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ELECTING A PRESIDENT - THE CASE FOR DIRECT POPULAR ELECTION

BIRCH BAYH*

I would do away with the whole electoral college. I would do away with it completely. I would have the people elect the President of the United States on election day. . . . Let the man who gets the most votes be President. It is as simple as that. That is my idea of representative government. Everything else beyond that is a gimmick.

Senator John Pastore, 1956[1]

As millions of Americans anxiously awaited the outcome of the 1968 Presidential election, the political pundits exclaimed with a growing sense of alarm that this just might be the year our antiquated electoral machinery backfired. It was as if the public, through the magic of television, had been made privy to the mysterious workings of the electoral process, only to discover a Pandora's Box of potential political and constitutional crises.

First, it was feared that despite his apparent electoral majority, Mr. Nixon actually might poll fewer popular votes than Vice President Humphrey. With Humphrey showing unexpected strength in the large, industrial states, where it was thought that Wallace would damage traditional Democratic majorities, and the American Independent Party dashing faint Republican hopes in the South, it seemed very likely that Nixon would be the first minority President since Benjamin Harrison in 1888.[2]

At a time of great international tensions and discontent at home, with so evident a need for strong Presidential leadership to rally the country, it would have been ironic, indeed, if the President-elect was not the choice of the American people. As Nixon himself had said, "I think that if the man who wins the popular vote is denied the

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1 102 CONG. REC., 5162 (1956).

2 As used in this paper, the term "minority President" refers to the candidate who won an electoral majority while capturing fewer popular votes than his opponent.

Presidency, the man who gets the Presidency would have very great difficulty in governing."[3] The practical and political consequences of a minority Presidency now became more real than academic.

Second, speculation was rife about what would happen in the event no candidate received an electoral majority. Throughout the heated campaign, it was now recalled, commentators had pointed out that this, in fact, appeared to be the very purpose of the Wallace candidacy — despite his predictions that "we are going to win in November."[4] If this strategy proved successful, the American Independent Party would hold the balance-of-power when the victorious slates of electors convened in the respective state capitols on December 16. On the basis of pre-election polls, showing Wallace with as much as 20 percent of the popular vote and possibly as many as 103 electoral votes, it was not an implausible scheme.

In fact, it had been a subject of great concern to both Nixon and Humphrey, particularly after it was learned that Wallace's electors had signed notarized oaths that pledged them to Wallace "or whomsoever he may direct." At one point late in the campaign, Humphrey challenged Nixon to join him in a public pledge that neither would bargain for the Wallace electoral votes.[5] Nixon, for his part, asked Humphrey to agree to a plan that would insure that the popular vote winner was chosen President.[6]

Would Wallace really try to barter away his electoral votes for that "solemn covenant" he talked about during the campaign, or would he ask for something more tangible such as a cabinet post. In an interview with U. S. News and World Report, the former Alabama Governor discussed his electoral strategy:

> Q. If none of the three candidates gets a majority, is the election going to be decided in the Electoral College or in the House of Representatives?
>
> A. I think it would be settled in the Electoral College.
>
> Q. Two of the candidates get together or their electors get together and determine who is to be President —
>
> A. That is right.[7]

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3 Quoted in CONG. Q. No. 43, pt. 2 2955 (October 25, 1968).
4 U. S. NEWS AND WORLD REPORT, (September 30, 1968) at 34.
5 CONGRESSIONAL QUARTERLY, *supra* note 3, at 2955.
6 *Id.* at 1996.
7 U. S. NEWS, *supra* note 4.

Many observors thought this scheme was somewhat fanciful. Neither Humphrey nor Nixon could afford to accept the American Independent Party electors, it was argued, because the Wallace strategy was so transparent. A deal would permanently taint the new administration and, therefore, was not a real possibility. The alternative to a bargain with Wallace in the electoral college, however, was no more in keeping with our democratic tradition and sense of fair play. It was, as provided for in the Twelfth Amendment, an election in the House of Representatives from among the top three candidates, with each state having one vote.[8]

As early as July, the possibility of the election being thrown into the House of Representatives was recognized by Congressman Morris Udall and Charles Goodell, who proposed that candidates for the House of Representatives pledge themselves to vote for the national popular vote winner.[9] By mid-October, 52 House members had agreed to the Udall-Goodell plan. At the same time, 30 candidates for the House, all but one from the South, pledged themselves to vote for the popular vote winner in their districts.[10]

Though the Democrats nominally controlled the House, with 26 delegations, it was highly unlikely that they could muster the necessary majority to insure a Humphrey victory. In view of the make-up of the newly elected Congress, no one was prepared to make any predictions — except to say that a decision by the House of Representatives undoubtedly would be a sordid affair, as it had been in 1800 and 1824. During this period, of course, the Senate would be choosing a Vice President. A substantial Democratic margin in the Senate, 58 to 42, seemed likely to hold together for a Muskie victory and, failing a decision in the House by January 20, Muskie would have become acting President.

The 1968 Presidential election, by any yardstick, was a sobering experience and an indictment of what the American Bar Association's Special Commission on Electoral Reform has described as our "archaic, undemocratic, complex, ambiguous, indirect and dangerous" electoral

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8 The Twelfth Amendment requires a majority of House delegations — that is, 26 states. Under the rules of the House of Representatives, the candidate who receives a majority of the votes cast by a state delegation is awarded that state's vote. If the state delegation's balloting is tied, that state forfeits its vote. The rules also provide that the balloting is to be continuous.

9 CONG. Q. *supra* note 3, at 2996.

10 *Id.*

system.[11] Certainly 1968 demonstrated that the Bar Association's verbal barrage was on the mark in every respect. The possibility of a minority President, or of a deal in the electoral college, or an election thrown into the House of Representatives, described by Professor Ernest Brown in July, 1967 as "remote," was not considered remote by either Nixon or Humphrey during the final days of the campaign or on the morning of November 6.[12]

These dangerous possibilities are not, as some supporters of the present system argue, the product of temporary stresses and strains brought on by the Wallace movement. It was not so much the Wallace candidacy that produced these near-misses, but the basic structural flaws in the present system that Wallace so wisely exploited for his own partisan advantage.

To confirm this, let us examine the 1960 Presidential election, looking behind the Kennedy electoral victory to the workings of the electoral process. In 1960, for example, an Oklahoma Republican elector disregarded the traditional role of presidential electors and exercised his constitutionally guaranteed — but rarely used — independence. Despite Nixon's popular vote victory in Oklahoma, Henry Irwin cast his electoral vote for the late Senator Harry Byrd, a Democrat who was not a candidate for President.[13]

Contrary to popular impression, this was not merely an isolated instance of strong-willed individualism. It was, in fact, part of an organized effort known as the "Free Elector Plan." The express purpose of the "Free Elector" movement was to withhold large blocs of electoral votes through the device of unpledged electors. Hopefully, in the anticipated close contest between Kennedy and Nixon a small bloc of electoral votes could deny either major party candidate the necessary electoral majority. This would have forced a decision in the electoral college, where the unpledged electors held the balance-of-power — a strategy not dissimilar to Wallace's in 1968.[14]

The Wallace strategy and the "Free Elector Plan" before it are both the linear descendants of Strom Thurmond's 1948 States' Rights Party.

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11 *See, Electing the President: A Report of the Commission on Electoral College Reform*, AMERICAN BAR ASSOCIATION, January, 1967.

12 Ernest Brown, *Proposed Amendment a Power Vacuum for Political Blackmail?*, TRIAL, June/July 1967, at 15.

13 *Hearings, Nomination and Election of the President and Vice President, Subcommittee on Constitutional Amendments*, 87th Congress, 1st SESS. 562ff (1961).

14 *Id.* at 600-610.

The present electoral system, in short, enhances the prospects of sectional third parties because of their ability, under the unit rule, to win all of a state's electoral votes on the basis of a popular vote plurality.

Among the many imperfections in the present electoral vote system, none is more dangerous and undemocratic than the unit rule, often described as the "winner-take-all" formula. As a result of the unit rule, the popular vote totals of the losing candidate in each state are completely discounted in the final electoral result. In effect, millions of voters are disfranchised if they happen to vote for the losing candidate in their state because the full voting power of the state — that is, its electoral votes — is awarded to the candidate they opposed. The injustice of this was pointed out by Thomas Hart Benton over a century ago. "To lose their votes is the fate of all minorities," he said, "and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority and given to a person to whom the minority is opposed."[15]

A more serious consequence of the unit rule is the distortions it produces in the value of individual popular votes. As both its liberal supporters and conservative detractors point out, the unit rule tends to inflate the voting power of the residents of large, urbanized states. Professor Alexander Bickel, the most articulate spokesman for the present system, explained it this way:

> The upshot [of the unit rule] is that many popular votes are wasted in the more homogeneous states, and that presidential elections are for the most part decided in the large, populous states, where, in turn, block voting as by minorities, or by solid party organizations in the cities is often decisive. This has meant that modern Presidents have been particularly sensitive and responsive to urban and minority interests.[16]

The same line of reasoning justifies this built-in advantage by describing it as a necessary political counterweight to the overrepresentation of rural interests in the state legislatures and in the House of Representatives — the Supreme Court's reapportionment decisions notwithstanding.[17]

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15 S. REP. No. 22, 19th Cong., 1st Sess. 4 (1826).

16 Alexander Bickel, *The Case for the Electoral College*, NEW REPUBLIC, Jan. 28, 1967, at 16.

17 The "counterweight" argument that Professor Bickel presents was developed and refined by Senator John Kennedy in 1956 in his famous "solar system" speech. 102 CONG. REC. 5150, 5253, 5539-40, 5548 (1956).

Professor Bickel has provided us with a very interesting, often overlooked perspective on the Presidency. He points out, quite correctly, that the electoral process itself is an important determinant of the nature of the Presidency. Unfortunately he has drawn the wrong conclusion. First, in the interests of improving the quality of our political institutions one must seriously question the right of any political group to occupy a special position of power in the choice of the President, who represents all Americans. Second, from the standpoint of the power relationships between "rural" and "urban" interests, or between North and South, the salutary effect of recent reapportionment decisions and the steadily increasing exercise of the franchise by Black Americans in the South have greatly lessened, if not eliminated, the need to maintain special preserves of power.[18] Finally, on the one hand the Bickel argument overestimates the influence of urban minorities and, on the other hand, underestimates the danger the present system carries for the very political interests he has identified.

The influence of minorities, as a result of the unit vote, is exaggerated by Professor Bickel simply because these groups are not composed of "swing" voters who can entice the major party candidates to bargain for their votes. It is a fact of political life, known alike to Democratic and Republican politicians, that these minorities traditionally vote Democratic.[19] Nevertheless, let us concede, for a moment, that organized minorities do, in fact, exercise a power all out of proportion to their numbers. One wonders how Professor Bickel views the ascendancy of the Conservative Party in New York? Would he argue for retaining the present system, with its alleged advantages, if the Conservative Party held the balance of power for New York's 43 electoral votes?

Political expediency, simply, is hardly the foundation upon which to build a sound and democratic electoral process — a process that insures every American, white and black, North and South, of the same opportunity to vote directly and equally for the candidate of his choice and guarantees us a popular choice every time.

Largely as a result of the unit rule, however, the present electoral system cannot guarantee that the electoral victor will also be the popular vote winner. This, more than anything else, condemns the

18 *See* Neil Peirce, *The Case Against the Electoral College*, NEW REPUBLIC, February 11, 1967, at 12-13.

19 Neil Peirce, THE PEOPLE'S PRESIDENT 263 (1968).

present system as an imperfect device for recording the sentiment of American voters. Today, for example, it is possible to win an electoral majority on the basis of only 25 percent of the popular vote; or, put another way, the eleven largest states and the District of Columbia could produce an electoral majority. In 1824, 1876, and again in 1888 this system led to minority Presidents and on numerous other occasions shifts of a few thousand popular votes would have elevated to the Presidency the candidate with fewer popular votes. This was true in 1948, 1960, and in 1968.

Good fortune, not design, has given us Presidents who were also the popular choices of the people. In runaway elections, of course, even the present system will produce an electoral majority for the popular vote winner. As Professor Charles Bischoff noted, "any halfway reasonable electoral system can elect the right man in a landslide election."[20] It is what happens in closely contested elections that determines the soundness of the system. Based on this criterion, the present system gives us good cause for alarm.

The tests of a modern electoral system are twofold. First, it must guarantee that the candidate with the most votes is elected. Second, in the election of the President every American voter should have the same opportunity to influence the outcome. How do the various reform proposals currently under consideration measure up to these tests?

I. The District System

The district plan would eliminate the general ticket or unit rule ("winner-take-all") method of apportioning electoral votes, thus avoiding one of the most objectionable features of the present system. However, it would preserve the electoral vote, allotting to each state "a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in Congress." Electors would be chosen from single-member districts within each state on the basis of direct election, with two electors running at large.[21]

By splitting a state's electoral vote on the basis of popular elections in a multitude of electoral units, the district — or Mundt — plan effectively reduces the influence of the larger states in presidential elec-

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20 *Id.* at 133.
21 S. J. Res. 12, 90th Cong., 1st Sess.

tions. Thoretically, therefore, it would result in a more equitable distribution of voter influence.

By retaining the electoral vote, however, the district plan would continue to distort the value of individual popular votes. This would not occur as much in the choice of electors by districts — which must be "composed of compact and contiguous territory, containing as nearly as practicable the number of persons which entitled the state to one Representative in the Congress" — as it would in the election of the two at-large electors from every state.

Thus, in the 1964 presidential election more than 7,165,000 New York voters would have participated in the election of three electors, while only 67,000 voters in Alaska would have shared this same opportunity — a ratio of approximately 107 to 1!

Furthermore, despite the specific requirements that electoral districts be compact, contiguous, and nearly equal in population, it still would be possible for partisan interests to gerrymander electoral units, distorting district lines in order to perpetuate a political advantage. The impracticality of enforcing a vague constitutional standard for electoral districts, it seems to me, is another major obstacle to the establishment of a viable district system. In short, while it would successfully eliminate a major evil of the present system, the district plan would introduce a new and equally disturbing measure of voter inequality, along with a host of seemingly insoluble complexities and uncertainties.

A significant factor in evaluating the district system is the totally new geographical orientation it would introduce into the election of the national executive — as presidential campaigns would be spread across 481 separate electoral units. This decentralization would conflict with both the theory and practice of the modern presidency. The President, as a matter of political fact and practical necessity, is the representative of all of the people of the United States. He should be chosen, therefore, on the basis of a national constituency. To do otherwise, as in the case of a district plan, would undermine both the two-party system, which has benefitted greatly from the political necessity of embracing various sectional interests, and the separation of powers, which would be drastically weakened by creating for the presidency a constituency similar to that of the House of Representatives.

The district system, as its proponents proclaim, would model the

presidency on a federal plan. Unfortunately, this federal model bears absolutely no relevance to the presidential election plan adopted at the Constitutional Convention in 1787 — a fact often overlooked by supporters of the district plan in their hasty appeals to history. The Compromise of 1787, which led to the adoption of the Constitution, was centered on the question of representation in Congress. The essential features of this Compromise provide that state interests would be protected in the Senate, while local interests would find expression in the House of Representatives. In that sense, it is true, the Constitution established a federal principle of government. It is wrong to assume, however, that this federal principle was to be extended to the Presidency. The records of the Federal Convention reveal that it was not a consideration in the debate over how to choose a President.[22]

II. The Proportional Plan

The proportional plan would abolish the electoral college, but would retain the electoral vote. Like the district system, the proportional vote would eliminate the "winner-take-all" formula, substituting a proportionate division of a state's electoral votes in accordance with the popular vote in that state.[23] The proportional plan also would result in a somewhat more equitable distribution of individual voter influence.

The purpose of the proportional plan, according to its supporters, is more accurately to reflect the popular vote. While the present system, admittedly, tends to exaggerate the importance of the larger, more doubtful states, the proportional vote would result in the opposite extreme — emhasizing the value of the more numerous smaller states where a substantial net electoral advantage could be won on the basis of relatively few popular votes. This would greatly magnify the influence of so-called "one-party" states and encourage states to maintain artificially low voter turn-outs.

It would appear that a proportional division of electoral votes is an open invitation to splinter groups to disrupt the party structure by playing an increasingly important role in presidential elections.

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22 The compromise, in terms of the interests of the small vs. the large states, was the provision for a contingent election in the House of Representatives. As George Mason said, "19 out of 20 times" the electoral system would fail to produce a majority and so the interests of the small states would be safeguarded by giving each state only one vote. Max Farrand, 2 The Records of the Federal Constitutional Convention 500 (1911).

23 S. J. Res. 84, 90th Cong. 1st Sess. (1967).

III. Direct Popular Vote

The only electoral system without any of the structural defects inherent in the other plans is direct popular vote. It is the only system that assures victory to the popular choice. It is the only system that counts every vote equally. Direct popular election has the additional virtue of operating in the way most Americans think the electoral process operates — and expect it to operate.

The opponents of direct election have conjured up a number of theoretical arguments to sustain their opposition. One of the most popular myths about direct election is the alleged danger it poses to the two-party system.[24] The most striking feature of this argument, however, is that we are rarely treated to a detailed explanation of how direct election actually would undermine the party structure.

The idea that direct popular election would unsettle the historic role of the major parties is based on the assumption that the American two-party system is the result solely of our electoral machinery. To be more specific, that the need to win a majority of electoral votes, under the winner-take-all system at the State level, is resonsible for the present supremacy of the Democratic and Republican parties. This requirement, it is contended, has forced the parties to "assimilate" new and competing forces, thus acting as a deterrent to the formation of splinter parties. This overlooks the fact that any election machinery requiring a majority vote in a single member district tends to discourage minor parties, and is true whether the majority so required is popular or electoral.

The growth of national political parties, most historians agree, was a pragmatic development. The first appearance of formal party organizations — in the form of the Jeffersonian Republicans and the Federalists — was a response to the immediate issues growing out of the need to govern a new nation. To explain it otherwise, as some have done, is to put the cart before the horse. Could the electoral system alone maintain the two party structure if a third party developed strong popular support? It could not; nor should it. Such developments, as in 1860, 1912, 1924 and 1948, are themselves signs of a breakdown in party organization, and no artificial mechanism — not even the electoral college — can sustain a political framework that is contrary to the will of the majority. The sustenance of the two-party

24 *See, e.g.*, Bickel, *supra*, note 16.

system in America is nothing less than American society itself, its values, customs, psychology, and, of course, its institutions.

Direct popular election would in no way alter the political bases of the two-party system in America. The state party structure would remain intact; representatives would still be chosen by plurality vote in single member districts; and the nature of the Presidency itself, as a single member office, would mitigate against any splintering of the parties. If anything, direct election would strengthen the two-party system by providing an added incentive to the minority party in traditional one party states.

Supporters of the present system have argued, as a matter of practical politics, that direct election would seriously weaken the influence of organized minorities.[25] While I seriously question the view that urban minorities derive substantial benefits from the present system, I think it can be easily demonstrated that these groups would play a prominent role under direct election. For example, Negro voters in Alabama and Mississippi, whose votes have counted for nothing under the present system, would now have their popular vote totals added to those of Negroes in New York City and Chicago.

Another major argument that is often raised against direct popular election is the claim that it would destroy the federal system. My colleague, Senator Karl Mundt, a long-time champion of the district system, is the most vigorous and able exponent of this view. In a letter to the Washington *Post*, Senator Mundt explained:

> "Were the President to be elected . . . (by direct election) his title should be changed to President of the American People, or President of the People of the United States of America. He would no longer be President of the United States because the federal element of the union of States would have been abandoned in favor of a unitary national State."[26]

If nothing else, however, it is an established fact based on 175 years of American history that the President is truly the representative of all of the people. He is not, nor was he intended to be, as Senator Mundt implies, a sort of super-governor.

This misguided notion that the electoral college is a safeguard of the federal system was answered with devastating clarity by Senator Mike Mansfield when he said:

25 In addition to Bickel's article, *see* Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1 (1968).

26 WASHINGTON POST, May 24, 1967 at 28.

> (T)he Federal system is not strengthened through an antiquated device which has not worked as it was intended to work when it was included in the Constitution and which, if anything, has become a divisive force in the Federal system by pitting groups of States against groups of States. As I see the Federal system in contemporary practice, the House of Representatives is the key to the protection of district interests as district interests, just as the Senate is the key to the protection of State interests as State interests. These instrumentalities, and particularly the Senate, are the principal constitutional safeguards of the Federal system, but the Presidency has evolved, out of necessity, into the principal political office, as the courts have become the principal legal bulwark beyond districts, beyond States, for safeguarding the interests of all the people in all the States. And since such is the case, in my opinion, the Presidency should be subject to the direct and equal control of all the people.[27]

Direct popular election would substitute clarity for confusion, decisiveness for danger, and popular choice for political chance. As Norman Thomas aptly put it, "No one in his right mind would suggest any way of electing the President of the United States, if you were starting *de nova*, other than by straight popular vote."[28]

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27 107 CONG. REC. 350 (1961).

28 *Hearings, Amending the Constitution with Respect to Election of President and Vice President, House Judiciary Committee*, 81st Cong., 1st Sess. 163 (1949).

NATIONALIZATION OF THE ELECTORAL PROCESS

RICHARD P. CLAUDE*

Testifying to a dynamic system of federalism, Americans have found many ways of transferring power from local to higher government units. Examples may be found in policy areas of national scope ranging from the regulation of commerce to the prohibition of sedition, by means as diverse as federal grants and preemption doctrines, and by agencies of accommodation as far apart as political parties and federal courts. In the electoral process, not only trends in state law, but political party decisions, constitutional amendments, Supreme Court rulings and congressional legislation have all led Americans to a more standard set of election laws and voting requirements.[1] It is important to ask how we have come to a situation in the late 1960's in which virtually every election for public office is affected by both state and federal law, and where we go from here.

An understanding of the emergence of an increasingly unitary electoral system must advance along political as well as legal lines. The struggles for woman suffrage, black enfranchisement, abolition of the poll tax, and reapportionment are all historical commentaries on the direction of political change in the United States. In each of these movements, reformers found that when they were blocked at one level of government, they could gainfully seek another at which to advance their proposals. In the last century, the effective cutting edge of these movements has been at the national level (a point at which party competition is more continuous than at the state and local levels).[2]

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1 Summaries of state law can conveniently be found in the BOOK OF STATES published annually by the COUNCIL OF STATE GOVERNMENTS. Compendia of federal and state law for 1968 were published by both Houses of Congress. CLERK, HOUSE OF REPRESENTATIVES, LAWS RELATING TO FEDERAL CORRUPT PRACTICES AND POLITICAL ACTIVITIES (1968). SENATE SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS, ELECTION LAW GUIDE BOOK, 1968; SENATE LIBRARY, FACTUAL CAMPAIGN INFORMATION; and NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, INCLUDING THE MANNER OF SELECTING DELEGATES TO NATIONAL POLITICAL CONVENTIONS (1968).

2 REINHARD BENDIX, NATION-BUILDING AND CITIZENSHIP (1964); ARTHUR N. HOLCOMBE, OUR MORE PERFECT UNION, (1950);

Where the electoral process is concerned, however, nationalized politics rubs against the traditional legal grain because conducting elections and defining the scope of the franchise have generally been decentralized functions of state activity.[3]

I. The Political Framework of Legal Change

The tension between federal authority and local control over the electoral process has been shaped significantly by the American party system and its adaptations to advancing modernization in many fields.[4] Even before the Civil War, the process of democratization was afoot among state politicians who found it expedient to promote changes in the rules of the political game by increasing the number of participants.[5] Jacksonian Democrats frequently authored liberalized state franchise laws, enacting manhood suffrage or substituting tax-paying qualifications for property tests.[6] But the realignment of voters by party following liberalization of the suffrage remained sufficiently unclear to motivate both Democrats and Whigs to sponsor electoral reform at the state level.[7] The result was that in most American states before the Civil War, electoral law changes were the result of bipartisan efforts and a function of party and factional competition. Through the interplay of socio-economic change and party politics, the opposition to suffrage reform on a nationwide scale was first routed when the propertyless were brought into the electorate for political advantage.[8] By the mid-nineteenth century, adult manhood suffrage for all but Negroes and females virtually existed under the laws of the states. In 1832, Alexis de Tocqueville observed this process of democratization at work:

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3 Richard Scammon, *The Electoral Process*, 27 Law and Cont. Prob. 299 (Spring, 1962).

4 V. O. Key, Jr., Politics, Parties, and Pressure Groups, (4th ed. 1958) chaps. 21-23; Seymour Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 Am. Pol. Sc. Rev. 69 (1959).

5 William N. Chambers, Political Parties in a New Nation (1963).

6 Lee Benson, The Concept of Jacksonian Democracy (1964); A complete tabular summary was printed in United States Commission on Civil Rights, Report 24 (1959).

7 Richard McCormick, *Suffrage Classes and Party Alignments: A Study in Voter Behavior*, 46 Miss. V. Hist. Rev. 407 (1959).

8 Chilton Williamson American Suffrage from Property to Democracy, 1760-1860 (1960). *Cf.* Alfred de Grazia, Public and Republic (1951).

> The further electoral rights are extended, the greater is the need for extending them: for after each concession, the strength of democracy increases and its demands increase with its strength.[9]

The classic pattern of democratizing political parties (acting as brokers in the process of enfranchising more and more groups) has carried Jacksonian democracy into the twentieth century. De Tocqueville's diagnosis presently requires little reformulation except to note that, since his day, the new demands stimulated by strengthened democracy have been carried outside political parties and state legislatures and into the constitutional amendment process, the courts, and Congress.

Historically, the reform of property and tax qualifications was effected with little reference to legal change at the national level.[10] Yet, notwithstanding this experience with reform, resistance to electoral egalitarianism has generally been stronger at the level of local government than at the federal level. In the years following the Civil War, it was the Federal Constitution which proved the most significant vehicle for change. In the history of tinkering with the Constitution, about 5700 suggestions for revision have been proposed. But the most successful in terms of adoption have been those dealing with representation and voting. No less than seven Amendments have served to advance federal standards for the electoral process.[11] Extension of the right to vote for groups previously frustrated in their efforts to gain that right at the state level was accomplished at the federal level: i.e. Negroes

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9 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 56-57 (1955).

10 In Congress, the Jeffersonian Republicans and their heirs, the Jacksonian Democrats, maintained control of Congress for forty years after 1801. In exercising its power over the federal territories, Congress abandoned the freehold as a prerequisite for western residents in the election of representatives to the various territorial conventions, but taxpaying and poll tax requirements were permitted to linger.

11 U. S. CONST. amend. XII (electoral college casting of ballots for executive); amend. XIV, § 1 (equal protection and due process of the law), § 2 (federal sanction against states denying the right to vote); amend. XV (denial of vote on account of race forbidden); amend. XVII (popular election of senators); amend. XIX (denial of vote on account of sex forbidden); amend. XXIII (limited presidential right to vote extended to the District of Columbia); amend. XXIV (outlawing the poll tax in federal elections).

In the original Constitution of 1787, the following provisions are relevant. art. I, § 2, cl. 1 (representatives chosen by state-qualified electors); art. I, § 2, c. 3 (congressional apportionment); art. I, § 4, c. 1 (congressional authority to alter state election regulations); art. I, § 5, c. 1 (House and Senate as judges of respective elections, election returns and membership); art. II, § 2 (the electoral college); art. IV, § 4 (United States guarantee of republican government).

(Fifteenth Amendment in 1870), women (Nineteenth Amendment in 1920), and the poor (Twenty-fourth Amendment in 1964). The net legal result has been that the introduction by gradual stages of universal suffrage has made of the franchise a right of age, residence, and citizenship, and not one of property, race, sex or occupation. The net political effect of universal suffrage in the United States is summarized in Table I below, which gives refined figures on the growing American electorate since the enactment of the Nineteenth Amendment.

The strenuous processes prescribed by Article V for constitutional amendment are themselves indicators of the consensus which exists at the national level on the desirability of expanding the representativeness of government and the lengths to which Americans will go in order to do so. The route generally taken to constitutional amendment requires the support of two-thirds of Congress and three-fourths of the state legislatures. Not surprisingly, then, since Reconstruction every successful amendment which affects the electoral process has enjoyed bipartisan support.

Enlargement of the franchise is one component of a larger social phenomenon which a contemporary sociologist, Talcott Parsons, has called "the inclusion process."[12] The history of inclusion of an ever larger portion of the population into the electorate may be viewed as a dynamic process of institutional adaptation by the major political parties. The growth of the electorate has enjoyed bi-partisan support, since doubt generally envelops the question of which party will be the lasting beneficiary of any given increment to the electorate, and neither party wishes to let the other take full credit. The consequence of "the inclusion process" for the parties is that in addition to the sheer number of members, their structure, goals, and leadership recruitment may be changed. The parties establish roles and procedures useful in integrating diverse interests and in bargaining for goals and resources for which those involved might otherwise compete in a mutually destructive manner. The newly enfranchised are encouraged

12 Talcott Parsons, *Full Citizenship for the Negro American? A Sociological Problem,*" 94 DAEDALUS 1009 (Fall, 1965). Elsewhere, Parsons elaborates a functional theory of voting which deemphasizes behavioral studies in favor of stressing that elections operate so as to mobilize generalized support for leadership. The inferences of this perspective draw attention to the role of political leadership (or party 'brokerage") in the electoral inclusion process. *Voting and the Equilibrium of the American Political System,* AMERICAN VOTING BEHAVIOR, Burdick and Brodbeck, eds., (1959).

TABLE I

THE EXPANDING FRANCHISE[13]

YEAR	ESTIMATED POPULATION OF VOTING AGE	VOTE CAST FOR PRESIDENTIAL ELECTORS		VOTE CAST FOR U. S. REPRESENTATIVES	
		Number	Percent	Number	Percent
1920	60,581,000	26,748,000	44.2	25,080,000	41.4
1922	62,984,000	—	—	20,409,000	32.4
1924	65,597,000	29,086,000	44.3	26,884,000	41.0
1926	67,912,000	—	—	20,435,000	30.1
1928	70,362,000	36,812,000	52.3	33,906,000	48.2
1930	72,602,000	—	—	24,777,000	34.1
1932	75,048,000	39,732,000	52.9	37,657,000	50.2
1934	77,215,000	—	—	32,256,000	41.8
1936	79,375,000	45,643,000	57.5	42,886,000	54.0
1938	81,514,000	—	—	36,236,000	44.5
1940	83,512,000	49,891,000	59.7	46,951,000	56.2
1942	85,759,000	—	—	28,074,000	32.7
1944	89,517,000	47,969,000	53.6	45,103,000	50.4
1946	91,497,000	—	—	34,398,000	37.6
1948	94,470,000	48,691,000	51.5	45,933,000	48.6
1950	96,992,000	—	—	40,342,000	41.6
1952	99,016,000	61,551,000	62.2	57,571,000	58.1
1954	101,097,000	—	—	42,580,000	42.1
1956	103,625,000	62,027,000	59.9	58,426,000	56.4
1958	105,727,000	—	—	45,655,000	43.2
1960	107,949,000	68,839,000	63.8	64,133,000	59.4
1962	110,266,000	—	—	51,304,000	46.5
1964	113,931,000	70,644,000	62.0	66,044,000	58.0
1966	116,383,000	—	—	57,585,000	48.3
1968	121,500,000	73,186,819	60.2		

13 Adapted from CONG. Q. SER., POLITICS IN AMERICA 1945-1964, 78. The population estimate for 1944 includes 4,342,000 members of the Armed Services serving abroad. The same estimate for 1958 includes Alaska, which voted for Representatives in November, 1958, although it did not become a state until January, 1959. Voting age is defined as resident population 21 years of age and older, except: 18 years and over in Georgia since 1944; 18 years and over in Kentucky since 1956; 19 years and over in Alaska; 20 years and over in Hawaii. The figures for 1966 are drawn from the New York Times, Nov. 13, 1966, p. 86 and Nov. 15, p. 36. Presidential vote total for 1968 taken from 24 CONG. Q. 3175 (Nov. 15, 1968).

at least partly to interpret their interests in terms of national political party objectives. But the reverse occurs as well. At the same time, there is a need for party flexibility to permit a shift in organization and a redistribution of power to accommodate the gradual entrance of new groups into the political process. Thus, the parties and the political system as a whole become more responsive to the enlarged electorate.[14]

Four important present-day consequences for the federal government flow from this trend toward inclusion. All have to do with federal governmental responsiveness to a changing electorate. The first is that the enlargement of the franchise, together with social and economic changes, has tended to reduce the dissimilarities between the cross-sections of state and regional electorates and such cross-sections of the national electorate as a whole. The Census Bureau statistics describe an increasingly unitary electorate.[15]

The second consequence is that the requirements of legitimacy militate toward more national and uniform standards of voter qualification and electoral process. In the American political system, voting serves the function of legitimation, that is, as a means to determine which alternatives among leaders or courses of action will be accepted as legitimate and rightful by the entire citizenry. When the electorate and the manner of casting and counting votes differs from one part of the country to the other, the legitimacy of the outcome of various elections is thrown into question. In order to avoid a crisis of legitimacy, it will become necessary to make qualifications and procedures more uniform so that they are acceptable to all (or at least the dominant competitors for office and power).[16]

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14 *See* AMITAI ETZIONI, THE ACTIVE SOCIETY 511-512 (1968).

15 *See Estimated Characteristics of the Electorate, 1820-1960,* in WILLIAM H. FLANNIGAN, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 10-12 (1968). Flanigan notes that, during the early years of the Republic, almost all voters resided in rural areas, the electorate becoming more urban over 150 years. The literacy rate of the electorate was high from the beginning, although the level of education was not. The rate of high-school graduates among the electorate has also risen rapidly since the nineteenth century. When Negroes were enfranchised after the Civil War, only about half of them had recently been slaves but the overwhelming majority were illiterate. The illiteracy rate among blacks has steadily declined and at present approaches the very low rate among whites. Naturalized citizens have never been a large proportion of the electorate and they are a decreasing proportion today. *See* BUREAU OF THE CENSUS, CHARACTERISTICS OF PERSONS OF VOTING AGE, 1964-1968, Series P-20, No. 172, May 3, 1968.

