THE ELECTORAL FUNCTION OF STATE LEGISLATURES: AN ILLUSTRATIVE EXAMPLE

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A popular pastime in some circles is the criticism and ridicule of state legislatures. In attempting to evaluate this criticism, however, its thrust is often unclear. Does it, for instance, attack the idea of a basic need for a legislative body in the traditional sense, or rather the general performances of these bodies in this country? More specifically, is it intended as a broadside condemnation, or does it purport to discriminate among selected legislative functions? To condemn the institution generally, without taking into account its many and varied facets, would appear to be judging without considering all the facts. Yet at no other post in state government is it so essential to have all the facts: the legislature is truly the hot corner on the governmental ball diamond.

Nothing original is intended by the observation that the history of state legislatures in America unfolds a genuine paradox. On the one hand, state constitutions have typically manifested basic distrust of these bodies by imposing upon them a multitude of confining restrictions. At the same time, these legislatures appear to be the objects of an almost blind, perhaps unconscious, faith. For whenever unresolvable eventualities in state government have been foreseen, they have been traditionally assigned for solution to the state legislatures. From this perspective, the wonder is not that state legislatures may have an unfavorable reputation in some quarters, but that they have any reputation at all. They are expected to perform where angels fear to tread, but are then criticized when controversy surrounds these performances or when their results are thought to be disagreeable ones.

Any number of typically assigned legislative tasks might be selected to illustrate this point. One of the most apt of these illustrations, it is here maintained, is the legislative electoral function—precisely, the election of a state Governor. What more controversial function could exist than that of determining the holder of the State's highest elective office, in the event the popular election process is deemed to have failed? Who is to be charged with this awesome responsibility should this eventuality materialize? Of all the possible candidates for this task, the separation-of-powers concept might seem to constitute the legislature the most unlikely one. Nevertheless, the eventuality has been foreseen in some of

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the states; and the legislature's door is the one at which the problem has been deposited. The State of Georgia will hopefully serve as an intriguing example.

I.

In early days, the two houses of the Georgia General Assembly performed the complete electoral function in selecting the state's Governor. For instance, the Constitution of 1789 empowered the House of Representatives to name three candidates for the office and the Senate to select one of these by majority vote.[1] By amendment to the constitution in 1824, however, the basic electoral power was transferred to the people of the state, with the General Assembly's participation reduced to intervention when the popular election process failed.[2] Over the years, the 1824 electoral scheme remained basically unchanged, and was embodied in the Georgia Constitution of 1945.[3]

Under that scheme, an election for Governor was held every four years on a specified date, with election managers presiding over voting in the various counties.[4] These managers then separately sealed the election returns for Governor, which they sent to the Secretary of State, who held them until the General Assembly convened.[5] After the two houses were organized, they were directed to proceed as follows:

> 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 to a choice.[6]

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1. GA. CONST. art. II, § 2 (1789).
2. Ga. Laws, 1824, p. 41.
3. GA. CONST. art. V, § 1, (2), (3), (4), GA. CODE ANN. §§ 2-3002, 3003, 3004 (Rev. 1948).
4. GA. CONST. art. V, § 1 (2), GA. CODE ANN. § 2-3002 (Rev. 1945). "[T]he Governor-elect shall be installed in office at the next session of the General Assembly."
5. GA. CONST. art. V, § 1 (3), GA. CODE ANN. § 2-3003 (Rev. 1948). The Secretary of State was not to open the returns and was to lay them before the Senate on the day after the two houses were organized.
6. GA. CONST. art. V, § 1(4), GA. CODE ANN. § 2-3004 (Rev. 1948).

Should a contested election arise, it "shall be determined by both houses of the General Assembly in such manner as shall be prescribed by law."[7]

Upon failure of the popular electoral process, therefore, the legislative branch of government was to determine the holder of the state's highest office. Whatever the reasons which recommended this solution to the constitutional framers, they were not peculiar to the State of Georgia; other states have evolved similar schemes.[8] This power to elect a governor, then, provides a specific and striking example of the kinds of extra-curricular functions historically imposed upon state law-making bodies. Its wisdom, logic, or necessity—as well as its effectiveness over the years—can be evaluated only by looking to its history in individual states. Perhaps, however, a brief account of its role in two major controversies in Georgia might provide an appropriate point of departure.

II.

The first of these controversies was Georgia's famous "two governors" episode, which resulted from the 1946 general election.[9] In that election, Eugene Talmadge received a vast majority of the votes cast for Governor,[10] but then died before the General Assembly convened in January, 1947.[11] Two other candidates in the election each received less than 1000 votes; and Herman Talmadge, son of the deceased Governor-elect, received a number of "write-in" votes.[12]

In this situation, Governor Ellis Arnall claimed the right to continue in office[13] and then to resign in favor of M.E. Thompson, who had been

7. GA. CONST. art. V, § 1(5), GA. CODE ANN. § 2-3005 (Rev. 1948).

8. In *Fortson v. Morris*, 385 U.S. 231 (1966), discussed *infra*, the Supreme Court observed that "[t]wo States, Mississippi and Vermont, that provide for majority voting also provide for state legislative election of their governors in cases of no majority in the general election." The Court further pointed out that "[t]hirty-eight States of the Union which today provide for election of their governors by a plurality also provide that in case of a tie vote the State Legislatures shall elect." The states listed by the Court were as follows: North Carolina, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 234-35.

