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NORTH CAROLINA LAW REVIEW

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Volume 46 | Number 1

Article 14

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12-1-1967

# Constitutional Law -- Legislative Election of a Governor

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## Recommended Citation

Richard J. Bryan, *Constitutional Law -- Legislative Election of a Governor*, 46 N.C. L. REV. 128 (1967).

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cern to many political and industrial factions, is that regulations at the local level should tend to deter "big brother," be it the state or federal government, from imposing its own influence and solutions on the local scene.

WILLIAM H. THOMPSON

### Constitutional Law—Legislative Election of a Governor

When the "one man, one vote" principle first arose in a case concerning the county unit system in Georgia,<sup>1</sup> the question asked was how far it would be extended. The answer came quickly in two historic decisions. The Court ordered that congressional districts be approximately equal in population,<sup>2</sup> and that both houses of state legislatures be apportioned on the basis of population.<sup>3</sup> Yet these decisions raised more questions concerning what limitations the Court would put on the "one man, one vote" maxim. These questions were partially answered in *Fortson v. Morris*,<sup>4</sup> where the Court, with a vigorous dissent, did put a limitation on the applicability of the "one man, one vote" concept,<sup>5</sup> refusing to use it to prevent the legislative election of a governor in which the winning candidate might have been (and, in fact, eventually was) the loser at the polls.

The case arose out of the 1966 race for Governor of Georgia. Democrat segregationist Lester Maddox contested with conserva-

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<sup>1</sup> *Gray v. Sanders*, 372 U.S. 368, 381 (1963): "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

<sup>2</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964).

<sup>3</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>4</sup> 385 U.S. 231 (1966).

<sup>5</sup> Since *Fortson v. Morris* the Supreme Court has limited further the application of "one man, one vote." In *Sailors v. Bd. of Educ.*, 387 U.S. 105 (1967), *aff'g* 254 F. Supp. 17 (W.D. Mich. 1966), the Court held that "one man, one vote" was not applicable to the selection of a county school board because the choice was not by an elective process, no election being required because the offices were nonlegislative. In *Dusch v. Davis*, 387 U.S. 112 (1967), *rev'g* 361 F.2d 495 (4th Cir. 1966), the Court refused to apply "one man, one vote" to the at-large election of a city council, where there was a requirement that the members reside in certain boroughs. The Court, however, did not reach the merits of applying "one man, one vote" to local governments in these cases, or in *Moody v. Flowers and Supervisors of Suffolk County v. Bianchi*, 387 U.S. 97 (1967), dismissed on jurisdictional grounds.

tive Republican Howard "Bo" Callaway. Mainly as a protest move, a write-in campaign was launched for Ellis Arnall, a former governor, and a man of more liberal persuasions. The votes received by Arnall were enough to prevent either Callaway or Maddox from obtaining a majority.<sup>6</sup> This result invoked a section of the Georgia Constitution<sup>7</sup> which provides that if no candidate receives a majority the General Assembly shall choose among the two candidates receiving the highest number of votes, regardless of which one had a plurality.

The right of the Georgia legislature to make this choice was challenged in federal district court. In *Morris v. Fortson*<sup>8</sup> the legislature was enjoined from selecting the governor, the court relying heavily on *Gray v. Sanders*<sup>9</sup> and reasoning as follows:

This [allowing the legislature to choose a candidate who did not receive a plurality] would give greater weight to the votes of those citizens who voted for this candidate and necessarily dilute the votes of those citizens who cast their ballots for the candidate receiving the greater number of votes. The will of the greater number may be ignored. In addition each legislator would stand as a unit in selecting the Governor, and his vote would necessarily eliminate the will of his constituents who voted for the other candidate.<sup>10</sup>

The Court in *Fortson v. Morris* reversed, by a 5-4 decision, the district court's holding, saying tersely: "There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select

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<sup>6</sup> Howard H. Callaway—449,894 or 47.07%; Lester G. Maddox—448,044 or 46.88%; Ellis G. Arnall—57,832 or 6.05%.

<sup>7</sup> GA. CONST. art. V, § 1, para. 4:

The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary for a choice.

<sup>8</sup> 262 F. Supp. 93 (N.D. Ga. 1966).

<sup>9</sup> 372 U.S. 368 (1963).

<sup>10</sup> 262 F. Supp. 93, 95 (N.D. Ga. 1966).

its governor."<sup>11</sup> The dissent, composed of the "liberal" faction of the Court,<sup>12</sup> rested their rationale upon two major points: (1) A malapportioned legislature, such as the Georgia legislature,<sup>13</sup> should not be permitted to choose a governor; (2) In any case, a legislative choice of governor, after the popular will has made a choice,<sup>14</sup> is in violation of the equal protection clause of the fourteenth amendment,

<sup>11</sup> 385 U.S. at 234.

