

Case No. 14-3882

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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MARK BALSAM; CHARLES DONAHUE; HANS HENKES; REBECCA  
FELDMAN; JAMIE MARTINEZ; WILLIAM CONGER; TIA WILLIAMS;  
INDEPENDENT VOTER PROJECT; COMMITTEE FOR A UNIFIED  
INDEPENDENT PARTY INC., doing business as  
INDEPENDENTVOTING.ORG,

Plaintiffs-Appellants

vs.

SECRETARY OF THE STATE OF NEW JERSEY,

Defendant-Appellee

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On Appeal from United States District Court  
for the District of New Jersey

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**BRIEF OF AMICUS CURIAE EQUAL VOTE COALITION IN SUPPORT  
OF REMAND TO THE DISTRICT COURT**

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## **STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE**

David Frohnmayer is a member of the Oregon State Bar, the California State Bar (inactive), and the United States Supreme Court Bar. He is President Emeritus and Professor of Law Emeritus at the University of Oregon. He served as dean of the University of Oregon School of Law (1992-1994).

Mr. Frohnmayer has served as an Oregon State Representative (1975-1980) and as Oregon Attorney General (1981-1991) and was elected President of the National Association of Attorneys General (1986-1987) and received that organization's Wyman Award as the nation's outstanding Attorney General in 1987. Mr. Frohnmayer twice won the American Bar Foundation Weaver Constitutional Law Essay Competition (1972, 1974) and the American Bar Association Ross Essay Award (1980).

Mr. Frohnmayer serves as "Of Counsel" to the Oregon law firm of Harrang Long Gary Rudnick P.C., however this brief is submitted entirely in his capacity as a scholar of constitutional law and of election law. He has no other financial or client interest in the outcome of this litigation, and no attorney for a party has helped write this brief or defrayed the cost of its preparation.

Mark Frohnmayer is the founder of the Equal Vote Coalition, a grassroots volunteer organization dedicated to true equality in the voting franchise. He served

as the Chief Petitioner of 2014 Oregon Initiative Petition #54, the Unified Primary, in order to bring equality to Oregon's voting franchise by means of ballot measure.

This brief is filed pursuant to Fed. R. Civ.P. 29 and is accompanied by a motion seeking leave to file. Both the amicus brief and its accompanying motion are timely filed pursuant to an extension granted November 10, 2014.

### **SUMMARY OF ARGUMENT**

The Supreme Court of the United States has underscored the requirement of equality in our voting franchise, but little attention has been focused on the judicial tests for measuring that standard. The present New Jersey closed primary system violates the equal vote weight standard and impermissibly underwrites an official state process that ratifies oligarchic control of voter selections.

Amicus argues for articulation of a judicial test that is consistent with underlying democratic theory and which will insure that voters are equal to each other in exercising the franchise that is part of their entitlement under the Constitution.

## ARGUMENT

### I. INTRODUCTION

The Supreme Court of the United States has explicitly mandated equality in vote weight as part of the guarantee of equal protection of the laws. This understanding of equality has been traced to the body of the Constitution and to American history, not merely to the later adopted Fourteenth Amendment to the United States Constitution. Because this declaration implicates fundamental notions of political theory, we depart from a discursive style of legal argumentation to explore these theoretical underpinnings in diagrammatic form.

#### A. THE LEGAL MANDATE FOR EQUALITY OF VOTE WEIGHT

The Supreme Court has traced the conception of equality in the voting franchise not just to the Equal Protection Clause of the Fourteenth Amendment, but also as a thread that defines the essential character of the nation itself. In *Gray v. Sanders*, 372 U.S. 368, 381, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) the Court declared:

“The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.”

In that same opinion, the Court established that all who meet the basic qualifications as voters must necessarily be afforded an equal vote – that there shall be no preferred class of voters within any geographical unit:

“Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”

*Gray*, 372 U.S. at 379-380.

In *Wesberry v. Sanders*, 376 U.S. 1, 18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), the Supreme Court affirmed this notion of vote equality and traced its definition to James Madison in No. 57 of *The Federalist*:

“Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.”

The Court specifically associated Madison's passage with the principle of “one person, one vote.” *Wesberry*, 376 U.S. at 18.



