Fair Elections and the Law
for the
State of California

A Project of
FairVote

I. Introduction

This document is intended to educate reformers and elected officials as to the changes necessary for implementing voting reform in their state and community. The reforms advocated are to use IRV (instant runoff voting) for executive offices and full representation (a.k.a. proportional representation) for legislatures, councils, and committees. The reader should be familiar with common voting systems: plurality voting and bloc voting. The reader should also be familiar with fair elections systems: IRV, choice voting (a.k.a. single transferable vote or preference voting), cumulative voting, one-vote (a.k.a. single non-transferable vote or limited voting), and list voting.

While this document is intended to give a legal overview to voting reform, the reader should be cautioned that state statutes and constitutions can be confusing, complex, ambiguous, and subject to more than one interpretation. Further, although the author of this document has attempted a thorough analysis, he may have missed important statutes that would change the analysis herein.

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II. Summary of Findings

- IRV can be implemented for the eight executive offices by modifying state law and without modifying the constitution.

- A constitutional amendment is required to implement any method of full representation for the state legislature because the constitution specifies single-member districts.

- Chartered cities and counties probably can implement IRV for executive offices. Non-chartered cities may implement IRV if it is found to be compatible with the plurality requirement of state law.

- Chartered cities and counties can probably implement any method of full representation for their legislatures and school boards. Non-chartered cities and counties may not implement any method of full representation for their legislatures and school boards.

III. Reformers

The following are known voting reform groups.

- California IRV Coalition (http://www.calirv.org/)

- Californians for Electoral Reform (http://www.fairvoteca.org/)

- Email List (http://groups.yahoo.com/group/InstantRunoffCA/)

In 2003, Assemblywoman Loni Hancock introduced a home rule bill (AB 1039) to allow all cities to implement IRV.

San Francisco approved the use of IRV by referendum in 2002 and IRV may be used for the first time in 2003.

IV. Court Holdings

- <u>People v. Elkus</u>, 59 Cal. App. 396 (1922) – The state appellate court held that choice voting was unconstitutional because voters have a constitutional right to cast a vote for all positions on the city council and choice voting violates this right by giving each voter only one vote. This holding may not apply to cumulative voting and modern versions of choice voting that allow fractional transfers of votes. The state constitutional provision this holding is based on has been repealed, indicating it may no longer be good law. However, provisions that may be interpreted similarly are still a part of the state constitution (Article II, Sections 2, 2.5).

- <u>People v. Butler</u> 252 CA2d Supp 1053, 59 Cal Rprt 924 (1967) - Chartered cities and counties have full power to legislate in regard to municipal affairs unless the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern, the subject matter has been partially covered by general law couched in such terms as to indicate that a paramount state concern will not tolerate further or additional local action, or the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality. Under this holding, elections would likely be characterized as a municipal affair, but there is no specific holding to this effect.

- <u>California Water & Tel. Co. v. Los Angeles County</u> 253 CA2d 16,161 Cal Rpter 618 (1967) - If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, such as a county ordinance, even if the subject were otherwise one properly characterized as a "municipal affair." If a county ordinance conflicts with general law or covers a matter of state-wide rather than strictly local concern, it is void whether or not the general law totally occupies the "field," however that term may be defined. Under this holding, elections would likely be characterized as a municipal affair, but there is no specific holding to this effect.

V. General Provisions

A. Plurality Requirement

- "If the majority vote on the question is to recall, the officer is removed and, if there is a candidate, the candidate who receives a plurality is the successor." Cal. Const. Art. 2 § 15(c) (2005).

- "The person who receives a plurality of the votes cast for any office is elected or nominated to that office in any election, except: (a) An election for which different provision is made by any city or county charter. (b) A municipal election for which different provision is made by the laws under which the city is organized." Cal. Elec. Code § 15452 (2005).

- There are several statutes that state the winner is the person or persons receiving the "highest number of votes." §§ 8140-8143 (non-partisan primaries), § 10263 (city elections), § 10551 (county elections), § 10600 (school boards), § 11385 (recall elections), § 15400 (all elections), § 15451 (primaries), § 15503 (Senator and Representative), § 15505 (presidential electors).

- "A plurality of the votes given at any election shall constitute a choice ... provided that it shall be competent in all charters of cities [or] counties ... to provide the manner in which their respective elective officers may be elected and to prescribe a higher proportion of the vote therefor." Cal. Elec. Code § 15450 (2005).

- A United States citizen 18 years of age and resident in this state may vote. A voter who casts a vote in an election in accordance with the laws of this state shall have that vote counted. Cal. Const. Art. 2 § 2, 2.5 (2005).

- California Voting Rights Act. Cal. Elec. Code § 14025 – 14032(2005)

The constitution specifies a plurality requirement when there is an election after the recall of an officer. In addition, state law contains a plurality requirement for all elections except where a city charter or state law provides otherwise. Whether the plurality requirement is compatible with IRV is not clear. One could argue that the winner of an IRV election has received a plurality after all rounds of counting have been completed. However, a court could interpret this provision as requiring traditional plurality elections.

