

AND IF THERE BE NO CHOICE MADE: A MEDITATION ON SECTION 47 OF THE VERMONT CONSTITUTION

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INTRODUCTION**

Majority rule is the essential mode of democratic rule when a body of people is asked to decide between two choices. “Yes” or “no”; this candidate or that are choices that have only one outcome—one candidate has the majority of votes and prevails. When three or more candidates are on the ballot for an office, it becomes harder for any one candidate to attain a majority of votes. As such three- or four-way elections go, obtaining more votes than anyone else—a plurality—has become the standard in most states, cities, and towns.¹

Vermont is different. In Vermont, majority rule remains the standard for the election of the three highest state officials and some local offices.² Section 47 of the Vermont Constitution requires a candidate running for Governor, Lieutenant-Governor, or state Treasurer to obtain a majority vote in order to be elected.³ Failing that, “the Senate and House of Representatives shall by a joint ballot, elect to fill the office, not filled as aforesaid, one of the three candidates for such office (if there be so many) for whom the greatest number of votes shall have been returned.”⁴

During the 2002 political campaign, Section 47 was called a “quirk” by some partisans.⁵ They described it as a “little known” provision of the

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** The facts and assertions presented in this essay rely heavily on the contents of historical constitutions and documents. Most of these historical documents, unless otherwise noted, can be located at the Avalon Project at Yale Law School, at <http://www.yale.edu/lawweb/avalon/states/stateco.htm> (last visited Apr. 6, 2003) (cataloguing four centuries of state constitutions).

1. One has only to consider the electoral college in Presidential elections where a candidate can actually win without a majority (or even a plurality) of the popular vote. See *infra* Part II.

2. “[A]nd if there be no choice made, then the Council and General Assembly, by their joint ballot, shall make choice of a Governor.” This phrase is taken from the language of Chapter II, Section XVII of the 1777 Vermont Constitution. VT. CONST. of 1777, ch. II § XVII, reprinted in RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 12 (Paul S. Gilles & D. Gregory Sanford eds., 1991) [hereinafter COUNCIL OF CENSORS].

3. VT. CONST. Ch. II, § 47.

4. *Id.*

5. E.g., Christopher Graff, *Democrats seek to frame election in final week*, TIMES ARGUS (Montpelier), Oct. 26, 2002, available at <http://timesargus.nybor.com/Archive/Article/55262> (last visited Apr. 6, 2003). A 2002 Democratic Campaign ad stated:

Jim Douglas, Brian Dubie and the Republican Party are openly talking about stealing your vote. How? They want to use a *little-known quirk* in the Vermont

Vermont Constitution⁶ and said that anyone who would not support the plurality winner as the choice of the legislature, if no candidate received a majority of the votes, was a cheat.⁷

The recent attention given to Section 47 is not the first time the Vermont Constitution has surfaced as a point of debate for Vermont elections. For example, the debates over Act 60 (Vermont's educational financing law) and same-sex Civil Unions fired recent general elections as factions debated the constitutionality of each from the stump. By comparison, the election of 2002 was a quieter affair, but like its recent predecessors, the 2002 campaign featured a spirited debate on the meaning of a provision of the Vermont Constitution. The discussion was mainly political, not constitutional, but as in previous years it demonstrated how central the Vermont Constitution has become in the lives of Vermonters.

Section 47 has its own history. There have been 160 general elections in Vermont's 225-year history.⁸ In that time, there has been no popular (majority) election of seventy offices, including twenty-two races for Governor, twenty-six for Lieutenant-Governor, and seventeen for state Treasurer.⁹ The offices of Secretary of State, Auditor of Accounts, and Attorney General account for five other instances where the Joint Assembly had to meet to choose the winner.¹⁰

Constitution that allows the Legislature to pick the governor and lieutenant governor if no candidate gets 50 percent of the vote. They believe that even if Jim Douglas finishes second on Election Day, the Legislature should be free to install him as our next governor.

Id. (emphasis added).

6. See *id.* (quoting a Democratic ad accusing "Republicans of trying to steal the election").

7. How should a Senator or Representative vote when it comes to that critical moment? Some say it is obvious: that the right choice is the candidate with the plurality of votes. That makes sense. Others might say the representative should be bound by the plurality of votes in the district that elected him or her. What clearer plebiscite could there be than the vote at the General Election for the representative or senatorial district? That too makes sense. Then we enter the deeper question, long debated, of whether a representative is *of* or *for* the people who live in the district. If *of* the people, the representative has been given a nod as someone to trust, someone to whom power has been transferred. If *for* the people, a vote should follow the will of the electorate, to the extent that you can discern it. Alas, the Vermont Constitution gives us little help and no real guidance on how to handle this difficult question.

8. There were annual elections beginning in 1778, and biennial elections beginning in 1870. 21 STATE PAPERS OF VERMONT 51 (Christie Carter ed., 1989) (compiling information about Vermont election history from 1789-1989). Compare An Act for Regulating the Election of Governor, Deputy Governor, Council, and Treasurer (1779), reprinted in 12 STATE PAPERS OF VERMONT 82 (Allen Soule ed., 1964), with VT. CONST. ch. II, § 43.

9. For a history of races in which there was no majority winner see *Majority Elections in Vermont*, at <http://vermont-archives.org/governance/Majority/majority.htm> (last visited Apr. 6, 2003).