9. The election was held in November, 1946, for a term of office to begin in January, 1947. Thompson v. Talmadge, 201 Ga. 867, 868, 41 S.E.2d 883, 887 (1947).

10. The total was stated to be 143,279 votes. *Id.*

11. The date of death was December 21, 1946. *Id.*

12. This number was alleged to be 675 votes. *Id.* at 869, 41 S.E.2d at 887.

13. Arnall had been elected Governor in the general election of 1942, and, under the

elected Lieutenant Governor in the 1946 election.[14] Disagreeing, the General Assembly viewed the situation to trigger the electoral power vested in it by the state constitution, and proceeded to elect Herman Talmadge as Governor.[15] The legislature's action was challenged by Govenor Arnall's petitioning the superior court for a declaratory judgment, and for an injunction against Talmadge's "alleged invasion . . . of the office of Governor."[16] This litigation,[17] together with collateral controversies,[18] finally came to rest for decision in the Supreme Court of Georgia, under the style of *Thompson v. Talmadge*.[19]

The first matter to be treated by the court's majority opinion was the nature of the General Assembly's action in performing its electoral function.[20] In determining that the popular election process had failed, and purporting to fill the gap created by this failure, was the legislature taking actions which were judicially reviewable? Arguing that it was not, the defendant contended that the question involved was a purely political one, over which the General Assembly had exclusive jurisdiction. The court evaluated this argument by agreeing that a purely political question would be beyond its jurisdiction, as would legislative actions taken in conformity with the constitution. This was not true, however, of determining the meaning of the constitution; indeed, that determination "was the exclusive function of the courts . . . ."[21] The controversies here presented, explained the court,

> involve questions as to the title to the highest office in the State

constitution, was to serve for a term of four years and until his successor was chosen and qualified. GA. CONST. art. V, § 1(1), GA. CODE ANN. § 2-3001 (Rev. 1948).

14. When Thompson took the oath of office as Lieutenant Governor, Arnall resigned as Governor, and then Thompson took a further oath as acting Governor. 201 Ga. at 869, 41 S.E.2d at 888.

15. The General Assembly expressed its position by the following resolution: "Whereas, an election for Governor of the State of Georgia was held on November 5, 1946, and the returns of said election have been opened and published under the direction of the General Assembly on January 14, 1947, and Whereas, it appears that no person had a majority of the whole number of votes cast by virtue of the fact that Eugene Talmadge, now deceased, received the highest number of votes cast, Therefore, be it resolved that the General Assembly proceed immediately to elect a Governor viva voce." *Id.*

16. *Id.* at 868, 41 S.E.2d at 887.

17. Thompson had filed a motion for intervention in the case.

18. These involved questions subordinate to the principle question of who was Governor.

19. 201 Ga. 867, 41 S.E.2d 883 (1947).

20. The majority opinion expressed the views of five of the seven justices and was written by Presiding Justice Duckworth.

21. 201 Ga. at 872, 41 S.E.2d at 890. This jurisdiction could not be impaired "by the fact that there may be involved in such cases political questions, or actions by the General Assembly." *Id.* at 871, 41 S.E.2d at 890.

> government, including construction of the Constitution as to the jurisdiction of the General Assembly to elect a governor under provisions of the Constitution, . . . , and the courts have jurisdiction to decide such questions.[22]

The jurisdictional barrier having been so nimbly hurdled, the court devoted the remainder of its lengthy opinion to the Georgia General Assembly's electoral function.[23] Its first endeavor was to establish the specific character of this function under the above quoted directive of the constitution.[24] The duty imposed upon the legislature by this directive, the court concluded, was the precise, ministerial one of mathematically canvassing the election returns.[25] It was non-discretionary in nature and did not include the power to consider information extraneous of the returns themselves.[26] Here, therefore,

> the General Assembly, as canvassers, went beyond any authority conferred upon them, and hence, outside their legal jurisdiction, when they gave consideration to and made a finding of fact that the majority candidate had died after the election of November 5, 1946. It necessarily follows that all such action beyond the jurisdiction of the General Assembly was null and void and must be disregarded entirely.[27]

The court thought this conclusion all the more imperative when the controversy was viewed against the backdrop of history. Since 1824, the constitution had reserved to the people of the state the full and complete power to elect a Governor.[28] Only when the people failed to cast a majority of votes for one person could the General Assembly enter the picture: "then and then only is the power given to the legislature to elect a Governor."[29] The exercise of this "special and limited jurisdiction,"

22. *Id.* at 875, 41 S.E.2d at 892. "There is, however, a marked and fundamental difference between instances of incorrectly exercising unquestioned power and of exercise of a power never possessed." *Id.*

23. Under the constitution's directive, asked the court, "[D]id the General Assembly have power to elect a Governor under the circumstances that existed when they proceeded to elect Mr. Talmadge?" *Id.* at 876, 41 S.E.2d at 892.

