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Georgia's Runoff Election System Has Run Its Course

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GEORGIA'S RUNOFF ELECTION SYSTEM HAS RUN ITS COURSE

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Georgia requires candidates to earn a majority of votes in their party's primary to win elected office. The majority-vote requirement—passed by the General Assembly in 1964—is stained by racially-fraught politics of the era, and even its alleged "good government" goals are now antiquated. This Note explores the history of Georgia's majority-vote requirement, examines two legal challenges to the law, and analyzes its flaws and virtues. Finally, this Note demonstrates that more appealing alternatives to the majority-vote requirement exist and recommends that Georgia replace its current runoff election system with either ranked choice voting or a forty-percent threshold-vote requirement.

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I. INTRODUCTION

On May 22, 2018, over 600,000 Georgia voters participated in the Republican gubernatorial primary election.[1] Before casting their ballots, these voters had an opportunity to observe televised debates, view various campaign advertisements,[2] thumb through literature on the leading candidates, and speak with family, friends, and fellow voters about the upcoming election. Yet because of Georgia law, the selection process for the Republican gubernatorial nominee did not end on primary election day.[3] Instead, since no candidate captured more than fifty percent of votes cast, voters were subjected to nine more weeks of campaigning.[4] The weeks between the initial election and the primary runoff on July 24 included charges of incompetence,[5] leaked private conversations,[6] and a

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[1] In total, 438,574 votes (plus 808 provisional votes) were cast in person for the GOP governor's race. An additional 153,264 votes were cast in person during an early voting period, and 14,795 votes were cast by mail. *See* Current and Past Election Results, GA. SECRETARY ST., http://sos.ga.gov/index.php/Elections/current_and_past_elections_results (last visited Jan. 7, 2020).

[2] Several of then-Secretary of State Brian Kemp's video advertisements drew national attention. Most notably, one of Kemp's advertisements featured the candidate pointing a gun in the direction of a teenage boy who wanted to date his daughter. *See* Alix Langone, *This Republican Politician Jokingly Threatens a Teen with a Gun in His New Campaign Ad*, TIME (May 2, 2018), http://time.com/5262988/brian-kemp-campaign-ad-gun-teen/. Not to be outdone, State Senator Michael Williams drove a "deportation bus" across the state to promote his immigration plan. *See* Jessica Estepa, *Georgia Gubernatorial Candidate Goes on Campaign Tour with His 'Deportation Bus,'* USA TODAY (May 15, 2018, 3:58 PM), https://www.usatoday.com/story/news/politics/onpolitics/2018/05/15/michael-williams-candidate-georgia-governor-has-deportation-bus/612066002/.

[3] *See* O.C.G.A. § 21-2-501(a) (2017) (requiring candidates to receive a majority of votes cast to win an election and providing for a nine-week period before a runoff election if majority is not attained).

[4] *See* Ben Nadler, *GOP Candidates for Georgia Governor Ready for Runoff*, AP NEWS (May 23, 2018), https://www.apnews.com/817f838f726a47b19cbacc1f94bca544 (previewing the runoff election between Casey Cagle and Brian Kemp).

[5] *See Republican Governor Hopefuls Squabble over Runoff Calendar*, AP NEWS (June 5, 2018), https://apnews.com/c5af00f5cbe84581826310a7ddbb0766 ("'For all the voters horrified at the thought of nine more weeks of politics, you can thank [Secretary of State] Brian Kemp's office for bungling the federal court case that forced these long runoffs on the state,' said [Kemp's runoff opponent Casey] Cagle . . . .").

[6] *See* Richard Belcher & Greg Bluestein, *Secret Recording: Cagle Says He Backed Controversial Bill for 'Politics,' Not 'Policy'*, WSB-TV (June 7, 2018, 7:22 PM), https://www.wsbtv.com/news/2-investigates/secret-recording-cagle-says-he-backed-controversial-bill-for-politics-not-policy/764972739 (describing a secretly-recorded conversation in which candidate Cagle supported an education bill that he admitted was poor policy in order to prevent a primary opponent from receiving $3 million).

last-minute presidential tweet-dorsement.[7] The sixty-three extra days on the trail also launched the race into the record books for costliest gubernatorial campaign in state history—before the general election campaign had even begun.[8] Then, after the runoff dust settled, the more ideological candidate who trailed the establishment-friendly front-runner by fifteen percent of the vote on May 22 won the GOP nomination by a staggering thirty-nine percent.[9]

Since 1964, Georgia has required candidates to earn a majority of votes in their party's primary to win elected office.[10] If no candidate surpasses the fifty percent mark, the top two vote-getters face each other in a runoff election.[11] While Georgia is now one of only a handful of states to maintain such a rule in its elections,[12] the state has stubbornly stood by its majority-vote requirement amidst legal challenges and grueling, lengthy campaigns stretching through the hot Georgia summers. Costly, ugly, and flip[13] elections like the 2018 GOP governor's race raise the inevitable question—

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[7] *See* Alexander Burns, *Trump Endorses Brian Kemp over Casey Cagle in Georgia Governor's Race*, N.Y. TIMES (July 18, 2018), https://www.nytimes.com/2018/07/18/us/politics/trump-brian-kemp-georgia.html (discussing President Trump's endorsement of Brian Kemp by way of Trump's Twitter account).

[8] *See* Greg Bluestein & James Salzer, *The Georgia Race for Governor Sets a Spending Record with Months to Go*, ATLANTA J. CONST. (July 10, 2018, 2:53 PM), https://politics.myajc.com/news/state--regional-govt--politics/the-georgia-race-for-governor-sets-spending-record-with-months/7emQe4YHTXM5TSyloiJCUO/ (totaling the candidates' fundraising hauls at approximately $33 million by summer, clearing the $30 million mark from previous cycles).

[9] *See* Scott Neuman, *Trump-Endorsed Brian Kemp Easily Wins GOP Runoff for Georgia Governor*, NPR (July 25, 2018, 6:51 AM), https://www.npr.org/2018/07/25/632179601/trump-endorsed-brian-kemp-easily-wins-gop-runoff-for-georgia-governor ("Georgia's Trump-Pence endorsed Secretary of State Brian Kemp has won a run-off election against . . . Cagle, who . . . was the favorite of the state's Republican establishment.").

[10] Georgia's majority-vote requirement passed during the 1964 special session of the state legislature. *See* O.C.G.A. § 21-2-501 (2017) (originally enacted as Code 1933 § 34-1513 by Ga. L. 1964, Ex. Sess., p. 26 § 1). Before 1964, most counties used a plurality-vote system where the candidate who received the most votes won the election. *See* LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 93 (2003).

[11] *See* O.C.G.A. § 21-2-501(a) (2017) ("In instances where no candidate receives a majority of the votes cast, a run-off primary . . . between the candidates receiving the two highest numbers of votes shall be held.").

[12] *See Primary Runoffs*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx (last visited Jan. 7, 2020) (describing the six other majority-vote requirements in Alabama, Arkansas, Mississippi, Oklahoma, South Carolina, and Texas).

[13] "Flip" in the election context refers to a sequence of two elections in which the candidate who wins the most votes in the initial election loses in a runoff election. *See, e.g.*, Brooks v. Miller, 158 F.3d 1230, 1235 (11th Cir. 1998).

why does Georgia continue to require a majority vote to win an election?

Other questions, with unsatisfactory answers, follow. What motivated Georgia's move to a majority-vote requirement in 1964? Accounts differ, with proponents suggesting "good government" policies and opponents arguing racial discrimination.[14] Why must Georgia voters often wait nine weeks after the initial primary before voting in the runoff election?[15] Because a court held that Georgia had been violating federal law by not giving overseas voters sufficient time to vote in runoffs.[16] These frustrating answers may lead readers to ask about alternative systems other states use for their primary elections. And ultimately, what system makes the most sense for Georgia's future elections?

This Note proceeds in five subsequent parts. Part II provides historical context for Georgia's majority-vote requirement. Part III examines two court challenges to Georgia's election system: one in which Georgia's majority-vote requirement was held constitutional and not violative of § 2 of the Voting Rights Act; the other in which a federal court required Georgia to hold certain runoff elections at least forty-five days after the initial elections. Part IV details the flaws and virtues of a majority-vote requirement in primary elections. Part V discusses alternatives to Georgia's majority-vote requirement and analyzes how attractive each alternative election system may be to Georgia. Finally, Part VI recommends that Georgia replace its majority-vote requirement with either a forty-percent threshold-vote system or a ranked choice voting system.

This Note does not directly address the majority-vote requirement in Georgia's general elections,[17] largely for practical reasons. General election runoffs are less likely to occur than

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[14] *See infra* Part II.

[15] For an explanation of why some non-federal runoffs can take place sooner than nine weeks after the initial election, see *infra* notes 103–04 and accompanying text.

[16] *See infra* Section III.B.

[17] General elections refer to the final stage in the electoral process when voters choose which candidate will assume public office. *General Election*, BALLOTPEDIA, https://ballotpedia.org/General_election (last visited Apr. 7, 2020). Primary elections refer to the process for choosing a candidate to represent a political party in the general election. *See Primary Election*, BALLOTPEDIA, https://ballotpedia.org/Primary_election (last visited Apr. 7, 2020).

primary runoffs because of Georgia's strong two-party system.[18] Whereas primary elections in Georgia consist of as many candidates who choose to pay a filing fee and meet the other necessary qualifications for office,[19] general elections consist only of party nominees and write-in candidates,[20] essentially making the race to clear fifty percent of the vote a two-person competition.[21] Additionally, majority-vote requirement litigation has centered around primary, not general, elections.[22] Still, many of the policy rationales for alternate election systems are also persuasive in the general election context. For example, that avoiding a runoff election saves administrative and candidate costs applies to both primary and general elections.[23] So, while this Note's policy recommendations stay clear of explicitly advocating for a change to the majority-vote requirement in Georgia's general elections, the argument for eliminating the majority-vote rule in primary elections bolsters the case for the same in general elections.