10. *Id.*

Those who object to the joint assembly deciding elections point to the large number of public officials elected by plurality in Vermont. These offices include U.S. Senators, U.S. Representatives, all county elective offices, state senators, state representatives, and all local offices filled by elections using the Australian Ballot.¹¹ The only remaining local offices that require a majority of votes for election are town officers elected at traditional town meetings or pursuant to municipal charter.¹²

Whether the issues of the 2002 general election will trigger an amendment of Section 47 and its replacement with plurality rule, a run-off election if no candidate obtains more than 40% of the popular vote, or some newer approach (such as instant run-off voting), is at this time an open question.¹³ Previous attempts to repeal the majority requirement have not been successful; but we live in a politically diverse culture.¹⁴ With the rise of other parties and independent candidates, Vermont can expect more elections to remain unsettled after the voting is done if the majority requirement of Section 47 remains unchanged. Nonetheless, before we attempt to change this constitutional "quirk," we should make sure we understand it.

This Essay seeks to place the Vermont Constitution's majority requirement in its proper context within and outside Vermont. First, this Essay will examine how the first state constitutions dealt with majority and plurality elections. Second, this Essay will discuss how the President is elected and will look to the history of presidential elections by studying the

11. VT. STAT. ANN. tit 17, §§ 2592, 2682(c) (local elections) (1982). The Australian ballot is a method of voting where all the candidates' names are printed on a ballot, which the voter marks in secret.

12. *Id.* § 2660. Subsection (c) explains:

If no person has obtained a majority by the end of the third vote, the moderator shall announce that the person receiving the least number of votes in the last vote and in each succeeding vote shall no longer be a candidate, and the voting shall continue until a candidate receives a majority.

Id. The Burlington City and Colchester Town Charters alter this general law on the election of local officials by requiring a candidate to obtain 40% of the votes cast for the office or face a run-off with the second candidate with the next greatest number of votes. Oddly, both Charters explain that the person with the plurality of votes cast in the run-off is the winner; yet mathematically, with only two candidates one will always win a majority, unless there is a tie. VT. STAT. ANN. tit. 24, App. ch. 3, § 5; tit. 24, App. ch. 113, § 202 (2002).

13. There is evidence that many Vermonters support a change in the current voting system. See David Mace, *Runoff Backers Tout Poll*, TIMES ARGUS (Montpelier), March 12, 2002, (noting that fifty-one of fifty-four towns approved non-binding referenda on instant run-off voting), available at <http://timesargus.nybor.com/Legislature/Story/43929.html> (last visited Apr. 6, 2003). However, as of late May 2003, neither the legislature nor any officer of the state had made any attempt to effect such a change. Still, with the growth of third parties in Vermont, this issue promises, like the phoenix, to rise again in another election cycle.

14. See *infra* Part V.

Articles of Confederation and the Constitution of the Confederate States of America. Third, this Essay will survey how the individual states currently elect their governors. Fourth, this Essay will review the history of majority rule in Vermont by examining how Vermonters have elected federal, state, and local officials. Finally, this Essay will consider the numerous proposals made to change the Vermont Constitution's majority requirement.

I. THE FIRST STATE CONSTITUTIONS

With a few notable exceptions, most of the 1777 Vermont Constitution was taken directly from the Pennsylvania Constitution of 1776.¹⁵ Vermont's contributions added a number of firsts, including the abolition of slavery,¹⁶ compensation for the taking of private property for public uses,¹⁷ and universal manhood suffrage.¹⁸ Another first was Vermont's majority requirement for the election of top officials.¹⁹ Pennsylvania has used the plurality system for electing its Governor since its first Constitution in 1639.²⁰ But in its first constitution following independence, Pennsylvania chose not to elect its Governor (called President of the Council) by popular vote at all, leaving the decision entirely to the joint assembly.²¹

Leaving the decision to the legislature was the preferred method of electing a governor following independence. By the time Vermont adopted its constitution on July 8, 1777, Delaware, Georgia, Maryland, New Hampshire, New York, South Carolina, and Virginia had adopted constitutions.²² Each constitution, except New York's, provided for the election of a Governor or President by a vote of the legislature.²³ New York adopted a popular plurality as the standard for election.²⁴ Rhode Island, relying on its 1663 Royal Charter until 1843, also provided for the popular election of the Governor by a plurality vote.²⁵

15. Compare PA. CONST. of 1776, with VT. CONST. of 1777.

16. VT. CONST. of 1777, ch. I, § I.

17. *Id.* ch. I, § II.

18. *Id.* ch. I, § VIII.

19. *Id.* ch. II, § XVII.

20. See *supra* note **.

21. "The president and vice-president shall be chosen annually by the joint ballot of the general assembly and council, of the members of the council." PA. CONST. of 1776 ch. II, § 19.

22. DEL. CONST. of 1776, art. VII; GA. CONST. of 1777, art. II, § 1-2; MD. CONST. of 1776, art. XXV; N.H. CONST. of 1776; N.J. CONST. of 1776, art. VII; N.C. CONST. of 1776, art. XV; S.C. CONST. of 1777, art. II, § 1; VA. CONST. of 1776. See generally *supra* note **.

23. *Id.*

24. N.Y. CONST. of 1777, § 17.

25. CHARTER OF R.I. (1663), reprinted in THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 49 (Philadelphia, Francis Bailey 1781).