<sup>12</sup> The Chief Justice, and Justices Brennan, Douglas, and Fortas. But Justice Black, normally a "liberal," joined with the "conservatives"—Justices Clark, Harlan, Stewart, and White—and wrote the majority opinion.

<sup>13</sup> See *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962).

<sup>14</sup> In a separate dissenting opinion, Justice Fortas, joined by the Chief Justice and Justice Douglas (but not Justice Brennan), went even further, casting doubt on whether a legislature could elect its governor in any circumstance:

Moreover, the Court today announces in an offhand manner, as a side effect of today's decision, without adequate argument or consideration, that a State may today, as some States did long ago, provide that its Governor shall be selected by its legislature in total disregard of the voters. I do not believe that the issue is so easy. 385 U.S. at 246-47.

Justice Fortas does not say precisely on what basis such a system would be unconstitutional, whether due process, equal protection, or guarantee of a republican form of government (long recognized by the Court as being a political matter). In *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957), Chief Justice Warren stated: "Moreover, this Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments. . . ." (see also *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902)). If, therefore, it would be permissible for a state not to have an independent and separate executive, it is difficult to see how the manner in which a state chooses a governor becomes a constitutional issue, unless it violates some explicit constitutional mandate (*e.g.* not permitting Negroes to vote for governor). Furthermore, even though all states now elect their governor by popular vote (at least initially), Fortas's dictum is more than an academic nicety. How would such a viewpoint affect the generally successful and progressive city manager forms of urban government (in which the city's top executive is not chosen by the people), if, for instance, New York City, which has a larger budget than New York State, chose to adopt such a system? Would not whatever rights Justice Fortas thinks would be denied the people of New York State, if not permitted to choose their governor, be equally denied to the eight million residents of New York City if not permitted to choose their *de facto* mayor?

Justice Fortas also develops a rather clumsy analogy by discussing a hypothetical situation where the governor selects the legislature, which he assumes, no one would deny is unconstitutional. But consider the language in *Willis v. Blue*, 263 F. Supp. 965, 969 (N.D. Ga. 1967), citing the principle case: "There is no federal requirement intended to compel a state to elect any of its officers or agents through the popular vote of the people. So long as the method does not constitute an *unreasonable delegation* of power, it is sufficient." Few would deny that permitting a governor to select a legislature would be an "unreasonable delegation," *i.e.* that it would thwart the very purpose of a democracy—rule by the people or their representatives. The converse, however, does not follow. It would seem hard to call legislative election of a governor an "unreasonable delegation" that would raise government as a citadel above the control of the popular will.

especially as interpreted in *Gray v. Sanders*.<sup>15</sup> These points shall be considered in turn.

*Election by a Malapportioned Legislature*

In *Toombs v. Fortson*<sup>16</sup> the district court, following the lead of the United States Supreme Court in *Baker v. Carr*,<sup>17</sup> ruled that Georgia's legislature was malapportioned because neither house was apportioned according to population. The Georgia legislature responded by adopting a new apportionment plan. In the meantime, however, the Supreme Court had handed down its decision in *Reynolds v. Sims*, ordering that both houses of state legislatures must be apportioned on a population basis. Following *Reynolds*, the district court in the second *Toombs v. Fortson* decision<sup>18</sup> held that a population deviation of as much as fifteen per cent between legislative districts would not satisfy constitutional requirements. However the district court gave the legislature until May, 1968 to come up with a new plan, and gave it de facto status until that time.<sup>19</sup> This decision was affirmed without comment by the Supreme Court.<sup>20</sup>

In accordance with this, the majority in *Fortson v. Morris* dismissed the challenge to an election by Georgia's malapportioned legislature: "[W]e held [in *Toombs v. Fortson*<sup>21</sup>] that with certain exceptions,<sup>22</sup> not here material, the Georgia Assembly could continue to function until May 1, 1968. Consequently the Georgia Assembly is not disqualified to elect a Governor as required by Article V of the State's Constitution."<sup>23</sup> The dissent, however, viewed it in a different light. Referring to the language of the majority just quoted above, the dissent, per Justice Fortas, said:

This is indeed a weak reed for so monumental a conclusion. . . . We have declined to deprive a malapportioned legislature of its de facto status as a legislature. . . . [But] [i]f this Court

<sup>15</sup> 372 U.S. 368 (1963).

<sup>16</sup> 205 F. Supp. 248 (N.D. Ga. 1962).

