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Reclaiming Electoral Home Rule: Instant-Runoff Voting, New York City's Primary Elections, and the Constitutionality of Election Law § 6-162

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**RECLAIMING ELECTORAL HOME RULE:
INSTANT-RUNOFF VOTING, NEW YORK
CITY’S PRIMARY ELECTIONS, AND THE
CONSTITUTIONALITY OF ELECTION LAW
§ 6-162**

Sacha D. Urbach^{*†}

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[†] At the time of this writing, New York City announced that the question of whether to implement instant-runoff voting for certain primary elections will be included as one of NYC's 2019 Charter Revision ballot proposals — which New Yorkers will be able to vote for on November 5, 2019. In all likelihood, this measure will pass. However, the central argument of this Note will remain unchanged as a result of the November 5th vote.

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INTRODUCTION

What do the Oscars, Australia, and the City of San Francisco have in common? All three use an unconventional voting system¹ to select winners in their respective contests for Academy Awards or political office called instant-runoff voting (IRV).² In IRV elections, voters rank multiple candidates for a single position, rather than only picking a single candidate for a given position.³ Recently, IRV has become an increasingly discussed option for electoral systems both at the state and city level.⁴ In 2016, Maine became the first state to

1. See Katharine Q. Seelye, *As Australia and the Oscars Go, So Goes Maine?*, N.Y. TIMES (June 11, 2018) [hereinafter Seelye, *So Goes Maine?*], <https://www.nytimes.com/2018/06/11/us/maine-ranked-choice-voting.html> [https://perma.cc/MV8Z-CSCV].

2. Outside of the legal world, IRV tends to be referred to as “ranked-choice voting,” but legal scholars have insisted on referring to it as IRV. In deference to their infinite wisdom, this Note will do the same. San Francisco is largely credited with creating the term “ranked-choice voting.” See S.F. CITY CHARTER art. XIII, § 13.102 (2004); 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 n.35 (2006). There is no substantive difference between the two, and the labels can be used interchangeably, but this Note will avoid doing so for purposes of clarity.

3. See Seelye, *So Goes Maine?*, *supra* note 1.

4. *Id.*; see also *In Praise of Ranked-Choice Voting*, ECONOMIST (June 14, 2018), <https://www.economist.com/united-states/2018/06/14/in-praise-of-ranked-choice->

adopt IRV and implemented the system statewide in 2018 — doing so for its U.S. Senate and House races.⁵

Proponents of IRV argue that it has many benefits, but the central idea behind the system is that it is the most efficient means of preventing unpopular candidates from winning elections with a plurality — rather than a majority — of the vote.⁶ One recent example of the kind of result IRV seeks to prevent is the 2018 Democratic primary for Massachusetts's third congressional district, where Lori Trahan declared victory after securing less than 21% of the vote.⁷

Those in favor of IRV argue that it does more than just combat low-plurality winners. Perhaps most importantly, IRV elections can replace costly and relatively low-turnout runoff and primary elections, saving cities and states tens of millions of dollars while increasing voter participation.⁸ Additionally, by creating a system that incentivizes candidates to appeal to a broader swath of the electorate, rather than just their base, IRV can help combat hyper-partisan campaigning and governing.⁹ This can give voters in the political minority a louder voice in their government¹⁰ and increase voter satisfaction with the electoral process.¹¹ This can be particularly important in cities like New York City, where one party often

voting [<https://perma.cc/4DG2-GHXX>]. In addition to public elections, there have also been calls to implement IRV in private settings, such as corporate elections. See generally G. Scott Edwards, *Empowering Shareholders, or Overburdening Companies? Analyzing the Potential Use of Instant Runoff Voting in Corporate Elections*, 68 VAND. L. REV. 1335 (2015).

5. Katharine Q. Seelye, *Maine Adopts Ranked-Choice Voting. What Is It, and How Will It Work?*, N.Y. TIMES (Dec. 3, 2016) [hereinafter Seelye, *Maine Adopts RCV*], <https://www.nytimes.com/2016/12/03/us/maine-ranked-choice-voting.html> [<https://perma.cc/9V44-DFNM>]; *Timeline of Ranked Choice Voting in Maine*, FAIRVOTE, https://www.fairvote.org/maine_ballot_initiative [<https://perma.cc/K7KD-WJ7N>] (last visited Oct. 11, 2019).

6. Dick Dadey, *Instant Run-Off Voting: End High Cost, Low Turnout Run-Off Elections*, 19 CITY L. 118 (2013); see also Edward B. Foley, *Third-Party and Independent Presidential Candidates: The Need for a Runoff Mechanism*, 85 FORDHAM L. REV. 993, 1012–20 (2016) (arguing for IRV in presidential elections to prevent unpopular presidential candidates from winning under the electoral college).

7. Katharine Q. Seelye, *Fans of Ranked Voting See an Opportunity in Massachusetts*, N.Y. TIMES (Sept. 17, 2018) [hereinafter Seelye, *Massachusetts*], <https://www.nytimes.com/2018/09/17/us/politics/massachusetts-voting-lori-trahan.html> [<https://perma.cc/8M29-5839>].

8. See *infra* note 65 and accompanying text.

9. *Benefits of RCV*, FAIRVOTE, <https://www.fairvote.org/rcv#rcvbenefits> [<https://perma.cc/SX2Z-AX5H>] (last visited Oct. 9, 2019).

10. See *id.*

11. See *infra* notes 74–75 and accompanying text.

dominates local politics.¹² It is also relevant in traditionally conservative states like Texas, where the conservative leanings of the state are often at odds with the goals of progressive cities like Dallas, or El Paso.¹³ In statewide IRV systems, gubernatorial candidates in states with a city-state political dynamic similar to that of Texas would be incentivized to appeal to voters beyond the traditionally conservative state electorate.¹⁴

While only one state has implemented IRV thus far, many cities have been using the system for some time,¹⁵ and more cities and

12. In New York City, Democrats have a firm grip on the electorate. In the 2016 presidential election, it voted overwhelmingly for Democratic candidate Hillary Clinton, as she received 79% of the vote from the city. Seth Barron, *New York's Red Borough*, CITY J. (2018), <https://www.city-journal.org/html/new-yorks-red-borough-15652.html> [<https://perma.cc/QWL4-6S63>] (describing the extremely Democratic political demographics of New York City, with Staten Island as a Republican anomaly).

13. Ross Ramsey, *Analysis: The Blue Dots in Texas' Red Political Sea*, TEX. TRIB. (Nov. 11, 2016), <https://www.texastribune.org/2016/11/11/analysis-blue-dots-texas-red-political-sea/> [<https://perma.cc/JFT2-B3A2>]; see also Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 188 (2017) (discussing the political divide between progressive cities and conservative state legislatures).

14. *Problems RCV Can Help Solve*, FAIRVOTE, https://www.fairvote.org/problems_rcv_can_help_solve [<https://perma.cc/QS49-G8LR>] (last visited Oct. 9, 2019).

15. San Francisco, for example, has been using IRV since 2004. *Spotlight: Bay Area*, FAIRVOTE, https://www.fairvote.org/spotlight_bay_area#history_of_rcv_in_bay_area [<https://perma.cc/FVU9-24V2>] (last visited Oct. 11, 2019). See generally *Where Is Ranked Choice Voting Used?*, FAIRVOTE, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used [<https://perma.cc/GZ5N-XGTC>] (last visited Oct. 11, 2019). The first U.S. city to use some form of IRV was Cambridge, MA, which utilized IRV since the 1940s and continues to do so today. *Spotlight: Cambridge*, FAIRVOTE, https://www.fairvote.org/spotlight_cambridge#history_rcv_cambridge [<https://perma.cc/2BNH-MGM5>] (last visited Oct. 11, 2019). Other cities currently using some form of IRV include: Basalt, CO, Berkeley, CA, Minneapolis, MN, Takoma Park, MD, and Telluride, CO. *Where is Ranked Choice Voting Used?*, FAIRVOTE, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used [<https://perma.cc/5T22-VG7M>] (last visited Oct. 13, 2011). The cities that currently implement IRV, which include Oakland, St. Paul, and Minneapolis, tend to be progressive when measured by their policy preferences. Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 3, 38 (2014) (measuring policy preferences of public in cities with populations above 250,000). But the correlation between progressive cities and RCV has changed recently, as the number of IRV bills being introduced in local and state legislatures has increased dramatically. Between 2018 and 2019, state IRV legislation has been introduced in California, Connecticut, Hawaii, Maryland, Massachusetts, Missouri, New Hampshire, New Mexico, Rhode Island, Texas, Utah, Vermont, Virginia, and Washington. H.J.M. 19, 53d Leg. Sess., 2d Sess. (N.M. 2018); H.B. 35, 62d Leg., 2018 Gen. Sess. (Utah 2018); S. Bill 641, 2019–20 Reg. Sess. (Cal. 2019); H.B. 6881, Gen.

states are now seriously considering employing IRV in future elections.¹⁶ This includes New York City, the largest city in the country,¹⁷ and one that often portrays itself as a champion of progressive policies.¹⁸ For New York City, as with many other cities in the United States, implementing any major change to local election law presents a potentially complex legal issue, as there are often conflicts between state law and local law in this arena.¹⁹ New York State law prescribes a runoff mechanism for three New York City primaries — including its mayoral primaries.²⁰ In considering IRV for its primary elections (or any other change to its local elections), New York City risks potential preemption challenges from the state that could thwart any attempt to alter its voting laws.²¹ In particular, § 6-162 of New York’s Election Law likely preempts the City from unilaterally altering its voting laws to implement IRV.²² While amending § 6-162 to provide for IRV is one way to address this issue,

Assemb., Jan. Sess., (Conn. 2019); S.B. 427, 30th Leg., Reg. Sess. (Haw. 2019); S.B. 306, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); H.B. 26, 439th Gen. Assemb. (Md. 2019); H.F. 983, 91st Leg. Sess., 1st Reg. Sess. (Minn. 2019); H.B. 28, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); J.Res. 5496, 2019 Gen. Assemb. (R.I. 2019); H.B. 2751, 2019 Reg. Sess. (Va. 2019); H.B. 1722, 66th Leg., Reg. Sess. (Wash. 2019); S.F. 65, 65th Leg., 2019 Gen. Sess. (Wyo. 2019). Some of these laws seek to implement IRV for statewide elections (including federal elections). *See, e.g.*, H.B. 28, 100th Gen. Assemb., 1st Reg. Sess. (requiring IRV in all state and local elections). Others affirmatively grant localities the ability to use IRV in their local elections. *See, e.g.*, H.B. 26, 439th Sess. Gen. Assemb. (authorizing the mayor and city council of Baltimore to adopt IRV or open primary systems). There was also legislation introduced in 2019 in New York State that seeks to mandate IRV for New York City’s primary elections. *See infra* note 117 and accompanying text.

16. In 2017, 25 bills were introduced in 14 states to implement IRV in various local elections. Dan Diorio & Wendy Underhill, *Ranked-Choice Voting*, 25 NAT’L CONF. ST. LEGISLATURES 24 (June 2017), <http://www.ncsl.org/research/elections-and-campaigns/ranked-choice-voting.aspx> [<https://perma.cc/CWX8-BPKJ>]; *see Where is Ranked Choice Voting Used?*, *supra* note 15.

17. *See US City Populations*, WORLD POP. REV., <http://worldpopulationreview.com/us-cities/> [<https://perma.cc/J7PM-9QMC>] (last visited Oct. 14, 2019).

18. *See, e.g.*, David Weigel, *Bill de Blasio Declares a ‘New Progressive Era’ in New York*, WASH. POST (Jan. 1, 2018), <https://www.washingtonpost.com/news/powerpost/wp/2018/01/01/bill-de-blasio-declares-a-new-progressive-era-in-new-york/> [<https://perma.cc/AX6Q-NFCQ>].

19. *See* James P. Langan, Note, *Instant Runoff Voting: A Cure that Is Likely Worse than the Disease*, 46 WM. & MARY L. REV. 1569, 1573–75 (2005) (noting the failure of cities in the States of Washington and Texas to implement IRV where it was deemed inconsistent with state law).

20. N.Y. ELEC. LAW § 6-162 (2018).

21. *See infra* Part II.A.i.

22. N.Y. ELEC. LAW, § 6-162.

efforts to do so at the state level have been unsuccessful.²³ Further, given the fact that New York State Law regulates this aspect of New York City elections, § 6-162 will remain a legal obstacle for New York City in the future even if it is amended to prescribe IRV for city primary elections.²⁴ As long as § 6-162 remains in effect, New York City will not have the same legal autonomy to regulate its own elections as other localities throughout the state.

This Note argues that New York City should implement IRV for its elections, but it should not do so through the options currently being advocated — those options being a unilateral city charter revision or an amendment to § 6-162 at the state level. Through a careful analysis of § 6-162, its legislative history, subsequent judicial interpretations, and existing legislation, this Note ultimately concludes that § 6-162 violates both the New York Constitution and the basic principles embodied in New York's home rule doctrine. For this reason, this Note argues that § 6-162 should first be repealed or declared unconstitutional, and only then should New York City implement IRV through a charter revision.

Part I begins with an overview of the predominant electoral systems in the United States. It also provides an overview of IRV and examines arguments by its proponents, who claim that it is a better system than first-past-the-post and runoff schemes, and by its critics, who disagree. Part II focuses specifically on New York State and New York City — the current electoral dynamic between the city and the state, how that dynamic developed, and how this structure creates a legal obstacle that prevents New York City from unilaterally implementing IRV for its most important city elections. In its final Part, this Note first argues that, from a policy perspective, IRV makes sense and more cities and states, including New York City, should adopt it. Part III also presents multiple solutions that would allow New York City to unilaterally implement IRV, but ultimately concludes that a direct challenge to the constitutional validity of § 6-

23. See *infra* Part II.B.ii. However, New York State politics changed dramatically in the 2018 state elections. Prior to these elections, Republicans had 31 seats in the state senate while Democrats held 21 seats. In the other chamber of the state legislature, the state house of representatives, the Democrats had an overwhelming majority. After the 2018 elections, Democrats gained control of both chambers of the state legislature, picking up 19 seats in the senate and 2 seats in the house. See Jesse McKinley & Shane Goldmacher, *Democrats Finally Control the Power in Albany. What Will They Do With It?*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/nyregion/democrats-ny-albany-cuomo-senate.html> [<https://perma.cc/Y4CN-JMXV>].

24. See *infra* Part II.B.ii.

162 — one that would unambiguously clear the way for unilateral implementation by the City — is the best path forward.

I. ONLY IN AMERICA: AN OVERVIEW OF ELECTORAL SYSTEMS IN THE UNITED STATES

Because the U.S. Constitution delegates the power to regulate elections — city, state, and federal — to the states,²⁵ the United States has a uniquely decentralized electoral system, where different states employ different systems, and cities within those states often employ systems different from the state in their local elections.²⁶ This Part examines the major voting schemes utilized by cities and states in the United States. Section I.A examines the most popular voting system: first-past-the-post. Section I.B examines runoff elections, while Section I.C will examine primary elections. Section I.D examines instant-runoff voting, how advocates for this kind of system have argued it can solve the various problems associated with first-past-the-post, primary, and runoff systems — and critics’ responses to those arguments. Lastly, Section I.E will explore IRV advocacy less abstractly by examining New York City and how lawmakers and advocates at both the state and city level have attempted to bring IRV to New York City.

A. First-Past-the-Post Voting Systems

In order to discuss instant-runoff voting, it is first necessary to establish a working understanding of the predominant voting scheme in the United States: first-past-the-post²⁷ (FPP).²⁸ Under FPP

25. The Constitution provides that states may establish “[t]he Times, Places and Manner of holding Elections for Senators and Representatives.” U.S. CONST. art. I, § 4, cl. 1. Additionally, the Supreme Court has consistently recognized the broad authority states have to regulate federal and state elections. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 461–462 (1991) (“the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections” (quoting *Oregon v. Mitchell*, 400 U.S. 112, 124–125 (1970))). *But see* *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 543 (2013) (noting that although the states retain the power to regulate elections, “the Federal Government retains significant control over federal elections”).

26. For an excellent overview of the variety of electoral systems in the United States, including an interactive map, see *Electoral Systems in the United States*, FAIRVOTE, https://www.fairvote.org/research_electoralsystemsus [<https://perma.cc/9ECS-3EYG>] (last visited Oct. 14, 2019).

27. O’Neill, *supra* note 2, at 333 (“Plurality voting is the most commonly used voting system for single-member districts in the United States.”). For a detailed description of various voting systems, see DOUGLAS J. AMY, BEHIND THE BALLOT Box 65 (2000). The ACE Electoral Knowledge Network is also a useful and

systems, the candidate who receives the most votes is declared the winner.²⁹ This is true whether the candidate receives 99% or 9% of the total vote, as long as that total is greater than that of the next best candidate. Every state except Maine utilizes this system for federal elections, including presidential elections.³⁰ While FPP elections seem intuitive for many people, they can lead to seemingly undemocratic results in cases where a candidate wins with significantly less than a majority percentage of the total vote.³¹ This

interactive website for understanding how different electoral systems are designed. *Electoral Systems*, ACE ELECTORAL KNOWLEDGE NETWORK, <http://aceproject.org/ace-en/topics/es/ese/ese01/ese01a> [https://perma.cc/A4V7-K5E7] (last visited Oct. 14, 2019).

28. “First-Past-the-Post” has also been referred to as “winner-take-all,” but political scientists and academics alike prefer FPP, so this Note will follow suit.