24. Was the legislature acting "in a capacity of higher or lower dignity and responsibility" than that commonly possessed by canvassers of state election returns? *Id.* at 876, 41 S.E.2d at 892.

25. It was "simply performing the ministerial act of disclosing to the public the official election returns that had been prepared by the election managers." *Id.* at 876, 41 S.E.2d at 893.

26. "In this case there was no contest whatever, and the General Assembly had no right to exercise their power to determine contests in the performance of an entirely different duty as canvassers." *Id.* at 878-79, 41 S.E.2d at 894.

27. *Id.* at 878, 41 S.E.2d at 894.

28. "More than 120 years ago the people of this State recaptured for themselves the general power to elect a Governor." *Id.* at 879-80, 41 S.E.2d at 894.

29. *Id.* at 880, 41 S.E.2d at 895. In exercising the electoral function, therefore, the General Assembly "is an agency or tribunal of special or limited jurisdiction." *Id.*

therefore, was completely dependent upon an event which had not here transpired.[30]

Focusing upon the exact language of the constitutional provision itself, the court rejected the argument that the word "person" there necessarily referred to one in being at the time the legislature canvassed the returns.[31] Rather, said the court, "the word 'person,' as used in the first two clauses refers to a living person as of the time of the election by the people, and his subsequent death is immaterial, so far as any power of election by the General Assembly is concerned."[32] Were this not the meaning to be given the word, then the phrase "who shall be in life," used later in the provision—referring to a later point in time—[33] would be "pure surplusage."[34] Under this construction of the provision, "[i]ts true meaning is, that the General Assembly shall declare such person *to have been* duly elected Governor."[35]

Still another consideration relied upon by the court was Georgia's political history prior to the formulation of the Constitution of 1945.[36]

> Every Governor throughout that period was a Democrat, nominated by the Democrats of Georgia in a Democratic primary, after a campaign in which vital issues were discussed throughout the State and embodied in a platform of principles upon which he sought nomination.[37]

In the general election, this nominee traditionally encountered only token opposition.[38] How illogical it would be, the court thought, to impute to the constitution's framers the intent to restrict the General Assembly to a choice from this opposition when the elected Democrat died before the election results could be declared. This would force the legislators to "ignore all qualified Democrats of the State and limit themselves to a choice between two persons for whom votes were cast in

30. *Id.*

31. "The true meaning of such words can be ascertained in no other way except by a consideration, *inter alia*, of the subject-matter to which they relate as disclosed by the entire paragraph." *Id.* at 881, 41 S.E.2d at 895.

32. *Id.* at 881-82, 41 S.E.2d at 895-96.

33. *I.e.*, at the time when, after canvassing the returns, the General Assembly must elect a Governor.

34. *Id.* at 883, 41 S.E.2d at 896.

35. *Id.* at 884, 41 S.E.2d at 897. "That is what it means under any and all circumstances, for it refers always to a past fact."

36. "[O]ver a period of approximately half a century," said the court, "there has been one and only one dominant political party in this State." *Id.* at 884, 41 S.E.2d at 897.

37. *Id.*

38. "Such opposition candidates were not only opposing the choice of the Democrats of Georgia, but were opposing the platform of principles upon which he had been nominated." *Id.*

opposition to the Democratic nominee for Governor."[39] Indeed, some future General Assembly may be compelled

> to elect as Governor a person wholly undesirable, because of his communistic or other alien philosophies of government, in any case where the majority candidate died before the returns were published by the legislature and where two of such undesirable persons received the next highest number of votes.[40]

Upon the basis of the above rationale, a majority of the supreme court held that the General Assembly had been without power to elect any person as Govenor. Accordingly, Governor Arnall's hold-over had been valid; and his later resignation "immediately imposed upon the Lieutenant Governor the duties of Governor."[41]

Two of the justices disagreed with the majority, and each wrote a dissenting opinion. One of these was quite brief, concluding that the controversy was a non-justiciable one.[42] The other dissent was more extensive;[43] although it agreed with the majority that the question was judicially reviewable, it viewed the situation as triggering the legislature's electoral function. Under the constitutional directive, it argued, the General Assembly "was made something more than a mere animated adding machine."[44] Finally, it forcefully rejected the majority's interpretation of the directive to mean that "when the successful candidate dies before qualifying, it is nevertheless the duty of the General Assembly to solemnly declare him to be 'Governor-elect.' "[45]

III.

If it did nothing more, *Thompson v. Talmadge*[46] at least focused widespread public attention upon the legislative electoral function in

39. *Id.* "To attribute such an intention to the great hosts of Georgians who had a part in adopting the Constitution when the language they employed does not imperatively demand it would be unreasonable, if not unthinkable." *Id.* at 884-85, 41 S.E.2d at 897.

