Municipal Voting System Reform: Overcoming the Legal Obstacles

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With the troubled 2000 presidential election still a recent memory, another grueling round of redistricting now behind us, and another four-way governor's race this November, more attention is being paid to alternative voting methods that could resolve issues raised by these situations.

Some election reform advocates are starting locally by proposing that Minnesota cities act under their home rule powers and adopt Single Transferable Vote (STV) as their voting method. But some have asserted that cities are not free to conduct such an experiment, arguing either that the Legislature must specifically authorize such a system, or that a 1915 Minnesota Supreme Court case has held the method unconstitutional.

This article reports on the reform efforts and alleged legal hurdles to Single Transferable Vote and concludes that the opposing arguments are insubstantial and are not obstacles to reform.

Reform Movement

In the last decade, there has been a revival of interest in American municipal voting system reform that started at the beginning of the 20th century but nearly died out in the 1950s. In both periods, reformers have emphasized the need to elect leaders who represent the diversity of the community while maintaining a city-wide perspective. Elections with healthy give-and-take on important issues, competitive campaigns leading to responsive officeholders, and increased engagement and participation by the city's voters have also been stated as objectives of municipal voting reformers.

Reformers find fault with the familiar "Winner-Take-All" or "First-Past-The-Post" voting system in which the candidate with the most votes wins, even if more than half the votes are cast for other candidates. In election system language, votes that do not help elect a winner are "wasted" by the system. Reformers contend Winner-Take-All wastes too many votes. For example, all of Minnesota's statewide officers were elected in 1998 with less than a majority of the vote.[1] That means that more than half of the votes in each contest were wasted by the system. Winner-Take-All also fosters one-party domination, entrenched and unresponsive incumbents, an overly long and costly campaign season, little meaningful debate or choice for voters, and little incentive to turn out to vote.

"Single Transferable Vote," the alternative method discussed in this article, was described recently in *Time* magazine as "how democracy may look in the future."[2] STV differs from the familiar regime in two ways. First, instead of casting a vote for a single candidate, the voter ranks the candidates in order of preference. Second, the vote goes to the highest ranked candidate who can use it. A voter's lower rankings may come into play if the higher ranked

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[1] The Minnesota Legislative Manual 1999-2000. *St. Paul: Secretary of State. 1999*.

[2] Time*, April 15, 2002 Vol. 159 No. 15, http://www.time.com/time/magazine/notebook/0,9485,1101020415,00.html.*

candidates are either elected or defeated. Table 1 illustrates how a Single Transferable Vote ballot would compare to a First-Past-the-Post ballot.

Table 1. Comparison of Ballots

First-Past-The-Post ballot	Single Transferable Vote ballot
Put an (X) in the square opposite the name of each candidate you wish to vote for. Vote for one	Put an (X) in the square marked "1st choice" opposite the name of the candidate who is your first choice and in the squares marked "2nd," "3rd," and "4th" choice opposite the names of other candidates in order of your preference.
[ ] Candidate A [ ] Candidate B [ ] Candidate C [ ] Candidate D	1st choice / 2nd choice / 3rd choice / 4th choice [ ] [ ] [ ] [ ] Candidate A [ ] [ ] [ ] [ ] Candidate B [ ] [ ] [ ] [ ] Candidate C [ ] [ ] [ ] [ ] Candidate D

Candidates are elected in Single Transferable Vote elections by establishing a threshold: the number of votes needed to be elected. That threshold is determined by dividing the total number of votes cast by one more than the number of seats to be filled, and adding one to the quotient.

$$\text{Threshold} = \frac{\text{Votes}}{\text{Seats} + 1} + 1$$

The threshold goes down as the number of seats to be filled goes up. Thus, where one seat is to be filled, the threshold is 1/2 the votes plus one vote; where two seats are to be filled, the threshold is 1/3 the votes plus one vote; for three seats, 1/4 the votes plus one vote, and so forth.