Given the fact that many colonial Vermonters had emigrated from Connecticut has led to speculation that the Connecticut Constitution was the model for Vermont's adoption of the legislative election when no candidate obtained a majority. Such speculation is a dead end, however, since Connecticut at the time also relied on plurality for elective officials.²⁶

Of the original thirteen colonies, only Massachusetts adopted the majority requirement for high public office, but not until its 1780 Constitution. Accordingly, if no candidate won a majority, the House of Representatives chose a Governor from the two candidates with the highest votes.²⁷ Eventually, New Hampshire adopted this system, but changed to plurality election in 1912.²⁸ Vermont was the only state before 1780 to require a majority to elect its top officials. Of the first fourteen states, Vermont was one of only five that recognized popular election of a Governor at all. Today in Massachusetts, as in most states, the Governor is elected by plurality vote with election by the General Assembly required only in the case of a tie vote. In fact, Massachusetts abandoned majority election rules, in favor of plurality, by constitutional amendment in 1855.²⁹

A handful of other states also experimented with majority rule, only to change to plurality or other standards for election in later years. Virginia, for instance, adopted the rule of majority vote for Governor in 1851, with an election in the Joint Assembly between the top two candidates if neither earned a majority.³⁰ Virginia's Constitution changed to plurality in 1872.³¹ Georgia adopted a new Constitution in 1789 that gave its House of Representatives the power to choose three candidates, from whom the

26. "[T]he fundamental orders were the beginning of Connecticut as a commonwealth." William M. Maltbie, *Historical Antecedents: The First Constitution of Connecticut*, at <http://www.sots.state.ct.us/RegisterManual/Section/firstconst.htm> (last visited Apr. 6, 2003). Section 2 of the Fundamental Orders (1638-39) provided for a plurality vote for Governor, stating that:

every person present and qualified for choice shall bring in (to the persons deputed to receive them) one single paper with the name of him written in it whom he desires to have Governor, and he that hath the greatest number of papers shall be Governor for that year. And the rest of the Magistrates or public officers to be chosen in this manner

FUNDAMENTAL ORDERS OF 1638-39. The 1662 Charter of the Colony of Connecticut provided the same rule. CHARTER OF THE COLONY OF CONN. of 1662. The current Connecticut Constitution requires victory by a plurality vote for the elections of a Governor, Lieutenant-Governor, Secretary, Treasurer, Comptroller, and Attorney General. CONN. CONST. art. IV, § 4.

27. MASS. CONST. of 1780, pt. II, ch. II, § 3, available at <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited Apr. 6, 2003).

28. N.H. CONST. pt. II, art. 42.

29. MASS. CONST. pt. II, ch. II, art. III, amend. XIV.

30. See Robert P. Sutton, CONSTITUTION MAKING IN THE OLD DOMINION 125 (1989) (Virginia became "the next to the last state to abandon the idea of legislative appointment of the Governor").

31. VA. CONST. of 1872, art. IV, § 2, available at <http://confinder.richmond.edu/1872.html> (last visited Apr. 6, 2003).

Senate would elect one as Governor.³² In 1798, both chambers became authorized to elect the Governor by joint ballot.³³ Then, in 1824, a popular majority was required for election of governor.³⁴ Failing that, the House and Senate would choose from among the two persons having the highest votes.³⁵ This method remained in place until 1976 when the legislature provision was replaced by run-off elections.³⁶

Eventually, all of the states that elected their governors in the Joint Assembly abandoned that system. For instance, in Maryland popular election of governors began in 1812 with an implied plurality required for election.³⁷ In addition, North Carolina changed to plurality in 1835,³⁸ New Jersey in 1844,³⁹ and Maryland explicitly in its new Constitution of 1851.⁴⁰

II. ELECTION OF A PRESIDENT

The 1777 Articles of Confederation provided for the election of a president by the Continental Congress, not by popular election.⁴¹ In 1789, the U.S. Constitution granted voters the right to participate in the election of the president, albeit indirectly. The result is that the popular vote in each state determines only the presidential electors.⁴² The President must be elected by a majority vote of the electors, who constitute the electoral college.⁴³ Each state is entitled to a portion of the 538 total electoral votes, based on the number of representatives in the U.S. House and Senate.⁴⁴ The electoral system has received its share of criticism, most notably during the 2000 presidential election. That year, neither of the major candidates

32. GA. CONST. of 1789, art. II, § 2, available at <http://www.founding.com/library> (last visited Apr. 6, 2003) (under founding era documents).

33. GA. CONST. of 1798, art. II, § 2, available at <http://www.founding.com/library> (last visited Apr. 6, 2003) (under founding era documents).

34. *Fortson v. Morris*, 385 U.S. 231, 232 (1966).

35. *Id.* at 233-34.

36. GA. CODE ANN. § 21-2-501(a) (1998).

37. MD. CONST. of 1776, art. XVII, § 2 (ratified 1812).

38. N.C. CONST. of 1835, art. II, § 3, reprinted in *JOURNAL OF THE CONVENTION, CALLED BY THE FREEMEN OF NORTH CAROLINA, TO AMEND THE CONSTITUTION OF THE STATE (1835)*, available at <http://docsouth.unc.edu/nc/conv1835/conv1835.html> (last visited Apr. 6, 2003).

39. N. J. CONST. of 1844, art. V, § 2, available at http://www.njstatelib.org/cyberdesk/nj/1844_00.html (last visited Apr. 6, 2003).

40. MD. CONST. of 1851, art. II, § 3, available at <http://www.mdarchives.state.md.us> (last visited Apr. 6, 2003) ("The Speaker of the House of Delegates shall then open the said returns in the presence of both houses, and the person having the highest number of votes, and being constitutionally eligible, shall be the Governor, and shall qualify in the manner herein prescribed.")

