

POLICY NOTE

**THE CONSTITUTIONALITY OF ELIMINATING OR  
RESTRICTING U.S. SENATE PRIMARIES UNDER THE  
SEVENTEENTH AMENDMENT**

*By Megan Duthie*

I. INTRODUCTION

A century ago, Tennessee lent her signature to the ratification of the Seventeenth Amendment, which altered how a United States senator was chosen from legislative appointment to popular choice.<sup>1</sup> Today, some political factions are calling for a complete repeal of the amendment,<sup>2</sup> while others are taking smaller steps toward entrenching more power within state legislatures at the expense of the power granted to the voting public under the Seventeenth Amendment.<sup>3</sup>

Tennessee is one state that has taken steps toward diminishing the role of the Seventeenth Amendment in the

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<sup>1</sup> RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* 217 (2001).

<sup>2</sup> See Charles C.W. Cooke, *Repeal the 17th Amendment!*, *NAT'L REV.* (Mar. 1, 2013), <http://www.nationalreview.com/articles/341894/repeal-17th-amendment-charles-c-w-cooke>.

<sup>3</sup> New Hampshire lawmakers failed at altering the candidate selection process for senators in 2010. See John Celock, *Senate Elections: New Hampshire Lawmakers Propose Changes to Candidate Selection*, *HUFFINGTON POST* (Dec. 14, 2011), [http://www.huffingtonpost.com/2011/12/14/new-hampshire-senate-elections\\_n\\_1149279.html](http://www.huffingtonpost.com/2011/12/14/new-hampshire-senate-elections_n_1149279.html); John Celock, *Frank Niceley, Tennessee State Senator, Proposes Partial End to Direct Election of U.S. Senators*, *HUFFINGTON POST* (Feb. 14, 2013), [http://www.huffingtonpost.com/2013/02/04/frank-niceley-tennessee\\_n\\_2616266.html](http://www.huffingtonpost.com/2013/02/04/frank-niceley-tennessee_n_2616266.html) [hereinafter *Frank Niceley*].

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selection of United States senators.<sup>4</sup> As introduced earlier this year, Senate Bill 0471/House Bill 0475 would remove the primary election as the method for determining the candidates for the general election and would replace it with legislative nomination.<sup>5</sup> Under the bill, the members of the state legislature belonging to each party would choose the candidate for their respective parties.<sup>6</sup>

Although there is little discernible case law directly addressing the constitutional protection of primary elections, it is likely that, by leaving the general election and the ultimate choice of United States senator in the hands of the public, the proposed Tennessee legislation will be valid under the Constitution. There is a chance, however, that the law will be struck down if submitted to judicial scrutiny, as it is in direct opposition to the underlying objectives of the Seventeenth Amendment and would remove a considerable amount of choice from the people by placing it in the hands of the state legislatures. While this would be considered desirable under the original text and intent of the Constitution, it would not uphold the spirit of the Seventeenth Amendment.

## II. HISTORY OF CONSTITUTIONAL PROTECTION FOR PRIMARY ELECTIONS UNDER THE SEVENTEENTH AMENDMENT

On its face, the Constitution does little to address the protection of primary elections for United States senators, as the text itself omits any mention of the term.<sup>7</sup>

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<sup>4</sup> S.B. 0471, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 0415, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *See* U.S. CONST.

The Seventeenth Amendment, which requires the popular election of senators, reads in its relevant part as follows:

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.<sup>8</sup>

Due to the absence of direct protection for the primary,<sup>9</sup> it has been the province of the courts to determine whether, and to what extent, the primary is constitutionally protected.

In 1921, the Supreme Court heard *Newberry v. United States*.<sup>10</sup> There, the Court addressed an issue of campaign spending in a Michigan primary.<sup>11</sup> The Court, in preserving the Elections Clause as the congressional source of electoral authority,<sup>12</sup> determined that the primary election, in determining the candidates for the general election, “is in no real sense part of the manner of holding the election.”<sup>13</sup> This narrow interpretation of the term “manner of holding the election” led the Court to continue as follows: “We cannot conclude that authority to control

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<sup>8</sup> U.S. CONST. amend. XVII.

<sup>9</sup> See U.S. CONST.

<sup>10</sup> *Newberry v. United States*, 256 U.S. 232 (1921).

<sup>11</sup> *Id.* at 244-46.

