

Case No. 09-5142

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASA GORDON, DC Presidential
Elector, Chair DC Statehood Green Party
Electoral College Task Force, Executive
Director Douglass Institute of Government,

Plaintiff/Appellant,

v.

JOSEPH R. BIDEN, Jr., Vice President of the
United States, President of the Senate of
the United States of America,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
C.A. No. 08-1294 (HHK)

APPELLANT'S FINAL BRIEF

Asa Gordon, PRO SE
1667 Webster Street, N.E.
Washington, D.C. 20017
(202) 635-7926
digasa@aol.com

Dated: November 27th, 2009

CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Appellant, *Pro Se* provides the following information as to parties, rulings, and related cases:

(A) Appellant in this case is Asa Gordon, Plaintiff below. Appellee is Joseph R. Biden, in his official capacity as Vice President and President of the Senate, Defendant below. There are no amici curiae nor intervenors.

(B) Ruling Under Review. The ruling under review is the March 26, 2009, Memorandum Opinion and Order of the Honorable Henry H. Kennedy, granting the government's motion to dismiss and entering judgment in favor of Appellee.

(C) Appellant is aware of no pending related cases.

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UNITED STATES CONSTITUTION

Amendment XIV

*Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. **But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.***

UNITED STATES CODE

{2USC§6} Reduction of representation:

Should any State deny or abridge the right of any of the male inhabitants thereof, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendment to the Constitution, article 14, section 2, except for participation in the rebellion or other crime, the number of Representatives apportioned to such State shall be reduced in the proportion which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State.

GLOSSARY OF ABBREVIATIONS

AG --- ATTORNEY GENERAL United States Department of Justice.

VP ---- JOSEPH R. BIDEN, Jr., Vice President of the United States, President of the Senate of the United States of America, Defendant/Appellee.

This Brief uses the following designations:

References to the Civil Docket For Case#: 1:08-cv-01294 Excerpts are [CD[#]-*]

(# = docket entry number_ * = page number)

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights and elective franchise). The Plaintiff asserted jurisdiction in the District Court under 2 U.S.C. § 6, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution.

STATEMENT OF THE ISSUES

1. Did the District Court erroneously conclude that the Plaintiff's Alleged Injury Is Not *Fairly Traceable* to the Vice President's Actions ?
2. Did the District Court erroneously conclude that the Plaintiff's Summary Judgment Issues are Moot ?
3. Should This Court Direct the Issuance of a Court Order For Declaratory Relief ?

STATUTES AND REGULATIONS

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STATEMENT OF THE FACTS

This civil action, cause of controversy, arises from the Vice President's presentation for tabulation in the Hall of the House of Representatives of majority-polled presidential electors from *unbounded southern states*¹ on a *winner-take all* basis ungrounded in either state or federal law. This act by the VP constitutes an *abridgment* of the voting rights of minority polled presidential electors based on race and/or party affiliation in violation of the *mal-apportionment penalty clause*² pursuant to the United States Constitution (**Amend. XIV§2**) and statutory Code (**2USC§6**).

The District Court concluded that the Plaintiff "fails to satisfy the causation element of standing" and therefore he is "unable to prosecute the action," because the "alleged injury is not 'fairly traceable' to the Vice President's actions". The court also concluded that the Plaintiff's summary motions for relief were moot. **CD21_5**. This appeal followed. **Appellant's Brief at 3**.

Additional factual background is presented in the **Appellant's Brief at 3-5**.

-
1. The *unbounded states* are states wherein *Winner-take-all* or *First Past the Post* systems for awarding a states presidential electors is not specified in a state's electoral statute.
 2. The *mal-apportionment penalty clause* is used throughout this action in lieu of the *REDUCTION OF REPRESENTATION clause* of **Amend. 14§2 & 2USC§6** because it is posited that this construction best frames the constitutional injury in a matter that infers an appropriate democratic and non disruptive remedy, i.e. proportional apportionment of presidential electors.

SUMMARY OF ARGUMENT

The Plaintiff asserts that for the reasons set forth in the APPELLANT'S BRIEF and APPELLANT'S REPLY BRIEF, *The Plaintiff has sufficiently established his case* by legal precedents, and as a matter of law. Accordingly this Appellate court should rule in favor of the Plaintiff and Vacate the ruling of the District Court. Furthermore this court should remand with a summary declaratory relief for proportional apportionment of Presidential electors for the unbounded states that are the subject of this civil action.

This APPELLANT'S FINAL BRIEF presents additional supporting legal arguments, however the arguments herein also present a historical context for most of this case of controversy that should inform the Court in its resolution of this case.

This final brief presents tables that demonstrate how the "winner take all" rule in the *Unbounded Southern States* dilutes the weight of the votes cast in a Presidential Election by race and/or party affiliation. The brief presents a historical context that explains how the legacy of the "Three Fifths Compromise" in the Constitution of 1787 that denied equal representation to African-Americans and distorted equal representation for Whites is preserved in our time by the "winner take all" rule for the allocation of electors in the unbounded Southern States.

**THE PLAINTIFF HAS ESTABLISHED STANDING AND
DEFENDANT HAS NOT DISPROVED THAT STANDING.**

See APPELLANT'S BRIEF at 7-8 and APPELLANT'S REPLY BRIEF 5-8.

The foregoing arguments are supported by the following:

The federal courts have held that persons in appellant's position have standing:

The plaintiffs' standing does not depend on any injury suffered in the previous election, but rather on the probability that their votes will be miscounted in upcoming elections.

The claims of the plaintiffs here are not speculative or remote, but real and imminent. The plaintiffs here have alleged an injury in fact sufficient to confer Article III standing. The increased probability that their votes will be improperly counted based on punch-card and central count optical scan technology is neither speculative nor remote.³

A cause of action for interference with the right to vote requires only a denial or dilution of the vote. The "Winner take All" Electoral College denies and dilutes the votes of citizens in every Presidential Election in the Unbounded Southern States that are the subject of this action. A citizen need not wait for the dilution to alter the outcome of the election to challenge it.

3. *Stewart v. Blackwell*, 444 F.3d 843 (2006); citing *Bryant v. Yellen*, 447 U.S. 352 (1980).

In a case where no voter can know that it is he or she who will be injured, such a specific showing is not necessary for standing.⁴ All that is needed is a showing that an injury is likely to occur to some group of voters.⁵

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4. *Sandusky County Democratic Party v. Blackwell*, Nos. 04-4265, 04-4266, 2004 WL 2384445, at *6 (6th Cir. Oct. 26, 2004) (plaintiffs had standing to bring a claim on behalf of voters alleging that the Secretary of State's issuance of provisional ballots in Ohio elections violated the Help America Vote Act).
 5. *Stewart v. Blackwell*, 444 F.3d 843, 847 n.1 (2006), R. Guy Cole, Jr., Circuit Judge, dissenting.

ARGUMENT

The Plaintiff asserts that the APPELLANT'S BRIEF and APPELLANT'S REPLY BRIEF have sufficiently established his case by legal precedents and as a matter of law. The Attorney General's BRIEF FOR APPELLEE presents arguments that misconstrue the nature of this case of controversy and are unpersuasive. In fact, the BRIEF FOR APPELLEE presents arguments that support the plaintiff's complaint. The Attorney General's FINAL BRIEF FOR APPELLEE merely reiterates, in near verbatim form, the arguments presented in the BRIEF FOR APPELLEE, thus demonstrating that the Attorney General simply has no answer for the rebuttal arguments raised in the APPELLANT'S REPLY BRIEF. It appears at this point the Attorney General is just "mailing it in." APPELLANT'S FINAL BRIEF presents arguments herein that provide a historical context for this civil action that should inform the Court in its resolution of this case.