The language used to describe the process of counting IRV ballots could affect whether IRV is legal. If the process for counting the votes is described as requiring a majority of the vote, then this could be perceived as conflicting with the plurality requirement. However, the process could instead be described in terms of rounds of counting and stopping the count when only two candidates remain. The winner would then be the person having the highest number of votes in the final round. An approach that may pass muster is to have the IRV tally proceed automatically, rather than conditioned on the lack of a majority, reducing to two finalists, with the candidate then having a plurality being elected.

The California Voting Rights Act is effectively congruent to Section 2 of the Federal Voting Rights Act except in its removal of the geographic compactness requirement and its specifying of racial polarization as the sole factor needing to be proved to make a vote dilution claim. The statute appears to allow and even facilitate the use of proportional representation systems as remedies. However, it has recently been ruled facially unconstitutional by a Superior Court in Stanislaus County with an appeal pending.

B. Voting Machines
- "No voting system, in whole or in part, shall be used unless it has received the approval of the Secretary of

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         State, prior to any election at which it is to be first
         used."  Cal. Elec. Code § 19201 (2005).
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If a local government needs to purchase voting equipment to implement their desired voting system, they can do so with the approval of the Secretary of State.

VI. State Government

A. Executive Offices

There are eight executive offices elected every four years: Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer, Insurance Commissioner, and Superintendent of Public Instruction. The first six are specified in the constitution and the last two are specified in state law.

IRV can be implemented for the eight executive offices by modifying state law and without modifying the constitution. Legislation defining the implementation of IRV would have to be enacted and the plurality requirement of state law may also need to be changed.

B. Legislature

The Senate consists of 40 Senators elected from single-member districts. Half the senate is elected every two years to four-year terms by plurality vote. The Assembly consists of 80 Assemblypersons elected from single-member districts every two years by plurality vote.

- "The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years." Cal. Const. Art. IV § 2(a) (2005).

- "The Assembly has a membership of 80 members elected for 2-year terms." Cal. Const. Art. IV § 2(a) (2005).

- "For the purpose of choosing members of the Legislature, the State shall be divided into 40 Senatorial and 80 Assembly districts to be called Senatorial and Assembly Districts." Cal. Const. Art. IV § 6 (2005).

To implement any system of full representation, the constitution needs to be changed to allow for multi-member districts. Thus, the strategy in proposing a method of full representation to be implemented should be based on the merits of the system and the likelihood of success rather than on statutory considerations.

VII. Local Government

A. County Government

- "County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith." Cal. Const. Art. 11 § 3(a) (2005).

- "County charters shall provide for ... [a] governing body of 5 or more members, elected (1) by district or, (2) at large, or (3) at large, with a requirement that they reside in a district." Cal. Const. Art. 11 § 4(a) (2005).

- "County charters shall provide for ... [a]n elected sheriff, an elected district attorney, an elected assessor, other officers, their election or appointment, compensation, terms and removal." Cal. Const. Art. 11 § 4(c) (2005).

- County boards of supervisors consist of five members elected every two years to staggered terms of four years. Cal. Gov. Code § 25000(a) (2005).

- Supervisors must be elected by district unless they have been elected at large since 1907. Cal. Gov. Code § 25040 (2005).

- County executive offices include treasurer, county clerk, auditor, sheriff, tax collector, district attorney, recorder, assessor, public administrator, and coroner. The sheriff, district attorney, and assessor must be elected and the others may be elected or appointed. See Cal. Gov. Code § 24009 (2005).

The ability of a county government to implement fair representation voting systems depends on whether the county has a charter. While all laws must comply with the constitution, chartered counties can pass laws that supersede state law. However, county charters cannot regulate non-municipal affairs (see court holdings above). Elections would probably be characterized as municipal affairs, but there is no specific holding to this effect. Counties without a charter must comply with state law.

Chartered counties can implement IRV for county executive offices as there are no constitutional barriers. Chartered counties must have a board of at least five members and can probably use any method of full representation to elect the board. In 1922, a state appellate court in People v. Elkus found that choice voting violated the constitution, but as explained above this is probably not good law today.

Non-chartered counties must comply with the plurality requirement of state law. If IRV is compatible with the plurality requirement then a county can implement IRV to elect executive offices. Otherwise, a county would have to enact a charter to implement IRV. A non-chartered county may elect their supervisors at large if they have done so since 1907. But I believe all counties currently elect their supervisors from districts, so a county must enact a charter before it can use multi-member districts and implement any method of full representation.

B. City Government

- '"City" includes "city and county" and "incorporated town," but does not include "unincorporated town" or "village."' Cal. Gov. Code § 20 (2005).

- "City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." Cal. Const. Art. 11 § 5 (2005).