40. *Id.* at 888-89, 41 S.E.2d at 899-900. The court was also able to find what it viewed as "legislative interpretation" of the constitutional directive, which confirmed its approach. *Id.*

41. *Id.* at 889, 41 S.E.2d at 900. "But Mr. Thompson was elected in the general election in 1946 as Lieutenant Governor of this State, and he is required, in case of a vacancy in the office of Governor, to perform the duties of Governor." *Id.*

42. This was the opinion by Justice Candler. *Id.* at 907, 41 S.E.2d at 910.

43. This was the opinion by Chief Justice Jenkins. *Id.* at 890, 41 S.E.2d at 900.

44. *Id.* at 897, 41 S.E.2d at 904. "The figures merely furnish the basis that is the evidence on which the *declaration* required of the General Assembly by the Constitution is based." *Id.*

45. *Id.* at 889, 41 S.E.2d at 906. "True enough that a person now deceased once had a majority of the votes, but his narrow cell of six feet of earth owns nothing now—rather be it said nothing akin to lands, goods, tenements, or offices." *Id.* at 902, 41 S.E.2d at 907.

46. 201 Ga. 867, 41 S.E.2d 883 (1947).

designating a Governor. Although it had been diluted and tucked away in the state constitution for 122 years without mention, this function was now forcefully projected to the forefront by one of the most confusing epochs in state government. The fact that it was not the tool ultimately effective in thwarting this confusion was immaterial—its potential, and the General Assembly's willingness to utilize it in time of crisis, had now been demonstrated. If its clarification—or elimination—were in order, Georgia, as well as the observing states in the audience, had been put on notice.

The supreme court's opinion in *Thompson* could be, and has been, extensively discussed. Indeed, the mere decision to decide might be viewed as the most notable event of the litigation. As noted, this decision was accomplished by the drawing of a rather fine line between the question here presented and one "purely political" in nature. On the meaning of the constitutional directive itself, the majority opinion rang all the changes. From intent of the framers and the literal meaning of specific words, to historical considerations and the potential dangers of an alternative approach, the court hammered out its convictions. As noted, its conclusion of the controversy appeared to result more from a fear of legislative restriction than of legislative license. The specter of the General Assembly's being forced to a choice between two minority candidates for the state's highest office, with the vast majority of electors unrepresented upon the death of their elected candidate, was one the majority could not overcome. If this could be avoided only by the countering specter of the legislature's declaring a dead man to have been elected Governor—the feat found so incredible by the dissent—then so be it.

The official reaction by the General Assembly to the episode was vague and somewhat delayed. Two years after the court's decision it enacted statutes declaring itself "the sole judge" of the "election and qualifications" of the Governor,[47] with the power to "determine all questions relating thereto, including any contested election, and any question as to the eligibility or qualifications of the person elected Governor, ..."[48]

IV.

Twenty years were to elapse before the lightning of controversy would again strike the legislature's electoral function, but then it struck with a

47. GA. CODE ANN. § 40-101 (Rev. 1957).
48. GA. CODE ANN. § 40-104.1 (Rev. 1957).

vengence. In the 1966 general election for Governor of Georgia, the results appeared as follows: Howard Callaway received 449,894 votes (47.07%); Lester Maddox received 448,044 votes (46.88%); and Ellis Arnall received 57,832 votes (6.05%).[49] This time, therefore, the question presented by *Thompson* was absent; the situation was clearly one triggering the duty imposed by the constitution upon the General Assembly to select a Governor.[50] The time for head-on confrontation with this duty had finally arrived.

This confrontation materialized in the form of a voters' class action which challenged the constitutionality of the Georgia constitutional directive.[51] As presented to the United States District Court for the Northern District of Georgia, the plaintiffs' contention was that the directive violated the equal protection guaranty of the fourteenth amendment.[52] The court's *per curiam* opinion,[53] in noting the lengthy history of the directive, viewed the controversy to "bring into focus the question of gearing the Georgia Constitution to updated federal constitutional concepts."[54]

The district court adopted as controlling precedent the United States Supreme Court's decision in the so-called "Georgia county unit case," *Gray v. Sanders*.[55] The court restated the rationale of that decision to be that "once the class of voters is selected, the vote of each voter is to be

49. These figures are set out in the dissenting opinion of Mr. Justice Douglas in *Fortson v. Morris*, 385 U.S. 231, 236 (1966), discussed *infra*. Although the result is the same, there is a variance between these figures and those appearing in the appellants' statement of the case in *Jones v. Fortson*, 223 Ga. 7, 9, 152 S.E.2d 847, 849 (1967), also discussed *infra*. In the latter case, the figures are as follows: Callaway received 453, 685 votes; Maddox received 450, 900 votes; and Arnall received 52,898 votes.

50. "It follows that the Georgia constitutional provision in question is applicable and that the Legislature, pursuant to that provision, is under the duty to select as Governor one of the two candidates receiving the highest number of votes in the election." Morris v. Fortson, 262 F. Supp. 93, 95 (N.D. Ga. 1966).

51. Morris v. Fortson, 262 F. Supp. 93 (N.D. Ga. 1966). Actually, two cases presenting the same questions had been consolidated for hearing.

52. The court stated this contention to rest upon two grounds: "First, it is alleged that it would permit the malapportioned General Assembly of Georgia to elect a Governor of Georgia. Second, it is claimed that the election system set forth in that provision of the Georgia Constitution violates the Equal Protection Clause of the fourteenth amendment as interpreted by the Supreme Court in . . . *Gray v. Sanders*, . . . and particularly that portion of the decision which announces the 'one person, one vote' principle as being required in state elections." *Id.* at 94.