The plaintiff asserts that his case is won at this stage on the legal merits alone. However, the Attorney General has introduced a historical context in this case of controversy that is fraudulent and offensive to a just memory of the intent of the Reconstruction-era framers of the Civil War Amendments that restored the Constitution to its Revolutionary mooring, the Declaration intent of the Founding Fathers of this Nation. The Attorney General has been reduced to invoking

Supreme Court precedents that ended Reconstruction and reestablished white supremacy. The plaintiff is compelled to respond to the revisionist "lost cause" historical arguments of the Attorney General in this Civil Action. After all, this Civil Action was filed on July 28th, 2008, to commemorate the Century and Two Score years anniversary of the adoption of the Fourteenth Amendment to the Constitution of the United States.

I. The "Three Fifths Compromise" in the Electors Clause Denied Equal Representation to African-Americans and Distorted Equal Representation for Whites. The Attorney General Argues for this legacy to continue under the rule of "Winner Take All".

Once it was decided that the states would be represented in the House on the basis of population, the Framers were faced with the question whether African-American slaves would be included as a basis for apportionment in the House. Although the African slaves could not vote, the Southern states demanded representation in the House of Representatives and the Electoral College on the basis of their slave property. Northern delegates opposed this proposal, which promised to dramatically increase the power of the South in the national government. The Framers reached a compromise: three fifths of each slave would be included in the Southern states' numbers for purposes of representation (U.S. Const. art. I, § 2, cl. 3.) and Presidential Electors (U.S. Const. art. II, § 1, cl. 2.).

The "three fifths compromise" perverted the very principle of equal representation for which it was ostensibly adopted. By its terms, the compromise perpetuated the exclusion of African-Americans from the community of equal citizens. But the unholy bargain also polluted equal representation for white people, because white Southerners were rewarded for the practice of slavery with proportionately greater power in Congress than their Northern compatriots without having to enfranchise the slave population.⁶

The AG argues that the Plaintiff cannot challenge the distortion resulting from the Electoral College on constitutional grounds because the Constitution provides for the Electoral College:

The Electoral College certainly suffers from an **"inherent numerical inequality,"**⁷ ... Even if less than perfectly democratic, **the Electoral College is by definition constitutional.** Brief For Appellee, 17-18.

6. *No Call To Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, Raymond T. Diamond, 42 Vand. L. Rev. 93, 111-13 (1989); *The Compromising Expedient: Justifying a Proslavery Constitution*, James Oakes, 17 Cardozo L. Rev. 2023, 2039-43 (1996).

7. *Gray v. Sanders*, 372 U.S. 368, 378 (1963).

The AG has habitually misconstrued the nature of this Civil Action in the District court and now in the Appellate Court. *This Civil Action does not raise the controversy over the constitutional status of the Electoral College. Plaintiff deliberately leaves that argument to a more astute litigant on this point, while noting that the phrase "Electoral College" appears nowhere in the text of the Constitution* . It is clear from a reading of the plaintiff's pleadings that this action is not about a challenge to any distortion in votes as the result of the existence of an Electoral College . The uncontested fact that there exists an "**inherent numerical inequality**" in the electoral college presents no point of controversy between the Plaintiff and the AG.

This action in fact is intended to ameliorate the *distortion of votes by the Electoral College* as implemented by a "winner take all" rule. This rule is not in the constitution but only exists in the form of a state statute, or only exists in the unbounded states as a *state practice* . As a state practice "winner take all" is subject to equal-protection scrutiny under the 1st Amendment, 5th Amendment and Section 1 and 2 of the 14th Amendment.

Indeed the whole point of this Civil Action is to **Democratize the Electoral College** by implementing a proportional apportionment of a State's Presidential

Electors. This is certainly a more "perfectly democratic" Electoral College and brings the Electoral College into conformance with the Electoral Clause of the Fourteenth Amendment .

This is in line with the tenor of various Court rulings to address practices that have had the effect of denying or abridging the citizens right to vote. The Constitution now prohibits denying some citizens the right to vote or diluting their right to vote by racial gerrymandering,⁸ white primaries,⁹ or by any other technique. As a matter of law, it is probable the Electoral College itself could not be instituted today under the Constitution as presently amended because it was designed as and remains as a system of racial and political gerrymandering.

The AG asserts that the Plaintiff cannot fairly trace the denial of the right to vote and the dilution of the vote by the actions of the VP.

None of his alleged harms are fairly traceable to the actions of the Vice President. Instead, it is purely third parties-the five named states and/or their respective electors-whose action would appear responsible for Gordon's alleged injury.
Brief For Appellee at 11.

8. *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960).

9. *Terry v. Adams*, 345 U.S. 461, 469 (1953).

This assertion is completely false. The wrongs done by the five states would come to naught if the President of the Senate were directed by a court not to count the electoral votes resulting. Plaintiff has suffered injury in fact by the dilution of votes for minority-polled presidential electors; the conduct of the Vice-President caused that dilution; barring the Vice-President from counting electoral votes subject to the mal-apportionment penalty would remedy that dilution. No one may dilute the right to vote by **improperly counting ballots.** ¹⁰

The plaintiff has established, as a matter of law, that the VP is culpable for a dilution and abridgment in the **counting** of Electoral votes.

THE PLAIN TEXT of 3U.S.C.§15 CONFIRMS THE CAUSATION" ELEMENT OF STANDING FOR PLAINTIFF.

... Therefore the aforementioned actions of the Vice President within the context of the plain text of 3U.S.C.§15 establishes that it requires the "*announcement of the state of the vote*" by the president of the Senate to effect the transformation of *purported* "certificates of votes" submitted by the states into a "*sufficient declaration*" of the persons elected President and Vice-President of the United States. Thus pursuant to 3U.S.C.§15 the aforementioned actions of the VP are *necessary* and *sufficient* to certify the "certificates of votes". Q.E.D.

See Appellant's Reply Brief, 20-23.

Every voter's vote is entitled to be counted once. It must be correctly counted and reported. ¹¹

10. *United States v. Classic*, 313 U.S. 299, 315 (1941).

11. Mr. Justice Douglas delivered the opinion of the Court in *Gray v. Sanders*, 372 U.S. 368 (1963).

The Constitution protects not only the right to cast a ballot but the right to have the ballot "counted."

*Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . This Court has consistently held that this is a right secured by the Constitution.*¹²

No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote . . . [T]he Constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast. . . .

*Thus, a state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted.*¹³

*There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. It also includes the right to have the vote counted at full value without dilution or discount.*¹⁴

12. *United States v. Classic*, 313 U.S. 299, 315 (1941).

13. **Colegrove v. Green*, 328 U.S. 549, 569-70 (1946).

14. Justice Douglas, dissenting in *South v. Peters*, 339 U.S. 276, 279 (1950).

[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. ¹⁵

And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. ¹⁶

In decision after decision, this Court has made clear that a citizen has a constitutionally protected **right to participate in elections on an equal basis with other citizens in the jurisdiction.** ¹⁷

"The true measure of a Democracy is not in counting how many votes are cast, but in how many of those votes that are cast truly count." CD19_1.

15. *Terry v. Adams*, 345 U.S. 461, 469 (1953).

16. *Reynolds v. Sims*, supra., 377 U.S. 533, 562 (1964).

17. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

II. The "Winner Take All" Rule for Apportionment Under the Original Electors Clause Denies Equal Representation to African-Americans and Distorts Equal Representation for Whites.