41. ARTS. OF CONFEDERATION art. IX.

42. U.S. CONST. art. II, § 1, amends. XII, XIV, XXIII.

43. *Id.*

44. *Id.*

received a majority of the popular vote, but George W. Bush received a majority of the electoral votes.⁴⁵ Interestingly, Article II of the Confederate States Constitution provided for the election of a President and Vice-President "by ballot by the States represented in this Congress, each State casting one vote, and a majority of the whole being requisite to elect."⁴⁶

III. HOW GOVERNORS ARE ELECTED TODAY

Today, plurality is the standard in forty-six states for the election of Governor in the general election.⁴⁷ In addition to Vermont, three other states—Arizona, Mississippi, and Georgia—elect their governors using a different method than a plurality of votes. In Arizona, a majority is required to elect the Governor; failing that, there is a run-off election between the candidates with the two highest vote totals.⁴⁸ If there is a tie, the Joint Assembly decides the election.⁴⁹ In Mississippi, the votes are tallied for governor in each house district, and the candidates are entitled to one "electoral vote" for each district won by a plurality of votes.⁵⁰ Once these numbers are totaled, the candidate with a majority of electoral votes is declared elected.⁵¹ Incidentally, all votes in the Mississippi Legislature, as in many states, involving contests of elections are made *viva voce* and not

45. Bush received 47.87% of the popular vote and 271 electoral votes; Gore won 48.38% of the popular vote and 266 electoral votes. Federal Election Comm., *2000 Presidential Popular Vote Summary for all Candidates Listed on at Least One State Ballot*, at <http://www.fec.gov/pubref/fe2000/prespop.htm> (last visited Apr. 6, 2003).

46. CONST. FOR THE PROVISIONAL GOV'T OF THE CONFEDERATE STATES OF AM., art. II, § 1, No. 2, reprinted in 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, 1861-1865, S. Doc. No. 58-234, at 904 (2d Sess. 1904).

47. The following states have constitutional or statutory provisions that establish plurality as the standard for electing the state's governor. ALA. CONST. art. V, § 115; ALASKA CONST. art. III, § 3; ARK. CONST. art. VI, § 3; CAL. ELECTION CODE § 15450 (West 1996); COLO. CONST. art. IV, § 3; CONN. CONST. art. IV, § 4; DEL. CONST. art. III, § 3; FLA. CONST. art. VI, § 1; HAW. REV. STAT. § 11-155 (1993); IDAHO CONST. art. IV, § 2; ILL. CONST. art. V, § 5; IND. CONST. art. V, § 5; IOWA CONST. art. IV, § 4; KAN. STAT. ANN. § 25-702 (2000); KY. CONST. § 70; LA. REV. STAT. ANN. § 18-512 (West 1979); ME. CONST. art. V, pt. 1, § 3; MD. CONST. art. II, § III; MASS. CONST. ch. II, art. 3, amend. XIV; MICH. COMP. LAWS § 168.61 (2001); MINN. STAT. ANN. § 208.05 (West 1992); MO. CONST. art. IV, § 18; MONT. CONST. art. IV, § 5; NEB. CONST. art. IV, § 4; NEV. CONST. art. V, § 4; N.H. CONST. art. XLII; N.J. CONST. art. V, § 4; N.M. CONST. art. V, § 2; N.Y. CONST. art. IV, § 1; N.C. GEN. STAT. § 147-4 (2001); N.D. CONST. art. V, § 3; OHIO CONST. art. III, § 3; OKLA. CONST. art. VI, § 5; OR. CONST. art. V, § 5; PA. CONST. art. IV, § 2; R.I. CONST. art. IV, § 2; S.C. CONST. art. IV, § 5; S.D. CONST. art. IV, § 2; TENN. CONST. art. III, § 2; TEX. CONST. art. IV, § 3; UTAH CONST. art. VII, § 2; VA. CONST. art. V, § 2; WASH. CONST. art. III, § 4; W. VA. CONST. art. VII, § 3; WIS. CONST. art. V, § 3; WYO. CONST. art. IV, § 3.

48. ARIZ. CONST. art. V, § 1.

49. *Id.*

50. MISS. CONST. art. V, § 140.

51. *Id.*

by ballot.⁵² In Georgia, there is a run-off election between the two candidates with the greatest number of votes in the primary and the general elections.⁵³ A constitutional challenge to this provision of Georgia law was brought in 1993 on equal protection grounds and proved unsuccessful.⁵⁴

Some states require a candidate to receive a majority of votes in the primary election in order to qualify for the nomination. In Arkansas and Louisiana, a candidate who obtains a majority in the primary wins the election—eliminating the need for the general election in that race.⁵⁵ In Florida, if no candidate receives a majority of the votes in the primary election, a second primary is held.⁵⁶ In Georgia, Louisiana, Mississippi, Oklahoma, South Carolina, and Texas, the failure of any candidate to obtain a majority in the primary leads to a run-off between the two candidates with the highest votes to determine the nomination.⁵⁷ In North Carolina the primaries require a “substantial plurality.” This means a candidate must receive at least 40% of the vote in the primary in order to qualify for the nomination.⁵⁸ A run-off, second primary, occurs if no candidate obtains that number.⁵⁹ South Dakota shares a similar system, but requires only a minimum of 35%.⁶⁰

IV. A SHORT HISTORY OF MAJORITY RULE IN VERMONT

The first law on general elections, enacted in 1779, ordered constables to warn all freemen of each town to meet at 9:00 a.m. on the first Tuesday of September, to elect state and federal officials.⁶¹ Every voter took the Freeman's Oath, and then the meeting proceeded by electing a Town Representative and by taking the written ballots of voters for the other offices to be filled that day.⁶² No instructions were given for determining the victor in this first act,⁶³ and procedures were left to the town.⁶⁴

52. *Id.*

53. GA. CODE ANN. § 21-2-501(a) (1998).

54. *Pub. Citizen, Inc. v. Miller*, 813 F. Supp. 821, 823-24, 833-34 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993).