<sup>12</sup> *Id.* at 248.

<sup>13</sup> *Id.* at 257.

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party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections.”<sup>14</sup> This interpretation of the term has recently been questioned, and recent decisions have suggested that the modern Supreme Court agrees with a broader understanding of the term “manner of holding elections” as those procedural elements of holding elections.<sup>15</sup>

In the landmark 1941 case *United States v. Classic*, the Supreme Court established the extension of equal protection to the right to vote in a primary election.<sup>16</sup> It reads as follows:

Where the state law has made the primary an integral part of the procedure of choice, *or where in fact the primary effectively controls the choice*, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, *where the primary is by law made an integral part of the election machinery*, whether the voter exercises his right

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<sup>14</sup> *Id.* at 258.

<sup>15</sup> Zachary M. Ista, Comment, *No Vacancy: Why Congress Can Regulate Senate Vacancy-Filling Elections Without Amending (or Offending) the Constitution*, 61 AM. U. L. REV. 327, 336 (2011).

<sup>16</sup> *United States v. Classic*, 313 U.S. 299, 318 (1941).

in a party primary which invariably, sometimes or never determines the ultimate choice of the representative.<sup>17</sup>

Currently, primaries are unequivocally a part of the procedure of choice in Tennessee, and thus, the right to vote in the primary is equally protected under Article I of the United States Constitution.<sup>18</sup> What this case does not do, however, is establish the primary election as the necessary model of choice for nominations for electing a United States senator. The opinion is careful to recognize the protection of the right to vote in a primary only where the primary either effectively controls the choice of senator or where it is by law made a part of the “election machinery.”<sup>19</sup> Both the Constitution and the federal government have long deferred to the states to determine the method by which the states will elect their senators;<sup>20</sup> however, the final draft of the Seventeenth Amendment does not modify the congressional power to regulate “the [t]imes, [p]laces and [m]anner of holding [e]lections for Senators and Representatives.”<sup>21</sup>

Twenty-five years after the *Classic* decision, the Supreme Court heard *Tashjian v. Republican Party*.<sup>22</sup> The Court found Connecticut’s closed primary law, which required voters in primary elections to be registered members of the party, unconstitutional because it unreasonably burdened a political party’s free association

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<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> *See id.*

<sup>19</sup> *Id.*

<sup>20</sup> U.S. CONST. art. I, § 4.

<sup>21</sup> *Id.*; *see also* *Newberry v. United States*, 256 U.S. 232, 252 (1921) (quoting U.S. CONST. amend. XVII).

<sup>22</sup> *Tashjian v. Republican Party*, 479 U.S. 208 (1986).

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rights without a compelling government interest.<sup>23</sup> The Republican Party rule, which allowed independent voters the ability to vote in party primaries, was thus constitutional.<sup>24</sup>

While not directly addressing the protection of primary elections generally, the Court did discuss more broadly the rationale of constitutional protections. The Court said, “The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every state in the selection process.”<sup>25</sup> The Court ultimately held that “the Qualifications Clauses of Article I, § 2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections.”<sup>26</sup> Therefore, because the Republican Party rule did not disenfranchise voters that would otherwise be able to vote “for the more numerous house of the state legislature,” it did not run afoul of the Qualifications Clause.<sup>27</sup> This holding was adopted in the framework developed by *Classic* in that it is applied “[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice.”<sup>28</sup>

The Third Circuit addressed the practical effect of both *Classic* and *Tashjian* in *Trinsey v. Pennsylvania*.<sup>29</sup> The court, in interpreting *Classic* and *Tashjian*, held primary elections were not required under the Constitution

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<sup>23</sup> *Id.* at 229.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 227.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 229.

<sup>28</sup> *United States v. Classic*, 313 U.S. 299, 318 (1941).

<sup>29</sup> *See Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir. 1991), *cert. denied*, 502 U.S. 1014 (1991).

when filling a vacant senate seat mid-term.<sup>30</sup> While the *Trinsey* court was reluctant to issue a broad holding on the constitutional protection of primary elections generally,<sup>31</sup> it did address the history of the Seventeenth Amendment and the intent of those who ultimately passed the amendment into law. According to the court, “[the author of the Senate Report] made clear that he believed that the precise mode of senatorial nomination and election was to be a purely local question and that establishment of a primary system was to be left to the states.”<sup>32</sup> The court further determined that “there is no firm evidence [the authors of the amendment] believed that they were tackling the political machines by mandating primaries as well as direct election of Senators.”<sup>33</sup> Whether the Sixth Circuit will follow suit is yet to be determined.