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[18] Third-party candidates rarely disturb the dominance of Georgia's Republican and Democratic parties. The greatest vote share any third-party candidate received for a statewide race in Georgia's 2018 general elections was 2.67 percent (Ryan Graham, Libertarian Candidate for District 3 of the Public Service Commission). *See* Current and Past Election Results, *supra* note 1. And, all of the 236 State House and Senate seats during the 2017–2018 legislative session were held by members of either the Democratic or Republican parties. *See Representatives*, GA. HOUSE REPRESENTATIVES, http://www.house.ga.gov/Representatives/en-US/HouseMembersList.aspx (last visited Jan. 7, 2020); *Senators*, GA. ST. SENATE, http://www.senate.ga.gov/senators/en-US/SenateMembersList.aspx (last visited Jan. 7, 2020).

[19] *See* O.C.G.A. § 21-2-153(a)–(b) (2014).

[20] *See id.* § 21-2-130 (describing how candidates can qualify for general elections); *see also id.* § 21-2-373 (allowing electors to cast write-in votes).

[21] As seen in two 2018 general election races, however, a third-party candidate can trigger a runoff when the two leading candidates both earn vote totals just short of a majority. Libertarian Smythe Duval (2.23 percent) forced Republican Brad Raffensperger (49.09 percent) and Democrat John Barrow (48.67 percent) into a runoff in the Secretary of State race, and Libertarian Ryan Graham (2.67 percent) forced Republican Chuck Eaton (49.70 percent) and Democrat Lindy Miller (47.63 percent) into a runoff in the District 3 Public Service Commission race. *See* Current and Past Election Results, *supra* note 1.

[22] The two cases analyzed in Part III—*Brooks v. Miller* and *United States v. Georgia*—dealt with challenges to the majority-vote requirement for Georgia's primary elections. Majority-vote requirement cases in other states also challenged the requirement with respect to primary elections. *See, e.g.*, Whitfield v. Democratic Party of Ark., 890 F.2d 1423, 1433 (8th Cir. 1989) (holding that an Arkansas statute violated the Voting Rights Act for requiring runoffs in primary elections when a candidate did not receive the majority of the vote); Butts v. City of New York, 779 F.2d 141, 151 (2d Cir. 1985) (upholding a New York statute requiring a run-off election in city primaries if no party candidate receives more than forty percent of the vote).

[23] *See infra* Part IV.

II. HISTORY OF GEORGIA'S MAJORITY-VOTE REQUIREMENT

In the aftermath of the Civil War, the Civil War-era Amendments,[24] and Reconstruction, southern states systematically scaled back many of the rights that African Americans had just won.[25] The discriminatory laws passed during that period came to be known as Jim Crow laws.[26] Although the Fifteenth Amendment expressly prohibits states from denying or abridging the right to vote on account of race, Jim Crow policies drastically curbed African Americans' ability to vote through the use of denial practices such as literacy tests,[27] grandfather clauses,[28] and white primaries.[29] Southern states also enacted measures such as at-large elections,[30]

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[24] Ratified in 1865, the Thirteenth Amendment abolished slavery. U.S. CONST. amend. XIII. Ratified in 1868, the Fourteenth Amendment granted, among other rights, citizenship to "[a]ll persons born or naturalized in the United States" and ensured that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. And ratified in 1870, the Fifteenth Amendment prohibited states from denying or abridging the right to vote on account of race. U.S. CONST. amend. XV.

[25] *See* MCDONALD, *supra* note 10, at 15–44 (describing how the State of Georgia fits within the larger narrative of the South's push to revive the disenfranchisement of African Americans).

[26] *See Jim Crow Laws*, NAT'L PARK SERV., https://www.nps.gov/malu/learn/education/jim_crow_laws.htm (last visited Jan. 7, 2020).

[27] Literacy tests were devices used to examine the education of individual voters. Because they were administered in a discriminatory manner, however, by the early 1960s literacy tests became the most important devices used to restrict voting by African Americans in the South. *See* ELECTION LAW: CASES AND MATERIALS 36 (Daniel H. Lowenstein et al. eds., 6th ed. 2017) [hereinafter ELECTION LAW].

[28] Grandfather clauses served as "escape provisions" for literacy tests by waiving the tests for persons who were eligible to vote (or whose ancestors were eligible to vote) on a date prior to the initial enfranchisement of African Americans. *See id.*

[29] White primaries barred African American participation in party elections. Because the Democratic Party primaries were tantamount to the general election in historically one-party southern states, white primaries effectively denied African American voters the opportunity to participate in elections. *See id.* at 554.

[30] At-large elections are elections in which candidates run jurisdiction-wide, as opposed to running in a single district within a jurisdiction. *See Cities 101—At-Large and District Elections*, NAT'L LEAGUE CITIES, https://www.nlc.org/resource/cities-101-at-large-and-district-elections (last visited Jan. 7, 2020). At-large elections can prevent geographically compact minority populations who have the voting power to elect their preferred candidates in single-district elections from succeeding in jurisdiction-wide elections where, by definition, they do not comprise the majority of the electorate. *Id.*

multi-member districts,[31] and majority-vote requirements[32] that diluted the effect of African Americans' votes.

The State of Georgia in the pre-Civil Rights era was no stranger to discriminatory election laws. At varying points in its history, Georgia charged poll taxes,[33] conducted literacy tests, held white primaries, and established multi-member districts (among other vote denial and dilution policies).[34] In fact, Georgia's Election Code played a starring role in the Warren Court's jurisprudential shift toward striking down racially discriminatory voting laws.[35] In *Gray v. Sanders*, the U.S. Supreme Court held that Georgia's county unit system for tabulating votes in statewide primary elections violated the Fourteenth Amendment's Equal Protection Clause by giving unequal voting power to residents in rural, underpopulated, white-dominated counties.[36] Under Georgia's statewide primary system pre-*Gray*, Georgia's 159 counties were each assigned unit votes and the candidate who received the most popular votes in a county received all of that county's unit votes.[37] While the thirty-eight most populous counties each had marginally more unit

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[31] Multi-member districts are districts that elect two or more members to a legislative chamber. *See* Whitcomb v. Chavis, 403 U.S. 124, 127–28 (1971). Similar to at-large elections, multi-member districts encompassing wide swaths of the population can prevent an otherwise capable minority group from electing their candidate of choice. *See* White v. Regester, 412 U.S. 755, 769 (1973) (affirming the district court's finding that multi-member state house districts in two Texas counties discriminated against minority voters).

[32] The topic of this Note, majority-vote rules require a candidate to win at least half of votes cast in an initial election to avoid a runoff election. *See supra* note 3 and accompanying text. Thus, even if a majority of the electorate splits its vote among several candidates so that a candidate supported by the minority wins a plurality of votes in the initial election, the majority can regroup in the runoff and defeat the minority-supported candidate. When amending § 2 of the Voting Rights Act in 1982, the U.S. Senate explicitly noted the minority vote dilution effects of majority-vote requirements. *See* S. REP. NO. 94-417, at 38 (1982). Additionally, the U.S. Supreme Court has found that a majority-vote requirement can "permanently foreclose a black candidate from being elected." City of Port Arthur v. United States, 459 U.S. 159, 167 (1982).

[33] Poll taxes required voters to pay a fee (or even unpaid taxes from previous years) before casting a ballot. *See* ELECTION LAW, s*upra* note 27, at 36. Georgia pioneered the poll tax among former states of the Confederacy as a device to disenfranchise impoverished African American voters. *Id*. But the Twenty-Fourth Amendment to the U.S. Constitution, ratified in 1964, banned poll taxes in federal elections. Further, in 1966, the U.S. Supreme Court ruled that the use of a poll tax in any election violated the Fourteenth Amendment's Equal Protection Clause. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).

[34] *See* MCDONALD, *supra* note 10, at 15–44.

[35] For background on the many Warren-era cases, particularly in the 1960s, that recognized constitutional voting rights claims, see ELECTION LAW, *supra* note 27, at 52–95.

[36] 372 U.S. 368, 379 (1963).

[37] *Id*. at 371.

votes than the less populous counties,[38] the county-unit practice still systematically degraded the votes of urban county-dwellers. For example, in 1950, each vote outside Fulton County—Georgia's most populous county—averaged eleven times the weight of a Fulton County vote.[39]

In *Wesberry v. Sanders*, the Court struck down Georgia's congressional districting framework for violating Article I, Section 2 of the U.S. Constitution.[40] Under the invalidated congressional map, the least populous district only had around one-third of the population of the most populous district.[41] Article I, Section 2 requires members of the U.S. House of Representatives to be chosen "by the People of the several States,"[42] and the Court ruled that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[43]

Against this backdrop, in 1962, Carl Sanders was elected Governor of Georgia.[44] At the time, Governor Sanders was considered a racial moderate.[45] Shortly after taking office, he assembled the Election Laws Study Committee (ELSC),[46] and by 1964, the ELSC recommended the adoption of several voting reform

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[38] *Id.* at 371 n.1 (quoting GA. CONST. of 1945, art. III, § III, para. 1).

[39] In an extreme case, a vote in one Georgia county was worth 120 times that of a vote in Fulton County. *See* South v. Peters, 339 U.S. 276, 278 (1950) (Douglas, J., dissenting).