55. ARK. CODE ANN. § 7-7-304(a)(2) (Michie 2000); LA. REV. STAT. ANN. § 18:511 (West 1979).

56. FLA. STAT. ANN. § 100.061 (West 2002).

57. GA. CODE ANN. § 21-2-501(a) (1998); LA. REV. STAT. ANN. § 18:481 (West 1979); MISS. CODE ANN. § 23-15-191 (1991); OKLA. STAT. ANN. tit. 26, § 1-103 (West 1997); S.C. CODE ANN. § 7-17-600 (Law. Co-op. 1991); TEX. ELECTION CODE ANN. § 172.003-004 (Vernon 1986).

58. N.C. GEN. STAT. § 163-111 (1992).

59. *Id.*

60. S.D. CODIFIED LAWS § 12-6-51.1 (Michie 1995).

61. 12 STATE PAPERS OF VERMONT, *supra* note 8, 82-84.

62. *Id.* The Freeman's Oath (now known as the Voter's Oath) is still administered to all Vermont voters. It reads:

A. Town Representative

On Election Day, the decision of who would serve as a town representative was made town-by-town. All other offices were filled following a formal count or tally by canvassing committees. Originally, majority was the rule in each of these elections, but over time the difficulty of achieving a majority forced the General Assembly to rethink the issue.

Majority was implied in a 1787 act, giving voters a two-hour opportunity to cast ballots for town representative.⁶⁵ At the end of that period, the law explained, "if no choice shall be made, then the said constable shall be at Liberty [sic] to count the votes afterwards brought in without such delay."⁶⁶ The law grew more specific in 1797, explaining, "if no person shall have a majority of all the votes, the presiding officer of the meeting shall notify the same; and call on the freemen as aforesaid, giving a reasonable time only for receiving such votes, till an election shall be made."⁶⁷ A two-hour period was still the rule until 1838, when voters were given five hours to cast ballots.⁶⁸

In 1913, the General Assembly first embraced plurality as the default rule.⁶⁹ If towns failed to elect a majority candidate for representative in two tries using the majority rule, the candidate with the largest number of votes was elected on the third try.⁷⁰ In 1935, plurality took over on the second ballot,⁷¹ and in 1939 majority was eliminated entirely.⁷² There would be no run-off—the candidate with the most votes was elected.

You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the state of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person.

VT. CONST. ch. 2, § 42.

63. *Id.*

64. *Id.*

65. An Act for Regulating the Election of Governor, Lieutenant-Governor, Council, Treasurer, and Representatives (1787), reprinted in 14 STATE PAPERS OF VERMONT 247-50 (John A. Williams ed., 1966).

66. *Id.* at 248.

67. LAWS OF THE STATE OF VERMONT 546-47 (Revision of 1797) (directing the mode of election of Governor, Lieutenant-Governor, Treasurer, councilors, and representatives).

68. Act of Nov. 5, 1838, No. 15, § 2, 1838 Vt. Acts & Resolves 10.

69. Act of Feb. 5, 1913, No. 11, sec. 1, § 183, 1912 Vt. Acts & Resolves 11.

70. *Id.*

71. Act of Mar. 28, 1935, No. 8, sec. 3, § 270, 1935 Vt. Acts & Resolves 15, 16.

72. Act of Apr. 11, 1939, No. 8, sec. 3, § 270, 1939 Vt. Acts & Resolves 12, 13.

B. U.S. Representatives and Senators

Today, Vermont sends one representative to Congress, but this number has varied over the years as Vermont's population changed in proportion to the nation's. Vermont's greatest congressional representation occurred from 1813 to 1823 when Vermont sent six representatives to Congress.⁷³

After Vermont attained statehood in 1791, its congressional election law required a majority to elect.⁷⁴ Failing that, a plurality was required in the run-off election among the top three candidates.⁷⁵ In the case of a tie, the election was to be determined by the clerks "openly & publickly [sic]" by lot.⁷⁶ A 1792 act expanded the run-off to the top four candidates, while a 1794 act opened the run-off to all, simply directing the freemen of the district "to choose a person to represent this State in Congress."⁷⁷ A strict majority requirement was adopted in 1796, with elections continuing to be held until a majority was achieved.⁷⁸

Following an 1811 law that abolished representative districts in favor of election-at-large,⁷⁹ an 1812 act dropped the majority requirement in favor of plurality elections.⁸⁰ An 1818 act reestablished congressional districts and a strict majority requirement, regardless of the number of elections.⁸¹

The strict majority requirement often necessitated numerous run-off elections until a majority winner emerged. In the 1830 election in the Fourth Congressional District, no candidate won a majority of votes. There were ten run-off elections until one of the main candidates died and Herman Allen was elected in June of 1832, a few months before a new election was held.⁸² The law was altered again in 1832, changing the standard for election at the third run-off from majority to plurality.⁸³ This provision

73. The history of Vermont's congressional delegations can be traced at <http://vermont-archives.org/govinfo/elect/reptterms.htm> (last visited Apr. 6, 2003).

74. An Act Dividing This State into Districts for Electing Representatives to Congress (1791), reprinted in 14 STATE PAPERS OF VERMONT, *supra* note 65, at 580-81.

75. *Id.*

76. *Id.* at 582.

77. An Act Dividing This State into Districts for Electing Representatives to Congress of the United States (1792), reprinted in 15 STATE PAPERS OF VERMONT 126-28 (John A. Williams ed., 1967); An act Dividing the State into Districts for Electing Representatives to the Congress of the United States and Directing the Mode of Their Election (1794), reprinted in *id.* at 308-11.