In elections with multiple winners, *e.g.*, at-large school board or city council elections, Single Transferable Vote results in proportional representation of the voters, *i.e.*, a given percentage of the electorate elects that percentage of the seats.[3] In single-winner contests among multiple candidates, Single Transferable Vote results in a majority winner without the need for a runoff election. For this reason, this application is frequently referred to as "Instant Runoff Voting."

In an election conducted using Instant Runoff Voting, all first choices are tallied and totaled. The winning threshold is a simple majority of 50 percent of votes cast plus one. In the example in Table 2, where 100 votes are cast, the threshold is 51 votes. But, in the example, no candidate received 51 votes from the tally of first choices. Therefore Candidate D, the candidate with the fewest votes, is declared defeated. Then, voters who voted for D have their votes counted for their second choices. In this case, two went to Candidate C and one went to

[3] See *Douglas J. Amy,* Real Choices/New Voices, *New York:Columbia University Press. 1993. pp. 230-232, 237-238.*

Candidate B. Adding those votes to the first choices already counted for the remaining candidates still did not produce a winner with a majority of 51 votes. So, Candidate C is eliminated and those 28 votes are transferred to the next choices marked on each ballot. Twelve votes went to Candidate A and 16 votes went to Candidate B. This gave Candidate B the 51 votes required to win. Thus, Candidate B -- the candidate with the most overall support from voters -- wins the election instead of Candidate A, who had a narrower base of overall support.

Table 2. Vote Count Procedure

	1st Choices	1st Transfer	2nd Round	2nd Transfer	3rd Round
Candidate A	37		37	+12	49
Candidate B	34	+1	35	+16	51 WINNER
Candidate C	26	+2	28	-28	0
Candidate D	3	-3	0		
Total	100				
Winning Threshold 50%+1=	51				

Mechanics aside, the benefits of Single Transferable Vote include 1) minimizing wasted votes and thus achieving majority rule and full representation of the diversity of the city while maintaining a city-wide perspective, 2) competitive elections that root out unresponsive incumbents, 3) a shorter campaign (by eliminating primaries), 4) substantive debate (by reducing effectiveness of swing vote targeting), and 5) a guaranteed effective vote that provides an incentive to turn out to the polls.

Historical Perspective

In 1912, the state of Minnesota adopted a modified form of Instant Runoff Voting for all primary elections, including those for city, county, district, and state offices.[4]It was repealed in 1915.[5] A brief news article from the time indicates political calculations entered into the decision as well as problems with election judges not knowing how to properly conduct the vote count.[6] The city of Hopkins adopted Single Transferable Vote as part of its original charter in 1947. It was repealed by the voters in 1959 and the terms of the last officeholders elected under the system expired in 1961. Hopkins was one of two dozen American cities to use Single Transferable Vote for municipal elections in the first part of the century. Cambridge, Massachusetts, continues to use the method.

The movement was revived in the past decade, both around the country and in Minnesota. In the last year, interest in incorporating Single Transferable Vote in new or existing city charters has been expressed in Minneapolis, Roseville, Eagan, St. Louis Park, and St. Cloud.

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[4] Laws of Minnesota*, 1912 Sp. Sess., ch 2.*
[5] Laws of Minnesota**,** *1915, ch. 167, sec. 7.*
[6] *"Second Choice Passes,"* St. Paul Pioneer Press*, Apr. 18, 1915, 2nd edition, at 4.*

But legal objections to Single Transferable Vote have so far inhibited any city from adopting the method.

Constitutional Challenge

In Minneapolis, advocates of a 2001 charter amendment to adopt Single Transferable Vote for municipal elections ran into opposition from the city's charter commission. The commission's attorney brought a 1915 Minnesota Supreme Court decision, *Brown v. Smallwood*[7], to the body's attention. Several commission members cited this case as a basis for the body's recommendation against putting the proposed charter amendment question before the city's voters.