53. The court consisted of Circuit Judges Tuttle and Bell, and District Judge Morgan.

54. 262 F. Supp. at 95.

55. 372 U.S. 368 (1963). "Being of the view that *Gray v. Sanders* . . . is controlling, a discussion of the allegations resting on malapportionment is also unnecessary." 262 F. Supp. at 94.

treated the same."[56] Under that rationale, the court concluded, the Georgia provision was invalid:

> Many arguments may be made, but we need go no further than to point out . . . that the candidate receiving the lesser number of votes may be elected by the General Assembly. This 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.[57]

In reaching this conclusion, the court was forced to reject a number of arguments in favor of the legislative election. First it discounted the analogy to the federal electoral college principle by declaring that "a state may not avoid equality in the vote by following the federal electoral system."[58] Neither was it an answer, said the court, that the General Assembly might select the candidate having the greater number of votes. As long as the other result was possible, the directive was invalid.[59] Finally, the court refused to accept the justification of the directive's popular approval by the people; this was "without significance if the plan adopted fails to satisfy the requirements of the Equal Protection Clause."[60]

Accordingly, the district court entered a declaratory judgment to the effect that the directive of the Georgia Constitution "which authorizes and requires the election of the Governor by the General Assembly under the circumstances here presented is unconstitutional and void."[61]

Under the style of *Fortson v. Morris*,[62] the district court's decision was appealed to the United States Supreme Court, and, by a five-to-four division in that Court, reversed. Writing the majority opinion, Mr. Justice Black held simply that the district court's reliance upon *Gray* had been misplaced.[63] In that case, he said, large county voters had

56. 262 F. Supp. at 95. "Here Georgia has selected the class of voters in the election process for Governor. It is popular vote." *Id.*

57. 262 F. Supp. at 95. "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." *Id.*

58. 262 F. Supp. at 95. This too had been announced in *Gray v. Sanders* said the court.

59. "The fact that the system makes the other result possible is sufficient . . . to make it subject to constitutional attack prior to its use." 262 F. Supp. at 95.

60. 262 F. Supp. at 96. This position had been proclaimed, said the court, in *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

61. 262 F. Supp. at 96. The court granted a stay of ten days within which time the defendant could seek an additional stay from the United States Supreme Court.

62. 385 U.S. 231 (1966).

63. There, he said, "Georgia voters were denied equal protection of the laws by the operation of

demonstrated discrimination against them in favor of small county voters.[64] But,

> [n]ot a word in the 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.[65]

If legislative election of Governor could be employed initially, then certainly Georgia could utilize it as an alternative when the popular election process failed. "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 its Governor."[66]

But what of the district court's fear that the General Assembly may elect the candidate who received the fewer number of popular votes? Was there not the possibility that the will of the greater number would be ignored? The closest Mr. Justice Black appeared to come to answering this fear was his assurance that "the votes of the people were not to be disregarded. . . ."[67] Rather, the legislature was to consider them as "nominating votes" and was "to limit itself to choosing between the two persons on whom the people had bestowed the highest number of votes."[68]

Moreover, reasoned the majority, this election scheme was grounded in both practicality[69] and tradition:[70]

> Statewide elections cost time and money and it is not strange that Georgia's people decided to avoid repeated elections. The method they chose for this purpose was not unique, but was well known and frequently utilized before and since the Revolutionary War.[71]

Because the Court rejected the *Gray* analogy, it was confronted with a second argument of invalidity, one which the district court had expressly not considered. This argument was that the Georgia Legislature was

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a county-unit system under which state officials were elected by a majority of counties voting as units instead of by a majority of individual voters." *Id.* at 233.

64. But this, he said, "was only a voting case." *Id.*

65. *Id.*

66. *Id.* at 234.

67. *Id.*

68. *Id.*

69. "It would be surprising to conclude that, after a State has already held two primaries and one general election to try to elect by a majority, the United States Constitution compels it to continue to hold elections in a futile effort to obtain a majority for some particular candidate." *Id.*

70. The Court listed 40 states which utilized their legislatures in a similar manner. *Id.*

71. 385 U.S. at 234.

malapportioned and thus incapable of validly performing its electoral function. To this, Mr. Justice Black observed that the Court had previously held that the General Assembly could continue to operate as apportioned until May 1, 1968.[72] That deadline had not yet arrived, and thus the legislature was capable of electing a Governor.[73] Accordingly,

> Article V of Georgia's Constitution provides a method for selecting the Governor which is as old as the Nation itself. Georgia does not violate the Equal Protection Clause by following this article as it was written.[74]

One of the two dissenting opinions in *Fortson* was written by Mr. Justice Douglas,[75] who took issue with the majority's statement of the question presented.[76] That question, he argued, was not whether the state could legislatively elect a Governor, but "whether the legislature may make the final choice when the election has been entrusted to the people and no candidate has received a majority of the votes."[77] Thus formulated, the legislative election was "only a part of the popular election machinery,"[78] and squarely within the "one person, one vote" principle of *Gray*.[79] That principle, according to Mr. Justice Douglas, was violated by this legislative election.[80] Moreover, he feared, the majority's decision would perpetuate a "one party" system: "We would be less than naive to believe that . . . the predominantly Democratic legislature has now become neutral."[81]

The other dissenting opinion was written by Mr. Justice Fortas,[82] who also viewed *Gray* as controlling.[83] He reacted with alarm to the potential

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72. Toombs v. Fortson, 384 U.S. 210 (1966).

