MIT's student newspaper, see Nathan Collins, *Arrow's Theorem Proves No Voting System is Perfect*, THE TECH, Feb. 28, 2003, at 14, http://tech.mit.edu/V123/PDF/V123-N8.pdf [http://perma.cc/S2LL-SUPB].

77. *Minn. Voters Alliance*, 766 N.W.2d at 695.

78. *Id.* at 696. The court also takes issue with the fact that the appellants never provided evidence of how frequently a nonmonotonic effect may occur in real world voting scenarios. Thus,

affirmed the district court's ruling and held the IRV scheme constitutional.[79]

More recently, the Ninth Circuit has gone further and upheld a variation of IRV known as "restricted IRV."[80] The restricted IRV system adopted by San Francisco at issue in the case allowed voters to rank only three choices, instead of allowing them to rank all candidates, when the voting equipment is not able to handle a full ballot.[81] In fact, in every election predating this case, San Francisco had used "restricted IRV" instead of allowing voters to fill out a complete ballot.[82] The plaintiffs claimed that this restriction on the ballot disenfranchises voters.[83] For example, in a five-candidate election with restricted IRV, voters are only allowed to rank three of the candidates.[84] So, if one voter ranks three candidates, but does not rank either of the final two candidates (because she was limited to only three), then that voter is unable to influence the final round in which the winner is chosen.[85] To the plaintiffs, this outcome was akin to stopping a qualified voter from voting in a two-candidate runoff after a primary involving five candidates just because her least favorite candidates made it to the runoff.[86]

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it is difficult to say that IRV *facially* burdens the right to vote or *severely* burdens the right to vote, since the magnitude of the effects are unknown. *Id.*

79.   *Id.* at 698.

80.   Dudum v. Arntz, 640 F.3d 1098, 1117 (9th Cir. 2011).

81.   *Id.* at 1101. The text of the city charter itself reads as follows:

The ballot shall allow voters to rank a number of choices in order of preference equal to the total number of candidates for each office; provided, however, if the voting system, vote tabulation system or similar or related equipment used by the City and County cannot feasibly accommodate choices equal to the total number of candidates running for each office, then the Director of Elections may limit the number of choices a voter may rank to no fewer than three. The ballot shall in no way interfere with a voter's ability to cast a vote for a write-in candidate.

S.F. City Charter, Art. XIII, § 13.102(b).

82.   *Dudum*, 640 F.3d at 1101. The court explains that this choice by the city was necessary:

San Francisco maintains, and the plaintiffs, several San Francisco voters (collectively "Dudum"), do not dispute, that this choice is one of necessity: The voting machines currently in use are not equipped to tabulate unlimited rankings; cost and logistical concerns make accommodating the unlimited option untenable; and providing a ballot on which voters may rank every candidate in a large field could result in confusion, voter error, and inaccuracies in vote calculation.

Id.

83.   *Id.* at 1102.

84.   *See id.*

85.   *See id.*

86.   *Id.* The idea is that in a normal runoff system, the voter whose bottom two choices made the final runoff would still have an opportunity to express her preference by voting for her favorite of the two. In restricted IRV, since she did not rank either of those two, her least favorite, she would be given no voice or influence in the final round between those two candidates.

However, the court reasoned that this analogy was "off the mark in describing the real impacts of restricted IRV on voters' opportunities to cast ballots."[87] The court agreed that IRV can be seen as a *replacement* for a traditional two-stage runoff election, but the court refused to accept the contention that IRV has to be a *replica* of a two-stage runoff election.[88] The court held, therefore, that restricted IRV affords all voters a "single and equal opportunity to express their preferences for three candidates" by choosing to vote for zero, one, two, or three of the candidates.[89] By focusing on the instant that the voter casts his vote, the court concluded that all voters have an equal influence on the election at that moment at the polls, regardless of the eventual outcome of the various rounds of the IRV scheme.[90] In other words, no single voter or class of voters is afforded less of a voice in the election process at the time of the ballot casting, so there is no violation of the Equal Protection Clause for that aspect of San Francisco's restricted IRV.[91]

The plaintiffs also claimed that "exhausted" ballots, those ballots for which every chosen candidate had been eliminated, were discarded and not counted in the voting process.[92] However, the court reasoned that these votes were indeed counted, but they were "counted" for the losing candidate, just as those votes for a losing candidate in a plurality system are "counted."[93] The plaintiff's final charge was that

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87. *Id.* at 1107.

88. *See id.* at 1107–08:

Restricted IRV, of course, can be used in place of a two-round runoff election, which is what occurred in San Francisco and explains why the city supervisors compared the two. But restricted IRV does not replicate a two-round runoff system because, as we just explained, in two-round runoffs, voters cast ballots twice—that is, make and record their choices twice—whereas IRV allows only one chance to vote.

89. *Id.* at 1107.

90. *See id.* (noting the difference between a restricted IRV election and the two rounds of inputs characteristic of a two-round runoff system).

91. *See id.* at 1109 ("[T]he City's restricted IRV system is not analogous to limitations on voting in successive elections, because in San Francisco's system, no voter is denied an opportunity to cast a ballot at the same time and with the same degree of choice among candidates available to other voters.").

92. *Id.* ("Dudum tries a second tack: He maintains that the tabulation scheme under San Francisco's system burdens voters' constitutional rights to vote by effectively discarding, rather than counting, the votes from 'exhausted' ballots.").