The original *electors clause* of U.S. Const. art. II, § 1, cl. 2. embodied an exclusionary conception of citizenship. This exclusionary legacy is maintained in our time by the adoption of the "winner take all" rule for the allocation of a state's electors. Under the "winner take all" rule, the denial of equal representation in the allocation of Presidential electors that represent the majority political expression of African-Americans in the unbounded southern states has been maintained for over a century. In the same vein, the "winner take all" rule over this time has distorted the equal representation of electors that represent the political expression of the states' white population. "Winner take all" transfers the weight of the votes cast by African-Americans to augment the votes cast by a state's white population. In the unbounded *Southern* states "winner take all" distorts the political expression of a state's population, wherein the votes cast for a minority-polled party are transferred to augment the electoral representation of the majority-polled party .

The "three fifths compromise" in the original *electors clause* of Article 2 in the Constitution of 1787 was an unholy bargain that polluted equal representation based on race. This unholy bargain has been reconstituted in our time by a "winner take all" rule that pollutes political equality based on party affiliation irrespective of race. The following tables demonstrates the debasement in the weight of votes cast by Southern whites and blacks and the distortion of their political expression under "winner take all" rules for the allocation of Presidential electors.

The following table demonstrates how the electoral weight that represents the votes of Southern whites for a minority party is transferred to the party that received a majority of votes by the "winner take all" rule.

The Abridgment of Votes by Party Affiliation

Dave Leip's Atlas of U.S. Presidential Elections _ http://www.uselectionatlas.org/										
State	EV	Proportional Allocation		Winner Take All		Democratic	Republican	Total Votes	Popular Vote	
		McCain	Obama	R	D				McCain	Obama
Ar	6	4	2	6		422,310	638,017	1,060,327	60%	40%
Ga	15	8	7	15		1,844,123	2,048,759	3,892,882	53%	47%
La	9	5	4	9		782,989	1,148,275	1,931,264	59%	41%
Tn	11	6	5	11		1,087,437	1,479,178	2,566,615	58%	42%
Tx	34	19	15	34		3,528,633	4,479,328	8,007,961	56%	44%
		McCain	Obama			Democratic	Republican		McCain	Obama
Total	75	42	33	75	0	7,665,492	9,793,557	17,459,049		
		56%	44%			44%	56%			

This table demonstrates that the popular vote for the Democratic Presidential candidate in the 2008 Presidential election would translate to 33 Presidential electors. Under the "winner take all" rule the 33 electors are transferred to the Republican party candidate. No state election laws in the unbounded Southern states authorize the allocation of the states' presidential electors on a "winner take all" basis. Therefore the exclusive selection of the Republican slate of electors on a "winner take all" basis constitutes an *abridgment* of the citizens' "right to vote" and a debasement in the weight of the citizens vote in violation of **Amend. 14§2.** as implemented by **2U.S.C. § 6.**

The following table demonstrates how the electoral weight that represents the majority votes of Southern Blacks is transferred to augment the majority votes of Southern Whites by the "winner take all" rule.

The Abridgment of Votes by Race

Source: U.S. Census Bureau_ Internet Release date: February, 2009										
State	EV	Proportional Allocation		Winner Take All		BLACK	WHITE	Total Votes	Popular Vote	
		White	Black	R	D				White	Black
Ar	6	5	1	6		173,000	755,000	928,000	81%	19%
Ga	15	10	5	15		1,010,000	1,810,000	2,820,000	64%	36%
La	9	6	3	9		564,000	1,456,000	2,020,000	72%	28%
Tn	11	9	2	11		344,000	1,836,000	2,180,000	84%	16%
Tx	34	30	4	34		803,000	6,042,000	6,845,000	88%	12%
Total	75	60	15	75	0	2,894,000	11,899,000	14,793,000		
		80%	20%			20%	80%			

This table demonstrates that the black popular vote in the unbounded Southern States in the 2008 Presidential election translates into approximately 15 Presidential electors. Over 95% of blacks in these states cast their votes for the Democratic candidate. Under the "winner take all" rule, the 15 electors that represent the majority choice of these states' black populations are negated and transferred to represent the majority choice of the states' white populations. There is no state election law in the unbounded Southern states that authorizes the allocation of the states' presidential electors on a "winner take all" basis. Therefore the exclusive selection of the States' slates of electors on a "winner take all" basis constitutes an *abridgment* of the States' black citizens' "right to vote" and a debasement in the weight of their vote in violation of **Amend. 14§2**. as implemented by **2U.S.C.§6**.

III. As Altered by the Reconstruction Amendments, the *Electors Clause* Affirmatively Encourages Apportionment of Electors Necessary to Avoid a Denial or Abridgment in the Citizen's "Right to Vote".

The Reconstruction-amended *Electors Clause* of U.S. Const. amend. xiv, § 2 introduced an inclusionary conception of citizenship. The original Constitution in general, and the Electors Clause in particular, excluded slaves from membership in the American polity. The Reconstruction Amendments profoundly altered the nature of American citizenship by including African-Americans in the political community. In doing so, the Amendments transformed the Electors Clause from a relic of white supremacy to a herald of inclusionary democracy. The Clause, as amended, thus cannot be plausibly construed to allow any disproportionate allocation of votes of historically excluded populations and more fully achieve the constitutional goal of equal representation. Indeed, as altered by the Reconstruction Amendments, the Electors Clause strongly encourages the adoption of apportionment deemed necessary to avoid a discriminatory abridgment of the voting rights of a state's minority population.

The foregoing tables demonstrate an exact match in the proportional allocation of presidential electors with the popular vote by party and by race.

The tables also establish that the just solution that satisfies the requirements of the *Electors Clause* under Amend. 14§2 and the *mal-apportionment penalty clause* pursuant to its implementing statute 2U.S.C.§6, is the adoption of proportional apportionment of Presidential Electors to avoid a discriminatory abridgment of the voting rights of any class of a state's citizens based on race and/or party affiliation.

The Electoral College as it now exists arises from statutes (state and federal) and not from Article II. These statutes (or as in this action non-statutes e.g. "Winner-take-all", "Unit Voting" or "District Voting") are subject to the principle of equality of the Declaration of Independence, the 1st Amendment, the 5th Amendment, and the 14th Amendment. These statutes, or as in this action mere state practice, are subject to the "equal protection" and "mal-apportionment penalty" clause of the 14th Amendment. Section Two of the 14th Amendment mandates that states must grant equal weight to every citizen's vote or suffer a diminished representation in Congress. This principle naturally leads to the doctrine of "one person-one vote" announced by the Supreme Court in 1964.¹⁸

18. *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 US 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

This doctrine is the original intent of the American people as expressed in the Declaration of 1776: "All men are created equal". This is the clear intent of the Reconstruction-era framers of the Second Section of the Fourteenth Amendment to the Constitution of the United States of America.

IV. Plaintiff has a Right to Proceed As Private Attorney General.

The Attorney General has a public trust to enforce the law. In more than 140 years, the Attorney Generals of the United States have failed to enforce Section 2 of the 14th Amendment even over periods where the violations were blatant and violent. Plaintiff is a person who was to benefit from Section 2 of the 14th Amendment. If the Attorney General will not enforce the law, then let plaintiff proceed as a private Attorney General.

Marbury v. Madison bears on the Electoral College issue in several ways. 1) In a monarchy, the word of the king is law; but in a republic no man is above the law (or, to put it another way, the "law is king" and all people are subject to the law. 2) Since the function of the courts in a republic is to subject all to the law, a court must hold that even the Vice-President must obey the law when the duty is "ministerial" (e.g., when the performance of the duty is fixed and certain, not subject to his judgment or discretion). 3) The function of the courts is "juris

dictio," to say what the law is (e.g., to rule whether the 14th Amendment supersedes the provisions of the 12th Amendment to the contrary).