29. O’Neill, *supra* note 2, at 333.

30. See Charles King, *Electoral Systems*, GEO. UNIV. (2000), http://faculty.georgetown.edu/kingch/Electoral_Systems.htm [https://perma.cc/JR4C-UAKD]. Much has been written about reforming the method by which states select electors for presidential elections, with IRV proposed as one option. See *American Democracy’s Built-In Bias Towards Rural Republicans*, ECONOMIST (July 12, 2018), <https://www.economist.com/leaders/2018/07/12/american-democracys-built-in-bias-towards-rural-republicans> [https://perma.cc/7C97-7CFX] (arguing that FPP has given rise to increased partisanship in national elections and that IRV “give[s] office-seekers a reason to build bridges with opponents rather than torch them.”); Eric Maskin & Amartya Sen, Opinion, *A Better Electoral System in Maine*, N.Y. TIMES (June 10, 2018), <https://www.nytimes.com/2018/06/10/opinion/electoral-system-maine.html> [https://perma.cc/JU7T-PTQV] (describing how IRV would have changed the outcome of the 2016 presidential election).

31. There are many examples of this, including the 2000 and 2016 presidential elections where presidents George W. Bush and Donald Trump secured victories by winning the electoral vote but not the popular vote. These both translated to plurality wins because states select their electors for the electoral college based on whoever wins the state by a plurality. See *2016 Presidential Election, 270 TO WIN*, https://www.270towin.com/2016_Election/ [https://perma.cc/5AH3-PMLE] (last visited Oct. 14, 2019); *2000 Presidential Election*, https://www.270towin.com/2000_Election [https://perma.cc/YBH9-FEDN] (last visited Oct. 14, 2019); see also Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 982–87 (2016). Indeed, simulations show that Trump would have lost most of the Republican primary contests if every state employed the system for presidential primaries. See Andrew Douglas et al., *Simulating Instant Runoff Flips Most Donald Trump Primary Victories*, FAIRVOTE (Mar. 4, 2016), https://www.fairvote.org/simulating_instant_runoff_flips_most_donald_trump_primary_victories [https://perma.cc/3UD5-WPEV]. While these are the most well-known instances of controversial plurality winners, there are many more examples in gubernatorial and congressional races, such as Maine’s 2014 gubernatorial, where Paul LePage won re-election with around 48% of the vote. In fact, it was the re-election of Mr. LePage that spurred Maine to become the first state to adopt IRV. See Seelye, *So Goes Maine?*, *supra* note 1 and accompanying text. In the congressional context, Lori Trahan won the Democratic primary for a congressional

risk directly increases as the number of candidates in a given field increases.³² In a two-candidate race, which is typically a general election, FPP does not pose this problem, because one of those candidates will necessarily need to secure a majority in order to win. But in a more crowded field, such as a primary election where there can be upwards of ten candidates, a candidate could hypothetically win by securing only about 10% of the vote.³³

FPP systems also incentivize hyper-partisanship by candidates. In a crowded field, a candidate in an FPP system is rewarded by isolating a faction of the electorate rather than by appealing more broadly to the entire electorate, especially in a single-party primary.³⁴ This, by extension, incentivizes negative campaigning by candidates, where the focus is on attacking opponents and isolating a faction, rather than on advocating for their policies — something that gets voter’s attention, but they paradoxically detest.³⁵

B. Traditional Runoff Systems

Several states³⁶ and cities³⁷ mitigate the problem of low-plurality winners through a runoff mechanism within their respective FPP

seat based in Lowell, Massachusetts by securing less than 21% of the vote. Seelye, *Massachusetts*, *supra* note 7.

32. *E.g.*, Seelye, *Massachusetts*, *supra* note 7 and accompanying text (primary winner declared after securing 21% of the vote in a field of ten candidates).

33. *See, e.g., id.*

34. *See, e.g.*, Timothy Egan, *The Secret to Cracking Trump’s Base*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/opinion/trump-base-polls.html> [<https://perma.cc/CYK9-JXU6>]. Donald Trump’s 2016 presidential campaign is a great illustration of this phenomenon. Then-candidate Trump was successful in the Republican primaries largely because he isolated a faction, what many commentators referred to and still refer to as his “base.” *Id.* The crowded field of Republican contenders created a scenario where a candidate, like Trump, needed to secure only a larger percentage of the vote than the next best candidate, and he could do so by attacking both Republicans and Democrats. *See* Paul Schwartzman & Jenna Johnson, *It’s Not Chaos. It’s Trump’s Campaign Strategy*, WASH. POST (Dec. 9, 2015), https://www.washingtonpost.com/politics/its-not-chaos-its-trumps-campaign-strategy/2015/12/09/9005a5be-9d68-11e5-8728-1af6af208198_story.html [<https://perma.cc/6CU4-9LKF>]; *see also* Massimo Bordignon et al., *Moderating Political Extremism: Single Round Versus Runoff Elections Under Plurality Rule*, 106 AM. ECON. REV. 8, 2349–70 (2016) (comparing the influence of extremist voters on candidates in plurality systems to runoff systems).

35. *See* John Cassidy, *Closing Arguments: The Logic of Negative Campaigning*, NEW YORKER (Nov. 5, 2016), <https://www.newyorker.com/news/john-cassidy/closing-arguments-the-logic-of-negative-campaigning> [<https://perma.cc/3F68-55R>].

36. *See* ALA. CODE § 17-13-18 (2018) (held unconstitutional on other grounds by *United States v. Alabama*, 778 F.3d 926 (11th Cir. 2015)); ARK. CODE ANN. §§ 7-7-102, 7-7-202, 7-7-304 (2011); GA. CODE ANN. § 21-2-501 (2017); MISS. CODE ANN. §

systems.³⁸ In these jurisdictions, “runoff”³⁹ elections are held if no candidate emerges from a primary (or in some cases, general) election without the majority of the vote or with less than a statutorily prescribed threshold.⁴⁰ In a runoff election, the candidate(s) receiving the lowest percentage of the vote in the initial election are “run off” the ballot and do not appear as choices in the subsequent runoff election.⁴¹ This typically allows one of the remaining candidates to capture a majority — or the requisite threshold percentage — of the vote and claim victory.⁴²

While runoff elections can help combat low-plurality winners in FPP systems, there are two main critiques of runoff systems. First, holding a second election is expensive.⁴³ In New York City, for example, the last runoff election cost the city more money than the entire annual budget for the office for which the runoff was being conducted.⁴⁴ Additionally, it has been empirically shown that in a subsequent runoff election, turnout drastically decreases — especially among poor and minority voters.⁴⁵ Because of this, runoff voting

23-15-191 (2017); OKLA. STAT. ANN. tit. 26, § 1-103 (1976); S.C. CODE ANN. § 7-13-50 (1976); TEX. ELEC. CODE ANN. §§ 172.003-172.004 (1986).

37. See, e.g., BALT., MD., CODE art. IV, § 1 (2018); L.A., CAL., ADMIN. CODE art. IV, § 425 (2015). See generally Portland St. Univ. & the Knight Foundation, *Who Votes for Mayor?* (2016), <http://www.whovotesformayor.org/> [<https://perma.cc/WJ59-QLD3>] (noting that primary elections with a runoff mechanism are the most popular method for mayoral elections in U.S. cities).

38. Two states — Georgia and Louisiana — currently conduct general election runoffs for federal and state-level positions. *Runoff Elections*, BALLOTPEDIA, https://ballotpedia.org/Runoff_election [<https://perma.cc/8HBK-A52Q>] (last visited Oct. 7, 2019). Ten states conduct runoffs in their primary elections. *Primary Runoffs*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx> [<https://perma.cc/6XCS-WJTY>] (last visited Oct. 7, 2019).

39. Runoff systems are also sometimes referred to as “two-round” systems. See, e.g., *Electoral Systems: Two-Round System*, ACE ELECTORAL NETWORK, <http://aceproject.org/main/english/es/esd04.htm> [<https://perma.cc/MEE9-HR96>] (last visited October 7, 2019).

40. O’Neill, *supra* note 2, at 333.

41. *Id.*

42. *Id.*

43. The “average cost” of a runoff election would be an inappropriate statistic for demonstrating this point because cost is often relative to the size of the jurisdiction in which the election is taking place. But there are clear overall costs of runoff elections. See *infra* Section I.C.

44. See *infra* Section I.C.

45. See Bernard L. Fraga, *The Turnout Gap Between Whites and Racial Minorities Is Larger than You Think — and Hard to Change*, WASH. POST (Sept. 25, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/25/the-turnout-gap-between-whites-and-racial-minorities-is-larger-than-you-think-and-hard->

systems have been challenged a number of times on constitutional grounds, as well as on the grounds that they violate the Voting Rights Act, but such challenges have been largely unsuccessful.⁴⁶

C. Primary Elections

Much like FPP voting, primary elections are extremely popular throughout the United States.⁴⁷ Primaries are elections utilized by parties in order to narrow the field of candidates so that only one candidate will ultimately run as the party's candidate in the general election.⁴⁸ Prior to primary elections, the candidate who would appear on the ballot as the given party's nominee would directly or indirectly be chosen by "party bosses."⁴⁹ The primary was, and still is, seen as a purer form of democracy⁵⁰ where the voters, rather than party leaders, have a say in who will ultimately emerge as the party's nominee for a given position.⁵¹

to-change/ [https://perma.cc/7P4S-9J7W]; Elaine C. Kamarck, *The Importance of Increasing Turnout in Congressional Primaries*, STAN. SOC. INNOVATION REV. (Mar. 28, 2016), https://ssir.org/increasing_voter_turnout/entry/the_importance_of_increasing_turnout_in_congressional_primaries [https://perma.cc/SGR2-KCDZ]; Kelly Born, *Increasing Voter Turnout: What, If Anything, Can Be Done?*, STAN. SOC. REV. (Apr. 25, 2016) https://ssir.org/articles/entry/increasing_voter_turnout_what_if_anything_can_be_done [https://perma.cc/X7AS-9S2E].

46. See generally Gregory G. Ballard, Note, *Application of Section 2 of the Voting Rights Act to Runoff Primary Election Laws*, 91 COLUM. L. REV. 1127 (1991) (arguing that jurisdictions requiring majority threshold dilute minority vote in violation of § 2 of the Voting Rights Act). See also *infra* note 202. For additional critiques of runoff systems, see *Benefits of RCV*, FAIRVOTE, <https://www.fairvote.org/rcvbenefits> [https://perma.cc/467F-8US6] (last visited Oct. 4, 2019). For example, a candidate who could have ultimately won the election may not be on the ballot in the second round, but voters may have voted differently if they knew a certain candidate did not garner enough votes to reach the majority threshold. *Id.*

47. BENJAMIN GINSBERG ET AL., WE THE PEOPLE: AN INTRODUCTION TO AMERICAN POLITICS 349 (Ann Shin et al. eds., 8th ed. 2011). In fact, the United States is one of the only countries in the world to utilize a primary system. *Id.*

48. See generally *id.*

49. U.S. *Political Conventions and Campaigns*, NE. UNIV., <https://conventions.cps.neu.edu/nominations-conventions/past-practices/primaries-and-conventions/> [https://perma.cc/L6YV-4HQW] (last visited Oct. 14, 2019).

50. For a comprehensive overview of the origins of primary elections, see CHARLES EDWARD MERRIAM & LOUISE OVERACKER MERRIAM, PRIMARY ELECTIONS (1928).

51. It should be noted that the meaning and impact of primary election votes depends, in part, on the particular kind of primary system that is used — open, closed, or blanket. See Sean M. Ramaley, Comment, *Is The Bell Tolling: Will the Death of the Partisan Blanket Primary Signal the End for Open Primary Elections?*, 63 U. PITT. L. REV. 217, 218–20 (2001). In a closed primary, a voter is only permitted

Primaries are not perfect in practice, however, and they have the same major issues as runoff voting mechanisms: cost and turnout. In 2016, the combined cost of statewide primary elections in all states was just under \$500 million.⁵² California accounted for one-fifth of this cost, where the 2016 presidential primaries cost its taxpayers around \$100 million.⁵³ It is important to note that these costs are in addition to the costs for running a general election, which are even more expensive to conduct than primary elections.⁵⁴ Primary

to vote in the primary election for candidates from the same political party under which he or she is registered. *Id.* at 219. In open primaries, voters are permitted to vote in whichever party's primary they prefer, regardless of their own party affiliation, but they are restricted to only voting in one party's primary. *Id.* Lastly, in blanket primaries "all voters receive the same ballot, and a voter is not limited to the candidates of any single party but may vote, as to each office contested, for any candidate regardless of party affiliation." *Id.* at 219–20 (quoting *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1292 (E.D. Cal. 1997)). Blanket primaries have been declared unconstitutional by the Supreme Court because they violate a party's First Amendment associational rights. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577 (2000) ("[Blanket primaries] force[] political parties to associate with — to have their nominees, and hence their positions, determined by — those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary."). In considering the constitutionality of a state's primary regime, the Supreme Court has shown a preference for the associational rights of a party where the party itself wants to open (or close) its primary election to those who are not affiliated with any party or even members of other parties. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215 (1986) (holding that Connecticut's law prohibiting parties from conducting open primaries impermissibly violated the associational rights of parties wishing to conduct open primaries). In what is perhaps an issue regarding primaries the Supreme Court will visit in the future, the U.S. Court of Appeals for the Ninth Circuit recently upheld Hawaii's state law requiring open primaries. *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016). The case was interesting in that the state law at issue was very similar to California's blanket primary law that the Supreme Court struck down in *Jones*. Like California's law, Hawaii's constitution required parties to allow all voters, regardless of political affiliation, to participate in their primaries. *Id.* at 1121 (citing HAW. CONST. art. II, § 4). However, unlike the California law in *Jones*, Hawaii's constitution did not allow "cross voting," which is a scheme where a voter can change which party's candidate they vote for office by office. *Id.* ("[V]oters must commit to one party's slate prior to voting; they may not choose a Republican nominee for one state office and a Democratic nominee for a different state office."). This was apparently enough of a distinction for the Ninth Circuit, but it remains to be seen if such a distinction is sufficient in the eyes of the Supreme Court, which denied the Hawaii State Democrats petition for writ of certiorari after the Ninth Circuit's ruling. *Democratic Party of Hawaii v. Nago*, 137 S. Ct. 2114 (2017).

52. *Taxpayer Costs of Closed Primaries*, OPEN PRIMARIES, https://www.openprimaries.org/taxpayer_costs_of_closed_primaries [<https://perma.cc/KQJ4-E4RD>] (last visited Oct. 14, 2019).

53. *Id.*

54. *See* Stephen Ansolabehere, *The Search for New Voting Technology*, BOS. REV. (Oct. 1, 2001), <https://bostonreview.net/forum/stephen-ansolabehere-search->

elections also suffer the same turnout issue as runoff elections, as turnout is far lower than in general elections and those that do participate in primary elections tend to be older, whiter, and richer.⁵⁵

D. Instant-Runoff Voting

IRV seeks to combat the issues of FPP systems and extract the benefits of runoff voting without the incurring the additional costs and low-turnout. A typical IRV system requires voters to rank candidates in order of preference, rather than picking only one candidate like they do in traditional FPP systems.⁵⁶ If no candidate wins a majority of first-place votes in the initial round of vote-tallying, the last place candidate is eliminated, and the votes are redistributed based on voters' listed preferences.⁵⁷ This process continues until a candidate emerges with a majority of first-place votes.⁵⁸

Not all IRV systems are the same, however. They can differ based on the number of candidates a voter can rank, how many candidates a voter is *required* to rank, and the threshold vote percentage requirement a candidate must reach before being declared the winner.⁵⁹

new-voting-technology-0 [https://perma.cc/ZA9T-HTTK] (discussing MIT study that estimated America's counties and municipalities spent \$1 billion conducting the 2000 elections); see also Brad Tuttle, *How Much Election Day Costs the Country — and Voters*, TIME (Nov. 8, 2016), <http://time.com/money/4556642/election-day-2016-costs-country-voters/> [https://perma.cc/9VPP-AY24].

55. See *supra* note 45; see also *What Affects Voter Turnout Rates?*, FAIRVOTE, https://www.fairvote.org/what_affects_voter_turnout_rates [https://perma.cc/8VG5-8FUM] (last visited Oct. 14, 2019).

56. See generally Brian P. Marron, *One Person, One Vote, Several Elections?: Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343, 343–47 (2004) (describing IRV as a system “having a second distinct — but not independent — election”).

57. *Id.*

58. *Id.*

59. San Francisco, California allows — but does not require — voters to rank up to three candidates and has a required threshold of 50% for a candidate to be declared a winner. *Marking Your Ballot: Ranked-Choice Voting*, S.F. DEP'T ELECTIONS, <https://selections.sfgov.org/marking-your-ballot> [https://perma.cc/S8GM-TAUC] (last visited Oct. 14, 2019). Cambridge, Massachusetts allows — but also does not require — voters to rank as many candidates as can appear on the ballot. *Cambridge Municipal Elections*, CITY OF CAMBRIDGE, <https://www.cambridgema.gov/Departments/electioncommission/cambridgemunicipalelections> [https://perma.cc/33KG-FTBN] (last visited Oct. 14, 2019).