In that same opinion, the Court declared that equality in the vote goes further than simple access to the franchise. The weight and worth of the citizens' votes **as nearly as is practicable** must be the same:

“...The apportionment statute thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.

We hold that, construed in its historical context, the command of Art. I, s 2 that Representatives be chosen ‘by the People of the several States’ means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.”

*Id.* at 7.

The Court reaffirmed this notion of weight equality in *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), concluding, “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”

## **B. DEFINITION OF THE VOTE**

Merriam-Webster's Collegiate Dictionary (11<sup>th</sup> ed. 2008) defines “vote” as “a usually formal expression of opinion or will in response to a proposed decision; *especially*: one given as an indication of approval or disapproval of a proposal, motion, or candidate for office.”

The voting franchise defines the boundaries of expression permitted in a vote and contemplates the algorithm used to determine the election outcome from the collected votes of the electors.

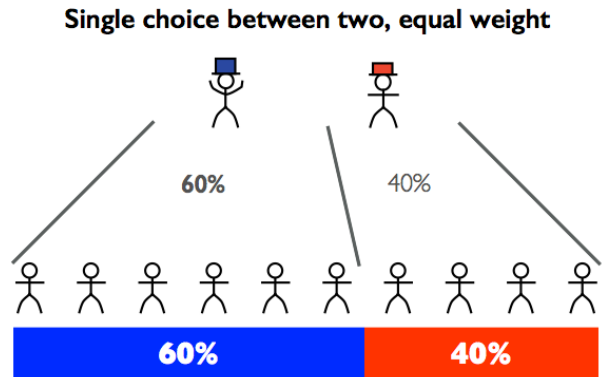
### **C. THE TEST OF WEIGHT EQUALITY**



As it has been since ancient times, the test for equality of weight is balance. To determine whether two objects are of equal weight, they must balance when placed on opposite sides of a balance scale.

This principle has a clear analogue in the voting franchise. The voting franchise provides votes of equal weight to all the voters if and only if for each possible vote expression that one voter may cast in an election, there exists another expression of the vote that another voter can cast that is in balance – such that the outcome of an election is the same whether both or neither votes are counted.

We know this intuitively in every election between two candidates or on questions of petition or referendum. If voter A chooses the first candidate and voter B chooses the second, their votes exactly counterbalance, so the overall election outcome reflects the will of the majority.



Madison, in Federalist No. 57, noted this majority preference as the first requirement for the equal representative vote:

“If we consider the situation of the men on whom the free suffrages of their fellow-citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents. In the first place, as they will have been **distinguished by the preference of their fellow-citizens**, we are to presume, that in general they will be somewhat distinguished also by those qualities which entitle them to it, and which promise a sincere and scrupulous regard to the nature of their engagements.”

The Federalist No. 57, at 263-64 (emphasis supplied).

## II. THE PRESENT FRANCHISE PERPETUATES INEQUALITY IN ITS STRUCTURE

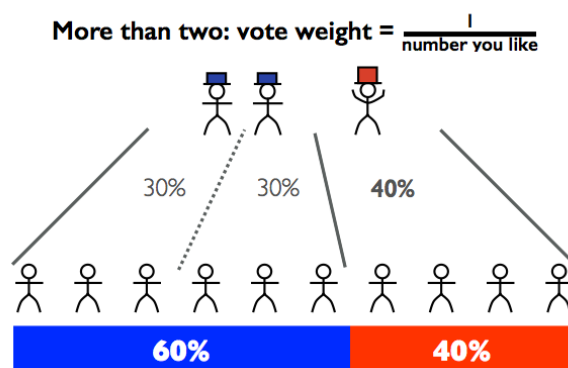
Unfortunately the voting franchise is structured in the systems of most states in the union, including the New Jersey primary election system, in such a way as to embody two orthogonal inequalities in the weight of the vote expressions between

voters. Not only do these pernicious inequalities run counter to the basic institutional requirement of equality of vote weight, they also lead quite naturally to the hyper-partisan, special interest-dominated policy outcomes we see today.

### A. RANK ORDER VOTING IS INHERENTLY UNEQUAL

The dominant voting method used in public elections in the United States is a system known as plurality voting, in which each voter's expression is limited to the support of a single candidate for each public office. Although this choice of one passes the test of equal weight when there are two candidates, whenever there are more than two candidates, the more similar candidates divide supporters' votes.

