

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
COMMITTEE ON INTERNATIONAL HUMAN RIGHTS  
COMMITTEE ON ASIA AFFAIRS**

**“One Person, One Vote”:  
The U.S. Electoral System and the Functional Constituencies Embodied  
in the Basic Law for the Election of the Chief Executive and of the Legislative Council**

**I. Introduction**

The Association of the Bar of the City of New York (the “Association”) has had a longstanding interest in preserving the rule of law in Hong Kong, and encouraging its progress to a truly democratic society with universal suffrage as envisaged in Articles 26, 39, 45 and 68 of the Basic Law.<sup>1</sup> Accordingly, we view certain recent developments in the Hong Kong Special Administrative Region of China (the “HKSAR”) with great concern, in particular, the recent regressive “interpretations” of the Basic Law by the Central Government of China by which it pre-empted the question of whether there is a “need to amend” the Basic Law regarding the election of the Chief Executive in 2007 and the Legislative Council in 2008, the manner in which such “interpretations” were delivered, and the barrage of intimidating personal attacks by the Central Government against the pro-democracy supporters of universal suffrage which accompanied these “interpretations.”

As the debate over constitutional reform in Hong Kong intensified over the course of this year, voices supportive of maintaining the electoral status quo in Hong Kong raised, at certain points, the example of the United States and its electoral system as they argued to reject the rising call in Hong Kong for the more immediate fulfillment of the Basic Law’s promise of “universal suffrage.” It is this reference to the U.S. electoral system that we will address in this Memorandum. The Memorandum will also address the historical experience of the United States with the democratic “one person, one vote” principle as it has evolved and expanded over the past 215 years.

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<sup>1</sup> THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA

The Association, founded in 1870 to combat corruption in the U.S. judiciary, is an independent, non-governmental organization with a membership of more than 22,000 lawyers, judges, prosecutors, law professors and government officials, principally from New York City but also from throughout the United States and from 40 other countries. The Association has had a long and ongoing interest in supporting Hong Kong as a democratic society.<sup>2</sup> This interest is not only one of principle but of professional interest to our members. For many years, numerous New York law firms and hundreds of our members have been working as lawyers in their Hong Kong regional offices, and many are permanent residents. We believe they contribute significantly to the economic, commercial, and financial life of Hong Kong. In addition, many of our members have regional headquarters in Hong Kong or do extensive business in Hong Kong and often seek our advice regarding the benefits of locating in, relocating from, or doing extensive business in and from Hong Kong. Over the years, we have commented favorably on Hong Kong's independent and highly qualified judiciary, its free press, its active lawyers' associations, its conditions of transparency, its absence of corruption and its adherence to the rule

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<sup>2</sup> Prior to and following the return of sovereignty to the People's Republic of China on July 1, 1997, we, together with the Joseph R. Crowley Program in International Human Rights at Fordham Law School, have carefully followed legal and political developments in Hong Kong through missions, reports and symposia:

- The Committee on International Human Rights, The Association of the Bar of the City of New York, *Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry*, 51 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 357-90 (1996).
- Symposium on Right of Abode Decision of Court of Final Appeals, May 25, 1999, Great Hall of the Association of the Bar of the City of New York sponsored by the Asian Affairs Committee of the Association.
- Report of the Joseph R. Crowley Program, *Tenth Annual Philip D. Reed Memorial Issue Special Report: One Country, Two Legal Systems?*, 23 FORDHAM INT'L L.J. 1 (1999).
- The Committee on International Human Rights, The Association of the Bar of the City of New York, *One Country, Two Legal Systems? The Rule of Law, Democracy, and the Protection of Fundamental Rights in Post-Handover Hong Kong*, 55 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 326 (2000).
- Letter from E. Leo Milonas, President of The Association of the Bar of the City of New York, to the Clerk of the Bills Committee, Legislative Council of the Hong Kong Special Administrative Region (April 25, 2003) <[www.abcny.org/pdf/report/INTERN.pdf](http://www.abcny.org/pdf/report/INTERN.pdf)> attaching *Legal Analysis of Certain Provisions of the National Security (Legislative Provision) Bill Pending Before the Legislative Council of the Hong Kong Special Administrative Region* <[www.abcny.org/pdf/report/30637027.pdf](http://www.abcny.org/pdf/report/30637027.pdf)>.

of law and common law principles that protect civil, political and commercial rights. Our experience confirms what economists can now demonstrate – that only societies with such freedoms attain and maintain economic prosperity and viable capital markets.<sup>3</sup>