Fig. 1.1. Four-Round IRV Election with a Majority Threshold and Ranking Requirement

	<i>Candidate A</i>	<i>Candidate B</i>	<i>Candidate C</i>	<i>Candidate D</i>	<i>Candidate E</i>
Round 1	25%	12%	36%	20%	9% <i>Eliminated</i>
Round 2	26%	13% <i>Eliminated</i>	39%	22%	
Round 3	36%		40%	24% <i>Eliminated</i>	
Round 4	53% <i>Winner</i>		47% <i>Eliminated</i>		

Figure 1.1 shows a hypothetical IRV election involving five candidates, A through E, where the required threshold to win is 50% — a true majority of votes. The first round shows the percentage of first-place votes each candidate received, with no candidate receiving anywhere close to the required 50%.⁶⁰ Candidate E received the fewest first-place votes and is thus eliminated from the vote tallying in any subsequent rounds. Now, votes for the next-ranked candidate by any voter who ranked Candidate E first are distributed amongst the remaining candidates in the second round. In the second round, Candidate B is eliminated and the process continues for four rounds until one candidate — in this case, Candidate A — emerges with a majority of the votes. In this model, the assumption is that each voter was *required* to rank all five of the candidates, so there is no possibility that the ultimate winner would not obtain a majority of the votes. Notice an interesting aspect of this race — the candidate who initially received the plurality of the vote, Candidate C, did not end up winning the election.⁶¹

60. If a candidate did receive a majority of the votes in the first round, the election would end without the need for subsequent (instant) runoff rounds.

61. A situation where the initial winner of the plurality vote ends up losing the election in an IRV system is not purely hypothetical — it has occurred and caused predictable controversy. In the 2010 mayoral race for Oakland, California, the initial plurality winner, Don Perata, eventually lost to Jean Quan, who implemented a campaign strategy that involved attracting other candidates' supporters for second-place votes. See Jenny Starrs & Daron Taylor, *Can Ranked-Choice Voting End Ugly*

Essentially, IRV provides the same runoff mechanism as traditional runoff systems, but without the time and expense involved in an additional election.⁶² The money IRV can save in this respect is perhaps its most demonstrable benefit. In cities that employ traditional runoff systems, like New York City, if no candidate reaches a certain threshold percentage of the vote in primary elections,⁶³ holding a second runoff election dramatically increases the already high cost of conducting a primary election, in addition to a general election.⁶⁴ By replacing runoffs with IRV, governments could significantly reduce the cost of conducting elections.

In addition to runoffs, some proponents have suggested that IRV can also eliminate the need for a primary election to be held before a general election.⁶⁵ Indeed, the elimination of primaries in favor of a single IRV election has already occurred in Minneapolis, Minnesota where the city implemented a single, general IRV election for multiple local offices in 2006.⁶⁶ As previously discussed, primary elections are a means of narrowing the field to a single candidate, who will represent a political party on a ballot in the general election, avoiding the risk that a party will split the vote among its own members and hand the election to a candidate from another, more

Election Battles? This November, Maine Hopes to Find Out., WASH. POST (Nov. 1, 2018), https://www.washingtonpost.com/politics/2018/10/31/can-ranked-choice-voting-end-ugly-election-battles-this-november-maine-hopes-find-out/?utm_term=.ba37be8088f3 [https://perma.cc/HE29-6Y8U]; Zusha Elinson & Gerry Shih, *The Winning Strategy in Oakland: Concentrate on Being 2nd or 3rd Choice*, N.Y. TIMES (Nov. 11, 2010), <https://www.nytimes.com/2010/11/12/us/politics/12bcvoting.html> [https://perma.cc/2S2Z-S2HT]. More recently, in the first use of IRV for a federal congressional election, Bruce Poliquin won more votes than Jared Golden in the first round, but ended up losing to Golden in the second round, after Golden captured 50.6% of the vote. See Jamie Ehrlich, *Maine Governor Deems Congressional Election 'Stolen' While Certifying Result*, CNN (Dec. 29, 2018), <https://www.cnn.com/2018/12/28/politics/maine-governor-certifies-congressional-election/index.html> [https://perma.cc/YN5H-677K]. In certifying the election, then-Governor Paul LePage wrote "Stolen Election" next to his signature. Paul R. LePage (@Governor_LePage), Twitter (Dec. 28, 2018, 2:58 PM), https://twitter.com/Governor_LePage/status/1078726890746191872 [https://perma.cc/Z3L3-2EV4].

62. See Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?*, 29 U. ARK. LITTLE ROCK L. REV. 679, 700 (2007).

63. N.Y. ELEC. LAW § 6-162 (2018); see *infra* Section II.B.i.

64. See *supra* Section I.C.

65. *Problems RCV Can Help Solve*, *supra* note 14.

66. See Brandt William, *Judge Upholds Instant Runoff Voting in Minneapolis*, MPR NEWS (Jan. 14, 2009), https://www.mprnews.org/story/2009/01/14/irv_ruling [https://perma.cc/LKA3-RMGH].

unified party.⁶⁷ Advocates of IRV argue that it can serve as a more efficient means to the same end.⁶⁸ Instead of having a separate, costly primary with low voter-turnout (relative to the general election), IRV would provide one, high-turnout election where voter preferences have the best chance to be reflected in the makeup of a city's or state's elected body.⁶⁹ Under this approach, however, a party might still be concerned with the possibility of candidates splitting the vote among the party, allowing a candidate from another party to capitalize on that vote splitting. While this would be an issue in an FPP general election where there are multiple candidates from the same party, the problem is greatly reduced under IRV. In Figure 1.2, consider the election that was previously discussed, except now the candidates are labeled according to party. In this example, assume there was no primary election and instead just one general IRV contest where multiple candidates from the same party could appear on the ballot.

Figure 1.2. Multi-Candidate Party Representation in General IRV Election

	<i>Candidate A Republican</i>	<i>Candidate B Republican</i>	<i>Candidate C Democrat</i>	<i>Candidate D Democrat</i>	<i>Candidate E Socialist</i>
<i>Round 1</i>	25%	12%	36%	20%	9% <i>Eliminated</i>
<i>Round 2</i>	26%	13% <i>Eliminated</i>	39%	22%	
<i>Round 3</i>	36%		40%	24% <i>Eliminated</i>	
<i>Round 4</i>	53% <i>Winner</i>		47% <i>Eliminated</i>		

As the example shows, while vote-splitting still might occur under IRV, its effects are likely negligible in terms of determining the ultimate winner of the election. While too many candidates on the ballot from a single party might initially dilute the vote percentage

67. See *supra* note 51 and accompanying text.

68. *Problems RCV Can Help Solve*, *supra* note 14.

69. *Id.*; see *supra* note 66 and accompanying text.

each of those candidates receive, that dilution will be isolated for the most part within the party's lines. If the two Republican candidates split the party vote 50-50, there is a credible assumption that, when the first of those two candidates is eliminated, the remaining candidate will receive the eliminated candidate's votes, because a voter who ranked one of the Republican candidates first likely ranked the other Republican candidate second. Ultimately, under IRV, a candidate from the more popular party will be declared the winner, unlike in an FPP election where, if the more popular party splits the vote, a candidate from a less popular party with less of a split might end up winning the election.

Proponents of IRV point to more than just the recouped runoff costs as justifying the voting scheme. They argue that IRV also combats many of the paramount concerns accompanying traditional American electoral systems.⁷⁰ First, IRV increases the likelihood that a winning candidate will have majority support when compared to a traditional FPP system.⁷¹ Just like in traditional runoff systems, an IRV system can mandate that a candidate must obtain the majority of votes in order to be declared the winner.⁷² Conversely, under a FPP system with no runoff mechanism, a candidate can win with a plurality of votes even where the overall percentage of votes the candidate received is far less than a majority.⁷³

70. See generally *Ranked-Choice Voting (RCV)*, BALLOTPEDIA, https://ballotpedia.org/Ranked-choice_voting_. [<https://perma.cc/QKS6-2ERR>] (last visited Oct. 14, 2019).

71. See Michael Lewyn, *Two Cheers for Instant Runoff Voting*, 6 PHOENIX L. REV. 117, 121 (2012); *Data on Ranked-Choice Voting: Voting Preferences, Spoilers and Majority Winners*, FAIRVOTE, https://www.fairvote.org/data_on_rcv#research_rcvsocialchoice [<https://perma.cc/DY44-B5BP>] (last visited Oct. 14, 2019). While there is not much data on this aspect of IRV, FairVote is currently using ballot image data to research the relative tendencies of IRV and FPP to elect majority winners. *Id.*

72. See Marron, *supra* note 56, at 343–47.

73. See O'Neill, *supra* note 2, at 333. However, it is still possible under some IRV systems that a candidate will emerge a winner even though they failed to receive a majority of the vote. See Lewyn, *supra* note 71, at 122. For example, in a system like San Francisco's, where voters are not required to rank more than one candidate, S.F. DEPT ELECTIONS, *supra* note 59, if every voter only chose one candidate, the election would operate exactly the same as an FPP election. If enough voters fail to rank a sufficient number of candidates, after a given number of rounds, there may just not be enough votes to have any single candidate achieve a majority. Additionally, this issue could be easily solved if voters were required to rank a given number of candidates — a number based on the number of candidates on the ballot that would ensure by mathematical certainty the winner would need a majority of votes to win. Even with these potential shortcomings, IRV still does a better job on paper at ensuring a true majority winner than FPP.

Second, proponents argue that IRV increases voter satisfaction. A number of surveys have shown that voters who participate in IRV elections feel that their ballot is more meaningful than in a traditional system where a voter can only choose one candidate.⁷⁴ A traditional FPP system is essentially a zero-sum game — if a voter chooses a candidate that does not win, his or her vote is exhausted. In an IRV system, however, if a voter's preferred candidate does not win, the voter can still impact the election with their subsequent candidate rankings. Proponents of IRV argue that part of this increased voter satisfaction is caused by decreased negative campaigning in IRV elections.⁷⁵ Negative campaigning has become increasingly prevalent in modern politics, despite its adverse impact on voter satisfaction,⁷⁶ and IRV proponents argue that candidates in an IRV election are incentivized to compete for first-place votes as well as votes for second place, third place, and so on.⁷⁷ Put more simply, they argue IRV elections incentivize candidates to appeal to a broader swath of the electorate, rather than appealing only to their base.⁷⁸ Although negative campaigning can be difficult to quantify, one quantitative measure that IRV advocates rely on to bolster this claim is voter perception. In the same surveys previously referenced, voters reported perceiving less negative campaigning in IRV cities versus cities not employing IRV.⁷⁹

However, there are valid criticisms of IRV worth noting.⁸⁰ One of the central critiques is simply a cost-benefit argument: the costs associated with implementing IRV are simply not worth the purported benefits.⁸¹ First, cities that implement IRV typically

74. See *Ranked Choice Voting in Practice: Candidate Civility in Ranked Choice Elections, 2013 & 2014 Survey Brief*, FAIRVOTE [hereinafter *FairVote Survey Brief*], <https://fairvote.app.box.com/v/APSA-Civility-Brief-2015> [https://perma.cc/UEX5-EJCB] (last visited Oct. 14, 2019); see also SARAH JOHN, FAIRVOTE, RANKED CHOICE VOTING IN PRACTICE: CANDIDATE CIVILITY AND VOTER UNDERSTANDING 1-6 (2015) [hereinafter FAIRVOTE CALIFORNIA SURVEY], <https://fairvote.app.box.com/v/CA-rcv-civility-survey> [https://perma.cc/9ZJG-PPAB].

75. *Id.* at 2.

76. See *supra* notes 34–35 and accompanying text.

77. See *Campaign Civility: Ranked Choice Voting and Civil Campaigning*, FAIRVOTE https://www.fairvote.org/research_rcvcampaigncivility [https://perma.cc/5AMQ-86G6] (last visited Oct. 14, 2019).

78. See Bordignon et al., *supra* note 34, at 2349–50.

79. *FairVote Survey Brief*, *supra* note 74, at 2.

80. See generally Langan, *supra* note 19.

81. See, e.g., David Sharp, *Ranked Choice as Easy as 1,2,3? Not So Fast*, *Critics Say*, ASSOCIATED PRESS (Oct. 9, 2016), <https://www.apnews.com/62c997cfd2ab403ca0b3c3333e1a9312>

employ some kind of voter education system in order to introduce the system to the electorate and explain the differences between IRV and more traditional voting methods.⁸² While the depth of these voter education programs can vary,⁸³ implementing any kind of program does require the city to divert its administrative and financial resources to some extent.⁸⁴ Second, counting ballots in an IRV system can be extremely time-consuming if done by hand, adding to the overall cost of an election.⁸⁵ Not all electronic voting systems have the ability to count IRV ballots,⁸⁶ and localities might be required to replace or update their existing machines.⁸⁷

[<https://perma.cc/PK63-UU9G>]; Gordon L. Weil, *Ranked-Choice Voting: Costly, Complicated, Undemocratic*, PORTLAND PRESS HERALD (Sept. 30, 2016), <https://www.pressherald.com/2016/09/30/maine-voices-ranked-choice-voting-costly-complicated-undemocratic/> [<https://perma.cc/6QQ4-LPOD>]; see also Langan, *supra* note 19, at 1595.

82. See, e.g., S.F. DEP'T ELECTIONS, *supra* note 59.

83. See generally CTR. FOR CIVIC DESIGN, RECOMMENDATIONS FOR INTRODUCING RANKED CHOICE VOTING BALLOTS 6–8 (2018), <https://civicdesign.org/wp-content/uploads/2017/07/Introducing-RCV-Ballots-18-0803-FNAL.pdf> [<https://perma.cc/NRD7-2MRB>].

84. However, a 2018 study concluded that “[o]verall, election cycle cost data of cities that have implemented RCV shows that any change to the cost of elections either during or after the switch to RCV is not statistically significant.” Christopher Rhode, *The Cost of Ranked Choice Voting*, N. ARIZ. U. 15 (2018), <https://esra.wisc.edu/papers/Rhode.pdf> [<https://perma.cc/7B3S-DR3Z>]. See also *The Cost of Ranked Choice Voting*, MIT ELECTION LAB (July 27, 2018), <https://medium.com/mit-election-lab/the-cost-of-ranked-choice-voting-522e646db323> [<https://perma.cc/8JCK-G78K>] (discussing the study). But see *How Much Will It Cost to Implement RCV?*, VOTER CHOICE MASS., https://www.voterchoicema.org/faq_cost [<https://perma.cc/75LF-ZLR8>] (last visited Oct. 14, 2019) (estimating the cost of voter education in the state of Massachusetts to be \$500,000).

85. See Langan, *supra* note 19, at 1585; see, e.g., Steve Brandt, *Hand-Counting Ballots in Instant-Runoff Vote Called ‘Huge Nightmare’*, STAR TRIB. (Nov. 28, 2008), <http://www.startribune.com/hand-counting-in-instant-runoff-vote-called-huge-nightmare/35201754/> [<https://perma.cc/T4DV-7X3T>] (discussing the issues Minneapolis was expected to face by implementing an IRV without a fully automated vote count).

86. The three largest voting machine manufacturers in the United States have responded to the demand for systems that are compatible with IRV. Election Systems and Software (ES&S) machines are all compatible with IRV elections, although some may require some modifications, and still require third party software to assist with the vote counting. *RCV and Election Administration*, FAIRVOTE, https://www.fairvote.org/rcv_administration#voting_systems_and_rcv [<https://perma.cc/D86W-HCLX>] (last visited Oct. 14, 2019). Dominion, another one of the three main manufacturers, has begun selling a machine which includes a module for conducting IRV elections. *Id.* This machine does not require any third-party software or modifications, in contrast to the ES&S machines. *Id.* Hart Intercivic, the third major manufacturer, is the only one of these three manufacturers to have a federally certified IRV system, although only one city has used its machines

Critics also argue that IRV will lead to voter confusion, because the system is too complicated for voters who are used to FPP voting,⁸⁸ and voters cannot be expected to educate understand the consequences of their ranking decisions.⁸⁹ Moreover, these critics point to data suggesting that voter confusion is an issue that disproportionately impacts poor and minority voters.⁹⁰

Others suggest that IRV does not always guarantee a majority winner.⁹¹ This is for two reasons. First, in an IRV system where candidates only need to obtain a percentage less than 50% to win, IRV still allows candidates to win an election with a plurality of the votes, undercutting one of its biggest purported benefits. This scenario is demonstrated in Figure 1.3, where the exact same values from Figure 1.1 are used, but there is only a 40% threshold requirement to be elected, leading to a different candidate winning the election by securing less than a majority of the votes. In the Figure 1.3 election, there is no need for a fourth round, as Candidate C reached the prescribed vote requirement in the third round.

in an IRV election. *Id.* Hart Intercivic's machine does not require third-party software like ES&S's machines. *Id.*

87. *See, e.g.*, Dan Diorio & Wendy Underhill, *Ranked-Choice Voting*, NAT'L CONF. ST. LEGISLATURES (2017), <http://www.ncsl.org/LinkClick.aspx?fileticket=p5luAhhYpyE3d&tabid=31410&portalid=1> [<https://perma.cc/DAT6-QNCW>] ("The Maine Secretary of State's office said it would need \$761,000 in 2017–2018 and \$641,000 in 2018–2019 for additional ballot pages and updated voting equipment[]" in order to implement IRV state-wide).

88. DAVID C. KIMBALL & JOSEPH ANTHONY, VOTER PARTICIPATION WITH RANKED CHOICE VOTING IN THE UNITED STATES 4 (2016), <http://www.umsl.edu/~kimballd/KimballRCV.pdf> [<https://perma.cc/X3BX-TGE4>]; Langan, *supra* note 19, at 1592.

89. *See, e.g.*, Weil, *supra* note 81 ("Instead of simply voting for the candidate you prefer, each voter must have an election strategy.").

90. *See* KIMBALL & ANTHONY, *supra* note 88, at 4 ("[t]here is evidence in American elections that confusing voting equipment or ballot designs produce more voting errors, and the impact of poor design falls disproportionately on low income and minority voters").