16 Stein Rokkan, *Electoral Systems,* 5 INT'L. ENCY. OF SOC. SCI. 6-21 (1968).

Third, the dynamic competition by parties for nationwide support has brought about some nationalized standards where voter qualifications and representational legitimacy are concerned, but has stimulated little demand for federal administration of elections. This applies to federal, state, and local elections. The same party competition which has generated equalized voter qualifications in the states has resisted repetition of the Reconstruction precedent, i.e. federal conduct of state and national elections. The reasons are many and do not end with high financial as well as administrative costs and with the resistance that may be expected because of vestiges of sectional bitterness over the unhappy experiment of the 1870's. The overriding explanation lies in the fact that, while standardization of voter qualifications and some electoral procedures support party competition, unitary control of the electoral process could too obviously threaten competition. This is because of the opportunities for abuse seemingly inherent in a system of centralized administration. The spectre of manipulation from a single party source reinforces the existing tradition of decentralized administration. Centralized administration of all elections is seen as dysfunctional to party competition, whereas standardization of various electoral procedures and voter qualifications supports party competition.

Fourth, the parties are not equipped to handle completely the adjustment of rights and demands which must accompany "the inclusion process." Courts become involved as well. Their role has been to oversee the definition and realization of the rights of political participation which crystalize at two main points in modern American politics. One is the franchise; the other is the right to attempt to influence policy, starting with the rights of free speech and petition, but extending to the sensitive areas of organizing for political purposes and lobbying.[17]

II. The Warren Court and the Electoral Process

When individuals and groups are unable to make effective use of their franchise rights, and government officials thereby become deaf to the full message of their social needs; litigation may function similarly to voting — as a form of political expression. Justice Brennan

17 Parsons, *supra* note 13, at 1017. *See generally*, Samuel Krislov, The Supreme Court and Political Rights (1967).

acknowledged this point in *NAACP v. Button*,[18] overruling on First and Fourteenth Amendment grounds a complex statutory attempt by Virginia to curtail litigation by the state branch of the NAACP. Brennan explained: "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."[18a] In 1962, Roy Wilkins, national director of the NAACP, expressed the view that his organization had come to look to federal courts for sympathetic treatment of political and civil rights. He said that, especially since the school desegregation case of *Brown v. Board of Education*[19] in 1954, people from a number of states had requested aid in challenging local statutes, such as franchise tax provisions, which impaired constitutional rights.[20] The tide of such legal claims is reflected in Table II, below, which displays the swelling volume of civil and political rights cases. It enumerates (in the center column) all private civil rights suits commenced in federal district courts and (on the right) the number of civil rights cases in which the United States served as plaintiff in a civil rights criminal or civil action. Notice the plateau of private litigation between 1948 and 1954, averaging 173 cases per year. This is followed between 1954 and 1961 by a generally rising slope until 1962, when apportionment litigation and the civil rights movement combined to generate a sharply increased constitutional rights docket (with some assistance from the Justice Department acting under both the Civil Rights Acts of 1957 and 1960 and the vestiges of Reconstruction Acts of 1870 and 1871).[21] The figures for both private suits and government initiated actions for the years 1962 to 1967 show an unprecedented upgrade.

Allowing for a one-to-three year delay in the appeals process, it is not surprising that the Supreme Court's caseload of civil and political rights disputes should be heavy in the years from 1958 to 1968. In this decade, the Supreme Court has done more to extend voting and electoral process rights than during any other period in American history. In these years, the justices have ruled, in constitutional terms,

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18 371 U.S. 415 (1963).
18a *Id.* at 429.
19 347 U.S. 483 (1954); 349 U.S. 294 (1955).
20 Wilkins Testimony, NAACP v. Gray, Transcript of Record, Sup. Ct. of U.S., Oct. Term, 1962, p. 307; decided *sub. nom.* NAACP v. Button, 371 U.S. 415 (1963).
21 42 U.S.C. 1971, 1974; 18 U.S.C. 241, 242.

TABLE II

UNITED STATES GOVERNMENT AND PRIVATE CIVIL RIGHTS SUITS COMMENCED IN UNITED STATES DISTRICT COURTS (1947-1967)[22]

Year	Private Suits	Government Suits
1947	92	10
1948	168	13
1949	159	22
1950	192	18
1951	158	16
1952	189	15
1953	149	24
1954	199	n.a.
1955	221	20
1956	275	20
1957	245	n.a.
1958	242	7
1959	280	3
1960	316	12
1961	270	13
1962	357	29
1963	424	53
1964	709	34
1965	994	40
1966	1,154	60
1967	1,006	106

22 Compiled from data published in JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1947-1968). See generally Table C2. The notation "n.a." indicates figures not available.

on the drawing of constituency boundaries;[23] on the apportionment of representatives at every level of government;[24] on racial discrimination where the political rights of voters are concerned,[25] and invidious discrimination where the rights of candidates are involved;[26]on state-set voter qualifications;[27] on electioneering practices;[28] and on the procedural fairness of Civil Rights Commission hearings regarding the state-conduct of elections.[29] These developments are registered in Table III, which identifies 31 Supreme Court decisions in which a full Opinion of the Court was delivered affecting some aspect of the electoral process.

Before discussing specific cases which have contributed to the standardization of electoral requirements, it is appropriate to take advantage of the panoramic view of the decade of Warren Court decisions presented in Table III. Three types of cases are tabulated where constitutional issues were adjudicated in the areas of districting and apportionment (15 cases marked "A" on the Table), racial discrimination (six cases marked "R"), and miscellaneous voter qualification and electoral process problems (ten cases marked "E"). The Table itemizes the cases chronologically from top to bottom and takes the changing membership of the Court into account. It reports the division among the justices on each case, and it gives cumulative totals of the votes cast. Unanimous rulings are rare except in race-related

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23 Relevant cases, as identified on Table III, are those with full opinions; Gomillion v. Lightfoot, 364 U.S. 399 (1960); Wright v. Rockefeller, 372 U.S. 52 (1964); Fortson v. Dorsey, 379 U.S. 433 (1965).

24 Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1966); WMCA v. Lomenzo, 377 U.S. 633 (1964); Lucas v. Colorado General Assembly, 377 U.S. 713 (1964); Burns v. Richardson, 384 U.S. 73 (1966); Swann v. Adams, 385 U.S. 440 (1966); Sailors v. Kent County Board of Education, 387 U.S. 105 (1967); Dusch v. Davis, 387 U.S. 112 (1967); Avery v. Midland County, 390 U.S. 474 (1968).

25 United States v. Raines, 362 U.S. 17 (1960); United States v. Louisiana, 380 U.S. 145 (1965); United States v. Mississippi, 380 U.S. 128 (1965); South Carolina v. Katzenbach, 383 U.S. 301 (1965).

26 Anderson v. Martin, 375 U.S. 394 (1964); Bond v. Floyd, 385 U.S. 116 (1966); Fortson v. Morris, 385 U.S. 231 (1966); Williams v. Rhodes, — U.S. —, 89 S. Ct. 5 (1968).

27 Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959); Harmon v. Forssenius, 380 U.S. 528 (1965); Carrington v. Rash, 380 U.S. 89 (1965); Katzenbach v. Morgan, 384 U.S. 641 (1966); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

28 Mills v. Alabama 384 U.S. 214 (1966).

29 Hanna v. Larche, 363 U.S. 420 (1960).

disputes; this result is in harmony with the cohesive Warren Court treatment of racial discrimination in areas other than voting. Only three of the districting and apportionment decisions were unanimously decided *(Burns v. Richardson, Sailors v. Board,* and *Dusch v. Davis),* and each of these yielded a ruling unfavorable to the persons claiming a political right. Of the ten electoral process decisions, three received the full support of the bench, *Harmon v. Forssenius, Mills v. Alabama* and *Bond v. Floyd,* and of these, the latter two involved sensitive First Amendment free expression issues.

In the table, the vote of each justice is recorded as being favorable (f) or unfavorable (u) to the political or civil rights claim asserted. These ratings are not intended to imply that the litigant asserting that his rights were infringed was necessarily correct. In some instances where different grounds were advanced by a member of the Court for favoring the asserted right, "fb" registers a favorable vote on broad grounds, and "fn" a favorable vote on narrow grounds. The vote of the author of the Opinion of the Court is entered on the Table in a capital letter. Where a justice did not participate, a notation of "0" is made. In the column entitled Nationalized Standards ("N.S."), a simple rating is given based on whether or not the majority's ruling tends to advance a single national standard (+) where one may previously not have existed, or to avoid requiring uniformity and therefore to sustain continued diversity (−) of electoral operations among the states. On this basis 24 rulings indicate standardization, while only seven tolerate diversity.

Before reviewing some of the more important cases of the last decade, it should be noted that the Warren Court has hardly been writing on a clean slate in directing its attention to the electoral process. No matter what the cause of debasement to the vote, myriad rulings have made clear that it is proper for the Court to look closely where a statute affects the right to vote. Where voting in federal elections was concerned, precedents from *Ex parte Yarbrough*[30] in 1884 to *Burroughs and Cannon v. United States*[31] in 1934 could be cited to identify

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30 110 U.S. 651 (1884). Justice Miller identified the times, places and manner clause of art. I, § 4 as supplying the express authority for federal regulations against interference, intimidation or fraud in congressional elections.

31 290 U.S. 534 (1934). Justice Sutherland relied on the necessary and proper clause for the implied authority sufficient to confer a degree of federal control over the popular vote in elections for president.

TABLE III

SUPREME COURT VOTES IN ELECTORAL PROCESS CASES, 1959-1968

CASE TITLE	YEAR	TYPE	N.S.	VOTE	Warr.	Doug.	Bren.	Black	Wtkr.	Clar.	Stew.	Fran.	Harl.
Lassiter v. Northampton	1959	E	—	0-9	u	U	u	u	u	u	u	u	u
U. S. v. Raines	1960	R	+	9-0	f	f	F	f	f	f	f	f	f
Hanna v. Larche	1960	E	+	2-7	U	f	u	u	u	u	u	u	u
Gomillion v. Lightfoot	1960	R	+	9-0	f	f	f	f	fb	f	f	F	f
cumulative total f			3		2	3	2	3	2	2	2	2	2
u			1		2	1	2	1	2	2	2	2	2
Baker v. Carr	1962	A	+	6-2	f	fb	F	f	White 0	f	f	u	u
Gray v. Sanders	1963	A	+	8-1	f	F	f	f	f	f	f	Gold f	u
Anderson v. Martin	1964	R	+	9-0	f	f	f	f	f	F	f	f	f
Wright v. Rockefeller	1964	A	—	2-7	u	f	u	U	u	u	u	f	u
Wesberry v. Sanders	1964	A	+	8-1	fb	fb	fb	FB	fb	fn	fn	fb	u
Reynolds v. Sims	1964	A	+	8-1	FB	fb	fb	fb	fb	fn	fn	fb	u
Md. Ctee v. Tawes	1964	A	+	8-1	FB	fb	fb	fb	fb	fn	fn	fb	u
Mann v. Davis	1964	A	+	8-1	FB	fb	fb	fb	fb	fn	fn	fb	u
WMCA v. Lomenzo	1964	A	+	8-1	FB	fb	fb	fb	fb	fn	fn	fb	u
Lucas v. Assembly	1964	A	+	8-1	FB	fb	fb	fb	fb	fn	fn	fb	u
Harmon v. Forssenius	1965	E	+	9-0	F	f	f	f	f	f	f	f	f
Carrington v. Rash	1965	E	+	7-1	0	f	f	f	f	f	F	f	u

CASE TITLE	YEAR	TYPE	N.S.	VOTE	Warr.	Doug.	Bren.	Black	White	Clar.	Stew.	Gold.	Harl.
Fortson v. Dorsey	1965	A	−	1-8	u	f	U	u	u	u	u	u	u
Louisiana v. U. S.	1965	R	+	9-0	f	f	F	f	f	f	f	f	f
U. S. v. Mississippi	1965	R	+	9-0	f	f	f	F	f	f	f	f	f
cumulative total f			7	.	15	19	16	17	13	14	14	14	6
u			3		4	1	4	3	2	6	6	1	13
												Fort	
So. Car. v. Katzenbach	1966	R	+	9-0	FB	fb	fb	f	fb	fb	fb	fb	fb
Katzenbach v. Morgan	1966	E	+	7-2	f	f	F	f	f	f	u	f	u
Mills v. Alabama	1966	E	+	9-0	fb	fb	FB	fb	fb	fb	fb	fb	fn
Harper v. Virginia	1966	E	+	6-3	f	F	f	u	f	f	u	f	u
Burns v. Richardson	1966	A	−	0-8	u	u	U	u	u	u	u	u	u
Bond v. Floyd	1966	E	+	9-0	F	f	f	f	f	f	f	f	f
Swann v. Adams	1966	A	+	7-2	f	f	f	f	F	f	u	f	u
Fortson v. Morris	1966	E	−	4-5	f	f	f	U	f	u	u	f	u
Sailors v. Board	1967	A	−	0-9	u	U	u	u	u	u	u	u	u
Dusch v. Davis	1967	A	−	0-9	u	U	u	u	u	u	u	u	u
cumulative total f			23		22	26	23	22	20	20	17	7	9
u			7		7	4	7	8	5	10	13	2	20
										Mars.			
Avery v. Midland	1968	A	+	5-3	fb	fb	fb	fb	FB	0	u	u	u
Williams v. Rhodes	1968	E	+	6-3	u	fb	f	F	f	f	u	f	fn
cumulative total f			24		22	27	24	23	21	1	17	8	10
u			7		8	4	7	8	5	−	15	2	20

a general federal police power over the entire field of federal elections (though it has never been fully exercised).

Generally, the federal government was placed on record as the enemy of racial and other arbitrary barriers to the exercise of the elective franchise. In 1950, Justice Douglas observed with Justice Black in *South v. Peters*[32] that Supreme Court rulings, including "our primary [election] cases since *Nixon v. Herndon* . . . have insisted that where there is voting there can be equality."[32a] The fact that Justice Douglas spoke in dissent suggests that reasonable men could disagree with his suggested application of the Equal Protection Clause to the arcane workings of the Georgia county-unit system of voting in statewide elections for public officials. But his retrospective words did betoken an important *fait accompli:* the Supreme Court's primary election cases had by 1950 yielded a new and flexible notion of federal safeguards in the electoral process.[33]

It is not too early to suggest that Supreme Court decisions, especially since 1958, have given impetus to the nationalization of the electoral process. This is not to deny that decentralized administration and control of local, state and federal elections is a permanent feature of the American electoral process; rather it is to state that, increasingly, the conduct of every election proceeds within the limitations of federal guidelines.

The nationally standardized requirements which the Court has called for from case to case involve quite different types of prescriptions and proscriptions. Disparate constitutional provisions have come into play in the decisions itemized on Table III, but by far the most potent constitutional instrument for change has been the Fourteenth Amendment. Its utility has been proven in the three areas of districting, racial discrimination, and electoral process cases. In the discussion that follows, a summary statement will be offered concerning the nationalization of the electoral process as evidenced in each of these three areas.

(1) *Uniform standards of voting equality are emerging in districting and apportionment cases for elections at every level.*

32 South v. Peters, 399 U.S. 276 (1950). (Douglas and Black dissenting); *cf.* Gray v. Sanders, 372 U.S. 368 (1963).

32a 339 U.S. at 281.

33 *See* Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953).

The Supreme Court opened the court-house door when it ruled in *Baker v. Carr*[34] that a claim of denial of equal protection by malapportionment presents a justifiable right to relief. In 1964, though the Court refused to set mathematical guidelines, it did hold that the equal protection clause required that both houses of a state legislature be apportioned on a population basis.[35] *Wesberry v. Sanders*[36] carried the population equality principle into congressional districting (under Article I, Section 2), while *Avery v. Midland County*[37] more recently brought the one-man, one-vote principle to bear upon local units which exercise "general governmental powers" and which involve the election of officials by districts.

A review of districting and apportionment cases since 1964 suggests that a majority of the Supreme Court has attemped to separate voter equality suits[38] from other kinds of representational contests, such as the multi-member districting issues involved in *Burns v. Richardson.*[39] Casting equally weighted votes is now a matter of legal right, but when other aspects of state electoral arrangements are challenged on equal protection grounds, a heavy burden of evidence and argument falls on the plaintiffs. Insuring the impact of those votes on public policy, or even requiring that an election be held in the first place, remains more a matter of politics.[40] So long as the Court is engaged in the delicate post-*Reynolds* task of setting voter equality in workable order, it appears to prefer avoiding a fixed position on other, though clearly related, electoral problems.

(2) *Vintage "state action" doctrines have been removed as bars to federal protection of voters and registration workers against interference or intimidation by private individuals.*[41]

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34 369 U.S. 186 (1962).
35 Reynolds v. Sims, 377 U.S. 533 (1964).
36 376 U.S. 1 (1964).
37 390 U.S. 474 (1968).
38 *See, e.g.* Swann v. Adams, 385 U.S. 400 (1965).
39 Burns v. Richardson, 384 U.S. 73 (1966).
40 *See* Fortson v. Morris, 385 U.S. 231 (1966).
41 In most race-related cases reaching the Supreme Court, an element of "state action" is obvious. *Anderson* v. *Martin,* 375 U.S. 399 (1964), is a typical racial discrimination case involving the electoral process, except that it grew out of allegations made by candidates rather than the more usual voters' complaints. In this instance the Court was unanimous in voiding a Louisiana statute which required that the race of all candidates be stated on the ballot in all elections including primaries. Justice Clark's opinion noted that by using the state-printed ballot to identify the race of the candidate, the state furnished a vehicle for racial

In its first complaint under the Civil Rights Act of 1957,[42] the Justice Department sought to restrain several Georgia election registrars from continuing racially discriminatory practices.[43] The district court had dismissed the complaint on the ground that Title IV of the Act was so broadly worded as to punish private individuals for interfering with voting.[44] Justice Brennan replied that what was involved here was the action of state election registrars, not private persons.[45]

In *United States v. Guest*,[46] dealing with the shotgun slaying of a Negro teacher by six private citizens, the Court said the the involvement of the State need not be either exclusive or direct in order to bring federal protective statutes under the Fourteenth Amendment into operation. More important, six justices, in concurring opinions, were put on record as saying that they would feel bound to sustain any appropriate law aimed at punishing private individuals who use violence to deny persons identified Fourteenth Amendment or other constitutionally secured rights.[47] One result was the civil rights protection provisions of the Civil Rights Act of 1968.[48] It overcomes the "danger line" in federal prosecutions against private individuals for being "void for vagueness" by identifying clearly the rights marked out for federal protection. Voting is included, along with education, housing, employment, jury service, and travel.[49]

(3) *The Supreme Court has read a Necessary and Proper Clause into the Fifteenth Amendment, thereby offering Congress a vast measure of authority.*

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prejudice. The law thus had a repressive effect on state conducted electoral processes in violation of the equal protection clause of the Fourteenth Amendment.

42 42 U.S.C. § 1971.

43 In Terrell County, where only 48 out of 5,036 Negroes of voting age were registered, four Negro teachers were disqualified for their alleged inability to read. They charged that the election officials delayed the handling of the applications of Negroes, arbitrarily refused to register others, and applied more stringent standards to black than to white applicants.

44 172 F. Supp. 552 (M.D. Co., 1959).

45 U.S. v. Raines, 362 U.S. 17 (1960). *Cf.* U.S. v. Thomas, 362 U.S. 58 (*per curiam*, 1960).

46 U.S. 745 (1966).

47 Cf. United States v. Price, 383 U.S. 787 (1966).

48 82 Stat. 73.

49 Amended 18 U.S.C. § 245 applies criminal sanctions against "Whoever, whether or not acting under color of law," willfully injures, intimidates or interferes with any person in his attempt at "voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary special, or general election."

In *South Carolina v. Katzenbach*,[50] the Chief Justice said that the basic question was whether Congress had exercised its powers under the Fifteenth Amendment in an appropriate manner in relation to the states when it provided for an end to literacy and similar tests for voters in those areas ("Section 4(b) areas") where fewer than 50 percent of the eligibles had either registered or voted in the presidential election of November, 1964. The Chief Justice argued that, although the states have broad powers to determine the conditions for exercising the vote, the Fifteenth Amendment, addressed to Negro voting rights, supersedes contrary exertions of state power where discrimination is the rule.

Section 2 of the Fifteenth Amendment declares that "Congress shall have the power to enforce this article by appropriate legislation." The basic test for the appropriateness of federal statutes under the Constitution was laid down in the permissive terms of Chief Justice John Marshall's time-honored interpretation:

> let the end be legitimate, let it be within the scope of the constitution, and all means . . . which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[51]

There is no doubt that the coverage formula fell unequally on the states, but the Court agreed with Congress that Section 4(b) areas were an appropriate target for the new remedies. Congress, according to Warren, began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies, and was clearly not bound by the rules relating to statutory presumptions in criminal cases when it prescribed civil remedies against other organs of government under Section 2 of the Fifteenth Amendment.

The Court excused the awkwardly composed formula as it applied

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50 383 U.S. 301 (1965). *See also* 42 U.S.C. 1973. "Tests or devices" are suspended in any State or political subdivision which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered or voted in the 1964 presidential election. A "test or device" is defined as any requirement that a person, as a prerequisite for voting, (1) demonstrate the ability to read, write, understand, or interpret any matter; (2) demonstrate any educational achievement; (3) possess good moral character; or (4) prove his qualifications by the voucher of registered voters or members of any other class.

51 McCulloch v. Maryland, 4 Wheat. 316, 421 (1819).

to the few remaining states and political subdivisions where no significant evidence of Fifteenth Amendment violations had been found. In any case, South Carolina was in no position to argue Alaska's case, and Alaska, certain that she could expeditiously reinstate her "tests or devices," registered no protest, nor did Arizona, Hawaii or Idaho.[52]

(4) *Sharp inroads in the name of the Equal Protection Clause of the Fourteenth Amendment have been made into traditional state claims of exclusive control over voting qualifications.*

In *Katzenbach v. Morgan*,[53] Justice Brennan spoke for seven members of the Supreme Court in ruling that Section 4(e) of the Voting Rights Act of 1965 was constitutional. It provided that no person who has completed the sixth grade in an American-flag school in which the dominant language is other than English shall be disqualified from voting under state English literacy statutes. New York residents initiated the suit seeking a bar against enforcing the federal law, which conflicted with the State's English literacy test. To Justice Brennan, the question was not whether the state literacy test had been proved discriminatory by a factual record presented to the Court. The issue was, rather, whether Congress on its own record had the power to override a state voting prerequisite as an appropriate way of enforcing the Fourteenth Amendment. Again, the relevant tests for appropriate federal enforcement legislation were formulated by Chief Justice Marshall in *McCulloch v. Maryland*[54] (with reference to the necessary and proper clause in conjunction with federal control of interstate commerce). The tests are whether the statute is plainly adapted to enforcement of the constitutional grant of federal power and whether

52 The fact that such reinstatement required a petition lodged in a single court in the District of Columbia also presented no difficulty to a majority of the Supreme Court (Justice Black dissenting on this point). The Court also permitted Congress to withdraw judicial review of administrative determinations affecting 4(b) coverage where "objective statistical determinations" by the Census Bureau and "routine" analyses of state statutes by the Justice Department were concerned. Where overbreadth of the coverage formula actually occurs, as in the case of Alaska for example, the affected area can always go to the District of Columbia court and avoid the trouble of challenging administrative determinations to which it objects. All it has to do to achieve this is to go to court with "clean hands." That is it can quickly end Section 4(b) coverage and overcome the chain of inconveniences set in motion by adverse administrative determinations if it has not been guilty of voting discrimination in recent years. Members of the high bench agreed that this procedure serves as a partial substitute for direct judicial review of administrative determinations.

53 384 U.S. 641 (1966).

54 4 Wheat. 316 (1819).

the statute is not prohibited by but is consistent with the letter and spirit of the Constitution. The federal literacy law was plainly adapted to furthering the aims of the Equal Protection Clause and comported with the general scheme of the Constitution, according to Brennan. One reason given was that the practical effect of the federal law was to prohibit New York from denying the right to vote to large segments of its Puerto Rican community, which, in turn, enabled the Puerto Rican minority better to obtain perfect equality of civil rights and equal protection of the laws. Justice Harlan dissented, suggesting that Congress could not do with respect to a state election law what the Supreme Court itself had refused to do in 1959 in *Lassiter v. Northampton Election Board*,[55] namely to hold an English literacy test void under the Equal Protection Clause as inherently discriminatory.

The Supreme Court has recently shown a willingness to void state voter qualifications without reference to federal statutes but solely on the grounds of conflict with the Equal Protection Clause. In *Harper v. Virginia State Board of Elections*,[56] several Virginia residents, supported by an *amicus curiae* brief from the Justice Department, sought to have the Virginia poll tax declared unconstitutional. By the time the case was decided by the Supreme Court, federal district courts in separate actions under Section 10 of the Voting Rights Act had already invalidated the Texas and Alabama state poll taxes.[57] Nevertheless, Justice Douglas' opinion not only said that the Virginia tax was void, but that the states must draw no lines which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment, including distinctions based on wealth or payment of a fee. Douglas asserted that the Court had come to see the right to vote as a right too fundamental to be burdened by the condition of fee paying, and an earlier case[58] upholding a poll tax was now overruled.

Carrington v. Rash[59] involved an effort by an Army careerist who had paid his poll tax and lived in Texas to vote in a Republican primary election there. According to the state Attorney General's interpretation of Article VI, § 2 of the Texas Constitution, ". . . no person

55 360 U.S. 45 (1959).
56 383 U.S. 663 (1966).
57 United States v. Alabama, 252 F.Supp. 95 (1966); U.S. v. Texas, 252 F.Supp. 234 (1966).
58 Breedlove v. Suttles, 302 U.S. 272 (1937).
59 Carrington v. Rash, 380 U.S. 89 (1965).

who entered the service as a resident of another state may acquire a voting residence in Texas while he is in the service."[60] The fact that Carrington had enlisted in the army as a resident of Alabama years earlier stood as a suffrage disability in Texas, even though he had since become a Texas resident. The Texas Supreme Court upheld the Attorney General's ruling, holding that Texas could reasonably seek to protect state and local politics from the influence of military voting strength.[61] The U. S. Supreme Court, with only Justice Harlan dissenting, reasoned that Texas may indeed require that all military personnel enrolled to vote be bona fide residents of the community.

> But if they are are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation. . . . By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment.[62]

(5) *The Equal Protection Clause of the Fourteenth Amendment and the right of assembly in the First Amendment impose limitations upon a state legislature's freedom to restrict political parties in their access to the ballot.*

In 1968, the Supreme Court gave its first clear indication that the power of the states under Article II, Section 1, to select presidential electors is subject to the limitations of the Fourteenth Amendment. In *Williams v. Rhodes,*[63] Justice Black spoke for six members of the Court in voiding the Ohio election laws which had barred George Wallace's American Independent Party (as well as the Socialist Labor Party) from the presidential ballot. The state conceded that the Independent Party had met the petition requirements, but denied the third party's request for printed identification on the November ballot for failure to meet the February 7, 1968 deadline. Having demonstrated its numerical strength, the Independent Party argued that the early deadline for filing and other burdens, including a party primary election conforming to detailed and rigorous standards, denied the party, and identified voters of the state, the equal protection of the laws. A three-judge

60 378 S.W.2d 304, 308 (1965).
61 *Id.*
62 380 U.S. at 89, 94, 96.
63 — U.S. —, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

court unanimously agreed with with the contention, but ruled only that the state must supply a space for write-in votes.[64] The Supreme Court found this remedy inadequate.

Justice Black rested his rejection of the complex of Ohio laws on the grounds that, taken in combination, they

> place burdens of two different, altogether overlapping, kinds of rights — the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.[65]

Black rejected Ohio's contentions that the avoidance of plurality winners, the development of party leadership proved by primary elections, and the promotion of a two-party system were "compelling interests" of the state sufficient to justify the burdens on the right to form a party.[66] Chief Justice Warren lamented the hurried review (seven days of consideration) given *Williams v. Rhodes*, and noted that Justice Black's rationale, based both on the Equal Protection Clause and the First Amendment guarantee of freedom of association, would apply to all elections, national, state and local. "I think it fair to say," he wrote, "that the ramifications of our decision today may be comparable to those of *Baker v. Carr*, a case we deliberated for nearly a year."[67]

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64 290 F.Supp. 983 (1968).

65 89 S.Ct. at 10.

66 *Cf.* Mills v. Alabama, 384 U.S. 214 (1966) where the Court (through Justice Black) ruled that no test of reasonableness could save a state law from invalidation as a violation of the First Amendment when that law made it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election. The Court unanimously barred the prosecution of a newspaper editor for disobeying the Alabama Corrupt Practices Act. The law made it illegal to solicit votes for or against any election proposition on the day for voting. Mills' paper published an election day editorial urging a vote to replace the city commission form of government in Birmingham with a mayor-council arrangement. Justice Black acknowledged that the state's rationale for the statute was to protect the public from last minute charges which could not be answered. Yet, Black said, the state law left people free to hurl their campaign charges up to the last minute of the day before election, and then made it a crime to answer those 'last minute' charges on election day, the only time they can be effectively answered.

67 89 S.Ct. at 27. The Chief Justice concluded significantly with this positive analysis of Williams v. Rhodes: "Both the opinion of this Court and that of the District Court leave unresolved what restrictions, if any, a State can impose. Although both opinions treat the Ohio statutes as a 'package,' giving neither Ohio nor the courts any guidance, each contains intimations that a State can by reasonable regulation condition ballot position upon at least three considerations — a substantial showing of voter interest in the candidate seeking a place on the ballot,

Williams v. Rhodes notwithstanding, Supreme Court forays into the "political thicket" have generally been marked by unhurried deliberation. In the last decade, the Court has been careful about staking out federal claims for supervisory control of the electoral process. From the Court's point of view, dealing with districting, discrimination, and electoral process cases has been something less than an exercise in self-aggrandizement. For example, many problems involving broad social and political issues, including electoral process disputes, might be removed from federal court dockets if *Baker v. Carr* and its progeny result in making state officials more responsive to expanded constituencies. If not, the Warren Court has opened the door to congressional remedies. A review of the propositions advanced on the preceding pages suggests that in several electoral process areas, the Supreme Court has virtually invited Congress to follow the judge-blazed federalization path. Short of compromising judicially defined First Amendment rights and constitutional voting rights where race and fair representation are concerned, there appear to be few barriers left standing to impede Congress from doing what it thinks appropriate to enforce equal protection guarantees applicable to the conduct of any election. Under the times, places and manner clause and the Fourteenth and Fifteenth Amendments, Congress could even remedy a state practice not condemned by the Court or, of its own accord, strike down a state voting requirement which it judges to be invidiously discriminatory. For example, if Congress can make a conclusive legislative finding that ability to read and write English as distinguished from Spanish, is constitutionally irrelevant to an American citizen's casting of a ballot, then a determination that all literacy tests hinder the "equal protection of the laws" might be equally conclusive. Perhaps Congress could even make a similar finding regarding the denial of the vote to eighteen year olds, since they are subject to taxes and military service.[68]

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a requirement that this interest be evidenced sometime prior to the election. and a party structure demonstrating some degree of political organization. With each of these propositions I can agree." *Id.* at 30, 31.

68 Gallup Polls periodically taken since 1939 on whether or not the vote should be extended to 18 year-olds show marked increases in public support during World War II (April, 1943, 42%) the Korean War (July, 1953, 63%), and the Viet Nam War (March, 1967, 64% favorable in a nationwide sampling). The figures were lower in interim years. CONG. Q. 534 (April 7, 1967).

III. Congress and the Electoral Process

The Supreme Court has opened the constitutional door for Congress to give the national leadership it has hitherto avoided in setting selected uniform standards for the electoral process. Whether Congress is politically or temperamentally prepared to natonalize the rules of electoral operations is quite another question. Since the end of the Reconstruction Period, congressional interest in setting selected uniform standards for the electoral process has lagged behind Supreme Court leadership. Civil rights legislation since 1957, however, indicates a changing congressional temper.[69] In addition, an increasing number of federal governmental agencies and commissions concerned directly or indirectly with the electoral process have been developed, and they stimulate or carry policy recommendations forward to Congress.[70] Particularly since 1961, various Judiciary and Elections Subcommittees of Congress have been presented with an unprecedented flood of federal election law proposals, symptomatic of the needs of a nation

69 For the Civil Rights Acts of 1957, 1960, 1964, and 1965, see: 42 U.S.C. §§ 1971, 1973, 1974, 1975c, 2000f.

70 Federal government units which contribute to the security of voting rights or which are concerned with the electoral process have proliferated. They include committees on constitutional rights and on elections in both houses of Congress. The President's Committee on Civil Rights was succeeded by the Civil Rights Commission, [*see* Report of the U.S. Comm. on Civil Rights, 1959, Part I, Voting; Voting (1961); Voting in Mississippi (1965); The Voting Rights Act, The First Months (1965); The Voting Rights Act of 1965 (1965); Law Enforcement, A Report on Equal Protection in the South (1965); Political Participation (1968).] The President's Committee on Campaign Expenditures [Financing Presidential Campaigns, (1962)] and the President's Commission on Registration and Voting Participation [Report, 1963] were both temporary panels under President Kennedy. The Commission on Political Activities of Government Personnel served for two years under President Johnson [Report, 1968]. More long-lived is the responsibility of the Bureau of the Census for maintaining voting statistics. Occasionally doing work touching on voting rights disputes is the Community Relations Service with its race-relations "diplomatic corps." More directly relevant to enforcement is the work of the office of Hearing Examiners of the Civil Service Commission involved in administering the Voting Rights Act of 1965. Voting Rights Examiners are under the direction of the Attorney General who is also responsible for deploying United States marshalls and using the Federal Bureau of Investigation, which is occasionally brought into electoral investigations. The Justice Department discharges its duties under the civil rights laws through the Civil Rights Division. The Criminal Division maintains jurisdiction in election frauds and Hatch Act matters. The Civil Rights Commission and the Civil Rights Division of the Justice Department, though not always in policy agreement, have been particularly instrumental in developing the voting provisions of the Civil Rights Acts of 1960 and 1964, the Voting Rights Act of 1965, and the civil rights protection provisions of the Civil Rights Act of 1968. See Foster Rhea Dulles, The Civil Rights Commission: 1957-1965 (1968).

becoming increasingly unitary. In the wake of the 1960 presidential election, it appeared that short-term interest in legislative changes was spurred by the combination of a new Administration's reforming zeal and opposition concern with alleged voting irregularities and with the need to scrutinize campaign funds. However, a larger perspective on the volume and variety of regulatory proposals from Congress to Congress during the 1960's must take account of technological and economic changes developing at a pace so rapid as to revolutionize campaign techniques and to make obsolete the traditional melange of poorly meshed federal and state laws on national elections.