93. *Id.* at 1111:

"Exhausted" ballots are counted in the election, they are just counted for losing candidates in the tally of total votes. In the terms used by election experts, these are "wasted" votes, not because they aren't counted, but because they were cast for candidates not ultimately elected. Notably, both IRV and restricted IRV tend to result in fewer entirely 'wasted' votes than plurality voting, because voters whose first-choice candidate is eliminated may choose the winning candidate as their second- or third-choice pick."

the IRV scheme violated the equal protection guarantee of "one person, one vote."[94] The plaintiffs contend that some voters are allowed more than one vote when their votes for their second and third choice candidates are counted, while others only get to vote once, in the first round and first round only.[95] However, the court reasoned that at each instance of tabulation of the votes, each voter can only cast his vote once.[96] A voter's ballot may cast a vote for a different candidate in subsequent rounds, due to the runoff nature of the voting system, but this does not mean that his vote is counted more than once: for every round, the maximum vote for a voter is one.[97]

Since IRV did not impose "severe burdens on voting rights," the court did not apply strict scrutiny.[98] The court concluded by reasoning that every voting system necessarily has *some* impact and burden on the citizenry's right to vote, and the IRV system in place here is no different.[99] The court also held that any of the plaintiffs' alleged burdens, if they exist at all, are "minimal at best."[100] Lastly, the court held that San Francisco's "important regulatory interests" clearly are substantial enough to justify the "minimal at best" burdens imposed by the restricted IRV voting system.[101] These interests include orderly administration of elections, monetary savings, and providing the opportunity for voters to express "nuanced voting preferences and [elect] candidates with strong plurality support."[102]

D. *Legality of IRV Under Delaware and Federal Securities Law*

There do not appear to be any legitimate legal concerns with implementing an IRV system for corporate elections under Delaware or federal securities law. Opponents of implementing an IRV scheme in a corporate election could argue that IRV violates the Equal Protection Clause, similar to the claims brought by the plaintiffs of the cases explained in Section C. However, this argument may be frivolous since there do not appear to be any cases successfully challenging a corporate

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94.   *Id.* at 1112.

95.   *Id.*

96.   *Id.* ("[T]he option to rank multiple *preferences* is not the same as providing additional *votes*, or more heavily-weighted votes, relative to other votes cast.").

97.   *Id.* ("The ability to rank multiple candidates simply provides a chance to have several preferences recorded and counted sequentially, not at once.").

98.   *Id.* at 1114.

99.   *See id.* at 1113.

100.   *Id.* at 1113–14.

101.   *Id.* at 1114.

102.   *Id.* at 1115–16.

election on equal protection grounds. Opponents could also claim that federal securities law forbids corporations from listing common stock that has "unequal voting rights" on national security exchanges.[103] Lastly, opponents of IRV in Delaware corporations could claim that IRV violates section 212 of the Delaware corporate code, which provides that each shareholder is entitled to one vote per share of common stock, unless otherwise provided in the corporation's bylaws.[104] However, as explained below, opponents of IRV are not likely to succeed in making any of these claims.

First, opponents could argue that IRV violates the Equal Protection Clause by claiming that IRV gives greater weight to some shareholder's ballots than others. However, as seen in Section I.C, courts have not been sympathetic to such claims.[105] Courts have held that in political elections, each voter is given the same rights as every other voter, and thus there is no violation of equal protection with an IRV election.[106] And, given that courts apply the strictest scrutiny when adjudicating claims based on equal protection in the context of political elections, it is very unlikely that courts would hold that IRV in the corporate context, as opposed to IRV in the political context, violates the Equal Protection Clause.[107]

Opponents could also claim that an IRV scheme violates SEC Rule 19c-4, which states that no security may be listed on a national exchange if the issuer of the security takes "corporate action [that has the] effect of nullifying, restricting, or disparately reducing the per share voting rights of holders of an outstanding class . . . of common stock . . . ."[108] However, similar to the Equal Protection Clause argument, this argument is unlikely to succeed. Courts are likely to use the same reasoning seen in the Equal Protection Clause cases to hold that shareholders' voting rights are not reduced or restricted in an IRV election, as each shareholder would still possess the same voting rights as every other shareholder.[109] Moreover, one federal appeals court has ruled that Rule 19c-4 is invalid, as the rule exceeded the SEC's

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103. *See* Richard S. Dalebout, *Cumulative Voting for Corporation Directors: Majority Shareholders in the Role of a Fox Guarding a Hen House*, 1989 B.Y.U. L. REV. 1199, 1220–21 (1989) (referring to the Securities and Exchange Commission's Rule 19c-4, which addresses unequal voting rights).

104. *See* 8. Del. C. § 212(a).

105. *See supra* section I.C.

106. *See supra* section I.C.

107. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 25 (1976) (applying strict scrutiny to a campaign expenditure provision).

108. 17 C.F.R. § 240.19c-4(a) (2015).

109. *See supra* section I.C.

statutory authority by promulgating rules relating to corporate voting rights, a traditional state domain.[110] Thus, this claim is unlikely to succeed in invalidating an IRV voting scheme in a corporate election.