91. *See* Lewyn, *supra* note 71, at 122 and accompanying text.

Fig. 1.3. Three-Round IRV Election with a 40% Threshold and Ranking Requirement

	<i>Candidate A</i>	<i>Candidate B</i>	<i>Candidate C</i>	<i>Candidate D</i>	<i>Candidate E</i>
Round 1	25%	12%	36%	20%	9% <i>Eliminated</i>
Round 2	26%	13% <i>Eliminated</i>	39%	22%	
Round 3	36%		40% <i>Winner</i>	24%	
Round 4					

Second, in a system where voters are not required to rank a given number of candidates, there is no guarantee that voters will rank enough candidates to allow the system to work.⁹² Further, if voters only list one preference or if they only list relatively weak candidates, their votes may not end up being counted in the later rounds, something known as “ballot exhaustion.”⁹³ The example in Figure 1.4 shows what can occur if an IRV system only requires voters to choose one candidate, but allows them to rank up to three candidates. Under such a system, it is possible that most or all voters will only choose a single candidate. If that occurs, and no candidate reaches the statutorily proscribed threshold, the last-place candidate would be eliminated, but there would be little to no votes to be redistributed from each eliminated candidate. Consequently, the winner may not even be able to reach the required threshold to win the election, and the system would essentially revert to a traditional FPP system, where the winner would be declared solely on the basis of who receives the most votes.

92. San Francisco utilizes an IRV statute that does not require voters to rank more than one candidate. See S.F., CAL., CITY CHARTER art. XIII, § 13.102 (2002).

93. See Simon Waxman, *Ranked-Choice Voting Is Not the Solution*, DEMOCRACY J. (Nov. 3, 2016), <https://democracyjournal.org/arguments/ranked-choice-voting-is-not-the-solution/> [<https://perma.cc/84R4-WXS7>].

Fig. 1.4. IRV Election with a Majority Threshold Requirement and No Ranking Requirement

	<i>Candidate A</i>	<i>Candidate B</i>	<i>Candidate C</i>	<i>Candidate D</i>	<i>Candidate E</i>
Round 1	25%	12%	36%	20%	9% <i>Eliminated</i>
Round 2	25%	12% <i>Eliminated</i>	36%	20%	
Round 3	25%		36%	20% <i>Eliminated</i>	
Round 4	25% <i>Eliminated</i>		36% <i>Winner</i>		

Despite these criticisms, many cities have been using IRV in local elections for some time. San Francisco, the largest U.S. city to utilize IRV, has been using it since 2002 in its mayoral elections.⁹⁴ Twelve cities and localities and one state (Maine) currently have some form of IRV in place or a system that will be effective by 2021.⁹⁵ The data on IRV from these cities have been generally positive. The earlier referenced FairVote surveys measuring voter satisfaction in IRV jurisdictions found that a majority of voters in IRV cities supported using the system in their elections.⁹⁶ Additionally, in contrast to one of the main critiques of IRV — namely, that it tends to lead to voter confusion — the surveys found that the vast majority of voters in

94. S.F., CAL., CITY CHARTER art. XIII, § 13.102 (2002).

95. ME. REV. STAT. ANN. tit. 21-a, § 723-A (2017); MASS. GEN. LAWS ch. 43, § 96 (2018) (Cambridge's electoral code is incorporated into Massachusetts state laws); BERKELEY, CAL., MUN. CODE tit. 2, ch. 2.14 (2004); OAKLAND, CAL., CODE OF ORDINANCES art. XI, § 1105 (2018); S.F., CAL., CITY CHARTER art. XIII, § 13.102 (2018); SAN LEANDRO, CAL., MUN. CODE art. II, § 225 (2018); BASALT, COLO., MUN. CODE art. II, § 2.8 (2018); CARBONDALE, COLO., MUN. CODE art. VI, § 6-8 (2018); PORTLAND, ME., CITY CODE OF ORDINANCES art. II, § 3 (2018); TAKOMA PARK, MD., MUN. CHARTER art. VI, § 606 (2018); MINNEAPOLIS, MINN., CODE OF ORDINANCES art. III, § 3.1(b) (2018); ST. PAUL, MINN., CODE OF ORDINANCES tit. V, Ch. 31 (2018); SANTA FE, N.M., MUN. CHARTER art. IV, § 4.06 (2018).

96. *FairVote Survey Brief*, *supra* note 74, at 2. Additionally, in a 2014 poll of California cities, a majority of voters living in cities employing FPP systems supported adopting IRV in their local elections. FAIRVOTE CALIFORNIA SURVEY, *supra* note 74, at 2.

cities utilizing IRV found that the ballot instructions were easy to understand.⁹⁷

Since these polls were conducted in 2013 and 2014, the state of American politics has undoubtedly undergone a significant transformation. The election of Donald Trump, who employed a no-holds-barred campaign style where he ruthlessly attacked any and all of his political opponents, has emboldened more candidates — both Republicans and Democrats — to employ campaign strategies that are increasingly critical of their opponents.⁹⁸ There is limited data on how much, if at all, IRV's ability to reduce negative campaigning will translate into a new, much more hostile political climate. The uncertainty of these issues notwithstanding, IRV ultimately has proven to be popular in the cities where it has been used.⁹⁹ Additionally, while the claims related to campaign conduct may be undermined by a shift in the nation's political climate, the benefits of IRV in terms of avoiding additional costs incurred by runoff and primary elections likely remain valid.

Perhaps because of the success of IRV in the cities that have already implemented it, more cities are laying the legal groundwork for IRV in their future elections.¹⁰⁰ Many other cities and states are

97. FAIRVOTE CALIFORNIA SURVEY, *supra* note 74, at 6–9; *FairVote Survey Brief*, *supra* note 74, at 2.

98. See Susan B. Glasser, *The Dark Certainty of the 2018 Midterms*, NEW YORKER (Nov. 5, 2018), <https://www.newyorker.com/news/letter-from-trumps-washington/the-dark-certainty-of-the-2018-midterms-donald-trump> [<https://perma.cc/7M8T-AFDA>] (noting how Trump has “redefin[ed] American politics to suit his own explosive style”); see also, e.g., Anthea Butler, *Opinion, Democrats Will Lose in 2018 If They Don't Shut Up About Civility and Shout About Our Democracy Dying*, NBC NEWS (July 15, 2018), <https://www.nbcnews.com/think/opinion/democrats-will-lose-2018-if-they-don-t-shut-about-ncna891196> [<https://perma.cc/9XR3-U6VG>].

99. See also MINN. CITY COUNCIL, STANDING COMM. ON ELECTIONS & RULES, THE 2017 MUNICIPAL ELECTION: AN ANALYSIS & RECOMMENDATIONS 36–38 (May 9, 2018), <https://fairvote.app.box.com/s/zfu1gdn4zslhw5sbe5t185awzstqxfzp> [<https://perma.cc/596W-J6ZE>]; Chris Hughes, *Minneapolis Voters Give Ranked Choice Voting High Marks After Third RCV Election*, FAIRVOTE (Dec. 21, 2018), https://www.fairvote.org/minneapolis_voters_give_ranked_choice_voting_high_marks_after_third_rcv_election [<https://perma.cc/V65H-74YL>]. Of course, this data may not be broadly applicable, as the data is drawn from an unrepresentative sample — populations that supported IRV implementation in the first place by voting to implement it.

100. AMHERST, MASS. HOME RULE CHARTER art. 10, § 10.10 (2018); ST. LOUIS PARK, MINN. CITY CHARTER ch. 4, § 4.08 (2018); LAS CRUCES, N.M. H.B. 98 (as passed by legislature Mar. 7, 2018); Bennet Hall, *Benton Gears Up for Ranked Choice*, CORVALLIS GAZETTE-TIMES (Mar. 19, 2018), <https://www.gazettetimes.com/news/local/benton-gears-up-for-ranked->

also seriously considering IRV, if for no reason other than its fiscal benefits.¹⁰¹ The final section of this Part discusses one such city — New York City — and how the expense of runoff elections has spurred calls for reform in the form of IRV.

E. IRV Advocacy in New York City

As will be discussed in Part II, New York City has a traditional runoff mechanism in place for primaries for three public offices: mayor, public advocate, and comptroller.¹⁰² In these primaries, if no candidate secures at least 40% of the vote, there is a subsequent runoff election.¹⁰³ The subsequent runoff elections, when they have occurred, have confirmed one of the main critiques IRV advocates posit against traditional runoff systems: they impose a significant financial burden on the localities and states employing such a system.¹⁰⁴ In 2013, the Democratic primary for public advocate went to a runoff and the ultimate cost of that election was \$13 million, while the annual budget for the office of public advocate at the time was \$2.3 million.¹⁰⁵ Apart from the cost, another notable aspect of the 2013 runoff election was the decreased voter turnout. The turnout in the initial primary was 18% of the eligible voting population, but turnout dropped to less than half of that — 7% — in the subsequent runoff.¹⁰⁶ Additionally, those who returned for the runoff election tended to be older, whiter, wealthier than the initial primary voting bloc.¹⁰⁷

choice/article_cf6ea193-72b6-51ff-b0b9-38b1262c2e12.html [https://perma.cc/P4WX-4652] (noting Benton County, Oregon's adoption of IRV for 2020 elections).

101. Jamie Munks, *Instant Runoff Voting Survives at the Polls, But Will It Be Implemented in Memphis?*, MEMPHIS COM. APPEAL (Nov. 7, 2018), <https://www.commercialappeal.com/story/news/2018/11/07/instant-runoff-voting-memphis-shelby-county-midterm-election/1858041002/> [https://perma.cc/JQ5V-QRGD].

102. N.Y. ELEC. LAW § 6-162 (2018).

103. *Id.* For an overview of a traditional runoff voting, see *supra* Part I.B.

104. Kate Taylor, *High-Cost Runoff for Public Advocate's Post Prompts Calls for Reform*, N.Y. TIMES (Sept. 30, 2013), <https://www.nytimes.com/2013/09/30/nyregion/high-cost-runoff-for-public-advocates-post-prompts-calls-for-reform.html> [https://perma.cc/MU7Y-BJWJ].

105. *Id.*

106. *New York City Democratic Primary Runoff Turnout: Older Whiter, Wealthier Voters, and Low Turnout Overall*, FAIRVOTE (Apr. 2018), <https://fairvote.app.box.com/v/NYC-Runoff-Handout> [https://perma.cc/2T9Y-JZNG].

107. *Id.* The racial disparity in runoff voting has prompted a handful of lawsuits challenging whether runoff elections are violations of federal law, namely the Voting Rights Act. See *infra* note 202.

The results of the 2013 runoff prompted efforts both at the state and the city level to implement IRV in order to prevent repeating what most saw as an incredibly costly process that could be avoided altogether with IRV. Furthermore, advocates for IRV, likely seeing an opportunity for a major victory in bringing IRV to New York City, have been increasingly active in pushing for its implementation.¹⁰⁸

At the city level, there have been efforts by local officials to implement IRV. Perhaps most notably, the winner of the 2013 runoff for public advocate and current New York Attorney General Letitia James has been one of the loudest voices in the city calling for IRV.¹⁰⁹ In addition to (now former) members of the city government like James, non-profit advocacy groups like Common Cause New York and FairVote have also led the charge to implement IRV in New York City.¹¹⁰ Most advocates at the city level have endorsed utilizing the Mayoral Charter Revision Commission to implement IRV to replace primaries for the city's three major offices through a charter revision.¹¹¹ In order to do this, the Mayoral Charter Revision Commission could include a proposal on a November ballot to utilize IRV in city primaries for the three offices currently using traditional runoffs.¹¹² Indeed, there is much discussion that the Charter Revision Commission will heavily consider the issue in the near future.¹¹³

108. FairVote, one of the leading advocacy groups for IRV, has a dedicated section on its website for the purpose of advocating New York City to adopt IRV. *New York City*, FAIRVOTE, https://www.fairvote.org/new_york_city [<https://perma.cc/RUS6-2TWN>] (last visited Oct. 14, 2019).

109. At a rally in 2018, James said “I am the face of instant runoff,” pointing to the fact that she won the runoff in 2013 that ended up costing far more than her office’s annual budget, and saying IRV is the “least expensive, most democratic option” that also forces candidates to appeal to a broader voting base. Madina Toure, *In NYC, Primary Election Runoffs Could Become a Thing of the Past*, OBSERVER (May 1, 2018), <https://observer.com/2018/05/new-york-city-instant-runoff-voting/> [<https://perma.cc/UDM2-Y2N4>].

110. Common Cause New York’s website argues that “[IRV] can profoundly change the voter experience, the way candidates run their elections, and has the potential to reshape local politics.” *New York City Needs Ranked Choice Voting!*, COMMON CAUSE, <https://www.commoncause.org/new-york/our-work/voting-elections/let-nyc-vote-help-bring-ranked-choice-voting-to-the-city/> [<https://perma.cc/MY34-B6CK>] (last visited Oct. 14, 2019).

111. *See, e.g.*, JERRY H. GOLDFEDER, TESTIMONY AT THE 2019 N.Y.C. CHARTER COMMISSION (Sept. 27, 2018) (transcript available at <https://s3.amazonaws.com/documents.nycbar.org/files/2018435-CharterRevisionVotingTestimony092718.pdf>) [<https://perma.cc/X5A8-JPHQ>] (“The City of New York has the authority to enact [IRV] in municipal elections, as articulated by various experts and disinterested parties.”).

112. *Id.*; *see* Murray Seagoood, *The New York City Charter*, 51 HARV. L. REV. 948, 948–49 (1938) (book review); *see also* Kara Marcello, Note, *The New York City*

However, the charter revision route largely ignores the fact that § 6-162 — the state election law requiring runoffs in city primaries — would likely preempt any change New York City makes to its mayoral, public advocate, or comptroller primary elections.¹¹⁴ Perhaps recognizing this obstacle, multiple state assemblymen and senators have introduced legislation in the state legislature to implement IRV in New York City primaries.¹¹⁵ The proposed amendments, which have been largely identical to each other, would change § 6-162 to read, in relevant part: “In the city of New York, any city-wide primary elections for the office of mayor, public advocate or comptroller, in which more than two candidates appear on the ballot for the same office, shall be conducted by instant run-off voting.”¹¹⁶ While there have been multiple attempts at passing legislation including this language, these attempts have all stalled before reaching the governor’s desk for signature.¹¹⁷ However, the politics in New York State changed dramatically after the 2018 elections, as Democrats, who have been far more active than state Republicans in advocating for IRV, took control of the state senate and now control both legislative chambers.¹¹⁸ Indeed, among the first bills introduced in the state legislature at the beginning of the 2019 legislative session was a bill with language identical to that of previously introduced legislation.¹¹⁹ The following Part examines the dynamic between city and state laws in New York, Election Law § 6-162, and how § 6-162 complicates New York City’s efforts to implement IRV.

Sugar-Sweetened Beverage Portion Cap Rule: Lawfully Regulating Public Enemy Number One in the Obesity Epidemic, 46 CONN. L. REV. 807, 828–29 (2013).

113. Ben Brachfeld, *With Nod from De Blasio and Push from Johnson, Momentum for Ranked-Choice Voting in New York City*, GOTHAM GAZETTE (Nov. 9, 2018), <http://www.gothamgazette.com/city/8062-with-nod-from-de-blasio-and-push-from-johnson-momentum-for-ranked-choice-voting-in-new-york-city> [https://perma.cc/2PNM-CESW].

114. *See infra* Part II.

115. A.B. 7013A, 2013–14 Leg. Sess. (N.Y. 2013); *see also* Taylor, *supra* note 104.

116. S.B. 3309, 2017–18 Leg. Sess. (N.Y. 2017).

117. *See, e.g.*, S.B. 3309, 2017–18 Leg. Sess. (N.Y. 2017); A.B. 5752, 2017–18 Leg. Sess. (N.Y. 2017); S.B. 6862, 2015–16 Leg. Sess. (N.Y. 2015); A.B. 5571, 2015–16 Leg. Sess. (N.Y. 2015).

118. *See* McKinley & Goldmacher, *supra* note 23.

119. S.B. 2517 2018–19 Leg. Sess. (N.Y. 2019).

II. HOME (RULE) IS WHERE THE HEART IS: NEW YORK'S ELECTION LAW AND THE LEGAL FRAMEWORK OF IMPLEMENTING IRV IN NEW YORK CITY

New York City has, on many occasions, regulated elections in a manner that differs from New York State's Election Law. For example, New York City amended its charter to establish term limits on the number of consecutive terms that various elected officials could serve, even though the state election law imposed no such limits.¹²⁰ In another example, New York City imposed campaign contribution limits that were more restrictive than state contribution limits under New York Election Law § 14-114.¹²¹ In both of these examples, the City's move to deviate from state election law survived judicial scrutiny.¹²² Given a history of judicial deference to New York City's unilateral deviations from state election law, unilaterally implementing IRV through a revision to the City Charter would appear to be a perfectly acceptable move by the city. Indeed, as voices within New York City calling for IRV have grown louder, most seem to believe that a Charter Revision is all it takes to implement IRV.¹²³

But this belief is incorrect. Because New York State law *mandates* a runoff for three of the most important primary elections in New York City, implementing IRV is distinguishable from the previously mentioned examples in that it would contradict, not supplement, state law.¹²⁴ Through a general overview of the relevant law in this area, this Part will demonstrate this point. Section II.A.i provides a general overview of home rule in New York, with a focus on how the doctrine of preemption is generally applied. Section II.A.ii examines a less discussed aspect of New York home rule — preemption via special law — and § 6-162 of New York's Elections Law, which mandates a runoff in New York City's primary elections for mayor, comptroller, and public advocate. Section II.B.i analyzes the legislative history of, and legal challenges to, § 6-162. Lastly, Section II.B.ii focuses specifically on New York City and examines the impact of § 6-162 on

120. *Roth v. Cuevas*, 158 Misc. 2d 238, 240 (Sup. Ct. N.Y. 1993), *aff'd*, 197 A.D.2d 369 (N.Y. Sup. Ct. App. Div. 1993), *aff'd*, 624 N.E.2d 689 (N.Y. 1993).