In spite of the fact that federal election law proposals failed to receive sympathetic treatment in the House in 1961, momentum for reform was sustained by President Kennedy's bipartisan Commission on Campaign Expenditures. The Report of the President's Commission was published in 1962 with recommendations which were endorsed by Presidents Eisenhower and Truman.[71] The Commission urged encouragement (largely by tax incentives) of unlimited contributions for bipartisan political activities. This was grounded on a faith in disclosure as a contribution-policing technique and on the assumption that giving money to one's political party could be viewed on a level with voting as a form of civic participation. Also suggested was a repeal of the easily-evaded ceilings on federal campaign expenditures in favor of renewed emphasis on an effective accounting for receipts and outlays by all political committees. With respect to Taft-Hartley prohibitions on corporate and union partisan spending, the Report recommended that the continued equal legislative treatment of business and labor with respect to political contributions be maintained.[72] The proposals and findings of the Campaign Commission, in addition to a series of related and outstanding studies by scholars such as Stanley Kelley and Alexander Heard, did more to delineate the issues of presidential campaigning in the 1960's and to mark out the alternatives in a continuing debate on election law reform than to generate legislation.[73] As Senator Cannon conceded in 1967, "Con-

71 PRESIDENT'S COMMISSION ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS (1962).

72 A complete statutory history and compilation of Taft-Hartley, Corrupt Practices and Hatch Act provisions relating to federal elections may be found in Document No. 68 of the SENATE SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS, FEDERAL CORRUPT PRACTICES AND POLITICAL ACTIVITIES, 88th Cong., 2d Sess., 1964.

73 STANLEY KELLEY, JR., POLITICAL CAMPAIGNING (1960). ALEXANDER HEARD, THE COSTS OF DEMOCRACY (1962).

gress after Congress has attempted to rewrite the Federal election laws, but without much success."[74]

President Kennedy's appointment of a Commission on Registration and Voting Participation also contributed to the widening scope of debate over federal election law. Indeed, something of the range of legislatively federalized elections standards, aside from race-related matters, is suggested by Commission's Report, published in 1963. Its recommendations are addressed to the states, and the Commissioners realistically assumed the continued administration of elections by state and local officials. Nevertheless, it is instructive to read through the score of proposals which were made and to note those which, in the years 1964-1968, have come under congressional consideration for enactment as uniform national standards. Of the 21 electoral standards advanced, over half (those starred) have become the subject of proposed federal legislation, congressional inquiry or federal action within six years of the Report's publication. In the listing given below, parenthetical reference is made to only the most prominent examples of expressed federal concern or national action.[75]

1. Each state should create a commission on registration and voting participation, or utilize some other existing state machinery to survey in detail its election law and practices.

*2. Voter registration should be easily accessible to all citizens. (H.R. 8176 would make pertinent "recommendations" to states. 90th Congress.)

3. State residence requirements should not exceed six months.

4. Local residence requirements should not exceed 30 days.

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74 An exception was the Presidential Election Campaign Fund Act of 1966. Hastily enacted in the closing hours of the Eighty-ninth Congress, it permitted taxpayers to designate one dollar of their income tax for expenses of the next presidential election campaign. "Major parties" which polled 15 million or more votes in the last presidential elections would divide contributions evenly. For each, actual expenses would be met, or one dollar times the number of votes above 10 million, whichever was lower. A "minority party" which polled between 5 and 15 million votes would receive one dollar for each vote above 5 million. Only such expenses as were already incurred would be subsidized under the supervision of the General Accounting Office. The law, which would give immense new power to the national over the local parties, was repealed in 1967; 113 CONG. REC. (Apr. 13, 1967).

75 REPORT OF THE PRESIDENT'S COMMISSION ON REGISTRATION AND VOTING PARTICIPATION 31-48 (1963).

*5. New state residents should be allowed to vote for the President. (S. 1881 proposes such a requirement. 90th Congress.)

6. Voter registration should extend as close to election day as possible, and should not end more than three or four weeks before election day.

7. Voter lists should be kept current.

8. No citizen's registration should be cancelled for failure to vote in any period less than four years.

*9. Voter registration lists should be used only for electoral purposes. (S. 1026 would require the use of voting rolls for the random selection of all juries. 90th Congress.)

*10. States should provide absentee registration for voters who cannot register in person. (H.R. 8176 so recommends for overseas citizens. 90th Congress.)

*11. Literacy tests should not be a requisite for voting. (Civil Rights Act of 1964, and Voting Rights Act of 1965.)

*12. Election day should be proclaimed a national day of Dedication to Our American Democracy. (S. 2111 would make presidential election day a legal holiday. 90th Congress.)

13. Polling places should be so equipped as to eliminate long waiting periods.

*14. Polling places should be open throughout the day and remain open until at least 9 P.M. (H.R. 2 would require a uniform closing time for polling places in presidential elections. 90th Congress.)

*15. The states should provide every possible protection against election fraud. (A study of electoral fraud irrespective of racial discrimination by the Civil Rights Commission is authorized by the Civil Rights Act of 1964.)

*16. Candidacy should be open to all. (See Civil Rights Commission recommendations regarding federal protection of rights of candidates and dissemination of information regarding candidacy qualifications. Report, *Political Participation,* 1968.)

*17. The right to vote should be extended to those living on

federal reservations. (S. 1581 would facilitate the necessary federal-state cooperation. 90th Congress.)

*18. Absentee voting by mail should be allowed for all who are absent from home on primary or general election day. (S. 1881 so provides. 90th Congress.)

*19. The poll tax as a qualification should be eliminated. (The Twenty-fourth Amendment supplemented by *Harper* v. *Virginia* and the Voting Rights Act of 1965.)

20. Each state should keep informed on other states' practices and innovations in election administration.

*21. Voting by persons 18 years of age should be considered by the states. (S. J. Res. 8 seeks to lower the voting age to 18 by constitutional amendment. 90th Congress.)

With respect to the last standard, it might be noted that abolition of the electoral college, recently regarded with renewed interest, could induce states to outbid each other for a larger popular electorate by relentless lowering of age qualifications to inflate the popular vote. Under these circumstances, the necessity for a uniform national standard could become inescapable. It could materialize in one of two ways. First, a uniform and democratic suffrage could be attained by a positive statement of federal responsibility incorporated in a constitutional amendment of the type illustrated below:

> Section 1. Every citizen of the United States of the age of eighteen years or older who has resided in any State or Territory six months and in the voting precinct 30 days, immediately before offering to vote, shall be entitled to vote at any primary election or other election therein, in which candidates for any public office are nominated or elected, except that the right to vote shall not extend to persons in confinement for crimes nor to persons adjudicated unsound of mind.
>
> Section 2. Congress shall have power to enforce this Article by appropriate legislation.[76]

Second, if the constitutional amendment route to nationalized standards is not taken where political considerations warrant change, a line of federal statutory development would probably parallel the expansion of federal regulation of commerce. After a period of litigation chal-

76 The text of this amendment proposal is a modification of the suggested constitutional change urged and fully explored in DUDLEY MCGOVNEY, THE AMERICAN SUFFRAGE MEDLEY ch. 9 (1949).

lenging each new incursion, all concerned would finally demur to the proposition that the question of whether local regulation should be preserved is more a matter of policy for Congress than of law for the courts.

Building on the recommendations and findings of the two Presidential Commissions concerned with campaign financing and voting participation, President Johnson in 1967 called for comprehensive reform and a new set of nationalized standards to apply to federal elections. His message to Congress on "The Political Process in America" included a five point program designed, as he put it, to:

> — Reform our campaign financing laws to assure full disclosure of contributions and expenses, to place realistic limits on contributions, and to remove the meaningless and ineffective ceilings on campaign expenditures.
>
> — Provide a system of public financing for Presidential election campaigns.
>
> — Broaden the base of public support for election campaigns, by exploring ways to encourage and stimulate small contributions.
>
> — Close the loopholes in the Federal laws regulating lobbying.
>
> — Assure the right to vote for millions of Americans who change their residence.[77]

Reforms such as these are workable if they move with the grain of dominant patterns of political forces and social and economic facts. The proposals on campaign financing, for example, take into account that modern technology makes possible a national presidential contest marked by expensive jet-age campaigning from Florida to Alaska and from Maine to Hawaii, by telethons costing hundreds of thousands of dollars, by costly specialists and advisors, nationwide intelligence networks, and by the inclination of each of the political parties to assume above all that defeat is the highest price it can pay. The proposal for uniform residency requirements in presidential elections recognizes that citizen-mobility in the 1960's has generated a disfranchised group that rivals, if it does not surpass, historical groups of otherwise qualified but voteless Negroes. In the single year, 1965-1966, changes of resi-

77 The President's Message to Congress on May 25, 1967, entitled "The Political Process in America," was reprinted in SENATE COMM. ON RULES AND ADMINISTRATION, HEARINGS ON FEDERAL ELECTION REFORM, 90th Cong., 1st Sess., 3-10 (1967).

dence from one state to another were made by 6,263,000 Americans.[78] Large numbers of persons so endangering their votes by moving from one jurisdiction to another constitute an imposing political problem. The traditional justification for state residence prerequisites ranging from six months to two years lay in the need for familiarity with local politics and problems. But American voters at home, abroad or on the move can familiarize themselves with the national issues of presidential campaigns. In the English literacy test case of *Katzenbach v. Morgan,*[79] the Supreme Court supplied Congress with the constitutional underpinnings sufficient for it to remedy the discrimination faced by mobile Americans whose travel bars them from voting in presidential elections. The impact of this problem has been enough to stimulate reform efforts at both the state and federal levels.[80] In 1962, the National Conference of Commissioners on Uniform State Law proposed a remedy in a model statute which they urged the states to adopt. It applies only to new residents and to presidential elections. With built-in reservations to protect against double voting, the act grants a waiver from existing residence requirements to otherwise qualified state newcomers who wish to vote in an upcoming presidential election.[81] When the proposal for a similar requirement under federal law was made by the President in 1967, enough states had already adopted the model state statute so that changes in less than

78 Bureau of the Census CURRENT POPULATION REP. NO. 156, *Mobility of the Population of the United States from March, 1965 to March 1966* 20 (1966). A meticulous reworking of 1960 mobility data by William G. Andrews indicated that 5.4 million adult Americans were barred from voting by residence requirements. *American Voting Participation,* 19 WEST. POL. Q. 639-652 (1966).

79 *Supra* n. 53.

80 The Federal Voting Assistance Act of 1955 (5 U.S.C. 2171) replaced the Soldiers Voting Act of 1942. The version of 1955 provides for a simple, uniform federal post card application procedure for absentee registration and voting by members of the Armed Forces, their dependents, and civilian government employees abroad. In 1967, Congressman Brademas asked for revision (H.R. 8176) in the Act of 1955 to make it applicable to all Americans temporarily abroad. His bill would follow the Voting Assistance Act in permitting states to accept or reject its recommendations.

81 *See, Elections: Qualifications of Voters, Residency Requirements Reduced for Voting in Presidential Elections,* 77 HARV. L. REV. 574 (1964). In 1967, three scholars showed the strong correlation between the stringency of residence requirements and voter turnout. They concluded that "registration requirements are a more effective deterrent to voting than anything that normally operates to deter citizens from voting once they have registered, at least in presidential elections." Stanley Kelley, Jr., Richard E. Ayres, and William G. Bowen, *Registration and Voting: Putting First Things First,*" 61 A.P.S.R. 359, 362 (1967). See also, Drueding v. Devlin, 234 F.Supp. 721 (1964), *affd.*, 380 U.S. 120 (1965).

half of the states would be required to bring about uniformity. The federal law thus would have the effect of hastening a reforming tendency already in motion for a problem that is fundamentally interstate in character.

The increasing volume of federal statutory proposals which have busied Congress in the last decade have focused chiefly on presidential and congressional elections (except where Congress sought to remedy racial discrimination in all elections under civil rights legislation.) Some proposals have been advanced as "recommendations" to the states. How long such federal self-restraint will prevail will depend upon such factors as the changing social and technological realities of the political system, on changing party structures and on the effectiveness of local governmental representation. Inhibitions on the nationalization of the electoral process now depend little upon constitutionally imposed limitations. If the litigation process is to recede from the center of the electoral arena where it has been for ten years, it will probably only take its exit from the courts because it has given way to legislation, to changing patterns of party competition and party discipline, or, less happily, to irresponsible non-legal procedures.

THE NEW YORK PRIMARY: RETURN OF PRE-PRIMARY DESIGNATING CONFERENCES

ROBERT L. TIENKEN*

INTRODUCTION

On June 18, 1968, for the first time in forty-eight years, New York voters participated in a direct primary to select nominees for an office upon which the entire electorate of the state would vote at the general election. The Democratic and Liberal parties in New York elected their nominees for the United States Senate in the first state-wide primaries held under a statute enacted in 1967.[1]

In the Democratic primary, Paul O'Dwyer, former New York city councilman, won an upset victory over his two opponents, Eugene Nickerson, Nassau County Executive and candidate of the state party organization, and Representative Joseph Y. Resnick, Democratic Congressman from the Twenty-eighth district. In the Liberal Party primary, Senator Jacob Javits, incumbent United States Senator, won handily over Murray Baron, a prominent member of the Liberal Party and a labor leader.[2]

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1 Laws 1967, ch. 716, §§ 2-5, (1967) N.Y. Laws 1828-1831, *amending* N.Y. ELECT. LAW (1964) §§ 131(2), 132(1), 136(2), 137(2) (McKinney, Supp. 1967).

2 N.Y. Times, June 20, 1968, at 40, col, 1, 3. The vote was O'Dwyer, 266, 500; Nickerson, 250,405; Resnick, 217,141. In the Liberal primary, the vote was Javits, 8,424; Baron 3,452 (all unofficial figures). The Democratic State Committee had endorsed Nickerson on March 30, 1968, with 58 percent of the committee's vote. Representative Resnick received 28 percent of the committee's vote and was entitled to a place on the primary ballot. *See* CONG. Q. Apr. 5, 1968, at 740-741. Mr. O'Dwyer had qualified by filing a petition containing at least 10,000 signatures of enrolled party voters of whom at least 50 resided in each of three-quarters of the counties of the State, N.Y. Times, May 11, 1968, at 21, col. 4. Senator Javits had received 66 percent of the vote at the Liberal party's convention on March 30, 1968, and Mr. Baron had received 29 percent, entitling him to a place on the party's primary ballot. There was no primary contest for a Senate candidate in the Republican Party after Senator Javits had been unanimously nominated by the Republican State Committee on March 27, 1968 (CONG. Q., *supra*).

These primaries were of singular significance for New York as the first state-wide primaries held since the repeal in 1921 of a 1913 statute[3] under which all major party candidates for public office, except for town, village, and school district offices, were nominated at direct primaries after qualifying by filing petitions. For the general elections from 1914 through 1920, candidates of major parties for state-wide offices were nominated under this statute in direct primaries.[4] Following repeal of the primary law, major party candidates for such offices[5] were nominated by state party conventions, the process used before 1914.[6] Consequently, party voters had exercised only an indirect influence over the selection of such nominees.[7]

Furthermore, the pre-primary conference system established by the 1967 statute was substantially the plan championed by former Governor Charles Evans Hughes more than fifty years earlier.[8] Under this

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3 Law of May 2, 1921, ch. 479, § 1 (2), (4), (1921) N.Y. Laws 1451, 1454 (amended). The original statute was Law of December 17, 1913, ch. 820 § 17, (1913), N.Y. Laws 2327 (repealed 1921). A political party was described in the 1913 statute as an organization which at the last preceding gubernatorial election polled at least 10,000 votes for governor. Law of December 17, 1913, ch. 820, § 1 (2) (8) (amended). Existing law has placed this figure at 50,000 votes. N.Y. ELECT. LAW § 2 (4) (McKinney, 1964).

4 Such offices were Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, Attorney General, State Engineer, Judge of the Court of Appeals, and United States Senator. N.Y. LEGIS. MANUAL, 1921, at 766, and 1922, at 668. Election of United States Senators by popular vote was effected by Law of December 17, 1913, ch. 822, (1913) N.Y. Laws 2418-2419.

5 The offices for which the entire state electorate voted were the same as in note 4, *supra,* until 1927 when three positions were removed from the ballot: Secretary of State by Law of April 16, 1926, ch. 437, § 1 (1926) N.Y. Laws 759; Treasurer by Law of April 22, 1926, ch. 548, §§ 2, 5, 7-9, (1926) N.Y. Laws 963-966; and State Engineer and Surveyor by Law of April 14, 1926, ch. 348, § 1 (1926) N.Y. Laws 615.

6 The primary law of 1911 did not require primaries and pre-primary conferences for offices voted on by the entire electorate. Law of October 18, 1911, ch. 891 (1911), N.Y. Laws 2657-2726 (repealed 1913).

7 N.Y. ELECT. LAW (1964) § 132 (McKinney, 1967 Supp.), *as amended,* Law of March 27, 1968, ch. 39-232, 33, at 137, regulates state party conventions in: (1) apportionment of delegates and alternates, (2) the certification of elected delegates, (3) the time and place for holding such a convention (fixed by the party state committee), (4) the procedure in calling the convention to order, (5) the selection of a temporary chairman, (6) the appointment of committees, (7) the filing of minutes with the appropriate state official. Delegates are selected from assembly districts within New York City and from subdivision units prescribed by the party in areas outside of the city.

8 Laws 1967, ch. 716 §§ 2-5, (1967), N.Y. Laws 1828-1831, *amending* N.Y. ELECT. LAW (1954) §§ 131 (2), 132 (1), 136 (2), 137 (2) (McKinney, Supp. 1967). For a discussion of the Hughes plan *see* C. Beard, *The Direct Primary in New York State,* 7 PROC. AM. POL. SCI. ASS'N. 192 (1910). H. Feldman, *The Direct Primary in New York,* 11 A.P.S.R. 516-518 (1917).

system, the party committee or conference designates its choice for the primary ballot.[9] If the party voters dissent from this selection they may place other members of the party on the primary ballot by filing petitions of candidacy.[10]

This study will trace the origins and development of the pre-primary conference system in New York, beginning with early efforts to legislate some measure of control over the nominating process. The first application of the pre-primary conference, a 1911 statute[11] passed after a crusade by Governor Hughes, will be considered to highlight the modern experience of New York. Next, the immediate struggle leading up to the 1967 primary statute in which the plan re-emerged and the modern experience in the 1968 primary will be recounted. Finally, some comments will be made on the likely future of the system.

I. Early Attempts to Regulate the Nominating Process

In the middle of the nineteenth century New York began a long and continuous effort to regulate the selection of party nominees for public and party office. Gradually large areas of decision-making where party leaders had exercised discretion were restricted, and penal proscriptions were applied against illegal activities. At the same time, insurgent groups within the parties themselves attempted to achieve reform by amending party rules. However, they met with less success.[12]

The first step was taken in 1866 with the enactment of a statute proscribing bribery and other corrupt practices at primary meetings,

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9 "Conference" as used here includes a party convention although the Hughes plan limited designations to party committees or other organizational units less than a convention.

10 In New York since 1960, party members desirous of contesting a primary may also file a petition for an opportunity to designate write-in candidates at a primary. N.Y. Elect. Law, §§ 148, 148a (McKinney, 1964). This method works somewhat like a pre-primary conference system but is more awkward because it requires write-in votes to contest a primary. Such petitions are filed not later than the fourth Tuesday preceding the primary. This is a week later than the day required for the filing of designating petitions. N.Y. Elect. Law § 143 (1) (3a) (McKinney, 1964).

11 Law of October 18, 1911, ch. 891, (1911), N.Y. Laws 2657-2726 (repealed 1913).

12 *See* F. Dallinger, Nominations for Elective Office in the United States (1916 ed.) at 108-109.

caucuses or conventions.[13] In 1882 and 1883 New York broadened its penal provisions for nominating sessions, applying the new law to every county regardless of the size of its cities.[14] An act in 1887 extended the prior law to provide procedures for challenges and poll watchers and required prior notice of nominating sessions. However, it superceded the earlier acts only in the cities.[15] This geographical limitation was not the only failing, as a contemporary judicial commentary suggests:

> While these provisions reduced to a considerable extent the wrongs which had been committed against the voter . . . and made snap caucuses impossible and the selection of delegates by brute force extremely difficult, still the right of the general committee to prescribe tests or qualifications for a voter was in some instances so employed as to exclude from participation in the primary many who were not in sympathy with the majority of the committee. . . . The not unnatural desire of the several general committees to perpetuate their power and control led, in some instances to the making of 'regulations' under which members who were not congenial to the majority were disciplined upon charges of disloyalty, inefficiency or mismanagement.[16]

Even after three more statutes in the decade following 1887, party leaders still retained substantial discretion over party organization. The statutes continued to be limited to larger geographical areas (over a population of 5,000).[17] A large gap in statutory regulation of party

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13 Law of April 24, 1866, ch. 783, (1866), N.Y. Laws 1687 (amended). *See* C. MERRIAM AND L. OVERACKER, PRIMARY ELECTIONS (1928), at 8. For a study of abusive practices at caucuses, conventions, and primary meetings, *see* MERRIAM AND OVERACKER, *supra*, ch. 1, and DALLINGER, *supra*, chs. 5-6.

14 Law of May 13, 1882, ch. 154, (1882) N.Y. Laws 188-189 (repealed 1892). Law of May 113, 1883, ch. 380, (1883) N.Y. Laws 560 (repealed 1892).

15 Law of May 2, 1887, ch. 265 (1887), N.Y. Laws 329-333 (repealed 1892). The 1887 law specifically required, with regard to poll watchers, that inspectors be designated at every poll by the parties, and that slates of candidates be permitted to name poll watchers. It authorized certain other procedures to be adopted optionally by party rule, local referendum, or on demand by five electors in an election district. These procedures included voting by ballot, the taking of an oath by the inspectors, use of a ballot box in an open location, the maintenance of a poll list of the electors, a prescribed time for holding open the polls, and the filing of returns by the inspectors.

16 People *ex rel.* Coffey v. Democratic Committee, 164 N.Y. 335, 340-341, 50 N.E. 124 (1900).

17 The Law of May 2, 1890, ch. 262, §§ 2, 3, 4, 5 (1890) N.Y. Law 482-483 (repealed 1896) defined political parties for the application of the statutes regulating conventions and primary meetings. In 1895, the statutes were amended to permit nominations by convention or primary meeting by parties which cast 10,000 votes at the last preceding general election, or one percent of the entire

enrollment continued, enabling party leaders to manipulate "qualifications" for their own purposes.[18]

In 1898 the first major statute regulating primaries was enacted.[19] It was a comprehensive effort on its face. It applied to political parties which at the last preceding election for governor polled at least 10,000 votes but more than three percent of the entire vote for that office.[20] Territorially, the act covered political parties in cities and villages having five thousand or more population. While optional in cities of the third class and villages with five thousand population or more, it was compulsory for cities of the first and second class.[21]

The act established a more thorough control over party enrollment than its predecessors,[22] specified primary days for election of delegates

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vote cast in the subdivision for which the convention or primary meeting was held. Law of May 29, 1895, ch. 810 (1895) N.Y. Laws 602 (repealed, 1896). In 1896, following the adoption of the Constitution of 1894 (Art. 2, § 4), the Legislature provided that conventions and primary meetings were to be conducted and presided over by officers to be selected pursuant to party rules or rules of an independent body in all cities and villages with populations of over 5,000. Optionally, the six following additional requirements could be obtained: (1) chairman and other officers shall take the constitutional oath of office, (2) candidates, delegates, and officers of the organization or committee shall be chosen by ballot, (3) the meeting shall be held open not less than one hour for voting, (4) tellers shall keep a poll list and assist the secretary in the canvass of the votes, (5) an elector shall be appointed watcher for each candidate or set of candidates or delegates who so requested, and (6) the chairman shall publicly announce the result of the vote for each candidate and the result of the canvass, and, if the primary is held in a city or village having a population of more than 5,000, file a statement of the results, the oath, and the poll list for inspection and examination by any elector of the State. Law of May 27, 1896, ch. 909, §§ 50-59 (1896) N.Y. Laws 920-928 (partially repealed, 1911).

18 Party enrollment of voters for participation in primary meetings and caucuses was left to the parties to regulate by rules, in the privisions of the 1882 law, § 2 at 188. *See* note 17. A similar provision was contained in the 1887 law, § 14, at 331. In the 1892 law [Law of May 18, 1892, ch. 630, § 53 (1892), N.Y. Laws 1620 (repealed 1896)] it was provided that no person would be entitled to vote at any primary unless he were qualified to vote at the general election for the officers to be nominated. Such persons also had to possess such other qualifications as might be authorized by party rules and regulations. This same provision was carried in the Law of May 27, 1896, ch. 909 § 53 (1896), N.Y. Laws 922 (repealed, 1911).

19 Law of March 29, 1898, ch. 179 (1898), N.Y. Laws 331-359 (amended 1899).

20 *Id.*, § 2, at 332; *Id.*, § 15, at 357-358.

21 *Id.*, § 1, at 331; *Id.*, § 16, at 358.

22 *Id.*, §§ 3, 7, at 332-340, 345-347. It provided that voters could enroll in parties, if they so desired, on statutory registration days, by filing a declaration of affiliation, or by responding to a challenge. Enrollment took effect as of the first day of January following the registration days and was good for one year. Additions to party rolls could be made by special and supplemental enrollments. In order to enroll in a party, a voter must not have enrolled with any other party, or have participated in the primary elections or conventions of any other party,

to certain conventions[23] and party committeemen,[24] and provided for the nomination of party candidates for public office who had won at primaries under party rules.[25] It regulated the creation of election districts and the actual polls and ballot tallies.[26] Party conventions in state subdivisions came within its scope.[27] Judicial relief was outlined.[28]

Yet control over primaries and conventions still concentrated on the cities,[29] nominations were still indirect, and party control remained with the "machine."[30] Party enrollment had become honest as had appearances at the primaries, "but obstacles were placed in the way of independent movements within the parties, and contests were discouraged. In consequence, the vote at the primary was small."[31]

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since the first of January of the preceding year. Provision was made for the transfer of enrolled members who had removed from one election district in a city or village to another election district in the same city or village. Enrollment records were kept by the chairman of the board of election inspectors in each election district. In cities and villages with populations under 5,000, enrollment was governed by § 53, ch. 909, of the Laws of 1896. The 1898 statute was amended by Law of May 2, 1899, ch. 473, § 3 (1899), N.Y. Laws 970-980 (amended, 1911, 1913). The new system provided for written enrollment by voters on enrollment blanks in voting booths instead of answering questions from election officials. Further minor changes were made in the enrollment provisions prior to 1911.

23 Law of March 29, 1898, ch. 179, *supra*, § 4, at 340. The principal exceptions were delegates to state and national conventions, and delegates to conventions made up of delegates chosen by other conventions pursuant to party rules. Delegates to state conventions were elected at a separate primary either directly, or indirectly by election of delegates to conventions which selected delegates to state conventions. Selection of national convention delegates was left to the determination of each party.

24 *Id.*, § 4, at 340. Party committeemen in Buffalo and New York City were required to be elected at the primary. *Id.*, § 9, at 351.

25 *Id.*, § 4(3), at 341.

26 *Id.*, §§ 4-8, at 341-349.

27 *Id.*, § 10, at 352-353.

28 *Id.*, § 12, at 356-357.

29 Two additional statutes prior to 1911 added little. Law of May 2, 1899, ch. 473 (1899), N.Y. Laws 968-998; Act of March 21, 1902, ch. 195, §§ 1-16 (1902), N.Y. Laws 488-496 (repealed, 1911) (certain towns could elect to be covered by the 1898 statute).

30 *See* Beard, *supra*, note 8.

31 H. A. Bull, *The New York Primary Law*, PAPERS AND ADDRESSES ON PRIMARY REFORM, ANNUAL MEETING, MICH. POL. SCI. ASSOC. (Mar. 1905), Vol. VI, No. 1, at 103. "District committeemen in each election district made up a party ballot. If anyone wished to contest the organization candidates he would file his own printed ballot, but had no chance to know whom the machine had nominated. A contestant either had to file names for all places on the ballot and fight the machine across the board, or leave numerous blank spots on his ballot. He could also provide pasters with his name on them and ask voters to write his name in on the organization ballot, but all the methods were difficult to get people to use." *Id.*, at 98-99.

II. The Original Choice of the Pre-primary Conference

Momentum for direct primary reform commenced seriously in New York with the election of Charles Evans Hughes as governor in 1906.[32] It was not initiated as a popular demand. Rather it was carried forward in New York politics when the insurgent forces in the Republican party felt that there was no other way of capturing the established organization which had been discredited by the insurance investigation and the legislative scandals during the first years of the new century. The Citizens Union, the leading civic organization of New York City, had, from time to time, proposed direct nominations at Albany, and independent reformers had done the same thing on their own account, but it was not until 1909 that Governor Hughes recommended a state-wide direct primary and took positive steps toward the formation of a definite legislative measure embodying his ideas.[33]

He had been preparing such a move, however, from the beginning of his administration. Although a strong supporter of the direct primary, Governor Hughes nevertheless urged adoption of the pre-primary conference plan, as a feasible means of effectively containing the machinery of the party organization without destroying its efficiency.[34] A bill carrying his proposal was defeated by negative committee reports in both Houses of the Legislature, but the issue was not closed entirely. The Legislature established a joint committee in April, 1909, and authorized it to examine the operation, efficiency and results of direct primary statutes in other states and to recommend amend-

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32 L. Abrahams, *Origin of the Direct Primary Laws of the State of New York*, 43 Law Notes 11 (Nov. 1939) J. G. Saxe, A Manual of New York Laws Relating to Elections, (1914 ed.) at 30-31.

33 *See* Beard, *supra*, note 8, at 187.

34 *See* Beard, *supra*, note 8, at 192-193. Hughes subsequently wrote about the plan; "The object of the direct primary . . . is to make party organization representative and responsible, to prevent its abuse, not to destroy its wholesome influence. . . . The primary system should be so devised as to interpose the necessary check upon party leadership, while at the same time putting both the community and the candidate to as little trouble and expense as possible. . . . I have never favored the so-called open primary. I have never believed in attempts to destroy party organization. . . . in the endeavor to secure freedom from intolerable abuses, the efficiency and reasonable requirements of party organization should not be impaired." Charles Evans Hughes, *The Fate of the Direct Primary* 10 Nat. Mun. Rev. 23-31, (Jan. 1921).

ments, if any, to the New York laws.[35]

The joint committee reported to the Legislature in February, 1910. Not surprisingly, the report was adverse to a direct primary. The committee conceded that political conditions in the state and parties therein were "not all to be desired", but it was convinced that no reason existed in New York, as it did in other states, for so revolutionary a procedure as the abolition of the convention system which had been in vogue since New York had become a state. It declared that often where direct primary laws were adopted corruption and dishonesty had been rampant in the nominating processes because the statutory regulation of conventions and caucuses as imposed in New York was lacking. The committee expressed the opinion that the direct primary was still in the experimental stage, and that therefore it was preferable to await results in other states before making drastic changes in New York. Finally, it suggested that in the interim efforts should be undertaken seeking to perfect New York's representative nominating system.[36] Following the report of the Committee, Governor Hughes attempted unsuccessfully to secure a direct primary law during the session of 1910.

Support for the direct primary concept continued to grow, however, and both major parties included a direct primary plank in their platforms for 1910.[37] The newly elected Democratic administration, under Governor John A. Dix, did succeed in its efforts to obtain a primary statute in 1911.[38] For the first time, primaries in New York for major parties became mandatory in the selection of candidates for all public offices except those voted for by the entire electorate, and except for town, ward, and village offices and for the office of school director. Nominees for offices voted for by the entire electorate were to be nominated at party state conventions. Party nominations

35 *See* Beard, *supra*, note 8, at 193. REPORT OF THE JOINT COMMITTEE OF THE SENATE AND THE ASSEMBLY OF THE STATE OF NEW YORK APPOINTED TO INVESTIGATE PRIMARY AND ELECTION LAWS OF THIS AND OTHER STATES. Transmitted to the Legislature, February 21, 1910.

36 *Id.*, at 213, 216-217. The Committee proposed a uniform primary day throughout the State, an official primary ballot for each party printed at public expense, the abolition of intermediate conventions for the selection of delegates to other conventions, state-wide enrollment of party voters, the election of party, county, town, and ward committeemen at the primary, the filing of names of all candidates for committeemen, and for delegates to conventions with appropriate officials a reasonable time before primary day, and, the introduction of the "short ballot".