Section 2 of the 14th Amendment has never been litigated as it was intended by the Reconstruction-era Constitutional framers; it has never been enforced. Judicial notice may be taken that for well over a century, Congress and the president have failed to enforce this provision despite the overt denial of the right to vote and other civil rights to African-Americans in the South. Since Congress and the White House have not enforced this Constitutional provision for well over a century, *then a theory of private attorney general should fill the resulting gap, for there are no surplusages or dead letters in the law. Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

V. The History of the United States Constitutional Franchise Founded on Racial Quotas and Reconstruction Amendments Grounded in the Intent of the Declaration Should Inform the Court In Its Resolution of This Case.

The original intent of the constitutional framers of 1787 was to establish an electoral franchise predicated on racial quotas that disproportionately favored a southern white minority.

The Reconstruction-era constitutional framers of 1868 enacted amendments to reconstitute the constitution of 1787 with the original Declaration intent ("all men are created equal") of the founding fathers of the American Revolution.

The Electoral College of 1787 is not in accord with the principle that "All men are created equal." The intent of the Founders (1776) was turned upside down by the intent of the Framers (1787). The value system of the Declaration is "liberty, equality and fraternity." The value system of the Electoral College of 1787 was slavery, inequality, and racism. The Civil War restored (and was intended to restore) the "original intent" of 1776, the first principles of the nation as set forth in the Declaration of Independence, the ancient Masonic slogan: liberty (13th Amendment), equality (14th Amendment), and fraternity (15th Amendment). Unfortunately, this obvious truth, the teaching of what really happened in our nation's historical origin, is in the main omitted from the schools and universities of the land and suffers summary dismissal in our courts of law.

We look back to our past, in order to illuminate our present, so as to gain informed insight into our future.

A. THE ELECTORAL COLLEGE INTENT FOR A FRANCHISE BY RACIAL QUOTAS.

"Resolved, that the compact which exists between the North and the South is a covenant with death and an agreement with hell - involving both parties in atrocious criminality - and should be immediately annulled."

This resolution was drafted by the abolitionist William Lloyd Garrison and passed by the Massachusetts Anti-Slavery Society. The compact to which it referred was the Constitution of the United States of America. The compact was declared an agreement with hell because - in its original form - it sanctioned slavery.

How did our nation evolve in just over a decade from the divine universal addition of inclusiveness in the Declaration of Independence of 1776 - the self evident truth "That all men are created equal" - to the fractional division of "3/5ths of all other persons" in the Constitutional Convention of 1787?

When 55 delegates from the former colonies assembled that hot summer in what would become the Philadelphia Constitutional Convention of 1787, it soon became evident that mere adjustments to the Articles of Confederation (an alliance of semi-autonomous states that had proved sufficient to prosecute the Revolutionary War) could not be adapted to govern an emerging unified nation.

The framers of our Constitution could not agree on a system of federalism for the national government until the universal ideals of the Declaration of Independence could be reconciled with the preservation of white racial privilege. This was the compromised Constitution's "covenant with death".

"[T]he states were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concurred in forming the great division of interests in the United States. It did not lie between the large and small states: it lay between the Northern and Southern."

Notes of Debates in the Federal Convention of 1787 Reported by James Madison, June 30th, (<http://www.nhccs.org/Mnotes.html>)

The compromises put into place institutional safeguards to preserve racial privilege predicated upon *white minority privilege quotas* for congressional representation. It required a cognitive dissonance that could compartmentalize democracy with racial exclusion. At the very outset the compromised constitutional racial quotas came whole, in fractions, and as a null set: whole if you were white, partial if you were black, zero if you were a Native American.

Article 1 Section 2 Clause 3.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, (*i.e. those of European descent*) including those bound to Service for a Term of Years, (*i.e. indentured servants of European descent*) and excluding Indians not taxed, (*i.e. the indigenous natives*) three fifths of all other Persons, (*i.e. those of African descent*). *My emphasis.*

Thus an anti-majoritarian calculus for congressional representation that disproportionately favored the minority white slaveholding population of the South by counting its slave population was entrenched into the fabric of the American Constitution of 1787.

The small states did fear being out voted in a proposed legislature based solely on population. On behalf of the small states, New Jersey delegate William Paterson argued that the proposal for proportional representation advocated by the large state nationalists James Wilson and James Madison was "striking at the existence of the small States". Finally, the Connecticut Compromise offered by Roger Sherman broke the convention deadlock between the small States' New Jersey Plan and the large States' Virginia plan by proposing a bicameral legislature that consisted of a lower house with representation apportioned according to population and an upper house with an equal vote for each state. Slave states, with a disproportionate slave population, feared being out-voted in a proposed legislature based on a population of free whites. The Southern states would be overwhelmed by the North if representation was based solely on free whites.¹⁹

19. In the first Congress, the North had thirty-five representatives, and the South had thirty. However after the first federal census, the original northern states had fifty-five members of Congress, and the southern states had only forty-four. Had slaves not been counted for congressional representation, the South's members of the House after 1790 would have been only about thirty-four.

In order to placate the slave states, Pennsylvania delegate James Wilson and the South Carolinian John Rutledge proposed the "three-fifths rule" that was adopted in April 1783 by the Congress of Confederation for computing representation. The whole white population would be counted with slaves reckoned at three-fifths of their whole number.

"It seemed now to be pretty well understood that the real difference of interests lay, not between the large and small but between Northern and Southern states. The institution of slavery and its consequences formed the line of discrimination.."

Notes of Debates in the Federal Convention of 1787 Reported by James Madison, July 14th, (<http://www.nhccs.org/Mnotes.html>)

The sectional clash at the 1787 Constitutional Convention between the North and South was resolved when the majority voted on July 12, 1787 to sanction the slave doctrine of the Southern States. This was the Faustian bargain denounced by latter day abolitionists as the Constitution's "covenant with death." The Southern slave was property and could be counted at a two-fifths discount of a white person in the apportionment of their representatives in the lower house. The convention eventually adopted James Wilson's elector system that incorporated the "*white minority privilege quotas*" in the election of the president. This was accomplished by the indirect choice of the president by an 'electoral college' with a composition based on state representation in Congress. The Convention also assured a minimum of three electoral votes for every state regardless of population, predicated on two Senators and one House representative.

Article 2 Section 2 Clause 1.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.

This provision of the Constitution provided one of the most prominent indirect protections for slavery.

Art. II, sec. 1, par. 2. This clause provided for the indirect election of the President through an electoral college based on congressional representation. This provision incorporated the three-fifths clause into the electoral college and gave whites in slave states a disproportionate influence in the election of the President.

_ Paul Finkelman, *Garrison's Constitution, The Covenant with Death and How It Was Made*, Prologue Quarterly of NARA, Winter 2000, Vol. 32, No. 4 , p233.

Thus an anti-majoritarian electoral math that disproportionately favored the minority white population of the South by counting a disfranchised black population was entrenched into the fabric of America's Constitution, and that legacy is maintained in the South to this day by the rule of "Winner take all".

The most eminent statesmen of the republic plainly noted the discriminatory effect of the political calculus of Article I which is carried over into Article II by the Electoral College from the beginning:

They neither vote themselves nor increase the votes of their masters. Upon what principle, then, ought they to be taken into the federal estimate of representation? ²⁰

James Madison.