121. *McDonald v. New York City Campaign Fin. Bd.*, 117 A.D.3d 540, 541 (N.Y. Sup. Ct. App. Div. 2014).

122. *Id.* at 540; *Roth*, 158 Misc. 2d at 240.

123. *See, e.g., Background*, N.Y.C. CHARTER REVISION COMMISSION, <https://www.charter2019.nyc/background> [https://perma.cc/ERS3-9K3J] (last visited Oct. 16, 2019); GOLDFEDER, *supra* note 111.

124. *Supra* notes 120–22 and accompanying text.

its ability to regulate its local elections, and examine the challenges New York City will face when implementing IRV due to interplay of § 6-162, New York home rule, and existing case law.

A. HOME RULE IN NEW YORK

i. Preemption Generally

In the same fashion that the U.S. Constitution delegates certain powers (including election regulation¹²⁵) to the states,¹²⁶ most states delegate certain powers to local municipalities to pass their own laws without approval from the state legislature.¹²⁷ This legal structure is known as “home rule.”¹²⁸ Just as the Tenth Amendment presents the U.S. Supreme Court with questions about exactly what powers are reserved by the states under the Constitution,¹²⁹ state courts face similar questions in the context of home rule.¹³⁰ In New York, home rule is both a constitutional and statutory construct.¹³¹ Article IX of the New York Constitution¹³² provides a “bill of rights” for the state’s localities, recognizing that localities need the ability to pass laws that regulate matters of strictly local concern, and mandates the legislature enact laws “granting to local governments powers including but not

125. *See supra* note 25.

126. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

127. JON D. RUSSELL & AARON BOSTROM, FEDERALISM, DILLON RULE AND HOME RULE 6–9 (2016), <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf> [<https://perma.cc/Q7GA-AYYU>] (noting that 44 states currently provide for home rule); *see also* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003).

128. *See* DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 11–12 (2001); *Su, supra* note 13, at 181–82.

129. This has been especially true in recent decades, where Tenth Amendment jurisprudence has reemerged at the Supreme Court, starting in 1991 with *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *See also* *New York v. U.S.*, 505 U.S. 144 (1992) (finding it unconstitutional for Congress to compel state legislatures to adopt laws or other regulatory schemes). More recently, the Court expanded the reach of the Tenth Amendment in *Murphy v. Nat’l Collegiate Athletic Ass’n*, where the Court held that Congress could not prohibit states from legalizing and regulating sports betting. 138 S. Ct. 1461, 1474 (2018).

130. *See, e.g.*, Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1963).

131. N.Y. CONST. art. IX.

132. Article IX was not an original component of New York’s Constitution, it was incorporated into the state constitution through amendments in 1963. *See Note, Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1151 (1966) [hereinafter *Home Rule*].

limited to those of local legislation and administration in addition to the powers vested in them by [Article IX].¹³³ Pursuant to this mandate, the legislature enacted the New York Municipal Home Rule Law (MHRL) in 1964.¹³⁴ MHRL provides in pertinent part that:

- (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and,
- (ii) every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:

- a. A county, city, town or village:

- (1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers. This provision shall include but not be limited to the creation or discontinuance of departments of its government and the prescription or modification of their powers and duties.¹³⁵

MHRL has two basic components.¹³⁶ The first restricts the ability of the State to interfere in local affairs by passing laws that apply to one or more localities, but not to others.¹³⁷ The second component affirmatively grants localities the power to regulate their local affairs, as long as those local laws are not inconsistent with any of the State's

133. N.Y. CONST. art. IX, § 2.

134. N.Y. MUN. HOME RULE LAW (1964). For a more in-depth discussion about the history of home rule in New York, see generally *Home Rule*, *supra* note 132.

135. N.Y. MUN. HOME RULE LAW art. 2, § 10(1)(i)-(ii)(a)(1)-(2) (1964). New York's constitution also provides a mechanism by which the state legislature can grant additional powers to cities that may not necessarily have initially fallen within the realm of the home rule provision. N.Y. CONST. art. IX, § 2 (“[The state legislature] [s]hall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.”).

136. See generally James D. Cole, *Local Authority Supersede State Statutes*, N.Y. St. B.J., Oct. 1991, at 34.

137. *Id.*

general laws or the State Constitution.¹³⁸ “General law” is a term of art, defined specifically within MHRL as “[a] state statute which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all towns or all villages.”¹³⁹ By contrast, a “special law” is “[a] state statute which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages.”¹⁴⁰ For example, a state law that regulates activity as a whole within the state — as the majority of state legislation does — is a “general law.”¹⁴¹ By contrast, a state law only targeting a locality such as New York City is a “special law.”¹⁴² If the state wishes to regulate the purely local affairs, it must either do so via a general law that applies to all of the State’s localities, or, if it wishes to regulate the purely local affair of some localities but not others, it must do so via a special law.¹⁴³ However, passing a special law is a procedurally distinct process from passing a general law, a distinction that is explored in more depth in Section A.2.

Turning from the state perspective to the local perspective, while localities have the power to pass some local laws, that power is significantly limited.¹⁴⁴ Local governments can only pass laws that are

138. *Id.*

139. N.Y. MUN. HOME RULE LAW art. I, § 2(5) (1964).

140. *Id.* § 2(12).

141. *See, e.g.,* *People ex rel. Cent. Tr. Co. of N.Y. v. Prendergast*, 194, 95 N.E. 715, 717 (N.Y. 1911) (holding tort damages statute was general law, “for it applies to awards made pursuant to any statute of the state for damages sustained by reason of any change of grade of any street, avenue, or road in the state[]” as opposed to roads in a specific locality). *Cf. Osborn v. Cohen*, 4 N.E.2d 289, 289–90 (N.Y. 1936) (holding law targeting emergency services in cities with a population over one million not a general law, because law had the effect of only targeting New York City).

142. *See, e.g.,* *Greater N.Y. Taxi Ass’n v. State*, 993 N.E.2d 393, 396 (N.Y. 2013) (defining the “HAIL Act,” a state law which implemented new regulations for New York City yellow cabs, as a special law).

143. N.Y. CONST. art. IX, § 2(b)(1).

144. This limitation has been heavily discussed by scholars who argue that home rule in all states, not just New York, is being eroded — with localities wielding less and less autonomy over matters of local concern. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2263 (2003) (“[C]urrent rules of American local government law produce a form of home rule that assumes and reinforces a view of private property that disables local communities from promoting a different kind of development.”); Su, *supra* note 13, at 193 (“[A]s the response to the recent municipal activism illustrates, local policymaking is still largely seen as a novelty. States continue to believe that they are entitled to block or overturn local laws, and micromanage the policy areas that cities and other localities can address.”); *see also* Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241 (2018) (discussing state’s regulatory preemption of cities but their converse “limited appetite for preempting plaintiff city litigation”).

“not inconsistent with the provisions of the constitution or not inconsistent with any general law.”¹⁴⁵ This means a locality cannot pass laws that are “preempted” by state law.¹⁴⁶ New York State can preempt local laws in two ways. First, under what is known as “conflict preemption,” a local law is preempted where a local government passes a law directly conflicting with New York State law.¹⁴⁷ Put simply, local law cannot prohibit what state law expressly allows, or conversely, local law cannot allow what state law expressly prohibits.¹⁴⁸ For example, New York State law prohibits the sale of tobacco products to individuals under the age of eighteen.¹⁴⁹ If a locality passed legislation that prohibited the sale of tobacco products to only those under the age of 16, such a law would directly conflict with state law and would thus be preempted. However, where a locality chooses to prohibit the purchase of tobacco products to those under the age of 21, as New York City has,¹⁵⁰ such a law is *not* in conflict with existing state law, as localities can impose *additional* layers of regulation that expand existing state law.¹⁵¹ Issues of conflict preemption are usually straightforward, in that it will usually be obvious based on the plain language of the state and local statutes that they conflict with each other.¹⁵² Legal challenges to state laws conflicting with local laws typically allege that the state does not have the ability to expressly preempt a local law in a given field because MHRL has reserved regulation of that issue to local governments rather than the state.¹⁵³ Put more simply, it is usually clear whether a local statute is facially conflict preempted. Instead, the issue is

145. N.Y. MUN. HOME RULE LAW § 10(1)(i)-(ii) (1964).

146. *See generally* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007).

147. *DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186, 189–190 (N.Y. 2001).

148. *Chwick v. Mulvey*, 81 A.D.3d 161, 168 (N.Y. App. Div. 2010).

149. N.Y. PUB. HEALTH LAW § 1399-cc(1) (2014).

150. N.Y.C. LOCAL LAW No. 191 Int. No. 1076-A (2017).

151. *See, e.g.*, *Roth v. Cuevas*, 624 N.E.2d 689 (N.Y. 1993) (New York City law imposing term limits in addition to those mandated by state law not preempted); *McDonald v. N.Y.C. Campaign Fin. Bd.*, 117 A.D.3d 540 (N.Y. App. Div. 2014) (New York City Law imposing campaign contribution limits in addition to state campaign contribution limits not preempted).

152. *See, e.g.*, *Highway Superintendent Ass’n of Rockland, Inc. v. Town of Clarkstown*, 150 A.D.3d 731, 733 (N.Y. App. Div. 2017) (conflict preemption where local law required “approval of the town board” to appoint employees to repair or maintain highways, while state law vested such power solely in the Highway Superintendent).

153. *E.g.*, *Osborn v. Cohen*, 4 N.E.2d 289, 289–90 (N.Y. 1936).

typically whether the state *has the authority* to expressly preempt local law in the given sphere.¹⁵⁴

Local laws can also be field preempted, and the issue of whether or not a local law is field preempted is more complex than issues of conflict preemption. Field preemption occurs where the state legislature “has clearly evinced a desire to preempt an entire field thereby precluding any further local regulation.”¹⁵⁵ Field preemption can occur in three ways: (1) expressly — where the relevant State statute expressly states that it “preempts all local laws on the same matter”;¹⁵⁶ (2) implicitly through a policy declaration — where “a declaration of State policy evinces the intent of the [l]egislature to preempt local laws on the same subject matter”;¹⁵⁷ or (3) implicitly through a detailed regulatory scheme — where field preemption is implied due to “the [l]egislature’s enactment of a comprehensive and detailed regulatory scheme” in the field at issue.¹⁵⁸ Where a court determines that a given field has been preempted by the state, a local law in that field is considered inconsistent with state law because it either (1) prohibits conduct that the state legislature would consider acceptable, or at least does not proscribe; or (2) additionally restricts rights granted by the state.¹⁵⁹ For example, in *Consolidated Edison v. Town of Red Hook*, the New York Court of Appeals found that a local law was field preempted because it prohibited conduct that would have otherwise been acceptable under a general state law.¹⁶⁰ In that case, Con Edison, a power company that operates in the state, announced a plan to study the possibility of opening a new power plant in one of two towns.¹⁶¹ One of those towns, Red Hook, quickly passed a law that requiring that any company seeking to study a site within the town would need to acquire a license from the town, which required the company to pay a fee and submit detailed data reports to

154. *See, e.g., id.*

155. *Jancyn Mfg. Corp. v. Suffolk Cty.*, 518 N.E.2d 903, 905 (N.Y. 1987).

156. *Chwick v. Mulvey*, 81 A.D.3d 161, 169 (N.Y. App. Div. 2010); *see, e.g., DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186 (N.Y. 2001).

157. *Chwick*, 81 A.D.3d at 169; *see, e.g., Robin v. Inc. Vil. of Hempstead*, 285 N.E.2d 285 (N.Y. 1972).

158. *Chwick*, at 169–70; *see, e.g., New York State Club Ass’n v. City of New York*, 505 N.E.2d 915 (N.Y. 1987); *People v. De Jesus*, 430 N.E.2d 1260 (N.Y. 1981).

159. *Jancyn Mfg. Corp.*, 518 N.E.2d at 905. However, “the mere fact that both the State and local government seek to regulate the same subject matter does not, in and of itself, render the local legislation invalid on preemption grounds.” *Ba Mar, Inc. v. Cty. of Rockland*, 164 A.D.2d 605, 612 (N.Y. App. Div. 1991).

160. 456 N.E.2d 487, 491 (N.Y. 1983).

161. *Id.* at 488.

the town, and gave the town the authority to deny the license if it determined that the proposed activities would be detrimental to the town and its residents.¹⁶² However, the state had previously enacted legislation creating a board that would ultimately decide whether a facility should be built on a given site, a decision-making process that included weighing the interests of the town containing the site.¹⁶³ Because of this, the court found that Red Hook's local law was field preempted by the state.¹⁶⁴

ii. Special Laws: The Home Rule Message Requirement and Preemption

The discussion of preemption by courts and academics typically concerns local laws conflicting with general laws or the New York State Constitution. Where a special law is concerned, a preemption challenge is rarely raised. A "special law," which is a law targeting specific localities rather than the state as a whole, has a procedurally distinct enactment process prescribed by the State Constitution. Article IX provides that the state legislature:

Shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b), except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.¹⁶⁵

162. *Id.*

163. *Id.*

164. *Id.* at 490. The court also noted that "[t]he intent to pre-empt need not be express[,] [i]t is enough that the Legislature has impliedly evinced its desire to do so[.]" and pointing to the regulatory structure the state implemented in order to implement the legislation, *id.*, placing this case in the third category of field preemption.

165. N.Y. CONST. art. IX, § 2(b)(2). MHRL supplements this requirement:

The elective or appointive chief executive officer, if there be one, or otherwise the chairman of the board of supervisors, in the case of a county, the mayor in the case of a city or village or the supervisor in the case of a town with the concurrence of the legislative body of such local government, or the legislative body by a vote of two-thirds of its total voting power without the approval of such officer, may request the legislature to pass a specific bill relating to the property, affairs or government of such local government which does not in terms and in effect apply alike to all counties,

Preemption issues involving special laws are less common than those involving general laws.¹⁶⁶ Rather, issues involving special laws usually come up where the state passes legislation that touches on issues of local concern without a “home rule message” by the locality, as required by Article IX.¹⁶⁷ A valid home rule message is “sent” when (1) two-thirds of a local legislature vote to request legislation from the state; (2) the chief executive of a given locality along with a majority of that locality’s legislature vote to request legislation from the state; or (3) New York’s Governor declares a valid emergency and two-thirds of both houses of the State Legislature concur.¹⁶⁸ In cases where there is no home rule message, those challenging the law will urge the court to construe the law as a special law and then invalidate the law as procedurally unconstitutional.¹⁶⁹ However, even where a law is properly classified as a special law, there is no requirement that the locality send a home rule message where the special law also touches on a “matter of state concern.”¹⁷⁰ Because of this exception, courts often must grapple with whether the law is one that concerns only local affairs, or also involves a matter of state

all counties other than those wholly included within a city, all cities, all towns or all villages, as the case may be. Such a request may be made separately by two or more local governments affected by the same bill. Every such request shall declare that a necessity exists for the passage of such bill by the legislature and shall recite the facts establishing such necessity. The form of request and the manner of its communication to the legislature shall conform to rules promulgated by concurrent resolution of the senate and assembly pursuant to article three-A of the legislative law. In adopting such a request the legislative body shall be governed by the provisions of subdivision one of section twenty of this chapter with regard to the adoption of a local law. The validity of an act passed by the legislature in accordance with such a request shall not be subject to review by the courts on the ground that the necessity alleged in the request did not exist or was not properly established by the facts recited.

N.Y. MUN. HOME RULE § 40 (1964).

166. This is because, contrary to general laws, localities have some authority to supersede special laws. *See supra* notes 179–81 and accompanying text.

167. N.Y. CONST. art. IX, § 2(b)(1).

168. *Id.* The third option, which does not involve the locality, cannot be used to apply special laws to New York City, which the Constitution explicitly exempts from this procedure.

169. *See, e.g.,* City of New York v. Patrolmen’s Benev. Ass’n of New York, Inc. (“*PBA I*”), 676 N.E.2d 847, 850 (N.Y. 1996); Matter of Kelley v. McGee, 443 N.E.2d 908, 912 (N.Y. 1982).