Through the 1984 Joint Declaration<sup>4</sup>, the United Kingdom and the People’s Republic of China (“China” or “PRC”) entered into a solemn compact: the return of sovereignty to China in exchange for continued maintenance of Hong Kong’s political, social, economic, and legal institutions accompanied by a high degree of autonomy, and the promise that universal suffrage would be instituted for the election of the Chief Executive and members of the Legislative Council. Expressly stipulated in the Basic Law implementing China’s obligations under the Joint Declaration is the commitment by China and the Hong Kong Special Administrative Region Government (the “H.K.S.A.R.G.”) that the fundamental rights of free speech, free press, freedom of assembly, freedom of association and freedom of religion, as well as due process, would not only continue but flourish and that the “ultimate aim” of universal suffrage would be implemented for the election of both the Chief Executive and the Legislative Council.<sup>5</sup> It is therefore incumbent on all interested parties, the United Kingdom (through the Joint Declaration), China (through the Joint Declaration and the Basic Law) and the HKSAR government (through the Basic Law), to maintain these basic principles in action as well as words.<sup>6</sup> The benefits of such freedoms will accrue not only to the people of Hong Kong but to

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<sup>3</sup> See Chen Zhiwu, “Freedom of Information and the Economic Future of Hong Kong,” presented at “Freedom and National Security – Has the Right Balance Been Struck?”, Hong Kong University (June 14, 2003), <http://www.hku.edu.hk/ccpl/pub/conferences>.

<sup>4</sup> Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, Dec. 19, 1984.

<sup>5</sup> For a discussion of the structures put in place for democracy in Hong Kong, *see generally* Joseph R. Crowley Program, *supra* note 2, at 66-89.

<sup>6</sup> As Justices Brandeis and Holmes stated in their concurrence to the majority opinion in *Whitney v. California*, 274 U.S. 357, 375 (1926):

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.

Hong Kong's economy, as a society which safeguards such rights and freedoms is the most secure foundation upon which to build a prosperous economy.

Freedom of speech, freedom of the press, freedom of assembly and freedom of association are not abstract principles embodied in the Basic Law for cosmetic purposes. Rather, they are the foundations for an informed public to choose those who would govern, assure transparency in government, and determine who would be accountable for their actions. To support these four freedoms but deny universal suffrage to the citizens of Hong Kong is to weaken or frustrate the attainment of a truly democratic society.

Until these recent developments, and with certain exceptions<sup>7</sup>, we have been gratified that Hong Kong and the People's Republic of China generally have fulfilled their obligations under both the Joint Declaration and the Basic Law. However, the Association is particularly concerned with the unsolicited (by the Hong Kong Government, the Court of Final Appeal, or any other Hong Kong actor) April 6, 2004 and April 26, 2004 "interpretations" of the Basic Law and pronouncements by the Central Government that freeze in place the "functional constituency" system and thus blatantly frustrate the goal of universal suffrage in the foreseeable future. Our concerns are not academic, but reflect matters that have an immediate impact on Hong Kong's economic prospects. Foreign investors with whom our members work as legal advisors - both those investors with a long history in Hong Kong and those just now entering the Asian markets - are unsettled by the implications of such unilateral actions which directly

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They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

<sup>7</sup> We have had previous concerns, such as the controversy surrounding the right of abode in Hong Kong and, most recently, the controversy over the proposed Article 23 Legislation, which this Association addressed separately in its *Legal Analysis of Certain Provisions of the National Security (Legislative Provision) Bill*, *supra* note 1. The controversy surrounding Articles 45 and 68 of the Basic Law, and the unsolicited "interpretation" by the Standing Committee of the NPC in connection therewith, however, represent the first overt instances of direct interference by the Central Government in the matter of Hong Kong governance without a request from the Hong Kong Government, the Court of Final Appeal, or any other Hong Kong actor.

frustrate Hong Kong's development as a free and open democratic society. This is of critical importance for the relative attractiveness of Hong Kong as a regional business and financial center and the ongoing economic prosperity of Hong Kong. Recently, concerns have been expressed by the major debt and currency rating agencies regarding the Central Government's actions impeding universal suffrage in a manner that undermines Hong Kong's autonomy in what is essentially a local matter.<sup>8</sup> At the core of those concerns was the swift, unilateral, and unsolicited action of the Central Government in its "interpretations" of the Basic Law in response to the very civil and thoughtful public appeals for greater democracy as called for in the Basic Law itself.

Part II of this report will summarize recent comments raising the example of U.S. electoral arrangements in the context of Hong Kong's electoral debate. Part III will then detail the "one person, one vote" tradition within the U.S. system and give a brief historical background of the U.S. Electoral College and Senate. Part IV will address Hong Kong's "functional constituencies" in light of the U.S. historical experience.

## **II. The U.S. Electoral System in the Context of Hong Kong's Electoral Debate**

Since early 2004, the Central Government through intimidating pronouncements, "interpretations" and virtual amendments to the Basic Law, has unilaterally imposed impediments to consideration of amendments to the Basic Law which would provide for election of the Chief Executive through universal suffrage rather than through an 800 member Election Committee composed of representatives from various business, financial, professional, labor and governmental groups known as "functional constituencies." In seeking to justify the present Election Committee structure, it has been suggested that its indirect nature is no less democratic than the Electoral College in the United States.