78. An Act Dividing the State into Districts for Electing Representatives to the Congress of the United States, and Directing the Mode of Their Election (1796), reprinted in 16 STATE PAPERS OF VERMONT 12-17 (John A. Williams ed., 1968).

79. Act of Oct. 29, 1811, ch. LXXII, 1811 Vt. Acts & Laws 85.

80. Act of Nov. 4, 1812, ch. 100, § 4, 1812 Vt. Acts & Laws 132, 136.

81. 1818 Vt. Acts & Resolves 66, 66-69.

82. 21 STATE PAPERS OF VERMONT, *supra* note 8, at 50, 193-95.

83. Act of Nov. 8, 1832, No. 11, 1832 Vt. Acts & Resolves 7-14.

changed again in 1848 where the first run-off would be won by the plurality candidate.⁸⁴ Majority was abandoned in 1915 in favor of plurality at the general election for representative to Congress.⁸⁵

Until 1916, the joint assembly elected U. S. Senators by majority vote. That year the U.S. Constitution was amended to provide for popular elections for Senators, and since that time they have been elected by a plurality of the vote.⁸⁶

C. The General Assembly

Elections in the Vermont House of Representatives, Senate, and Joint Assembly are by majority vote of a quorum of the members, as are votes on all bills and resolutions.⁸⁷ The House elects its clerk and the Senate its Secretary, by the same method. Elections of the Sergeant-at-Arms, the trustees of the University of Vermont and the State Colleges, the adjutant and inspector generals, and votes on the retention of judges are by majority of the quorum of joint assembly members.⁸⁸

D. The Three Other Statewide Officials

While section 47 is specific in describing how the Governor, Lieutenant-Governor and state Treasurer are elected, it does not address the other statewide offices. The Secretary of State and Auditor of Accounts were first popularly elected in 1884,⁸⁹ following a constitutional amendment that abandoned the former system of election by the joint assembly.⁹⁰ The office of Attorney General was re-established in 1904.⁹¹ The method of electing these officials is defined by legislation. The application of the majority requirement to these offices was not made

84. Compare VT. REV. STAT. ch. I § 42 (1839) (requiring majority), with Act of Oct. 26, 1848, No. 14 § 3, 1848 Vt. Acts & Resolves 13, 14 (requiring plurality).

85. Act of Feb. 18, 1915, No. 6, 1915 Vt. Acts & Resolves 69, 70.

86. U.S. CONST. amend. XVII; VT. STAT. ANN. tit. 17, § 2592(h) (1982).

87. See VT. CONST. ch. II, § 14 (Powers of the House), § 19 (Powers of Senate); see generally Joint Rules of the Senate and House of Representatives (articulating the voting rules in the Joint Session which were adopted Jan. 30, 1990 with amendments made on Apr. 25, 1991 and Apr. 16, 2002), available at <http://www.leg.state.vt.us/misc/jrules.htm> (last visited Apr. 6, 2003).

88. VT. STAT. ANN. tit. 2, § 10 (election of state officers); see also VT. CONST. ch. II, § 34 (retention of Supreme Court Justices); VT. STAT. ANN. tit. 4, § 4 (retention of Supreme Court justices), § 71 (retention of Superior Court judges), § 606 (retention of District Court judges). Note that majority vote for retention of Supreme Court justices is a statutory requirement—not a constitutional one. Compare VT. CONST. ch. II, § 34, with VT. STAT. ANN. tit. 4, § 4 (1999).

89. Act of Nov. 26, 1884, No. 69, §§ 1-5, 1884 Vt. Acts & Resolves 67, 68.

90. VT. CONST. amend XXVIII (1883).

91. Act of Dec. 10, 1904, No. 58, 1904 Vt. Acts & Resolves 77.

explicit until 1906.⁹² In 1912 the races for Secretary of State, Auditor of Accounts, and Attorney General failed to produce majority winners and were decided by the joint assembly.⁹³ In 1974, the same thing occurred for the offices of Auditor and Attorney General.⁹⁴ In 1991, on advice of the attorney general, the majority requirement for the three offices was dropped.⁹⁵

E. The Governor

In twenty-two elections since 1789, including the election of 2002, no gubernatorial candidate won a majority of votes.⁹⁶ Twenty-one out of the twenty-two times the legislature filled the office using the directions provided in Section 47 of the Vermont Constitution.⁹⁷ The only time the process has failed was in 1835 when the joint assembly could not agree on a majority candidate.⁹⁸ "After sixty-three ballots, the Joint Assembly gave up . . ." and the Lieutenant-Governor served as Governor for the year.⁹⁹

Of the twenty-one governors elected by the Joint Assembly, eighteen had won a plurality of the votes in the general election.¹⁰⁰ There were three governors elected by the joint assembly who had failed to win the plurality of votes cast for that office.¹⁰¹ In each case, there were two factors present. First, the incumbent Governor was the plurality winner, and second, no party wielded a legislative majority.¹⁰²

Moses Robinson was elected in 1789, with 26.0% of the popular vote, to Thomas Chittenden's 44.13%, as a result of an accusation of impropriety against Vermont's first Governor over the issuance of a town charter.¹⁰³ In 1813 Governor Jonas Galusha received 49.5% of the vote to Martin Chittenden's 48.7%.¹⁰⁴ The joint assembly, divided over the war and

92. PUBLIC STATUTES OF VERMONT, § 199 (1906).

93. 21 STATE PAPERS OF VERMONT, *supra* note 8, at 340-42.