37 *See* Beard, *supra*, note 8, at 197.

38 Law of October 18, 1911, ch. 891 (1911) N.Y. Laws 2657-2726 (repealed 1913).

for town, ward, and village offices and for the office of school director were to be made in the manner prescribed by the rules of the respective party county and city committees.[39]

All members of party committees including municipal court district committees were to be elected at the primary.[40] Delegates and alternates to state conventions were to be elected by assembly district conventions. All delegates and alternates to all other conventions except national conventions were to be elected at the primary.[41] The pre-primary conference plan of Charles Evans Hughes was enacted into law by providing (except in the case of nominees selected by state conventions) that designations by party committees were to be filed not later than the third Tuesday preceding the primary, while designations by party members, by petition, were to be filed not later than five days after the third Tuesday preceding the primary.[42] The statute also contained provision for the first official primary ballot in the State, but it was in the columnar form with organization interests being granted the privilege of the left hand column and the use of the party emblem.[43]

III. The Second Round: Repeal in New York and Experiments in Other States

Although it wrought beneficial changes, the 1911 statute with its

39 *Id.*, § 29, at 2682. The 1967 statute includes offices voted on by the entire electorate. *See* note 1, *supra.*

40 *Id.*, § 27, at 2679. This was a recommendation of the Joint Committee in 1910.

41 *Id.*, § 58, at 2714-2715. A partial fulfillment of a recommendation of the Joint Committee in 1910, *see* note 36, *supra.*

42 *Id.*, § 29, at 2686. Candidates at the primary, (1) for the United States House of Representatives were designated by congressional district committees, (2) for the State Senate were designated by senatorial district committees, (3) for justices of the supreme court were designated by judicial district committees, (4) for the state assembly were designated by assembly district committees, (5) for county offices were designated by county committees, and for judges of the court of general sessions in the County of New York, and justices of the City Court of New York were designated by the county committee, (6) for city offices to be filled by the voters of the entire city were designated by city committees, (7) for borough offices in a city containing more than one million inhabitants were designated by borough district committees, (8) for justices of the municipal court in a city containing more than one million inhabitants were designated by municipal court district committees, and (9) for aldermen in cities containing more than one million inhabitants were designated by aldermanic district committees. *Id.*, § 29, at 2682-2683.

43 *Id.*, § 29, at 2692-2695. This came also from the 1910 Joint Committee Report.

pre-primary conference plan was to be short-lived. The columnar ballot, the numerous candidacies, and chicanery by the party bosses created havoc at the spring primary and apathy at the fall primary in 1912.[44] The 1912 elections returned William Sulzer, a Democrat, as Governor. After his impeachment, his successor, Governor Martin Glynn, and the reform advocates of the direct primary spurred the Legislature to enact the primary law of 1913. The Statute provided for direct primaries for all major party candidates for public office and for party positions[45] and repealed the Hughes pre-primary conference plan of the 1911 law by allowing for designation by petition only.[46]

However, experience under the 1913 law changed from enthusiastic response in 1914, when the primary vote for governor was more than one-third of the general election vote, to bare recognition by 1920.[47]

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44 *See* H. Feldman, *supra*, note 8, at 495-496; "In the 1912 primaries great confusion occurred. The peak of absurdity was reached by the election board in New York City, which decided upon using a ballot 14 feet long. A newspaper suggested in this connection that such ballots made admirable hall runners for city flats. At least 400 out of the 1699 election districts were lacking in something — ballots, tally sheets or election officials — and, as a result, no primary at all was held in quite a 'substantial fraction' of the districts . . . Even the fall primary failed to raise enthusiasm. The World Almanac for 1912 reports that 'the primaries in the city of New York held on September 18, 1912, proved to be of little interest, since in every case the organization candidates were elected.'"

45 Nominations for certain local offices were excepted from the petition and the primary and were made as prescribed by party rules. Law of Dec. 17, 1913, ch. 820, §§ 17, 18, at 23, 27. Other changes affected by the statute were: (1) each designating petition contained the names of a committee to fill a vacancy should the candidate designated decline the designation, die before primary day, etc., *Id.*, § 24, at 2332-2333; (2) the 'Massachusetts' type ballot was adopted under which the names of all candidates of the party in the primary were placed under the office title, thus preventing "straight ticket" voting, *Id.*, § 30, at 2336-2340; (3) no party funds were to be expended for primary purposes, *Id.*, § 68, at 2374; (4) party conventions could be held for the formulation of party platforms and for the transaction of party business, but delegates to such conventions were not to be chosen at official primaries or at public expense, *Id.*, § 17, at 2327.

46 The repeal of the pre-primary conference system in New York did not abolish its informal utilization by the parties during the direct primary years of 1914-1920. The parties did hold conferences and conventions after 1913 at which party tickets for the primaries were informally agreed upon. *See* H. Feldman, *supra*, note 8, at 494. For a discussion of informal endorsement of party designees for a primary by state conventions called for purposes of platform drafting, etc., *See* Schuyler C. Wallace, *Pre-primary Conventions*, 106 ANNALS at 97 (Mar. 1923).

47 The percentage of the primary to the general election vote for governor, in all counties of New York, 1912 to 1920, were:

1912	(delegates to state nominating conventions)	16%
1914		34%
1916		28%
1918		30%
1920		20%

The lack of contests should be noted. In 1914 contests in practically all state offices aroused interest. In 1916, however, party organization candidates swept the election. "Machine" candidates received active support from party organizations, such as speaking invitations that were denied others.[48] Government organization was not sophisticated enough to handle the long ballot with a host of unimportant, non-political offices and the frequent elections — the term for assemblymen was one year. Moreover, the statute itself had defects. It did not provide privileges to candidates such as free publicity pamphlets, and thus expenses rose. It forbade designations of candidates by party organizations, thus relieving the machine of responsibility for poor candidates that it in fact supported. At least one observer, however, saw no difference in quality between the candidates in this era and those under the convention system.[49]

After several unsuccessful attempts to repeal the direct primary, opponents obtained the repeal of the direct nomination of U. S. Senators, supreme court judges and all officers elected on a state-wide ticket in 1921.[50] The Legislature substituted nomination by state and judicial district conventions under a little-debated bill introduced shortly before adjournment.[51]

Since the 1913 statute had repealed the pre-primary conference system, its formal application in New York, prior to 1968, was limited to the one year of 1912. The system, nevertheless, continued to receive consideration elsewhere. A variation of the New York concept was proposed by the Committee on Electoral Reform of the National Munici-

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See L. Overacker, *The Operation of the State-Wide Direct Primary in New York State*, 106 ANNALS at 145 (Mar. 1923).

The decline was even more severe in New York City. In the Republican primary, the figures were 1914-45%, 1916-37%, 1918-21%, 1920-16%. In the Democratic primary — 1914-43%, 1916-27%, 1918-27%, 1920-23%. R. S. Boots, *The Trend of the Direct Primary*, 16 A.P.S.R., at 412-13 (Aug. 1922).

48 H. Feldman, *supra*, note 8, at 503-506.

49 Overacker, *supra*, note 47, at 146. *See also* H. Feldman, *supra*, note 8, at 517-518.

50 *See* R. S. Boots, *supra*, note 47, at 412, 413. A move to give the nomination of candidates for statewide offices by state party conventions the stature of a constitutional amendment had failed. N.Y. CONSTITUTIONAL CONVENTION, 1915, PROPOSED AMENDMENTS, VOL. II, Intro. 4 No. 729. N.Y. CONSTITUTIONAL CONVENTION, 1915, JOURNAL, at 303-304 (July 19, 1915).

51 Law of May 2, 1921, ch. 479, § 1 (1921) N.Y. Laws 1451, 1454 (amended). A plan to have conventions designate candidates subject to a primary was rejected. 10 NAT'L. MUN. REV., at 311, (June 1921).

pal League in 1921.[52] The Committee's plan included a requirement that candidates selected by party committees file petitions of candidacy at least two weeks prior to a committee meeting. No primary election would be held if no one contested the committee's selections.[53]

Ten states other than New York have experimented with variations of the pre-primary conference system. These include Colorado, 1910 to the present;[54] South Dakota, 1917 to 1929;[55] Minnesota, 1921 to 1923;[56] Nebraska, 1943 to 1953;[57] Massachusetts, 1932 to 1937, 1953 to the present;[58] Connecticut, 1955 to the present;[59] Idaho, 1963 to

52 *The Outline of an Improved Method of Conducting Elections, With Discussion of the Direct Primary.* 10 NAT'L. MUN. REV. at 603-16, (December 1921).

53 *Id.*, at 613.

54 Law of October 10, 1910, ch. 4, Colo. Laws § 4 (1910) Special Session 17-18 (amended); COLO. REV. STATS. § 49-6-3, 49-6-4, 49-6-7, 49-6-8, 49-6-9 (1963). Nominees for United States Senator, Representative in Congress, Governor, Lieutenant Governor, Secretary of State, State Treasurer, Auditor of State, Attorney General, Member of the State Board of Education, Regent of the University, Member of the General Assembly, Supreme Court Justice, District Judge, County Judge, District Attorney and all county officers may be nominated by party assemblies or by petitions filed by party members. Party assembly designations are placed on the primary ballot first with the person receiving the highest vote at the assembly being allotted the preference position. Any person receiving twenty percent or more of the vote on the one ballot taken for an office at the party assembly can be placed on the primary ballot. Party assemblies must be held at least seven days before the filing date.

55 S.D. Laws 1916-1917, ch. 234 (1917), 320; repealed, 1929, ch. 118 § 2 (1929) 125. The "Richards Law" provided for pre-primary conventions at which majority and minority candidates of a party would be proposed. Other party members could be placed on the primary ballot by petition, but filing was not later than convention filings. Candidates for statewide office including judges of the supreme and circuit courts, for the United States Senate and the House of Representatives, and county legislative and district offices were included within the system.

56 Law of April 15, 1921, ch. 322 (1921), Minn. Laws 401; repealed, Law of April 2, 1923, ch. 125 (1923); Minn. Laws 124. State, congressional, and county conventions endorsed candidates. Other party members could file by petition.

57 Law of May 25, 1943, ch. 77, § 4 (1943), Neb. Laws 265-269 (amended); repealed, Law of February 18, 1953, ch. 108, (1953) Neb. Law § 44. Pre-primary conventions for state, congressional district, and county endorsements were held. The two persons who received the highest endorsement votes at a convention for an office of those who filed declarations appeared on the primary ballot as convention endorsees if they received at least twenty-five percent of the vote cast by the convention. The person with the highest convention vote received a preference position on the ballot. Other party members who filed declarations of candidacy were also placed on the primary ballot. For a comment on the Nebraska system, see A. Breckenridge, *Pre-primary Trial Dropped*, 43 NAT'L. MUN. REV. at 186 (1954).

58 Acts and Resolves of Massachusetts, 1932, ch. 310, Acts and Resolves of Massachusetts, 1933, at 3 (passed in referendum, November 8, 1932); repealed, Law of May 28, 1937, ch. 384 (1937) Acts and Resolves of Massachusetts 430 (direct primary substituted). Law of May 25, 1953, ch. 406, § 7 (1953) Acts and Resolves of Massachusetts 295-296 (amended); MASS. GEN. ANN. LAWS, ch. 53, § 54 (§§ 5, 44,

the present;[60] Utah, 1947 to the present;[61] Rhode Island, 1947 to the present;[62] and New Mexico, 1951 to 1955 and 1963 to 1967.[63]

54, 54 C) (Supp. 1968). Applicable to state convention for endorsement of candidates for offices to be voted upon state-wide. Candidates receiving at least twenty percent of the vote for an office at the convention, on any ballot, may subsequently file petitions to secure a place on the primary ballot. Party members can also subsequently file petitions.

59 Supp. Conn. Gen. Stat. ch. 58 a, §§ 581 d, 583 d, 586 d, 587 d (1955, Special Session, June) 213-215 (amended); CONN. GEN. STATS. ANNO., 1967, §§ 9-382, 9-383, 9-388; (1968 Supp.) §§ 9-390, 9-400, 9-415. Candidates for offices to be voted for state-wide, and for district and municipal offices may be nominated by conventions. Any person receiving at least twenty percent of the vote at any convention for an office to be filled by electors state-wide or for a district office on any balloting may subsequently file for the primary by petition filed by at least the fourteenth day following the close of the convention. Any other party member may also file by petition by the same date. Candidacies of persons other than party-endorsed candidates for nomination to any municipal office may be filed by at least the twenty-first day preceding the party primary. *See* D. Lockard, *Connecticut Gets a Primary*, 44 NAT'L. MUN. REV. 469 (1955); D. Lockard, *Connecticut Legislature Revises New Primary Law*, 45 NAT'L. MUN. REV. 126 (1956); D. Lockard, *Connecticut Tries Its New Primary*, 45 NAT'L. MUN. REV. 494 (1956).

60 Law of March 12, 1963, ch. 93 (1963) Idaho Sess. Laws 291; IDAHO GEN. LAWS ANNO. 1963. (1967 Supp.) §§ 34-606, 34-612 B, 34-612 C, 34-612 D. Candidates for offices to be voted upon state-wide who file declarations of candidacy and receive at least twenty percent of the vote at a party state assembly are endorsed by the assembly for the primary. Candidates for nomination who receive at least ten percent of the votes for an office at the party assembly and a majority of the votes from the delegations of at least their own counties may be subsequently nominated for the primary by petition. Independent candidates for the primary may also subsequently file by petition.

61 Law of March 13, 1947, ch. 35, §§ 3-9 (1947); Utah Laws 64-67 (amended); UTAH CODE ANNO., (1953) §§ 20-4-4, 20-4-5, (1965 Supp.) §§ 20-4-3, 20-4-7, 20-4-9. Candidates for statewide offices, congressional district candidates, legislative candidates, judicial district candidates, and candidates for county office shall file declarations of candidacy, and subsequently may be nominated for the primary by appropriate party conventions. The two persons receiving the highest number of votes for an office at a convention shall be nominated for the primary. However, where one candidate receives eighty percent or more of the votes of a convention for an office, he shall be nominated without a primary.

62 Law of May 28, 1947, ch. 1886, §§ 4, 6, 7, 8-12 (1947, January Session), Acts and Resolves of Rhode Island 157-158, 159-160, 161-165, (amended); R.I. GEN. LAWS 1956, (1967 Supp.) §§ 17-12-4, 17-12-11, 17-14-1, 17-14-4, 17-14-5. State committees may endorse candidates to be voted for by all the electors of the State, candidates for state senator and representative, and also primary candidates usually endorsed by town, city, ward, or district committees for their respective jurisdictions when these latter fail to do so. Members of the state committee from a congressional district may endorse a candidate for the United States House of Representatives. All endorsements are filed with the appropriate state or local officials by 5 p.m. of the second day after the last day for filing declarations of candidacy. Subsequent to receiving declarations of candidacy from candidates for the primary and endorsements from the committees, the appropriate public officials shall prepare nomination papers for voters' signatures. Candidates for nomination for different offices endorsed by the respective committee of any party shall be combined on nomination papers. Nomination papers must be filed in the office of the secre-

IV. Return to New York: the 1967 Statute and the 1968 Experience

New York is the only state that has adoped the pre-primary conference as conceived by Hughes. The 1967 statute provides that a majority vote of a party state committee shall designate candidates for offices voted on by the entire electorate of the state at the general election.[64] Party members may make further designations by petition.[65]

tary of state not later than forty-five days before the date of the primary. *See* R. Childs, *Rhode Island Tries Primary*, 38 Nat'l. Mun. Rev. 126 (1949).

63 Law of March 16, 1951, ch. 180, §§ 1-10, (1951), N.M. Laws 320-329. Candidates for state-wide offices and the United States House of Representatives were nominated at conventions. One ballot for each office was taken and every candidate receiving at least twenty percent was placed on the primary ballot in the order of the votes at the convention. Conventions had to be held on or before the first Tuesday in March; that date also began a four day period for other party member candidates to file candidacy and nominating petitions. Candidates for state legislative, judicial district, and county offices could be designated at conventions held prior to the state conventions. The Convention method was optional with the county organizations. Other candidates for such offices could file declarations of candidacy and nominating petitions.

This Act was repealed by Law of March 26, 1955, ch. 218, §§ 1-34, (1955), N.M. Laws 524-541, which established a direct primary system. In 1963, the Legislature re-established the pre-primary convention system for nomination of candidates for offices to be filled state-wide and for the United States House of Representatives, Law of March 27, 1963, ch. 317, §§ 1-17 (1963), N.M. Laws 1102-1114. A convention could ballot as many times as was necessary until one candidate received a majority of the votes. In addition, any candidate who received at least twenty percent of the convention vote on any balloting could be placed on the primary ballot immediately after the candidate who had received the majority vote. (This was amended, Law of March 29, 1965, ch. 204, § 1, (1965) N.M. Laws 516-517, to provide that all candidates receiving twenty percent of the convention vote for designation for the primary could be placed on the primary ballot). Conventions were to be held on or before the first Tuesday in March. Other party members could file a declaration of candidacy and a nominating petition between the first and third Tuesdays in March. Candidates for nomination to state legislature, district, and county offices could file declarations and pay a filing fee on the first Tuesday in March.

This Act was repealed by Law of March 16, 1967, ch. 98 §§ 1-2, (1967), N.M. Laws 734-746; N.M. Stat. Anno., 1953, 1967 Supp., §§ 3-11-2.1 to 3-11-2.3, 3-11-6.1 to 3-11-8.3, 3-11-14.1 to 3-11-20, which re-established the direct primary. *See* D. Cline, *New Mexico Makes Changes in Pre-primary Convention Law*, 40 Nat'l. Mun. Rev. 423 (1951); D. Cline, *New Mexico Retains Primary* 39 Nat'l. Mun. Rev. 233 (1950).

64 Laws 1967, ch. 716, §§ 2-5, N.Y. Laws 1828-1831, amending N.Y. Elect. Law (1964.) §§ 131 (2), 132 (1), 136 (2), 137 (2) (McKinney, Supp. 1967). By contrast, in only one of the ten states which have used the system (Rhode Island) has authority over designations been granted to party committees, and this is simply to endorse after persons have filed declarations of candidacy and before nomination petitions have been signed and filed.

65 *Id.*, § 4; N.Y. Elect. Laws § 131 (c) (McKinney, 1967 Supp.). A petition for any office to be filled by the voters of the entire state must contain the signatures

The time allowed to file is adequate for the purpose of contesting an organization choice since the one-week period for filing petitions is six weeks after the one-week period in which the committee meeting must be held.[66] Four of the six states which still use a pre-primary conference system provide such a means for contest, but only one out of the four statutes repealed did so.[67]

However, despite the similarity to the Hughes plan, New York has made two significant additions. A candidate who receives at least twenty-five percent of the committee vote on any ballot can claim a position on the primary ballot.[68] This is similar to the Colorado system where such persons winning a minimum vote are not required to file petitions as they are in Connecticut, Massachusetts, and Idaho.[69] Secondly, the vote of each committee member is weighted.[70] The scheme can be compared to the traditional method of apportioning delegates from assembly districts to state conventions according to the ratio of party votes for governor in the district to the total party vote cast for governor in the state.[71] State committee members are elected

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of 10,000 party electors of whom at least fifty shall reside in each of three-quarters of the counties of the state. N.Y. ELECT. LAW § 136 (McKinney, 1967 Supp.).

66 The meeting is held not earlier than the twelfth Tuesday nor later than the eleventh Tuesday preceding the primary. Laws 1967, ch. 716, § 2; N.Y. ELECT. LAW (1964) § 131 (2) (b) (1) (McKinney, Supp. 1967). Petitions must be filed not earlier than the sixth Tuesday nor later than the fifth. N.Y. ELECT. LAW 143 (1) (McKinney, 1964). The primary date in New York is the third Tuesday in June before the general elections. N.Y. ELECT. LAW § 101 (1) (a) (McKinney, 1967 Supp.).

67 Colorado, Massachusetts, Connecticut, and Idaho so provide as did the repealed New Mexico statute.

68 The candidate must make a written demand to the Secretary of State within seven days after the meeting; he may withdraw it within fourteen days in the same manner. *Id.*, § 2; N.Y. ELECT. LAW 3131 (2) (b) (3) (McKinney, 1967 Supp.).

69 *See* notes 54, 58, 59, 60. New Mexico's statute had a similar provision. Utah designates the candidates receiving the two highest votes unless one receives eighty percent or more. *See* note 61.

70 Each committee member is entitled to cast a number of votes which shall be in accordance with the ratio which the number of votes cast for the party candidate for governor on the line or column of the party at the last preceding general state election in the assembly district of such member bears to the total vote cast on such line or column at such election for such candidate in the entire state. The apportionment of such votes as so prescribed shall be determined by the rules of the party. *Id.*, § 2; N.Y. ELECT. LAW (1964) § 131 (2) (B) (2), (McKinney, Supp. 1967).

71 N.Y. ELECT. LAW § 132 (McKinney, 1964). It was amended by law of March 27, 1968, ch. 39-232, § 3, at 132, to permit party rules to regulate units of representation from which delegates to a state convention (and a judicial district convention) elected from outside New York City are chosen. Delegate and alternate appointments shall remain as in existing law, however, despite changes that may be made in the units of representation.

two from each assembly district unless the committee rules otherwise prescribe.[72] Thus, the weighted voting factor permits designations by the state committee to be made on the same basis of party voting power as would exist in a state convention.

The struggle before the enactment of the 1967 statute also bore likeness to the earlier Hughes experience.[73] For years highly vocal concern had been expressed for the ideal of a direct primary for state-wide offices; however, this posture was always accompanied by inaction or criticism of particular bills.[74] In the confusion that usually attends a major reform, it was often difficult to distinguish constructive from obstructive criticism, and suspicions suggested that sides were drawn according to political self-interest.

An important early attempt began when a bill similar to the present statute was introduced in 1965 and passed the Democratic-controlled legislature on a vote divided along party lines.[75] The Democratic party wanted the primary to test the voter appeal of their potential challengers to Governor Nelson Rockefeller in the election the following year. The strongest personal supporters of the bill coveted the Democratic nomination for Governor and calculated they were more likely

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72 N.Y. ELECT. LAW § 13 (McKinney, 1964), § 11 (McKinney, 1967 Supp.), Section 11 was amended to provide that a state committee may provide by rule that units of representation outside the City of New York need not have an equal number of members. Nevertheless, the representatives of each such unit shall have in the aggregate, the same number of votes as any other unit, except in the balloting for designations for state-wide office. Law of March 27, 1968, ch. 39-232, §§ 1-2, at 136-137; N.Y. ELECT. LAW, § 131 (2) (b) (2) (McKinney, 1967 Supp., as amended).

73 Beard, *supra* note 8, at 187.

74 Governor Averill Harriman proposed that the Legislature enact a pre-primary conference system. N.Y. Times, Jan. 3, 1957, at 1, col. 5. Direct primary bills were introduced in the early nineteen-fifties. See, for instance, N.Y. Times, Feb. 20, 1952, at 20, col. 1. The Democratic State Platform included a direct primary plank, in 1962. N.Y. Times, Sept. 18, 1962, at 30, col. 7.

Subsequent to Governor Nelson Rockefeller's veto in 1965 of a pre-primary conference bill, another bill, similar to the one enacted in 1967, was introduced by Democrats in the 1966 Legislature. N.Y. Times, Jan. 27, 1966, at 26, col. 6. Two slightly variant versions were passed by the Assembly (N.Y. Times, Feb. 8, 1966, at 35, col. 2; N.Y. Times, June 21, 1966, at 26, col. 4), but the bills were killed in committee in the Senate. N.Y. Times, July 7, 1966, at 24, col. 5. Both major parties included planks calling for a direct primary for nominees for offices to be filled state-wide, in their 1966 platforms. (Democratic Party, N.Y. Times, Sept. 8, 1966, at 50, col. 3; Republican Party, N.Y. Times, Sept. 8, 1966, at 51, col. 4-6).

75 Unlike the present statute, however, a candidate who challenged the party designee had to win at least twenty-five percent of the convention vote on any ballot besides filing petitions. Senator Javits objected to this requirement. N.Y. Times, July 23, 1965, at 32, col. 5.

to win a primary than secure the nod of the party leaders.[76] Rockefeller vetoed the bill after declaring that the convention system was not so bad after all. He added, with what must have been some humor, that the financial burden of primaries favors candidates who are personally wealthy. In answer, many Democrats retorted that the Governor sought to protect his own political future. Ironically, Eugene Nickerson, who lost in the Democratic senatorial primary in 1968, charged: "He is scared to get into a primary fight."[77]

The history of the present statute itself again records a Republican-Democratic clash. Both parties had called for another direct primary bill and Governor Rockefeller echoed their position.[78] However, while the Democratic-controlled Assembly sat on its bill, the Republican-controlled Senate passed its version, which eventually became the present law, on February 28, 1967, by a vote of 54-0.[79]

Openly embarrassed, the Democratic State Executive Committee attacked the bill as "undemocratic."[80] A week later the Committee recanted and announced its support of three bills for consideration by the Assembly, including the Assembly version of the Senate-passed bill.[81] The admitted "change of strategy" was justified by an argument that the Senate-passed bill was better than none at all.[82] The Assembly passed all three measures,[83] but the Senate did not ratify the two new proposals and the Governor signed the Senate bill on May 2.[84]

76 N.Y. Times, April 24, 1965, at 1, col. 2.

77 N.Y. Times, July 23, 1965, at 32, col. 5, S4641.

78 N.Y. Times, Sept. 8, 1966, at 50, col. 3, at 51, col. 4; N.Y. Times, Jan. 5, 1967, at 22, col. 6.

79 N.Y. Times, Mar. 1, 1967, at 30, col. 3. S2711. Both bills were introduced by a majority of the membership of both houses on February 8, 1967. N.Y. Times, Feb. 9, 1967, at 1, col. 4.

80 N.Y. Times, Mar. 1, 1967, at 30, col. 3.

81 A3, A5975, A4583; N.Y. Times, Mar. 9, 1967, at 30, col. 2. The three bills were noted in order of preference: (1) a direct primary-petition bill providing that persons seeking a position on a ballot at a primary for an office to be filled by the voters of the entire state would file a petition containing 7,500 signatures of enrolled voters of whom at least fifty, or five percent of the party's enrollment, whichever was smaller, would reside in each of forty-seven of the sixty-two counties of the state; (2) a convention-challenge bill whereby a person could challenge the convention nominee if he received fifteen percent of the vote at a state convention held four weeks prior to the June primary and to which delegates had been elected at a separate primary; (3) the Assembly version of the Senate-passed bill.

82 N.Y. Times, Mar. 9, 1967, at 30, col. 2.

83 Bills A3 and A4583 were passed by the Assembly unanimously. Bill A5975 passed by a vote of 125-20 with the opposition centering in the Reform Democrats who objected to retaining the convention. N.Y. Times, Mar. 16, 1967, at 30, col. 1.

84 N.Y. Times, May 3, 1967, at 1, col. 1.

Immediate reactions were mixed. Some critics envisioned scores of primary fights inflating the campaign costs for state-wide offices and destroying all that was good in the party structure.[85] Franklin D. Roosevelt, Jr., was more optimistic; he saw a "revitalization" of the Democratic party on the horizon.[86] On the other hand, Governor Rockefeller felt the pre-primary conference plan, among other defects, sapped the primary of its value for enlarging voter participation and interest.[87] Senator Javits, the late Senator Robert Kennedy, and the Democratic State Chairman expressed a "better-than-nothing-at-all" stance, while hoping that amendments could be passed before the 1968 elections. In sum, the prevailing climate was captured in one line from a news article: "While almost everyone talked about the alleged flaws, few leaders could describe them."[88]

A few specific criticisms were voiced however. Some thought that the power to designate candidates at the pre-primary conference should not be given to the party state committees, who traditionally performed political housekeeping chores only. Moreover the "lame-duck" state committees are elected at primaries a full twenty-two months before the designating conference.[89] The weighted voting innovation was criticized. Some regarded the petition requirement of 10,000 signatures including fifty from each of three-quarters of the counties in the state as overly strict since, for example, a Conservative party candidate could have difficulty in upstate counties where party enrollment is small.[90]

Fear was voiced that the statute would effectively kill cross-party nominations, which are a crucial source of power in New York state politics.[91] Under the previous system a candidate could decline a convention nomination to allow his party to substitute a candidate chosen by another party.[92] Although party rules may provide that a non-member may be the nominee, a problem of timing is now involved;

85 N.Y. Times, May 7, 1967, § 4, at 2, col. 3.
86 N.Y. Times, May 3, 1967, at 1, col. 1.
87 N.Y. Times, April 27, 1967, at 55, col. 5.
88 N.Y. Times, May 3, 1967, at 1, col. 1.
89 *Id.*, N.Y. ELECT. LAW § 13 (McKinney, 1964).
90 N.Y. Times, May 3, 1967, at 1, col. 1. *See* note 65, *supra.*
91 N.Y. Times, Dec. 10, 1967, at 141, col. 1. Often a major party needs cross-party support to insure victory. New York's last Democratic Governor, W. Averell Harriman, was elected in 1954 with a plurality of 11,125 after gaining 264,093 Liberal party votes. *Id.*
92 N.Y. ELECT. LAW, § 139 (1) (2) (McKinney, 1964), § 137 (4) (McKinney, 1964), (2) (McKinney, 1967 Supp.).

the party committee will have to guess who will win another party's primary in June in order to designate him at their conference held almost three months earlier.[93] Nonetheless, the Liberal party did designate Senator Javits, a Republican, as its candidate for Senator in the 1968 election.

V. Conclusion

The general wisdom of direct primaries and pre-primary conferences is even more difficult to evaluate than the specific problems of the 1967 law. Objective evidence is wanting to fully decide whether the advantages expected in New York and other states have materialized or not.

Advocates of direct primaries claim the advantage of greater citizen interest and control in the nominating process. If we employ voter turnout at primaries as a measure of citizen interest, statistics apparently could demonstrate whether the advantage of increased interest has accrued. Yet statistics are not sufficiently available for comparison on the voter turnout in elections for delegates to nominating conventions.[94] All that can be said is that in New York the 1968 Democratic primary turnout compared favorably with the previous experience with state-wide direct primaries under the short-lived 1913 statute.[95]

93 N.Y. Times, Dec. 10, 1967, at 141, col. 1. See note 66 *supra*.

94 Generally voter turnout as percentage of party enrollment is about thirty percent for direct primaries. Key, American State Politics: An Introduction (1956) Ch. 5.

95 In terms of voter participation in contested Democratic primaries as a percentage of party, state-wide enrollment, the following is from available figures:

1914 — (1916 N.Y. Legis. Manual).
State-wide Democratic enrollment, 1915; 651,873 (p. 829).
State-wide Democratic primary vote for governor, 1914; 244,159 (p. 781).
Percentage of party vote to party enrollment — 37%.

1916 — (1917 N.Y. Legis. Manual).
State-wide Democratic enrollment, 1916; 692,519 (p. 893).
State-wide Democratic primary vote for United States Senator, 1916; 152,063 (p. 785).
Percentage of party vote to party enrollment — 22%.

1920 — 1921 N.Y. Red Book, James Walsohm).
State-wide Democratic enrollment, 1920; 922,170 (p. 527).
State-wide primary vote for United States Senator, 1920; 154,221 (p. 533).
Percentage of party vote to party enrollment — 17%.

1968 — (1967 N.Y. Legis. Manual).
State-wide Democratic enrollment 1966-1967; 3,616,775 (p. 1280).
State-wide primary vote for United States Senator, 1968; 734,046 (unofficial) see, note 2, *supra*.
Percentage of party vote to party enrollfent — 20%.

Of course citizen interest is not an end in itself. If, as some have argued,[96] the primary vote is almost always a ready ratification of the organization choice, little has been gained. Comprehensive recent studies of the success of party endorsed candidates in state-wide primaries in other states is lacking. The victory of O'Dwyer in New York in the 1968 Democratic senatorial primary may indeed prove exceptional. However, even if, as some experience indicates,[97] organization choices usually win primaries, those choices must have been influenced by estimates of their appeal to the rank-and-file at the primary.

Nor is it evident that the pre-primary conference enhances any voter tendency to acquiesce in the organization choice. A primary without any official endorsement appears on its face to serve better the purposes of the direct primary. However, unofficial party support may be just as effective for the machine while relieving it of responsibility for poor endorsements, as New York discovered under its 1913 statute.[98] Nebraska had a similar experience.[99] For this reason the National Municipal League outlined party sponsorship as the "outstanding principle" of its Model Primary Law.[100] By so distributing power, the pre-primary conference encourages internal reform of political parties rather than simply providing an opportunity for a series of popular mavericks to be successful at the polls.[101]

96 D. Pugliesi, *Needed: A Re-evaluation of Our Direct Primary System*, 38 DET. L.J. 437 (1962). Pugliesi argues that the convention system involved more people more directly in the effective choice of candidates. Moreover, he contends that the convention choice in our present political atmosphere would center less on "bossism" and more on qualifications, voter appeal, and valuable compromises which spread the available talent among the offices while primaries eliminate good talent in the heated contests for the higher offices. *Id.* at 445.

97 Early experience with the primary in Connecticut showed little threat to the party "machine." D. Lockard, *supra* note 59. Commentators saw the same effect in Nebraska, but the organization candidates were incumbents and well-known to the voters. A. Breckenridge, *supra* note 57. Primaries in New York in 1951 for county and city offices included few contests, although the suggestion was made that institution of state-wide primaries would open up these primaries. G. Bell, *Study Made of New York Primaries*, 42 NAT'L. MUN. REV. 87 (1953).

98 *See* H. Feldman, note 48 *supra.*

99 Nebraska initially used a direct primary without formal endorsements. Informal party support was often evident. The pre-primary conference was added to eliminate "name" candidates and encourage honest party support. It was later repealed, but its success or failure is not established. A. Breckenridge, *supra* note 57.