170. *See* Patrolmen’s Benev. Ass’n of New York, Inc. v. City of New York (*PBA II*), 767 N.E.2d 116, 120 (N.Y. 2001) (“Thus, a special law that relates to the property, affairs or government of a locality is constitutional only if enacted upon a home rule message or the provision bears a direct and reasonable relationship to a substantial State concern.”).

concern.¹⁷¹ The notion of “a matter of state concern” derives from an influential 1929 New York Court of Appeals decision, *Alder v. Deegan*, in which the court set out to define what was encompassed by “property, affairs or government” of any local government, the regulation of which triggers the protections of Article IX.¹⁷² The case is most notable for Judge Cardozo’s concurrence, in which he framed the test for determining whether something is a matter of state concern: “[I]f the subject *be in a substantial degree* a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality.”¹⁷³ “Substantial degree,” as developed through subsequent case law, means that a special law that does not comply with the Constitution’s home rule requirements must “serve a supervening State concern,”¹⁷⁴ and “relate to life, health, and the quality of life [of the People of the State].”¹⁷⁵ Additionally, the substantial state concern cannot be derived “purely from speculative assertions on possible State-wide implication of the subject matter, having no support in the language, structure or legislative history of the statute.”¹⁷⁶

As a result of *Alder* and New York’s subsequent case law, if a court finds that the law involves a matter of State concern, any argument that the law is a procedurally invalid special law falls to the wayside, as a special law triggers the home rule message requirement only where it regulates matters of *purely* local concern.¹⁷⁷ Perhaps

171. See, e.g., *PBA I*, 676 N.E.2d at 850.

172. 167 N.E. 705 (N.Y. 1929); see James D. Cole, *Constitutional Home Rule in New York: “The Ghost of Home Rule,”* 59 ST. JOHN’S L. REV. 713, 715–19 (discussing the implications of *Alder* in the broader context of home rule in New York). The law at issue in *Alder* was whether a state law regulating tenement houses only in New York City was constitutional. *Alder*, 167 N.E. at 706. The purpose of the law, the court found, was to ensure that conditions in New York City housing were suitable for living. *Id.* at 710. The court reasoned that this was a matter of public health, which was within the state’s police power because public health concerned the entire state, rather than just New York City. *Id.* at 709. Because health concerns did not fall into the category of matters of *strictly local concern*, the fact that the State law could be classified as special made no difference, because the home rule provisions of the New York Constitution only protect local governments from State legislation regulating matters of strictly local concern. *Id.*

173. *Alder*, 167 N.E. at 705 (Cardozo, J., concurring) (emphasis added).

174. *Wambat Realty Corp. v. State of New York*, 362 N.E.2d 581, 584 (N.Y. 1977).

175. *City of New York v. Patrolmen’s Benev. Ass’n of New York, Inc. (PBA I)*, 676 N.E.2d 847, 852 (N.Y. 1996) (quoting *Wambat Realty Corp.*, 362 N.E.2d at 585) (alterations in original).

176. *Id.*

177. The New York Court of Appeals has at times classified matters of local concern that also involve matters of state concern as “an exception” to the home rule procedural requirements for enacting special laws. *PBA I*, 676 N.E.2d at 850 (citing

predictably, how courts determine matters of state concern is extremely consequential, as too broad of an interpretation has the potential to swallow home rule in its entirety.¹⁷⁸

Returning to the issue of preemption, having briefly discussed special laws, New York courts have held that, in general, a locality can pass legislation superseding a special law.¹⁷⁹ The reasoning

Matter of Kelley v. McGee, 443 N.E.2d 908 (N.Y. 1982)); *see also* *Patrolmen's Benev. Ass'n of New York, Inc. v. City of New York (PBA II)*, 767 N.E.2d 116, 120 (N.Y. 2001) ("Thus, a special law that relates to the property, affairs or government of a locality is constitutional only if enacted upon a home rule message or the provision bears a direct and reasonable relationship to a *substantial* State concern." (internal quotations omitted) (alteration in original)). But the use of the language "exception" was not always how special laws were understood. In *Matter of Kelley* — which the Court in *PBA* quotes in support of its classification of state interests as an "exception" to the procedural requirements of a special law — the court never classified the state interest as an exception. 443 N.E.2d 908 (N.Y. 1982). In that case, the Court *rejected* the argument that the law at issue was a special law. *Id.* at 913 ("The counties argue that the statute is invalid as a 'special law' . . . This argument, however, misperceives the nature of the authority under which the Legislature has acted."). The court in *Matter of Kelley* clarified that "[o]nce a statute is found to involve an appropriate level of State interest, the fact that it effects a classification among the local governments it regulates does not render the enactment invalid, so long as that classification is related and related to the State's purpose." *Id.* at 915. The first step in the analysis is "whether a challenged statute involves a matter other than the property, affairs or government of a municipality." *Id.* at 913. Reading this in conjunction with the text of Article IX, the procedural requirements of § 2(b) kick in only where the matter is one that *solely* concerns local property, affairs, or government. If matter involves concerns beyond local interests, § 2(b) is no longer applicable. *See* *Town of Islip v. Cuomo*, 473 N.E.2d 756, 757 (N.Y. 1984) ("The limitation upon the power of the Legislature to act by special law in relation to the property, affairs or government of a local government contained in article IX (§ 2, par. [b], cl. [2]) of the New York Constitution must be read together with section 3 (par. [a], cl. [3]) of the same article, which declares that, 'Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to: . . . [m]atters other than the property, affairs or government of a local government.' So read *the limitation applies only to a special law which is directly concerned with the property, affairs or government of a local government and unrelated to a matter of proper concern to State government.*" (emphasis added) (alterations in original)); *see also* *Hotel Dorset Co. v. Tr. for Cultural Res. of New York*, 385 N.E.2d 1284, 1291 (N.Y. 1978) ("If the subject matter of the legislation is of sufficient importance to the State generally, the legislation cannot be deemed a local law even though it deals directly with the affairs of a municipality."). Based on the text of Article IX and its subsequent interpretations, it would seem to follow that a law that is both a special law and one that touches on matters of state concern is an oxymoron. However, the Court of Appeals has changed its understanding in recent decades and now understands there to be two kinds of special laws: ones that involve matters of purely local concern and ones that involve matters of *both* local and state concern. *See, e.g., PBA II*, 767 N.E.2d at 120; *PBA I*, 676 N.E.2d at 850.

178. *See infra* notes 229–31 and accompanying text.

179. "There is no . . . requirement that a local law be consistent with a 'special law' enacted by the Legislature. A 'special law' may thus be superseded by a validly

emerges from the text of MHRL § 10, which states in part that “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any *general* law relating to its property, affairs or government.”¹⁸⁰ Because this section only refers to general laws, courts have interpreted this as allowing local laws that are inconsistent with special laws.¹⁸¹

Despite this, MHRL § 34 does impose certain restrictions on a locality’s ability to supersede special laws.¹⁸² While § 34 includes

enacted local law.” *Gizzo v. Town of Mamaroneck*, 36 A.D.3d 162, 165 (N.Y. App. Div. 2006); *see also Ricket v. Mahan*, 97 A.D.3d 1062, 1063 (N.Y. App. Div. 2012); *Landmark Colony at Oyster Bay v. Bd. of Supervisors*, 113 A.D.2d 741, 741 (N.Y. App. Div. 1985). Some have said that special laws that also involve matters of state concern preempt localities to which that special law does not apply from passing local laws that are inconsistent with that special law. But existing case law does not support this interpretation of the law. In an article appearing in the *New York Law Journal*, the author claimed that preemption “has been construed also to bar local legislation that is inconsistent with special laws (i.e., laws applying to specified municipalities but not to the entire state) where those laws touch on matters of state concern.” Jeffrey D. Friedlander, *Setting Limits: Litigation Between Mayor, City Council*, N.Y. L. J. (Mar. 7, 2008), <http://www.nyc.gov/html/law/downloads/pdf/ar3708.pdf> [<https://perma.cc/Q7GA-AYYU>]. In support of this statement of the law, the author cites to two cases. The first, *DJL Rest. Corp. v. City of New York*, was a case where the issue was whether the State’s Alcoholic Beverage Control (ABC) Law field preempted a city zoning law regulating the location of “adult establishments.” 749 N.E.2d 186 (N.Y. 2001). The case had absolutely nothing to do with special laws or what constitutes a matter of state concern. Indeed, neither “special law” nor “state concern” is mentioned once throughout the opinion. The second case, *Matter of Slominski v. Rutkowski*, did not concern preemption whatsoever, instead it concerned a county executive’s refusal to certify the need to fill certain vacancies within the county government, pursuant to the county charter. 91 A.D.2d 202, 203 (N.Y. App. Div. 1983).

180. N.Y. MUN. HOME RULE LAW § 10(1)(i) (2018).

181. *See, e.g., Ricket*, 97 A.D.3d at 1063. For those interested in such things, this reading of the text subscribes to the “omitted-case canon,” or “*casus omissus* canon,” which is “[t]he doctrine that nothing is to be added to what a legal instrument states or reasonably implies; the principle that a matter not covered is to be treated as not covered.” BLACK’S LAW DICTIONARY (10th ed. 2014); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 93–100 (1st ed. 2012).

182. N.Y. MUN. HOME RULE LAW § 34 (2019). In *Baldwin Union Free School District v. County of Nassau*, the New York Court of Appeals spoke on the issue. 9 N.E.3d 351 (N.Y. 2014). In that case, the court was presented with the question of whether a county could pass a local law that shifted the obligation to pay property tax refunds from the county to its individual taxing districts, which superseded a special state tax law. *Id.* at 353. Nassau County adopted an alternative form of government in the early 20th century that was established by state legislation and acquired its charter and local legislative powers via a state-drafted charter, thus it lacked the ability in many areas to unilaterally amend its charter — which included its tax code. *Id.* at 354. The County, in order to change its tax code, petitioned the State through a

many limitations,¹⁸³ the limitation that is important for the purposes of this Note is found in § 34(3)(g), which prohibits localities from superseding the state's Election Law, *regardless of whether the pertinent local election law is general or special*.¹⁸⁴ The importance of this restriction will become apparent in the following section, which will discuss New York Election Law § 6-162 and how it complicates New York City's ability to amend its charter and unilaterally implement IRV.

B. The Intersection of State and Local Election Law: § 6-162

i. The History of § 6-162

New York's Election Law, enacted as a general law in 1909, first sought to establish boards of elections in the state's counties.¹⁸⁵

home rule message pursuant to Article IX of the Constitution. *Id.* at 355. The state subsequently enacted the requested legislation, but some decades later, the County sought to unilaterally amend its tax code. *Id.* at 354–57. The court held that even though the County's tax code was a special law, because it concerned “the distribution of the proceeds of taxes or benefit assessments” (quoting N.Y. MUN. HOME RULE LAW § 34(3)(a)), the law could only be amended by the county “pursuant to an express and unambiguous delegation of authority by the state legislature.” *Id.* at 356, 361.

183. The exemption includes any law:

Which relates to the imposition, judicial review or distribution of the proceeds of taxes or benefit assessments; Insofar as it relates to the educational system in the county or to school districts therein, except that functions, powers or duties assigned to units of local government or to agencies or officers thereof outside the educational system may be transferred to other units of local government, agencies or officers as authorized by [§ 34]; Which requires that specified functions of government be performed by or financed by units of local government, except that any of such functions may be transferred to other units of local government, agencies or officers as authorized by this article; Insofar as it relates to a function, power or duty of the state or of any officer or agency thereof which is financed directly by the state; Insofar as it relates to the commencement or prosecution of actions or proceedings against the county; Insofar as it relates to a public benefit corporation; In this chapter or in the civil service law, eminent domain procedure law, environmental conservation law, election law, executive law, judiciary law, labor law, local finance law, multiple dwelling law, multiple residence law, public authorities law, public housing law, public service law, railroad law, retirement and social security law, state finance law, volunteer firefighters' benefit law, volunteer ambulance workers' benefit law, or workers' compensation law.

N.Y. MUN. HOME RULE LAW §§ 34(3)(a)–(g).

184. N.Y. MUN. HOME RULE LAW § 34(3)(g).

185. One New York court gave the following historical description of New York's Election Law:

Today, it covers many aspects of elections taking place within the state at all levels.¹⁸⁶ The story of the relevant portion of New York's Election Law for purposes of this discussion — § 6-162 — begins in the late 1960s. The 1969 mayoral election in New York City was an unusual one. In the Democratic primary, Herman Badillo and Robert Wagner received 28% and 29% of the vote, respectively.¹⁸⁷ This allowed a third Democratic candidate, Mario Proccacino, to win the nomination with 33% of the votes.¹⁸⁸ Proccacino would go on to lose the general election to incumbent John Lindsay.¹⁸⁹ Democrats, who held a significant majority in the state and city legislature, felt that they had lost the mayoral race because their two strongest candidates, Badillo and Wagner, had split the vote and allowed Proccacino, a less popular candidate, to emerge as a weaker Democratic nominee, thus handing the election to Lindsay.¹⁹⁰

A few years later in 1972, Democratic State Assemblymen Stanley Steingut and Albert Blumenthal sponsored a bill that would create a primary runoff mechanism for primaries in New York City.¹⁹¹ Proponents of the bill argued that “it was designed to avoid a repeat of the 1969 ‘fluke’ Proccacino result, when a candidate who clearly

The Election Law which this act amends is a general law. As originally enacted by chapter 22 of the Laws of 1909, it provided for a board of elections in cities of the first class containing one or more counties (the city of New York), and for a single commissioner of elections in each of the counties of Erie, Monroe, Onondaga, and Westchester. It vested in the individual commissioners, respectively, of the counties named, powers and duties similar in some respects to those of this Niagara county act.

Vroman v. Fish, 181 A.D. 502, 507 (N.Y. App. Div. 1918).

186. See N.Y. ELEC. LAW § 1-102 (2005) (“This chapter shall govern the conduct of all elections at which voters of the state of New York may cast a ballot for the purpose of electing an individual to any party position or nominating or electing an individual to any federal, state, county, city, town or village office, or deciding any ballot question submitted to all the voters of the state or the voters of any county or city, or deciding any ballot question submitted to the voters of any town or village at the time of a general election. Where a specific provision of law exists in any other law which is inconsistent with the provisions of this chapter, such provision shall apply unless a provision of this chapter specifies that such provision of this chapter shall apply notwithstanding any other provision of law.”).

187. *Butts v. City of New York (Butts II)*, 779 F.2d 141, 143 (2d Cir. 1985); see also Robert B. McKay, *Butts v. City of New York: Race, Politics and the Run-Off Primary*, 53 BROOK. L. REV. 499, 501 (1987).

188. *Butts II*, 779 F.2d at 143. It is worth noting here that this is an excellent example of the results traditional runoffs and IRV are designed to prevent. See *supra* Section I.D.

189. *Butts II*, 779 F.2d at 143.

190. *Id.* at 143.

191. *Id.* at 143.

did not represent the views of a majority of the members of his party secured the nomination because of the vicissitudes of vote division.”¹⁹² Those who opposed the bill were concerned that a runoff mechanism would disproportionately dilute the minority vote.¹⁹³ Additionally, there was also a deep suspicion that § 6-162 had racist motivations and was to intended to prevent Harman Badillo, the first Puerto Rican to run for citywide office, from securing a victory in a future election, as the bill became known in Albany circles as the “Badillo bill.”¹⁹⁴ Nonetheless, the bill easily passed the State Senate, 49 votes to 8, as well as the State Assembly, 104 votes to 5, and was signed into law by Governor Rockefeller as New York Election Law § 131-a in 1972.¹⁹⁵ At the time it was signed into law, § 131-a applied to all cities in New York with a population above one million people. Yet, in 1972, the only city that met this criterion was New York City.¹⁹⁶ The law was amended in 1976 and then again in 1978 to include its current, New York City-specific language and become New York Election Law § 6-162.¹⁹⁷ It was last amended in 1993, to reflect the change in title for leader of the City Council from “President” to “Public Advocate.”¹⁹⁸ However, in a 2002 charter revision, the duties of the public advocate were transferred to the

192. *Id.* at 143–44.

193. *Id.* at 144. This was the issue that would ultimately be the grounds for the Voting Rights Act challenge to § 6-162. *Infra* note 202. These same concerns continue to be raised by skeptics of IRV. *See supra* note 90 and accompanying text.

194. *Butts v. City of New York (Butts I)*, 614 F. Supp. 1527, 1530 (S.D.N.Y. 1985), *rev'd*, 779 F.2d 141 (2d Cir. 1985).

195. *Butts I*, 614 F. Supp. at 1550; *see also* McKay, *supra* note 187, at 501.

196. § 131-a stated:

Any inconsistent provision of law to the contrary notwithstanding, in cities having a population of one million or more, in any case in which no candidate for the office of mayor, city council president or comptroller receives forty percent or more of the votes cast by the members of a political party for such office in a city-wide primary election, the board of elections of such city shall conduct a run-off primary election between the two candidates receiving the greatest number of votes for the same office.

N.Y. ELEC. LAW § 131-a (1972).

197. N.Y. ELEC. LAW art. I, § 6-162 (2018). Section 6-160, which has no runoff mechanism, applies to all primary elections in the state outside of New York City. N.Y. ELEC. LAW § 6-160 (2018) (“If more candidates are designated for the nomination of a party for an office to be filled by the voters of the entire state than there are vacancies, the nomination or nominations of the party shall be made at the primary election at which other candidates for public office are nominated and the candidate or candidates receiving the most votes shall be the nominees of the party.”). This is a simple FPP system for primaries. *See supra* Section I.A.

198. 1993 ch. 418. N.Y. Laws 8131.

Council Speaker.¹⁹⁹ Section 6-162 now prescribes the procedure for runoff elections in arguably the most important New York City primaries in the event no candidate receives at least 40% of the vote.²⁰⁰ Subsection (1) states:

In the City of New York, when no candidate for the office of mayor, public advocate, or comptroller receives forty percent or more of the votes cast by the members of a political party for such office in a city-wide primary election, the board of elections of such city shall conduct a run-off primary election between the two candidates receiving the greatest number of votes for the same office.²⁰¹

The next section discusses the various legal challenges § 6-162 faced after its enactment and how courts, both state and federal, have interpreted § 6-162.

ii. Legal Challenges to § 6-162

Since its inception, § 6-162 of New York's Election Law has faced a variety of legal challenges.²⁰² Most relevant to the focus of this Note was an initial challenge to § 6-162 (codified as § 131-a at the time) on the grounds that it violated New York's Municipal Home Rule Law. In *Procaccino v. Board of Elections of the City of New York*,²⁰³ plaintiff Mario Procaccino, whose primary victory spurred the state

199. See Diane Cardwell, *Betsy Gotbaum, the Advocate, Struggles to Reach Her Public*, N.Y. TIMES (Dec. 2, 2002), <https://www.nytimes.com/2002/12/02/nyregion/betsy-gotbaum-the-advocate-struggles-to-reach-her-public.html?pagewanted=all&src=pm> [https://perma.cc/L36D-TJEQ] (“A charter proposal backed by Mayor Bloomberg and passed on Nov. 5 has already stripped the public advocate of one role, serving as presiding officer of the City Council.”).