<sup>17</sup> 369 U.S. 186 (1962).

<sup>18</sup> 241 F. Supp. 65 (N.D. Ga. 1965).

<sup>19</sup> Previously the district court had enjoined the legislature from proposing a new constitution, but this order was vacated and remanded by the Supreme Court, because, in the light of new facts, the issue had become moot. *Fortson v. Toombs*, 379 U.S. 621 (1965). However, the prohibition against proposing a new constitution while so malapportioned remains, by implication, in effect. See also note 26 *infra*.

<sup>20</sup> 384 U.S. 210 (1966).

<sup>21</sup> *Id.*

<sup>22</sup> Proposing a new constitution.

<sup>23</sup> 385 U.S. at 235.

had foreseen that events would place the Georgia Legislature in a position to override the vote of a plurality of the voters and to select as Governor of the State the loser at the polls, I expect that it would have included this power as one of the 'exceptions,' forbidden to this Legislature which, this Court has held, functions only by judicial sufferance despite its constitutional infirmity. To a reader of *Gray v. Sanders*, *Fortson v. Toombs*, and *Toombs v. Fortson*, it must seem inconceivable that the Court would permit this malapportioned legislature to select Georgia's Governor in these circumstances. Indeed, the irony of the matter is that a three judge federal court held that the Georgia legislature was so malapportioned that it could not properly submit to the voters a new Constitution, adopted by both houses of the Georgia legislature, which would have abolished the provisions for legislative selection of a Governor<sup>24</sup> and have substituted a run-off or special election. . . . But now the Court holds that this same, unreformed legislature is not so malapportioned that it cannot itself select the Governor by direct action! I confess total inability to understand how the two rulings can be reconciled.<sup>25</sup>

What the Court might have said if it had foreseen the results of the 1966 Georgia gubernatorial election and what it actually did say are two different things. The basic issues, then, dividing the majority and dissent are these: (1) Should the Court add other exceptions to the granted de facto status of a malapportioned legislature when unforeseen contingencies arise? (2) Is a legislative election of a governor an act of the same quality or importance as the adoption of a new constitution? The answers to both the questions are basically subjective policy decisions. It should be noted that the reason malapportioned legislatures are given temporary de facto status is functional. Leaving a state without a legislature would grossly disrupt the political, economic and social well being of its people. In the Court's view, a malapportioned legislature is better than no legislature at all. It might well be said that a malapportioned legislature is better than an ineffective one. The possibility that every legislative act might be voided by a judicial afterthought would put the legislators in a straight jacket. What would happen, for instance, if the Georgia legislature, while functioning under "judicial sufferance," attempted a major revision of the penal code? Would it not be just as "inconceivable" that a malapportioned legislature should be allowed to affect such a change

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<sup>24</sup> See note 35 *infra*.

<sup>25</sup> 385 U.S. at 245-46.

as to elect a governor? There is one possible distinction. The Court gave the Georgia legislature de facto status to "enact such legislation as shall properly come before it." Electing a governor is not legislation. Nonetheless, the Court specifically excepted from legislative power one thing only—proposing a new constitution. The truth of the matter is that the possibility of the Georgia legislature electing a governor never crossed the Court's mind. If it had, it is idle speculation to guess whether it would have been made an exception. A court may perhaps properly limit the power of a malapportioned legislature,<sup>26</sup> but such limitations should be prospective. Invalidating legislative acts or enjoining legislative power on an ad hoc<sup>27</sup> basis will result in uncertainty and instability, and put the Court in an undesirable political role which would confirm all the fears that Mr. Justice Harlan originally voiced in *Baker v. Carr*.<sup>28</sup>

### *Legislative Election and Equal Protection*

There are three basic methods by which governors have been elected: (1) legislature alone; (2) popular vote alone; and (3) a combination of the popular vote and legislative action. Although many states, including Georgia before 1824, left the election to the legislature, no state employs such a method today. Only nine states leave the election entirely to the popular will,<sup>29</sup> while forty-one others have some form of legislative involvement. Thirty-eight<sup>30</sup>

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<sup>26</sup> This issue is by no means clear. It was raised in *Fortson v. Toombs*, 379 U.S. 621 (See note 19 *supra*), but the Court did not reach the merits because of mootness. Justice Harlan's separate opinion implied that he, at least, did not favor limiting the power of a legislature once it has been allowed to function.