Every planter South of the Potomac has three votes in effect for every five slaves he keeps in bondage; while a New England farmer who contributes ten-fold as much to the support of the Government has only a single vote." ²¹

John Quincy Adams.

The slaves do not vote; they are only counted and so used, as to swell the influence of the white people's votes.²²

Abraham Lincoln.

Where Lincoln complains of the tendency of the 3/5 clause to "swell" the votes of white people, Sarah Grimke argued that under the existing political system of her day, women existed only to "swell" the votes of men:

Woman has no political existence. With the single exception of presenting a petition to the legislative body, she is a cipher in the nation; or, if not actually so in representative governments, she is only counted, like the slaves of the South, to swell the numbers of law-makers who form decrees for her government, with little reference to her benefit, except so far as her good may promote their own. ²³

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20. *The Federalist Papers*, No. 54, by James Madison, "The Apportionment of Members Among the States," from the New York Packet, (Tuesday, February 12, 1788).
 21. *John Quincy Adams and the Foundation of American Foreign Policy*, by Samuel F. Bemis, (Nov. 8, 1804), quoted at p. 123, note 37 (1949).
 22. *Speech on the Kansas-Nebraska Act*, by Abraham Lincoln (October 16, 1854).
 23. *Letters on the Equality of the Sexes and the Condition of Women*, Letter 12, by Sarah Grimke (1837).

[M]en and women were CREATED EQUAL.... Whatever is right for a man to do, is right for woman....I seek no favors for my sex. I surrender not our claim to equality. All I ask of our brethren is, that they will take their feet from off our necks and permit us to stand upright on that ground which God destined us to occupy. ²⁴

All this "*swelling*" was due to the fact that the Electoral College is a system of *virtual representation* and not one of *actual representation*. The fact of the matter is that this departure from equality under the Electoral College system was not accidental but deliberate. A deliberate departure from equality is the worst form of inequality and the most susceptible to constitutional attack.

24. *Letters on the Equality of the Sexes and the Condition of Woman*, by Sarah Grimke (1838).

The *Southern white minority privilege quotas* of 1787 have worked well.

The *Southern white minority privilege quotas* favored the slave state of Virginia with over a quarter of the electors required to elect a President, resulting in the election of a white slaveholding Virginian to the presidency for 32 of the Constitution's first 36 years. A slaveholder served as president for 50 of the nation's first 60 years. From the constitutional convention of 1787 to the election of 1860 at the dawn of the Civil War, only two Presidents were elected who were not favorable to slavery.

Let us now examine how this reflection on our past illuminates our present.

Under the rule of "winner take all" the historic and present disproportionate representation provided by yesterday's slave population and today's disenfranchised black population has served and continues to serve as the enduring bulwark of disparate political power for Southern whites.

The true measure of a democracy is not in counting how many votes are cast, but in how many of those votes that are cast truly count.

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By this measure, American democracy does not measure up. This failure of American democracy is grounded in America's allocation of electoral college votes for the President of the United States on a "winner take all" basis. By awarding all electoral votes in each state to the candidates who win the most popular votes in that state, the "winner-take-all" or 'general ticket' system effectively disenfranchises everyone who voted for other candidates.

"Winner-Take-All" is structurally anti-majoritarian, institutionally racially biased, and constitutionally deficient. "Winner-Take-All" is constitutionally deficient and should expose the *unbounded* states to a reduction in state representatives pursuant to the mal-apportionment penalty of the Second section of the Fourteenth Amendment to the Constitution for an abridgment of a citizen's "right to vote".

The founding fathers had specifically designed the electoral college as an undemocratic racially-biased constitutional quota system, ("to swell the influence of the white people's votes" _ *Abraham Lincoln*). This amoral compromise provided a basis for the "states rights" argument for Southern secession which brought on the Civil War: local control of non-whites, free from federal interference with the "reserved" right of sovereign white supremacy.

The specter of the 3/5ths compromise that established an institutionalized Constitutional franchise by racial quotas haunts every modern day presidential election. The original Constitution's "*covenant with death*" that established an augmented white elective prerogative is now preserved by "Winner take All" in the unbounded former Confederate states.

B. A DIVINE REDEMPTION, THE RECONSTRUCTION AMENDMENTS' DECLARATION INTENT FOR THE FRANCHISE.

There is a solution. Let us once more look back to our past so as to illuminate our present situation, not the past of the flawed "more perfect union" of our 1787 Constitutional origin, but the more perfected union of our Reconstruction-era Constitutional amendments. How did America redeem itself from our nation's original sin in the garden of democracy? By a cataclysmic fratricidal baptism in blood unparalleled in the history of civil wars.

Those who fought the Civil War understood that the departure from the principle of the Declaration of Independence had produced that conflict. Those who fought the Civil War knew that they had to "reconstitute" the Constitution in the image of the Declaration for America to be at peace in one great Union. Hon. Thaddeus Stevens articulated this principle when he said:

Sir, our fathers made the Declaration of Independence; and that is what they intended to be the foundation of our Government. If they had been able to base their Constitution on the principles of that Declaration it would have needed no amendment during all time, for every human being would have had his rights; every human being would have been equal before the law. But it so happened when our fathers came to reduce the principles on which they founded this Government into order, in shaping the organic law, an institution hot from hell appeared among them.... It obstructed all their movements and all their actions, and precluded them from carrying out their own principles into the organic law of this Union. ²⁵

25. Hon. Thaddeus Stevens, (R-Penn.), in the *Congressional Globe*, at p. 536. The original defendant in this action, Richard Cheney wrote a book praising Thaddeus Stevens as one of the *Kings of the Hill: How Nine Powerful Men Changed The Course of American History*, by Richard Cheney, Touchstone, May 9, 1996.

The early "Republicans" were fully aware of how the Electoral College system altered the weight of votes depending upon where they were cast.

Abraham Lincoln followed John Locke in arguing that Social Contract and Consent of the Governed means that each person has an equal right to form the government:

South Carolina has six representatives, and so has Maine; South Carolina has eight presidential electors, and so has Maine. This is precise equality so far; and, of course they are equal in Senators, each having two. Thus in the control of the government, the two States are equals precisely. But how are they in the number of their white people? Maine has 581,813-- while South Carolina has 274,567. Maine has twice as many as South Carolina, and 32,679 over. Thus each white man in South Carolina is more than the double of any man in Maine. This is all because South Carolina, besides her free people, has 384,984 slaves. The South Carolinian has precisely the same advantage over the white man in every other free State, as well as in Maine. He is more than the double of any one of us in this crowd. The same advantage, but not to the same extent, is held by all the citizens of the slave States, over those of the free; and it is an absolute truth, without an exception, that there is no voter in any slave State, but who has more legal power in the government, than any voter in any free State. There is no instance of exact equality; and the disadvantage is against us the whole chapter through. This principle, in the aggregate, gives the slave States, in the present Congress, twenty additional representatives-being seven more than the whole majority by which they passed the Nebraska bill.²⁶

Federalists, Whigs, and abolitionists recognized this distortion of the weight of the vote based upon race and place before the Republican Party came into being.

26. *Speech on the Kansas-Nebraska Act*, by Abraham Lincoln (October 16, 1854).

Conforming the Constitution to the Declaration was the "original intent" of

the Republican Party from its inception. Their party platforms of 1856 and in 1860 identified the Declaration of Independence as the "true constitution" of the United States.