200. N.Y. ELEC. LAW § 6-162.

201. *Id.*

202. One such challenge was under the Voting Rights Act, where minority candidates argued that runoff elections had both the purpose and effect of diluting the minority vote in New York City, an argument the Southern District of New York found convincing. *Butts v. City of New York*, 614 F. Supp. 1527 (S.D.N.Y. 1985). However, the Southern District's decision was overturned on appeal by the Second Circuit. *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985). Judge Oakes dissented, however, finding that because the effect of § 6-162 was discriminatory, the question of purpose was irrelevant to the ultimate question of whether there was a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1982). *Id.* at 151 (Oakes, J., dissenting); see also Arnold H. Lubasch, *City Runoff in Primaries is Upheld*, N.Y. TIMES (Dec. 14, 1985), <https://www.nytimes.com/1985/12/14/nyregion/city-runoff-in-primaries-is-upheld.html> [https://perma.cc/BU5W-QFBX]. For a more in-depth discussion of the Voting Rights Act and runoff elections, see generally Matthew G. McGuire, Note, *Assessing the Legality of Runoff Elections Under the Voting Rights Act*, 86 COLUM. L. REV. 876 (1986); Ballard, *supra* note 46

203. 73 Misc. 2d 462 (N.Y. Sup. Ct. 1973).

legislature to enact § 6-162 just three years earlier, challenged the provision on the grounds that it violated Article IX of the State Constitution, because § 6-162 was a special law enacted absent a home rule message and did not involve a matter of state concern.²⁰⁴ The court agreed that § 6-162 was a special law, but held that primary elections for certain New York City offices were matters of state concern, thereby exempting § 6-162 from the home rule message requirement.²⁰⁵ This opinion was notable for both its discussion of a special election law's preemption effects, as well its broad construction of what constitutes an issue of statewide concern. The court first addressed the question of whether or not § 6-162 was a special law, which was not immediately clear, because, at its inception, § 6-162 did not explicitly name New York City in its application.²⁰⁶ Looking to the test employed by Judge Cardozo in *In re Elm St. in City of New York*,²⁰⁷ under which a law that applies to populations (i.e., cities with a population over 1 million) "only to designate and identify the place to be affected" is considered a local law and therefore can only be enacted by the state via special law, the court concluded that § 6-162 was indeed a special law.²⁰⁸

Although it classified § 6-162 as a special law, the court held that it did not violate the home rule message requirements of Article IX because, under *Alder*, it sufficiently touched on a matter of state concern.²⁰⁹ The court's application of *Alder* is worth reading in its entirety:

[I]t may be concluded that the legislative enactment under consideration does not conflict with article IX of the State Constitution, because it clearly relates to a matter of State concern and the run-off procedure delineated therein is part of the election process (*see Matter of Devoe v. Trustees of Inc. Vil. of Colonie*, 11 A.D.2d 602). In positioning this conclusion on the basis of State concern, the force of section 1 of article IX of the State Constitution lends itself in pertinent part: "Effective local self-government and intergovernmental cooperation are purposes of the people of the state". This declaration significantly forms the policy basis

204. *See id.* at 463. Procaccino also challenged § 6-162 on the grounds that it violated the Equal Protection Clause of the U.S. Constitution, *id.* at 469, but this aspect of this case is not relevant for the purposes of this Note.

205. *Id.* at 468–69.

206. N.Y. ELEC. LAW § 131-a (1972); *see supra* note 197 and accompanying text.

207. 158 N.E. 2d (N.Y. 1927).

208. *See Procaccino*, 73 Misc. 2d at 468 (finding "no doubt that the act is special and not general").

209. *Id.* at 468–69.

underlying section [6-162] of the Election Law, to wit, adjustment of the primary election process to better reflect the will of a majority or sizable plurality of voters. In this accomplishment the State's concern cannot be initially frustrated.²¹⁰

The court's reasoning on this point is somewhat difficult to unpack, and its citations to *Matter of Devoe* and to the State Constitution do not shed much light on the court's rationale. Concisely stated, the court concluded that the "the election process" is inherently a matter of state concern, and because runoff procedures are part of the election process, they necessarily touch on matters of state concern.²¹¹ To support this conclusion, the court cites to *Matter of Devoe*, a case concerning a village law that mandated a random draw in the event of a tie in an election to fill a vacancy on the village's board of trustees.²¹² The question before the court was whether the village law conflicted with Article I § 9, and the now repealed Article IX § 9 of the State Constitution.²¹³ Article I § 9 of the State Constitution, at the time *Matter of Devoe* was decided, prohibited localities from conducting lotteries and the act of selecting the winner of the village's election at random was challenged as an unconstitutional lottery.²¹⁴ Further, Article 9, § 9 of the State Constitution provided that local officers should be elected by the voters of those localities.²¹⁵ The court held that the draw in the event of a tie violated neither of these constitutional provisions, essentially saying that in the event two candidates received enough votes to tie, it still reflected the will of the people if either one of those candidates won the election.²¹⁶

It is unclear how this holding supports the court's reasoning in *Procaccino*. The court appears to lean on *Matter of Devoe* for the

210. *Id.* at 468.

211. *Id.* at 467–69.

212. 11 A.D.2d 602, 612 (N.Y. App. Div. 1960).

213. *Id.* at 611–12.

214. N.Y. CONST. art. I, § 9.

215. The full text of Article IX, § 9 provided:

All city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution and all officers whose offices may hereafter be created by law shall be elected by the people or appointed, as the legislature may direct.

N.Y. CONST. art. IX, § 9 (repealed).

216. "The choice being limited to the candidates receiving an equal and the greatest number of votes, the expressed will of those who have voted is effectuated as nearly as may be." *Matter of Devoe*, 11 A.D.2d at 706 (internal quotation omitted).

proposition that runoffs are part of the election process, yet this still does not explain how the local election process itself is a matter of state concern. Perhaps the court was referring to New York Election Law § 15-126, which mandates runoffs for villages in the State of New York in the event of a tie²¹⁷ (and the candidates in *Matter of Devoe* agreed to forgo)²¹⁸ to demonstrate how the state already mandates runoffs in local elections and that shows this is a matter of state concern. But § 15-126 is a law that applies with equal force to *all* villages within the state — that is, § 15-126 is a general law.²¹⁹ Recall that the state can regulate matters of purely local concern via general law,²²⁰ so this also fails to explain the court's conclusion in *Procaccino*.

The court's reference to Article IX, § 1 of the State Constitution is also unhelpful in deciphering its conclusion. The opinion states that the preamble (§ 1) to Article IX, “[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state,”²²¹ forms the underlying policy of § 6-162. This translates to “adjust[ing] [] the primary election process to better reflect the will of a majority or sizable plurality of voters.”²²² The court does not go on to explain how this relates to the policy underlying Article IX, nor how that underlying policy supports its conclusion.

The opacity of the conclusion that the use of runoffs in three of New York City's primaries involve matters of state concern notwithstanding, the court also fails to address the local election carveout in MHRL § 10.²²³ The carveout states in part that local governments shall have the power to adopt laws relating to “[t]he . . . mode of selection . . . of its officers.”²²⁴ While *Procaccino*

217. N.Y. ELEC. LAW § 15-126 2(b) (2018).

218. *Matter of Devoe*, 11 A.D.2d at 611.

219. See *supra* note 135 and accompanying text.

220. The state legislature “[s]hall have the power to act in relation to the property, affairs or government of any local government only by general law . . .”. N.Y. CONST. art. IX § 2.

221. *Id.* § 1.

222. *Procaccino v. Bd. of Elections of the City of New York*, 73 Misc. 2d 462, 467 (N.Y. Sup. Ct. 1973).

223. N.Y. MUN. HOME RULE LAW art. 2, § 10(1)(i)–(ii)(a)(1) (2018).

224. *Id.* While New York courts have rarely discussed what exactly is encompassed by this phrase, a Court of Appeals case from 1927 described it in the following way when interpreting a predecessor to MHRL: “The term ‘mode of selection’ expresses an intent to allow a city to determine not only that it shall cause its officers either to be elected or appointed but connotes also that a municipality may define the precise method by which either an election or appointment shall be effected.” *Bareham v. City of Rochester*, 158 N.E. 51, 53 (N.Y. 1927).

never squarely addressed this aspect of MHRL, it held that New York City could simply supersede § 6-162 if it so chose.²²⁵ This conclusion overlooked another section of MHRL, § 34, which contains various restrictions on localities' ability to supersede special laws.²²⁶ Specifically, § 34(3)(g) states that “a county charter or charter law *shall not supersede* any general or special law enacted by the legislature . . . [i]n . . . [the] election law.”²²⁷ Thus, MHRL § 34(3)(g) seriously calls into question one of the fundamental justifications motivating the *Procaccino* court's conclusion.

While *Procaccino* provided little justification for its conclusion that § 6-162 involves a matter of state concern, appeared to ignore legislation that explicitly carved out this aspect of local elections as matters of local concern, and appeared to fundamentally misunderstand the preemption effects of a special election law, its ruling was never appealed; both *Procaccino* and § 6-162 remain good law.²²⁸ This area of election law is a symptom of a larger erosion of home rule in New York due to the State concern doctrine.²²⁹ In the context of New York City, the state concern doctrine has grown increasingly broad and has swallowed much of the power that would appear to reside with the City.²³⁰ The erosion of home rule is not

225. *Procaccino*, 73 Misc. 2d at 469.

226. N.Y. MUN. HOME RULE LAW § 34 (2019).

227. *Id.* 34(3)(g) (emphasis added).

228. While *Procaccino* has not received much judicial or scholarly attention since it was decided, when § 6-162 was challenged in federal court as a violation of the Voting Rights Act in *Butts v. City of New York*, the court briefly discussed the ruling in *Procaccino*. The court noted that although “[t]here was no Home Rule request before the enactment of [§ 6-162] . . . the court in *Procaccino* upheld the statute, relying in part on the presumption of constitutionality attached to any legislative enactment.” *Butts v. City of New York*, 614 F. Supp. 1527, 1548 (S.D.N.Y. 1985) (citing *Procaccino* at 465). The court then extensively recounted § 6-162's legislative history, noting that Republican leadership in the State Senate took the position that § 6-162 “was solely a matter affecting the internal affairs of the City of New York.” *Id.* at 1551. Yet, “no Home Rule request had been received from the legislative body of that city, as ordinarily would be thought to be required under the New York Constitution, Article IX, § 2(b).” *Id.*

229. *See Report and Recommendations Concerning Constitutional Home Rule*, N.Y. ST. BAR ASS'N (2016), [https://www.nysba.org/homerulereport/\[https://perma.cc/9G8F-K77X\]](https://www.nysba.org/homerulereport/[https://perma.cc/9G8F-K77X]) (“The State concern doctrine has narrowed the Home Rule clause's guarantee of a modicum of local legislative autonomy. Today, the line between matters of State concern and matters of local concern is increasingly indistinct. Few constraints exist of the Legislature's ability to interfere in local affairs by special law.”).

230. *See, e.g., Greater N.Y. Taxi Ass'n v. State of New York*, 993 N.E.2d 393, 400 (N.Y. 2013) (finding regulation of New York City taxicabs to be matter of state concern); *City of New York v. State of New York*, 730 N.E.2d 920, 926–27 (N.Y. 2000) (finding matter of state concern in easing burden on non-New York City residents

unique to New York — on the national scale, local authority has increasingly been constrained or removed altogether in recent years.²³¹

III. THE PATH OF MOST RESISTANCE: A ROADMAP TO IRV IN NEW YORK CITY

IRV would significantly improve New York City's elections and, at the very minimum, should be implemented to replace existing runoff primary elections. This Part first argues that from a policy perspective, IRV should be adopted by New York City, as well as by other cities and states, because it leads to a fairer, cheaper, and more democratic elections. However, this Part also argues against implementing IRV through the state legislature by amending § 6-162 or via charter revision while § 6-162 remains in effect. Instead, implementing IRV by repealing or striking down § 6-162, *and then* revising the City Charter to implement IRV, is in the best long-term interest of the City.²³²

A. Policy Considerations in Implementing IRV

IRV systems have little downside and considerable upside, and IRV elections have been largely successful where implemented.²³³ In

who commute into City); *Uniformed Firefighters Ass'n v. City of New York*, 405 N.E.2d 679, 680 (N.Y. 1980) (finding residency of New York City employees to be matter of state concern).

231. See Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 964–974 (2019). Professor Davidson attributes much of this to in-state redistricting that locks in partisan advantages that allow a single party to more easily control both houses of a given state legislature and the governorship. *Id.* at 964. When a single party reaches this level of in-state political domination, “[t]here is evidence of a tipping point institutionally with respect to preemption.” *Id.* Professor Davidson concludes:

As a result, states in recent years have sought to constrain or remove local authority across a striking range of policy areas and with increasing vehemence. This wave of preemption reflects a mix of deregulatory libertarianism — particularly focused on employment, the environment, and technology — and social conservatives’ concerns about religious liberty and reducing immigration, forming a shared agenda of reducing local power.

Id. (internal citations omitted); see also Pratheepan Gulasekaram et al., *Anti-Sanctuary and Immigration Localism*, 199 COLUM. L. REV. 837, 848 (2019) (noting how after federal efforts to curtail the power of sanctuary cities (typically cities that refuse to comply with federal immigration initiatives) largely stalled, states housing sanctuary cities have begun curtailing the autonomy of sanctuary cities to comply with the federal government).

232. *Supra* Section II.B.ii.

233. See *supra* notes 94–96 and accompanying text.

New York City, IRV should be implemented if for no other reason than to replace existing runoff primary elections, which have proven to be both expensive and under-inclusive.²³⁴ While voter education initiatives may impose some up-front costs on the City,²³⁵ those costs will be negligible when compared to the money saved by forgoing runoff elections.²³⁶ The criticisms of IRV should not be ignored, however, and local and state governments should pay close attention to the concerns that IRV critics raise.²³⁷ Perhaps the most important of these criticisms is that voter confusion that may occur in IRV systems could disproportionately affect poor communities and communities of color.²³⁸ The City should take this into account when implementing voter education programs to ensure that these communities are adequately included in these programs. The City should also keep a close eye on data from IRV elections in order to evaluate whether its education initiatives are equally effective across the socioeconomic spectrum.

However, the argument for implementing IRV — adequately discussed by experts in the social sciences²³⁹ — is not the primary focus of this Note. Instead, this Note focuses on *how* New York City

234. *Supra* Section I.D.

235. *Supra* notes 81–84 and accompanying text.

236. For a discussion of the costs associated with IRV, see *supra* notes 81–101 and accompanying text. In the state of Massachusetts, the estimated cost of state-wide voter education was \$500,000. Rhode, *supra* note 84. The population of Massachusetts is just under 7 million. See *Massachusetts Population 2019*, WORLD POPULATION REV., <http://worldpopulationreview.com/states/massachusetts-population/> [https://perma.cc/VPZ6-GLJC] (last visited Oct. 14, 2019). The population of New York City, on the other hand, is about 8.5 million. See *New York City, New York Population 2019*, WORLD POPULATION REV., <http://worldpopulationreview.com/us-cities/new-york-city-population/> [https://perma.cc/3AMK-33Y4] (last visited Oct. 14, 2019). While there may be additional factors to consider in this comparison, it is difficult to see how those factors could bring the cost for voter education in New York City anywhere close to the \$13.8 million the 2013 runoff cost the City. See Taylor, *supra* note 104.

237. See *generally supra* notes 104–07 and accompanying text.

238. *Supra* notes 88–90 and accompanying text.

239. See *generally, e.g.*, COREY COOK & DAVID LATTERMAN, RANKED CHOICE VOTING IN THE 2011 SAN FRANCISCO MUNICIPAL ELECTION: FINAL REPORT (2011), https://repository.usfca.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1002&context=mccarthy_fac [https://perma.cc/3UP7-U7ZB]; Jim Anest, *Ranked Choice Voting: A Path Toward a More Integral Politics*, 4 J. INTEGRAL THEORY & PRAC. 3 (2009); Francis Neely et al., *An Assessment of Ranked-Choice Voting in the San Francisco 2004 Election*, PUB. RES. INST. (May 2005), http://archive.fairvote.org/sfrcv/SFSU-PRI_RCV_final_report_June_30.pdf [https://perma.cc/VP6M-FFMK].

should implement IRV. To that end, the remainder of this Part explores various options and makes a recommendation.