- Cities will be governed by a city council of at least five members, a city clerk, a city treasurer, a chief of police, and a fire chief. Cal. Gov. Code § 36501 (2005).

- The mayor can be elected by the voters or by and from the city council. Cal. Gov. Code § 36801 (2005). Cal. Gov. Code § 34871 (2005).

- The city council may consist of: (a) four, six, or eight members and an elected mayor, or (b) five, seven, or nine members without an elected mayor. The members must be elected by districts or from districts. Cal. Gov. Code § 34871 (2005).

Similar to counties, a city can be chartered or non-chartered. A chartered city may pass laws that supersede state laws with regards to municipal affairs. The conduct and manner of city elections would likely be characterized as municipal affairs, but there is no specific holding to this effect (see court holdings above). Non-chartered cities must comply with state law.

Chartered cities can implement IRV for executive offices as there are no constitutional barriers. Chartered cities can probably use any method of full representation to elect the city council. In 1922, a state appellate court in People v. Elkus found that choice voting violated the constitution, but as explained above this is probably not good law today.

Non-chartered cities must comply with the plurality requirement of state law. If IRV is compatible with the plurality requirement then a city can implement IRV to elect executive offices. Otherwise, a city would have to enact a charter to implement IRV. A non-chartered city must elect its city council by or from single-member districts. A city must enact a charter before it can use multi-member districts and implement any method of full representation.

C. School Boards

- "When one member of the governing board of a school district ... is to be elected, the candidate receiving the highest number of votes shall be elected. When two or more members are to be elected, the two or more candidates receiving the highest number of votes shall be elected. Each voter may vote for as many candidates as there are members to be elected." Cal. Elec. Code § 10600 (2005).

- School board elections are to be held biennially. Cal. Educ. Code § 5000 (2005).

- Terms of office are four years. Cal. Educ. Code § 5017 (2005).

- Elections can be at-large, by districts, or from districts. Cal. Educ. Code § 5030 (2005).
- Chartered cities and counties may override state law regarding school board elections. Cal. Educ. Code § 5200 (2005).

Chartered cities and counties may also pass laws that supersede state laws with regards to school board elections. Non-chartered cities and counties must conform to state law.

Chartered cities and counties can probably use any method of full representation to elect school boards. In 1922, a state appellate court in People v. Elkus found that choice voting violated the constitution, but as explained above this is probably not good law today.

Non-chartered cities and counties may elect their school boards at large. However, since each voter may vote for as many candidates as there are members to be elected, this would preclude most forms of full representation. It is possible that cumulative voting would be compatible with this provision.

VIII. Judges

- Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Cal. Const. Art. 6 § 16 (2005).

- Judges of superior courts shall be elected in their counties at general elections except as otherwise necessary to meet the requirements of federal law. In the latter case the Legislature, by two-thirds vote of the membership of each house thereof, with the advice of judges within the affected court, may provide for their election by the system prescribed in subdivision (d), or by any other arrangement. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.
  - (d)(1) Within 30 days before August 16 preceding the expiration of the judge's term, a judge of the Supreme Court or a court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor before September 16 shall nominate a candidate. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected.
    - Electors of a county, by majority of those voting and in a manner the Legislature shall provide,

may make this system of selection applicable to judges of superior courts. Cal. Const. Art. 6 § 16 (2005).

- The voters of any county may adopt subdivision (d) of Section 16 of Article VI of the Constitution of this state as applicable to the judge of the superior court of the county if a majority of the voters of the county, voting on the question of its adoption, vote in favor thereof. Elec. Code § 8220 (2005).

- In any election at which two or more judges or justices of any court are to be voted for or elected for the same term, it shall be deemed that there are as many separate judicial offices to be filled as there are judges or justices of the court to be elected. Each separate office shall be designated by a distinguishing number not greater than the total number of the offices. The designation shall remain the same for all purposes of both primary and general election and shall be used on all nomination papers, certificates of nomination, ballots, certificates of election, and all election papers referring to the office. After election and the issuance of the certificates of election, the designating number shall have no further significance. Elec. Code § 8200 (2005).

IRV can probably be implemented for election of judges to the State Supreme Court, Court of Appeals, and Superior Courts by modifying state law and without modifying the constitution. Legislation defining the implementation of IRV would have to be enacted and the plurality requirement of state law may also need to be changed. Counties themselves do not appear to have the power to implement any other system beside that laid out in Subdivision (d) through majority vote Superior Court judges.

This document was created by Jeff O'Neill. Jeff is a student of the Class of 2005 at Cornell Law School and was a legal intern with the Center for Voting and Democracy in the summer of 2003. You can reach Jeff by email at jco8@cornell.edu.

This document was updated by Leo Goldbard. Leo is a student of the Class of 2007 at Yale Law School and was a legal intern with FairVote in the summer of 2005. You can reach Leo by email at leo.goldbard@yale.edu.