Although SEC Rule 14a-4 lays out the requirements of the proxy statement, IRV does not appear to violate any of the stated requirements.[111] IRV will also fulfill the requirement that the corporate proxy statement provide means for a shareholder to withhold her vote for any management director nominee, as the shareholders are able to vote for dissidents, or simply abstain from voting for the incumbents.[112]

Moreover, an IRV system should pass muster under existing Delaware corporate law. First, all elections of directors for Delaware corporations must be by written ballot, unless otherwise authorized in the certificate of incorporation.[113] As a general standard, directors of Delaware corporations shall be elected by a plurality of the votes of the shares voting, but this requirement may be changed by a specification

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110. *See* Business Roundtable v. SEC, 905 F.2d 406, 407 (1990) ("Because the rule directly controls the substantive allocation of powers among classes of shareholders, we find it in excess of the Commission's authority under § 19 of the Securities Exchange Act of 1934 . . . ."); *see also* Thomas Lee Hazen, TREATISE ON THE LAW OF SECURITIES REGULATION § 10.1 (6th ed. 2014) ("Notwithstanding the development of exchange and Nasdaq voting rights rules, the primary source of shareholder voting rights remains the law of the state of incorporation. Many state statutes permit shareholders to have disparate voting rights.").

111. 17 C.F.R. § 14a-4(b)(1) (2015):

Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter referred to therein as intended to be acted upon, other than elections to office . . . . A proxy may confer discretionary authority with respect to matters as to which a choice is not specified by the security holder provided that the form of proxy states in bold-face type how it is intended to vote the shares represented by the proxy in each such case."

112. § 14a-4(b)(2):

A form of proxy that provides for the election of directors shall set forth the names of persons nominated for election as directors . . . . Such form of proxy shall clearly provide any of the following means for security holders to withhold authority to vote for each nominee: A box opposite the name of each nominee which may be marked to indicate that authority to vote for such nominee is withheld; or [a]n instruction in bold-face type which indicates that the security holder may withhold authority to vote for any nominee by lining through or otherwise striking out the name of any nominee; or [d]esignated blank spaces in which the security holder may enter the names of nominees with respect to whom the security holder chooses to withhold authority to vote; or [a]ny other similar means, provided that clear instructions are furnished indicating how the security holder may withhold authority to vote for any nominee.

113. DEL. CODE ANN. tit 8, § 211(e) (2015):

All elections of directors shall be by written ballot unless otherwise provided in the certificate of incorporation; if authorized by the board of directors, such requirement of a written ballot shall be satisfied by a ballot submitted by electronic transmission, provided that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the stockholder or proxy holder.

in the certificate of incorporation or in the bylaws of the corporation.[114] Thus, implementing an IRV system should not violate any of these Delaware laws dealing with election of directors.

One possible legal hurdle for an IRV system concerns the voting rights of shareholders. Under Delaware law, "each stockholder shall be entitled to one vote for each share of capital stock held by such stockholder" unless otherwise provided in the certificate of incorporation.[115] Opponents of IRV could make the argument that IRV gives stockholders more than one vote, or less than one vote, similar to the arguments made in the political election cases.[116] However, given that courts have not looked favorably on these types of arguments in the political context, when voters' rights are more heavily protected under the U.S. Constitution, it is unlikely that Delaware courts would be persuaded that IRV burdens the shareholders' right to vote in corporate elections.[117] However, no cases were found that would shed light onto how a Delaware court would treat an IRV system.[118] Given that Delaware has historically been "flexib[le] in their basic governance arrangements," a corporation should be able to implement an IRV scheme under Delaware law.[119]

II. HOW TO IMPLEMENT IRV IN CORPORATE ELECTIONS: COMBINE SHORT-SLATE ELECTIONS WITH IRV

Since IRV systems are often used for single-winner elections, it may seem that IRV is not suitable for corporate elections. However, by combining IRV with shareholder access to the corporate proxy card and short-slate elections, IRV may prove to be a viable voting system for a corporation.

A. Shareholder Proxy Access and Short Slates

To begin, we need to understand short slates and the advent of shareholder proxy access. Before the Dodd-Frank Act of 2010, shareholders did not have the ability to place director nominees onto

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114. § 216(3).

115. § 212(a).

116. *See supra* Section I.C (dealing with legal challenges to IRV).

117. *See supra* Section I.C.

118. *See generally* William K. Sjostrom, Jr. & Young Sang Kim, *Majority Voting for the Election of Directors*, 40 Conn. L. Rev. 459 (2007) (discussing the increase and legality of majority voting in corporate elections).

119. McBride & Bissell, *supra* note 4, at 1.

the corporate ballot.[120] For years, proponents of shareholder rights had argued for the right of shareholders to be able to put their own nominations on the management proxy card, thus saving the shareholders a significant amount of money as they would not have to send out their own proxy card.[121] Because shareholder access would make it easier for challengers to nominate their own candidates for the board, proponents of shareholder access hoped that shareholders would be able to take a more active and effective role in monitoring the board and managers of the company.[122] Before shareholder access, there were very few contested elections, and proponents of shareholders' rights saw shareholder access as a way to increase the competitiveness of corporate elections.

Opponents of these initiatives attempted to block shareholder access, as the large costs involved with a challenger sending out his own shareholder proxy card frequently deterred shareholder activism.[123] However, after years of debate, the SEC finally implemented shareholder access in August of 2010 in light of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which gave the SEC the express authority to implement such a rule.[124]

Often dissident shareholders do not wish to nominate a full slate of director candidates but merely wish to win some seats on the board. When a challenging shareholder wishes to replace only a fraction of the directors of a corporation, he can nominate a "short slate" of directors.[125] Before the SEC enacted regulations in 1992, minority shareholders seeking to nominate only a fraction of the board of directors (instead of the entire board) were limited by the Bona Fide Nominee Rule, which gave shareholders only two choices: to vote for the full management slate, or vote for only the dissident's short slate.[126] However, in 1992, the SEC implemented regulations that allowed voters to vote for the

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120.   J.W. Verret, *Defending Against Shareholder Proxy Access: Delaware's Future Reviewing Company Defenses in the Era of Dodd-Frank*, 36 J. CORP. L. 391, 392 (2011).