[40] 376 U.S. 1, 4 (1964).

[41] *See id.* at 8 (noting that Georgia's "thinly populated" Ninth Congressional District could be weighted at two or three times the value of the more populous Atlanta-based Fifth Congressional District).

[42] U.S. CONST. art. I, § 2, cl. 1.

[43] *Wesberry*, 376 U.S. at 7–8.

[44] *See Carl Sanders (1925–2014)*, NEW GA. ENCYCLOPEDIA (July 13, 2018), https://www.georgiaencyclopedia.org/articles/government-politics/carl-sanders-b-1925 (noting Sanders's defeat of Marvin Griffin, a former governor and "arch-segregationist").

[45] *See id.* (noting Sanders, unlike his predecessors, cooperated with the federal government in complying with new civil rights laws). Still, "moderate" is a relative term. The Sanders campaign's platform plank on segregation pledged "a continued legal fight to maintain segregation," and during his tenure as President Pro Tempore of the Georgia Senate, Sanders sponsored several anti-integration bills. *See* MCDONALD, *supra* note 10, at 85, 203–04. Ellis Arnall, another former governor viewed by history as relatively progressive on racial issues, perhaps encapsulated the racial dogma of the era best when he quipped, "Hell . . . if I had defied Southern [racial] orthodoxy, I wouldn't have been elected door keeper." *Id.* at 85.

[46] The ELSC that Governor Sanders established in 1963 was the third iteration of the committee. *See* Brooks v. Miller, 158 F.3d 1230, 1234 (11th Cir. 1998) (recounting the history of the 1957 and 1961 committees and the creation of the third ELSC in 1963). The prior two ELSCs dissolved without producing any comprehensive election reform measures. *See id.*

measures, including a majority-vote requirement for primary elections.[47]

Some supporters of the recommended majority-vote requirement had "good government" motives. These motives included reducing the power of courthouse crowds and eliminating the manipulative uses of "stalking horses" and "dummy candidates." Courthouse crowds were groups, particularly in rural counties, who controlled local elections and often manipulated election practices to maintain their power.[48] The practice of "stalking horses" refers to a strategy used in plurality-voting systems in which a "dummy candidate" was entered in an election in order to split the opposition vote and assure victory for courthouse crowd candidates.[49] For example, opponents of Carl *E.* Sanders (the governor) could place a Carl *F.* Sanders on the ballot to confuse legitimate Sanders supporters into voting for the wrong candidate. Voters, unaware who the "real" Carl Sanders was, would then have to blindly vote for "E" or "F," allowing a candidate supported by the local political machine to divide the Sanders vote and conquer the otherwise more popular candidate.[50]

Other majority-vote requirement proponents were instead motivated by racial animus. In 1963, Representative Denmark Groover championed a statewide majority-vote rule to restore the "protection" that rural white voters lost with the invalidation of the county unit system in *Gray v. Sanders*[51] and to prevent "bloc groups" from electing candidates to office.[52] Groover's racially-motivated majority-vote bill passed the Georgia House by a decisive 133–41 margin, but stalled in a Senate committee and failed to receive a floor vote before the 1963 legislative session expired.[53] James MacKay, a member of the Georgia House in 1963 and later a U.S. Congressman, would state in a court filing, "I do not think that the

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[47] *See id.* (noting that the General Assembly adopted most of the recommendations, including the majority-vote requirement). However, other measures recommended by the ELSC included a literacy requirement, a voter understanding test, and a provision prohibiting assistance in voting except in cases of physical disability. *See* MCDONALD, *supra* note 10, at 99 (calling these measures "an impressive array of discriminatory voting practices").

[48] *See Brooks*, 158 F.3d at 1233.

[49] *Id.* at 1234.

[50] *Id.* In fact, Sanders had initially entered the 1962 race for Lieutenant Governor against Peter Zack Geer, but then withdrew from that campaign after he learned of Geer's plan to enter a dummy candidate to confuse voters. *Id.*

[51] MCDONALD, *supra* note 10, at 92 (quoting VALDOSTA DAILY TIMES, Feb. 21, 1963).

[52] The "bloc" vote was a euphemism for the African American vote. *Id.*

[53] *Id.* at 93–94.

statewide majority vote requirement would have been passed had [House] members not been convinced of the racially discriminatory potential of the runoff system."[54]

Yet when the General Assembly—the state's legislature—convened in the early summer of 1964, the requirement passed comfortably through both chambers of the legislature.[55] It was then signed into law by Governor Sanders and remains codified in Georgia's Election Code at O.C.G.A. § 21-2-501(a)(1).[56]

III. PAST CHALLENGES TO GEORGIA'S PRIMARY RUNOFF SYSTEM

A. *BROOKS* CHALLENGE

In the years following the landmark Voting Rights Act of 1965,[57] majority-vote requirements attracted the attention of critics who argued that the requirements harmed African American voters' ability to elect candidates of their choice.[58] These arguments eventually made their way into courtrooms across the country.[59] In

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[54] *Id.* at 205 (quoting Plaintiff's Exhibit 308 at 3–4, Brooks v. Miller, 158 F.3d 1230 (11th Cir. 1998)).

[55] Senate Bill 1, the Election Code reform package, passed the upper chamber by a unanimous 47–0 vote on June 22, 1964. *See* Journal of the Senate of the State of Georgia, 1964 Ex. Sess., 744. The House approved the bill the next day by a 150–27 vote margin. *See* Journal of the House of Representatives of the State of Georgia, 1964 Ex. Sess., 1088.

[56] Runoff elections are also now provided for in the Georgia Constitution. *See* GA. CONST. art. II, § II, para. II.

[57] The Voting Rights Act of 1965 is currently codified as 52 U.S.C. § 10101 *et seq.* The legislation's 1965 passage followed a violent, decades-long struggle, encapsulated earlier that year by the "Bloody Sunday" march in Selma, Alabama, to secure African American enfranchisement as guaranteed by the Fifteenth Amendment. *See generally* MCDONALD, *supra* note 10, at 8–14. Among its key provisions, § 2 restated the Fifteenth Amendment's prohibition on race discrimination in voting, § 5 required covered jurisdictions to obtain "preclearance" of any new voting rules or practices, and § 4 established the coverage formula used in § 5 and prohibited discriminatory voting tests and devices in covered jurisdictions. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); *see also* ELECTION LAW, *supra* note 27, at 424–44 (explaining federal statutes' effect on voting rights).

[58] Generally, these critics asserted that majority-vote requirements were created to stifle African American political influence, and that they dilute the strength of minority voters in violation of § 2 of the Voting Rights Act. *See, e.g.*, Gregory G. Ballard, Note, *Application of Section 2 of the Voting Rights Act to Runoff Primary Election Laws*, 91 COLUM. L. REV. 1127 (1991); William Simpson, *The Primary Runoff: Racism's Reprieve?*, 65 N.C. L. REV. 359 (1987).

[59] *See, e.g.*, Whitfield v. Democratic Party of Ark., 890 F.2d 1423, 1433 (8th Cir. 1989) (holding that Arkansas's majority-vote requirement was constitutional on Equal Protection Clause grounds but that plaintiffs' claim under § 2 of the Voting Rights Act was legitimate because the majority-vote requirement resulted in denying equal access to African American voters); Butts v. City of New York, 779 F.2d 141, 151 (2d Cir. 1985) (holding New York's primary runoff law was constitutional under the Equal Protection Clause and did not violate § 2 of the Voting Rights Act).

1990, twenty-seven African American voters from Georgia challenged the state's majority-vote requirement for primary elections on the grounds that it violated § 2 of the Voting Rights Act, as well as the First, Fourteenth, and Fifteenth Amendments of the U.S. Constitution.[60] The U.S. District Court for the Northern District of Georgia dismissed the challengers' claims, concluding that the majority-vote requirement was not enacted for a discriminatory purpose and that the requirement did not have a significant adverse effect on African American voters or candidates.[61]

The Eleventh Circuit panel that reviewed the plaintiffs' appeal unanimously affirmed the district court's judgment.[62] The Eleventh Circuit began by outlining the evidence presented by the plaintiffs and the State of Georgia regarding the majority-vote requirement's alleged discriminatory purpose and effect. First, the court summarized evidence considered for discriminatory purpose. The State of Georgia offered direct trial testimony from Governor Sanders and other Gold Dome[63] regulars with first-hand accounts of the 1960s election reform efforts, all of whom refuted the claim that the majority-vote requirement was motivated by race.[64] In addition to Governor Sanders, the State offered the testimonies of Eugene Patterson, editor of *The Atlanta Constitution* in the early 1960s; George T. Smith, Speaker of the House during the Sanders Administration; and Melba Williams, a member of the 1963 ELSC.[65] The challengers countered by asserting that discriminatory purpose behind the 1964 provision could be inferred from (1) the racially discriminatory motives behind the 1963 bill proposing a majority-vote requirement,[66] (2) the ELSC's proposal of a modified

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[60] *See* Brooks v. Miller, 158 F.3d 1230, 1232 (11th Cir. 1998). In 1990, the district court denied preliminary injunctive relief to the plaintiffs after conducting a five-day hearing on the plaintiffs' motion. *Id.* at 1233. The U.S. Department of Justice then filed a parallel case to the plaintiffs' action, the two cases were consolidated, and the United States subsequently moved to voluntarily dismiss the consolidated complaint. *Id.* In issuing its judgment in 1998, the Eleventh Circuit relied on the district court's findings, which had considered both the testimony presented in 1990 and the testimony presented during a four-day bench trial in 1996. *Id.*

[61] *See id.* at 1234–35.