<sup>27</sup> And what would be the standard for ad hoc invalidation? The nature of the power to be exercised or the importance of the power? If it is the importance, is it the theoretical importance or the actual importance? In *Fortson v. Morris* the actual effect of legislative malapportionment on the result of the legislative election is nugatory. Under any scheme of apportionment the Georgia legislature would still have elected Lester Maddox as governor. Thus the dissent, while arguing for an additional limitation on the power of the Georgia legislature as though some great injustice were about to occur, based their rationale not on political realities but on theoretical abstractions. Whether such an approach in this particular context is wise or unwise is debatable. True, in general courts should ignore strictly political considerations. But when courts have entered such highly political areas as legislative apportionment, such considerations begin to become unavoidable.

<sup>28</sup> 369 U.S. 186 (1962).

<sup>29</sup> See 385 U.S. at 235 & n. 3.

<sup>30</sup> *Id.*

of these provide for legislative election when there is a tie vote.<sup>31</sup> Two other states, Mississippi and Vermont, have provisions similar to that of Georgia.<sup>32</sup>

Previous to 1824, the Georgia General Assembly chose the governor, the House selecting three candidates and the Senate choosing one of the three by majority vote.<sup>33</sup> On November 6, 1824 the Georgia Senate, by a 47-9 vote, called for a constitutional amendment setting up the present election system. Six days later the House approved the plan by a 90-10 vote.<sup>34</sup> Five times since then the same system has been incorporated into new constitutions, the latest being in 1945.<sup>35</sup> Thus, this method of choosing a governor had been a part of the Georgia Constitution for 142 years before it was challenged in this case.<sup>36</sup>

The principal difference between the majority and dissent centered around the question of the continuity of the electoral process. Under the majority's interpretation, election of the governor by the

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<sup>31</sup> One method, at least, of settling a tie vote has generally been held constitutional—namely, drawing straws. See *Webster v. Gilmore*, 91 Ill. 324 (1878); *Johnston v. State ex rel. Sefton*, 128 Ind. 16, 27 N.E. 422 (1891); *Keeler v. Robertson*, 27 Mich. 116 (1873). But deciding by lot must be provided for by statute or constitutional provision. See *State ex rel. King v. Solomon*, 82 Neb. 200, 117 N.W. 348 (1908). Compare with *Fortson v. Morris* the words of the Indiana Supreme Court: "We can not concur with counsel, that where an election is held and results in a tie vote for opposing candidates, the General Assembly may not provide for determining the right to office otherwise than by making provision for another election." 128 Ind. 16, 18, 27 N.E. 422 (1890).

<sup>32</sup> Miss. CONST. art. V, § 141; Vt. CONST. ch. II, § 39.

<sup>33</sup> GA. CONST. art. II, § 2 (1789). Note the nomination process provided for in this system. The 1824 Amendment, in a sense, gave the nomination process to the people, unless the people could muster a majority for one candidate, in which case they would elect.

<sup>34</sup> The lopsided vote, however, is not indicative of a grandiose plan by the General Assembly to extend the franchise. The same House that voted 90-10 for this amendment, turned down a bill providing for the popular election of presidential electors by a 45-55 margin.

<sup>35</sup> A proposed new constitution, however, would change this method of choosing a governor. It has been delayed because of malapportionment problems. See *Toombs v. Fortson*, 384 U.S. 210 (1966), *aff'g* 241 F. Supp. 65 (N.D. Ga. 1965); *Fortson v. Toombs*, 379 U.S. 621 (1965).

<sup>36</sup> It is interesting to note the similarity between this method of choosing a governor and the federal method of choosing a president. If a presidential candidate does not receive a majority of the electoral college vote (which usually means he would fail to receive a majority of the popular vote), the election reverts to the House of Representatives, which, with each state having one vote, chooses among the top three candidates. U.S. CONST. amend XII. While the Court has not been impressed by federal analogies, the question of whether they should be regarded as completely inapposite is discussed in note 63 *infra*.

legislature is an alternative procedure which commences upon the failure of the people to elect by majority vote. In other words, the right granted to the people under the 1824 amendment to elect their governor is limited to the general election, and when that election is over, the right simultaneously ceases.<sup>37</sup> The dissent, however, rejected this "alternate procedure" view by stating succinctly: "The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office."<sup>38</sup> The dissent argued that once the people are permitted to make a choice, their voice can not be silenced until an eventual winner is selected. The people's right *continues* beyond the general election and can not be overruled by any "alternate procedure." Thus, the dissent reasoned, to allow the legislature to disregard the plurality of the voters is ipso facto a violation of the equal protection clause.<sup>39</sup>

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<sup>37</sup> 385 U.S. at 233-34:

It [the Georgia Constitution] set up two ways to select the Governor. The first, and preferred one, was election by a majority of the people; the second, and alternative one, was selection by the State Assembly if any one candidate failed to receive a majority of the popular vote. Under the second method, in the legislative election the votes of the people were not to be disregarded but the State Assembly was to consider them as, in effect, nominating votes and to limit itself to choosing between the two persons on whom the people had bestowed the highest number of votes. . . . A method which would be valid if initially employed is equally valid when employed as an alternative.