73. The Court also rejected the contention that the Democratic members of the General Assembly had obligated themselves to support the Democratic nominee. Those promises, said the Court, had been limited to the general election, which was now over.

74. 385 U.S. at 236.

75. *Id.* Concurring with Mr. Justice Douglas were Chief Justice Warren, and Justices Brennan and Fortas.

76. "The Court misstates the question we must decide." *Id.* at 238.

77. *Id.*

78. *Id.* "The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office."

79. The electoral college analogy was rejected: "But the Twelfth Amendment creates the exception in case of a President." *Id.* at 239.

80. "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." *Id.* at 240.

81. *Id.* at 241-42. The pledge taken by Democratic members of the legislature, he argued, extended through the legislative election of governor.

82. 385 U.S. at 242. Concurring with Mr. Justice Fortas were Chief Justice Warren and Justice Douglas.

83. "The analogy to *Gray v. Sanders* is clear." *Id.* at 244.

of the majority's resolution: "If the voting right is to mean anything, it certainly must be protected against the possibility that victory will go to the loser."[84] This was not a case, he contended, in which a state had merely provided for legislative election of its Governor.[85] Rather, the Georgia Constitution "purports to give the legislature power to complete the process begun at the polls—to cast aside the vote of the electorate and award the office to the winner or the loser of the popular election, as it may see fit."[86] Moreover, he lamented, "[t]he Georgia Legislature is concedely malapportioned, and is under a federal court order to reapportion itself."[87] To allow this legislature to select the Governor was "inconceivable."[88]

V.

Even though it had now withstood the attack of unconstitutionality, the Georgia General Assembly's electoral function still faced one remaining challenge. This challenge took its roots from actions by the legislature itself in 1964—the enactment of a state election code which provided, in part, as follows:

> In instances where no candidate receives a majority of the votes cast, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes, on the 14th day after the day of holding the first primary or election, unless such runoff date is postponed by court order. The candidate receiving a majority of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner.[89]

In reliance upon this statute, voters and taxpayers petitioned the state court to enjoin the Secretary of State from transmitting the 1966 general election returns to the General Assembly, and to order that a runoff election for Governor be held.[90] With the United States Supreme Court's

84. *Id.* at 243. "The integrity of the vote is undermined and destroyed by any scheme which can result in the selection of a person as Governor who receives the lesser number of popular votes." *Id.*

85. Even as to the permissiblity of this, Mr. Justice Fortas indicated doubt: "Much water has gone under the bridge since the late 1700's and the early 1800's." *Id.* at 247.

86. *Id.* at 244.

87. *Id., citing* Toombs v. Fortson, 384 U.S. 210 (1966).

88. *Id.* at 245. "But not until today has this Court allowed a malapportioned legislature to be the device for doing indirectly what a State may not do directly." *Id.*

89. Ga. Laws, 1964, p. 26, 175. This statute was repealed in 1969, but the replacement contains virtually the same provision in GA. CODE ANN. § 34-1514 (Supp. 1969).

90. This litigation was proceeding at the same time the *Morris* case was in the federal courts. In his dissenting opinion in *Morris*, Mr. Justice Douglas referred to the statute and to the point that the

decision in *Fortson v. Morris*,[91] it now became necessary for the Georgia Supreme Court to face this petition.[92] It did so in *Jones v. Fortson*.[93]

The court[94] viewed the "controlling question" in *Jones* to be "whether . . . the Georgia Election Code . . . , providing for the rules and regulations in the election of the Governor, is in irreconcilable conflict with Art. V Sec. I of the Georgia Constitution of 1945. . . ."[95] If such conflict existed, said the court, the constitution must control.[96] Proceeding to lay the constitution and the statute "side by side,"[97] a majority of the court thought it "plain and certain"[98] that in the situation here presented the legislature was vested with the "power and right"[99] to elect a Governor.

> The provisions of . . . the Georgia Election Code of 1964 do not apply to the election of Governor where no person in the general election receives a majority of the votes—the 'runoff' or selection between the two highest being reserved by the Constitution to the members of the General Assembly.[100]

Accordingly, the plaintiffs' petition was dismissed.

A dissenting opinion[101] charged the majority with turning its back upon the "one main purpose"[102] of the 1824 amendment to the

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Georgia Attorney General had previously ruled that it was controlled by the Georgia constitutional provision, 385 U.S. at 237. The district court had also made reference to the statute and had expressly stated that "we do not now consider the applicability of this run-off method to the contest between the two candidates for Governor who received the highest number of votes." 262 F. Supp. at 95-96, n. 2.

91. 385 U.S. 231 (1966).

92. *I.e.*, had the United States Supreme Court invalidated the Georgia Constitutional provision in *Morris* this would have resolved the validity of the 1964 statute.

93. 223 Ga. 7, 152 S.E.2d 847 (1967). The trial court had denied the petitioners' prayers and dismissed the petition.