### III. POLICY ISSUES SURROUNDING THE DIRECT ELECTION OF SENATORS

#### A. The Seventeenth Amendment

The Seventeenth Amendment was passed at a time in which several political concerns outweighed the Framers’ intent of entrenching federalism within the national legislative framework by delegating United States senators to act as representatives of, and chosen by, state legislatures.<sup>34</sup> At the time the Seventeenth Amendment was passed, there were no primaries as exist today.<sup>35</sup> These concerns have been addressed in the years following the

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<sup>30</sup> *Id.* at 234.

<sup>31</sup> *Id.* at 231.

<sup>32</sup> *Id.* at 230.

<sup>33</sup> *Id.*

<sup>34</sup> *See* THE FEDERALIST NO. 10 (James Madison).

<sup>35</sup> *Newberry v. United States*, 256 U.S. 232, 250 (1921).

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Seventeenth Amendment and still rightly exist as legitimate concerns today.

One of the concerns the Seventeenth Amendment aimed to address was the problem of legislative deadlock within state legislatures.<sup>36</sup> The difficulty came about due to a variety of factors involving the power vested in the states to conduct their own affairs and the balanced two-party system.<sup>37</sup> This deadlock resulted in the failure of many states to elect senators over a period of years leading up to the ratification of the Seventeenth Amendment.<sup>38</sup>

A second concern included bribery of legislators and corruption of senate elections.<sup>39</sup> While the number of senators investigated on bribery charges was relatively few in comparison to the number of senators appointed, the cases were heavily publicized, leading to a demand of populist reform.<sup>40</sup>

## B. The “Activist” Supreme Court

Beyond the history and intent of the framers, the proponents of increased (or absolute) state power in appointing senators argue that as a result of the decline of federalism and inherent protection for state powers, an “activist” Supreme Court has been required to step in to protect state interests.<sup>41</sup> Since the ratification of the Seventeenth Amendment,<sup>42</sup> the Supreme Court has made a series of increasingly “pro-state” decisions in order to

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<sup>36</sup> ROSSUM, *supra* note 1, at 183.

<sup>37</sup> *See id.* at 184-87.

<sup>38</sup> A table of legislative deadlocks in the appointment of U.S. senators can be found at ROSSUM, *supra* note 1, at 187-90.

<sup>39</sup> ROSSUM, *supra* note 1, at 190-91.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*



maintain the federalist structure that was undermined by the enactment of the Seventeenth Amendment.<sup>43</sup>

These decisions include: *Hammer v. Dagenhart*, which held the Federal Child Labor Act invalid under the commerce clause,<sup>44</sup> and *Bailey v. Drexel Furniture Company*, in which the Court found that Congress was improperly penalizing employers using child labor.<sup>45</sup> *Bailey* was decided in the same year as *Hill v. Wallace*, which invalidated the Future Trading Act of 1921 as an unconstitutional tax levied by Congress.<sup>46</sup> These decisions evidenced the Court's determination that Congress was overstepping its bounds in enacting legislation that ought to be the province of the states.<sup>47</sup> These decisions have been described as

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<sup>43</sup> *Id.*

<sup>44</sup> *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918), *amended on public policy grounds by U.S. v. Darby*, 312 U.S. 100 (1941); ROSSUM, *supra* note 1, at 236.

<sup>45</sup> *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36, 44 (1922); ROSSUM, *supra* note 1, at 238.

<sup>46</sup> *Hill v. Wallace*, 259 U.S. 44, 66-68 (1922); ROSSUM, *supra* note 1, at 238.

<sup>47</sup> ROSSUM, *supra* note 1, at 236-38.