100 R. Childs, *A New Model Primary Law*, 39 NAT'L. MUN. REV. 225 (1950). *See also* J. Harris, *A Model Direct Primary System*, 24 STATE GOV'T 135 (1951).

101 Pugliesi criticizes the direct primary for leaving the parties themselves untouched because the reform candidate appeals to the voter alone for his election and stays aloof from party politics once elected. Pugliesi, *supra* note 96.

Finally, the pre-primary designation should allow a potential candidate to assess his chances more realistically and thus avoid unnecessary contests. In sum, the justifications for a pre-primary conference plan advanced by Governor Hughes in the early years of the century still remain formidable today — though not unchallenged.

CAMPAIGN FUND REPORTING IN NEW JERSEY[1]

HERBERT E. ALEXANDER* and
KEVIN L. MCKEOUGH**

A recently published survey of state regulation of political finance disclosed that thirty-two states require some degree of public reporting of general election receipts and expenditures by political committees.[2] Yet it is not always clear which committees are required to report, nor is it easy to ascertain the degree of compliance. Some light, however, can be shed on the extent of compliance with disclosure and publicity laws as they pertain to party committees in one competitive two-party state. As part of a study of the financing of the 1965 gubernatorial election in New Jersey, the legal requirements for campaign fund reporting were examined. With respect to party committees the language of the statute is clear:

> Within twenty days after the day of the general election, the person who has had the custody of the moneys contributed to or on account of any state, county or municipal committee during the previous year shall file with the secretary of state in the case of the state committee, and with the county clerk in the case of the county or municipal committee, a statement of the amount of money received by or on behalf of such committee during the previous year, together with the names and addresses of the persons from whom the money was received and also a statement of the purposes for which it was expended, itemized as to all items in excess of five dollars, and with a general statement as to the purposes for which the

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2 HERBERT E. ALEXANDER, with LAURA L. DENNY, REGULATION OF POLITICAL FINANCE, (1966), pp. 55-57.

> items less than five dollars were expended. The person making such statement shall make affidavit that the same is true.[3]

To determine the level of compliance, reports on file in the offices of the Secretary of State and the Clerks of New Jersey's twenty-one counties were examined in the summer of 1965.[4] This investigation found that both state committees regularly filed the required annual report. However, of the forty-two county committee reports which were required to be filed annually, only seventeen committees — eleven Republican and six Democratic — regularly reported between 1959 and 1964.[5] Of these, twelve reports were filed in six counties in which both parties reported, and five reports were filed in five additional counties in which the Republican committees reported and the Democratic did not. Thus, in ten of twenty-one counties neither party committee had reported its financial operations for a period of several years. In addition, reports from party committees in the Garden State's 567 municipalities were almost negligible, with no more than a dozen widely-scattered reports available.

These findings posed a serious obstacle to a determination of the extent and nature of campaign expenditures in 1965. Therefore, an inquiry was addressed to the Attorney General's office. It resulted in the issuance of two pre-election memoranda to the county clerks, signed by the Acting Secretary of State. The Secretary's office dispatched these memos at the Attorney General's request. The initial notice, dated September 29, 1965, quoted the reporting provision in its entirety, and requested the county clerks to advise all the county and municipal party committees within their jurisdictions of the necessity for "strict compliance" with the statute. The second memorandum, dated October 29, 1965, was sent in response to requests

3 N.J. STAT. ANNO. 19:5.5 (1964).

4 A similar investigation conducted a decade earlier revealed that, although the Democratic and Republican State Committees regularly reported during the period in question (1952-54), less than one-fourth of the county committees observed the statutory mandate. TRUMAN S. CASNER, MONEY IN POLITICS: NEW JERSEY (unpublished Senior thesis, Woodrow Wilson School of Public and International Affairs, Princeton University, 1955), pp. 86-87.

5 Two Republican committees failed to report in 1964 after doing so annually from 1959 through 1963. Since they both reported again in 1965 they were included here among the seventeen "regularly reporting" committees.

On the other hand, a Democratic factional split in one county has resulted in the filing of a report by county committee officials in the name of a *municipal* committee rather than the full county organization. This report was not regarded as constituting a county committee report for the purposes of the present tabulations.

from several clerks for a clearer statement of the types of information required and the manner in which it was to be reported. This memo paraphrased and elaborated upon certain segments of the statute. It again urged the clerks to advise the county and municipal committees of the necessity for compliance. Copies of both memoranda were sent to the Republican and Democratic state chairmen.

A second survey of state and county offices following the November, 1965, elections revealed an uneven pattern of increased, but still incomplete, reporting. As had regularly been the case, both state committees filed reasonably detailed financial reports. With respect to the county and municipal committees, however, the results while superior to the previous survey were still incomplete.

Of the forty-two county committees which were required to report on their finances, thirty-one — seventeen Republican and fourteen Democratic — did so in varying degrees of completeness. All seventeen committees which regularly reported in previous years did so again in 1965. None of the fourteen newly reporting committees — six Republican and eight Democratic — had filed even a single report during the previous six years.[6]

The increased reporting by county committees in 1965 was distributed across the state in the following fashion. Six reports, one by each party, were filed in three of ten counties in which neither party had reported previously. Six reports, three Republican and three Democratic, were filed, one to a county, in six other counties in which neither party had filed previously. Two reports, both Democratic, were filed in two of the five counties which had previously recorded only Republican reports.

Thus, the number of counties in which neither party filed financial reports dropped from ten to one. The number of counties in which both committees reported increased from six to eleven. The number of counties in which one committee reported rose from five to nine. The number of non-reporting committees declined from twenty-five to eleven. Viewed geographically, where pre-1965 nonreporting by one or both parties had been scattered over fifteen counties, only ten registered any nonreporting in 1965.

The relative rise in municipal committee reporting was even more startling than that of the county committees. In 1965, 158 municipal

6 Subsequent interviews with party leaders confirmed that in at least one-half of these cases the party committee had not reported its finances within memory.

party reports — 86 Republican and 72 Democratic — were filed. The pattern of reporting was highly uneven. The lone county in which *neither county committee* filed a report produced *thirty-seven municipal* reports (seventeen Republican and twenty Democratic), while eight counties in which at least one of the county committees reported yielded not a single municipal committee report for either party. On the other hand, 60 percent of the municipal reports were filed in seven of the eleven counties in which both county committees reported. While the 1965 level of reporting represented a large increase over previous years, the 158 reporting committees still constituted less than one-third of the total number of committees covered by the law.[7] Even if, as some county clerks or their deputies have asserted, most municipal committees reported in their respective municipalities, they failed to meet the statutory requirement that they file with the county clerk.

These patterns of compliance take on greater significance when one realizes that the 1965 reporting rate of 74 percent for New Jersey's county committees compares quite favorably with that of neighboring Pennsylvania. Yet the Pennsylvania publicity law generates greater pressure for compliance, for the county committee reports must be filed with the Secretary of the Commonwealth in Harrisburg.[8] Moreover, the increase in county committees reporting demonstrates the effect that even the hint of enforcement can have on reporting rates.[9] This

7 It was beyond the scope of the larger study on which this report is based to ascertain the number of municipal party committees operating in 1965. A staff member of the Republican State Committee estimates that nearly all of the state's 567 musicipalities had both Republican and Democratic committees functioning. However, even if the parties had active committees in only one-half of these communities, the 158 reports which were filed would constitute only a 28 percent level of compliance.

8 In 1960, 95 of the 134 county committee reports (71 percent) which were supposed to be made pursuant to Pennsylvania law were actually filed; 80 percent of these committees reported in 1962. VICTOR L. PROFUGHI, SOURCES OF PARTY FINANCES IN PENNSYLVANIA: 1960, (unpublished Master's thesis, Department of Political Science, University of Pittsburgh, 1962), at 5; and VICTOR L. PROFUGHI (ed.), PENNSYLVANIA STATE AND LOCAL GOVERNMENT: A SERIES OF UNDERGRADUATE STUDIES (Department of Social Science) (Mimeographed.) See also, A. HEARD, THE COSTS OF DEMOCRACY, (1960), at 368-69.

9 HEARD, *supra* note 8, at 369-70, recounts a similar development in Connecticut in the early fifties. There the Republican Secretary of State took action on her own initiative, and sent copies of the official reporting forms to the committees along with notification of the publicity law's requirements. The state committees of both parties also sent letters to all their respective candidates and committees, calling for compliance with the law.

No such party activity occurred in New Jersey, nor are there any official re-

point is dramatically underscored at the municipal level where, as Heard has noted,[10] the prospects that nonreporting will be detected in the absence of an investigation such as the one reported here are virtually nil. Although the overall reporting rate for municipal committees was low, in six of the twenty-one county offices surveyed the investigator found evidence of serious attempts by the clerk to secure compliance by municipal committees. Over two-thirds of all municipal reports were filed in these six counties! Clearly, the indication by state and county officials that compliance with the public reporting law was expected was the principal catalyst for the upsurge in reporting.[11]

While lack of enforcement in the past undoubtedly contributed to the widespread nonobservance of the law, other factors were also involved. One such factor was outright ignorance on the part of both public and party officials. The necessity of a second memo to the county clerks was evidence of this. It is ironic to note the comment of a veteran deputy clerk in one county which registered reports for the first time in 1965: "They passed a new law this year." Additional indications of ignorance of the coverage of the law can be seen in the assertions of several county officials that municipal committees were supposed to report in their respective municipalities. This is true for municipal candidates, but not for municipal party committees.[12] While the memoranda from state and county officers appreciably reduced such ignorance, or the opportunity to profess it, they did not eradicate it.

Although claims of ignorance by county officials are normally taken with a healthy dose of sketicism, there is some evidence that these

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porting forms provided for political committees as there are for candidates. One highly motivated Republican county clerk, however, did design a reporting form and distribute it to the county and municipal committees within his jurisdiction. Twenty Republican (but no Democratic) municipal committees and both county committees subsequenly reported. This was the first instance of party committee filings on record in that county.

10 HEARD, *supra*, note 8, at 369, n. 81.

11 In a post-election survey of party officials across the state, numerous references were made to these letters and to the pre-election investigation of courthouse records which gave rise to them.

12 N.J. STAT. ANNO. 19:23-6; 19:44-1; 19:44-2 (1964). A 1967 statute made the reporting requirement clearer by spelling out to whom a report should go. N.J. Law 1967, ch. 22, § 2, N.J. STAT. ANNO. 19:23-6 (as amend.) (1967 supp).

assertions may be genuine. Given the history of nonenforcement of and, consequently, noncompliance with the law, it was not impossible for clerks to serve for a decade or more without ever becoming aware of the statute. This is true at least in those ten counties where neither party reported prior to 1965. As for the party committees themselves, members are elected annually and large-scale turnover, particularly at the municipal level, is not uncommon. Without prodding from government or party officials it was likely that many committee leaders were unaware of their responsibilities under the law. Many county clerks were aware that financial reports were supposed to be filed, although some professed ignorance as to exactly which committees were covered by this requirement. Prior to the memos, virtually every clerk's office disclaimed any responsibility to insure the filing of reports. As a general rule county officials maintained that they were unfamiliar with procedures for enforcing the law. Where interpretations of these procedures were volunteered, they were generally incorrect.

The traditional reluctance of politicians to reveal their financial affairs constitutes another barrier to full reporting. When a report of receipts and expenditures must be filed with a county clerk of the opposition party, this reluctance often hardens into outright refusal. Interview data suggest that this factor accounts for a portion of municipal nonreporting, although it appears somewhat less significant for county committees. Yet one county chairman did admit that he could not file an "honest" report, since the opposition would then know the identity of his contributors. Rather than file an incomplete report, he chose not to report at all. Other party officials, however, have admitted no reluctance to file incomplete reports.

Although this paper is concerned with the extent of *pro forma* compliance with the publicity law, rather than with the completeness of such reports, interviews with political figures across the state indicate that reported receipts and expenditures are generally 80 to 90 percent accurate. The identities of contributors are often concealed by a variety of ingenious techniques, and some contributions are never reported in any fashion. If not all receipts are reported, neither are all expenditures. Moreover, certain types of expenditures, such as vote buying, are of such a nature that they would go unreported in any case.

CONCLUSIONS

Although nonreporting continued despite the memos, particularly at the municipal level, the increase in county and municipal reports yielded far more comprehensive information about New Jersey political finance than was ever before available. Thus the immediate goal of acquiring more comprehensive data was substantially realized. But one can only hypothesize about the prospects of future compliance with the public reporting law in the absence of a stimulus such as this study provided.

It seems unlikely that reporting will decline to its earlier levels. Given the impact of 1965 developments it is doubtful that any of the factors contributing to noncompliance — nonenforcement, ignorance, and unwillingness to disclose financial details — will remain unchanged. Since so much of what is done or not done in politics depends on traditional behavior, any change in the operational context is liable to stimulate new patterns of action. Thus the notices from state and county officials to party leaders may have dispelled the notion that no one cares about financial reports. In any case, nonenforcement is no longer a certainty, and the opportunity to plead ignorance of statutory responsibility is appreciably reduced.

In the eleven counties where both committees reported in 1965, neither party is likely to ignore the publicity law in the future. In counties where only one committee reported, future results may be more variable. Prior to 1965, seventeen county committees had regularly filed financial reports, in most cases dating back to 1959 or earlier. In all but one instance,[13] once a committee began to report it did so consistently. All these committees reported again in 1965. The fourteen committees which reported initially in 1965 may have begun similar reporting habits, but several factors could influence their behavior. Some derelict committees may feel pressure to report or risk the opposition's attack. The press, when culling reports for newsworthy items, may give increased publicity to non-reporting, thereby playing a more active role in stimulating enforcement. On the other hand, changes in party leadership might result in future non-reporting by county committees which filed in 1965 while their opposition

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13 A Republican committee which reported annually from 1959 to 1963 did not report in 1964. A spokesman stated that he would report when the Democrats did. Since the Democrats reported for the first time in history in 1965, the Republicans resumed their reporting pattern.

counterparts did not. Despite these imponderables, once the inertia of the political system with respect to financial reports is overcome, the realities of politics are at least capable of generating their own pressures toward compliance.

The New Jersey experience demonstrates that where noncompliance is the rule and nonenforcement its antecedent, a simple inquiry, even by researchers, may stimulate the appropriate officials to take some formal action. This in turn produces benefits in increased knowledge of political finance practices. It also illustrates well that enforcement procedures must be carefully specified at the time of the passage of a law in order to ensure its full effect.

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NOTES

MEMBERSHIP IN THE CLUB: DENIZENS OF THE MASSACHUSETTS HOUSE OF REPRESENTATIVES

*Barry M. Portnoy**

The best (state legislatures) seem to be those of some of the New England states, particularly Massachusetts, where the venerable traditions surrounding an ancient commonwealth sustain the dignity of the body and enduce good men to enter it. This legislature, called the General Court, is according to the best authorities substantially pure and does its work well.

James Bryce, 1888

INTRODUCTION

Today the reputation of the Massachusetts General Court is at an all time low. Twice in the last six years legislative pay raises have been recalled by the people. In 1966, Governor John Volpe himself led an initiative petition drive to reduce the size of the House from 240 to 160 members. During the summer of 1966, the author served as Special Assistant to the Rules Committee of the Massachusetts House of Representatives. This somewhat unique opportunity for observation of the legislative process and communication with individual legislators provided the stimulus for this article. It is hoped that it will provide necessary data for would-be reformers in Massachusetts and elsewhere.

In recent years there has been a great deal of research done by political scientists concerning legislative behavior. A number of studies have focused directly on the role perceptions of legislators.[1] Most efforts have attempted to identify those specific variables — constituency, ethnicity, educational background, party — that explain why

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1 Major examples are JOHN WAHLKE, et al., THE LEGISLATIVE SYSTEM, (1962); JAMES BARBER, THE LAWMAKERS, (1965); MALCOLM JEWELL AND SAMUEL PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES, 372-409 (1966); Lewis A. Froman, Jr., *The Importance of Individuality in Voting in Congress*, 25 J. OF POL. 324-332 (1963); Samuel C. Patterson, *The Role of the Deviant in the State Legislative System*, 14 W. POL. Q. 460-472 (June 1961).

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representatives vote the way they do on specific issues.[2] Some have even used the modern techniques of psychology and personality studies to define legislative character.[3] In the process several typologies have been developed along lines first describd by Max Weber.[4] They largely conform to the general categories outlined by Robert K. Merton: conformity, innovation, ritualism and retreatism.[5] The present study goes beyond these previous efforts by combining data on legislative character and political performance to define multi-dimensional types and by introducing a time perspective into the discussion of the four basic types of legislators found. Roles are found to change over time as a person becomes more acclimated to the system.

The specific data used in this study was collected through a series of extended interviews with ten per cent of the members of the 1965-1966 Massachusetts House. Table 1 indicates how the House was stratified for interview purposes. The educational criterion was selected because it generally reflects social class background and family income levels as well. Experience was used because it takes into account age but also insures that the different outlook developed by extensive service is not ignored. Party was used because it was assumed that the two parties would be major subsystems within the House and detailed information about each would be needed.

Whenever possible interview subjects were chosen from the group of representatives with whom the author had some prior contact. The advantage of interviewing members who are reasonably accessible

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2 See excellent summaries in Norman Meller, *'Legislative Behavior Research' Revisited: A Review of Five Years' Publications*, 18 W. POL. Q. 776-793 (1965); and SHELDON GOLDMAN, ROLL CALL BEHAVIOR IN THE MASSACHUSETTS HOUSE OF REPRESENTATIVES: A TEST OF SELECTED HYPOTHESES, (1968).

3 BARBER, *supra*, is the main work in the area. See also Greenstein, *The Role of Personality in Politics*, 61 A.P.S.R. 629-641 (1967).

4 Max Weber, *Politics as a Vocation*, FROM MAX WEBER: ESSAYS IN SOCIOLOGY, (1946), trans. H. H. GERTH and C. WRIGHT MILLS. See E. A. Shils, *The Legislator and his Environment*, 18 U. CHI. L. REV. 571-584 (1951). WAHLKE, *supra*, p. 245-287 divides legislators' roles into two parts—that of decision-maker and that of representative. The former classification includes ritualists, tribunes, inventors and brokers. The latter includes trustees, delegates and politicos. Barber, *supra*, describes representatives as spectators, advertisers, lawmakers and reluctants. Other descriptive typologies are found in EDGAR LITT, POLITICAL CULTURES OF MASSACHUSETTS, (1965), p. 7-24 finds patricians, yeomen, workers and managers.

5 Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 676 (1938). For a discussion of the use of typology in the social sciences, see JOHN C. MCKINNEY, CONSTRUCTIVE TYPOLOGY AND SOCIAL THEORY (1967).

Table 1. DIVISION OF MASSACHUSETTS HOUSE BY PARTY, EDUCATION, AND EXPERIENCE, 1965-1966
(number in parenthesis is number of each group interviewed)

(N = 238*)

	Education				
	At least two years of college Experience**		Less than two years of college Experience**		
Party	Less than 5.2 years	More than 5.2 years	Less than 5.2 years	More than 5.2 years	Total
Democrat	66 28% (7)	30 13% (3)	42 17% (4)	32 13% (3)	170 71% (17)
Republican	28 12% (3)	23 10% (2)	9 4% (1)	8 3% (1)	68 29% (7)
Total	94 40% (10)	53 23% (5)	51 21% (5)	40 16% (4)	238 100% (24)

*two vacancies
**mean seniority = 5.2 years

seemed to outweigh possible bias to the sample when the interviewees appeared to closely reflect the entire House in the variables listed above.[6] About one half of the interviews were conducted at the State House lasting from two to three hours. The other half were conducted over dinner at a downtown hotel, in bars around the State House, or in the members' home living room and lasted as long as five hours. Very few notes were taken during interviews to maintain an informal atmosphere. Immediately following each interview everything signficant that had been said was recorded.[7]

I. The System

Under the present system, I had to forge a chairman's name to get any action on a bill. I filed this bill and then spoke to (Speaker) Davoren and (Senate President) Donahue. They both promised it to me, but I could see the way things were going I wasn't going to get it. I went to see Davoren and he said Donahue would kill it in the Senate anyway. I went to see Donahue and he said, "Get that bill over here and I'll put it through." When I saw Davoren again I could tell they were just waltzing me around, so I forged the chairman's name and had a friend on the committee take the bill down to the Clerk. The bill came out and went right through.

Before considering the specific types of representatives uncovered by this study, it is important to describe the framework of the Massachusetts legislative system in general. The General Court is characterized by the joint legislative committee[8] and the strong speaker system. The constitutional right of free petition complemented by the custom of giving all petitions a public hearing before a legislative committee makes it impossible for a representative to follow all legislation. The

6 It should also be pointed out that the 1965-1966 legislature may not be typical of most recent sessions. The Johnson landslide plus the lack of reapportionment after 1955 combined to produce 75 new members of the 1965-1966 House, a turnover of almost 33 percent. Since 1949 the normal turnover has been closer to 20 percent.

7 This technique seems to have been most fully developed by Richard F. Fenno in his work on the National Congress. See especially Fenno, The Power of the Purse, (1966). Erving Goffman, Encounters: Two Studies in the Sociology of Interaction, (1963) and A. N. Oppenheim, Questionnaire Design and Attitude Measurement, (1966) were used in preparation for the interviews and designing the questionnaire. The questionnaire focused on how legislators are recruited, what they felt their job to be, the inner workings of the house and the importance of constituents and lobbyists.

8 The joint committee system is also used only in Maine and Connecticut. It effectively increases the power of the committee chairmen. Only the committee on Rules, on Ways and Means, and several minor housekeeping commitees are duplicated in each branch, and even they often meet in joint session.

work of the committees as a filtering mechanism is hampered by the rule that all petitions must be reported out of committee and sent to the floor relatively early in the session.[9] Thus all members must look for cues to the party leadership or other informed members.

The Speaker makes all committee assignments and presides on the floor. The Clerk arranges the daily calendar with his approval. However, Speaker Davoren was the first Speaker in state history to allow the Minority Leader to make minority appointments to the standing committees. Committee chairmen are also powerful, due not only to their control of the calendar of committee work but also because they can amend or report bills without allowing other members to vote on them.[10] The House accepts most committee reports. Even on the most important bills the leadership almost always votes the committee report.[11]

In addition, there is a strong tradition of party discipline built up through the struggle for control between the Republican Yankee and the Democratic Irish.[12] Though the population of the state was two-thirds foreign-born in 1920, it is only since 1958 that Democrats have predominated in the House.[13] On the Democratic side, this discipline

9 Thirteen other states require committees to clear their dockets before adjournment, but more often than not this is merely a perfunctory matter usually occurring on the last day of the session. In Massachusetts, most standing committees must report all matters before the fourth Wednesday in March except that matters referred to them after March 15 must be reported within ten days. All petitions not reported out by the deadline are given an unfavorable report by the clerk of the house of origin and put on that house calendar. Deadlines have been frequently extended in recent years but this rule is still important for most petitions.

10 A chairman may notify a representative of an executive session just before the meeting when he is certain that he cannot come. In addition, he has the power to poll absent members of the committee.

11 Speaker Davoren was more inclined to overturn committee reports in the session studied but even he claimed to have sought a chairman's approval beforehand. The percentage of committee reports accepted was approximately 90%. However, most of the bills dealt with minutiae.

12 Massachusetts had the greatest internal party cohesion of any eastern state except Pennsylvania in the period 1931-1959. MALCOLM E. JEWELL, THE STATE LEGISLATURE: POLITICS AND PRACTICE, 49-55 (1963). For a general picture of this political rivalry see OSCAR HANDLIN, BOSTON'S IMMIGRANTS: A STUDY IN ACCULTURATION (1959); JOSEPH HUTHMACHER, MASSACHUSETTS PEOPLE AND POLITICS 1919-1933 (1959); MURRAY LEVIN and GEORGE BLACKWOOD, THE COMPLEAT POLITICIAN: POLITICAL STRATEGY IN MASSACHUSETTS 17-32 (1962).

13 *See* EARL LATHAM AND GEORGE GOODWIN, JR., MASSACHUSETTS POLITICS, 14 (1960), for data on the 1921-1922 sessions through the 1959-1960 sessions. Other sources include DAVID R. MAYHEW, TWO-PARTY COMPETITION IN THE NEW ENGLAND STATES, (1967) and Pertti Pesonan, *Close and Safe Elections in Massachusetts*, 7 MIDWEST J. OF POL. SCI. 58, 66 (1963).

was strengthened by the tradition of loyalty to party leaders on the ward level in return for services.[14] However, there has been a loosening of control and division into factions under the luxury of a large majority and the rise to significance of other minorities, notably the Italians.

The role of the Governor within the system is important because of his ability to veto a local bill, influence bureaucratic decisions and mobilize public opinion. However, there have been few occasions in which the present governor has attempted to use this power though he is a member of the opposition party. Governor Volpe holds regular leadership meetings with the Speaker, Senate President, Minority Leaders of both branches, and, occasionally, the Chairman of the House Ways and Means Committee; but the sales tax appears to be the only issue during the 1965-1966 legislative session on which he attempted to bring his full influence to bear.

Yet in the Massachusetts political milieu, it is the power to distribute patronage that gives the Governor real leverage if he chooses to use it. Nepotism is almost a norm of a Massachusetts legislator's life. Preference in state job recruitment is traditionally given to friends and relatives of representatives.[15] In addition, representatives from Boston often have the opportunity to pick up an extra $100-$150 each week somewhere on the city pay roll.[16] Ex-legislators are well provided for through appointments.[17] Important representatives have a regular

14 Perhaps the classic statement was made by Boston politician Martin Lomasney, "I think there's got to be in every ward a guy that any bloke can go to when he's in trouble and get help—not justice and the law, but help, no matter what's to be done", quoted in LEVIN AND BLACKFORD, *supra*, at 25.

15 This system is especially pervasive at the lower levels of the state bureaucracy. Troy R. Westmeyer *Massachusetts Myth: Legislators Cling to Political Controls Over Cities*, 45 NAT. MUN. REV. 116-119 (1956). For an analysis of the corruption that may result see James Q. Wilson, *Corruption, The Shame of the States*, PUBLIC INTEREST 28-38 (1966).

16 To the best of the author's knowledge, six Boston representatives were on the city pay roll, while several others had relatives placed in the city administration. At least two of these men appear to make a serious effort to do their city job, but, since the time required by their legislative duties usually allows little spare time, most seem content to collect city checks without even an occasional appearance at city hall.

17 Sixty five per cent of the 1955-1956 House membership now living and under the age of sixty five are on the public pay rolls. Five per cent more moved to a higher elective office or an appointive state job after their service in the House but have since retired from government. There is little change in the pattern ten years later. Thirty four members of the 1965-1966 House under the age of sixty five do not now hold elective office. By February 16, 1967, fifteen (forty four per cent) had already found government jobs. Many of the rest seemed to be "awaiting appointment" in the State House corridors.

relationship with the Governor's office on patronage matters.

The gubernatorial influence is somewhat modified by the flexibility of the state bureaucracy at all levels to the demands of representatives. The closeness of the relationship on legislative matters between committee chairmen and most executive departments cannot be overstated.[18] At meetings of the Highway and Motor Vehicle Committee the author observed the Registrar of Motor Vehicles seated behind the committee table next to the chairman, taking testimony. The legislative counsel to the State Department of Taxation sits in on all Municipal Finance Committee hearings and even has a desk in the chairman's office at the State House.

The direct role of lobbyists is somewhat limited because Massachusetts law makes it illegal for a representative to use a lobbyist for patronage, an important source of the power of lobbies in other states. Public agencies, such as the Transit and Turnpike Authorities, are not so limited. It is through them and the leadership that the influence of these groups is concentrated.[19]

One final factor of importance is the length of the legislative session. This leads to constant commuting via car pools for out-state representatives and the renting of hotel suites near the State House, partly in order to collect the extra expense money provided for maintenance during the session. These small groups tend to vote together to a significant degree.[20]

Thus Massachusetts has a strong leadership system with little practical separation between the executive and the legislature. Power is concentrated in the Speaker and committee chairmen, though the Governor can have a great deal of control if he chooses to exercise it.

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18 Interesting work on executive-legislative relations at the national level that illustrate a similar phenomenon include J. LEIPER FREEMAN, THE POLITICAL PROCESS: EXECUTIVE BUREAU-LEGISLATIVE COMMITTEE RELATIONS (1965) and ARTHUR MAASS, MUDDY WATERS (1951).

19 A forthcoming study on lobby influence in four states by Professor Harmon Ziegler of the University of Oregon, examines in detail the Massachusetts lobby and promises to explain these influences in much greater detail than is possible here.

20 Referring to the boarding house communities about Capital Hill in the early 1800's, James Young observed that "the members who lived together, took their meals together and spent most of their leisure hours together also voted together with a high degree of regularity." JAMES STERLING YOUNG, THE WASHINGTON COMMUNITY, 1800-1828, (1966), p. 102.

In Massachusetts members of double and triple districts also often form small voting blocs. See also Alan Fiellin, *The Function of Internal Groups: A State Delegation* in ROBERT L. PEABODY AND NELSON W. POLSBY, EDS. NEW PERSPECTIVES ON THE HOUSE OF REPRESENTATIVES 59-79 (1963).

TABLE 2: JOB PERCEPTION OF INTERVIEWED REPRESENTATIVES, MASSACHUSETTS HOUSE, 1965-1966 (N = 22*)

	SAMPLE	PERCENT OF TOTAL SAMPLE	LEGISLATIVE ORIENTATION	CONSTITUENCY ORIENTATION
Fixers	7	32	low	high
Movers	6	27	high	low
Legislators	8	36	high	high
Alienated	1	5	low	low

*Only twenty-two of those interviewed were used in calculating the percentage for this table. The Speaker and the Minority Leader were also interviewed for this study, and as would be expected, they both seem to fit into the *legislator* category, but most of their interviews were devoted to their special role in the total system. Their inclusion in these statistics would present a distorted distribution picture among the four groups. In Tables 3 and 4 data on the *alienated* member is also omitted to protect his privacy and because it is impossible to outline a pattern from only one interview.

TABLE 3: PERSONAL CHARACTERISTICS OF REPRESENTATIVES AS PRESENTED IN SAMPLE OF MASSACHUSETTS HOUSE, 1965-1966 (N = 21)

	Legislator	*Fixer*	*Mover*
Party	4 Republicans 4 Democrats	1 Republican 6 Democrats	6 Democrats
Mean seniority	11 years	1.3 years	2.7 years
Mean age	50-51	39-40	31
Education	4 high school or less 4 college or more	5 high school or less 2 college or more	6 college or more
Have some outside occupation	4/8	2/7	6/6
Principal income from legislature	4/8	6/7	3/6
Have held previous elective office	5/8	4/7 (and 1 former policeman)	2/6

II. The Typology

It's a real club . . . I could even feel it today. The fellow sitting next to me in the chamber had lost his bid for re-election; already walls were building up. Former members are really not members of the club anymore.

Table 2 divides representatives into four types on the basis of their own job perception. *Fixers* stated that personal service to constituents and watching out for the local interests of their town were the most important parts of their job. *Movers* recognized their lawmaking duties as the principal aspect of the job but said that they might do "favors" for constituents although they did not like to. *Legislators* indicated that their duties on the floor of the House and in committee were of primary importance. The only *alienated* representative interviewed responded to questions on job perception with the observation that it made no difference what he did because everyone else was "under the tent".

The backgrounds of each type are spelled out in Table 3. It should be especially noted that most members have had previous legislative experience before coming to the House. However, the proportion over the age of 50 has declined in recent years.[21] About one-quarter of the membership consists of lawyers and another third are business executives.[22] However, these figures may not reveal the occupation before election as members have a tendency to pick up real estate licenses, insurance agencies and law degrees after they are elected.[23] In addition, though 85% list some outside occupation in the book of bibliographical data, only 33% of those who were interviewed derived their principal income from activity outside the legislature.

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21 In 1925 95 members (40%) were over 50. The number declined to 81 (34%) in 1955 and 72 (30%) in 1966. For a detailed presentation of the changing personal characteristics of Massachusetts legislators see Thomas Wood, Distinctive Practices of the Massachusetts General Court, (unpublished Ph.D. thesis, Harvard 1949); Horace B. Davis, *Occupations of the Massachusetts Legislature, 1790-1950*, 24 New Eng. Q. 89-100 (1951), and George Fingold State Library, Occupations of Massachusetts Legislators, 1949-1964 (1965).

22 Sheldon Goldman, *supra*, at 24. The percentage of lawyers rises to 41% for those representatives under the age of thirty-nine. The general figures have changed little over the last fifteen years. See Duncan MacRae, *The Role of the State Legislator in Massachusetts*, 19 Am. Soc. Rev. 186 (1954).

23 At least thirty-five members of the 1965-1966 House had attended or were attending Suffolk University or Portia Law School, and several others were enrolled in public relations or government courses at other schools in the Boston area.

The percentage breakdown of types can best be viewed as a rough estimate of the relative size of each group in the House. All that can be concluded is that the 1965-1966 House was about equally divided among *legislators*, *fixers* and *movers* with a small group of *alienated* (not exceeding five per cent). Of more significance is that each of these types exemplifies a different style of legislative life and plays a different role in the legislative system. Table 4 outlines these characteristics in statistical terms.