[62] *See id.* at 1243.

[63] The Gold Dome refers to Georgia's State Capitol Building in Atlanta, Georgia.

[64] *Brooks*, 158 F.3d at 1236.

[65] *Id.*

[66] *Id.* at 1234.

literacy test,[67] and (3) evidence that then-State Senator Carl Sanders supported previous discriminatory voting measures such as at-large elections.[68]

Next, the Eleventh Circuit summarized evidence considered for discriminatory effect. The plaintiffs offered evidence suggesting African American candidates were discouraged from running for office by the prospect of a second election, but the plaintiffs did not offer proof that the majority-vote requirement would act as a greater deterrent for African American candidates than for white candidates.[69] Meanwhile, the State of Georgia's expert witness presented study findings on the majority-vote requirement's effect on Georgia's primary elections from 1970 to 1995.[70] The twenty-five year study window included nearly 2,800 runoff sequences, with 278 runoffs pitting an African American candidate against a white candidate.[71] Only 85 of those runoffs resulted in flip sequences where the candidate who won a plurality of votes in the initial primary lost in the runoff. The African American candidate lost the runoff in 56 of the flip sequences and the white candidate lost the runoff in 29—a net result of 27 fewer African American candidates getting nominated because of the majority-vote requirement.[72]

Following their validation of the district court's factual findings, the Eleventh Circuit conducted a careful review of the challengers' claim under § 2 of the Voting Rights Act. A § 2 claim can only succeed if the plaintiffs prove the challenged voting practice gives racial minorities "less opportunity . . . to participate in the political process and to elect representatives of their choice."[73] The court recognized that the 1982 amendments to the Voting Rights Act eliminated the need for challengers to prove the discriminatory purpose of an alleged vote dilution claim.[74] Accordingly, the panel looked to the discriminatory "results test" prescribed by § 2.[75]

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[67] *Id.* at 1237. For further discussion on the racial undertones of the third ELSC's proposals, see MCDONALD, *supra* note 10, at 94–102.

[68] *Brooks*, 158 F.3d at 1237.

[69] *Id.* at 1235.

[70] *Id.*

[71] *Id.* Between 1970 and 1995, there were 2,798 primary runoff sequences in Georgia, but complete data was available for only 2,773 of those runoffs. *Id.*

[72] *Id.*

[73] *See id.* at 1238 (quoting § 2 of the Voting Rights Act).

[74] *See id.* at 1237 (noting that the 1982 amendments superseded the Court's ruling in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which had held that a plaintiff must show both a discriminatory purpose and discriminatory effect to establish a § 2 violation).

[75] *Id.*

To guide its results test, the Eleventh Circuit applied the three prerequisites the U.S. Supreme Court established in *Thornburg v. Gingles* for vote dilution claims.[76] *Gingles* requires challengers to establish that (1) "the minority group [can] demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group [can] show that it is politically cohesive"; and (3) "the minority [group can] demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate."[77]

In applying these requirements, the Eleventh Circuit found that the *Brooks* challengers failed to prove each predicate.[78] Regarding the first *Gingles* predicate, the court found that the challengers failed to prove that "any alternative to the majority vote requirement would result in a net increase of black elected officials."[79] The court then combined the second and third *Gingles* predicates, finding that the challengers "failed to show that the purported white voting bloc 'usually' defeated the purported minority bloc's candidates under the majority vote system."[80]

Finally, the Eleventh Circuit rejected the challengers' constitutional claims to the majority-vote requirement. The *Brooks*

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[76] The Eleventh Circuit found that Georgia's majority-vote requirement did not "fit neatly" into the *Gingles* framework for challenges to multi-member districts, but nonetheless modified the three prerequisites to apply to the majority-vote requirement challengers. *See id.* at 1239 (noting that the Court in *Gingles* recognized the "potentially dilutive" effect of majority-vote requirements (citing Thornburg v. Gingles, 478 U.S. 30, 56 (1986))).

[77] *Gingles*, 478 U.S. at 50–51 (internal citations omitted).

[78] *See Brooks*, 158 F.3d at 1239–41. The Eleventh Circuit noted that failure to prove *any one of* the three predicates would have ended the challengers' case. *Id.* at 1240.

[79] *See id.* at 1239. The *Brooks* court found that under a forty-five percent threshold-vote requirement, there would have been a net *loss* of one African American primary winner between 1970 and 1995. *Id.* The Court recognized that under a pure plurality system more African American candidates would have won primary elections. *Id.* However, it determined that the state interest in preventing extreme scenarios such as a candidate winning the nomination with only one percent of the vote overwhelmed the challenger's interest in eliminating the majority-vote requirement. *Id.* at 1240.

[80] *Id.* at 1240. The *Brooks* court found the majority-vote requirement only caused runoffs in a small fraction of primaries, and that the requirement "had no net adverse racial impact on black candidates in roughly 99 percent of all runoffs over a 25 year period." *Id.* Additionally, the court found that the challengers "advocated conflicting positions on the question of racially polarized voting." *Id.* at 1241. Regarding the first predicate, the challengers argued that a pure plurality system would get more African American candidates elected in primary elections. *Id.* That argument, however, relied on white "crossover" voting in a general election since Georgia's electorate had more white voters than minority voters. *Id.* Yet regarding the second and third predicates, the challengers argued voting was so racially polarized that the white majority, voting as a bloc, always had the ability to defeat the minority's preferred candidate. *Id.*

court relied on Supreme Court doctrine to determine whether the plaintiffs made out a constitutional claim for a "racially neutral on its face" law.[81] Under this precedent, the challengers had to demonstrate both that the majority-vote requirement was motivated by a discriminatory purpose and that its discriminatory motive was a "substantial" or "motivating" factor behind the rule's passage.[82] If the challengers carried their burden, the rule would survive only if the State could show that the law would have been enacted regardless of the discriminatory motive.[83]

As with the Voting Rights Act claim, the Eleventh Circuit found that the lower court was sufficiently justified in determining that discrimination was not a substantial or motivating factor behind enactment of the majority-vote provision.[84] While the district court noted "the virus of race-consciousness was in the air" when the General Assembly passed the 1964 Election Code, the district court nonetheless found the plaintiffs failed to prove that the majority-vote requirement in particular was "infected thusly."[85] Relatedly, the district court found the State's "good government" reasons for the majority-vote rule would have led the General Assembly to pass the measure even without the discriminatory motivations.[86] The *Brooks* court saw little merit in the plaintiffs' argument that the district court relied too heavily on after-the-fact reconstructions of legislative purpose,[87] since the district court did

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[81] *Id.* at 1241. To determine whether the facially neutral law was discriminatory, the Eleventh Circuit followed *Hunter v. Underwood*, 471 U.S. 222 (1985), which applied the discriminatory purpose test laid out in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) to voting statutes. A facially neutral law differs from a facially discriminatory law in that the law's language does not draw a distinction among classes of people based on a particular characteristic. *See* KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 678–85 (19th ed. 2016).

[82] *Brooks*, 158 F.3d at 1241 (quoting *Mt. Healthy*, 429 U.S. at 287).

[83] *See id.* ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." (quoting *Hunter*, 471 U.S. at 228)).

[84] *See id.*

[85] *Id.* at 1241–42.

[86] *Id.* at 1242 (noting that even if some of the legislators who voted for the 1964 Election Code had discriminatory reasons for their support, the plaintiffs' constitutional claims would still fail).

[87] *Id.* Granted, the court acknowledged the principle from *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 268 (1977), that after-the-fact reconstructions should only be relied on in "extraordinary instances." *Id.*

look at a variety of relevant discriminatory purpose considerations beyond the trial testimony of Governor Sanders and others.[88]

Although some have criticized the Eleventh Circuit for crediting the majority-vote requirement proponents with "good government" aims,[89] no serious Voting Rights Act or constitutional challenge to O.C.G.A. § 21-2-501 has surfaced in the wake of *Brooks*. Without discounting the ingenuity of talented civil rights attorneys, it seems that the window for a race-based challenge as seen in *Brooks* has closed for modern Georgia. The 1982 Voting Rights Act Amendments' "results test" as applied by the Eleventh Circuit in *Brooks* remains good law.[90] Therefore, challengers to Georgia's majority-vote requirement under § 2 would need to prove that

> the political processes leading to nomination . . . are not equally open to participation by members of a class of [protected] citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[91]

The *Brooks* challengers failed to carry their burden of proof at a time when Georgia's Democratic Party was far more white and less diverse than it is today.[92] Given that the second and third *Gingles*

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[88] *See id.* (noting that the district court explicitly referenced the *Arlington Heights* discriminatory purpose factors in making its determination, including "the historical background of the challenged act," the "specific sequence of events" leading up to the act's passage, and the legislative history of the act (quoting *Arlington Heights*, 429 U.S. at 266–68)).

[89] See, for example, one civil rights lawyer's critique in MCDONALD, *supra* note 10, at 200 (referring to some of the testimony relied on by the Eleventh Circuit as "a mixture of denial, evasion, amnesia, and self-rehabilitation" that "fully supports the admonition of Congress that after-the-fact reconstructions of legislative intent are inherently unreliable and are entitled to little, if any, weight").

[90] *See* 52 U.S.C. § 10301 (2012); *see also* Veasey v. Abbott, 830 F.3d 216, 265 (5th Cir. 2016) (holding that the State of Texas's voter identification requirement violated § 2 of the Voting Rights Act through discriminatory effects), *cert. denied* 137 S. Ct. 612 (2017).

[91] 52 U.S.C. § 10301 (a)–(b) (2012) ("No voting qualification . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen . . . .").