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“unfortunate”<sup>48</sup> and  
“imprudent”<sup>49</sup> by some,  
coupled with stark criticism  
of the actions of the Supreme  
Court Justice Day. In writing  
for the majority in *Hammer*,  
Justice Day seemed wholly  
unaware that there is simply  
no historical evidence to  
suggest that the people who  
ratified the Seventeenth  
Amendment intended to  
transfer the power to protect  
that original federal design  
from the indirectly elected  
Senate to an appointed Court  
so that it might invalidate the  
very measures now passed by  
their democratically elected  
Senate.<sup>50</sup>

Yet the Supreme Court continued to pass increasingly pro-state decisions, invalidating laws supported by the legislative and executive branches of the federal government.<sup>51</sup> The role of the Supreme Court in supporting the original design of federalism and the protection of states continues to this day.<sup>52</sup>

A second school of thought insists that the ramifications of the Seventeenth Amendment are concerned primarily with not a loss or decline in federalism but with

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<sup>48</sup> See *id.* at 238.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 241.

<sup>51</sup> See *id.*

<sup>52</sup> See ROSSUM, *supra* note 1, at 284-85.

the relationships among the branches of the government.<sup>53</sup> While the relationships surely have changed, they require more understanding and deliberation than what is currently afforded.<sup>54</sup>

#### IV. ANALYSIS OF THE CONSTITUTIONALITY AND POLITICAL WISDOM OF THE STATE LEGISLATURE CHOOSING CANDIDATES FOR THE GENERAL ELECTION OF U.S. SENATORS

Of course, the proposed Tennessee legislation falls short of calling for an absolute repeal of the Seventeenth Amendment. By removing a step of the process in which the voting public can choose, however, the law would prove to be ultimately undesirable, bringing with it many more problems than solutions.

The first is the question of constitutionality. At first glance, the proposed law is constitutional, as there is no mention within the Constitution itself of primary elections.<sup>55</sup> However, the Supreme Court in *Classic* and in later cases maintained that rights were protected when the primary was included as a part of the “election machinery” and as a part of the choice of the people, with deference given to the choice of the states.<sup>56</sup> Supreme Court precedent suggests the pivotal issue, therefore, is whether this law would remove the primary as a part of this procedure of choice. If it does, then the law will remain constitutional and the Seventeenth Amendment will not be offended, as the public will make the final selection of a

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<sup>53</sup> Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1349-50 (1996).

<sup>54</sup> See *id.* at 1405.

<sup>55</sup> See U.S. CONST.

<sup>56</sup> See *United States v. Classic*, 313 U.S. 299, 318 (1941).

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United States senator in a general election. If the proposed law falls short of removing the selection of candidates from the procedure of choice, it may be found invalid under the Seventeenth Amendment under this reading of the *Classic* holding.<sup>57</sup>

Assuming the constitutionality of the proposed bill withstands judicial scrutiny, there remains a question of policy. By removing the selection of candidates from the public domain and admitting it to the legislature, proponents of the law suggest its benefits echo those of the individuals who would repeal the Seventeenth Amendment altogether.<sup>58</sup> Those who would see it repealed cite an increased need for reins on the powers of the federal government, which, they argue, have been increasing at the expense of the powers of the states, thereby undermining federalism.<sup>59</sup> The Framers, in borrowing from the British the model of the bicameral legislature, with the House of Representatives and Senate resonant of the House of Commons and the House of Lords, did not intend for both chambers to be elected by popular vote.<sup>60</sup> Rather, they intended the House of Representatives to act as agents of the people and the Senate to act with the voices of the several states.<sup>61</sup>

Indeed, removing the public vote is a small step toward the original intent of the Framers. According to the bill's sponsor, "We've tried it this way for 100 years. It's

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<sup>57</sup> *Id.*

<sup>58</sup> See Frank Niceley, *supra* note 3.

<sup>59</sup> John W. Dean, *The Seventeenth Amendment: Should It Be Repealed? Why the Direct Election of Senators May Have Been a Serious Mistake, and One That Helps Explain the Supreme Court's States' Rights Views*, FIND L. (Sept. 13, 2002), <http://www.writ.corporate.findlaw.com/dean/20020913.htm>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

time to try something different.”<sup>62</sup> This would further allow the State of Tennessee a greater part in the choice of senator and allow the senator to act in the interest of the state as an independent political entity.