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<sup>8</sup> See Moody's Investors Service, Global Credit Research Issuer Comment 1 (April 30, 2004) and Standard & Poor's Ratings Report 2, 3, 5, 6 (May 11, 2004).

In March of this year, Sir David Akers-Jones, now retired, but previously serving in Hong Kong's colonial government, stated that "one-man-one-vote ... is not the only democratic method of election. Each democratic country has a very different democratic system... [For example, t]he U.S. president is actually selected through indirect election."<sup>9</sup> Just a month later, Zhu Yucheng, director of the Institute of Hong Kong and Macau Affairs, a voice for the Central Government of China, stated that "[t]he development of democracy cannot be achieved in just one step... The election system in the United States, for instance, is not 'one-person one-vote' although it has a history of about 150 [sic] years."<sup>10</sup> Even further back, after the occasion of the 2000 U.S. Presidential election, Shiu Sin-por, the then and current Executive Director of the One Country, Two Systems Research Institute, a Hong Kong think tank with strong links to the Central Government and certain sectors of the Hong Kong business community, in an article entitled "Popular Elections Cannot Secure Good Governance" criticized the electoral system of the United States and used it as an example to justify non-direct and restrictive elections in Hong Kong.<sup>11</sup>

The consistent comparison to the U.S. Electoral College is inappropriate for several reasons, not least because, unlike the Election Committee whose members are selected by a limited and self-perpetuating number of special interest groups and represent only 163,500 residents of Hong Kong, the 538 members of the U.S. Electoral College are elected by universal suffrage exercised by the citizens of each State and who, in casting their State's electoral votes for the Presidential nominees of the political parties, are essentially acting as proxies for the universal constituency of voters who selected them.

More directly, however, the comparison is not useful because of the particular circumstances that brought the Electoral College into existence. The Electoral College structure

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<sup>9</sup> Gang Bian, *Akers-Jones: HK Can't Just Do Whatever It Wants*, CHINA DAILY, March 25, 2004.

<sup>10</sup> *Vote? You May Wait until 2047*, THE STANDARD (Hong Kong), April 25, 2004.

<sup>11</sup> Shiu Sin-por, Editorial, *Popular Elections Cannot Secure Good Governance*, THE SOUTH CHINA MORNING POST, Dec. 15, 2000.

was one of many compromises among the original thirteen States necessary in order to adopt a unique constitutional government in which the people of both large and small States with varied economic, social, and cultural interests, and stretching over thousands of square miles with primitive means of communication, would agree to surrender a large degree of sovereignty and be bound by a Federal constitution.

Fundamentally, comments such as these incorrectly characterize both representative democracy generally within the United States and the unique nature specifically of the Electoral College through which the U.S. President is elected. They therefore deserve a direct response from an institution such as the Association, which has ample experience of direct democracy in the United States and a thorough knowledge of the nation's political and constitutional history. We hope that the following discussion of both the history and operation of the Electoral College and of representative democracy through universal suffrage on a "one person, one vote" basis in the United States will conclusively rebut the inappropriate and plainly wrong commentary that now feature in the democratization debate in Hong Kong, and add to the force of argument put forth by those insisting on the present implementation of the Basic Law's express commitment to universal suffrage and thus a more democratic Hong Kong.

### **III. Representative Democracy in the United States**

#### **A. *Introduction***

For the English subjects who, in the 18<sup>th</sup> century, separated themselves from the British Empire and set to the task of forming a Union of States out of the former British colonies in America, settling on a manner of popular sovereignty through representation for the national government was fundamental. "For the guiding political theorists of the Revolutionary generation, the English system of representation, in its most salient aspects of numerical inequality, was a model to be avoided, not followed."<sup>12</sup>

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<sup>12</sup> Baker v. Carr, 369 U.S. 186, 267, 307 (1962) (Frankfurter, J., dissenting). Frankfurter does document, however, that American practice departed from a strict adherence to numerical equality to facilitate local governance, as in

Representation in the American colonies early on developed in a markedly more democratic direction than in England in several interrelated ways.<sup>11</sup> The franchise in colonial America tended to be far more extensive because the greater abundance of land in America rendered landholding requirements less restrictive. Colonial apportionment likewise followed population shifts to an extent that was nearly unthinkable for Parliamentary elections. By contrast, the “rotten boroughs,” which characterized the English system of representation, grew from a system of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population.<sup>13</sup> Nor did the colonies import the practice of voting for local representatives through occupational guilds, the closest historical equivalent of Hong Kong’s functional constituencies.<sup>14</sup> The American colonists not surprisingly came to oppose the British idea of “virtual” representation – the idea that Parliament could reflect all significant functional groupings in the empire – in favor of “actual” representation – the notion that representatives should reflect the views of those who elect them. As the eminent historian Bernard Bailyn states, “there were no ‘functional groupings,’ in this English sense in pre-Revolutionary America.”<sup>15</sup>

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apportioning representatives among local government entities such as towns or counties, rather than abstract units of approximately the same population. *Id.* This practice nonetheless did not depart from the idea of numerical equality nearly to the extent it did in eighteenth-century England. See *infra*, text accompanying notes 11-14.