121.   *Id.* at 395.

122.   *Id.* at 393.

123.   *Id.* at 395.

124.   *Id.* at 399.

125.   Ronald J. Gilson, Lilli A. Gordon, & John Pound, *How the Proxy Rules Discourage Constructive Engagement: Regulatory Barriers to Electing a Minority of Directors*, 17 J. CORP. L. 29, 34 (1992).

126.   *See* AMY L. GOODMAN, JOHN F. OLSON, LISA A. FONTENOT, LAURIE L. GREEN & AARON N. GOLDBERG, PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES § 9.06 (2014):

> Rule 14a-4(d), the 'bona fide nominee' rule, prohibits listing a nominee on a proxy card unless the nominee consents to being named in the dissident's proxy statement and agrees to serve if elected. This rule had the effect of forcing shareholders in a proxy contest seeking minority representation to choose between voting for the management nominees to vote for a full slate, or voting for the dissident's minority slate.

short slate of directors and fill out the rest of their ballot with nominees from the corporate ballot.[127] In recent years, short-slate proxy contests have become more common than proxy contests for a majority of the board.[128] Dissidents often prefer a short-slate proxy contest to a full-blown contest for control of the board because short-slate contests often garner more support from passive, non-activist investors (as opposed to activist hedge funds).[129] Moreover, a change to the majority of the board often will trigger certain takeover defenses, such as poison pills, while short-slate contests do not entail this risk.[130]

B. How to Combine IRV and Short-Slate Elections

An effective way for IRV to be implemented in the corporate context involves combining the recent right of shareholder access to the proxy statement and utilizing a short-slate proxy contest.[131] The way it would work is as follows: assume that a corporation employs a ten-person board of directors. A dissident shareholder could nominate a short slate of three directors and place those nominations on the corporate proxy. Then, shareholders would be given the opportunity to rank up to thirteen candidates on their proxy card in order of preference, giving them more control and ability to express nuanced preferences in their vote.

After the vote, the counting begins, and seats are won one at a time in subsequent vote tabulations. For example, in the first election, the corporation uses the IRV system to elect the first seat on the board, using the methodology explained in Section I.A. After ensuing rounds of eliminating last-place candidates when no majority has been reached, we will elect the first candidate that receives a majority of first-place votes. Then, after that candidate is elected, we remove that

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127. SECURITIES AND EXCHANGE COMMISSION, RELEASE NO. 31326, REGULATION OF COMMUNICATION AMONG SHAREHOLDERS 26 (1992):

> Under the amendment to Rule 14a–4(d) as adopted, a soliciting shareholder would not be precluded by the bona fide nominee rule from undertaking to vote the proxy in favor of the company's nominees, other than those specifically excluded by the soliciting shareholder, so long as shareholders are provided an opportunity specifically to write the names of any other company nominees with respect to whom they wish to withhold voting authority from the proxy holder.

128. *See* GOODMAN ET AL., *supra* note 126, § 9.06 ("During the 2012 proxy season, dissidents sought majority control at only five companies, out of 19 proxy fights. This is an increase from the 2011 proxy season, when dissidents sought a majority of the board in only one contest out of 20 proxy fights.").

129. *Id.*

130. *Id.*

131. Credit goes to Vanderbilt Professor of Mathematics and Law Paul Edelman for proposing this idea.

candidate from all of the ballots and perform the IRV system again to elect the second candidate to the board. Then, that candidate is taken off the ballot after she has won her seat on the board. This process is continued until we have filled the ten seats on the board.

III. ADVANTAGES TO USING IRV IN CORPORATE ELECTIONS

Companies may wish to implement IRV for a variety of reasons. This Part outlines four advantages that IRV may have in corporate elections. First, IRV may solve the "short-slate problem," as, in a standard majority voting scheme, dissident directors on a short-slate ballot have a harder time winning elections than incumbent directors. Also, IRV will prevent the need for runoff elections in majority voting schemes, saving corporations both time and money. IRV may also prevent radical or ineffective candidates from winning a seat on the board, as shareholders will have greater choice and control in deciding whom to elect. Lastly, IRV has been shown to benefit minority viewpoints in elections, which may lead to better representation of shareholder interests.