Resolved: That the maintenance of the principles promulgated in the Declaration of Independence, and embodied in the Federal Constitution are essential to the preservation of our Republican institutions....²⁷

Resolved: That, with our Republican fathers, we hold it to be a self-evident truth, that all men are endowed with the inalienable right to life, liberty, and the pursuit of happiness, and that the primary object and ulterior design of our Federal Government were to secure these rights to all persons under its exclusive jurisdiction...²⁸

This court should read the three Civil War Amendments as a whole. In *The Slaughterhouse Cases* (1872), dissenting Supreme Court Justice Swayne wrote, "Fairly construed, these amendments may be said to rise to the dignity of a new Magna Carta." But historians and the legal establishment have generally failed to acknowledge that the purpose of the Civil War Amendments were collectively to conform the Constitution to the Declaration.

27. Platform of the Republican Party of 1856, <http://members.aol.com/jfepperson/r1856.html>

28. Platform of the Republican Party of 1860, <http://members.aol.com/jfepperson/r1860.html>.

The Civil War Amendments were intended to alter all the branches of

government to the principle of equality and not just the legislative branch.

Conforming the Constitution to the Declaration was the "original intent" of those conducting the Civil War as the Union Party (composed of Republicans, Democrats, and Others). On May 8th, 1866 during the debate on the 14th Amendment, the leader of the House of Representatives, Thaddeus Stevens, delivered a very important speech on the Amendment's intent:

I can hardly believe that any person can be found who will not admit that every one of these provisions (of the 14th Amendment) is just. They are all asserted, in some form or other, in our DECLARATION or organic law. ... The second section I consider the most important in the article. It fixes the basis of representation in Congress. If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive. ²⁹

When Lincoln issued the Emancipation Proclamation it included a provision that called upon the slaves to put the emancipation in effect by service in the Union Armies to free themselves. Now the Reconstruction amendment would have to call upon the freemen to effect the franchise by an irony wherein the ex-slaves had to be allowed *to vote for the right to vote*.

29. Hon. Thaddeus Stevens, (R-Penn.), in the *Congressional Globe*, at p. 536.

In order to reconstruct the South and reconstitute the Constitution, the South's freedmen were enfranchised thanks to the first Reconstruction Act of March 2, 1867. Agents of the Freedmen's Bureau registered freemen throughout the South to vote for the first time. Whereas under the Reconstruction Act some white southerners were disenfranchised for disloyalty, black southerners were permitted to vote in elections for the various state constitutional conventions. Before the 14th and 15th Reconstruction Amendments could be realized, the vote of ex-slaves was necessary to restore the union and perfect the constitution to the founding principle of the DECLARATION.

By the end of 1867, 735,000 blacks, in contrast to 660,000 whites, were registered to vote in the former Confederate states.³⁰ Ulysses S. Grant, the General who saved the Union, could not win a majority of the white vote. Black voters provided the winning margin of victory in electing Ulysses S. Grant president in the election of 1868.

One century and two score years later, black voters would provide the winning margin over the choice of white voters in the election to the Presidency of the United States, the first American of African descent.

30. *Harper's Weekly*, September 28, 1867 reported that black voters constituted a majority in the states of Alabama, *Georgia*, *Louisiana*, and *Texas*.

Reacting to the retreat of white America from Reconstruction to "Redemption," in September of 1883 Frederick Douglass played off the Gettysburg Address, which itself played off the Declaration of Independence. "We hold it to be self-evident that no class or color should be the exclusive rulers of this country; If there is such a ruling class, there must of course be a subject class, and when this condition is once established this Government of the people, by the people and for the people, will have perished from the earth." So is the lineage: from Thomas Jefferson to Abraham Lincoln to Frederick Douglass.

We should honor the abolitionist and democratic spirit embodied in the Reconstruction amendments. We should honor those amendments to the Constitution that represent the crowning achievement of the ultimate sacrifice made in the Civil War by that "*band of brothers*" of Americans of European and African descent to effect "*a new birth of freedom*" and forge "*a more perfect union*".

The Reconstruction amendments restored our most enduring founding principle. The forgotten and maligned "self evident truth", the divine universal addition in the Declaration of Independence of 1776 -- "That all men are created equal"-- was redeemed in *the second section of the fourteenth amendment to the Constitution.*

VI. The Attorney General Invokes The Redemptionist Era Voting Rights Precedents that Reestablished Racial Supremacy and Ended Reconstruction.

"Can we forget for whom we are forming a government? Is it for men, or for the imaginary beings called States?"

James Wilson, author of U.S. Constitution. 30 June 1787.
Madison, James (1 April 1987). *Notes of Debates in the Federal Convention of 1787*. W.W. Norton & Company.

The Attorney General shamelessly asserts:

Alternatively, if Gordon's claims nonetheless constituted a justiciable case or controversy, dismissal would still have been appropriate for failure to state a claim. This follows because the States have plenary power to determine how to 'appoint' their electors and control (if they wish) the Electors' votes for President and Vice President. See *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). **Brief For Appellee at 16-18.**

The Appellant's Brief warned that this court should be guided by:

[The] jurisprudence of "Textualism" weighted and tempered by the "Original Intent" of the Reconstruction-era's constitutional framers rather than undue reliance on legal precedents. ... Indeed case law precedents in this regard are fraught with the danger of slippage into reliance on redemptionist-era court rulings which sustained the reestablishment of racial supremacy. **Appellant's Brief at 14.**

The Attorney General (AG), by invoking the precedent of *McPherson v. Blacker* (1892), which in turn relies on the redemption-era voting rights case precedents (*US v. Reese*, 92 U.S. 214 (1875) and *US v. Cruikshank*, 92 U.S. 542 (1875)) has crossed the rubicon of reliance in our modern era on the discredited rulings (*among scholars of jurisprudence*) of a redemptionist-era Supreme Court that ended the enforcement of the franchise for blacks, and only four years later in *Plessy v. Ferguson*, 163 U.S. 537 (1896) established racial apartheid in the United States of America.

Of course if the AG had cited *Plessy* it would have elicited a righteous public outrage. However the AG cites a precedent grounded in the reasoning of *Reese* and *Cruikshank* that set the stage for *Plessy* with a more appalling precedent on which the public is silent in ignorance and our courts are silent in embarrassment and denial.

"The fifteenth amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States, but the last has been. *U. S. v. Cruikshank*, 92 U.S. 542 ; *U.S. v. Reese*, Id. 214. , Id. 214." ***McPherson v. Blacker*, 146 U.S. 1, 38 (1892)**

This is a lie, and any serious, honest student of the Reconstruction-era knows it's a lie. If sovereign power over the *right to vote* had not been removed from the Rebel states for its abuse by the states and had disloyal "Confederate" Southern whites not been disfranchised and Southern blacks loyal to the United States of America enfranchised, it is conceded that "*dismissal would [be] appropriate for failure to state a claim*," since no Fourteenth Amendment to the Constitution would exist under which a claim could be made. The Reconstruction-era Constitutional framers , all *white* congressmen of course, were guided by the *Declaration Intent* ("all men are created equal"). The plain text of the second section of the Fourteenth Amendment sets a clear hierarchy, placing the citizen's right to vote over a state representative's right to hold his seat in Congress for an *abridgment* of that right. This construction presents the *McPherson* thesis of an Article Two *sovereign* legislature as nonsensical and historically fraudulent. The South did lose the Civil War, despite the Attorney General's "*lost cause*," states' rights argument in *McPherson*.

Several scholars have addressed the Redemptionist-era rulings of the Supreme Court.

"Not content with having thus knocked the props out from under the amendments, the Court went on to strike yet another blow at black rights in this crucial election year. In *U.S. v. Reese* it threw out the indictment of a Kentucky official who had refused to count a black's vote. The Fifteenth Amendment did not bestow upon U.S. citizens any right to vote for U.S. officials but merely prohibited the states from restricting that privilege on racial grounds, the Court expressly held. ... Once again, Southern blacks stood defenseless before their former masters.