Brown v. Smallwood involved a preferential voting system adopted by the city of Duluth in its 1912 charter and a municipal judgeship created by the Legislature in 1913.[8] The Duluth system asked voters to rank the candidates according to their preferences, but did not use the Single Transferable Vote method to count votes and determine the winner. Instead, a vote-counting procedure known as "the Bucklin method" was used.[9]

In the Bucklin vote-counting system, if no candidate received the majority of first choices, all second choices were added to the first choices already tallied, and vote totals were checked to see if any candidate reached the new majority threshold. Thus, in contrast to Single Transferable Vote, under Bucklin some voters' votes were counted more than once, and a second-choice vote for a candidate could work as a vote *against* one's first choice.

To see how this is true under the Bucklin system, consider a voter who casts a first vote for candidate *A*, a second choice vote for candidate *B*, and one "additional choice" vote for candidate *C*. If candidate *A* had a plurality, but not a majority, of first choice votes, then the voter's second choice would be *added to* the number of first choice votes *B* received, along with the second choices of other voters. Thus, the voter's second choice for *B* has the effect of undermining his first choice, *A* by giving *B* more total votes (first- plus second-choice votes) than *A*. This is why, while 12,313 voters cast ballots in the 1915 Duluth election, the total number of "votes" counted (including first, second, and additional choices) was 18,860.[10]

These flaws of the Bucklin plan -- not present in Single Transferable Vote -- led the Minnesota Supreme Court to declare the Bucklin system unconstitutional. The Court first noted that the Minnesota Constitution provided that every male age 21 or older was "entitled to vote" in elections. The Court then said that, when the Minnesota Constitution was framed,

> …the word "vote" meant a choice for a candidate by one constitutionally qualified to exercise a choice. ... It was never meant that the ballot of one elector, cast for one candidate, could be of greater or less effect than the ballot of another elector cast for another candidate. It was to be of the same effect.[11]

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[7] *130 Minn. 492, 153 N.W. 953 (1915).*
[8] Id. *at 494, 153 N.W. 954.*
[9] *The system was named for its originator, James Bucklin, from Grand Junction, Colorado, where it was first used. Unpublished manuscript, Center for Voting and Democracy, Takoma Park, Maryland.* See *www.fairvote.org for contact information.*
[10] Brown v. Smallwood*, 130 Minn. at 497, 153 N.W. at 955.*
[11] Brown v. Smallwood*, 130 Minn. at 498, 153 N.W. at 956.*

Guided by this definition of "vote," the Court concluded that Duluth's Bucklin voting system had the effect of giving more than one vote to some voters and was thus unconstitutional. The Court was particularly troubled by how the Bucklin system put voters in a position of undermining the prospects of their first choices when they indicated lower preferences:

> The preferential system directly diminishes the right of an elector to give an effective vote for the candidate of his choice. If he votes for him once, his power to help him is exhausted. If he votes for other candidates he may harm his choice, but cannot help him.[12]

In contrast to the unconstitutional Bucklin system, Single Transferable Vote not only does not share this infirmity, it clearly possesses the qualities the Court said were required of a voting system. In a similar election under Single Transferable Vote, each voter would have *one* vote which would be counted for each voter's highest preferred candidate who was eligible to receive it. The total number of votes would never change (except for voters who failed to name a second or subsequent choice, whose votes would be considered as being exhausted if their first choice candidate was dropped after the first round of counting). The practical effect would be no different than having a runoff election to narrow the number of candidates to two, except that it would occur instantaneously.[13]

Thus, a full reading of *Brown v. Smallwood* shows the Court invalidated the Bucklin system not because it was a preferential voting method *per se*, but because it had the effect of giving some voters more than one vote, and because it did not permit the voters to fully and effectively support their first choices. Because Single Transferable Vote does not share this fatal flaw, there is no reason to believe that the Supreme Court would hold that *Brown v. Smallwood* would prohibit a city from adopting Single Transferable Vote for its municipal elections.