This is known commonly as vote-splitting or the “spoiler effect,” but at its root it is a fundamental inequality in the franchise: the limit of one choice in elections with more than two candidates creates a vote



that is impossible to balance. Consequently, voters who like one candidate actually have more power than those who like more than one.

This inequality in the franchise has profoundly negative consequences: we are encouraged not to “waste” our votes on a long-shot candidate we might really like and instead cast support only for the “lesser evil,” in order that our worst option be prevented from winning. Because this inequality compels voters to vote

against their actual favorite candidates, it runs directly counter to the Court's findings in *Reynolds*, 377 U.S. at 555, namely that:

“The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”

Further, this impulse gives a huge advantage to well-funded special interests, in direct violation of Madison's mandate.

The “lesser evil” is just the more tolerable of the two frontrunners with the biggest financial war chests, who are therefore most beholden to the money.

**Plurality Voting - Limit of one choice**  
Vote-Splitting compels “lesser evil” voting



Independent candidates without big backing don't even get a fair count.

Instead they are vilified for participating, because the more support they draw, the



more likely their presence on the ballot will spoil the outcome and result in the election of the “greater evil.” The spoiler effect inequality essentially creates our one-dimensional, two-party dominated political system.

Plurality Voting, the limit of a single choice in elections, is the simplest rank-ordered voting system. There are other ranking systems such as Instant Runoff Voting that allow the voters to express support for multiple candidates in preference order – first choice, second choice, third choice and so on. With more than two candidates, all rank-ordered voting systems fail the equality test. Why? Because if a voter “bullet votes” – that is, ranks only a single candidate in first position – there is no way to construct a rank ordering that balances that selection.

**Rank Ordering**

Alice	1
Bob	4
Carey	3
Drew	2
Edith	5
Frank	6

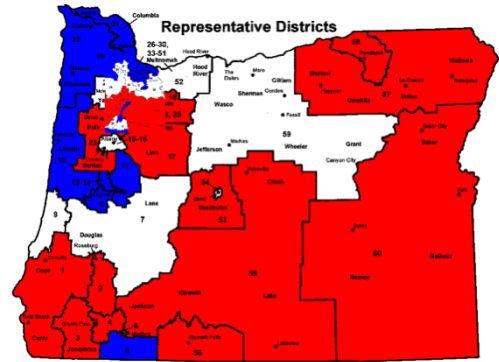
Dr. Kenneth Arrow won a Nobel Prize for his Impossibility Theorem in *Social Choice and Individual Values* (2d ed. 1963), that proved it is impossible to construct a voting system from voters’ rank orders that meets all of several “fairness” criteria.

## **B. PARTISAN SEGREGATION IS INHERENTLY UNEQUAL**

Most states have two elections each cycle. The first (primary) election eliminates one or more candidates from consideration and advances one or more candidates to the second (general) election. The primary election was created more than a century ago to give voters the choice of which candidates from their major party would be nominated to the general election. Prior to the establishment of the

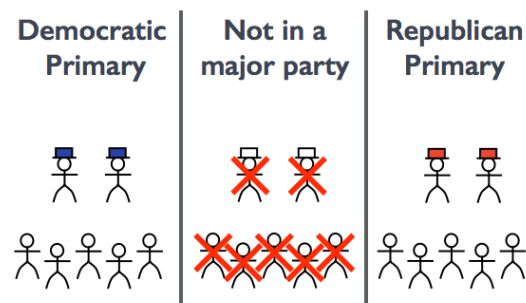
primary, the two main party candidates were chosen at party conventions or in the “smoke-filled back rooms” by party bosses. Unfortunately, this effort to give more voice to the people has created another dimension of inequality in the vote: partisan segregation.

Here in Oregon, for example, 32.2% of registered voters as of October 1, 2014 – nearly a third – have chosen not to affiliate with a major party according to Oregon’s Secretary of State. *See* Voter Registration by County,



<http://www.oregonvotes.gov/doc/voterresources/registration/Oct14.pdf> (last visited Dec. 4, 2014). These voters are denied the opportunity to participate in Oregon’s closed primary election that eliminates all but one Democrat and all but one Republican candidate from consideration at the state’s general election.