94. The Georgia Supreme Court split five-to-two, with Presiding Justice Almand writing the majority opinion.

95. 223 Ga. at 10, 152 S.E.2d at 849-50.

96. "Under our Constitution and the decisions of this court, the State Constitution is superior in authority to an Act of the legislature in conflict with the Constitution, so where there is any conflict between a statute and the Constitution the provisions of the latter control." *Id.* at 13, 152 S.E.2d at 851.

97. *Id.* at 10, 152 S.E.2d at 850.

98. *Id.* at 16, 152 S.E.2d at 853.

99. *Id.*

100. *Id.*

101. The dissenting opinion, concurred in by Justice Cook, was written by Chief Justice Duckworth. 223 Ga. at 16, 152 S.E.2d at 853. It is interesting to note that it was Justice Duckworth who, twenty years earlier, had written the majority opinion for the court in *Thompson v. Talmadge*.

102. 223 Ga. at 16, 152 S.E.2d at 853.

constitution.[103] That purpose, argued the dissent, had been "to empower the people to elect their Governor . . . ."[104] The electoral function of the General Assembly formulated by that amendment was to be performed only when no person had received a majority of the votes upon completion of the popular election process.[105] With enactment of the statute of 1964, the popular election process was not complete until a runoff election, if required, had been held.[106] If the two candidates received the same number of popular votes in the runoff, then, and only then, would the legislature be authorized to elect the Governor. Under this approach, therefore, the constitutional provision and the election code were not in conflict.[107]

The dissent utilized this same approach in rejecting the contention that the need for a runoff election could never be determined because the constitution required that the election returns be sealed and sent to the General Assembly.[108] This all depended upon what the constitution meant by "*election returns*,"[109] said the dissent, and the obvious meaning was "returns from an election that has been completed as required by law."[110] Until the first votes had been counted, and it was determined that no runoff was necessary, there were no "election returns" to be transmitted.[111] Again, therefore, the statutory provision for a runoff election was construed as complementing the purpose of the constitutional provision.[112] To hold otherwise, concluded the dissent, "takes from the hands of the Georgia voter, his ballot, which is the only sure defense against dictatorship . . . ."[113]

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103. "This day will stand in history as one on which all the voters in free Georgia were, for the first time since 1824 deprived of their right to choose with their votes the Governor who will rule over them." *Id.*

104. *Id.*

105. Until the statute of 1964, said the dissent, this process had been complete at the conclusion of the first election; and if that election failed to produce a majority candidate, then "election by the General Assembly was the only way left to obtain a Governor." *Id.* at 17, 152 S.E.2d at 853.

106. "There can be no completed election under the 1964 Act until the procedure there prescribed for completing an election has been followed when necessary to secure someone with a majority." *Id.* at 18, 152 S.E.2d at 854.

107. The court's duty was said to be to give statutes a construction which would render them constitutional rather than unconstitutional. *Id.* at 20, 152 S.E.2d at 855.

108. Thus, went the argument, this would preclude a discovery of whether someone had received a majority of the votes.

109. 223 Ga. at 18, 152 S.E.2d at 854.

110. *Id.* at 19, 152 S.E.2d at 854.

111. ". . . only when this has been done can there be produced 'returns for every election for Governor,' which can be lawfully sealed and directed as the Constitution requires." *Id.*

112. *I.e.*, to permit the people to elect the Governor.

113. 223 Ga. at 22, 152 S.E.2d at 856. As to whether the decision by the United States Supreme Court in the *Morris* case controlled the decision here in *Jones*, the dissent declared that "the answer is so plainly, no, that even a law student could give this answer." *Id.*

With the Georgia Supreme Court's decision in *Jones v. Fortson*, therefore, the exercise of the General Assembly's electoral function could no longer be stayed from the Callaway-Maddox contest. The legislature must proceed to declare one of these men Governor of Georgia.[114]

VI.

The twenty years which elapsed between "Talmadge-Thompson" and "Callaway-Maddox" had thus contributed little to resolving the problems surrounding the Georgia General Assembly's electoral function. Although most observers would probably agree that the latter episode more clearly fell within the province of this function, there appeared to be few who did not at least have some questions about the entire matter.

Reversing the usual strategy of proceeding against such a system, the attack on grounds of unconstitutionality was pressed first. As noted, the lower federal court was completely sympathetic to this attack, viewing the situation as precisely governed by the one-man-one-vote concept of equal protection. Conclusive for that court was the possibility that the candidate with the fewer number of votes might be elected Governor by the General Assembly. By a closely divided vote, the United States Supreme Court surveyed the matter from a different perspective. For that Court, the question was simply whether a state could validly provide for legislative selection of its Governor. Influenced by considerations of practicality and tradition, the majority thought this power uninhibited by more recent developments in federal constitutional law. It refused to accept the minority's derivation of equal protection from defining popular election to include the legislative function. Further, it summarily rejected the malapportionment theory, in a manner deemed inconceivable by the dissenters. With the Supreme Court's decision, the constitutional validity of the legislature's electoral function was finally established.