A. The Fixer

> *Once you start, you create something and there's no way out; the word gets around that you fix things.*

Fixers do not get different requests from their constituents than other representatives; they simply get more of them. The volume and variety of constituency requests that they process can hardly be overestimated. One *fixer* reported that he had "handled" about four-hundred suspended driving licenses for his constituents and had "delivered" four-hundred low numbered automobile registrations during his first two years in the House.[24]

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24 A license request results from the suspension of a driving license by the Registry of Motor Vehicles. Almost everyone in Massachusetts convicted of a traffic violation like speeding will have his license to operate suspended for 15-30 days. The suspensions occur as late as six months after the conviction when the court record finally reaches the Registry in Boston. When this happens, an "aware" citizen calls his state representative or someone who knows him and asks for help. The representative then calls or visits the Registry and quickly arranges to have the suspension cut down to 2-5 days. Usually this much time has gone by before the representative has found out about the problem, and he can often bring the license home with him from Boston a day or two after the request is made.

Low numbered license plates are another favorite errand of the *fixers*. Before 1966, low numbered plates were distributed as political patronage by the Governor's office and the Registry of Motor Vehicles. In those days, the only way a citizen could get a special license plate was by knowing a politician, and low numbered plates were displayed with pride as a symbol of influence. In 1965 there was a minor scandal with disclosure of the fact that certain employees at the Governor's office and at the Registry often sold low numbered plates for from $25.00 to $100.00. Following this disclosure, the legislature in a burst of reform spirit, which also established a "no-fix" traffic ticket, passed a law allowing any citizen to buy any numbered license plate he wanted. The citizens of the Commonwealth still generally seem convinced, maybe justifiably, that having a representative make applications for the special plates helps insure that they will be gotten. In any case, it probably saves some time to have the local representative pick up the plates in Boston and "deliver" them.

TABLE 4: MEMBERSHIP PERCEPTION OF ROLE WITHIN THE SYSTEM (N = 21)

	Legislator	*Fixer*	*Mover*
Think the most important part of job is legislation	8/8	1/7 (local bills)	5/6
See legislative aspect as most time consuming part of job	8/8	2/7 (local legislation only)	6/6
Dislike errand running	2/8	0/7	2/6
Feel it is a club	7/8	6/7	2/6
Happy with job	8/8	7/7	3/6
Plan to stay in the House	8/8	4/7 (rest seek Senate or County office)	0/6
Feels floor debate can be important	5/8	2/7	4/6
Feels parties are important	2/8	4/7	0/6
Feels influence of constituency is important	1/8	3/7	2/6
Feels influence of press is important	2/8	0/7	5/6
Feels influence of lobbyists is important	6/8	3/7	6/6

> I get as many as one-hundred phone calls each week. About a third or less are legislative matters. Mostly they call for city services: tree removal or garbage collection. I only get three or four low number plate requests a whole year. Mostly it's for simple things they could do themselves, if they weren't afraid. . . .
>
> I get a lot of employment problems and housing problems. I have a friend down at ———————— (his city) Housing Authority who takes care of things for me.

As might be expected, different types of requests seem to come from different constituents. However, even the wealthiest constituents are not immune to the somewhat arbitrary power of the Registry of Motor Vehicles, the desire for help in getting children into state colleges, or the problems of admission to some state hospitals.

> I guess ———————— hit the nail on the head when he said education was the biggest thing today. Writing recommendations and making phone calls to get people into state colleges and the University (of Massachusetts) out in Amherst can really keep you busy. Right now I'm working on a case to keep a girl up there (at the University) who is on the border line.
>
> I've gotten a few phone calls to help get emotionally disturbed children into state hospitals. . . . Once in a while I can be of help on these. Last year we had beforehand information that they were going to open a new hospital so I told these people to get their applications in early, and set up the right appointments for them here in Boston.

In fact, some of the most outlandish constituency requests seem to come from the economically better off districts in the remote parts of the state.

> Take a guy like ————————; he does almost anything they want. Why, he got a call from a lady whose son was going to B.U. (Boston University). She wanted him to pick up his laundry on Thursday or Friday, bring it back to her, and then bring the clean laundry back to him on Monday.

Some members laugh at these requests, but the *fixers* often encourage them. *Fixers* are so favorably disposed towards these errands that they almost advertise for them, and occasionally compete with one another for an individual driver license.

> On of my best supporters called the other night. His neighbor had an accident a few months ago and had just lost his license. I told him to have the fellow call me, and I'd see what I could do. He called me back in a while and told me his neighbor had given his license to his lawyer who was handling the accident. The lawyer's probably going to give it to ———————— (another representative from another town) and charge him for it. I told him to make sure he called me right away next time.

The political job situation in Massachusetts is made to order for the *fixer*. Most confide quietly that the Governor's office has never refused any of their requests for thirty-day jobs, and it is doubtful that the state could find the temporary personnel it needs in any other manner. Although every representative requests at least five to ten summer jobs for students, many of these positions still remain unfilled. It is only on the rarest occasions that they are so scarce that the Governor uses their distribution for influence in the House. The civil service system in Massachusetts allows most appointments to be given to any one of the top three candidates on examination lists and thus is similarly adaptable to the demands of political influence.

> Say ———————— (the town in which he lived and where he previously served as a selectman) may be putting on one cop out of the three on the list, and a friend may call up to see what I can do. . . .

The fact that most *fixers* have held local office before entering into the House further increases their sphere of operation in thse matters.

Needless to say, *fixers* spend the bulk of their time on constituency requests. What is more significant is that they enjoy this part of the job most. When asked whether or not constituents bothered them with foolish errands, two of them took issue with the word "bother." When asked what they liked best about their job, they talked about the "prestige" of the job or "knowing that you're liked" or the "feeling that I've helped someone."[25] One of their common complaints is the ingratitude of their constituents. The following is a rather humorous example.

> The other day a girl called me at 3:00 A.M. She got locked up. . . . This girl called me a total of three times. The first

25 Some Congressmen also seem to derive a similar satisfaction from helping constituents. See CHARLES L. CLAPP, THE CONGRESSMAN: HIS WORK AS HE SEES IT, 487-489 (1963).

> time it was about 9:00 A.M. She called and told me her husband got locked up. I asked what happened. She said they were at a bar the night before, and he started horsing around and roughed her up. I said, 'So you had him locked up and now you want him out.' 'Yea,' she said. So I went down to the police station. They're great to me down there. So we tear up the arrest papers and shove him out the back door. Next thing you know, a couple of weeks later, she calls me at 3:00 A.M. This time she's in the 'clink.' I go down again; we tear up the papers, and she's out. A couple of weeks later she calls me to get her a temporary forty-five day city job — he's not giving her any money, and she needs the rent, etc. So I get her a temporary appointment with the city, Now, to top it all off, I'm going around to the polls on election day, and I see this same girl standing there with my opponent's badge on and passing out his cards. . . .

Fixers generally come from low income districts and have rarely gone beyond high school. They generally belong to every lodge and social club in their district.[26] Their attitude toward campaigning reflects this orientation.

> Campaigning is one of the most enjoyable aspects of politics to me.
>
> I like meeting people.
>
> I do it all year round. I go to wakes if I know the people. I always send death cards. I have them all made up. I send a card whenever someone goes to the hospital or has a baby.

They seem genuinely impressed by the House and with their colleagues. Some of them led the discussion astray to mention "the type of men I've met up here." Almost to the man, they feel a strong bond of friendship toward the other representatives. Legislative service is membership in the "greatest club in the world."

> I think I've made many friends here that will last after our service in the legislature is through.
>
> Every one of them (representatives) are good men, but there are some real close associations that I've made up here.
>
> I don't think I've ever met a better group of men.

Fixers are happy with their job and often feel a sense of personal accomplishment.

26 This may also be due to the fact that *fixers* are most likely to enter at an age over 35 years, at least during the session studied. They are community leaders whose local social relations are already well established.

> I've accomplished many things for myself and my district. I've given myself a greater outlook on life by being here, and I've come to realize what men before me have done. . . .

By comparison, their legislative accomplishments are rather limited. A *fixer* can sometimes point to a particular law which settled an important local problem in his town, but most feel that significant statewide issues are beyond their personal control.

> The biggest battle I was ever in in the House was over a bill to increase the membership on the Municipal Lighting Commission in ———————— (his home town) from three to five. We were fighting some of the biggest guns in the state on this one.

> I feel I've had a part in everything that goes to the Governor's desk, but I can't point to anything that happened that wouldn't have happened if I hadn't been there.

Because they enjoy their work, *fixers* usually want to remain in the House as long as possible. However, sometimes the desire for security leads them into an appointive political job, or the feeling that they have mastered the House inspires them to conquer the Senate or some municipal or county office.

> I'm going for the state Senate next time. After that I don't know. I'm not that well equipped; I find things hard to grasp now and then.

> I'm thinking very seriously about county office or city government. . . . What I really want to do is get myself an appointive position before the end of this term and then run for city council. It's legal; one's a city salary and one's a state salary. . . . I can be of more help to my business with a local office. That's when people come to you with local problems. (He is an undertaker.)

Fixers tend to underestimate the significance of floor debate in the system of operation in the House. They often enjoy being in the Chamber and listening to debate, but their attitude seems more akin to Mr. Dooley's than to any notion of parliamentary consideration.[27] Generally, they prefer to rely on friendship and "cronyism" to line up support for their positions.

27 "I was sayin' Hennissey whin a man gets to be my age, he ducks pol-itical meetin's, an' r-reads th' papers an' weighs th' argymints, — pro-argymints an' con-argymints, — an' makes up his mind ca'mly, an' votes th' Dimmycratic ticket." FINEY PETER DUNNE, MR. DOOLEY IN PEACE AND WAR, 88 (1899).

> I don't think it's important. Sometimes you may lose a bill by debating it on the floor. . . .
>
> Floor debate is definitely not important. It never sways me. . . . If I've got a bill coming up, I'm going to have my votes long before it goes to the floor. . . . Given a reasonable amount of time, I can get fifty votes lined up for any bill I want.

All interviewees agreed that friendship could be an important vote determinant within the House, but one reason the *fixer's* friendship approach to policy is somewhat successful is probably the limited use they make of it. Since their whole orientation is local, the matters that they bring before the House are usually motivated by local interest.[28]

> Mostly you see what other guys are getting. . . . a swimming pool or a skating rink. . . .
>
> I go through last year's bulletin and look at the bills that were defeated. If I like any of them, I may file them. I'm not a bill filer. I only file bills which people will accept and which don't include any expenditure of their money.

Party lines appear more important to *fixers* than other members.

> They're very important. Most of the time members of political parties stick together on votes.

They usually do not appreciate the freedom from party control which the present lop-sided Democratic majority allows. Those who recognize that party lines are not clearly drawn on many issues often complain about this fact.

> I've been brought up on the philosophy of being a party man. Under the present leadership, many's the time I couldn't figure out what he wanted.
>
> Everything the Speaker wants should be a party issue. I don't feel it's my responsibility to read all the five-thousand bills that come before us, but the Speaker is not keeping on top of things and doesn't seem to know what's coming off. Davoren is a nice guy, but he has no guts. He should bang

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28 It has been stated often by observers of Congress and various state legislatures that one of the most important "rules of the game" requires members to defer to colleagues on matters of concern only to their district. See WAHLKE, *supra*, at 141-170.

> some heads together and knock some people around if it's needed.

So it is that the bitterest criticism of the Speaker comes from those who would be his most ardent followers. *Fixers* seem angered at the Speaker because the freedom he allows leaves them in a position of doubt and uncertainty.

The dilemma of the *fixer* is best demonstrated by the remarks of one of them when he was asked about party caucuses.

> They are more confusing than anything else. They are not well run by the leadership. Most of the time the caucuses just confuse me. I become confused about a bill I wasn't mixed up about before. I'm confused between the Speaker's position and those that oppose him. And sometimes I can't figure out what he wants.

Another major influence on *fixers* is constituency pressure.[29]

> Yes, they (constituents) influence my vote. . . . If I know a group is united, and they have a lot of influence, they may switch my vote. But if an issue encompasses the whole state, I'm more likely to follow leadership than listen to them.
>
> Let me give you an example. Some of the boys from the Veterans post called me on the beano bill. Now, I'm a past division commander of the V.F.W. Well, they wanted me to vote for it, and I voted for it although I didn't believe in it. . . . Take the strike benefits bill. Politically, I would like to vote for strike benefits if I didn't get so much flak from the industrialists on it. . . . Yet, if I thought there was enough support from labor in my district for it, I would have gone for it. It seemed to me that only the labor establishment here in Boston was for it, and by George, every industry in the state was against it. When I'd go through the plant where I used to work, no one came up to me and said, 'Look here, you're taking bread off my table.' If they had, it might have made a difference.

Lobbyists seem aware of the fact that *fixers* have a limited role in the law-making process. What little contact there is is usually limited to a casual "hello" when a lobbyist pays a dinner check or outside the Chamber where lobbyists use a standard "can you give me a vote on

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29 The attitude of the *fixers* is somewhat similar to that of the *delegate* described in the Wahlke study of four state legislatures. WAHLKE, *supra*, at 276-280.

this one" approach and seldom waste time explaining the details of the particular bill. The *fixer* who proudly stated, "They don't usually approach me," exemplifies the distrust which he and his fellows hold for the third house.

Perhaps the easiest way to influence them is indirectly through the House leadership or through their constituents. The observations of one of the *fixers* seems revealing of the actual situation.

> They never influence my vote, but I think they do have a block of votes up here that they do influence. . . . I see how close and solid they are with certain members. . . . Yes, I switched on that one (extending sales tax to capital equipment), but that was because certain industrialists in my area called me up and explained how it was a poverty stricken area, and I was afraid I might be hurting people in the plants.

For the past few years, the press has been the leading advocate of legislative "reform" in Massachusetts. Because they enjoy their work and want to stay in the House, *fixers* resent this criticism and have built up almost a belligerent antagonism toward the opinions of the news media.

> They absolutely do not influence my vote. The press is running everything today. We have government by the press.

This antagonism is often coupled with suspicion. *Fixers* seem more inclined to hide from the press than to seek out reporters. The following statement indicates how removed from public attention some *fixers* want to be.

> We have a local paper, but I don't issue press releases, unless I've been mentioned in some critical way. Why stick your neck out, when no one asked you to? You can only get embroiled in a controversy of some sort that way.

Thus the *fixer* is happy in the House though he is not a major actor in the legislative process. He is willing to follow the party leadership blindly on all but the most local issues. It is an honor to hold the position of representative and to serve the concrete needs of persons in his district as he perceives them.

B. The Mover

I don't want to make a career out of the House. . . . I'm not

> *plotting now because I'm too young, but maybe Congress or statewide. It depends on where the chips fall.*

A distinguishing characteristic of the *movers* is their ambition.[30] Only one of the six interviewed expressed a desire to stay in the House for an extended period,[31] and this was conditional on his entering the top leadership in the near future.[32] When asked if he planned to stay in the House, another responded, "I hope not," and then outlined elaborate plans to run for Congress in 1968. Whether or not these dreams are likely to be fulfilled, other responses indicate equally high levels of ambition.

> Anyone not disillusioned here is sick. I couldn't spend my life here. . . . It couldn't get worse. . . . let's say I'm content but itchy. . . . Each time I said it was my last term. . . . You have to make up your mind and plan. If you sit around waiting for the call it may never come. I don't want to be like ————————, too afraid to make any move.

All the *movers* interviewed had some type of outside employment. They are more likely to be lawyers or night law students than any other group in the House. Being a representative usually helps a young lawyer establish himself, and the three with the longest seniority derived the major part of their income from their non-legislative employment.

> After leaving the Federal service, I opened a law office and people just didn't beat a path to my door. I had a lot of free time. . . .
>
> I passed the bar just as I came into the House for my first

30 One of the best discussions of political ambition to date can be found in JOSEPH A. SCHLESINGER, AMBITIONS AND POLITICS: POLITICAL CAREERS IN THE UNITED STATES, (1966).

31 Of the six *movers* interviewed, one was regularly mentioned in the Boston press as a possible candidate for mayor in 1967; another was seriously considering running for mayor of his home city; two others will run for Congress in 1968, if their districts can be favorably reapportioned; and one has unofficially announced his intention of seeking the state Senate in 1968 and the office of Attorney General in 1970.

32 An examination of the data on age of first election and educational levels of 1955-56 House seems to indicate that many more *movers* will remain in elective or appointive political jobs than might be expected. However, this data is probably misleading because of the unusual opportunities connected with the rapid rise of the Democratic party in Massachusetts in the mid-1950's. The effects of a similarly rapid rise of the Democrats in the 1950's in California is discussed in WILLIAM BUCHANAN, LEGISLATIVE PARTISANSHIP, (1963).

> term. I did a lot of legal work free for constituents then. Now I've learned the score.

Their political position enables some of these men to develop comfortable law practices. Many of the non-lawyer representatives resent the fact that their lawyer colleagues are able to charge fees for appearances on behalf of constituents before the Industrial Accident Board or at Registry of Motor Vehicles hearings.

Both *movers* who had held political office before their election to the House were elected to local school committees while they themselves were in college. The school committees in most cities and towns in Massachusetts are semi-political posts which require election but are normally isolated from the patronage and ticket fixing demands of elective office.

> I'm not a political figure. People don't expect me to be able to do things. I couldn't put up with it the way some members do, getting calls at all times of the day and night. I have an answering service to handle all the calls I do get. I call in a couple times every day, get my messages and call people back.

Movers handle most of the constituency requests which they get because they feel it is politically necessary. However, unlike the *fixers* they discourage these requests and often complain about "wasting time on foolish errands."

> I broke them of the habit of using me for errands. I may fix one or two licenses a month, but I don't like to do it. . . . Constituents often call me about votes. I discourage letter writing. I don't think I've ever answered with mail. If they have a point, I use the phone.

One *mover* who said he got about twenty-five calls each week from constituents complained that he came from "that kind of district." It should be remembered that *fixers* often handle as many as one-hundred calls each week. However, districts do build up traditions, and if a *mover* replaces a *fixer* he often inherits a considerable flow of requests.

Movers' responses to questions about the part of their job they liked least are particularly significant when compared with the *fixers* responses to similar questions.

> The *ombudsman* function is the thing I like least.

> Going to social affairs really bugs me, I like to go out with my own friends, but I don't like to go to an affair in my district or anywhere in the state where I don't know anybody. And then they expect me to say something and nobody really wants to listen.

They are not interested in doing favors but rather in their own advancement. Elective office at this stage is a transitional step which offers visibility and perhaps economic advantage. In addition, many of the *movers* come from politically active families as compared with either of the other main representative types in the House. In a sense, they are born into the "game".

> You might say I was brought up in it. My mother was on the Democratic State Committee and my father was city chairman.
>
> My uncle was the representative from my district and was a candidate for various offices. Naturally, my mother was very active on his behalf.

Movers respond to questions about their feelings of personal accomplishment with expressions of guilt. Because of their education, they know what the job of representative should be; yet, they feel that they are not doing as good a job as they could. Undoubtedly, this self-criticism reinforces the *mover's* already keen desire to get out of the House.

> I'd like to do some real work on important bills this time.
>
> The thing I like least is the lack of time to put in on legislation. . . . I wanted to file a bill to abolish county government. It takes time to work out the details of something like this, and I didn't have it so I didn't file it.

Not all the *movers* are this hard on themselves. Those whose outside occupations have not yet gotten off the ground and some of those who have won leadership positions seem to find the time to do a job they are proud of. When they were asked what legislation they filed and what they had accomplished at the state house, *movers* cited spectacular examples of legislative initiative.

> I initiated a $150,000 program to deal with motor-perceptual handicaps. It started with a letter from a constituent. I filed the bill, guided it through committee and got the money for it. . . . I don't think ten members understood it, but we got

> it through. We occupied a whole day at the hearing, and I ran the whole show.
>
> I started every constitutional amendment passed in the last four-five years.
>
> I did a lot of work on the MBTA power plant bill. Maybe it will be the start of public power. In any case, we slowed down the utility companies a bit.

Fixers complain that constituents' problems keep them out of the Chamber during debate. One of the parts of the job they enjoy most is relaxing in the state house with other members. Perhaps because of their outside jobs, *movers* feel themselves even more pressed for time and generally view their relationship to other members in a more business-like manner.

> The one thing I really dislike is hanging around — the slow pace during the session — waiting to vote.
>
> It's not a club. It's merely a group of people who enjoy politics, a group of people who work together.
>
> There is a congeniality, but I think it's confined to here within the state house. I don't go visiting members in Pittsfield (a city in the extreme west of the state).

On most issues, *movers* follow the lead of key *legislators* and the House leadership. Like *fixers* they are often critical of the Speaker. However, their criticism is not rooted in the freedom of action he allows. They are most concerned about the public image of the House and its reflection on their chances for future political success. They are annoyed with the Speaker because of the lack of direction and initiative from the House on important issues.

> The leadership should be making decisions on important issues, but it hasn't done this.

Movers are not willing to put in the necessary time to lead the House themselves. They want the Speaker to initiate programs and create an aura of activity and newsworthiness from which they might benefit.

Unlike *fixers*, *movers* do not believe that party labels are significant or that they should be.

> The Democrats today have so large a majority it lessens the importance of individual members. The Speaker can afford

> to alienate 10 to 15 members. Besides, I feel the public today puts personalities ahead of parties.
>
> Publicly today, there really is no difference between the parties. . . . People who have ambition have to leave themselves free.

The one *mover* interviewed who indicated that parties should play an important role in the House, quickly pointed out that he meant parties which defined issues the way he defined them.

> The trouble is I can't identify the Democratic philosophy with the Democratic majority in the House, and this frustrates me no end.

In line with their need to project a party image a small group of liberal *movers* within both political parties have organized themselves to act as a unit on various matters. There are at least seventeen members in the Democratic group. They meet about once each month at the home of one of the leaders to discuss issues and assign work details. The Republican group is, of course, much smaller. It does not have nearly as formal a structure and appears to limit its activity to voting as a bloc and covering simultaneous committee meetings for members.

Movers usually don't read minor bills, but they do read their mail and even one letter from a constituent may become important.

> If I wanted to stay in the game, I have to do what the public wants. Communications from my constituents are particularly important if I have no strong feelings about an issue.

However, constituency pressure often puts *movers* in a particularly difficult position. On major issues a *mover's* constituency may push him in a direction he feels is wrong or contrary to the wishes of the larger constituency he hopes to serve in the future.

> The trouble with the racial question is that if you vote liberal, you get killed in Boston for re-election; if you vote conservative, they'll hold it against you statewide. . . . I got out of that predicament. I got one vote for the Racial Imbalance Law on the final step.
>
> You have to distinguish between political votes and regular votes. . . . A political vote was that pharmacy vote because it was important to the pharmacists in my district, and that means votes. I voted for it. I knew it was miserable, uncon-

> stitutional, monopolistic bill, but most of us figured the Senate would kill it. Even when we over-rode the Governor's veto, if the Senate passed it, the Supreme Court might throw it out. Generally, on political bills, we vote the political way and leave it to the Senate or the Governor to carry the grief, I don't know how I'd vote, if I knew my vote was the determining one.

It has been pointed out that lobbyists and *fixers* seem to avoid each other. *Movers* tend to seek out the lobbyisits. Sometimes, in violation of the laws of the state, they use lobbyists for patronage.

> I frequently use the insurance lobbyists to re-instate policies that have been canceled. . . . I've used the retail trade board to get kids jobs here in Boston. . . . The public utilities respond with alacrity to my requests to re-install gas or electric power. . . . They never remind me of former favors, but I don't mind reminding them of a vote on their behalf.

More frequently, however, the *mover* comes to depend upon the lobbyists for legislative information.

> I depend on lobbyists as much as possible. I think we have a fair court of lobbyists, and I often go to them for information. I don't have the time to dig out. If you ask them direct questions, they answer you straight.

Similarly, while *fixers* seem to hide from the press, *movers* are more conscious of the fourth estate than other members. Some *movers* spend much of their time at the state house issuing press releases and manufacturing news. Even one of the more modest *movers* was able to explain, "I try to keep the press informed when I'm doing something newsworthy." It is not surprising that *movers* are the only group in the House who feel that the press has an important impact upon the body.

> I think it's natural to care what they say, although, unless they really attack me, I just look at it as publicity value.

> To a certain extent we are all influenced by the press. If you're for something and the press is against it, you think twice and may shy away or back off.

Movers view their service primarily as a stepping stone to higher office. They generally have not held prior elective office but hold college degrees. When they put their mind to it they can make important contributions to the legislative process. Like the *fixer*, how-

ever, the *mover* does not usually devote enough time to committee work or floor debate to be effective at either. Unlike the former he resents wasting time on unimportant constituency errands and fraternizing with members.

C. The Legislator

> *I think we have the best trading stamp bill in the country. I filed and put it through.*

Legislators see their formal legislative duties as the most important part of their job. The aspects of the job they enjoy most are attending sessions and committee hearings and participating in parliamentary manipulations.

> I like legislating best, changing the language of a bill on the floor, like when I inserted the word 'temporary' in the bill setting up the Boston branch of the University of Massachusetts in Copley Square. In the future no court will be able to say that the legislative intent was for that to be its permanent home.

When it comes to handling a constituent's problems, these men are expert and often have this part of their job systemized.

> I spend every Friday back in ———————— (home town) in my office hearing complaints from my constituents. The secretary tells people who call during the week to call or come down on Friday morning, and it's just like a doctor's office. (He has a real estate office.)

> I've made it a point to give immediate answers to all my letters. I guess I must have written about three thousand letters to constituents during the last two years. . . . That's about five a day.

One *legislator*, who represents a very poor neighborhood in Boston, complained that he could not handle the volume of constituency business without the help of a secretary whom he hires at his own expense.

> An awful lot of these people come to me looking for jobs. I have an employment book this thick. Just yesterday I was questioning a young man in the gallery while debate was going on. We type up a resume for them — this is something they wouldn't ordinarily be able to do themselves — and then

> I usually take them down to the Governor's patronage office. He can usually take care of them.

The fact that this representative meets his constituents in the gallery, where he can listen to the proceedings, rather than in the lobby, points out the distinction between *legislators* and *fixers*.

Although they frequently resent doing "foolish" errands and may refuse to handle a constituent's request they consider "illegal," most *legislators* enjoy helping their constituents. They recognize it as such an important part of their job that the thing they frequently like least is "disappointing a constituent who asks for a not unreasonable request."

> The errands can be frustrating sometimes. I had a kid call up today who wanted to know when he's getting his license back. He's a truck driver, and it's a matter of working or not. Wednesday I called the Registry. They lost his file over there. Sometimes it may take as long as one week to find a file. He probably won't believe me when I tell him later tonight.

However, they often ignore issue-directed mail and other forms of constituency pressure. Their attitude is that the public is never familiar enough with the issues to make the right decision and that it is their job "to do their thinking for them."[32a]

> Most people don't try to tell you how to vote; they feel you know more than they do. I very seldom get any indication on how to vote. . . . I've usually made up my mind by the time I hear from them, and I usually don't from the people — it's some lobby group that has an ax to grind.

> I take a poll every two years as a campaign technique. . . . I take real delight in the reply that takes an opposite position from me on every issue, and then says she'll work for me and do everything to help in the campaign. Ninety-nine percent of the time we operate in a vacuum as to what our constituents want.

Legislators expressed the belief that their constituents would agree with them if they had all the facts and some explained how they were

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32a This is similar to the opinion held by some congressmen interviewed by Charles Clapp. See CLAPP, *supra*, at 426-427. For a statistical analysis of the relationship between constituency and representatives in Massachusetts see Duncan MacRae, Jr., *The Relations Between Roll Call Votes and Constituencies in the Massachusetts House of Representatives*, A.P.S.R. 185-194 (1954).

able to educate their constituents rather than let their constituents sway them.[32b]

> I talk to people in the district a lot about issues — say coming out of church on Sunday. One time an I.E.U. union man was really giving me a hard time on the strike benefits bill until I explained to him what would happen if we passed that law. I told him, 'What would you do if GE decided to move its factory up to New Hampshire? Do you think you'd be willing to move up there too, and do you think you'd find as favorable a labor climate up there, or that you could make one?' He said that he never thought of it like that, and he came around to my way of thinking.

Because their job in the House usually takes so much of their time, *legislators* are less likely to have outside occupations. Unless they possess inherited wealth, their state salary is their principal source of income.

> I list insurance in the little book, but I really do very little business.

> I only make one to two-hundred dollars a year on my broker's license.

Their attitude toward campaigning provides an insight into their total adjustment to and acceptance of the present system.

> Yes, I like it, but it's very exhausting. We're campaigning all the time, going to large meetings or breakfast at the synagogue.

> I don't like the physical and emotional strain. You're always in the district, and, yet, you have to put on that special push.

Legislators seem able to draw a high sense of personal fulfillment and accomplishment from their service. They are always able to point to several pieces of major legislation which they personally guided to enactment.

> I pushed through fiscal autonomy for the University of Massachusetts and I think that was important.

> I filed ninety-one bills last year, and seventeen of them became law. . . . This year I filed one-hundred and two. . . .

32b This attitude seems particularly similar to that expressed by the "trustees" described in WAHLKE, *supra* at 272-276.

It is not surprising that they seem to be very happy with their job and want re-election.

> I love it. It's still as exciting as it was twenty years ago, when I first started.
>
> I enjoy it. I would serve in the House for no pay. You couldn't get me to cross the street for $200.00, but you might get me to go to Fall River and spend three days there for $0 as a legislator.

If the *legislator* has ever thought of higher elective office, he has probably rejected the idea some time in the past. The only other elective office they are interested in is Congress. Here their interest is tempered by comprehension of political reality.

> I'd love to go to Congress, but I don't see any chance.
>
> You've got to wait for somebody to die to run for Congress!

Legislators were the only members who recognized the fact that committee work was a crucial part of the legislative process. They are the members who regularly attend committee meetings and decide most issues before they reach the floor. Even the one *legislator* who had an admittedly poor committee attendance record recognized their importance.

> My life in the House, on the floor, is the most important part of my job, but it should be my committee work.

Despite the generally very poor committee attendance record in Massachusetts, minority members have better attendance records in committee as might be expected from the high concentration of Republicans in the *legislator* category.[33] Democrats confirmed this observation.

> If you ask me to name the members of my committee, I don't think I could. I never see them all together.
>
> I'm a Republican, and I was all alone for twenty minutes at two committee hearings last year. I had to take testimony by myself.

33 In fairness to the representatives, it should be pointed out that many committees schedule hearings at the same time, and some members often have conflicting assignments, while others may prefer to remain on the floor for an important debate. However, it should be noted that absenteeism at committee meetings is so institutionalized that some of the committee rooms have fewer chairs than there are committee members.

> I've never been at a meeting with everyone present, yet the Republicans are almost always there.

Poor attendance and an average turnover of five representatives out of eleven on each committee every two years, work together to increase the responsibility and power of chairmen *(legislators)*.

> . . . . Then my committee has a tremendous turnover every two years. This year we have one new senator and five new representatives. That's six out of fifteen. I hardly ever have more than one senator attending, because they have so many committees to attend. My vice-chairman is also Clerk of Taxation and spends a lot of time down there. The third member of my committee is now House Chairman of Public Health and that committee meets at the same time we meet. . . . Many of these bills we hear are perennials which we've heard over and over again for the last ten - eleven years. I've heard all the arguments on them, and I know all the answers on them, and it's difficult to send a new member up to debate them on the floor. The only time you might do that is to let a new member make his maiden speech on something that isn't controversial. Even when I do that, as chairman, I have to stay in the House and be ready to answer any questions that may come up.

During floor debate and voting, *legislators* dominate the law making process in Massachusetts. They regularly attend sessions and participate in and listen to floor debate. Most issues of any significance are decided on the basis of a standing vote. Thirty members must stand to require a roll call on any issue, and the observations of the Minority Leader in this matter are particularly revealing.[34]

> There is a certain group who is there on the floor all the time. The most important thing to notice is who is there. You ask a member for a vote in the lobby the day before and he'll say sure, but he can't vote if he's not there and you can't get a roll call without asking me for it. A fellow like ——— ——— is never there to vote with you on a standing vote and many issues are decided this way.

Even when an issue reaches a roll call vote of the total membership, *legislators* are usually able to maintain control. The common chant of

34 The members present may sometimes allow an issue to go to a roll call because a member who loses a standing vote will bring the House to a standstill by doubting the presence of a quorum. Generally, members are not familiar enough with this tactic to use it and quorum calls are unfashionable on everything except a major issue.

the one-hundred and fifty members who rush in to vote on every roll call is, "What's my vote?"[35] The Speaker verified this observation.

> I think they just ask anyone who happens to be around. Many times they will even ask court officers. Some of the more aware ones, like those at the two doors, will be able to tell a member what his vote is. . . . They'll ask anyone around regardless of party. . . .It's one of the worst sins to give a member a bad steer.

Despite the fact that Speaker Davoren was unable to distinguish a pattern in these communications, only *legislators* who were on the floor when the issue was debated can tell colleagues how to vote. By probing deeper in other interviews, it was possible to distinguish "key men" who at least influence, if not control, blocks of votes under the present system of operation in the House.

> I think I'm adept at the operation of the House. I move around a lot during debate and talk to certain key people, people who are always in the House and respect each other as legislators. The saying that ———— has seventeen votes has some truth to it. . . .

> Yes, I know what you mean. . . . It's impossible for me to be at my hearings and for me to know every bill that's coming up every day. I usually ask ————. Sometimes I'll come running in at the last second, and that's all I'll have time to do is look up at the board and see how ———— and a few others have voted. Afterwards, I may go over and ask him, 'What's it all about?'

When *fixers* were asked about the "key man" theory of voting behavior, one explained its importance.

> No, I don't watch anybody. I will say this, however, I watch the leadership and vote accordingly. . . .

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35 The Massachusetts House has an electric roll call machine. Roll calls are usually announced about ten minutes in advance to give members time to reach the Chamber, but once the machines are opened the tally doesn't take more than two or three minutes.

There are 240 members in the Massachusetts House of Representatives. About 220 members vote on every roll call, but the observations of the author and some members indicated that there are usually only about 70 members in the Chamber during debate — the same 70.