Some have made the argument that the obvious inequality presented by denying nearly a third of the electorate a voice in the elimination of one or more candidates from consideration is a result of the voter’s own choice: that by choosing not to affiliate with a major party, the voter is simply choosing not to participate.



This misunderstanding neglects the actual inequality itself, namely that segregating the choice along the boundaries of political organization creates an inherent inequality in the weight of the vote for ALL voters. No matter what political affiliation a voter chooses, she cannot balance the vote expression of any voter who does not share her same political affiliation – no matter the algorithm used for computation of the vote outcome.

This segregation inequality is exhibited clearly in a phenomenon known politically as “district safety.” According to the Cook Political Report’s Partisan Voter Index, when the registration differential between political organizations exceeds a 5% domination threshold, the district is no longer competitive or “swing” between the two major party candidates in the general election plurality voting contest. *See* Introducing the 2014 Cook Political Report Partisan Voter Index, <http://cookpolitical.com/story/5604> (last visited Dec. 4, 2014). In these districts, therefore, the determinative choice of representation provided by the voting franchise is effectively made in the primary election, only by the members of a single party. 90% of Oregon’s representative districts provide one party a registration advantage in excess of the 5% domination threshold and are therefore “safe.” *See* Voter Registration by County, *supra*. Added together the 32.2% of the electorate who choose not to affiliate with a major party and the 22.3% of the



electorate who are in a major party but are on the wrong side of the “safety” equation comprise more than half of the electorate. *Id.*

### **III. THE PATH FORWARD MUST ADHERE TO THE “AS NEARLY AS IS PRACTICABLE” TEST**

The academic fields that explore voting methods and voting method analysis have advanced considerably in the two centuries since the founding of the country, and in the half-century since Arrow published his theorem. While all rank-ordered voting methods are inherently unequal, a new class of voting methods has begun to gain wide adoption that pass the test of equal weight and are not covered under the Impossibility Theorem.

Analogues for a newer system abound. Olympic judging, product reviews on Amazon (from zero to five stars), or the simple “Like” on Facebook are examples of rating – attributing to each competitor, product, or idea an independent measure of value. For every rating a voter gives a candidate, there exists a balancing rating: yes to a no or zero stars to another’s five. All rating systems actually pass the test for equal weight.

Even the simplest rating system – a binary yes or no, +1 or 0, support or not – lets voters communicate what no rank ordering can: which choices on the ballot they actually approve. The ballot for this simplest rating system, also known as Approval Voting, looks the same as the ballot for the simplest ranking system, only with the single choice limitation removed.

Rating		Plurality Voting Support your favorite	Approval Voting Support your favorites
Alice	10 /10	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Bob	4 /10	<input type="checkbox"/>	<input type="checkbox"/>
Carey	8 /10	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Drew	8 /10	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Edith	3 /10	<input type="checkbox"/>	<input type="checkbox"/>
Frank	0 /10	<input type="checkbox"/>	<input type="checkbox"/>

Princeton-trained mathematician Warren Smith, PhD, has characterized by simulation more than 50 different voting systems. See Range Voting With Mixtures of Honest and Strategic Voters, <http://scorevoting.net/StratHonMix.html> (last viewed Dec. 4, 2012). According to his analysis, higher-rated voting methods capture the top four spots as measured by both key performance measures of voting system efficacy: propensity to elect the “Condorcet Winner” (the candidate who would beat every opponent in a head to head contest) and minimization of simulated net social regret at the outcome of the election with both strategic and honest voters.

Recall the Court’s teaching from *Wesberry v. Sanders*: “as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another’s.” *Wesberry*, 376 U.S. at 7. The evolution of decision science has provided us with several templates for voting systems that provide true practicable equality between the voters, and those systems demonstrably provide outcomes

that are more representative of the will of the electorate than the plurality voting method in use in New Jersey today.

#### **IV. CONCLUSION**

We recommend the court adopt the proposed test of balance to determine whether the voting franchise complies with the Constitutional requirement of equality of vote weight, and reject the state of New Jersey's segregation of the franchise by political affiliation in the first stage as a clear violation of this test. This case should be remanded to the District Court for the development of criteria by which the New Jersey election system should be recast and reordered.

Dated this 8<sup>th</sup> day of December, 2014.

Respectfully submitted,

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