Statutory Challenge

In the city of Roseville, advocates of election reform came up against a statutory, not constitutional, argument thwarting adoption of Single Transferable Vote. This argument, too, does not withstand analysis.

A charter commission was appointed to write a new charter that would convert Roseville from a statutory city to a home-rule city. A resident of the city asked the commission to use the Instant Runoff Voting form of Single Transferable Vote for elections to be held under the proposed charter. The commission referred him to its attorney for an opinion on whether there are any state prohibitions to adopting this alternative voting method.

The Special Counsel for the League of Minnesota Cities, which had been retained by Roseville to do legal work on the charter, advised that certain provisions of Minnesota's election statutes, specifically Minn. Stat. sections 205.185, subd. 2, and 204B.35 to 204B.44, prohibited a city from establishing a preferential voting system "without specific enabling legislation."[14]

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[12] Id.

[13] *A Michigan state trial court used similar reasoning to uphold an instant runoff voting system, noting that the system gave each voter one vote*. See Stephenson v. Ann Arbor Bd. of Canvassers*, No. 75-10166 aw (Jackson County, Mich. Cir. Ct. Nov. 1975). Available at http://www.fairvote.org/library/statutes/legal/irv.htm.*

[14] *June 26, 2001, correspondence from Duke Addicks to Bruce Kennedy, copies of which are in the authors' files.*

Section 205.185, subd. 2 reads: "A municipal election shall be by secret ballot and shall be held and returns made in the manner provided for the state general election, so far as practicable." Section 204B.36, subd. 2, para. 2-3, a section that otherwise gives general instructions on how ballots must be formatted, reads as follows:

> On the left side of the ballot at the same level with the name of each candidate and each blank line shall be printed a square opposite the name of each candidate in which the voter may designate a vote by a mark (X).
>
> Each square shall be the same size. Above the first name on each ballot shall be printed the words, 'Put an (X) in the square opposite the name of each candidate you wish to vote for.' At the same level with these words and directly above the squares shall be printed a small arrow pointing downward. Directly underneath the official title of each office shall be printed the words 'Vote for one' or 'Vote for up to...' (any greater number to be elected).

The League's counsel concluded that because an election employing the Single Transferable Vote method would have to have instructions that differed in part from the verbatim instruction contained in this statute, a city could not use Single Transferable Vote without specific authorization from the Legislature. The League's counsel's technical argument ended the matter as far as the Roseville Charter Commission was concerned, and the League's opinion may be the conventional wisdom on the subject.[15]

City Charters Rule

The laws cited by the League's counsel provide that they apply except as otherwise provided by law.[16] Minnesota's home rule law, Minn. Stat. section 410.07, does provide otherwise.

> Subject to the limitations in this chapter provided, [a city charter] may provide for any scheme of municipal government not inconsistent with the constitution, and may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, as fully as the legislature might have done before home rule charters for cities were authorized by constitutional amendment in 1896.[17]

It is demonstrated above that Single Transferable Vote is "not inconsistent with the constitution." Therefore, the Legislature could adopt such a system for state elections, as it did in 1912, and this statute expressly gives cities the same authority for municipal elections.

Section 410.21 applies this grant of authority explicitly to elections. Not only does it vest a city with the affirmative power to enact in its charter an election system that is "valid and shall control ... notwithstanding" any inconsistency with other general election law; it also reinforces

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[15] *To be fair, the League's counsel says he is not personally opposed to alternative voting systems and that the League of Minnesota Cities generally takes a position in defense of home rule powers. However, he regards his opinion as stated in the correspondence with Kennedy to be a reasonable reading of the law.*

[16] See *Minn. Stat. §§200.015, 204B.02, 204B.35, subd. 1.*

[17] *Minn. Stat. §410.07.*

this affirmative grant of power by expressly providing that charter provisions take precedence over any general law that is not consistent with the charter.[18]