94. *Id.* at 337-39.

95. JOURNAL OF THE VERMONT SENATE 860-61 (1991) (the Attorney General based his opinion on the changes to the election law brought about by Act 269 of 1974).

96. Vermont Historical Campaign Finance Database, at http://www.sec.state.vt.us/seek/fin_seek.htm (last visited May 26, 2003).

97. *Id.*

98. 21 STATE PAPERS OF VERMONT, *supra* note 8, at 49, 356.

99. *Id.* The House was also unable to agree and that post was filled by a Clerk Pro Tem for the year. *Id.*

100. *See generally id.* at 334-62 (listing all elections in which there was a failure to attain a majority).

101. *See infra* notes 104-08 and accompanying text.

102. 21 STATE PAPERS OF VERMONT, *supra* note 8, at 49, 356.

103. *Id.* at 233, 361.

104. *See id.* at 236, 360-61.

between Federalist and Democratic-Republican factions, elected Chittenden by a single vote amidst charges of fraud.¹⁰⁵ In 1853, Erastus Fairbanks won 43.9% of the popular vote to John S. Robinson's 38.3%, but on the twentieth ballot the Joint Assembly chose Robinson as governor.¹⁰⁶ Fairbanks, it seems, was a victim of the backlash following the previous year's enactment of a temperance law.¹⁰⁷

F. Non-Plurality Winners

On four occasions, the plurality winner in a non-gubernatorial contest was not selected by the Joint Assembly. The most startling deviation from the plurality outcome in a Vermont election race was the 1837 state Treasurer contest. The Treasurer race was the only state election that did not produce a majority candidate. The incumbent, Augustine Clarke, received 47.3% of the vote, Charles Cleaves received 44.8%, and Norman Williams 3.4%.¹⁰⁸ The Joint Assembly elected Williams, who then refused to serve.¹⁰⁹

More enlightening in terms of the role of the joint assembly is the 1977 Lieutenant-Governor election. The only statewide race that failed to produce a majority winner in 1976 was the Lieutenant-Governor's contest. Democrat John T. Alden received 48.4% of the vote, followed by Republican T. Garry Buckley with 47.6% and Liberty Union candidate John Franco with 4%.¹¹⁰ Prior to the Joint Assembly vote, a handful of legislators, perhaps as few as three, learned that Alden was about to be charged and probably convicted for misuse of his clients' insurance premiums.¹¹¹ In the judgment of these legislators, Vermont would not be well-served by having the lieutenant governor under indictment and they switched their votes to Buckley. Buckley was elected by a bare majority. Alden was subsequently charged and convicted.¹¹²

Proponents of the Joint Assembly system point to the 1977 vote as an example of how the system was designed to work. The legislators, as

105. See *id.* 361; see also *Petition and Remonstrance*, in VERMONT ASSEMBLY JOURNAL 44–55 (1813) (alleging improprieties in the assembly's voting read by Speaker of the House Chipman).

106. 21 STATE PAPERS OF VERMONT, *supra* note 8, at 245, 343–44.

107. III WALTER HILL CROCKETT, VERMONT THE GREEN MOUNTAIN STATE 411–12 (1921).

108. See *id.* at 288, 355.

109. *Id.* at 355; JOURNAL OF THE VERMONT SENATE 30 (1837). Prior to the Joint Assembly election, Norman Williams had been elected Secretary of the Senate.

110. 21 STATE PAPERS OF VERMONT, *supra* note 8, at 283, 335.

111. Vermont State Archives, *Election by Joint Assembly*, Summary, at <http://vermont-archives.org/governance/Majority/summery.htm> (last visited Apr. 6, 2003).

112. Christopher Graff, *Parties and Politics*, in *Vermont State Government Since 1965*, at 88 (Michael Sherman ed., 1999).

trustees of the electorate, received information not available to the general public and in their judgment, switched their votes to avoid the disruption of having the Lieutenant-Governor on trial.¹¹³ Not everyone agreed that this illustrated the appropriate role of the Joint Assembly, and in 1979, an amendment to the Constitution was proposed, eliminating election by Joint Assembly in favor of a run-off election in the event there was no majority winner.¹¹⁴

V. PROPOSALS TO ELIMINATE MAJORITY REQUIREMENTS

Until 1870, amendments to the Vermont Constitution were proposed by the Council of Censors, a thirteen-member body elected at-large every seven years from among citizens who were not presently government officials.¹¹⁵ If the Council of Censors proposed amendments, each town would elect a delegate to a Constitutional Convention to adopt or reject, but not amend, the proposals.

The 1813 Council of Censors proposed replacing majority with plurality as the method of election for governor, but the idea never made it into the final draft.¹¹⁶ The subject was raised again by the council in 1848 with a proposal offered by one member to provide for plurality voting for Governor, Lieutenant-Governor, and state Treasurer.¹¹⁷ It was defeated after the Committee on the Powers of the Constitution rejected it as not expedient.¹¹⁸ Interestingly, in 1855-56, another council committee declared the proposal expedient, but the amendment was never adopted.¹¹⁹

In 1870, the Council and Convention were abolished.¹²⁰ The present system, described in Section 72 of the Vermont Constitution, became the law.¹²¹ The Senate, by a two-thirds vote, proposes amendments, which are then ratified by a majority of the House, approved in a subsequent biennium by a majority vote of both chambers, and then put to a vote by the electorate for adoption.¹²²

113. JOURNAL OF THE VERMONT SENATE 544-45 (1977). The information on the three legislators is based on privileged conversations with two legislators who were members of the 1977 General Assembly. *Id.*

114. JOURNAL OF THE VERMONT SENATE 566 (1979).

115. VT. CONST. of 1777.

116. COUNCIL OF CENSORS, *supra* note 2, at 199, 218-223 (proposing but not adopting a plurality rule for gubernatorial elections).