The hard-won Fourteenth and Fifteenth Amendments to the Bill of Rights were still in the U.S. Constitution, but the statutes designed to enforce them had been largely wiped out. Black rights as dead letters were something the South's white supremacists could live with. "

After Appomattox : How the South Won the War, Stetson Kennedy, University Press of Florida, p.261 (1995).

This author provides a satiric critique of the Supreme Court's Redemptionist-era rulings that disfranchised blacks.

ARTICLE XV

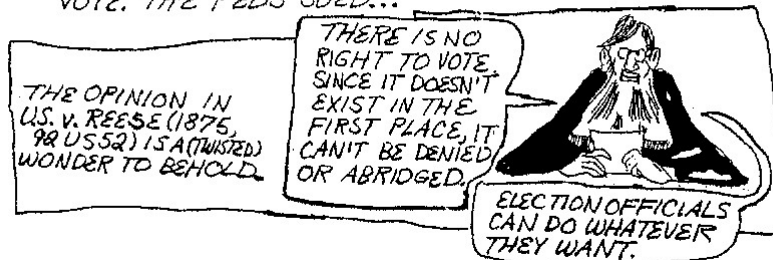
Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

IT IS VERY RARE, INDEED, WHEN THE SUPREME COURT CALLS THE CONSTITUTION A LIAR,

BUT

IN 1874, AN ELECTION OFFICIAL NAMED REESE REFUSED TO LET REGISTERED BLACK VOTERS VOTE. THE FEDS SUED...



The Cartoon Guide to The Constitution of the United States, Eric Lurio, Harper & Row, New York , p.200 (1987).

" Even more devastating was the 1876 decision in *U.S. v. Cruikshank*. This case arose from the Colfax massacre, the bloodiest single act of carnage in all of Reconstruction. Indictments were brought under the Enforcement Act of 1870, alleging a conspiracy to deprive the victims of their civil rights. On the grounds that the wording 'failed to specify race as the rioters' motivation, the Supreme Court overturned the only three convictions the government had managed to obtain. More, however, was at stake than faulty language, for the Court went on to argue that the postwar amendments only empowered the federal government to prohibit violations of black rights by states; the responsibility for punishing crimes by individuals rested where it always had with local and state authorities. In the name of federalism, the decision rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law."

Reconstruction : America's Unfinished Revolution 1863-1877,
Eric Foner, Harper & Row, New York, pp. 530-531(1988)

"[I]n the two leading voter rights cases of the 1870s, *Reese* and *Cruikshank*, the federal courts did not read the law to grant the right to vote or to impose on state governments the affirmative duty of protecting voters at the polls. ... Goldman's book is thus doubly relevant for modern readers. It reminds us what ensues when courts refuse to enforce laws guaranteeing minorities' rights, and it warns us that what happened at the end of Reconstruction can happen again. "

Reconstruction and black suffrage : losing the vote in Reese and Cruikshank
, Robert M. Goldman, University Press of Kansas, 2001, Editors' Preface,x-xi.

"In 1875, disregarding the poignant testimony of 300 witnesses, the Supreme Court ruled unanimously in *U.S. v. Cruikshank* to overturn a lower court conviction of eight conspirators. This decision virtually nullified the Ku Klux Klan Enforcement Acts of 1870 and 1871-which had made federal offenses of a variety of acts to intimidate voters and officeholders-and cleared way for the Jim Crow era."

The Colfax massacre: the untold story of Black power, White terror, and the death of Reconstruction, LeeAnna Keith. Oxford University Press, Inc., 2008.

"In 1875, an army of white terrorists in Mississippi led a campaign to 'redeem' their state-to abolish, with violence and murder if need be, the newly won civil rights of freed slaves and blacks. The outcome of the Civil War hung in the balance. It was as if the Civil War had not really ended with the Confederate surrender at Appomattox. In the South, a second war went on for years over the question of rights, especially voting rights, for African-Americans."

{Jacket cover}

On the forty-eighth anniversary of the Colfax massacre, April. 13, 1921, the white townspeople of Colfax erected a monument-a white marble obelisk placed at the most prominent location in the town cemetery-to commemorate the most dramatic day in their local history. Engraved on the shaft were these words: **In loving remembrance, erected to the memory of Stephen Decatur Parrish, John West Hadnot, Sidney Harris, who fell in the Colfax Riot fighting for white supremacy, April 13, 1873."**

Redemption : the last battle of the Civil War, Nicholas Lemann,
Farrar, Straus and Giroux, New York, 2006, p. 26.

The AG, by invoking the precedent of *McPherson*, which in turn relies on the precedents *Reese* and *Cruikshank* as dispositive, presents this Appellate Court with a stark choice: Should the Appellate court, guided by the plain text of the Reconstruction-era's second section of the Fourteenth Amendment, honor the D.C. memorial to those of African descent who fought for freedom in the Civil War by ruling that the appellant as Citizen states a *valid justiciable claim* in this action, or, guided by the Redemption-era *McPherson* precedent, should it rule for the Vice President on the basis of a "*failure to state a claim*," thus honoring the Colfax, Louisiana monument to commemorate those "*who fell in the Colfax Riot fighting for white supremacy*".

The title of this scholar's book says it all:

The Day Freedom Died: the Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction, Charles Lane, Henry Holt and Company, New York, 2008.

"The Colfax massacre was also a turning point because it showed the inability or at least the unwillingness of the United States to enforce Reconstruction laws, including the Fourteenth and Fifteenth Amendments. The United States did eventually indict 97 alleged perpetrators for conspiracy to deprive the victims of their civil rights, but managed to obtain only three convictions. The Supreme Court overturned even those three, holding that the Fourteenth and Fifteenth Amendments only prohibited violations of black persons' rights by states, not by individuals or organizations. Thus it gave a green light to private terrorism. In the words of James Hogue, "Colfax thus became not only the spark, but also the blueprint for the overthrow of Radical rule."

Lies Across America: what our historic sites get wrong, James W. Loewen, New Press, New York, 1999, pp. 212-213

The AG revives the *Colfax blueprint* in this action and adds insult to injury, to the plaintiff, to the Constitution, to the principles of the *Declaration* intent for the foundation of our Government, to the intent of the Reconstruction-era framers of the Fourteenth Amendment. It expressly made citizenship a national right, where it had previously been merely a derivative status as a citizen of a state. The Civil War Amendments reduced the provisions in the Constitution for the Electoral College to merely a "statutory" basis. Section 2 of the 14th Amendment mandates a reduction in the members elected to the House of Representatives from states which *debase the weight* of their own citizens' votes by denying the offending states seats in Congress in proportion to that class of citizens whose votes were *denied* or *abridged*. In this civil action, filed on the date that commemorates the one century and two score adoption of the Fourteenth Amendment, an Attorney General of the United States Department of Justice resurrects the notorious Redemptionist-era Supreme Court ruling in *Colfax* to serve as a contemporary blueprint for overthrowing an action to enforce the suffrage rights for which that "band of brothers" of European and African descent died in America's Civil War.

VII. THE ATTORNEY GENERAL DEFENDS THE DISCREDITED THEORY OF THE CONSTITUTIONAL DEMOCRATS AND THE CONFEDERATE STATES OF AMERICA.

In 1860, Vice-President John Breckinridge occupied the position that Vice-President Joe Biden does today. Elected on the Democratic ticket with James Buchanan as president in 1856, Breckinridge was the youngest Vice President in U.S. history. In 1860 the Democratic Party split in two: Northern Democrats who supported Stephen Douglas called themselves **National Democrats**. Southern Democrats who supported John Breckinridge called themselves **Constitutional Democrats**.