[92] Georgia Democrats took until 2014 to nominate an African American candidate for Lieutenant Governor (Connie Stokes) and until 2018 to nominate an African American candidate for Governor (Stacey Abrams). *See Georgia Lieutenant Gubernatorial Election, 2014*, BALLOTPEDIA, https://ballotpedia.org/Georgia_lieutenant_gubernatorial_election,_2014 (last visited Jan. 7, 2020); *Georgia Gubernatorial Election, 2018*, BALLOTPEDIA

predicates require proof that "the purported white voting bloc 'usually' defeat[s] the purported minority bloc's candidates under the majority vote system,"[93] it would be particularly difficult for modern-day challengers to show that African Americans' candidates of choice in a majority-minority Democratic Party voting electorate are usually defeated by the white voting bloc.

B. DEPARTMENT OF JUSTICE CHALLENGE

Just over a decade after Georgia's majority-vote requirement cleared Voting Rights Act and constitutional questions, the U.S. Department of Justice challenged Georgia's Election Code on the grounds that it had an adverse effect on overseas voters. In 1986, President Ronald Reagan signed the Uniform Overseas Citizens Absentee Voting Act (UOCAVA).[94] The Act was an effort to ensure that service members and other U.S. citizens living overseas could participate in federal and state elections.[95] Congress later determined that more was needed to achieve UOCAVA's goals of improved voter access, so it passed the Military and Overseas Voter Empowerment Act (MOVE) in 2009.[96] In pertinent part, MOVE requires states to transmit a timely requested absentee ballot to overseas voters forty-five days prior to an election.[97] MOVE also mandates that states holding runoff elections for federal office have a plan to provide U.S. citizens living overseas with absentee ballots in a manner that affords "sufficient time" to return the ballot.[98]

The Department of Justice determined that Georgia's procedures, as they stood following MOVE's enactment, did not grant overseas voters sufficient time to return their runoff ballots,

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https://ballotpedia.org/Georgia_gubernatorial_election,_2018 (last visited Jan. 7, 2020); *see also Party Affiliation Among Adults in Georgia by Race/Ethnicity*, PEW RES. CTR., http://www.pewforum.org/religious-landscape-study/compare/party-affiliation/by/racial-and-ethnic-composition/among/state/georgia/ (last visited Jan. 7, 2020).

93 *See Brooks*, 158 F.3d at 1240.

94 Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986).

95 Congress had previously addressed the ability of overseas military servicemen and women to vote in elections through the Soldier Voting Act of 1942, but not long after that bill's passage, there were calls for more action. *See* Wayne Satterfield & Andrew Barksdale, Note, *Elections and Primaries Generally*, 31 GA. ST. U. L. REV. 93, 94 n.3 (2014).

96 Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, § 575, 123 Stat. 2190, 2318 (2009).

97 52 U.S.C. § 2032(a)(8) (2012).

98 *Id.* § 2032 (a)(9).

and on June 27, 2012, U.S. Attorney for the Northern District of Georgia Sally Yates filed suit.[99] After first granting a preliminary injunction and ordering remedial relief for the 2012 federal primary runoff election,[100] District Court Judge Steve C. Jones found that MOVE's required forty-five day transmittal period applied to *all* federal runoff elections.[101] Accordingly, Judge Jones ordered the State of Georgia to change its election laws to show full compliance with UOCAVA as to all future federal runoff elections.[102]

Judge Jones's order did not mandate that Georgia's non-federal elections must comply with UOCAVA.[103] When crafting the bill to align Georgia's Election Code with the requirements of *United States v. Georgia*, however, the General Assembly mandated a nine-week time window (identical to the time window for federal elections) for all state elections that were held in conjunction with federal elections.[104] The bill quickly passed both chambers in the first weeks of the 2014 legislative session, and Governor Nathan Deal signed the legislation on January 21, 2014.[105]

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[99] Press Release, Dep't of Justice, Justice Department Announces Lawsuit to Protect Rights of Military and Overseas Voters in Georgia (June 27, 2012), https://www.justice.gov/opa/pr/justice-department-announces-lawsuit-protect-rights-military-and-overseas-voters-georgia.

[100] *See generally* United States v. Georgia, 892 F. Supp. 2d 1367 (N.D. Ga. 2012).

[101] United States v. Georgia, 952 F. Supp. 2d 1318, 1327 (N.D. Ga. 2013) (rejecting Georgia's argument that "an election," as defined in MOVE, only applies to general—not primary—elections).

[102] *See id*. at 1333–34 (holding that Georgia's inability to transmit absentee ballots to overseas voters within forty-five days of the runoff election violated UOCAVA and requiring Georgia to propose adequate changes to the state's election laws).

[103] *See id*. ("[Georgia] shall confer with [the Department of Justice] and thereafter submit to the Court written proposed changes to Georgia's election laws that show full compliance with UOCAVA as to all future *federal* runoff elections." (emphasis added)).

[104] The General Assembly deemed that separating federal and state elections would be too expensive and unworkable. *See* Alice Queen, *Kemp: New Primary Date Will Mean Extended Runoff Campaigns*, CITIZENS (Jan. 20, 2014), https://www.rockdalenewtoncitizen.com/news/kemp-new-primary-date-will-mean-extended-runoff-campaigns/article_cc07347f-6ca1-5c46-852a-dbc40fa6799f.html. Then-Secretary of State Brian Kemp also found that the separation would have caused confusion among voters due to having one primary for federal elections and another for state primaries. *See id.*

[105] *See 2013–2014 Regular Session - HB 310: Elections; Ethics in Government; Revise Definitions; Provisions*, GA. GEN. ASSEMBLY, http://www.legis.ga.gov/Legislation/en-US/display/20132014/HB/310 (last visited Jan. 7, 2020).

IV. THE FLAWS AND VIRTUES OF THE MAJORITY-VOTE REQUIREMENT

Georgia's majority-vote requirement has now been in place for over half a century. Because Georgia's Election Code has been litigated on various grounds in the judiciary and challenged in the court of public opinion,[106] it is appropriate to analyze the asserted flaws, as well as the defended virtues, of Georgia's current primary system. The advantages and disadvantages outlined below can apply to any runoff election system, not just a system that requires a runoff when one candidate fails to gain the majority of votes in an initial election. However, since runoffs are more likely when the threshold to avoid them is higher, these advantages and disadvantages are more pronounced in a majority-vote requirement system.

The flaws associated with holding runoff elections are numerous. First, conducting a second election increases election administration costs. Among other marginal expense increases, poll workers must be paid to staff election locations, ballots must be printed and sent to voters requesting to vote absentee, and local election offices must dedicate resources to the tabulation of election results.[107] In fact, before Georgia's majority-vote requirement was passed in 1964, critics pointed to strained finances as a reason not to have runoff elections.[108]

Second, the two candidates who qualify for the runoff have to spend more money to keep their campaigns viable through the end of the runoff.[109] In Georgia's 2018 Republican gubernatorial

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[106] *See, e.g.*, Greg Bluestein, *As Polls Close, Ex-Gov. Sonny Perdue Calls for 'Ground Rules' in GOP Runoffs*, ATLANTA J. CONST. (July 22, 2014), https://politics.myajc.com/blog/politics/polls-close-gov-sonny-perdue-calls-for-ground-rGules-gop-runoffs/WxlR56XmG8zIuz96jAnyaO/ (quoting former Governor Perdue, referring to Georgia's nine-week runoff campaign format, "[i]t's not the best way to choose a nominee").

[107] *See* John Sharp, *One Runoff, Two Candidates, $500,000 Tab*, AL.COM (Mar. 5, 2016, 6:00 AM), https://www.al.com/news/mobile/index.ssf/2016/03/one_runoff_two_candidates_5000.html (describing the $500,000 tab the State of Alabama ran up for one State Board of Education primary runoff in 2016 and the $3,000,000 spent on a host of statewide runoff contests in 2014).

[108] *See* MCDONALD, *supra* note 10, at 98 (quoting correspondence from ELSC member William J. Schloth in which Schloth lamented the financial difficulties that smaller counties would face in having to operate a runoff election).

[109] NCSLorg, *Webinar | Primaries and Beyond: The Legislative Role*, YOUTUBE (May 12, 2017), https://www.youtube.com/watch?v=OGCwKjjJ2vQ&feature=youtu.be [hereinafter *Primaries and Beyond*] (discussing the cost of an election runoff to candidates).

primary, the nine-week period between the initial primary and the runoff led to the costliest gubernatorial primary in state history.[110] While well-heeled campaigns may have little trouble soldiering on through the primary's overtime, candidates who anticipate conducting a more cash-strapped campaign may be deterred from entering the race altogether due to the prospect of a costly runoff.[111]

Third, turnout in runoff elections virtually always lags behind turnout in the initial election.[112] A report that compiled all voter turnout numbers for federal primary runoff elections between 1994 and 2016 found that the median decline in turnout from the initial primary to the runoff was 33.4 percent.[113] Only 7 out of 190 (3.7 percent) federal primary runoffs saw *more* voters in the runoff than in the initial primary.[114] This lower turnout detracts from one of the virtues of runoff elections, described below, that runoff elections lead to general election candidates who most represent their party's voters.

In Georgia, several recent statewide races reflect the trend of lower turnout in runoffs. The last two open Republican gubernatorial contests saw moderate drops from the initial primary election to the runoff.[115] Those drops paled in comparison, however, to the 2018 general election for Secretary of State. The November 6th election between Republican Brad Raffensperger, Democrat John Barrow, and Libertarian Smythe Duval garnered the votes of 3,883,594 Georgians.[116] But when voters were asked to return to the polls on December 4 for the runoff between the race's top two

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[110] *See supra* note 8 and accompanying text.