A. *Providing a Solution to the "Short-Slate Problem"*

Traditional short-slate contests appear to be an effective and lower-cost way for shareholders to exert control and oversight of management. Unfortunately, unforeseen problems can arise with short-slate contests, what some have labeled the "short-slate problem."[132] The problem can be seen as follows: assume that there is a fourteen-person board, and a minority shareholder has nominated a short slate of three candidates.[133] Then assume that 40 percent of shareholders vote the straight management ticket (i.e., all fourteen incumbent directors), 30 percent of shareholders vote only for the short slate of three directors, and the last 30 percent split their votes by voting for the three short-slate nominations and filling in the rest of the ballot with eleven out of the fourteen incumbent directors (with the 30 percent splitting their votes approximately evenly among the fourteen incumbents).[134] Based on these numbers, one may expect that the minority shareholders will win seats on the board, as 60 percent of the shareholders voted for the three short-slate directors.[135] However, since 40 percent of the

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132. Gilson, Gordon, & Pound, *supra* note 125, at 34.
133. *Id.* at 35. The example given is from Gilson's paper.
134. *Id.* at 36.
135. *Id.*

shareholders voted for the incumbents and 30 percent of the shareholders voted for the short slate and eleven of the incumbents (thus giving each incumbent approximately 30 percent multiplied by 11/14 of the vote), the incumbent directors will all receive about 64 percent of the vote.[136] Then, each incumbent will have received a higher vote total than each short-slate nominee, and the dissidents will have received no seats on the board.[137] This is a major problem for short-slate elections, as a majority of shareholders expressed that they wanted a change in the makeup of the board. But, given the paradoxes involved with splitting their vote, the dissident shareholders end up receiving no minority representation on the board, and the full incumbent board is elected.

Implementing an IRV scheme can potentially avoid this problem. Shareholders wishing to see a change to the board can rank the short-slate candidates first, second, and third on their ballots, and then rank the incumbents fourth through fourteenth. If 30 percent of shareholders do this, and the other 30 percent simply vote for the short slate only, then it is likely that the dissidents will receive some representation on the board.

B. Preventing the Need for Runoff Elections in Majority Voting Schemes

If a corporation already uses a majority voting system, then IRV may end up reducing costs by negating the need for a separate and costly runoff election.[138] For example, in the CalPERS example presented later in Section IV.A, the corporation had to expend $1,053,697 to perform its runoff election, an amount comparable to the cost of the original election.[139] Governments that implement IRV often tout this cost-saving feature of IRV, as runoffs are very common among majority voting systems with multiple candidates.[140] In fact, San

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136. *Id.*

137. *Id.*

138. CalPERS OPERATIONS SUPPORT SERVICES DIVISION, Agenda Item 4a *1 (Sept. 14, 2010).

139. *Id.* at *3.

140. *See* Dudum v. Arntz, 640 F.3d 1098, 1116 (9th Cir. 2011):

The City points to evidence that restricted IRV will save money compared to a two-round runoff system (the election system in place prior to IRV), as each runoff election costs the City between $1.5 million and $3 million. The interest in alleviating the costs and administrative burdens of conducting additional elections can be 'a legitimate state objective' that also justifies the use of IRV, given the minimal at best burdens the system imposes on voters' constitutional rights to vote.;

Minn. Voters Alliance v. Minneapolis, 766 N.W.2d 683, 697 (Minn. 2009) ("Reducing the costs and inconvenience to voters, candidates, and taxpayers by holding only one election, increasing voter turnout, encouraging less divisive campaigns, and fostering greater minority representation in

Francisco has saved several hundreds of thousands of dollars by implementing their IRV system and stopping costly runoff votes.[141]

C. Preventing Polarizing or Ineffective Candidates from Being Elected

Implementing an IRV system may prevent polarizing or ineffective candidates from being elected to the board. Since shareholders will each rank their candidates, they may choose to rank radical dissident candidates towards the bottom to prevent discord on the board of directors. This will allow voters to choose other short-slate candidates that voters feel will be more effective without totally disrupting the status quo of the board. Moreover, voters will also be able to rank lazy, ineffective, and entitled incumbents low on their ballots and replace them with candidates who may be more effective in overseeing the management of the company.

D. Increasing Minority Representation in Elections

One possible effect of implementing IRV in political elections is an increase in the election of candidates from minority groups.[142] For example, in San Francisco, sixteen out of the eighteen officeholders elected using IRV are racial minorities.[143] Although IRV may not result in a more racially diverse board, it is clear that IRV can result in minority voters increasing their effectiveness and influence.[144] Thus, dissident shareholders may be able to exert more influence, leading to more effective oversight of the management and officers of the corporation.[145] This could be the next step in the majority voting

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multiple-seat elections are all legitimate interests for the City to foster."); *Comparing IRV with Delayed Runoffs*, FAIRVOTE, http://www.fairvote.org/comparing-irv-with-delayed-runoffs/#.UtGyT_RXk4B (last visited Feb. 19, 2015) [http://perma.cc/6LGN-Q6L6]:

> The costs of conducting this second round runoff can also be substantial, as jurisdictions must print ballots, recruit and train pollworkers, locate precincts, and prepare voting equipment—not once, but twice. . . . However, [with IRV], taxpayers save the cost of a second election, voters don't have to return to the polls, and candidates don't need to fundraise and campaign for an extended period.

   141. *Comparing IRV with Delayed Runoffs, supra* note 140.

   142. Michael Benjamin, *Instant Runoff Voting: Good for Democracy and the Bottom Line*, CITY & STATE (Sept. 8, 2015), http://archives.cityandstateny.com/instant-runoff-voting-good-for-democracy-and-the-bottom-line/ [http://perma.cc/8PCK-WDQM].

   143. *Id.*

   144. *Id; see also* Shaun Bowler, Todd Donovan & David Brockington, ELECTORAL REFORM AND MINORITY REPRESENTATION: LOCAL EXPERIMENTS WITH ALTERNATIVE ELECTIONS 107 (2003) (stating that the authors' empirical findings suggest that alternative voting schemes do a "better job of producing minority representation" than traditional electoral schemes).