B. New York City's Paths to Implementing IRV Under Current State Law

As IRV has gained traction in New York City, there are increased calls to implement IRV for city primaries through a Charter Revision, which would involve having City voters consider the issue on election day.²⁴⁰ Under the current state of the law, the City would need to exclude from the consideration primary elections for mayor, comptroller, and public advocate²⁴¹ — the elections that IRV would most benefit.²⁴² New York City cannot implement IRV for these elections; § 6-162, a “special law” within New York’s Election Law,²⁴³ cannot be superseded by a New York City charter revision, because § 34 of the Municipal Home Rule Law prohibits exactly this.²⁴⁴ The examples provided in Part II, where New York City unilaterally introduced laws concerning campaign finance²⁴⁵ and term limits,²⁴⁶ are distinguishable from the IRV issue in an important way — in both of these cases, the applicable state election law was a *general* law, not a special law like § 6-162.²⁴⁷ As discussed in Part II, a locality like New York City can pass local laws that are *more* restrictive than a state general law.²⁴⁸ As long as the City’s laws do not *permit* what would otherwise be restricted under state law, the City’s laws should not be preempted.²⁴⁹ In the case of IRV, the City could hypothetically pass a law that imposes a runoff where no candidate captures 50% of the total vote, as opposed to 40% like it is now.²⁵⁰ But can this city replace runoffs with an IRV system with a threshold above 40%? This option, among others, is discussed in the next sub-section.

240. *Supra* Section I.E.

241. *Infra* notes 251–55 and accompanying text.

242. *See supra* Section I.D.

243. *See supra* Section II.B.

244. *Supra* notes 226–27 and accompanying text.

245. *Supra* note 121 and accompanying text.

246. *Supra* note 122 and accompanying text.

247. *Supra* notes 140–42 and accompanying text.

248. *See supra* Section II.A.i.

249. *See supra* note 152 and accompanying text.

250. N.Y. ELEC. LAW § 6-162 (2018).

i. A City IRV Statute with a Vote Threshold Greater than Forty Percent

One could argue that, because § 6-162 is only triggered in a primary “when no candidate for the office of mayor, public advocate or comptroller receives 40% or more of the votes cast,”²⁵¹ an IRV statute that required a candidate to obtain any percentage of the vote *greater than* 40% would not be inconsistent with § 6-162. Because § 6-162 does not say *how* that initial primary vote needs to be conducted, it could be argued that the law would not prohibit the use of IRV. In this scenario, where the IRV statute mandated, for example, a 50% vote threshold,²⁵² then after the initial IRV election, a candidate would never have less than 40% of the vote and thus § 6-162 would never apply.

While there may be some merit to this argument, it should ultimately be rejected for a few reasons. First, a plain reading of § 6-162 would suggest that it only authorizes the use of a traditional runoff system for primary elections, not other systems in place of a runoff — such as IRV.²⁵³ Second, this method would essentially render § 6-162 obsolete, which would be contrary to the presumption against ineffectiveness with which statutes should be read.²⁵⁴ Third, while it could be argued that the legislature’s purpose in enacting § 6-162 was to prevent low plurality primary winners,²⁵⁵ and that purpose would not be frustrated by introducing IRV in place of traditional runoffs, IRV was not something the legislature contemplated at the time § 6-162 was drafted. Although this argument may have legislative purpose on its side, other, more widely accepted methods of statutory interpretation weigh against this argument.

Adopting IRV under this understanding of § 6-162 would leave the IRV statute exposed to a possible legal challenge based on the previous points. IRV laws have been challenged on multiple occasions²⁵⁶ and there is no reason to believe the same will not occur

251. *Id.*

252. *See supra* note 59 and accompanying text.

253. “[W]hen no candidate . . . receives forty percent or more of the votes cast . . . [the] city shall conduct a run-off primary election between the two candidates receiving the greatest number of votes for the same office.” N.Y. ELEC. LAW § 6-162 (emphasis added); *see supra* note 201.

254. *See* SCALIA & GARNER, *supra* note 181, at 93–100.

255. *See supra* Section II.B.i.

256. *See, e.g.,* Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011) (Fourteenth Amendment claim against San Francisco’s IRV system); Me. Republican Party v. Dunlap, 324 F. Supp. 3d 202 (D. Me. 2018) (Maine Republicans brought First Amendment freedom of association claim after the state adopted IRV). The First

in New York City. Further, the power to regulate these primary elections would still reside with the state, which could amend § 6-162 in the future in a variety of ways that may be contrary to the desires and interests of New York City. For these reasons, it would be unwise for New York City to proceed in this manner.

ii. Abolishing Primaries to Circumvent § 6-162

Another more plausible argument is that New York City could simply eliminate primary elections in favor of a single, general IRV election for New York City's most important local positions. Section 6-162 is only triggered during a *primary* election,²⁵⁷ but an IRV system could replace the primary system in New York City altogether, thus rendering § 6-162 obsolete. This would be a wise policy choice and New York City would not be the first city to choose to replace its primary system entirely by implementing IRV.²⁵⁸ Indeed, one of the promises of IRV is that it can replace a primary election, saving the expense involved in conducting a separate election prior to a general election.²⁵⁹ Besides eliminating the expense of holding a primary elections — not to mention the costs involved in holding a subsequent runoff election should no candidate reach the 40% threshold — a single IRV election would avoid low-turnout primary elections, thereby involving more of the city's population in the electoral process.²⁶⁰

While there is nothing in the text of § 6-162 that directly contradicts such a maneuver,²⁶¹ there would still likely be a question under this course of action as to whether § 6-162 implicitly requires primary elections for mayor, comptroller, and public advocate. Two of same points mentioned in the previous scenario would also apply here. A reading that the statute does not require primary elections would render § 6-162 obsolete, but at the same time one could argue that

Amendment argument against IRV derives from the series of Supreme Court cases concerning primary election regulations, discussed *supra* note 51. *See, e.g., Dunlap*, 324 F. Supp at 208–13 (discussing the various burdens IRV in primary elections imposes on a party and weighing them against the state regulatory interest in implementing IRV).

257. N.Y. ELEC. LAW § 6-162 (2018) (“when no candidate . . . receives forty percent or more of the votes . . . in a *city-wide primary election*, the board of elections of such city shall conduct a run-off primary election” (emphasis added)).

258. *See supra* note 66 and accompanying text.

259. *Supra* Section I.C.

260. *Supra* Section I.D.

261. *See supra* notes 147–52.

because the statute (or any other state law) does not explicitly require primary elections, a requirement should not be read into the statute.

Legislative intent and purpose are also relevant when considering this argument. It is reasonable to assume that the legislature never contemplated that there would not be a primary election at the time § 6-162 was drafted. In fact, primaries may have been so embedded in the legislature's understanding of how elections should be conducted that it did not believe an explicit requirement would be necessary. In other words, the legislature may have never considered it necessary to write a requirement for primary elections into the statute. As to purpose, replacing primary elections with IRV would likely still be in line with the purpose of § 6-162, which was to avoid low plurality winners. As discussed in Part I, IRV elections can largely prevent vote-splitting among members that leads to the opposing, more unified party's victory — which is the underlying purpose of primary elections.

One additional point worth discussing is whether § 6-162 has the effect of field preempting New York City from eliminating primary elections, or, for that matter, changing its primary elections for mayor, comptroller, public advocate in any manner whatsoever. As previously discussed, the New York State legislature can express its intent to completely occupy a field either expressly or impliedly.²⁶² The text of § 6-162 does not expressly state the legislature's intent to occupy the field of primaries for the three offices mentioned in § 6-162.²⁶³ Where, as is the case in other special laws, the statutory text expressly prohibits the locality from passing any laws in the given field, the legislature has unequivocally expressed intent to occupy that regulatory field.²⁶⁴ The text of § 6-162 contains no such language, so there's little question that there is no express intent by the State to occupy this field.

Nor does there appear to be any implied intention by the legislature to occupy this field.²⁶⁵ The legislative history of § 6-162 indicates that the purpose of § 6-162 was not to restrict New York City's ability to regulate how it conducts its elections.²⁶⁶ Rather, the law was intended to prevent candidates from winning primaries by obtaining a low percentage of the vote in a crowded electoral field.²⁶⁷

262. *See supra* Section II.A.

263. N.Y. ELEC. LAW § 6-162 (2018).

264. *See supra* Section II.A.i.

265. *See supra* notes 155–64.

266. *See supra* Section II.A.i.

267. *See supra* Section II.B.i.

Additionally, the state has never employed any type of regulatory scheme to further this goal.²⁶⁸ For these reasons, it seems clear that New York City is not field preempted by § 6-126.

On balance, it is difficult to say one way or the other whether the elimination of primary elections would be permissible under § 6-162. This uncertainty, however — even if the uncertainty is low — makes this a risky path for the City. An IRV law eliminating primary elections in New York City would be susceptible to a legal challenge and, the state would still retain the ultimate authority to regulate.

Additionally, the elimination of primary elections is a drastic change to the election process that would require considerable adjustment on the part of candidates as well as parties. How party resources would be distributed among multiple party candidates running in the same general election is one of the major issues that comes to mind when discussing this option. While there are likely solutions to these problems and the ultimate elimination of primary elections is a worthy goal, this could perhaps be a case where the City tries to run before it has learned to walk. Small steps, beginning with the implementation of IRV to replace existing primary runoffs, are probably the wisest course of action.

While each of the solutions discussed thus far provides a possible means by which New York City could *unilaterally* implement IRV, the City does not necessarily need to act unilaterally in order to implement IRV.

iii. Amending § 6-162 Via the State Legislature

One of seemingly more obvious solutions to this issue is for the State Legislature to amend § 6-162 in the way previous bills have suggested.²⁶⁹ Although the current legislature in Albany may be more favorable to IRV,²⁷⁰ relying on the legislature is an undesirable solution. First, history has demonstrated that bills attempting to amend § 6-162 have failed to gain enough support to clear both houses of the State Legislature.²⁷¹ Second, while IRV may seem like the best option for the City today, a better system could be introduced in the future, and the City would need to once again go through the State — which may not view the new system favorably — in order to implement this system. Further, while the state political

268. *See supra* note 159 and accompanying text.

269. *See supra* note 115–17.

270. *See supra* notes 23, 118.

271. *See supra* note 117 and accompanying text.

climate may currently be favorable to IRV advocates, that could also change in the future. Most importantly, however, amending § 6-162 would allow the State to retain authority over an aspect of New York City’s elections that should be reserved to the City under New York’s home rule doctrine and the State Constitution.²⁷² The final section of this Note will discuss this issue and propose a path forward.

iv. Challenging § 6-162 as Unconstitutional

Section 6-162 is a clear violation of New York’s Constitution and Municipal Home Rule Law. The initial version of § 6-162 included language that attempted to masquerade a special law as a general law,²⁷³ in that the statute applied to “cities with a population above 1 million.”²⁷⁴ Of course, the legislature knew at the time that the effect of the law was to target only New York City — the only city in the state at the time with a population above one million people.²⁷⁵ This allowed the State to circumvent the procedures required for implementing a special law — namely a request from the locality to do so, something the City never did.²⁷⁶ One question that arises here is why the State Legislature felt the need to avoid naming New York City specifically. If this was so clearly a matter of state concern, it is interesting that the State was reluctant to pass § 6-162 as a facially special law.

The legislature also received significant assistance from the state judiciary when the law was challenged in *Procaccino*,²⁷⁷ where the court’s decision was seriously flawed multiple respects. As an initial matter, the Court’s reasoning that New York City can simply supersede § 6-162 when it sees fit²⁷⁸ is a borderline reckless reading of the law. As the text of § 32 of MHRL make very clear, a locality has no ability to supersede a special law found within the Election Law.²⁷⁹ This understanding of § 32, which only requires a plain reading of the

272. Consider an example in 2002, where the state amended § 6-162 to apply to public advocate instead of the president of the city council. *See supra* notes 198 and accompanying text.

273. *Procaccino v. Bd. of Elections of City of New York*, 73 Misc. 2d 462, 468 (N.Y. Sup. Ct. 1973) (finding § 6-162 to be “a local law masquerading as general”).

274. N.Y. ELEC. LAW § 131-a (1972).

275. *Id.*

276. *Supra* Section II.B.i.

277. 73 Misc. 2d 462.

278. *Supra* Section II.B.ii.

279. *Supra* notes 182–84 and accompanying text.

text free from any interpretive heavy lifting, has since been applied by the New York Court of Appeals with ease.²⁸⁰

Even putting aside this fundamental misunderstanding of special law preemption in the context of election laws, the court still ignores § 10 of MHRL, which makes clear that “the method of appointment” of local officers is a matter of local concern.²⁸¹ While the State certainly has an interest in elections generally,²⁸² MHRL makes clear that *the method of appointment* of strictly local officers is a matter reserved to the locality.²⁸³ In *Procaccino*, the proffered matter of statewide concern accepted by the court is the “adjustment of the primary election process to better reflect the will of a majority or sizable plurality of voters.”²⁸⁴ It is hard to see how this can be a matter of state concern based on New York’s jurisprudence in this area. As discussed earlier, a matter of state concern must “be in a substantial degree a matter of State concern.”²⁸⁵ To substantially relate to a matter of state concern, the matter must “serve a supervening State concern”²⁸⁶ and “relate to life, health, and the quality of life” of the people of New York State.²⁸⁷ There must be a state-wide concern involved that is “supported in the language, structure, or legislative history of the statute.”²⁸⁸ The opinion failed to address any of these elements with reasonable rigor, which is further evidence that *Procaccino* was wrongly decided.

280. See, e.g., *Baldwin Union Free School Dist. v. County of Nassau*, 9 N.E.3d 351 (N.Y. 2014); see also *Monahan v. Murphy*, 71 A.D.2d 92, 94 (1979), *aff’d*, 412 N.E.2d 1326 (1980) (“no county charter or charter law shall supersede the Election Law”); *Mohr v. Giambra*, 7 Misc. 3d 723, 727 (N.Y. Sup. Ct. 2005), *aff’d*, 27 A.D.3d 1185 (2006) (“The provisions of the Election Law . . . cannot be superseded by [county charter]” (citing NY. MUN. HOME RULE LAW § 34(g)(3))).

281. N.Y. MUN. HOME RULE LAW art. 2, § 10(1)(i)-(ii)(a)(1)-(2) (1964).

282. “Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.’” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724 (1974)). Clearly, states governments have an interest in assuring “that elections are operated equitably and efficiently.” *Id.*

283. *Id.*

284. *Procaccino*, 73 Misc. 2d at 467.

285. *Alder v. Deegan*, 167 N.E. 705, 705 (N.Y. 1927) (Cardozo, J., concurring); see also *supra* notes 149–55.

286. *Wambat Realty Corp. v. State of New York*, 362 N.E.2d 581, 584 (N.Y. 1977).

287. *City of New York v. Patrolmen’s Benv. Ass’n of New York, Inc.*, 676 N.E. 2d 847, 852. (N.Y. 1996).

288. *Id.*

First, the legislative history shows that § 6-162 was really the result of state Democrats reacting to an election result they did not like.²⁸⁹ There is also ample evidence that § 6-162 was passed in part because of racist motivations by state Democrats, who believed that Herman Badillo — the first Puerto Rican to run for New York City office and secured 28 of the vote in the 1969 mayoral primary — came too close to winning the Democratic nomination.²⁹⁰ There is nothing in the legislative history of § 6-162 that would suggest that the State Legislature was even remotely considering a statewide interest when it passed § 6-162. Nor does the text of § 6-162 appear to implicate a statewide interest.

Further, the Court fails to explain why, if ensuring primary elections were decided with a larger plurality of the electorate, the legislature chose only to implicate this interest for three primary elections in New York City. If the state was really concerned with protecting this interest, why not enact similar legislation for statewide elections? Indeed, the three aforementioned offices in New York City are the only elections in which the Election Law requires a runoff. It would seem to follow that if this was truly a significant statewide interest, the state would enact similar legislation for gubernatorial elections, as well as for state and federal congressional elections. But no such runoff laws exist, and the Court never asked why.

Ultimately, the holding that primary elections for three officials who serve only the City of New York is a matter of state concern stretches the imagination and begs the question — if the mode of selection in local primary elections for strictly local officers are matters of state concern, what is *not* a matter of state concern? Following this reasoning, the doctrine of home rule becomes a paper-thin shield for New York localities, standing little chance of protecting purely local interests against an increasingly powerful regulatory sword wielded by the State.²⁹¹

For the aforementioned reasons, the case against the constitutionality of § 6-162 is strong. While state lawmakers from New York City who are introducing legislation to amend § 6-162 likely believe they are acting in the best interest of the City, they would be truly acting in the best interest of the City by repealing § 6-162. An alternative option to abolishing § 6-162 is by challenging it in

289. *See supra* Section II.B.i.

290. *See McKay, supra* note 187, at 501; *see also* note 194 and accompanying text.

291. *See supra* note 144.

a court as unconstitutional, where it is difficult to see how a court would agree with the *Procaccino* court's assessment of the law. Either of these options would unambiguously clear the way for New York City to implement IRV through a charter revision. Moreover, it would transfer local electoral power back to the people of New York City, power that was unconstitutionally usurped by the State in the first place.

CONCLUSION

In 1927, the New York Court of Appeals said in *Bareham v. City of Rochester* that “[t]he term ‘mode of selection’ expresses an intent to allow a city to determine not only that it shall cause its officers either to be elected or appointed but connotes also that a municipality may define the precise method by which either an election or appointment shall be effected.”²⁹² This principal perfectly captures the issue underlying the discussion in this Note and makes clear that § 6-162 is incompatible with long-held principles of home rule. For too long, this usurpation of local power to determine the mode of selection by which purely local officers are chosen has gone unchallenged. The IRV conversation in New York City presents both the City and the State with an opportunity to restore the proper dynamic between those areas of regulation reserved to the state and those reserved to localities. While the policy arguments regarding IRV and the elimination of primary elections will further develop as more cities and states experiment with this voting system, what remains clear — the task of evaluating IRV for New York City's elections should reside solely with New York City's citizens.

292. 158 N.E. 51, 53 (N.Y. 1927).