[111] *See Primaries and Beyond*, *supra* note 109.

[112] *See id*. Granted, in southern states dominated by the Democratic Party, runoff elections historically had higher voter turnout rates than the initial election. *Id.* Given that the victor of the Democratic Primary was all but assured victory in the general election, voters viewed the primary runoff as the de facto general election. *Id.* The more consequential nature of the primary runoff thus provided greater incentive for citizens to vote. More modern factors that may lead to higher turnout in runoff elections include elections involving particularly salient local issues and elections between candidates who earned a similar portion of votes in the initial election. *Id*.

[113] *See* FAIRVOTE, FEDERAL PRIMARY ELECTION RUNOFFS AND VOTER TURNOUT DECLINE, 1994–2016, at 4 (Dec. 2016), https://www.fairvote.org/federal_primary_runoff_elections_2016. FairVote's report did not compile voter turnout data for state- and local-level primary and primary runoff elections.

[114] *See id*. at 1.

[115] In 2010, turnout fell from 680,499 votes to 579,551 votes and in 2018, turnout fell from 607,441 votes to 588,307 votes. *See* Current and Past Election Results, *supra* note 1.

[116] *See id.*

candidates, Raffensperger and Barrow, only 1,473,904 answered the call[117]—a mere forty percent of the November 6 total.

And fourth, runoff elections can facilitate heightened levels of negative campaigning.[118] Whereas candidates in a wide-open primary might stick to positive messages to boost their images (instead of paying for negative advertisements against a host of candidates), a one-on-one runoff contest incentivizes candidates to train their negative attacks on a singular figure. Additionally—for better or worse—the extra weeks or months under the public microscope may shine an unwelcome light on skeletons in candidates' closets.[119]

These runoff election flaws are buffered by certain virtues. First, requiring candidates to earn over a threshold of votes in a primary election increases the likelihood that a nominee actually represents the majority of the party's primary voters.[120] A majority-vote requirement tends to encourage candidates to broaden their appeal to voters, and it reduces the chances of more extreme candidates winning their party's nomination.[121] Second, runoffs enable voters to more effectively express their preference for their party's candidate without having their vote wasted on an unsuccessful candidate in the initial election.[122] For example, imagine a voter preferred Candidate A to Candidates B and C, and preferred Candidate B to Candidate C. In a runoff system, even if Candidate A finished behind Candidates B and C in the initial election, the voter's preference for Candidate B could still be realized in the runoff election. Notwithstanding the virtuous aspects of runoffs, the flaws discussed in the paragraphs above compel an analysis of majority-vote requirement alternatives—the subject of Part V.

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[117] *See id.*

[118] *See, e.g.*, Shannon McCaffrey, *Georgia Governor Race: Karen Handel, Nathan Deal Clash in Runoff Debate*, LEDGER-ENQUIRER (Aug. 1, 2010, 9:06 PM), https://www.ledger-enquirer.com/news/local/article29138791.html.

[119] *See, e.g.*, *supra* note 6 (describing a secret recording of Lieutenant Governor Casey Cagle admitting he supported a bad policy as a result of political gamesmanship).

[120] *See* MCDONALD, *supra* note 10, at 208 (quoting the May 15, 1996 *Brooks v. Miller* trial transcript in which Roy Barnes, defending the democratic underpinnings of Georgia's majority-vote requirement, said "there is nothing more American than to have a majority vote requirement").

[121] *See id.* (quoting Barnes, who argued that a majority-vote rule would prevent the election of "extremist" or "nut" candidates).

[122] *See* FAIRVOTE, *supra* note 113, at 2.

V. ALTERNATIVES TO THE MAJORITY-VOTE REQUIREMENT

Only nine states other than Georgia use a comparable runoff system for primary elections,[123] and even among the small group of states with runoff elections, not all of those states have a majority-vote requirement.[124] Georgia's minority status as a majority-vote requirement state urges an investigation into the non-majority vote systems of other states. This Part first discusses some of the alternative election systems found in Georgia's sister states and then analyzes how attractive each of those systems may be to Georgia.

A. ALTERNATIVE ELECTION SYSTEMS

1. Plurality Voting.

In a plurality-voting system, the most common election system in the United States,[125] the candidate who receives the most votes wins the election.[126] No runoff between the top two vote recipients takes place. Plurality voting is both simple and relatively inexpensive. The notion that the candidate receiving the most votes wins the election is intuitive, and declaring a victor on election night avoids costs associated with runoff elections.[127]

However, plurality-voting systems have numerous disadvantages. Under plurality voting, a candidate can win nomination without approval of the majority of his or her constituents. In the most extreme cases, where votes are distributed among many candidates, a candidate who fails to earn seventy-five to eighty percent of the vote can still win the election.[128] Additionally, for contests with many candidates, plurality voting

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[123] *See supra* note 12.

[124] In North Carolina, runoffs only take place if a candidate fails to win more than forty percent of votes cast, and in Vermont, runoffs only take place in the event of a tie in the primary. *See supra* note 12.

[125] *See Alternative Voting Systems*, NAT'L CONF. ST. LEGISLATURES (Oct. 20, 2017), http://www.ncsl.org/research/elections-and-campaigns/alternative-voting-systems.aspx.

[126] Plurality voting is also referred to as "first-past-the-post" or "winner-take-all" voting. *See Plurality Voting System*, BALLOTPEDIA, https://ballotpedia.org/Plurality_voting_system (last visited Jan. 7, 2020).

[127] *See supra* notes 107–11 and accompanying text.

[128] For example, imagine a five-candidate race in which Candidate A receives twenty-one percent of the vote, Candidates B, C, and D each receive twenty percent of the vote, and Candidate E receives nineteen percent of the vote. Under a plurality system, even though Candidate A was not the first choice of seventy-nine percent of the electorate, she would win the election.

can incentivize candidates to carve out niche, sometimes extreme, positions on issues. For example, Ross Perot, an independent presidential candidate in 1992 running against Democrat Bill Clinton and Republican George H.W. Bush, won 18.9 percent of the popular vote by focusing his campaign on specific economic issues, such as reducing the national debt.[129] More recently, then-candidate Donald Trump stood out among over a dozen Republican presidential contenders by making unfiltered, populist-like appeals to rural, historically-Democratic voters.[130] Trump's polarizing approach allowed him to win a plurality of votes in many of the campaign's early primaries, but he did not win a majority of votes until the campaign's thirty-fifth primary or caucus—his home state of New York.[131]

Finally, primary elections in which the winner receives less than a majority of votes cast may lead to the nomination of candidates who will have a difficult time winning the general election against an opponent with broader appeal. For example, politically-toxic 2012 Missouri Republican U.S. Senate candidate Todd Akin[132] only won 36 percent of the GOP primary vote in an eight-person race.[133] Then, while Republican Presidential Nominee Mitt Romney easily won Missouri's Electoral College votes over President Barack Obama (54 to 44 percent),[134] the ideologically-tainted Akin was

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[129] *See 1992 Presidential Election*, BANCROFT LIBR., http://bancroft.berkeley.edu/ROHO/projects/debt/1992presidentialelection.html (last visited Jan. 7, 2020). In every state besides Maine and Nebraska, presidential candidates who win a plurality of a state's votes win all of that state's Electoral College shares. *See U.S. Electoral College*: *Frequently Asked Questions*, NAT'L ARCHIVES & RECORDS. ADMIN., https://www.archives.gov/federal-register/electoral-college/faq.html (last visited Jan. 7, 2020).

[130] *See* John Cassidy, *How Donald Trump Won the G.O.P. Nomination*, NEW YORKER (May 4, 2016), https://www.newyorker.com/news/john-cassidy/how-donald-trump-won-the-g-o-p-nomination.

[131] *See Republican Primary Results—2016 Election*, CNN POLITICS, https://www.cnn.com/election/2016/primaries/parties/republican (last visited Jan. 7, 2020).

[132] *See* John Eligon & Michael Schwirtz, *Senate Candidate Provokes Ire with 'Legitimate Rape' Comment*, N.Y. TIMES (Aug. 19, 2012), https://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html (quoting an Akin interview, "'It seems to me, from what I understand from doctors, that's really rare,' Mr. Akin said of pregnancies from rape. 'If it's a legitimate rape, the female body has ways to try to shut that whole thing down.'").

[133] *See United States Senate Elections in Missouri, 2012*, BALLOTPEDIA, https://ballotpedia.org/United_States_Senate_elections_in_Missouri,_2012 (last visited Jan. 7, 2020).

[134] *See Missouri*, 270 TO WIN, https://www.270towin.com/states/Missouri (last visited Jan. 7, 2020).

swept away in a fifteen-point landslide by moderate Democrat Claire McCaskill (39 to 55 percent).[135]

2. Threshold-Vote Requirement.

A threshold-vote requirement system offers a moderating alternative to the classic majority-vote rule. Under a threshold system, if the leading candidate receives above a certain percentage of votes, that candidate wins nomination without a runoff.[136] If a candidate receives fewer votes than required by the threshold, that candidate faces the second-place finisher in a second election.[137] The threshold system marginally lessens the likelihood that runoffs occur, therefore decreasing the risk that election offices, candidates, and voters suffer from the runoff flaws described in Part IV. A threshold system also provides an incremental, potentially more amicable alternative for majority-vote requirement states than an abrupt shift to a plurality-voting system.[138] However, a threshold system does not fully address the concern of majority-vote requirement proponents that a candidate should only win nomination if approved by over fifty percent of voters.[139]

3. Ranked Choice Voting.

Ranked choice voting, sometimes referred to as an "instant runoff" system,[140] provides an unorthodox alternative to the majority-vote rule. Ranked choice voting varies in exact format across jurisdictions, but in general terms it allows voters, in a single election, to rank candidates in order of preference.[141] Then, if one candidate fails to win a majority of first place votes, an "instant runoff" takes place. The candidate who received the lowest number of first place votes gets removed from the race, and first place votes

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[135] *See United States Senate Elections in Missouri, 2012*, *supra* note 133.