   145. Benjamin, *supra* note 142.

movement, as some legal scholars have noted that majority voting provisions, although implemented with the goal of improving shareholder rights, are little more than "smoke and mirrors" and have not led to greater shareholder primacy.[146]

IV. POTENTIAL DOWNFALLS OF IRV IN CORPORATE ELECTIONS

IRV presents some serious disadvantages as well. First, the costs of IRV may be too great to justify implementing an IRV scheme. Also, IRV is subject to monotonicity failure, meaning that the scheme is subject to paradoxical results where a winner of an election would have lost the election if the candidate were ranked higher by a certain subset of voters.[147] Moreover, IRV often leads to voter confusion due to its complicated processes, compared to the simplicity of a standard plurality or majority voting scheme. Lastly, IRV may reduce the effectiveness of dissident shareholders by reducing the number of seats won in the proxy contest.

A. Increase in the Cost of Running Corporate Elections

One of the first major potential downsides to implementing an IRV system is increased costs involved in running the election.[148] While IRV systems reduce costs in the event a runoff is necessary, they increase costs for the vast majority of elections that would not have required a runoff. Corporate elections already impose a significant cost on the corporation and shareholders, and those costs are significantly increased during contested elections, when challengers also incur significant costs.[149] For example, challengers seeking to replace incumbent directors often must spend up to or greater than one million dollars for legal fees and the cost of preparing, printing, and mailing the proxy materials to the shareholders.[150] Challengers must also spend

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146. *See generally* Sjostrom & Kim, *supra* note 118 (discussing how their "smoke and mirrors" hypothesis of majority voting holds true due to finding no "statistically significant market reaction" to companies implementing a majority voting requirement).

147. Ornstein & Norman, *supra* note 15, at 2.

148. *See, e.g.*, CALPERS, *supra* note 138, at *3–4 (discussing the costs involved with implementing an Instant Runoff System); MD. GEN. ASSEMB. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S.B. 292 at 4 (2006) (same); VT. OFFICE OF THE SEC'Y OF STATE, INSTANT RUNOFF VOTING (IRV): ADMINISTRATIVE IMPLEMENTATION OPTIONS AND COSTS 3–4 (2007) (same).

149. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VAND. L. REV. 675, 688–91 (2007).

150. *See id.* at 688–89 ("In the recent proxy contest at Six Flags, insurgent Red Zone LLC spent about $850,000 on legal fees and the cost of preparing, printing, and mailing proxy materials.").

vast amounts of money persuading shareholders to support their candidates in the election, as they must communicate with large numbers of shareholders and prepare and present their strategic plans.[151] Additionally, challengers will have to pay investment banker fees, travel expenses, and fees for services of professional proxy solicitors, bringing the overall cost—just for the challengers—in the $5 million range for a large company.[152]

Costs for challenging shareholders are only made worse by the "free-rider" problem, as other shareholders have an incentive to let one shareholder bear the burdens of running the proxy contest.[153] In a proxy contest, the challengers to the incumbent board must internalize all the costs of running a campaign.[154] However, if the challengers win seats on the board, the fact that they are minority shareholders means they will not receive the full benefits of their actions.[155] For example, if a minority shareholder with a significant stake in the company, say 8%, wins his short-slate election, and this increases the value of the company by $10 million, he will only receive $800,000 in gains, representing his 8% stake in the company.[156] Thus, if the costs of the election exceed $800,000, then it would not be in the best interest of the minority shareholder to run the short-slate proxy contest.[157]

Implementing an IRV for corporate elections could exacerbate the problem of excessive costs for a potential challenger. First, running the proxy contest in an IRV election involves additional costs. For example, preparing, printing, and mailing materials to shareholders will cost more than in a traditional plurality or majority voting scheme, since IRV ballots require more detail, paper, and postage (due to increased weight).[158] Moreover, a "winning" challenger may only receive one or two seats on the board, a result that may decrease the benefit conferred to the challenger as opposed to winning the full short slate of directors.[159]

Moreover, the corporation will have to incur additional costs to run the election. When CalPERS was considering a change to an IRV

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151. *Id.* at 689.

152. *Id.* at 689–90.

153. *Id.* at 689.

154. *Id.*

155. *Id.*

156. *Id.* at 689–90.

157. *Id.*

158. *See* CALPERS, *supra* note 138. CalPERS estimated the potential costs for running an IRV election and compared those numbers to their actual costs from their plurality and runoff election. *Id.* For preparing the ballot cards, costs would go from $186,000 to $500,141. *Id.*

159. *See* Section II.B.

voting scheme to elect its board of directors from a majority voting scheme, it estimated that costs incurred by its organization could increase up to about $1 million for each election.[160] The corporation would also have to implement voting hardware systems capable of running an IRV election, which would likely cost the corporation millions of dollars.[161]

B. Vulnerability to Monotonicity Failure

A frequent criticism of IRV is that the voting system suffers from nonmonotonicity.[162] Monotonicity failure occurs when a winner of an election would have lost the election if the candidate were ranked higher by a certain subset of voters.[163] Conversely, monotonicity failure also occurs when a losing candidate would have won if a certain subset of voters had voted that candidate lower.[164] A simple example, based on an actual Burlington, Vermont, mayoral election, illustrates the point.[165] Assume that there are three candidates, A, B, and C. The actual ballots cast are as follows:

Table 3: Original Vote (C wins election)

Ranking/number of ballots cast	150	50	120	130	80	45	200	35	60
1st	A	A	A	B	B	B	C	C	C
2nd	B	C		C	A		B	A	
3rd	C			A	C		A	B	

In this example, after the first round, A has 320 first-place votes, B has 255, and C has 295. Since no candidate has a majority, B is eliminated. By striking B from the ballot, A receives 80 more first-place votes, and C receives 130 more. Then, C has a total of 425 first-place votes, and A has only 400. Thus, C wins the election.