<sup>38</sup> *Id.* at 238.

<sup>39</sup> The rejection of the "continuity" theory by the majority was decisive in settling a third minor challenge to the legislative election—the pledge of the Democratic legislators. Each Democratic candidate in Georgia took the following pledge: "I further pledge myself to support at the General Election of November 8, 1966, all candidates nominated by the Democratic Party of the State of Georgia." This pledge was advanced as evidence that the Democratic legislators would not be free to choose between the two candidates. The majority quickly dismissed this contention by saying: "That election is over, and with it, terminated any promises by the Democratic legislators to support the Democratic nominee." 385 U.S. at 236. The dissent took a different view: "We would be less than naive to believe that the momentum of that oath has now been dissipated and that the predominantly Democratic legislature has now become neutral." *Id.* at 241-42. Yet as regards the pledge, it is not so important what the Court thought about "continuity" as what the legislators thought about it. The only issue is whether or not the legislators felt bound by the pledge. Empirical data, while of course not available to the Court at the time of the decision, answers the question. The Democrats have a 229-30 edge in the Georgia legislature. Yet Maddox, the Democrat, won over Callaway by only a 182-66 margin. Therefore approximately thirty-six Democrats did not feel themselves bound by the pledge. Barring gross dishonor or apostasy on the part of the Democrats who voted for Callaway, it is apparent that the pledge did not have the continuity the dissent suggested (even if all the Democrats had remained loyal to Maddox, it would be merely *post hoc ergo propter hoc* reasoning to assume that the pledge was the motivating force).

There is evidence both in the language of the Georgia Constitution,<sup>40</sup> and other extrinsic facts to support both the majority and the dissent in their disagreement over continuity. A case in point is *Thompson v. Talmadge*.<sup>41</sup> In that 1947 case, the candidate for governor elected by a *majority* of the voters had died before taking office. The Georgia Constitution provides that when the legislature is making a choice, they shall choose between the two top candidates "who shall be in life."<sup>42</sup> The General Assembly, interpreting the "in life" phrase to extend beyond election day, proceeded to choose between the top two defeated candidates (both of whom were write-ins receiving less than 1000 votes). The majority in *Thompson* overruled the action of the General Assembly, saying that "in life" refers only to the situation where the General Assembly is making a choice because no candidate received a majority. "By the terms of the Constitution, full and complete power to elect a Governor is reserved to the people, but if the voters *fail to elect* because they do not cast a majority of their votes for one person, then and then only is the power given to the legislature to elect a Governor."<sup>43</sup> The Georgia Supreme Court thus treated the failure of the people to give a candidate a majority of the votes as a constitutional divesting of their electoral rights, and an *eo instante* vesting of the same right in the General Assembly. Such an interpretation does not lend itself to a continuity rationale.<sup>44</sup>

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<sup>40</sup> See note 7 *supra*.

<sup>41</sup> 201 Ga. 867, 41 S.E.2d 883 (1947).

<sup>42</sup> See note 7 *supra*.

<sup>43</sup> 201 Ga. 867, 880, 41 S.E.2d 883, 895 (emphasis added).

<sup>44</sup> Even more striking in regard to the dissent's view in *Fortson v. Morris* is the language, in *Thompson*, of dissenting Chief Justice Jenkins (who dissented upon the interpretation of the phrase "in life," rather than on the more general principles enunciated by the majority):

It is well to observe at the outset that the paragraph of the Constitution giving the General Assembly the right and duty to elect a Governor when the election by the people has thus failed, whether wise or unwise, antiquated or not, is not mere cast-up driftwood littering the shore line of today. . . . Much has been said about changed conditions since the language of the quoted paragraph of the Constitution was embedded within our organic law in the year 1824. It is true many things have come to pass since then, but what has all this to do with the language of the Constitution requiring the General Assembly to elect a Governor under a named contingency? Language has not changed. Dictionaries were in vogue then just as they are now. The language under discussion has five times been carried forward and five times solemnly embedded within our organic law. The last time [1945] that this was done was but as yesterday, after the horses and buggies were mostly put away. There in clear cold print it stands, and there it should re-

It is noteworthy that the Georgia court painstakingly insisted that the power of the legislature to elect a governor arose only upon a definite condition precedent—the failure of the people to muster a majority for one candidate. The power did not arise merely because in hindsight the people in fact made no choice (since the candidate they had selected had died). It is also relevant, in lieu of the “in life” clause, that the framers of the 1824 amendment intended to give the legislature, once it was vested with the power by the necessary condition precedent, a real choice (i.e., *inter alia*, live candidates) and not merely a *pro forma* duty.