<sup>11</sup> See BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 80-89, 100-101 (1968).

<sup>13</sup> As population shifted, this system of apportionment led to severe and stark examples of disproportionate representation between various boroughs, the most notorious example being that of “Old Sarum,” a town deserted in the sixteenth century and continuously unpopulated but which continued to elect a representative to Parliament until the early 19<sup>th</sup> century when the system allowing “rotten boroughs” was abolished. See J.R.M. BUTLER, *THE PASSING OF THE GREAT REFORM BILL* 236-38 (1964 ed.).

<sup>14</sup> Reliance on medieval guilds in this way was the practice in 18<sup>th</sup> century London. See GEORGE RUDE, *WILKES AND LIBERTY* 149-55 (1970).

<sup>15</sup> BAILYN, *supra* note 11, at 100-101 (1968). For a more recent general study, see EDMUND S. MORGAN, *INVENTING THE PEOPLE* (1988). See also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 170 (1969) (“None of [the] electoral safeguards for the representational system, however, was as important to Americans as equality of representation; ‘in other words,’ said John Adams, ‘equal interests among the people should have equal interests’ in the legislatures. More than anything else this equality would prevent the ‘unfair, partial, and corrupt elections’ and the ‘monstrous irregularity’ of the English representational system whereby over three hundred members of the House of Commons, as the English radicals never ceased broadcasting, were elected by only a handful of the English population concentrated in numerous ‘beggarly boroughs.’”).



As the group of men that would draft the U.S. Constitution gathered in Philadelphia in 1787, certain principles emerged from the debates that shaped the Constitutional Convention: an insistence upon election “by the people” in the selection of the President and the Congress and, in the case of Congress, that democratic representation would be equal, that is, “the proportion of the representatives and of the constituents [would] remain invariably the same.”<sup>16</sup> These democratic ideals, however, were diluted over the course of the Constitutional Convention as the delegates struggled to reach acceptable compromise positions between the large States favoring representation based on population and the smaller States favoring equal representation among the States in Congress in order to protect them from oppression by the larger States. In order to avoid the abandonment of the constitutional project altogether, compromises, such as are embodied in the Senate and the Electoral College, were forced into the original U.S. constitutional structure.

B. *One Person, One Vote and the Expansion of the Electorate*

In 1789, creating a federal government that would be elected by white males over 21 and owning a relatively accessible amount of land or other property was a revolutionary concept, or in the words of one American colonist, “a leap in the dark.”<sup>17</sup> However, over the past 215 years the franchise has been expanded to all citizens regardless of race, sex, property or educational status. In the words of another early Patriot, “the course of things in this country is for the extension and not the restriction of popular rights.”<sup>18</sup> Property requirements were, generally, abandoned by 1855; the 15th Amendment to the Constitution adopted in 1870 assured that the

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<sup>16</sup> Reynolds v. Sims, 377 U.S. 533, 564 (1964) (quoting James Wilson, a leader in thought and argument, with James Madison and Gouverneur Morris, of the delegates present at the Constitutional Convention). See also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 224 (1996) (“Madison had long since concluded that equitable reapportionment of representation was an essential requirement of republican government....”).

<sup>17</sup> See JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 167 (2003) (citing Civis, PENNSYLVANIA GAZETTE, May 1, 1776).

<sup>18</sup> GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 270 (1993) (quoting notes from the Report of the Debates of the New York Convention of 1821).

right to vote would not be denied on the basis of race; the 17th Amendment adopted in 1913 provided that Senators would be elected in each State by direct, general election rather than by each State's legislature; the 19th Amendment adopted in 1920 granted women the right to vote; the 24th Amendment adopted in 1964 prohibited poll taxes or any qualifications based on wealth or property; and the 26th Amendment adopted in 1971 lowered the voting age to 18. In 1970, Congress enacted a nationwide ban on literacy tests, which was upheld by the Supreme Court.

Beginning in the early 1960's the U.S. Supreme Court ruled on a line of cases addressing vote dilution and districting controversies which established clearly, as Justice Douglas writing for the Supreme Court in an early vote dilution case stated, that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of votes but equality among those who meet the basic qualifications."<sup>19</sup> As Chief Justice Warren, writing the majority opinion on behalf of the Supreme Court in the 1964 case of *Reynolds v. Sims*, observed, "history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."<sup>20</sup> He went on to say, "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes."<sup>21</sup> In addressing the "one person, one vote" principle that underlies representative democracy in the United States, the Supreme Court in 1963 noted that the Electoral College and the allocation of Senators in a non-population based manner are the only Constitutionally-sanctioned deviations from the "one person, one vote" principle.<sup>22</sup>

C. *Exceptions to the One Person, One Vote Principle in the U.S. Electoral System*

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<sup>19</sup> *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

<sup>20</sup> *Reynolds*, 377 U.S. at 555.

<sup>21</sup> *Id.*, at 579.