Constitutional Democrats claimed that "slavery" was a "constitutional right" and argued that the Constitution of the United States "created" a right to possess slaves.³⁰ Breckinridge ran for president on this platform with the support of incumbent Democratic president Buchanan. Breckinridge came in second in electoral votes, winning only in the states that would become the Confederacy.

As the outgoing vice president, Breckinridge "counted" the votes that placed Lincoln in office; as the outgoing vice president, he swore in Lincoln's vice president, Hannibal Hamlin.

30. This argument rested upon "four pillars." 1) the international slave trade clause ; 2) the fugitive slave clause; 3) the 3/5th clause: and 4) the Electoral College.

Though Breckinridge had taken an oath to uphold and defend the Constitution, he left the Senate of the United States, joined the Confederate army and led Confederate troops against the lawfully elected government in which he was included. In short, John Breckinridge went to war asserting that slavery was **"...by definition constitutional."**

The Attorney General defends inequality on the grounds that it is in the Constitution, that *"the winner-take-all system creates no legally cognizable injury, as that quintessentially republican system is surely constitutionally permissible."* **See Brief For Appellee at 5.** Based upon Section Two of the 14th Amendment, Appellant responds, "Not any more." That makes this a case or controversy of a constitutional dimension. At a minimum, a court of the United States must examine the record on the Civil War Amendments.³⁰

30. *The Reconstruction amendments' debates; the legislative history and contemporary debates in Congress on the 13th, 14th, and 15th amendments*, compiled by Alfred Avins, Virginia Commission on Constitutional Government: Richmond (1967). **(Note: Virginia compiled the Civil War debates in order to bury them; they don't teach this in law school.)** See also *Our Secret Constitution: How Lincoln Redefined American Democracy* by George P. Fletcher (2003); *Abraham Lincoln and the Second American Revolution* by James M. McPherson (1992).

Now the current Attorney General of the United States adopts the discredited, treasonous position of the Confederacy as he argues that the inequality of the Electoral College as implemented by "winner take all" is "...**by definition constitutional.**" **Brief For Appellee at 18.** Will the Attorney General of the United States next argue that the three fifths clause is "...**by definition constitutional?**"

The Attorney General claims that inequality in the number of persons represented by each elector is mandated. But 1) the Electoral College system links Article II (number of Presidential Electors) to Article I (allocation of membership in the House of Representatives); the Supreme Court of the United States has already pronounced a rule requiring equality in the number of persons represented by each member in the House of Representatives known as the "one person-one vote rule"; so 3) equality in the number of persons represented by each member in the House of Representatives under Article I alters the inequality in the allocation of the number of Presidential Electors. If you move the foundation of the house, the frame and roof will move as well. The principle of unequal votes went out with slavery and the three-fifths clause.

VIII. QUOD LEGES POSTERIORES PRIORES CONTRARIAS ABROGANT.
A later law by the same authority abrogates all its earlier laws to the contrary.

Richard Henry Lee warned Samuel Adams in a letter on October 5, 1787, on how the doctrine of *quod leges* could subvert a Bill of Rights by allowing a subsequent Legislature to repeal the rights earlier granted.³¹ In 1781, Thomas Jefferson referred to the doctrine of *quod leges* in his *Notes on the State of Virginia*, Query XIII.

[T]hough divers parliaments have attempted to restrain subsequent parliaments, yet could they never effect it; for the latter parliament hath ever power to abrogate, suspend, qualify, explain, or make void the former in the whole or in any part thereof, notwithstanding any words of restraint, prohibition, or penalty, in the former: for it is a maxim in the laws of the parliament, *quod leges posteriores priores contrarias abrogant.*'³²

The duty of the courts is to construe and give effect to the latest expression of the sovereign will.³³

31. *Richard Henry Lee Letter to Samuel Adams* (October 5, 1787) Letters 2:444-

32. Lord Edward Coke, 4. *Inst.* 43.

33. *Kappus v. Commissioner*, T.C. Memo. 2002-36, affd. 337 F.3d 1053, 1057 (D.C. Cir. 2003)(quoting *Whitney v. Robertson*, 124 U.S. 190, 195 (1888); See *S. African Airways v. Dole*, 817 F.2d 119, 125- 126 (D.C. Cir. 1987); *Price v. Commissioner*, T.C. Memo. 2002-215 (where provisions conflicted, the last expression of the sovereign will prevailed under the last-in-time)

[W]e must examine the applicable statutes and Convention provisions to decide (1) whether the Code provisions and the Convention can be harmonized as both parties contend, and (2) *if they cannot be harmonized, which provision qualifies as the "last in time."* 34

[c]onflicts between a revenue law and a treaty must be resolved by applying the principle that the provision adopted later in time controls (the last-in-time rule). 35

Since the people of the United States enacted the 14th Amendment after they enacted the 12th Amendment, the latter prevails over the former. Under the last will of the sovereign, the Attorney General cannot prevail. The so-called "Electoral College" of Article II no longer exists. It has been swept away by the 12th Amendment. The "Electoral College" of the 12th Amendment no longer exists. It has been swept away by the 14th Amendment. The position of the Attorney General is hopeless because the "Electoral College" of the 12th Amendment is GONE WITH THE WIND.

34. *Jamieson v. Commissioner of Internal Revenue*, United States Tax Court, T.C. Memo. 2008-118 (April 29, 2008).

35. S. Rept. 100-445, at 321-322 (1988); see also *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889).

CONCLUSION

From the year 1876, the dawn of the era of white "Redemption", for a century, one score, and a decade plus three and *still counting*, the Electoral College as effected by the mechanism of "winner take all" has rendered the *descendants of enslaved blacks* to the role of inert bodies that inflate neo-Confederate southern political power but have no other impact. In the unbounded Southern states it distorts political expression by race and/or party affiliation.

The eminent historian Eric Foner has called Reconstruction an "unfinished revolution". Should this Appellate Court vacate the district court order with a remand for the lower court to affirm the plaintiff's plea for a declaratory judgment this court can, here and now, take a significant step toward *finishing it*.

This Appellate court should perfect **Amend. 14§2's** "right to vote" for all the states' citizens. This court should not allow the *denial* or *abridgment of* the vote of any citizen by race or party affiliation and instead allow for the original divine *universal* intent of the Declaration of 1776 to prevail. It should allow the legacy of the fractional division of 1787 for disunion expire. For all of the foregoing reasons, this court should ensure that henceforth, all Americans who are counted in order to determine their state's representation in Congress will be represented in the final count for electoral democracy.

The Plaintiff should prevail under the rule that the last expression of the sovereign prevails.

For the foregoing reasons, the Plaintiff requests that the Appellate Court Vacate the judgment of the District Court and remand with a declaratory judgment for a proportional allocation of presidential electors based on the popular vote for *unbounded* electoral states.

Respectfully submitted,

Asa Gordon, *PRO SE*
1667 Webster Street, N.E.
Washington, D.C. 20017
Telephone: (202) 635-7926

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS**

Appellant certifies that this Reply Brief is presented in Times New Roman style, 14-point size and contains 11,277 words, exclusive of: Certificate of Parties, Rulings Under Review, and Related Cases, Table of Contents; Table of Authorities, and Glossary of Abbreviations and complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant's Brief were served by First Class Mail this 27th day of November, 2009, upon:

ALAN BURCH
Assistant United States Attorney
555 4th Street, NW
Washington, DC 20530
(202) 514-7204