Notwithstanding all this, the *Thompson* case illustrates the lurking dangers and inequities in such a system, dangers that may well have been on the dissenting justices’ minds in *Fortson v. Morris*. If the Georgia court had interpreted the “in life” phrase differently, the General Assembly would have been allowed to choose between two candidates who received less than 1000 votes. No one could deny that such a situation would completely discard any remnant of a popular system of electing a governor, and thwart the spirit of the 1824 amendment.<sup>45</sup> Furthermore the General Assembly does not have a free choice, but is restricted to choosing from the top two living candidates. Thus the alternate procedure is not totally independent of the original popular procedure. One has to employ legal fictions to change the votes from electoral votes to nominating votes when no candidate receives a majority, something which is

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main until the power that wrote it in shall write it out. . . . [The power of] the General Assembly to elect a Governor under the contingency stated . . . is as plain now as it was in 1824.

201 Ga. 867, 902-04, 41 S.E.2d 883, 907-08. *But compare* the declaration “there it should remain until the power that wrote it in shall write it out” in the above quotation with the language in *Lucas v. General Assembly*, 377 U.S. 713, 736-37 (1964): “A citizen’s constitutional right can hardly be infringed simply because a majority of the people choose that it be.”

<sup>45</sup> But again consider the language of dissenting Chief Justice Jenkins in *Thompson*:

Laws and constitutions in a government of law as distinguished from an autocracy are not decreed and administered to fit some special occasion *after it has happened*; but being fashioned in advance to meet all future contingencies, they are more like ready made garments, and for this very reason do not always by specific, as distinguished from general, language fit unusual future contingencies as perfectly as we can afterwards see that they might possibly been made to do. But there are few indeed in all this land who would exchange their liberty under a government of law for any other system where rights and liberties, if any, are doled out as a matter of grace from some malevolent or even benevolent autocrat.

201 Ga. at 900, 41 S.E.2d at 900-01.

quite casually done by Justice Black. Yet a voter might vote differently if his vote were a nominating vote.<sup>46</sup> It is overstating an otherwise supportable position to claim that no aspects of continuity exist between the original popular vote and the final choice of the legislature.

But whatever continuity is present, it is weak and partial in character. It thus seems that there is a rational basis for both the continuity theory of the dissent and the alternate procedure theory of the majority. Faced with such a situation, the Court acted rightly in not declaring a law unconstitutional when there was a rational basis for upholding its constitutionality.<sup>47</sup>

Because of the majority and the dissent's differences over "alternate procedure" and "continuity," the two rendered conflicting interpretations of *Gray v. Sanders*.<sup>48</sup> In *Gray*, the Supreme Court held that Georgia's county unit system used in primaries for state-wide office, including governor, was unconstitutional, the Court for the first time unfolding its "one man, one vote" concept.<sup>49</sup> Under the county unit system, the eight largest counties would have three votes, the thirty next largest two votes, and the rest one vote. These votes would be cast in a block, as in the federal electoral college, for the candidate that carried the county.<sup>50</sup> The smaller counties had a disproportionate share of the vote.<sup>51</sup> The Court had held that such a system violated the equal protection clause, remarking:

Once the geographical unit from which a representative is to be chosen is designated, all who participate in this election are to

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<sup>46</sup> Take, for instance, a hypothetical election between candidates *A*, *B*, and *C*. Voter *V* is in favor of *A*, and would vote for him in a normal election. Let us further assume that in a normal election *A* would in all probability receive a plurality. However, *V* dislikes candidate *B* even more than he favors *A*. If the legislature were to choose between the two candidates receiving the most nominating votes, and there was only a 50-50 chance that the legislature would choose *A*, *V* (assured that *A* will be one of the nominees) might well cast his nominating vote for *C*, in order that *B*, whom he dislikes, will lose to *C*, and thus not be one of the nominees. Thus while *V* would vote for *A* in a regular election, he would vote for *C* in a nomination.

<sup>47</sup> Cf.: *U. S. v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1934).

<sup>48</sup> 372 U.S. 368 (1963).

<sup>49</sup> See note 1 *supra*.

<sup>50</sup> To win, however, a candidate needed both the county unit vote and the popular vote. If different candidates won the county unit vote and the popular vote, those two candidates would have a run-off; in the run-off the county unit vote would prevail.