<sup>22</sup> *Gray*, 372 U.S. at 380.

While the Constitution embodies the fundamental democratic value of equality of representation, there exist within our constitutional structure certain exceptions to this principle, the most notable of which are the Electoral College and the Senate. With regard to the Senate's deviation from this democratic principle, Chief Justice Warren, again in *Reynolds v. Sims*, held that, "The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government."<sup>23</sup> And, with regard to the Electoral College, the Court in *Gray v. Sanders* found that: "The inclusion of the Electoral College in the Constitution, as the result of specific historical concerns validated the collegiate principle despite its inherent numerical inequality...."<sup>24</sup> The following two sections will discuss each of these deviations and the context out of which they arose.

#### 1. The Case of the U.S. Senate

The importance that the Framers placed on fashioning the form of the national legislature cannot be overstated. As such, it was the first item, outside of general procedural resolutions on the conduct of the Convention, to be addressed by the delegates of the Convention. The debate that ensued over the nature of representation in Congress was fought between delegates from the large States, on the one hand, and delegates from the smaller States, on the other. Equality of representation based on population was the democratically principled argument of the larger States that faced the intransigent argument of the smaller States that each State must have an equal number of representatives in the Congress regardless of population. It quickly became clear that a compromise was necessary to keep the smaller States from abandoning the

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<sup>23</sup> *Reynolds*, 377 U.S. at 574.

<sup>24</sup> *Gray*, 372 U.S. at 378.

Convention and the Constitution with it. John Dickinson, a Delaware delegate to the Convention and proponent of the small State position, speaking to James Madison, an adherent of population-based representation in the legislature, warned: “[W]e [small States] would sooner submit to a foreign power than ... be deprived of an equality of suffrage in *both* branches of the Legislature, and thereby be thrown under the domination of the large states.”<sup>25</sup> The ensuing compromise was fashioned through agreement on a bicameral legislature where one body, the House of Representatives, would apportion representatives based on population and the other body, the Senate, on the basis of equality among the States, where each State would be apportioned two Senators.<sup>26</sup> The establishment of a bicameral legislature would provide a system of checks and balances preventing the majority population from dominating the minority. Thus, the non-population based apportionment of Senators in the U.S. Congress was entrenched in the Constitution as a key compromise necessary to form a lasting Union of States. The debates surrounding the choice of a mode of Presidential selection were equally hard fought as they involved issues of representation similar to those that the large and small States had fought over in the context of the Congress.

## 2. Selecting the U.S. President through the Electoral College

### a. The Constitutional Text

Article II of the Constitution, as amended by the Twelfth Amendment, outlines the form of the Electoral College.<sup>27</sup> Section 1 of that Article provides each State of the Union with the power to appoint, in a manner to be determined by such State’s legislature, a number of

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<sup>25</sup> Max Farrand, ed., I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 242 (1937) (emphasis added).

<sup>26</sup> *Id.* at 468-469 (quoting Oliver Ellsworth (delegate from Connecticut), as reported by James Madison on June 29, 1787):

The proportional representation in the first branch was conformable to the national principle and would secure the large states against the small. An equality of voices [in the second branch] was conformable to the federal principle and was necessary to secure the small states against the large. He trusted that on this middle ground a compromise would take place. He did not see that it could on any other. And if no compromise should take place, our meeting would not only be in vain but worse than in vain....

<sup>27</sup> While the body of electors for which Article II, Section 1 provides is commonly and historically referred to as the “Electoral College,” that term is not found anywhere in the Constitution itself.

Presidential electors equal to the number of its representatives in both the House of Representatives and in the Senate. It also defines how the electors, once appointed, shall cast their ballots for President and Vice President, how the votes shall be counted and finally provides for a contingency procedure should the electoral vote tally fail to produce an absolute majority for any of the candidates in the case of either the Presidential or Vice-Presidential contest.

The contingency procedure provides that, in the case where the electors fail to agree on a Presidential candidate by an absolute majority, the top three vote-winners will be submitted to a vote in the House where each State's delegation will cast only one vote. The contingency procedure in the case where the electors fail to agree on a Vice Presidential candidate is nearly identical but that the decision passes to the Senate for vote.

In addition, Article II, Section 1 provides that "no Senator or Representative, or Person holding and Office of Trust or Profit under the United States, shall be appointed an Elector".<sup>28</sup> By contrast, the composition of Hong Kong's Election Committee includes the 60 members of the Legislative Council and 36 members of the National People's Congress of China. Such a composition sets up exactly the type of conflict of interest that the Framers of the U.S. Constitution sought to avoid in the process of electing the President.

b. Birth of the U.S. Electoral College – Constitutional Convention (1787)

The record of the Convention left behind by the delegates, James Madison principal among them, makes clear that the Electoral College was born of the practicalities of political compromise and not of any abstract theoretical arguments in its favor. The delegates, having just resolved the large State-small State conflict over apportioning representation in the Congress that had threatened to dissolve the entire Constitution-making exercise, were not eager to bring the Convention to another crisis and, therefore, were ready for compromise in order to keep the Union alive. In fact, the delegates proposing the Electoral College's form had nothing to