The second-front attack on the function consisted of an effort at dilution. If the runoff popular election required by the 1964 statute could be determined a prerequisite to applicability of the function, then rarely indeed would the occasion for legislative election of Governor ever arise. As noted, however, only a minority of the Georgia Supreme Court would agree to that approach. The majority saw the issue purely as one of legislative enactment in conflict with constitutional provision, with

114. The General Assembly proceeded to elect Lester G. Maddox as Governor.

the latter necessarily in control. This split in the Georgia court forcefully demonstrates the wide range of views existing at this late date on the precise electoral role which the constitution commanded the General Assembly to play.

By 1968, Georgia had been convinced that there must be a more desirable way in which to elect a Governor.[115] At that time the people ratified amendments to the state constitution which considerably changed the electoral process. First, these amendments evidenced an intent to avoid a repetition of the Talmadge-Thompson occurrence. They provide that upon the death or resignation of the Governor-elect, the Lieutenant Governor-elect, upon becoming Lieutenant Governor, is to exercise the executive power until the next general election.[116] Thus, no possibility of legislative election was to arise in this context.

The amendments were also directed to the Callaway-Maddox situation. They instruct that the various poll managers are to send the election returns to the Secretary of State, who is to transmit them to a "Constitutional Officers Election Board."[117] This Board is vested with the duty of opening and publishing the returns and declaring a duly elected Governor.[118] If the Board determines that no candidate received a majority of the popular votes, it

> shall continue the gubernatorial election by immediately calling a runoff election and designate as candidates therein the two persons who received the highest number of votes, who continue in life and have not declined to continue as a gubernatorial candidate.[119]

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115. Actually, the proposed new Constitution of 1964, as enacted by both houses of the General Assembly, had provided for a special election for Governor when no candidate received a majority of the votes cast in the general election, thus eliminating the legislature's election in such a case. Proposed Constitution of 1964, Art. IV, § 7 (3). But a three-judge district court for the Northern District of Georgia enjoined the placement of this proposal on the ballot for ratification by the people in 1964, and it never became the law of the state. The text of the district court's order is printed in the dissenting opinion of Mr. Justice Goldberg in *Fortson v. Toombs*, 379 U.S. 621, 639 (1965). In his dissenting opinion in *Fortson v. Morris*, 385 U.S. 231, 245 (1966), Mr. Justice Fortas made note of this point in his argument against allowing a malapportioned legislature to elect the Governor: "But now this Court holds that this same unreformed legislature is not so malapportioned that it cannot itself select the Governor by its direct action! I confess total inability to understand how the two rulings can be reconciled." *Id.* at 246.

116. GA. CONST. art. V, § 1 (7), GA. CODE ANN. § 2-3007 (Supp. 1969). Provision is made also for the holding of the next general election.

117. GA. CONST. art. V, § 1 (3), GA. CODE ANN. § 2-3003 (Supp. 1969). This Board is composed of the Speaker and Clerk of the House of Representatives, the President Pro Tempore and the Secretary of the Senate, and the chairman of all standing committees of the General Assembly.

118. Each candidate can designate one person to attend the opening of the returns by the Board.

119. GA. CONST. art. V, § 1 (1) (4), GA. CODE ANN. § 2-3004 (Supp. 1969). Only the returns for the two persons designated by the Board are to be counted in the runoff election.

The returns of the runoff election are also canvassed by the Board, and the person receiving the most votes is declared Governor.[120] Again, therefore, the General Assembly's power to elect has been eliminated.[121]

Contrasting these amendments against the background here sketched, at least two points might be incidentally noted. First, the great fear of the Georgia court in *Thompson* had been of forcing the legislature to a choice between two minority candidates, with the vast majority of electors unrepresented upon the death of their elected candidate. That potential no longer exists. Second, the great fear of a majority of the federal judges who considered the *Morris* case had been of electing the candidate who received the fewer number of popular votes. That prospect also has been abolished. Indeed, the General Assembly does not even possess the power of breaking a tie in the runoff election. If the purpose of the 1824 amendment to the constitution was to allow the people to elect their Governor, that purpose has now been completely confirmed.

VII.

The effort here has not been to formulate a brief for state legislatures, but rather a plea for criticism in context. It is logically indefensible to unload the governmental dirty work upon these bodies and then to ridicule them as an institution. Although they may in fact do much which deserves ridicule, more discrimination as to thrust should be employed.

The attempt here has been to isolate one such function historically delegated to legislatures in some states, and to view that function in the context of specific controversies. Given the nature of the problem to be solved, is there any wonder that the function has been a controversial one? Aside from the question of constitutionality, the power to elect a Governor fits awkwardly indeed into the legislative process.

For Georgia, this discussion is of interest only from the standpoint of history. But for other states which may still delegate the electoral function—and for all states which assign equally inappropriate tasks to their legislatures—perhaps there is a lesson to be learned.

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120. *Id.*

121. An amendment also provides that "The General Assembly may provide by law for any additional procedures or requirements connected with any subject-matter embraced within Paragraphs III and IV, . . . and in connection with any contested election, provided such laws are not inconsistent with the provisions therein." GA. CONST. art. V, § 1(1)(5), GA. CODE ANN. § 2-3005 (Supp. 1969).