As it happens, one of the Court's findings in *Brown v. Smallwood* affirms that home rule authority over elections extends to the choice of voting system:

> We are of the opinion that it was the intention of the legislature that, [the office in question] should be elected at the general municipal election of Duluth in the manner provided for elections by the charter. The election was a local one, of no particular concern to the rest of the state, and there was no reason why it should not be conducted by the local machinery...If the preferential system of voting was constitutional, there is no reason why it should not be applied to [the office in question].[19]

Reformers should prevail on the home rule argument alone. However, the strength of their legal position goes much deeper.

While a city's home rule authority over its elections is broad, it is not unlimited. The Legislature may rein in that authority by enacting specific laws restricting cities' powers and which supersede section 410.21. The Legislature has expressly done so only twice.[20] These laws affect how cities must draw precinct borders and apply campaign contribution limits to municipal elections. If the Legislature intended the general ballot instructions in state election law to constrict cities' broad home rule powers, it would have expressly said so.

Even if one were to find a conflict between the general state election laws and the home rule law's grant of power to a city to design their own election systems, two well-settled canons of construction would resolve the conflict in favor of recognizing the city's authority.[21]

The first canon is that a more specific law controls over a more general law with which it purportedly conflicts. Applied to municipal elections, the law expressly authorizing a city to design its own election system is more specific than the general state election law and should be interpreted as an exception to the more general law.

Second, if the home rule and election laws were found to be equally specific, then a court will interpret the conflicting statutes in such way as to give effect to both.[22] Applying this canon, the state election laws (including the "vote for one" instruction) would be considered the background default rule that would be applied to all municipal elections (thus giving effect to the election law), except to the extent that a city's charter provides for an alternative election scheme that deviates from the general law, in which case the charter would control (thus giving effect to the home rule law).

Moreover, section 205's application of general election laws to cities is qualified in an important way. It says general election laws shall apply "so far as practicable." This approach gives cities the support of statutes in the absence of their own procedures. But it doesn't restrict them if they have established procedures of their own.

There is thus nothing about the form of ballot instructions that would exempt this section from the "so far as practicable" qualifier. The appropriate use of the voter-instruction statute is

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[18] *Minn. Stat. §410.21.*
[19] *130 Minn. at 495, 153 N.W. at 955.*
[20] See *Minn. Stat. §§204B.14, subd. 7 and 211A.12 (2000).*
[21] Correll v. Distinctive Dental Servs.*, 607 N.W.2d 440, 445 (Minn. 2000) (citing Minn. Stat. §645.26, subd. 1).*
[22] Id.

to serve its intended purpose of presenting choices to voters clearly and impartially, and empowering voters to cast their votes effectively and secretly. This principle is stated in the statute.

> Ballots shall be prepared in a manner that enables the voters to understand which questions are to be voted upon and the identity and number of candidates to be voted for in each office and to designate their choices easily and accurately. The name of a candidate shall not appear on a ballot in any way that gives the candidate an advantage over an opponent, including words descriptive of the candidate's occupation, qualifications, principles, or opinions, except as otherwise provided by law.[23]

This purpose can be accomplished with Single Transferable Vote as was shown above.

There are further reasons why, if the Legislature intended to preclude home rule cities from adopting a Single Transferable Vote voting system, it would have to do so directly and explicitly. But these need not be belabored further here. A full reading of *Brown v. Smallwood* and Minnesota election law shows that recent questions raised about the legality of Single Transferable Vote in municipal elections are without foundation and should not be construed as legal impediments to voting system reform. This should free up the discussion to take place in the political arena, where reformers' critique of the First-Past-The-Post voting system and the merits of their proposed alternatives can be considered on the basis of criteria for how to best achieve the performance goals for our democracy.

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[23] *Minn. Stat. §204B.35, subd. 2 (2001).*