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<sup>28</sup> U.S. CONST. art. I, § 1, cl.1.

recommend in it other than that it acted as a middle ground between the two modes of Presidential selection initially proposed by various delegates to the Convention: 1) direct election by the people and 2) election by the national legislature. Or, as one prominent historian has noted: “Its principal merit was to avoid the greater disadvantages that weighed against the other modes of election.”<sup>29</sup>

The option of election of the President by the national legislature was objected to on several principled grounds, the separation of powers being first among them. Most of the delegates wished to keep the President outside of Congressional control as far as possible, particularly outside the reach of the Senate, an institution that already had several checks on the proposed Presidential powers. On the other hand, while a number of the delegates to the Convention voiced fears that direct election by the people would lead to demagoguery, there was no agreement on this point and its rejection, instead, seemed to rest largely on several practical objections. These practical objections included: 1) the numerical disadvantage the Southern States would suffer as their population included a high percentage of non-voting slaves, and 2) the belief that the Union would be too decentralized and far-flung to produce anything but a dispersion of votes among each State’s “favorite sons,” with no candidate receiving anything close to a majority of the popular vote. While the proposal for direct election of the President had strong support from several of the most respected delegates to the Convention, James Madison, James Wilson (a leading constitutionalist of the time and playing a role second only to Madison’s at the Convention<sup>30</sup>) and Gouverneur Morris, among them, even the persuasive force of these individuals’ arguments was unable to rally agreement among the delegates on direct election. In fact, the only consensus that could be reached settled on the Electoral College as a compromise between the two other options.

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<sup>29</sup> Jack N. Rakove, *The E-College in the E-Age*, in *THE UNFINISHED ELECTION OF 2000*, at 201, 213 (Jack N. Rakove, ed., 2001).

<sup>30</sup> Adrienne Koch, *Introduction* to JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at xii (Adrienne Koch, ed. 1966).

The delegates, in choosing this mode of Presidential election, believed that after the conclusion of George Washington's term, with no other individual having his status, electors would no longer be able to provide electoral vote majorities and that the President would most often be chosen by the House contingency mechanism described above. The accepted conception, therefore, was that the electors would in effect serve as a nominating body, in most cases failing to vote in a candidate by an absolute majority, and thereby throwing the process to the House where the members of that body would cast their votes with one vote per State delegation. It satisfied proponents of both the direct election plan and the legislative election plan: the people, through the Electoral College, nominate and the House elects on a State unit basis.

The arguments made in support of the Electoral College during the ratification debates that followed the conclusion of the Convention subsequently imbued the Electoral College with theoretical content not present at its inception, with such theoretical post facto justifications continuing to be repeated – erroneously – even into the modern age. In the Federalist No. 68, Alexander Hamilton asserts that “if the manner of [the Electoral College] be not perfect, it is at least excellent”<sup>31</sup> and proceeds to list the variety of desirable attributes that combined in the form of the Electoral College. Hamilton's essay, in part, is the most likely source of the common and incorrect perception that the Electoral College was created out of a philosophical mistrust of the people's deliberative capabilities. While Federalist No. 68 states that it was “desirable... that the immediate election should be made by men most capable of analyzing the qualities adapted to the station....,”<sup>32</sup> the records of the Convention show that such a concern did not prevail during the debates and eventual selection of the Electoral College as the mode of electing the President.

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<sup>31</sup> THE FEDERALIST No. 68 (Alexander Hamilton).

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

Due to the lack of a convincing theoretical basis to support it, the Electoral College remains an oddity unique to the United States' system. The anomalous historical considerations existing in the 18th Century giving rise to our Electoral College no longer apply, and the Electoral College concept, as originally envisioned, has not been copied in any State of the United States or - as far as we can tell - by any other democratic society.<sup>33</sup> Rather, the generally accepted principle of "one person, one vote" prevails in democratic states, and is embodied in the International Covenant on Civil and Political Rights – in particular, Article 25<sup>34</sup> -- which is incorporated into Hong Kong law through Article 39 of the Basic Law. As such, references to the U.S. electoral system in arguments supporting maintenance of the electoral status quo in Hong Kong are unfounded.

c. Current Operation of Electoral College

The Electoral College never operated as contemplated by the Framers and very quickly began its process of evolution away from its originally conceived design. The rise of the two-party political system in the U.S., in particular, has done more to shape the functioning of the Electoral College than the Framers' contemplation of how the Electoral College would operate. As the political parties served to solidify national support for their preferred candidate, the Framers' speculation that the House contingency mechanism, whereby the electoral college would serve a nominating function and the House would actually select the President (described above), would determine the selection of the President "nineteen times out of twenty"<sup>35</sup> was proven wrong. Popularly-based political parties, instead, became the vehicle for nominating

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<sup>33</sup> For just these reasons, the Association – along with many other institutions -- has repeatedly called for a constitutional amendment to the Constitution supporting direct election of both the President and Vice President. Committee on Federal Legislation, Association of the Bar of the City of New York, *Proposed Constitutional Amendment Providing for Direct Election of the President and Vice President of the United States* (1992). See also 24 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 285 (1969) (report calling for same).