<sup>51</sup> Fulton County, for instance, with 556,326 residents, had only three times the voting strength of Echols County, with 1,878 residents.

have a equal vote. . . . The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.<sup>52</sup>

The Court also struck down the district court's holding<sup>53</sup> that such disparity was acceptable if it did not deviate more than the federal electoral college,<sup>54</sup> holding that such comparisons with the federal system were inapposite.<sup>55</sup>

The majority in *Fortson v. Morris*, relying on the "alternate procedure" theory, dismissed any applicability of *Gray* by holding that it was "only a voting case" and adding: "Not a word in the [*Gray*] Court's opinion indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly."<sup>56</sup> The dissent, however, viewing the legislative election as a part of the popular vote process, could see no difference between the "evils" abolished in *Gray*, and the "evils" of a legislative election.<sup>57</sup>

Yet despite the clear logical framework,<sup>58</sup> it is quite likely that

<sup>52</sup> 372 U.S. 368, 379-80.

<sup>53</sup> 203 F. Supp. 158 (N.D. Ga. 1962).

<sup>54</sup> The relative voting strength between Alaska and New York, the smallest and largest states respectively in the electoral college, is approximately five to one. Each state has an electoral vote equal to its representation in Congress. Since each state has two senators and at least one representative, regardless of population, imbalance results.

<sup>55</sup> See note 63 *infra*.

<sup>56</sup> 385 U.S. at 233.

<sup>57</sup> *Id.* at 240-41:

If the legislature is used to determine the outcome of a general election, the votes cast in that election would be weighted, contrary to the principles of 'one person, one vote.' All the vices we found inherent in the county unit system in *Gray v. Sanders* are inherent when the choice is left to the legislature. A legislator when voting for governor has only a single vote. Even if he followed the majority vote of his constituency, he would necessarily disregard the votes of those who voted for the other candidate, whether their votes almost carried the day or were way in the minority. He would not be under a mandate to follow the majority or plurality votes in his constituency, but might cast his single vote on the side of the minority in his district. Even if he voted for the candidate receiving a plurality of votes cast in his district and even if each Senator and Representative followed the same course, a candidate who received a minority of the popular vote might receive a clear majority of the votes cast in the legislature.

<sup>58</sup> However, for a different approach to the problem consider *Jones v. Fortson*, 223 Ga. 7, 152 S.E.2d 847 (1967) concerning the same fact situation as *Fortson v. Morris*. A Georgia statute (GA. CODE ANN. § 34-1514 (Supp. 1966)) provides that where no candidate "receives a majority of the

more general considerations influenced this decision, causing Justice Black, for instance, to change sides abruptly. The Court may have simply felt that enough is enough.<sup>59</sup> Indeed, somewhere the line will have to be drawn. A too literal interpretation of the concept that it is a violation of equal protection to have one man's vote count more than another's, and that no vote can either be diluted or aggrandized, could lead to absurdities. For example, when one candidate defeats another, the vote of the 49 per cent or less minority is disregarded—diluted to zero. The only effective way to avoid this dilution would be a system of proportional representation, a system that would present both political (e.g. the destruction of the two-party system) and constitutional problems.<sup>60</sup> As Justice Stewart commented, dissenting in *Lucas v. Colorado General Assembly*:<sup>61</sup> "It is just because electoral systems are intended to serve functions other than satisfying mathematical theories, however, that the system of proportional representation has not been widely adopted." And how would the practice of demanding extraordinary majorities on certain occasions be reconciled with a "no dilution" rule?<sup>62</sup> Indeed, the whole system of representative government could be theo-

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votes cast, a runoff primary or election shall be held between the two candidates receiving the highest number of votes. . . ." The plaintiffs in this case, decided after *Fortson v. Morris*, argued that this statute should govern and take the election out of the hands of the General Assembly. The majority of the Georgia Court rejected this argument saying simply that when the constitution and a statute are in conflict, the constitution governs. The dissenting opinion in *Jones*, however, interpreted the constitutional provision as merely an escape clause to be invoked only if no provisions for handling runoffs had been established by statute. (This dissenting opinion was written by Chief Justice Duckworth, who also wrote the majority opinion in *Thompson v. Talmadge*). Such an interpretation was not discussed by the dissent in the *Fortson v. Morris* case at the Supreme Court level, but was suggested in the original opinion of the district court, *Morris v. Fortson*, 262 F. Supp. 93, 95 & n.2 (N.D. Ga. 1966).

<sup>59</sup> See note 5 *supra*.