[136] For example, in North Carolina, a candidate who wins over forty percent of the vote avoids a runoff election. *See* CHARLES S. BULLOCK III & LOCH K. JOHNSON, RUNOFF ELECTIONS IN THE UNITED STATES 119 (1992).

[137] *See id.* In North Carolina, however, the second-place finisher must actually request a runoff for it to occur. *Id.*

[138] *See id.* at 119–20 (referencing North Carolina's move from a majority-vote requirement to a forty percent threshold system).

[139] *See supra* Part IV.

[140] *See Ranked-Choice Voting (RCV)*, BALLOTPEDIA, https://ballotpedia.org/Ranked-choice_voting (last visited Jan. 7, 2020).

[141] *Frequently Asked Questions*, RANKED CHOICE VOTING RES. CTR., https://www.rankedchoicevoting.org/faq (last visited Jan. 7, 2020).

are re-tabulated. This process continues until a candidate surpasses the winning threshold.[142]

Ranked choice voting traces its origins to the mid-nineteenth century and was first adopted in U.S. cities as early as 1915.[143] While by 1962, twenty-three of the twenty-four cities that had implemented ranked choice voting had ceased using the practice,[144] ranked choice voting has recently seen a resurgence. Major cities, such as San Francisco, Minneapolis, and Santa Fe (New Mexico), adopted instant runoffs in the early 2000s, and the State of Maine adopted instant runoffs for all state and federal elections through a voter referendum process in 2016.[145] Ranked choice voting in Maine's general elections for offices such as Governor and seats in the state legislature has since been found to violate the Maine Constitution,[146] but the use of instant runoffs in Maine's *federal* elections was upheld against a legal challenge to the state's 2018 Second Congressional seat results.[147]

Like the alternative election systems described above, ranked choice voting comes with its unique set of advantages and disadvantages. Ranked choice voting might appeal to states employing traditional runoffs because it maintains the overall runoff format. In effect, voters in an instant runoff still participate in a runoff election, but only take one trip to the ballot box. Consequently, ranked choice voting saves money that would be spent in a second election and avoids the typical drop in voter turnout seen in runoffs.[148] Additionally, instant runoffs ensure that

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[142] *See* FAIRVOTE, *supra* note 113, at 9.

[143] *See History of RCV*, RANKED CHOICE VOTING RES. CTR., https://www.rankedchoicevoting.org/history_rcv (last visited Jan. 7, 2020) (noting that ranked choice voting dates back to the 1850s in Europe and that states in Australia began adopting the practice around the same time it was introduced in the United States).

[144] Only Cambridge, Massachusetts remained. *See id.* (explaining that the repeal of ranked choice voting stemmed from "[p]oliticians displaced by RCV, lack of organization amongst groups benefited by RCV, and a political climate that turned against the parties elected through the proportional representation of RCV").

[145] *See Where Is Ranked Choice Voting Used?*, FAIRVOTE, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used (last visited Jan. 7, 2020).

[146] *See* Opinion of the Justices, 162 A.3d 188 (Me. 2017) (finding that the ranked choice voting system approved by Maine voters through referendum violated a provision of the Maine Constitution that allows elections to be won by pluralities of votes).

[147] *See* Baber v. Dunlap, 376 F. Supp. 3d 125, 138 (D. Me. 2018) (ruling that Article I of the U.S. Constitution grants states broad discretion to conduct elections and the Constitution does not require that the congressional candidate who receives the most votes be declared the winner).

[148] *See* FAIRVOTE, *supra* note 113, at 1–3 (finding that "in 96% of primary runoff elections fewer people voted in the second round than in the first" and explaining how runoffs "can cost

overseas voters can express their preferences through the same means as in-state voters without the hassle of a mandated nine-week delay between an initial election and runoff election.[149]

Disadvantages of a ranked choice voting system include voter fatigue, voter confusion, and the costs associated with updating election administration equipment. Asking voters to rank each of their preferred candidates presumably requires more time spent researching candidates than simply choosing a single, favorite nominee. That added research, multiplied by the number of races on the ballot in a given election, has the potential to dissuade voters from casting ballots.[150] Additionally, voters unaccustomed to the ranked choice voting concept may be confused by the departure from the simple, "vote for one candidate" model. While cities that introduce instant runoffs often accompany their rollouts with a voter education campaign,[151] such campaigns can prove costly and may not be entirely effective.[152] Finally, election agencies may not have voting equipment capable of conducting instant runoffs.[153] And while the federal government provided states with generous sums of money to improve voting equipment following the 2000 presidential election debacle,[154] a similar gesture does not seem

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jurisdictions millions of dollars in extra administrative costs and nearly double the campaign funds necessary to win an election").

149 *See id.* at 6.

150 *See How Ranked Choice Voting Works*, STUFF YOU SHOULD KNOW (Sept. 20, 2018), https://www.stuffyoushouldknow.com/podcasts/how-ranked-choice-voting-works.htm (explaining that ranked choice voting "calls for a more informed voter" because "[the voter] need[s] to know something about all of the candidates because [she has] to figure out who is second, and who is third, and who is fourth").

151 *See, e.g.*, *Ranked-Choice Voting in Minneapolis*, MINNEAPOLIS ELECTIONS & VOTER SERVS., http://vote.minneapolismn.gov/rcv/index.htm (last visited Jan. 7, 2020).

152 The most diligent of education efforts will undoubtedly fall short of reaching all of a state's voters.

153 *See, e.g.*, Letter from Brian Kemp, Sec'y of State, State of Ga., to David Ralston, Speaker of the House, State of Ga. (June 13, 2014) ("Let me tell you in no uncertain terms that the voting and tabulation equipment that Georgia uses now cannot facilitate an instant runoff or ranked voting procedure."). *But see* Mark Niesse, *Disagreement Persists over Replacement Georgia Voter System*, ATLANTA J. CONST. (Dec. 12, 2018, 6:03 PM), https://politics.myajc.com/news/state--regional-govt--politics/disagreement-persists-over-replacement-georgia-voting-system/3PLLKqJIS1G8EJjFPZXDzL/ (recapping a 2018 election commission meeting in which Georgia leaders debated spending up to $100 million to replace the state's 16-year old voting equipment).

154 *See* ELECTION LAW, *supra* note 27, at 450–52 (describing the Help America Vote Act of 2002, the federal government's most significant intervention to date in the "nuts and bolts" of election administration, which passed following the fraught Florida Presidential recount in 2000).

imminent at present, leaving state and local governments to dip into their own coffers for any enhancements in technology.[155]

B. EFFICACY OF ALTERNATIVE ELECTION SYSTEMS IN GEORGIA

1. Plurality Voting.

Although plurality voting offers cost-saving benefits and does not alter the "vote for one candidate" format currently in place in Georgia, the system's disadvantages weigh heavily against Georgia adopting plurality voting. Certainly, the threats of pervasive courthouse crowds and stalking horses do not exist today to near the extent they did in 1964 when Georgia lawmakers eliminated the state's plurality-voting system.[156] Still, a return to plurality voting cuts away at the safeguards against modern forms of unsavory election maneuvering. For example, a plurality system provides more incentive to run an eleventh-hour advertisement smearing a rival candidate against which she has no time to respond, or to quietly implement a "divide and conquer" strategy against a dozen competing candidates to win an election with nowhere near fifty percent of the total vote.

Furthermore, that the state has never given serious thought to permanently shifting from a majority-vote requirement in primary elections to even a threshold-vote requirement suggests that there continues to be an important state interest in having voters nominate candidates with near a majority of the electorate's support. Former Georgia Governor Roy Barnes espoused this majority-or-bust sentiment during the *Brooks* trial,[157] and Georgia has not flinched as peer states have shifted away from elections with pure majority-vote requirements.[158]

2. Threshold-Vote Requirement.

Adopting a threshold-vote requirement to replace its majority-vote rule offers several benefits to Georgia. First, a

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[155] *See, e.g.*, *Notes from the Senate, January 4, 2019*, SENATOR JACK HILL: GA.'S 4TH DISTRICT (Jan. 4, 2019), http://www.senatorjackhill.com/default.asp?pt=newsdescr&RI=544 (posing the "real question" of how governments might cobble together funds to pay for new voting machines).

[156] *See supra* text accompanying notes 48–50.

[157] *See supra* notes 120–21.

[158] *See* BULLOCK & JOHNSON, *supra* note 136, at 119–22 (discussing North Carolina's adoption of threshold requirements).

threshold requirement presents a mere alteration, not a total shift, to Georgia's current primary system. Second, the General Assembly can peg the threshold to a percentage of its choosing. Therefore, if legislators want to continue advancing the state interest of a candidate earning close to a majority of the electorate's support, they can set the threshold at a relatively high percentage value. In fact, Georgia experimented with such a threshold in the midst of the *Brooks* litigation when the state replaced the majority-vote rule for most general elections with a forty-five percent threshold rule.[159] Finally, Georgia can look to neighboring North Carolina for a model of how to gain support for removing the majority-vote requirement. For instance, in 1989, many defenders of the North Carolina majority-vote rule shifted their support to the threshold rule when they realized such a compromise system was better than the alternative pure plurality system.[160]

While shifting to a threshold requirement avoids drastic change and may prove amicable enough to hesitant state lawmakers, it may yet lead to undesirable consequences depending on Georgia's priorities for its election system. On the one hand, pegging the required threshold to a percentage such as forty percent will not provide as significant cost savings as would plurality voting or instant runoff systems. One need only look to the 2018 Republican gubernatorial primary described above in Part I for an example of a runoff that still would have occurred under a forty-percent threshold system.[161] On the other hand, setting a threshold requirement anywhere below fifty percent chips away at the state's interest in a candidate earning a majority of the electorate's support. And with too low a threshold, Georgia would be increasingly exposed to cases like Todd Akin's[162] where candidates who cater to the more ideological wing of the party earn their party's nomination but lose an otherwise-guaranteed general election race.