<sup>34</sup> Article 25(b) establishes that every citizen shall have the right "[t]o vote and to be elected at genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>35</sup> LAWRENCE D. LONGLEY AND NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 2000, at 21 (1999).



presidential candidates, and the election was determined by the electors with the House contingency mechanism rarely being invoked.

Further, as the Framers left the details for the selection of electors in the hands of the individual State legislatures, the manner in which electors would be chosen was left open to inconsistencies across the nation. Nonetheless, by 1796, three modes of choosing electors predominated in the States: popular election of individual electors by districts, popular election of a statewide slate, and appointment by a popularly elected State legislature. The operation of the Electoral College, however, in the selection of electors did very quickly become largely standard across the nation and, by 1828, South Carolina was the only State where electors were appointed by the State legislature. Everywhere else winner-take-all, popular voting prevailed.<sup>36</sup>

The current operation of the Electoral College is largely characterized by the following practices among the States: a) the direct election of electors through universal suffrage in each State; b) the winner-take-all award of a States' electoral votes by which all States, other than Maine and Nebraska, award the totality of their State's slate of electors to the candidate winning the popular vote within such State; and c) the "automatic" role of the electors whereby the electors perform the role of proxy for the people, voting as instructed by the State's voters, with only the very rare appearance of a "faithless elector" who votes against the instructions of the State's voters. This last convention illustrates a further aspect of evolution toward control by the electorate. Although it was originally contemplated that the electors chosen would exercise their independent judgment in selecting a President, very early on, again with the emergence of political parties, this concept of elector independence gave way to the proxy concept of the elector. In fact, approximately one-third of the States have laws requiring electors to vote in accordance with their pledge.<sup>37</sup>

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<sup>36</sup> See THE UNFINISHED ELECTION, *supra* note 28 at 220.

<sup>37</sup> LONGLEY AND PEIRCE, *supra* note 34, at 24.

Notably, in 215 years of operation, on only three occasions in exceedingly close elections has a candidate who did not win a plurality of the popular vote go on to become President due to the mechanics of the Electoral College. The likelihood of a candidate losing the popular vote by a wide margin, but winning a majority of the electoral votes, remains remote.

#### **IV. Functional Constituencies and the One Person, One Vote principle in Hong Kong**

The functional constituencies in Hong Kong exist both in the selection of the Chief Executive and in the election of the Legislative Council. They are a form of government by special interests that provides inequitable distributions of power not only between local Hong Kong business and social constituencies, but also between them and foreign commercial actors. Our American experience, both since the founding of our republic and as English colonies, has shown that constituent arrangements that deviate from the “one person, one vote” principle should be disfavored as they tend towards a system of patronage, which is at odds with a free market, both in the political and in the economic context. A democratically elected executive and legislative branches of government provide greater responsiveness to the people and, therefore, a more balanced and equitable distribution of resources. Such a government has greater support, stability and credibility that contributes to the economic and social growth of the community and acts as an attraction for foreign investors. Thus, universal suffrage is more than a lofty ideal, it is a powerful incentive for better, more equitable government.

Although various economic groups had sought representation in pre-revolutionary colonial assemblies or councils, there were no “functional groups” in America as originated in the medieval guild system and practiced in England in the 18th Century. The medieval system in which “local men, locally minded, whose business began and ended with the interests of their constituency” were sent to Parliament to do their constituents’ bidding and spoke for no group larger than the one that had specifically elected them was repudiated by the Framers.<sup>38</sup> In fact,

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<sup>38</sup> BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 162-163 (1967).

the use of “functional groups” for voting purposes was never considered during the debates at the Constitutional Convention in 1787. Special interest groups and hereditary prerogatives, such as England’s “rotten boroughs,” were deemed to have no place in a democratic society.

The last colonial governor of Hong Kong, has described Hong Kong’s functional constituencies as “an abomination.”<sup>39</sup> He added that “[w]hoever had devised them must have had a good working knowledge of the worst abuses of British eighteenth-century parliamentary history, and had presumably concluded that such a system would appeal to the business barons of Hong Kong as it had to those of Britain two centuries before....”<sup>40</sup> Such a system tending towards corruption on its own, as it has in the distant and recent past, in conjunction with the arguably otherwise eroding rule of law in Hong Kong<sup>41</sup>, if unchecked, can be expected to lead inevitably to a destabilizing effect on Hong Kong society and, with it, Hong Kong’s prosperous economy and financial markets.