Needless to say, all the key men encountered during this study fit into the *legislator* category.[36]

Legislators seem to have a modest view of party significance and often appreciate the freedom which the present large Democratic majority allows.

> Today, they're (parties) not too important. . . . All that's gone now, and it's probably good. If a member comes from a close district, he has to respect the opposition's point of view. . . .

Similarly, because they remember how "rough" things used to be, *legislators* have a more favorable view of the present Speaker than the other groups in the House.

> I like the way he handles the House. Everyone gets a chance to speak.

> Davoren never wants to say 'no'. . . . Of course that's nothing compared to John Thompson (previous Speaker). Members would stand up and yell at him for an hour straight and he'd just go right on and put the bill through. Sometimes he'd even shut off the microphone so they couldn't hear what he was doing. It wasn't in the finest tradition of democratic government. . . . Some say if you want anything from Davoren, oppose him, but he really is well liked; nobody hates him. He's the fairest Speaker I've ever served under.

It is difficult to define a consistent pattern of lobbyist-*legislator* relations, but they do seem to have a mutual respect for each other, and, occasionally, an individual lobbyist will cultivate a particularly close working relationship with an individual *legislator.*

> Lobbyists serve a useful purpose. They probably know more about laws affecting their interest and exactly what the language of the laws are and what any given bill will do than anyone else.

> I often go to lobbyists myself to find out about a particular bill. I must see the insurance people at least twenty times a week.

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36 The leaders of the two parties in the House are the most important "key men" and both realize the need to signal their members on every issue. It is significant that the electric light boards at the front of the House list all the members in alphabetical order, but with the leadership of both parties on top.

There is no doubt that lobbyists concentrate their activity in the House on the leadership. All of the members interviewed believed this to be the case.

> They operate primarily in the Senate and with the House leadership. The futility of trying to lobby such a large House causes them to spend 70-80 percent of their time in the Senate.

Of course, it should be remembered that the leadership is made up of *legislators.*

Like *fixers, legislators* enjoy their work and want to stay in the House. Similarly, they often resent the criticism that is heaped upon them by the news media.

> Sometimes, I'm disinclined toward anything they (the press) come out for.

> There are all kinds of air pollution. The press and radio "talk shows" are certainly part of it. . . . I think the press does a tremendous disservice to sell copy.

They are aware of the impact the media can have on campaigns, but, because their ambition is limited to re-election, they issue releases only to local papers and Boston newsmen must often seek them out.

> I issue some releases, but it's mostly for the local press.

> I send press releases now and then to the local papers. We have only one paper in my area and everybody reads it. Naturally, I pay attention to what they say.

The typical *legislator* is a man in his fifties with considerable legislative experience. He is one of the key men in the legislative process and devotes most of his time to committee meetings and the drafting of legislation. He recognizes the need to perform an *ombudsman* function but frequently ignores constituency pressure on a particular issue. Those representatives who remain within the system gravitate toward this position over time.

D. The Alienated

> *This whole thing is probably an exercise in futility. Neither I nor any of you (the committee before whom he was testifying) believe for a minute that any of these bills will be reported out favorably.*

The *alienated* representative is the fourth type. He may be a Massachusetts phenomenon.[37] Although only one *alienated* member was encountered in the interviews conducted for this study, the author's observation of the House indicates that a small group fit into this category. They are really not in the "club" and significantly they do not feel it exists.

> There's a comradeship, but remember we're playing with power, and it's not a friendly game.

Alienated members may encourage issue orientated mail from their constituents, but they refuse to handle most constituency requests because they feel it represents a form of corruption. They have a low rate of legislative accomplishment and seem to derive a personal satisfaction from a martyr-like criticism of the political system.

> Only one bill I ever filed became law, and that was merely a clarification of a confusing arrangement. . . . Maybe it's because I take all the hard things like veteran's preference and revising the pension system, and I'm reasonably sure I'm not going to make it on these.

Movers initiated some of the legislative proposals to reduce the size of the House which are currently under discussion in Massachusetts. For them, filing these bills was primarily a means of attracting newspaper attention. The *alienated* group is more likely to seriously advocate this type of self-critical reform. Because they either do not understand or accept the political process, they reject any effort at bargaining within the system.

> I'm no good at this 'can you give me a vote' lobbying in the lobby. They may say, 'sure,' but then tomorrow they may ask me for a vote, and then where am I?

Alienated types may enjoy campaigning, but their campaigns probably consist of telling their constituents how "evil" things are at the state house. A *mover* who seemed to possess traces of alienation (and may well join this group, if he stays in the House) seemed completely out of tune with the political system when he was asked about campaigns.

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37 The phenomenon of an *alienated* representative becomes more understandable after a glance at MURRAY B. LEVIN, THE ALIENATED VOTER: POLITICS IN BOSTON, (1960).

> All you want is to get the most qualified people in office, and I don't think this is a good way of doing it. I'd be for putting them all on I.B.M. cards and let the best man turn out the winner.

At the end of the 1965-1966 legislative session, one of the representatives was convicted of federal tax evasion. Before he started his jail term, a colleague arranged a testimonial dinner for his wayward friend and collected over $2000.00 from the House. It is reassuring to note that the representative who ran the dinner did not approach several members, and the only one he did approach who refused to buy a ticket was the *alienated* member whose comments on the bill to reduce the size of the House were cited at the beginning of this section.

It is difficult to characterize the typical *alienated* representative from the limited evidence available. Because men generally discontinue doing things they dislike and the electoral process usually eliminates anyone who really does not want public office, this group is probably very small. All that can be definitely asserted is that this group does exist with its apparent frustrations and martyr complexes.

III. Conclusions

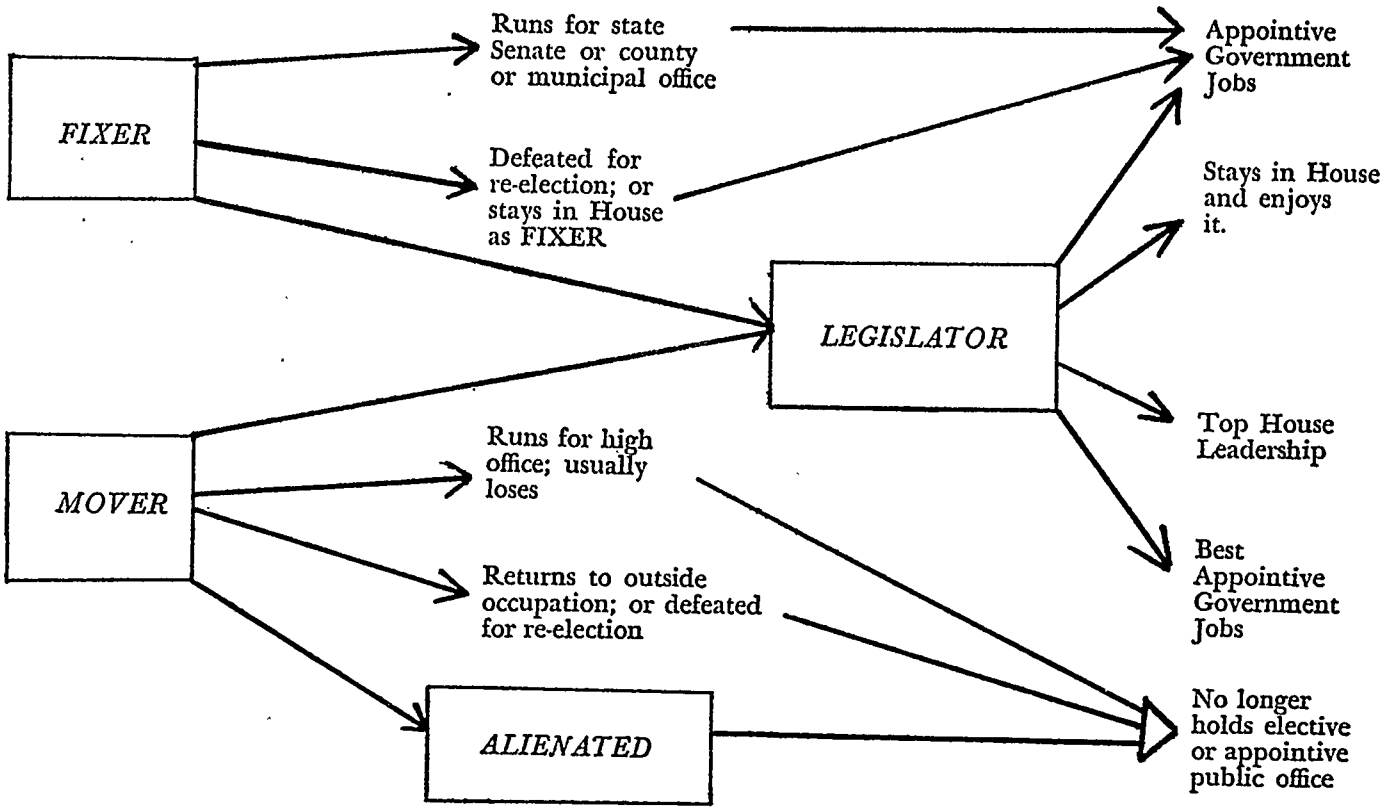
> *"The other day he (the Speaker) was putting a bill through that just seemed a little bit badly designed to me. I went up and asked him, 'Who is it for', which is a much more relevant question than 'what is it' or 'what does it do'. He told me, and afterward, when I really didn't have any reason to hold it up, I let it go by. When I was walking away he said, 'Remember, I owe you one; I owe you one.'"*

The study of the four basic types described in this study appears to outline patterns of career development within the House, despite the fact that some of the representatives interviewed do not fit perfectly into one of the four classifications.[38] Members begin their legislative careers as *fixers* or *movers*. If they remain in the House they often become *legislators*. *Alienated* members are transient and soon leave.

The path between *fixer* and *legislator* is particularly well worn. The three *fixers* who deviated from their group norms most frequently incline in that direction. One was appointed a committee chairman

38 See Figure 1, *infra*.

FIGURE 1: SCHEMATIC VIEW OF MASSACHUSETTS LEGISLATIVE CAREER TENDENCIES



midway through the 1965-1966 session, another became a chairman at the beginning of the 1967-1968 session, and the third was a member of the prestigious Rules Committee. At this point they begin spending a considerable amount of time on legislation and their outlook on the system changes.

The career development of *movers* is harder to outline, but most are destined for disappointment in their quest for the positions of Governor, Attorney General or Congressman. A few begin to enjoy their job and stay in the House with the hope of getting a judicial appointment. Others simply do not move, become alienated and leave the political scene.

These patterns have a great deal of influence upon how important legislation is handled. They suggest that the task facing advocates of legislative reform in the states involves more than juggling pay scales, district lines, procedural rules or length of sessions. As an example, in 1966 Republican Governor John Volpe focused his campaign on inefficiency in the state legislature and called specifically for a reduction in the size of the House from two hundred and forty to one hundred and sixty members. However, it is difficult to perceive how larger districts will mean representatives who are less constituency-oriented. Indeed these representatives may simply have more favors to do and less time for other business. The present experience in double and triple districts is illustrative. One member noted, "After you've been up here, your reputation for power or influence gets around and you get more and more calls. This happens no matter what size your district is, but those of us from double and triple districts really get burdened down."

Similarly, it is difficult to say what effect higher salaries will have on the caliber of men who seek election. However, it is possible that such salaries would encourage more *movers* to stay in the House and become *legislators*. Limiting sessions would also have limited value. The effect might be negative if it meant a shorter term of full-time work as opposed to the present part-time experience for many representatives.

Thus proposals must be evaluated in terms of how they affect the relative mix of legislative types as well as how they affect the formal functioning of the legislative system, especially where "personal government" flourishes. For Massachusetts this study should provide information for proponents of reform in deciding how issues should be developed and pursued.

LEGISLATIVE DEVELOPMENTS

THE UNCERTAIN IMPACT OF *WILLIAMS V. RHODES* ON QUALIFYING MINORITY PARTIES FOR THE BALLOT

I. THE SUPREME COURT'S DECISION

On July 29, 1968 the Ohio American Independent Party of George Wallace filed suit in the United States District Court for the Southern District of Ohio challenging the constitutionality of the Ohio laws governing the selection of electors for President of the United States. Charging that these statutes, taken together, made it virtually impossible for any party to qualify on the ballot except the Democratic and Republican Parties, plaintiffs argued that their party and its supporters were denied equal protection of the laws. They asked the Court to order the name of their party and its electors to be entered on the ballot.

The three-judge district court[1] held unanimously that these laws were unconstitutionally restrictive; but by a vote of two to one it granted relief only to the extent of requiring the state to provide a space for write-in votes.[2] The majority refused to order the party's name put on the ballot on the ground that it had been guilty of laches in filing the suit too late for the Ohio legislature to revise its laws satisfactorily before the presidential election. Plaintiffs appealed directly to the U.S. Supreme Court.[3]

Mr. Justice Stewart, Circuit Justice for the Sixth Circuit, granted the request for an injunction which would order that Ohio place the party's candidates on the ballot pending appeal to the United States Supreme Court.[4] The full Supreme Court then heard the appeal and affirmed the ruling that Ohio's laws, taken as a unit, were unconstitutional. Furthermore, it granted the full equitable relief sought, and instructed that the name of the Ohio American Independent Party

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1 *Cf.* 28 U.S.C. § 2281 (1964).

2 290 F.Supp. 983 (D.C.S.D. Ohio 1968).

3 Appeals from a three-judge district court are allowed directly to the Supreme Court. 28 U.S.C. § 1253 (1964).

4 — U.S. —, 89 S.Ct. 1, — L.Ed.2d — (1968).

should be printed on the ballot together with the names of its electors.[5]

The Ohio Revised Code required any new party which seeks a line on the Ohio ballot first to gather signatures equal in number to 15% of the qualified voters who voted in the last gubernatorial election.[6] Then, a petition containing these signatures and declaring an intent to form a political party had to be filed with the Secretary of State at least 90 days before an election.[7] This meant 90 days before Ohio's May *primary* election, since a new party must participate in that primary in order to choose its delegates to a national convention. (See below.) Thus, in 1968, the statutory deadline for filing the signature petition fell on February 7.

Independent candidates for President were, and are, prohibited by Ohio law; no candidate may run without the endorsement of a political party.[8] In order to qualify as a party, a group must elect a county central committee and then a state central committee composed of two members from each congressional district.[9] In order to place presidential electors on the ballot, the party must nominate candidates for President and Vice President in national conventions, to which delegates and alternates from Ohio have been elected at the May primary.[10] These delegates and alternates must not have voted as members of a different party at a primary election in the previous four years.[11] Both delegates and central committeemen must offer petitions of endorsement on their behalf signed by voters who likewise did not vote for any other party in the last preceding primary.[12]

The newly elected central committee must convene a state convention of 500 delegates apportioned throughout the state on the basis of party strength.[13] The delegates then choose the presidential electors.[14]

Williams is not the first case in which the Supreme Court has been asked to hold state laws governing new parties unconstitutional under

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5 Williams v. Rhodes — U.S. —, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

6 OHIO REV. CODE § 3517.01 (1959). For the purposes of the 1968 election, the number of signatures required was 433,100.

7 *Id.*, § 3513.256-262.

8 Ohio makes specific provision for independent candidates for municipal offices, *id.*, 3513.251-252; county offices, *id.*, § 3513.256; and state and federal offices excluding President, *id.*, § 3513.257-258.

9 *Id.*, § 3317.02-04.

10 *Id.*, § 3505.10.

11 *Id.*, § 3513.191.

12 *Id.*, § 3513.05.

13 *Id.*, § 3513.11.

14 *Id.*, § 3513.12.

the equal protection clause. In *MacDougall v. Green*,[15] a case not discussed by the Court, the Progressive Party of Illinois sought an injunction against enforcement of the Illinois Election Code[16] which required that, for a new party to nominate candidates it must present a petition signed by 25,000 qualified voters, including at least 200 from each of at least 50 of the 102 state counties. Petitioners, alleging that 52% of the state's registered voters resided in Cook County, 87% in the 49 most populous counties and only 13% in the 53 least populated counties, charged that the statute was so discriminatory as to violate the equal protection, due process and privileges and immunities clauses of the fourteenth amendment.[17] The Court found no such violation in a state policy which required candidates for state-wide office to have support throughout the state. Citing *Colegrove v. Green*,[18] the Court decided it was not its role to make the number of required signatures proportionate to the population of each county.

The Court in *MacDougall* thus interpreted *Colegrove* as discouraging the Court's exercise of its equity powers in controversies of a peculiarly political nature, such as those involving reapportionment. But *Baker v. Carr*[19] indicated that the Court was ready to modify the force of *Colegrove*, at least where voting rights were involved. Thus, *Baker v. Carr* indirectly paved the way for the *Williams* decision by weakening the force of *MacDougall*.

In *Williams*, Ohio claimed that Article II, section 1, of the United States Constitution gives each state absolute power to regulate the selection of electors in any way it desires, even to the point of placing the choice of electors beyond the control of the general electorate. Mr. Justice Black, for the six Justices in the majority, rejected this argument, stating that while the Constitution does grant extensive power to the states in this area, that power is subject to the qualification that it not be exercised so as to violate other specific provisions of the Constitution. Pursuing a similar line of reasoning in concurring, Mr. Justice Douglas asserted that, while it was true that the States may select their electors through appointment rather than by popular election, Ohio had already provided that they be chosen by suffrage. Since

15 335 U.S. 281 (1948).
16 ILL. STATS. Ch. 46, § 10-2 (Smith-Hurd 1968 Supp.).
17 335 U.S. 281, 283 (1948).
18 328 U.S. 549 (1946).
19 369 U.S. 186 (1962).

it had done so, the issue is whether Ohio may burden that right with the restrictions under consideration here.[20]

The majority asserted that two rights of the appellants were involved, the right to vote and the right of political association. The Court assumed that the right to vote is substantially impaired if a citizen is deprived of the opportunity to vote for a newly emerging party, or for any other than the two major parties. It also found a violation of the first amendment freedom of association and thereby gave notice that a constitutional violation does not require a clear and distinct causal link between the statute and the impairment of the right. In the cases cited by the Court as the foundation of the right,[21] there existed substantial reason to believe that, if the statute were allowed to stand or be applied, the freedom of association would be diminished. Here, as Mr. Justice Stewart asserted in dissent, the conclusion that the right will be violated by the Ohio laws, simply assumes (without proof) that third parties will be sapped of their vigor without the opportunity of organizing to win the presidency. He did not feel, as did the majority, that depriving a new party of a place on the presidential ballot would render virtually meaningless the right to form a party for the advancement of political goals.

Generally, where a state claims a valid interest underlying its legislation and where the resulting danger to a right asserted under the equal protection clause is only speculative, the Court will defer to the judgment of the state legislature. The Supreme Court's refusal to do so here is derived from an apparent acceptance of a wider responsibility for the democratic operation of our political system. The sense of responsibility, clearly evident in the reapportionment cases, encourages the Court to apply a stricter standard where first amendment rights are at stake.[22]

This is evidenced by the manner in which the Court balances the rights of association and voting against Ohio's interests in the statute. Under traditional equal-protection analysis a statutory classification is valid if it bears some reasonable relationship to a legitimate gov-

20 In another concurring opinion, Justice Harlan, who chose to analyze the case under due process instead of equal protection, went a step further. He would have held that, even if Ohio withheld the choice of electors from the public, which is within its power, any party would have the right to urge its candidates before that state body which would designate the electors. 89 S.Ct. at 15.

21 NAACP v. Alabama 357 U.S. 449 (1958); NAACP v. Button 371 U.S. 415 (1963); Mine Workers v. Illinois Bar Association 389 U.S. 219 (1967).

22 ARCHIBALD COX, THE WARREN COURT 10 (1967).

ernmental purpose.[23] Citing *NAACP v. Button*,[24] the Court ruled that a legitimate state interest or purpose is not sufficient; the interest must be "compelling."

> In determining whether the state has the power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.[25]

Ohio claimed four specific state interests, all of which were rejected by the Supreme Court. Ohio claimed, first, an interest in promoting a two-party system to encourage compromise and political stability. The Court held, however, that the Ohio system unjustifiably accorded two particular parties, the Democrats and the Republicans, a virtual monopoly within the state.

Secondly, it asserted an interest in seeing that the winner of the election be chosen by a clear majority of its voters, in order to avoid a situation in which the third party draws a significant share of the vote and the winner of the plurality is consequently less acceptable to the majority of voters than the runner-up. The Court ruled, however, that this interest does not justify stifling the growth of new parties by keeping their candidates off the ballot.

Ohio argued, thirdly, that the requirement of a party structure and a primary insured that disaffected citizens would be given a choice of candidates as well as a choice of issues. To this the Court responded that, because the platforms of the major parties may change and because their candidates will not be selected until summer of an election year, the new party may not rise out of popular discontent until only a few months before the election. In that case, Ohio's restrictive network of laws not only works against its professed policy of giving its voters a choice of candidates, but also effectively deprives them of a choice on the issues.

Finally, Ohio insisted that, if ballot requirements were less strict, parties would proliferate and introduce confusion into the voting booth. But the Court noted that forty-two states require the signature

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23 *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942); Tigner v. Texas, 310 U.S. 141 (1940).

24 371 U.S. 415 (1963) at 438.

25 89 S.Ct. at 11.

of only one percent or less of the electorate in order to appear on the ballot, without any apparent problem of confusion. Therefore, the Court found, the danger was too remote to justify so heavy a burden on the right to vote and the freedom of association.

II. The Problem of Standards for Forty-nine States

Although the Supreme Court in *Williams* did not hesitate to outline the interests involved as it brought a new area under constitutional control, the majority and concurring opinions were reluctant to detail definite standards to be applied in future cases. Chief Justice Warren in his dissent rebuked the majority for failing to guide the state legislatures and the lower courts as to what is constitutional and what is not. The most specific criteria discovered by his reading of the Court's opinion was that the state could demand a "substantial showing of voter interest . . . evidenced some time prior to election, and a party structure demonstrating some degree of political organization."[26]

Arguably such restraint should be characteristic of judicial review, especially under the Fourteenth Amendment; it may prove fruitful in provoking experimentation by the legislatures. Even when Justice Harlan expressed displeasure with the Court's broad treatment and passed separately on the fifteen percent petition requirement, he declined to suggest what percentage would be more acceptable.

Nevertheless, the dimensions of the problem exposed by the Court in *Williams* indicate that articulation of standards would not have been premature; the process of amendment and adjudication outside the Court cannot help but flounder amidst the sheer diversity of statutory approaches to qualifying new and minority parties for the ballot. In the instant case it was enough to test the state's interests against the "fundamental rights" of voting and association, since Ohio's restrictive qualifications stood at the extreme even among those statutes thoroughly designed to discourage qualification.[27] The forty-nine remaining statutes present diverse combinations of the following:

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26 Williams v. Rhodes, — U.S. —, 89 S.Ct. 5, 30-31, 21 L.Ed.2d 24, (1968).

27 For brief summaries of the requirements which faced George Wallace early in his campaign in the 50 states *see*, 25 Cong. Q. Weekly Rep. 2068 (October 13, 1967). The survey contained some inaccuracies when published and is now out of date; but it remains useful for a brief overview.

(1) varying percentages for qualifying by petition,[28] (2) a variety of other nominating procedures including state conventions, caucuses, and primaries,[29] (3) varying percentages which parties in past elections must have won to avoid the restrictions on new and minor parties,[30] (4) varying formulas to guarantee that supporters who sign petitions show geographic distribution within the state,[31] (5) varying degrees of formal party organization as demonstrated through state and local conventions and committees,[32] and (6) unlike Ohio, a variety of provisions to allow independents to qualify, which if they

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28 The Court was quick to note how the fifteen percent petition requirement of Ohio compared with the percentages of electorate required by other states:

Less than 0.1%	16 states
0.1% to 1%	26 states
1.1% to 3%	3 states
3.1% to 5%	4 states

California parallels Ohio in its direct primary requirement (ten percent) but is significantly less restrictive in its Presidential primary. *See* CAL. ELECTION CODE §§ 6080, 6082, 6430 (West 1961). The absolute number of required signatures probably more accurately measures the burden of qualifying, but the percentage corresponds to the state's interests in restrictions and thus is the proper standard for comparisons between states.

29 *See, e.g.*, Alabama (primary optional for major parties; new and minority parties by convention, caucus, or mass meeting 60 days before election after filing declaration of candidacy in March), ALA. CODE Title 17, §§ 145, 336, 337, 340 (Recompiled 1958 and 1967 Supp.); Arkansas (parties must hold primaries, but presidential electors nominated by state convention), ARK. STATS. ANN. §§ 3-201, 3-216, 3-330, 3-825 (1956 Replacemt. and 1967 Supp.); Kentucky (minority parties by primary, convention, or petition; new parties by petition), KENT. REV. STATS. §§ 118.70, 118.80, 118.90, 118.120, 118.130 (Baldwin's 1963 and 1968 Supp.); Oklahoma (new and minority parties by petition, except for presidential electors which are nominated by state conventions), OKLA. STATS. ANN. Title 26, §§ 111, 229, 522 (1955 and 1966 Supp.).

30 *See, e.g.*, Alabama (20 percent of entire vote cast in last election; can qualify county by county), ALA. CODE Title 17, § 337 (Recompiled 1958 and 1967 Supp.); Pennsylvania (2 percent of largest vote total for elected candidate at last election in each of ten counties and state-wide), PA. STATS. ANN. Title 25 § 2831(a) (Purdon's 1963); South Carolina (need only qualify once), S.C. CODE § 23-251, 252 (1962); Texas (party's candidate for Governor won 200,000 votes in last election), VERNON'S ELECTION CODE Art. 13.45, 13.47 (1951 and 1968 Supp.). New Hampshire is more representative of the other states; (3 percent of total vote for Governor at last election). N.H. REV. STATS. ANN. §§ 56.1, 56.65 (1955).

31 *See, e.g.*, note 47 *infra*.

32 Some requirements are described very generally and thus are apparently lenient; *see, e.g.* New Mexico (self-regulating), NEW MEX. STATS. ANN. § 3-12-2 (1967 Supp.); Kansas (so general that petition requirement was added), KAN. GEN. STATS. ANN. § 25-302a (1967 Supp.), *amending* KAN. GEN. STATS. ANN. § 25-302 (1964 Rev.); Hawaii, REV. LAWS OF HAW. § 11-90 (1955). Some call for a series of local conventions held by local committees; *see, e.g.*, Nevada, NEV. REV. STATS. §§ 293.130-293.150 (1967); Texas, VERNON'S ELECTION CODE Arts. 13.45, 13.47 (1968 Supp.); Mississippi, MISS. CODE ANN. §§ 3107, 3107-01 (1962).

are lenient can effectively offset restrictive party requirements for presidential movements centering around the personality of their candidate rather than a defined political doctrine.[33]

In Nebraska, for example, new and minority parties qualify for the state-wide ballot by holding a convention of 750 members at least 75 days before the general election; they then nominate their candidates by the same primary method followed by the major parties. If the party does not qualify in time to enter the primary, they may nominate by convention or committee 50 days before the general election. A party becomes a minority party when all its candidates fail to poll five percent of the entire vote cast in the state or subdivision for which they entered the last election. Presidential electors cannot qualify as independents, but other independents qualify state-wide by filing a petition with 1000 signatures 60 days before the general election.[34]

On the other hand, Nevada requires that new and minority parties enter the primary. A petition must be filed 60 days before the primary signed by five percent of the entire vote cast for the Representative to Congress at the last election. Independents can qualify by petition by the second Friday in June, but presidential electors can be nominated only at state conventions in May.[35]

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33 South Dakota, where parties nominate presidential electors at state conventions, provides that new and minority parties qualify as parties by filing a petition signed by ten percent of the last vote cast for Governor; however, independent presidential electors need only file a two percent petition. SOUTH DAK. ELECTION LAWS §§ 16.0102, 16.0201, 16.0208, 16.0240, 16.0501, 16.0502, 16.0615, 16.1105 (1966). In most states, however, qualifying as an independent involves comparable burdens; *e.g.*, South Carolina (10,000 signatures for new party or independent), S.C. CODE § 23-251, 23-252, 23-263, 23-400.16 (1962 and 1948 Supp.); North Carolina, GEN. STATS. OF N.C. § 163-122 (1967 Supp.). Further problems arise in states which are ambiguous on the status of independent presidential electors. Many states exclude them only by implication, *e.g.*, Alaska, ALAS. STATS. § 15.30.020 (Michie's 1968 Supp.). Others do not explicitly provide for the presidential candidate's name to appear on the ballot rather than the electors'; *e.g.* Kentucky, KENT. REV. STATS. §§ 118.080-130 (Baldwin's 1968 Supp.); *contra*, Indiana, IND. STATS. ANN. § 29-3905 (Burn's 1949 Replacement and 1968 Supp.); Minnesota, MINN. STATS. ANN. § 202.10 (1962 and 1967 Supp.).

34 REV. STATS. OF NEB. §§ 32-504, 32-521, 32-524 to 527 (Reissue 1968); State v. Marsh, 123 Neb. 423, 243 N.W. 277 (1932); Morrissey v. Wait, 92 Neb. 271, 138 N.W. 186 (1912); State ex. rel. Beeson v. Marsh, 150 Neb. 233, 34 N.W.2d 279 (1948).

35 NEV. REV. STATS. §§ 293.073(2), 293.200, 298.020, 298.150 (1967).

States of course fix various dates by which their requirements must be met.[36] Moreover, unlike Ohio, many states distinguish between new parties and minority parties, which qualified for the last election but did not secure a minimum percentage of votes cast.[37]

The Court's approach to Ohio's requirements, however, does suggest a constitutional reference point in this "political thicket." In his reply to the arguments of valid state interests, Justice Black drew upon the successful experience in other states with less restrictive statutory policies in avoiding the dangers which Ohio feared. He employed this approach most explicitly when Ohio claimed that its petition requirement was necessary to limit the number of parties on the ballot to prevent voter confusion. Indeed, despite his emphasis on the "invidious classification" and "unequal burdens" cast upon minority parties, his equal protection analysis resembles the "less restrictive alternative" orientation of Justice Harlan's due process opinion.

Thus the Court's opinion indicates that states generally must gravitate toward the standard set by those states with minimal restrictions.[38]

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36 The different qualifying dates usually correspond to the different filing dates set by the states for the primaries for major parties. *See, e.g.*, ALAS. STATS. § 15.25.020, 15.25.040, 15.25.150-160 (Michie's 1968 Supp.); LA. REV. STATS. § 18,627 (West's 1967 Supp.). *But cf.* ALA. CODE, Title 17 § 145 (Recompiled 1958 and 1967 Supp.) (independent's petition must be filed on first Tuesday in May when major parties hold primaries, but new and minor parties file 60 days before general election); REV. STATS. OF NEB. §§ 35-524, 35-525 (Reissue 1968) (new party may nominate after primary).

37 Massachusetts is fairly representative; a party whose candidate for Governor polled 0.1 percent or more at the last three elections but less than three percent nominates by state convention; a new party nominates by petition. MASS. GEN. LAWS ANN. Ch. 53 §§ 1, 2, 6 (1958 and 1968 Supp.). *See, e.g.*, Texas, VERNON'S ELECTION CODE §§ 13.45-13.48 (1951 and 1968 Supp.); West Virginia, W.VA. CODE §§ 3-5-22 to 3-5-25 (1966).

38 *See, e.g.*, Maine (party which polled one percent of total gubernatorial vote in last election nominates in June primary but Presidential electors by convention; other parties and independents by one percent petition filed before August 1, including presidential candidates), ME. REV. STATS. §§ 1.21, 401.2, 441, 448, 491, 492 (1964 and 1968 Supp.); New Hampshire (independents, new parties, parties polling less than three percent of gubernatorial vote at last election by petition forty days before election, e.g. 1000 signatures for Senate candidate), N.H. REV. STATS. §§ 56.1, 56.65-68 (1955 and 1967 Supp.); Iowa (new party and party polling less than two percent of gubernatorial vote at last election by fifty-member convention with one elector from each of ten counties at least 65 days before general election; independents including presidential candidates by petition of 1000 signatures by same date) IOWA CODE ANN. §§ 43.2, 44.1-44.4, 44.14, 45.1 (1949 and 1968 Supp.); Connecticut, CONN. GEN. STATS. ANN. §§ 9-372, 9-374, 9-452 to 458 (1967 Rev.); Nebraska, REV. STATS. OF NEB. §§ 32-504, 32-521, 32-524 to 527 (Reissue 1968); Maryland, MA. ANN. CODE Art. 33, §§ 5-1, 5-2, 6-1, 7-1, 10-1, 12-1,

In Indiana, for example, a party which cast 0.5 percent of the total state vote at the last general election nominates by convention or petition by September 1. A new party or an independent qualifies by petition before the same date. The petition must contain signatures numbering 0.5 percent of the total vote cast in the last election for Secretary of State. Ballots can name the presidential and vice-presidential candidates to which electors are pledged.[39]

This orientation needs several qualifications however. First of all, after the Court has pared away the extreme cases like Ohio, the "totality" of the burdens imposed by the state's statutory scheme will become more important, and comparison with other states' proportionately less precise. Colorado, for example, requires only 300 signatures to qualify state-wide by petition, but adds the burden that each signature must be individually notarized.[40] With Ohio it was enough to compare its petition requirement with that of other states because Ohio employed most other barriers as well: extensive party organization, early filing dates, prohibition against independent Presidential candidates, and a primary.[41]

Secondly, a state would be heard to demonstrate special circumstances to distinguish the dangers of splinter ballots in its political climate from conditions in states with more liberal requirements. Success would be rare, since it is difficult to imagine a showing based on more than speculation.[42] Complaints of a uniquely divisive political atmosphere would be particularly inapplicable when national (i.e. presidential) balloting is involved.