3. Ranked Choice Voting.

As with the threshold-vote requirement, replacing the majority-vote rule with ranked choice voting provides attractive

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[159] *See* Brooks v. Miller, 158 F.3d 1230, 1233 (11th Cir. 1998) (citing Ga. L. 1994, p. 279, § 11).

[160] *See* BULLOCK & JOHNSON, *supra* note 136, at 119–20.

[161] *See supra* Part I; *see also* Current and Past Election Results, *supra* note 1.

[162] *See* Eligon & Schwirtz, *supra* note 132 (discussing Akin's "legitimate rape" scandal).

benefits to Georgia. First, ranked choice voting serves Georgia's interest in having a candidate earn a majority of the electorate's support to win nomination. Through an instant runoff's redistribution of ballots, a candidate does not earn nomination until she wins over a majority of votes.[163] Second, Georgia would likely avoid the relatively low voter turnout seen in runoff elections because voters in an instant runoff need only take one trip to the polls.[164] In connection with the turnout advantage, having all voters cast a ballot only once addresses the concern that voters who take the time to vote in a runoff constitute the more extreme wing of their party, leading to a more partisan runoff winner.[165] This concern manifested itself in the 2018 Georgia Republican gubernatorial primary runoff. Casey Cagle, seen by many as the "establishment" candidate, won fifteen percent more votes in the primary election than Brian Kemp, seen by many as the more "extreme" candidate.[166] Then, in the primary runoff, Brian Kemp won approximately forty percent more votes than Casey Cagle.[167]

Ranked choice voting also offers financial advantages, as Georgia's local election offices and the candidates themselves will not need to spend resources on a second contest. However, the State *would* need to incur the steep up-front cost of purchasing election equipment that can facilitate ranked choice voting.[168] Finally, ranked choice voting directly addresses the issue brought up in the lawsuit filed by the Department of Justice demanding sufficient time for overseas absentee voters to cast ballots in runoff elections.[169] In fact, several of Georgia's neighboring states have already opted for ranked choice voting ballots for overseas voters,[170] in some cases to avoid the court-mandated nine week window

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[163] *See supra* Section V.A.3.

[164] For a discussion on drops in turnout for runoff elections, see *supra* notes 112–14 and accompanying text.

[165] *See supra* Part IV.

[166] *See* Neuman, *supra* note 9.

[167] *See id*.

[168] *See* Niesse, *supra* note 153.

[169] Since instant runoffs negate the need for sending a second absentee ballot, Georgia would no longer need to cater to 52 U.S.C. § 2032(a)(9). *See supra* Section III.B.

[170] *See* Dania N. Korkor, *Overseas Voters from 5 States to Use Ranked Choice Voting Ballots in 2014 Congressional Election*, FAIRVOTE (Apr. 17, 2014), https://www.fairvote.org/overseas-voters-from-5-states-to-use-ranked-choice-voting-ballots-in-2014-congressional-election (listing Alabama, Arkansas, Louisiana, Mississippi, and South Carolina as states using ranked choice voting ballots for Congressional contests in 2014).

between the general and runoff elections as was required by Judge Jones in Georgia.[171]

Still, Georgia could face a range of issues if it adopted a ranked choice voting system, including voter fatigue and the pitfalls associated with being one of the first states to adopt instant runoffs. Every four years, Georgia voters pick between candidates in statewide races ranging from Governor to State School Superintendent to Commissioner of Agriculture.[172] Voters wanting to inform themselves on those races, along with federal, state legislative, and local races that occur as often as every two years—not to mention ballot measures for constitutional amendments and local tax initiatives—may balk if told they will be expected to rank each election's candidates.[173] Additionally, unlike with a threshold voting requirement, Georgia cannot look to a neighboring state (or to any of its own cities) for a ranked choice voting model. Maine, the only state to adopt the system, has carried out just one election cycle of instant runoffs.[174] While that cycle ran smoothly,[175] one election cycle in one state hardly provides a significant dataset from which Georgia lawmakers can gain wisdom.

VI. CONCLUSION

As this Note's title suggests, Georgia's majority-vote requirement has run its course. The rule that a candidate for elected office needs to win over fifty percent of votes cast emerged out of a politically and racially fraught era of Georgia's history.[176] Racially

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[171] *See* Letter from Brian Kemp, *supra* note 153 ("I understand that the DOJ told Mississippi that they could either implement an instant runoff procedure, isolated to their UOCAVA ballots, or face an immediate lawsuit.").

[172] *See Voting in Georgia*, BALLOTPEDIA, https://ballotpedia.org/Voting_in_Georgia (last visited Jan. 7, 2020) (outlining Georgia's various elections).

[173] In fact, the Secretary of State's office blamed ballot length for voting lines wrapping around school gymnasiums on General Election Day in 2018. *See* Erik Larson & Margaret Newkirk, *Kemp's Office Blames Georgia Voter Lines on Lengthy Ballot*, BLOOMBERG (Nov. 6, 2018, 8:54 PM), https://www.bloomberg.com/news/articles/2018-11-06/kemp-s-office-blames-long-georgia-voter-lines-on-lengthy-ballot. Of course, Georgia lawmakers could attempt to mitigate voter fatigue by allowing voters to rank only those candidates with whom voters feel comfortable.

[174] *See* Baber v. Dunlap, 376 F. Supp. 3d 125, 138 (D. Me. 2018) (validating Maine's 2018 election results by holding that the state's ranked choice voting system did not violate the U.S. Constitution).

[175] *See id.* at 128.

[176] *See supra* Part II.

discriminatory effects have been attributed to the rule,[177] and the runoff requirement accompanying the rule eventually led to Georgia getting sued over the amount of time it must give overseas voters to participate in a second election.[178] The primary and general election cycles of 2018 highlighted negative features of the majority-vote requirement,[179] and this Note demonstrates that more appealing alternatives to the majority-vote rule exist.

Before recommending the two, more attractive alternatives, this Note recommends that Georgia should keep its current system if the only available alternative were a plurality system. The interest Georgia lawmakers have expressed in electing candidates who earn the majority of voters' support[180] clearly conflicts with the plurality-based elections that would nominate candidates who earn as little as twenty-five to thirty percent of the vote. Moreover, taking the dramatic leap from a pure majority-vote system to a pure plurality-vote system would be unwise for a state like Georgia who has not seen a significant change to their election format in over half a century.

Instead of changing to a plurality system or keeping its majority-vote requirement, Georgia should adopt either a forty-percent threshold-vote requirement or a ranked choice voting system. A threshold-vote requirement would still contribute to the state's interest in preventing "extremist" candidates from winning their party's nomination,[181] and requiring candidates to win forty percent of the vote presents merely a marginal shift away from requiring candidates to win fifty percent. It is true that the 2018 GOP gubernatorial primary still would have ended in a runoff under a forty-percent threshold rule, just as it did under a majority-vote rule.[182] But since nearly seventy percent of Republican runoff voters ultimately rejected the candidate who led in the initial primary, one could argue that a forty-percent threshold fittingly balances Georgia's interests in nominating favorable candidates while not wasting public resources on a second election.[183]

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[177] *See supra* Section III.A.
[178] *See supra* Section III.B.
[179] *See supra* Part I; *see also supra* notes 21, 116–17.
[180] *See supra* notes 120–21.
[181] *See supra* note 121.
[182] *See supra* Part I.
[183] After all, the candidate some perceived to be the "extreme" candidate in the GOP runoff still prevailed, albeit by a razor-thin margin, against his Democratic opponent in the general election. *See* Current and Past Election Results, *supra* note 1.

A ranked choice voting system serves Georgia's interest in nominating candidates who win the support of the majority of voters. Furthermore, even though election administrators would need money for improved voting equipment,[184] the costs saved through the instant runoff format when compared to the costs associated with administering runoff elections year after year[185] would likely make funding the improvements a sound investment. Certainly, Georgia being one of the first states to adopt this unconventional voting system would require confronting unforeseen challenges and educating an unacquainted electorate. But Maine's successful cycle of ranked choice voting in 2018 and the steady flow of prominent American cities adopting instant runoffs since the turn of the century[186] prove that the system can flourish in settings comparable to Georgia.

Today's Georgia lawmakers should finally revisit the historic policy shift their 1964 predecessors adopted. Whether the legislators of the 1960s were motivated by curbing courthouse crowds or clinging to white supremacy, the foundational reasons for establishing a majority-vote requirement are relics of Georgia's past. In the wake of an election cycle with prolonged runoffs, state leaders should tap the resources of the Secretary of State's office, the General Assembly, and other interested parties to establish a suitable, modern system for Georgia's elections. The proverbial ball is in the Gold Dome's court, and viable and worthy alternatives await consideration.

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184 *See supra* note 153.
185 *See* Sharp, *supra* note 107.
186 *See supra* note 145.