117. *Id.* at 463-64.

118. *Id.*

119. *Id.* at 522, 540, 561-62, 578, 588-90.

120. *Id.* at 706.

121. VT. CONST. ch. II, § 72.

122. *Id.*

The majority requirement for Governor remained untouched during the intervening years. In 1971, the Senate proposed an amendment requiring a run-off election between the candidates with the largest number of votes, but the House returned the proposal to the Senate.¹²³ The same proposal was rejected by the House in 1975.¹²⁴ A 1979 proposal would have substituted plurality for majority, with a 40% threshold for victory, and a run-off of the two highest candidates if neither received that many votes.¹²⁵ It was rejected in the Senate in 1980 and killed in the House in 1988.¹²⁶ Direct plurality election of Governor and other state officials died in the Senate in 1991.¹²⁷ In 1999 another plurality proposal failed to gain Senate approval.¹²⁸

In recent years, the League of Women Voters, among other groups, has promoted instant run-off voting.¹²⁹ That system would allow voters to select first, second, and third choices for state officials, so that a majority could always be obtained from the results of the general election, even if in the first round no candidate qualified.

CONCLUSION

In 1916, the Vermont Supreme Court invalidated a Montpelier city ordinance regulating the erection of buildings.¹³⁰ The case involved a man named Gitchell who built an ice house without a permit.¹³¹ The city of Montpelier sued to enforce its regulation.¹³² The ordinance required a two-thirds vote of the city council to approve a building permit if the building inspector opposed its issuance, or a majority vote if the inspector approved the issuance.¹³³ Gitchell had requested a permit but had been denied.¹³⁴ In *State v. Gitchell*, Justice Seneca Haselton explained that the two-thirds provision was not enforceable because it was created by ordinance, not by

123. Vermont State Archives, *Proposals of Amendment to the Constitution*, at <http://vermont-archives.org/governance/Constitution/proposals.html> (last visited Apr. 6, 2003).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*; JOURNAL OF THE VERMONT SENATE 1521 (1999).

129. For a discussion of the League of Women Voters' position on election reform see League of Women Voters, *Making Democracy Work*, at http://www.lwvofvt.org/lwvvt_positions.htm (last visited Apr. 6, 2003).

130. *State v. Gitchell*, 90 Vt. 57, 59, 96 A. 383, 384 (1916).

131. *Id.* at 58-59, 96 A. at 383-84.

132. *Id.*

133. *Id.*

134. *Id.*

statute or charter.¹³⁵ As majority voting is the implied proper method of acting as a municipal body, the Council had no authority to change that standard without legislative support.¹³⁶ Saying "yes" or "no" to a proposition necessitates the use of majority voting. There is no plurality in such votes.

For the election of officers, however, the history of Vermont's voting standards suggests evolving support for altering the majority requirement to a plurality requirement in specific elections. Almost all statutory requirements for majority election have been replaced by plurality provisions.¹³⁷ Election by plurality can be more efficient than attempting to reach a majority. It eliminates extra elections, allows the winners to be declared immediately following the vote, and does not rely on the default mechanism of the Joint Assembly vote.

Nevertheless, strong arguments remain for majority election. A candidate who earns a majority is elected and no one disputes the victory or the right to hold office. At what point does a plurality winner not reflect the popular will: 49%, 40%, 30%? The use of plurality in primary elections offers several examples of candidates gaining nomination without broad popular support. In 1918 Percival Clement captured the Republican gubernatorial nomination with just 37% of the vote.¹³⁸ Since the Republican nomination was tantamount to success in the general election in those days, Clement became Governor. He then successfully frustrated the Republican Party leadership's efforts to ratify the 19th Amendment.¹³⁹ A candidate elected by plurality has no less right to the office, but there must always be a question about the level of support necessary for such an official.

135. *Id.*

136. *Id.* In *Bean v. Prudential Comm. of School Dist., No. 11*, 38 Vt. 177, 1864 WL 2483 (1865), a majority of the voters of a Glover school district approved the location of a new schoolhouse. *Id.* at 177. A minority of voters were unhappy with the result and demanded that the school directors ask the selectmen to decide the question, because not all voters agreed with the choice. *Id.* Judge Asa Aldis, writing for the Supreme Court, dismissed this argument. *Id.* at 178. In Vermont, a majority vote is the vote of the school district, and the decision of the voters was upheld. *Id.* Only when a majority cannot decide where to site a school are the selectmen involved in the decision. *Id.*

The phrase "by vote" is always construed to mean by vote of the majority, unless the express term of the act show [sic] another intent; thus, sections 40 and 46 of this chapter show that the vote to abate taxes and to omit the names of such as are not able to pay their taxes must be by a vote of two-thirds of the voters present; while sections 37 and 43 show that the words "by vote" means by vote of a majority.

Id.

137. See *supra* part IV.

138. 21 STATE PAPERS OF VERMONT, *supra* note 8, at 81.

139. IV CROCKETT, *supra* note 107, at 546-58.

Given Vermont's efforts to reform Section 47, constitutional change may be difficult. The recent emergence of third parties, however, may make it increasingly difficult to achieve majority election. Tradition is hard to abandon in Vermont, even if it means contested elections and hard questions for the Joint Assembly. Majority rule is still the law of Vermont.