However, if C were ranked higher by a certain number of voters, and nothing else changed, then C could have lost the election. The ballots below represent a case where some voters ranked C higher but

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160. CALPERS, *supra* note 138.

161. *See* VERMONT, *supra* note 148, at 15 (estimating that costs to implement an IRV system in Vermont would be over $4 million in the first year).

162. Ornstein & Norman, *supra* note 15, at 1.

163. *Id.* at 2.

164. *Id.*

165. For a more in-depth view, see *id.* or Nicholas R. Miller's paper, *Monotonity Failure in IRV Elections with Three Candidates*, presented to the Second World Congress of the Public Choice Societies, March 8, 2012, http://userpages.umbc.edu/~nmiller/MF&IRV.pdf [http://perma.cc/T8A4-C6VA]. The example provided in this paper is a simplification of the example presented in Ornstein's paper.

did not change anything else about their ballots. The changed ballots are bolded (thirty voters changed from (A, C) to (C, A), and forty voters changed from (A) to (C, A)).

Table 4: Modified Vote (ranking C higher, but B wins election)

Original number of votes cast	150	50	120	130	80	45	200	35	60
Modified number of ballots cast	150	20	80	130	80	45	200	105	60
1st	A	A	A	B	B	B	C	C	C
2nd	B	C		C	A		B	A	
3rd	C	B		A	C		A	B	

In a monotonic voting scheme, we would expect C to win again, as C increased her support from the original election, where she won. Now, though, after the first round, A has 250 first-place votes, B has 255, and C has 365. Thus, as there is no majority, A is eliminated because he is in last place. In the second round, B gets 150 new first place votes (from the (A, B, C) voters) and C gets 20 new first-place votes (from the (A, C, B) voters). B then has 405 first-place votes, compared to only 385 for C. Thus, B is the winner of this election.

These results are clearly troubling, as they go against common sense: the winner of an election should not lose if he received an increase from his original support. However, the frequency of this paradox is debated. For example, one study suggested that a monotonicity failure would only happen about once per century.[166] If this is indeed the case, then a corporation should have no problem implementing such a scheme. However, recent papers have taken issue with such a conservative estimate. One study suggests that monotonicity failures will likely occur with "significant frequency" under an IRV scheme and that this frequency increases as the competitiveness of the election increases.[167] Depending on the type of voter distribution, the frequency could be as high as 51% of cases, with a lower bound of 15%.[168] The study concluded that IRV exhibits "unacceptably frequent monotonicity failures."[169] A 2012 paper also shows that IRV is often vulnerable to monotonicity failures; this author, too, believes that upwards of "50 percent of all closely contested IRV ballot profiles may be vulnerable" to monotonicity failure.[170] However, the author qualified his conclusion by writing that showing that IRV is

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166. Ornstein, *supra* note 15, at 2.

167. *Id.* at 5–6.

168. *Id.*

169. *Id.* at 8.

170. Miller, *supra* note 165, at 24.

a frequent phenomenon "does not pro[ve] that it is also a relatively significant or worrisome phenomenon."[171] Once again, this 2012 study only involves elections with three candidates, and the case with more than three candidates is, at this point, only a "promising topic for future research."[172] Thus, any corporation looking to implement an IRV scheme should carefully look at whether the nonmonotonic aspect of IRV is too grave of a concern.

C. Increase in Voter Confusion

Implementing a new voting system is likely to confuse shareholders and may lead to an unfair advantage for incumbent directors. In 2007, the town of Cary, North Carolina, implemented an IRV scheme for their municipal elections.[173] A year later, a survey was conducted to see whether the citizens of Cary fully understood the mechanics and process of IRV.[174] In the survey, 22% of the population reported that they "do not understand [IRV] at all" a year into using the system.[175] Also, over 40% of the population ranked their understanding of IRV as five or fewer on a nine-point scale where nine represented complete understanding.[176] As another example, after a close election for a University of Virginia student office, even the candidates running for office "could not understand the process" of IRV.[177] It is no surprise that the student voters were confused as well, as controversy arose

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171. *Id.* The author goes on to write:

[T]he phenomenon itself is often misstated and/or misunderstood. Advocates of IRV often say that there is little or no evidence that IRV produces "non-monotonic election results." This is literally true, since an IRV "election result" itself can never be "non-monotonic," rather it is the IRV voting system itself (i.e., the function that maps ballot profiles into winners) which is (always) "nonmonotonic." Here (and perhaps to the point of monotony), I have been careful to say that an IRV ballot profile (in effect, an IRV "election result") may be "vulnerable to monotonicity failure."

Id. (footnote omitted).

172. Ornstein, *supra* note 15, at 9.

173. *IRV "Fact Sheet" from Cary NC*, RANGEVOTING (Jul. 2007), http://www.rangevoting.org/Cary123.html [http://perma.cc/JY9V-BYXU].