There may also be fiscal benefits to eliminating senatorial primaries. Elections for United States senators can cost millions of dollars for the state to administer.<sup>63</sup> Saving that money that pays for the primaries could allow the state to direct it elsewhere; the time saved by those voting in the primaries could be put to another use. There would also be the reduction of costs for those wishing to be considered for the general ballot, with proponents suggesting that by avoiding a primary altogether, primary consideration would be open to a greater number of people.<sup>64</sup>

Finally, it would allow state legislatures a larger role in choosing senate candidates without the difficulty of repealing a constitutional amendment. To amend the United States Constitution, Article V requires an affirmative vote of two-thirds of both the House of Representatives and the Senate, followed by a ratification of three-quarters of state legislatures.<sup>65</sup>

Unfortunately, these benefits do not outweigh the negative repercussions of implementing such a plan. First, allowing the legislature to select the primary candidates for a general election will do very little to reestablish

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<sup>62</sup> *Frank Nicely, supra* note 3.

<sup>63</sup> For example, the upcoming New Jersey special primary and special election to fill the vacant seat of Senator Frank Lautenberg is estimated to cost taxpayers about \$24 million. John Celock, *Objection to Christie's \$24 Million Senate Special Election Spreads Across State*, HUFFINGTON POST (June 20, 2013), [http://www.huffingtonpost.com/2013/06/20/new-jersey-senate-special-election\\_n\\_3474790.html](http://www.huffingtonpost.com/2013/06/20/new-jersey-senate-special-election_n_3474790.html).

<sup>64</sup> *Frank Nicely, supra* note 3.

<sup>65</sup> U.S. CONST. art. V.

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federalism as the ultimate choice of senator will be left to the people of Tennessee.<sup>66</sup> While the choice of candidates would be determined by the legislature, there is little guarantee that the candidates, if elected, would work to promote the state's interest beyond what they currently do, short of an additional mandate requiring them to do so. This in turn would fail to remedy the actions of the "activist" Supreme Court given their decisions supporting and defending states' interests would continue to be required.

Second, it would give legislators an additional responsibility above and beyond those they currently have. Tennessee legislators are in session a short amount of time. Session begins each year on the second Tuesday in January at noon and usually adjourns in late April or early May for a total of ninety session days over a two-year period.<sup>67</sup> The addition of such a potentially time-consuming task would take time away from their primary mandate—to make laws.

The additional task could then make the process of selecting candidates much more politicized. In addition to appealing to public sentiment to win the general election, those wishing to become the candidate would undoubtedly be required to be well-connected to state politics, the politicians, and the party itself. This may result in better-qualified individuals being placed on the ballot, as the sponsor of the proposed Tennessee law has insisted.<sup>68</sup> However, it could also be argued that a primary in itself results in more electable candidates on the final ballot, having already been chosen by the voting public above other party candidates. Additionally, the increased political

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<sup>66</sup> S.B. 0471, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 0415, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013).

<sup>67</sup> *About the Tennessee Legislature*, TENN. GEN. ASSEMBLY, <http://www.capitol.tn.gov/about/> (last visited July 27, 2013).

<sup>68</sup> See *Frank Niceley*, *supra* note 3.

pressure could also narrow the field of potential candidates running under Democratic or Republican banners and to enter the general election as Independents.<sup>69</sup>

Finally, the proposed law would run afoul of the spirit of the Seventeenth Amendment—to give the voters of the several states a dominant voice in the election of their U.S. senators and to ensure a more democratic system of election.<sup>70</sup> Proponents will still argue that the intent of the original Constitution validates their stance on the matter.<sup>71</sup> Ratified by the states, the proposed bill will, the author submits, potentially violate the Seventeenth Amendment under the principles of *Classic*.<sup>72</sup>

Ultimately, taking away the ability of the public to vote in primaries for their choice of party candidate in the general election would leave voters feeling ostracized. In this time of low voter turnout and general public apathy toward elections,<sup>73</sup> enacting legislation that would push individuals away from the electoral process and leave them feeling like their input is neither required nor desired would be ill-advised. It should be the democratic goal of all branches of government to engage the population in political life, rather than shun them. For this reason, the proposed Tennessee legislation should not pass.

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<sup>69</sup> The proposed legislation allows for minor parties to nominate a person in accordance with the rules of the minor parties or by holding a primary election. S.B. 0471, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 0415, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013).

<sup>70</sup> Amar, *supra* note 53, at 1354.

<sup>71</sup> Dean, *supra* note 59.

<sup>72</sup> *United States v. Classic*, 313 U.S. 299, 318 (1941).

<sup>73</sup> See *Voter Turnout*, FAIRVOTE.ORG, <http://www.fairvote.org/voter-turnout> (last visited July 16, 2013).

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