Thirdly, states with less restrictive statutes should logically have experienced a significant number of plurality winners many of whom would not have won a two-party contest. That some states have made this choice does not in itself constitutionally command other states to surrender this "majority-choice" interest, which the Court's opinion

12-2 (Michie's 1967 Supp.); Minnesota, MINN. STATS. ANN. §§ 200.02 to 202.04, 202.09, 202.10, 202.11, 202.13, 202.16 (1962 and 1967 Supp.).

39 IND. STATS. ANN. §§ 29-3801, 29-3805, 29-3905, 29-3904 (Burn's 1949 Replacement and 1968 Supp.).

40 COL. REV. STATS. ANN. §§ 49-6-7, 49-7-1 (1967 Supp.). Minnesota had a similar provision which was recently amended to provide for an oath enforced by a perjury sanction to serve the state interest in preventing fraudulent signatures. MINN. STATS. ANN. § 202.12 (1962), *amending* MINN. STATS. ANN. § 202.22 (1957).

41 *See* notes 6-14, *supra*.

42 Compare Black's language that Ohio's fear of numerous splinter parties was "at the present time" no more than "theoretically imaginable." Williams v. Rhodes, — U.S. —, 89 S.Ct. 5, 12, 21 L.Ed.2d 24 (1968).

and Justice Harlan's concurring opinion recognized as a legitimate state objective.

Justice Harlan alone squarely addresses this issue of whether "constitutional electoral structures could be designed to accommodate this valid state interest, without depriving other political organizations of the right to participate effectively in the political process."[43] Yet his proposed "less restrictive alternatives" are not available without sacrifice. The expensive prospect of run-off elections may actually frustrate the potential for a minority party to consistently threaten the established Republican and Democratic parties even on the state level. Voter turn-out may diminish as run-off elections increase the burden of citizen participation; since the fact that there are many candidates does not necessarily reflect or provoke voter interest. Moreover, run-off elections would seriously complicate the clockwork of Presidential elections.

Justice Harlan's suggestion of choosing presidential electors on a district basis reduces the chance of a plurality winner not preferred by a majority but only by artificially distorting the popular vote; and it could not be constitutionally applied in elections for state and local office.[44] For the state legislature to select the presidential electors if none wins a majority also contravenes the "majority-choice" interest which the state is trying to promote.[45]

Finally, Justice Harlan proposed that states use some method of preferential voting. For example, voters would mark their first and second choice for each office; if no candidate received a majority of the first choice votes, the second choice votes would be counted. This system promises a substantial improvement over restrictive ballot qualifications in accurately reflecting the choice of the popular majority. However, problems of technical implementation and voter education may arise; the field of candidates could be so split that preferences beyond first and second choice would have to be marked and counted.

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43 *Id.*, at 18, n. 8.

44 Gray v. Sanders, 372 U.S. 368 (1963) (county unit system for nominating Georgia state officials); Fortson v. Morris, 385 U.S. 231 (1966) (distinguished *Gray*). Popular voting by district for Presidential electors is constitutionally valid and has been practised. McPherson v. Blacker, 146 U.S. 1 (1892).

45 McPherson v. Blacker, 146 U.S. 1 (1892) (constitutionally valid for selecting presidential electors); Fortson v. Morris, 385 U.S. 231 (1966) (constitutionally valid for selecting Governor; 5-4 decision).

The issue remains whether the Court has totally rejected the "majority-choice" justification for all but the most lenient ballot restrictions, thus forcing the states to discover alternatives or abandon the interest. For the states to continue to apply ballot restrictions to this task is certainly to employ a blunt instrument since three candidates alone can result in the election of a candidate by a plurality who was not in fact preferred by the majority. In any event, a failure to resolve this dilemma in choosing presidential electors will bolster the case of those who criticize the electoral college for its inadequacies in recording the popular choice.[46]

Despite the difficulty of deriving a workable test applicable to all states and all requirements from the result in *Williams*, the Court does intimate that one particular requirement will be unacceptable. Several states[47] call for geographical distribution in their petition provisions, a restriction upheld against constitutional attack in the era when the "political question" doctrine was still thriving.[48] A fresh assault on this requirement on the heels of *Williams* and the reapportionment decisions[49] should succeed, even if the particular formula does not impose a heavy burden on the qualifying party.[50]

Although the reapportionment cases do not directly apply, they demonstrate that restrictions on the voting process designed to provide a voice for geographic and economic interests within the state are highly suspect.[51] Presumably states require petition signatures from

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46 For example, in the last Presidential election Richard Nixon carried Ohio by 2 percent of the popular vote while George Wallace tallied 12 percent; Ohio's electoral vote thus may have gone to the "wrong" candidate depending on the second choice of the voters for Wallace. N.Y. Times, Nov. 8, 1968, at 26, col. 1.

47 *See, e.g.*, Delaware (must qualify separately in each county), DEL. CODE ANN. § 15-4101 (1953 and 1966 Supp.); Florida, FLA. STATS. ANN. § 103.021 (1968 Supp.); Kansas (five percent of total gubernatorial vote in last election in each of 30 counties), KAN. STATS. ANN. § 25-302 (1967 Supp.); Idaho (3000 signatures for independent; no more than 150 from one county), IDAHO CODE § 34-612C (1967 Supp.); Missouri (in each Congressional district, one percent of gubernatorial vote in that district in last election; or two percent in each of one-half of the districts), VERNON'S ANN. STATS. §§ 120.160, 120.220 (1966 Rev. and 1967 Supp.). For Illinois, *see* text to note 16 *supra*.

48 MacDougal v. Green, 335 U.S. 281 (1948).

49 Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Lucas v. The Fourty-Fourth General Assembly, 377 U.S. 713 (1964).

50 *See, e.g.*, Massachusetts (three percent of total vote in last gubernatorial election; not more than one-third from one county), MASS. GEN. LAWS ANN. Ch. 53, § 6 (1958 and 1968 Supp.).

51 "Citizens, not history or economic interests, cast votes." Reynolds v. Sims, 377 U.S. 533, 580 (1964).

several counties to insure that candidates on the ballot are acceptable in some degree to varying group interests within the state. However in the reapportionment cases the similar rationale of encouraging a broad consensus in the work of the state legislatures was not recognized as a legitimate state interest to justify apportionment divergent from the "one man-one vote" standard.[52] In both areas the state "dilutes" the effective vote of one group to appease another.

III. The Impact in One State

Party organization requirements should also undergo close scrutiny in the future. For the presidential election, Ohio's provisions called for extensive organization on a local and state level in order to participate in the May primary to elect delegates to a national convention, which in turn named the presidential candidate for the Ohio ballot. A separate state convention chose the presidential electors.[53] Again Ohio stood at the extreme. Texas, whose requirements almost matched Ohio's in severity, seemed unconsciously to anticipate the result in *Williams* when its legislature passed substantial amendments effective in August, 1967.[54] These provisions deserve extensive treatment here because they typify the amending process which must follow *Williams* if that case foreshadows a more thorough review of state requirements than was necessary for its result.

Under previous Texas law, new parties and all parties whose gubernatorial nominee in the last election polled less than 200,000 votes faced two alternatives for nominating for state-wide offices and presidential electors: (1) a state convention held late in May, or (2) the same primary held early in May by the major parties. To be nominated by either process a candidate would have to file in early February. The party's state executive committee had to choose either method a full twelve months before the general election; apparently a new party could not qualify after this deadline. If the party chose the state convention method, it would select delegates for the state convention at county conventions held earlier in May in at least twenty counties comprising together at least twenty percent of the state population. The county delegates had been elected in turn at

52. *Id.*

53 *See* notes 6-14, *supra.*

54 Acts 1967, 60th Leg., ch. 723, § 38 (p. 1907), § 56 (p. 1918), §§ 59 to 61 (pp. 1921-23), § 63 (p. 1925).

precinct conventions held on the first Saturday in May.[55] Qualifications for independents were lenient but only parties could nominate presidential electors.[56]

Current requirements in Texas now compare more favorably with other states which emphasize party organization in qualifying parties and nominating candidates.[57] Minor parties, which polled at least two percent of the vote cast in the last gubernatorial election but less than 200,000 votes, still face the option of the primary or the state convention; but the state convention process now demands appreciably less local organization.[58] The February filing date for potential nominees and the twelve-month deadline for choosing between the primary and the convention continue under the new statute, but these dates should not hinder minority parties since by definition they were organized enough at the last election to qualify for the ballot.[59] New parties or parties which failed to poll two percent in the last gubernatorial election nominate by the same amended convention method open to minority parties.[60]

The state convention provision no longer requires that twenty county conventions be held for selecting state delegates. Precinct elections still choose county delegates on the first Saturday in May, and county conventions choose state delegates the following Saturday, but no minimum number of precinct or county conventions is specified. The party's own rules govern the number of delegates selected at each level.[61] Furthermore, the convention requirement can now be fulfilled

55 VERNON'S ELECTION CODE §§ 13.03, 13.45, 13.47, 13.48 (1967 Rev.). If the party desired to designate delegates for a national convention, another series of conventions — precinct, county, and state — had to begin in May. This was amended to allow the same state convention for nominating for state offices to also select delegates to a national convention if the party so chose. *Id.* §§ 1101a, 1334, 1358 (1968 Supp.), *amending id.* §§ 1101a, 1334, 1358 (1967 Rev.).

56 *Id.* §§ 1101a, 1350 (1967 Rev.).

57 *See* note 37 *supra.*

58 VERNON'S ELECTION CODE § 13.45 (1968 Supp.), *amending* VERNON'S ELECTION CODE § 13.45 (1967 Rev.).

59 *Id.* §§ 13.46, 13.12 (1967 Rev.).

60 *Id.* §§ 13.45, 13.47 (1968 Supp.), *amending id.* §§ 13.45, 13.47 (1967 Rev.).

61 *Id.* §§ 13.45, 13.47 (1968 Supp.), *amending id.* §§ 13.45, 13.47 (1967 Rev.). Iowa has a convention provision requiring fifty members be present, with at least one from each of ten counties. IOWA CODE ANN. §§ 44.1, 44.4 (1968 Supp.).

The new Texas statute (§ 13.47) could be read to now require a convention in each county since the prior provision for twenty county conventions (§ 13.45), deleted from the current code, was drafted in language suggesting that it limited the language of § 13.47: "It shall not be necessary that county conventions . . . be held in all counties of the state, but such conventions . . . be held in not less than twenty counties . . ." However, this reading is too strict since § 13.34 which

at least in part by petitions. The number of qualified voters attending the precinct conventions must equal one percent of the total vote in the last gubernatorial election, but petitions can be filed to supplement their numbers to satisfy the percentage.[62] Thus, Texas no longer requires a broadly based party organization and has retreated from its kinship with Ohio.

On the other hand, the dates for holding the various conventions have not been amended. A potential nominee by convention must file in early February; the convention series must begin with a notice posted ten days before the precinct conventions held the first Saturday in May. The supplementary petitions must be filed twenty days after the state convention held the second Saturday in June.[63] Because of these timing requirements, the constitutional validity of the Texas convention requirement as applied to new parties may still be open to question. These dates for qualifying by new parties parallel the timing provisions for the established parties which nominate by primary;[64] many states follow this pattern of treating new and old parties alike for timing purposes.[65] Yet similar restrictions on parties in dissimilar circumstances must be justified. Timing is a greater barrier to potential new parties than extensive organization or large petition requirements since new parties arise through defections from the Democratic and Republican party. Candidates for major party nominations are less likely to risk forming a splinter party until they have been rejected by their own party's nominating process. The rank and file of the Democratic and Republican parties are less likely to bolt the secure ranks of a party sanctioned by tradition until their stand for a candidate or an issue has been clearly rejected by their party. Yet in Texas potential new party nominees must file in February long before these decisions are made by the major parties at the May primary; the first precinct conventions of the new party must be

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applied to major parties specifies a "convention shall be held in each county" while § 13.47 merely reads "in the various counties." In any event, such a restriction would be an impossible burden and also subject to the same criticisms against geographical distribution requirements for petitions.

62 *Id.* § 13.45.

63 *Id.* §§ 13.45, 13.45a, 13.47, 13.47a.

64 Potential nominees file in February in both cases. The convention system begins with the precincts on the same day as the primary, the first Saturday in May. The state convention is held the second Saturday in June; the run-off primary is held a week earlier. *Id.* §§ 13.03, 13.07, 13.12, 13.47, 13.47a (1967 Rev. and 1968 Supp.).

65 *See* note 36 *supra.*

held on the primary day.[66] In contrast, Nebraska allows a new party which has not formed soon enough to hold a primary to nominate by convention up to 50 days before the general election.[67]

On the other hand, the state can advance strong justifications for parallel qualifying dates. When all parties must qualify for the general election during the same period, head-to-head debate on the issues is more likely to reach the average voter. Observers can generally predict the outcome of the major party nominating process in sufficient time to form a new party. This is especially true in Texas because its convention requirement could be met by the efforts of the small "hard core" groups that defect very early from the major party because of their strong political consciousness. Texas also allows independents to qualify for the ballot by filing a minimal petition thirty days after the run-off primary for major parties.[68] Presidential electors cannot run as independents but for other elections this may be almost as effective as a new party. The state interest in "compromise and stability," though unpersuasive in extreme cases like *Williams*, becomes more convincing when the state has made measurable efforts to allow new parties to qualify. Finally, the state interest in the economy and convenience of a single qualifying period should not be overlooked, especially considering the number of election officials, county clerks, and other state officers which must assist the process.

Ultimately the constitutional validity of the Texas convention system may depend on what function new parties serve that the Court considered worth constitutional protection. Justice Black seemed to view new parties as potentially serious contenders for the allegiance now enjoyed by the Republican and Democratic parties. His opinion emphasized that the Ohio statutes "stifle the growth of all new parties working to increase their strength from year to year" thus insuring the established parties of a "permanent monopoly."[69] Justice Douglas in contrast stressed the function of third parties as vehicles for airing frustration and protest; this purpose could be served by sporadic bursts of activity without the sustained effort necessary to threaten the

66 VERNON'S ELECTION CODE §§ 13.03, 13.47 (1967 Rev. and 1968 Supp.).

67 REV. STATS. OF NEB. §§ 35-524, 35-525 (Reissue 1968). Iowa also provides for a significant lapse of time between the filing date for the primary and the deadline for qualifying a new party. IOWA CODE ANN. §§ 44.1, 44.4 (1968 Supp.).

68 One percent of gubernatorial vote in last election when filing for state-wide candidacy. VERNON'S ELECTION CODE § 13.50 (1967 Rev.).

69 Williams v. Rhodes, — U.S. —, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1963).

stature of the Democratic and Republican parties. Thus, the Texas convention requirements fare better under Justice Black's view, since substantial organization at an early date would be necessary if the new party is to make enough inroads to survive beyond one election. Third party movements dependent entirely upon a popular candidate without substantial local organization have proven to be short-lived.[70]

IV. Conclusion

The result in *Williams* is most impressive not for any new refinements in equal protection analysis, but for the Court's willingness to become embroiled in still another vast area formerly beyond judicial intervention under the "political question" doctrine. After noting that petitioners from four other states[71] had already asked the Court for similar relief, Chief Justice Warren predicted that the impact of *Williams* may rival *Baker v. Carr*.[72]

Certainly, given *Baker*, the result in *Williams* is not novel. The Court moved into the reapportionment area largely because the disadvantaged class in the malapportioned districts could not seek redress in the state legislatures.[73] Restrictions on new and minority parties are similarly self-perpetuating.

If the measures recently introduced in the Ohio General Assembly are any indication,[74] the state legislatures will not appreciably lighten the burdens on new and minority parties until the Court outlines some clearer standards for devising permissable restrictions. Yet the problem of logical standards is not peculiar to *Williams*; much of the simplicity of the "one man-one vote" standard which followed *Baker* is in the nomenclature only. In deciding what state interest would

70 *See* Comment, *Legal Obstacles to Minority Party Success*, 57 Yale L.J. 1276 (1947-48).

71 Alabama, California, Illinois, Virginia. Williams v. Rhodes, —— U.S. ——, 21 L.Ed.2d 24, 89 S.Ct. 5, 27 (1968); Californians for an Alternative in November v. California, —— U.S. ——, 89 S.Ct. ——, 21 L.Ed.2d 1 (1968) (per curiam; dismissed by exercise of equitable discretion).

72 Baker v. Carr, 369 U.S. 186 (1962).

73 *Id.* (Clark, J., concurring); *see also*, Lucas v. The Forty-Fourth General Assembly, 377 U.S. 713 (1964) (popular referendum will not validate malapportionment).

74 One draft bill (S.B. 24) decreases the petition requirements from fifteen to ten percent, but the signatures must comprise five percent of a county's vote for Governor in the last election for each of half the counties in Ohio. Moreover, the petition must be filed 120 days before the primary. Prior party affiliation will no longer be a bar to participating in a new party's primary however. Press Release, Office of Secretary of State Ted Brown (January 14, 1969).

justify deviations from the norm of "one man-one vote," the Court allowed a state to provide some voice for each political subdivision (*e.g.*, each county) since these bodies implement state programs. The Court disallowed deviations designed to recognize group interests within the state.[75] Given the workings of our state legislatures, it is not at all clear that the second policy will not promote compliance with state legislation as effectively as the first.

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75 Reynolds v. Sims, 377 U.S. 533 (1964).

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COMMENT

THE PROBLEM OF THE FAITHLESS ELECTOR

On December 16, 1968, pursuant to the Constitution[1] and federal law,[2] the members of the College of Electors met in their respective states to cast their ballots for President and Vice President of the United States. On that day, an obscure elector from Rocky Mount, North Carolina, Dr. Lloyd W. Bailey, announced that he would cast his electoral ballots for George C. Wallace and Curtis E. LeMay, even though he had been chosen by the people of his state on a slate pledged to the Republican candidates, Richard M. Nixon and Spiro T. Agnew.[3] Dr. Bailey thereby added another footnote to history and joined the ranks of the five previous "faithless electors" in the history of the Republic.

Dr. Bailey's vote for Wallace did not change the winner of the national election; nor did it throw the vote into the House of Representatives. But it did arouse the fear that if it were allowed to stand as a precedent for similar defections on a wider scale in the future, a Pandora's box of electoral chaos might be opened. It is not difficult to include in one's parade of horribles a vision of an election from which a candidate might emerge with only a one- or two-vote majority in the Electoral College, with the inevitably resulting pressures on electors to cast independent votes for presidential candidates who were not the choice of the people who elected the electors. A mere six defections from the popular will, out of 16,510 electors, in the Republic's history, might seem proof of an amazing fidelity to an un-

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1 U.S. CONST., amend. XII: "The electors shall meet in their respective states, and vote by ballot for President and Vice-President, etc."

2 3 U.S.C. § 7 (1964): "The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct."

3 It might be mentioned that Dr. Bailey defended his defection, in part, on the ground that Wallace had received a majority of the votes of the Second Congressional District, which he represented as Republican elector. However, this is quite beside the point, in that Bailey was nominated by a district caucus at his party's state convention, but was elected on a statewide basis. Bailey was not elected by the Second District. On the contrary, his election was made possible by the majority of North Carolina voters outside his district. Had Wallace won the state, or had the election been on a Congressional District basis, Bailey, as a Republican elector, would not have been chosen.

enforced tradition; but Dr. Bailey's vote of December 16, 1968, revived memories of the spectre that had been engendered by the Wallace third-party candidacy, and thus provided a further stimulus for the Congress to take a badly needed look at fundamental reform of the presidential electoral system.

This Comment will not deal with the broader question of electoral reform,[4] but will rather focus on the narrower issue of whether the Congress or a federal court could, without express amendment of the Constitution, rectify Dr. Bailey's errant behavior and thus achieve quickly one of the *minimal* objectives of electoral reform: the elimination of the independence of electors.

The Twelfth Amendment to the Constitution of the United States sets up the two-stage structure of the electoral system. First, the electors meet in their respective states to cast their votes, and then sign, certify, seal, and transmit them to the President of the U.S. Senate. Second, the President of the Senate, in the presence of both Houses of Congress, opens and counts the ballots and declares the winner. The procedural details and timetable for the fulfillment of these constitutional requirements are found in Title 3 of the United States Code. The most important provisions, which are derived from the Electoral Count Law of 1887,[5] confer upon the two Houses of Congress the power to reject any electoral vote or votes when they agree that such vote or votes have not been "regularly given by electors whose appointment has been lawfully certified" by the executive of the electors' home state.[6]

On January 6, 1969, the day fixed by statute for the congressional counting of the electoral votes,[7] Senator Edmund S. Muskie of Maine and Congressman James G. O'Hara of Michigan (both Democrats) presented a formal objection to the electoral vote of Dr. Bailey. As required by statute, this objection was in writing; it was signed by one Senator and one Congressman; and it stated "clearly and concisely, and without argument," the ground of the objection.[8] The filing of the objection required both Houses of Congress to decide concurrently whether Dr. Bailey's vote had been "regularly given" by an elector

4 For discussion of this broader topic, see, in this issue, Bayh, *Electing a President: The Case for Direct Popular Election*, 6 HARV. J. LEGIS. 127 (1969).

5 Act of February 3, 1887, ch. 90, 24 Stat. 373. Title 3 was codified into law by Act of June 25, 1948, ch. 644, 62 Stat. 672.

6 3 U.S.C. §§ 6, 15 (1964).

7 3 U.S.C. § 15 (1964).

8 *Id.*

"whose appointment has been lawfully certified" by the executive of North Carolina.

The Governor of North Carolina had indeed certified Dr. Bailey's appointment as an elector, as required. The questions presented to the Congress, then, were: (1) what does the phrase "regularly given" mean? and (2) who is to decide what that phrase means? The terms of the statute do not answer these questions, nor does the legislative history of the 1887 law answer them directly.

The Electoral Count Law of 1887 was enacted to establish a procedure for determining who the chosen electors were; it was designed to avoid a repetition of the confusion and scandal surrounding the disputed Hayes-Tilden contest of 1876, when some states sent two sets of electoral returns to the Congress. One conclusion from this legislative history might be that the statutory purpose was to keep such disputes over electoral votes *within the states*, and to circumscribe to the narrowest limits the responsibility of Congress to do anything but certify the results contained in the certified ballots. In 1968, North Carolina certified only one set of electoral returns, and there was no evidence of formal or procedural error or legal (as opposed to possible moral) fraud sufficient to invalidate Dr. Bailey's vote. Even if the authorities or voters of the State of North Carolina were unhappy with Dr. Bailey's wayward vote, neither state nor federal law provided any remedy. Therefore, it might be argued, since Dr. Bailey did not violate any state or federal laws, in no sense could his vote have been anything but "regularly given."

The Muskie-O'Hara forces contended, on the contrary, that the phrase "regularly given" must mean more that just "procedurally correct," and that the Act of 1887 therefore provides a remedy for other problems besides the Hayes-Tilden situation.[9] If the standard of "regularity" is to be more than mere surplusage, *someone* must have authority to apply it. Whoever has the authority to apply it has the responsibility of determining its meaning. Thus the challengers pointed out that the Electoral Count Law does not give the state governor any power to scrutinize or certify the electors' *ballots*. It only authorizes him to certify the "ascertainment" or "appointment" of the electors — in other words, their identity. The electors certify

9 113 CONG. REC. S15 (daily ed. Jan. 6, 1969) (remarks of Senator Muskie).

their own sealed ballots[10] and send them "forthwith," by registered mail, to the President of the Senate.[11] It follows, the challengers argued, that *Congress* has the authority, and the responsibility, to determine whether the vote cast by Dr. Bailey was "regularly given."

Alternatively, if the Muskie-O'Hara forces were to concede that Section 15 of Title 3 gives no guidance on the point at issue, they might have argued that a decision by Congress to reject Dr. Bailey's vote would constitute a *de facto* amendment of Section 15, or at least a gloss on it. This might be objected to, however, on grounds of parliamentary procedure. Congress perhaps should properly amend Section 15 in a formal manner (assuming it would be constitutional to do so), before attempting to weigh Dr. Bailey's vote according to the statutory standard.

If we assume *arguendo* that the objection was in order, and that the language of Section 15 leaves Congress the requisite authority to determine whether an elector can be required to vote according to the majority vote of the state which elected him, we then reach the merits of the objection. One possible theory upon which those objecting might have relied was the theory that the electors perform only an agency or ministerial function. That is, it might be argued that by modern understanding and historical tradition, the voters expect that their state's electoral votes will be cast for the candidate of the majority's choice, without the intervention of someone else's judgment in a manner contrary to their expressed wishes. If pushed to its logical conclusion, this purely ministerial view of the Electoral College requires the effectuation of the expressed wishes of the sovereign people, regardless of whether the electors are formally pledged, named on the ballot, or subject to legal sanctions for noncompliance.

Apparently, this doctrinaire "democratic" view was rejected by the leaders of the Bailey challenge, in favor of a more sophisticated notion of estoppel, by which an elector's moral obligation to vote for the people's choice becomes a legal one. The argument went as follows: A presidential elector under the Constitution is a free agent, entitled to express his individual preferences on Electoral College Day. But if, prior to that day, the elector expresses his preference in such a way as to make people reasonably justified in relying on what he says or does, the elector — by his own act — limits the freedom which

10 3 U.S.C. § 10 (1964).
11 3 U.S.C. § 11 (1964).

the Constitution gives him and is thereby estopped from voting in any manner inconsistent with the express or implied representations made to the people, upon which they would otherwise rely only to their detriment. Since in all states the electors are chosen by the people, electors have at least some minimal responsibility to the people, although under this theory unpledged electors would still be free under Article II and the Twelfth Amendment to exercise untrammeled discretion.[12]

In arguing that Dr. Bailey was indeed bound to vote for Richard M. Nixon, the Muskie-O'Hara forces pointed to the fact that North Carolina is among 35 states which authorize the use of the so-called "presidential short ballot," on which only the names of the presidential and vice-presidential candidates are printed. The competing slates of enumerated presidential electors are omitted from the ballot. The 1933 North Carolina statute authorizing the presidential short ballot provides in substance:

> A vote for the candidates named on the ballot shall be a vote for the electors of the party by which those candidates were nominated and whose names have been filed with the Secretary of State.[13]

The Muskie-O'Hara forces contended that this statutory provision represented a clear expression or implication of a legislative determination that the state's electoral votes were meant to be counted according to the choice of the voting public.

If North Carolina electors are indeed so bound, it can be contended that Congress is authorized to see that the state's legal requirements are fulfilled. This would be a reasonable construction of Section 15 of Title 3, which allows Congress to reject an elector's vote which has not been "regularly given." The requirements of North Carolina Law are not self-evident here, however. Some 17 or 18 states which employ the "presidential short ballot" also prescribe in one form or another that the electors must vote for those winning candidates on whose behalf their names were filed.[14] It might be possible to imply such

12 A three-judge federal court has sustained the authority of a state to provide by statute for unpledged electors of a national party on the ballot. Gray v. Mississippi, 233 F.Supp. 139 (D.C. Miss. 1964). Cf. 1960: Mississippi (8) and Alabama (6) unpledged electors elected by the voters.

13 N.C. GEN. STAT. § 163-209 (Supp. 1967).

14 E.g., CAL. ELECTIONS CODE § 25105 (1961) (electors "shall vote" for candidates of the party they represent); COLO. REV. STATS. § 49-20-5 (1963) (each elector "required" to vote for candidates who received highest number of votes); N. MEX.

a requirement necessarily, especially given the connection between the short ballot and pledge requirement in those states which use both devices. However, such an interpretation was rejected by a North Carolina commentator discussing the statute in question in the *North Carolina Law Review* at the time of its passage:

> Neither the old law nor the new law, however, pledges the elector to cast a party vote, and legally, at least, the individual elector, as was intended by the framers, still has discretion to cast his vote for whomsoever he individually desires.[15]

Could federal law override such an interpretation if the North Carolina Supreme Court adopted it? Article II of the United States Constitution seems to delegate control over the selection of electors to the state legislatures.[16]

The Congress in January, 1969, did not have clear guidance from either federal or state law. If we assume *arguendo* that a decision by the Congress to reject the ballot of the "faithless elector" would have been permissible under federal and state law, we are left with further questions of the constitutional validity of such a decision.

The constitutionally-required indirect, two-step presidential selection process was devised in 1787 by men who thought that the choice of a President was too important to entrust to ordinary voters. Thus, instead of picking a President, voters choose a group of "electors" from each state, the number to be equal to that state's congressional delegation.[17] In theory, the electors were to be the best and wisest men available, and in Federalist No. 68 there seems to be some basis for believing that the Founding Fathers intended these electors to be free agents in selecting a President.[18] But the Framers of the Constitution did not foresee and therefore did not provide for the growth

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STATS. ANNO. § 3-10-1.1 (Supp. 1967) (elector guilty of misdemeanor if he votes for other than candidates of party he represents).

15 *A Survey of Statutory Changes in North Carolina in 1933*, 11 N.C. L. REV. 191, 229-30 (1933). This statement was followed by the following qualifying sentence:

> "The moral force of party allegiance is so binding, however, that seldom in the history of the electoral college has an elector refused to cast his vote in harmony with the will of the popular majority in his state."

16 "Each State shall appoint *in such Manner as the Legislature thereof may direct*, a Number of Electors . . ." U.S. CONST., art. II, § 1 (emphasis added).

17 *Id.*

18 Hamilton, *The Federalist No. 68*, in THE FEDERALIST 458-59 (J. Cooke ed. 1961).

and development of political parties in America. Similarly, they did not foresee or provide for the "popularization" of the office of the Presidency or for the innovation of the presidential short ballot. These developments thrust the actual candidates for national office to the very forefront of the public mind on election day and eventually pushed the electors, for the most part, into the political shadows — if not into virtual oblivion. Furthermore, the roles originally intended by the Framers to be filled by "wise men" have in many cases gone to the party faithful as a reward for past service, presumably on the basis that being an elector today is merely an honorary ceremonial position.

What, then, is the remaining significance, if any, of the words of the Twelfth Amendment, which provide that "The electors shall . . . vote by ballot for President and Vice President"? Can a court reach any other result but that a "vote by ballot" means, despite the foregoing considerations, that electors are still constitutionally free and independent in choosing a President or Vice President?

> . . . Certainly electors' discretion conforms to the original concept of the Framers and has never been changed by explicit constitutional amendment. Can the practice of the ensuing years be deemed nevertheless to have amended the Constitution to the point where an elector who attempted to vote contrary to the voters' mandate would be deemed to have violated a legal, as distinguished from a moral obligation? The Constitution is an evolving instrument, but can it evolve to a point diametrically opposite its original import?[19]

A lower New York court answered these questions in the affirmative in *Thomas v. Cohen*,[20] in which a voter challenged the presidential short ballot on voting machines on the ground that, if he was voting for electors with free discretion he had a right to know for whom he was voting. But this case stands virtually alone. The issue has rarely arisen squarely, although dicta by several state courts suggest that electors still retain their voting discretion.[21] The U.S. Supreme Court has held that a state statute requiring an elector to take a "loyalty oath" to vote for his party's nominee prior to certification as an elector

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19 Rosenthal, *The Constitution, Congress and Presidential Elections*, 67 MICH. L. REV. 1, 19-20 (1968).

20 146 N.Y. Misc. 836, 262 N.Y.Supp. 320 (Sup. Ct. 1933).

21 Opinion of the Justices, No. 87, 250 Ala. 399, 34 So.2d 598 (1948); Breidenthal v. Edwards, 57 Kans. 332, 339, 46 P. 469, 471 (1896); State ex rel. Beck v. Hummel, 150 Ohio St. 127, 146, 80 N.E.2d 899, 909 (1948).

is compatible with the Twelfth Amendment.[22] But the Court has never approved the binding of an elector *after* his certification, and has indeed suggested that such a statutory requirement might perhaps be legally unenforceable.[23]

Until the U.S. Supreme Court interprets the key provisions of Article II and the Twelfth Amendment in a case in point, we are left to speculate. Should the Court be willing to take the bold step forward necessary to recognize that political practice for about 150 years has effectively and thoroughly undermined the purposes and intent of the Framers, it will not be the first time, and it might well be greeted by most citizens as a long overdue constitutional accommodation to a fundamental change in the political realities of this nation.

On the other hand, the Court may be more cautious and conservative in its approach to this particular problem for a number of sound reasons of law and policy. First, it may conclude that to "vote by ballot" can only mean what it was originally intended to mean — *i.e.*, that electors, constitutionally, have untrammeled discretion in their choices for President and Vice President. The language of Article II and the Twelfth Amendment could strongly imply a constitutional prerogative not subject to modification on grounds of historical practice or some kind of estoppel theory. Moreover, on institutional grounds, the Court may deem it the better part of valor to refrain from such innovation because of the likelihood that Congress will act in a fundamental way in the near future. A Court decision constitutionally binding an elector could "steal the thunder" from those seeking basic electoral reform, by removing their catalytic *cause célèbre*, and would simultaneously anger the strict constructionists thereby creating an exotic opposing coalition of liberal and conservative legislators. Paradoxically, a Supreme Court decision upholding the prerogative of a "faithless elector" might well provoke the long-sought overhaul of the system via Constitutional amendment. On the other hand, it might not!

What seems to hold out the greatest promise of success, in terms of finality, effectiveness, and likelihood of immediate action, is fundamental reform of the presidential system through the amendment process. Congressional initiative, necessary in practical terms if not

22 Ray v. Blair, 343 U.S. 214 (1952).
23 *Id.* at 229-30.

in constitutional terms, may finally be forthcoming; hearings on the need for and content of such reform are now being conducted.

In any event, until such fundamental reforms are adopted by either the Supreme Court or the Congress, it must remain an open question whether the American people possess a right, remedy, recourse, or protection against "the faithless elector who betrays their trust, abuses his office, disdains their wishes, and cavalierly substitutes his will for theirs."[24]

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24 113 CONG. REC. H46 (daily ed. Jan. 6, 1969) (remarks of Congressman Wright).

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