174. TOWN OF CARY, 2008 BIENNIAL CITIZEN SURVEY REPORT, https://www.townofcary.org/Assets/Public+Information+Division/Public+Information+Division+PDFs/biennialsurvey/2008BiennialSurveyReport.pdf [http://perma.cc/35ZS-L3CY].

175. *Id.* at 34.

176. *Id.*

177. *Marginal   Mayhem*,   CAVALIERDAILY.COM   (Mar.   3,   2010,   1:52   AM), http://www.cavalierdaily.com/article/2010/03/marginal-mayhem/ [http://perma.cc/6JGK-5WCC].

when the plurality winner of the first two rounds lost by one vote in the final round.[178]

Although confusion can be reduced by having a robust educational outreach to shareholders, there will likely be some confusion over the IRV process. Confusion is detrimental to a corporation as a whole, since confusion can reduce investor confidence, leading to a possible discounting in the value of a corporation's securities. This confusion is likely to be especially detrimental to challenging shareholders, as confused voters often turn in invalid ballots.[179] And, more often than not, voters that invalidly fill out ballots favor insurgents rather than incumbents.[180] This could possibly lead to boards of directors strategically implementing an IRV scheme, or another complicated voting scheme, to reduce the chances of shareholders challenging their candidacy.[181] This result obviously goes against the shareholder-empowerment movement, undermining the reasons for implementing an IRV scheme.

D. Reduction of the Effectiveness of Dissent Shareholders

Combining IRV with a short slate of directors may have the downside of reducing the effect of the challenging shareholders. For example, if challengers put together a short slate of four directors in an IRV election, and one of those candidates is much more vocal and passionate about the challengers' goals, then that director may be less likely to be elected to the board, as the majority of shareholders may not be willing to elect such a polarizing figure to the board. Thus, even if two or three of the other short-slate directors do get elected, that group may not be as effective as the full short slate of directors that may have been elected on a traditional short-slate ballot.

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178. *Id.* In this case, although information was provided to the students on how to rank candidates, no information was given to explain how the winner was to be chosen. Obviously the confusion could have been lessened with a greater educational emphasis.

179. *See* J.W. Verret, *Defending Against Shareholder Proxy Access: Delaware's Future Reviewing Company Defenses in the Era of Dodd-Frank*, 36 J. CORP. L. 391, 412 (2011) ("[A new voting system] would also significantly complicate the voting process itself, which would mean that a greater percentage of shareholder ballots would likely go uncounted as being invalidly filled out.").

180. *Id.*

181. *See id.*

V. IRV May Prove a Valuable Addition to Smaller
Corporations with Involved and Knowledgeable
Shareholders, but IRV Would Prove Ineffective
for Large Corporations

As seen in Part IV, IRV may increase shareholder empowerment and lead to a more effective and involved shareholder base. However, IRV would likely be too costly, confusing, and administratively complex for large corporations. Given that the city of San Francisco could not handle ballots containing more than three candidates, it is probable that a large corporation would not be able to handle a full director IRV ballot with its large number of shareholders.[182] Moreover, shareholders may be too confused to properly fill out their ballots, as many shareholder voters likely have less of an incentive to learn the IRV system than citizens using IRV in their political elections, and those citizens have proven that they often find IRV too confusing even after years of using the system.[183] Moreover, in large corporations, the likelihood of nonmonotonic results is likely high when there are proxy contests with highly competitive elections with a large number of director candidates.[184] Thus, large corporations should most likely not attempt to implement an IRV system for their corporate elections.[185]

However, IRV could be an effective tool in smaller corporations that value shareholder rights and minority representation on the board of directors. A smaller corporation could more easily educate their shareholders, who likely are more involved in the corporation than shareholders of large corporations. The costs of running the election when there are smaller numbers of shareholders may prove small enough to justify using an IRV system, especially given that IRV would rid the need for runoff elections in corporations already using a majority voting scheme. Shareholders would also likely be more familiar with director nominations and be able to more effectively fill out their preferential ballots.

VI. Conclusion

IRV has picked up momentum in the past two decades, as proponents have lauded IRV's ability to cut costs, increase minority

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182. *See supra* Section IV.A.

183. *See supra* Section IV.C.

184. *See supra* Section IV.B.

185. *See* CalPERS, *supra* note 138 (discussing the positives and negatives of implementing an IRV system and ultimately deciding to keep their traditional voting scheme).

representation, and more effectively implement voter preference. Given that shareholder activists have called for IRV to be used in elections, many corporations are likely to face the question of whether to implement a nontraditional voting scheme in their corporate elections. Indeed, some already have considered the question, although no publically traded company has decided to implement an IRV system.[186] However, given the costs, complexities, confusion, and nonmonotonicity of IRV, IRV likely is not a suitable voting system for large corporations. But smaller corporations could implement IRV in an attempt to increase shareholder primacy and encourage minority representation on their boards.

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186. *See* CalPERS, *supra* note 138 (discussing the costs of an IRV system and deciding not to implement one); *Where Instant Runoff Voting Is Used*, *supra* note 46.

*   Doctor of Jurisprudence, May 2015, Vanderbilt University Law School. B.S. Mathematics, 2012, University of North Carolina at Chapel Hill. I am grateful for the Vanderbilt Law Review's patience and flexibility in publishing this note. I most want to thank my wife, Elizabeth, for encouraging me to publish and for her help throughout these last six months. Without her unyielding support and steadfast faith in the words of Romans 5:3-5, I would have given up on my goal of publishing long ago.