<sup>60</sup> See *People ex rel. Devine v. Elkins*, 59 Cal. App. 396, 211 P. 34 (1922); *Wattles v. Upjohn*, 211 Mich. 514, 179 N.W. 335 (1920); Opinion to the Governor, 62 R.L. 316, 6 A.2d 147 (1939). But as regards federal constitutional problems, consider the language in *Bianchi v. Griffing*, 238 F. Supp. 997, 1004 (E.D.N.Y. 1965): "It is not for the courts to prescribe the type of representative government that is best suited to the needs of the voters. . . . The task of the courts is to determine whether particular methods transgress the Constitution."

<sup>61</sup> 377 U.S. 713, 750 & n.12 (1964).

<sup>62</sup> In Georgia, for instance, two-thirds of the voters must agree in order to adopt a constitutional amendment. Thus, two votes must be cast "yes" for every "no" vote. The "no" voters then would have twice the voting power of the "yes" voters.

retically challenged. The dissent in *Fortson v. Morris* criticizes the legislative election because a legislator is free to ignore the plurality or even the majority choice of the voters in his district. But a legislator has always been free to ignore the desires of his constituents. The dissent would hardly suggest that we reduce all government to the level of a New England town meeting. At some point function must supersede arithmetical abstractions.<sup>63</sup>

### Conclusion

A proposed new constitution for Georgia would end such legislative elections<sup>64</sup> as the one that gave rise to the problems in *Fortson v. Morris*. Although such provisions would remain in Mississippi and Vermont, it is not likely that such a case will rise again. But *Fortson v. Morris* is not without practical significance. It demonstrates a recognition by at least a majority of the Court that the "one man, one vote" lodestar, while perhaps useful in certain situations, has its limitations. It is not clear precisely how far the ambit of its usefulness extends; but the Court in *Fortson v. Morris* has at

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<sup>63</sup> It would be appropriate to reflect upon the Court's distaste for electoral comparisons with the federal system. As said by the Court in *Gray v. Sanders*, 372 U.S. 368, 378:

We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.

Besides the "inequalities" of the electoral college and equal representations of senators which the Court mentions, one can find many other violations of "one man, one vote" in the Federal Constitution, such as counting non-voting slaves as three-fifths of a person, giving each state at least one representative in the House regardless of population, and if and when the presidential election is thrown into the House, giving each state delegation one vote irrespective of its size. While it may be unwise to run strict and inflexible comparisons between the federal and state system, it is going a bit too far to declare it completely inapposite. The Constitution was not written in a political vacuum. The delegates to the Convention in Philadelphia gathered their political wisdom and experience from state governments. The multitude of violations of the "one man, one vote" maxim in the Federal Constitution is evidence that the Founders worried little, if at all, about any "one man, one vote" postulate. Nor can it be said that the writers of the fourteenth amendment had any different attitude. To ignore totally any comparison between the federal and state systems is to disregard history, distort reality, and to foster some strange conclusions.

<sup>64</sup> See note 35 *supra*.

least recognized that such an ambit exists, and that the "one man, one vote" principle should not venture outside of it lest the theoretical tail end up wagging the functional dog.

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### Constitutional Law—*Miranda v. Arizona* and the Fourth Amendment

An interesting new dimension of *Miranda v. Arizona*<sup>1</sup> was presented in two recent cases, *State v. Forney*<sup>2</sup> and *State v. McCarty*.<sup>3</sup> The defendants in these cases argued for application of *Miranda's* requirements<sup>4</sup> concerning confessions to those rights guaranteed by the fourth amendment.<sup>5</sup> Despite the judiciary's contemporary tendency to emphasize the necessity of protecting the individual's constitutional rights, neither court would apply the *Miranda* test because *Miranda* dealt specifically with only the fifth and sixth amendments.

In *Forney* the defendant willingly went to the police station to answer questions after being apprehended in his car as a suspect for burglary. When the defendant was asked by an officer at the station if the officer could look in his car, the defendant agreed. Later, in testimony, the defendant described the situation: "Ah Well, they asked me if I was—they could search my car, and I said, 'Yeah, go ahead.' I couldn't stop them."<sup>6</sup> As a result of the search, a bag

<sup>1</sup> 384 U.S. 436 (1966).

<sup>2</sup> 150 N.W.2d 915 (Neb. 1967).

<sup>3</sup> 427 P.2d 616 (Ore. 1967).

<sup>4</sup> As for procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence . . . the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. 384 U.S. at 444.

<sup>5</sup> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV. See *Camara v. Municipal Court*, 385 U.S. 523. (1967).

<sup>6</sup> 150 N.W.2d 915, 917 (Neb. 1967).