## **V. Conclusion: The Basic Law, The Rule of Law and Democracy – Guarantees for stability and prosperity in Hong Kong**

The genesis, structure and continued existence of both the Electoral College and the U.S. Senate do not provide any theoretical foundation upon which to build arguments antithetical to the democratic ideals of “universal suffrage” and “equality,” both of which, in the context of electing Hong Kong’s leaders, are being called for today and both of which, beyond forming the bedrock of the most prosperous and stable of modern polities, are securely embedded within the Basic Law.<sup>42</sup>

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<sup>39</sup> CHRIS PATTEN, EAST AND WEST: THE LAST GOVERNOR OF HONG KONG ON POWER, FREEDOM AND THE FUTURE 47 (1998).

<sup>40</sup> Despite his apparent preference for getting rid of the functional constituencies altogether, Patten did note those based on a wider franchise were preferable to those that were not. As he put it, “[o]n the whole, the larger the number of voters and the more open the voting process the more defensible the functional constituency became. Other constituencies were tiny, which led to corruption (the representative of 1991’s smallest constituency, covering a handful of voters from the Regional Council, went to prison for his electioneering methods)...” *Id.*

<sup>41</sup> See *supra*, text accompanying notes 5-6.

<sup>42</sup> THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA, arts. 25, 26, 39, 45 and 68.

Those seeking to stagnate democratic development in Hong Kong should not seek justification of their position in historical foreign political anomalies, such as the U.S. Electoral College and the U.S. Senate. As explained above, they are inapplicable to the situation of Hong Kong and, in fact, are decidedly more democratic in nature than the corresponding Hong Kong institutions that have been put in place only since 1997. Instead, those challenging the growing democratic tide, should take heed, if not of the promise of “universal suffrage” in Articles 45 and 68 in the Basic Law, then of the HKSAR’s obligations under Article 109 of the Basic Law: “The Government of the Hong Kong Special Administrative Region shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre.” The true lesson from the American experience is that a government not elected by the people lacks the credibility and responsiveness to address the needs of its citizenry and, therefore, threatens the social and political stability of the region.

While business leaders, such as Gordon Wu, the Princeton-educated chairman of Hopewell Holdings, have publicly argued against the current push towards democratic progress, claiming that such moves will only lead to a welfare state in Hong Kong,<sup>43</sup> the counterpoint is made clearly by foreign businesses in Hong Kong. Both the American and British Chambers of Commerce in Hong Kong have recently indicated that an erosion of democratic principles and the rule of law in Hong Kong would unsettle the international business community that has heretofore chosen Hong Kong as its Asian base. Frank Martin, president of the American Chamber of Commerce in Hong Kong recently stated that, “In order to ensure Hong Kong's continued role as an international financial centre, it is absolutely essential that we have no erosion of the rule of law and no erosion of free press principles.”<sup>44</sup> In the 2003 Annual

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<sup>43</sup> *Tycoons Prefer the Status Quo*, FINANCIAL TIMES (London), May 31, 2004, at 13 (“The voting thing is an evolutionary process. If you try to take it as a revolutionary process ... economically it produces very, very bad results.”).

<sup>44</sup> Alexandra Harney and James Kynge, *China's Approach to Hong Kong Raises Doubts over One Country, Two Systems Policy*, FINANCIAL TIMES (London), May 31, 2004, at 13.

Business Confidence Survey commissioned by and conducted in part by the The British Chamber of Commerce in Hong Kong, one can find the following under the heading of “What’s Not So Good About Business in Hong Kong”: “Members are increasingly dissatisfied with government leadership (9 per cent decrease) and a stable government and political system (20 per cent decrease).”<sup>45</sup> The stymied development of democratization in Hong Kong as promised will only add to these anxieties and concerns.

As China moves to a more open and pluralistic society, with a higher level of education and improved economic conditions for all citizens, the call for greater democracy and participation will increase. Hong Kong, having reached this stage, is more than ready for implementation of the democratic provisions contemplated in the Basic Law. China, by helping Hong Kong realize these goals, will be better able - when the time comes – to implement its own democratic government with Chinese characteristics. In this way, Hong Kong, it is hoped, will be the laboratory for China’s eventual moves to a pluralistic society, universal suffrage and a government responsible to its citizens.

It would indeed be ironic if in matters of self-government and democracy within the “one country, two systems” framework, Hong Kong will not be the model for Taiwan, but instead Taiwan a model for Hong Kong. China may well keep in mind the statement of John Dickinson, an American colonial patriot writing in 1765 against the Stamp Act imposed on the American Colonies by the English Parliament: “. . . many states and kingdoms have lost their dominions by severity [but] . . . I remember none that have been lost by kindness.”<sup>46</sup>

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<sup>45</sup> The British Chamber of Commerce in Hong Kong , *2003 Annual Business Confidence Survey* <<https://www.britcham.com/asp/general.asp?MenuItemId=97>>.

<sup>46</sup> John Dickinson, *The Late Regulations Respecting the British Colonies [1765]* in PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, 1:683, 688-89 (Bernard Bailyn & Jane N. Garret, eds., Belknap Press of Harvard University 1965).

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